2015 IL App (1st) 131025-U

SECOND DIVISION
February 3, 2015

No. 1-13-1025

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. 12 CR 3658
	)	
JASON AVERHART,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Simon and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's possession of a controlled substance conviction affirmed over his challenge to the sufficiency of the evidence, where there was sufficient evidence that he, and not his codefendant, was the offender who flushed cocaine down a toilet.

¶ 2 Following a bench trial, defendant, Jason Averhart, was found guilty of possession of a controlled substance, to wit, less than 15 grams of cocaine, then sentenced to three years' imprisonment. On appeal, defendant challenges the sufficiency of the evidence to sustain his conviction.

¶ 3 The record shows that defendant was charged with two counts of unlawful possession of a weapon by a felon and one count of possession of a controlled substance, and codefendant, Lonell Tate, who is not a party to this appeal, was charged with armed violence, unlawful use or possession of a firearm by a felon and possession of a controlled substance. Defendant and codefendant were tried in simultaneous but separate bench trials, during which the State presented the testimony of three Chicago police officers, who participated in the execution of a search warrant at 2115 East 96th Place in Chicago on the evening of January 28, 2012.

¶ 4 Chicago police officer Robert McHale testified that he approached the side entrance of the single-family residence at that address, and saw defendant standing at the door. McHale announced his office and the search warrant, and defendant slammed the door. The officers pounded on the door, then made forced entry into the home about 30 seconds later. McHale began to give chase to defendant, who was running up the stairs to the second floor. McHale testified that the second-floor landing was not visible from the bottom of the stairs due to the curve of the stairwell, and he briefly lost sight of him as he followed him up the stairs.

¶ 5 When McHale reached the second floor, he saw defendant "running out of the bathroom" which was "directly at the top of *** [and] across from the stairs[.]" McHale observed "empty plastic baggies strewn around the toilet area" and "water that was swirling" in the toilet bowl. Defendant then ran into a far bedroom at the end of the hall, where he was pursued by Officers Boyd and Burns. McHale, instead, went into the closer bedroom where he found codefendant. Codefendant threw a gun to the floor, and McHale placed him in custody. McHale conducted a search of that bedroom and recovered the gun, and four baggies of a white rock-like substance. He then entered the bedroom into which defendant had fled, and discovered a few bags of cannabis and a plastic bag containing live rounds of 9-millimeter ammunition. Defendant was

taken into custody, and advised of his *Miranda* rights. When the officer questioned him about the bullets that were recovered, defendant responded "we're just small time out here."

¶ 6 Officer Darryl Bowen testified that, during the execution of the search warrant, he went to the basement of the home, broke a pipe, and radioed to another officer to flush the second-floor bathroom toilet, which was the only toilet in the home. At that time, a plastic bag with 24 clear knotted bags containing a white rock-like substance and a loose rock fell out of the pipe. Officer Bowen recovered the plastic bag and turned it over to Officer Dillon at the police station to be inventoried.

¶ 7 Officer James Dillon testified that he took custody of, and inventoried the evidence recovered during the search, and sent the suspect narcotics to the crime lab for testing. The parties then stipulated that Tina Joyce, a forensic chemist with the Illinois State Police Crime Lab, would testify that she tested 6 of the 24 items contained in the small plastic baggies found in the waste pipe, and concluded that they were 5.1 grams of cocaine.

¶ 8 At the close of evidence and after argument, the trial court found defendant not guilty of unlawful possession of a weapon by a felon, finding that there was no evidence showing that he lived in the house or that otherwise tied him to the ammunition found in the back bedroom. The court, however, concluded that the State proved defendant's "constructive possession" of the cocaine found in the waste pipe, observing that "the officers smashed the toilet and lo and behold out pops the drugs." The court found defendant guilty of that offense, and defendant now appeals the propriety of the trial court's judgment, contending that the evidence was insufficient to support his conviction.

¶ 9 When reviewing a challenge to the sufficiency of the evidence, " '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.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985), quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A reviewing court may not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses (*People v. Young*, 128 Ill. 2d 1, 51 (1989)), and will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of a defendant's guilt (*Collins*, 106 Ill. 2d at 261).

