2015 IL App (2d) 130312-U
No. 2-13-0312
Order filed February 19, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KEVEEN FULLWILEY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 10-CF-3058 Honorable Christopher R. Stride, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved beyond a reasonable doubt that defendant possessed the illegal drugs found by the police. Defendant did not receive ineffective assistance when his counsel failed to object to the prosecutor's use of the terms "narcotics trafficking" or "narcotics trafficker." The mittimus must be corrected to reflect that defendant's conviction for unlawful possession of cannabis with intent to deliver is a Class 3 felony, not a Class 4 felony. Affirmed as modified.

¶ 2 Following a jury trial, defendant, Keveen Fullwiley, was found guilty of unlawful possession of a controlled substance (cocaine) with intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2010)) (count 1), and unlawful possession of cannabis with intent to deliver (720 ILCS

550/5(d) (West 2010)) (count 4).[1] Defendant was sentenced to concurrent prison terms of 29 years on count 1, and 5 years on count 4. Defendant raises two issues on appeal. The first is whether the State failed to prove beyond a reasonable doubt that he possessed the illegal drugs found by the police. The second is whether his defense counsel was ineffective for failing to object to the prosecutor's repeated use of the terms "narcotics trafficking" and "narcotics trafficker" throughout the trial. We affirm and modify the mittimus to reflect that defendant's conviction for unlawful possession of cannabis with intent to deliver is a Class 3 felony, not a Class 4.

¶ 3 I. BACKGROUND

¶ 4 A search warrant was executed for 2323 33rd Street, Unit B, in Zion, Illinois (the residence), on September 3, 2010. Defendant was not at the residence when police conducted the search. The jury trial was held on November 26, 2012, and the State presented the following evidence collected during the search:

> (1) a red bucket containing a gold jewelry box that contained four red sandwich baggies containing a white, rock-like substance, which weighed 3.74 grams, 3.56 grams, 3.62 grams, and 3.68 grams;
>
> (2) a Styrofoam plate found on top of the cabinets in the kitchen with a silver digital scale next to it that had a white, chunky, and powdery substance and residue suspected to be cocaine;
>
> (3) a Crown Royal bag containing a large bag of a green plant-like material, considered to be cannabis, weighing 21.53 grams and some small red Ziploc bags and loose cannabis;

[1] Counts 2 and 3 were severed from the drug charges.

(4) several plastic bags under the kitchen sink containing a substance considered to be cannabis, one weighing 321.77 grams;

(5) loose cannabis on the floor under the stove;

(6) a metal grinder on the kitchen counter;

(7) a box of sandwich bags;

(8) a clear sandwich bag containing several pieces of white, chunky residue considered to be cocaine;

(9) approximately $1,760 in cash, held together by a rubber band, inside the pocket of a man's jacket found in the bedroom;

(10) a handgun with a loaded magazine secreted under a dresser in the bedroom;

(11) a blue drawstring-type backpack found in the bedroom containing a gold-colored zipper bag with multiple clear sandwich bags of a white, powdery substance, one containing 139.1 grams, one containing 135.80 grams of a substance containing cocaine, three additional large, clear sandwich bags, one weighing 11.60 grams, one weighing 14.72 grams, and one weighing 14.89 grams, a clear plastic bowl with residue on it, and a black digital scale with white powdery residue on it;

(12) a plastic bowl on top of the bedroom dresser with white, powdery residue on it; and

(13) an electronic digital scale with suspected cocaine residue, found in the blue backpack in the bedroom.

¶ 5 Detective Eric Barden, an expert in narcotics trafficking, opined that whoever lived at the residence was engaged in narcotic trafficking due to the quantity, packaging, material, and scales.

¶ 6 As proof of residency, the officers collected a Walgreen's prescription bottle, dated June 25, 2010, with defendant's name on it but with a different address than the residence. They also found in the living room a Commonwealth Edison (ComEd) bill dated February 23, 2010, and addressed to "Kevin Fullwiley, at 2323 33d St., B, Zion." Deborah Norman testified that she knew defendant and had a professional relationship with him.[2] She initially stated that she met defendant on October 3, 2010, and then identified defendant as the person she met "back on August 3 of 2010." Norman stated that, on that date, defendant informed her that he lived by himself at 2323 33rd Street, Apartment B, Zion.

¶ 7 The jury found defendant guilty of both charges. Following the denial of a motion for a new trial, the trial court sentenced defendant to 29 years' imprisonment for the unlawful possession of a controlled substance (cocaine) with intent to deliver, to be served at 75%, and a concurrent 5-year term on the unlawful possession of cannabis with intent to deliver. Thereafter, the trial court denied a motion to reconsider sentence. Defendant timely appeals.

