2018 IL App (1st) 153464-U

SIXTH DIVISION
APRIL 27, 2018

No. 1-15-3464

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. 15 CR 128
	)	
MICHAEL WILLIAMS,	)	Honorable
	)	Angela M. Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The State failed to prove defendant guilty beyond a reasonable doubt of the Class 4 felony of possessing more than 10 grams but not more than 30 grams of cannabis. We reduce defendant's conviction to the Class B misdemeanor of possession of more than 2.5 grams but less than 10 grams of cannabis.

¶ 2 Following a bench trial, the defendant Michael Williams was convicted of the Class 4 felony of possessing more than 10 grams but not more than 30 grams of cannabis, under section 4(c) of the Cannabis Control Act (Act) (720 ILCS 550/4(c) (West 2014)), and sentenced to two years' imprisonment. On appeal, the defendant contends that the State's evidence was

insufficient, entitling him to outright reversal or, in the alternative, a reduction to a lesser offense under the Act. For the following reasons, we reduce the defendant's conviction.

¶ 3 The defendant was charged by way of information under the name "Michael Williams, also known as Michael Deal," with the Class 4 felony of possession of more than 10 but not more than 30 grams of cannabis and possession of cannabis with intent to deliver.

¶ 4 At trial, the State's first witness was Chicago police officer Michael Laurie. Officer Laurie testified that he was near 6708 South Winchester Avenue on the evening of November 23, 2014. There, he observed that the defendant, as well as another man with the last name Casey, were being detained by two other officers: Officer Babicz and Officer Homer.

¶ 5 The following exchange occurred during Officer Laurie's direct examination:

> "Q. Did you have a conversation with either of the two police officers?
>
> A. Yes. I had a conversation with both Officer Homer –
>
> [DEFENSE COUNSEL]: Objection as to any substance of the conversation.
>
> THE COURT: The answer will stand yes, that he had a conversation. You may ask another question.
>
> [STATE'S ATTORNEY]: Yes, Judge.
>
> Q. After you had the conversation with the two officers, what did you do?
>
> A. I was directed to a metal fence post at 6723 South Winchester, to the top of the fence post."

Officer Laurie testified that, from inside the top of the fence post, he recovered "two ziplock bags each containing crushed green leafy substance suspect cannabis."

¶ 6 On cross-examination, Officer Laurie testified that the defendant was already detained when he arrived, and that a total of eight police officers were on the scene. Officer Laurie agreed that the fence post was at 6723 South Winchester, "down the street" from where the defendant was detained. Officer Laurie also acknowledged that he never saw the defendant touch the bags that were recovered from the fence post.

¶ 7 The State subsequently called Chicago police officer Justin Homer. Officer Homer testified that, on the evening of the defendant's arrest, he was working with "multiple partners" and that he was driving an unmarked police vehicle with his partner, Officer Babicz. As he was driving, he observed the defendant walking on the 6700 block of Winchester yelling, "weed, weed." Officer Homer believed that the defendant was advertising the illegal sale of cannabis.

¶ 8 After driving by the defendant, Officer Homer "went to circle around to come back" to the defendant. As he was driving, Officer Homer saw the defendant enter a vacant lot at 6730 South Winchester, pick up a "clump of grass," and place a clear plastic bag beneath the grass. The defendant then "walk[ed] out onto Winchester." Officers Homer and Babicz detained the defendant at 6708 South Winchester.

¶ 9 Officer Homer testified that he proceeded to tell another officer at the scene, Officer Doherty, what he had seen, and that he directed Officer Doherty to the vacant lot. There, Officer Doherty recovered the plastic bag that the defendant placed under the clump of grass. Officer Homer testified that the plastic bag contained 13 Ziploc bags of suspected cannabis, which he inventoried.

¶ 10 On cross-examination, Officer Homer acknowledged that he testified that after he observed the defendant, he drove around the block through the "west alley of Winchester." He agreed that he arrested the defendant at 6708 Winchester, "down the block" from the vacant lot. Officer Homer acknowledged that he searched the defendant and did not find cannabis on his person. However, the defendant was carrying money, a set of keys, and multiple cell phones.

