2019 IL App (2d) 160962-U
No. 2-16-0962
Order filed January 29, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. STACEY O. ASKEW, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 15-CF-2039 Honorable Christen L. Bishop, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Birkett and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err (1) in denying defendant's motion to suppress evidence because the apartment lessee consented to police officers' entry, and (2) in finding defendant guilty of possession of a controlled substance beyond a reasonable doubt; we affirm.

¶ 2 After a two-day bench trial, defendant was found guilty of one count of possession of a controlled substance. Defendant, Stacey Askew (hereinafter defendant), raises two issues on direct appeal. The first is whether the trial court erred in denying his motion to suppress evidence. The second is whether the trial court erred in finding beyond a reasonable doubt that

the State proved the necessary elements of possession of a controlled substance. We hold that the court did not err in either instance.

¶ 3 I. BACKGROUND

¶ 4 On August 9, 2015, defendant was a guest of Myron Blair (hereinafter Blair), who was hosting a dinner party for several people at his apartment. The police received an anonymous tip of possible drug activity occurring at Blair's apartment. At approximately 3:11 p.m., two North Chicago police officers, Laracuente and Tolver, responded to the tip and knocked on Blair's door. They did not announce themselves as police officers nor did they have warrants to search the apartment or arrest the defendant. After the police entered the apartment, both officers witnessed defendant holding a baggie with a brown substance and shoving the baggie into the side of a reclining chair upon which he was sitting. Defendant was arrested and charged with two counts: (I) unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(1) (West 2014)); and (II) unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2014)).

¶ 5 A. Motion to Suppress Evidence

¶ 6 Defendant filed a motion to suppress evidence, claiming that the officers did not have Blair's valid consent to enter the apartment. At the motion to suppress hearing on February 18, 2016, Blair testified that he and defendant have been friends for forty years, he had previously lived at defendant's house in the past, defendant had "stayed at [Blair's] apartment [a] couple times" and that defendant had a key to that apartment, which he could use "any time he got ready." Blair continued, stating that just after one of his guests left the apartment to get Kool-Aid, he heard a knock on the door and "thinking that it's [the guest]" opened the door about "a foot and a half." However, instead of his guest, he saw "three to four" officers at his door. While

remaining in the hallway outside of the apartment, the officers informed Blair that they received a call about possible drug activity at his apartment and asked to come in. Blair explained that he was having a dinner party and denied the officers' request to enter his apartment. The officers then threatened to arrest Blair, and one of the officers, later identified as Officer Tolver, pushed Blair back into his apartment before the officers entered the apartment. Once inside, Blair recalled that he had bread in the broiler, so he left the officers standing in his apartment's entryway. When he returned, the officers had entered his living room and an officer, later identified as Officer Laracuente, was giving commands of "be still" and "stop moving" to defendant.

¶ 7 Upon cross-examination, however, Blair admitted that he "swung the door open" and as he turned his back to the door, noticed that there were officers at the door rather than his guest. Blair further stated that he and the officers remained in the approximately six-foot long entryway to his apartment for around two minutes. There, he explained to the officers that they were not welcome before remembering the bread in the broiler and leaving the officers standing in the entryway.

¶ 8 Officer Laracuente testified that he has been a North Chicago police officer for over ten years and was on duty, in full uniform, as the "cover officer" on August 9, 2015. He and Officer Tolver responded to the possible drug activity call at Blair's apartment. After they knocked on the door, Blair opened the door all the way with his back toward the officers. Laracuente testified that Blair was not looking at him, but was rather turned and speaking with someone inside the apartment. After Blair opened the door, he said "come in," and walked into his apartment. Laracuente walked in first and followed Blair through the entryway into the living room. The guests in the living room then stopped speaking and stared at the officers like "deer in the

headlights." Only then did Blair turn around and begin asking why the officers were in his apartment. At that time, Officer Laracuente noticed that defendant reached forward and grabbed a baggie with a brown substance from a coffee table. Officer Laracuente noticed defendant shoving the baggie down the side of his reclining chair. Officer Laracuente directed defendant to stand up and move away from the chair, and defendant complied with his orders. Officer Laracuente later conducted a search of the chair and found a baggie with a brown substance that tested positive for heroin.

