2015 IL App (1st) 131501-U

FIFTH DIVISION
December 11, 2015

No. 1-13-1501



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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 20471 |
| | ) | |
| MICHAEL BOOKER, | ) | Honorable |
| | ) | Thaddeus L. Wilson, |
| Defendant-Appellant. | ) | Judge Presiding. |

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PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

**O R D E R**

¶ 1 *Held*: The evidence was sufficient to sustain defendant's convictions, although one conviction for cannabis had to be vacated on one-act, one-crime principles; the trial court was not required to conduct a *Krankel* inquiry; and the mittimus was amended to reflect the proper cannabis conviction.

¶ 2 Following a bench trial, defendant Michael Booker was found guilty of unlawful use of a weapon by a felon, possession of cannabis after having been previously convicted of possession of cannabis with intent to deliver, and possession of cannabis with intent to deliver. The court sentenced defendant to concurrent terms of seven, three, and five years respectively in the

Illinois Department of Corrections (IDOC). On appeal, defendant contends: (1) he was not proven guilty of the offenses beyond a reasonable doubt, (2) the trial court erred in failing to conduct a *Krankel* inquiry, (3) entry of judgment on both counts of possession of cannabis violated the one-act, one-crime doctrine, and (4) the mittimus identified the wrong offense of conviction for cannabis possession. We vacate the judgment on one count of cannabis possession, affirm the judgment on the remaining counts, and order correction to the mittimus.

¶ 3 The trial testimony established that defendant's convictions arose from the execution of a search warrant by a team of Chicago police officers on October 12, 2012, at about 10:30 p.m. The warrant authorized the officers to search the basement apartment on South Loomis and an individual named Michael Booker at that address. After knocking on an outer door at the Loomis address and announcing their office, and hearing no response, the officers breached the outer door. They went down a few steps to a basement common area containing a washer, dryer, refrigerator, and other objects. They also breached a second door separating the common area and the basement apartment. The officers entered the apartment, which was one large room with a bathroom separated by a curtain and a small closet; there was no kitchen. The apartment's furnishings included a bed, a dresser, a TV, a freestanding bar, and miscellaneous items. Pursuant to the search warrant, the officers looked for an individual named Michael Booker. They found only one individual in the apartment: defendant Michael Booker, who was hiding wrapped in a shower curtain in the bathroom.

¶ 4 Some narcotics packaging and a digital scale in plain view atop the bar were recovered. A shoebox lid was lying in plain view on the bed, and a green substance suspected to be cannabis was strewn about in the lid. An officer placed the loose suspected cannabis in a plastic bag. Also inside the box lid were knotted clear plastic bags containing a green leaf like substance suspected

to be cannabis, some money, and a cell phone. The cell phone was not seized or inventoried, and it was not known to whom it belonged. Items of men's clothing, several boxes of men's shoes, all size 13, and two jackets were observed by the bed and the bar. A shoebox was found in plain view on a shelf inside the bar. The shoebox held a plastic freezer bag containing 12 additional knotted sandwich baggies, each containing a green plantlike substance suspected of being cannabis.

¶ 5 A backpack found on the floor inside the closet enclosed a MasterPiece Arms nine-millimeter assault pistol which contained a 30-round magazine with 24 live nine millimeter rounds of ammunition. The pistol had the capability of being modified to be fully automatic. Three live .45 caliber rounds in a clear plastic sandwich bag were found on top of a desk in the apartment. At trial, a State photographic exhibit showed the plastic bag containing the ammunition rounds and also depicted what appeared to be an Illinois identification card next to the plastic bag. The officer who found the ammunition and card did not recall whose identification card it was. The items seized by the police, including the firearm with a loaded magazine, digital scale, three bullets, a box of Hefty baggies, one large freezer bag containing 12 smaller bags of suspect cannabis, and two additional bags containing suspect cannabis, were transported to the police station and inventoried.

