

NOTICE
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2013 IL App (5th) 110160-U
NO. 5-11-0160
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Effingham County.
)	
v.)	No. 09-CF-249
)	
MICHAEL J. MATLOCK,)	Honorable
)	Kimberly G. Koester,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's intent to manufacture methamphetamine in the future was sufficiently established by un rebutted evidence of his past pattern of manufacture; error in the jury instruction did not prejudice the defendant; and the defendant's sentence to an extended-term sentence on the lesser of two felonies is reduced to the maximum nonextended term.

¶ 2 At the conclusion of a jury trial in the circuit court of Effingham County, the defendant, Michael J. Matlock, was found guilty of unlawful possession of less than five grams of methamphetamine, a Class 3 felony, and possession of methamphetamine-manufacturing materials in violation of section 30 of the Methamphetamine Control and Community Protection Act, a Class 2 felony (720 ILCS 646/30 (West 2010)). On February 9, 2011, the defendant was sentenced to an extended sentence of 8 years' imprisonment on the charge of unlawful possession of methamphetamine, and sentenced as a Class X offender to a 15-year term of imprisonment on the charge of possession of methamphetamine-manufacturing materials, the two sentences

to be served concurrently. The defendant appeals from his conviction for possession of methamphetamine-manufacturing materials and from his sentence for unlawful possession of methamphetamine.

¶ 3 The following pertinent evidence was adduced at trial. Because the defendant appeals from his conviction only of possession of methamphetamine-manufacturing materials, we will set forth only the evidence pertinent to that charge, and only to the extent necessary for our disposition.

¶ 4 In the early morning of November 25, 2009, the defendant was approached by the police at the home of his girlfriend, where he had spent the night. The defendant had just awakened and was dressing. The defendant agreed to accompany the police to his apartment and allow them to search it for illegal drugs. Also living in the defendant's apartment was a woman, Andrea Aanas, who had a bedroom separate from that of the defendant. She had her own key to the apartment.

¶ 5 In Aanas' bedroom, the police found drug paraphernalia and methamphetamine. In the defendant's bedroom, the police found, in the headboard of the defendant's bed, a plastic bag which contained coffee filters that had a chemical residue or white powder on them. This residue or powder turned out to be methamphetamine. In the kitchen, the police found a small electric coffee bean grinder which contained white flakes of powder, which turned out to be pseudoephedrine, an ingredient used in manufacturing methamphetamine. No fingerprints were found on the coffee grinder.

¶ 6 Nick McCarty, who had multiple criminal convictions and had spent time in prison, and who was being held in the county jail on a probation revocation at the time of his testimony, testified that during September and November 2009, he obtained methamphetamine from the defendant approximately 20 times. McCarty would trade pills containing pseudoephedrine, a drug used in the manufacture of methamphetamine, to the

defendant in return for either cash or methamphetamine. These exchanges would take place at the defendant's apartment, never at the home of the defendant's girlfriend.

¶ 7 Aanas testified that the defendant usually kept his bedroom door locked, but the apartment had been burglarized on November 14, 2009, just weeks before the defendant was arrested. The lock to the defendant's bedroom had been broken during that burglary. When the police were inside the defendant's apartment on that date to investigate the burglary, they saw no methamphetamine or paraphernalia, or evidence of methamphetamine manufacturing.

¶ 8 Police officers testified that electric coffee grinders are often used to grind up pseudoephedrine pills to speed up the process of manufacturing methamphetamine, and that coffee filters are also used in the manufacture of methamphetamine. These coffee filters can be used multiple times in the manufacturing process and are also sold for the methamphetamine they retain from the manufacturing process.

¶ 9 The defendant's girlfriend testified that the month prior to his arrest, the defendant had slept at her house nearly every night. He had not, however, moved any of his personal property into her house. The defendant did not have a key to his girlfriend's house.

¶ 10 The defense theory in closing argument was that the defendant essentially lived at his girlfriend's house and spent all of his time there. The methamphetamine-manufacturing materials found in the defendant's apartment either belonged to Andrea Aanas or were planted there by the unidentified burglar who broke the lock to the defendant's bedroom door.

