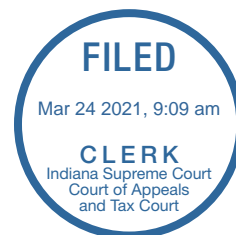


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Eric Walker,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 24, 2021

Court of Appeals Case No.
20A-CR-1519

Appeal from the Marion Superior
Court

The Honorable Alicia Gooden,
Judge

Trial Court Cause No.
49G21-1810-F3-35417

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Defendant, Eric Walker (Walker), appeals his convictions for possession of cocaine having a prior enhancing conviction, a Level 5 felony, Ind. Code §§ 35-48-4-6(a), (b)(2); possession of a narcotic drug, a Level 6 felony, I.C. § 35-48-4-6; and neglect of a dependent, a Level 6 felony, I.C. § 35-46-1-4(a)(1).
- [2] We affirm.

ISSUE

- [3] Walker presents this court with three issues, which we consolidate and restate as the following single issue: Whether the State proved beyond a reasonable doubt that he committed possession of cocaine, possession of a controlled substance (fentanyl), and neglect of a dependent.

FACTS AND PROCEDURAL HISTORY

- [4] In the fall of 2018, Walker lived in a home in the 3500 block of North Layman Avenue in Indianapolis, Indiana, with his brother, Joshua Walker (Joshua), and his father, Eric Walker, Sr. (Eric Sr.). The home had two bedrooms on the main floor and a third bedroom in a converted attic space. As a result of an ongoing narcotics investigation, at 8:45 a.m. on October 10, 2018, law enforcement officers executed a search warrant on the home. When the officers entered, Walker was on the main floor in a hallway between the living room and the dining room, and Joshua was in bed in the attic bedroom. Walker's

six-year-old son, K.W., was seated on a chair in the living room playing video games. Eric Sr. was not at home when the search warrant was executed.

[5] In the southwest main-floor bedroom, officers found two clear baggies containing 3.3924 grams of cocaine on top of a dresser. A cell phone which Walker later identified as his was located on the dresser's top inches away from the baggies of cocaine. A pair of pants with Walker's identification in the pocket and a child's sippy cup were also in the southwest bedroom. In the second main-floor bedroom on the southeast side of the home, officers found identification and other documents bearing Eric Sr.'s name.

[6] The home's kitchen had a four-burner electric stove with a flat surface. Almost immediately upon entering the kitchen, the officer searching there observed on the stovetop's right-front burner a small amount of a white powder which, through his training and experience, he suspected was either heroin or fentanyl. The white powder, which was subsequently identified as fentanyl, had been partially formed into lines. Directly behind the fentanyl was an open box of pizza rolls. The search of the kitchen also netted a working set of digital scales and a heroin cutting agent from a cabinet above the stove, 0.1972 grams of heroin in a baggie in an ashtray on top of the refrigerator, another set of scales on top of the refrigerator, and a small press used to compact heroin on the kitchen table.

[7] When officers searched the living room of the home, they discovered a loaded firearm under the cushion of a chair and a set of digital scales by the front door.

A grey plastic grocery bag containing of 24.7913 grams of Tramadol and 0.0661 grams of cocaine was found on the floor of the dining room, which was adjacent to the living room. In addition, on top of a grandfather clock in the dining room, officers located a candy box containing a clear plastic baggie of 0.9314 grams of cocaine. In the attic bedroom, officers found a bag of marijuana on a nightstand, Oxycodone pills in the pocket of a pair of jeans, synthetic marijuana, and a bottle of an agent commonly used to cut narcotics. After officers provided Walker and Joshua with their *Miranda* advisements, Walker stated that, immediately prior to the officers' entry of the home, he had been in the kitchen preparing pizza rolls for K.W. Before transporting Walker subsequent to his arrest, officers located a pair of athletic shoes in the southwest bedroom that fit Walker. Walker did not deny that the shoes belonged to him.

[8] On October 15, 2018, the State filed an Information, charging Walker with Level 3 felony dealing in a Schedule IV controlled substance; Level 6 felony possession of a controlled substance; Level 6 felony possession of cocaine; Level 5 felony possession of a narcotic drug; Level 4 felony unlawful possession of a firearm by a serious violent felon; Level 6 felony neglect of a dependent; and Level 6 felony maintaining a common nuisance. On March 5, 2020, the trial court convened Walker's two-day jury trial. After a series of amendments, dismissals, and additions to the Information, the State proceeded to trial on the following seven charges: Level 6 felony possession of cocaine, elevated to a Level 5 felony due to Walker's prior conviction for Class A felony dealing in cocaine; Level 6 felony possession of a narcotic drug (heroin); Level 4 felony

unlawful possession of a firearm by a serious violent felon; Level 6 felony neglect of a dependent, K.W. (controlled substances within reach); Level 6 felony maintaining a common nuisance; Level 6 felony neglect of a dependent, K.W. (firearm within reach); and Level 6 felony possession of a narcotic drug (fentanyl).

