2011 IL App (2d) 100006-U
No. 2—10—0006
Order filed August 11, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 09—CF—75
JAMES E. DUMAS,	)	Honorable Allen Anderson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

Held: The defendant's convictions for unlawful possession of a controlled substance with intent to deliver and unlawful possession of a controlled substance must be reversed because the defendant never possessed the controlled substance.

¶ 1 Following a bench trial, the defendant, James Dumas, was convicted of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2008)) and unlawful possession of a controlled substance (720 ILCS 570/402(a)(2)(D) (West 2008)). The defendant was sentenced to 15 years' imprisonment. On appeal, the defendant argues that his

convictions should be reversed because he was never in possession of the controlled substance. We agree and reverse.

¶ 2 I. BACKGROUND

¶ 3 The defendant was arrested on January 9, 2009. On March 11, 2009, the defendant was charged by indictment with unlawful possession of a controlled substance with intent to deliver and unlawful possession of a controlled substance. On October 9, 2009, a bench trial commenced. At trial, Detective Mario Elias testified that he was an Elgin police officer and worked in drug enforcement. On September 19, 2008, he was assigned to work undercover posing as a seller of narcotics. On that date, he met the defendant at an IHOP restaurant in Elgin to discuss future narcotics transactions. Detective Elias identified the defendant in court. The meeting was arranged by a confidential informant. The defendant told Detective Elias that he was looking for a consistent supplier of cocaine if the price was right. In response, Detective Elias stated that he could supply a kilogram of cocaine for $26,000. The defendant indicated that he intended to resell the same kilogram for $28,000. Detective Elias told the defendant he was expecting a shipment to arrive any day and that he would call the defendant when it came in.

¶ 4 Detective Elias further testified that on the morning of September 22, 2008, he called the defendant to tell him that he might be ready that date, but he would call him later. That evening, he called the defendant to tell him that the cocaine shipment arrived and that they could meet the following day. They made arrangements to meet the next day to discuss the cocaine purchase. The defendant indicated that he was interested in purchasing "two birds," which is code for two kilograms of cocaine.

¶ 5 On September 23, 2008, Detective Elias met the defendant in the parking lot of the same IHOP restaurant in Elgin. The meeting did not last long. The defendant told Detective Elias that he was waiting on friends to arrive from Detroit. Those friends were going to purchase the cocaine from the defendant. The defendant wanted a sample of the cocaine to see the quality. Detective Elias refused to break down the kilograms for sampling but reassured the defendant that the cocaine was of good quality. Detective Elias offered to stay with the defendant and his friends, at the time of the sale, until they determined whether they were satisfied with the quality of the cocaine. Although the defendant continued to ask for a sample, the defendant eventually agreed to try to work it out with his friends.

¶ 6 Thereafter, numerous phone calls took place to arrange the narcotics sale and the defendant continued to request a sample. The sale was arranged to take place on September 24, 2008. The plan was for the defendant to show the money, Detective Elias to show the cocaine, and then to "do the exchange." During these phone calls the defendant also reduced his requested amount from two to one kilogram of cocaine.

¶ 7 On September 24, 2008, the defendant and Detective Elias met in the parking lot of a Meijer supermarket. Detective Elias arrived first. He exited his car and opened the hood to make it look like he was doing something. When the defendant arrived, the defendant exited his car and approached Detective Elias. Detective Elias asked the defendant if he was ready to go. The defendant insisted on seeing the cocaine. They both entered Detective Elias's vehicle. They went back and forth over the sampling issue. Detective Elias exited the vehicle to retrieve a black bag containing the "brick" of cocaine from his trunk. He then reentered his car and handed the defendant the black bag. The defendant opened the bag, took out the kilogram of cocaine and looked at it. He

then put it back in the bag and handed the bag to Detective Elias. The defendant handled the cocaine for about 30 seconds. Detective Elias testified that the defendant was not, at any point, free to leave with the cocaine and that he had no intention of letting the defendant have the cocaine without seeing the money first.

¶ 8 The defendant exited the vehicle to make a phone call to his friends. After the phone call was done, the defendant told Detective Elias that he was nervous about doing the transaction in the Meijer parking lot and that he wanted to go somewhere else. Detective Elias put the cocaine back in the trunk and asked to see the money. The defendant admitted that he did not have the money. The defendant stated that the money was at a house on the east side of Elgin. The defendant wanted to go there to complete the transaction. Detective Elias told the defendant he would follow him. They both entered their cars. Detective Elias followed the defendant for about two blocks but did not follow him any further. Detective Elias met up with the surveillance units a short time later at the Elgin police department and gave the cocaine back to Officer Chris Jensen.

