2018 IL App (2d) 170897-U
No. 2-17-0897
Order filed November 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 14-CF-377
RENEE ANDREA HERMES,	)	Honorable Robert A. Wilbrandt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The State failed to prove defendant guilty beyond a reasonable doubt of possession of cocaine, as the cocaine at issue was locked in a safe and a rational trier of fact could only speculate that defendant (as opposed to her husband, a cocaine dealer) had access to the safe.

¶ 2 Defendant, Renee Andrea Hermes, appeals from her conviction of possession of 100 grams or more, but less than 400 grams, of a substance containing cocaine or an analog thereof (720 ILCS 570/401(a)(2)(B) (West 2014)); she contends that the evidence was insufficient to sustain her conviction. We agree. Although defendant concedes that she was aware that her husband William Hermes (William) was using the couple's house as a base for cocaine dealing,

the State's case that defendant herself had possession of the cocaine was speculative. We thus reverse defendant's conviction.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with possession, and possession with intent to deliver, of 100 grams or more but less than 400 grams of a substance containing cocaine (720 ILCS 570/401(a)(2)(B) (West 2014)). She was also charged with lesser included offenses. Each count alleged that the offense occurred on or before April 16, 2014. Defendant had a bench trial.

¶ 5 The State's evidence showed that, on the evening of April 16, 2014, defendant called 911 from her residence, a house on Bentley Lane in Spring Grove, to report possible carbon monoxide poisoning. No one answered the door when the police came in response to the call. About an hour later, a woman who lived roughly a mile away from the Bentley Lane house made a second 911 call; defendant had appeared on her doorstep asking for help. Defendant said that she might have been poisoned by carbon monoxide in her house and that someone might still be in the house. Police officers and an ambulance were dispatched. Defendant told a member of the ambulance crew that she had been using crack cocaine for several days. That crewmember noticed that she was sniffing frequently, something that he had learned to associate with the use of powder cocaine. Defendant was taken to the hospital by ambulance. A police officer interviewed her there; she again admitted that she had been using crack, but denied knowledge of other drugs in the house. The officer made a video recording of the interview, which was brief; in it defendant can be seen sniffing.

¶ 6 Defendant left the hospital with William; they eventually went to stay with a Lionel Lecasse in Mohawk, Michigan. Michigan State Police officers recovered a car belonging to William from Lecasse's house; they took it from Lecasse's property, but did not find either

William or defendant. Defendant was eventually arrested at a beauty salon in Round Lake. Defendant was in possession of about $324 in cash, various gift cards, Prada sunglasses, and an Illinois driver's license and Illinois ID card bearing the name "Doreen Davis." A truck found near the salon had plates registered to "Doreen Davis." According to the truck's Michigan registration, the owner of the truck was "Lionel Lee Lecasse" and the truck had been sold on "04-29-2014."

¶ 7 When the second 911 call was received, officers were sent again to the Bentley Lane house. They again found that no one would answer the door, so one officer entered through a window. No one was in the house. In the basement, one officer noticed a pink plastic basin on a desk and a residue of white powder on the desktop; the basin contained wire twist-ties, plastic bags, and a knife and spoon—also covered with white powder. The officers also found a digital scale with powdery residue.

¶ 8 The officers then left to obtain a search warrant. When they executed it, they found a six-foot-tall safe in a large walk-in closet in the basement. It was closed, so they hired a locksmith, William E. Darrington, to open it. After unsuccessfully trying many combinations based on common strategies people use to create combinations that they can remember, Darrington was about to drill the lock to open the safe. It then occurred to him to try the safe's factory combination, 123456; the safe opened. The safe contained a small lockbox, some mail, and a printout of an internet discussion "on how to purify *** cocaine." Darrington opened the lockbox by picking the lock. According to an officer, the lockbox contained the following:

> "There were eight plastic sandwich-sized bags which contained numerous smaller plastic baggies that contained a white powdery substance. There were two larger Ziploc bags that contained a white powdery and chunky substance. There were three envelopes

> containing United States currency [in the amounts of] $8,700, *** $1,420 and $1,790. There were credit cards belonging to [defendant and] William *** Hermes and two LG flip phones."

