2018 IL App (1st) 151420-U
No. 1-15-1420
December 29, 2017

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TERENCE MOORE, Defendant-Appellant.	Appeal from the Circuit Court Of Cook County. No. 13 CR 7972 The Honorable Charles P. Burns, Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justice Pucinski concurred in the judgment.
Justice Mason specially concurred.

ORDER

¶ 1 *Held*: A misleading organization of the allegations in a complaint for a search warrant does not require a *Franks* hearing, where the defendant did not make a preliminary showing of the falsity of the misleading allegations. The prosecutor's deliberate presentation of prejudicial hearsay in violation of a pretrial ruling and misstatement of the law in closing argument amounted to plain error mandating reversal of the convictions in this case with closely balanced evidence.

¶ 2 In the course of executing a search warrant for an apartment leased by Gwendolyn Smith, police found crack cocaine and heroin. A jury found Gwendolyn's nephew, Terence Moore,

guilty of possessing the narcotics. In this appeal, Terence argues that the trial court should have granted his motion for a *Franks* hearing to determine whether police officers made false statements in the complaint for a search warrant. We hold that Terence did not meet his burden of making a substantial preliminary showing that the complaint included false statements, and therefore the trial court correctly denied the motion for a *Franks* hearing. However, we find that the prosecutor deliberately violated the trial court's motion *in limine* and, in closing argument, misstated the law of constructive possession. Because the evidence was closely balanced, we hold that the plain errors require reversal of the convictions and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 Around 8 p.m. on March 24, 2013, 8 police officers executed a search warrant for an apartment at 2240 South Central Park Avenue in Chicago. As they entered, they saw Terence in a hallway near the apartment's bathroom. Officers found no one else in the apartment. They found a backpack under a sink in the bathroom. The backpack held cannabis, a digital scale, small packaging, empty baggies, and pill bottles containing tinfoil packets of heroin. In a back bedroom, they found a bag of crack cocaine. In a dresser they found more pill bottles, Terence's social security card, Terence's birth certificate, and a letter addressed to Terence. The officers took Terence into custody and charged him with possession of heroin and crack cocaine with intent to deliver.

¶ 5 Motion to Quash Warrant

¶ 6 Terence filed a motion to quash the search warrant. He claimed that "the averments in the complaint were falsehoods or made with reckless disregard for the truth." He attached to the motion the complaint for a search warrant, in which Officer Fernando Banda said:

> "On 21 March 2013, I met with *** J. Doe. J. Doe stated that J. Doe met with a subject known as 'Fatz' *** residing at 2240 s Central Park ***.
>
> J. Doe stated that on 20 March 2013, J. Doe went to 2240 S Central Park *** front apartment *** and knocked on the front door and 'Fatz' opened the door. 'Fatz' then asked J. Doe How many you want? J. Doe replied, give me an eight ball (meaning an eighth of an ounce of crack cocaine). J. Doe then handed 'Fatz' United States Currency ***. [Fatz] return[ed] with a large clear plastic bag containing numerous smaller clear plastic bags each containing a white rock like substance, suspect crack cocaine. 'Fatz' then tendered one clear plastic bag from the larger plastic bag to J. Doe. *** [J. Doe] ingested some of the suspect crack cocaine. J. Doe then stated that J. Doe felt the same euphoric feeling that J. Doe has felt in the past after ingesting crack cocaine. *** J. Doe stated that J. Doe *** has purchased crack cocaine from 'Fatz' in the same apartment once a month for the past year. ***
>
> *** Banda *** utilized the Chicago Police Department C.L.E.A.R. system and found 'Fatz' who is *** Te[r]ence Moore with the IR#638169. J. Doe was provided a C.L.E.A.R. system photo mug-shot which was positively identified by J. Doe as Te[r]ence Moore with the IR#638169. *** Banda *** along with P.O.

> David McCray *** and P.O. Benjamin Martinez *** on 20 March 13 at 1400 hrs while conducting surveillance on 2240 S Central Park observed Te[r]ence Moore IR#638169 exit *** 2240 S Central Park Ave. and enter a red pick up truck.
>
> [Banda, McCray and] Martinez on 20 March 13 at 1530 hrs. drove past 2240 S Central Park Ave. *** where J. Doe pointed to the *** building and stated, that's where 'Fatz' lives. *** J. Doe observed Te[r]ence 'fatz' Moore Ir#638169 exit 2240 S Central Park Ave. and enter a red pick up truck ***. J. Doe related 'that's "fats" right there and that his truck ***[']."