¶ 10 In this case, defendant contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt because no one saw him physically possess the cocaine or flush it down the toilet. He contends that "the drugs could have been flushed by codefendant [who] was also present on the floor where the bathroom was located[.]" The State responds that the evidence adduced at trial established defendant's constructive possession of the cocaine beyond a reasonable doubt.

¶ 11 To sustain a conviction for possession of cocaine in this case, the State was required to prove that defendant had knowledge and possession of the drugs. 720 ILCS 570/402 (West 2010); *People v. Givens*, 237 Ill. 2d 311, 334-35 (2010). It is well established that possession can be "proved by testimony which shows [that the] defendant exercised some form of dominion over the unlawful substance, such as trying to conceal it and throwing it away." *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987). Knowledge and possession are both questions of fact, and the trier of fact's findings will not be disturbed unless the evidence is so unbelievable and improbable that it creates a reasonable doubt of defendant's guilt. *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007). We do not find this to be such a case.

¶ 12 The evidence at trial showed that, in executing a search warrant, officers approached the home, and saw defendant, who slammed the door after the officers announced their office and the search warrant. The officers then forced entry, and Officer McHale chased defendant up the stairs, and saw defendant "running out of the bathroom" where there was evidence of drug packaging surrounding the toilet and the water in the toilet bowl was "swirling" from being recently flushed. Officer Bowen, who was in the basement, broke a water pipe and, after another officer flushed the second-floor toilet, a bag containing cocaine dropped from the pipe. Viewed in the light most favorable to the prosecution, the trial court could reasonably conclude from these facts, and the reasonable inferences therefrom, that defendant was shown to be in constructive possession of that cocaine.

¶ 13 Defendant disagrees, and asserts that the evidence is insufficient because codefendant "could easily have been the person to flush the drugs" relying on *People v. Jackson*, 23 Ill. 2d 360 (1961). The defendant in *Jackson* ran from police into her bathroom carrying her purse. *Jackson*, 23 Ill. 2d at 362. When the police entered the bathroom, they found footprints on the bathtub, the defendant's open purse on the floor, and a package of dry and clean drugs in an otherwise dirty and wet airwell beneath the window. *Jackson*, 23 Ill. 2d at 362. The court noted that while it was likely that the defendant ran to the bathroom and discarded the drugs from the window into the airwell, the airwell was accessible to seven other apartments and there was no other evidence linking the defendant to the drugs. *Jackson*, 23 Ill. 2d at 363-65. Thus, the State's evidence did not support her possession of narcotics conviction beyond a reasonable doubt. *Jackson*, 23 Ill. 2d at 365. Defendant contends that his case is analogous to *Jackson* because in that case "the drugs could have some from one of seven other apartments that opened out into an

airwell," and in his case, "the flushed cocaine could have come from either [defendant or codefendant]." We disagree.

¶ 14 *Jackson* is factually distinguishable from the case at bar. In this case, the cocaine was recovered from a waste pipe connected to the second-floor bathroom toilet, which was the only toilet in the home. Officer McHale testified that he saw defendant running from that bathroom when he followed him up the stairs, and also observed the toilet bowl water swirling, and evidence of narcotics packaging strewn around the toilet. Defendant concedes that Officer McHale testified that defendant "was situated closer to the bathroom than [codefendant]." While it is theoretically possible that codefendant flushed the cocaine down the toilet, we note that this issue was presented to the trial court, which is in the best position to resolve any conflicting inferences produced by the evidence. *People v. McDonald*, 168 Ill. 2d 420, 447 (1995). In circumstances such as these, the trier of fact is not required to disregard the inferences that flow normally from the evidence, nor is it required to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Jackson*, 232 Ill. 2d at 281. We conclude that the trial court was presented with sufficient evidence from which it could determine that defendant, not codefendant, flushed the cocaine.

¶ 15 After reviewing the evidence in the light most favorable to the State, we cannot say that the trial court's determination was so unreasonable or improbable as to raise a reasonable doubt of defendant's guilt. *Collins*, 106 Ill. 2d at 261. We therefore affirm the judgment of the circuit court of Cook County.

¶ 16 Affirmed.