The photographic exhibits showing the lockbox contents show six cards issued in defendant's name: two or three were store cards; the others were general credit cards. The cards were a "Buckle" store card with no expiration date, a Macy's card expiring in September 2015, a Mastercard with the sticker with the activation phone number still on it, valid from October 2013 to October 2016, a Sears Mastercard—poorly photographed—that appears to have an expiration date of October 2016, an American Express card, with the sticker still on it and an expiration date of September 2013, and a Visa card with the sticker still on it and an expiration date of October 2013. The photographs do not show the backs of the cards and no State witness could testify that they were signed or that the accounts had been activated.

¶ 9 The residence contained two kitchens, one on the first floor and one in the basement. The officers saw no evidence that anyone slept in the basement. The master bedroom contained evidence that it was shared by a man and a woman.

¶ 10 Spring Grove officers searched the Bentley Lane house again on July 16, 2014. This time, they discovered a greeting card and a notebook on the living room table and, in the first-floor pantry, boxes of sandwich bags and twist-ties of the same color that the police had found on the baggies in the basement. These items did not appear in an inventory done when the police executed the search warrant. An officer read the relevant part of the notebook:

> " 'Yes. I have done dope again, crack. I cook it. I don't know how long I've been up or when the last time I took a shower. My husband is a cocaine businessman. He never touches it. *** I have the tools to keep me on track. I did not use the *** [*sic*]. I liked

> what I was doing because every—I took a hit, there was a lot of *** paranoia *** and it got to be very real.' "

He also read the card: below the printed inscription, defendant had written, " 'Happy birthday, love your wife, me, Renee.' " The State rested after the court entered the notebook and card into evidence.

¶ 11 Defendant moved for a directed finding; the court denied the motion. It ruled that the State had clearly demonstrated that defendant knew both that cocaine could be generally found in the house and of William's activities as a drug dealer. "The Court feels that there has been sufficient evidence at this time to show that [defendant] knew that some kind of drug business was going on down in the basement. She was benefiting from it." It deemed that the evidence showed that defendant had been on a "four-day cocaine binge." Finally, based on her being alone when she called 911 and the evidence that she had used powder cocaine, it concluded that it would be proper to infer that defendant had sniffed cocaine that she found in the house.

¶ 12 William, the first defense witness, admitted that he was serving a nine-year sentence because of his conviction on charges stemming from the cocaine seized from the Bentley Lane house and that he had two prior convictions of possession and delivery of a controlled substance. Defendant was William's third wife; they had married in 2003, about a year after they met. Defendant left William for several years when she learned that he was selling cocaine. She moved back in 2012 or 2013 after she was diagnosed with breast cancer. William moved into the basement, and he "lived down there awhile" as they "kind of got reacquainted." {ROP 619} However, he regularly went upstairs to check on her.

¶ 13 William testified that he did not want defendant to find out about his drug dealing; he believed that defendant would leave him again if she did. He bought the safe when defendant

returned and he always stored his cocaine there. William was the only one who knew the combination. He was the one who had packaged some of the cocaine from the safe into small baggies. He had about 400 grams of powder cocaine in the safe. Defendant's credit cards were in the lockbox because she had taken them from her purse and asked him to take care of them.

¶ 14 On cross-examination, William denied having left out his materials for packaging cocaine, but he also said that he might have covered everything with newspaper. He said that he had left his packaging materials on the table because he had left quickly, but that he usually put everything in the "little pink tub," which he then put in the safe. He would not have left the materials in open sight.

