2013 IL App (4th) 120531-U

NO. 4-12-0531

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 16, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ROBERT E. WHEELER, JR.,	)	No. 11CF962
Defendant-Appellant.	)	
	)	Honorable
	)	Harry E. Clem,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The evidence was sufficient to prove beyond a reasonable doubt defendant knowingly possessed the weapon found in the glove box of a vehicle in which he was the front seat passenger under a theory of constructive possession.

(2) Trial counsel was not ineffective for acquiescing in the trial court's response to the jury's question about whether defendant's knowledge of the presence of the weapon was sufficient to constitute possession within the meaning of the offense.

(3) Trial counsel was not ineffective for failing to request an accomplice-witness instruction when the evidence presented at trial did not support a basis for the instruction.

¶ 2 Defendant, Robert Wheeler, appeals from his conviction of unlawful possession of a weapon by a felon. He claims the State failed to prove him guilty beyond a reasonable doubt when the evidence against him consisted primarily of unreliable accomplice testimony. He further claims his trial counsel rendered ineffective assistance when he failed to (1) propose a different, and

arguably, more accurate response to the jury's question about defendant's knowledge of the weapon, and (2) request an accomplice-witness instruction. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In June 2011, the State charged defendant by information with aggravated unlawful possession of firearm by a felon, a Class 2 felony (720 ILCS 5/24-1.6(a)(1), (d) (West 2010)). The State amended the information on the day of trial, charging defendant with unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)).

¶ 5 At the jury trial, the State presented the following evidence and argument. Champaign County Sheriff's Deputy Richard Coleman initiated a traffic stop of a vehicle driven by Jordan Brooks (defendant, the only passenger, was in the front seat), on June 18, 2011, at approximately 1:30 a.m. after it "rolled through a stop sign." Deputy Coleman smelled "a faint odor of cannabis coming from the vehicle," so he called for backup and a canine officer. Deputy Chad Beasley and a City of Champaign canine officer responded. After a walk around the vehicle, the dog alerted to a positive indication of narcotics. Brooks and defendant were removed from the vehicle, while Deputies Coleman and Beasley searched the interior. Deputy Beasley found a loaded gun in the glove box laying under loose papers. Neither Brooks nor defendant admitted knowing anything about the gun, so both were arrested.

¶ 6 Brooks also testified for the State. He said he had not been promised anything in exchange for his testimony in terms of the outcome of his pending case on identical charges. He had been convicted of burglary in 2005 and possession of a controlled substance in 2008. Brooks had known defendant for a few years. On the night in question, defendant asked Brooks for a ride to an apartment complex in downtown Champaign. Brooks agreed because he intended to go to a

nightclub in Champaign. He had gone to his mother's house, where defendant was, to get dressed. His friend, Tonisha Brown, had allowed Brooks to use her vehicle that evening.

¶ 7 After he was stopped, Brooks reached into the glove box to get proof of insurance for Deputy Coleman. Brooks said, once the canine alerted, defendant told him "to pull off," meaning drive away. Brooks told him he was not driving away so, if defendant wanted to get away, he needed to do so on foot. Brooks said he looked in the rearview mirror to see "what the cops were doing, and [he] heard the glove box close." He had left the glove box open when he gave Deputy Coleman the insurance information so he could easily put the card back when the officer returned it. When Brooks got the insurance card out of the glove box, he did not see a gun. Brooks said the gun was not his, he had not seen a gun in the vehicle, and he had never before seen the gun depicted in the photographic evidence. He also said (1) he did not see defendant with a gun, (2) defendant did not say he had a gun, and (3) he did not see defendant reach into the glove box. On cross-examination, Brooks said his purpose in testifying "was to keep [himself] from going to jail 'cause [defendant] was trying to put the whole situation off on [him]."

¶ 8 The trial court read two stipulations to the jury: (1) Tracy Moore, a forensic scientist with the Illinois State Police, if called to testify as a witness, would testify she examined the gun and the accompanying magazine found in the vehicle for latent fingerprints and found none, and (2) defendant was a convicted felon as of the date of the incident. The State rested. Defendant presented no evidence.

¶ 9 In his closing argument, the prosecutor focused on Brooks' testimony that he knew nothing about a gun in the glove box and that the gun was not in the glove box when he got the insurance card out. The prosecutor said if Brooks had known about the gun, he would have closed

the glove box immediately after he retrieved the insurance information. Instead, he left it open so he could replace the card upon its return from Deputy Coleman. The prosecutor stated: "That gun wasn't in there before. It's in there after the defendant closes the glove box. You get to draw a reasonable inference from that. And a reasonable inference is the defendant put the gun in the glove box." The prosecutor asked the jury to recall Brooks' testimony regarding defendant's desire to flee from the traffic stop. He said: "So what possible reason would the defendant have had at that point in time to tell Brooks to flee? Well, I'd suggest it's 'cause he's got a gun."

