MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Philip Certain,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 8, 2022

Court of Appeals Case No. 21A-CR-2343

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause No. 79D02-2009-F5-151

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Philip Certain (Certain), appeals his convictions for possession of methamphetamine, a Level 5 felony, Ind. Code §§ 35-48-4-6.1(a), (b)(2); and carrying a handgun without a license, having a prior felony conviction within fifteen years, a Level 5 felony, I.C. §§ 35-47-2-1(a), (e)(2)(B).

[2] We affirm.

ISSUES

[3] Certain presents this court with two issues, which we restate as:

> (1) Whether the State proved beyond a reasonable doubt that he possessed methamphetamine; and
>
> (2) Whether the State proved beyond a reasonable doubt that Certain had a prior felony conviction within fifteen years as alleged in the Level 5 felony handgun carrying charge.

FACTS AND PROCEDURAL HISTORY

[4] Certain dated Connie Campbell (Campbell) intermittently between 2015 and 2020. During August of 2020, the two were not dating, and, during the evening of August 20, 2020, Certain came uninvited to Campbell's home in the 1800 block of Greenbush Street in Lafayette, Indiana. Campbell was at home with her three sons, M.H., Ma.H., and Z.H., who were sixteen, fourteen, and twelve years old, respectively. Campbell lived in the second-floor apartment of a home

which had been divided into apartments, and her mother, Melody Campbell (Melody), lived in a first-floor apartment.

[5] Certain and Campbell began arguing in the kitchen, and the argument became heated. Z.H. texted Melody that she should call the police, which she did. Officer Keifer Mikels (Officer Mikels) of the Lafayette Police Department responded, along with at least four other officers, including Officer Austin Schutter (Officer Schutter). While responding to the call, the officers became aware that Certain had two outstanding warrants for his arrest. Officer Mikels knocked on the front door, while other officers fanned out around the house, with Officer Schutter taking a position at the rear in the back yard. Initially, Campbell did not allow the officers into her home, but in the process of speaking with Campbell, Officer Mikels observed Certain inside Campbell's apartment. When Certain became aware that there were officers outside, he pulled a gun from his waistband and told Campbell and her three sons that he was going to shoot whoever had called the police. Certain did not have a permit to carry a handgun.

[6] Certain went into the bathroom at the back of the apartment and started climbing out the window, which had a roof under it. Officer Schutter observed Certain crawling out of the bathroom window, and he saw a handgun in Certain's hand. When Officer Schutter made his presence known, Certain climbed back inside the bathroom, set the handgun down next to the window, and surrendered himself.

[7] After Certain was taken into custody, Z.H. and M.H. went into the bathroom, and Z.H. retrieved the handgun from next to the bathroom window and brought it to the responding officers. Campbell then allowed the officers inside her apartment, and they performed a protective sweep. A plastic, knotted baggie containing what was later determined to be 3.53 grams of methamphetamine was located in the middle of the bathroom floor near the bathroom door, approximately six feet away from where Officer Schutter had seen Certain place the handgun. During the ensuing investigation, Campbell and her three sons denied that the handgun or the methamphetamine was theirs.

[8] On September 2, 2020, the State filed an Information, charging Certain with Level 5 felony possession of methamphetamine, Class A misdemeanor carrying a handgun without a license, and Level 5 felony carrying a handgun without a license, having a prior felony conviction within fifteen years. On July 6, 2021, the trial court convened Certain's two-day, bifurcated trial. During the first phase on the methamphetamine and Class A misdemeanor handgun charges which were tried to a jury, Campbell testified that Certain lived on Commanche Trail with his mother and that neither she nor her three sons had any methamphetamine in her house on August 20, 2020. Officer Mikels informed the jury that he had reviewed Certain's driver records which contained his photograph that matched the defendant Certain sitting in the courtroom, Certain's date of birth was June 5, 1989, and that the last four digits of Certain's driver's license were -9507. At the close of the evidence, the jury found Certain

guilty of Level 5 felony possession of methamphetamine and carrying a handgun without a license as a Class A misdemeanor.

