THIRD DIVISION
December 26, 2018

No. 1-16-1602

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. 14 CR 16285
	)	
TERRANCE LYLES,	)	Honorable
	)	Alfredo Maldonado,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County convicting defendant of two counts of aggravated unlawful use of a weapon by a felon is affirmed; the trial court properly denied defendant's motion for a *Franks* hearing where defendant failed to make a substantial showing the police officer-affiant intentionally or recklessly included a falsehood in the warrant application; the record is insufficient to resolve defendant's claim of ineffective assistance of counsel; and the evidence admitted at trial was sufficient to prove beyond a reasonable doubt defendant had constructive possession of two rounds of ammunition found in plain view on the floor of a bedroom defendant admitted he used.

¶ 2 The State charged defendant, Terrance Lyles, with multiple offenses based on contraband seized during the execution of a search warrant from what was allegedly defendant's bedroom and a separate closet allegedly used by defendant. The indictment charged defendant with six counts of unlawful use of a weapon by a felon (UUWF) based on defendant's alleged possession of a box of .22 caliber bullets (two counts), one .38 caliber bullet (two counts), and one .9 mm bullet (two counts). Defendant was also charged with two counts of possession of codeine with intent to deliver. Before trial, defendant filed a motion for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) (hereinafter, a "*Franks* hearing"), which the court denied. Following a bench trial, the circuit court of Cook County found defendant guilty of possession of the .38 caliber bullet and the .9 mm bullet and not guilty of the remaining charges. The court merged multiple counts based on possession of the same bullet and sentenced defendant to four years in the Illinois Department of Corrections on each of the two remaining counts with the sentences to run concurrently.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 In August 2014 police executed a search warrant at a residence where defendant was staying while on electronic home monitoring from a prior offense. As a result of that search police seized contraband that formed the basis of the charges against defendant at issue in this appeal. Before trial defendant filed a motion for a *Franks* hearing. In this case, Officer Nicholas Rumsa completed the affidavit in support of the complaint for a search warrant. The confidential informant who provided Officer Rumsa with the information forming the basis for Rumsa's affidavit also appeared before the judge who issued the warrant.

¶ 6 Defendant's motion alleged the warrant affidavit falsely averred that the police officer-affiant's confidential informant purchased an illegal substance from defendant at the back door

of the residence to be searched because the residence has no back door; the motion also alleged the affiant falsely alleged the same informant had purchased the same substance from defendant at the residence three times a week for three years because defendant had been incarcerated for much of the past three years. During argument on the motion, the State argued, in part: "To suggest that that means that every single week for the last three years like clockwork, like it was the [informant's] job, he went three times that week to that particular address and this defendant ignores the vagaries of narcotics distribution. *** [T]he mere fact that the handful of months over that three year period of time defendant was in jail or on electronic monitoring doesn't at all disprove the claim." Following a hearing, the trial court denied defendant's motion for a *Franks* hearing. The trial court addressed defendant's argument he did not live at the residence for a portion of the three-year period during which the informant stated he purchased narcotics three times per week. The court stated: "I'll take it [(defendant's affidavit)] at its face value defendant was in custody as indicated by the parties. He was on house arrest from January 31st, 2014 to March 30th, the year 2014 and then he was incarcerated in the [Cook County] Department of Corrections for a 54 day period from March 3 to May 23, the year 2014. That's a 114 day period." The court found the informant's affidavit could be "read several different ways." The court began to state "[t]hat doesn't necessarily mean he purchased [narcotics] at that location three times a week in the—" but the court was interrupted by defendant's attorney. Defendant's attorney had argued the averment meant that the informant had purchased narcotics three times per week, every week, for the past three years, and stated to the court: "He said every time he's visited he was able to [purchase narcotics.]" The court continued:

> "I recognize the way you're reading it and I indicate to you there's other ways to read it.

> The question before the Court because of the use of informants, confidential informants, is that there is a possibility, there's a possibility [the informant was telling the truth[1]] and under those circumstances, the motion is denied.
>
> The reason for the ruling, just so the record is clear, concerns the reliability of the confidential informant. Since I have to be one of those magistrates that signs those documents. The magistrate that signs the document ascertains whether or not the individual is reliable. The affidavit I'm looking at, the search warrant indicates an individual who used the name of John Doe signed the complaint in front of Judge Ford. Judge Ford's determination of his [*sic*] is viable since he signed the affidavit—since he signed the search warrant, excuse me."

