

**NOTICE**

This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2022 IL App (4th) 220236-U

NO. 4-22-0236

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

November 23, 2022  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
MARCUS McGATH,	)	No. 20CF190
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.  
Justices Cavanagh and Zenoff concurred in the judgment.

**ORDER**

¶ 1 *Held:* The State’s evidence was sufficient to prove beyond a reasonable doubt defendant committed unlawful possession with the intent to deliver a controlled substance.

¶ 2 In July 2020, the State charged defendant, Marcus McGath, by information with one count of unlawful possession with intent to deliver a controlled substance (720 ILCS 570/401(c)(2) (West 2020)) and one count of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2020)). At the conclusion of a bench trial, the Livingston County circuit court found defendant guilty of both charges. Defendant filed a “motion to reconsider the verdict and/or for new trial.” At a joint November 2021 hearing, the court denied defendant’s posttrial motion and sentenced him to 25 years’ imprisonment for unlawful possession with intent to deliver a controlled substance. Defendant filed a motion to reconsider his sentence, which the court denied.

¶ 3 Defendant appeals, contending the State's evidence was insufficient to prove him guilty beyond a reasonable doubt of unlawful possession with intent to deliver a controlled substance. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Both charges asserted that, on July 30, 2020, defendant knowingly possessed more than 1 gram but less than 15 grams of a substance containing cocaine and was eligible for an extended-term sentence due his prior conviction in Livingston County case No. 15-CF-11. On June 9, 2021, the trial court commenced a bench trial on the two charges against defendant. The State presented the testimony of (1) Inspector Brian Maier with the Livingston County Proactive Unit, (2) Sergeant Derek Schum with the Pontiac Police Department, and (3) defendant's girlfriend Katrina Ross. Additionally, the State presented numerous exhibits, including recordings of jail telephone calls between defendant and Ross and 55 pages of photographs of text messages between the pair. Defendant testified on his own behalf.

¶ 6 Inspector Maier testified that, on July 29, 2020, he was contacted by Sam Schneider from the Department of Children and Family Services (DCFS), who notified him of scheduled forensic interviews of defendant and Ross's three children. Inspector Maier was present for those interviews that took place later that day. Based on what the children stated, Inspector Maier applied for a search warrant for Ross's residence. He was aware the management of Ross's housing complex did not want defendant present on the property. Defendant lived at the residence directly behind Ross's residence. Only a fence separated Ross's and defendant's backyards.

¶ 7 At 4:30 p.m. on July 30, 2020, the police executed the search warrant for Ross's residence. When Inspector Maier arrived on the scene, another police officer was escorting

defendant out of the residence, and Ross was crying in front of the residence. Inspector Maier identified defendant in court as the man being escorted from Ross's residence. Inspector Maier and others then searched Ross's residence. During the search, the police recovered several bags containing an off-white, chunky substance, which were located in a tin on the kitchen counter. Based on his experience as a narcotics officer, Inspector Maier believed the bags contained drugs. He also testified the manner in which the suspected drugs were packaged and put together suggested the drugs were prepared to be sold. Inspector Maier explained that, with a user, "the bag has been opened or untied, tied again, untied, tied again, just from them going in and out using it." The police did not test the tin in which the drugs were found for fingerprints. The police also found cash, but Inspector Maier could not recall the amount. In Ross's bedroom, the police found an electronic scale. In Inspector Maier's training and experience, a scale is used by drug dealers to weigh out drugs. Additionally, the police found what appeared to be a man's wallet in the residence. However, Inspector Maier did not know if it belonged to defendant.

¶ 8 During the search, the police also recovered Ross's and defendant's cellular telephones (cellphones). No other cellphones were found in Ross's residence. Inspector Maier obtained a search warrant for the cellphones and was able to review the text messages contained in the cellphones. Inspector Maier noted a text conversation on defendant's cellphone with the contact identified as "Cowboy." One of the conversations was on July 22, 2020, at 7:14 p.m. and appears to be about Cowboy obtaining drugs from defendant. The State also presented photographs of text messages between defendant and Ross beginning on July 15, 2020, at 11:11 a.m. According to Inspector Maier's testimony, the text messages ended on July 29, 2020. The last visible date on the text messages was July 19. Those text messages also discuss what appears to be drug sales and drug usage by defendant and Ross.