¶ 15 Defendant testified after William. Her testimony about her relationship with William was largely consistent with William's. In oral argument, defendant conceded that the evidence showed that nothing would have prevented her from entering the basement if she wanted to do so. She had believed that William had stopped selling cocaine when she moved back in with him. However, she began to suspect strongly that she was wrong early that April. She had been sober for about 14 years, but starting on April 10, 2014, she "went on a four-day, five-day bender": "at the end of this, [she] purchased some crack cocaine and [she] smoked it. And then [she] totally lost it." During the "bender," she decided that she wanted cocaine and asked her niece to help her. They drove together to Waukegan, and her niece bought a "rock" of crack cocaine the size of a gumball. Defendant gave half to her niece and smoked her portion in a spark-plug socket wrench with a Brillo pad. The cocaine made her paranoid; after mixing what was left of the crack with bleach and flushing it down a toilet, she noticed a strange gas smell and felt that she was having trouble breathing. She called 911 and went outside. When it took too long for anyone to arrive, she set out walking. Eventually, she went to a stranger's house and

asked the woman who answered the door to call a ride for her. The woman called an ambulance. Defendant told the emergency personnel that she had been up for four days and that she had used cocaine.

¶ 16 Defendant's niece was defendant's last witness; she testified about going with defendant to Waukegan to purchase cocaine. Her testimony was largely consistent with defendant's.

¶ 17 In rebuttal, the State admitted recordings of calls that William made to defendant from jail. In these, William and defendant agreed that they should deny that they had a close relationship. William said that he would say what was needed to help defendant.

¶ 18 The court found defendant guilty of possession of 100 grams or more but less than 400 grams of cocaine, but not of possession with intent to deliver. It deemed the State's witnesses to be credible and the defense witnesses incredible and found that defendant knew that cocaine was present in the house. It focused on William's testimony, and particularly what he said about how he stored his cocaine:

> "Mr. Hermes said he kept cocaine in a large safe, the Liberty safe. But interestingly, at least to the Court, he never mentioned there was another one inside. *Nor did he mention that he had the key to it or that anybody had the key to it or whether it was even closed.*" (Emphasis added.)

Further:

> "The Court also notes that Mr. Hermes, in his testimony, was careful to say that he always put his cocaine tools away and put them back into the safe when he was done, or at least he covered them up. This time when the police came over, they were not. They were in plain view on the table. According to the testimony of Mr. Hermes, then, somebody must have left them out. Not him.

> There were credit cards in the safe with Mrs. Hermes' name on it. Mail in the safe with Mrs. Hermes name on it. She says she never saw them before. Didn't know how they got there. Mr. Hermes says that she gave them to him. So the testimony in regards to the mail and the credit cards in the safe certainly is inconsistent and not credible.
>
> The combination of the outer safe was easy to guess, and no one knows who had the key to the inner safe. Mr. Hermes said that he put away that pink basin. However, it was left out in the day.
>
> I think the conclusion is that Mrs. Hermes knew that there was cocaine down in the basement. She knew that her husband was a cocaine dealer. She had the intent to get some powder. She wasn't able to get some powder [from the dealer in Waukegan]. She had access to the downstairs basement and somebody went in there, took out the pink basin, had access to it, and somehow or another Ms. Hermes got an overdose of cocaine with signs of powder cocaine, not crack cocaine.
>
> Therefore, based on all the circumstantial evidence that the Court has before it, the Court believes that Ms. Hermes had knowledge of the drugs in the house, she had intent to use those drugs. She wanted to get powder. She had access to the house and to the safe. And the circumstantial evidence shows she has control over that cocaine. She wanted it, she OD'd on something that apparently was powder, not necessarily crack cocaine. And somehow or another, the tools that Mr. Hermes indicated were left in the safe were left out and open and in plain view that particular day."

However, the court held that defendant had no intent to distribute the cocaine:

> "Now, as to the issue of possession with intent to deliver, I don't think there has been any evidence that Mrs. Hermes had intent to deliver any of this cocaine. According to her view, she was reaping the benefits of Mr. Hermes' intent delivering the cocaine. Mrs. Hermes herself didn't want to get involved in that. She wouldn't mind—apparently she was using cocaine, but she didn't show any intent to deliver that particular cocaine, as far as the Court is concerned."

¶ 19 Defendant filed no posttrial motions. The court sentenced her 30 months' probation; she did not file a postsentencing motion. She filed a timely notice of appeal.

