COMMONWEALTH v. WILLIAMS

Criminal Law and Procedure—Motion for Reconsideration of Sentence and Post-Trial Motions—Statement of Errors Complained of on Appeal—Weight of Controlled Substance—Increased the Standard Range of Sentencing—Element of the Offense—Jury—Part of Verdict—Sufficiency of Evidence—Standard Applied—Light Most Favorable to Commonwealth as Verdict Winner—Fact-Finder—Element of the Crime—Beyond a Reasonable Doubt—Facts and Circumstances Established—Preclusion—Doubts Resolved by Fact-Finder—Weak and Inconclusive Evidence—Matter of Law—No Probability of Fact—Evidence Deemed to Support Verdict—Circumstantial Evidence—Cocaine—Controlled Substance—Prohibited Possession—780- 113(a)(16)—Controlled Substance, Drug, Device and Cosmetic Act—Defendant Convicted of Intentional Possession—18 Pa. C.S. §301(c)—Possession Defined—Conflicts in the Testimony—Conjecture or Guess—Reconciling Conflicting Testimony and Questions of Credibility—35 P.S. §780-113(a)(30)—PWID (Possession With the Intent to Deliver)—Proof—Circumstantial Evidence—Commonwealth's Burden—Constructive Possession—Totality of the Circumstances—Proof Required—Relevant Factors—Expert Testimony—Credibility Questions of Doubt—Fact-Finder—Evidence Insufficient as a Matter of Law—Lesser Included Offense—Double Jeopardy Principles—18 Pa. C.S.A. §109—Longstanding Precedent—Inconsistent Verdicts Allowable—Not Reversible Error—Allegation of Court's Abuse of Discretion—Fentanyl—Offense Gravity Score (OGS)—Legality of the Sentence—Second Offense—35 Pa. C.S.A. §780-115—Recidivist Statute for Drug Offenders—Appeal—Superior Court of Pennsylvania—AFFIRMED.

1. Since the weight of the controlled substance at issue increased the standard range, it is an element of the offense that must be found by the jury or part of its verdict.

2. The Standard the Court applies in reviewing the sufficiency of the evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the Commonwealth as verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.

3. In addition, the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence.

4. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances.

5. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.

6. If the fact-finder reasonably could have determined from the evidence adduced that all of the necessary elements of the crime were established, then that evidence will be deemed to support the verdict.

7. The standard applies equally to cases in which the evidence is circumstantial, rather than direct, as long as the evidence as a whole links the accused to the crime charged beyond a reasonable doubt.

8. Possession of cocaine, a controlled substance, is prohibited by Section 780-113(a)(16) of the Controlled Substance, Drug, Device and Cosmetic Act.

9. In the matter *sub judice,* the jury convicted the Defendant of intentional possession of cocaine, which requires that the Commonwealth prove that Defendant possessed the contraband.

10. As defined by the Crimes Code, the act of "possession" occurs "if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession." 18 Pa. C.S. §301(c).

11. In this case, the Commonwealth successfully proved that the substance was cocaine and the Commonwealth and Defendant entered into a stipulation with regard to the crack cocaine at Commonwealth Exhibit Number 11, agreeing that the evidence was in fact .21 grams plus or minus .01 grams of cocaine. In addition, the Commonwealth proved that the Defendant possessed the cocaine.

12. The mere existence of conflicts of testimony does not mean that the fact-finder is require to resort to speculation which would cause the result to be based on conjecture or guesswork.

13. A conviction cannot properly be sustained if it be based upon testimony of a witness which is so contradictory on the essential issues as to make the verdict obviously the result of conjecture or guess. However, the mere fact that there are some inconsistencies is not alone sufficient to destroy the Commonwealth's case.

14. It is the function of the fact-finder to reconcile conflicting testimony and questions of credibility. The trier of fact, while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

15. In the instant case, viewing all of the evidence in the light most favorable to the Commonwealth, the jury could reasonably have determined that all of the necessary elements of the crime were established.

16. 35 P.S. §780-113(a)(30) precludes an unregistered person from possessing a controlled substance with the intent to deliver it.

17. To convict a defendant of PWID (Possession With the Intent to Deliver) the Commonwealth must prove beyond a reasonable doubt that "on a specific occasion the defendant possessed a controlled substance he was not licensed to possess and that he did so under circumstances demonstrating an intent to deliver that substance."

18. In determining whether there is sufficient evidence to convict Defendant of PWID, all facts and circumstances surrounding the possession are relevant, and the Commonwealth may establish the essential elements of the crime entirely by circumstantial evidence.

19. The Commonwealth may meet its burden of demonstrating that the Defendant possessed the controlled substances by showing actual, constructive, or joint constructive possession of the controlled substances.

20. Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as conscious dominion. We subsequently defined conscious dominion as the power to control the contraband and the intent to exercise that control. To aid application, we have held that constructive possession may be established by the totality of the circumstances.

21. Constructive possession requires proof of the ability to exercise conscious dominion over the substance, the power to control the contraband, and the intent to exercise such control. Presence is not enough to establish constructive possession.

22. Factors which may be relevant in determining whether the drugs were possessed with the intent to deliver include, but are not limited to, the "manner in which the controlled

substance was packaged, the behavior of the Defendant, the presence of drug paraphernalia, and large sums of cash."

23. The final factor to be considered is expert testimony. Expert opinion testimony is admissible concerning whether the facts surrounding the possession of controlled substances are consistent with an intent to deliver rather than with an intent to possess it for personal use.

24. As indicated, issues of credibility are left to the finder of fact, who is free to accept all, part, or none of a witness's testimony. Questions of doubt are for the finder of fact, unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the totality of the circumstances.

