FIFTH DIVISION
August 26, 2016

No. 1-14-0210

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. 11 CR 4634
	)	
MARCUS LYONS,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

¶ 1 *Held*: We affirm the trial court's judgment where it properly denied defendant's motions to quash arrest and suppress evidence, and where the evidence was sufficient to prove him guilty beyond a reasonable doubt of unlawful use or possession of a weapon by a felon and possession of cannabis; we vacate the $250 DNA fee.

¶ 2 Following a bench trial, defendant Marcus Lyons was convicted of unlawful use or possession of a weapon by a felon (UUWF) and possession of cannabis. He was sentenced to 30 months' imprisonment for UUWF and 30 months' probation for possession of cannabis, to be served consecutively. On appeal, defendant contends that: (1) the trial court erred in denying his

motions to quash arrest and suppress evidence; (2) the State failed to establish beyond a reasonable doubt that defendant committed the offense of UUWF and possession of cannabis; and (3) his $250 DNA fee should be vacated. We affirm as modified.

¶ 3 Defendant was charged with two counts of UUWF and one count of possession of cannabis with intent to deliver. Defendant subsequently filed a motion to suppress evidence, alleging that the State should have been precluded from introducing any evidence recovered from the unlawful search of his premises that was warrantless, nonconsensual and conducted in the absence of exigent circumstances. Defendant also filed a motion to quash arrest and suppress evidence, in which he essentially made the same allegations as in his motion to suppress evidence, but added a request to suppress any ensuing statements made as a result of the unlawful search.

¶ 4 At the hearing on defendant's motions, Timberly Hardy (Hardy) testified that in February 2011, she lived with her children on the second floor of an apartment building at West Marquette Road in Chicago. Danielle Moore (Moore), her children, and defendant lived together across the hall from Hardy. At about 5 p.m. on February 28, 2011, Hardy and her children were in the hallway of the building with Moore and her children. An hour later, Hardy, her children, and one of Moore's children returned to Hardy's apartment and closed the door. Hardy heard gunshots a couple minutes later. She called Moore, opened her door, and observed defendant in front of Moore's door screaming in pain. Hardy observed shell casings in the hallway and a "twist tie" on the stairs near the hallway. Hardy called 9-1-1 and paramedics arrived shortly thereafter. They attended to defendant's injuries in the living room by the front door. There was blood inside the

apartment, approximately 3 to 4 feet from the doorway. The paramedics removed defendant from the premises.

¶ 5 Shortly after the paramedics left with defendant, and about 20 to 30 minutes after defendant was shot, the police arrived and entered Moore's residence. Hardy heard Moore ask the officers why they were searching her residence. In response, she heard a male voice say "Shut the f*ck up." Approximately an hour later, the officers left the residence with Moore in handcuffs. Hardy never smelled cannabis emanating from Moore's residence, but she did smell gun smoke.

¶ 6 Moore testified similarly to Hardy. Moore testified defendant was her boyfriend. She further testified that when the paramedics arrived to treat defendant on February 28, 2011, defendant was still in the hallway of the apartment. The paramedics brought defendant inside Moore’s residence and sat him on a chair only three or four feet away from the doorway. There was a trail of blood on the floor from where the paramedics brought defendant inside the apartment to where he was sitting on the chair. The paramedics took defendant out of the building and then the police arrived. Moore was in the doorway when police walked past her and entered her residence. Moore asked what was going on and an officer stated, "Shut the F up and sit the F down." Moore complied. The officers searched her apartment, and then took her out of the apartment in handcuffs. Moore never consented to a search of her apartment.

¶ 7 Moore further testified that a clear storage bin was located in the closet of the bedroom she shared with defendant. The bin had a lid and clothes on top of it, concealing what was inside. Moore was shown a photograph depicting the contents of the storage bin, which included bags of

marijuana, a scale, a firearm, and money. Moore denied knowing that those items were inside the storage bin, and stated that she never smelled cannabis inside of her apartment.

