

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Lamar Bush,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 8, 2021

Court of Appeals Case No.
21A-CR-842

Appeal from the Starke Circuit
Court

The Honorable Kim Hall, Judge

Trial Court Cause No.
75C01-2009-F2-10

Tavitas, Judge.

Case Summary

- [1] Lamar Bush challenges his convictions for dealing in a narcotic substance and dealing in methamphetamine, Level 2 felonies. Bush argues that the evidence presented at trial is insufficient to sustain his convictions. We do not agree and, accordingly, affirm the trial court.

Issue

- [2] Bush raises two issues, which we consolidate and restate as whether there is sufficient evidence to sustain his convictions.

Facts

- [3] On September 3, 2020, Chief Deputy John Lynch of the Hamlet Police Department, while parked in his patrol car across from a gas station, observed an SUV pull into the gas station and park. Shortly thereafter, a second car, a white Buick driven by Bush, arrived and pulled alongside the first vehicle. Bush exited the Buick and walked up to the SUV, at which point Deputy Lynch could no longer see what Bush was doing. The SUV then departed, and Bush moved his car to a different area of the parking lot. Bush opened a rear car door, appeared to manipulate something inside the car, and then did the same inside the trunk. Deputy Lynch watched as Bush got into the driver's seat and drove the white Buick away.
- [4] As Bush was driving away, Deputy Lynch followed and was able to make out the expired registration sticker on the license plate of the white Buick. Deputy Lynch further observed that the lightbulb above the license plate was

inoperable. Deputy Lynch effectuated a traffic stop. During the stop, Deputy Lynch noted that Bush and his passenger appeared to be nervous. Deputy Lynch requested backup from Deputy Jack Hudgens. While Deputy Lynch was writing a citation for the expired license plate and an inoperative license plate light, Deputy Hudgens arrived on the scene, accompanied by a canine officer. An open-air sniff revealed the presence of narcotics in the vehicle.

[5] Officers searched the car and discovered: (1) empty sandwich bags; (2) a glass pipe; (3) a scale; (4) a tourniquet; (5) several syringes; (6) 16.94 grams of heroin in the trunk; and (7) three bags of methamphetamine, the largest bag weighing 82.58 grams. Combined, the three bags of methamphetamine weighed 134.51 grams. One of the bags was found behind the driver's seat, and two were located in the trunk, where the heroin was also located.

[6] Bush and his passenger were arrested. While still at the scene, Bush informed officers that he and his passenger won \$10,000 at a casino and used the money to purchase the drugs with the intent of reselling them. Bush subsequently rendered a different version of events, wherein an unknown male got into the Buick, provided the drugs, and then threatened Bush and his family with harm if Bush did not deliver the drugs in accordance with the unknown male's instructions. Bush explained that the unknown male provided a so-called burner phone and that Bush threw the phone out of his car window once he was being pursued by police. Officers did not recover any such phone.

[7] On September 8, 2020, the State charged Bush with Count I, dealing in a narcotic drug, a Level 2 felony; Count II, dealing in methamphetamine, a Level 2 felony; Count III, possession of a narcotic drug, a Level 4 felony; and Count IV, possession of methamphetamine, a Level 3 felony. After a jury trial, during which Bush represented himself, a jury convicted Bush on all counts on March 19, 2021. The trial court entered judgments on Counts I and II but declined to enter judgments on Counts III and IV. The trial court then sentenced Bush to fifteen years on each count, to be executed in the Department of Correction and to run concurrently. Bush now appeals.

Analysis

[8] Bush contends that the evidence produced at trial was insufficient to sustain his convictions for dealing methamphetamine and dealing in a narcotic drug. Sufficiency of evidence claims “warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility.” *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citing *Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994)). “. . . [W]e consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence.” *Id.* (citing *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). “We will affirm a conviction if there is substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt.” *Id.* We affirm the conviction “. . . unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of

innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007)).

[9] Bush was convicted of dealing in a narcotic drug and dealing in methamphetamine. Both charges involve possession with an intent to distribute.

A person who . . . possesses, with intent to . . . deliver . . . cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II; commits dealing in cocaine or a narcotic drug. . . . The offense is a Level 2 felony if the drug is heroin and the amount of heroin involved, aggregated over a period of not more than ninety (90) days, is at least twelve (12) grams.

Ind. Code § 35-48-4-1(a)(2); -(e)(3).

A person who . . . possesses, with intent to . . . deliver . . . methamphetamine, pure or adulterated; commits dealing in methamphetamine. . . . The offense is a Level 2 felony if . . . the amount of the drug involved is at least ten (10) grams. . . .

I.C. § 35-48-4-1.1(a)(2); -(e)(1).

[10] Bush’s arguments with respect to the dealing methamphetamine and dealing in a narcotic charges are: (1) the heroin and some of the methamphetamine were found in the trunk of the vehicle; (2) Bush did not own the vehicle; (3) no testimony was presented that Bush knew that the methamphetamine was located in the trunk or in the back seat of the vehicle or that the heroin was located in the trunk; and (4) no testimony was presented that Bush possessed

the intent to distribute the methamphetamine or the heroin. Accordingly, Bush challenges the sufficiency of the evidence to establish: (1) his possession of the drugs; and (2) his intent to distribute the drugs.

I. Constructive Possession

[11] Possession can be either actual or constructive. *See, e.g., Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011) (citing *Goodner v. State*, 685 N.E.2d 1058 (Ind. 1997)). We consider the matter here to be one of constructive possession.¹ “For the State to prove constructive possession, it must prove the defendant had the intent and capability to maintain dominion and control over the contraband.” *Parks v. State*, 113 N.E.3d 269, 273 (Ind. Ct. App. 2018) (citing *Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997), *modified on reh’g on other grounds*, 685 N.E.2d 698 (Ind. 1997)).