¶ 10 The prosecutor further argued:

> "The defendant had actual possession of the gun in this case, he had constructive possession of it once he put it in the glove box and arguably he had joint possession of it when Mr. Brooks is sitting there in the front seat of that vehicle with him and they both had the opportunity to exercise control over the item."

¶ 11 After receiving the instructions, the jury retired to deliberate. During deliberations, the jury posed the following question: "Does [defendant] have possession if he only knew the gun [was] in the glove box?" The trial court met with the parties and submitted an answer to the jury, telling the jury to consider the evidence presented and the instructions previously provided. After further deliberations, the jury found defendant guilty of unlawful possession of a weapon by a felon.

¶ 12 In March 2012, the trial court sentenced defendant to eight years in prison. This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendant claims the State failed to prove beyond a reasonable doubt that he

knowingly possessed the gun. He contends the State's case hinged on Brooks' "unreliable accomplice testimony," which was insufficient to sustain the conviction. We disagree.

¶ 15 The State intended the evidence to show that, during the traffic stop, defendant placed a gun in the glove box while seated in the front passenger seat. In support of its theory, the State presented Brooks' testimony that he knew nothing about the gun, but he heard the glove box close as he was looking in the rearview mirror watching Deputy Coleman approach. It was at that moment that defendant had placed the gun in the glove box without Brooks' knowledge. The State also highlighted Brooks' testimony that defendant spoke of fleeing the traffic stop. Defendant argues this evidence was insufficient given (1) no fingerprints were found on the gun, (2) no one saw defendant with the gun, or (3) no one saw defendant place the gun in the glove box.

¶ 16 We will reject a defendant's challenge to the sufficiency of the evidence if we find any rational trier of fact could have found the essential elements of the charged offense beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). It is not our duty to retry a defendant. *Wheeler*, 226 Ill.2d at 114. We give the State the benefit of all reasonable inferences, and consider the evidence in the light most favorable to the prosecution. *Wheeler*, 226 Ill.2d at 116.

¶ 17 "The trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court and jury that saw and heard the witnesses." *Wheeler*, 226 Ill.2d at 114–15. However, "a conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of defendant's guilt." *Wheeler*, 226 Ill.2d at 115. Our review "must include consideration of all the evidence, not just the evidence convenient to the State's theory of the case." *Wheeler*, 226 Ill.2d at 117. This standard does not require "a point-by-point discussion of every piece of evidence as well

as every possible inference that could be drawn therefrom." *Wheeler*, 226 Ill.2d at 117, 871 N.E.2d at 742. It is sufficient if, after considering all of the evidence in the light most favorable to the prosecution, the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Wheeler*, 226 Ill. 2d at 117-18.

¶ 18 A person is guilty of unlawful possession of a weapon by a felon if he (1) knowingly possessed on or about his person any weapon and (2) has been convicted of a felony under the laws of this State or any other jurisdiction. 720 ILCS 5/24-1.1(a) (West 2010). The second element is not at issue, as the parties stipulated to defendant's prior felony conviction.

¶ 19 Criminal possession may be actual or constructive. In this case, the possession was allegedly constructive, and therefore, the State had to prove defendant (1) had knowledge of the presence of the weapon, and (2) had immediate and exclusive control over the area where the weapon was found. *People v. Hampton*, 358 Ill. App. 3d 1029, 1031 (2005). Knowledge must often be proved by circumstantial evidence. *People v. McKnight*, 39 Ill. 2d 577, 581 (1968). Because the State could not rely on an inference of knowledge stemming merely from defendant's presence in the car, the State had to present other evidence establishing knowledge of the weapon. *Hampton*, 358 Ill. App. 3d at 1033. Knowledge could be inferred from several factors, including (1) the visibility of the weapon from defendant's location in the vehicle, (2) the amount of time in which defendant had an opportunity to observe the weapon, (3) gestures or movements made by defendant that would suggest an effort to retrieve or conceal the weapon, and (4) the size of the weapon. See *Hampton*, 358 Ill. App. 3d at 1033 (citing *People v. Bailey*, 333 Ill. App. 3d 888, 891-92 (2002)).