¶ 6 Diane Billings Wilkins testified at trial that on October 12, 2012, she owned the building on South Loomis. Wilkins lived in the first and second floors of the building with her three young grandchildren. The common area of the basement contained her office files, storage areas, a washer and dryer, and a deep freezer/refrigerator. She denied that the basement was a garden apartment. Wilkins conceded that there was a bed, a TV, and a bar in the basement but claimed no one was living in the basement on October 12, 2012. Wilkins described defendant as her

"nephew by marriage" and stated that she has known him for most of her life. Although Wilkins stated she observed defendant in the basement apartment on October 12, she denied that he was living there at that time, claiming he had not lived there since January 2012. Wilkins was confronted with her statement to police that defendant did live there and had been doing so for the past two years, but denied making it. She also claimed the officer asked her if there was a lease, "but there was no lease. There was no rent paid. There was never a requirement for rent to be paid. And, as I indicated before, [defendant] was not living there at that time." Wilkins, an attorney, testified that as an officer of the court, she would not lie for defendant.

¶ 7 Officer Malloy testified that on the evening of October 12, he had a conversation with Wilkins in the common area of the basement, outside the apartment. Wilkins told Malloy that she was the owner of the building. Malloy asked her if defendant currently resided in the basement apartment, and she replied yes, he had been living there for the last two years. Malloy asked for a current lease, but she was not able to provide him with one. At the time of Malloy's conversation with Wilkins, Sergeant Hardy was present but all of the other officers were still executing the search warrant in the basement apartment. Malloy did not believe he made Wilkins aware of what was recovered in the basement.

¶ 8 Before defendant was removed from the basement apartment to the police station, Malloy observed that defendant was clothed but was not wearing shoes or a jacket. Malloy observed several pairs of men's gym shoes near the bed in the basement apartment that matched defendant's shoe size, 13. Defendant pointed to a specific pair and said they were his, and he was allowed to put them on before being escorted to the station.

¶ 9 The parties stipulated to the chain of evidence of the inventoried items and to the fact that the green leafy material was sent to the Illinois State Police crime lab for analysis. The parties also stipulated that the contents of each of the two individual bags tested positive for cannabis, and the total weight of both was 55.8 grams. As to the larger bag containing 12 small bags of suspect cannabis, 2 of the 12 bags were tested; the contents were positive for cannabis; the weight of the tested substances from the 2 bags was 51.3 grams; and the total estimated weight of all of the contents was 308.2 grams.

¶ 10 The State tendered two certified copies of felony conviction for Michael Booker: a conviction on January 25, 2010, in case Number 09 CR 21705-02 for possession of cannabis with intent to deliver, and a conviction on October 4, 2002, in case Number 02 CR 22896-01 for felony possession of a weapon.

¶ 11 After the State rested, defendant's trial counsel addressed the court: "I have obviously had the opportunity to talk to my client, not only today and before. I have explained to him his right to testify, his right not to testify. I have given him some advice on this, but also informed him it is obviously his choice whether or not to testify. At this time he does not wish to testify." With that, the defense rested. The court advised defendant that it was his right alone to testify or not testify. Defendant stated that he understood and that it was his decision not to testify. The court found that defendant knowingly waived his right to testify.

¶ 12 Following the parties' closing arguments, the trial court found that the testimony of the officers was credible and that of Wilkins was not credible. The trial court observed that "the setup of that separate room in the basement with its own separate door, its own separate bed, TV, [had] everything of the makeup of a studio apartment." After reviewing the law on constructive possession, the trial court found that defendant was in sole and exclusive possession of the

basement apartment where cannabis was in plain view and that he lived there, as indicated by the presence of men's clothing and shoes. The trial court found defendant guilty on all three counts charged in the felony information. Subsequently, the trial court denied defendant's motion for new trial after again finding that defendant had exercised dominion and control over the basement apartment.

