NO. 4-10-0088 Filed 6/23/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
LEE A. BROWN,	)	No. 08CF1337
Defendant-Appellant.	)	
	)	Honorable
	)	Katherine M. McCarthy,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

Held: The State presented sufficient evidence from which a jury could convict defendant of possession of a controlled substance where a pipe found on defendant's person contained cocaine and defendant admitted smoking crack cocaine from the pipe a week prior to his arrest.

In April 2009, a jury convicted defendant, Lee A. Brown, of unlawful possession of a controlled substance (cocaine) (720 ILCS 570/402(c) (West 2008)). In January 2010, the trial court sentenced him to three years' imprisonment.

Defendant appeals, arguing the evidence failed to establish knowing possession of cocaine where the State's case was premised on week-old ash waste. We affirm.

I. BACKGROUND

Brian Allison, a police officer with the Decatur police department, testified on April 12, 2007, he responded to a complaint of a man disturbing others by begging for money. Allison approached defendant and detected the odor of burnt cannabis. Allison asked defendant

if he had any marijuana on him. Defendant responded he did not. Allison then asked defendant if he had any paraphernalia on him. Defendant produced a metal tube from his pocket. The tube was burnt at both ends and contained a steel wool-type material commonly used to keep a burning substance in place. Allison testified in his experience the tube was consistent with devices used to smoke crack cocaine. According to Allison's testimony, defendant admitted he had used the pipe to smoke marijuana the preceding day and crack cocaine the week before.

On September 15, 2008, more than 16 months later, the State charged defendant by information with unlawful possession of a controlled substance with prior unlawful possession of a controlled-substance conviction (720 ILCS 570/402(c) (West 2008)), alleging that on April 12, 2007, he knowingly and unlawfully possessed less than 15 grams of a substance containing cocaine, and he had been previously convicted of unlawful possession of a controlled substance in Macon County case No. 04-CF-1077.

During defendant's April 23, 2009, jury trial, Mark Paiva, a forensic scientist with the Illinois State Police, testified he normally would weigh a substance. However, in this case, "there was no substance to weigh." Paiva scraped out some of the residue and performed an infrared spectrometer test, a thin layer chromatography test, and a gas chromatograph mass spectrometer test. Based on the results of those tests, Paiva opined the residue contained cocaine base, "also known as crack."

During deliberations, the jury sent a note to the trial court asking the following. "The jury would like clarification on the law that addresses whether residue constitutes possession of controlled substan[ce]." The trial court and the parties discussed the matter. The court responded to the note, stating, "You have before you the jury instructions concerning this issue.

Please refer to the jury instructions in their entirety." The jury had been given Illinois Pattern Jury Instructions, Criminal, No. 17.27 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 17.27) which states "[a] person commits the offense of possession of a controlled substance when he knowingly possesses a substance containing a controlled substance." IPI Criminal 4th No. 17.28 was also given and states "[t]o sustain the charge of possession of a controlled substance, the State must prove the following proposition: [t]hat the defendant knowingly possessed a substance containing cocaine, a controlled substance."

On April 23, 2009, the jury found defendant guilty of possession of a controlled substance.

On April 24, 2009, defendant filed a motion for a new trial or, in the alternative, a judgment notwithstanding the verdict, which the trial court denied.

On October 29, 2009, the trial court found defendant unfit to be sentenced and remanded him to the custody of the Department of Human Services.

On December 21, 2009, the trial court adjudged defendant fit to proceed.

On January 26, 2010, the trial court sentenced defendant as stated.

This appeal followed.

II. ANALYSIS

On appeal, defendant argues the evidence was insufficient to convict him of unlawful possession of a controlled substance.

When reviewing a challenge to the sufficiency of the evidence, in a criminal case, the relevant inquiry is whether, when 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. Brown*, 169 Ill. 2d 132, 152, 661 N.E.2d 287, 296 (1996). It is the responsibility of the trier of fact to determine the credibility of witnesses, and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259, 752 N.E.2d 410, 425 (2001). A court of review will not overturn the verdict of the fact finder "unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *People v. Milligan*, 327 Ill. App. 3d 264, 267, 764 N.E.2d 555, 558 (2002).

To support a conviction for unlawful possession of a controlled substance, the State must prove beyond a reasonable doubt "that the defendant knew of the presence of the substance and that the substance was in the defendant's immediate and exclusive control." *People v. McCoy*, 295 Ill. App. 3d 988, 995, 692 N.E.2d 1244, 1249 (1998).

During trial, defendant's counsel essentially conceded there was crack residue in the device. He focused his argument instead on whether defendant *knew* the cocaine residue was in the crack pipe. Similarly, on appeal, defendant argues the State failed to establish he knowingly possessed the cocaine where there was no evidence defendant was aware the week-old ash waste contained cocaine residue and no amount of cocaine was visible to the naked eye.

However, "[t]he element of knowledge is hardly ever susceptible of direct proof, but it may be proved by evidence of acts, declarations or conduct of the accused from which the inference may be fairly drawn." *People v. Embry*, 20 Ill. 2d 331, 334, 169 N.E.2d 767, 768 (1960). "Because of the difficulty in proving knowledge, when actual or constructive possession is established, generally the element of knowledge can be inferred from the surrounding circumstances." *People v. Roberts*, 263 Ill. App. 3d 348, 352, 636 N.E.2d 86, 90 (1994), citing *People v. Jackson*, 23 Ill. 2d 360, 365, 178 N.E.2d 320, 322 (1961). It is the fact finder's

prerogative, not ours, to decide what inferences to draw from such evidence. See *People v. Robinson*, 167 Ill. 2d 397, 413, 657 N.E.2d 1020, 1029 (1995). Thus, a defendant's knowledge of the controlled substance is a question to be determined by the trier of fact. *People v. Butler*, 242 Ill. App. 3d 731, 733, 611 N.E.2d 603, 605 (1993).

In this case, the facts before the jury indicated the tube was used as a smoking device and was located on defendant's person. Officer Allison testified defendant produced a metal tube, which in Allison's experience was consistent with devices used to smoke crack cocaine. Both Allison and Paiva testified the cocaine was not visible to the naked eye. Paiva testified he performed tests on the tube. As a result of the testing, Paiva was of the opinion, based on a reasonable degree of scientific certainty, that the substance scraped out of the tube contained cocaine base, *i.e.*, crack cocaine. According to Allison's testimony, defendant admitted using the tube to smoke crack cocaine the week before. The jury could reasonably conclude defendant knew residue from the crack cocaine remained in his pipe. *People v. Comage*, 303 Ill. App. 3d 269, 275, 709 N.E.2d 244, 249 (1999).

Reviewing the sufficiency of the evidence in the light most favorable to the prosecution, we are unable to say that no rational trier of fact could have concluded the proof presented by the State was so improbable or unsatisfactory as to raise a reasonable doubt of defendant's guilt.

III. CONCLUSION

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

Affirmed.