¶ 7 To support his claim that Banda acted with reckless disregard for the truth, Terence also attached to his motion a history of Banda's searches using the C.L.E.A.R. system on March 21, 2013. The records show Banda entered no search for "Fatz," or any name like Fatz. Instead, he used the unique file number for Terence's records to pull up Terence's rap sheet and photograph.

¶ 8 At the hearing on the motion for a *Franks* hearing, defense counsel argued that "the 21st of March of 2013 was when [J. Doe told Banda about] this delivery ***. On the next page *** they say they ran the CLEAR system and got the background of the defendant and the mug shot *** on the 20th. Judge, it's backwards." The trial court said, "I see that apparently there are some errors, maybe some juxtaposition of dates in this matter." However, the trial court found the errors insufficient to make a substantial preliminary showing of a reckless disregard for the truth, and therefore the court denied the motion for a *Franks* hearing.

¶ 9 Motion To Suppress Statements

¶ 10 Terence also filed a motion to suppress statements. At the hearing, Banda testified that when he entered the apartment he handcuffed Terence and "asked him if there was anything in [the] apartment that shouldn't be there." Terence answered the question. Banda then asked how long Terence had lived in that apartment, and again Terence answered. Banda testified that after he asked those two questions, he read Terence his Miranda rights, and Terence agreed to talk. Terence testified that Banda never informed him of his Miranda rights. The trial court found Banda credible, and suppressed the answers to the two questions Banda asked before he read Terence his Miranda rights.

¶ 11 The parties disagreed about the effect of the trial court's ruling. After the court selected the jury, the trial court held a second hearing on the issue of what Banda could say without violating the court's ruling. At the hearing held without the jury, Banda testified that when he entered the apartment, he saw officers holding Terence down on the floor of the hallway. He did not speak to Terence, except to ask him his name, until the other officers completed the search of the apartment. Before asking Terence any questions, Banda read Terence his Miranda rights. Banda then asked Terence about what was in the apartment and where he lived.

¶ 12 The trial court said:

> "This officer testified that the only thing he asked while he was on the floor was what his name is. I find that to be not wholly truthful.
>
> ***

> Impeachment goes to the weight, not the admissibility of the evidence. I'm going to exclude the fact that he admitted that he lived in that apartment *** for the last three years.
>
> I will allow him, the officer, to testify with regard to any questions regarding the recovery of what's in the backpack and any subsequent statement that might have been made at the district."

¶ 13 Motion *in Limine*

¶ 14 Terence made a pretrial motion *in limine* to bar the State from presenting evidence that the search warrant named Terence as the target of the search. The prosecutor said, "We will not be mentioning the target, whether it was Defendant or someone else." The court granted the motion to bar the prosecution from naming the target of the search warrant. The court clarified that the prosecution could present evidence that the officers came to the apartment to execute a search warrant for that specific apartment.

¶ 15 Trial

¶ 16 Martinez testified about the entry into the apartment and the items found in the search. He said Terence cooperated with police, who handcuffed him while he stood in the hall. Martinez never saw Terence held down in the apartment. About an hour into the search, Ronald Smith, Gwendolyn's brother and Terence's uncle, came in. Police kept Ronald in the front room while they finished the search.

¶ 17 Banda testified that he saw Terence lying on the hall floor, but no one held him down. Banda said he misspoke in his pretrial testimony, when he said officers held Terence on the floor. Banda stayed with Terence in the front room of the apartment during the search. He

did not speak to Terence during the search. After the search, Banda informed Terence of his Miranda rights and started questioning him. Banda testified that Terence said that the backpack and "everything recovered in the apartment was his." On cross-examination, Banda admitted that he did not include the incriminating statement in his arrest report. Banda included the statement in a second report he wrote later the same day he wrote the arrest report.

¶ 18 The prosecutor, Jamie Dickler, also elicited the following testimony:

"Q. Did you also process the defendant for his arrest?

A. Yes, I did.

Q. Where did you obtain the spelling of his name?

A. From the search warrant."

¶ 19 Defense counsel did not object.

¶ 20 Terence's mother, Angela Moore, testified that Terence lived with her in an apartment on St. Louis Avenue. They moved into the apartment in February 2013, a few weeks after a fire damaged the apartment they previously shared. Terence's name appeared with Angela's name on the lease for the new apartment. On cross-examination, Angela admitted that after the fire in January 2013, she stayed with her daughter until she could move into the new apartment in February. She did not know where Terence slept for those weeks.