¶ 20 II. ANALYSIS

¶ 21 Defendant argues on appeal that the evidence was insufficient to show defendant's access to, and knowledge of, the specific cocaine that the police found in the lockbox. The State, citing *People v. Young*, 2013 IL App (2d) 120167, ¶ 30, argues that "[t]he mere presence of illegal drugs on premises which are under the control of the defendant gives rise to an inference of knowledge and possession sufficient to sustain a conviction absent other factors which might create a reasonable doubt as to the defendant's guilt." It further contends that defendant was aware that cocaine was in the basement and demonstrated her control of it by ingesting some of that cocaine. We conclude that the case supporting defendant's possession of the cocaine was so speculative as to preclude proof beyond a reasonable doubt.

¶ 22 We review the sufficiency of the evidence under the standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), as adopted by *People v. Collins*, 106 Ill. 2d 237, 261 (1985): when a reviewing court decides a challenge to the sufficiency of the evidence, " 'the relevant question 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 crime beyond a reasonable doubt.' "

(Emphasis in original.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson*, 443 U.S. at 319). When a conviction is based on circumstantial evidence, the proof need not be beyond a reasonable doubt as to every link in the chain of circumstances, provided that the evidence as a whole is sufficient. *People v. Milka*, 211 Ill. 2d 150, 178 (2004).

> "Under [the *Collins*] standard, the reviewing court does not retry the defendant, and the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. [Citation.] But merely because the trier of fact accepted certain testimony or made certain inferences based on the evidence does not guarantee the reasonableness of its decision. A conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of defendant's guilt." *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

¶ 23 As the court's statement on finding defendant guilty shows, it relied on evidence from the defense case to find her guilty; it particularly relied on William's testimony about how he stored his cocaine. Reliance on evidence from the defense case is not necessarily error. However, due process considerations limit the extent to which a reviewing court may assume that negative inferences from the defense case provide the support for a conviction. At its root, it is "the insufficiency of the People's evidence which creates [reasonable] doubt. If a conviction is to be sustained, it must rest on the strength of the People's case and not on the weakness of the defendant's case." *People v. Coulson*, 13 Ill. 2d 290, 296 (1958). To be sure, "[t]he People's evidence is not solely the evidence introduced by the State." (Internal quotation marks and citations omitted.) *People v. Scott*, 2018 IL App (2d) 151056, ¶ 31. For instance, Illinois cases consistently recognize that a reviewing court may give weight to the negative inferences that a

trier of fact might draw when a defendant testifies and explains his or her behavior in a way that is implausible on its face. *Scott*, 2018 IL App (2d) 151056, ¶¶ 31-32. On the other hand, " '[i]f negative inferences, based on demeanor evidence, were adequate in themselves to satisfy a rational [trier of fact] of guilt beyond a reasonable doubt, appellate courts might not be able to provide meaningful review of the sufficiency of evidence.' " *Scott*, 2018 IL App (2d) 151056, ¶ 32 (quoting *United States v. Jenkins*, 928 F.2d 1175, 1179 (D.C. Cir. 1991)).

¶ 24 To support a conviction of possession of a controlled substance, the State must prove (1) possession of the substance and (2) knowledge of the substance's presence. *People v. Givens*, 237 Ill. 2d 311, 334-35 (2010). When the State's theory is that the defendant was in actual possession of the substance, it must show that the substance was "in the immediate and exclusive control of defendant." *People v. Frieberg*, 147 Ill. 2d 326, 360 (1992). "The rule that possession must be exclusive does not mean, however, that the possession may not be joint." *Givens*, 237 Ill. 2d at 335. Further, possession need not be actual. A defendant has constructive possession of contraband when he or she lacks "actual personal present dominion" over the contraband, but nevertheless has "an intent and capability to maintain control and dominion." *Frieberg*, 147 Ill. 2d at 361. Actual personal present dominion is shown by acts such as hiding or trying to dispose of the contraband (*e.g.*, *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007))—in other words, a defendant shows personal present dominion by doing things that tend to determine the fate of the contraband. Thus, the capability to maintain dominion and control implies having the power to cause the contraband to be hidden, destroyed, or the like. Similarly, the intent to maintain dominion and control implies a state of mind of readiness to do such things.

