IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

RICHARD SHAWL,

Appellant,

v. Case No. 5D20-619

STATE OF FLORIDA,

Appellee.

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Opinion filed December 4, 2020

Appeal from the Circuit Court
for Citrus County,
Richard A. Howard, Judge.

James S. Purdy, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Douglas T. Squire, Assistant Attorney General, Daytona Beach, for Appellee.

EDWARDS, J.

Appellant, Richard Shawl, was charged by information with possession of methamphetamine under sections 893.13(6)(a) and 893.03(2)(c), Florida Statutes (2019). After a jury trial, Appellant was found guilty as charged and sentenced to five years in prison, consecutive with any sentence then being served. In his timely appeal, Appellant

raises five issues. We affirm his conviction as there was sufficient evidence presented to the jury to convict Appellant of the constructive possession of the methamphetamine. Several arguments regarding other issues raised by Appellant were not presented to the trial court and thus were not properly preserved for appellate review. Furthermore, while we note Appellant's concern about the effectiveness of the representation provided by his trial counsel, those matters are better addressed in a Florida Rule of Criminal Procedure 3.850 motion.

The methamphetamine, which Appellant was charged with possessing, was found when deputies executed a search warrant on Kristina Marcalo's residence. Specifically, the deputies found a baggie containing meth directly beneath Appellant's wallet inside a dresser. Appellant advised one of the deputies that Marcalo was his girlfriend and that he had been staying at her house in the middle room where the meth was found. A recording was made of the deputy's interview of Appellant in which he admitted knowledge that there were drugs in the house and that his girlfriend dealt with drugs a bit. That recording was played for the jury.

Appellant testified at trial that he was unaware that the meth was in the dresser beneath his wallet. Contrary to what he told deputies when they were executing the search warrant, Appellant told the jury that he was not really staying in that room, rather it was a place where he stored some of his belongings. In his trial testimony, Appellant claimed that when the deputies arrived at his girlfriend's house, he was working in the backyard leveling dirt so they could plant sod. Appellant testified that the deputy tricked him into saying that he knew there were drugs in the house. On rebuttal, the State played a tape recording of a phone call made from jail by Appellant to Marcalo, during which he

stated that he saved her by throwing out or burying her heroin and methamphetamine in her backyard. The jury found Appellant guilty as charged.

First, Appellant argues that the trial court erred in denying his motions for judgment of acquittal, claiming there was insufficient evidence to prove Appellant's constructive possession of the baggie containing methamphetamine.

> In reviewing a motion for judgment of acquittal, a de novo standard of review applies. *See Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981). Generally, an appellate court will not reverse a conviction which is supported by competent, substantial evidence. *See Donaldson v. State*, 722 So. 2d 177 (Fla. 1998); *Terry v. State*, 668 So. 2d 954, 964 (Fla. 1996). If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. *See Banks v. State*, 732 So. 2d 1065 (Fla. 1999).

Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002).

"Constructive possession exists where a defendant does not have actual, physical possession of the controlled substance, but knows of its presence on or about the premises, and has the ability to exercise and maintain control over the contraband." *Harris v. State*, 954 So. 2d 1260, 1262 (Fla. 5th DCA 2007). In his briefs, Appellant discusses a number of cases in which constructive possession was not properly proved because multiple people had access to the area where the drugs were found. He argues that his testimony showed that a man named Cody may have been in the same room prior to the deputies' arrival. He also points out that, according to the arrest affidavit, his girlfriend told deputies that any drugs in the house were hers, not Appellant's. However, "[a]n inference of knowledge and dominion and control may also arise where the contraband located in jointly occupied premises is found in or about other personal property which is shown to be owned or controlled by the defendant." *Tolbert v. State*,

154 So. 3d 1141, 1145 (Fla. 2d DCA 2014) (citing *Jackson v. State*, 995 So. 2d 535, 540 (Fla. 2d DCA 2008)). Although the meth was found during a search warrant execution for his girlfriend in her home, it was located underneath Appellant's wallet which contained his driver's license. That fact, coupled with his original statement that he was staying in that room, allowed for an inference that Appellant had knowledge of the methamphetamine. "[T]he accused's knowledge of the presence of drugs and ability to maintain control over the premises [can be proved] by presenting evidence of actual knowledge or evidence of incriminating statements and circumstances from which the jury might lawfully infer the requisite knowledge to support conviction." *Goin v. Comm'n of Ethics*, 658 So. 2d 1131, 1135 (Fla. 1st DCA 1995) (citing *Frank v. State*, 199 So. 2d 117 (Fla. 1st DCA 1967)). Here, Appellant's statements to the deputies that he knew there were drugs in the house and that he had been smoking marijuana and meth there recently, together with the discussion in the jail phone call of burying drugs in the backyard, were completely inconsistent with his protestations of innocent unawareness presented at trial. Accordingly, under the facts of this case, the trial court did not err in denying Appellant's motions for judgment of acquittal.

