FIFTH DIVISION
Order filed: December 7, 2018

No. 1-16-2337

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KWAME OWUSU, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County No. 15 CR 11793 Honorable Mauricio Araujo, Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to prove the defendant guilty of possession of a controlled substance with intent to deliver where a police officer saw him manipulating and retrieving an item from a specific location in a gangway where heroin was hidden and packaged for selling.

¶ 2 Following a jury trial, the defendant, Kwame Owusu, was convicted of possession of a controlled substance with intent to deliver and was sentenced to six years' imprisonment. On appeal, he contends that the evidence was insufficient to sustain a conviction because the State failed to prove beyond a reasonable doubt that he had actual or constructive possession of the

heroin that the police officers recovered from a gangway. For the following reasons, we affirm.

¶ 3 In June 2015, the State charged the defendant with possession of a controlled substance with intent to deliver pursuant to section 401(c)(1) of the Illinois Controlled Substances Act (720 ILCS 570/401(c)(1) (West 2014)).

¶ 4 At trial, Chicago police officer Carl Kruger testified that he was conducting narcotics surveillance at approximately 7 p.m. on June 25, 2015. Officer Kruger and another surveillance officer, both dressed in plain clothes, parked their unmarked police car near 1026 Ridgeway Avenue, a vacant building. From approximately 150 to 180 feet away, Officer Kruger saw the defendant, who he identified in court, sitting on a milk crate in a vacant lot down the block.

¶ 5 Officer Kruger observed a car briefly stop in front of the defendant before parking farther up the block near 1024 Ridgeway Avenue. A man, later identified as Billy O'Neal, and a woman approached the car and the woman exchanged a small, dark item with the driver for cash. The driver said, "I need two more," and the defendant walked up to the car and stopped for a few seconds. Next, he entered the gate of 1026 Ridgeway Avenue. After walking approximately 30 feet down the building's gangway, the defendant picked up an item, manipulated it, walked back, and handed it to O'Neal. O'Neal removed a small, dark item from what the defendant had given him and handed it to the driver. Over the next two minutes, the defendant stood with O'Neal as he conducted two more transactions with different people. Five minutes later, O'Neal walked approximately 15 feet down the gangway of 1026 Ridgeway Avenue and set down an item. After rejoining the defendant, O'Neal handed him a "wad of bills." Officer Kruger witnessed only the defendant and O'Neal enter the gangway during his surveillance.

¶ 6 On Officer Kruger's orders, two enforcement officers detained O'Neal, the woman, and the defendant and searched the gangway. The officer retrieved a total of 19 small, dark ziplock

bags, each containing a foil packet of a white, powdery substance. The officer found 6 of the small bags in a knotted plastic bag approximately 15 feet down the gangway and the other 13 small bags in a knotted plastic bag approximately 30 feet down the gangway. Officer Kruger testified that dealers commonly bundle 13 small, $10-bags of a particular drug, known as a "jab." The fact that the small bags were bundled into two separate bags indicated to Officer Kruger that half of a "jab" had already been sold and that the remaining bags were packaged as a "jab" and prepared for sale. An officer then arrested the defendant and O'Neal. In the initial search of the defendant, the police recovered $93 in cash, but found no drugs on his person. A later search of the defendant at the police station yielded an additional $480 hidden in his shoe. Neither the woman nor the three alleged buyers were arrested. Thus, the items that were sold were not recovered.

¶ 7 The State also called one of the enforcement officers, Michael Chernik, who testified that he found and inventoried the 19 small, dark ziplock bags. A forensic scientist with the Illinois Police Forensic Science Center at Chicago testified that she received the items, analyzed the contents, and determined they contained a total of 4.8 grams of heroin.

¶ 8 The defendant did not testify in his case-in-chief, and he called one of the enforcement officers, Jimmy Krklus, who testified that he made a "mistake" when he failed to search the defendant's shoe at the time of the arrest.

¶ 9 The jury found the defendant guilty of possession of more than 3 grams, but less than 15 grams, of a controlled substance with intent to deliver. After denying the defendant's supplemental motion for a new trial, the circuit court sentenced him to six years' imprisonment. This appeal followed.

