2011 IL App (2d) 100618-U
No. 2-10-0618
Order filed December 23, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-4643
JAVIER L. ZAVALA,	)	
	)	Honorable Christopher R. Stride,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Hutchinson concurred in the judgment.

ORDER

Held: Evidence sufficient to sustain defendant's convictions for possession of more than 900 grams of a controlled substance with intent to deliver and possession of a weapon without a firearm owner's identification card where: defendant resided in the house where the cocaine and weapon were found; the door to the roommate's bedroom where the cocaine and weapon were found was not locked at all times; the weapon was in an unlocked nightstand drawer with ammunition on top of the nightstand in plain view; drug paraphernalia was found throughout the house and near defendant; and where police found in defendant's bedroom cellophane wrappings with cocaine residue that matched the wrappings in the roommate's bedroom, defendant was found near a "line" of a substance that appeared to be cocaine, and there was no evidence to suggest that the line came from a source outside of the apartment.

Ineffective assistance claims rejected where counsel's decision not to introduce into evidence the name of one co-defendant was not objectively unreasonable and there was no reasonable probability that, absent counsel's decision, the results of the trial would have been different. Similarly, where trial court correctly determined that the proposed lesser-included instructions were improper, counsel's performance with regards thereto was not ineffective.

¶ 1 After a jury trial, defendant, Javier L. Zavala, was convicted of possession of more than 900 grams of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2008)) and possession of a firearm without a firearm owner's identification (FOID) card (430 ILCS 65/2(a)(1) (West 2008)). On June 11, 2010, the trial court denied defendant's motion for judgment notwithstanding the verdict (JNOV) and sentenced defendant to 20 years' imprisonment. Defendant appeals, arguing that the evidence was insufficient to prove his constructive possession of more than 900 grams of cocaine and possession of a weapon and that his trial counsel was ineffective. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 The evidence at trial established that, on October 30, 2008, Waukegan police officers executed a search warrant at 1237 South Jackson, a two-story, single-family residence in North Chicago. Defendant was not named in the search warrant. After receiving no response to their announced presence, the police officers used a ram to break entry through the outer door of an enclosed front porch. Once through the outer door, the officers faced wooden French doors with glass panes. Two men, defendant and Armando Hernandez-Limon, were visible through the doors. When police entered through the French doors, defendant stood "frozen" in place; to defendant's right, on a television stand, was a line of a substance that appeared to be cocaine.[1] Hernandez-

[1]Detective Mark Sturtevant testified that the line of white, powdery substance appeared to him to be cocaine and that he collected the powder. The evidence at trial did not reflect the weight

Limon fled into a bedroom on the east side of the house and locked the door. The police kicked open the door to force entry into the east bedroom into which Herndandez-Limon had fled. Both Hernandez-Limon and defendant were arrested.[2]

¶ 4 It was uncontested at trial that the east bedroom belonged to Hernandez-Limon. Therein, the police found two safes, one on a nightstand and one on the floor. The safe on the nightstand was empty. The safe on the floor was locked, and the police used a hydraulic ram to pry it open. Inside, there were 5,555.4 grams of cocaine, some in a compressed brick form and wrapped in cellophane. In addition, the safe contained cellophane wrappings, large and small plastic bags, a green leafy substance, a box cutter and razor blade, a black permanent marker, and a dehumidifier packet to keep out moisture. On the nightstand, the police recovered four .38-caliber bullets and two $20 bills. Inside a closed, but unlocked, nightstand drawer, the police found a black revolver sticking out of a sock. Also, cellophane wrapping with a white powder residue was found in the bedroom's garbage and, next to the garbage, was a gas blowtorch. Other items in the bedroom included a box of clear plastic baggies, a digital scale, a cellphone, and paperwork belonging to Hernandez-Limon. Fingerprint analysis was not performed on these items.

¶ 5 Police officers testified that the house was sparsely furnished. In the living room, there was a reclining chair, a barstool, and a television on a stand, but no dining room table. In addition, the

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and content of that powder or the results of any forensic testing performed on that evidence.

[2]Hernandez-Limon was tried separately, and another panel of this court affirmed his convictions for possession of a controlled substance with intent to deliver and possession of a firearm without a FOID card. *People v. Hernandez-Limon*, No. 2-09-1282 (June 29, 2011) (unpublished order pursuant to Supreme Court Rule 23).

living room contained fabricated metal horses, a heavy duty jack, plastic bags containing bottles of Inositol (a dietary supplement that resembles cocaine), plastic wrappings, fast food wrappers, key cards issued by a GNC store, and a can of acetone.

