THIRD DIVISION
December 2, 2015

No. 1-14-0695

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. 13 C3 30373
	)	
MARCO SILVA,	)	Honorable
	)	Bridget Jane Hughes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Evidence presented at trial was sufficient to prove that defendant had constructive possession of cannabis where defendant was the sole occupant of the car in which the contraband was found and the car smelled of burnt cannabis.

¶ 2 Following a bench trial, defendant Marco Silva was convicted of possession of cannabis and sentenced to two years of probation. On appeal, defendant contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt because he did not have exclusive control over the car where the cannabis was found. He also argues that the State failed to prove that he knew of the cannabis's presence. We affirm.

¶ 3 Elk Grove Village police officer Nicholas Langendorf testified that he was watching a stop sign from his marked police car on March 22, 2013. A car, travelling approximately 25 miles per hour, drove past the sign and through the intersection without stopping. Langendorf activated his lights and siren and drove after the car. As he reached the car, it pulled over to the side of the road and stopped momentarily. The car then began to drive forward again and turned right at the next street. After driving for about fifty feet, the car stopped again. Langendorf parked behind the car, exited, and approached the other vehicle. Defendant was its sole occupant. As the officer began to talk with defendant, he smelled "a strong odor of burnt cannabis" coming from the vehicle. Defendant's eyes were "red shot" and his hands were shaky. He told Langendorf that his driver's license was suspended and he did not have proof of insurance with him. Langendorf noted the cannabis odor and asked defendant "if there was anything [Langendorf] should know about?" Defendant replied that there was nothing in the vehicle, but the smell was "probably from previous use." Langendorf told defendant that he was going to be arrested for driving on a suspended license and that he should call a family member for bond. Langendorf returned to his vehicle and radioed for backup. While he waited for the second officer, he could see defendant moving "all around" in the driver's seat. He was "very fidgety" and "bending." At one point, Langendorf returned to defendant and informed him that his car would be searched. Defendant replied that he would not consent to a search.

¶ 4 After 10 minutes, a second officer arrived and both officers approached the car. Langendorf told defendant that it was "time to go." Defendant, who was on the phone at the time, ignored several requests from the officer to exit the car. Langendorf eventually "placed his hands" on defendant to get him out of the car. Defendant indicated that he would get out, but

remained seated and continued to talk on the phone. Langendorf then pulled defendant out of the vehicle. Defendant was argumentative as Langendorf handcuffed him and yelled repeatedly that the officers could not search his car. Defendant's mother arrived while the officers tried to place him in the police car and defendant repeatedly yelled to his mother that the police could not search his car. Once defendant was in the back of the police car, Langendorf returned to the empty car and began a search. As the officer searched, defendant continued to yell that there was no consent, and screamed for his mother "to get the vehicle and for her to drive the vehicle, to remove the vehicle." During the search, Langendorf found a plastic Wal-Mart bag "stuffed" beneath the driver's seat. The bag was within arm's reach of the driver, but was not plainly visible. He had to "forcefully remove the bag" because it had been wedged so tightly beneath the seat. Later, at the police station, Langendorf found two clear plastic bags inside the Wal-Mart bag. One bag held a large quantity of cannabis. The other contained four smaller baggies, each filled with cannabis. Langendorf also testified that he determined that the stopped vehicle was registered to defendant's father.

¶ 5 On cross-examination, Langendorf explained that the smell of cannabis came from the car, not defendant's breath or person. He also testified that he found no items for the use of cannabis and did not see defendant make "furtive movement[s]" under the driver's seat. During the encounter, defendant repeatedly referred to the stopped car as "my car."

¶ 6 Following the officer's testimony, the State entered a video of the incident from Langendorf's dashboard camera into evidence. The video begins shortly before defendant's car drove past the stop sign and ends as Langendorf drove away from the stop. When defendant was alone in his car, the video shows his silhouette frequently moving around. He bends downward

several times. The video also records defendant repeatedly referring to the car as "my car," and later as his mother's car.

¶ 7 It was stipulated that a forensic chemistry expert tested the material within the clear plastic bags and found it to be positive for cannabis, which weighed a total of 107.21 grams.

¶ 8 Defendant testified that he shared the use of his father's car with several family members. His brother had the car for the whole morning on March 22, 2013. When defendant began driving the car at 1:30 p.m., he noticed that it smelled like someone had smoked cannabis in it. He did not know that there was cannabis in the car. On cross-examination, defendant testified that he told the officers to let his mother take the car because his father needed to be picked up from work.

¶ 9 The court found defendant guilty of possession of cannabis. It noted that defendant's failure to "immediately stop" for the officer and the odor of cannabis in the car supported a finding that defendant knew about the drugs. It also explained that the drugs' location "right underneath the driver's seat" and defendant's references to "my car" supported its finding of guilt. Defendant appeals.

¶ 10 On appeal, defendant solely contends that the State failed to prove beyond a reasonable doubt that he was in possession of cannabis. He argues that the evidence does not support a finding of constructive possession because the drugs were not in sight of the driver's seat, other people had access to the car, and there was no indication that he touched or tried to conceal the drugs. The State responds that ample circumstantial evidence supports a finding that defendant knew the drugs were present and had exclusive control over them. It notes that defendant failed to immediately stop his car, acknowledged the car smelled like cannabis, moved suspiciously

when the officer returned to his police car, and repeatedly stressed that he did not consent to a search of his car.

¶ 11 Due process requires the State to prove each element of a criminal offense beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004), citing *In re Winship*, 397 U.S. 358, 364 (1970). When reviewing the sufficiency of evidence, a reviewing court must decide "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.) *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); see also *Cunningham*, 212 Ill. 2d at 278. A reviewing court will not overturn a guilty verdict unless the evidence is "so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005). On appeal, the reviewing court must resolve all reasonable inferences in favor of the prosecution. *Cunningham*, 212 Ill. 2d at 280. This court may not retry a defendant on appeal. *People v. Milka*, 211 Ill. 2d 150, 178 (2004).

¶ 12 Defendant was found guilty of possession of cannabis. 720 ILCS 550/4(d) (West 2012). To sustain defendant's conviction, the State was required to prove beyond a reasonable doubt that defendant knowingly possessed more than 30 grams but not more than 500 grams of any substance containing cannabis. *Id*. When establishing possession, the State need not prove that defendant had actual possession of the controlled substance; constructive possession is sufficient. *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002). To establish constructive possession, the State must show that: (1) defendant had knowledge of the controlled substance and (2) exercised immediate and exclusive control over the area where it was found. *People v. Love*, 404 Ill. App.

3d 784, 788 (2010). Constructive possession may be and often is proved entirely by circumstantial evidence *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). Knowledge may be inferred from defendant's acts or declarations which indicate that he knew the contraband existed in the place where it was found. *People v. Beverly*, 278 Ill. App. 3d 794, 798 (1996). Exclusive possession can be established even where possession is joint or others have access to the area where contraband is located. *People v. Griffin*, 194 Ill. App. 3d 286, 292 (1990). A defendant's control over the location where drugs are found gives rise to an inference that the defendant knew of and possessed them. *People v. Givens*, 237 Ill. 2d 311, 335 (2010).

¶ 13 We find that the State presented sufficient evidence that defendant constructively possessed more than 30 grams of cannabis. Defendant was the driver and sole occupant of the car at the time of the traffic stop, and 107.21 grams of cannabis were found immediately beneath his seat. Thus, he had exclusive and immediate control over the location where the drugs were found. Given the obvious odor of burnt marijuana and defendant's suspicious behavior before and during the traffic stop, a rational fact-finder could infer that defendant knew of the drugs' presence.

¶ 14 Defendant first argues that he did not have exclusive control over the car because other family members frequently drove it, including his brother that morning. Initially, we note that the only evidence that someone else drove the car that day came from defendant's own testimony. The fact-finder is not required to accept a defendant's self-serving testimony as true. See *People v. Villarreal*, 198 Ill. 2d 209, 231 (2001). While it is undisputed that the car was registered to defendant's father, both Langendorf's testimony and the video evidence show that defendant initially and repeatedly referred to the car as his own. Taking the evidence in the light most

favorable to the State, a rational fact-finder could reasonably infer that defendant was the vehicle's primary driver based on his immediate possession of the vehicle and his repeated references to "my car." While he also later referred to the car as belonging to his parents, this recognition of the title-owner is not inconsistent with a finding that he was the primary user. Moreover, even if the court accepted defendant's testimony as true, another individual's prior access to a location does not destroy exclusivity of control. See *Griffin*, 194 Ill. App. 3d at 292. It is undisputed by the parties that defendant was the driver and sole occupant of the car from 1:30 p.m. until the traffic stop at 2:30 p.m. For that hour, defendant had immediate and exclusive control over the car. Even if other family members had driven the car in the past, from 1:30 p.m. until 2:30 p.m. on March 22, 2013, they did not have control of the car or access to its contents. A rational fact-finder could determine beyond a reasonable doubt that defendant therefore had immediate and exclusive control over everything in the car, particularly the cannabis which was within an arm's reach of the driver's seat.

