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2015 IL App (3d) 130556-U

Order filed June 24, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF	)	Appeal from the Circuit Court
ILLINOIS,	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0556
v.	)	Circuit No. 12-CF-326
	)	
KRISTIAN T. BUSH,	)	Honorable
	)	Clark Erickson,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Holdridge and Schmidt concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The evidence was sufficient to convict defendant of unlawful possession of a controlled substance and defendant was afforded a fair trial when the prosecutor's statements during opening and closing arguments were not in error.

¶ 2 A jury convicted defendant, Kristian T. Bush, of unlawful possession of between 1 and 15 grams of a controlled substance. 720 ILCS 570/402 (West 2012). Defendant appeals her conviction, contending she was not proved guilty beyond a reasonable doubt and, alternatively, she was not afforded a fair trial based on statements made by the prosecutor during opening and

closing arguments. We affirm.

¶ 3

## FACTS

¶ 4

Defendant's unlawful possession conviction stems from the execution of a search warrant on defendant's home. Prior to trial, defendant filed a motion to suppress statements allegedly made by defendant to Agent Kristopher Lombardi wherein defendant admitted she knew cocaine was in the basement of the residence. The trial court granted the motion and the statement was suppressed.

¶ 5

The matter proceeded to trial. During jury selection, the trial court informed the jurors that it was their duty to make a decision based on the evidence. Before opening statements commenced, the trial court explained to the jurors that the arguments attorneys make in opening and closing statements are not evidence. The court further explained that any argument in opening or closing statements that is not based on the evidence should be disregarded.

¶ 6

During opening statements, the prosecutor told the jury that he "believe[d]" the jury would hear testimony from a police officer that defendant "took [the police] to an area in the basement, which I think will be described as like a bar, and that inside of that bar underneath it on the back side police officers found a black plate with \*\*\* cocaine."

¶ 7

Officer Jose Martinez testified he helped execute a search warrant on a residence in Kankakee County. Martinez and other officers knocked and announced themselves twice. Without a response, the officers entered the residence through an unlocked door.

¶ 8

Officer Paul Berge testified he also assisted in executing the search warrant. When the officers entered the home, they discovered three children and defendant's mother. Defendant's mother was found by officers sitting on a couch in the basement. During the search, Berge and another officer noticed a vehicle approach the residence. Inside the vehicle was defendant.

¶ 9 Lombardi testified that he collected evidence during the execution of the search warrant. Lombardi recalled that defendant's mother was found sitting on the couch in the basement. Lombardi located two pieces of mail from the residence. One letter listed defendant's name and the address of the residence. The other piece of mail listed defendant's mother and the address of the residence.

¶ 10 According to Lombardi, defendant arrived during the execution of the search warrant. Lombardi testified that he verbally gave defendant her *Miranda* rights. Subsequently, Lombardi located cocaine behind the bar in the basement.

¶ 11 On cross-examination, Lombardi testified that despite searching the bar during the initial security sweep, he did not discover cocaine. Lombardi admitted he did not know why defendant's mother was in the basement when the officers entered the residence.

¶ 12 Upon the conclusion of the State's case-in-chief, defense counsel made an oral motion for directed verdict. Counsel did not present argument in support of his oral motion but reserved the right to present it the following day. The trial court denied the motion.

¶ 13 On the following day, defense counsel again made an oral motion for directed verdict. This time, defense counsel expressly argued the State failed to make a *prima facie* case for possession because the State failed to present evidence that defendant had any knowledge of the presence or had any exclusive control of the cocaine since another person lived at the residence. The trial court found the issue was for the jury to decide and denied the motion.

¶ 14 At the jury instruction conference, defense counsel objected to the instruction on circumstantial evidence. The State argued it had presented circumstantial evidence when Lombardi testified defendant took him to the location of the cocaine. Both the trial court and

defense counsel noted that the State had not presented the evidence even though the State made such comments in his opening statement. The court allowed the instruction.

¶ 15 After the jury instruction conference, defense counsel called defendant's sister, Octavia Mallette. Mallette identified defendant's mother as their "drug-addicted mother." Mallette also testified she was with defendant while the home was being searched and went inside with defendant to retrieve the children and take them to Mallette's house. Mallette acknowledged she did not inform the officers her mother was a drug addict.

¶ 16 After Mallette's testimony, the matter proceeded to closing arguments. Before the prosecution or defense argued, the trial court instructed the jurors that any statement made by either counsel should not be considered as evidence.

¶ 17 During the State's closing argument, the prosecutor described joint possession as existing when two or more people "share immediate control over something." The prosecutor further explained, "I think this is true of people who are in a marriage or people who are in a business partnership." The prosecutor went on to elaborate, "[y]ou may not have it in your hand at that exact moment, but you have the ability to control it. You have a roofing business. You may not have the hammer in your hand. In fact, your partner may be pounding with it. But you still have possession. You have an interest in it."

¶ 18 During defense counsel's closing argument, counsel argued the State failed to present evidence that defendant had knowledge of the cocaine or the intent to exercise control over it. Referring to joint possession, defense counsel argued defendant and her mother did not share a relationship like a marriage or a business partnership.

¶ 19 Upon the conclusion of closing arguments, the jurors were instructed of their duty to determine the facts only from the evidence. Jurors were also told that opening and closing

statements made by the attorneys are not evidence and any statement or argument not based on evidence should be disregarded. The court also included the following instruction:

"Possession may be actual or constructive. A person has actual possession when he has the immediate and exclusive control over a thing. A person has constructive possession when he lacks actual possession but he has both the power and the intention to exercise control over a thing.

If two or more persons have the immediate and exclusive control or share the intention and the power to exercise control over a thing, then each person has possession."

