2016 IL App (2d) 141133-U
No. 2-14-1133
Order filed December 9, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAVID KLEIN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Carroll County. No. 13-CF-67 Honorable Val Gunnarsson, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justice McLaren concurred in the judgment.
Presiding Justice Schostok specially concurred.

ORDER

¶ 1 *Held*: Defendant's conviction for unlawful possession of a weapon by a felon was affirmed where (1) the evidence was sufficient to prove that defendant possessed a firearm, and (2) the trial court did not err by not holding a fitness hearing.

¶ 2 Following a jury trial, defendant, David Klein, was convicted of unlawful possession of a weapon by a felon (725 ILCS 5/24-1.1(a) (West 2012)). On appeal, defendant argues that (1) the State failed to prove beyond a reasonable doubt that he possessed a firearm and (2) the court erred by failing to hold a fitness hearing after it purportedly found a *bona fide* doubt of his fitness to stand trial. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 28, 2013, defendant was charged by criminal complaint with one count of unlawful possession of a weapon by a felon. At the arraignment on December 2, 2013, the State informed the court that there were "significant" concerns about defendant's mental health when the underlying incident occurred on November 27, 2013. The State noted that representatives from Sinnissippi Mental Health Center met with defendant after he was taken into custody to determine whether he should be involuntary committed for mental health services. The representatives from Sinnissippi ultimately recommended that defendant not be involuntary committed, and he was charged with a felony.

¶ 5 At the date set for a preliminary hearing on December 16, 2013, defense counsel represented to the court that defendant had a history of mental health issues in the eight months preceding his arrest. Defendant purportedly told his parents that he heard voices; his parents took him to mental health centers and a hospital on a few occasions, but he refused treatment. Counsel also informed the court that, in their conversations, defendant would not respond to questions about his case, and he talked only about "going to the university." The court then asked if counsel was requesting a "fitness evaluation," to which defense counsel replied that he was. After the State indicated that it did not object to the evaluation, the court responded: "Yeah. If it's – if it's such extreme despondency, which seems to be part of it, that he can't communicate with his attorney I suppose that would be a genuine fitness issue; wouldn't it?" It then granted defense counsel's request for a fitness evaluation and ordered the State to draft the written order. At the end of the hearing, defendant stated that he did not understand "any of this," and the trial court explained the purpose of a preliminary hearing but said that they were

going to address the mental health issue first. The court then postponed the preliminary hearing pending resolution of the "mental health issue." A status date was set for January 13, 2014.

¶ 6 The first paragraph of the December 16, 2013, written order stated that, pursuant to section 104-11(a) of the Code (725 ILCS 5/104-11(a) (West 2012)), defendant made an oral request to appoint an expert to determine whether a *bona fide* doubt existed as to his fitness to stand trial. The court's ruling, contained in the second paragraph of the order, directed Dr. Terrance Lichtenwald, a clinical psychologist, to perform a fitness examination to determine whether a *bona fide* doubt of fitness existed under section 104-11(b) of the Code (725 ILCS 5/104-11(b) (West 2012)). The order concluded by stating that Dr. Lichtenwald was required to submit a written report, under section 104-15 of the Code (725 ILCS 5/104-15 (West 2012)), on the "sole issue" of defendant's fitness to stand trial.

¶ 7 On December 24, 2013, Dr. Lichtenwald attempted to conduct the fitness examination, but defendant refused to speak with him. Dr. Lichtenwald's December 30, 2013, written report indicated that, in addition to attempting to interview defendant, he interviewed officers from the jail, reviewed a variety of records, and used that information in a psychological test to assess whether defendant exhibited signs of schizophrenia. Per the psychological test, defendant did not have any signs or symptoms of schizophrenia. Dr. Lichtenwald noted in his report that defendant appeared to be "selectively uncooperative" when it came to his legal situation but that he otherwise cooperated with correction officers and others at the county jail. For instance, Dr. Lichtenwald noted that defendant took care of his hygiene and did not have problems being transported to and from court proceedings. Dr. Lichtenwald also noted that defendant did not exhibit any signs or symptoms of mental illness, nor did he appear to suffer from delusions or hallucinations. Additionally, records showed that defendant had been in court several times

previously in this and other cases, and defendant did not appear impaired in his ability to stand trial in those appearances. Dr. Lichtenwald ultimately opined that he was unable to render an opinion on defendant's fitness to stand trial due to defendant's refusal to cooperate with the examination.