¶ 8 Officer Kasper testified that on February 28, 2011, he was dispatched to the apartment in question because a person was shot inside. He arrived at the scene in approximately 30 seconds as he was six blocks away. Paramedics also arrived on the scene. When Officer Kasper entered the apartment building, he followed other officers up the stairs and heard a man screaming in pain. He also smelled marijuana and observed shell casings and "flex cuffs," which are disposable ties police use for mass arrests, on the stairs and in the hallway. Upon entering the apartment, the door to which was open, he observed a trail of blood leading from the foyer of the kitchen into the bedroom. He entered the bedroom, looked past the bed to see if anyone was lying down hurt, and, as he turned to exit the room, he noticed a bin inside of the bedroom closet. A portion of the bin was in the threshold of the doorway of the closet and did not contain a lid. Officer Kasper observed the tops of clear zip-lock bags with suspect marijuana inside. He also indicated that an open white bag containing suspect marijuana was on top of the bin, as well as clothes. He recovered 16 bags of marijuana, a loaded firearm, a scale, and $1,520 from the bin. Officer Kasper did not have to move anything in the closet in order to find the suspect marijuana. The additional white bag containing marijuana was not included in Officer Kasper's police report. Officer Kasper acknowledged that he conducted the search of the apartment without a warrant or expressed consent, never found the man he heard screaming, and never observed defendant at the scene. Officer Kasper never wrote in any of his reports that he heard a man screaming, or that he followed a trail of blood into the bedroom.

¶ 9 Detective Thomas Carr testified that on February 28, 2011, he arrived on the scene at approximately 7:30 p.m. Upon entering the building, he observed a plastic zip tie and an expended shell on the stairs leading up to the second floor. Carr also observed shell casings in the hallway on the second floor. The door to one of the apartments on the second floor had blood on the bottom near the metal threshold and two apparent bullet holes in the doorjamb. Carr entered the apartment and noticed blood drops on the floors of the foyer and living room. He did not recall a blood trail leading into or though the kitchen and noted that, had there been such a trail, he would have had it photographed. Carr walked through the apartment and noticed officers in a bedroom, which he entered. He noticed a plastic bin containing plastic bags with crushed green plant and a firearm.

¶ 10 Officer Craig Lyke (Officer Lyke) testified that on February 28, 2011, he was the third officer to respond to the scene at approximately 7:30 p.m. At the time, defendant, who had been shot multiple times, was on the second floor of the apartment building. The paramedics had just placed him on a stretcher and were starting to bring him outside.

¶ 11 James Lewandowski, an investigator for the State's Attorney's Office, testified that on December 13, 2011, he had a conversation with Hardy. Hardy indicated that she was close friends with Moore. She never indicated that paramedics left with defendant before the police arrived.

¶ 12 The parties stipulated that, after the cannabis was recovered, defendant made statements to the police. The content of those statements was not revealed.

¶ 13 In denying defendant's motions, the trial court found that the testimony of Hardy and Moore that police officers did not arrive at the scene until 20 or 30 minutes had passed was

"wholly and completely incredible." The trial court also found Moore's testimony that she knew nothing about the contents of the plastic bin incredible. The trial court further stated that, although there were some "confounding points" to Officer Kasper's testimony, based on all of the evidence, exigent circumstances existed that allowed the police to "run through the house to see what was going on." Moreover, the trial court found that the cannabis was in plain view.

¶ 14 At trial, Officer Kasper testified similarly to his testimony during the hearing on defendant's pretrial motions. He also admitted, after being shown a copy of the transcripts, that he testified before a grand jury he had observed defendant in the living room when he was inside the apartment. Officer Kasper, however, testified did not recall providing this testimony and continued to maintain that he never observed defendant on the day of the shooting. He further testified that he only observed men's clothing in the bedroom, but acknowledged he did not indicate this in his report.