¶ 6 In the kitchen, there were no food items, dishes, or utensils, and the refrigerator was empty. There was no kitchen table. Instead, the police recovered from the cabinets a digital scale, Inositol, metal plates with bolts and screws, rubber bands, packaging tape, plastic wrap, and large plastic baggies. Further, a mixing bowl and spoon with a white powdery residue were recovered and submitted for fingerprint analysis. The fingerprints recovered did not match defendant's.

¶ 7 The house contained another bedroom on the west side. The west bedroom contained a mattress, clothes in bags in the closet, a makeshift nightstand with personal care items, and a white plastic Walmart shopping bag stuffed with numerous clear plastic bags and cellophane wrappings. The cellophane wrappings contained a white residue and resembled those found in the east-bedroom safe. The parties stipulated that the residue on the cellophane inside the Walmart bag contained cocaine.

¶ 8 Scott Chastain, a Waukegan police sergeant, testified that street dealers usually package cocaine using clear plastic baggies, tucking the drugs into the corners of the bags and sometimes tearing them off to sell, generally, in quarter grams, half grams, and whole grams. Chastain testified that the cellophane wrappings found in the west bedroom are common for packaging kilograms of cocaine. Chastain testified that Inositol is often added to cut pure cocaine to increase the amount prior to sale. He explained that the metal plates from the kitchen, metal horses and jack in the living room, and the acetone and gas torch found in the house were all tools that may be used to form the cocaine and Inositol into bricks. In Chastain's opinion, the house's sole purpose was to manufacture and remanufacture cocaine prior to sale. Further, Chastain testified that the large amount of cocaine

found in the safe far exceeds an amount for personal consumption and, therefore, was possessed with an intent to deliver. Chastain opined that, uncut, the cocaine in the safe was worth between $550,000 and $650,000, but that, if cut with a substance like Inositol to increase the amount, its value might be around $1.5 million. Chastain further testified that the presence of a weapon in the house was significant to his opinion that the house was a drug house. According to Chastain, it is common for drug houses to have weapons inside to protect the drugs from other drug dealers and purchasers who might try to steal the drugs. The gun helps to protect the drugs as well as the drug dealers in case of an attempted robbery.

¶ 9 Defendant, who speaks Spanish (the trial was translated through an interpreter), was apprised of his *Miranda* rights both at the house and at the police station. According to detective Rigoberto Amaro, who speaks fluent Spanish, defendant told him that he understood his rights and that he agreed to talk with Amaro. Defendant told Amaro that he worked with Hernandez-Limon and had lived in the house for one week. Defendant told Amaro that he used drugs and wanted help. Amaro agreed that he wrote in his report that, when he asked defendant about the narcotics found inside the house, defendant "denied" knowing anything about them. At trial, however, Amaro testified that, when asked about the cocaine and gun, defendant became silent and made no response. Amaro did not find a FOID card on defendant's person, nor was a FOID card found in the house.

¶ 10 The trial court denied defendant's motion for directed findings. Defendant did not testify or present any witnesses. Thereafter, the court asked defense counsel whether defendant wished to instruct the jury on lesser-included offenses. Counsel explained that defendant wanted the jury instructed to allow for a conviction of mere possession of a Class 4 felony amount of cocaine. The State asked whether defendant wished for a simple possession instruction regarding the residue found on the cellophane and baggies in the Walmart bag in the west bedroom and the line of cocaine

found in the living room (a Class 4 quantity), or whether defendant wanted the jury instructed as to simple possession of the amount of cocaine found in the safe (a Class X quantity). The court explained that there were two quantities of cocaine at issue: (1) more than 900 grams (*i.e.*, contained in the safe and actually totaling more than 5,500 grams) and (2) less than 900 grams (*i.e.*, the residue amounts and line found in other areas of the house). The court stated that, as to the quantity that exceeded 900 grams, the evidence did not support a simple possession instruction because, according to Chastain, the amount of cocaine found in the safe would be possessed only with an intent to deliver. Further, the court found that an instruction regarding the residue cocaine and line in the living room was inappropriate because the State had not charged defendant for that subset batch of cocaine. Essentially, the court determined that the State had narrowly charged the case, prosecuting possession with intent to deliver for only the cocaine in the safe; thus, there could not be a lesser-included charge for something that was not charged. Accordingly, the court asked counsel whether, as opposed to a lesser-included instruction, defendant was actually seeking a compromise instruction.

