

No. 1-13-0912

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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. 12 CR 1724
)	
LORENZO CHO,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Evidence sufficient to sustain defendant's convictions for possession of cocaine and cannabis with intent to deliver; defendant waived arguments relating to admissibility of evidence and shifting of the burden of proof.
- ¶ 2 Following a bench trial, defendant Lorenzo Cho was found guilty of possession with intent to deliver 100 grams or more but less than 400 grams of cocaine, and 30 grams or more but less than 500 grams of cannabis, then sentenced to concurrent, respective terms of nine and

three years' imprisonment. On appeal, defendant challenges the propriety of that judgment, essentially claiming that he was not found guilty beyond a reasonable doubt.

¶ 3 The charges filed against defendant arose from the execution of a search warrant by a team of Chicago police officers on December 20, 2011, at 4418 North St. Louis Avenue in Chicago, Illinois. The officers entered the designated third floor apartment, and during the search that followed, the officers recovered, *inter alia*, a digital scale, a ledger, a denim bag containing marijuana, a white container of cocaine, and a zip-lock bag containing \$19,000 in cash.

¶ 4 At trial, Chicago police officer Brian Tucker testified that he has executed approximately 50 search warrants in his 16 years on the force. About 7 a.m. on December 20, 2011, he and 20-to-30 other officers, including a SWAT team, executed a search warrant in the third floor apartment (the apartment) on the south side of the building at 4418 North St. Louis Avenue. Upon arriving, members of the SWAT team entered and secured the apartment, after which Officer Tucker and the rest of the team entered. At that time, Officer Tucker saw a man, who he identified in court as defendant, in the living room with two men, two women, and a child. Officer Tucker then began to search the apartment, focusing first on the bedroom designated by a canine officer who had initially surveyed the apartment.

¶ 5 Upon entering the bedroom, Officer Tucker saw a small dresser to the right of the door, a bed to the left, another dresser straight ahead next to a window, and a garment rack on the wall. Officer Tucker testified that he found insurance documents addressed to defendant at 4418 North St. Louis in the dresser by the window. Defense counsel objected, "unless we have those documents," and the trial court overruled his objection. In the top drawer of the same dresser, Officer Tucker found a small digital scale and several knives covered in white residue, and some

plastic sandwich bags. Based on his training and experience, he believed the white residue to be cocaine. He also found approximately \$480 in the dresser near the bed, and a ledger reflecting weights, measurements, and colors, on top of the garment rack.

¶ 6 Officer Tucker testified that all of the documents he found in that bedroom were in defendant's name, then identified the exhibits as follows: People's Exhibit 1, a photograph of the bedroom he searched; People's Exhibit 2, a photograph of two auto insurance documents addressed to defendant; People's Exhibit 3, a photograph of the scale, sandwich bags and knives; People's Exhibit 4, a photograph of the dresser drawer containing money; and People's Exhibit 5, a photograph of the ledger.

¶ 7 When Officer Tucker was asked why he believed the item he found was a ledger, defense counsel objected that Officer Tucker had not been qualified as an expert. The trial court overruled the objection, stating "you can inquire on that." Officer Tucker testified that based on his training and experience as an officer, the terms "white" and "green" written in the ledger refer to cocaine and marijuana, respectively, and the references to 10 grams and half a pound therein refer to weights of narcotics.

¶ 8 Officer Tucker and Sergeant Daniels then searched a hallway closet to which the canine officer directed them, and found clothes, shoes, numerous bags, and a black safe. On top of the safe, they found court documents in defendant's name and an I.D. card bearing defendant's name. When he and Sergeant Daniels opened the locked safe, they found a denim bag containing marijuana, a white container of cocaine, and a zip-lock bag containing about \$19,000 in cash. Officer Tucker identified People's Exhibit 6 as a photograph of the hallway closet he searched, People's Exhibit 7 as a photograph of a Walgreen's prescription label in defendant's name and a Sheriff's Work Alternative Program (SWAP) I.D. card bearing defendant's name and picture,

People's Exhibit 8 as a photograph of a document from the Circuit Court of Cook County bearing defendant's name, People's Exhibit 9 as a photograph of the denim bag with marijuana, People's Exhibit 10 as a photograph of cocaine and money, and People's Exhibits 11 and 12 as photographs of the white container of cocaine. The items recovered from the bedroom and closet were then inventoried.