¶ 15 Officer Lyke testified that when he responded to the scene, he noticed defendant, who was not screaming, being taken out of the apartment by paramedics. Officer Lyke also observed defendant at approximately 9:30 p.m. that same evening in the hospital. While in the hospital, Officer Lyke inquired whether defendant knew anything about the cannabis found in his apartment before reading defendant his *Miranda* rights. Defendant responded negatively. Officer Lyke then read defendant his *Miranda* rights, and again inquired if he knew anything about the cannabis. Defendant initially stated that the recovered cannabis was not his, but then admitted the cannabis belonged to him, after Officer Lyke informed him his girlfriend was being questioned about it and that she could be charged. Defendant informed Officer Lyke that he sold cannabis to make money and pay his bills, and requested that his girlfriend not be imprisoned. Defendant

further admitted that the recovered firearm belonged to him. Officer Lyke did not record defendant's statements.

¶ 16 Officer Andre Green (Officer Green) testified he went to the scene at approximately 7:15 p.m. with his partner Officer Lyke. They entered the apartment on the second floor, searched the bedroom, and recovered mail and a State identification card with defendant's name and address from the dresser area. The recovered items of mail included a voting card, a U.S. cellular envelope, a credit card bill, a Comcast bill, and a piece of mail from a bank, all of which contained defendant's name and the address of the apartment in question. The U.S. cellular envelope, voting card, and Comcast bill had 2009 dates on them, and his identification card, which was issued in 2008, was set to expire on December 28, 2011. Officer Green did not recover mail for anyone other than defendant as he was only looking for defendant's proof of residency.

¶ 17 At the State's request, the trial court admitted defendant's 2004 conviction for possession of a controlled substance.

¶ 18 The parties stipulated that forensic chemist Peter Anzalone would testify that he tested 12 of the 16 recovered bags of suspect cannabis and that the contents of the tested items were positive for the presence of cannabis. The estimated weight of the tested items was 5,116.5 grams and the total estimated weight of the 16 items was 6,822 grams.

¶ 19 Defendant rested without presenting any evidence.

¶ 20 Following closing arguments, the trial court found defendant guilty of both counts of UUWF and one count of simple possession of cannabis. In so finding, the trial court rejected the statement defendant allegedly made to Officer Lyke, finding that the statement was unreliable.

The trial court also found that defendant lived in the apartment in question, and that the proof of residency recovered by the police was sufficient to establish that he was in constructive possession of the cannabis.

¶ 21 At sentencing, following arguments in aggravation and mitigation, the trial court merged the two UUWF convictions, and sentenced defendant to 30 months' imprisonment. The trial court also sentenced defendant to a term of 30 months of probation for possession of cannabis and assessed him fines and fees, including a $250 DNA analysis fee. This appeal followed.

¶ 22 On appeal, defendant first contends that the circuit court erred in denying his motions to suppress where the search was admittedly unsupported by either a warrant or consent, and the purported exigency excusing their absence depended upon a demonstrably incredible basis. He specifically asserts that Officer Kasper's testimony was incredible and that the emergency aid exception to the warrant requirement did not apply.

¶ 23 A two-part standard of review applies to the trial court's decision to deny a defendant's motion to quash arrest and suppress evidence. *People v. Almond*, 2015 IL 113817, ¶ 55. We uphold the trial court's factual findings unless they are against the manifest weight of the evidence, but review *de novo* its ultimate legal conclusion as to whether suppression is warranted. *People v. Timmsen*, 2016 IL 118181, ¶ 11. Further, we may consider evidence presented at defendant's trial and at the suppression hearing. *Almond*, 2015 IL 113817, ¶ 55.