25. Only when the evidence offered to support the verdict is in contradiction to the physical facts, or in contravention to human experience and the laws of nature, can the evidence be considered insufficient as a matter of law.

26. In the instant case, the totality of the circumstances demonstrates that the Commonwealth proved each element of the PWID offense with sufficient evidence.

27. In the matter *sub judice,* although the Defendant is correct in stating that possession is a lesser included offense of PWID, his argument is flawed. Defendant bases his allegation on the double jeopardy principles set forth at 18 Pa. C.S.A. §109.

28. Longstanding precedent dictates that inconsistent verdicts are allowable in the Commonwealth of Pennsylvania.

29. The rule that inconsistent verdicts do not constitute reversible error applies even where the acquitted offense is a lesser included offense of the charge for which a defendant is found guilty.

30. In the matter at hand, because there was sufficient evidence to support Defendant's conviction for PWID as discussed above, the inconsistent verdict resulting in his acquittal on the lesser included offense of possession should not be overturned.

31. The Defendant in this case alleges that the court abused its discretion or committed an error of law when it sentenced the Defendant by applying an incorrect Offense Gravity Score ("OGS") of 10 due to the weight of a controlled substance (2.7 grams of fentanyl) that was the subject of Defendant's conviction for PWID.

32. A claim that the sentencing court used an incorrect OGS is a challenge to the discretionary aspects of sentence and goes to the legality of the sentence. [*See* case citations and analysis.]

33. Neither case cited by Defendant applies in the case. Accordingly, the court determined that the prescribed statutory maximum penalty for the Defendant's conviction of Possession with Intent to Deliver a Controlled Substance is thirty (30) years of incarceration and/or a $500,000.00 fine.

34. Because the instant offense, in this case, is Defendant's second offense under Section 780-113(a)(30), Section 780-115 of Title 35 also applies. Section 780-115, a recidivist statute for drug offenders, is a discretionary sentencing enhancement statute.

35. In the matter herein the maximum penalty is provided for in the statute and is a result of Defendant's prior conviction.

36. The court, herein, was able to impose a sentence within its discretion and issued a standard range sentence after considering all of the obligatory factors, statutory requirements and the sentencing guidelines.

37. For all of the foregoing reasons, this court respectfully submits that Defendant's appeal is without merit and that Defendant's judgment of sentence should be undisturbed.

38. Appealed to Superior Court of Pennsylvania. [*See* Criminal Court Docket.]

39. AFFIRMED on Appeal, August 4, 2023.

In the Court of Common Pleas of Luzerne County—Criminal Division—CP-40-CR-0002417-2019. AFFIRMED on Appeal by the Superior Court of Pennsylvania, August 4, 2023. See *Criminal Court Docket.*

Samuel M. Sanguedolce, Esquire, District Attorney of Luzerne County, for the Commonwealth.

Matthew P. Kelly, Esquire, for Defendant.

Before: Sklarosky, Jr, J.

SKLAROSKY, JR, J., June 28, 2022:

Pa. R.A.P. 1925(a) Opinion

Joseph Edward Williams ("Defendant") appeals from the June 28, 2022, order denying Defendant's motion for reconsideration of sentence and post-trial motions. After a jury trial commencing on October 19, 2021, Defendant was convicted of possession with intent to deliver (fentanyl) ("PWID")[1, 2] and possession of a controlled substance (cocaine).[3] Defendant was found not guilty of possession of a firearm with manufacturer's number altered,[4] possession of a controlled substance (fentanyl),[5]

[1] 35 P.S. §780-113(a)(30).

[2] Before trial, this court granted the Commonwealth's motion to amend the information—which had originally listed heroin and fentanyl—to omit the word heroin. N.T. Jury Trial, 10/19/21, at pp. 4-5.

[3] 35 P.S. §780-113(a)(16).

[4] 18 Pa. C.S.A. §6110.2 §(a).

[5] 35 P.S. §780-113(a)(16).

and use or possession of drug paraphernalia.[6] The original count one, possession of a firearm prohibited,[7] was severed for trial.

On January 20, 2022, Defendant was sentenced to a state correctional institution for a minimum of 60 months to a maximum of 120 months on the PWID charge followed by twelve months of consecutive special probation on the possession of cocaine charge. Defendant was also ordered to pay restitution.[8]

Defendant filed a Motion for Reconsideration of Sentence and Post-Trial Motions, which were denied on June 28, 2022, after a May 11, 2022, hearing. Trial counsel, Robert Saurman, Esquire, filed a Notice of Appeal on July 14, 2022. Attorney Saurman was permitted to withdraw as counsel and the Public Defender's Office was appointed to represent Defendant on August 9, 2022. On the same day, an order directing Defendant to file a Statement of Errors Complained of on Appeal (Statement) within 21 days pursuant to R.A.P. 1925(b) was issued. On August 29, 2022, attorneys from the Public Defender's Office filed a motion citing a conflict in representation and requesting that conflict counsel be appointed. Said motion also requested an extension of time for conflict counsel to file the Statement. On September 1, 2022, Attorney Matthew Kelly, Esquire, was appointed as counsel and this court granted a 21-day extension of time for conflict counsel to file the Statement. Defendant's Statement was filed by conflict counsel on September 20, 2022.

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[6] 35 P.S. §780-113(a)(32).

[7] 18 Pa. C.S.A. §6105(a)(1).

[8] Defendant was also ordered to forfeit $526.00, to pay court costs, and to provide a DNA sample. In addition, Defendant was ordered to follow treatment recommendations regarding a drug and alcohol evaluation and a mental health evaluation.