¶ 13 At the sentencing hearing, the trial court inquired of the State: "As to counts two and three, those are for cannabis found in different areas. Right?" The assistant State's Attorney replied: "One is possession of cannabis based on a prior conviction. That was count two. Then count three was charged as a felony based on the amount."

¶ 14 After hearing the parties' arguments in aggravation and mitigation of sentence, the trial court asked defendant if he had anything to say before imposition of sentence. Defendant responded that on the day of trial, "I was advised if I took the stand that day that you wasn't [*sic*] going to believe anything that I had to say, but I wish that I did. I am the only person in this case that could provide any sufficient evidence." Referring to Officer Malloy's testimony that Wilkins told him that defendant had lived in the basement apartment for two years, defendant stated that it would have been impossible because he was in the penitentiary two years earlier. Defendant also informed the trial court he had paperwork, including a lease, a light bill in his name, a gas bill, and a letter from the realty company, demonstrating that he lived at 7948 South Paulina.

¶ 15 The trial court sentenced defendant to three concurrent terms in the Illinois Department of Corrections (IDOC): seven years on count one, unlawful use or possession of a weapon by a felon; three years on count two, possession of more than 30 grams but not more than 500 grams of cannabis after previously having been convicted of possession of cannabis with intent to deliver; and five years on count three, possession of more than 30 grams but not more than 500

grams of cannabis with intent to deliver.

¶ 16 On appeal, defendant contends he was not proven guilty beyond a reasonable doubt of possessing the cannabis and firearm found in the basement apartment where the evidence showed only his mere presence there and failed to establish that he resided in the apartment such that he had immediate and exclusive control over those items. The State responds that defendant's attempt to hide from the police in the apartment bathroom, along with other circumstantial evidence, demonstrates he was in constructive possession of the cannabis and firearm.

¶ 17 When a defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). In reviewing the evidence, it is not the function of this court to retry the defendant, nor will we substitute our judgment for that of the trier of fact. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). A reviewing court affords great deference to the trier of fact and does not retry the defendant on appeal. *People v. Smith*, 318 Ill. App. 3d 64, 73 (2000). The deferential standard of review is based on the reality that the trial judge is in a superior position to determine and weigh the credibility of the witnesses, observe their demeanor, and resolve conflicts in their testimony (*People v. Richardson*, 234 Ill. 2d 233, 251 (2009)), and we may not reverse the judgment merely because we might have reached a different conclusion (*People v. Love*, 404 Ill. App. 3d 784, 787 (2010)). A conviction will be overturned only where the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *Beauchamp*, 241 Ill. 2d at 8.

¶ 18 To sustain defendant's conviction on count one, unlawful use of a weapon by a felon, the

State had to prove that defendant had knowing possession of the weapon and that he had a prior felony conviction. 720 ILCS 5/24-1.1 (West 2012); *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). Here, defendant's prior conviction is not challenged on appeal; only his possession of the weapon is at issue. To establish defendant's guilt on counts two and three for possession of more than 30 grams but not more than 500 grams of any substance containing cannabis, the State was required to prove beyond a reasonable doubt that defendant knowingly possessed cannabis. 720 ILCS 550/4(d) (West 2012). Possession may be either actual or constructive. *Love*, 404 Ill. App. 3d at 788. Actual possession is proven by testimony that the defendant exercised some form of dominion over the contraband, such as trying to conceal it or throwing it away. *Id.*, citing *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987).

