2011 IL App (1st) 100082-U

THIRD DIVISION
December 28, 2011

No. 1-10-0082

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. 09 CR 12784
	)	
TYRSHAWN SIMMS,	)	Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Presiding Justice Steele and Justice Salone concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant was proven guilty of the possession of a controlled substance with intent to deliver beyond a reasonable doubt when a police officer observed him engage in three narcotics transactions and his inventory was recovered. Defendant's claim of ineffective assistance of counsel must fail when he cannot establish how he was prejudiced by the complained of behavior.

¶ 2 After a bench trial, defendant Tyrshawn Simms was found guilty of the possession of a controlled substance with intent to deliver and sentenced because of his background to a Class X sentence of six years in prison. On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that he constructively possessed narcotics. Defendant also contends that he was denied his sixth amendment right to counsel because he was represented by an

unsupervised law student at trial. In the alternative, he contends that trial counsel was ineffective because she did not adequately supervise the law student. We affirm.

¶ 3 Prior to trial, defendant signed a "consent to be represented by a senior law student," indicating that he understood that the law student would be working with defendant's counsel and could participate in pretrial hearings, trial, and posttrial proceedings. At each hearing, the law student introduced himself as appearing under Supreme Court Rule 711 (eff. Feb. 10, 2006), and as supervised by defense counsel. The record indicates that although defendant's counsel was present throughout pretrial hearings and trial, the law student conducted the hearings, examined witnesses, and made the closing argument.

¶ 4 At trial, but before the first witness testified, the trial court asked defendant whether he wished for the law student to represent him under the supervision of defense counsel. Defendant answered in the affirmative.

¶ 5 Officer Matthew McGrory then testified that while engaged in a surveillance operation on South Albany Street in Chicago he saw defendant. McGrory watched, from approximately 150 feet away, as an unknown person approached defendant, spoke to him, and gave him currency. Defendant then went to 1121 South Albany, retrieved an object from next to the front porch, returned, and tendered the object to the person. McGrory observed this sequence of events two more times. He believed that defendant was engaging in narcotics transactions.

¶ 6 After the third transaction, McGrory "broke" surveillance, radioed a description of defendant to other officers, and walked to meet those officers. When McGrory returned to the block one to two minutes later, defendant was standing beneath the rear porch at 1130 South Albany. After defendant was detained, McGrory directed Officer Murphy to the front porch at 1121 South Albany.

¶ 7 When the law student attempted to cross-examine McGrory regarding the location from which he conducted surveillance, the State objected. The court then questioned McGrory. After determining that McGrory had been on the public way and there were other possible locations

from which surveillance could be conducted in that area, the court overruled the State's objection.

¶ 8 McGrory then testified that he was located in an alley one block north. He could see defendant's face and clothing, but did not remember what defendant's customers looked like.

¶ 9 The court then questioned McGrory. He testified that defendant picked up "small" objects from the side of the porch and that after defendant was detained, he instructed another officer to search the north side of that porch.

¶ 10 Officer John Murphy testified that he found a clear piece of plastic which contained 23 Ziplock bags of suspect heroin and 16 bags of suspect crack cocaine on the north side of the porch at 1121 South Albany. These items were subsequently inventoried.

¶ 11 Officer James Gallagher performed a custodial search of defendant which recovered $166. No narcotics were recovered from defendant.

¶ 12 The parties stipulated that forensic chemist Jamie Hess would testify that the contents of the 16 baggies tested positive for the presence of cocaine and weighed .8 gram. The 23 Ziplock bags weighed 4.5 grams. The contents of seven of the Ziplock bags weighed 1.3 grams and tested positive for the presence of heroin.

¶ 13 At the close of the State's case, defendant made a motion for a directed finding, which the trial court denied. Ashley Paramore, the mother of defendant's child, then testified that she was walking with defendant and their child when a police officer grabbed defendant and another young man. According to Paramore, defendant never left the street.

¶ 14 Ultimately, the trial court found defendant guilty of the possession of a controlled substance with intent to deliver based upon the credible testimony of the police officers. The court also stated that Paramore was not a credible witness. Defendant was then sentenced based upon his background to a Class X sentence of six years in prison.