¶ 24 The fourth amendment to the United States Constitution secures the right of citizens to be "secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const., amend. IV; see also *Elkins v. United States*, 364 U.S. 206, 213 (1960) (holding that the fourth amendment applies to state officials through the fourteenth amendment). The central

requirement of fourth amendment analysis is reasonableness. *Illinois v. McArthur*, 531 U.S. 326, 330 (2001). Specifically, courts must examine whether the totality of the circumstances surrounding the particular invasion of the citizen's person or property was reasonable. *People v. Jones*, 215 Ill. 2d 261, 268 (2005).

¶ 25 A search is generally unreasonable if it is not conducted pursuant to a warrant supported by probable cause. *Id*. at 269. However, exceptions to the warrant requirement exist, and the totality of the circumstances can render a warrantless search reasonable under the fourth amendment. *Id*. When determining whether a warrantless search is reasonable, courts must balance the legitimate promotion of government interests against the intrusion of fourth amendment principles. *Id*.

¶ 26 The emergency aid exception to the warrant requirement allows police officers to enter and search a home without a warrant in emergency situations. *People v. Lomax*, 2012 IL App (1st) 103016, ¶ 29. A two-step process must be employed to determine whether the emergency aid exception applies. *Id*. The police must first have " 'reasonable grounds' " to believe there is an emergency at hand; and second, they must have some reasonable basis " 'approximating probable cause,' " associating the emergency with the area to be searched or entered. *Id*. (quoting *People v. Ferral*, 397 Ill. App. 3d 697, 705 (2009)). A determination of the reasonableness of the officers' beliefs is to be judged in terms of the totality of the circumstances known to them at the time of their entry. *Lomax*, 2012 IL App (1st) 103016, ¶ 29. "The United States Supreme Court has held that emergency situations include instances when someone may be injured or threatened with injury." *Id*. (citing *Michigan v. Fisher*, 558 U.S. 45 (2009) (*per curium*) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). The State bears the burden of proving the applicability of the

emergency aid exception to the warrant requirement. See *People v. Koester*, 341 Ill. App. 3d 870, 874 (2003) (noting that "the State bears the burden of demonstrating exigent need for a warrantless search or arrest").

¶ 27 Here, the police had reasonable grounds to believe an emergency was at hand where they were dispatched to the apartment building based on calls pertaining to a shooting having occurred there. A 9-1-1 call is one of the most common means through which the police learn an emergency exists. *Lomax*, 2012 IL App (1st) 103016, ¶ 31 (citing *United States v. Richardson*, 208 F.3d 626, 630 (7th Cir. 2000)). The police had a reasonable basis approximating probable cause to associate the emergency, *i.e.* the shooting, with the apartment in question. Officer Kasper arrived at the apartment building within seconds of being dispatched. Walking up the stairs to the second floor, he observed shell casings, flex cuffs, and smelled marijuana. Significantly, the door to the apartment was open and he noticed blood on the foyer floor leading into the kitchen and toward the bedroom. Officer Kasper also heard a man screaming in pain from somewhere inside of the apartment. Based on this evidence, we agree with the trial court's finding that the police "would certainly have the ability under exigent circumstances to run through that house to see what was going on," *i.e.*, to determine whether anyone was injured or in danger, and conclude defendant's motions to suppress were properly denied.

¶ 28 Nevertheless, defendant challenges the trial court's credibility determinations regarding Officer Kasper. Specifically, defendant claims that if Officer Lyke, who arrived shortly after Officer Kasper, was able to observe defendant being treated at the apartment by paramedics, it is inconceivable that Officer Kasper never noticed defendant at the scene when he testified he arrived within 30 seconds of the initial radio dispatch. Defendant further challenges the Officer

Kasper's credibility by emphasizing that: there was no mention of a blood trail in Officer Kasper's report; his testimony regarding the blood trail was refuted by Detective Carr who did not recall a blood trail leading into or though the kitchen; no explanation was offered for the alleged scream Officer Kasper heard in the apartment; and Officer Kasper's testimony that he smelled cannabis taxes credulity where he did not report discovering any burnt cannabis, but instead recovered cannabis in ziplock bags within a plastic container.