¶ 9 On cross-examination, Officer Tucker stated that he never saw defendant in the bedroom and closet that he searched and acknowledged that the case report he wrote reflects that Maria Garcia is the owner of the apartment. He further acknowledged that he did not know whose bedroom he searched or when the knives, baggies and digital scale were placed in the dresser and who placed them there. He also acknowledged that the prescription depicted in people's Exhibit 7 is dated October 22, 2011, lists 2620 West Balmoral as defendant's address, and states that the prescription may be refilled twice before October 21, 2012; and further, that police did not recover any phone, cable, light or rent bills in defendant's name, and that Yobar Pardo was arrested for possession of a handgun during the search.

¶ 10 The State then called Maria Garcia, who testified that at the time of the incident, she rented the apartment and lived there with her children Yobar Pardo, Ada Pardo, Jimmie Pardo, and granddaughter Sumayah, who is Ada's daughter. When asked about her relation to defendant, she repeatedly responded that she had "nothing to say." The trial court appointed a public defender, who spoke with Garcia during a recess to assess whether her Fifth Amendment right against self-incrimination was implicated. Counsel informed the court that those rights were not implicated, save for Garcia's testimony regarding her being the leaseholder of the apartment, to which she had already testified and did not wish to recant. Direct examination of Garcia by the State then resumed.

¶ 11 Garcia testified that she has known defendant for five years and that he is her granddaughter's father. At the time of the incident, he did not live in the apartment, never stayed there overnight, and did not have mail sent there, but visited about twice a week to see his daughter, and played with her and watched television in Ada's room. She testified that defendant was at the apartment when the police arrived on the morning of the incident, but she did not know when he had arrived. During the search, police placed her, Yobar and Sumayah in the living room, and Ada, Jimmie and defendant elsewhere in the apartment. Garcia identified People's Exhibit 1 as a photograph of Ada's bedroom, the same room where defendant would spend time when he visited. Garcia testified that she was unaware that a black safe was inside the hallway closet, but did know that the closet contained blankets, bags of toys, and an air conditioner. Garcia identified People's Exhibit 6 as a photograph of that closet. Garcia also testified that she did not know of or see defendant dealing drugs inside the apartment, and denied that, during the search, police officers asked her whose safe it was and she told them that it belonged to defendant.

¶ 12 Sergeant Donald Daniels testified that he assisted in executing the search warrant at the apartment, and, in doing so, spoke with Garcia. When he asked her who owned the safe in the hallway closet, she told him it belonged to defendant. On cross-examination, Sergeant Daniels stated that he did not reduce Garcia's statement about the safe to writing, nor her statement that her daughter's boyfriend lived in the apartment with her family.

¶ 13 The parties then stipulated to the chain of custody of the drugs recovered in the apartment and that forensic testing revealed that the suspect cocaine tested positive for 104.4 grams of cocaine, and the suspect cannabis tested positive for 163.8 grams of cannabis. At that point, the State rested its case-in-chief and defendant elected not to testify or to present any evidence.

¶ 14 Following closing arguments, the trial court found defendant guilty of possession with intent to deliver between 100 and 400 grams of cocaine and possession with intent to deliver between 30 and 500 grams of cannabis, and not guilty of possession with intent to deliver less than one gram of cocaine. In doing so, the court stated that it was not taking into consideration Garcia's statement to police that the safe belonged to defendant, as it constituted impeachment evidence, and not substantive evidence. The court noted Garcia's demeanor on the stand and stated that it found it "incredibly impossible" to believe that she did not know the safe was in the hallway closet, and that her testimony "hurts" defendant. Based on the totality of the circumstances, the court believed defendant exercised control over the drugs in the apartment and had constructive possession of them.