¶ 20 Ultimately, the jury found defendant guilty of the lesser included offense of unlawful possession of between 1 and 15 grams of a controlled substance. Before sentencing defendant to 24 months' probation, the trial court denied defense counsel's motion for a new trial and motion for judgment notwithstanding the verdict.

¶ 21 ANALYSIS

¶ 22 On appeal, defendant contends her conviction should be reversed outright because the evidence was insufficient to convict her of unlawful possession of between 1 and 15 grams of a controlled substance. 720 ILCS 570/402 (West 2012). Alternatively, defendant argues her conviction should be reversed and the matter be remanded for a new trial because statements made by the prosecution during opening and closing arguments denied defendant of her right to a fair trial. We disagree with both arguments.

¶ 23 I

¶ 24 Defendant contends the evidence was insufficient to sustain her conviction because the facts and circumstances created a reasonable doubt as to whether she had actual, constructive, or

joint possession of the cocaine. When a defendant challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether 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). A conviction will only be overturned where the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *Id.* We find the evidence was sufficient to sustain defendant's conviction for possession.

¶ 25 Under section 402 of the Illinois Controlled Substance Act, a person unlawfully possesses a controlled substance when a person knowingly possesses the controlled substance. 720 ILCS 570/402 (West 2012). To prove defendant guilty of the offense, the State must establish that defendant had knowledge of the presence of the controlled substance and that defendant had the controlled substance in her immediate and exclusive possession or control. *People v. Schmalz*, 194 Ill. 2d 75, 81-82 (2000). Where a controlled substance is found on premises under defendant's control, it may be inferred that defendant had the requisite knowledge and possession, absent other facts and circumstances, which might lead to a reasonable doubt as to defendant's guilt. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). The State may prove control over the premises by proving defendant lived at the premises. *People v. Lawton*, 253 Ill. App. 3d 144, 147 (1993). Here, Lombardi's testimony was that he recovered mail with defendant's name and the address of the premises. Viewing the evidence in the light most favorable to the State, this evidence of residency is sufficient to infer that defendant had the requisite knowledge and possession to support her conviction.

¶ 26 Defendant argues that the facts and circumstances create a reasonable doubt as to whether she had joint possession of the cocaine, because her mother also lived in the residence; her sister

testified that their mother was a drug addict; defendant was not home during the execution of the search warrant; and her mother was in the basement near the contraband. The trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony, and resolves conflicts or inconsistencies in the evidence. It is not the function of this court to retry the defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Here, the State presented sufficient evidence for the trier of fact to conclude that defendant had joint possession of the cocaine.

¶ 27

## II

¶ 28

Defendant argues she was not afforded a fair trial because the prosecutor misstated the facts during his opening argument and the law during his closing argument. Defendant acknowledges she failed to preserve these issues for review but requests that we review the issues under the plain error doctrine. We find, however, no error.

¶ 29

First, defendant argues she was deprived of the right to a fair trial when the prosecutor told the jury in opening statements that the evidence would show that defendant took police to the bar in the basement, when no such evidence was provided.

¶ 30

An opening statement in a criminal trial should outline the facts which the prosecutor in good faith expects to prove. *People v. Graca*, 220 Ill. App. 3d 214, 220 (1991). It is improper, at least with foreknowledge, to include matters in an opening statement which are not proved. *People v. Wills*, 153 Ill. App. 3d 328, 342 (1987). However, reversible error only occurs where the impropriety is attributable to the deliberate misconduct of the prosecutor and results in substantial prejudice to defendant. *Id.*

¶ 31

In his opening statement, the prosecutor told the jury: "I believe that you will hear from some officers, specifically Officer Lombardi, who will testify \*\*\* [defendant] took them to an area in the basement, which I think will be described as like a bar, and that inside of that bar

underneath it on the back side police officers found \*\*\* cocaine \*\*\*." But, Lombardi testified that after he spoke with defendant and informed her of the search warrant and what the officers were searching for, cocaine was discovered in the basement.

¶ 32 We find that the prosecutor's statement is not attributable to any deliberate misconduct. The prosecutor had been relying on notes he had made, erroneously, from testimony in an earlier motion to suppress. In good faith, he expected to show that defendant took Lombardi to the contraband. See *Graca*, 220 Ill. App. 3d at 220. After the evidence was taken, the prosecutor did not repeat the argument during closing statements.

¶ 33 Next, defendant argues that in his closing argument, the prosecutor misstated the law on joint possession of contraband by implying certain relationships are dispositive of joint possession. A prosecutor is given great latitude in closing argument. *People v. Morrison*, 137 Ill. App. 3d 171, 183 (1985). However, a prosecutor must not make comments which misstate the law. *People v. Gutierrez*, 205 Ill. App. 3d 231, 264 (1990).

¶ 34 In his closing argument, the prosecutor told the jury "[t]wo or more persons can share immediate control over something. I think this is true of people who are in a marriage or people who are in a business partnership." Essentially, the prosecutor told jurors that joint possession *can* exist in these relationships not that it *per se* exists. We do not find that these comments imply that certain relationships always show joint possession, but simply provided examples of certain relationships where joint possession might be found.

¶ 35 Finally, even if the prosecutor's statements were error, the trial court cured the error when it instructed the jury on the applicable law and repeatedly instructed the jury that statements made during opening and closing arguments should be disregarded if they are not based on evidence. See *People v. Scott*, 194 Ill. App. 3d 634 (1990) (misstatement of evidence can be



rendered harmless by repeatedly cautioning jury that statements not based on evidence should be disregarded).

¶ 36

#### CONCLUSION

¶ 37

The judgment of the circuit court of Kankakee County is affirmed.

¶ 38

Affirmed.