¶ 11 Defense counsel stated that he did not want a compromise instruction, that he agreed with the court's position that no instruction regarding the residue amount was appropriate, and stated that, because the penalties available for possession of more than 900 grams of cocaine were not significantly less than those available for possession with intent to deliver, he " should probably roll the dice." The court asked counsel whether, based on counsel's discussions with defendant, he wanted a lesser-included instruction. Counsel replied "based on my further conversations with [defendant] and the facts presented and the charges not brought on the amount of cocaine and residue on the garbage, which would be less than 15 grams on a Class 4, yes, do not give a lesser included offense." The court clarified that no lesser-included would be given "on anything," and

counsel replied "do not instruct the jury on a lesser included offense, unless it's just the amount on the table and the residue in the garbage, but I don't think the State is charging it that way, as your Honor repeated." The court asked defendant if he understood and if he had any questions; defendant responded that he understood and had no questions.

¶ 12 The court then ruled that the facts and evidence did not in any manner support a lesser included offense of mere possession of cocaine in an amount greater than 900 grams; rather, all of the facts were consistent with an intent to deliver. Further, the court ruled, as the State elected not to charge defendant with "the cocaine that was in front of him, or the cocaine that was found in the trash can in his bedroom," it was not appropriate to instruct the jury on a lesser-included offense of unlawful possession of a Class 4 amount.

¶ 13 At the jury instruction conference, the trial court denied the State's request for an accountability instruction. The court reasoned that the cellophane in the garbage in defendant's room was consistent with the cellophane wrapped around the bricks of cocaine in the safe, but, otherwise, there was no evidence linking defendant to the "other indicia." The court determined that the consistent cellophane, standing alone, was insufficient evidence of an intent on defendant's behalf to promote or facilitate and aid the commission of the offense. "Had there been the fingerprint on the scale, had there been a fingerprint on the press, something else, that showed an active participation in this, my opinion might be different, but just the consistency of a wrapper in a trash can in a bedroom, standing alone, I don't think warrants [the instruction]."

¶ 14 During its deliberations, the jury asked the court whether the concepts of actual and constructive possession applied to both the drug and weapon charges. The court, with no objection, instructed the jury that actual and constructive possession applied to both charges. The jury convicted defendant of both charges.

¶ 15 Defendant moved for JNOV or, alternatively, a new trial. Before the motion was ruled upon, defendant was evaluated by clinical psychologist Anthony Latham, who indicated as part of the presentence investigation that defendant's intelligence quotient (IQ) fell in the 60 to 74 range, a score "in the extremely low range, which is consistent with mild mental retardation if other factors are met and[,] at the upper end of his range[,] he was in the borderline intellectual functioning level." After defense counsel told the court that, in light of Latham's findings, he had a *bona fide* doubt regarding defendant's ability to communicate and intellectual functioning, the court ordered Latham to determine whether defendant was fit for sentencing. At the fitness hearing, Latham testified for the State that defendant was fit for sentencing. Defendant presented no witnesses at the fitness hearing. The court found that defendant was fit for sentencing.

¶ 16 On June 11, 2010, the court heard defendant's posttrial motion. Defense counsel argued that he did not know about defendant's low IQ prior to trial and that the first time he had any indication that defendant's cognitive ability might be an issue was when, during trial, defendant indicated that he could not read or write (even in Spanish). Counsel stated "If I had known would I have done things dramatically differently? Absolutely, your Honor. I would not have conducted the trial in the manner I did, if I had known my client's [IQ]." On June 11, 2010, the court denied the JNOV motion, noting that, during trial, defense counsel never raised a concern regarding defendant's ability to assist in his own defense and that defendant never appeared to struggle to understand anything the court asked of him. The court found counsel's concerns regarding defendant's intelligence belied by the record. In addition, the court sentenced defendant to 20 years' imprisonment. The court noted that the sentences on the two convictions would be served concurrently. The order entered on June 11, 2010, however, notes only a 20-year sentence for the drug conviction and does not reference the weapon conviction.

¶ 17 II. ANALYSIS

¶ 18 A. Sufficiency of the Evidence

¶ 19 Defendant argues first that the State failed to prove beyond a reasonable doubt that he constructively possessed: (1) the cocaine found in a locked safe in Hernandez-Limon's bedroom; or (2) the firearm found in Hernandez-Limon's nightstand.

¶ 20 First, we disagree with defendant's assertion that there are no facts in dispute and, therefore, our standard of review should be *de novo*. The element of possession was established by circumstantial evidence and, because different inferences, *i.e.*, factual conclusions, may be drawn from circumstantial evidence, the sufficiency-of-the evidence test is appropriate. *People v. Moore*, 365 Ill. App. 3d 53, 58 (2006); *People v. Rizzo*, 362 Ill. App. 3d 444, 449 (2005). It is well-established that, when considering whether the evidence was sufficient to sustain defendant's conviction, we ask whether, viewing 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. Weathersby*, 383 Ill. App. 3d 226, 229 (2008). For the following reasons, we conclude that the evidence was sufficient to sustain defendant's convictions.