[9] An officer who had searched the kitchen testified that, according to his training and experience, the manner in which the small amount of fentanyl on the stovetop had been manipulated indicated to him that it was about to be consumed or bagged. The State's chemist testified that fentanyl is a "very dangerous substance" and that she wears personal protective equipment when handling it so as not to accidentally ingest it through contact with her skin. (Transcript Vol. III, p. 43). Joshua testified that Walker's two-year-old daughter, A.W., had also spent the evening prior to the execution of the search warrant at the Layman Avenue home and that Walker's children sleep where he sleeps. Joshua confirmed that he had slept in the attic bedroom the night prior to the execution of the search warrant and had not been in the kitchen that morning prior to the officers' entry.

[10] After the close of the evidence, the trial court granted Walker's motion for a directed verdict on the firearm possession charge. The jury found Walker not-guilty of possession of a narcotic drug (heroin), maintaining a common nuisance, and neglect of a dependent for leaving a firearm within K.W.'s reach. The jury found Walker guilty of possession of cocaine, neglect of a dependent for leaving controlled substances within K.W.'s reach, and possession of a

narcotic drug (fentanyl). In a separate proceeding, the jury also found that Walker had a prior conviction for Class A felony dealing in cocaine which elevated his instant possession of cocaine conviction to a Level 5 felony. On August 10, 2020, the trial court held Walker's sentencing hearing. The trial court imposed a 910-day sentence for each of Walker's convictions, to be served concurrently.

[11] Walker now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[12] Walker challenges the evidence supporting each of his three convictions. Our standard of review for such challenges is well-established: We consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is not our role as an appellate court to assess witness credibility or to weigh the evidence. *Id.* We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Id.*

II. *Constructive Possession*

[13] The State charged Walker with "knowingly or intentionally" possessing cocaine and fentanyl. (Appellant's App. Vol. II, pp. 98, 104). The State argued at trial that Walker had possessed the cocaine found on top of the dresser in the southwest bedroom and that he had possessed the fentanyl on the stovetop. Therefore, the State did not allege that either substance was found on Walker's

person. If a person does not have direct physical control over an item, he may, nevertheless, constructively possess it if he has the capability and intent to maintain dominion and control over it. *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011). When a defendant has exclusive possession of the premises where the item was found, an inference arises that he knew of the presence of the item and was capable of controlling it. *Id.* However, if possession of the premises is not exclusive, a trier of fact may still infer that a defendant had the requisite intent if additional circumstances indicate a defendant's knowledge of the presence and nature of the item. *Id.* Examples of these additional circumstances include incriminating statements by the defendant, attempted flight or furtive gestures, a drug manufacturing setting, proximity of the defendant to the item, whether the item is in plain view, and other items belonging to the defendant in close proximity to the item. *Id.* These are merely examples of additional circumstances which may show constructive possession. *Cannon v. State*, 99 N.E.3d 274, 279-80 (Ind. Ct. App. 2018), *trans. denied*. Other circumstances may just as reasonably demonstrate the requisite knowledge. *Id.* at 280.

A. Cocaine

[14] Walker argues that his possession of the home was not exclusive and that the State did not show any additional circumstances proving his knowledge of the presence of the cocaine on the dresser. However, one of the officers who searched the bedroom testified that it was not necessary to move any items to see the cocaine on the dresser and that it was in his view when he walked into the room and looked down on the dresser. The cocaine was located inches

from Walker's cell phone and in the same room as Walker's pants, identification, and a pair of shoes that the jury could reasonably infer were Walker's because they fit his feet and he did not deny that the shoes were his. The fact that the cocaine was in plain view and found in close proximity to other property belonging to Walker are additional circumstances from which the jury could have reasonably inferred the requisite knowledge. *See Gray*, 957 N.E.2d at 174.