¶ 7 Three police officers who executed the search warrant testified for the State at defendant's bench trial. Officer Rumsa testified that as he approached the residence to execute the search warrant he saw defendant on the front porch with two other persons. His partner and his sergeant were with him. Officer Rumsa testified defendant told Officer Rumsa that he lived in the basement bedroom of the residence and as a result the officers "went to the basement and began our search there." Officer Rumsa testified that prior to going to the basement defendant and the two other individuals "were detained outside the residence." Officer Rumsa later testified that defendant stated he kept other items in a first-floor closet. Officer Rumsa described the basement as one large room that is used as a bedroom, with a hallway that leads to a laundry area and a closet across from the bedroom. On cross-examination, Officer Rumsa testified

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[1] See *People v Voss*, 2014 IL App (1st) 122014, ¶ 35.

defendant stated he lived in the basement bedroom in response to a question by police. Specifically, Officer Rumsa was asked: "Now, you claim that the defendant told you he stayed in the basement. Is that correct?" and Officer Rumsa responded: "We asked him where he stayed, and he said, yes, he stayed in the basement." Officer Rumsa testified he searched the basement and found a .38 caliber bullet on the floor of the basement bedroom, a .9 mm bullet in a box in the bedroom, and a box of .22 caliber bullets hidden behind a ceiling tile. Regarding the recovery of the bullets, Officer Rumsa specifically testified as follows:

"Q. Was that basement bedroom searched?

A. Yes.

Q. What, if anything, was recovered and where was it recovered?

A. There was—a .38 caliber round was recovered from the ground.

Q. The ground of the basement bedroom?

A. The floor, yes.

* * *

Q. Was anything else recovered from that basement?

A. Yes. There was another 9mm round that was recovered by myself from inside of a box in that bedroom.

Q. And that was one single 9mm bullet. Is that correct?

A. That's correct."

¶ 8 Officer Rumsa also testified police found pills he suspected to be codeine in a shoe that was in a closet on the first floor of the residence, and defendant's voter registration card on the first floor. Also on cross-examination, Officer Rumsa repeated that the .38 caliber round was found, exactly, "In that bedroom on the floor." He also testified on cross-examination that the

.9mm round was found in a box "within that bedroom." Officer Rumsa did not ask defendant if male clothing found in the bedroom belonged to him.

¶ 9 Officer Clifford testified he was part of the team that executed the search warrant. As part of the team he searched a rear first-floor bedroom closet. Officer Clifford testified there was a shoe with a pill bottle containing suspect narcotics and loose pills, which were also suspect narcotics, inside the shoe. Officer Clifford testified the closet was inside a rear first-floor bedroom. Officer Clifford testified he came to search that bedroom because of a conversation he and Sergeant Sloyan had with defendant. Officer Clifford testified two conversations took place between police and defendant. According to Officer Clifford, Officer Rumsa was also present for the first conversation during which defendant "told us that he stayed in the basement." Later, Officer Clifford and Sergeant Sloyan asked defendant if he had any other personal items inside the house that he kept anywhere else, and defendant stated he kept items in the closet of the rear bedroom on the first floor. On cross-examination Officer Clifford testified another officer found proof the location was defendant's residence but that proof was not found in the basement.

¶ 10 Sergeant Sloyan also testified that he was in charge of the team of officers that executed the search warrant. When he and his team arrived at the residence to be searched he observed three people on the front porch including defendant. After Sergeant Sloyan made an in-court identification of defendant as one of the individuals who was on the porch when the officers arrived at the residence to execute the search warrant, Sergeant Sloyan was asked the following questions and gave the following answers:

> "Q. At that point were you able to have a conversation with the defendant regarding that location?
>
> A. We secured him. We secured the location, deemed it safe first, and then we were able to talk to him, present him with a search warrant.

Q. In that conversation what was the defendant able to tell you?

A. That he was indeed the target the search was looking for. I further asked if—where he stayed in the residence.

Q. Was he able to give you an indication of where?

A. He said he stayed in the bedroom in the basement."

Sergeant Sloyan further testified that members of his team proceeded to search the basement. If a member of his team found any evidence they would alert Sergeant Sloyan who would go to their location, photograph the evidence, and recover it. Sergeant Sloyan testified to recoveries that were made in the bedroom in the basement. He stated a .38 caliber bullet was recovered from the basement bedroom floor, a single .9 mm bullet was in a box in the basement bedroom, and a box of .22 caliber bullets were recovered from the ceiling tiles. Sergeant Sloyan testified he asked defendant if there were any other locations inside the residence where he would have personal belongings. He testified defendant directed them to the closet area on the first floor. Sergeant Sloyan also testified that defendant's voter registration card bearing the same address as the residence police searched was recovered on the first floor of the residence. On cross-examination Sergeant Sloyan testified he did not recall receiving anything from any member of his team indicating defendant had clothes in the basement. Sergeant Sloyan identified a picture of a pillow, blanket, and sheet on the first floor. He stated defendant never told him those items were his.

¶ 11 The parties stipulated that the recovered pills contained codeine and the State introduced evidence of defendant's prior convictions.

¶ 12 At the close of the State's case defendant moved for a directed verdict. The trial court denied the motion.

¶ 13 Denise Lyles[2] testified for the defense that she lives in the residence with her two grandsons, an adult male roommate, and defendant—her nephew. Denise Lyles testified her roommate, Douglas Goar[3], stayed in the basement bedroom and had lived there for six or seven years. She testified Goar works as a security guard. She testified she only went into the basement to do laundry and, to her knowledge, no one else went into the basement. Denise Lyles testified specifically that defendant never went into the basement. On cross-examination, Denise Lyles testified that only she and Goar did laundry in the residence. She stated defendant slept in the dining room between the front room and dining room on the floor. Denise Lyles identified a photograph taken on the first floor of the residence of a comforter, pillow and sheet. She stated that was where defendant slept. Defendant was on electronic home monitoring and the device was at the front door. Denise Lyles testified that the shoe in which police found the pills belonged to her grandson. She thought the pills looked like Tylenol 3 and testified she had a prescription for Tylenol 3. She had approximately 30 pills at the time.