¶ 21 We address first the drug conviction. To succeed on a charge of unlawful possession with intent to deliver, the State must prove beyond a reasonable doubt that the defendant had knowledge of the narcotic, that the narcotic was in the defendant's immediate possession or control, and that defendant intended to deliver the narcotic. *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). A defendant's knowing possession may be found where evidence of his or her acts or conduct allow the inference that the defendant was aware of its presence at the place of discovery. *People v. Hodogbey*, 306 Ill. App. 3d 555, 560 (1999). Possession may be actual or constructive. Constructive possession exists where the defendant does not have actual personal present dominion

over an illegal item, but does have *both* the intent and capability to maintain control and dominion over the item. *People v. Blue*, 343 Ill. App. 3d 927, 939 (2003). Proof that the defendant controlled the premises where the substance was found may give rise to an inference that he or she had knowledge and possession (*People v. Givens*, 237 Ill. 2d 311, 335 (2010)), and habitation in or rental of the premises where the substance was found may suffice to show that defendant controlled the premises and, thus, constructively possessed the substance. *Blue*, 343 Ill. App. 3d at 939. However, a defendant's mere presence in the vicinity of an illegal item is not sufficient to support a finding that he or she constructively possessed it. *Id.*; *People v. Scott*, 367 Ill. App. 3d 283, 285 (2006). Indeed, even where the State establishes that a defendant knew that contraband was present nearby, that knowledge is not tantamount to proof that he or she had the capability to exercise control and dominion over it. *People v. Schmalz*, 194 Ill. 2d 75, 81-82 (2000).

¶ 22 Defendant challenges on appeal the evidence establishing that he constructively possessed the drugs found in the safe. Defendant argues that the evidence establishing his connection to the house was minimal because, although he was present when the officers arrived and although he told the officers he had just moved in, there was no indicia of his residency, no evidence that anything in the west bedroom belonged to him, no evidence establishing that the west bedroom was, in fact, his, and, therefore, no evidence that he had the capability and intent to exercise dominion or control over any area in the house, let alone over the contents of the locked safe in Hernandez-Limon's room. We disagree and conclude that the evidence was sufficient for the jury to find beyond a reasonable doubt that defendant knew the cocaine was inside Hernandez-Limon's bedroom safe and that defendant had both the intent and capability to maintain control and dominion over it.

¶ 23 In our view, the following evidence, viewed together and in the State's favor, supports the jury's verdict. First, the evidence established that, when the police entered the house, defendant was

standing near a line of a substance that appeared to be cocaine. Defendant argues that the State did not present: (1) the results of chemical testing to prove that the line of powder was cocaine, as opposed to Inositol (a fact the State acknowledges on appeal); (2) any evidence that defendant placed the powder there; or (3) any evidence that he "possessed any type of packaging from which he might have removed such a powder." As to the first point, it is the jury's function to draw reasonable inferences from the evidence. *People v. Moss*, 205 Ill. 2d 139, 164 (2001). Although conclusive chemical test results would have answered the question whether the line of white powder near defendant was, as it appeared to detective Sturtevant, cocaine, the absence of chemical evidence did not preclude the jury from reasonably inferring that, in fact, the substance was cocaine. Also, the kilo press, hydraulic jack, can of acetone, plastic baggies, and cellophane wrappers with cocaine residue were also in the living room with defendant; this evidence was sufficient for the jury to reasonably infer that the line was cocaine.

¶ 24 As to the second point, regardless of whether defendant placed the line of powder near him, the jury could have reasonably inferred from its proximity and the fact that it was in a "line" that defendant intended to use it, which, in turn, shows the intent and capability to maintain control and dominion over it. In addition, according to Amaro, defendant admitted that he was a drug user and had a drug problem, another strong factor in support of the inference that defendant intended to use the line of cocaine near him.