¶ 15 Defendant filed a motion for a new trial. At the hearing held thereon, defense counsel argued that the documents admitted into evidence did not show that defendant constructively possessed the drugs that were found in the apartment, and that it was improper for the trial court to allow the State to impeach Garcia, its own witness. The trial court denied defendant's motion, stating that it found that sufficient circumstantial evidence had been presented to show beyond a reasonable doubt that defendant exerted control over the recovered cannabis and cocaine and constructively possessed them. On appeal, defendant challenges the sufficiency of the evidence to sustain his convictions.

¶ 16 The standard of review on a challenge to the sufficiency of the evidence is 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. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). This standard applies to all criminal cases, whether the evidence is direct or circumstantial, and acknowledges the responsibility of the trier of fact to

determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Campbell*, 146 Ill. 2d 363, 374-75 (1992). A reviewing court will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009)).

¶ 17 Defendant first argues that he was not proved guilty beyond a reasonable doubt because the documents linking him to the offenses were never offered into evidence. He points out that the State's exhibits consisted of photographs of documents bearing his name, and were not the original documents. Defendant maintains that pursuant to the best evidence rule, the original documents should have been introduced.

¶ 18 The State responds, and we agree, that this argument is an attack on the admissibility, not the sufficiency, of evidence, and thus may be waived. *People v. Tharpe-Williams*, 286 Ill. App. 3d 605, 610 (1997). Under well-settled law, defendant cannot raise the admissibility of evidence on appeal where he did not both contemporaneously object at trial and present the issue in a post-trial motion. *People v. Robinson*, 157 Ill. 2d 68, 83 (1993), citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 19 The State maintains that defendant has forfeited review of this issue because he objected to the automobile insurance documents at trial, but failed to object to the admissibility of any of the photographs in his post-trial motion. The State further maintains that defendant has forfeited plain error review of this issue because he failed to argue plain error in his opening brief.

¶ 20 Defendant replies that he has not forfeited this issue, and points to defense counsel's objection at trial. The record shows, however, that this objection was limited to the insurance documents, and that defense counsel did not raise a similar objection to any of the other

documents at issue. Defendant also points out that in his post-trial motion, he argued that the State failed to sustain its burden of proving actual possession because "[t]hey produced no bills, driver's license or voter's registration documents, nor any documentary proof whatsoever."

Defendant thereby asserted that the items that were introduced were not documentary proof of actual possession, but did not refer to the best evidence rule, or to the fact that photocopies of particular documents were introduced instead of the original documents, which he now raises on appeal. Accordingly, we find that by failing to raise this issue in his post-trial motion, he has forfeited it for purposes of appeal. *People v. Lewis*, 165 Ill. 2d 305, 336 (1995); *Robinson*, 157 Ill. 2d at 83.

¶ 21 In an effort to avoid this result, defendant asserts for the first time in his reply brief that we may consider the issue pursuant to the plain error doctrine. The plain error doctrine is a narrow exception to the general rule of procedural default which allows a reviewing court to consider unpreserved claims of error where defendant shows that the evidence is closely balanced, or the error is so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Under both prongs, defendant bears the burden of persuasion, and he must first show that a clear and obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). If a defendant fails to sustain his burden, we will honor his procedural default. *Hillier*, 237 Ill. 2d at 545. Where defendant fails to present an argument on how either of the two prongs of plain error is satisfied in a particular case, he forfeits plain error review. *Hillier*, 237 Ill. 2d at 545-46.

¶ 22 In this case, defendant did not mention plain error in his opening brief. Further, in response to the State's contention that he forfeited plain error review, defendant merely argues in a conclusory fashion, that it was reversible error for the trial court to rely on the photographs of

the documents, and that the case was closely balanced. His sole citation to authority is to the general principle of plain error review. We find this insufficient to sustain his burden of persuasion under the plain error doctrine, and we therefore honor his procedural default of this claim. *Hillier*, 237 Ill. 2d at 545-46; *People v. McCoy*, 405 Ill. App. 3d 269, 273-74 (2010).