[15] In arguing otherwise, Walker draws our attention to evidence that the dresser was cluttered with other objects which he contends impeded visibility of the cocaine, Joshua's testimony that he, Walker, and Eric Sr. shared all three bedrooms, Joshua's testimony that he also had belongings in the southwest bedroom, and what he contends was a paucity of evidence regarding when Walker's belongings had been placed in the southwest bedroom. These arguments are unavailing in light of our standard of review which precludes us from reweighing the evidence or considering evidence that does not support the jury's verdict. *See Drane*, 867 N.E.2d at 146. We also observe that the jury could have reasonably concluded that Walker had spent the night in the southwest bedroom and, thus, had been the last adult to occupy that room given evidence that his pants with his identification were still in the room, supporting an inference that he had disrobed there before going to bed. In addition, a child's sippy cup was on the bed, indicating that one of the children had recently been in the southwest bedroom, and Joshua testified that the children slept where Walker slept. Because the evidence showed additional

circumstances from which the jury could infer Walker's knowledge of the presence of the cocaine on the dresser, we will sustain the jury's verdict for possession of cocaine.

B. *Fentanyl*

- [16] Walker argues that his conviction for possessing fentanyl cannot stand because, even if the State showed that he knew of the presence of the white powder on the stovetop, the State did not prove that he had actual knowledge of the illegal nature of that powder. To reiterate, in assessing whether a defendant knew of the presence and the nature of a controlled substance where his possession of a premises is non-exclusive, we determine whether additional circumstances point to his or her knowledge. *See Gee v. State*, 810 N.E.2d 338, 341 (Ind. 2004).
- [17] Here, the State admitted into evidence photographs of the stovetop which showed a small amount of white powder which had been manipulated into a pile and lines. One of the officers who searched the kitchen testified that the white powder appeared to him to have been prepared for ingestion or to be bagged. The jury could have reasonably inferred from the additional circumstance of the appearance of the substance gathered into a pile and lines, coupled with the officer's testimony, that Walker was aware that the substance on the stovetop was a controlled substance.
- [18] Walker argues that the State did not make its case because a white powder on a stovetop in a kitchen could be any number of innocent substances, such as "flour, sugar, salt, or baking soda." (Appellant's Br. p. 15). Walker also directs

our attention to the fact that the officer who found the fentanyl and the chemist who analyzed it were unable to positively identify it as fentanyl by merely looking at the substance. Similar to his argument regarding his possession of cocaine, these challenges to the evidence are not persuasive, as they essentially invite us to reweigh the evidence presented to the jury, in contravention of our standard of review. *See Drane*, 867 N.E.2d at 146. These arguments also ignore that the State relied upon the fact that the powder on the stovetop had been gathered into a pile and lines and not simply upon its powdery, white characteristics. Therefore, we conclude that the evidence proved beyond a reasonable doubt that Walker also constructively possessed the fentanyl on the stovetop.

III. *Neglect of K.W.*

[19] The State alleged that Walker committed Level 6 felony neglect of K.W. in relevant part as follows:

On or about October 10, 2018, [] Walker having the care of K.W., a dependent, did knowingly place said dependent in a situation that endangered the dependent's life or health, to-wit: allowing controlled substances to be kept within reach of K.W.

(Appellant's App. Vol. II, pp. 39, 101). "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." I.C. § 35-41-2-2(b). For purposes of the neglect statute, the State is required to show that the defendant had a "subjective awareness of a 'high probability' that a dependent had been placed in a

dangerous situation.” *Shultz v. State*, 115 N.E.3d 1280, 1286 (Ind. Ct. App. 2018). In most cases, such a finding requires the fact-finder to infer the defendant’s mental state, so we will look to all the surrounding circumstances of a case to determine if the jury’s verdict was proper. *Id.*

[20] Here, the State showed that the fentanyl on the stovetop in the kitchen, the cocaine on the dresser in Walker’s bedroom, and the marijuana found in the upstairs bedroom were all in plain view. As we have already concluded above, the fact that these controlled substances were in plain view supported the jury’s reasonable conclusion that Walker knew about their presence and character. *See Gray*, 957 N.E.2d at 174. We also have little trouble concluding that Walker placed K.W. in a dangerous situation by having him stay the night in a home which was littered with controlled substances. The jury could have reasonably inferred that a six-year-old was capable of reaching the top of a stove, dresser, and nightstand and was equally capable of accidentally ingesting those substances. Indeed, the fentanyl alone was so dangerous that the State’s chemist testified that it can be absorbed through contact and that she would not work with fentanyl without personal protective equipment. Because the State proved that Walker knowingly placed K.W. in a dangerous situation by allowing controlled substances to be kept within his reach, we will not disturb the jury’s verdict.

CONCLUSION

- [21] Based on the foregoing, we conclude that the State proved beyond a reasonable doubt that Walker possessed cocaine and fentanyl. We also conclude that the evidence was sufficient to sustain his conviction for neglect of a dependent.
- [22] Affirmed.
- [23] Najam, J. and Crone, J. concur