¶ 25 Defendant's third point actually touches on the evidence from which the jury could have found that defendant constructively possessed the cocaine found in the safe. Specifically, defendant contends that there was no evidence that he possessed packaging from which he might have removed the powder found near him. We disagree. Although Chastain testified that drugs sold for consumption are often packaged in the corners of baggies and broken off for sale, there was no

evidence that any such baggies with broken-off corners were recovered from the scene. Accordingly, the jury could have reasonably inferred that the line of cocaine intended for defendant's use came from within the house, as opposed to an outside source. Given that: defendant admitted living in the house, the evidence reflected that the house had two bedrooms and that the east bedroom was undisputedly Hernandez-Limon's, the jury could have reasonably inferred that the west bedroom was used by defendant. Inside that west bedroom was a Walmart bag; in the Walmart bag, police found cellophane with cocaine residue on it. That cellophane matched the cellophane wrapping found on the cocaine in the safe. Accordingly, because the cellophane in the west bedroom matched that in the safe and there was no evidence that the cocaine near defendant came from an outside source, the jury could have reasonably found that defendant had accessed the safe to obtain cocaine. Although the door to the bedroom was locked *after* Hernandez-Limon fled into it, it was not locked when he ran into it. Thus, the jury could have determined that, because the bedroom door was not locked at all times, defendant could have accessed the room. Further, although the safe was locked when police entered the bedroom, the jury could have reasonably inferred that Hernandez-Limon locked the bedroom door behind him to delay police entry so that he could close and lock the safe. Thus, a reasonable inference could be made that the safe was not always closed and locked and, therefore, defendant could have accessed the safe.

¶ 26 Defendant argues that there was no evidence that he participated in any mixing or packaging of cocaine, or that he was even present when such activities occurred. He asserts that a reasonable person not involved in drug trafficking could not be expected to recognize that the equipment, which was disassembled and stored in various locations throughout the house, constituted drug manufacturing and packaging equipment. Further, defendant argues, even if he knew that the house contained kilo presses and other drug-related equipment, that knowledge alone would not give rise

to a reasonable inference that he possessed, *i.e.*, controlled, the cocaine locked in the safe. However, defendant ignores that the standard is whether the evidence viewed in the State's favor was such that a reasonable jury could have found possession beyond a reasonable doubt. The State argued and presented evidence from Chastain that this house was not a home: it was a business. There were almost no furnishings, food or food products, or dishes inside the house. Instead, there was drug paraphernalia throughout. A reasonable jury could have concluded that any person purportedly *living* under such circumstances would have knowledge of the purpose of the items found therein, control over the premises, and, for the reasons described above, constructive possession over items found in an unlocked bedroom.

¶ 27 The cases upon which defendant relies are distinguishable because, in those cases, the evidence failed to establish constructive possession where there was insufficient evidence that those defendants lived in the residence or otherwise had control over the narcotics. See *People v. Scott*, 367 Ill. App. 3d 283, 286 (2006) (the defendant and a co-defendant went to a locked mailbox, the co-defendant opened the box with a key and handed the defendant cocaine; the defendant had no constructive possession over the drugs in the locked mailbox where there was no evidence presented that he resided in the apartment or, even if he had stayed there "off and on," possessed a key to access the mailbox and drugs therein); *In re K.A.*, 291 Ill. App. 3d 1, 6-8 (1997) (the defendant did not reside in the apartment where cocaine was found; the drugs were concealed and no paraphernalia was found; there was no evidence that anyone stayed in the apartment regularly or that the defendant had ever previously been to the apartment); *People v. Jones*, 278 Ill. App. 3d 790, 793-94 (1996) (the defendant did not reside in the house where cocaine was found, and a co-defendant testified to owning and hiding the cocaine). In contrast, "one way to prove the necessary control over the premises is to show that the defendant lived there." *In re K.A.*, 291 Ill. App. 3d at 6. Here,

defendant told police that he lived in the house. That assertion was supported by the evidence that, in the west bedroom, clothes were found in bags and personal care items were found on the nightstand. Where defendant resided in the house and drug paraphernalia and cocaine was located prominently throughout the house, the circumstantial evidence viewed in the State's favor was sufficient for a jury to conclude that defendant intended to and was capable of exercising dominion and control over the drugs even though there was no evidence that defendant possessed the combination or a key to the safe.[3]

¶ 28 We next address the possession-of-a-weapon charge and conclude that the foregoing analysis similarly applies. A defendant may constructively possess a firearm where he or she: (1) has knowledge of the presence of the weapon; and (2) exercises immediate and exclusive control over the area where the weapon was found. *People v. Ross*, 407 Ill. App. 3d 931, 935 (2011). "A trier of fact is entitled to rely on reasonable inferences of knowledge and possession." *Id.* "The law is clear that the exclusive dominion and control required to establish constructive possession is not diminished by evidence of others' access to the contraband." *People v. Williams*, 98 Ill. App. 3d 844, 849 (1981).