¶ 9 On cross-examination, Officer Laracuente testified that neither he nor Officer Tolver had a warrant to search Blair's apartment and that he did not immediately notice any suspicious smells or odors emanating from Blair's apartment.

¶ 10 Officer Tolver testified that he had been employed as a North Chicago police officer for over two years and was on duty in full uniform on August 9, 2015. Officer Tolver stated that he and Officer Laracuente approached the apartment and knocked on the door. Blair opened the door with his back toward the officers, walked away from it, and said "come in." Officer Tolver walked in behind Blair and Officer Laracuente through the entryway and into the living room. His attention was drawn to defendant, who was pulling a baggie across his lap and stuffing it on the right side of the seat upon which he was sitting. Officer Tolver ordered defendant to show his hands. Officer Tolver noticed that the other guests "appeared to be a bit shocked" to see the officers. Finally, Officer Tolver noted that Blair did not ever tell the officers to stop or leave the apartment and that neither he nor Officer Tolver ever pushed Blair.

¶ 11 On cross-examination, Officer Tolver noted that his police report contained a typographical error, in which he inadvertently used Blair's name instead of defendant's name.

He also noted that from his vantage point, he could see that defendant had a baggie, but could not tell what was in the baggie.

¶ 12 Defense counsel argued that the officers should have obtained a warrant to search Blair's apartment. Counsel also argued that the officers' testimony was inconsistent in that Officer Laracuente saw defendant grab the baggie from the coffee table and Officer Tolver first saw the baggie when it was on defendant's lap. Finally, counsel argued that Blair did not give consent to the officers, noting that Blair testified that the officers remained in the hallway until pushing past Blair into the apartment.

¶ 13 The State argued that the officers' conduct was not unreasonable or unconstitutional as they were simply following up from a call and Blair said "come in" to them. The State continued that the officers testified consistently and credibly, as Officer Laracuente entered the living room first and was able to see defendant grab the baggie and Officer Tolver was able to witness the baggie move across his lap and into the chair.

¶ 14 Trial court denied defendant's motion to suppress. The court indicated that it had the responsibility "to determine the credibility of the witnesses who have testified" and relayed the facts as the officers explained them before stating, "[i]n the Court's determination of credibility and listening to the witnesses, the officers' testimony was not inconsistent ***." The court continued that the "officers entered with permission." The court further stated that the officers "observed what they reasonably believed to be a felony being committed" and acted accordingly.

¶ 15 B. Trial

¶ 16 After several continuances for defense to investigate witnesses, the two-day bench trial began on September 6, 2016. The State began its case in chief with testimony from Officer Laracuente. His testimony was markedly similar to the testimony at the motion to suppress

hearing. He testified as to his training and history with the North Chicago police department as well as a physical description of the building to which he and Officer Tolver were sent due to the possible drug activity. He then testified that after knocking on Blair's apartment door, Blair opened the door while "looking back talking to somebody" and stated "come in." Both he and Officer Tolver followed Blair into the apartment's living room, where Blair's guests were seated "frozen" "like a deer in the headlights" starring at the officers. Officer Laracuente noticed that one guest, later identified as defendant, reached out to a nearby coffee table and grabbed "what appeared to be a baggy" and shoved it into the right side of the chair upon which he was sitting. Officer Laracuente then instructed defendant to stand, handcuffed defendant, and retrieved the baggie from the chair. He then found a small black electronic scale on the right armrest of the chair. He collected both the baggie and the scale as evidence. He further stated that he did not search any other piece of furniture in the living room nor any other room in the apartment.

¶ 17 On cross-examination, Officer Laracuente stated that he did not find a cell phone, pager, cutting powders like baking powder or baking soda, additional baggies, or money on or near defendant.

¶ 18 The State then called Officer Tolver as a witness. Like Officer Laracuente, his testimony regarding Blair's opening the door and entering the apartment was markedly similar to his testimony at the motion to suppress hearing. After knocking on the door, Blair opened the door with his back to the officers and said "come on in" as he was walking away towards the living room. Officer Tolver followed Blair and Officer Laracuente into the living room area, where he noticed defendant had "some sort of bag or something that was on his lap, and he took that and moved it and stuffed it into the couch ***." Officer Tolver instructed defendant to stop moving and raise his hands, which defendant did, and Officer Laracuente put defendant into handcuffs.

