

No. 1-12-3498

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 20039
)	
TERRY KIRK,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

O R D E R

¶ 1 *Held:* The evidence established defendant knowingly possessed cocaine and heroin where one officer saw defendant drop a bag containing an item that later tested positive for cocaine; officers subsequently found heroin in a room that contained male clothing and mail addressed to defendant and recovered a house key from defendant; and defendant later made a statement, which was not written down and only witnessed by one officer, that he sold drugs for a gang.

¶ 2 Following a bench trial, defendant, Terry Kirk, was convicted of two counts of possession of a controlled substance and sentenced to concurrent three-year prison terms. He appeals, arguing the evidence at trial was insufficient to sustain his convictions because the State

failed to prove he knowingly possessed cocaine and heroin. For the reasons that follow, we affirm.

¶ 3 At trial, Officer William O'Brien testified that he executed a search warrant at a single-family home at 952 North Pulaski at approximately 9:28 p.m. on November 4, 2011. O'Brien was working with a gang enforcement team comprised of six members and one sergeant. Upon arriving at the home, the officers knocked on the front door and announced their office three or four times. They did not receive a response after approximately 30 seconds, so Officer Bala used a pry tool to forcibly open the door. It took Bala only "[s]econds" to force open the door. O'Brien entered the home first and immediately saw defendant standing approximately seven feet away in the living room. When defendant saw O'Brien, he dropped a plastic Ziploc bag to the ground. O'Brien immediately recovered the bag, saw that it contained suspect cocaine, and placed defendant into custody.

¶ 4 After placing defendant into custody, the officers secured the residence and conducted a "systematic search." Two women were in the home's front bedroom, located on the first floor. The room contained a bed, a TV, a wooden table, and "lots" of male clothing. On the wooden table, officers found a box containing plastic baggies and two baggies of suspected heroin. From the headboard in that room, the officers also found a Ziploc baggy with a Batman logo on it, inside of which was a tinfoil packet that "smelled like PCP" and contained "some sort of tobacco product." In addition, the officers recovered four blue-tinted Ziploc baggies, containing suspect crack cocaine. Finally, the officers found a People's Gas bill and a letter addressed to defendant. O'Brien brought all of the recovered contraband to the station. Officer O'Brien did not see defendant go into the bedroom where the narcotics were recovered, nor did he recover a scale.

O'Brien acknowledged the recovered gas bill was dated March 30, 2011, and the recovered letter was dated March 9, 2011. No other mail was recovered from the home.

¶ 5 Officer Jason Bala testified that about 5 to 10 seconds after the officers arrived at the home and started knocking, he used a 40-pound ram to break open the front door. He did not need any pry tools. He then entered about 10 seconds after O'Brien and found defendant in handcuffs in the living room. The front bedroom door was open. Approximately 30 seconds after he broke open the door, Bala conducted a custodial search of defendant and found money and a key to the front door of the home. Later, at the station, Bala read defendant his *Miranda* rights and defendant agreed to speak with Bala. In an unmemorialized statement he made outside the presence of everyone, defendant told Bala he was a member of the Four Corner Hustlers street gang and that he sold narcotics for them.

¶ 6 Chicago police officer Rafael Magallon testified that in the front bedroom of the home, he located a box containing (1) a roll of sandwich baggies; (2) a clear, knotted plastic bag containing a white powdered substance, suspect heroin; and (3) a Ziploc baggy containing suspect heroin. He did not find these items until at least 15 minutes after the officers entered the home, and he did not search the area until a drug dog indicated in that location. In the box, he also found a letter and a gas bill, both from People's Gas. He later inventoried the recovered contraband at the station. He acknowledged "there were several other people in the residence" in addition to defendant and the officers. When defense counsel asked him whether there were "[a]pproximately eight people," he responded, "That sounds correct, yes." Magallon did not pat down or search any of those people.

¶ 7 The parties stipulated that Debora Bracey, a forensic chemist with the Illinois State Police Crime Lab, would testify she analyzed the items in this case and found one item contained 0.2

gram of plant material that tested positive for PCP, one item tested positive for cocaine and weighed less than 0.1 gram, one item tested positive for heroin and weighed 0.1 gram, one item tested positive for heroin and weighed less than 0.1 gram, one item tested positive for cocaine and weighed less than 0.1 gram, and three items weighing 0.2 grams were not tested.