¶ 14 Denies Lyles testified she was in the second-floor bathroom when police entered her home. When she saw police, they made her lay on the floor and told her they had a search warrant. She saw defendant when they brought her downstairs. Denise Lyles testified that when she saw defendant "They had him outside." She testified Goar had equipment related to his job as a security guard in the basement. She had observed a security vest, a uniform, a hat, and a weapon and holster. Denise Lyles testified that prior to the search she had observed loose bullets

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[2] The State charged Denise Lyles as a codefendant. Before defendant's trial began, Denise Lyles pleaded guilty to one count of possession of a substance containing codeine with intent to deliver.

[3] Defendant's trial attorney stated multiple times during the proceedings and the State admitted that an investigator for the State interviewed Goar, who had moved out of state. Goar told the investigator he intended to testify as the defense represented, but the State refused to stipulate to the contents of Goar's affidavit. Goar did not testify at defendant's trial.

on the floor in the basement several times while she was in the basement washing. She stated that Goar told her the bullets were his, but she did not relay that information to police when they executed the search warrant.

¶ 15 Defendant testified he had been living in the residence at issue for approximately two and one-half months. He lived there because he was on electronic home monitoring. The electronic home monitoring device was by the front room door. Defendant testified that he was on the front porch when the police arrived. He stated that when they arrived they told him to get on the ground outside of the house. Police performed a pat-down search. Defendant testified he talked to the sergeant. Defendant testified he told the sergeant he slept in the living room on the floor. Defendant identified a photograph of his pillow, sheet, and blanket where he slept. Defendant testified his voter registration card and personal items (deodorant, soap, toothpaste) were all in the same area as his pillow, sheet, and blanket in a cabinet above his head. Defendant testified he did not tell police he stayed in the basement, and he did not have a conversation with anyone other than the sergeant. He identified the shoe in which pills were found as belonging to his nephew.

¶ 16 Defendant testified that in the time he lived in the residence he never had occasion to go into the basement. He never had occasion to have a gun or bullets. On cross-examination, defendant testified he knew Goar was an armed security guard, but he did not know that if he was on electronic home monitoring he cannot be around any weapons. He reiterated he never went into the basement. He testified his fiancé would take his laundry to her home.

¶ 17 In its oral ruling, the trial court stated the issue was the contention by the defense that defendant was not a resident of the home or sleeping in the basement bedroom. The court noted the testimony by the three officers that defendant stated he lived in the basement. The court stated it "had the opportunity to observe the demeanor of all three of those officers and all three

of the officers' testimony in the court's view was credible." The court found Denise Lyles' testimony at parts "less than credible." As for Denise Lyles' testimony about Goar and defendant's testimony he never went into the basement and his fiancé did his laundry, the court found the testimony "a little odd, and frankly not that believable that the defendant's contention that he never went into that basement." The court found defendant not guilty of possessing the box of .22 caliber bullets found in the ceiling tile and not guilty of possessing the pills recovered from the rear first-floor bedroom closet. The court found defendant guilty of possessing the two bullets found on the floor of the basement bedroom. The court denied defendant's posttrial motion. Following a sentencing hearing, the court merged the counts into one for each bullet for which defendant was found guilty of UUWF and sentenced defendant to two four-year terms of imprisonment to run concurrently.

¶ 18 This appeal followed.

¶ 19 ANALYSIS

¶ 20 Defendant argues the trial court erred when it denied his motion for a *Franks* hearing, he received ineffective assistance of counsel when his trial attorney failed to move to suppress his alleged statements to police that he lived in the basement, and the State failed to prove beyond a reasonable doubt that he possessed the two rounds of ammunition. We address each argument in turn.

¶ 21 1. *Franks* Hearing

¶ 22 Defendant argues the trial court erred in denying him a *Franks* hearing because the trial court based its judgment solely on the appearance of the informant before the magistrate who issued the warrant and because he made a substantial preliminary showing that police included false statements in the complaint for a warrant. A *Franks* hearing allows a defendant to challenge the truthfulness of averments in an affidavit supporting a complaint for a warrant.

Franks, 438 U.S. at 155. "[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. [Citation.]" (Internal quotation marks omitted.) *People v. Chambers*, 2016 IL 117911, ¶ 35 (quoting *Franks*, 438 U.S at 155-56). "The Court emphasized that the rule it announced in *Franks* 'has a limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded.' [Citation.] Further, the 'deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.' [Citation.]" (Internal quotation marks omitted.) *Id.* ¶ 36 (quoting *Franks*, 438 U.S. at 167, 171). In *Chambers*, our supreme court held "the presence of the informant at the *ex parte* hearing on the warrant application does not, standing alone, foreclose the possibility of a *Franks* hearing. When the defendant claims intentional, knowing, or reckless conduct by the affiant officer resulting in the presentation of false information to the issuing judge, the presence of the informant who allegedly provided that information is merely a factor to be considered when deciding whether a substantial preliminary showing has been made." *Id.* ¶ 63. We review a trial court's ruling on a motion for a *Franks* hearing *de novo*. *Id.* ¶ 79.