¶ 20 In *People v. Scott*, 2012 IL App (4th) 100304, ¶ 20, this court concluded that to prove constructive possession, the State must present sufficient evidence to demonstrate to a reasonable

juror that "defendant exhibited an intent and opportunity to continue exercising dominion over the [contraband] by concealing it." In *Scott*, we noted the State can prove constructive possession by showing that the defendant has exercised, not necessarily "personal present dominion" over the contraband, but rather, " 'an intent and a capability to maintain control' " over it. *Scott*, 2012 IL App (4th), ¶ 19 (quoting *People v. Morrison*, 178 Ill. App. 3d 76, 90 (1988)). When contraband is found near the defendant, but not on his person, constructive possession may be inferred when the State can demonstrate that the defendant once had physical control, he had no intent to abandon the contraband, and no other person has obtained possession. *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002). The State must often wholly rely on circumstantial evidence to prove constructive possession. *Scott*, 2012 IL App (4th) 100304, ¶ 19.

¶ 21 Applying these factors, we find the State presented sufficient evidence to convince a reasonable jury that it was defendant's gun in the glove box. Although the gun was found in the closed glove box, it was reasonable to assume defendant had the gun in his possession when he entered the vehicle. It was likewise reasonable to infer from the evidence that, after the vehicle was stopped, after the canine alerted, and after Brooks said he would not flee the scene in the vehicle, defendant placed the gun in the glove box. Brooks testified (1) there was no gun in the glove box when he reached in to get the insurance information, (2) he had left the glove box open in order to return the insurance information, and (3) he heard defendant close the glove box as Deputy Coleman was returning to the vehicle. This testimony from Brooks, coupled with the testimony of Deputies Coleman and Beasley, was sufficient circumstantial evidence for a reasonable juror to have inferred that defendant, not only had, at one time, actual possession of the gun, but, more important, that he had constructive possession in that he exhibited an intent and opportunity to continue exercising

dominion over the gun by concealing it in the glove box. The jury was in the best position to determine the credibility of witnesses and we afford its credibility determination great weight. *Wheeler*, 226 Ill. 2d at 114-15. Despite the circumstantial nature of the evidence, the inference that defendant possessed the gun was not so unreasonable as to preclude the jury's guilty verdict.

¶ 22 B. Ineffective Assistance of Counsel

¶ 23 Defendant also argues his attorney rendered ineffective assistance when he failed to (1) propose a different response to the jury's question regarding the definition of possession, and (2) tender a jury instruction regarding accomplice witness testimony. Defendant contends either error, standing alone, is sufficient to reverse his conviction but, he claims, should this court disagree with his position, in the alternative, the errors taken together are sufficient justification for reversal.

¶ 24 To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate (1) counsel's performance was objectively unreasonable, and (2) it is reasonably probable that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Evans*, 369 Ill. App. 3d 366, 383 (2006). We address each of defendant's claims in turn.

¶ 25 1. *Jury Question*

¶ 26 During deliberations, the jury submitted the following question to the trial court: "Does [defendant] have possession if he only knew the gun [was] in the glove box?" The trial court met with both sides and the following exchange occurred:

> "MR. HARRIS [Assistant State's Attorney]: Judge, the jury was instructed as to—given both the instructions with respect to possession. This isn't a question asking to interpret an instruction.

They're basically asking the court to decide the ultimate issue in this case by virtue of the question they've sent out. I don't think the court can answer this. I think the response has to be 'You have the appropriate instructions. Please consider'—or 'please continue your deliberations.'

THE COURT: Mr. Appleman?

MR. APPLEMAN: Your Honor, I think they are asking for an interpretation of the instructions or a clarification of it. I would suggest that the answer is that it's essentially no, of course. It has to be a knowing possession with some intent to exercise control. I think that they should at least be directed to or redirected to the definition that has been provided in the instructions already.

THE COURT: Well, first of all, I'm not inclined to answer the question in the yes or no fashion that you had suggested because that would be determining the ultimate factual issue in the case. But the second part of your suggestion, Mr. Appleman, seems to be more or less in accord with that of Mr. Harris. The court would be inclined to advise the jury that it has already—that the evidence which they are to consider is that the—consists only of the testimony of the witnesses and the exhibits received. The court has previously instructed the jury as to the issues in this case, including its instruction as to the meaning of possession. Acceptable?

MR. APPLEMAN: Yes, sir.

THE COURT: Mr. Harris?

MR. HARRIS: That's fine, Judge."