¶ 8 II. ANALYSIS

¶ 9 A. Evidence of Constructive Possession

¶ 10 To establish possession of a controlled substance with the intent to deliver, the State must prove beyond a reasonable doubt that: (1) the defendant knew that the controlled substance was present; (2) the defendant was in immediate possession or control of the drugs; and (3) the defendant intended to deliver the drugs. *People v. Jennings*, 364 Ill. App. 3d 473, 478 (2005). Here, defendant challenges the sufficiency of the evidence only as to his unlawful possession of the drugs.

[2] In order to avoid any inference of prior offenses, the court would not allow her to testify that she was defendant's probation officer.

¶ 11 In reviewing 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. Cooper*, 194 Ill. 2d 419, 430-31 (2000) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All of the evidence and all reasonable inferences drawn from the evidence must be considered in the light most favorable to the State. *People v. Gonzalez*, 239 Ill. 2d 471, 478 (2011); *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 12 To sustain a charge of unlawful possession, the State must prove that the defendant knowingly possessed the illegal item and that it was in his immediate and exclusive control. *People v. Woods*, 214 Ill. 2d 455, 466 (2005). Possession may be actual or constructive. *People v. Macias*, 299 Ill. App. 3d 480, 484 (1998). As there was no actual possession in this case because defendant was not at the residence at the time of the search, the State was required to prove constructive possession.

¶ 13 "Constructive possession exists without actual personal present dominion over a controlled substance, but with an intent and capability to maintain control and dominion." *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). Controlled substances discovered on premises under the defendant's control and in a place where he could have been, or should have been, aware of them give rise to an inference of knowledge and possession by defendant which may be sufficient to sustain a conviction for unlawful possession of controlled substances. *People v. Eiland*, 217 Ill. App. 3d 250, 261 (1991). Habitation in or rental of the premises where narcotics are discovered is sufficient evidence of control to constitute constructive possession. *People v. Blue*, 343 Ill. App. 3d 927, 939 (2003). "Proof of residency in the form of rent receipts, utility bills and clothing in closets is relevant to show the defendant lived on the premises." *People v.*

Lawton, 253 Ill. App. 3d 144, 147 (1993). Knowledge and possession are questions of fact to be resolved by the jury, whose findings should not be disturbed on review unless the evidence is so unbelievable, improbable, or palpably contrary to the verdict that it creates a reasonable doubt of guilt. *People v Ray*, 232 Ill. App. 3d 459, 462 (1992).

¶ 14 The State presented the following evidence to prove defendant had control over the premises where the drugs were found: (1) defendant's admission to Norman that he lived at the residence by himself; (2) a ComEd bill found in a kitchen drawer addressed to defendant and the residence but with a similar but misspelled first name; and (3) a prescription pill bottle made out to defendant but to a different address than the residence.

¶ 15 Defendant argues that this evidence was insufficient proof of control over the residence. He asserts that the ComEd bill and the prescription bottle cannot be used to establish, with any semblance of specificity, that he was at the residence at any time. He notes the eight-month gap between the date on the ComEd bill and the date the officers found the drugs, and because no current mail addressed to defendant was found in the apartment, the stale piece of mail failed to prove that he resided at the residence or had been there at any time near the time of the search. Defendant also points to the prescription bottle bearing his name but listing a different address and a date of June 25, 2010, and asserts that this evidence cannot suffice as proof of residence as of the date the residence was searched. As with the ComEd bill that was eight months old, and the prescription bottle that was more than two months old, defendant argues that the information from Norman, that defendant was living at the residence one month prior to the search, was "stale" and "irrelevant" to the issue of whether defendant was living at the residence when it was searched.

¶ 16 This is all argument about the weight of the evidence, and it was the jury's role, as trier of fact, to weigh the evidence, assess the credibility of the witnesses, resolve any conflicts, and draw reasonable inferences therefrom. *People v. Washington*, 2012 IL 110283, ¶ 60. A reviewing court will not disturb the jury's verdict merely because it could have determined the credibility of the witnesses differently or could have drawn different inferences from the facts, and when credible evidence supports the verdict, the court may not say that the conclusions other than the ones drawn by the jury are more reasonable. *Yowel v. Ringer*, 217 Ill. App. 3d 353, 362 (1991).

¶ 17 Here, defendant's admission to his probation officer that he lived at the residence by himself, was corroborated by the ComEd bill found at the house, which was addressed to defendant and to the residence, and by the prescription bottle, which was made out to defendant. See *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999) (holding that record contains substantial evidence of residency where, in addition to other evidence, defendant told his parole officer that he lived at the residence). Based on defendant's admission, and the other evidence supporting the admission, considered with all reasonable inferences that may be drawn therefrom, and in the light most favorable to the prosecution, a rational trier of fact could have found that defendant was living at the residence at the time it was searched, and we will not substitute our judgment for that of the jury's.

¶ 18 Defendant cites *People v. Free*, 94 Ill. 2d 378 (1983), wherein a police officer stopped the defendant, who was carrying a knife, 24 hours before the offenses occurred but within the vicinity of the crime. Defendant argues that, unlike in *Free*, Norman's testimony tended to place defendant living at the residence where the contraband was found "a full 31 days prior to the drugs being found." He argues that a lot can happen in 31 days, and there are a myriad of

reasons why someone might give a false address, and the fact that the ComEd bill was sent in February and a different address was on the prescription bottle on June 24, 2010, leads to the inference that the defendant had moved during that time period. This evidence supports the inference that defendant had access to more than one residence.

¶ 19 In *Free*, the defendant objected to the officer's testimony on the basis that it was "irrelevant and implied criminal misconduct" on his part. *Id.* at 412. The supreme court found that the testimony of the officer was relevant "to place the defendant in the vicinity of the crime within 24 hours before it was committed." *Id.* at 413. It also was relevant because the defendant was an out-of-State resident who allegedly was residing in Iowa with his parents at the time of the offense. *Id.*

¶ 20 The State correctly points out that there is no definitive time limit for determining whether evidence is relevant. What is gleaned from the court's ruling is whether the evidence is relevant to the offense committed. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id.* at 413. Here, the trial court properly found Norman's testimony was relevant to show that defendant was living at the residence. However, as stated, it was the jury's function to weigh Norman's credibility, resolve conflicts or inconsistencies in her testimony, and draw reasonable inferences from the evidence. See *People v. Enis*, 163 Ill. 2d 367, 393 (1994).

¶ 21 Defendant cites *People v. Songer*, 229 Ill. App. 3d 901, 903-04 (1992), in which the defendant admitted to living at the residence. Defendant claims that in this case, unlike in *Songer*, "[t]here was no such admission[.]" This assertion is contrary to Norman's testimony, who unequivocally stated that defendant had told her that his address was the same as the

residence searched. Furthermore, nothing in *Songer* suggest defendant could not be convicted without an admission.

¶ 22 Defendant contends that the jury could have concluded that Norman's "professional relationship" with defendant might have been the type of relationship "for which someone might give a false address to avoid continuing the 'relationship.' "

¶ 23 Prior to the trial, defense counsel argued that the State should not be allowed to present evidence that Norman was defendant's probation officer as it would be prejudicial. The court ruled that defendant's statement to Norman was relevant because he gave her his address twice and she could identify defendant. However, the court agreed that Norman's testimony could be potentially prejudicial if the basis of her knowledge was made known to the jury. The court resolved any potential problem by allowing the State only to refer to Norman as having a "professional" relationship with defendant. Consequently, defendant's argument about how the jury perceived the professional relationship between Norman and defendant is not supported by the record and was within the unique province of the jury.

¶ 24 Defendant maintains that additional evidence should have been presented by the State to prove that he resided in the residence, such as fingerprints or DNA evidence. He relies on *United States v. Onick*, 889 F.2d 1425 (5th Cir. 1989), in support of his assertion.

¶ 25 Defendant's argument is irrelevant because the State need not present other evidence to prove its case; it only has to present sufficient evidence to prove defendant resided in the residence. The jury examined the three items of evidence the State chose to submit as proof of constructive possession. The jury determined that the evidence was sufficient beyond a reasonable doubt to prove defendant had control over the premises where the drugs were found. We cannot say that the jury's determination was so "unbelievable, improbable, or palpably

contrary to the verdict that it creates a reasonable doubt." See *Ray*, 232 Ill. App. 3d at 462. In sum, a rational jury could find that the State proved the elements of the offenses of unlawful possession of a controlled substance with intent to deliver and unlawful possession of cannabis with intent to deliver beyond a reasonable doubt.

¶ 26 B. Ineffective Assistance of Counsel

¶ 27 To establish ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of care and that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984).