¶ 23 Defendant next contends that the State failed to prove beyond a reasonable doubt that he had control over the premises where the drugs were recovered and knowledge that the drugs were present on the date of the search. He points out that the State proceeded on a theory of constructive possession and never offered any evidence that he actually possessed, handled or was found in close proximity to the contraband or the safe where they were found.

¶ 24 To sustain defendant's convictions, the State was required to prove beyond a reasonable doubt that he had knowledge of the presence of the cocaine and cannabis, that he had possession or control of them, and that he intended to deliver them. *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 13; 720 ILCS 570/401(a)(2)(B) (West 2010); 720 ILCS 550/5(d) (West 2010).

Defendant does not contest the sufficiency of the evidence relating to intent to deliver, but focuses solely on the sufficiency of the evidence to prove that he controlled the premises where the drugs were recovered and had knowledge that the drugs were present on the date in question.

¶ 25 When establishing the element of possession, constructive possession is sufficient and the State need not prove that defendant had actual physical possession of the controlled substance. *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002). To establish constructive possession, the State must show that defendant had knowledge of the controlled substance, and exercised immediate and exclusive control over the area where it was found. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Constructive possession is often proved entirely by circumstantial evidence (*People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003)), and exclusive possession can be

established even where possession is joint or others have access to the area where they are located (*People v. Griffin*, 194 Ill. App. 3d 286, 292 (1990)).

¶ 26 A defendant's control over the premises where controlled substances are located gives rise to an inference of knowledge and control of those substances. *People v. Brown*, 277 Ill. App. 3d 989, 997-98 (1996), citing *People v. Adams*, 161 Ill. 2d 333, 345 (1994). Habitation of the residence where controlled substances are discovered has been found to be sufficient evidence of control to constitute constructive possession. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17; *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999).

¶ 27 Here, the evidence presented at trial showed that defendant was at the apartment at 7 a.m. when the search was executed. Insurance documents bearing his name and the address of the apartment were found in a dresser where drug paraphernalia was recovered, and that dresser was located in a bedroom where Garcia testified defendant spent time when he was at the apartment. Additionally, a court document in defendant's name, along with a SWAP photo I.D. bearing his name and likeness were also found in the apartment. Further evidence showed that the court document was a probation order for a two-year term of probation, with a scheduled termination date of June 8, 2013, from which it can be inferred that the order was entered on or about June 8, 2011, approximately six months before the search took place. In addition, the probation document and SWAP I.D were not found in a general or open area of the apartment, such as the living room or kitchen, but rather, inside a hallway closet, on top of a safe in which a large amount of drugs and cash were found. From this evidence, a reasonable trier of fact could find that defendant lived in the apartment and had constructive possession of the narcotics found therein. *Spencer*, 2012 IL App (1st) 102094, ¶ 18.

¶ 28 Defendant argues, however, that the prescription in his name which was found in the hallway closet, bearing an address other than that of the apartment and dated two months before the search was executed, establishes that he did not live at the apartment. We disagree. Two of the three documents bearing both defendant's name and address, listed the address of the searched apartment, while the prescription, dated two months before the search, listed another one. Even assuming that the latter tended to show that defendant may have lived at more than one address during the relevant time period, a person can be found guilty of possession of a controlled substance for drugs discovered in a home where he may live only part time. *People v. Herron*, 218 Ill. App. 3d 561, 571 (1991). Further, although no leases, utility bills or rent statements in defendant's name were recovered in this case, we observe that constructive possession does not require proof that defendant owns or has any other legal interest in the premises in which the contraband was discovered (*People v. Williams*, 98 Ill. App. 3d 844, 848 (1981)), and here, his ties to the apartment were well evidenced and contributed to the circumstantial evidence from which the court found him in constructive possession.