At the police station, Officer Tolver gave defendant his *Miranda* rights and conducted an interview with him. Defendant "adamantly stated" that the baggie was not his but he was trying to hide it from the police. He eventually stated that the baggie belonged to Blair.

¶ 19 Upon cross-examination, Officer Tolver stated that he did not conduct a search of any other piece of furniture, nor did he find any money, pagers, cell phones, baking powder, or baggies on defendant. He also noted that he had a typographical error in which he used Blair's name instead of defendant's on his police report.

¶ 20 The State's case continued with a forensic scientist who analyzed the substance in the baggie found in the chair. The forensic scientist identified the baggie before stating its weight was 8.19 grams. He then described various tests that he performed on the substance, including two color tests (Mecke and Marquis) and a conclusive test using a gas chromatograph mass spectrometer. From those tests, the forensic scientist identified the substance in the baggie as heroin. Upon cross-examination, the forensic scientist noted that he did not have any information as to the purity of the heroin, and he did not conduct any tests for DNA or fingerprints on the baggie or scale.

¶ 21 The next day, the state concluded with testimony from an officer qualified as an expert in the field of narcotics investigation. He testified that typical users of heroin "will not buy a lot of heroin" because a heroin high can last a long time. He also testified that a heroin user would have paraphernalia on them like pipes, needles, or straws while dealers would have scales to measure out the drug. The expert concluded that 8.19 grams of heroin would sell for approximately $810 and that a "typical user" would not have that much heroin for personal use.

¶ 22 On cross-examination, the officer testified that it was possible that an individual could purchase a "larger" amount of heroin and that he has witnessed drug dealers having multiple cell

phones, baggies, money, and cutting agents on them. Finally, he stated that he has never seen a scale used by a drug user, only by a drug dealer.

¶ 23 Before calling the first witness, defendant's counsel moved for directed verdict, which the trial court denied. Counsel called Blair who testified that a guest of his had just left the apartment when the police knocked, so he "popped" the door open and "turned and walked away" from the door. Then a "badge caught [his] eye" and he returned to the door. Blair testified that the police remained in the hallway as he discussed why they were present and Blair insisted that the police had no need to enter his apartment. He requested that the officers remain there as he went to remove bread from the oven. When he returned the officers were "standing a little bit more inside [Blair's] door" before "shoving" Blair off to the side and entering the living room. The officers then instructed everyone to "be still" and used profane language towards Blair's guests, including defendant.

¶ 24 On cross-examination, Blair stated that the police were about two feet into his apartment's entryway when he was shoved to the side and the police entered his living room. Blair also stated that defendant was sitting in chair in the corner, but he did not see defendant move because his back was toward defendant. When asked if the heroin recovered from the chair belonged to him, Blair stated "I plead the Fifth." The defense then rested and again moved for a directed verdict, which the court denied.

¶ 25 After hearing closing arguments, the trial court found defendant not guilty of the first count, unlawful possession of a controlled substance with the intent to deliver (720 ILCS 570/401(c)(1) (West 2014)), noting the lack of testimony regarding whether the scale was on, opened, or just closed on the chair, the fact that the scale was not tested for any residue, and defendant's lack of possessing other indicators of dealing, such as multiple baggies, cutting

agents, and money. Turning to the second count, unlawful possession of a controlled substance (720 ILCS 570/402(C) (West 2014), the court found defendant guilty. The court initially addressed that "momentary possession" of a controlled substance is not a defense in Illinois, and that the State established that defendant had exclusive control of the heroin:

> "The Defendant did have it in his control. I do find that his actions by grabbing it, holding it, hiding it, are circumstantial evidence of his exclusive control. I'm not saying that he brought it there. I'm not saying that he planned to use it, and, certainly, I have not found him guilty of possessing with intent to deliver. However, based on the totality of the evidence the Court considered, I would find the Defendant guilty of unlawful possession of a controlled substance."

¶ 26 On October 4, 2016, Defense counsel filed a motion for judgment notwithstanding the verdict or, alternatively, a new trial. The motion was denied on October 18, 2016, and defendant was sentenced to serve 15 months in the Illinois Department of Corrections with one year of mandatory supervised release, with credit for the time he served pending his trial. On November 8, 2016, defendant timely filed his notice of appeal.

