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2014 IL App (3d) 130025-U

Order filed June 17, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0025
v.	)	Circuit No. 11-CM-1046
	)	
KETURAH S. HENRY,	)	Honorable
	)	Bennett J. Braun,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justices Carter and Holdridge concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* (1) The evidence was sufficient to prove defendant guilty beyond a reasonable doubt; (2) the prosecutor's statements during closing arguments violated defendant's right not to testify.
- ¶ 2 Following a jury trial, defendant, Keturah S. Henry, was found guilty of possession of a firearm without a firearm owner's identification (FOID) card (430 ILCS 65/2(a)(1) (West 2010)), unlawful use of a weapon (720 ILCS 5/24-1(a)(4) (West 2010)), and possession of not more than 2.5 grams of cannabis (720 ILCS 550/4(a) (West 2010)). She was sentenced to 24 months' court supervision, \$600 in fines, and 300 hours of community service. On appeal, defendant argues:

(1) the evidence was insufficient to prove her guilty of the charges beyond a reasonable doubt; and (2) the prosecutor's comments during closing arguments referencing defendant's failure to testify violated her fifth amendment right not to testify at trial and deprived her of a fair trial.

We reverse and remand for a new trial.

¶ 3

### FACTS

¶ 4

At trial, Officer Robert Korzak testified that on April 2, 2011, he responded to a call that a gun had been stolen from defendant's vehicle. Upon arriving on the scene, defendant was sitting in the driver's seat of a black Jeep accompanied by a female passenger. Defendant indicated that while she was driving, someone jumped in front of her vehicle, and she slammed on the brakes. Due to the abrupt stop, a green satchel slid out from underneath the passenger seat. The person who had stepped in front of the vehicle attempted to take her passenger's purse, but then ran off with the green satchel, which contained her father's gun. Defendant indicated that the vehicle she was driving belonged to her father, and he kept the gun underneath the passenger seat. Defendant produced her father's FOID card but did not have a FOID card of her own.

¶ 5

After speaking with defendant, Korzak asked the passenger to exit the vehicle. When the passenger stood up, Korzak observed two baggies containing a green leafy substance on the passenger seat. The contents of the baggies later tested positive for cannabis. Neither defendant nor her passenger responded when Korzak asked from whom the marijuana had been obtained.

¶ 6

Within 20 minutes of Korzak arriving on the scene, a green "Jeep" satchel containing a black Smith and Wesson semiautomatic handgun was recovered by officers one block away. Defendant identified the satchel and gun as the items she reported stolen.

¶ 7 Officer Benjamin Grant testified that defendant had described the stolen gun as a black Smith and Wesson handgun in a green cloth bag. Officers recovered a green canvas satchel containing a Smith and Wesson handgun.

¶ 8 The parties stipulated that defendant did not have a valid FOID card. Defendant did not call any witnesses or present any evidence.

¶ 9 During closing arguments, the prosecutor indicated that defendant had admitted to the officers that she had the firearm in the car without a valid FOID card of her own and was not in her home or a fixed place of business. The prosecutor also asked the jury to use common sense and stated:

"Officer gets to the scene, is told somebody stole a firearm. Twenty minutes later gets called by other officers to another scene, sees the satchel. The defendant identifies the satchel. There is a firearm in it. It's the same make and model as the \*\*\* firearm that the defendant said was stolen.

And what don't you have testimony of? You've got testimony from Officer Korzak and Officer Grant that the defendant identified the satchel and that it was opened up and that somebody had a firearm. You don't have any testimony this wasn't—this wasn't mine."

¶ 10 Defendant's counsel immediately requested a sidebar, after which the trial judge instructed the jury:

"[D]isregard the comment or the argument that what they don't have and what was not said or what was not done. Okay. So the jury is to disregard the most recent 30 seconds of [the prosecutor's] argument. The defendant does not have an obligation to testify. The defendant does not have an obligation to present any evidence. It is the State's entire burden to demonstrate the allegations beyond a reasonable doubt."

¶ 11 During jury instructions, the trial judge again instructed the jury that the State had the burden of proving defendant guilty beyond a reasonable doubt, defendant was not required to prove her innocence, and defendant's failure to testify should not be considered by the jury in reaching a verdict.

¶ 12 On November 7, 2012, the jury found defendant guilty of all three counts. On December 7, 2012, the court sentenced defendant to "24 months court supervision on all three charges," fines and costs of \$200 on each charge, and "300 hours of community service."

¶ 13 On December 7, 2012, defendant filed a motion for new trial, in which she argued, *inter alia*, that the State's improper remark during closing arguments regarding defendant's choice not to testify prejudiced defendant and deprived her of a fair trial. The trial court denied the motion.