¶ 9 Detective Elias identified People's Exhibit No. 10 as the kilogram of cocaine that the defendant took out of the bag and looked at. Detective Elias testified that many of the phone conversations and in-person meetings he had with the defendant were recorded pursuant to a "court-ordered overhear." The recordings and transcripts of the recordings were admitted into evidence. Detective Elias identified People's Exhibits No. 5 and 9 as the transcript and the recording of the in-person meeting that occurred on September 24, 2008, and testified that it fairly and accurately represented the conversation that took place with the defendant. Detective Elias testified that when the defendant asked him to "take a ride" that meant he wanted to go to where the money was at on the east side of Elgin. Detective Elias testified that he would never allow a suspect to change the

location of a drug transaction due to safety concerns—it would be too hard to control the situation and there was a risk of being robbed or killed.

¶ 10 The transcript of the meeting at the Meijer parking lot on September 24, 2008, reveals the following conversation:

"[Officer]: Let me just see the cash real quick and we will jump in and I'll let you sample it.

[Defendant]: Uhh no I don't want to do it.

[Officer]: No I just want to see it I don't even got to count it.

[Defendant]: No I understand all that. But I'm just saying it's all good on that man. We at Meijer's and you got to work with me somehow ***.

[Officer]: All 26 is there right?

[Defendant]: All 26 is there.

[Officer]: With you?

[Defendant]: With me.

[Officer]: I just want to see it, we jump in and you can sample it.

[Defendant]: Like I said *** at least let me just see, I don't got to sample sh**, just let me see what you are working with. ***

[Officer]: Alright

[Defendant]: I ain't even seen nothing yet.

[Officer]: Jump in. Just jump in the car real quick.

[Defendant]: O.k.

[Officer]: It's an odd shape because of the trap that we use.

[Defendant]: Ummm hmmm

[Officer]: So because we use different types of traps and the quality is excellent. Let me cut it up a little bit. ***.

[Defendant]: ummm hmm

[Officer]: So it's solid I mean.

[Defendant]: I understand that but the whole re rock process and sh** like that

[Officer]: Right no I mean you know you and I could until they are happy with it ***.

[Defendant]: O.k. Alright. Let me just call him.

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[Defendant]: Hey man umm I think this ain't going to work out here. I I can't there's a guy sitting in that truck there, dude just left from over there I can't I can't trust

[Officer]: Alright [d]o you want to just go somewhere else then?

[Defendant]: Yeah I can't trust this.

***

[Officer]: Well the thing is you know I gotta take I for me to take the sh** now.

[Defendant]: O.k. well listen. Why can't me and you just take this ride?

[Officer]: I tell you what if I see the money and I know that you got the money then we'll take the ride, I'll take the risk we'll throw it in the trunk I'll take the risk.

[Defendant]: We can take it in my car and you don't have to worry about it, we'll put it in my car, it's not an issue with that, we'll put it in my car.

[Officer]: So you don't have the money with you is basically.

[Defendant]: No no but I'll

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[Defendant]: But the money is all good but.

[Officer]: I haven't seen it, but I haven't seen anything

[Defendant]: I'm just saying that, you thin[k] you think I'm take you thru this sh** with out you getting no money and then I'm telling you we can take my f**ing car with this sh** in it.

[Officer]: Yeah but you just finished telling m[e] you got the money with you and sh** now I got to go somewhere else.

[Defendant]: Because I got to have this guy at least see it ***."

¶ 11 Officer Jensen testified that he was in the Meijer parking lot on September 24, 2008, when Detective Elias met the defendant. Officer Jensen could not see the defendant and Detective Elias when they were inside Detective Elias's vehicle. He followed the defendant for a short time after he left the lot, but ultimately stopped because the defendant would have noticed him. The plan had been to arrest the defendant when he produced the money. Officer Jensen acknowledged that the defendant was not arrested until January 2009. This was because he wanted to confer with the Kane County state's attorney. The police also wanted to see if a subsequent transaction would materialize, but it did not. Officer Jensen opined that they "absolutely" could have arrested the defendant on the scene. Finally, the State adduced testimony establishing the chain of custody of the cocaine and expert testimony establishing that the substance handled by the defendant was cocaine and that it weighed 1009.1 grams.

¶ 12 On October 23, 2009, the trial court found the defendant guilty of both counts. The trial court noted that at the moment the defendant had the cocaine in his hands inside Detective Elias's vehicle,

the defendant "had exclusive contact and control" over the substance. The trial court reasoned, "[the defendant] could have exited the car and left. He could have paid the agents the agreed price. He could have done anything that possession and control would have allowed at that moment in time." Following the denial of the defendant's motion for a new trial, the trial court merged the convictions and sentenced the defendant to a single term of 15 years' imprisonment. The trial court imposed a street value fine of $28,000 and a $3,000 statutory drug assessment. Thereafter, the defendant filed a timely notice of appeal.

¶ 13 II. ANALYSIS

¶ 14 On appeal, the defendant first argues that his conviction for possession with intent to deliver should be reversed because he never possessed the cocaine. Alternatively, he argues that if he was in possession, he did not have the intent to deliver at the time of such possession and, therefore, his conviction should be reduced to simple possession. Finally, should his convictions not be reversed, the defendant argues that he is entitled to a $5 per day credit against his fines for the 332 days he spent in jail prior to being sentenced.

¶ 15 We first consider the defendant's challenge to the sufficiency of the evidence to sustain his conviction of unlawful possession of a controlled substance with intent to deliver. A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When we review a challenge to the sufficiency of the evidence, " 'the relevant question 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.' " (Emphasis in original.) *Collins*, 106 Ill. 2d at 261, quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶ 16 When the sufficiency of the evidence is challenged, it is not the function of this court to retry the defendant. *Collins*, 106 Ill. 2d at 261. The trier of fact is best equipped to judge the credibility of witnesses, and the fact finder's determinations are entitled to great deference. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). However, a fact finder's decision is "neither conclusive nor binding." *Id.* at 115. Although we are not required to search out all possible explanations consistent with innocence or be satisfied beyond a reasonable doubt as to each link in the chain of circumstances, we must ask, after considering all of the evidence in the light most favorable to the State, whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Id.* at 117-18.

¶ 17 To establish the elements of unlawful possession of narcotics with intent to deliver, the State must prove that the defendant had knowledge of the presence of the narcotics, the narcotics were in the immediate possession or control of the defendant, and that the defendant intended to deliver the narcotics. *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). The defendant's possession of the controlled substance may be actual or constructive. *People v. Eghan*, 344 Ill. App. 3d 301, 306 (2003). Actual possession is the exercise of "immediate and exclusive dominion or control" over the controlled substance. *Id.* at 307. Constructive possession is "the intent and capability to maintain control and dominion" over the controlled substance. *Id.* In the present case, the State did not argue that the defendant was in constructive possession of the cocaine. The State argued only that the defendant was in actual possession of the cocaine.

¶ 18 In arguing, on appeal, that he was never in actual possession of the cocaine, the defendant relies on *United States v. Kitchen*, 57 F. 3d 516 (7th Cir. 1995). In *Kitchen*, undercover officers contacted the defendant, Kitchen, through an informant to set up a "reverse buy" of cocaine—where

the undercover officers would sell drugs to and arrest the defendant-buyer during the course of the sale. *Id.* at 519. Kitchen ultimately agreed to purchase narcotics from the informant. *Id.* The informant and an undercover police officer, posing as a drug trafficker, met Kitchen and Kitchen's friend at a pre-arranged location. During the meeting, the informant and the undercover officer entered Kitchen's vehicle. Kitchen and his friend produced envelopes containing $14,000 in cash. *Id.* While Kitchen and the undercover officer traveled to a separate location "to check the merchandise," Kitchen's friend, who had the cash, and the informant remained in Kitchen's vehicle. *Id.* At the subsequent location, another undercover officer was waiting with two kilograms of cocaine in a bag in the trunk of his car. *Id.* When Kitchen arrived, one of the officers opened the bag, revealing two packages of cocaine. *Id.* The undercover officers testified that Kitchen picked up one of the kilograms of cocaine for "two or three seconds" and expressed concerns about the cocaine's "purity." *Id.* At that point, the officers placed Kitchen under arrest. *Id.* Kitchen was subsequently convicted of the offense of possession of cocaine with intent to distribute. *Id.* at 518.

¶ 19 On appeal, Kitchen argued that the evidence was insufficient to prove that he had possessed the cocaine. *Id.* at 520. The reviewing court, although holding that "the issue is a close one," agreed. *Id.* at 521. The reviewing court held that Kitchen's momentary handling of the cocaine did not constitute possession. *Id.* at 522. According to the reviewing court, the record was "devoid of evidence that Kitchen intended to walk away with the narcotics or otherwise transport them." *Id.* The reviewing court added that:

> "This factual distinction might not be dispositive if the record revealed *any* evidence that Kitchen had completed the sale or indicated some sort of unequivocal agreement to complete the drug transaction. Given that sort of clear evidence, perhaps a momentary holding,

without more, would be sufficient to demonstrate actual possession. But that is not the case before us now." (Emphasis in original.) *Id.*

¶ 20 The reviewing court also noted that at the time of the arrest the sale of the drugs remained incomplete. *Id.* at 523. Kitchen had not indicated that he would proceed with the drug sale or handed over any money. *Id.* Under such circumstances, the court noted that it was "quite uncomfortable with the notion that momentary contact with narcotics establishes actual possession." *Id.* Although Kitchen held the cocaine in his hand, "he did not yet have a recognized authority to exert control over it" because "'the power to make off with someone else's property is not equivalent to a right to the property.'" *Id.* at 524, quoting *United States v. Ortega*, 44 F. 3d 505, 507 (7th Cir. 1995). The reviewing court held that Kitchen's "intent" to purchase was insufficient to establish possession. *Id.* at 525. Finally, the court held that Kitchen's conduct was consistent with inspection, but did not exhibit dominion or control. *Id.* It therefore found the evidence insufficient to support Kitchen's conviction for possession of cocaine. *Id.*

¶ 21 Nonetheless, the reviewing court emphasized that its holding was limited to the unique facts of the case:

> "We do not attempt to use the present case to formulate a rule workable for all circumstances. Nor, by focusing on the incomplete nature of the narcotics deal here, do we wish to suggest that all drug transactions must be 'complete' in order to later establish possession at trial. Of necessity, the particulars of a given drug transaction will drive the determination that a certain aspect of the defendant's conduct is unequivocal enough to establish possession. But here, nothing in the record convinces us that Kitchen's momentary

holding constitutes possession of the drugs. Money had not yet changed hands, and Kitchen had not otherwise assented to the deal." *Id.* at 523.

¶ 22 The State relies on *People v. Thomas*, 242 Ill. App. 3d 266 (1993), in arguing that the defendant was in possession. In *Thomas*, undercover officers contacted the defendants, Jesse and Claude Thomas, through an informant to set up a reverse buy. *Id.* at 268. Claude called the undercover officer and told him he wanted to purchase 10 pounds of cannabis for $1,000 per pound. *Id.* They agreed to meet in a mall parking lot. *Id.* The undercover officer, who was equipped with a recording device, and the informant arrived in one vehicle while Claude and Jesse arrived in a different vehicle. *Id.* The officer and the informant approached Claude, who was in the driver's seat. The officer said he wanted to see the money first. *Id.* at 269. Jesse retrieved a white paper bag from the trunk and reentered the vehicle. Jesse then opened the bag and showed the officer a large quantity of money. *Id.* After viewing the money, the undercover officer told the defendants that the cannabis was in another car. *Id.* Claude and the officer went to a third vehicle. Claude entered the vehicle, opened a bag and took a plastic-covered bundle of cannabis out of the bag to look at it. *Id.* The undercover officer told Claude that if he did not like the marijuana, he did not have to take it. *Id.* The transcript of the recording did not indicate that Claude ever orally accepted the marijuana. *Id.* After Claude held the marijuana for about 10 to 15 seconds, he was arrested. *Id.* at 270.

¶ 23 The defendants were found guilty of unlawful possession of cannabis with intent to deliver. *Id.* at 267. Jesse's conviction was based on the theory of accountability. *Id.* at 275. On appeal, Jesse argued that he was not proven guilty beyond a reasonable doubt. *Id.* at 274. The reviewing court noted that:

> "Jesse does not argue on appeal that the evidence was insufficient to prove Claude guilty of the cannabis charge. Nor do we view any such argument as having any merit in light of the evidence of Claude's involvement in the transaction." *Id.* at 275.

Based on evidence that Jesse knew of and participated in the drug transaction, the reviewing court affirmed Jesse's conviction. *Id.* at 276.

¶ 24 In arguing that *Thomas* supports a determination that the present defendant was in possession of the cocaine, the State relies on the above quoted language (see *id.* at 275). However, that language is *obiter dictum*. *Obiter dictum* is a "'remark or expression of opinion that a court uttered as an aside, and is generally not binding authority or precedent within the *stare decisis* rule.'" *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 288 (2009), quoting *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993). *Obiter dictum*, even of the supreme court, is not binding authority, although it may be persuasive. *People v. Dylak*, 258 Ill. App. 3d 141, 143 (1994). The issue in *Thomas* was whether Jesse was accountable for Claude's conduct, not whether Claude's conduct was sufficient to uphold his conviction for possession with intent to deliver. Accordingly, we are not bound by the decision in *Thomas* as it relates to the issue in the present case. Similarly, we are not bound by the court's decision in *Kitchen*, although it does serve as persuasive authority. See *Lamar Whiteco Outdoor Corp. v. City of West Chicago*, 355 Ill. App. 3d 352, 360 (2005) (noting that Illinois state courts are not bound to follow federal court decisions, but such decisions can provide guidance and serve as persuasive authority).

¶ 25 Relying on both *Thomas* and *Kitchen* as persuasive authority, we conclude that the defendant was not in possession of the controlled substance. The facts in *Thomas* and *Kitchen* are very similar and the *Kitchen* court noted that the case was "a close one." In both *Thomas* and *Kitchen*, the

defendants showed up with the money to purchase the illegal substance although neither formally turned the money over to the undercover agents. In *Thomas*, once the drugs were in hand, the defendant did not express concerns with the drugs. In *Kitchen*, the defendant expressed concerns with the drugs when he handled them. In the present case, unlike *Kitchen* and *Thomas*, the defendant did not show up with the money to purchase the narcotics. Furthermore, unlike *Thomas*, but similar to *Kitchen*, the defendant expressed concern over the "whole re rock process and sh** like that" when he was showed the cocaine. The defendant also stated that his friend would have to see the cocaine before it would be purchased. Accordingly, the facts in this case are more similar to those in *Kitchen*. In addition, this case is not as "close" as *Kitchen* because the present defendant did not show up with the money to complete the transaction, a fact that further undermines the inference that he actually intended to purchase the drugs.

The State argues that *Kitchen* is distinguishable from the present case. In the present case, the State argues, the defendant's prior conversations with the undercover officer indicated that he intended to purchase the cocaine and resell it, and that he wanted to purchase from the undercover officer regularly in the future. Additionally, the State points out that the defendant specifically asked the undercover officer to drive to another location to complete the transaction. The State argues that, unlike *Kitchen*, this was unequivocal evidence of the defendant's intent to complete the deal.

¶ 26 We disagree. The evidence does not show that the defendant unequivocally indicated that he wanted to complete the transaction. After he looked at the cocaine, the defendant did not state that he would take it. Rather, he expressed concerns over how it was packaged. The defendant indicated that he wanted to go to another location; however, the defendant also stated that he had to go to the next location because his friend had to "at least see" the cocaine. The defendant admitted

that he did not have the money to complete the transaction, but stated that his friend had the money. However, it was still possible that the defendant and his friend did not have the money at all or, if his friend had the money, that the friend would not be interested in purchasing the cocaine once he inspected it. As such, the defendant's conduct did not demonstrate an unequivocal agreement to complete the drug transaction. See *United States v. Toro*, 840 F. 2d 1221, 1238 (5th Cir. 1988) (the defendant was in possession when he took the cocaine from the government agent and put it in a briefcase which he then locked); *United States v. Jones*, 676 F. 2d 327, 332 (8th Cir. 1982) (the defendant was in possession when he loaded bales of marijuana into his van); *United States v. Posner*, 868 F. 2d 720, 724 (5th Cir. 1989) (the defendant was in possession when the defendant's coconspirator accepted keys to a van containing marijuana, entered the van and attempted to start it).

¶ 27 Moreover, as in *Kitchen*, the defendant's stated intent to purchase the cocaine cannot support a conviction for actual possession because intent does not establish the required element of dominion or control. *Id.* at 525. The trial court found that the defendant had possession because, when the defendant held the kilogram of cocaine in his hands, he could have exited the car, or paid the agents, or done anything else consistent with dominion and control. However, as explained in *Ortega*:

> "There is a sense in which, when Ortega was alone in the van with the heroin, he had 'control' over it. He could have picked up the bag of heroin and run. But the power to make off with someone else's property is not equivalent to a right to the property." *Ortega*, 44 F. 3d at 507.

As such, merely because the defendant could have possibly exited the car with the cocaine did not establish possession. Although the defendant may have physically touched the cocaine, he never

exercised any actual dominion or control over the drugs and, thus, cannot be found to have possessed the drugs. Based on this determination, we need not address the defendant's additional arguments on appeal.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we reverse the defendant's convictions and sentence.

¶ 30 Reversed.