¶ 9 After the search, Inspector Maier went to the police station and observed defendant and Ross in the booking room. Defendant was telling Ross to tell the jail staff she was not feeling well and coaching her to say the drugs belonged to him so she would not get in trouble. Inspector Maier spoke with defendant individually. Defendant stated he did not have a job, and Ross received unemployment and child support. When Inspector Maier mentioned the drugs to defendant, defendant stated he obtained his drugs in a different place than where Ross obtained her drugs. Defendant admitted he had previously used cocaine very recently to the date of the search. Defendant also told Inspector Maier he had arrived at Ross's residence between 1:30 and 2:30 p.m. and he came to help Ross do chores. Inspector Maier also interviewed Ross. When he spoke with her, she did not appear to be intoxicated. At that time, Inspector Maier was aware Ross had been incarcerated in the past for drug offenses. When he first told Ross about the amount of cocaine found in her residence, she thought he was referring to a crack pipe. When Inspector Maier again explained about the amount of cocaine found in the tin, she got excited and stated she was not going to take that one. She denied knowing about it and again said she was not taking that.

¶ 10 Sergeant Schum testified he assisted with the execution of the search warrant for Ross's residence. He knocked on the door of the residence, and Ross opened the door and stepped outside. Sergeant Schum described the residence and noted the front door entered into a living room. The kitchen was located to the left of the living room and then there was a hallway. The hallway had a bathroom off of it and led to two bedrooms. Sergeant Schum found defendant at the end of the hallway. He testified he arrested defendant within seconds of the front door opening.

¶ 11 Ross testified she was not officially married to defendant, but they had been in a

continuous relationship for 13 years. Ross and defendant had children together. At the time of the July 30, 2020, search warrant, defendant did not live with Ross because he was not allowed in her apartment. His residence was a minute-and-a-half walk from her residence. Ross further testified defendant did not have a key to her residence and denied he visited her house often. She also denied he had any belongings at her house. Ross noted defendant had only been at her residence when there was a tornado warning and when one of the children had cut her foot. However, Ross spoke with defendant every day, both in person and on the cellphone. On the day of the search warrant, defendant was at her residence to help her clean the home because DCFS was coming for a visit. She did not tell defendant about the crack cocaine in her house because she did not want to share. Ross also testified defendant did not know where she hid her cocaine in her residence because he had previously found her drugs and flushed them down the toilet.

¶ 12 Ross admitted she was a drug addict and crack cocaine was in her residence at the time of the search warrant. For the two months prior to the search warrant, Ross had been using 10 to 14 grams of cocaine a day, as well as drinking alcohol and taking Xanax. She explained she had relapsed because her brother died of an overdose. However, Ross denied being involved in drug deals and explained she would go in together with other users to get drugs. Ross explained she and around seven other people would put money together and one person would buy the drugs. Defendant would sometimes be involved in the group purchase. Ross purchased her drugs with the \$874 a week she received in unemployment. She testified she had smoked crack cocaine within a few minutes of the search warrant. Ross stated she had a pipe in her hand when the police knocked on the door, and she put the pipe in the kitchen cabinet.

¶ 13 Ross admitted she told Inspector Maier during her interview with him that defendant sold drugs, kept drugs at her residence, and they did drugs together. However, she

testified she was lying when she made those statements in hopes Inspector Maier would let her go home. Ross later admitted she and defendant discussed sales of crack cocaine on their cellphones. She also explained crack cocaine was made by cooking powder cocaine. Once cooked, crack cocaine could be smoked. Ross and defendant would share the drugs they each possessed. Additionally, Ross testified Cowboy was her nephew, and he used marijuana.

¶ 14 Defendant testified he was a felon and had used and sold drugs in the past. However, he denied having drugs in his possession or under his control on July 30, 2020. Defendant further testified he did not know about drugs found in Ross's apartment before the police arrived. He testified he went to her home on July 30 to help her clean for a possible DCFS visit. Defendant was not monitoring Ross as they cleaned her residence, and Ross did not admit she had drugs in her possession that day. Defendant acknowledged he had been in a long-term relationship with Ross but described their relationship as stressful with constant fighting due to her drug use. Additionally, defendant described his sale of drugs in July 2020 as pooling money with others to obtain a larger amount of drugs and then kept the extra for Ross and himself. He testified he wanted to quit doing that because Ross was untrustworthy and would use all of the drugs while he slept, which happened on July 27, 2020. They stopped using drugs together "for the most part" after that incident.

¶ 15 The parties stipulated to the admission of the laboratory report for an item described as "three plastic bags with several individual packages of an unknown white chunky substance." The report further noted 1.2 grams of an off-white substance from three plastic bags was cocaine and 4.5 grams from 13 plastic bags containing an off-white substance was not analyzed.

¶ 16 After hearing the parties' arguments, the trial court found defendant guilty of both

charges. Defendant filed a “motion to reconsider verdict and/or for new trial,” in which he admitted the text messages showed drug usage and delivery but pointed out such discussions did not occur for several days prior to the offense. He then asserted that, given the temporal distance between the text messages and the cocaine found in Ross’s home, no rational correlation existed between the text messages and defendant’s knowledge of the cocaine. At a joint November 2021 hearing, the trial court denied defendant’s posttrial motion and sentenced him to 25 years’ imprisonment for unlawful possession with intent to deliver a controlled substance. The court did not sentence him on the possession charge based on the merger doctrine.

