NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2017 IL App (3d) 160201-U

Order filed February 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Henry County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0201 Circuit No. 14-CF-328
CHOU XIONG,	)	Honorable Jeffrey W. O'Connor,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Schmidt concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held*: (1) The State presented evidence sufficient for the jury to find defendant guilty beyond a reasonable doubt of cannabis trafficking; (2) the circuit court cured any prejudice caused by an incorrect jury instruction and the State's reference to that instruction.

¶ 2 Defendant, Chou Xiong, was found guilty by a jury of cannabis trafficking, unlawful possession with intent to deliver cannabis, and unlawful possession of cannabis. The circuit court entered conviction only on the most serious offense, cannabis trafficking, and sentenced

defendant to a term of 15 years' imprisonment. On appeal, defendant argues that the State's evidence was insufficient to prove that he possessed cannabis with the intent to deliver. He also argues that the State's closing argument was prejudicial in that it referenced a jury instruction that would later be retracted. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant by information with one count each of unlawful cannabis trafficking (720 ILCS 550/5.1(a) (West 2014)), unlawful possession with intent to deliver cannabis (720 ILCS 550/5(g) (West 2014)), and unlawful possession of cannabis (720 ILCS 550/4(g) (West 2014)). The matter proceeded to a jury trial on December 16, 2015.

¶ 5 The State's first witness at trial was Andrew Fratzke, a road trooper and canine handler with the Illinois State Police. Fratzke testified that he had been a trooper for 19 years, had completed a number of trainings regarding narcotics including cannabis, and had worked on "hundreds" of cases involving narcotics or cannabis detection. Through this experience, he was able to distinguish between amounts of narcotics intended for personal use and amounts intended for distribution. He testified that most cannabis intended for personal use was found in gram or ounce increments, usually consisting of loose material in jars or Ziploc baggies. He testified that where narcotics are intended for distribution or delivery, they tend to be in multiple packages, often in one-pound vacuum-sealed bags.

¶ 6 Fratzke also testified to the common patterns he had experienced in dealing with cannabis traffickers. He testified that a recurring situation is that where individuals fly one way from the east coast to the west coast and then return in a rental car. These trips are often scheduled to be quite short. Fratzke pointed out that such a pattern contrasts with normal travelers, who tend to travel round trip, either by airplane or by car, and build in time for activities. Fratzke also

testified that traffickers make efforts to mask the odor of cannabis by using air fresheners or cigarettes.

¶ 7 Fratzke testified that he was on patrol at approximately 8 a.m. on November 13, 2014, when he pulled over a vehicle, noticing that the backseat passenger was not wearing a seatbelt. There were three occupants inside the vehicle, including defendant, who was in the backseat. Upon stopping the vehicle, Fratzke observed defendant light a cigarette. He also noticed an air freshener on the back deck of the interior, as well as air fresheners hanging from the rearview mirror. Mong Lor was the driver of the vehicle and Joe Lor was the front seat passenger.

¶ 8 The occupants gave Fratzke the car rental contract and told him they were coming from Colorado. The rental contract showed that the vehicle had been rented on November 9—four days earlier—in Sacramento. It was scheduled to be returned on November 17 in New Jersey. Approximately $1100 had been paid for the car rental.

¶ 9 After backup arrived, Fratzke walked his canine around the vehicle. The dog alerted to the presence of a narcotic in the back of the vehicle. In the trunk, Fratzke found a garbage bag containing 10 one-pound vacuum-sealed packages of suspected cannabis, and 2 more one-pound vacuum-sealed bags of suspected cannabis inside the spare tire compartment. A piece of luggage bearing defendant's name was found in front of the garbage bag.

¶ 10 Fratzke testified that 12 pounds of cannabis was an amount not consistent with personal use. He stated: "[T]he quantity is more than one person could obviously smoke in a very, very long time. Eventually, this stuff does dry out, and it does go bad." Fratzke opined that the quantity, packaging, and method of travel were consistent with cannabis trafficking.

¶ 11 Fratzke testified that Joe Lor told him that he had stolen the cannabis when he, Mong, and defendant were in Colorado. Fratzke was immediately skeptical that Joe had stolen 12

pounds of cannabis. He felt that story failed to explain why 2 one-pound packages were separated from the 10 in the garbage bag. It also failed to explain why the group was traveling in the first place.