¶ 19 In the instant case, defendant was not found in actual possession of contraband. Thus, the State was required to prove constructive possession. *People v. Hannah*, 2013 IL App (1st) 111660, ¶ 28. Constructive possession may be shown where it is demonstrated that defendant had knowledge of the presence of the contraband and exercised immediate and exclusive control over the area where the contraband was found. *Id.*; *People v. Ingram*, 389 Ill. App. 3d 897, 899-900 (2009). The mere presence of contraband on premises under the control of the defendant gives rise to an inference of knowledge and possession sufficient to sustain a conviction absent other factors which might create a reasonable doubt as to the defendant's guilt. *People v. Smith*, 191 Ill. 2d 408, 413 (2000). Here, amounts of both loose and bagged cannabis, together with implements to weigh and package it, were in plain view. Although the weapon was found in the closet and was not in open and plain view, the evidence established that defendant exercised control over the area where the weapon was discovered. A defendant's control over the location where weapons are found gives rise to an inference that he possessed the weapons. *People v.*

*Spencer*, 2012 IL App (1st) 102094, ¶ 17. From defendant's control of the area, therefore, the trial court could reasonably infer that defendant knew of the presence of the firearm in the closet. *Id.*; *McCarter*, 339 Ill. App. 3d at 879.

¶ 20 Contrary to defendant's assertion, this was not a situation where defendant merely happened to be found in the presence of contraband. The police, who were armed with a search warrant for both the premises and defendant, expecting to find him there, found creditable corroborating evidence associating defendant with the contraband discovered in the one-room apartment: a police officer testified that the building owner told him defendant had been living in the basement apartment for two years; cannabis, a digital scale, packaging supplies, and live ammunition were in plain view; defendant was alone in the small apartment at 10:30 at night and had made himself comfortable by removing his jacket and shoes; and men's clothing and several pairs of men's shoes, size 13, including a pair defendant identified as his own shoes, were found in the apartment, indicating defendant resided there. Although Wilkins was disinclined to describe the area as an apartment, it was obvious from the furniture and personal items that the area was a dwelling where defendant appeared to be very much at home, and the trial court found that it was set up as a studio apartment. Moreover, the testimony that when the police entered, defendant was found hiding in a shower curtain to avoid detection was admissible as a circumstance tending to show consciousness of guilt. *People v. Pursley*, 284 Ill. App. 3d 597, 606 (1996); *People v. Jones,* 162 Ill. App. 3d 487, 492 (1987). While the evidence of possession was circumstantial, proving possession frequently rests upon circumstantial evidence because possession is often difficult to prove directly. *Love*, 404 Ill. App. 3d at 788. In the instant case, viewed in the light most favorable to the State, the evidence established that defendant exercised immediate and exclusive control over the area where the contraband was found and was in

constructive possession of both the firearm and the cannabis.

¶ 21 Defendant contends, nevertheless, that the presence in the apartment of unidentified property, namely, a cell phone and identification card, undercuts the State's claim that he had exclusive possession of the apartment. Defendant asserts that the fact the State did not introduce the cell phone and identification card at trial "can only lead to the reasonable conclusion that these items, along with the contraband right next to them, likely belonged to someone other than [defendant]." The record reveals that the reason why the State did not proffer those items at trial was that they were not among the items seized and inventoried by the police. With the exception of the backpack containing the firearm, the only objects seized and inventoried were items of contraband. The record does not reveal why the cell phone and identification card were not seized. If either or both items belonged to defendant, the failure to seize them and introduce them in evidence worked to defendant's benefit. If one or both items did not belong to him and their ownership could be identified with another person that did not prove defendant did not control the basement apartment. Mere proof of others' access to the contraband does not defeat a finding of constructive possession, as possession may be exclusive and joint. *People v. Warren,* 2014 IL App ($4^{th}$) 120721, ¶ 66; *People v. Hill,* 226 Ill. App. 3d 670, 672-73 (1992). Defendant also asserts that the items of men's clothing found in the basement apartment were not shown to belong to him. He speculates that the clothing could belong to some of the many individuals who periodically stayed in the basement apartment. However, the evidence that other individuals were overnight guests in the basement apartment came from Wilkins, whose testimony the trial court rejected as being not credible. The police found defendant to be alone in the apartment when they entered, and his exclusive dominion and control over the premises was not diminished by evidence of others' access to the contraband. *Id.* at 673.