¶ 29 As to knowledge, Amaro testified that, although defendant waived his *Miranda* rights and spoke to him, when asked about the gun in the house, defendant fell silent. "Knowledge may be

[3]We note that we find unavailing defendant's argument that the trial court's rationale for denying the State's request for an accountability instruction reflects that the evidence was insufficient to sustain defendant's possession conviction. The fact that the court did not find that the evidence supported an instruction that defendant aided or abetted the crime is simply a different inquiry from whether he had the intent and ability to exercise dominion and control over the drugs.

proven by evidence of a defendant's acts, declarations or conduct from which it can be inferred he knew the contraband existed in the place where it was found." *Id.* at 936. The jury could have reasonably inferred from defendant's silence, coupled with his admitted residence in the house, that he knew about the weapon in the east bedroom. Further, according to Chastain, it is common for a drug house to contain a weapon for protection of the drug dealers and the drugs. Accordingly, the jury could have reasonably believed that, given the nature of the house, the amount of drug paraphernalia, and the overall drug operation therein, defendant knew that a gun was present.

¶ 30 As to possession, again, the evidence reflected that: (1) defendant stated he lived in the house; (2) the east bedroom door was not locked at all times; (3) unlike the safe, which contained a lock, the nightstand drawer where the gun was found was not locked; and (4) the ammunition was found sitting on top of the nightstand, in open view (thus also making known to anyone who viewed the ammunition that a weapon likely existed) and with unhindered access thereto. Accordingly, the jury could have reasonably inferred that defendant exercised dominion and control over the weapon. As defendant did not possess a FOID card,[4] defendant's conviction for possession without a FOID card is affirmed.

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[4]Defendant suggests that he did not need to possess a FOID card when inside his own home. However, there was no evidence presented that defendant possessed a FOID card at *all*, despite the requirement that "[n]o person may acquire *or possess* any firearm *** within in this State without having in his or her possession a [FOID card] *previously issued* in his or her name by the Department of State Police under the provisions of this Act." (Emphases added.) 430 ILCS 65/2(a)(1) (West 2008).

¶ 31 In sum, we reject defendant's challenges to the sufficiency of the evidence and conclude that the evidence was sufficient for the jury to find that defendant intended to and was capable of exercising control and dominion over both the drugs and the weapon.

¶ 32 B. Ineffectiveness of Counsel

¶ 33 Next, defendant argues that his trial attorney was ineffective where he: (1) misunderstood a court ruling and consequently failed to present significant evidence favoring defendant; and (2) acquiesced in the court's conclusion that the evidence did not support a lesser-included offense instruction and verdict form for possession of a Class 4 felony amount of cocaine.

¶ 34 When a defendant argues that counsel's performance was ineffective, he or she must show both that: (1) the attorney's performance fell below an objective standard of reasonableness (deficient performance prong); and (2) there is a reasonable probability that, but for the attorney's deficient performance, the outcome of trial would have been different (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Villareal*, 198 Ill. 2d 209, 228 (2001). To succeed on an ineffective-assistance-claim, both *Strickland* prongs must be satisfied. *Strickland*, 466 U.S. at 687; *People v. Williams*, 181 Ill. 2d 297, 320 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome; specifically, that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Enis*, 194 Ill. 2d 361, 376 (2000).

¶ 35 There is a strong presumption that an attorney's performance falls within the wide range of reasonable professional assistance. Trial strategy cannot be a basis for finding counsel ineffective. See *People v. Smith*, 177 Ill. 2d 53, 92 (1997). Our standard of review of defendant's ineffective-assistance claim is bifurcated: we defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but make a *de novo* assessment of the ultimate legal issue of

whether counsel's act or omission supports an ineffective assistance claim. *People v. Bailey*, 375 Ill. App. 3d 1055, 1059 (2007).

¶ 36 1. Counsel's Alleged Misunderstanding of Ruling

¶ 37 Defendant's first argument that counsel provided ineffective assistance is based on counsel's misunderstanding of a pre-trial ruling. Specifically, the court granted the State's motion *in limine* to preclude introduction of any evidence of "the status, the outcome or any mention of the co-defendants' cases." At trial, neither Hernandez-Limon nor Erick Limon (apparently Hernandez-Limon's cousin) were mentioned by name until the assistant State's Attorney asked one State expert whether Hernandez-Limon's fingerprints were found on pieces of evidence. Defense counsel objected, noting that he had taken great pains to avoid mentioning the co-defendants by name, referring instead to Hernandez-Limon as defendant's "roommate." The court clarified that its order did not preclude reference to the names of the co-defendants, but only the status of the co-defendants' cases. Thereafter, defense counsel referred to Hernandez-Limon by name, but Erik Limon's name was never mentioned. Defendant argues that his counsel's failure to introduce any information about Erik Limon was prejudicial because, if counsel had suggested that Hernandez-Limon and Erik Limon jointly possessed the drugs, the jury might have believed that Hernandez-Limon merely safeguarded the cocaine for his cousin and that defendant was merely a newly-arrived boarder with no connection to the enterprise. As it was, he argues, the jury was forced to accept the unlikely notion that Hernandez-Limon ran the drug enterprise entirely alone.

