2014 IL App (2d) 121048-U
No. 2-12-1048
Order filed June 9, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-1628
ROOSEVELT YANKAWAY, JR.,	)	Honorable Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of constructive possession of a weapon, as defendant knew of the weapon and had a sufficient presence at the premises, even if he did not technically reside there, to have control over the weapon's location; (2) defense counsel was not ineffective for failing to move to strike a witness's nonresponsive answers: although the motion likely would have been granted, the answers were not so crucial that counsel could not have strategically decided against calling attention to them by moving to strike them; (3) defendant's Class X sentence was the product of an improper double enhancement, as it was partly based on the same felony that was an element of his offense of unlawful possession of a weapon by a felon; we vacated the sentence and remanded for resentencing.

¶ 2 Defendant, Roosevelt Yankaway, Jr., appeals, challenging his conviction of unlawful possession of a weapon by a felon, charged as a Class 2 felony (720 ILCS 5/24-1.1(a), (e) (West 2008)), and the Class X sentence he received for that offense. He raises three claims of error on appeal: (1) that the evidence was insufficient to prove his guilt beyond a reasonable doubt; (2) that defense counsel was ineffective when he did not object to a State witness's assertedly nonresponsive inculpatory answers during cross-examination; and (3) that his sentence was the result of an impermissible double enhancement. The State confesses error as to defendant's sentence, and we accept that confession. We further hold that the evidence was sufficient to establish defendant's constructive possession of the weapon at issue and that defense counsel's decision to let stand the witness's answers was not ineffective. We therefore affirm the conviction but vacate the sentence and remand the matter for resentencing.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by indictment with two weapons offenses and two drug offenses. As amended, the first count was of unlawful possession of a weapon by a felon (charged as a Class 2 felony) (720 ILCS 5/24-1.1(a) (West 2008)), with defendant's felon status based on his conviction of "manufacture/delivery of controlled substance" in Kane County case No. 95-CF-1159. The second was a count of unlawful use of a weapon (possession of a sawed-off shotgun) (720 ILCS 5/24-1(a)(7)(ii) (West 2008)). Third was a count of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)). Finally, fourth was a count of unlawful possession of cannabis (720 ILCS 550/4(b) (West 2008)).

¶ 5 Defense counsel moved to bar introduction of evidence as to the specific offense on which the State based its allegation of felon status, and the court allowed a stipulation that

defendant had been convicted of an unnamed felony. The court later severed the controlled-substance counts from the weapons counts.

¶ 6 Defendant's trial on the weapons counts took place on May 10, 2010. Defendant had bonded out and had been present for pretrial hearings, but failed to appear on the day of trial.

¶ 7 Steve Stemmet, an Aurora police officer, was the State's first witness. On June 12, 2008, Stemmet was 1 of about 12 officers executing a search warrant at the house at 913 Harriet Avenue in Aurora. He knocked on the front door, and Angela Pryor opened it, coming from the kitchen area to do so. Also in the house at the time was Dontae Yankaway, who came out of the south bedroom.

¶ 8 The house was a very small single-story ranch with two bedrooms that the police noted. Stemmet searched the northeast bedroom. The room was cluttered with clothing, "predominantly male." A large bed took up most of the floor space. The bed had a solid wooden canopy, and, on top of that, Stemmet found a box of 20-gauge shotgun shells. On the dresser was an envelope, unopened, addressed to defendant. Stemmet stated that the letter to defendant had an August 29, 2005, postmark. He did not know whether any other mail addressed to defendant was found during the search. Also in the bedroom were photographs of defendant, at least one of which was of defendant with Pryor.

¶ 9 Another officer called Stemmet over to a hallway closet just outside the northeast bedroom. Inside it was a 20-gauge sawed-off shotgun.

¶ 10 As the officers were about to depart, a car pulled into the driveway, and defendant got out of a passenger-side door. Stemmet approached defendant, told defendant that he had a warrant for defendant's person, and then handcuffed defendant. The State asked Stemmet whether he had "advise[d] him what had previously happened"; Stemmet said that he had. The State asked,

"What did you say?" and Stemmet answered, "I told him we also had a search warrant for his house which we already searched."