¶ 12 Sergeant Clint Thulen of the Illinois State Police also testified for the State. His testimony was substantially similar to that of Fratzke. Specifically, Thulen opined that the 12 pounds of cannabis found in defendant's trunk was consistent with trafficking, and inconsistent with personal use. He described the amount of cannabis as "much more than three people could consume." He approximated that such an amount of cannabis would, conservatively, provide more than 1800 marijuana cigarettes per person. He further opined that the method of packaging was consistent with narcotics trafficking. Thulen also testified that the packages of cannabis appeared to contain only buds of the plant, without seeds or stems, which is also consistent with trafficking.

¶ 13 The parties stipulated that Denise Hanley would testify that she was a forensic scientist at the Illinois State Police forensic laboratory, that the materials seized were cannabis, and that the total weight of cannabis found was 5421 grams. The State rested.

¶ 14 The defense called Joe Lor as its only witness. Joe testified that he, Mong, and defendant were all from the same area of Massachusetts. In November 2014, they planned to fly to Sacramento, then drive back home in a rental car. Once in California, they went sightseeing, and spent the night in Eureka. The men later got lost, and had to stop at a gas station in California. Joe testified: "We asked if the man that was working there can help us print a map to go back to Massachusetts, but then he didn't know Massachusetts." The man working at the gas station instead printed a map showing a route to New York.

¶ 15 Joe testified that the group stopped in Colorado. While he was relieving himself, Joe smelled the odor of marijuana, and "decided to track it down." Joe eventually came upon a man who was smoking marijuana. The two talked, and eventually began to argue after the man criticized Joe's knowledge of medical marijuana. At some point, the man opened his van and showed Joe some marijuana. Joe testified: "He opened it up to me and tried to bribe me of some marijuana."

¶ 16 In an effort to prove to Joe that the marijuana was of a high quality, the man went to the front seat of the van to retrieve materials to roll a joint. Joe testified that at that moment he grabbed two one-pound packages of the marijuana, grabbed a black bag to cover those packages, and ran off. When he arrived back at his car, Mong and defendant were already inside. They opened the trunk for him from inside the car, and Joe placed the stolen marijuana in the trunk. The group then continued eastward. Joe testified that he never told defendant or Mong about the marijuana. The defense rested following Joe's testimony.

¶ 17 At the close of evidence, the parties and the court held a jury instruction conference. Defendant objected to the delivery of the instruction that reads in part: "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution." Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.17). Counsel argued that Joe's testimony was that he acted alone, rather than *with* defendant, and therefore would not warrant that instruction. The court ruled that the instruction would be given over objection.

¶ 18 In its closing argument, the State referenced that instruction, telling the jury:

> "I want to point out to you that you're going to receive an instruction about the fact that if a person has committed a crime or has been involved in the commission of this crime, that you need to consider their testimony in terms of their credibility and also with caution. All right? So I want you to pay attention to that, those jury instructions, and have those jury instructions in mind when you consider [Joe's] testimony and consider whether or not you think his explanation is credible."

Following closing arguments, the court delivered the jury instructions, including IPI Criminal 4th No. 3.17.

¶ 19 After completing the jury instructions, the judge asked the jury to remain in the courtroom while the parties joined him in chambers. In chambers, the judge told the parties that he no longer found IPI Criminal 4th No. 3.17 to be a proper instruction, as Joe had not testified that he committed a crime *with* defendant. The judge thus intended to tell the jury to disregard the instruction. The State did not object to that analysis, but pointed out that it had referenced the instruction in its closing arguments. The judge replied: "Well, your closing is not law, and it's not evidence, and I'm going to specifically tell them that this is *** erroneous and to disregard it." Both attorneys expressed acceptance of that decision.

¶ 20 Back in the courtroom, the court addressed the jury:

> "Jurors, what we just went over here, I was reading through the instructions one by one, and as I was reading one of the instructions, it occurred to me that it was an invalid instruction and does not belong in this case.
>
> I'm going to read it to you, not because I want to emphasize it, I want you to be able to identify which one I'm talking about, and, again, my instructions to

you are to completely disregard the contents of this singular instruction, and it will not be included in the packet.

And that instruction is the one that says, 'When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in the light [*sic*] of the other evidence in the case.'