¶ 21 Gwendolyn testified that she leased the apartment at 2240 South Central Park, and only her name appeared on the lease. She stayed in the hospital on March 24, 2013, due to complications from diabetes. She asked her relatives to spend time in her apartment to

discourage burglars from breaking in. Terence did not live in her apartment. After the fire burned Terence and Angela's apartment in January 2013, Gwendolyn let Terence keep some of his documents in the back bedroom of her apartment. For one month, Terence used Gwendolyn's address as his mailing address.

¶ 22 In closing argument, defense counsel argued that Terence never actually possessed the narcotics, and the evidence did not support an inference of constructive possession. Counsel said, "a person has constructive possession when he *** has both the power and intention to exercise control over the thing either directly or through another person," and he argued that the evidence did not persuasively show that Terence intended to exercise control over the narcotics. Assistant State's Attorney Asheena Graham, in rebuttal, argued:

> "[W]ith the theory of constructive possession, *** that item did not have to be in the defendant's hand. *** I will give you an example.
>
> Some of you are taking notes and have been taking notes today and yesterday. When you left the courtroom yesterday, *** you didn't have the opportunity to take your notes with you. *** But you left those notes here with the understanding that those notes were yours and you would come back and get them today so you could continue taking notes.
>
> See, you constructively possessed those notes while you were all the way at your home."

¶ 23 Defense counsel did not object.

¶ 24 During deliberations jurors sent several questions to the trial court. First, they asked whether the search warrant named any individuals. Next, they asked how long they should

deliberate if they found they did not agree on a verdict. With the approval of the parties, the trial court answered both question, "You heard all the evidence. You have the instructions of law. Please continue to deliberate." After several hours of inconclusive deliberations, the trial court sent the jurors home for the night.

¶ 25 The next day, the jurors asked for transcripts of the testimony. The trial court told the jury that the transcripts were not yet available. The jurors asked for a "further instruction *** as to the meaning of 'intent to deliver.' " The trial court answered, "I am not able to give you another instruction with regard to that question.:"

¶ 26 After seven hours of deliberations, the jury returned a verdict acquitting Terence on both counts of possession with intent to deliver, but finding him guilty on the lesser included offenses of simple possession of more than 100 grams of cocaine and more than 1 gram of heroin.

¶ 27 The court denied Terence's motion for a new trial. Terence had two prior convictions for selling narcotics, from 2000 and from 1996. He had three prior convictions for possession of narcotics, from 1995, 1993, and 1992, and a 1993 conviction for unlawful use of a weapon by a felon. The multiple prior convictions required the court to impose a class X sentence. The court sentenced Terence to 8 years in prison for possessing cocaine, and to 3 years for possessing heroin, with the sentences to run concurrently. Terence now appeals.

¶ 28 ANALYSIS

¶ 29 *Franks* Hearing

¶ 30 Terence argues first that the trial court erred when it denied his motion for an evidentiary hearing on his claim that the court had no valid basis for issuing the search warrant. Under

Franks v. Delaware, 438 U.S. 154 (1978), a defendant has a right to a hearing to challenge a search warrant if the defendant makes a substantial preliminary showing that "(1) the affidavit for the search warrant *** contained a false statement; (2) the affiant's state of mind in making the false statements was reckless; and (3) the false statement was material to the finding of probable cause." *United States v. McClellan*, 165 F.3d 535, 545 (7th Cir. 1999). Our supreme court further explained the requisite preliminary showing:

> "What is required is that the defendant's preliminary showing be more than a mere request and more than an unsubstantiated denial. [Citation.] However, because the defendant's burden at the *Franks* hearing itself is preponderance of the evidence, the preliminary showing may, logically, be something less. [Citation.] *** [T]his threshold *** 'lies somewhere between mere denials on the one hand and proof by a preponderance on the other.' " *People v. Chambers*, 2016 IL 117911, ¶ 41, *quoting People v. Lucente*, 116 Ill. 2d 133, 152 (1987).

¶ 31 The *Chambers* court added that "a trial court's ruling on a motion for a *Franks* hearing is subject to de novo review. A reviewing court is as capable as the trial court of determining whether the motion and supporting documents have made a substantial preliminary showing." *Chambers*, 2016 IL 117911, ¶ 79.