¶ 17 In December 2021, defendant filed a timely motion to reconsider his sentence, contending his sentence was excessive. At the conclusion of a March 23, 2022, hearing, the trial court denied defendant’s motion to reconsider his sentence.

¶ 18 On March 23, 2022, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 12, 2021). Accordingly, this court has jurisdiction of defendant’s appeal under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant contends the State’s evidence was insufficient to prove beyond a reasonable doubt he committed the offense of unlawful possession with intent to deliver a controlled substance. Our supreme court has set forth the following standard of review for insufficiency of the evidence claims:

“It is well settled that, when reviewing a challenge to the sufficiency of the evidence, a reviewing court must determine 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. [Citation.]

All reasonable inferences from the evidence must be drawn in favor of the prosecution. [Citation.] This court will not reverse the trial court's judgment unless the evidence is so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt." (Internal quotation marks omitted.) *People v. Cline*, 2022 IL 126383, ¶ 25, 193 N.E.3d 1220.

¶ 21 A. Possession

¶ 22 Defendant first asserts the State failed to prove beyond a reasonable doubt he possessed the crack cocaine found in Ross's residence. The State disagrees.

¶ 23 Our supreme court has explained our review of the issue of possession of a controlled substance as follows:

“[T]he deciding question is whether defendant had knowledge and possession of the drugs. See 720 ILCS 570/402 (West 2004) (“it is unlawful for any person knowingly to possess a controlled \*\*\* substance”). Proof that a defendant had control over the premises where the drugs were located can help resolve this issue because it gives rise to an inference of knowledge and possession of the drugs, but control of the premises is not a prerequisite to a conviction. [Citation.]

Moreover, possession may be actual or constructive. [Citation.] Actual possession is the exercise by the defendant of present personal dominion over the illicit material and exists when a person exercises immediate and exclusive dominion or control over the illicit material, but does not require present personal touching of the illicit material. [Citation.] The rule that possession must be exclusive does not mean, however, that the possession may not be joint. [Citations.] If two or more persons share the intention and power to exercise



control, then each has possession. [Citation.] Finally, where possession has been shown, an inference of culpable knowledge can be drawn from the surrounding facts and circumstances. [Citation.]” *People v. Givens*, 237 Ill. 2d 311, 334-35, 934 N.E.2d 470, 484-85 (2010).

Proof of possession frequently rests upon circumstantial evidence because possession is often difficult to prove directly. *People v. Love*, 404 Ill. App. 3d 784, 788, 937 N.E.2d 752, 756 (2010). The trier of fact does not need to be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. *People v. Hall*, 194 Ill. 2d 305, 330, 743 N.E.2d 521, 536 (2000). “It is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant’s guilt.” *Hall*, 194 Ill. 2d at 330, 743 N.E.2d at 536.

¶ 24 The evidence at trial showed Ross and defendant had been in a relationship for 13 years and had three children together. Only a fence separated the backyards of their residences, and the children had lived in Ross’s residence until the DCFS investigation. Defendant had been at Ross’s residence for two to three hours before the police arrived. Inspector Mair interviewed Ross after the search, and in his opinion, she did not appear to be intoxicated. When Inspector Mair explained to Ross the amount of cocaine found in the residence, Ross became excited and stated she did not know about that one and was not going to take that one. While Ross testified all of her statements to Inspector Mair about defendant were lies, the trier of fact could have found Ross’s testimony was not believable. See *People v. Jones*, 86 Ill. App. 3d 1013, 1017, 408 N.E.2d 764, 767 (1980) (noting it is the trier of fact’s responsibility to weigh the testimony, judge the witnesses’ credibility, and determine factual matters in debatable sets of circumstances; and, in a criminal proceeding, the trier of fact may believe part of a witness’s testimony without believing all of it). The court also could have not believed Ross’s testimony indicating the

cocaine found on July 30 belonged to her and defendant did not have knowledge of the cocaine. During his testimony, defendant admitted he sold drugs but claimed he stopped on July 17 when he stated in a text message to Ross, he needed to “pull back.” However, subsequent text messages between Ross and defendant continued to indicate drug sales occurred. Inspector Mair opined the crack cocaine found in Ross’s residence was packaged for sale. The police also found a scale in Ross’s residence, and Ross and defendant’s text messages indicate defendant had used Ross’s scale in preparing drugs for sale. As with Ross’s testimony, the trier of fact did not have to believe defendant’s testimony he was unaware of the drugs in Ross’s residence. Additionally, the text messages between Ross and defendant indicate they were acting together in selling the drugs to make money and support their own drug habits. The recordings of the jail conversations showed the close relationship between defendant and Ross.