¶ 11 On appeal, the defendant argues that the State failed to prove him guilty beyond a reasonable doubt of possession of methamphetamine-manufacturing materials because it failed to prove the requisite intent to use the materials to manufacture methamphetamine in the future. The defendant was charged and convicted under section 30 of the Methamphetamine Control and Community Protection Act, which makes it illegal "to knowingly engage in the possession *** of any methamphetamine manufacturing material

*** *with the intent that it be used to manufacture methamphetamine.*" (Emphasis added.) 720 ILCS 646/30(a) (West 2010). The defendant does not dispute that the coffee filters and grinder may constitute methamphetamine-manufacturing materials, nor does he dispute that he possessed them. The defendant argues only that the State failed to prove beyond a reasonable doubt that they were possessed with the intent to use them in the future to manufacture methamphetamine.

¶ 12 The defendant argues that while the State presented sufficient evidence that the coffee filters and grinder had been used to manufacture methamphetamine *in the past*, this evidence was insufficient to show that they were possessed with the intent to use them *in the future* to manufacture methamphetamine. He argues that the requisite intent is not proven by evidence that the defendant used the materials to manufacture methamphetamine in the past; the State must prove that the defendant intended to manufacture methamphetamine in the future using the coffee filters and grinder. This, he argues, the State failed to do.

¶ 13 In reviewing the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Dorsey*, 362 Ill. App. 3d 263, 267 (2005). We will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt. *Dorsey*, 362 Ill. App. 3d at 267. The trier of fact is not required to disregard inferences that flow from the evidence, nor is it required to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 51. Proof beyond a reasonable doubt does not require the exclusion of every possible doubt, and a conviction may be sustained upon wholly circumstantial evidence if it leads to a reasonable certainty that the defendant committed the crime. *People v. Shevock*, 335 Ill. App. 3d 1031, 1037 (2003).

¶ 14 We conclude that a rational jury, viewing all the evidence in the light most favorable to the prosecution, could have reasonably inferred from the evidence of the defendant's past conduct and his retention of the coffee filters and grinder that he intended to use these items again in the future for the manufacture of methamphetamine. Accordingly, we find that there was sufficient evidence to prove the defendant guilty beyond a reasonable doubt of the offense of possession of methamphetamine-manufacturing materials.

¶ 15 We begin with the premise that in the absence of evidence to rebut the inference, evidence of a defendant's past practice gives rise to a reasonable inference that he intends to continue that practice. See *People v. Phillips*, 215 Ill. 2d 554, 575 (2005). In the case at bar, evidence of the defendant's past practice of manufacturing methamphetamine was provided by the mere fact of his possession of the coffee filters and grinder, both of which contained residue of either methamphetamine or pseudoephedrine, a drug used in the manufacture of methamphetamine. Evidence of the defendant's past practice was further provided by the testimony of Nick McCarty that in the months just prior to the defendant's arrest, McCarty had obtained methamphetamine from the defendant approximately 20 times. McCarty would sometimes obtain the methamphetamine by giving the defendant pseudoephedrine pills, which are used in the manufacture of methamphetamine. No evidence was presented that the defendant had discontinued his practice of manufacturing methamphetamine, and his continued possession of the coffee filters and grinder would belie any such intention.

¶ 16 Intent is rarely proved by direct evidence because, absent a defendant's confession of his intent, no one can see into the mind of another. Intent is most commonly proved by inferences drawn from circumstantial evidence. See *People v. Rudd*, 2012 IL App (5th) 100528, ¶ 14. As long as that inference is reasonable based on all the evidence, it is sufficient for a finding of guilt beyond a reasonable doubt. *Rudd*, 2012 IL App (5th) 100528, ¶ 14. Based on all the evidence in the case at bar, when viewed in the light most favorable

to the prosecution, we conclude that a reasonable jury could have reasonably inferred that the defendant possessed the coffee filters and grinder with the intent to use them to manufacture methamphetamine.