¶ 15 On appeal, defendant first contends that the State failed to establish beyond a reasonable doubt that he constructively possessed the narcotics at issue.

¶ 16 In assessing the sufficiency of the evidence, the relevant inquiry is whether, considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *Ross*, 229 Ill. 2d at 272; see also *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006) (it is the responsibility of the trier of fact to determine the credibility of witnesses, to resolve inconsistencies in the evidence, and to make reasonable inferences from the testimony). A conviction will be reversed only when the evidence was so unreasonable, improbable, or unsatisfactory that reasonable doubt remains as to whether the defendant was guilty. *Ross*, 229 Ill. 2d at 272.

¶ 17 To convict a defendant of possession with intent to deliver, the State must establish (1) the defendant had knowledge of the presence of the controlled substance, (2) the controlled substance was in the immediate possession or control of the defendant, and (3) the defendant intended to deliver the controlled substance. *People v. Burks*, 343 Ill. App. 3d 765, 768 (2003). Possession of narcotics can be actual or constructive. *People v. Givens*, 237 Ill. 2d 311, 335 (2010). Evidence that a defendant was aware of and exercised control over a controlled substance can establish constructive possession. *People v. Harden*, 2011 IL App (1st) 092309, ¶ 27 (June 7, 2011); see also *People v. Ingram*, 389 Ill. App. 3d 897, 899-900 (2009) (constructive possession may be established by showing that a defendant had knowledge of the presence of the contraband and immediate and exclusive control over the area where it was found). The evidence establishing constructive possession of contraband is "often entirely circumstantial." *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002). Knowledge and possession are questions of fact. *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007).

¶ 18 Here, the case for conviction is overwhelming. Viewing the evidence in the light most favorable to the State, as we must, a police officer saw defendant retrieve small objects from the

north side of a porch which he exchanged for money and narcotics were subsequently recovered from the north side of that porch. Although Paramore testified that defendant never left the sidewalk, the trial court determined that she was not a credible witness; this court will not substitute its judgment for that of the trial court on this issue. *Ross*, 229 Ill. 2d at 272. This court cannot say that no rational trier of fact could have found defendant guilty when he was observed exchanging small objects for cash and narcotics were recovered from the area where he obtained those objects. *Ross*, 229 Ill. 2d at 272.

¶ 19 Defendant, however, contends that the State failed to establish his constructive possession of the narcotics because McGrory could not specifically describe the items at issue, defendant did not have exclusive control over the yard, and absent specific instructions from McGrory "it is possible" that Murphy recovered narcotics belonging to someone else.

¶ 20 While McGrory could only describe the objects exchanged between defendant and the three individuals as small, he testified that based on his experience he believed that he was observing narcotics transactions. It was for the trial court, as the trier of fact, to determine the credibility of each witness and the weight to be given to his testimony. See *Ross*, 229 Ill. 2d at 272. Clearly, the court found McGrory credible as evidenced by the verdict, this court will not substitute our judgment for that of the trial court on this issue. *Ross*, 229 Ill. 2d at 272. Although it is true that McGrory did not accompany Murphy to search for narcotics at 1121 South Albany, Murphy testified that he recovered the narcotics from the north side of the porch, the same area where McGrory observed defendant retrieving the small objects at issue. This court declines defendant's invitation to assume that the drugs recovered belonged to some unknown individual. A trier of fact is not required to accept any possible explanation compatible with a defendant's innocence and elevate it to the status of reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009).

¶ 21 Similarly, this court rejects defendant's contention that the State failed to establish that he constructively possessed the narcotics because he did not have exclusive control over the yard.

Proof that a defendant had control over the place where contraband was located is not a prerequisite for conviction. *People v. Adams*, 161 Ill. 2d 333, 345 (1994). Constructive possession may exist when a defendant is no longer in physical control of contraband, provided that he had physical control of the contraband with the intention to exercise control on his own behalf, he has not abandoned the contraband, and no other person has obtained control of it. *Adams*, 161 Ill. 2d at 345. Here, defendant was observed retrieving objects from next to the porch which he then exchanged for cash and narcotics were later recovered from that area. Defendant's constructive possession of the narcotics was not defeated by the fact that he kept them across the street.