¶ 22 Defendant also attempts to minimize the weight to be given to Malloy's testimony that Wilkins, the building's owner, had told him defendant was living in the basement apartment and had been doing so for two years. Defendant contends that because the trial court found Wilkins' trial testimony unbelievable, the court was bound to find her statement to Malloy came from an unreliable source. However, the court's function was not to test the reliability of the hearsay statement, but to ascertain whether Wilkins actually made the statement to Malloy. Wilkins testified she did not make the statement; Malloy testified she did make the statement and did so as the search was ongoing, at a time before she knew what the police had found in the basement apartment. In a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). It was within the province of the trial judge to determine whether or not Wilkins had admitted to Malloy that defendant, her nephew about whom she cared, was the resident of the basement apartment.

¶ 23 Defendant also contends that even if Wilkins had made the statement to Malloy, the statement "should not be believed" because two years earlier defendant was still serving his prior three-year sentence for his 2010 conviction for possession of cannabis with intent to deliver in case number 09 CR 21705-02. Defendant represents that his argument is based in part on the website for the Illinois Department of Corrections (IDOC). However, the contents of the IDOC website were not presented to or considered by the trial court. A reviewing court must determine the issues before it on appeal solely based on the record made in the trial court. *People v. Gacho*, 122 Ill. 2d 221, 254 (1988).

¶ 24 Defendant next asserts that this court should remand the cause to the trial court for a *Krankel* inquiry. Defendant claims that in his statement in allocution at the sentencing hearing, he "pointed out that his attorney did not present readily available documentation that he resided elsewhere." Defendant asked the trial court to consider his documentation of a lease, gas bill, light bill, and a letter from his realty company establishing that he resided at a location other than the Loomis address. He also advised the trial court that, whereas Officer Malloy testified Wilkins told him defendant had lived in her basement apartment for two years, he actually had been in IDOC two years earlier. Defendant asserts that the failure to present evidence that he had resided elsewhere on October 12, 2012, demonstrated at a minimum "a possible neglect of the case" by his attorney.

¶ 25 When a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should conduct an adequate inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), to determine the factual basis for defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If the trial court determines that the *pro se* claim lacks merit or pertains only to matters of trial strategy, the trial court need not appoint new counsel and may deny the motion. *Id.* at 78. On the other hand, "if the allegations show possible neglect of the case, new counsel should be appointed." *Id.* However, where there was neither an explicit nor an implicit claim of ineffectiveness of counsel, no *Krankel* inquiry is required. *People v. Taylor*, 237 Ill. 2d 68, 77 (2010). In *Taylor*, the supreme court noted "that nowhere in defendant's statement at sentencing did he specifically complain about his attorney's performance, or expressly state he was claiming ineffective assistance of counsel." *Id.* at 76. The court concluded that defendant's statement at sentencing was insufficient to require a *Krankel* inquiry. *Id.* at 77.

¶ 26 We agree with the State that here, as in *Taylor*, defendant's statement was no more than an expression of regret over his own personal decision to waive his right to testify, as he believed his decision precluded his presenting evidence that he had maintained a residence apart from the Loomis address. Defendant's statement did not constitute a *pro se* claim of ineffective assistance of counsel sufficient to trigger the trial court's duty to conduct a *Krankel* inquiry.

¶ 27 Defendant asserts that *Taylor* is inapposite because in *Taylor* the defendant's statement at sentencing merely expressed regret about turning down a favorable plea agreement, whereas he claims that in the instant case, he told the trial court that his attorney did not present documentation that he resided elsewhere and that his statement "demonstrated a clear basis for an allegation of ineffective assistance." He contends that "the only fair interpretation of [his] statement as a whole is that there was evidence that should have been presented by his attorney, but was not presented." We reject this interpretation of defendant's statement. The record demonstrates that defendant never claimed that his attorney should have presented documentation that he resided elsewhere. Defendant began his statement at the sentencing hearing by telling the trial court: "I wish that I did [testify at trial]. I am the only person in this case that could provide any sufficient evidence" about residing elsewhere. Patently, defendant believed that the evidence, that his residence was at another location, could have been submitted to the trial court only through his own testimony, and he regretted his decision not to testify, a decision that was his alone to make. *People v. Medina*, 221 Ill. 2d 394, 403 (2006). There is no basis in the record for speculation that defendant's trial counsel would have been able to present the evidence in question without defendant's testimony.

¶ 28 Defendant contends, however, that his allocution statement to the trial court was sufficiently detailed with respect to the nature of the residence evidence to put the trial court on

notice that his attorney was negligent in failing to submit the evidence. He refers us to *People v. Pence*, 387 Ill. App. 3d 989 (2009), where this court remanded the cause for a factual inquiry based on the defendant's posttrial complaint that evidence favorable to him had not been presented at trial. *Spence* is inapposite where, in that case, the defendant made specific claims that his trial counsel had been ineffective. During the sentencing hearing, the defendant protested that "there were issues of facts that my defense looked [*sic*] and omitted." *Id.* at 992. He also complained: "In sum, I feel my defense did not thoroughly represent me." *Id.* In contrast, in the instant case defendant's statement to the trial court was neither an explicit nor an implicit claim of ineffective counsel. Rather, it was no more than an admission bemoaning his own personal decision not to testify. We note that defendant's allegation that he resided elsewhere, even had the trial court received that evidence and accepted it as true, still would not exclude the fact that defendant could have maintained multiple residences, where the evidence presented at trial established that defendant resided at and controlled the one-room basement apartment on South Loomis where the contraband was found. We conclude that the record does not indicate the trial court had any basis to suspect a claim of ineffectiveness of counsel so as to require a *Krankel* inquiry.

¶ 29 Defendant next contends that his conviction and sentence for both possession of cannabis and possession of cannabis with intent to deliver was error, as it violated the one-act, one-crime doctrine. We agree. Multiple convictions are barred where more than one offense is carved from the same physical act (*People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 46, citing *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996)), or where one is the lesser included offense of the other (*People v. King*, 66 Ill. 2d 551, 566 (1977)). For purposes of the one-act, one-crime rule, an "act" is defined as any overt or outward manifestation that will support a separate conviction. *Id.*;

*People v. Crespo*, 203 Ill. 2d 335, 342 (2001). Defendant's claim, that his conviction on both counts of possession of cannabis was error, raises a question of law that we review *de novo*. *People v. Almond*, 2015 IL 113817, ¶ 47.

¶ 30 The charging instrument (information) included two counts of possession of cannabis. Count two charged defendant with possession of "more than 30 grams but not more than 500 grams of any substance containing cannabis, and he has previously been convicted of manufacture or delivery of cannabis under 09CR2170502." Possession of that amount of cannabis is a Class 4 felony, but a subsequent offense is a Class 3 felony. 720 ILCS 550/4(d) (West 2012). Count three charged defendant with possession of cannabis "with intent to deliver *** more than 30 grams but not more than 500 grams of any substance containing cannabis," a Class 3 felony. 720 ILCS 550/5(d) (West 2012). Neither the information nor the State's theory at trial indicated that, in possessing multiple quantities of cannabis, defendant possessed separate and distinct items of contraband for purposes of justifying two separate convictions. His one act, possessing cannabis in the amount of more than 30 but not more than 500 grams, was the basis of both convictions under the same theory of constructive possession. All of the cannabis was found in plain view at the same time and in the same room. Under the one-act, one-crime rule, only the more serious version of the offense--here, possession of cannabis with intent to deliver as charged in count three--should have survived. *People v. Fuller*, 205 Ill. 2d 308, 346-47 (2002). Thus, the conviction on count two must be vacated. *People v. Cortes*, 181 Ill. 2d 249, 281-82 (1998). Moreover, possession of cannabis is a lesser included offense of possession of cannabis with intent to deliver. The conviction for possession of cannabis (count two) must be vacated as the lesser included offense of possession with intent to deliver (count three). *People v. Birge*, 137 Ill. App. 3d 781, 790 (1985).