¶ 17 The defendant next argues that his conviction for possession of methamphetamine-manufacturing materials must be reversed because the jury was erroneously instructed that it could convict upon a finding of *past use* of the manufacturing materials rather than possession with a *future intent*. At the time of the defendant's trial, there was no pattern jury instruction for the offense of possession of methamphetamine-manufacturing materials. The State tendered a nonpattern instruction, to which the defendant made no objection, and the jury was instructed as follows:

"To sustain the charge of possession of methamphetamine manufacturing material the State must prove the following propositions:

First Proposition: That the defendant knowingly possessed methamphetamine manufacturing materials; and

Second Proposition: That the methamphetamine manufacturing materials *were used or* intended to be used to manufacture methamphetamine.

* * *. " (Emphasis added.)

The defendant argues that this instruction improperly expanded the offense to include *past use* of the materials and therefore failed to properly set forth the elements of the offense.

¶ 18 As we have noted, the defendant made no objection to the instruction as tendered by the State, and tendered no alternative instruction, nor did he raise the issue in his posttrial motion. Ordinarily, a defendant forfeits review of an alleged error involving a jury instruction if he does not object to the instruction or offer an alternative instruction and does not raise the issue in a posttrial motion. *People v. Cotton*, 393 Ill. App. 3d 237, 256 (2009). The defendant argues that, despite his forfeiture at trial of the issue for purposes of appeal,

we should nevertheless address it as plain error or because his counsel's failure to remedy the error at trial constitutes ineffective assistance of counsel. We decline to do so because we find that, even in the absence of the alleged error, the result of the defendant's trial would have been the same.

¶ 19 The plain error rule applies where the evidence is closely balanced or where the alleged error is of such magnitude that commission thereof has denied the accused of a fair and impartial trial or may have significantly affected the outcome of the case. *People v. McMurtry*, 279 Ill. App. 3d 865, 871 (1996). We do not find the evidence of the defendant's guilt to be closely balanced. To the contrary, we find that it weighs heavily in favor of a finding of guilt. Nor do we believe the alleged error in the jury instruction was of such a magnitude that it affected the defendant's substantial rights to such a degree that we cannot confidently state that the defendant's trial was fundamentally fair. See *People v. Williams*, 391 Ill. App. 3d 257, 267 (2009). As in *Williams*, 391 Ill. App. 3d at 267, we have no doubt that had the reference in the instruction to past use of the materials been omitted, the jury would have rendered the same verdict it reached. The defendant's claim of plain error fails because the evidence was not close and no fundamental fairness violation occurred. See *Williams*, 391 Ill. App. 3d at 267.

¶ 20 In order to prevail on a claim of ineffective assistance of counsel, the defendant must show that his counsel's performance was so deficient that there exists a reasonable probability that, absent the alleged error, the outcome of the trial would have been different. *People v. West*, 187 Ill. 2d 418, 432 (1999). The defendant has not made this showing. As we have already concluded, the jury would have rendered the same verdict even if the reference in the instruction to past use had been omitted.

¶ 21 Finally, we turn to the issue of the defendant's sentence on the charge of unlawful possession of less than five grams of methamphetamine. The defendant argues that his

extended-term sentence of eight years' imprisonment is improper and must be reduced because it is a less serious class of felony, Class 3, than his conviction for possession of methamphetamine-manufacturing materials, a Class 2 felony. The State concedes the error. Under our supreme court's decision in *People v. Jordan*, 103 Ill. 2d 192 (1984), the defendant was ineligible for an extended-term sentence on the lesser, Class 3 felony of possession of methamphetamine. Accordingly, we reduce the defendant's sentence on that charge to the maximum term of imprisonment for a Class 3 felony, five years (730 ILCS 5/5-4.5-40(a) (West 2010)). See *People v. Jimerson*, 404 Ill. App. 3d 621, 637 (2010). The circuit court is directed to issue an amended mittimus.

¶ 22 For the foregoing reasons the defendant's convictions for unlawful possession of less than five grams of methamphetamine and possession of methamphetamine-manufacturing materials are hereby affirmed. The defendant's sentence on the charge of unlawful possession of less than five grams of methamphetamine is reduced to the maximum nonextended term of five years' imprisonment. The circuit court is directed to issue an amended mittimus.

¶ 23 The judgment of the circuit court of Effingham County is hereby affirmed as modified. The cause is remanded to the circuit court for the issuance of an amended mittimus.

¶ 24 Affirmed as modified; remanded with directions.