¶ 27 II. ANALYSIS

¶ 28 We begin with defendant's first argument: the trial court erred in denying defendant's motion to suppress evidence because the homeowner did not consent to the police officer's entry into the apartment. Defendant argues that because Blair was looking away from the officers when he answered the door, no reasonable officer would take that as a clear message of consent for the officers to enter the apartment. In response, the State argues two points. First, defendant did not have any legitimate expectation of privacy at Blair's apartment. Second, the evidence supported the trial court's finding that Blair consented to the officers' entry into his apartment

living room. We need not address the State's first argument that the defendant lacked a reasonable expectation of privacy in Blair's apartment as we hold that Blair consented to the police officers' entry, and thus the trial court did not err in denying defendant's motion to suppress.

¶ 29 A review of a trial court's motion to suppress involves mixed questions of law and fact. *People v. Slavin*, 2011 IL App (2d) 100764 ¶ 11. The trial court's factual findings are entitled to great deference, and we will reverse only if those findings are against the manifest weight of the evidence. *People v. Duran*, 2016 IL App (1st) 152678, ¶ 2. We review the legal question of whether the suppression is warranted under those facts *de novo*. *Id.*

¶ 30 The fourth amendment to the United States Constitution prohibits warrantless nonconsensual arrests in the home in the absence of exigent circumstances. U.S. Const., amend. IV; *Payton v. New York*, 445 U.S. 573, 590 (1980). However, the warrant requirement is subject to certain reasonable exceptions, as the ultimate touchstone of the fourth amendment is reasonableness. *Kentucky v. King*, 563 U.S. 452, 459 (2011). One such exception to the warrant requirement is valid consent. *People v. Absher*, 242 Ill. 2d 77, 83 (2011). When a court is deciding whether consent was given, "the circumstances must have been such that the *police* could have reasonably believed that they had been given consent to enter." (Emphasis added.) *People v. Bosse*, 238 Ill. App. 3d 1008, 1018 (1992). When confronting a situation, officers must be allowed some room for error in determining whether consent has been given, and so the police officers' factual determination need not always be correct, but it must be reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990).

¶ 31 Defendant argues that the present case is factually similar to *People v. White*, 117 Ill. 2d 194 (1987). In *White* the supreme court held that consent was not given for the police to enter the

defendant's brother's home, when the brother answered an exterior opaque door when his mother said "it is me" and the police entered instead. *White*, 117 Ill. 2d at 205. The court determined that because the defendant's brother opened the door "only for his mother," without knowing the police officers were waiting to "push past" her to enter the apartment building's hallway, and protested the officers' entry into the apartment, he did not give valid consent for the officers to enter his home. *Id.* at 221-22. Defendant maintains that, like the police in *White*, Officers Laracuente and Tolver entered Blair's home knowing that Blair was not giving them consent to enter his home, but rather some other expected guest for his dinner party. At oral argument, defendant's appellate counsel agreed that the officers' testimony was credible and based this argument upon the testimony of the officers alone.

¶ 32 Here, unlike *White*, there are sufficient facts in the record to support the trial court's finding that the officers entered Blair's apartment with permission. According to both officers' testimony, Blair opened the front door to his apartment widely, with his back turned, and said "come in." Blair gave the unambiguous statement of permission to enter to whomever was at the door, in this case the two officers. Contrary to defendant's argument that Blair did not consent to the officers' entry, he expressly told whoever was at the door to "come in." Officers Laracuente and Tolver were simply following Blair's directive, "come in," when they followed him into the apartment. They did not hide behind Blair's mother like the officers in *White*, cover a peephole like the officers in *Bosse*, or disguise their presence as police officers in any way. Indeed, both officers were in full uniform on the day of the incident. To say that their belief that Blair gave them permission to enter is unreasonable does not make sense as Blair himself told whomever at the door to "come in." The fact that Blair was distracted or busy with other guests does not factor into this, as it is the officers' reasonable belief that is relevant to this case. We therefore hold that

the trial court did not err when it dismissed defendant's motion to suppress because the officers entered with permission.