I. Statement of Facts

On June 27, 2019, Pamela Obitz lived at 416 East Main Street in the city of Wilkes-Barre with her fiancé, William Davis. N.T. Jury Trial, 10/19/21, p. 30. Obitz testified on behalf of the Commonwealth that she was addicted to heroin and fentanyl at that time. *Id.* at p. 31. She was using about 50 bags of heroin a day with a needle and syringe. *Id.* at pp. 32-33. On the date in question, Obitz had known Defendant for eight months to a year. *Id.* at p. 31. Defendant delivered drugs to her but she had never seen him use heroin or fentanyl himself. *Id.* at pp. 31, 42. She had seen him smoke weed on occasion. *Id.* at p. 42. She said that he came to her house almost every day to sit in the kitchen, "bag up stuff, and get stuff ready to sell." *Id.* at p. 32. Sometimes he would leave things, including drugs, in the house and he would hide them in different places. *Id.* at pp. 43-44. In exchange for letting him use their kitchen, Defendant would give her a few bags of drugs when he left. *Id.* at p. 32. She further testified that when people came to the house, she would sell Defendant's drugs to them for him in exchange for money. *Id.* at p. 33. In addition, she testified that she had helped arrange drug deals where people would call her phone number or Defendant's and she would give them the drugs. *Id.* at pp. 33, 46. Other times people called Defendant and he would send them to her house. *Id.* at p. 46.

Obitz testified that she arranged a drug deal for Defendant on June 27, 2019. *Id.* at pp. 33-34. Defendant was at her house when a man she knew previously called her phone and asked how much a "brick" would cost. *Id.* at pp. 34, 37. She said a brick is fifty bags of heroin and fentanyl. *Id.* at p. 34. Obitz testified that she asked

Defendant how much a brick would cost and then told the caller the price that Defendant had given her. *Id.* at p. 34. She said that the caller asked if he could meet her at Chacko's Bowling. *Id.* at p. 34. Obitz said she asked Bill Davis to take Defendant's car and take the drugs to meet the customer. *Id.* at p. 35.

William Davis testified that he had known Defendant for three years, and that they met when Defendant gave drugs to both him and Obitz. *Id.* at p. 60. He said that in June of 2019 he was using heroin and fentanyl. *Id.* at p. 60. He was using about fifteen bags a day. *Id.* at p. 61. He testified that he hung out with Defendant and that Defendant came to his residence on a daily basis to package heroin. *Id.* at p. 61. He said Defendant brought a backpack with drugs inside with him almost every time he came. *Id.* at p. 76. Davis said sometimes Defendant would leave the bag with drugs, a scale and a plate behind in Davis' kitchen cupboard but he wouldn't hide them. *Id.* at p. 77. In exchange for allowing Defendant to use their residence, Davis said Defendant would give him two buns a day, which was ten packages of heroin. *Id.* at pp. 61-62. He said Defendant gave Obitz anywhere from three to five buns a day. *Id.* at p. 61. Davis said he never saw Defendant use either heroin or fentanyl. *Id.* at p. 61.

Davis testified that he had seen Defendant with a silver .22 semiautomatic that he had in his backpack on one occasion. *Id.* a p. 62. He said Defendant left the gun with him because Defendant's girlfriend did not want the gun in her house. *Id.* at p. 62. Davis said he stored Defendant's gun under his mattress. *Id.* at p. 63.

Davis said that on June 27, 2019, he had just finished a shift at work, went to sleep and then he woke up. *Id.* at p. 64. He said Defendant and Obitz were in

the kitchen and they asked him to do a run and deliver heroin at Chacko's Bowling Alley. *Id.* at p. 64. Davis said Defendant gave him roughly a brick of heroin to sell, which would be 50 bags. *Id.* at p. 65. He testified that Defendant gave him roughly a bundle in exchange for doing the run. *Id.* at p. 65.

Davis drove Defendant's rental car to deliver the drugs. *Id.* at p. 82. When he got to Chacko's, Davis said Jeremy Gittens got in the passenger side of the vehicle and he exchanged the heroin for money. *Id.* at p. 65. Davis was familiar with Gittens because he was a past customer. *Id.* at p. 65. Davis said that after he made the exchange, Gittens must have signaled to the police as a confidential informant and the police apprehended Davis. *Id.* at p. 66. Davis was arrested and interrogated at the police station. *Id.* at p. 66. He said afterwards he went back to his apartment with the police and gave them permission to look around. *Id.* at p. 67.

Obitz testified that she was present when the police entered her apartment and found Defendant in the kitchen. *Id.* at p. 50. She said Defendant was either sitting or standing at the kitchen table and there were boxes on the table in front of him. *Id.* at p. 52. Obitz explained that although she had previously made statements to police that contradicted her testimony at trial, she had a better recollection at trial because she had been sober for two years. *Id.* at pp. 53-54.

Davis also testified that, at the time of trial, he had not been using drugs but had been going to a methadone clinic for the last two years. *Id.* at pp. 68-69, 81. He explained that any discrepancies in statements he made to police and his testimony at trial were because he was initially trying to cover up for Defendant. *Id.* at p. 83.

Officer Jeffrey Ference, of the Wilkes-Barre City Police Department ("WBPD"), also testified on behalf of the Commonwealth. *Id.* at pp. 86-87. Officer Ference has been a police officer in Luzerne County since 2001 and has been with the WBPD for thirteen years. *Id.* at p. 87. In June of 2019, he was working in the anti-crime unit doing drug task force work. *Id.* at p. 88. Officer Ference testified that on June 27, 2019, he was engaged in a buy-bust operation in which the focus was William Davis. *Id.* at p. 88. He said the police were working with an informant who told them he was able to purchase narcotics. *Id.* at p. 88. Ference said they searched the informant, made a call to Obitz, and gave the informant prerecorded buy money with which to purchase a brick of heroin or heroin fentanyl.[9] *Id.* at pp. 88-89. He explained that a brick would be fifty separate bags of the drug. *Id.* at pp. 89-90. He said that William Davis arrived in the Chacko's parking lot in a silver SUV and delivered the drugs. *Id.* at pp. 88, 90. Ference testified that after buy-busting Davis, he was read his *Miranda* warnings and was searched. *Id.* at p. 90. The search of Davis revealed the prerecorded buy money that was given to the informant and a few more packets of heroin. *Id.* at p. 90.