And that is an erroneous instruction as pertains to a fact basis of the case that we've had here. So this is out. Disregard any reference to it. Disregard my reading of it. And there are other instructions here that address the issue of assessing the credibility or believability of the witnesses. Those are still valid, and you can apply those to the facts of this case."

¶ 21 The jury found defendant guilty on all counts. The court entered a conviction only on the cannabis trafficking charge, finding that the other two counts were lesser-included offenses. The court sentenced defendant to a term of 15 years' imprisonment.

¶ 22 ANALYSIS

¶ 23 On appeal, defendant argues that the evidence presented by the State was insufficient to prove him guilty beyond a reasonable doubt. He also contends that the jury was prejudiced by the State's reference in closing arguments to the instruction that Joe's testimony should be viewed with extra scrutiny. Defendant maintains that the court's subsequent retraction of that instruction was insufficient to cure the prejudice. For the reasons set forth below, we reject each of defendant's arguments.

¶ 24 I. Sufficiency of the Evidence

¶ 25 Defendant argues that the evidence was insufficient with respect to two separate elements of cannabis trafficking: (1) possession and (2) intent to deliver. Specifically, regarding possession, defendant contends that the State failed to prove that he exercised actual dominion and control over the cannabis found in the vehicle. We note at the outset that defendant has made no arguments on appeal relating to Fratzke's traffic stop or the ensuing dog sniff.

¶ 26 When a challenge is made to the sufficiency of the evidence at trial, we review to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31; *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In making this determination, we review the evidence in the light most favorable to the prosecution. *Baskerville*, 2012 IL 111056, ¶ 31.

¶ 27 It is not the purpose of a reviewing court to retry a defendant. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). Instead, great deference is given to the trier of fact. See, *e.g.*, *People v. Saxon*, 374 Ill. App. 3d 409, 416-17 (2007). All reasonable inferences from the record in favor of the prosecution will be allowed. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). " 'Where evidence is presented and such evidence is capable of producing conflicting inferences, it is best left to the trier of fact for proper resolution.' " *Saxon*, 374 Ill. App. 3d at 416 (quoting *People v. McDonald*, 168 Ill. 2d 420, 447 (1995)). The trier of fact is not required to accept or otherwise seek out any explanations of the evidence that are consistent with a defendants innocence; nor is the trier of fact required to disregard any inferences that do flow from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 233 (2006); see also *Saxon*, 374 Ill. App. 3d at 416-17.

¶ 28 A. Possession

¶ 29 Section 5.1 of the Cannabis Control Act (Act) holds that "any person who knowingly brings or causes to be brought into this State for the purpose of manufacture or delivery or with

the intent to manufacture or deliver 2,500 grams or more of cannabis in this State or any other state or country is guilty of cannabis trafficking." 720 ILCS 550/5.1(a) (West 2014). The offense may thus be broken down into three elements: (1) knowingly bringing or causing to be brought into the state, (2) 2500 grams or more of cannabis, (3) for the purpose of delivery or with the intent to deliver that cannabis anywhere.

¶ 30 On its face, the offense of cannabis trafficking does not require the State to prove possession. In fact, the instructions received by the jury in the present case did not list possession as one of the elements needed to sustain a conviction for cannabis trafficking. The statute explicitly encompasses not just those who bring cannabis into the state, but those who "cause[cannabis] to be brought" into the state. *Id*. This language demonstrates the legislature's intent to target those higher in the trafficking chain of command, as it includes those individuals who direct others to transport cannabis, whether or not they ever possessed the cannabis themselves.

¶ 31 Though the State was not technically obligated to prove that defendant possessed the cannabis in the present case, it *was* obligated to establish beyond a reasonable doubt that defendant knew about the cannabis, in order to satisfy the requisite mental state element. Knowledge is itself a sub-element of the concept of constructive possession. See *People v. Hunter*, 2013 IL 114100, ¶ 19. Consequently, we will construct defendant's argument on appeal concerning "possession" as an argument that the State failed to prove that defendant knew about the cannabis found in the trunk.

¶ 32 The element of knowledge is rarely susceptible to direct proof. *People v. Nwosu*, 289 Ill. App. 3d 487, 494 (1997). Instead, that element "may be established by evidence of acts, declarations or conduct of the defendant which support the inference that he knew of the existence of narcotics at the place they were found." *Id*.