¶ 11 Defense counsel objected that, under the rulings on the motions *in limine*, the State was not to elicit information that was in the search warrant. The court told the jury to disregard "that portion of the testimony that the search warrant indicated that it is the defendant's house."

¶ 12 The State then asked Stemmet, "[A]fter you told him that you had searched, what did defendant say at that time?" Stemmet said that defendant asked what the police had found. The State asked how Stemmet had responded to defendant, and Stemmet said that he told defendant that they had found a sawed-off shotgun. Stemmet testified that defendant's response was, " 'That old thing, that's been in there forever.' "

¶ 13 On cross-examination, Stemmet admitted that neither he nor the other officers ever compared the size of clothing that they found in the closet and the bedroom with the size of clothing that defendant was wearing. No officer seized or documented the photographs in the house.

¶ 14 Investigator Chris McWilliams testified that he participated in executing the search warrant, with the assignment of collecting evidence. He saw the letter, the shotgun, and the shells. The box said that the shells were birdshot. The shotgun was in the front of the closet—in front of clothing.

¶ 15 On cross-examination, McWilliams said that he had not found anything that was clearly defendant's other than the 2005 letter with defendant's name on it and was not aware that any of the other officers had found such evidence. He did not see any utility bills in defendant's name. The size of the men's clothing and shoes was not something he noted.

¶ 16 Counsel asked McWilliams if he had "see[n] any pictures of [defendant] in that residence," and McWilliams responded that he had "personally observed [defendant] at that residence several times." When counsel repeated the question with similar phrasing, McWilliams said that he had misunderstood and that he had not seen any pictures of defendant.

¶ 17 McWilliams did not know whether defendant was carrying keys to the house. He said that keys were not something that the police would look for as evidence of residency.

¶ 18 Defense counsel asked McWilliams, "You're not aware of any document other than that one yellow envelope from 2005 with the name [of defendant] that was found in that residence?" McWilliams replied, "No, sir." Defense counsel followed up by asking, "In fact, you cannot say that a single item that you point to in that residence belonged to [defendant], other than the possibility of that yellow envelope?" McWilliams responded, "Yes." Defense counsel then asked, "Other than that, that's it?" to which McWilliams responded, "I know him to live there, yes." Defense counsel then asked if there was "any single item in that house that you can absolutely tie *** to [defendant] ***? McWilliams answered, "In my opinion, yes. There was [*sic*] items in that house."

¶ 19 Investigator Damien Cantona of the Aurora police also testified about the execution of the warrant. He said that the male present when they arrived was a 17-year-old. Cantona was the one who found the sawed-off shotgun in the hall closet. The gun was lying diagonally across the closet, as shown in evidence photographs. He saw the gun as soon as he opened the closet.

¶ 20 Officer Armando Montemayor of the Aurora police testified that he was trained as, and acted as, an evidence technician. He examined the shotgun for fingerprints and found none.

¶ 21 The evidence photograph of the shotgun, although of less-than-ideal quality, is sufficient to show that the gun was in the front of the closet, essentially wedged diagonally across the doorway.

¶ 22 The court admitted the parties' stipulation "[t]hat on the date of June 12, 2008, the defendant *** had been previously convicted of a felony under the laws of the State of Illinois." That is, defendant already had a felony conviction as of the trial date. After the stipulation, the State rested.

¶ 23 Defendant moved for a directed verdict, and the court denied the motion. The defense rested without presenting evidence.

¶ 24 The jurors sent the court three questions: (1) could they be told when defendant was released from incarceration; (2) could they see the warrant; and (3) was defendant still on "parole." The court instructed them that they had all the evidence that they were to consider. The jury later asked a question about whether Stemmet's testimony of defendant's " 'That old thing' " comment had been stricken. The court had the reporter read the relevant part of the transcript, which told the jury to disregard the comment that the warrant described the house as defendant's, but did not tell it to disregard Stemmet's testimony concerning defendant's remark.

¶ 25 The jury found defendant guilty of both unlawful possession of a weapon by a felon and unlawful use of a weapon.

¶ 26 Defendant was in custody as of May 7, 2012—in other words, two years after his trial. Defendant filed a posttrial motion challenging, principally, the sufficiency of the evidence. The court denied the motion.

¶ 27 At sentencing, the State noted some inconsistency in the record of defendant's prior convictions. Specifically, and contrary to what the record suggested, defendant would not have

been sentenced to two years' imprisonment for a Class 2 felony conviction. However, it stated that it did want the court to consider other convictions. Defense counsel told the court that he and the State had discussed defendant's record and had concluded that he was eligible for Class X sentencing.

¶ 28 The State noted that it assumed that the two convictions would merge, leaving defendant with a single Class 2 felony conviction from this case. It noted that under section 5-5-3(c)(8) of the Unified Code of Corrections (730 ILCS 5/5-5-3(c)(8) (West 2008)), a defendant who is convicted of a Class 2 or higher felony and who has two prior Class 2 or higher felony convictions is subject to mandatory Class X sentencing. The State submitted certified copies of documents relating to a Class 1 felony conviction—in Kane County case No. 95-CF-1159, a June 28, 2002, guilty plea to unlawful delivery of a controlled substance within 1,000 feet of public housing (720 ILCS 570/407(b)(3) (West 1994))—and a Class 2 felony conviction—in Kane County case No. 86-CF-114, a June 20, 1986, guilty plea to possession of a stolen motor vehicle (Ill. Rev. Stat. 1985, ch. 95½, ¶ 4-103). Including the listed convictions, he had nine prior felony convictions.

¶ 29 The court sentenced defendant to seven years' imprisonment. The State nolle prossed the two drug counts that had not yet been tried. Defendant timely appealed.

¶ 30 II. ANALYSIS

¶ 31 On appeal, defendant raises three claims of error. One, he asserts that the evidence of his constructive possession of the sawed-off shotgun was insufficient. His argument focuses on the limited evidence that defendant resided at the house. Two, he asserts that counsel was ineffective because he failed to object to McWilliams's two nonresponsive answers that tended to suggest that defendant lived at the house. Three, he argues that his Class X sentence was the

result of an impermissible double enhancement: the State used his conviction in case No. 95-CF-1159 both as one of the two predicate convictions for Class X sentencing and as the conviction that established his felon status as a predicate for the charge of unlawful possession of a weapon by a felon. On this matter, he states that *People v. Powell*, 2012 IL App (1st) 102363, is contrary authority. He also addresses *People v. Easley*, 2012 IL App (1st) 110023. However, the supreme court reversed the appellate court's holding on sentencing in *People v. Easley*, 2014 IL 115581, ¶¶ 27-30, 32, a decision that was released too recently for either party to address.

¶ 32 The State responds that the evidence led to a reasonable inference that the bedroom in which the shells were found was one shared by defendant and Pryor. As to the ineffective-assistance claim, the State argues that the question "Other than that, that's it?" invited the response "I know him to live there, yes."

¶ 33 With regard to the sentencing issue, the State confesses error, relying on the analysis in *People v. Chaney*, 379 Ill. App. 3d 524 (2008). It also argues that *Powell* is plainly distinguishable.

¶ 34 We conclude that the evidence was such that a reasonable jury might find defendant guilty. We further hold that defense counsel's choice not to seek the striking of McWilliams's answers was within the presumption that counsel's choices are sound trial strategy. Finally, we accept the State's confession of sentencing error and so vacate defendant's sentence and remand for proper resentencing.

¶ 35 On the issue of the sufficiency of the evidence, the standard of review is the familiar one from *People v. Collins*, 106 Ill. 2d 237 (1985):

> "When presented with a challenge to the sufficiency of the evidence, it is not the function of [the reviewing] court to retry the defendant. *** [Citation.] [Rather,] 'the relevant

> question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

It is the role of the trier of fact, and not our role, to judge the credibility of the witnesses, to decide the proper weight of all testimony, and to draw reasonable inferences from the evidence, and this court will not substitute its judgment for that of the trier of fact on these matters. *Village of Bull Valley v. Winterpacht*, 2012 IL App (2d) 101192, ¶ 12.

