2016 IL App (1st) 133755-U

SIXTH DIVISION
Order filed: June 3, 2016

No. 1-13-3755

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 13 CR 3638
	)	
HOZZEL ROBINSON,	)	
	)	Honorable
Defendant-Appellant.	)	Stanley J. Sacks,
	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for unlawful use of a weapon by a felon is affirmed, where the evidence sufficiently proved that he possessed the weapons recovered from his residence, the court did not misallocate the burden of proof or assume facts not in evidence in arriving at its decision, and the court properly denied his motion to suppress.

¶ 2 Following a bench trial, the defendant, Hozzel Robinson, was found guilty of two counts of unlawful use of a firearm by a felon under section 24-1.1(a) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.1(a) (West 2012)), and sentenced to three years' imprisonment. On

appeal, the defendant argues that (1) the evidence was insufficient to sustain his conviction; (2) the circuit court misallocated the burden of proof and assumed facts not in evidence in reaching its determination of his guilt; (3) the court erred in denying his mid-trial motion to suppress a statement he made to the police during a search of his apartment, and (4) his mittimus order must be corrected to reflect a proper credit for time served in custody prior to sentencing. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 At trial, Officers Albert Wyroba and Roberto Delcid testified that they were part of a team of eight officers who executed a search warrant on January 21, 2013, for the basement of a building located at 846 N. Central in Chicago. The defendant was not named in the warrant. Officer Wyroba testified that, on the day of the search, he and the other officers knocked on the rear door of the building, announced their office and then breached the door. They descended some stairs, and breached the interior door leading into the basement. Officer Wyroba testified that, when they entered, they found the defendant and a woman sitting in a makeshift "bedroom" on what was either a couch or a bed. They searched and handcuffed them for the officers' protection, and instructed them to remain on the couch during the search. Officer Wyroba described the basement as one large space, with the rear door being the only means of entry. The rear door opened into a kitchen/dining area, followed by the defendant's bedroom farther in and to the right. The "bedroom" consisted of a mattress underneath a stairwell, which was enclosed by a curtain. Past the bedroom, towards the front or east end of the basement, was a "living room/game room" (game room). According to Officer Wyroba, the game room was separated from the defendant's living space by a "door of some sort." He could not recall whether the door was locked at the time of the search. When shown a photograph depicting an accordion gate dividing the game room from the living area, Officer Wyroba denied that the gate was there on

the day of the search, and reiterated that it was a closed door. Officer Wyroba described the game room as consisting of a bar, pool table, a ping pong table and a poker table.

¶ 4 Officer Wyroba stated that the search produced a .22 caliber rifle, a .22 caliber handgun loaded with ten rounds of ammunition, and a plastic bag containing additional rounds of ammunition. All of these items were recovered from an unlocked closet in the game room. The rifle was covered by a blanket and leaning against the closet wall, and the ammunition and handgun were located in or near a milk crate on the floor. In addition, from a shelf in the kitchen/dining area at the rear section of the basement, Officer Wyroba recovered a letter addressed to the defendant at the 846 N. Central address and designated "basement."

¶ 5 Officer Delcid testified that, when the officers initially detained the defendant and the woman, he informed the defendant that they had a search warrant and asked him "if there was anything in the house or the place." According to Officer Delcid, the defendant replied that there were two guns in the "front room." On cross-examination, Officer Delcid testified that the basement consisted of two distinct areas that were divided by a metal gate, although he could not recall whether the gate was locked. Officer Delcid also acknowledged that there was a closet in the game room, but stated that the door had been opened by the time he got there.

¶ 6 The parties introduced photographs into evidence showing various areas of the basement, including the inside of the game room closet from which the weapons were recovered. The defense introduced a photograph in which a portion of the game room can be seen behind an accordion metal gate which is locked with a padlock. Finally, the parties stipulated that the defendant had a 1979 conviction for armed robbery. At the conclusion of the State's case, the defendant moved for a directed finding of acquittal. The court continued the matter for ruling.

¶ 7 At the next hearing date, the defendant obtained leave of court to file a motion to suppress his statement to the police regarding the presence of guns in the "front room." At the ensuing hearing on the motion, Officer Delcid testified that he and his partners had their weapons drawn when they first entered the apartment on the day of the search. He testified to the circumstances surrounding the defendant's detention, including that he and his female companion were searched, handcuffed and told to sit on a couch. Officer Delcid told the defendant they had a search warrant and then asked him "is there anything we should know about?" According to Officer Delcid, the defendant was not under arrest at this time, nor had he been informed of his *Miranda* rights. However, the officer stated that, when the defendant was later arrested and informed of his rights at the police station, he refused to answer any questions regarding the recovered weapons. The court subsequently entered a written order denying the motion to suppress.

¶ 8 When trial resumed, the defendant testified as follows. On January 21, 2013, he lived in the "one little room where the police found me" in the basement of 846 N. Central. The defendant was employed as a handyman in several different apartment buildings, including the one in which he lived. He testified that the landlord of 846 N. Central, Darnell Whitehead, gave him free rent in the building in exchange for his services as a handyman. Both he and Whitehead had keys to the basement. The defendant described his living space as consisting of a kitchen cabinet and sink, a dining area, a sitting area with a television, a bathroom, and his mattress under the stairwell.

¶ 9 When asked about the room in the front, the defendant described it as a large game room area where Whitehead plays poker with his friends. The game room was closed off with a bar gate which the defendant had installed at Whitehead's request. The defendant had similarly

installed a lock on the game room storage closet, located at the back of the game room, pursuant to Whitehead's orders. According to the defendant, both the bar gate and the storage closet remained locked at all times, and only Whitehead had the keys. The defendant admitted having been in the game room on occasion, but only when Whitehead was playing cards with his friends and invited him in. He denied ever going into the game room on his own, and also denied ever going into the storage closet or storing anything there. He stated that, from his position on the couch during the search, he saw the police break the padlock off of the game room gate. The defendant denied telling the police there were guns in the game room. He also denied having seen the guns at any point, including on the day of the search.

¶ 10 Following arguments, the circuit court found the defendant guilty of unlawful use of a weapon by a felon based upon the presence of the two firearms in the game room closet. As the bases for its ruling, the court stated that it did not believe the "story about the landlord," and also noted that the defendant admitted to residing in the basement apartment and that he was able to tell the police about the two firearms "in the front." Accordingly, the court found that the defendant was guilty of constructive possession of the weapons. The defendant's posttrial motion was denied, and the instant appeal followed.

¶ 11 The defendant first argues that the State failed to prove him guilty of unlawful use of a weapon by a felon, because there was no proof that he possessed the guns recovered from the game room closet.

¶ 12 In order for a person to be convicted of a criminal offense, the State must prove his guilt as to every element of that 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 a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the

evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A conviction will not be set aside on appeal unless the evidence is so unreasonable, improbable, or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Smith*, 141 Ill. 2d 40, 55 (1990). It is not this court's function to retry the defendant, and we will not substitute our judgment for that of the trier of fact on questions regarding the credibility of the witnesses or the weight to be given their testimony. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

¶ 13 A conviction for unlawful possession of a weapon by a felon requires proof by the State that the defendant has a prior felony conviction, and that he knowingly possessed a weapon. 720 ILCS 5/24-1.1(a) (West 2012); *People v. Hannah*, 2013 IL App (1st) 111660, ¶ 25. Where, as in this case, a defendant is not found in actual possession of contraband, the State must prove constructive possession. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). To establish constructive possession, the prosecution must prove that the defendant (1) had knowledge of the presence of the firearm, and (2) exercised immediate and exclusive control over the area where the firearm was found. *Id.* Knowledge may be shown by evidence of a defendant's acts, declarations, or conduct from which it can be inferred that he knew the contraband existed in the place where it was found. *People v. Sams*, 2013 IL App (1st) 121431, ¶ 10. Control is established when a person has the "intent and capability to maintain control and dominion" over an item, even if he lacks personal present dominion over it. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). The 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. Habitation or rental of the premises where contraband is discovered is sufficient evidence of

control to constitute constructive possession. *Id.* Finally, the mere fact that others had access to the premises will not defeat a finding of constructive possession. *People v. Hill*, 2012 IL App (1st) 102028, ¶ 40.

¶ 14 The defendant argues that the State failed to prove that he had constructive possession of the guns, because the game room area was separate and distinct from his residence and he had no independent means of access to it. He contends that the game room was used exclusively by Whitehead, and that both it and the closet in which the guns were found were kept locked continuously, with Whitehead possessing the only keys.

¶ 15 Viewing the evidence in the light most favorable to the State, we must reject the defendant's argument. He does not dispute that he resided in the basement of 846 N. Central and that he carried keys to the only entrance into the residence. This fact alone justifies an inference that he had constructive control over any contraband found there. See *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999). The defendant's testimony that the game room was protected by a metal gate and a lock on the closet door was called into question by Officer Wyroba, who testified that there was no metal gate at the time of the search, and that the game room closet door was not locked. Additionally, as noted by the trial court, the defendant demonstrated knowledge of the weapons by informing the police that there were two guns "in the front," and not attributing ownership of the guns to his landlord or anyone else. As the weapons were located inside the closet and out of plain sight, the fact that the defendant was aware of their presence and whereabouts further suggests that he not only had access to the game room space, but control over the weapons themselves. Finally, the trial court specifically rejected the defendant's testimony that his landlord had exclusive control over the game room and its

contents. This was a credibility determination that was within the province of the trial court, and we find no basis to disturb it on appeal.