¶ 22 This court is unpersuaded by defendant's reliance on *People v. Stewart*, 27 Ill. App. 3d 520, 522, 525 (1975) and *People v. Macias*, 299 Ill. App. 3d 480, 485-86 (1998). This is not a case where a defendant was merely present in an area where contraband was later found; rather, here, defendant was observed retrieving small objects that he exchanged for cash from the north side of a porch and narcotics were recovered from that area.

¶ 23 This court reverses a conviction only when the evidence is so unreasonable or improbable that reasonable doubt remains as to a defendant's guilt *(Ross*, 229 Ill. 2d at 272); this is not one of those cases. Accordingly, we affirm defendant's conviction.

¶ 24 Defendant next contends that he was denied his sixth amendment right to counsel when he was represented by an unsupervised law student at trial. Defendant alternatively contends that he was denied effective assistance of counsel by counsel's failure to supervise the law student.

¶ 25 Pursuant to Supreme Court Rule 711(c) (eff. Feb. 10, 2006), eligible law students may provide legal services "[u]nder the supervision of a member of the bar of this State, and with the written consent of the person on whose behalf he/she is acting." In those criminal cases in which the penalty could be a prison term, the law student may participate only "as an assistant of the supervising member of the bar, who shall be present and responsible for the conduct of the

proceedings." Rule 711(c)(2)(ii) (eff. Feb. 10, 2006). Our supreme court has determined that the supervising attorney only has to actually be present when a defendant may be sentenced to prison, in all other criminal cases, a law student in appearing in court pursuant to Rule 711 may do so alone. *In re Denzel W.*, 237 Ill. 2d 285, 297 (2010). In those cases in which a defendant is entitled to counsel, a licensed attorney must be present and must supervise the law student. *In re Denzel W.*, 237 Ill. 2d at 297.

¶ 26 An attorney does not satisfy her obligations under Rule 711 merely by being physically present in the court room. *In re Denzel W.*, 237 Ill. 2d at 298. When a licensed attorney's supervision of a law student is "insufficient in quality, nature, or duration" such that his or her performance amounts to ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), the defendant is entitled to a new trial. *In re Denzel W.*, 237 Ill. 2d at 298.

¶ 27 To show that counsel was ineffective, a defendant must demonstrate both that counsel's performance was deficient and that as a result he was prejudiced. *People v. Bailey*, 232 Ill. 2d 285, 289 (2009). Our supreme court has held that *Strickland* requires a defendant to show actual prejudice in order to succeed on an ineffective assistance claim, rather than mere speculation as to prejudice. *People v. Bew*, 228 Ill. 2d 122, 135 (2008). As failure to satisfy either prong of the *Strickland* test defeats a claim of ineffective assistance, a court does not have to determine whether counsel's performance was deficient before examining the prejudice a defendant suffered because of counsel's alleged errors. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 28 Here, as defense counsel was physically present during trial, the issue before this court is the adequacy of counsel's supervision. Initially, this court notes that defendant relies on no authority for the proposition that counsel's failure to speak on the record constitutes evidence of inadequate supervision. Defendant's argument rests on the assumption that the outcome of the trial would have been different had defense counsel been more "active" in her supervision.

¶ 29 However, even were this court to assume that counsel failed to adequately supervise the law student, defendant cannot establish prejudice. See *Bew*, 228 Ill. 2d at 135. As discussed

above, the evidence against defendant was overwhelming. Defendant does not explain how the outcome of his trial would have been different had counsel "supervised" the law student on the record, he merely argues his case would have gone better. However, a defendant's speculation that his trial could have gone better does not establish actual prejudice (*Bew*, 228 Ill. 2d at 135), and accordingly, his claim of ineffective assistance of counsel must fail (*Edwards*, 195 Ill. 2d at 163).

¶ 30 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 31 Affirmed.