¶ 33 We now turn to defendant's second challenge: whether the State's evidence was sufficient to prove defendant guilty of unlawful possession of a controlled substance beyond a reasonable doubt. Defendant asserts that, at best, the evidence presented by the State establishes that defendant only momentarily possessed the baggie containing heroin, and he did not have the authority or ability to control it. In response, the State avers that defendant exhibited immediate and exclusive control over the baggie when he grabbed it and tried to hide it from the officers. We agree with the State.

¶ 34 To convict on a charge of unlawful possession of a controlled substance, the State must prove beyond a reasonable doubt that the defendant had knowledge of the controlled substance and that it was in his immediate and exclusive control. *People v. Tates*, 2016 IL App (1st) 140619, ¶ 19. Possession may be actual, the exercise by the defendant of a present personal dominion over the illicit material and exists when the defendant exercises immediate and exclusive dominion or control over the illicit material. *People v. Eghan*, 344 Ill. App. 3d 301, 306-07 (2003). Possession may also be constructive, when a defendant has the intent and capability to maintain control and dominion over the controlled substance. *Id.* at 307. The elements of the offense may be proved by circumstantial evidence. *People v. Chavez*, 327 Ill. App. 3d 18, 24 (2001).

¶ 35 When a defendant challenges the sufficiency of the evidence, it is not the function of this court to retry him. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Instead, the relevant question we must ask 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). *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We will not substitute our judgment for the trial court's on questions regarding the weight to be given to a witness's testimony, the credibility of the witnesses, the resolution of inconsistencies and conflicts in the evidence, and the reasonable inferences to be drawn from the testimony. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). This standard applies whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). We will not reverse a criminal conviction for insufficient evidence unless the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *People v. Belknap*, 2014 IL 117094, ¶ 67.

¶ 36 Here, we agree with the trial court that the most compelling evidence that defendant was in exclusive control of the heroin comes from the officers' testimony that they witnessed defendant grab the baggie from the side table, pass it across his body, and hide it in the side of the chair. Defendant took action while the rest of Blair's guests were "like deer in the headlights." Both officers testified that defendant was the only person close enough to the heroin to grab it and their testimony was supported by Blair's identification of where defendant was sitting. That Blair pled the protection of the fifth amendment when asked if the heroin belonged to him does not take away from defendant's own actions of exerting control over the baggie. The record also establishes that defendant hid the baggie when the police entered the living room. Officer Tolver testified that defendant stated, after being given his *Miranda* rights, that he hid the baggie because he saw the officers. Defendant's actions provide sufficient evidence that he was aware that the baggie contained a controlled substance. See *Chavez*, 327 Ill. App. 3d at 24

("knowledge may be established by evidence of acts, declarations, or conduct of the defendant from which it may be inferred that the defendant knew of the existence of controlled substance").

¶ 37 Defendant's reliance on *United States v. Kitchen*, 57 F.3d 516 (7th Cir. 1995), for the proposition that momentary possession of a controlled substance is insufficient for finding a defendant guilty of unlawful possession of a controlled substance is unavailing. In *Kitchen* the defendant was arrested as a part of an undercover narcotics operation when he, at the prompting of undercover officers, picked up a package of cocaine to inspect it for "two or three seconds." *Kitchen*, 57 F.3d at 519. The Seventh Circuit held that the defendant's momentary handling of the cocaine alone did not constitute possession because the record was "devoid of evidence that Kitchen intended to walk away with the narcotics or otherwise transport them." *Id.* at 522. We decline to use the Seventh Circuit's reasoning in the case at hand. First, the factual scenario is completely different from *Kitchen*. Defendant here was at a dinner party, not present at an undercover narcotics operation. Second, and more importantly, the record clearly demonstrates that defendant did not just hold the baggie of heroin; he actively tried to hide it from police. This is evident not only from the officers' accounts of witnessing defendant stuffing the baggie into the chair, but also, according to Officer Tolver's testimony, defendant admitted that he tried to hide it because "he saw the police." The two cases are not analogous and thus we reject defendant's argument that the evidence, at best, shows that he only momentarily possessed the heroin. We therefore hold that the evidence in this case was sufficient to convict defendant of unlawful possession.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the defendant's conviction for unlawful possession of a controlled substance.

¶ 40 Affirmed.