¶ 27 The trial court summoned the jury to the courtroom and instructed the jurors as follows:

"Ladies and gentlemen of the jury, the attorneys and I have conferred in regard to the question that you pose. The only answer that is permissible that I can give you at this time is that the evidence which you are to consider consists only of the testimony of the witnesses and the exhibits which the court has received. Those are, of course, to be considered within the instructions of law that the court read to you at the conclusion of the case. The instructions have the information about possession that the court can provide for the jury at this time."

¶ 28 The jury had been previously instructed as follows:

"Possession is a voluntary act if the person knowingly procured or received the thing possessed or was aware of his control of the thing for a sufficient time to have been able to terminate his possession.

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 and he has both the power and the intention to exercise control over a thing either directly or through another person.
>
> If two or more persons share the immediate and exclusive control or share the intention and the power to exercise control over a thing, then each person has possession."

¶ 29 The jury had to primarily weigh Brooks' credibility and the implications of defendant's actions and statements to him in the vehicle. We also recognize the jury had to decide the case only on the possession element, as the second element of the offense (status as a felon) was presented by stipulation. It was clear from the question posed, the jury sought clarification on what constitutes constructive possession. However, we disagree with defendant that his trial counsel was ineffective for failing to request that the trial court answer the jury's question differently.

¶ 30 "[T]he general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion." *People v. Childs*, 159 Ill. 2d 217, 228-29 (1994). "This is true even though the jury was properly instructed originally." *Childs*, 159 Ill. 2d at 229.

> "A trial court may decline to answer a jury's questions if the instructions are readily understandable and sufficiently explain the relevant law, when further instruction would serve no useful purpose and could potentially mislead the jury, where the inquiry involves a question of fact, and where the question is ambiguous and an answer or explanation would require a colloquy between the court and the jury, further explanation of facts, or expression of the trial court's

opinion on the evidence or the outcome of the case." *People v. Oden*, 261 Ill. App. 3d 41, 46 (1994) (citing factors set forth in *Childs*, 159 Ill. 2d at 228).

However, where the jury's inquiry involves a question of law, the court must attempt to clarify the issue in the jurors' minds. *Oden*, 261 Ill. App. 3d at 46. "Reversible error can occur when the jury asks the trial court to define a key term used in the instructions but the court refuses the request." *People v. Coots*, 2012 IL App (2d) 100592, ¶ 49.

¶ 31 Unlike the nature of the jury's question in *Oden*, the jury's question here did not demonstrate the jury's "obvious confusion" of the law. In *Oden*, the jury was confused with respect to the legal theory of the State's case regarding the defendant's possession of a firearm. There, the State proceeded on the theory of actual and direct possession, not constructive possession. Yet, the jury's question indicated it was considering the theory of constructive possession. *Oden*, 261 Ill. App. 3d at 47. Because the jury was apparently confused on the applicable law, the reviewing court held the trial court erred in not resolving the jury's confusion, despite the fact the instructions previously given were accurate and complete. The court held the trial court had a duty to clarify the issue in the jurors' minds. *Oden*, 261 Ill. App. 3d at 47.

¶ 32 Here, the nature of the question posed did not demonstrate the jury's confusion of the applicable law. Instead, the jury's question centered on the ultimate disputed issue in the case. Where a defendant's alleged criminal possession is constructive, the State must prove defendant knew where the weapon was and that he had exclusive control over the area where it was found. *Hampton*, 358 Ill. App. 3d at 1031. Thus, the jury's question of whether defendant had possession of the gun, within the meaning of the law, if he only knew the gun was in the glove box addresses

the ultimate question of defendant's guilt. From this question, it appears the jury was questioning the importance of the control element of the definition. In other words, the jury questioned whether defendant could be guilty of possession if he merely knew the gun was in the glove box, but that it was not necessarily his gun or that he was not the one who put it there. The question goes to the issue of whether defendant had "the power and the intention to exercise control over a thing" so as to constitute constructive possession.

¶ 33 Unlike the jury in *Oden*, the jury in this case was not confused over the applicable legal theory. Instead, the jurors were on point and simply asked for guidance from the trial court to assist them in deciding the ultimate legal issue in the case—something the court is prohibited from doing. See *Reid*, 136 Ill. 2d at 39 (the trial court may refuse to answer a jury's question if an answer would cause the court to express an opinion that would direct a verdict one way or the other). The jury was properly equipped with the information needed to answer the question posed, as it had received adequate and complete instructions on the issue of possession prior to deliberating. The trial court provided a reasonable and accurate response to the jury's question. Accordingly, based on our analysis, we determine trial counsel did not provide inadequate assistance in acquiescing to the court's reasonable and accurate response.