¶ 11 Separate from Officer Homer's live testimony, the parties stipulated that Officer Homer would additionally testify that the two bags recovered from the fence post, as well as the 13 bags from the vacant lot, were sent to the Illinois State Police Crime Lab. The parties further stipulated that a forensic chemist would testify that the contents of the two bags from the fence post tested positive for cannabis and weighed 2.7 grams; the 13 other bags also tested positive for cannabis and weighed 7.7 grams.

¶ 12 The State also introduced into evidence a certified copy of conviction in case number 96 CR 1422301, showing that "Michael Deal" pled guilty to the manufacture and delivery of cocaine. The prosecutor stated that the certified copy of conviction "ha[d] the name Michael Deal which is an AKA that's listed in the *** charging document for the Defendant."

¶ 13 The defense called Lashawn Smith, who testified that she was a friend of the defendant. At the time of the defendant's arrest, Smith lived in a home at 6726 South Winchester next to a vacant lot. On the night of the defendant's arrest, Smith and the defendant spoke by telephone, and he told her that he would come to her residence. She recalled standing in her living room, "looking out the door" when she observed the defendant drive up to her home with "like three other people in the vehicle" whom she did not know.

¶ 14 At that point, Smith testified that "something happened with the kids" in her household, so she left to check on them for "a minute or so." When she returned to her front door, she looked out her window and observed a police officer talking to the defendant, as well as other officers. Smith did not go outside and "didn't get involved" after she saw the police. On cross-examination, Smith agreed that she did not see the police recover anything from the defendant.

¶ 15 Following a continuance, the court found defendant not guilty of possession with intent to deliver, but guilty of possession of cannabis, a Class 4 felony. The trial court remarked that it found that the police officers' testimony and Smith's testimony were credible. However, the court noted that Smith's testimony did not necessarily conflict with the officers' testimony because she "was not looking outside the whole entire time." The court sentenced the defendant to two years' imprisonment.

¶ 16 On appeal, the defendant offers three alternative grounds for why his conviction should be reversed or reduced to a misdemeanor. First, he argues that Officer Homer's testimony was too incredible to support a conviction, entitling him to an outright reversal. In the alternative, he argues that the conviction should be reduced to a Class B misdemeanor because the State failed to prove that he possessed more than 10 grams of cannabis. As a second alternative argument, the defendant seeks reduction to a Class A misdemeanor because the State failed to prove that the defendant had a prior conviction under the name "Michael Deal."

¶ 17 On a challenge to the sufficiency of the evidence, we inquire " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis omitted.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319

(1979)). In so doing, we "must allow all reasonable inferences from the record in favor of the prosecution" (*Davison*, 233 Ill. 2d at 43) and we do not retry the defendant (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)). The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). We will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 18 In relevant part, section 4 of the Act provides:

> "It is unlawful for any person knowingly to possess cannabis. Any person who violates this section with respect to *** more than 10 grams but not more than 30 grams of any substance containing cannabis is guilty of a Class A misdemeanor; provided, that if any offense under this subsection *** is a subsequent offense, the offender shall be guilty of a Class 4 felony." 720 ILCS 550/4(c) (West 2014).

"To support a conviction for possession of a controlled substance, the State must prove that the defendant had knowledge of the presence of the narcotics and that the narcotics were in the defendant's immediate and exclusive control. [Citations.] Possession can be either actual or constructive. [Citation.]" *People v. Tates*, 2016 IL App (1st) 140619, ¶ 19. Actual possession is proved by testimony that the defendant exercised some form of dominion over the contraband, such as trying to conceal it or throw it away. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). "On the other hand, 'constructive possession' arises when the defendant has the intent and capability to maintain control and dominion over the contraband" and "may be proved by

showing that the defendant had knowledge of the presence of the contraband and had immediate and exclusive control over the area where the contraband was found." *Id.* "A defendant's lack of control of the premises will not preclude a finding of guilt if the circumstantial evidence supports an inference that the defendant intended to control the contraband inside." *Tates*, 2016 IL App (1st) 140619, ¶ 20. On the other hand, "Where there is no evidence that the defendant controls the premises, proof of mere presence, even combined with defendant's knowledge of the presence of narcotics, will not support a finding of constructive possession unless there is other circumstantial evidence of defendant's control over the contraband. [Citations.]" *Id.*

¶ 19 We turn to the defendant's primary argument, which attacks Officer Homer's testimony as "unbelievable." Specifically, he argues that it was a "physical impossibility" for Officer Homer to observe the defendant's actions in the vacant lot as he was driving around the block "because buildings would have blocked his view." The defendant emphasizes that Officer Homer's partner, Officer Babicz, did not give corroborating testimony, and he claims that Officer Homer was "contradicted" by Smith's testimony. He asserts that Officer Homer's account of the events is "altogether too unlikely" to satisfy the State's burden of proof.

¶ 20 We emphasize that it is not the role of a reviewing court to second-guess credibility determinations of the trial court, as it is within the province of the trier of fact to determine the credibility of witnesses and resolve any conflicts in the evidence. *Siguenza-Brito*, 235 Ill. 2d at 228. It is well established that "[t]he testimony of a single witness, if it is positive and the witness credible, is sufficient to convict." *People v. Smith*, 185 Ill. 2d 532, 541 (1999). "We will not reverse a conviction simply because the evidence is contradictory or because the defendant claims that the witnesses were not credible." *People v. Ivy*, 2015 IL App (1st) 130045, ¶ 56.

¶ 21 As the factfinder, the trial court was entitled to credit Officer Homer's testimony that he heard the defendant advertising the sale of "weed," that he saw the defendant place a bag in the vacant lot, and that the same bag was recovered by police shortly thereafter. As the trial court noted, Smith did not directly contradict this testimony, as she acknowledged that she was not watching the defendant continuously. Further, the defendant does not dispute the evidence that the bag recovered from the vacant lot contained 13 smaller bags of cannabis that weighed 7.7 grams. From this evidence, the trier of fact could conclude that the State met its burden to prove that the defendant possessed 7.7 grams of cannabis. Thus, the defendant is not entitled to outright reversal of his conviction.

¶ 22 We turn to the defendant's alternative argument for a reduction of his conviction—that the State failed to prove that he "possessed the 2.7 grams of cannabis Officer Laurie found in a fence post, and thus did not prove that he possessed more than ten grams of cannabis as required to find him guilty of Class 4 felony cannabis possession." The defendant thus urges that his conviction should be reduced to a Class B misdemeanor for possession of more than 2.5 but less than 10 grams of cannabis under section 4 of the Act. 720 ILCS 550/4(b) (West 2014).

¶ 23 We thus consider whether the State offered sufficient evidence from which a factfinder could find, *beyond a reasonable doubt*, that the defendant possessed the cannabis recovered from the fence post. Unlike Officer Homer's testimony about the cannabis recovered from the vacant lot, the State offered no testimony that anyone saw the defendant near the fence post, or that he placed anything in that area. As there was no evidence that the defendant controlled this area, or was in the vicinity of the fence post, the State needed to show some "other circumstantial

evidence of defendant's control over the contraband" found in the fence post. *Tate*, 2016 IL App (1st) 140619, ¶ 20.

¶ 24 The State relies solely on Officer Laurie's testimony that, after he spoke to two officers who had detained the defendant *and the other man* named Casey, he "was directed" to the fence post. The State contends that, based on Officer Laurie's testimony, it was a "reasonable inference" that the defendant directed Officer Laurie "to the exact location of the additional cannabis he was selling."

¶ 25 We disagree. There is nothing in the record to support such an inference. Simply saying it does not make it so. We find that Officer Laurie's testimony was insufficient to prove beyond a reasonable doubt that the defendant possessed the cannabis found in the fence post. Officer Laurie merely testified that he was "directed" to the fence post after he spoke to two officers who detained the defendant and another man. There is no evidence of any actual statement by the defendant to the police which would indicate that he had any knowledge or control of the cannabis in the fence post. Further, it is significant that the defendant was not the only person detained by the officers whom Officer Laurie spoke to. Officer Laurie testified that a man named Casey was also detained at the scene along with the defendant. The State offered no testimony about who Casey was, or why he was detained.

¶ 26 Thus, even if a factfinder could reasonably infer that one of the detained individuals directed the police to the fence post, there is nothing to indicate that the information came from the defendant, rather than Casey or another source. Moreover, even if the defendant knew about the cannabis in the fence post, that would not be sufficient without additional evidence that he had *control* over it. *Tates*, 2016 IL App (1st) 140619, ¶ 20. Although we must allow reasonable

inferences from the record in favor of the prosecution, absent any other evidence linking the defendant to the cannabis found in the fence post, we conclude that the State's evidence with respect to that 2.7 grams of cannabis was so "unsatisfactory that it justified a reasonable doubt," as to the defendant's possession of that cannabis. *Ivy*, 2015 IL App 130045, ¶ 18. We note that our conclusion might be different, had the State offered testimony by Officer Homer (or another officer) specifying that the defendant told police about the cannabis in the fence post. The State's failure to do so is puzzling, especially since it elicited Officer Homer's testimony about his observations of the defendant before he was detained.

¶ 27 We thus conclude that the evidence was insufficient for the trial court to find that the defendant possessed more than 10 grams of cannabis. The only sufficient evidence offered by the State showed only that the defendant possessed 7.7 grams of cannabis recovered from the vacant lot. Possession of more than 2.5 grams but not more than 10 grams of cannabis is a Class B misdemeanor. 720 ILCS 550/4(b) (West 2014). "Although an accused cannot be convicted of a crime with which he has not been charged, he 'may be convicted of an offense not expressly included in the charging instrument if that offense is a "lesser included offense" of the offense expressly charged.' " *People v. Williams*, 267 Ill. App. 3d 870, 880 (1994) (quoting *People v. Jones*, 149 Ill. 2d 288, 292 (1992)). Additionally, under Supreme Court Rule 615(b)(3), a reviewing court may reduce the degree of the offense for which the defendant was convicted. Ill. S. Ct. R. 615(b)(3). Accordingly, we reduce the defendant's conviction to possession of more than 2.5 grams but not more than 10 grams of cannabis, a Class B misdemeanor.

¶ 28 Because the defendant's conviction must be reduced to a Class B misdemeanor, we need not address his remaining claim that the State failed to prove he had a prior conviction under the

name "Michael Deal," as was necessary to support a Class 4 felony conviction for possession of cannabis. Unlike the Class A misdemeanor offense for possession of 10 to 30 grams of cannabis (720 ILCS 550/4(c) (West 2014)), the Class B offense for 2.5 to 10 grams does not require a classification enhancement for a subsequent offense (720 ILCS 550/4(b) (West 2014)).

¶ 29 Accordingly, pursuant to Supreme Court Rule 615(b)(3), we reduce the defendant's conviction to unlawful possession of more than 2.5 grams but not more than 10 grams of cannabis, a Class B misdemeanor (720 ILCS 550/4(b) (West 2014)). We note that our original Rule 23 order in this appeal remanded the case for resentencing on that lesser offense. The defendant filed a petition for rehearing, in which he stated that he had completed his sentence for the original felony conviction, such that resentencing was unnecessary. The State filed a response in which it conceded that point. Further, "under Supreme Court Rule 615, this court may correct the mittimus without remanding the cause to the trial court." *People v. Smith*, 2016 IL App (1st) 140039, ¶ 19. Accordingly, the petition for rehearing is allowed. Rather than remand for resentencing, we direct the circuit court of Cook County to modify the defendant's sentencing order to reflect his conviction for the lesser offense of Class B misdemeanor cannabis possession.

¶ 30 Reversed and remanded with directions.