

No. 1-13-0527

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 9502
	)	
VICTOR THOMPSON,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PALMER delivered the judgment of the court.  
Presiding Justice Reyes concurred in the judgment.  
Justice Gordon dissented.

**O R D E R**

¶ 1 **Held:** Judgment entered on defendant's conviction for unlawful use of unidentified sound or audiovisual recordings affirmed over his claim that the evidence was insufficient to prove him guilty of that offense beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant Victor Thompson was found guilty of unlawful use of unidentified sound or audiovisual recordings, then sentenced to one year of probation. On appeal, defendant contests the sufficiency of the evidence to prove him guilty of that offense beyond a reasonable doubt.

¶ 3 The record shows that defendant was charged with four counts of unlawful use of unidentified sound or audiovisual recordings in connection with an incident that took place near 405 West 14th Street in Chicago Heights, Illinois, on April 23, 2012. Prior to the presentation of evidence, defendant, through private counsel, filed a motion to quash arrest and suppress evidence. The circuit court denied the motion, and defense counsel withdrew from the case. Thereafter, defendant elected to proceed *pro se* after being admonished by the court.

¶ 4 At trial, Chicago Heights police officer Phillip Kosteca testified that about 6:30 p.m. on April 23, 2012, he and his partners, Detectives Hahn and Bruni, were patrolling the parking lot of a Chicago Heights strip mall when he observed two black males, one of whom he identified as defendant, standing near a parked minivan. The rear hatch of the van was open, and inside Officer Kosteca observed that there was a portable DVD player atop boxes full of CDs. He then approached defendant and the other man on foot. Defendant told him that he was just selling CDs, and upon closer inspection through the open hatch, Officer Kosteca observed three boxes, each of which contained three rows of CDs. The rows were further separated by colored-tabbed dividers with handwritten "categories of music on them," and each individual CD was in a plastic sleeve with "writing in black marker."

¶ 5 Officer Kosteca further testified that it was illegal to sell CDs within Chicago Heights without a license, and since defendant did not have one, he placed him under arrest and searched the back of the vehicle. He found four more boxes which contained well over 1,000 CDs, and another four boxes of well over 1,000 DVDs organized in three rows with colored dividers separating genres. At the police station, Officer Kosteca listened to and watched the recovered CDs and DVDs, including "Act of Valor," "Good Deeds," and "Happy Feet" and found that they contained the content that their labels indicated. He also noted that the labels for the CDs and DVDs did not display the full and correct street address of the performers, acts, or groups. Officer Kosteca contacted the Recording Industry Association of America (RIAA) and the Motion Picture Association of American (MPAA), and Jerry Jansoz of the MPAA came to the police station.

¶ 6 Officer Kosteca further testified that Detective Hahn recovered a small notebook from defendant's pocket that contained a list of movie titles, including "Act of Valor" and "Happy Feet." At the police station, Officer Kosteca advised defendant of his rights from a pre-printed form, and presented it to defendant for his signature. He refused to sign the form, but spoke with Officer Kosteca and told him that he was a DJ and was just selling CDs.

¶ 7 On cross-examination, Officer Kosteca testified that he ran a Law Enforcement Agencies Data System (LEADS) check on the license plate of the van and found that it was registered to defendant. Defendant then showed him a picture of the vehicle's license plate that was different from the number Officer Kosteca ran through the LEADS check. Officer Kosteca attributed this discrepancy to the fact that the vehicle had different rear and front license plates. Defendant then

presented a printout from the Department of Motor Vehicles showing that the title to the car had been transferred to Patricia Blackmore on April 5, 2012. Officer Kosteca further testified that the other male standing with defendant at the rear of the van told the officers that he was buying CDs, but that he did not see defendant advertise that he was selling CDs or DVDs, and that he observed no money, CDs, or DVDs change hands.

¶ 8 Jerry Janosz testified that he is an MPAA certified investigator with training in the identification of fraudulent or pirated DVDs, and the court accepted him as an expert in that field. He further testified that he went to the Chicago Heights police department on October 22, 2012, to identify the DVDs at issue in this case. He viewed the DVDs and determined that their packaging did not comply with industry standards, and concluded that they were copied and pirated, counterfeit DVDs. On cross-examination, Janosz testified that he was not an expert with respect to music.

¶ 9 The State then introduced, and the circuit court accepted into evidence, certified copies of the vehicle records for the two license plate numbers on the van, and the State's exhibits, which included photographs of the boxes in the van and some of the DVDs recovered by Officer Kosteca.

¶ 10 At the close of argument, the court found defendant guilty of unlawful use of unidentified sound or audiovisual recordings with respect to the DVDs, but not guilty of unlawful use of unidentified sound or audiovisual recordings with respect to the CDs because Janosz was not an expert in music. The court, therefore, found that there was insufficient evidence to determine that the CDs were fraudulent.

¶ 11 As to the DVDs, the court determined that there was sufficient evidence to show that they were counterfeit, and recounted Officer Kosteca's testimony of approaching defendant and another man at the rear of the van in the parking lot and observing the boxes of DVDs and CDs. Although defendant was not in physical possession of the DVDs, the court noted that he was standing near the rear of the vehicle that contained them. The court recognized that the vehicle records indicated that defendant was the previous owner of the vehicle, that Blackmore had bought the van prior to the date of the arrest, and that the notebook recovered from him listed movie titles matching those recovered from the boxes. The court also noted that there was another man standing with defendant at the rear of the vehicle who told the officers that he was buying CDs, and that defendant indicated that he was selling CDs. The court concluded that the evidence left no doubt that defendant was in possession of counterfeit DVDs and was dealing them because he would not have stood behind the vehicle with the items in the trunk "for no reason whatsoever."

¶ 12 In this appeal, defendant contests the sufficiency of the evidence to sustain that judgment. He contends that the State offered no evidence to show that he was in possession of the DVDs or that he was selling unauthorized DVDs for profit, and thus failed to prove all the elements of the charged offense beyond a reasonable doubt.

¶ 13 Where defendant challenges the sufficiency of the evidence to sustain his conviction, the reviewing court must consider whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Jordan*, 218 Ill. 2d 255, 270 (2006). This standard

recognizes the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any conflicts and inconsistencies in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court must allow all reasonable inferences from the record in favor of the prosecution, and will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 14 To sustain defendant's conviction of unlawful use of unidentified sound or audiovisual recordings in this case, the State was required to prove that he "knowingly, recklessly, or negligently for profit manufactures, sells, distributes, vends, \*\*\* possesses, or otherwise deals in and with unidentified sound or audio visual recordings." 720 ILCS 5/16-7(b) (West 2012). A sound or audiovisual recording is unidentified where it does not include "the actual name and full and correct street address of the manufacturer, and the name of the actual performers or groups prominently and legibly printed on the outside cover or jacket and on the label of such sound or audio visual recording." 720 ILCS 5/16-7(b)(5)(West 2004); *People v. Williams*, 376 Ill. App. 3d 875, 882 (2007). Defendant does not contest that the DVDs recovered by the officers were unidentified under the statute, but contends that the State failed to prove that he possessed the DVDs or that he was selling them for profit.

¶ 15 Viewed in a light most favorable to the prosecution, the evidence in this case shows that Officer Kosteca arrested defendant after he found him standing in a Chicago Heights strip mall near the open trunk of a van which contained boxes of unidentified DVDs and CDs, and a

portable DVD player on top of them. The boxes contained thousands of CDs and DVDs organized in three rows with colored dividers separating genres. Defendant told Officer Kosteca that he was just selling CDs, and another man standing with defendant said that he was buying them. After placing defendant under arrest, Officer Kosteca viewed the DVDs and observed that they contained the movies that their labels suggested, and Detective Hahn recovered a notebook from defendant that contained a list of movie titles, some of which matched the titles of the DVDs recovered from the van. Although the officers did not observe any money change hands, the evidence presented by the State, and the reasonable inferences therefrom, were sufficient to allow a reasonable trier of fact to find that defendant was in possession of fraudulent DVDs and was selling them for profit, thus proving him guilty of the offense beyond a reasonable doubt.

*Beauchamp*, 241 Ill. 2d at 8.

¶ 16 Notwithstanding, defendant contends that he did not own the van, and therefore could not be in possession of the DVDs found inside. He maintains that the record shows that he sold the van to another before he was arrested, and although he was standing next to it when the officers arrived, he was not observed inside the van or holding any of the DVDs.

¶ 17 Because defendant was not observed in actual physical possession of the DVDs, the State was required to prove that he had constructive possession of them, *i.e.*, that he had knowledge of the presence of the DVDs and exercised immediate and exclusive control over the area where the DVDs were found. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). Control over the location where the contraband was found gives rise to an inference that defendant possessed the items. *Id.* Evidence of constructive possession is often entirely circumstantial (*People v.*

*Mclaurin*, 331 Ill. App. 3d 498, 502 (2002)), and in determining whether constructive possession has been shown, the trier of fact is entitled to rely on reasonable inferences of knowledge and possession, absent other factors that might create a reasonable doubt of defendant's guilt (*People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17).

¶ 18 In this case, the record shows that defendant was in the parking lot of a strip mall standing near the open trunk of a van containing thousands of CDs and DVDs, and a portable DVD player. In addition, defendant told the officers that he was selling CDs, and the only other person present told police he was buying CDs.

¶ 19 Contrary to defendant's contention, the fact that he sold the van to a neighbor before the date of his arrest is not determinative of whether he exercised sufficient dominion and control over the van to reasonably infer his possession of the contraband therein. *People v. Williams*, 98 Ill. App. 3d 844, 848 (1981). Constructive possession does not require proof that defendant owned or had a legal interest in the property in which the contraband was discovered. *Id.* Here, the court reasonably inferred from the facts presented that defendant would not have stood behind the vehicle with thousands of pirated and counterfeit items in the trunk "for no reason whatsoever," and that his reason for doing so was to sell them. Accordingly, we find that this evidence, and the reasonable inferences therefrom, were sufficient to establish defendant's control of the van and his constructive possession of the DVDs on display in the trunk.

*McCarter*, 339 Ill. App. 3d at 879

¶ 20 Defendant contends, however, that Officer Kosteca's testimony does not support a finding that he was selling the DVDs for profit. Although he acknowledged that he was selling CDs

when he was arrested, defendant maintains that Officer Kosteca did not observe any money or DVDs change hands, or see defendant advertise that he was selling DVDs.

¶ 21 We initially observe that the statute does not apply to "transactions where a recording is distributed for free, or at a price-point geared only to cover the recording's production and distribution costs." *People v. Williams*, 235 Ill. 2d 178, 200 (2009). We also note that our research revealed no published Illinois cases that directly address the indicia a court may use to determine whether defendant was selling unidentified sound or audiovisual recordings for profit. However, *Williams* is instructive on this point. In *Williams*, this court reversed the defendant's convictions of one count of unlawful use of recorded sounds or images (720 ILCS 5/16-7(a)(2) (West 2004)) and one count of unlawful use of unidentified sound or audio visual recordings (720 ILCS 5/16-8 (West 2004)), as the State failed to prove that the disks recovered contained images. *People v. Williams*, 376 Ill. App. 3d 875, 883, 885-86 (2007). However, this court affirmed the defendant's conviction under count III with regard to unlawful use of unidentified sound recordings, which included the element that this be done "for profit." *Id.* at 881, 883, 885. *Williams* is similar to our case because there, a witness testified that the defendant attempted to sell compact discs for \$5 from a suitcase inside and outside of a laundromat. *Id.* at 877. No evidence was presented with regard to the price points or the costs of production, and yet the defendant's conviction was affirmed by our court and subsequently by the supreme court. *Id.* at 885; *Williams*, 235 Ill. 2d at 212.