¶ 32 The complaint for a search warrant misleadingly presents its allegations out of chronological order. Reorganizing the allegations according to the times stated, Banda, McCray, and Martinez conducted surveillance on 2240 South Central Park on March 20, 2013, before any reported contact with J. Doe. Around 2 p.m., Banda saw Terence leave the building. The complaint does not say how or when Banda first spoke to Doe, but at 3:30

p.m. on March 20, 2013, Doe pointed to 2240 South Central Park and said Fatz lived there. Terence again left the building and Doe said, "that's 'fats'." The next day, Doe met with Banda again and told Banda that Doe bought crack cocaine from Fatz on the 20th, the day Banda conducted surveillance on 2240 South Central Park. After talking with Doe on the 21st, Banda used the CLEAR system "and found 'Fatz' who is *** Te[r]ence Moore with the IR#638169." Banda misleadingly omitted from the complaint the fact that he retrieved the record using the IR number for Terence, apparently because, before Doe told him about Fatz, Banda already knew the identity of the person he sought to charge with dealing narcotics.

¶ 33 Banda showed Doe a photograph of Terence that Banda retrieved from the CLEAR system. According to the complaint, the photograph "was positively identified by J. Doe as Te[r]ence Moore." Notably, in the complaint, Banda does not allege that Doe identified the photograph as a picture of Fatz, and Banda does not allege that Doe identified the photograph as a picture of the person who sold him crack. The identification alleged in the complaint adds nothing to the case. The CLEAR system identified the photograph as Terence; Doe referred to the person who sold him crack only as Fatz.

¶ 34 The documents Terence appended to his motion confirm that Banda searched for Terence's photo only by using Terence's IR number. The evidence shows that prior to any contact with Doe, Banda knew he sought to charge Terence with selling narcotics.

¶ 35 The trial court found that Terence showed only that Banda made "some errors, maybe some juxtaposition of dates in this matter." The court did not attempt to guess which assertions bore the correct date and which ones were wrong. We find instead that Banda misleadingly organized the complaint to obscure the fact that he had decided to try to find

grounds to arrest Terence before Banda first met Doe. The concurrence's theory -- that Banda only juxtaposed dates -- provides no explanation at all for how Banda used the CLEAR system to retrieve Terence's photograph when Doe referred to the drug seller only as Fatz, and Banda never searched the system for "Fatz" or any name like Fatz. Instead, Banda used only Terence's unique IR number to retrieve his photograph. The evidence strongly supports the inference that Banda knew Fatz's real name before Banda spoke with Doe. The concurrence also presumes that Banda stated the wrong dates in the complaint, but no evidence in the record contradicts Banda's statement using those dates. We will not presume that Banda made false statements in the complaint when the evidence does not compel that conclusion.

¶ 36 We cannot say that Terence met his burden of making a substantial preliminary showing that Banda included false statements in the complaint for a warrant. Illinois law does not yet recognize deliberately misleading statements in a complaint as a basis for voiding a search warrant. See *Chambers*, 2016 IL 117911, ¶ 81. The trial court correctly denied the motion for a *Franks* hearing.

¶ 37 Prosecutorial Misconduct

¶ 38 Terence asks this court to award him a new trial because of two instances of prosecutorial misconduct. He acknowledges that his trial counsel failed to preserve objections to both of the actions, but he asks us to review the issues for plain error or as evidence of ineffective assistance of counsel.

¶ 39 Motion *in Limine*

¶ 40 First, Terence contends that the prosecutor violated the court's ruling that barred any reference to the fact that the search warrant named Terence as its target. The prosecutor asked Banda, "Where did you obtain the spelling of [Terence's] name?" Banda dutifully answered, "From the search warrant." We see no proper basis for the question. See *People v. Fryer*, 266 Ill. 216, 220 (1914) (search warrant has no value as evidence of assertions made in the complaint for a warrant). The source the officer used to spell Terence's name bears no relevance to any issue in the case. We agree with Terence that the prosecutor deliberately elicited the barred evidence that the search warrant named Terence as the target of the search.

¶ 41 We also know from the record that the testimony had prejudicial effect. The jury sent the judge a written question asking, "Did the search warrant in this case name any individuals?" The question shows that the jury discussed the search warrant and the significance of naming a person as the target of the search. We can infer from the question that at least one juror recognized the significance of Banda's testimony, and concluded that the warrant named Terence as the individual suspected of possessing narcotics. The hearsay evidence that the warrant named Terence prejudiced him. See *People v.Virgin*, 302 Ill. App. 3d 438, 445, 451 (1998) (Evidence of the contents of a warrant may prejudice a defendant where the evidence is inadmissible hearsay).