Davis agreed to talk with officers. *Id.* at p. 91. He told them that there might be more narcotics at his apartment and agreed to take them there. *Id.* at pp. 91-92. When they arrived at Davis' residence, Ference and other officers knocked on the door which was answered by Obitz.

[9]Officer Ference testified that it would be common for officers to do a buy or a buy-bust where they request heroin but actually receive fentanyl. He explained that the narcotics market has changed in the years that he has been an officer. He testified that when he first started doing drug work, the laboratory results would mostly be heroin or heroin cut with another agent. He testified that now, the drugs are almost purely fentanyl because it is cheaper and gives a similar and effective high. *Id.* at p. 89.

Id. at p. 92. Both Davis and Obitz agreed that officers could search the residence. *Id.* at p. 92. The officer testified that seconds after entering the apartment, they saw Defendant sitting at the kitchen table. *Id.* at p. 93. The table had four seats around it and was not large. *Id.* at p. 94. The officer saw a box containing heroin packets and a box that was found to contain a scale on the table in front of Defendant. *Id.* at pp. 93, 108. There was a blender with a white powdered substance near his feet. *Id.* at p. 93. The officer testified that drug dealers often use a blender to mix the drug with a cutting agent such as a workout supplement or baby formula to maximize their product and sell more of it. *Id.* at p. 105. The drugs on the table in front of Defendant were packaged in seventeen bundles, or a total of 170 bags. *Id.* at p. 94. The items were collected as evidence and Defendant was placed under arrest. *Id.* at p. 94.

Officers testified that Defendant was searched incident to arrest and officers found one bag of marijuana and one bag of crack cocaine in addition to approximately $500.00 in U.S. currency on his person. *Id.* at pp. 95, 100.[10] Obitz was also arrested and found with approximately 20 bags of heroin but no cash. *Id.* at p. 94.[11] After searching the house, officers found paraphernalia and packaging materials throughout the house. *Id.* at p. 96. The officer testified that they also found a black backpack with the word PUMA on the side of it. *Id.* at pp. 98-99. He specifically described each type of paraphernalia found throughout the house, including finding a box of new empty packets marked "Blu Boy" with a picture of a small blue boy on them in a cabinet.

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[10]Later on cross-examination, Officer Ference said he did not know the exact location the cocaine was located. *Id.* at p. 121.

[11]Officer Ference testified that Obitz was arrested the following day.

Id. at p. 103. The officer further testified that the 170 packets of fentanyl found on the kitchen table in front of Defendant were packaged in the same bags containing a picture of a blue boy. *Id.* at p. 111. The officer testified that all of the evidence was sent to the lab for testing. *Id.* at pp. 111-12. Officer Ference also said they found a handgun in the bedroom which had the serial number removed. *Id.* at p. 112.

Detective James Conmy ("Conmy"), who has been employed with the WBPD for fourteen years, also testified on behalf of the Commonwealth. *Id.* at p. 143. Detective Conmy was admitted without objection as an expert in the field of drug trafficking investigations to offer an opinion regarding possession with intent to deliver a controlled substance versus possession for personal use. *Id.* at p. 146. The detective testified that he reviewed evidence in the instant matter and prepared a report of his findings. *Id.* at p. 147. In forming his opinion, he found several factors indicating that Defendant possessed the controlled substances with the intention of delivering or dealing them rather than for personal use. *Id.* at p. 148.

The detective said that Defendant was in possession of distributable amounts of fentanyl packets and estimated the street value of the fentanyl in his possession at between $850 and $1,360. *Id.* at p. 148. He said a user tends to have far less in their possession due to the highly addictive nature of the drug. *Id.* at p. 148. Conmy further testified that the fact Defendant had $526 in cash when he was arrested is consistent with the fact that drug dealing is primarily a cash business and it is common for people involved in narcotics trafficking to carry hundreds of dollars of cash. *Id.* a p. 151. He also

testified that in his experience it would be very rare to find an addict in possession of any significant amount of cash because they immediately spend it to restock their supply. *Id.* at p. 152. Conmy said that it also would be very common to find a Magic Bullet blender in a location where heroin or fentanyl is being cut up and packaged for sale. *Id.* at p. 153. Detective Conmy explained that in his experience, an addict usually buys their product from someone else and that it would be rare for an addict to make their own product. *Id.* at p. 153. He said when the Magic Bullet is used, heroin and fentanyl are usually cut with other ingredients such as baking soda, talcum powder or powdered milk to increase the amount and the profit. *Id.* at p. 153. He said that the heroin would be cut, mixed and then scooped with a small spoon to pack the drugs into a bag which would then be packaged for sale. *Id.* at p. 153. The digital scale would be used to weigh the bags and then ten bags would be wrapped in a rubber band to market as bundles. *Id.* at p. 152. He testified that in his opinion, the quantity of drugs, the firearm, the cash, and the type of paraphernalia in this case are consistent with possession with an intent to deliver rather than possession for personal use. *Id.* at p. 153. He said his opinion would not change even if no firearm had been discovered. *Id.* at p. 154. He also testified that he offered this opinion within a reasonable degree of certainty in the field of drug trafficking investigations and possession with intent to deliver. *Id.* at p. 155.