¶ 33 Fratzke and Thulen testified that many factors in the present case were consistent with cannabis trafficking. Specifically, the testimony showed that the amount, packaging, and nature of the cannabis seized was indicative of trafficking. Fratzke also testified that the complex and unusual travel plan—flying one way to the west coast, renting a car, and driving back relatively quickly—was also consistent with trafficking. Further, Fratzke testified that attempts to conceal odors, such as the presence of multiple air fresheners or defendant's lighting of a cigarette immediately upon being stopped, was indicative of trafficking.

¶ 34 Based on this evidence, a rational trier of fact might rationally reject Joe's testimony and instead infer that the cannabis was a part of a trafficking operation. See *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 21 ("It falls within the province of the trier of fact to judge the credibility of witnesses, resolve conflicts in the evidence, and draw conclusions based on all the evidence."). Further, the jury could have relied upon defendant's participation in renting the vehicle, as well as its own common sense in rationally concluding that defendant was a participant in the operation, rather than an unsuspecting travel partner. See *People v. Toliver*, 60 Ill. App. 3d 650, 652 (1978) ("A trier of fact may use common sense and general knowledge in considering evidence and drawing the proper inference from it."). Considering the totality of the circumstances, some rational trier of fact could conclude beyond a reasonable doubt that defendant knew about the 12 pounds of cannabis seized from his trunk.

¶ 35 B. Delivery

¶ 36 Defendant next argues that the evidence presented by the State was insufficient to "establish intent to deliver beyond a reasonable doubt." Because the trafficking statute contemplates passive actors (see *supra* ¶¶ 29-30), the State was not obligated to prove that defendant *himself* intended to deliver the cannabis. Instead, the State merely needed to prove that

the cannabis was being brought into the state "for the purpose of *** delivery." 720 ILCS 550/5.1(a) (West 2014). Put another way, the State was tasked with proving that defendant intended that the cannabis be delivered at some point, by any party.

¶ 37 Intent to deliver, like knowledge, is rarely susceptible to direct evidence, and therefore usually must be proven through circumstantial evidence. *People v. Robinson*, 167 Ill. 2d 397, 408 (1995). The most probative piece of circumstantial evidence is often the amount of a controlled substance found, as "the quantity of controlled substance alone can be sufficient evidence to prove an intent to deliver beyond a reasonable doubt. However, such is the case only where the amount of controlled substance could not reasonably be viewed as designed for personal consumption." *Id.* at 410-11. Where the amount of a controlled substance seized might be consistent with personal use, courts will require additional evidence to sufficiently prove intent to deliver. *Id.* at 411. Such other evidence tends to include, for example, the nature or type of packaging, the purity of the substance seized, and the presence of weapons or large amounts of cash. *Id.* at 408 (collecting cases).

¶ 38 In the present case, defendant was stopped in a vehicle that contained 12 pounds of cannabis, separated into 12 individual one-pound packages. Fratzke and Thulen each testified that this amount would be inconsistent with personal use. This evidence alone would be sufficient to prove the delivery element beyond a reasonable doubt. See *id.* at 410-11.

¶ 39 Defendant insists that "[t]he quantity [of cannabis] *** is far more consistent with long-term personal use by three individuals than it is of a commercially viable quantity of cannabis." We reject this argument. Initially, we note that the jury was not required to accept or otherwise seek out explanations of the evidence that would be consistent with defendant's innocence. *Sutherland*, 223 Ill. 2d at 272. Similarly, where reasonable inferences have been made, this court

will not substitute its own judgment for that of the trier of fact. *E.g.*, *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). Further, Thulen testified that the amount of cannabis found would produce at least 1800 marijuana cigarettes per person, and Fratzke testified that cannabis does dry out and go bad over time. More conceptually, defendant's argument regarding the possibility of "long-term personal use" is untenable. Given a long enough timeline, *any* amount of a controlled substance could be viewed as consistent with personal use.

¶ 40 Furthermore, though the amount of cannabis seized coupled with the testimony of Fratzke and Thulen on that subject was sufficient, we must note that the State actually presented far more evidence of an intent to deliver. In particular, Fratzke testified that the seized cannabis was packaged in a manner consistent with an intent to deliver. See *Robinson*, 167 Ill. 2d at 414 ("[*I*]*n appropriate circumstances*, packaging alone might be sufficient evidence of intent to deliver."). Thulen testified that the nature of the cannabis itself, containing pure buds without seeds or stems, was also indicative of a trafficking operation. See *People v. Torres*, 200 Ill. App. 3d 253, 264 (1990) (finding that high purity of controlled substance is probative of intent to deliver). In sum, the State presented more than enough evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that the cannabis in question was being transported into Illinois for the ultimate purpose of delivery.