¶ 42 Closing Argument

¶ 43 Terence also objects to the example the prosecutor used in rebuttal closing argument to explain constructive possession. The prosecutor told the jurors that they continued to

constructively possess their notes after they surrendered them to the bailiff before going home, because they intended to retrieve the notes from the bailiff the next day. Terence points out that constructive possession continues only as long as the possessor had "a capacity to maintain control and dominion" over the possessions. *People v. Wells*, 241 Ill. App. 3d 141, 145-46 (1993). Jurors do not have the capacity to control the notes they left with the bailiff.

¶ 44 The State answers that the jurors constructively possess the notes because they maintain control and dominion over the notes. See *People v. Scott*, 367 Ill. App. 3d 283, 285 (2006). Constructive possession exists without actual personal present dominion over a controlled substance, but there must be an intent and culpability to maintain control and dominion. *Scott*, 367 Ill. App. 3d at 285 (citing *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992)). The State's argument ignores the jurors' surrender of control over their notes to the bailiff. The jurors had no ability to access their notes in the locked courthouse. See *Scott*, 367 Ill. App. 3d at 286. The prosecutor's argument misstated the law of constructive possession. Because the case turned on the question of whether Terence had constructive possession of the narcotics in the apartment, we find that the misstatement of the law of constructive possession had prejudicial effect. See *People v. Weinstein*, 35 Ill. 2d 467, 470 (1966) (misstatements of law in closing argument prejudiced defendant).

¶ 45 The State argues that Terence invited the response by arguing that he did not have constructive possession of the narcotics. But an argument based on the evidence and the law cannot justify a response that misstates the law. *United States v. Kojayan*, 8 F.3d 1315, 1321-22 (9th Cir. 1993).

¶ 46 Plain Error

¶ 47 Terence admitted that his trial counsel failed to object at trial to the prosecutor's misconduct. He claims that the misconduct amounted to plain error. An objection to prosecutorial misconduct "that would ordinarily be considered to have been waived may be raised on appeal where 'the evidence is closely balanced or where the error was of such magnitude that the accused was denied a fair trial.' " *People v. Whitehead*, 116 Ill. 2d 425, 448 (1987) (quoting *People v. Stewart*, 104 Ill. 2d 463, 488 (1984)).

¶ 48 We find the evidence in this case very closely balanced. Police found the narcotics in an apartment leased only to Gwendolyn. Terence's name appears on a lease for a different address. Gwendolyn explained that several of her family members had keys to her apartment, and she asked them to spend time there while she was in the hospital. One of those family members, Robert, arrived at the apartment during the search. All persons with keys to the apartment would have had just as much access as Terence had to the narcotics found in the apartment. Gwendolyn also plausibly explained the presence of Terence's birth certificate, social security card, and mail in her apartment.

¶ 49 The prosecution's case largely rested on the credibility of Banda's testimony about statements Terence made to Banda. But Banda's testimony at trial – that Terence made the statements only after Banda read him the Miranda warnings – conflicted with Banda's pretrial testimony that Banda asked the questions about what police would find and where Terence lived before reading Terence his rights. Also, Banda shockingly omitted the incriminating statement from his arrest report. Banda's account of the arrest did not match Martinez's account. Banda's organization of the complaint for a search warrant showed an inclination to

deceive the court. The trial court noted the inconsistencies in Banda's testimony, and found Banda not entirely credible. In view of Banda's flexible memory and noncommittal relationship with the truth, we must find the evidence in this case closely balanced. We note that the extensive deliberations and the jurors' questions, suggesting difficulty reaching a consensus, indicate that the jurors, too, found the evidence closely balanced. See *People v. Gonzalez*, 2011 IL App (2d) 100380 ¶ 26; *People v. Davis*, 393 Ill. App. 3d 114, 133 (2009).

¶ 50 The prosecutor's misstatement of the law, and especially the egregious, deliberate violation of the court's ruling on the motion *in limine*, "threatened to tip the scales of justice against the defendant." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Accordingly, because of the plain error, we must reverse the convictions and remand for a new trial.