¶ 8 Defense counsel made a motion for directed finding, asserting, among other things, that other people in the home could have exerted control over the drugs. Counsel pointed out that "Officer Magallon just testified that there were approximately eight other people in the house," to which the trial court responded, "I don't think he did." The court then told counsel, "That was your question. He said there were other people in the house." Counsel responded, "I said that there were approximately eight other people in the house and he agreed." The court denied defendant's motion as to the charges based on possession of cocaine and heroin.

¶ 9 Defendant presented no evidence. Following closing arguments, the trial court found him guilty of multiple counts of possession of a controlled substance. The court then merged the two counts based on possession of cocaine and the two counts based on possession of heroin, entering judgment on two counts of possession of a controlled substance.

¶ 10 In finding defendant guilty, the trial court noted that while the officers' testimony differed in regards to "whether or not they used a battering ram or whether they used a pry bar and some other minor points of impeachment," those differences did not make the officers' testimony unbelievable. The court also found "the testimony to be clear, credible and beyond a reasonable doubt that the defendant in fact had actual possession of the bags in his hand" when the officers entered the home. In addition, the court found the State established defendant either actually or constructively possessed the drugs inside the bedroom. The court noted the officers recovered a utility bill and despite defense counsel's argument that the bill was several months old, it showed

defendant had "some interest in this particular property." The court also observed that male clothes were found in the bedroom, and defendant made a statement that he sold drugs for the Four Corner Hustlers.

¶ 11 Defendant filed a motion for new trial. At a hearing on the motion, defense counsel noted, among other things, that Officer Magallon testified there were eight other people in the residence and O'Brien testified there were only two. After reviewing its findings and the trial transcripts, the trial court denied defendant's motion. The court then sentenced him to three years in prison on each count, ordering the sentences to run concurrently. Defense counsel indicated defendant wished to "correct or point out" that he was not a Four Corner Hustler and had denied being a Four Corner Hustler for at least 17 years. The presentence investigation report (PSI) indicated defendant was 49 years old and had stated he terminated his affiliation with a street gang 19 years ago.

¶ 12 This appeal followed.

¶ 13 Defendant's sole contention on appeal is that the State failed to prove him guilty beyond a reasonable doubt because it failed to show he knowingly possessed the drugs recovered from the home. Specifically, defendant questions Officer O'Brien's credibility, contending his testimony about defendant's behavior was unbelievable. He also notes O'Brien's testimony conflicted with Officer Bala's as to the time and manner in which the officers entered the home and conflicted with Officer Magallon's as to the number of people found in the home. Defendant further argues the State failed to establish he constructively possessed the heroin found in the bedroom. He observes the officers found at least two other people in the bedroom but did not search them for house keys; the bedroom was freely accessible to others; the mail recovered by the officers was seven months old and consisted only of letters; the State failed to establish the size of the clothes

found in the bedroom or the gender of the other people in the home; and the heroin was not found in plain sight. Finally, defendant contends Officer Bala's testimony that defendant made a statement was unbelievable, observing the alleged statement was neither memorialized nor witnessed by anyone else. We disagree with defendant and find the evidence established he knowingly possessed cocaine and heroin.

¶ 14 In resolving a challenge to the sufficiency of the evidence, the relevant inquiry is whether, when viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Our function is not to retry the defendant. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Rather, in a bench trial, it is for the trial court to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any evidentiary conflicts. *Id.* We will reverse a defendant's conviction only "where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48.

¶ 15 To sustain defendant's convictions, the State was required to prove he knowingly possessed cocaine and heroin. 720 ILCS 570/402(c) (West 2010). Possession may be constructive or actual. *People v. Givens*, 237 Ill. 2d 311, 335 (2010). Actual possession exists when a defendant "exercises immediate and exclusive dominion or control over the illicit material." *Id.* Constructive possession is shown where a defendant has the "intent and capability to maintain control and dominion" over a controlled substance. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). The rule that possession must be exclusive does not mean it may not be joint. *Givens*, 237 Ill. 2d at 335. Where drugs are found on premises that are under a defendant's

control, it may be inferred that he possessed the requisite knowledge and possession, absent other facts and circumstances that might create a reasonable doubt as to his guilt. *People v. Bui*, 381 Ill. App. 3d 397, 419 (2008). "Proof of residency in the form of rent receipts, utility bills and clothing in closets is relevant to show the defendant lived on the premises and therefore controlled them." (Internal quotation marks omitted.) *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17.

¶ 16 In this case, Officer O'Brien testified that when he entered 952 North Pulaski, he saw defendant drop a Ziploc bag to the ground containing a substance that later tested positive for cocaine. This was sufficient to establish defendant's actual possession of cocaine. See *Givens*, 237 Ill. 2d at 335 (actual possession exists when a defendant "exercises immediate and exclusive dominion or control over the" contraband). Defendant challenges the believability of O'Brien's testimony and points out discrepancies between his testimony and the other officers' testimony. However, the trial court explicitly noted the officers' testimony differed as to the manner of entry into the home but nonetheless found their testimony believable. Moreover, the court later denied defendant's motion for new trial even after counsel pointed out that Magallon saw eight people in the home while O'Brien only saw two. It was for the trial court to determine the witnesses' credibility and resolve conflicts in the evidence. *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 17 The evidence was also sufficient to establish defendant constructively possessed the heroin found in the front bedroom. In the same bedroom where they discovered the heroin, the officers saw male clothing and found a utility bill and letter, each addressed to defendant. In addition, Bala recovered a front door key from defendant. This evidence supported a finding that defendant resided in the home. See *Spencer*, 2012 IL App (1st) 102094, ¶ 17 (proof of residency can be established in the form of rent receipts, utility bills and clothing in closets). In addition,

defendant made a statement to Officer Bala admitting that he sold narcotics for the Four Corner Hustlers. Based on defendant's statement and his habitation in the home, the trial court could reasonably find he had constructive possession of the heroin found in the bedroom. See *People v. Blue*, 343 Ill. App. 3d 927, 939 (2003) ("Habitation in or rental of the premises where narcotics are discovered is sufficient evidence of control to constitute constructive possession.").

¶ 18 Although defendant notes the officers did not search the other people in the home for house keys and did not establish the size of the clothing or the other occupants' gender, the State was not required to exclude every reasonable hypothesis of innocence. *People v. Larson*, 379 Ill. App. 3d 642, 654 (2008). Moreover, the potential that somebody else in the home, such as the two women in the bedroom, could have accessed or also possessed the drugs in the bedroom does not negate defendant's guilt, as mere access to contraband does not destroy constructive possession. *Bui*, 381 Ill. App. 3d at 424. Further, it is well-established that the rule that possession must be exclusive does not mean it may not be joint. *Givens*, 237 Ill. 2d at 335. We also reject defendant's contention that the utility bill was merely an inquiry letter. In support of his contention, defendant has cited only his attorney's arguments at trial and at the hearing on his post-trial motion. However, O'Brien and Magallon each testified a gas bill and a letter were recovered. In any event, defendant has provided no case law suggesting a letter is not probative of whether a person resides in a home. In addition, that the bill was seven months old merely goes to the weight to be given to it, which is a matter properly left to the trial court. See *Brown*, 2013 IL 114196, ¶ 48 (the trier of fact has the responsibility of weighing the evidence).

¶ 19 Finally, we are not persuaded by defendant's contention that Officer Bala's testimony concerning defendant's statement lacked believability. Defendant has cited no authority establishing that a statement must be memorialized or witnessed to be believable. Although

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defendant was 48 years old at the time of the crime and reported in his PSI that he discontinued his gang involvement 19 years ago, the trial court heard Bala's testimony about defendant's statement and evidently found it to be credible. We will not substitute our judgment for that of the trial court on matters of witness credibility. *Siguenza-Brito*, 235 Ill. 2d at 224-25.

¶ 20 In sum, based on the evidence presented and viewed in the light most favorable to the prosecution, a reasonable trier of fact could have found defendant guilty of possession of cocaine and heroin. Accordingly, we affirm the trial court's judgment.

¶ 21 Affirmed.