¶ 38 We conclude that counsel's failure to introduce evidence regarding Erik Limon was not objectively unreasonable. Indeed, we do not agree with defendant that introducing evidence about Erik Limon would necessarily have benefitted his case. At trial, the defense painted defendant as a new boarder with limited access to the cocaine and limited knowledge of the operation. It is quite

possible that the more people introduced to the jury as either living in the house or as being involved in running a drug operation out of the house, the less inclined the jury would have been to believe: (1) that defendant was completely unaware of the scale of the operation; or (2) that the house was a home with clearly-defined boundaries as opposed to simply a business with no part "off-limits" to anyone therein. Accordingly, evidence of Erik Limon's existence or involvement might have made the jury even more likely to find defendant knowingly and constructively possessed the cocaine.

¶ 39 As both *Strickland* prongs must be satisfied to succeed on an ineffective-assistance claim, and we have determined that counsel's performance did not fall below an objective standard of reasonableness under the first prong, we need not address the second, prejudice prong. *Williams*, 181 Ill. 2d at 320 (if defendant fails to make a showing under one prong, the reviewing court need not consider the other prong). Nevertheless, we note that counsel's failure to introduce evidence of Erik Limon was also not prejudicial such that, if counsel had introduced such evidence, the result of the trial would have been different. Regardless of whether defense counsel mentioned Erik Limon, counsel repeatedly emphasized through questioning and argument that the defense's theory of the case was that the drugs did not belong to defendant. Counsel argued repeatedly that the evidence pointed solely to Hernandez-Limon, and not defendant, as the drug owner. Counsel highlighted that drugs were found locked in a safe in Hernandez-Limon's bedroom, that the fingerprints found and identified on the drugs and/or paraphernalia did *not* match defendant's fingerprints, and that defendant had no knowledge of what was going on because he had only recently moved in. Thus, whether counsel had argued the drugs belonged to Hernandez-Limon or whether he had argued that the drugs belonged to Hernandez-Limon and Erik Limon, defendant's core argument would have remained the same: that the drugs belonged to someone other than

defendant. The jury rejected this argument. Accordingly, as there is no reasonable probability sufficient to undermine confidence in the outcome that, had defense counsel introduced evidence regarding Erik Limon, the result of the trial would have been different, and as counsel's performance was not objectively unreasonable, we reject defendant's first ineffective-assistance claim.

¶ 40 2. Counsel's Agreement that Lesser-Included Instruction Was Improper

¶ 41 Defendant next argues that counsel was ineffective because he acquiesced in the court's allegedly-mistaken determination that no lesser-included instruction was proper. We disagree.

¶ 42 The court and the parties engaged in a lengthy discussion about lesser-included instructions. Defense counsel initially stated that defendant wanted the court to instruct the jury on the lesser-included offense of simple possession; thereafter, he, defendant, the assistant State's Attorney, and the trial court discussed what, if any, lesser-included instructions in that regard would, based on the evidence, be appropriate. In that discussion, the trial court stated *numerous* reasons why the instructions defense counsel suggested were not appropriate. Counsel ultimately acted in accord with the court's position: (1) agreeing with the court's rationale regarding the residue amounts; and (2) stating that, as to possession of more than 900 grams, the penalties for mere possession would not be significantly less than possession with an intent to deliver and, therefore, he should probably "roll the dice" and hope for outright acquittal rather than permit the jury to view a mere possession instruction as a compromise verdict. Accordingly, counsel represented that he and defendant had decided that they would not tender the instructions.[5] Critically, the court thereafter formally *ruled*,

[5]We do not find relevant to the ineffective-assistance question defendant's low IQ. Again, we do not view counsel's actions to constitute, in substance, a withdrawal of the proposed lesser-included instructions. Even if we were to consider counsel's actions as a formal withdrawal of the

consistent with the rationale it had previously announced, that the instructions were, in fact, improper and would not be given.