During the trial, the Commonwealth and Defendant entered into a stipulation with regard to the items entered into evidence as Commonwealth Exhibit Number 11; specifically, the fentanyl, crack cocaine and marijuana. *Id.* at p. 142. All evidence in this matter was secured

at the WBPD and was transported to the Pennsylvania State Police Wyoming Regional Laboratory for the analysis of the drugs. The parties agreed that the laboratory possessed the proper certificates to identify controlled substances and determine their weights. It was further agreed that the evidence was tested by Jennifer Libus, a Forensic Scientist 2 at the laboratory, who possessed the requisite training, experience and certificates to perform tests on controlled substances. It was stipulated that the 171 glassine packets of powder weighed 2.7 grams plus or minus .02 grams of fentanyl. It was also stipulated that the tests on item 2.3, described as a Ziploc bag containing a chunky substance, determined that the evidence weighed .21 grams plus or minus .01 grams of cocaine. It was further stipulated that the evidence was securely stored in the evidence locker at the WBPD where it remained until the time of trial. Jennifer Libus' lab report is attached to the stipulation. The stipulation was signed by Defendant and his counsel, was read into evidence by the deputy district attorney and was entered into evidence without objection as Commonwealth Exhibit Number 12. *Id.* at p. 142. The court instructed the jury that because the parties had entered into a stipulation, the jury could regard those facts as proven. *Id.* at p. 142.

II. Legal Analysis

In his Statement, Defendant raises three allegations of error:

> 1. Whether the Commonwealth proved by sufficient evidence that the Defendant was guilty of Possession of Controlled Substance where there was no evidence proving that Defendant was ever in possession of cocaine.

2. Whether the Commonwealth proved by sufficient evidence that the Defendant was guilty of PWID where Defendant contends that because he was acquitted of the lesser included offense, Possession of Controlled Substance (Fentanyl/Heroin), his conviction for PWID (Fentanyl/Heroin) should have been overturned.

3. Whether the trial court abused its discretion or committed an error of law in sentencing Defendant in applying an incorrect Offense Gravity Score of 10 due to the weight of a controlled substance (2.7 grams of Fentanyl) that was the subject of Defendant's conviction for PWID[,] *See* Apprendi v. New Jersey, 530 U.S. 466 (2000) and Alleyne v. United States, 570 U.S. 99 (2013), where it was held that since the weight of the controlled substance at issue increased the standard range, it is an element of the offense that must be found by the jury or part of its verdict.

We will respond to the allegations of error in order.

A. Sufficiency

The standard we apply in reviewing the sufficiency of the evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the Commonwealth as verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. *Commonwealth v. Evans,* 901 A.2d 528, 532 (Pa. Super. 2006). In addition, the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. *Id.* Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no

probability of fact may be drawn from the combined circumstances. *Id.*

The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. *Commonwealth v. Lehman,* 820 A.2d 766, 772 (Pa. Super. 2003). If the fact-finder reasonably could have determined from the evidence adduced that all of the necessary elements of the crime were established, then that evidence will be deemed to support the verdict. *Commonwealth v. Wood,* 637 A.2d 1335, 1343 (Pa. Super. 1994). The standard applies equally to cases in which the evidence is circumstantial, rather than direct, as long as the evidence as a whole links the accused to the crime charged beyond a reasonable doubt. *Commonwealth v. Wright,* 865 A.2d 894, 910 (Pa. Super. 2004), (*citing Commonwealth v. Hardcastle,* 546 A.2d 1101, 1105 (Pa. 1988)).

1. Sufficiency—possession of controlled substance

Defendant claims that there was no evidence proving that he was ever in possession of cocaine. Possession of cocaine, a controlled substance, is prohibited by Section 780-113(a)(16) of the Controlled Substance, Drug, Device and Cosmetic Act[12] ("the act") as follows:

> Knowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, unless the substance was obtained directly from, or pursuant to, a valid prescription order or order of a practitioner, or except as otherwise authorized by this act.

35 P.S. §780-113(a)(16).

[12] 35 P.S. §§780-101-780-144, repealed in parts not relevant to this appeal.

The jury convicted Defendant of intentional possession of cocaine, which requires that the Commonwealth prove that Defendant possessed the contraband. As defined by the Crimes Code, the act of "possession" occurs "if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession." 18 Pa. C.S. §301(c).

Here, the Commonwealth successfully proved that the substance in question was indeed cocaine. Officer Ference was shown what was marked as Commonwealth Exhibit 11, which consisted of bags of different controlled substances recovered from the scene. The officer testified that when he collected the evidence, he documented it by marking the name of the drugs discovered directly on the bags, including the cocaine. Further, the Commonwealth and Defendant entered into a stipulation with regard to the crack cocaine at Commonwealth Exhibit Number 11, agreeing that the evidence was in fact .21 grams plus or minus .01 grams of cocaine.

In addition, the Commonwealth proved that Defendant possessed the cocaine.

At trial, the assistant district attorney questioned Officer Ference as follows:

> Q: Were there any other drugs located *on the Defendant* that day?
>
> A: That day we located an amount of marijuana and I believe also an amount of if I'm not mistaken crack cocaine.

N.T. Jury Trial, 10/19/21, at p. 110 (emphasis supplied).

On cross-examination, Officer Ference was asked about the location of various items recovered by police

on the date in question. N.T. Jury Trial, 10/19/21, at p. 121. When asked where he found the cocaine, the officer responded, “I don’t recall the location of the cocaine.” *Id.* at p. 121. There were no further questions regarding the location of the cocaine.