¶ 29 However, as set forth above, factual findings made by the trial court are upheld on review unless the findings are against the manifest weight of the evidence. *Timmsen*, 2016 IL 118181, ¶ 11. This deferential standard is premised on the fact that the trial court 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. Gherna*, 203 Ill. 2d 165, 175 (2003). All of defendant's examples attacking the credibility of Officer Kasper were heard, considered, and rejected by the trial court. Although the trial court noted in its findings that there were some "confounding points" to Officer Kasper's testimony, it found, based on all of the evidence, that exigent circumstances existed for the police to enter and search the apartment. The trial court specifically stated that the defense witnesses were unbelievable, shell casings and a flex tie were found leading up to the apartment, blood was found inside the apartment, and Officer Kasper heard screaming and smelled cannabis. These factual findings made by the trial court were not against the manifest weight of the evidence, and we see no reason to upset them.

¶ 30 The cases relied on by defendant to demonstrate that Officer Kasper's testimony was insufficient to support his search of the apartment under the emergency aid exception are distinguishable. In *People v. Gonzalez*, 2015 IL App (1st) 132452, we found the evidence

insufficient to prove the defendant guilty of reckless conduct beyond a reasonable doubt where a police officer testified that he observed the defendants throw bricks at two passing cars, but then testified on cross-examination that he did not observe the defendants throw a brick at a car. *Id*. ¶¶ 4, 6. Here, however, Officer Kasper's testimony was consistent.

¶ 31 In *People v. Jones,* 2015 IL App (2d) 130387, a police officer responded to a neighbor's call of a domestic dispute and observed the defendant and a woman arguing on an enclosed front porch. *Id*. ¶¶ 3-4. Despite the fact that the defendant informed the officer that there was no problem and the woman was not injured, the officer remained on the porch. *Id*. ¶¶ 4-8. The court in *Jones* held that the officer violated the fourth amendment in remaining on the porch because the defendant had assured him no problem existed, the officer observed the woman was not injured, and she did not request assistance. *Id*. ¶ 15. Here, in contrast, there was ample evidence that a violent act had occurred, including, shell casings on the stairs leading to the second floor and the presence of blood. Therefore, the emergency aid exception to the warrant requirement applies here.

¶ 32 Defendant next contends the State failed to prove its case beyond a reasonable doubt. He specifically maintains that the State failed to prove defendant was in constructive possession of the cannabis and the weapon.

¶ 33 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). Under this standard, it is the responsibility of the trier of fact to assess the witness’s credibility, to weigh the

evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the testimony. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 34 In the instant case, the State must prove beyond a reasonable doubt that defendant knowingly possessed the cannabis recovered by police, to sustain a conviction for possession of cannabis. See *People v. Evans*, 2015 IL App (1st) 130991, ¶ 26; 720 ILCS 550/4 (West 2010). Similarly, to sustain a conviction for UUWF, the State must prove beyond a reasonable doubt that defendant knowingly possessed any firearm and that he has a felony conviction. See *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 22; 720 ILCS 5/24-1.1(a) (West 2010). Defendant does not challenge his status as a felon, but instead claims there was insufficient proof that he possessed the cannabis and firearm.

¶ 35 Generally, possession may be actual or constructive. *Givens*, 237 Ill. 2d at 335. In the absence of actual possession, as here, constructive possession is shown where the defendant has an intent and a capability to maintain control and dominion over the contraband. *People v. Macias*, 299 Ill. App. 3d 480, 484 (1998). Constructive possession may be established where the defendant controlled the premises where the contraband was found. *Id*. Therefore, for both charges, the State must show that defendant had knowledge of the cannabis and weapon and that he had immediate and exclusive control over the area where they were found. *Id*.