¶ 10 The defendant's sole assertion on appeal is that the evidence was insufficient to sustain

his conviction for possession of a controlled substance with intent to deliver because the State failed to prove beyond a reasonable doubt that he had possession of the heroin. Since there was not actual possession, as no heroin was found on his person, the defendant argues that the State failed to show constructive possession where: (1) another man was also observed in the gangway in possession of the heroin; (2) the heroin was retrieved from a public space; and (3) the items sold were never recovered.

¶ 11 When a defendant challenges the sufficiency of the evidence, it is not the function of this court to retry the defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). A reviewing court must determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). A reviewing court may not overturn a conviction based on insufficient evidence unless the proof is so unreasonable, improbable, or unsatisfactory that a reasonable doubt exists as to the defendant's guilt. *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007); *People v. Smith*, 2015 IL App (1st) 132176, ¶ 24.

¶ 12 To sustain a conviction for possession of a controlled substance with intent to deliver, the State must prove beyond a reasonable doubt that: (1) the defendant had knowledge of the presence of a controlled substance; (2) the controlled substance was in the immediate control and exclusive possession of defendant; and (3) the amount of the controlled substance exceeded that which could be viewed as merely for personal use. *People v. Harris*, 352 Ill. App. 3d 63, 68 (2004); 720 ILCS 570/401(c)(1) (West 2014). Possession may be constructive or actual. *People v. Givens*, 237 Ill. 2d 311, 335 (2010). Where, as here, the defendant is not found in actual physical possession of the contraband, the State must prove that he had constructive possession.

People v. Spencer, 2012 IL App (1st) 102094, ¶ 17. Constructive possession is shown where a defendant has the "intent and capability to maintain control and dominion" over a controlled substance. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). Constructive possession is often proven entirely by circumstantial evidence. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 23. The trier of fact is entitled to rely on an inference of knowledge and possession sufficient to sustain a conviction absent other factors that might create a reasonable doubt as to the defendant's guilt. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003).

¶ 13 Here, a rational trier of fact could have found that the defendant had constructive possession of the heroin recovered from the gangway. Officer Kruger testified that he observed O'Neal and a woman exchange an item for money with an individual who then asked for "two more." The defendant responded by walking over to the individual for a few seconds before going to the gangway. Next, the defendant stopped at the specific location, 30 feet down the gangway, where the police found heroin distinctively packaged for selling. There, the defendant was observed manipulating an item, picking it up, and bringing it to O'Neal, who exchanged it for cash with the individual. The defendant stood with O'Neal as he conducted two more transactions, exchanging a small, black item for cash. After all three transactions were complete, O'Neal placed the item in the specific location, 15 feet down the gangway, where the police retrieved heroin that was distinctively packaged for selling. Finally, a forensic scientist testified that the white, powdery substance found in the bags was, in fact, 4.8 grams of heroin. Thus, a reasonable trier of fact could have found that the evidence, although mostly circumstantial, supported the inference that the defendant retrieved the heroin from the gangway and gave it to O'Neal who then sold some of it before placing it back in the gangway. *McCarter*, 339 Ill. App. 3d at 879.

¶ 14 While the defendant questions the strength of some of the circumstantial evidence, his arguments do not create a reasonable doubt as to his guilt. *Wheeler*, 226 Ill. 2d at 115. The fact that the drugs were also handled by another person does not negate the defendant's guilt as two people may be deemed in possession of the contraband when they share immediate and exclusive control or share the intention and power to exercise control over the contraband. *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000). Although the drugs were hidden in a public space, it does not destroy the exclusiveness of the defendant's possession. *People v. Burks*, 343 Ill. App. 3d 765, 770 (2003) (constructive possession affirmed where the drugs were hidden behind a garbage can in an alley). Even though the items that were sold to the alleged buyers were not recovered, it is reasonable to infer that the small items were small bags of heroin because they were sold from a bag that contained small bags of heroin packaged for sale. *People v. Jennings*, 364 Ill. App. 3d 473, 482 (2005) (constructive possession affirmed where the items sold were never recovered, but the bag that the defendant was observed selling from was recovered, and it contained individual packets of cocaine and cash).

¶ 15 Based on the forgoing, we find that the evidence, together with the reasonable inferences flowing therefrom, and viewed in the light most favorable to the prosecution, was sufficient to establish that the defendant possessed the heroin with intent to deliver beyond a reasonable doubt.

¶ 16 Affirmed.