[9] During the second phase, Certain waived his right to a trial by jury on the allegation that he had a prior felony conviction within the last fifteen years. The State had certified Bureau of Motor Vehicles (BMV) driver records admitted into evidence bearing the name "PHILIP AD CERTAIN"; address "2916 COMMANCHE TRL"; date of birth "06/05/1989"; gender male; and driver's license number "[****-**]9705". (Exh. Vol. p. 30). Also admitted into evidence were certified copies of records from Cause Number 49G20-0812-FC-287180, including the Information, plea agreement, judgment and sentencing order, and abstract of judgment, showing that "Phillip Certain[,] W/M DOB 6/5/1989" had been convicted in 2009 of Class C felony possession of a handgun with an obliterated serial number. (Exh. Vol. p. 34). The trial court found Certain guilty of the prior felony conviction alleged to support the Level 5 felony handgun carrying charge.

[10] On September 24, 2021, the trial court convened Certain's sentencing hearing. The trial court sentenced Certain on the Level 5 felony convictions only. The trial court imposed five-year sentences for each conviction, to be served concurrently.

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

DISCUSSION AND DECISION

I. *Standard of Review*

[12] Certain challenges the evidence supporting his convictions. Our standard of review in such matters is well-established: We will consider only the probative evidence and reasonable inferences that support the judgment of the trier of fact. *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). We do not reweigh the evidence or judge the credibility of the witnesses. *Id.* Accordingly, "[w]e 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 of Methamphetamine*

[13] Certain first argues that the State failed to prove beyond a reasonable doubt that he possessed the methamphetamine found in the bathroom of Campbell's apartment. The State charged Certain, in relevant part, with "knowingly or intentionally" possessing less than five grams of methamphetamine while in possession of a firearm and within the presence of three children less than eighteen years of age. (Appellant's App. Vol. II, p. 12). The State proceeded on a theory that Certain had constructively possessed the methamphetamine. A person constructively possesses an illegal substance when that person has "(1) the capability to maintain dominion and control over the item; and (2) the intent to maintain dominion and control over it." *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011).

[14] While proof of a possessory interest in a premises in which an illegal substance is found is sufficient to show the 'capability' requirement, where a defendant has no possessory interest in the premises, the State may meet its burden by showing that "the defendant is able to reduce the controlled substance to the defendant's personal possession." *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999). While Certain correctly argues that he had no possessory interest in Campbell's apartment, he fails to present us with any argument that he was unable to reduce the methamphetamine to his personal possession. For its part, the State contends that it met its burden of proof on capability because it showed that Certain was in exclusive possession of the bathroom. Even if we were to credit the State's apparent argument that the relevant premises in question was the bathroom, not the entire apartment, the State's argument fails on its own terms, as the record indicates that Z.H. and M.H. were both in the bathroom before the methamphetamine was discovered. Nevertheless, we conclude that the jury could have reasonably inferred Certain's ability to reduce the methamphetamine to his control where the knotted baggie of methamphetamine was located in the middle of the bathroom floor where Officer Schutter testified Certain would have had to have passed on his way out of the bathroom when he surrendered, and with nothing restricting Certain's access to it. *See Lampkins v. State*, 685 N.E.2d 698, 699 (Ind. 1997) (concluding that the State had met its burden on the 'capability' element where it showed that the cocaine found in the car under the passenger seat where the defendant had been sitting "was within reach of the defendant").

[15] As to the 'intent' requirement, where, as here, possession of the premises is non-exclusive, the State is required to show additional circumstances evincing the defendant's knowledge of the nature of the controlled substance and its presence. *Gee v. State*, 810 N.E.2d 338, 340-41 (Ind. 2004). Examples of these additional circumstances include

> (1) a defendant's incriminating statements; (2) a defendant's attempting to leave or making furtive gestures; (3) the location of contraband like drugs in settings suggesting manufacturing; (4) the item's proximity to the defendant; (5) the location of contraband within the defendant's plain view; and (6) the mingling of contraband with other items the defendant owns.

Gray, 957 N.E.2d at 174 (citing *Gee* and observing that this list is non-exclusive). A lack of evidence that contraband belongs to someone else may also be considered as additional evidence of knowledge. *See Deshazier v. State*, 877 N.E.2d 200, 208 (Ind. Ct. App. 2007) (considering the lack of evidence that the gun found below the passenger seat where he had been sitting belonged to anyone else as supportive of his conviction under a constructive possession theory), *trans. denied*.

