NO. 4-09-0560 Order filed 2/16/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
MARCUS POSEY,	)	No. 09CF108
Defendant-Appellant.	)	
	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice McCullough concurred in the judgment.

Held: 1. The trial court did not err in instructing the jury on constructive possession when there was some evidence to support the instruction.

2. The evidence was sufficient to convict defendant of unlawful possession of a controlled substance with intent to deliver beyond a reasonable doubt when the circumstantial evidence, and all reasonable inferences drawn therefrom, convinced the jury that defendant had thrown out of the car window a plastic bag containing a total of 5.1 grams separated into 30 individually packaged rocks of crack cocaine, which defendant had intended to sell, as evidenced by the amount and the manner in which it was packaged.

3. The trial court did not abuse its discretion in sentencing defendant to 22 years in prison based upon defendant's extensive criminal history, the nature of the crime, and defendant's character.

ORDER

In June 2009, a jury found defendant, Marcus Posey, guilty of unlawful possession of a controlled substance with intent to deliver. The trial court sentenced him to 22 years in prison. He appeals his conviction and sentence, claiming (1) the court erred in instructing the jury on constructive possession, (2) the evidence was insufficient to

support the jury's verdict, and (3) his sentence was excessive. We disagree with defendant's claims and affirm the court's judgment.

I. BACKGROUND

On January 20, 2009, a police officer observed defendant and another man talking outside of Walgreens. The officer watched defendant get in the passenger side of a vehicle waiting in the parking lot. The officer suspected that he had just observed a drug transaction, so he followed the vehicle as it left the lot. The officer found a plastic bag containing suspected cocaine in the street after the vehicle had passed. Because the officer did not have backup, he chose not to pursue defendant. The next day, the officer and his partner found defendant and another man in the area, apparently searching for something on the ground. The officers arrested defendant for possession of the cocaine found in the street the day before.

At defendant's jury trial, the State presented the following evidence. Francisco Hutchins, a convicted felon and admitted drug user, testified that he had been trying to maintain sobriety for some time, though he had experienced multiple relapses. One of those relapses occurred on January 20, 2009, the day when defendant approached him at a convenience store and offered to pay him $20 for a ride to Walgreens. Hutchins agreed. Hutchins waited in the vehicle while defendant went inside the store. Defendant came back out and got in the car. According to "the deal," Hutchins was supposed to return defendant to the convenience store, but when they left Walgreens, defendant told Hutchins to make a turn in the opposite direction. Unsure of defendant's intentions based on his "skittish" demeanor and thinking something was "a little funny," Hutchins stopped the car and defendant "jumped out." Hutchins realized he had not yet been paid, so he returned

to where he had left defendant. Defendant got back in the car and told Hutchins to drop him off "somewhere on Main Street." When defendant got out, he paid Hutchins with cocaine rather than cash.

Martinez Foster, a convicted felon and current parolee, testified that on January 21, 2009, defendant asked him to help look for some money he had dropped in the street near Walgreens. Defendant was carrying a bucket. Foster assumed defendant meant they were looking for currency. As they were searching, two police officers approached and questioned them about the cocaine found the day before. Foster told the officers the cocaine was not his, as he was just helping defendant, at defendant's request, search for the money he had lost.

Jay Loschen, an Urbana police officer, testified that he was at Walgreens on the evening of January 20, 2009, when he saw defendant talking to Robert Barrett outside the store. Loschen got in his unmarked police vehicle and watched defendant and Barrett enter the store together. When they came out, defendant got into Hutchins' vehicle. Barrett bent down to pick something up from the sidewalk and then gestured toward defendant. Loschen started to follow Hutchins' vehicle when he spotted something laying in the middle of the road. He got out and picked it up. It was a plastic bag containing 30 individual plastic bags, each with a white chunky substance inside. Loschen testified that this item was not in the road before he entered the Walgreens parking lot. At that time, Loschen did not take any enforcement action because he did not have backup assistance. Based on Loschen's experience, it was his opinion that the crack cocaine found in the road was packaged for sale, not individual use, and had a street value of approximately $1,200. Later that evening, Loschen and his partner, Michael Cervantes, returned to Walgreens,

suspecting that defendant would be looking for the drugs. They did not find defendant. The next day, they returned to the area and found defendant and Foster apparently searching for something on the ground. Defendant was carrying a bucket and was kicking at the snow. The officers arrested defendant for possession of the cocaine Loschen had found the day before.

Michael Cervantes, an Urbana police officer, testified that on January 20, 2009, he met with his partner, Officer Loschen, at the police department. Loschen had with him a plastic bag of suspected crack cocaine. He said Loschen described to him what he had observed at Walgreens and suggested the two return to the area and search for defendant. They did so, but did not find defendant. The next day, they saw defendant with a bucket in his hand, kicking snow, apparently looking for something on the ground. The officers made contact with defendant and arrested him. In Cervantes' opinion, the cocaine that Loschen found on the ground was packaged for sale, not individual use.

Gary Havey, a forensic scientist with the Illinois State Police, testified that he conducted a fingerprint analysis on the outer plastic bag, but he was unable to obtain a suitable print for comparison. The State also presented a trial stipulation that Hope Erwin, an Illinois State Police forensic scientist, would testify, if called as a witness, that the 30 plastic bags contained a total of 5.1 grams of cocaine.

At the close of the testimony, the State introduced four exhibits into evidence: (1) 30 individual plastic bags of cocaine, (2) the plastic bag that had contained the 30 individual bags, (3) the plastic bucket defendant was carrying at the time he was arrested, and (4) a map of the area. Without objection, the court admitted the State's exhibits into evidence. The State rested. Defendant presented no evidence.

During the instruction conference, the State introduced an instruction on constructive possession. Defense counsel objected, claiming that the State's theory of the case (that defendant threw his cocaine from the car window) did not involve constructive possession. Despite counsel's objection, the court ordered the instruction to be given. After closing arguments, the court instructed the jury and included the following from Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000) (hereinafter IPI No. 4.16): "Possession may be actual or constructive. A person has actual possession when he has immediate and exclusive control over a thing. A person has constructive possession when he lacks actual possession of a thing but he has both the power and the intention to exercise control over a thing either directly or through another person."

After deliberating, the jury found defendant guilty. Defendant filed a motion for a new trial, in which he included the claims he now raises on appeal. The trial court denied defendant's motion and proceeded to sentencing. Based primarily on defendant's extensive criminal record, the court sentenced him to 22 years in prison. This appeal followed.

II. ANALYSIS

A. Whether the Trial Court Erred in Giving a Jury Instruction on Constructive Possession

Defendant first claims the trial court erred in instructing the jury on the element of constructive possession pursuant to IPI No. 4.16 when the evidence did not support any theory of possession other than actual possession. Without factual support, defendant argues, the jury should not have been allowed to consider the possibility that defendant was guilty under the theory of constructive possession.

> "The purpose of jury instructions is to provide the jury with correct legal rules that can be applied to the evidence to guide the jury toward a proper verdict. [Citation.] In a criminal case, the trial court is required to properly instruct the jury on the elements of the offense, the burden of proof, and the presumption of innocence. [Citation.] The decision to give a certain instruction rests with the trial court, and we will not reverse its judgment absent an abuse of discretion. [Citation.] A trial court abuses its discretion if the jury instructions given are unclear, mislead the jury, or are not justified by the evidence and the law. [Citation.]" *People v. Lovejoy*, 235 Ill. 2d 97, 150 (2009).

"In examining a challenge to jury instructions, a reviewing court must determine whether the instructions, taken as a whole, fairly, fully and comprehensively apprised the jury of the relevant legal principles." *People v. Banks*, 237 Ill. 2d 154, 208 (2010). A trial court is justified in giving a jury instruction if it is supported by some evidence in the record. *Curi v. Murphy*, 366 Ill. App. 3d 1188, 1199 (2006).

The circumstantial evidence presented at trial established that the bag of crack cocaine was thrown by defendant out of the window of Hutchins' car. Defendant did not possess the drugs at the time he was arrested, but, under the State's theory, the drugs were still within his possession, meaning he constructively possessed them. It was proper for the jury to be instructed that defendant could possess the drugs in a legal sense without actually having them on his person at the time the drugs were found or at the time he was arrested.

Thus, the State presented some evidence to establish a reasonable probability that defendant possessed the drugs, within the legal definition of possession, though he was not found with them in his physical possession. Rather, defendant possessed them based on the fact that the premises where the drugs were found was under defendant's control at the time the drugs appeared. See *People v. Stupka*, 226 Ill. App. 3d 567, 571 (1992). We conclude that, because the theory of constructive possession was supported by at least some evidence, the trial court was justified in giving the instruction.

B. Whether the Evidence Was Sufficient To Support Defendant's Conviction

Defendant next claims the State failed to present sufficient evidence to convict him of possession of a controlled substance with intent to deliver beyond a reasonable doubt. He argues the State failed to establish that the cocaine found in the plastic bag laying in the street belonged to him. In fact, defendant argues, it is illogical to assume that he threw the plastic bag containing 30 individually packaged rocks of cocaine out of Hutchins' car, while keeping one to give to Hutchins for payment.

The State argued to the jury that the evidence presented at trial supported its theory that defendant knowingly possessed the 30 rocks of cocaine at the time that he got into Hutchins' vehicle at Walgreens. Defendant then, according to the prosecutor, "figured out the police were on to him" and threw the drugs out the window. The prosecutor told the jury they could be sure that defendant had knowingly possessed the cocaine "because he came back to find it." According to the State, the fact that defendant was searching the next day in the same area where the drugs were found was "just a little too coincidental" to establish a reasonable doubt.

In terms of the intent-to-deliver element, the police officers' testimony revealed that the amount of crack cocaine found and the way it was packaged were indicative that it was intended to be sold. According to the testimony, the amount of the cocaine exceeded that which was typically possessed for personal use, and the 30 individual bags for sale were placed in one larger bag for ease of transport.

The elements of unlawful possession of a controlled substance with intent to deliver are: (1) the defendant had knowledge of the presence of the controlled substance, (2) the drugs were in the immediate possession or control of the defendant, and (3) the defendant intended to sell the drugs. 720 ILCS 570/401 (West 2008); *People v. Robinson*, 167 Ill. 2d 397, 407 (1995). These elements of knowledge, possession, and intent are questions of fact that are rarely susceptible to direct proof and most often must be proved by circumstantial evidence. *People v. Cooper*, 337 Ill. App. 3d 106, 110 (2003).

Relying on the State's circumstantial evidence, the jury obviously concluded that the cocaine found in the street belonged to defendant. Although Officer Loschen did not see defendant throw the plastic bag from the vehicle, he testified that the bag was not in the street before the vehicle in which defendant was riding had passed that area. Jurors are entitled to believe as much or as little of the testimony of the witnesses as they choose. *People v. Warren*, 33 Ill. 2d 168, 174 (1965). Where the truth must be obtained from a debatable set of circumstances, it is a matter for the trier of fact and it is not for the reviewing court to substitute its own opinion. *People v. Bowman*, 138 Ill. 2d 131, 139 (1990).

In this case, the jurors were entitled to make the reasonable inference, based on the witnesses' testimony, that defendant threw the bag from the car as it passed the area.

The jurors could also make the reasonable inference that the drugs were intended to be sold based upon the quantity and the manner in which they were packaged. See *People v. Friend*, 177 Ill. App. 3d 1002, 1021 (1988). The jurors made these inferences, and thus, we cannot say as a matter of law that the evidence was insufficient to support the jury's verdict. See *People v. Richardson*, 21 Ill. 2d 435, 436-38 (1961) (police officers testified that they thought the defendant had thrown heroin on the ground and because the jury believed their testimony and there was no reason to doubt the officers' credibility, the supreme court affirmed the defendant's conviction based on the sufficiency of the evidence).

When a reviewing court considers the sufficiency of the evidence, it should not retry the defendant. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). Instead, the court should consider 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. Woods*, 214 Ill. 2d 455, 470 (2005). A court will not overturn the jury's verdict unless "the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *People v. Maggette*, 195 Ill. 2d 336, 353 (2001). It is the jury's duty, not the reviewing court's, to weigh the credibility of witnesses and to resolve conflicts or inconsistencies in the testimony. *People v. Phillips*, 127 Ill. 2d 499, 510 (1989).

Given the deferential rules of appellate review, we will not reassess the witnesses' credibility, and we therefore acquiesce in the jury's finding with regard to defendant's possession of the crack cocaine found laying in the street. We cannot say that the jury's findings are so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of defendant's guilt of possession of a controlled substance with intent to

deliver. See *People v. Wells*, 241 Ill. App. 3d 141, 147 (1993) (jury was faced with credibility question and chose to believe certain testimony over the defendant's theory, a decision that was within its province and will not easily be disturbed).

C. Whether Defendant's Sentence Was Excessive

Finally, defendant claims the 22-year sentenced imposed was excessive based on the "mere 5.1 grams of cocaine" involved, his youthful age, and his overall rehabilitative potential. As defendant is aware, the sentencing court has broad discretionary powers in choosing an appropriate sentence, and this court will overturn a sentence only if it is discovered that the trial court abused its discretion. See *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). A sentence will be deemed an abuse of discretion where the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). In this case, we find no abuse of discretion.

Defendant was convicted of a Class 1 felony (720 ILCS 570/401(c)(2) (West 2008)) and was eligible for an extended-term sentence based on his criminal record (730 ILCS 5/5-5-3.2(b)(1) (West 2008)). Thus, the applicable sentencing range for defendant's conviction in this case was 4 to 30 years in prison. See 730 ILCS 5/5-8-2(a)(3) (West 2008). Defendant's criminal history is extensive and alone sufficient to justify the trial court's imposition of a 22-year sentence. As a juvenile, in 2001 and 2002, defendant was convicted of eight offenses, all but one of which involved drugs or violence. His resulting community-based sentences were unsuccessful and he then served time in the Illinois Department of Corrections. As an adult offender, in addition to 14 traffic offenses, defendant was convicted of assault, unlawful possession or consumption of liquor by a

minor, and two other drug-related offenses. In 2006, he was sentenced to a term of eight years in prison upon his conviction of the identical offense of unlawful possession of a controlled substance with intent to deliver, his prior Class 1 felony. In 2008, he was convicted of a Class 4 felony of unlawful possession of a controlled substance. He was sentenced to 13 months probation. He was on probation for that offense when he committed the current offense. At the time of sentencing, he also had a pending aggravated-battery charge.

It is obvious that defendant's prior sentences had no deterrent effect on his involvement in criminal activity. He committed a vast number of crimes and traffic offenses within a relatively short period of time, just over seven years. And, he has committed the same crime twice within three years. While in jail, he has received multiple disciplinary tickets based on his destructive and violent behavior, including an assault on a corrections officer. Based on defendant's history, in particular, his failure to comply with any of his community-based sentences, it is evident that he holds little regard for authority and the law, making his rehabilitative potential limited, or more likely, nonexistent.

Defendant's criminal history, his behavior, his character, and his total disregard for the law, coupled with the need to deter others from committing similar crimes, even those involving a relatively small quantity of drugs, justified the 22-year sentence imposed. See *People v. Simms*, 192 Ill. 2d 348, 422 (2000) (the nature of the offense, the defendant's "generous criminal record," his violent behavior in prison, and his disciplinary infractions while in custody were proper considerations for the imposition of his sentence). As the trial court stated, defendant committed a "very significant offense," and based on this significance, we conclude defendant's sentence is not at variance with the

spirit and purpose of the law, nor is it manifestly disproportionate to the nature of the offense. The 22-year prison sentence was within the applicable statutory limit. See *Jones*, 168 Ill. 2d at 373-74 (if the sentence is within the statutory range, a reviewing court has the power to disturb the sentence only if the trial court abused its discretion). Given the totality of the circumstances in this case, we find the trial court did not err in imposing the sentence or in denying defendant's motion to reconsider. Defendant's sentence is affirmed.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

Affirmed.