¶ 8 At the next status date on January 13, 2014, the court noted that there had not yet been a finding of a *bona fide* doubt as to defendant's fitness to stand trial. Both the State and defense counsel requested a further status date so that they could research how to proceed in light of defendant's refusal to cooperate with Dr. Lichtenwald's examination. Defendant again stated: "I don't understand." The court then explained in general terms that, if there is a *bona fide* doubt of a person's fitness to stand trial, then an evaluation is conducted to determine whether the individual can proceed to trial. It also informed defendant that it had ordered an evaluation to determine whether Dr. Lichtenwald believed that there was a *bona fide* doubt about his fitness to stand trial. The court encouraged defendant to cooperate with Dr. Lichtenwald and his attorney.

¶ 9 At the next court date on February 7, 2014, the court considered Dr. Lichtenwald's December 30, 2013, written report, without objection. After reading the report, the court told defendant that he had "ordered" him to talk with Dr. Lichtenwald so he could do the evaluation. Then, without hearing testimony or argument, the court found that it did not have "any doubt" that defendant was fit to stand trial. It noted that defendant worked and cooperated with jail personnel. It also noted that defendant spoke to the court during proceedings in the past but simply chose not to respond to the evaluator or provide any information to him. On February 14, 2014, the case proceeded to a preliminary hearing. The court found probable cause for the arrest, and the case was set for trial.

¶ 10 Defendant's jury trial was held on March 31, 2014. The State called Linda Klein to testify. Linda testified that she was defendant's mother, and defendant lived with her and her husband, Lonnie Klein, in Savanna, Illinois. On November 27, 2013, Linda was at home with defendant and her one-year-old granddaughter. Linda testified that she and defendant were looking for a receipt for a computer item. As they were doing so, Linda spread various receipts out on the bed in the bedroom that she shared with Lonnie. Later, she and defendant had a discussion about the receipt in the office next to her bedroom. Defendant left the office, went into her bedroom, and closed the bedroom door. Linda testified that defendant was in the bedroom for "maybe" three minutes and then left.

¶ 11 Linda further testified that, after defendant left her bedroom, she went into the bedroom to put away all the receipts that were on her bed. While she was cleaning up, Linda noticed that Lonnie's shotgun was leaning against the nightstand. The shotgun's cloth case and a box of shells were on the floor next to the nightstand. Linda testified that the shotgun was normally stored in a case under the bed. The shotgun had not been leaning against the nightstand when Lonnie left for work that morning or when she had previously been in the bedroom sorting receipts. Linda testified that she then went into the kitchen where defendant was located and grabbed her cell phone. She went into the office and called Lonnie to tell him to come home immediately because defendant "had a gun." Linda testified that she returned to the living room with defendant and waited for Lonnie to return, which took about ten minutes. Linda did not say anything to defendant about the gun, nor did she tell him that she had called Lonnie.

¶ 12 The State also called Lonnie as a witness. He testified that he was working on November 27, 2013, when he received a call from defendant, his son, asking him to go to the doctor's office to pick up a prescription. Immediately after speaking to defendant (and before he could put his

phone away), Lonnie received a call from Linda telling him to come home. Lonnie testified that once he returned home, he found defendant and Linda in the living room. He went straight into his bedroom where he found his shotgun lying on top of the bed and a box of shells lying on the floor. He did not see the case in the bedroom. Lonnie removed a shell from the chamber and placed the shotgun back on the bed. He testified that he was the last one to use the shotgun before that day, he did not leave the shotgun loaded, and he normally did not leave a round in the chamber when he stored it. Lonnie further testified that after removing the shell, he left the shotgun on the bed and went into the living room to call the sheriff's department. Once the officers arrived and went into the basement to talk with defendant, he returned to his bedroom and put the shotgun back into its case. The officers did not take the shotgun from the residence.