¶ 15 Defendant analogizes his case to *People v. Wolski*, 27 Ill. App. 3d 526 (1975). In *Wolski*, the defendant was convicted of possession of marijuana after police officers found drugs in an apartment he shared with his brother. *Id.* at 527. The defendant was not present when the officers searched the apartment and testified that other individuals frequently used the apartment. *Id.* This court found that the evidence presented was insufficient to support the defendant's conviction. *Id.* at 528. Here, unlike in *Wolski*, Langendorf found the contraband while defendant was physically present and the sole occupant of the car. Moreover, as we discuss below, there was sufficient circumstantial evidence of defendant's knowledge of the cannabis. Therefore we find *Wolski* readily distinguishable.

¶ 16 Defendant also compares his case to *People v. Gore*, 115 Ill. App. 3d 1054, 1058 (1983), where the defendant was convicted of possession of cannabis after drugs were found in the car he was driving. The appellate court reversed the conviction due to insufficient evidence of defendant's exclusive control, based upon the fact that there were multiple other people in the car at the time drugs were found and because the drugs themselves were located beneath an occupied passenger seat. *Id.* at 1057-58. In the present case, cannabis was found under defendant's seat while he was the sole occupant of the car. We find *Gore* equally inapposite.

¶ 17 Defendant next argues that the State failed to prove that he knew the drugs were present; however, we find the State presented sufficient circumstantial evidence of defendant's knowledge. First and foremost, both Langendorf and defendant testified that the car smelled of cannabis. While defendant argues that the smell of "burnt cannabis" is not evidence that he knew there was unburned cannabis in the vehicle, we disagree. Defendant admitted that he smelled burnt cannabis and cannabis was found in his immediate proximity. Therefore, a fact-finder could reasonably infer that defendant knew that there was cannabis in the car. Furthermore, defendant's suspicious behavior provides additional circumstantial proof of his knowledge. *People v. Jones*, 2014 IL App (3d) 121016, ¶ 26 ("A trier of fact is, indeed, entitled to draw a commonsense inference that a defendant's suspicious behavior resulted from his knowledge that he was committing a crime"). Langendorf testified, and the video showed, that defendant did not immediately stop when the officer attempted to pull him over, but drove away from the officer once the police car stopped behind him. During the stop, defendant moved frequently, including bending downwards several times. While it is unclear from the video where exactly defendant is moving, it is clear that he moves downwards and the drugs were later found directly beneath

defendant's seat. He also initially refused to get out of the car and had to be pulled out by Langendorf. Finally, once defendant's mother arrived, he frantically yelled at her to take the car and drive it away, despite the officer's previous and clear declaration that the car would be towed. A rational fact-finder could make the commonsense determination that defendant's evidently fervent wish to remove the car from the officer's presence resulted from a desire that the officer not be able to discover the car's illicit contents. When the evidence is viewed in the light most favorable to the prosecution, a rational fact-finder could find beyond a reasonable doubt that defendant knew of the drugs' presence based upon the obvious odor and his suspicious behavior.

¶ 18 Defendant argues that there are other potential inferences to be drawn from the cannabis's odor and defendant's behavior. While he raises several alternate explanations, the trier of fact was not required to accept such explanations. *Jones*, 2014 IL App (3d) 121016, ¶ 33. We are required to resolve all reasonable inferences in favor of the prosecution on appeal. *Cunningham*, 212 Ill. 2d at 280.

¶ 19 Defendant also argues that *People v. Bailey*, 333 Ill. App. 3d 888 (2002), is instructive. In that case, the defendant was the passenger in another man's car when police officers found a gun beneath the defendant's seat. *Id.* at 890-91. The gun was not visible to the defendant and he made no movements when approached by the officers. *Id.* The appellate court considered four factors in finding that there was insufficient proof that the defendant knew of the firearm's presence: "(1) the visibility of the weapon from defendant's position in the car, (2) the period of time in which the defendant had an opportunity to observe the weapon, (3) any gestures by the defendant indicating an effort to retrieve or hide the weapon, and (4) the size of the weapon." *Id.* at 891-92.

However, the court's list of factors was not exclusive. *Id.* Given the different circumstances in the current case, we believe the factors considered in *Bailey* are less relevant here. Therefore, we find *Bailey* inapposite to the current facts.

¶ 20 We find that a rational fact-finder could find beyond a reasonable doubt that defendant maintained immediate and exclusive control over the car where the cannabis was found and had knowledge of the contraband. Consequently, the State provided sufficient proof that defendant maintained constructive possession over the cannabis.

¶ 21 For the foregoing reasons, we find that the State proved beyond a reasonable doubt that defendant was in possession of cannabis. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 22 Affirmed.