¶ 31 The State contends that two distinct convictions for possession of the cannabis must stand because the cannabis was recovered in two different locations of the apartment and in two separate quantities: a portion of the cannabis found in the bar tested positive for 51.3 grams and the total amount of cannabis found in the shoebox lid on the bed tested positive for 55.8 grams. We reject the State's argument. The information evinced the State's intent to treat defendant's conduct as a single act, albeit based on two different theories, and it did not charge defendant with possession of two different types or amounts of contraband. Both counts two and three charged defendant with possession of 30 to 500 grams of cannabis, and the two counts did not apportion those offenses between the two quantities of cannabis. Rather, here, as in *Crespo*, the separate counts charged defendant "with the same conduct under different theories of criminal culpability." *Crespo*, 203 Ill. 2d at 342.

¶ 32 We note that the State's argument on appeal is different than its argument in the trial court. There, the State's only argument to sustain convictions on all charges was that, as to count two for "just possession of cannabis with the prior conviction, *** there is loose cannabis laying [*sic*] on the bed out in the open and you have the certified copy of conviction for his prior." However, the loose cannabis strewn about in the shoebox lid on the bed was never weighed separately--that cannabis and the cannabis in the plastic bag also found inside the shoebox lid were weighed together and totaled 55.8 grams. It was not determined whether the weight of the loose cannabis alone exceeded 30 grams.

¶ 33 In finding defendant guilty as charged on both possession counts and imposing sentence on both, the trial court did not articulate a reason for doing so. At the sentencing hearing, however, the trial court raised the question the State now addresses on appeal when, before pronouncing sentence, the court asked the State: "As to counts two and three, those are for

cannabis found in different areas. Right?" The State did not argue that the two separate locations of the cannabis required two separate convictions. Rather, the assistant State's Attorney replied to the court's question by stating that the separate counts were based on two different theories of criminal culpability: "One is possession of cannabis based on a prior conviction. That was count two. Then count three [intent to deliver] was charged as a felony based on the amount." On appeal, the State now advances a different theory. We cannot allow the State to change its theory of the case on appeal. *Crespo*, 203 Ill. 2d at 344. Consequently, only the conviction on count three, possession with intent to deliver, the more serious of the cannabis possession counts, may be upheld.

¶ 34 Finally, defendant contends and the State agrees that the mittimus incorrectly states that his conviction on count three was "MFG/DEL CANNABIS/30-500 GRAMS" when in fact he was convicted on that count only of possession of cannabis with intent to deliver, not of manufacture or delivery of cannabis. We agree that the mittimus should be corrected to reflect the proper judgment entered by the trial court. *People v. Hill*, 408 Ill. App. 3d 23, 32 (2011). We have the authority to correct a mittimus that misidentifies the offense of which defendant was convicted. *People v. Gorosteata*, 374 Ill. App. 3d 203, 230 (2007). Consequently, we instruct the clerk of the circuit court to correct defendant's mittimus to indicate no conviction on count two and to reflect that the conviction on count three was for possession of cannabis with intent to deliver.

¶ 35 For the foregoing reasons, and in the exercise of our authority under Supreme Court Rule 615(b)(1) (eff. July 15, 2013) to modify a judgment, we affirm the decision of the trial court finding defendant guilty of unlawful use of a weapon by a felon (count one) and possession of cannabis with intent to deliver (count three), vacate the conviction on count two, and order the

mittimus to be corrected to enter convictions only on counts one and three and to reflect the proper name of count three to be possession of cannabis with intent to deliver.

¶ 36 Affirmed in part and vacated in part; mittimus corrected.