¶ 34 2. *Accomplice-Witness Instruction*

¶ 35 Finally, defendant contends his trial counsel was ineffective for failing to request an accomplice-witness instruction with respect to Brooks' testimony. Specifically, defendant claims his attorney should have requested Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.17), which states:

"When a witness says he was involved in the commission of

a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case."

¶ 36 The test for determining if a witness constitutes an accomplice and requires an accomplice-witness instruction is " 'whether there is probable cause to believe that [the witness] was guilty either as a principal, or on the theory of accountability.' " *People v. Cobb*, 97 Ill. 2d 465, 476 (1983) (quoting *People v. Robinson*, 59 Ill. 2d 184, 191 (1974)). That is, the evidence must show probable cause to believe that the witness was not just merely present " 'and failed to disapprove of the crime, but that he participated in the planning or commission of the crime[.]' " *People v. Kirchner*, 194 Ill. 2d 502, 541 (2000) (quoting *People v. Henderson*, 142 Ill. 2d 258, 315 (1990)). An individual's presence at the scene of the crime, knowledge that the crime is being committed, close affiliation to the defendant before and after the crime, failing to report the crime, and fleeing from the scene of the crime may be considered in determining whether the individual may be accountable for the crime or shared a common criminal plan or agreement with the principal. *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995). The committee notes for IPI Criminal 4th No. 3.17 follow our supreme court's decision in *People v. Rivera*, 166 Ill. 2d 279, 292-93 (1995), and recommend giving the instruction any time an accomplice testifies, regardless of whether the testimony is presented by the State or by the defense. IPI Criminal 4th No. 3.17, Committee Note.

¶ 37 Defendant argues that, because Brooks was charged with the identical offense relating to the same incident, the accomplice instruction should have been given. However, "merely having been charged does not render the witness an accomplice." *People v. Clark*, 207 Ill. App. 3d 439, 452 (1991). There is no rule that a "co-indictee is automatically an accomplice without more."

People v. Allen, 119 Ill. App. 3d 186, 192 (1983). Instead, the reviewing court must make a determination as to whether a witness satisfies the definition of an accomplice and should not be bound by such like determinations made by the police or the State's Attorney. *Allen*, 119 Ill. App. 3d at 192.

¶ 38 In Illinois, the generally accepted test as to whether a witness is an accomplice is whether he himself could have been indicted for the offense either as principal or accessory. *Robinson*, 59 Ill. 2d at 190-91. If a witness is not an accomplice under this test, it is not error to refuse to give a tendered instruction relative to the testimony of an accomplice. *People v. Nowak*, 45 Ill. 2d 158, 168-69 (1970). Faced with these principles, our supreme court has identified the question to be whether there is probable cause to believe that the witness, in this case Brooks, was guilty either as a principal or on the theory of accountability. *Robinson*, 59 Ill. 2d at 191. "To constitute one an accomplice he must take some part, perform some act or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime." *People v. Hrdlicka*, 344 Ill. 211, 222 (1931). There must be sufficient evidence in the record to justify an alleged accomplice's indictment either as principal or on the theory of accountability. *Cobb*, 97 Ill. 2d at 476.

¶ 39 In examining the evidence in this case, we find no indication that Brooks knew anything of the gun found in the vehicle. There is no indication Brooks participated in the concealment of the weapon in the glove box by either seeing someone place the gun inside or simply knowing it was inside. There was no evidence, let alone probable cause, to demonstrate Brooks knew about the gun and, as a result, there was no reason to instruct the jury with IPI Criminal 4th No. 3.17 regarding accomplice-witness testimony. Defendant's point in making this argument on

appeal is that he believed the jury should have been instructed regarding the tainted character of Brooks' testimony. We suggest this goal was accomplished when the trial court issued the instruction to the jury regarding its duty to consider a witness's interest, bias, or prejudice in providing testimony. See *People v. McCallister*, 193 Ill. 2d 63, 97 (2000) ("[W]e believe that the fact that the jury was told to consider, in general, the bias, interest or prejudice of the witnesses may be considered as one factor, *among others*, which establishes that defendant was not prejudiced by his trial counsel's failure to tender the accomplice witness instruction." (Emphasis in original.)). We find trial counsel was not ineffective for failing to request the accomplice-witness instruction, as it did not apply in light of the evidence presented at trial.

¶ 40 III. CONCLUSION

¶ 41 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed.