

2017 IL App (1st) 162639-U

No. 1-16-2639

Order filed December 29, 2017

Sixth Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 13576
)	
KEESLER WILSON,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The evidence was sufficient to establish defendant's constructive possession of the contraband recovered from a bedroom where defendant told officer he used that room. Moreover, no first-prong plain error occurred when the trial court heard evidence of defendant's prior conviction that was more than 10 years old.

¶ 2 Following a bench trial, defendant Keesler Wilson was convicted of possession of between 400 and 900 grams of heroin with intent to deliver and of the unlawful use of a weapon (UW) by a felon. The trial court sentenced defendant to concurrent terms of 15 years and 7

years in prison for those offenses. On appeal, defendant challenges the sufficiency of the evidence as to both convictions, asserting the State did not prove he had control of the bedroom from which the contraband was recovered. He also contends the State's introduction of two of defendant's prior convictions that were more than 10 years old, in order to impeach his testimony, constituted plain error because the evidence in this case was closely balanced.

¶ 3 At trial, Chicago police officer Vincent Stinar testified that on June 18, 2013, he and other officers executed a search warrant at a third-floor apartment at 4943 South Michigan Avenue. He testified that officers first knocked at the rear door and announced their presence. When no one answered, the officers attempted to forcibly enter, at which point a woman opened the door. Officer Stinar asked the woman where defendant was, and she responded he "just ran out the front."

¶ 4 Defendant was detained by other officers at the front of the building and brought back into the apartment. Officer Stinar informed defendant that he was the subject of the search warrant and asked defendant if any narcotics or weapons were present "and which room was his." According to the officer, defendant responded that "the rear bedroom was his bedroom."

¶ 5 Officers recovered a weapon from a rear bedroom; Officer Stinar identified both the bedroom and the weapon in photographs. When he asked defendant about that weapon, defendant said he bought the weapon six months earlier "from the streets for approximately \$200." Police determined defendant did not have a valid firearm owner's identification (FOID) card and had a prior felony conviction. On cross-examination, Officer Stinar stated he never saw defendant inside the rear bedroom.

¶ 6 Chicago police officer John Dalponte testified that he and other officers arrested defendant “coming out of the front door of the residence.” A set of keys was recovered from defendant that unlocked the front door of the apartment where the search was conducted. Officer Dalponte and other officers searched the back bedroom and recovered currency, a kitchen scale, coffee grinders with suspected drug residue, a cutting agent, a cooking sifter and plastic bags for the packaging of heroin. On cross-examination, the officer said there could have been two beds in the room but he did not specifically recall.

¶ 7 Chicago police officer Boonserm Srisuth testified that he recovered a 9-millimeter caliber handgun from a box on a closet shelf in the bedroom where the other items were recovered. A box containing 36 rounds of .44-caliber ammunition also was recovered from that closet. Two plastic bags of suspect heroin also were recovered; those bags were inside a black box inside the same closet. Several coffee grinders were sitting on a table near the closet. Officer Srisuth also recovered “Farmer’s Insurance documents with the defendant’s name on it.” On cross-examination, Officer Srisuth said he “observed only one air mattress in that bedroom.”

¶ 8 As pertinent to the charge of UUI by a felon, the parties stipulated that defendant had a previous felony conviction for the manufacture and delivery of a controlled substance in case No. 01 CR 25793 and did not have a valid FOID card on June 18, 2013. The parties further stipulated that the bags recovered by police contained 729.2 grams of heroin.

¶ 9 For the defense, Cornelia Tilson testified that on June 18, 2013, she lived in an apartment on South Michigan Avenue with her husband, Roger Tilson, her daughter, Malinda Forest, and her son, Edmond Forest. Cornelia could not recall the exact address, stating she thought it was 4436. Three grandsons, including Kemarion Wilson, also lived there. Malinda and defendant are

Kemarion's parents. The apartment had three bedrooms; the Tilsons stayed in one, the grandchildren stayed in one, and Malinda and Edmond shared the rear bedroom.

¶ 10 On June 18, 2013, Cornelia was sick and she testified that defendant "called my daughter and came over to help me with the baby." Defendant arrived between 11:30 and 11:45 a.m. When the police arrived, Cornelia opened the rear door for them. A female officer searched her and took her house keys. Defendant did not have keys to the apartment and Cornelia was not aware of the presence of narcotics or a weapon in the rear bedroom.

¶ 11 On cross-examination, Cornelia testified defendant never stayed overnight at the apartment. About 20 minutes after police entered, they brought defendant inside through the front door. Cornelia did not see the officers recover any items described in their testimony.

¶ 12 Malinda Forest testified that on the day the warrant was executed, she left the apartment at 6 a.m. for work. She and her brother lived in the rear bedroom, where she slept on an air mattress and her brother slept on the floor. She had never seen narcotics or firearms in that room and had not given defendant keys to the apartment because it was her mother's apartment. The dresser in that room belonged to her brother. Defendant visited the apartment but had never spent the night there; she stated he lived "[o]n Spaulding" and she had visited him there. Malinda kept documentation in the bedroom of a life insurance policy that she helped to fund for the benefit of her child.

¶ 13 On cross-examination, Malinda said she was 35 years old and her brother was 34. She stated defendant visited once or twice per week but did not spend time in the rear bedroom, stating, "That's my mom's place."

¶ 14 Roger Tilson offered testimony consistent with that of Cornelia and Malinda, stating defendant visited the apartment but did not spend the night. Roger stated they lived at 4300 South Michigan.

¶ 15 Defendant testified that in June 2013, Kemarion lived with Malinda and her mother and he visited about twice each week. He had never slept at the apartment and did not have a key. Defendant denied that police took a key from him on the day of the search; he also denied telling officers the rear bedroom was his or saying he owned the weapon that was recovered. He testified he did not know of the presence of narcotics in the bedroom and was aware he could not possess firearms as a convicted felon. On cross-examination, defendant acknowledged his prior convictions for possession of a controlled substance in case No. 06 CR 12488 and for aggravated UUW in case No. 03 CR 12231.

¶ 16 In rebuttal, the State indicated it would introduce “two certified copies of conviction for the defendant.” The court replied that was not necessary because “the cat is out of the bag.”

¶ 17 Also in the State’s rebuttal case, Chicago police officer Mark Jacobs testified he was helping execute the search warrant when he saw defendant run out of the apartment building’s entrance. Defendant was apprehended and Officer Jacobs and Officer Dalponte took him into the apartment, where a set of keys was recovered from defendant.

¶ 18 The Farmer’s Insurance documents entered into evidence in the State’s case are included in the record on appeal. Those documents, which are dated February and March 2012, include an application for life insurance that named defendant as the insured and “Milanda Forrest” as the primary beneficiary. Defendant’s address is listed as 3655 West Lexington Street in Chicago.

¶ 19 In finding defendant guilty of both charges, the trial court recounted the testimony of the defense witnesses and found their accounts “incredible.” The court noted the inability of Cornelia and Roger Tilson to state the address where they testified they had been living when the search warrant was executed. The court also described Malinda’s testimony that she never saw weapons or drug paraphernalia in the rear bedroom as “inherently unbelievable.” As to defendant’s version of events, the trial court stated it was “less than credible.” Defendant filed a motion for a new trial, which was denied.

¶ 20 The trial court found defendant was subject to mandatory Class X sentencing due to his six prior felony convictions. The court imposed concurrent sentences of 15 years in prison for possession of a controlled substance with intent to deliver and 7 years in prison for UUW by a felon. Defendant filed a motion for reconsideration of that sentence, which was denied.

¶ 21 On appeal, defendant first contends the State did not prove his guilt of either offense beyond a reasonable doubt because it did not establish he had control of the bedroom from which the narcotics, paraphernalia and weapon were recovered. He argues no mail, lease documents or rent checks or receipts in his name were presented.

¶ 22 The State responds that it established defendant’s constructive possession of the contraband through the recovery of the insurance documents in the rear bedroom. In addition, the State also points to defendant’s statements to officers that the room was “his bedroom” and that he bought the gun, as well as the recovery of keys from defendant and his flight from the apartment when the police arrived.

¶ 23 When considering a challenge to the sufficiency of the evidence, the relevant inquiry 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 offense beyond a reasonable doubt. *People v. Bradford*, 2016 IL 118674, ¶ 12. It is the responsibility of the trier of fact, which was the trial judge in this bench trial, to resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *Id.* It is not the role of this reviewing court to retry the defendant when the sufficiency of the evidence is challenged. *People v. Lloyd*, 2013 IL 113510, ¶ 42. Therefore, a reviewing court will not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of witnesses, and a conviction will not be overturned unless the evidence is so improbable, unsatisfactory or inconclusive that it creates a reasonable doubt as to the defendant's guilt. *Bradford*, 2016 IL 118674, ¶ 12. "Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 24 Defendant was convicted of possessing the narcotics and weapon recovered from the apartment. Possession may be either actual or constructive. *Id.* at 335. Because defendant was never seen in actual possession of the contraband, we consider whether he constructively possessed those items.

¶ 25 Constructive possession exists where there is no personal dominion over the contraband but the defendant has control over the area where the items were found. *People v. Hunter*, 2013 IL 114100, ¶ 19. To prove a defendant's constructive possession, the State must prove beyond a reasonable doubt that the defendant (1) had knowledge of the contraband's presence and (2) exercised "immediate and exclusive" control over the area where the contraband was discovered. *People v. Terrell*, 2017 IL App (1st) 142726, ¶ 18.

¶ 26 Evidence establishing constructive possession is “often entirely circumstantial.” *People v. Fernandez*, 2016 IL App (1st) 141667, ¶ 18 (quoting *People v. McLaurin*, 331 Ill. App. 3d 498, 402 (2002)). The State may establish knowledge through evidence of a defendant’s acts, declarations or conduct from which it may be inferred that he knew of the presence of the prohibited items. *People v. Sams*, 2013 IL App (1st) 121431, ¶ 10. The trier of fact “is entitled to rely on an inference of knowledge and possession sufficient to sustain a conviction ‘absent other factors that that might create a reasonable doubt as to the defendant’s guilt.’ ” *People v. Alicea*, 2013 IL App (1st) 112602, ¶ 24 (quoting *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003)). Here, Officer Stinar testified defendant told him he had purchased the weapon six months earlier “from the streets for approximately \$200.” The officer also testified defendant told him the rear bedroom “was his.” Those statements establish defendant’s knowledge of the contraband recovered from that room.

¶ 27 In addition to establishing defendant’s knowledge of the items, the State also must prove that defendant exercised immediate and exclusive control over the area where the contraband was found. *Terrell*, 2017 IL App (1st) 142726, ¶ 18. A defendant’s control over the premises where the prohibited items are located gives rise to an inference of both knowledge and control of the items. *People v. Brown*, 277 Ill. App. 3d 989, 997-98 (1996).

¶ 28 Habitation of the location where the contraband was found can constitute sufficient evidence of control to establish constructive possession. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 29. The parties urge different inferences based on the recovery of the insurance papers from the bedroom. Defendant points out those documents listed a different address for him than the property at which the warrant was executed, while the State contends the documents’

presence in the rear bedroom exhibited defendant's control over that room. Here, the trial court was presented with conflicting inferences; it is reasonable to conclude the insurance records could be kept either by defendant, the insured, or Malinda, the beneficiary. The trial court did not refer to the documents in making its ruling. Accordingly, we conclude that, by themselves, the insurance documents neither create nor defeat an inference of constructive possession.

¶ 29 We thus consider whether the remaining evidence, including defendant's statements as testified to by police, establish his control over the bedroom in which the contraband was found. The defense presented the testimony of several witnesses that Malinda and her brother, Edmond, slept in the rear bedroom. A person may have constructive possession of contraband even if others have access to the area where the items were recovered. *People v. Spencer*, 2016 IL App (1st) 151254, ¶ 25. Therefore, that testimony does not defeat a finding of defendant's constructive possession.

¶ 30 Here, defendant's testimony was contradicted by the accounts of the State witnesses. Officer Stinar testified that defendant admitted owning the weapon and using the rear bedroom. Defendant denied making those statements, asserting he did not have a key to the apartment and denying that officers took a key from him during the execution of the search warrant. However, Officer Dalponte testified that keys were recovered from defendant and that those keys unlocked the front door of the apartment building. Also, another officer testified in the State's rebuttal case that defendant attempted to flee from the building through the front door during the execution of the warrant. Evidence of flight is admissible as tending to demonstrate a defendant's consciousness of guilt. *People v. Moore*, 2015 IL App (1st) 140051, ¶ 26.

¶ 31 Though we note that here the State offered testimony contradicting defendant's account, the trial court is not required to accept the defendant's exculpatory statements as true even where the State has not offered *any* evidence to contradict it. See *People v. Schaefer*, 87 Ill. App. 3d 192, 194 (1980). It was the responsibility of the trial court as the trier of fact in this case to weigh that disparate testimony, judge the credibility of each witness and resolve conflicts in the evidence. See *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). The court expressly found the testimony of the defense witnesses to be not credible.

¶ 32 Defendant compares this case to *Fernandez, Terrell* and other decisions in which evidence was presented that the defendant lived somewhere other than the address at which the search occurred. In *Fernandez*, the defendant's convictions were reversed because mail addressed to the defendant was recovered that bore a different address than the subject property, even though the defendant was in possession of keys that unlocked two doors at the property, and because the defense presented witnesses who testified the defendant did not live there. *Id.* ¶ 19. The officers in *Fernandez* also recovered defendant's passport and insurance card, though those documents did not list an address for the defendant. *Id.* ¶ 11. This court found the keys did not establish the defendant's control over the premises and that no other evidence "placed him in the residence" on the day of the search. *Id.* ¶ 22.

¶ 33 We do not find those cases mandate the same result in this case. Here, defendant told an officer that he used the rear bedroom. Moreover, defense witness Cornelia Tilson testified defendant was in the apartment that day, and her testimony that defendant did not have keys to the apartment was contradicted by the recovery of keys from him by an officer stationed at the front of the apartment building.

¶ 34 In conclusion on this issue, the State presented evidence, via defendant's statements, that defendant had knowledge of the contraband and had control over the area where the items were kept. The State presented testimony that keys to the apartment were recovered from defendant and that insurance documents bearing defendant's name were recovered from the bedroom. That evidence was not so improbable, unsatisfactory or inconclusive that it created a reasonable doubt as to defendant's guilt.

¶ 35 Defendant's remaining contention on appeal is that the trial court erred in allowing the State to impeach him with evidence of his prior convictions that were more than 10 years old at the time of trial. Defendant argues that even though he did not object at trial or raise the issue in his posttrial motion, he can now seek review under the first prong of the plain-error rule because the evidence in this case was closely balanced and the proof of his prior convictions weighed against him in the trial court's determination of his credibility.

¶ 36 When a defendant testifies on his own behalf in a criminal case, a record of defendant's prior conviction or convictions is admissible for the purpose of discrediting the defendant as a witness, though it cannot be used for the purpose of proving the defendant's guilt or innocence of the crime for which he is being tried. *People v. Naylor*, 229 Ill. 2d 584, 594-95 (2008). A prior conviction is admissible to impeach the defendant's credibility where (1) the prior crime was punishable by death or imprisonment in excess of one year or if the crime involved dishonesty or false statement regardless of the punishment and (2) less than 10 years have elapsed since the prior conviction or the date the witness was released from confinement, whichever is later. *People v. Montgomery*, 47 Ill. 2d 510, 516 (1971). The trial court must also determine the probative value of the evidence of the prior crime outweighs the danger of unfair prejudice (*id.*);

however, that weighing did not take place here because the issue of the convictions' admissibility was not raised at trial.

¶ 37 During defendant's cross-examination, he acknowledged prior convictions for possession of a controlled substance in case No. 06 CR 12488 and aggravated UUW in case No. 03 CR 12231. We note that as opposed to raising the issue on cross-examination of the defendant, the State is required to impeach the defendant as to his or her prior conviction by introducing the record of the prior conviction. See *Naylor*, 229 Ill. 2d at 594. The State attempted to do so in its rebuttal case, and defendant raises no issue on appeal as to the method of impeachment.

¶ 38 Defendant's prior conviction in case No. 06 CR 12488 occurred on September 18, 2006, and was thus within 10 years of the trial in this case, which took place on June 23, 2016. Therefore, defendant's conviction in case No. 06 CR 12488 could be used for impeachment purposes. See *Naylor*, 229 Ill. 2d at 602 (the 10-year limit in *Montgomery* is "calculated in relation to the date of the defendant's trial" in the instant proceeding).

¶ 39 However, as the State concedes, defendant's prior aggravated UUW conviction does not fall within the 10-year window established in *Montgomery*. The State notes, and our review of the record confirms, that defendant was convicted in case No. 03 CR 12231 on July 28, 2004, and was released from confinement on April 4, 2006. Thus, more than 10 years elapsed between that date and the June 2016 trial in this case. Therefore, defendant's conviction in case No. 03 CR 12231 should not have been introduced in the instant case to impeach his credibility.

¶ 40 Under the first prong of plain error, defendant's claim can be addressed only where a clear or obvious error has occurred and the evidence is so closely balanced that the error alone could have affected the outcome of the case. See *People v. Hood*, 2016 IL 118581, ¶ 18. The

defendant bears the burden of persuasion to show both that an error has occurred and that the evidence was closely balanced. *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010). Defendant has shown that an error has occurred, in that one of his two prior convictions was outside the 10-year period set out in *Montgomery* and therefore should not have been introduced to impeach his credibility. However, we cannot conclude that defendant has met his burden of establishing plain error in the court's consideration of his prior convictions.

¶ 41 Whether evidence is closely balanced is a separate question from whether the evidence is sufficient to sustain a conviction on review against a reasonable-doubt challenge. *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007). The test of whether the evidence is closely balanced requires the defendant to show that “the alleged error alone would tip the scales of justice against him, *i.e.*, that the verdict ‘may have resulted from the error and not the evidence’ properly adduced at trial[.]” *People v. White*, 2011 IL 109689, ¶ 133 (quoting *People v. Herron*, 215 Ill. 2d 167, 178 (2005)).

¶ 42 As set out above, two of defendant's prior convictions were presented via defendant's own testimony, and one of those convictions was improperly admitted. Even where error has occurred in admitting a prior conviction under *Montgomery*, any prejudicial impact is minimal where other convictions of a defendant were properly admitted. *People v. Hawkins*, 243 Ill. App. 3d 210, 223-24 (1993); *People v. Bock*, 242 Ill. App. 3d 1056, 1081 (1993).

¶ 43 Furthermore, “[t]he reason for impeaching a witness with a prior conviction is to affect the credibility of the witness' testimony at trial” and it relates to whether the trial court should “believe the defendant's testimony rather than the testimony of conflicting witnesses.” *Naylor*, 229 Ill. 2d at 598-99. Here, the police entered the apartment while executing a search warrant

that named defendant and the residence and authorized them to seize heroin and drug paraphernalia. Police recovered heroin and items associated with the packaging and sale of narcotics from the rear bedroom of the apartment. The court found the testimony of the defense witnesses was not believable. Therefore, the trial court's determination of defendant's guilt rested not only on defendant's own testimony but on its assessment of the testimony of the other witnesses presented by the defense. Moreover, the trial court did not refer to defendant's prior convictions in its ruling. For all of those reasons, we cannot conclude that the trial court's ruling was based upon the erroneously admitted conviction and cannot conclude that the verdict may have resulted from the error and not the properly adduced evidence.

¶ 44 In summary, despite the conflicting testimony, the evidence was sufficient to prove defendant's guilt of the charged crimes beyond a reasonable doubt. Additionally, the admission of defendant's prior conviction to impeach his credibility did not constitute first-prong plain error.

¶ 45 Accordingly, the judgment of the trial court is affirmed.

¶ 46 Affirmed.