¶ 25 The State suggests that we can infer defendant's possession of the cocaine from her knowledge that cocaine was present and from her access to the whole house. We do not agree.

Because the cocaine was locked away, we conclude that it is improper to infer possession without evidence that defendant had actual access to it. As the State correctly points out, " ' "[t]he mere presence of illegal drugs on premises which are under the control of the defendant gives rise to an inference of knowledge and possession sufficient to sustain a conviction *absent other factors which might create a reasonable doubt as to the defendant's guilt*." ' " (Emphasis added.) *People v. Young*, 2013 IL App (2d) 120167, ¶ 31, (quoting *People v. Chavez*, 327 Ill. App. 3d 18, 26 (2001), quoting *People v. Smith*, 191 Ill. 2d 408, 413 (2000)). But those "other factors" were present here in the form of the safe and the lockbox. Defendant concedes that she had access to the basement, but, absent evidence that defendant had access to the safe, we cannot infer that she had constructive possession of the cocaine in it. See *United States v. Zeigler*, 994 F.2d 845, 846-48 (D.C. Cir. 1993) (applying similar principles of law where a defendant lacked clear access to a room in shared premises). And, as we next discuss, the evidence that defendant had access to the safe amounts to mere speculation.

¶ 26 The best evidence that defendant had access to the safe and the lockbox was the presence of credit cards in her name in the lockbox. But, because the evidence did not show that the cards were in use—indeed, the evidence did not show that they had *ever* been used—the cards' presence does little to show that defendant had access to either the safe or the lockbox inside it.

¶ 27 The court also relied on an inference that defendant ingested cocaine from William's supply, but that inference was improper. The court's reasoning was circular. *If* good evidence existed that defendant had access to the safe, then it would be reasonable to infer that any cocaine she used came from William's stores. However, the court appears to have used its belief that defendant used cocaine from William's stores to draw the inference that defendant must have had access to the safe. To do so, the court had to assume that defendant could have easily

guessed the safe's combination—despite Darrington's testimony that he thought to try the factory combination only as a last resort before drilling the lock. Further, to reach its conclusion, the court downplayed Darrington's testimony that he had to pick the lock on the lockbox to open it, and instead focused on the fact that William never mentioned that the lockbox was locked. We see nothing in the evidence that permits more than speculation that defendant got her cocaine from William's supply; evidence of defendant's ingestion of cocaine thus provided minimal proof that she had constructive possession of the cocaine in the safe.

¶ 28 The court relied in significant part on evidence from defendant's case, and particularly William's testimony, to find her guilty. Defendant's case did not supply the necessary evidence to make her conviction sustainable. To be sure, the court was entitled to decide to accept some of William's testimony even as it discredited other parts. See, *e.g.*, *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 62 ("The trier of fact may accept or reject all or part of a witness' testimony."). Nevertheless, its choices are not above review and we can reject them if they are evidently unreasonable. *Ross*, 229 Ill. 2d 255, 272, (2008). Here, the tapes of the jail calls strongly suggest that William meant to exculpate defendant by denying anything that would connect her to his dealing. Under those circumstances, it is unreasonable to give great weight to William's would-be exculpatory testimony that he did not leave any cocaine or cocaine tools out on the desk. Moreover, although the court noted that William's and defendant's testimony conflicted on how the credit cards came to be in the lockbox, neither William's nor defendant's explanation was implausible. We thus cannot give any weight to negative inferences drawn from that testimony.

¶ 29 In sum, the cocaine at issue was locked away, and a rational trier of fact could only speculate that defendant had access to it. As mere speculation cannot constitute proof beyond a

reasonable doubt (*People v. Davis*, Ill. App. 3d 532, 544 (1996)), we reverse defendant's conviction.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we reverse the judgment of the circuit court of McHenry County.

¶ 32 Reversed.