¶ 23 We first address defendant's contention the trial court denied the motion for a *Franks* hearing solely because the informant appeared before the magistrate issuing the warrant. At the hearing on the motion the parties argued extensively about the meaning and veracity of the informant's statement that he had purchased narcotics from defendant at the residence three times per week during the previous three years. The court expressly accepted at face value that defendant was in custody as indicated by the parties. Based on the trial court's recitation of its

holding, we find the court was concerned with the ability of the claims in the complaint for a search warrant to support a finding of probable cause in light of the allegations in the motion for a *Franks* hearing and defendant's affidavit. The trial court framed the issue before it as follows: "To get to that stage where the Court will authorize a *Franks* hearing, it must be a possibility, something close to a possibility presented to the Court for the purpose of setting that hearing. For example, a plane ticket which shows the individual is out, couldn't have been there, the individual is at another location." After recognizing that the informant's statements to the officer-affiant could be read another way, the court found "there is a possibility." This "possibility" is that the events transpired as the informant stated, which is a factor in determining whether a motion for a *Franks* hearing should be denied. See, *e.g.*, *Voss*, 2014 IL App (1st) 122014, ¶ 22 (and cases cited therein).

¶ 24 Here, the trial court said nothing about the appearance of the informant before the magistrate issuing the warrant. Only after the trial court initially stated the motion is denied for the reasons it explained with regard to the possibility of the informant's statements being true did the court go on to add the rationale about the appearance before the magistrate. The court clearly did consider the informant's appearance at the hearing on the complaint for a warrant, but the court's ruling read as a whole reveals it did not apply a bright line rule that the appearance of the informant before the judge prior to the issuance of the search warrant removes the case from the ambit of *Franks*. See *Chambers*, 2016 IL 117911, ¶ 31. Based on our review of the record, we find the trial court did not foreclose the possibility of a hearing based on the presence of the informant at the hearing on the complaint for a search warrant. See *id*. ¶ 63. Rather, the court properly considered the presence of the informant at the hearing as one factor to be considered in deciding whether a substantial preliminary showing had been made. See *id*. Accordingly, defendant's argument fails.

¶ 25 Next, we address defendant's argument he made a substantial preliminary showing that police knowingly and intentionally, or with reckless disregard for the truth included false statements in the complaint for a warrant. To make the required substantial preliminary showing and obtain a hearing, several conditions must be met. First, "the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. [Citation.]" *Chambers*, 2016 IL 117911, ¶ 92 (quoting *Franks*, 438 U.S. at 171). Second, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth. [Citation.]" *Id.* Third, "those allegations must be accompanied by an offer of proof" and must "point out specifically the portion of the warrant affidavit that is claimed to be false. [Citation.]" *Id.* Finally, the defendant must furnish "[a]ffidavits or sworn or otherwise reliable statements of witnesses. [Citation.]" *Id.* If these requirements are met, "the next step is for the court to examine the warrant affidavit, setting aside the allegedly false or reckless statements, to determine whether sufficient content remains to support a finding of probable cause." *Chambers*, 2016 IL 117911, ¶ 93 (citing *Franks*, 438 U.S. at 172). This court has identified a variety of relevant facts to consider in determining whether a substantial preliminary showing has been made. See *Voss*, 2014 IL App. (1st) 122014, ¶ 22. Those factors include, but are not limited to:

> "(1) whether defendant's motion is supported by affidavits from interested parties or disinterested third persons ([citation]);
>
> (2) whether defendant has available any objective evidence to corroborate the affidavits such as records of hours worked or receipts for travel or other activities;
>
> (3) whether the information in the affidavits, accepted as true, renders it impossible for the confidential informant's testimony to be true ([citations]);

> (4) whether the matters asserted by defendant are in the nature of an alibi or a general denial that he engaged in the conduct giving rise to probable cause ([citation]);
>
> (5) whether the information supporting probable cause is the result of a police investigation or information supplied by an informant or other confidential source;
>
> (6) if probable cause is based on information from a confidential source, whether the warrant affiant took steps to corroborate that information ([citation]);
>
> (7) the facial plausibility of the information provided by the confidential source ([citation]);
>
> (8) whether the affiant had any prior experience with the confidential source that would enhance the source's reliability ([citation]);
>
> (9) whether there exist any circumstances that should counsel against believing the information provided by the confidential source ([citation]); and
>
> (10) whether the confidential source appeared before the issuing magistrate who had the opportunity to examine the source and asses his or her credibility ([citation])." *Id.* ¶ 22.

¶ 26 Applying the *Voss* factors to this case, we find defendant failed to make the required substantial preliminary showing. Defendant did not supply affidavits from disinterested third persons but instead relies only on his own affidavit. But see *Chambers*, 2016 IL 117911, ¶ 83 ("the mere fact that an affidavit serves the defendant's interests does not render it inherently incredible"). Records of defendant's incarceration and locations of house arrest are objective evidence corroborating portions of defendant's affidavit, but defendant did not attach photographs of the residence at issue to depict the lack of a back door. Nonetheless, the trial

court did not afford the fact defendant did not reside at the residence continuously for the three months preceding the execution of the search warrant much weight because, when viewed in light of the next factor, the averments, accepted as true, do not render it impossible for the informant's testimony to be true. Defendant's trial attorney construed the informant's statements to mean the informant purchased narcotics from defendant three times per week, every week, for the past three months. The trial court found, and we agree, "there's other ways to read it." The complaint for search warrant reads: "J. Doe has been to this residence three times per week during the past 3 years, and has always been able to purchase MDMA from [defendant.]" The allegation in the complaint for search warrant is not a clear and unequivocal statement that the informant purchased narcotics three times per week, every week, for the past three years. The allegations can reasonably be read to mean the informant had been to the residence to purchase narcotics three times in some weeks during the previous three years. Additionally, if that specific allegation in the complaint were removed sufficient content would remain to support a finding of probable cause. *Chambers*, 2016 IL 117911, ¶ 93 (citing *Franks*, 438 U.S. at 172). The complaint for search warrant also alleges that the informant had purchased narcotics at the residence from defendant within the last 48 hours. See, *e.g.*, *People v. Blake*, 266 Ill. App. 3d 232, 241 (1994) ("even if the hearsay statements attributed to the informant that implicate defendant in the first transaction are disregarded, the remaining content of the search warrant complaint was more than sufficient to establish probable cause that a controlled substance would be found at defendant's residence.").

¶ 27 The matters asserted by defendant are in the nature of an alibi in that he averred he was not at the residence when, in his view, the informant alleged he purchased narcotics at the residence. However, for the reasons discussed above, this factor does not weigh in defendant's favor. The information supporting probable cause was supplied by an informant and police took

steps to corroborate the informant's information. The complaint for search warrant states the officer obtained a photograph of a person using the nickname the informant used when describing the person he bought narcotics from and the informant positively identified defendant as that person. Officers then took the informant to the residence at issue and the informant identified it as the location where he had purchased the narcotics within the prior 48 hours. The complaint states defendant has used the address the informant identified in prior arrests.

¶ 28 The information the informant provided is facially plausible, but the complaint for search warrant does not indicate whether or not the officer had any prior experience with the informant that would enhance the informant's reliability. Defendant points to no other circumstances that should counsel against believing the information provided by the informant beyond what has already been addressed, and the informant did appear before the magistrate who had the opportunity to examine the informant and assess his credibility.

¶ 29 As for defendant's averment the residence has no back door, the allegation, even if true, would not entitle defendant to a hearing.

> "It is relatively difficult for a defendant to make the 'substantial preliminary showing' required under *Franks*. Allegations of negligent or innocent mistakes do not entitle a defendant to a hearing, nor do conclusory allegations of deliberately or recklessly false information. The defendant must identify specific portions of the warrant affidavit as *intentional or reckless* misrepresentations, and the claim of falsity should be substantiated by the sworn statements of witnesses. [Citation.] To obtain a hearing, the defendant must also show that if the *deliberately or recklessly false* statements were omitted, or if the *deliberately or recklessly misleading* omissions included, probable cause would

> have been absent. [Citation.]" (Emphases added.) *United States v. McMurtrey*, 704 F.3d 502, 509 (7th Cir. 2013).

¶ 30 The complaint for a search warrant in this case states the informant first went to the front porch of the residence and asked defendant if he had any narcotics. According to the informant defendant said he did and directed the informant to follow defendant to the rear of the house. The complaint states defendant "then went into the residence, while [the informant] was instructed to stand outside rear door and wait." Defendant then "returned from inside the house with" the narcotics. Defendant has failed to come forward with evidence "tending to show that the purported [falsehood] amounted to deliberate or reckless misrepresentations;" nor has he shown that the inaccuracies "give rise to an inference of a disregard for the truth, [or] submitted any additional evidence from which such an inference could be drawn." See *United States v. Shields*, 783 F. Supp. 1058, 1065 (N.D. Ill. 1991). Defendant's motion for a *Franks* hearing alleges the officer's use of the informant was "obviously staged" because the residence "has no rear door." With the exception of his own self-serving affidavit, defendant "provides no evidentiary basis whatsoever for that claim. Conclusory, self-serving statements are not enough to obtain a *Franks* hearing. [Citation.] If [defendant] believes that [the officer-affiant] lied, he must support that allegation with an offer of proof, [citation], which he has not done." *United States v. Johnson*, 580 F.3d 666, 671 (7th Cir. 2009).

¶ 31 In *Johnson*, the defendant argued that the officer's complaint contained false statements the officer made intentionally or with reckless disregard for the truth. *Id*. at 670. The informant had allegedly told the officer he had been inside the defendant's home at least three times in the past 30 days and the defendant regularly sold narcotics from that address. The informant also provided a physical description of the defendant. *Id*. at 668. The defendant argued the informant's allegations were false because no one other than the defendant, his girlfriend, and

their children had been inside the apartment in the last 30 days and the physical description of the defendant and the interior of the defendant's apartment were inaccurate. *Id*. at 670. The court dismissed the argument the description of the interior of the apartment was false. *Id*. The court found that even if the informant was lying about visiting the apartment, the defendant presented no evidence the officer had reason to question the accuracy of the informant's statement about visiting the apartment. *Id*. The court also found that the defendant presented no evidentiary basis for his claim the officer lied intentionally. Regarding the incorrect physical descriptions of the defendant and the apartment, the court found the description irrelevant because if the officer "had known they were inaccurate, this would not necessarily have led him to believe that the informant was lying altogether because the mistakes were minor enough to have been innocent. [Citations.]" *Id*. at 671.

¶ 32 Similarly, in this case defendant has presented no evidence the officer-affiant had reason to question the accuracy of the informant's statement he was directed to the rear of the house and told to wait by a back door. The officer verified the address the informant provided by driving him to that address and confirming it was the location he purchased narcotics. There is no evidence the officer drove to the rear or that he would have had reason to. There is also no evidence the officer lied intentionally. Defendant's claim the complaint was obviously staged because the residence has no back door is conclusory and the claim the officer lied intentionally about it not accompanied by an offer of proof. See *Chambers*, 2016 IL 117911, ¶ 92 (citing *Franks*, 438 U.S. at 171). Finally, we similarly find that if, *arguendo*, the officer-affiant in this case knew the informant's statement about the back door was inaccurate it would not have necessarily led him to believe the informant was lying altogether. The informant informed the officer-affiant he purchased narcotics from defendant at the residence. We find that whether the transaction occurred at the front door, back door, or side door is not "the kind of material

misrepresentation contemplated by *Franks*." See *U.S. v. Pritchard*, 745 F.2d 1112, 1119-20 (7th Cir. 1984) (whether device used to circumvent long distance telephone charges was "attached to the telephone" or "held next to" a telephone was not a material misrepresentation).

¶ 33 For the foregoing reasons, we hold defendant failed to make a substantial preliminary showing that a false statement necessary to the determination of probable cause was intentionally, knowingly, or recklessly included by the officer-affiant in the complaint for a search warrant. Accordingly, the trial court properly denied defendant's motion for a *Franks* hearing.

¶ 34 2. Ineffective Assistance of Counsel

¶ 35 Defendant argues he received ineffective assistance of counsel when his trial attorney failed to file a motion to suppress his alleged statements to police reflecting that he stayed in the basement of the residence. Defendant argues the State relied heavily on these statements and but for their admission he could not have been found guilty of UUWF.

> "A claim of ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 *** (1984). [Citations.] Under this test, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [Citation.] A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. [Citation.]" *People v. Henderson*, 2013 IL 114040, ¶ 11.

To establish prejudice "the defendant must demonstrate that the unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." *Id*. ¶ 15. Where, as here, the claim of

ineffectiveness is based on the failure to file a suppression motion, "the record will frequently be incomplete or inadequate to evaluate that claim because the record was not created for that purpose. [Citation.] In such instances, the ineffective assistance claim may be better suited to collateral proceedings. [Citation.]" *People v. Williamson*, 2018 IL App (3d) 150828, ¶ 29.

¶ 36 In this case defendant argues it was ineffective assistance not to move to suppress the statements because he allegedly made the statements when he was questioned by police while in custody, and the police did not inform him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

> "In *Miranda*, *** the Supreme Court held that a defendant's statements are inadmissible when elicited during a custodial interrogation unless the State 'demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.' The term 'custodial interrogation' means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.] Whether a person is in custody and subject to *Miranda* warnings requires consideration of the circumstances surrounding the interrogation and whether, under those circumstances, a reasonable person would have felt at liberty to terminate the interrogation and leave. [Citation.] 'With respect to the latter inquiry, the accepted test is what a reasonable person, innocent of any crime, would have thought had he or she been in the defendant's shoes.' [Citation.]" *People v. Beck*, 2017 IL App (4th) 160654, ¶ 69.

¶ 37 The State responds (1) defendant failed to establish police did not give him *Miranda* warnings, (2) defendant was not in custody for *Miranda* purposes when police spoke to him, and (3) the failure to object was a strategic choice by defendant's trial attorney.

¶ 38 We must agree with the State that the record is inadequate to evaluate defendant's ineffective assistance claim. See *People v. Bew*, 228 Ill. 2d 122, 133-35 (2008) (finding record on appeal insufficient to address argument that evidence seized as a result of dog sniff was inadmissible based on duration of stop, initial lawfulness of detention, or training of canine and handler where no motion to suppress was filed). We have reviewed the record and the State is correct that "no one asked the police whether they provided the warnings and defendant did not testify that he did not receive them." Therefore, defendant's claim of ineffective assistance of counsel based on failure to file a motion to suppress his alleged statement to police is better suited to collateral proceedings where both defendant and the State have an opportunity to develop a factual record bearing precisely on the issue. *People v. Veach*, 2017 IL 120649, ¶ 46 ("ineffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is incomplete or inadequate for resolving the claim"). Accordingly, we do not reach the merits of the issue; but we note that "defendant is not precluded from raising this issue in postconviction proceedings, where the record may be adequately developed. [Citation.]" *Williamson*, 2018 IL App (3d) 150828, ¶ 34 (citing *Bew*, 228 Ill. 2d at 135).

¶ 39 3. Sufficiency of the Evidence

¶ 40 Finally, defendant argues the State failed to prove he was in constructive possession of the two bullets beyond a reasonable doubt. Specifically, defendant argues (1) the State did not prove him guilty beyond a reasonable doubt because the officers' testimony that defendant lived in the basement was not believable, and (2) accepting that testimony the evidence still fails to prove defendant had constructive possession of the bullets in question.

> "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. [Citation.] The trier of fact is responsible for assessing the credibility of the witnesses, weighing the testimony, and drawing reasonable inferences from the evidence. [Citation.] Under this standard, a reviewing court resolves all reasonable inferences in favor of the State. [Citation.] A criminal conviction will not be set aside on appeal unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. [Citation.]" *People v. Stewart*, 406 Ill. App. 3d 518, 525 (2010).

¶ 41 Defendant argues the officers' testimony was not believable because no physical trace of him was found in the basement and the only physical evidence connecting defendant to the residence was found on the first floor, where the defense witnesses testified defendant lived. He notes none of the officers disputed defendant's testimony his electronic home monitoring device was on the first floor, no officer testified they found any clothing belonging to defendant in the basement, and police testified defendant's voter registration card was found on the first floor. Defendant also argues it is incredible that he told police he lived in the basement, where contraband was found, but he also told police he kept personal items in a closet, where contraband was also found.

¶ 42 "In reviewing the evidence we will not substitute our judgment for that of the trier of fact. [Citation.] The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact. [Citation.]" *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006).

> "Thus, it is our duty in the case at bar to carefully examine the evidence while giving due consideration to the fact that the court and jury saw and heard the witnesses. [Citations.] If, however, after such consideration we are of the opinion that the evidence is insufficient to establish the defendant's guilt beyond a reasonable doubt, we must reverse the conviction. [Citations.] *** While credibility of a witness is within the province of the trier of fact, and the finding of the jury on such matters is entitled to great weight, the jury's determination is not conclusive. Rather, we will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. [Citations.]" *People v. Smith*, 185 Ill. 2d 532, 541-42 (1999).

¶ 43 Putting aside defendant's argument he was questioned in violation of *Miranda*, in this case, we cannot say the officers' testimony is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. The trial court heard the testimony that someone else lived in the basement who might be expected to possess bullets, and the testimony that defendant slept on a pallet near his monitoring device and kept his belongings in a nearby cabinet. The court rejected that testimony, specifically finding one of the witnesses "less than credible." The determination of the credibility of the witnesses and the resolution of the conflicting testimony was the responsibility of the trier of fact, and we will not substitute our judgment for that of the trier of fact. *Sutherland*, 223 Ill. 2d at 242. We recognize that determination is not binding or conclusive. *People v. Zaibak*, 2014 IL App (1st) 123332, ¶ 64. Nonetheless, in this case the evidence is not "so unsatisfactory, unreasonable, or improbable that it raises a reasonable doubt as to defendant's guilt." See *id*.

¶ 44 The officers testified defendant told them he stayed in the basement when they first approached the residence. Sergeant Sloyan testified he asked defendant specifically "where he

stayed in the residence." They then testified that they asked defendant directly whether he had personal items anywhere else in the residence, and he told them he did, in the first-floor rear bedroom closet. We cannot reweigh the credibility of the officers' testimony as to the substance of these questions and answers. Given that the officers were there to execute a search warrant, it is not improbable or unreasonable that the officers executing the search warrant would ask these types of questions. Nor is it improbable or unreasonable that defendant would have personal property in multiple locations in the residence. Accordingly, defendant's argument must fail. *Smith*, 185 Ill. 2d at 542 ("we will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt").

¶ 45 Next, defendant argues that if the officers' testimony is accepted, the State failed to prove defendant had constructive possession of the bullets at issue.

> "When a defendant is not found in actual possession, the State must prove constructive possession. [Citation.] To establish constructive possession, the prosecution must prove that the defendant (1) had knowledge of the presence of the firearm and ammunition and (2) exercised immediate and exclusive control over the area where the firearm and ammunition were found. [Citations.] 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. [Citation.] 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. [Citation.] The defendant's control over the location where weapons are found gives rise to an inference that he possessed the weapons. [Citation.] Habitation in the premises where contraband is discovered is sufficient evidence of control to constitute constructive

> possession. [Citation.] *** In deciding whether constructive possession has been shown, the trier of fact is entitled to rely on reasonable inferences of knowledge and possession, absent other factors that might create a reasonable doubt as to the defendant's guilt. [Citation.]" (Internal quotation marks omitted.) *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17.

¶ 46 Defendant argues the State failed to prove he had knowledge of the presence of the bullets or that he exercised immediate and exclusive control over the area where the bullets were found. Here, we quote defendant's argument in his opening brief to this court:

> "Even if Lyles had lived in the basement apartment of the building in question, it was undisputed that the bullets Lyles was convicted of possessing were found in a part of the basement that Lyles would not have exercised exclusive control over—the laundry room that Denise Lyles used to do laundry. (R. BB5). In addition, no evidence was presented at trial to support the conclusion that Lyles even knew of these bullets that were on the floor of the laundry room in the basement. The State relied upon the officers' testimony that Lyles told them he stayed in the basement of the building. But even if Lyles had lived in the basement, it doesn't follow that he knew about two bullets on the floor of the laundry room."

¶ 47 Defendant's argument clearly misstates the record. The record citation he provided is to Denise Lyles' testimony that she went into the basement only to wash. Defendant ignores or misstates the following testimony by Officer Rumsa on direct examination:

> "Q. What, if anything, was recovered and where was it recovered?
>
> A. There was—a .38 caliber round was recovered from the ground.
>
> Q. The ground of the basement bedroom?

A. The floor, yes."

* * *

Q. Was anything else recovered from that basement?

A. Yes. There was another 9mm round that was recovered by myself from inside of a box in that bedroom"

And then Officer Rumsa testified as follows on cross-examination:

"Q. Where exactly in the basement was that located?

A. In that bedroom on the floor.

* * *

Q. You also said that you found another 9mm round in a box?

A. Yes that's correct?

Q. Where was that box located?

A. Somewhere within that bedroom."

Sergeant Sloyan testified as follows:

"Q. Can you tell the Court about any of the recoveries that were made in the bedroom that the defendant indicated was his in the basement?

A. Yes.

The team went into the basement. Recovered was ammunition on the floor. I believe that was a .38 special caliber bullet. Also in a box was a 9mm round, single round. In the ceiling tiles there was a box of .22-caliber bullets."

Later, Sergeant Sloyan identified a photograph of "the 9mm found that was found in the basement bedroom" and "the .38 round that was found in that bedroom also on the floor." He was asked the following question and gave the following answer on direct examination:

"Q. Where in the basement was it found, if you know?

A. I know it was in that basement room. I don't remember exactly where in that room."

Then on cross-examination, Sergeant Sloyan was asked the following questions and gave the following answers:

"Q. Now, were you actually there when the 9mm single round was recovered?

A. Yes. I am the one that recovered it.

* * *

Q. That was in the bedroom of the basement?

A. Yes.

Q. There also was a .38 round recovered by Officer Zavala. Where was that found in relationship to the 9mm?

A. I don't recall exactly where. I know it was in the same bedroom."

We find no reasonable interpretation of the record from which defendant's appellate attorney can make the argument propounded in its brief.

¶ 48 Defendant also cites *People v. Maldonado* in support of the argument the State failed to prove he was in constructive possession of the bullets. There, this court found the State failed to present evidence that the defendant had knowledge of the contraband found in a residence. *Maldonado*, 2015 IL 131874, ¶ 24. In that case, "[t]he evidence the trial court found credible was, in a nutshell: officers searched a residential location that contained men's and women's clothing, no one was on the scene before, during or after the search, ammunition and heroin hidden in a statue was found on the premises along with three documents that bore defendant's name and the address of the premises searched, and a certified copy of defendant's felony conviction was admitted into evidence." *Id.* ¶ 24.

¶ 49 In this case, unlike in *Maldonado*, there was evidence before the court (which defendant might challenge in postconviction proceedings) that defendant admitted he resided in the bedroom where the bullets were found. *Cf., id.* ¶ 34. "Habitation of the location where contraband is found can constitute sufficient evidence of control to establish constructive possession. [Citations.]" *Id.* ¶ 29. We find the evidence was sufficient to prove the control element of constructive possession beyond a reasonable doubt. *Id.* (citing *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999)). "It is well established that a defendant's control over the premises where contraband is located gives rise to an inference of knowledge of that contraband." *Id.* ¶ 39. "However, while knowledge can be inferred based on control, it remains a fundamental principle that knowledge is a necessary element of the offense *** of felony possession of ammunition UUWF that must be proven beyond a reasonable doubt." *Id.* ¶ 40. In this case, the evidence was sufficient to prove defendant's knowledge of the bullets at issue where the evidence admitted at trial established defendant had control over the bedroom and because they were in plain view in his bedroom. See *People v. Macias*, 299 Ill. App. 3d 480, 487 (1998) (distinguishing that case from application of rule that knowledge may be inferred when contraband is in plain view to the defendant); *People v. Hill*, 226 Ill. App. 3d 670, 673 (1992) (finding evidence sufficient to support finding of guilt of constructive possession of a weapon where weapon was "clearly visible in Hill's bedroom cabinet"). We find the evidence admitted at trial was sufficient to sustain defendant's conviction beyond a reasonable doubt.

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 52 Affirmed.