[16] Here, when Certain became aware that law enforcement had arrived, he attempted to flee out the bathroom window, only stopping when Officer Schutter announced his presence. After Certain had surrendered, the methamphetamine was found in close proximity to where Certain was observed placing his handgun, the possession of which he does not contest on appeal, and the methamphetamine was in the middle of the bathroom floor where

Certain would have had to have passed on his way out to surrender to police. The jury also heard evidence that Campbell, M.H., Ma.H., and Z.H. denied that the methamphetamine belonged to them. In light of this additional evidence of flight, Certain's close proximity to the methamphetamine and its proximity to where Certain's handgun was discovered, the location of the methamphetamine in plain view, and the lack of evidence that it belonged to anyone else, the jury was justified in drawing a reasonable inference that Certain knew about the methamphetamine sufficient to sustain his conviction. *See id*; *see also Gray*, 957 N.E.2d at 174.

[17] Certain argues otherwise, first directing our attention to the fact that neither the occupants of the apartment nor the police actually saw the methamphetamine on his person. This argument is unavailing, given that the State proceeded on a theory of constructive possession, not one of actual possession. Neither do we find persuasive Certain's arguments that the methamphetamine was not found by the bathroom window and that he made no incriminating statements about possessing the methamphetamine. The methamphetamine was found directly in the path that Certain would have taken to surrender to the police, and an absence of proof on one of the circumstances listed above does not constitute a gap or failure in the State's case. *See Gray*, 957 N.E.2d at 175 (observing that the circumstances enumerated in *Gee* were not an exhaustive list and that other circumstances could also reasonably permit an inference of knowledge).

[18] Certain also argues that the methamphetamine was not in plain view because its incriminating character was not immediately apparent simply by looking at

it. Certain contends that the officer who found the methamphetamine "was only able to determine that it was suspected methamphetamine" based on his training and experience, therefore, it "would be unreasonable to assume that it would have been readily apparent to Certain that it was methamphetamine." (Appellant's Br. p. 18). For purposes of a constructive possession analysis, in addition to being in plain view, "the contraband's incriminating character must be immediately apparent." *Gray*, 957 N.E.2d at 175. To determine if the incriminating character of contraband was immediately apparent, we will apply the law governing the admissibility of evidence seized in a warrantless search under the plain view doctrine. *Id.* In *Taylor v. State*, 659 N.E.2d 535, 538-39 (Ind. 1995), our supreme court observed that

> [t]he "immediately apparent" prong of the plain view doctrine requires that law enforcement officials have probable cause to believe the evidence will prove useful in solving a crime. As a plurality of the Supreme Court explained in *Texas v. Brown*, this does not mean that the officer must "know" that the item is evidence of criminal behavior. 460 U.S. 730, 741, 103 S.Ct. 1535, 1542, 75 L.Ed.2d 502 (1983). Probable cause requires only that the information available to the officer would lead a person of reasonable caution to believe the items could be useful as evidence of a crime. A practical, nontechnical probability that incriminating evidence is involved is all that is required.

(Cleaned up). We glean from this authority, that, contrary to Certain's assertion on appeal, to be in plain view for purposes of constructive possession, the precise identity of the powdered drug involved need not be readily discernable. Indeed, in *Stewart v. State*, 688 N.E.2d 1254,

1257 (Ind. 1997), our supreme court found that the incriminating nature of contraband, described only as a "white powdery substance" found on a table in front of the couch where the defendant was asleep, was immediately apparent.

[19] Here, the officer who found the methamphetamine testified that he saw a "baggie with a white powdery substance" on the bathroom floor. (Transcript Vol. II, p. 172). Certain makes no claim that the sight of a knotted baggie containing a white powdery substance found on a bathroom floor would not lead a reasonable person to believe he could be seeing evidence of a crime, and we decline to so hold. Accordingly, we conclude that the State proved beyond a reasonable doubt that Certain constructively possessed the methamphetamine as alleged.

III. *Prior Conviction*

[20] Certain also challenges the evidence supporting the State's case that he had a prior conviction for Class C felony possession of a handgun with an obliterated serial number, as alleged in the Level 5 felony carrying a handgun without a license charge. More specifically, Certain contends that there was inadequate evidence identifying him as the defendant who incurred the Class C felony conviction described in the State's Exhibit 15. We review such matters as we do other challenges to the evidence supporting a criminal conviction, in that we will consider only the evidence and reasonable inferences supporting the judgment, without reweighing the evidence or rejudging the credibility of the witnesses. *Firestone v. State*, 838 N.E.2d 468, 473 (Ind. Ct. App. 2005).

