NOTICE
Decision filed 08/30/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 100488-U

NO. 5-10-0488

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,	)	Jackson County.
	)	
v.	)	No. 09-CF-18
	)	
GREGORY BENNETT, JR.,	)	Honorable
	)	E. Dan Kimmel,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by instructing the jury with IPI Criminal 4th No. 4.16 defining "possession" after the jury had started deliberation and the record contained testimony of actual possession.

¶ 2 Defendant, Gregory Bennett, Jr., directly appeals his convictions, after a jury trial, of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)) and unlawful possession of cannabis. He argues that his conviction of unlawful possession of a weapon must be reversed and remanded for a new trial on the basis that the circuit court improperly instructed the jury on constructive possession (Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 4.16)) after deliberations had begun and without any argument by the State of a theory of constructive possession. We affirm.

¶ 3 FACTS

¶ 4 Anthony Kirby was the maintenance supervisor at the Fields Apartment Complex in

Carbondale, Illinois. On January 7, 2009, he was working on one of the apartments when he saw a black male, who he later identified as defendant, walking on the sidewalk outside the building. Kirby thought the individual looked suspicious. Kirby also testified that he knew defendant was not a resident of the building, being familiar with all of the building's residents. Kirby gave a detailed description of this individual, noting he was approximately 5 feet 8 inches or 5 feet 9 inches tall, about 150 to 160 pounds, and wearing a khaki jacket, black gym shoes, and blue jeans. Kirby observed defendant as he approached a green Pontiac and pulled a handgun with a silver barrel out of his pocket. Kirby later identified People's Exhibit No. 1 as the gun that he saw. After defendant walked up the stairwell to the area containing apartments 401 and 402, Kirby called the police. The day after this incident, Kirby identified defendant in a photographic lineup as the individual he saw.

¶ 5 The police arrived, ascended the staircase, and knocked on the doors of both apartments 401 and 402. At the second apartment, a woman answered the door and let the officers enter. Upon entry, the officers observed a man sitting on a couch who matched Kirby's description of the individual with the gun. There was another woman in the apartment along with the woman who answered the door. After defendant was requested to stand and was subjected to a pat-down search, the officers found no weapon on defendant. However, in checking the area around defendant, the officers found a silver handgun underneath the sofa cushion on which defendant had been sitting. Both the women in the apartment said the gun did not belong to them. Defendant was arrested and charged with unlawful possession of a weapon by a felon. It was stipulated that defendant had a felony conviction from January 2009.

¶ 6 The case proceeded to a jury trial, and prior to deliberations, the jury received an instruction which stated in part:

"A person commits the offense of unlawful possession of a weapon by a felon

> when he, having been previously convicted of a felony offense, knowingly possesses a firearm."

During deliberation, the jury sent a note to the presiding judge asking: "[W]ill you please define possession of firearms? (i.e., touching it at one point or does it mean you have to have it on your person?)" In the subsequent conference with the judge, defense counsel, and the prosecutor, the prosecutor suggested giving the jury paragraph 1 of IPI Criminal 4th No. 4.16, which defines possession. Defendant's attorney objected on the basis that it was improper to provide the jury additional instructions after it had begun deliberating. The State, in return, argued that if a jury poses a specific question, it would be improper not to provide an answer. The court determined that the jury should be given paragraph 1 of IPI Criminal 4th No. 4.16, which reads as follows:

> "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." IPI Criminal 4th No. 4.16.

Defendant was subsequently found guilty and sentenced. Defendant timely appeals.

¶ 7 ANALYSIS

¶ 8 Defendant argues that the court should not have provided the jury with IPI Criminal 4th No. 4.16 as it contains definitions of both constructive and actual possession and the State's theory of the case was actual possession. Accordingly, defendant argues he was deprived of his right to defend against a new theory of guilt put forward by the State. The State, in response, argues that defendant forfeited this issue by failing to make this specific objection at trial. The State also urged that the trial court did not abuse its discretion because the evidence presented to the jury supported a theory of constructive possession as well as actual possession and, accordingly, any error in instructing of both was harmless. For the

reasons explained below, we agree with the State.

¶ 9 Initially we note that even when a jury has been properly instructed, if that same jury raises specific questions on a point of law, the trial court must attempt to clarify the issue. *People v. Oden*, 261 Ill. App. 3d 41, 46, 633 N.E.2d 1385, 1389 (1994). See also *People v. Millsap*, 189 Ill. 2d 155, 724 N.E.2d 942 (2000), stating:

> "The general rule when a trial court is faced with a question from the jury is that the court has a duty to provide instruction to the jury when the jury 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)." *Millsap*, 189 Ill. 2d at 160, 724 N.E.2d at 945.

Defendant urges *Millsap* as controlling our disposition in this matter. After noting that a court should not submit new theories to the jury after the jury commences its deliberations, our supreme court determined that the trial court in *Millsap* had erred. In that case, the defendant's guilt was argued with being a principal in a robbery and home invasion. During deliberation, and over the defendant's objection, the jury was instructed on an aiding and abetting theory of accountability. The defendant's counsel argued to the supreme court, as defendant has here, that this additional instruction deprived his counsel of the ability to argue against that additional theory.

¶ 10 Our supreme court noted that since the accountability theory was not argued or initially instructed, the defendant was deprived of the opportunity to argue. The *Millsap* court further noted the difference in the elements the State would have to prove in convicting the defendant as a principal as opposed to convicting him as an accomplice. The *Millsap* court determined that after the case had been sent to the jury, it was too late to change the theory of the case and the defendant was put in a situation in which he was convicted based on a theory that he never had an opportunity to defend against. See also *People v. Wetzel*,

308 Ill. App. 3d 886, 721 N.E.2d 643 (1999).

¶ 11 In the instant case, defendant argues that a new theory was injected into the jury's deliberations by submitting the IPI definition given above. While admittedly the definition included the word "constructive," the instant case is distinguishable from *Millsap* on a number of points. First of all, in the instant case the same elements that the State had to prove applied to actual possession as well as constructive possession. Additionally, the testimony of Kirby, noted above, indicates actual possession of a weapon. The State argued to the jury actual possession by defendant in that the State argued the gun was placed under the cushion defendant was sitting on by defendant himself. The instant case is distinguishable from *Millsap* and *Wetzel* in that the addition of the word "constructive" did not inject a new theory with different elements which the State was required to prove beyond a reasonable doubt. Even assuming for the sake of argument that the giving of IPI Criminal 4th No. 4.16 with the word "constructive" was error, it was harmless given the testimony concerning defendant's possession of the gun outside the apartment building. See *People v. Traina*, 230 Ill. App. 3d 149, 595 N.E.2d 635 (1992).

¶ 12 Accordingly, we affirm the judgment of the circuit court of Jackson County.

¶ 13 Affirmed.