¶ 36 The fact whose proof is at issue here is whether defendant had constructive possession of the sawed-off shotgun.

> "To establish constructive possession, the prosecution must prove that the defendant (1) had knowledge of the presence of the firearm and ammunition and (2) exercised immediate and exclusive control[1] over the area where the firearm and ammunition were found. *** Control is established when a person has the 'intent and capability to maintain control and dominion' over an item, even if he lacks personal present dominion over it. [Citation.] The defendant's control over the location where weapons are found gives rise to an inference that he possessed the weapons. [Citation.] Habitation in the

[1] "The requirement of exclusive control does not mean that possession may not be joint." *People v. Roberts*, 263 Ill. App. 3d 348, 353 (1994). In other words, "exclusive" in this context does not mean "sole." This is not a paradox. A dictionary definition of "exclusive" is "excluding or *having power to exclude*; *** limiting or limited to possession, control or use by a single individual *or group*." (Emphases added.) Merriam-Webster's Collegiate Dictionary, 404 (10th ed. 2001).

premises where contraband is discovered is sufficient evidence of control to constitute constructive possession." *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17.

Here, defendant concedes that the State presented adequate proof of defendant's knowledge of the shotgun, in the form of McWilliams's report of defendant's " 'That old thing' " comment. What remains at issue is control over the location and habitation.

¶ 37 The argument here focuses primarily on whether the State proved defendant's habitation of the house and the extent to which the three-year-old unopened envelope was relevant to habitation. This argument is partly misdirected. As many college students can easily explain, habitation is not binary. The evidence allows a strong inference that defendant had at least a significant presence there. The photograph in the bedroom of defendant and Pryor together allows an inference of a romantic relationship. The presence in Pryor's house of a 17-year-old sharing defendant's last name allows an inference of a durable relationship. The men's clothing in the bedroom at least suggests overnight stays. Also, defendant's comment that he knew the gun found in the closet has "been in there forever" would show his long-term connection to the premises. The most socially conventional explanation for these facts is defendant and Pryor's regular cohabitation.

¶ 38 Thus, the jury could properly conclude that the house was a place where defendant was more than a guest or a visitor. The jury could reasonably infer that he was a person with "the run of the house," that is, with control of spaces equivalent to a full-time inhabitant's, even if he was not that. Under the constructive-possession standard, this, with defendant's knowledge, was sufficient to establish his possession of the shotgun. See *Spencer*, 2012 IL App (1st) 102094, ¶ 17.

¶ 39 We now turn to defendant's claim of ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, a defendant must show both (1) that counsel's performance was objectively unreasonable; and (2) that it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984); *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006). A strong presumption exists that trial counsel's decisions are the result of sound trial strategy rather than incompetence. *People v. Wiley*, 165 Ill. 2d 259, 289 (1995). At issue here is defense counsel's failure to object to McWilliams's two assertedly nonresponsive statements relating to whether defendant was a resident at the house. We conclude that, because McWilliams's answers were sufficiently similar to other evidence such that their admission did not fundamentally reshape the State's case, it was within defense counsel's judgment of sound trial strategy to let them pass to avoid drawing attention to them.

¶ 40 The State argues that McWilliams's statement that he knew that defendant lived at the house was, in fact, responsive to the question—"Other than that, that's it?—that counsel asked while addressing the papers the police found in the house. Put another way, the State implies that counsel's question was so open ended as to invite any answer that McWilliams took to be relevant to defendant's guilt. That argument simply shifts the focus of the ineffectiveness claim. Were the question as clearly open ended as the State suggests, asking the question would be objectively unreasonable. The State implicitly concedes that McWilliams's statement that he had seen defendant at the house was nonresponsive.

¶ 41 The question of whether defense counsel acted objectively unreasonable in failing to seek to strike the two responses has two parts. Part one is whether a motion to strike would have had a good likelihood of success. Part two is whether defendant has overcome the presumption that

counsel's failure to object was strategic. We conclude that the court would likely have granted a motion to strike. However, we hold that defendant has failed to overcome the presumption.

¶ 42 Both of McWilliams's challenged statements were of a character such that the court could have deemed them nonresponsive. The general rule is that evidentiary rulings are entrusted to the discretion of the trial court; a reviewing court should not disturb such rulings absent a clear abuse of discretion. *E.g.*, *People v. Hill*, 2014 IL App (2d) 120506, ¶ 49. Here, we are asked to address hypothetical objections. We agree with the State's implicit concession that McWilliams's answer, "I personally observed [defendant] at that residence several times,." in response to the question, "Did you see any pictures of [defendant] in that residence?" was nonresponsive. The answer was at best tangentially related to the question; the court thus would have had no choice but to grant a request to strike the answer. As to McWilliams's response, "I know him to live there, yes," defense counsel would have had a high likelihood of success in seeking to have the answer stricken. Only by taking the question "Other than that, that's it?" in an abnormally literal sense and without any context can one conclude that McWilliams's answer was responsive. Defense counsel had been quite specifically asking about anything in the house that the police had identified as belonging to defendant. Thus, a good likelihood exists that, had it been asked, the court would have granted a motion to strike.

¶ 43 The next question is whether defense counsel's choice not to seek to have the answers stricken was so clearly problematic as to overcome the presumption that the choice was sound trial strategy. On this point, we note the obvious: seeking to strike any answer has the potential to draw the jury's attention to it. Therefore, the choice to seek to have an answer stricken is clear only when the State without it has completely failed to present evidence as to an element of an

offense or when the answer is otherwise key evidence for the State.[2] Such was the case in *People v. Bailey*, 374 Ill. App. 3d 608 (2007), (on which defendant relies), but not here.

¶ 44 In *Bailey*, the defendant was convicted of possession of a controlled substance with intent to deliver. *Bailey*, 374 Ill. App. 3d at 609. Defense counsel, in cross-examination, received a nonresponsive answer that explained otherwise puzzling aspects of the State's evidence. *Bailey*, 374 Ill. App. 3d at 615. The *Bailey* court held that, under the circumstances, both prongs of the *Strickland* test were satisfied. *Bailey*, 374 Ill. App. 3d at 614-15.

¶ 45 Here, however, McWilliams's answer that he had seen defendant at the house several times was, unlike the evidence elicited in *Bailey*, not qualitatively different from the evidence already before the jury. The jury already knew that a 17-year-old who shared defendant's surname seemed to live in the house and that defendant arrived during the search with another apparent family member. While it is hard to guess how a small piece of confirmatory evidence might have influenced the jury in a case like this, in which the State's evidence is far from overwhelming, we can confidently say that this was not evidence that reshaped the case. Given that, we defer to counsel's judgment regarding the appropriate response to its introduction. McWilliams's statement that he knew defendant that lived in the house was similar. We hold that counsel's decisions on both were potentially sound trial strategy, and thus not ineffective.

¶ 46 Finally, as to defendant's claim of sentencing error, defendant recognizes that this error has been forfeited because it was not raised below. Defendant argues, and the State agrees, that an issue of double enhancement is reviewable under the second prong of the doctrine of plain error. *People v. Owens*, 377 Ill. App. 3d 302, 304 (2007). We agree with the State that the

[2] Even in such circumstances, the issue can fail to be clear-cut when multiple charges are at issue.

analysis in *Chaney* is applicable and persuasive such that it requires us to vacate defendant's sentence. The State points out that, under section 24-1.1(e) of the Criminal Code of 1961 (Criminal Code), unlawful use of a weapon "by a person not confined in a penal institution who has been convicted of *** a Class 2 or greater felony under the Illinois Controlled Substances Act *** is a Class 2 felony for which the person shall be sentenced to not less than 3 years and not more than 14 years." 720 ILCS 5/24-1.1(e) (West 2008). (Where the basis for the offense is an unspecified felony conviction, the offense is a Class 3 felony with a sentencing range of 2 to 10 years. 720 ILCS 5/24-1.1(e) (West 2008).) The allegation of defendant's felon status in count I of the amended indictment was based on his conviction of Class 1 unlawful delivery of a controlled substance in Kane County case No. 95-CF-1159, which was also one of the cases that the State relied on to claim that Class X sentencing was mandatory.

¶ 47 Under *Chaney*, this is impermissible double enhancement. In *Chaney*, the court held that the same conviction that is used to increase the class of an unlawful use of a weapon under section 24-1.1(e) of the Criminal Code (720 ILCS 5/24-1.1(e) (West 2004)) could not also be used under section 5-5-3(c)(8) of the Unified Code of Corrections (730 ILCS 5/5-5-3(c)(8) (West 2004))[3] to require Class X sentencing. The court, citing the supreme court in *People v. Phelps*, 211 Ill. 2d 1, 12-13 (2004), recognized two conditions that constitute double enhancement: "(1) where the same factor constitutes an element of the offense and serves as a basis for imposing a harsher sentence than otherwise would have been imposed; or (2) where the same factor is used twice to elevate the seriousness of the offense itself." *Chaney*, 379 Ill. App. 3d at 528. It further recognized that "a double enhancement is not erroneous where the legislature clearly expresses

[3] The two sections at issue here and in *Chaney* did not change in any relevant way between the 2004 versions at issue in *Chaney* and the 2008 versions at issue here.

an intent to allow double enhancement" (*Chaney*, 379 Ill. App. 3d at 528 (citing *Phelps*, 211 Ill. 2d at 15) but did not deem that the two sentencing provisions at issue showed such intent. The court held that, where the defendant had only two Class 2 or greater convictions, and the State had used one to raise the charge of unlawful use of a weapon to a Class 2 felony, use of the same conviction to establish the defendant's Class-X-sentencing eligibility was impermissible double enhancement. *Chaney*, 379 Ill. App. 3d at 532.

¶ 48 We further agree with the State that the facts of *Powell* make it distinguishable and, further, that *Easley* is also distinguishable on its facts.

¶ 49 In *Powell*, the defendant, guilty of unlawful possession of a weapon by a felon, received a Class 2 sentence because his prior conviction was of burglary, a forcible felony. *Powell*, 2012 IL App (1st) 102363, ¶ 9. Because the legislature, in structuring section 24-1.1 of the Criminal Code, made clear that it intended different classes of the offense to apply based on different predicate convictions, the enhancement was legislatively mandated. *Id*. at ¶ 11.

¶ 50 In *Easley*, the defendant received a Class 2 sentence for unlawful possession of a weapon by a felon. *Easley*, 2014 IL 115581, ¶ 1. The basis for the Class 2, rather than Class 3, sentence was that the defendant had a previous conviction of the same offense (see720 ILCS 5/24-1.1(e) (West 2008)). *Easley*, 2014 IL 115581, ¶¶ 21-22. The court rejected the defendant's claim that his Class 2 sentence was improper. The court noted that the legislature had mandated a Class 2 sentence for this sort of repeat offense. *Easley*, 2014 IL 5518, ¶ 26.

¶ 51 *Chaney*, *Easley*, and *Powell* are all in accord that a single felony conviction can both bar a person from owning firearms under section 24-1.1 and determine the class of punishment applicable under that section. However, only *Chaney* addresses whether the legislature intended the same conviction to be usable as one of the pair of Class 2 or higher convictions that bring the

defendant under the Class X sentencing provisions of section 5-5-3(c)(8) of the Unified Code of Corrections. The *Chaney* court concluded that nothing in that section suggested that the legislature intended to make an exception to the general rule. The facts here are essentially identical to those in *Chaney*, so we accept the State's confession of error.

¶ 52 III. CONCLUSION

¶ 53 For the reasons stated, we affirm defendant's conviction but vacate the sentence and remand for sentencing without the Class X enhancement.

¶ 54 Affirmed in part and vacated in part; cause remanded.