¶ 36 A defendant is deemed to have acted knowingly if he is proven to be aware of the existence of facts which make his conduct unlawful. *People v. Hodogbey*, 306 Ill. App. 3d 555, 559 (1999). The element of knowledge is rarely susceptible to direct proof, and can be

established by circumstantial evidence of acts, statements or conduct of the defendant, as well as the surrounding circumstances, which support the inference that he knew of the existence of the contraband at the place they were found. *People v. Bui*, 381 Ill. App. 3d 397, 419 (2008). It is well settled that "the mere presence of illegal drugs on premises which are 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 defendant's guilt." *People v. Smith*, 191 Ill. 2d 408, 413 (2000). In a bench trial, the determination of whether the defendant had knowledge is a question of fact for the trial court. *People v. Williams*, 267 Ill. App. 3d 870, 877 (1994). The trial court's determinations will not be disturbed on review unless the evidence is so palpably contrary to the verdict or judgment that it creates a reasonable doubt of guilt. *Id.*

¶ 37 Viewing the evidence in the light most favorable to the State and disregarding, as did the trial court, defendant's alleged admission to Officer Lyke, we find that any rational trier of fact could have found defendant guilty of possession of more than 5,000 grams of cannabis and a loaded firearm. In responding to a call that a person had been shot, Officer Kasper observed in plain view a plastic bin protruding from the bedroom closet of the apartment. He observed several bags of suspect cannabis in the bin and, as he approached the bin, noticed a plastic bag on top of the bin with more suspect cannabis inside. Upon further inspection of the bin, Officer Kasper also observed a loaded firearm, a scale, and money. Officer Kasper further found men's clothing in the bedroom.

¶ 38 Further, Officer Green searched the dresser inside of the bedroom and recovered proof that the apartment was defendant's residence. Specifically, Officer Green recovered a U.S.

Cellular envelope postmarked in 2009, a verification of voter registration issued in 2009, a 2009 Comcast bill, and a State ID issued on 2008 with an expiration date of December 28, 2011. He also recovered mail from a credit card company and a bank addressed to defendant. This proof of residence recovered in the bedroom, along with the men's clothing, established without a reasonable doubt that defendant lived in the bedroom of the apartment and had constructive possession over the cannabis and firearm found therein.

¶ 39 In reaching this conclusion, we find *People v. Ray*, 232 Ill. App. 3d 459 (1992), relied on by defendant to show the recovered mail was too old to establish residency, distinguishable. In *Ray*, we noted that a 6-month old cable bill was the only evidence showing the defendant's control over the premises and thus reversed his conviction for possession of a controlled substance due to lack of circumstantial evidence showing constructive possession. *Id*. at 462-63. Here, multiple pieces of documentary evidence recovered inside the bedroom showed defendant lived there, including a State identification card that expired after the date of the search. Defendant's argument that other people might have been present or used the bedroom where the contraband was found, is unpersuasive. Significantly, the potential that someone else may have access to the bedroom does not defeat defendant's constructive possession of the cannabis and firearm. See *Bui*, 381 Ill. App. 3d at 424 ("mere access to an area by others is insufficient to defeat a charge of construction possession"). Therefore, we do not find the evidence so unsatisfactory as to create a reasonable doubt of defendant's guilt, and affirm his convictions of UUWF and possession of cannabis.

¶ 40 Defendant finally contends that the $250 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2010)), must be vacated because he was previously convicted of possession of a controlled

substance and has already submitted a DNA sample. Based on our supreme court decision in *People v. Marshall*, 242 Ill. 2d 285, 303 (2011), the State agrees that a DNA analysis fee is authorized only where the defendant is not currently registered in the DNA database. Pursuant to our authority under Illinois Supreme Court Rule 615(b)(2) (eff. Jan. 1, 2016), we vacate the $250 DNA assessment, and direct that the trial court's fines and fees order be amended to reflect a total of $2,499.

¶ 41 For the foregoing reasons, we direct that the fines and fees order be modified as indicated, and affirm the judgment of the circuit court in all other respects.

¶ 42 Affirmed as modified.