¶ 41 II. Jury Instructions

¶ 42 Finally, defendant argues that the State's reference in its closing argument to IPI Criminal 4th No. 3.17—which instructed the jury to consider Joe's testimony with caution—and the court's subsequent delivery of that instruction was prejudicial. He contends that the court's retraction of the instruction was not sufficient to cure that prejudice.

¶ 43 A circuit court may cure the prejudicial effect of erroneous comments made in closing arguments by giving the jury proper instructions regarding the law. *People v. Simms*, 192 Ill. 2d 348, 396 (2000). The court's determination that an error has been sufficiently cured through instruction will not be disturbed absent an abuse of discretion. See *id*. at 396-97.

¶ 44 In the case at hand, any prejudice caused by the court's recitation of the improper instruction and the State's reference to that instruction was cured by the court's emphatic retraction. First, the court retracted the instruction and removed it from the packet of instructions before the jury began its deliberations. Thus, the jury entered the jury room with the correct set of instructions. Moreover, the court could not have been more emphatic and explicit in its retraction of the erroneous instruction. See *supra* ¶ 20. The court called the instruction invalid and erroneous, said that the instruction was "out" and that it did not belong, and told the jury to disregard the instruction three times. Then the court directed the jury to the other, standard instructions regarding the determination of credibility.

¶ 45 Defendant's argument—that after such an emphatic retraction, the jury still applied IPI Criminal 4th No. 3.17 in its deliberations—is simply untenable. Indeed, defendant concedes that "[t]he trial court was very clear in its curative remarks." His further contention, that the court should have explained to the jury *why* it was retracting the instruction, is similarly without merit. Not only has defendant failed to provide any legal citation in support of the notion that such an explanation enhances a curative effect, it is apparent that an explanation of the court's legal analysis would only serve to confuse the jury.

¶ 46 CONCLUSION

¶ 47 The judgment of the circuit court of Henry County is affirmed.

¶ 48 Affirmed.

¶ 49 JUSTICE McDADE, dissenting.

¶ 50 The majority affirms defendant's conviction for cannabis trafficking, holding that the evidence presented by the State was sufficient to allow the jury to conclude beyond a reasonable doubt that defendant had knowledge of the cannabis found in the trunk of the rental car. I disagree with that conclusion, and therefore respectfully dissent.

¶ 51 Initially, I acknowledge that even where the State's case-in-chief is based entirely on circumstantial evidence and the inferences drawn therefrom, such evidence may be sufficient for the State to carry its burden of proving a defendant guilty beyond a reasonable doubt. *People v. Pollock*, 202 Ill. 2d 189, 217 (2002). Indeed, as the majority points out, absent a confession, evidence relating to a defendant's mental state frequently must be proven through circumstantial evidence and related inferences. *Nwosu*, 289 Ill. App. 3d at 494.

¶ 52 To be sure, the State in the present case did present a fair amount of circumstantial evidence from which a trier of fact might infer that defendant was aware of the cannabis. See *supra* ¶ 33. However, the State's inference-based evidence was not the only evidence presented at trial. In Joe's testimony, defendant presented *direct* evidence that he did not have knowledge of the cannabis in the trunk. Specifically, Joe testified that he had acted alone in stealing the cannabis in Colorado, and that the other men in the vehicle had no knowledge of his actions. The State did not present any direct evidence that would refute Joe's testimony as to this version of events. See, *e.g.*, *Ortiz*, 196 Ill. 2d 236 (reversing conviction based on circumstantial evidence where defendant's own testimony was largely unrefuted).

¶ 53 "[A]lthough determinations by the trier of fact are entitled to great deference, they are not conclusive. Rather, [this court] will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Id.* at 259. In

the instant case, while the State presented circumstantial evidence that might ordinarily be sufficient to sustain a conviction, its failure to refute defendant's direct evidence surely raises a reasonable doubt with respect to the element of knowledge. For that reason, I would reverse defendant's conviction for cannabis trafficking.