¶ 16 Next, the defendant argues that the trial court misallocated the burden of proof and assumed facts not in evidence in making its determination of guilt.

¶ 17 Initially, we point out that the defendant has forfeited these issues by failing to raise any objection either at trial or in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Forfeiture aside, we reject the defendant's contentions. In making his arguments, the defendant relies upon the following factual findings by the court:

> "[THE COURT]: He lives there. *** He knows there's guns in the basement at the time and his statement is they're in the front room.
>
> I believe that's sufficient to show knowledge and possession under those circumstances. They don't have to prove he had a gun in his pocket or the same room where he's at, the so-called makeshift room he was at with his lady friend. His saying, in response to the question ***, there are a couple guns in the front room *** the only way you could say not guilty to this is if I believe the story about the landlord, which I don't believe it.
>
> *It doesn't require calling witnesses, but if he interjects about the so-called landlord, consider the fact I didn't hear from the landlord at all, like an alibi. I was with my mother at the time of the murder. Okay, where is the mother*? Doesn't prove anything at all, but if you put it all together, the guns are there, he's there and he lives in the basement apartment at the time, a friend or sister visiting ***.
>
> He has control to the basement. I think he said he has a key or he lives there, in any event, and there is [sic] two guns found in the basement. *** Whether in the room

with him or the basement at all, he knows they're there. Therefore, he has possessions of the two guns, as he put it, from the front room." (Emphasis added.)

¶ 18 First, the defendant asserts that, by commenting on his failure to call Whitehead as a witness, the trial court improperly shifted the burden to him to prove his innocence. We disagree.

¶ 19 Due process of law mandates that the State prove all of the elements of the charged offense beyond a reasonable doubt. This burden remains with the State throughout the entire trial, never shifting to the defendant. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). The defendant need not testify, present any evidence, or otherwise prove his innocence. *People v. Cameron*, 2012 IL App (3d) 110020, ¶¶ 27-28 (citing cases).

¶ 20 The trial court is presumed to know the law regarding the burden of proof and apply it properly. *Howery*, 178 Ill. 2d at 32. However, that presumption may be rebutted when the record contains "strong affirmative evidence" that the trial court incorrectly allocated the burden of proof to the defendant. *Id.* at 32-33. "The trial court's efforts to test, support, or sustain the defense's theories cannot be viewed as improperly diluting the State's burden of proof or improperly shifting that burden to the defendant." *Cameron*, 2012 IL App. (3d), 110020, ¶ 28 (citing *Howery*, 178 Ill. 2d at 35). Reflection upon the strength of the defendant's evidence or the implausibility of his theory of the case is entirely appropriate, as long as it is clear from the record that the court applied the proper burden of proof in finding the defendant guilty. *Id.*

¶ 21 We have reviewed the record in this case and fail to find strong, affirmative evidence that the court misapplied the burden of proof. Throughout its factual findings, the court repeatedly referenced the defendant's incriminating statement to the police regarding the presence of two guns in the front room, and his failure to make any suggestion at that time that they belonged to a

landlord. Based upon this observation, the court stated that it did not believe the "story" regarding the landlord as asserted for the first time at trial. While the court did point out that it did not "hear from" the landlord, it also noted that this fact did not "prove anything" and that the defendant was not required to call any witnesses. We conclude that the court's findings, as a whole, correctly stated the law and the proof required for the charged offense, and the disputed comments merely reflect its effort to thoroughly examine the strength of the defendant's case. See *Cameron*, 2012 IL App (3d) 110020, ¶ 29.

¶ 22 We have also reviewed the defendant's assertions that the court assumed facts not in evidence, and find them to be without merit. The defendant claims that the court was mistaken when it pointed out that he "has control to the basement" because he has a key or lives there. However, the defendant did, in fact, testify that he had keys to the basement and that he resided there. The court's statement was a permissible inference to be drawn from the defendant's testimony. The defendant also challenges a statement by the court, that he allegedly testified that his landlord "occasionally" put guns in the front area. Although the defendant never specifically testified as such, it was implicit in his theory of the case; that is, that the landlord alone had possession of the guns, and had presumably left them in the storage closet.

¶ 23 Next, the defendant argues that the court erred in denying his motion to suppress his statement to Officer Delcid that there were two guns in the front room. He maintains that he was "in custody" when he made the statement, but had not been apprised of his *Miranda* rights. Therefore, the statement should have been suppressed.