¶ 13 Carroll County Sheriff's deputy Michael Holland testified that he was dispatched to the Klein residence on November 27, 2013. When he arrived, Lonnie met him and another officer outside the residence and directed them to the basement where defendant was sitting with Linda. Holland did not go into the office or bedroom. He testified that defendant did not speak or answer questions, except to say that he did not give the officers permission to touch him. On cross-examination, Holland testified that the purpose of the call was for an involuntary mental health commitment, and they took defendant into custody with the intention of getting him mental health treatment.

¶ 14 Carroll County Sheriff's deputy Ryan Kloepping testified that he also responded to the Klein residence on November 27, 2013. Defendant would not speak to the officers before he was taken into custody. Kloepping testified that medical personnel were called to the residence and the officers attempted to have defendant go with them, but he refused all treatment.

¶ 15 The State then introduced a certified copy of defendant's 2010 felony conviction. At the close of the State's evidence, defendant moved for a directed verdict, which the court denied. Defendant did not present evidence. The jury found defendant guilty of unlawful possession of a weapon by a felon. The court sentenced defendant to three years' imprisonment in the Department of Corrections.

¶ 16 Defendant timely appealed.

¶ 17 II. ANALYSIS

¶ 18 Defendant raises two arguments on appeal. He first argues that the State failed to prove him guilty beyond a reasonable doubt of unlawful possession of a weapon. He also contends that the trial court erred by failing to hold a hearing regarding his fitness to stand trial after it found a *bona fide* doubt as to his fitness. We will address defendant's arguments in the order that he presents them.

¶ 19 Due process requires that the State prove each element of an offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). In reviewing the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319 This court will not retry the defendant, and the trier of fact remains responsible for making determinations concerning the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). A criminal conviction will not be set aside unless the evidence is so "unreasonable, improbable, or unsatisfactory" as to justify a reasonable doubt of the defendant's guilt. *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 20 To sustain a conviction for unlawful possession of a weapon by a felon, the State must prove that defendant (1) knowingly possessed a weapon and (2) was previously convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2012). Here, it is undisputed that defendant had a prior felony conviction. Therefore, we will analyze whether the State proved beyond a reasonable doubt that he knowingly possessed a firearm.

¶ 21 Possession of a firearm may be actual or constructive. *People v. Moore*, 2015 IL App (1st) 140051, ¶ 23. Actual possession is the exercise of present personal dominion over the firearm, and it exists when the defendant exercises immediate and exclusive dominion or control over the firearm. *People v. Eghan*, 344 Ill. App. 3d 301, 306-07 (2003). To establish constructive possession, the State must prove that defendant had knowledge of the firearm and that he exercised immediate and exclusive control over the area where the firearm was found. *Moore*, 2015 IL App (1st) 140051, ¶ 23. Constructive possession can be demonstrated if the defendant once had physical control over the contraband with intent to exercise control again, the defendant did not abandon the items, and no other person obtained possession. *Moore*, 2015 IL App (1st) 140051, ¶ 23. Whether the defendant had knowledge and possession are questions of fact that are within the province of the jury. *People v. Denton*, 264 Ill. App. 3d 793, 798 (1994).

¶ 22 Here, the jury was given instructions on both actual and constructive possession, and the jury verdict form did not identify under which theory of possession they found defendant guilty. On appeal, however, defendant argues that, because there was no evidence that he was in actual possession of the gun, the State was required to prove that he had constructive possession of it. We disagree.

¶ 23 The evidence of actual possession can be summarized as follows. Linda testified that Lonnie's shotgun was normally stored in a cloth case under the bed. She also testified that, after

defendant was in her bedroom, she found the shotgun out of the case and leaning next to the nightstand, with a box of shells on the floor next to it. Linda testified that the shotgun had not been leaning against the nightstand when Lonnie left for work that morning or when she had previously been in the bedroom before defendant entered it on November 27, 2013. Similarly, Lonnie testified that before the incident occurred, he was the last one to use the shotgun, he left it unloaded, and he stored it in a soft, form-fitting case under the bed. He further testified that, upon arriving home on November 27, 2013, he found the shotgun loaded, out of its case, and with a box of shotgun shells on the floor.

¶ 24 While neither Linda nor Lonnie personally saw defendant in possession of the shotgun, "both possession and knowledge may be proved by circumstantial evidence." *Denton*, 264 Ill. App. 3d at 798. Circumstantial evidence is the proof of certain facts and circumstances from which the trier of fact may infer connected facts that reasonably and usually follow from experience. *In re Gregory G.*, 396 Ill. App. 3d 923, 929 (2009). "The sole limitation on the use of circumstantial evidence is that the inferences drawn from the evidence must be reasonable." *Gregory G.*, 396 Ill. App. 3d at 929. Circumstantial evidence is sufficient to uphold a conviction if it satisfies beyond a reasonable doubt proof of each element of the crime charged. *Gregory G.*, 396 Ill. App. 3d at 929. Each link in the chain of circumstances need not be proved beyond a reasonable doubt; rather, it is sufficient if all the circumstantial evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Gregory G.*, 396 Ill. App. 3d at 929.

¶ 25 Viewing the evidence in the light most favorable to the State, a reasonable trier of fact could have found that defendant actually possessed the shotgun while he was in his parent's bedroom. The circumstantial evidence showed that, before defendant entered the bedroom, the

shotgun was unloaded and stored in its cloth case under the bed; after defendant left the bedroom, the shotgun was out of its case and loaded. A reasonable inference drawn from this evidence was that defendant exercised immediate and exclusive control over the shotgun when he removed it from its case under the bed, loaded it, and left it out. No evidence suggests that anyone other than defendant moved the shotgun. See *People v. Nyberg*, 275 Ill. App. 3d 570, 579 (1995) ("A conviction based upon circumstantial evidence must be based on proof of a conclusive nature that tends to lead to a satisfactory conclusion and produces a reasonable and moral certainty that defendant and no one else committed the crime.").

¶ 26 Nevertheless, defendant contends that his act of moving the gun was merely a "transitory touching," which was incapable of establishing actual possession. Defendant relies on two Florida cases to support his theory. In *Roberts v. State*, 505 So. 2d 547, 549-50 (Fla. Ct. App. 1987), the court held that the defendant's "transitory touching" of a bale of marijuana for the purpose of inspection was insufficient to establish the charge of possession. Similarly, in *Ford v. State*, 69 So. 3d 391, 393 (Fla. Ct. App. 2011), the court held that the defendant's "momentary possession" of another individual's marijuana for the purpose of hiding it during a traffic stop was insufficient to establish possession.

¶ 27 We reject defendant's reliance on *Roberts* and *Ford*. Initially, we note that this court is not bound to follow decisions from other states. *Fosse v. Pensabene*, 362 Ill. App. 3d 172, 186 (2005). Instead, we may look to cases from other states as persuasive authority where there is no Illinois authority that speaks to the issue and those cases have facts patterns that address the issue. *Fosse*, 362 Ill. App. 3d at 186. While both cases relied on by defendant address possession, neither bears any factual resemblance to the present case. In both *Roberts* and *Ford*, the defendants did not have dominion or control over the contraband when they briefly touched it

in the presence of or at the direction of the contraband's owner. See *Roberts*, 505 So. 2d at 549-50 (marijuana was not under the control of the defendant before the consummation of the completed drug transaction); *Ford*, 69 So. 3d at 393 (defendant did not have control over the marijuana when the owner of the marijuana "tossed" it to him during a traffic stop and instructed him to hide it in the backseat of the car). As explained above, the evidence here was sufficient for a reasonable trier of fact to conclude that defendant had immediate and exclusive control over the shotgun during the three minutes that he was in his parent's bedroom. Additionally, no Illinois authority remotely suggests that a defendant's culpability for unlawful possession of a weapon by a felon is dependent on the amount of time that he possessed the weapon.

¶ 28 Accordingly, we hold that the evidence was sufficient to find defendant guilty beyond a reasonable doubt of unlawful possession of a weapon by a felon.

¶ 29 Defendant also contends that the trial court erred by failing to hold a fitness hearing after it found a *bona fide* doubt of his fitness to stand trial on December 16, 2013. Specifically, he argues that the court found a *bona fide* doubt on that date when it commented that there was a "genuine fitness issue." He further claims that the December 16, 2013, written order was internally inconsistent and should not "control," because it referred to both subsections (a) and (b) of section 104-11 of the Code.

¶ 30 The State responds that the trial court did not find a *bona fide* doubt of fitness on December 16, 2013, as evidenced by the record of the subsequent hearings. The State also contends that the December 16, 2013, written order was neither internally inconsistent nor inconsistent with the court's oral pronouncement.

¶ 31 As an initial matter, defendant acknowledges that he did not raise this issue in the trial court, but argues that we should review the issue for plain error.[1] A trial court's failure to conduct a meaningful fitness hearing may be reviewed for plain error because it concerns a substantial right and is an issue of "constitutional dimension." *People v. Contorno*, 322 Ill. App. 3d 177, 180 (2001). The plain-error doctrine allows a reviewing court to consider an unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to affect the outcome of the case, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Under either prong, the defendant has the burden of persuasion. *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 121. To find plain error, however, we must first find that the trial court committed some error. *Garcia*, 2012 IL App (1st) 103590, ¶ 121.

¶ 32 Due Process prohibits the prosecution of a defendant who is unfit. *People v. Rosado*, 2016 IL App (1st) 140826, ¶ 31. A defendant is presumed fit to stand trial (725 ILCS 5/104-10 (West 2012)), and he or she is entitled to a fitness hearing only after a *bona fide* doubt of fitness is raised. *Garcia*, 2012 IL App (1st) 103590, ¶ 122. The defendant bears the burden of proving that there is a *bona fide* doubt. *People v. Hanson*, 212 Ill. 2d 212, 221-22 (2004). It is within the trial court's discretion to determine whether a *bona fide* doubt of fitness exists, based on certain factors, which include: (1) the defendant's irrational behavior, (2) the defendant's demeanor at trial, (3) any prior medical opinion on the defendant's competence, and (4) any

[1] Defendant does not at all explain or argue either prong of the plain-error doctrine or articulate how the doctrine applies here.

representations by defense counsel on the defendant's competence. *Rosado*, 2016 IL App (1st) 140826, ¶ 31; *People v. Eddmonds*, 143 Ill. 2d 501, 518 (1991).

¶ 33 Here, defendant's claim implicates section 104-11 of the Code, which provides, in relevant part, as follows:

> "(a) The issue of the defendant's fitness for trial *** may be raised by the defense, the State or the Court at any appropriate time before a plea is entered or before, during, or after trial. When a bona fide doubt of the defendant's fitness is raised, the court shall order a determination of the issue before proceeding further.
>
> (b) Upon request of the defendant that a qualified expert be appointed to examine him or her to determine prior to trial if a bona fide doubt as to his or her fitness to stand trial may be raised, the court, in its discretion, may order an appropriate examination. However, no order entered pursuant to this subsection shall prevent further proceedings in the case. An expert so appointed shall examine the defendant and make a report as provided in Section 104-15." 725 ILCS 5/104-11 (West 2012).

¶ 34 Defendant contends that, on December 16, 2013, the trial court found a *bona fide* doubt of his fitness to stand trial when it stated: "Yeah. If it's – if it's such extreme despondency, which seems to be part of it, that he can't communicate with his attorney I suppose that would be a genuine fitness issue; wouldn't it?" Defendant, however, takes the trial court's statement out of context. The court did not, as defendant claims, make a finding of *bona fide* doubt or determine that there was a genuine fitness issue. Instead, the transcript shows that the court was commenting that, if defense counsel's representations of defendant's behavior and mental health issues were borne out, the court would then find a *bona fide* doubt of his fitness to stand trial.