¶ 43 Counsel is not required to offer baseless or losing arguments to avoid being found ineffective. See *e.g.*, *People v. Phipps*, 238 Ill. 2d 54, 64-65 (2010); *People v. Lewis*, 88 Ill. 2d 129, 156 (1981). Here, however, defendant is essentially challenging counsel's failure to present or argue a baseless position. Regarding the proposed lesser-included instruction on the residue amount, the trial court did not err in finding that, because defendant was not charged with possessing the *residue* amounts found in the house, it could not offer a lesser-included offense instruction on those drugs. "Where a defendant is charged with a single offense, he cannot be convicted of an offense *not charged* unless it is a lesser-included offense of the crime for which defendant is *expressly charged*." (Emphases added.) *People v. Hamilton*, 179 Ill. 2d 319, 327 (1997). The parties do not dispute that possession is a lesser-included offense of possession with intent to deliver. However, defendant was charged only with possessing a specific amount of cocaine, *i.e.*, more than 900 grams. That amount was found in the safe. As defendant was *not* charged with possessing with intent to deliver residue amounts of cocaine found throughout the house, there could be no lesser-included instruction for those amounts. Thus, counsel's agreement with the court's correct determination cannot form the basis of an ineffective-assistance claim.

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instructions, it may be presumed, absent evidence to the contrary, that defendant made or consciously acquiesced in that decision. See *People v. Medina*, 221 Ill. 2d 394, 409 (2006); *People v. Rhodes*, 386 Ill. App. 3d 649, 653 (2008). Here, defendant stated on the record that he understood and agreed that no lesser-included instruction would be tendered, and the court found that defendant was fit and able to assist with his defense. That decision is not challenged on appeal.

¶ 44 As to the proposed lesser-included instruction on the amount with which defendant *was* charged, that in the safe exceeding 900 grams, we note that defendant does not directly challenge his counsel's decision not to request a possession instruction for that quantity found in the safe (instead, defendant concedes that if the jury found that he possessed over 900 grams, it most assuredly would have found that he did so with the intent to deliver). In any event, we agree with the court's determination that a possession (*i.e.*, without an intent to deliver) instruction on the 900 grams was inappropriate because the evidence (and common-sense) reflected that no rational jury could have found that defendant would have possessed the cocaine in the safe, more than 5,555 grams (some in brick form wrapped in cellophane), without an intent to deliver. See *People v. Hamilton*, 179 Ill. 2d 319, 323-24 (1997) ("a defendant is entitled to a lesser included offense instruction only if an examination of the evidence reveals that it would permit a jury to rationally find the defendant guilty of the lesser offense yet acquit the defendant of the greater offense"). Accordingly, permitting the jury to convict defendant of possession *without* an intent to deliver of more than 900 grams was simply not supported by the evidence.[6] It bears noting that, although counsel affirmatively represented to the court that defendant did not want the court to tender a lesser-included instruction on mere possession of more than 900 grams of cocaine because it would

[6]Defendant does not raise this argument, but we nevertheless note that an instruction that defendant simply possessed with no intent to deliver *less* than 900 grams of the cocaine found *in the safe* would also have been improper. There was no argument or evidence to suggest that, as to the cocaine in the safe, defendant could have been found to have possessed less than the entire amount found within—in other words, he either did not possess it at all or, if he possessed it, he possessed the entire amount.

offer the jury a compromise verdict, at that point it was clear that, even if defense counsel *did* ask the court to tender an instruction on mere possession of more than 900 grams of cocaine, that exercise would be futile because the court was clear in its position and would have (as it ultimately did) refused to give the instruction.

¶ 45 Thus, where counsel did pursue lesser-included instructions but ultimately agreed with the court's correct assessment that the instructions would not be proper, we cannot find his performance ineffective. Not only are such decisions strategic and completely divorced from performance assessments (see *People v. Palmer*, 188 Ill. App. 3d 414, 428 (1989) (counsel's decisions regarding lesser-included instructions strategic and have no bearing on competency of counsel)), the trial court and counsel were *correct* that the suggested lesser-included instructions would have been improper (*Lewis*, 88 Ill. 2d at 156 (counsel need not offer losing objections to avoid being found ineffective)).

¶ 46 We affirm the judgment of the trial court. However, the State notes that defendant was not sentenced for the possession-of-a-weapon conviction. Indeed, it is unclear whether defendant received a sentence for this conviction because, although the trial court noted at sentencing that the sentences would run concurrently, it entered one, 20-year sentence and did not state in the sentencing order what sentence, if any, it imposed based on defendant's conviction for possessing the weapon. Accordingly, we remand the cause for the trial court to determine whether it imposed a sentence for the possession of a weapon without a FOID card conviction and, if it did not, to impose a sentence on that charge.

¶ 47 III. CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed and the cause is remanded.

Affirmed and remanded.