¶ 28 Defendant contends that the State's repeated use of the phrases "narcotics trafficking" and "narcotics trafficker" throughout the trial was prejudicial and inflammatory and defense counsel was ineffective for failing to object to the remarks. Defendant asserts that the use of the terminology was "inflammatory language" that served no purpose other than to "create fear in the minds of the jurors, and to have the jury believe that the defendant was guilty of conduct much more serious than that charged," and "the jury would be led to believe the defendant was a dangerous, nefarious individual in need of serious punishment." Defendant further argues that the "numerous instances" of using the terms during questioning and closing argument "rendered the trial fundamentally unfair and its outcome unreliable."

¶ 29 The prosecutor used the terms "narcotics trafficker" or "narcotics trafficking" several times during the trial. In describing the cocaine that was found throughout the residence, the prosecutor explained that the importance of where the drugs were found would be explained by Detective Barden who "is an expert in narcotics trafficking." Defense counsel did not object to

the use of the terms complained of. Officer Barden defined the term "narcotic trafficking" as "[t]he movement and sale, distribution of narcotics." He testified about the packaging of the controlled substances found at the residence and that, in his training in narcotics trafficking, sandwich bags are a "common way we're finding narcotics being possessed, trafficked, held in this area." Barden stated that whoever lived at the residence was engaged in narcotic trafficking due to the quantity, packaging, material, scales, and small packaging material found.

¶ 30 During closing argument, the prosecutor reviewed Barden's explanation of why this was narcotics trafficking. The prosecutor stated:

> "That's important because narcotics trafficking, when you have somebody who's engaged in that, what [is he or she] doing? It is [his or her] intent to deliver the drugs and how do we know that? We know that because of all the items that were found, the totality of all of these combined, so it wasn't just one thing that Detective Barden looked at. He looked at everything and formed an opinion that whoever possessed this was involved in narcotics trafficking."

¶ 31 Black's Law Dictionary 1340 (5th ed. 1979) defines "trafficking" as "[t]rading or dealing in certain goods and commonly used in connection with illegal narcotics sales." Black's Law Dictionary 922 (5th ed. 1979) defines "narcotic" as a "[g]eneric term for any drug which dulls the senses or induces sleep and which commonly becomes addictive after prolonged use."

¶ 32 Here, both the prosecutor and the trial court told the jury that defendant had been charged with possession of cocaine with the intent to deliver, and possession of cannabis with the intent to deliver, which does not include any kind of "trafficking." The trial court also instructed and gave verdict forms on the specific offense of which defendant was charged. Officer Barden defined the term as he was using it as "[t]he movement and sale, distribution of narcotics," which

was consistent with the charges read to the jury. The prosecutor did not state that defendant had been charged with narcotics trafficking; rather, consistent with Officer Barden's use of the term, he stated that defendant had been charged with "possession of cocaine with the intent to deliver as a narcotics trafficker would do and possession of cannabis with the intent to deliver, again, something our narcotics trafficker would do." We observe also that unlawful possession with intent to deliver is an element of the offenses of controlled substance trafficking (720 ILCS 550/401.1(a) (West 2010)) and cannabis trafficking (720 ILCS 550/5.1 (West 2010)).

¶ 33 The terms set forth in Black's Law Dictionary, and Officer Barden's definition of "narcotics trafficking," are generic in nature, and it is apparent that the prosecutor construed the terms "narcotics trafficking" and "narcotics trafficker" as synonymous with "illegal drug dealing." Furthermore, the jury was not instructed on the other more serious offenses of controlled substance trafficking or cannabis trafficking, and the jury could not be confused or led to believe that defendant had committed offenses other than those charged and of which the jury had been apprised.

¶ 34 Based on the prosecutor's generic use of the phrases and that the jury was properly instructed on the offenses of which defendant was charged, we fail to see how defense counsel's performance was deficient in failing to object. Since defense counsel's performance was not deficient, defendant did not receive ineffective assistance when his counsel failed to object. Even if it was error, there is no reasonable probability that, but for the error, the result of the proceeding would have been different. See *People v. Easley*, 192 Ill. 2d 307, 317 (2000).

¶ 35 C. Amended Mittimus

¶ 36 The State notes that the court correctly apprised defendant that the charged offense in count 4 was a Class 3 felony. However, the judgment order reflects that this offense is a Class 4

felony. The State admits error and requests that the mittimus for count 4 be amended to reflect a Class 3, not a Class 4, felony. Pursuant to our authority under Supreme Court Rule 615(a) (eff. Jan. 1, 1967), we order that the mittimus be amended to reflect that defendant's conviction for unlawful possession of cannabis with intent to deliver is a Class 3 felony.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm defendant conviction and order the mittimus be corrected.

¶ 39 Affirmed as modified.