¶ 22 That said, the record shows that defendant had multiple copies of the same DVD and was displaying more than 1,000 DVDs in boxes with colored labels separated by genre. Defendant

also had a portable DVD player in the trunk on top of the cardboard boxes, ostensibly to allow previews of the DVDs for prospective purchasers. In addition, defendant told the officers he was selling, and after his arrest, the officers recovered a notebook in which he had written the titles of movies, some of which matched the movies recovered from the van. Viewed in a light most favorable to the prosecution, this evidence was sufficient to allow a reasonable trier of fact to find that defendant was selling the DVDs for profit (see *People v. Contreras*, 327 Ill. App. 3d 405, 408-09 (2002) (finding circumstantial evidence of defendant's intent to sell narcotics based on the amount of narcotics defendant possessed and the manner of packaging)) and was thus proved guilty of unlawful use of unidentified sound or audiovisual recordings beyond a reasonable doubt.

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.

¶ 25 JUSTICE GORDON, dissenting.

¶ 26 Since the State offered no evidence that defendant was selling the DVDs "for profit," as opposed to at "a price-point \*\*\* to cover the recording's production and distribution costs," it failed to prove one of the required elements of the offense. *People v. Williams*, 235 Ill. 2d 178, 200 (2009). As a result, I must respectfully dissent.

¶ 27 Defendant was convicted of one count of selling allegedly bootlegged DVDs "for profit." 720 ILCS 5/16-7(b) (West 2012). Our supreme court in *Williams* defined the term "for profit" for purposes of this statute. *Williams*, 235 Ill. 2d at 200. In *Williams*, the court explained that the statute "does not apply to transactions where a recording is distributed for free, or at a price-

point geared only to cover the recording's production or distribution costs." *Williams*, 235 Ill. 2d at 200. Under *Williams*, the State has the burden of proving, beyond a reasonable doubt, that the recording was not sold "at a price-point geared only to cover the recording's production or distribution costs." *Williams*, 235 Ill. 2d at 200. In the case at bar, there was absolutely no evidence offered by the State about prices or costs of production or costs of distribution.

¶ 28 On appeal, the State cites drug cases where the factfinder was permitted to infer an intent to sell from the quantity that the defendant possessed. *E.g.*, *People v. Contreras*, 327 Ill. App. 3d 405, 408-09 (2002); *People v. Robinson*, 167 Ill. 2d 397, 408 (1995). However, as defendant observes, there is a significant difference between drugs and DVDs. While it is illegal to distribute drugs at any price, the same is not true for DVDs. The question with respect to this statute is not whether defendant had an intent to sell, but whether he did, in fact, sell the DVDs "at a price-point" that was above what was needed "to cover the recording's production and distribution costs." *Williams*, 235 Ill. 2d at 200. Since the State presented no evidence at trial on this issue, I must respectfully dissent.

¶ 29 In addition, the majority cites our appellate court opinion in *Williams* in support of its "for profit" holding. *Supra* ¶ 21. However, that issue was not raised on appeal in *Williams*. *Williams*, 376 Ill. App. 3d at 882. In *Williams*, the defendant challenged the sufficiency of the evidence on the limited grounds that the State failed to prove the items in the suitcase contained audio or visual recordings and that the State failed to prove that the defendant acted without consent of the MPAA. *Williams*, 376 Ill. App. 3d at 882. The defendant did not raise any issues with respect to the "for profit" requirement and, as a result, we did not address it. *People v.*

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*Givens*, 237 Ill. 2d 311, 323 (2010) ("Illinois law is well-settled that \*\*\* 'a reviewing court should not normally search the record for unargued and unbriefed reasons to *reverse*.' "

(Emphasis in original.) (quoting *Saldena v. Wirtz Cartage Co.*, 74 Ill. 2d 379, 386 (1978)).

¶ 30 For the foregoing reasons, I must respectfully dissent.