¶ 24 On appeal from the denial of a motion to suppress, we defer to the factual findings and credibility determinations made by the trial court, and will reverse those findings only if they are against the manifest weight of the evidence. *People v. Slater*, 228 Ill. 2d 137, 149 (2008).

However, our review of the ultimate ruling on the legality of the search or seizure is subject to the *de novo* standard. *Id.*

¶ 25 Under *Miranda v. Arizona*, 384 U.S. 436, 454 (1966), once a suspect is in custody, his statements in response to police interrogation are inadmissible unless he has first been warned of his constitutional rights, including the right to remain silent and to be represented by counsel. Although the focus of the defendant's argument here is that he was in custody at the time he gave his statement, we need not reach this issue. We agree with the trial court that, even assuming that the defendant was in custody, his statement falls under the public safety exception to the requirement of *Miranda*, established in *New York v. Quarles*, 467 U.S. 649 (1984).

¶ 26 In *Quarles*, 467 U.S. at 659, the Court held that a police officer may ask limited questions to a suspect without first giving him *Miranda* warnings, if the officer finds that it is reasonably necessary "to secure [his] own safety or the safety of the public." The exception is narrow in scope, and is circumscribed based upon the exigencies of the circumstances facing the officers at the moment of the inquiry. *Id.* at 657-8. The focus of the exception is not upon the officers' subjective perception; rather, it applies as long as the questioning "relate[s] to an objectively reasonable need to protect the police or the public from any immediate danger." *United States v. Newton*, 369 F.3d 659, 677-78 (2d Cir. 2004) (citing *Quarles*, 467 U.S. at 659 n. 8).

¶ 27 Our courts have recognized the public safety exception. See *People v. Williams*, 173 Ill. 2d 48, 77 (1996); *Hannah*, 2013 IL App (1st) 111660, ¶ 46. In *Williams*, the suspect had been handcuffed and subjected to a pat-down search pursuant to an arrest warrant for a recent shooting. The police asked whether the defendant had any weapons "on him," to which the defendant responded that he had a gun in the attic. In affirming the denial of his motion to suppress, the court cited the exception set forth in *Quarles*, where the Court noted that "the need

for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Williams*, 173 Ill. 2d at 77 (citing *Quarles*, 467 U.S. at 657). *C.f., Hannah*, 2013 IL App (1st) 111660, ¶ 46 (finding that questioning was not within the exception but amounted to illicit interrogation, when officer had already recovered the weapon and then asked handcuffed suspect "whose gun is this?").

¶ 28 We note preliminarily that the search warrant in this case has been omitted from the record, and we are unable to glean its contents or scope from the testimony, apart from the fact that it named an individual who resembled the defendant in age and physical stature. It was the defendant's burden, as appellant, to present a sufficiently complete record to enable a meaningful review of this issue. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-2 (1984). As a result of the defendant's failure to do so, we will resolve any doubts against him that may arise from the incompleteness of the record. *Id.* at 392.

¶ 29 When Officer Delcid and the other officers knocked at the basement door and received no response, they were required to forcibly enter the apartment with their guns drawn. After searching the defendant and his companion and uncovering no weapons, Officer Delcid inquired whether there was "anything that we should know about." The basement was a large space that was divided by a closed door or a gate and contained numerous partially enclosed areas. As the basement had not yet been searched, Officer Delcid could reasonably have believed that there were other individuals or hidden weapons on the premises that could pose a threat to his safety or that of the other officers. As such, we find that Officer Delcid's inquiry was justified as a means of ensuring his safety and that of the other officers, and did not constitute illicit interrogation in violation of *Miranda*. See *United States v. Are*, 590 F.3d 499, 505-06 (7th Cir. 2009) (defendant

handcuffed in his home pursuant to search warrant and asked whether there were any weapons in the house); *Newton*, 369 F.2d 659 (defendant handcuffed in apartment and asked whether he had "contraband" in house); *United States v. Williams*, 181 F.3d 945, 953 (8th Cir. 1999) (suppression denied where officer asked "is there anything we need to be aware of?"); see also *United States v. Reyes*, 353 F.3d 148, 152-3 (2d Cir. 2003) (collecting cases). We find these cases instructive and, accordingly, find no error in the trial court's denial of the defendant's motion to suppress.

¶ 30 As a final point, the defendant requests that we correct the mittimus, because it erroneously reflects that he is entitled to 296 days of pre-sentence incarceration credit rather than 297 days. As the State concedes this issue, we grant the defendant's request.

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County. We order that the mittimus be corrected to reflect 297 rather than 296 days of pre-sentence credit.

¶ 32 Judgment affirmed; mittimus corrected.