[21] The State alleged the Level 5 felony handgun charge as follows:

> On or about August 31, 2020, in Tippecanoe County, State of Indiana, Philip Ad Certain did knowingly or intentionally carry a handgun, in a vehicle or on or about his person without being licensed under I.C. [§] 35-47-2 to carry a handgun; and said offense was committed after Philip Ad Certain was convicted of a felony within the last fifteen (15) years, to-wit: on January 13, 2009, Philip Certain was convicted of Possession of Handgun with an Altered Serial Number, Class C Felony, in the Superior Court 21 of Marion County, State of Indiana, under cause number 49G21-0812-FC-287180.

(Appellant's App. Vol. II, p. 14). Regarding the use of documents to prove the existence of a prior conviction, our supreme court has stated:

> Certified copies of judgments or commitments containing a defendant's name or a similar name may be introduced to prove the commission of prior felonies. While there must be supporting evidence to identify the defendant as the person named in the documents, the evidence may be circumstantial. If the evidence yields logical and reasonable inferences from which the finder of fact may determine beyond a reasonable doubt that it was a defendant who was convicted of the prior felony, then a sufficient connection has been shown.

Tyson v. State, 766 N.E.2d 715, 718 (Ind. 2002) (cleaned up).

[22] The evidence supporting the conviction was that Officer Mikels testified that he had reviewed Certain's BMV driver records which contained his photograph, date of birth as June 5, 1989, and the last four digits of his driver's license as -9507. Officer Mikels identified Certain in open court as the man whose

photograph was included in the driver records associated with that date of birth and driver's license. In addition, Campbell testified that Certain lived on Commanche Trail.

[23] During the second phase of the trial, the State incorporated the jury trial evidence into the bench trial proceeding on the prior conviction. The State then had admitted into evidence Exhibit 14, consisting of certified driver records bearing the name "PHILIP AD CERTAIN" with an address on Commanche Trail, gender male, with a date of birth of June 5, 1989, and a driver's license with the last four digits of -9705. (Exh. Vol. p. 30). Therefore, this driver record was linked by name, gender, date of birth, driver's license, and street to the jury trial testimony identifying Certain.

[24] Finally, to link this identification to the alleged conviction, the State had Exhibit 15 admitted into evidence, which consisted of several certified court records all bearing the same cause number, 49G20-0812-FC-287180.[1] The charging Information bears the name of white male "Phillip Certain" with a date of birth of June 5, 1989, while the plea agreement's caption refers to "Philip Certain, DOB: 6/5/1989." (Exh. Vol. pp. 34, 36). The judgment/sentencing order and the abstract of judgment bear the name "Philip A. Certain". (Exh. Vol. pp. 38, 40). Therefore, the certified court records are

[1] The cause number and court of conviction alleged in the Information in the instant case differ from those listed in the certified records of the prior conviction, in that the instant Information alleges Marion Superior Court 21, and the certified records of the prior conviction indicate the court of conviction as Marion Superior Court 20. Certain does not contend that this difference undermines the evidence supporting his conviction.

linked to the driver records, and thus to the in-court identification, through name (or similar name), gender, and date of birth. This evidence was sufficient to support the trial court's reasonable inference that Certain had the prior conviction as alleged in the Information for Level 5 felony carrying a handgun without a license. *See id.*

[25] Certain argues that just because he is "white and was born on the same day as the Defendant in the Marion County conviction is not enough" to prove identity. (Appellant's Br. p. 20). We observe that this court has previously held that a matching name and date of birth, without other identifying evidence, is insufficient to prove identity. *Livingston v. State*, 537 N.E.2d 75, 78 (Ind. Ct. App. 1989). However, here, Officer Mikels' in-court identification of Certain, linked to Certain through his driver's record, was additional circumstantial evidence which supported the trial court's reasonable inference that Certain had the alleged prior felony. In addition, while Certain cites numerous cases holding that other types of evidence not present in this case were sufficient to prove identity, he ignores Officer Mikels' testimony and fails to provide any authority indicating that the in-court identification was inadequate additional evidence showing Certain's identity to link him to the previous conviction. His argument is essentially a request that we reweigh the evidence, which is unpersuasive given our standard of review. *See Firestone*, 838 N.E.2d at 473.

CONCLUSION

[26] Based on the foregoing, we conclude that the State proved the offenses beyond a reasonable doubt.

[27] Affirmed.

[28] Robb, J. and Molter, J. concur