¶ 25 We agree with the State the aforementioned circumstantial evidence was sufficient for the trial court to find defendant had control over the cocaine in Ross’s residence.

¶ 26 This case is distinguishable from *People v. Tate*, 2016 IL App (1st) 140619, ¶ 31, 61 N.E.3d 175, where the reviewing court found the State failed to show the defendant’s immediate and exclusive control over the narcotics. There, the police executed a search warrant on a home and found the defendant near a dining room table, which held clumps of cannabis and packaging materials. *Tate*, 2016 IL App (1st) 140619, ¶¶ 4-5. The defendant immediately left the room when the police entered. *Tate*, 2016 IL App (1st) 140619, ¶ 5. No evidence connected the defendant to the residence where the narcotics were found, suggested the defendant exercised any control over the premises, showed the police observed the defendant touching or otherwise handling the cannabis or other materials on and around the dining room table, or demonstrated the defendant had knowledge of hidden narcotics. *Tate*, 2016 IL App

(1st) 140619, ¶¶ 24, 26, 31. The defendant's presence in the dining room where cannabis was in plain view and flight from police was insufficient to demonstrate the defendant's constructive possession of that contraband. *Tates*, 2016 IL App (1st) 140619, ¶ 31.

¶ 27 Unlike in *Tates*, ample evidence tied defendant to Ross's residence. Here, prior to the discovery of the drugs, defendant had been present for two to three hours in the residence of Ross, his longtime girlfriend and mother of his children. Text messages between the pair show defendant sold drugs with the assistance of Ross. After the search warrant, Ross admitted having a crack pipe but denied knowing about the amount of cocaine found by the police.

¶ 28 B. Intent to Deliver

¶ 29 Defendant also argues the State failed to prove intent to deliver the cocaine found in Ross's residence. The State again disagrees.

¶ 30 Illinois courts have recognized direct evidence of intent to deliver is rare, and thus intent is usually proven by circumstantial evidence. *People v. Robinson*, 167 Ill. 2d 397, 408, 657 N.E.2d 1020, 1026 (1995). In controlled substance cases, Illinois courts have considered many different factors as probative of intent to deliver, including the following (1) whether the quantity of controlled substance in the defendant's possession was too large to be viewed as being for personal consumption, (2) the high purity of the drug confiscated, (3) the possession of weapons, (4) the possession of large amounts of cash, (5) the possession of police scanners, beepers, or cellular telephones, (6) the possession of drug paraphernalia, and (7) the manner in which the substance is packaged. *Robinson*, 167 Ill. 2d at 408, 657 N.E.2d at 1026-27.

Additionally, in *Robinson*, 167 Ill. 2d at 410, 657 N.E.2d at 1027, the supreme court found as probative of intent and properly admitted 21 untested packets found in the same bag and similar in size and appearance as the 15 packets that tested positive for cocaine.

¶ 31 Defendant contends the untested packages in this case are distinguishable from those in *Robinson* because the tested packages in this case were in separate packaging from the untested packages. However, the record in this case is not clear as to where the tested packets came from. The stipulated lab report stated “several individual packages” were in “three plastic bags,” and 1.2 grams of an off-white substance from “three plastic bags” were cocaine. The lab report referred to the untested material as “13 plastic bags containing off-white substance.” If one package from each plastic bag was tested, then the situation in this case would be similar to the one in *Robinson*. Regardless, all of the packages were found together in a tin in Ross’s kitchen and admitted into evidence. A photograph admitted into evidence shows 14 packages of similar size and two slightly larger packages. All of the packages appear to contain a white, chunky substance. Thus, we agree the number of packages and their weight is probative of intent. When showing intent, the fact only a portion of the packets was tested and determined to contain controlled substances affects only the weight to be given the evidence rather than its admissibility. *Robinson*, 167 Ill. 2d at 410, 657 N.E.2d at 1028. Defendant argues that, even if all of the packets can be considered, the amount still could reasonably be viewed as intended for Ross’s consumption because she testified she consumed 10 to 14 grams per day. However, evidence to the contrary was presented.

¶ 32 Defendant admitted to selling drugs in the recent past, and Inspector Mair testified the drugs were packaged for sale. Inspector Mair explained that, with personal use, it was normal to find evidence the packaging had been previously open. The packages found in Ross’s residence were all intact. Inspector Maier did acknowledge that, if someone recently purchased drugs, the packages would still be intact. He also admitted he was aware some people bought drugs and wanted to save them for a weekend party. No evidence showed defendant had