We decline to hold that the court made a finding of a *bona fide* doubt where it did not expressly state that it was doing so and its comment was phrased as a question to defense counsel.

¶ 35 Even if the trial court's statement was ambiguous as to whether it made a *bona fide* doubt finding, any ambiguity was resolved by the court's December 16, 2013, written order. Defendant misconstrues the written order when he claims that it was entered pursuant to subsection 104-11(a) of the Code. The first paragraph of the order mentioned subsection 104-11(a) only with respect to defendant's request for the appointment of an expert to determine whether a *bona fide* doubt existed as to his fitness to stand trial. While the reference to subsection (a) rather than subsection (b) may have been a typographical error, the first paragraph did not contain the court's ruling. Instead, the court's ruling was in the second paragraph, in which it unambiguously ordered the expert "to determine whether there is a bona fide doubt as to the Defendant's fitness to stand trial in this cause, pursuant to 725 ILCS 5/104-11(b)." We acknowledge that the court went on to order a report "on the sole issue of the defendant's fitness to stand trial," but that request was not inconsistent with subsection 104-11(b). Indeed, subsection 104-11(b) explicitly requires appointed experts to submit a report under section 104-15; per section 104-15, the report must include "an opinion as to whether and to what extent [the defendant's disability] impairs the defendant's ability to understand the nature and purpose of the proceedings against him or to assist in his defense, or both." 725 ILCS 5/104-15(a)(2) (West 2012). Hence, even where a court ordered an evaluation to determine whether a *bona fide* doubt of fitness may have been raised before trial, the expert's report was required to be on the issue of fitness.

¶ 36 Finally, to the extent that there was any ambiguity in either the court's December 16, 2013, oral pronouncement or the written order, that ambiguity was resolved at the following

court dates on January 13 and February 7, 2014. On January 13, 2014, the court began the proceeding by stating that the written order "directed a fitness evaluation to determine whether or not a bona fide doubt exists. So there apparently has not been a finding of bona fide doubt." The court similarly commented on February 7, 2014, that Dr. Lichtenwald was ordered "to address the question of whether or not there was a bona fide doubt as to [defendant's] fitness to stand trial." At no point did defendant object either to the court's December 16, 2013, written order or the court's subsequent statements on January 13 and February 7, 2014, that it had not found a *bona fide* doubt.

¶ 37 Accordingly, we hold that the trial court did not make a finding of a *bona fide* doubt of defendant's fitness to stand trial, and thus defendant was not entitled to a fitness hearing. See *Hanson*, 212 Ill. 2d at 222 ("The mere act of granting a defendant's motion for a fitness examination cannot, by itself, be construed as a definitive showing that the trial court found a *bona fide* doubt of the defendant's fitness."). As the trial court did not err in failing to hold a fitness hearing, the court did not commit plain error. Furthermore, as defendant does not alternatively contend that the trial court abused its discretion in failing to find a *bona fide* doubt of fitness, we need not determine whether the court erred on February 7, 2014, when it specifically found that it had "no doubt" that defendant was fit to stand trial.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the judgment of the circuit court of Carroll County.

¶ 40 Affirmed.

¶ 41 PRESIDING JUSTICE SCHOSTOK, specially concurring:

¶ 42 Although I concur with the ultimate disposition in this case, I write separately to draw attention to the unfortunate circumstances that this case presents. It is obvious that the

defendant's parents were desperately in need of obtaining mental health treatment for their son, the defendant, and never called the sheriff's department in order to facilitate an arrest. However, with their son's lack of cooperation and refusal of treatment at the mental health facility, the situation ultimately resulted in an arrest.

¶ 43 In light of the defendant's mental health issues and other facts of this case, I find troubling the State's decision to prosecute the defendant on such evidence. Nonetheless, based on the controlling case law, I agree with the majority that the defendant's conviction must be affirmed.