¶ 29 In reaching that conclusion, we have examined the numerous cases cited by defendant, and find them distinguishable because they involve circumstances where there was either no evidence, or only a single piece of documentary evidence, linking defendant to the apartment in question. In *People v. Ray*, 232 Ill. App. 3d 459, 462-63 (1992), the State relied upon one cable television bill, in *People v. Jones*, 105 Ill. App. 3d 1143, 1149 (1982), the State relied upon a single unopened envelope addressed to defendant, and in *People v. Macias*, 299 Ill. App. 3d 480, 485-88 (1998), and *People v. Blue*, 343 Ill. App. 3d 927, 939-40 (2003), no documentary evidence was introduced. Here, in contrast, the State presented five separate pieces of

documentary evidence to establish defendant's connection to the apartment, as well as his personal interests there.

¶ 30 We have also considered *People v. Ortiz*, 91 Ill. App. 3d 466 (1980), relied upon by defendant for his argument that the fact that he did not provide police with a key to the locked safe created a reasonable doubt as to the element of knowledge. In *Ortiz*, this court found sufficient evidence to support defendant's constructive possession of heroin found in a locked cabinet, the key to which defendant provided to officers. *Ortiz*, 91 Ill. App. 3d at 471-73. However, *Ortiz* does not stand for the proposition that a defendant cannot be found in constructive possession of contraband that was in a locked compartment unless he is in possession of a key to that compartment. As such, defendant's argument fails.

¶ 31 In sum, after viewing the evidence presented in the light most favorable to the State (*Siguenza-Brito*, 235 Ill. 2d at 224), we find it was sufficient to support the inference drawn by the trial court that defendant knew and had control of the drugs in the apartment to establish his constructive possession of them. *People v. Birge*, 137 Ill. App. 3d 781, 791 (1985). Accordingly, we find that defendant was proved guilty beyond a reasonable doubt of possession with intent to deliver between 100 and 400 grams of cocaine and between 30 and 500 grams of cannabis.

¶ 32 Defendant next contends that the trial court erred in allowing Officer Tucker to testify that he recovered a "ledger" describing different weights and types of contraband. Defendant maintains that such testimony constitutes expert testimony, which was inappropriate because the State failed to qualify him as an expert in narcotics.

¶ 33 The State responds that defendant has forfeited this issue by failing to raise it in his post-trial motion. Defendant does not contest that he failed to raise this issue in his post-trial motion,

but argues for the first time in his reply brief that we may consider it pursuant to the plain error doctrine. His reference to plain error consists of four sentences spanning eight lines of text, with no citation of authority, and a conclusory argument that the evidence presented was closely balanced. As discussed above, we find this insufficient to sustain the burden of persuasion under the plain error doctrine, and, accordingly, conclude that he has forfeited plain error review of this claim. *Hillier*, 237 Ill. 2d at 545-46; *McCoy*, 405 Ill. App. 3d at 273-74.

¶ 34 Defendant finally argues that the trial court improperly shifted the burden of proof to him by erroneously relying on Garcia's testimony. He specifically maintains that when the trial court stated that Garcia's testimony "hurt" him, it was criticizing the sufficiency of the State's case, as Garcia was called by the State.

¶ 35 Defendant raises this issue as part of his challenge to the sufficiency of the evidence. However, the issue as to whether the trial court improperly shifted the burden of proof to him is not a sufficiency question, but rather, one that can be forfeited where defendant has not preserved it for appeal. See *People v. Cameron*, 2012 IL App (3d) 110020, ¶¶ 24-29 (invoking a plain error analysis where defense counsel failed to object at trial or raise burden shifting issue in post-trial motion). The record shows that defendant did not object at trial, and his sole reference to Garcia's testimony in his post-trial motion was that the trial court erred in allowing the State to impeach its own witness. Defendant did not mention any improper burden shifting, and accordingly, we find that he has forfeited review of this issue on appeal. *Lewis*, 165 Ill. 2d at 336; *Robinson*, 157 Ill. 2d at 83. Moreover, defendant has not argued for plain error review, and we thus honor his procedural default. *Hillier*, 237 Ill. 2d at 545-46.

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.