The mere existence of conflicts in the testimony does not mean that the fact-finder is required to resort to speculation which would cause the result to be based on conjecture or guesswork. *Commonwealth v. Duncan,* 373 A.2d 1051, 1054 (Pa. 1977). “It is true, of course, that a conviction cannot properly be sustained if it be based upon testimony of a witness which is so contradictory on the essential issues as to make the verdict obviously the result of conjecture or guess. However, the mere fact that there are some inconsistencies is not alone sufficient to destroy the Commonwealth’s case.” *Commonwealth v. Williams,* 434 A.2d 717, 719 (Pa. Super. 1981) (internal citations omitted). It is the function of the fact-finder to reconcile conflicting testimony and questions of credibility. *Commonwealth v. Fuentes,* 272 A.3d 511, 516 (Pa. Super. 2022). In addition, the trier of fact, while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence. *Commonwealth v. Bullick,* 830 A.2d 998, 1000 (Pa. Super. 2003).

Despite the fact that the testimony might appear contradictory, Officer Ference here testified that he believed crack cocaine was found “on the Defendant” and the parties stipulated that the substance recovered at the scene was cocaine. Viewing all of the evidence in the light most favorable to the Commonwealth, the jury could reasonably have determined that all of the necessary elements of the crime were established.

2. Sufficiency—possession with intent to deliver controlled substance

a. Sufficiency of PWID Conviction in General

In addition to prohibiting a person from possessing a controlled substance, the act also precludes an unregistered person from possessing a controlled substance with the intent to deliver it. Specifically, the act proscribes:

> the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

35 P.S. §780-113(a)(30).

To convict a defendant of PWID the Commonwealth must prove beyond a reasonable doubt that "on a specific occasion the defendant possessed a controlled substance he was not licensed to possess and that he did so under circumstances demonstrating an intent to deliver that substance." *Commonwealth v. Griffin,* 804 A.2d 1, 15 (Pa. Super. 2002), citing *Commonwealth v. Aguado,* 760 A.2d 1181, 1185 (Pa. Super. 2000) (en banc). In determining whether there is sufficient evidence to convict defendant of PWID, all facts and circumstances surrounding the possession are relevant, and the Commonwealth may establish the essential elements of the crime entirely by circumstantial evidence. *Commonwealth v. Bricker,* 882 A.2d 1008, 1015 (Pa. Super. 2008).

The Commonwealth may meet its burden of demonstrating that the defendant possessed the controlled

substances by showing actual, constructive, or joint constructive possession of the controlled substances. *Commonwealth v. Roberts,* 133 A.3d 759, 767 (Pa. Super. 2016), quoting *Commonwealth v. Vargas*, 108 A.3d 858, 868 (Pa. Super. 2014) *(en banc).* Because the fentanyl was not found on Defendant's person in the instant case, the Commonwealth was required to establish that he had constructive possession of the items seized.

> Constructive possession is a legal fiction, a pragmatic construct to deal with the realities of criminal law enforcement. Constructive possession is an inference arising from a set of facts that possession of the contraband was more likely than not. We have defined constructive possession as conscious dominion. We subsequently defined conscious dominion as the power to control the contraband and the intent to exercise that control. To aid application, we have held that constructive possession may be established by the totality of the circumstances.

Commonwealth v. Hopkins, 67 A.3d 817, 820 (Pa. Super. 2013), quoting *Commonwealth v. Brown,* 48 A.3d 426, 430 (Pa. Super. 2012), *appeal denied,* 63 A.3d 1243 (Pa. 2013).

"Constructive possession requires proof of the ability to exercise conscious dominion over the substance, the power to control the contraband, and the intent to exercise such control." *Commonwealth v. Bricker,* 882 A.2d 1008, 1014 (Pa. Super. 2005). Mere presence is not enough to establish constructive possession. *See Commonwealth v. Armstead,* 305 A.2d 1, 2 (Pa. 1973); *Commonwealth v. Juliano,* 490 A.2d 891, 894 (Pa. Super. 1985). In the instant case, there was evidence showing more than Defendant's mere presence at the scene.

Both Obitz and Davis testified that Defendant provided them with fentanyl to use and to sell. They said that he came to their home on an almost daily basis to package narcotics with the intent to sell them. Evidence was presented that when officers entered the home where Defendant was apprehended, he was seated at a table which held a scale and a box full of 171 fentanyl packets with a blender at his feet. When viewed in their totality, the facts and circumstances clearly support the finding that Defendant had the ability, power, and intent to exercise control over the fentanyl.

The Commonwealth also proved that Defendant possessed the controlled substance with the specific intent of delivering it to another person. Defendant's intent may be inferred from the totality of the circumstances. *Bricker,* supra at 882 A.2d 1008, 1015 (Pa. Super. 2005). Initially, we note that 171 fentanyl packets is a large quantity of fentanyl, indicating an intent to deliver. Even if the quantity were not dispositive as to intent, there were other factors present here. *Commonwealth v. Ratsamy,* 934 A.2d 1233, 1238 (Pa. 2007), quoting *Commonwealth v. Jackson,* 45 A.2d 1366, 1368 (Pa. Super. 1994). Factors which may be relevant in determining whether the drugs were possessed with the intent to deliver include, but are not limited to, the "manner in which the controlled substance was packaged, the behavior of the Defendant, the presence of drug paraphernalia, and large sums of cash[.]" *Id.* at 1238.

Here, the fentanyl recovered from the scene was individually packaged in clear bags in accordance with the way drugs are commonly packaged and sold. In addition, Defendant was found with $526.00 in cash, a large amount of money. A box of empty clear bags and a scale were also

found on the scene. A blender with a white powdered substance in it was recovered by the Defendant's feet. The fact that the blender was near the fentanyl was consistent with delivery and not with personal use in that both Officer Ference and Detective Conmy testified that a person dealing fentanyl often cuts the product with baby powder or another substance to increase profit. Obitz and Davis testified that the Defendant came to their home almost daily to prepare the drugs for sale and that he gave them drugs in exchange for being able to use their home. In addition, both Davis and Obitz delivered drugs to customers on behalf of Defendant and both testified that they had never seen Defendant use either heroin or fentanyl.

"The final factor to be considered is expert testimony. Expert opinion testimony is admissible concerning whether the facts surrounding the possession of controlled substances are consistent with an intent to deliver rather than with an intent to possess it for personal use." *Ratsamy,* supra at 1238, quoting *Commonwealth v. Jackson,* 45 A.2d 1366, 1368 (Pa. Super. 1994). Detective Conmy testified in detail that he considered all available factors before forming his expert opinion that Defendant possessed the controlled substances with the intent to distribute them. In our judgment, the totality of evidence on this point is ample.

The defense argued that the testimony of Obitz and Davis was not believable, both because they were drug users and because the more serious of their charges in the instant matter were withdrawn after they pled guilty to simple possession. The defense was permitted to cross-examine both witnesses on those issues and to make that argument to the jury. Evidently, the jury accepted the testimony of the prosecution's witnesses in

reaching their verdict. Issues of credibility are left to the finder of fact, who is free to accept all, part, or none of a witness's testimony. *Commonwealth v. Andrulewicz,* 911 A.2d 162, 164 (Pa. Super. 2006). Questions of doubt are for the finder of fact, unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the totality of the circumstances. *Id.* Only when the evidence offered to support the verdict is in contradiction to the physical facts, or in contravention to human experience and the laws of nature, can the evidence be considered insufficient as a matter of law. *Commonwealth v. Widmer,* 744 A.2d 745, 751 (Pa. 2000).

In the instant case, the totality of the circumstances demonstrates that the Commonwealth proved each element of the PWID offense with sufficient evidence.

b. Sufficiency—Acquittal of Lesser Included Offense

Defendant asserts that because he was acquitted of the lesser included offense of possession, his conviction for PWID should have been overturned. Although Defendant is correct in stating that possession is a lesser included offense of PWID, his argument is flawed. Defendant bases his allegation on the double jeopardy principles set forth at 18 Pa. C.S.A. §109. (*See* Defendant's 1/31/22 Motion for Reconsideration of Sentence and Post-Trial Motions, p. 4 (unpaginated).)

The statute provides in relevant part:

> When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances:
>
> (1) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a

> finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside.

18 Pa. C.S.A. §109.

Defendant acknowledges that this rule is in reference to retrial after a hung jury, but posits that based on the rule, the acquittal of a lesser included offense should still act as double jeopardy against the more serious offense. As Defendant here was not tried more than once, there was no "former prosecution" and Rule 109 does not apply in the instant case.

Longstanding precedent dictates that inconsistent verdicts are allowable. *Commonwealth v. States,* 938 A.2d 1016, 1025 (Pa. 2007). The Superior Court explained the reasoning as follows:

> We note first that inconsistent verdicts, while often perplexing, are not considered mistakes and do not constitute a basis for reversal. Consistency in verdicts in criminal cases is not necessary. When an acquittal on one count in an indictment is inconsistent with a conviction on a second count, the court looks upon the acquittal as no more than the jury's assumption of a power which they had no right to exercise, but to which they were disposed through lenity. Thus, this Court will not disturb guilty verdicts on the basis of apparent inconsistencies as long as there is evidence to support the verdict.

Commonwealth v. Burton, 234 A.3d 824, 829 (Pa. Super. 2020), *appeal denied,* 252 A.3d 234 (Pa. 2021), (quoting *Commonwealth v. Petteway,* 847 A.2d at 713, 718 (Pa. Super. 2004).

The court in *Burton* continued its explanation by specifically addressing the very issue Defendant raises: *"The rule that inconsistent verdicts do not constitute reversible error applies even where the acquitted offense is a lesser included offense of the charge for which a defendant is found guilty." Id.* (emphasis supplied).

Because there was sufficient evidence to support Defendant's conviction for PWID as discussed above, the inconsistent verdict resulting in his acquittal on the lesser included offense of possession should not be overturned.

B. Alleyne/Apprendi *Allegation of Sentencing Error*

Finally, Defendant alleges that this court abused its discretion or committed an error of law when sentencing Defendant by applying an incorrect Offense Gravity Score ("OGS") of 10 due to the weight of a controlled substance (2.7 grams of fentanyl) that was the subject of Defendant's conviction for PWID. Defendant cites to *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and *Alleyne v. United States,* 570 U.S. 99 (2013) in arguing that since the weight of the fentanyl increased the standard range, it is an element of the offense that must be found by the jury. A claim that the sentencing court used an incorrect OGS is a challenge to the discretionary aspects of sentence. *Commonwealth v. Williams,* 151 A.3d 621, 625 (Pa. Super. 2016). However, issues pertaining to *Alleyne* and *Apprendi* go to the legality of the sentence. *Commonwealth v. Lawrence,* 99 A.3d 116, 123 (Pa. Super. 2014).

At sentencing, Defendant argued that he was being sentenced in the wrong OGS range in that the jury had not determined a weight for the fentanyl involved in

the PWID charge. The OGS is "an assignment in the sentencing guidelines reflecting the seriousness of a conviction offense. The OGS assigned to the most serious offense in the case is used to determine the risk factors and associated values to be included in the risk scales." 204 Pa. Code §305.1. Defendant claims that he should be sentenced in the range for possession with intent for no weight rather than the weight assigned in this matter for sentencing purposes.