¶ 51 CONCLUSION

¶ 52 Although Terence presented evidence that Banda organized the facts stated in the complaint for a search warrant in a misleading way, Terence did not meet his burden of making a substantial preliminary showing that Banda deliberately made false statements in the complaint. We hold that the trial court correctly denied Terence's motion for a *Franks* hearing. However, we find that a prosecutor deliberately violated the court's ruling on the motion *in limine* to bar the prejudicial hearsay evidence that the search warrant named Terence as its target. A prosecutor also prejudicially misstated the law of constructive possession in closing argument. In this case with very closely balanced evidence, prosecutorial misconduct tilted the scales of justice. Accordingly, we reverse the convictions and remand for a new trial.

¶ 53 Reversed and remanded.

¶ 54 JUSTICE MASON, specially concurring.

¶ 55 I agree with my colleagues that there was an error in Moore's trial that entitles him to a new trial. I write specially because (i) I take issue with credibility determinations made by the majority regarding the misleading nature of the complaint for a search warrant and (ii) I disagree that the error in rebuttal closing argument contributed to Moore's conviction.

¶ 56 With respect to Moore's claim that he was entitled to a *Franks* hearing, the majority concludes that he was not, but proceeds to make a factual finding that "Banda misleadingly organized the complaint [for a search warrant] to obscure the fact that he had decided to try to find grounds to arrest [Moore] before Banda first met Doe." (¶ 35, *supra*). Apart from the fact that there is nothing in the record to support the conclusion that Banda knew Moore before meeting with Doe on March 21, 2013, or that he had any reason to try to dig up charges against him, the majority's "finding" is inherently factual. But there was no evidentiary hearing conducted on Moore's motion to quash the warrant and, in particular, Banda never testified, either at the motion to suppress or at trial, to the chronological sequence that led to the search warrant. In contrast, the trial court attributed the discrepancy to a "juxtaposition of dates," which, frankly, makes more sense. Further, Doe and Banda appeared before the issuing judge and, for all we know, the discrepancy was addressed before the warrant was issued. So despite my agreement with the majority's ultimate conclusion that a *Franks* hearing was not warranted, I disagree with the observation that Banda was guilty of attempting to deliberately mislead the issuing judge.

¶ 57 I agree with the majority's analysis of the prosecutor's error in eliciting testimony from Banda that Moore's name appeared on the search warrant. The trial court's *in limine* order

was clear: there was to be no mention at trial of the fact that Moore was the target of the search warrant. Despite that order, the prosecutor asked Banda how he determined the spelling of Moore's name, a question that had nothing to do with any issue in the case. And because Moore's defense focused on his claim that he was only in the apartment that day at the request of his aunt and that he did not reside there, the suggestion that his name appeared on the warrant allowed the jury to speculate that, despite the testimony of his aunt and mother, he did live there. The jury's inquiry during deliberations as to whether any individuals were named in the warrant and the difficulty and length of its deliberations suggest that this improper question could have tipped the scales against Moore.

¶ 58 Whether or not jurors still have constructive possession of their notes when the courthouse is closed for the night is debatable (see *People v. Scott*, 367 Ill. App. 3d 283, 286 (2006) (defendant conceded that his conduct in handing narcotics to his companion who then placed them in a locked mailbox to which only the companion had the key supported finding that defendant had constructive possession of the drugs)), but ultimately beside the point because it bears no relationship to the facts supporting constructive possession here. But I part ways with the majority on its analysis of the prosecutor's rebuttal argument on the issue of constructive possession. The analogy used by the prosecutor was factually inapt: she hypothesized a situation involving the jurors leaving their notes in the bailiff's custody overnight. The more appropriate analogy would have been to the situation where jurors leave their notes in the jury room during a bathroom break.

¶ 59 Moore's jury was not asked to decide whether he could be found to be in constructive possession of the backpack had he been arrested on the sidewalk outside the apartment

building without a key to the front door. It is undisputed that Moore was physically present in the apartment and in the vicinity of the bathroom where the blue backpack containing drugs was found. Further, his social security card, birth certificate and mail addressed to him were found in the drawer of a dresser in a bedroom where his aunt admitted he slept when he stayed there and where a large quantity of drugs was also found on the bed. So even if the prosecutor's statement was incorrect—and I do not believe it was—it could not have influenced the jury's verdict. And I certainly would not place the prosecutor's analogy in the category of "prosecutorial misconduct." (¶ 36, *supra*).