Second, Appellant argues that the trial court reversibly erred in striking Marcalo from his supplemental witness list. Appellant moved for speedy trial and then listed Marcalo in a supplemental witness list. The State objected and the trial court gave Appellant the choice of keeping Marcalo as a witness by waiving speedy trial or having a speedy trial but without Marcalo as a witness due to her being late listed. Before this Court, but not below, Appellant argues that filing a supplemental witness list after the filing of a demand for speedy trial does not automatically establish that the defense is not ready

for trial.[1] "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985).

Additionally, defense counsel did not preserve this issue for appeal because he did not proffer what the excluded testimony of Marcalo would have been. "Such a proffer is necessary to preserve a claim for appellate review because an appellate court will not otherwise speculate about the admissibility of such evidence." *De la Portilla v. State*, 877 So. 2d 871, 874 (Fla. 3d DCA 2004) (internal citations omitted) (citing *Lucas v. State*, 568 So. 2d 18, 22 (Fla. 1990)). We agree with Appellant that the arrest affidavit foreshadowed that Marcalo might have testified that the subject methamphetamine was hers; however, whether she would have indeed testified as such remains speculative. Accordingly, we are compelled to affirm as to this issue because it was not properly preserved.

Third, Appellant argues that the trial court reversibly erred by permitting the State to introduce his jail phone call with Marcalo in its rebuttal case. During that call, Marcalo repeatedly called Appellant a liar, they exchanged heated profanities directed at each other, and Appellant told her that he saved her by throwing out her heroin and burying her drugs in the backyard. On the one hand, a limited portion of the call was relevant as rebuttal of Appellant's trial testimony that he did not know there were drugs at the house. On the other hand, if a proper objection or a request for redaction had been made, the trial court could have considered excluding the balance of the call as irrelevant. *See*

[1] If it had been properly preserved, this argument might have been worthy of consideration. *See Wright v. State*, 722 So. 2d 263, 266 (Fla. 5th DCA 1998).

Knowles v. State, 632 So. 2d 62, 65–66 (Fla. 1993); *Adams v. State*, 277 So. 3d 249, 259 (Fla. 4th DCA 2019). However, the only objection Appellant made at trial was that the entire phone call should have been excluded as being more unfairly prejudicial than probative. In his final argument, discussed below, Appellant acknowledges that trial counsel failed to make a sufficient objection. We do not find that the trial court abused its discretion in its ruling, given the objection raised at trial.

Fourth, Appellant argues on appeal that he was denied a fair trial because the jury heard comments from one of the deputies expressing opinions about Appellant's guilt and lack of truthfulness. In Appellant's recorded interview, which was played for the jury, the deputy tells Appellant that he can tell from his mannerisms that Appellant is lying about whether the meth was his. Appellant candidly advises that no objections were made regarding that testimony. Nevertheless, he requests us to consider it as evidence that he was prejudiced by ineffective assistance of counsel and he asks us to order a new trial for that reason.

> As a general rule, claims of ineffective assistance of counsel may not be raised on direct appeal. *Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001); *Stewart v. State*, 420 So. 2d 862, 864 n.4 (Fla. 1982); *Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2d DCA 2002). However, appellate courts make an exception to this rule when the ineffectiveness is obvious on the face of the appellate record, the prejudice caused by the conduct is indisputable, and a tactical explanation for the conduct is inconceivable. *Corzo*, 806 So. 2d at 645.

Larry v. State, 61 So. 3d 1205, 1207 (Fla. 5th DCA 2011) (internal quotation marks omitted). We decline Appellant's invitation as his claims of ineffective assistance of counsel are more properly addressed in a Florida Rule of Criminal Procedure 3.850 motion and related proceedings.

Fifth, Appellant argues that he was prejudiced by the admission of evidence relating to uncharged drug-related crimes. In the jail phone call, Appellant discussed throwing out and burying his girlfriend's drugs in her backyard. In the recorded interview, Appellant admitted to smoking marijuana and meth. He was charged only with possession of the methamphetamine in the baggie found under his wallet; thus, the other matters are collateral. As noted above, Appellant's conversation regarding hiding his girlfriend's drugs was relevant rebuttal evidence to dispute his claimed lack of knowledge that there were drugs in the house. However, his personal consumption of drugs was not an issue. Evidence that a defendant may have committed collateral, uncharged crimes, absent special circumstances, is typically inadmissible because it is irrelevant, or its probative value is far outweighed by unfair prejudice that may lead the jury to convict on an improper basis. *Woolman v. State*, 292 So. 3d 530, 534–35 (Fla. 2d DCA 2020). However, Appellant concedes that his attorney failed to object to that evidence; thus, it was not properly preserved for review on direct appeal. Once again, without prejudice to Appellant pursuing a rule 3.850 motion if he can do so in good faith, we decline Appellant's invitation to review his attorney's failure to object as ineffective assistance of counsel.

AFFIRMED.

WALLIS and HARRIS, JJ., concur.