The following exchange took place at the sentencing hearing with regard to the Commonwealth's request to amend the presentence investigation report ("PSI"):

> ADA: Your Honor, as far as the corrections goes, in reviewing the presentence investigation I noticed that adult probation and parole calculated an offense gravity score for the offense of possession with intent to deliver fentanyl as an offense gravity of ten—excuse me, of nine, Your Honor.
>
> It's the Commonwealth's position that the offense gravity score should be ten. The guidelines in effect at the time of this crime, back in 2019, indicated that a weight of fentanyl between one and ten grams, carrying an offense gravity score of ten, not nine. During the trial in this case the defense and the Commonwealth stipulated to a lab report indicating that the only fentanyl alleged to be involved in this case as far as that count goes was to 2.7 grams of fentanyl.
>
> THE COURT: And that would make the standard range what?
>
> ADA: Your Honor, that would increase the standard range. Currently it's listed as 48 to 60 months. It would be 60 to 72 months with a prior record score of five as indicated.

> THE COURT: Do you want to be heard on that Mr. Saurman?
>
> DEFENSE: Yes, your Honor ... I do not believe that a stipulation to a lab result automatically allows the imposition of a higher weight. I think there's certainly case law—if we are going to increase someone's sentence based on something like that, it has to been found (sic) by the jury.
>
> The jury was not, did not make a finding of weight. They merely found possession with intent. So under the laws that exists (sic) we are at a nine, we are not at a ten.
>
> ADA: Your Honor, may I respond to that?
>
> THE COURT: Sure.
>
> ADA: In my understanding of a lean (sic), that applies if its taking the discretion from the Court at sentencing as a mandatory minimum sentence or when a maximum is increased. In this case Your Honor, the maximum stays the same. There's no mandatory minimum because the Court still has the discretionary aspect of sentencing.
>
> MR. SAURMAN: Your Honor, I read it differently. And I can certainly indicate that I've had multiple trials for possession with intent and/or theft or anything like that, where there is a breakout on the jury sheet that indicates the weight and/or value to allow the jury to make that determination so that standard is met.

N.T. Sentencing Hearing, 1/20/22, at pp. 2-4.

In *Apprendi v. New Jersey,* 530 U.S. 466 (2000), the Supreme Court of the United States held that other than the fact of a prior conviction, any fact that in-

creases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. *Id.* at 490. In *Apprendi,* the court did not consider a conviction for possession of fentanyl but instead reviewed a defendant's conviction for possession of a firearm for unlawful purpose and unlawful possession of prohibited weapon. The New Jersey hate crime statute in *Apprendi* allowed the judge to make a factual determination based on the preponderance of the evidence. The judge's determination increased the maximum sentence of the defendant, who had been convicted of the second-degree offense of unlawful possession of a prohibited weapon, to a punishment identical to that imposed for a first-degree crime. *Id.* at 468, 491. The Supreme Court held that such factual determination needed to be made by the jury on the basis of proof beyond a reasonable doubt. *Id.* at 490.

In *Alleyne v. United States,* 570 U.S. 99 (2013), the United States Supreme Court held that any fact that increases the mandatory minimum sentence for a crime is an element of the crime that must be submitted to the jury. *Alleyne,* supra at 108.

Neither *Apprendi* nor *Alleyne* is applicable to this case. The prescribed statutory maximum penalty for the Defendant's conviction of Possession with Intent to Deliver a Controlled Substance is thirty (30) years of incarceration and/or a $500,000.00 fine.

The Controlled Substance, Drug, Device, and Cosmetic Act provides in pertinent part:

§780-113. Prohibited acts; penalties

(f) Any person who violates clause (12), (14) or (30) of subsection (a) with respect to:

(1) A controlled substance or counterfeit substance classified in Schedule I or II[13] which is a narcotic drug, is guilty of a felony and upon conviction thereof shall be sentenced to imprisonment not exceeding fifteen years, or to pay a fine not exceeding two hundred fifty thousand dollars ($250,000), or both or such larger amount as is sufficient to exhaust the assets utilized in and the profits obtained from the illegal activity.

35 P.S. §780-113.

Because the instant offense is Defendant's second offense under Section §780-113(a)(30), Section 780-115 of Title 35 also applies. Section 780-115, a recidivist statute for drug offenders, is a discretionary sentencing enhancement statute. Specifically, the statute provides:

§ 780-115. Second or subsequent offense

(a) Any person convicted of a second or subsequent offense under clause (30) of subsection (a) of section 13 of this act or of a similar offense under any statute of the United States or of any state may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to the commission of the second offense, the offender has at any time been convicted under clause (30) of

[13] 35 P.S. §780-104.

> subsection (a) of section 13 of this act or of a similar offense under any statute of the United States or of any state relating to controlled substances.

35 P.S. §780-115.

As a result, the weight of the fentanyl here does not increase the maximum penalty because the maximum penalty for the offense is not dependent on the weight. The maximum penalty is provided for in the statute and is a result of Defendant's prior conviction. The Superior Court specifically held that §115, allowing for enhancement of sentence upon finding of prior conviction, did not violate *Apprendi's* requirement that any fact that increases the penalty for a crime beyond the prescribed statutory maximum had to be submitted to the jury because *Apprendi* explicitly exempted the fact of prior conviction from the requirement. *Commonwealth v. Griffin,* 804 A.2d 1, 18 (Pa. Super.2002), *appeal denied,* 868 A.2d 1198 (Pa. 2005), *cert. denied,* 54 U.S. 1148 (2005). Further, the weight of the fentanyl does not implicate a mandatory minimum sentence as forbidden by *Alleyne.* This court was able to impose a sentence within its discretion and issued a standard range sentence after considering all of the obligatory factors, statutory requirements and the sentencing guidelines.

For all of the foregoing reasons, this court respectfully submits that Defendant's appeal is without merit and that Defendant's judgment of sentence should be undisturbed..

[EDITOR'S NOTE: AFFIRMED on Appeal to the Superior Court of Pennsylvania, August 4, 2023.]