¶ 14 Defendant appeals. We reverse and remand for a new trial.

## ¶ 15 ANALYSIS

### ¶ 16 I. Sufficiency of the Evidence

¶ 17 Defendant first argues that she was not proven guilty beyond a reasonable doubt of either of the firearm charges or the possession of cannabis charge because the State failed to prove that she knowingly possessed those items. When presented with a challenge to the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237 (1985). It is for the trier of fact to assess the witnesses' credibility, weigh their testimony, resolve inconsistencies and conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Sutherland*, 223 Ill. 2d 187 (2006). A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt. *Id.*

¶ 18 Possession may be actual or constructive. *People v. Givens*, 237 Ill. 2d 311 (2010). Actual possession occurs when defendant exercises immediate and exclusive dominion or control over the item. *People Eghan*, 344 Ill. App. 3d 301 (2003). When a defendant is not found in actual possession, the State is required to establish constructive possession. *People v. Spencer*, 2012 IL App (1st) 102094. To establish constructive possession, the State must prove beyond a reasonable doubt that defendant: (1) knew the contraband was present; and (2) exercised immediate and exclusive control over the area where the contraband was found. *Id.*

¶ 19 Knowledge is usually proven by circumstantial evidence because it rarely can be established by direct proof. *People v. Sanchez*, 375 Ill. App. 3d 299 (2007). Knowledge can be proven by evidence of defendant's acts, conduct, or statements, as well as the surrounding circumstances from which it may be inferred that defendant knew of the contraband's presence in the place it was found. *Id.*

¶ 20 A. Possession of the Firearm

¶ 21 To prove a defendant guilty of possession of a firearm without a valid FOID card, the State must prove that defendant knowingly possessed the firearm and did not have a valid FOID card. 430 ILCS 65/2 (West 2010). To prove unlawful use of a weapon, the State must show that defendant knowingly possessed a firearm in a vehicle or on her person and, at the time, was not on her land, home, or a fixed place of business. 720 ILCS 5/24-1(a)(4) (West 2010). The elements of knowledge and possession are factual questions to be determined by the trier of fact. *Eghan*, 344 Ill. App. 3d 301.

¶ 22 Here, viewing the facts in the light most favorable to the State, we conclude that a rational juror could have found beyond a reasonable doubt that defendant knowingly possessed the firearm. Despite the vehicle and weapon belonging to defendant's father, there was circumstantial evidence that she was driving the vehicle with the knowledge that the firearm was

stored under the passenger seat. Defendant's knowledge of the weapon under the passenger seat, in conjunction with her accurate description of the firearm and the recovery of the firearm within one block of her location, gave rise to a reasonable inference that she knowingly possessed the firearm. Therefore, the evidence was sufficient for the jury to find defendant guilty of the firearm charges beyond a reasonable doubt.

¶ 23 B. Possession of Cannabis

¶ 24 To prove possession of cannabis, the State must show that defendant knowingly possessed a substance that contained cannabis. 720 ILCS 550/4(a) (West 2010). Here, defendant was not found in actual possession of the cannabis, requiring the State to prove constructive possession. Thus, the State needed to show that: (1) defendant knew cannabis was present; and (2) the area where the cannabis was found was in defendant's immediate and exclusive control. *Spencer*, 2012 IL App (1st) 102094.

¶ 25 Proof of a defendant's control over the premises where contraband is located allows an inference that defendant knew of and possessed the contraband, absent any other factors that may create reasonable doubt of defendant's guilt. *People v. Smith*, 191 Ill. 2d 408 (2000). A defendant's status as a driver does not place him in possession of everything within the passenger area of the car when passengers are present who may be in possession of the contraband. *People v. McIntyre*, 2011 IL App (2d) 100889. However, the requirement that possession must be exclusive does not mean that possession cannot also be joint. *Givens*, 237 Ill. 2d 311. If two or more persons share the intention and power to exercise control, then each has possession. *Id.*

¶ 26 In regard to the cannabis charge at hand, defendant's knowledge and constructive possession of the cannabis can be inferred by the surrounding circumstances and by defendant's conduct. The cannabis was found on the passenger seat of the vehicle defendant was driving. Defendant told police a suspicious story of an unknown person jumping in front of her car and

attempting to steal belongings from her passenger but then instead stealing her father's gun. Meanwhile, two bags of cannabis appeared on the passenger seat of defendant's vehicle. In viewing the evidence in the light most favorable to the State, we hold that a reasonable jury could have found defendant possessed the cannabis, either independently or in joint possession with her passenger. Accordingly, we conclude that the evidence was sufficient to support defendant's conviction of unlawful possession of cannabis.

¶ 27 II. Statements During Closing Arguments

¶ 28 Defendant next argues that she was denied a fair trial when the prosecutor argued that the jury did not hear anyone testify that "this wasn't mine." Defendant claims that the prosecutor's comment resulted in reversible error as a violation of her fifth amendment right not to testify and deprived her of a fair trial. Improper remarks during closing argument are reversible when they cause defendant substantial prejudice, given the context of the language, its relationship to the evidence, and its effect on defendant's right to a fair and impartial trial. *People v. Edgcombe*, 317 Ill. App. 3d 615 (2000).

¶ 29 Generally, a prosecutor is allowed wide latitude in closing arguments and may comment upon the evidence and all legitimate inferences therefrom, even if unfavorable to defendant. *Id.* However, because an accused has a fifth amendment right not to testify, the prosecution is forbidden from commenting, even indirectly, on the accused exercising his constitutional right not to testify on his own behalf. U.S. Const., amend. V; *Griffin v. California*, 380 U.S. 609 (1965); *People v. Arman*, 131 Ill. 2d 115 (1989). The test for determining whether the prosecutor's remark violated defendant's right to remain silent is whether the remark was intended or calculated to direct the attention of the jury to the fact that defendant did not testify. *People v. Smith*, 402 Ill. App. 3d 538 (2010).

¶ 30 In this case, we find no purpose for the prosecutor's comment that no one testified that "this wasn't mine" except to draw attention to the fact defendant did not testify as a witness on her own behalf. To prove defendant guilty of the weapons charges, the State had to produce evidence that defendant knowingly had possession of a gun either (1) without a FOID card or (2) without being on her land, home, or fixed place of business. Defendant had no obligation to show that the gun was not her gun and had the right to refrain from testifying. Furthermore, such testimony from defendant that the gun "wasn't mine" was not necessary. The State's evidence showed that defendant told police she was driving her father's car and the missing gun belonged to him. The origin or ownership of the gun was not an issue.

¶ 31 Additionally, the comment that there was no testimony that "this wasn't mine" improperly insinuates defendant should have testified to deny possession, which taints the drug conviction. The State was required to prove that defendant knowingly possessed the cannabis found in her car. However, the comment highlighted the fact defendant did not testify in order to deny possession of the cannabis. Therefore, in viewing the prosecutor's closing argument as a whole, we conclude that the prosecutor's comment appears to have been made in error as improperly directing the jury's attention to defendant's failure to testify.

¶ 32 The State argues that the erroneous comment was cured by the trial court sustaining defendant's objection to the comment, directing the jury to disregard the comment, informing the jury that defendant did not have an obligation to present evidence, and instructing the jury that defendant's decision not to testify should not be considered in arriving at the verdict. See *People v. Simms*, 192 Ill. 2d 348 (2000) (a trial court may cure errors by giving the jury proper instruction on the law or sustaining defendant's objections and instructing the jury to disregard the inappropriate remark). However, even though the trial court attempted to cure the improper comment, we cannot say the comment did not contribute to defendant's conviction.

¶ 33 Here, the convictions were based upon whether the jury found that defendant was in possession of the gun and cannabis. The weapon convictions relied on proof that defendant knew her father's gun was in her father's car when she was driving the car. It would have been possible for the jury to conclude that defendant knew her father tended to keep the gun in his car when he drove it but was not aware that the gun was actually in the car on the evening she was driving the car until it slid out from under the seat. Similarly, the drug conviction hinged upon whether defendant was in possession of the cannabis. The jury could have found that the defendant was not in possession of the cannabis, either actually or constructively. However, the prosecutor's comment highlighted defendant's lack of testimony denying possession. Following the prosecutor's comment, the jury was likely to have made inferences favoring the State because defendant did not testify to deny involvement with the gun or the cannabis found in the car she was driving. Therefore, given the context of the comment, its relationship to the evidence, and its effect on defendant's right to a fair and impartial trial, we conclude defendant was substantially prejudiced by the comment, and the trial court's attempt to cure the prejudice was insufficient.

¶ 34 In remanding for a new trial, we note that there is no double jeopardy problem, as we have found that the evidence was sufficient for a rational trier of fact to find the essential elements of the crime were proven beyond a reasonable doubt. *People v. McKown*, 236 Ill. 2d 278 (2010). On remand, we direct the trial court to consider the constitutionality of the unlawful use of weapon charge in light of our supreme court's decision in *People v. Aguilar*, 2013 IL 112116, which was decided during the pendency of this appeal. Likewise, the court and parties should consider whether the FOID statute under which defendant was convicted suffers from the same constitutional infirmities as does the unlawful use of weapon count.

¶ 35

## CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the circuit court of Will County is reversed,  
and the cause is remanded with directions.

¶ 37 Reversed and remanded with directions.