[12] We begin by addressing Bush’s capability to maintain dominion and control over the contraband. “The capability requirement is met when the state shows 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) (citing *Lampkins*, 682 N.E.2d at 1275). It has long been established that the mere fact

¹ The State does argue that the evidence established actual possession. We cannot agree. “To show actual possession, the State must show that the defendant had ‘direct physical control over the [contraband].’” *Deshazier v. State*, 877 N.E.2d 200, 205 (Ind. Ct. App. 2007) (quoting *Bradshaw v. State*, 818 N.E.2d 59, 62 (Ind. Ct. App. 2004)), *trans. denied*. The record does not support such a showing here.

that contraband is located in a car's trunk does not preclude the establishment of the possession element:

The defendant contends that he was not capable of maintaining dominion and control over the cocaine because it was in the trunk of the vehicle. . . . Although the defendant contends that he could not reach the cocaine in the trunk of the car when he was stopped, he did possess the key that opened it The evidence is sufficient to support the jury's conclusion that the defendant had constructive possession of the cocaine.

Goliday, 708 N.E.2d at 6. In the instant matter, Bush had the keys to the trunk, and, indeed, Deputy Lynch testified to seeing Bush open the trunk and appear to manipulate its contents. It is apparent that Bush had the capability to reduce the contraband in the trunk to his control and dominion, even more so with respect to the methamphetamine recovered from the Buick's cabin.² *See, e.g., Gooden v. State*, 401 N.E.2d 93, 96 (Ind. Ct. App. 1980) (holding that there is possession "whether the defendant has the power, by way of legal authority or in a practical sense, to control the place where, or the item in which, the substance is found").

[13] We next address the evidence concerning Bush's intent to maintain dominion and control over the contraband. "To prove intent to maintain dominion and

² Furthermore, it is not important that Bush was not the owner of the white Buick. He possessed it and was driving it, thereby demonstrating the requisite possessory interest. Just as car ownership, standing alone, is insufficient to demonstrate legal possession of the car's contents, so too is lack of ownership, standing alone, insufficient to categorically absolve a driver of legal possession of the car's contents. *See, e.g., Godar v. State*, 643 N.E.2d 12, 14-15 (Ind. Ct. App. 1994).

control, there must be additional circumstances supporting the inference of intent.” *Parks*, 113 N.E.3d at 273 (citing *Lampkins*, 682 N.E.2d at 1275).

Proof of dominion and control, and therefore knowledge, of contraband has been found through a variety of means: (1) incriminating statements by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant’s plain view, and (6) the mingling of the contraband with other items owned by the defendant. *Henderson v. State*, 715 N.E.2d 833, 836 (Ind. 1999). Where a passenger is charged with possession, the evidence is more likely to be sufficient when the passenger could see the contraband and was in the best position to access it, and when no evidence clearly indicates it belonged to or was under the control of another occupant of the vehicle. *Deshazier v. State*, 877 N.E.2d 200, 208 (Ind. Ct. App. 2007), *trans. denied*. “When constructive possession is alleged, the State must demonstrate the defendant’s knowledge of the contraband.” *Bradshaw v. State*, 818 N.E.2d 59, 63 (Ind. Ct. App. 2004).

Id.

[14] Here, Bush’s control over the car and its contents was non-exclusive, and, thus, “intent to maintain dominion and control may be inferred from additional circumstances that indicate the person knew of the presence of the contraband.” *Smith v. State*, 787 N.E.2d 458, 460 (Ind. Ct. App. 2003) (citing *White v. State*, 772 N.E.2d 408, 413 (Ind. 2002)). We further note that the set of circumstances that can be used to demonstrate a defendant’s knowledge of the presence of contraband, as listed above, is not an exhaustive list. *Id.*

[15] The evidence presented at trial that Bush was aware of the presence of the narcotics includes: (1) Bush told Deputy Lynch that he purchased the narcotics; (2) Bush's second version of the events regarding the unknown male entering the vehicle suggests that Bush knew that the narcotics were present in the car and that Bush was supposed to deliver them to a third party; (3) the passenger's testimony as well as her statements to officers at the scene indicates that she and Bush "pick[ed] up drugs" in South Bend (Tr. Vol. III p. 83); (4) Bush opened the trunk; (5) Bush's passenger testified that Bush instructed her to grab the methamphetamine that was behind the driver's seat; (6) one of the bags of methamphetamine was located behind the driver's seat in close proximity to Bush and in plain sight; (7) Deputy Lynch's testimony that Bush was acting in a nervous manner at the beginning of the traffic stop; (8) the presence of the plastic bags in the driver's side door; and (9) the presence of drug paraphernalia in both the cabin and trunk of the car. Based on this evidence, it was reasonable for a jury to infer that Bush knew about the drugs. Bush's arguments fail, and we conclude that sufficient evidence exists to establish that Bush had constructive possession of the illegal drugs.

II. Intent to Distribute

[16] Finally, with respect to evidence of Bush's intent to distribute, we recall that: "Our courts have long held that evidence of the illegal possession of a relatively large quantity of drugs may support a conviction for possession with intent to deliver as a larger quantity creates an inference that the drugs are not held for personal consumption." *Elvers v. State*, 22 N.E.3d 824, 835 (Ind. Ct. App. 2014)

(internal quotation omitted). “The more narcotics a person possesses, the stronger the inference that he intended to deliver it and not consume it personally.” *Davis v. State*, 791 N.E.2d 266, 270 (Ind. Ct. App. 2003) (quoting *Love v. State*, 741 N.E.2d 789, 792 (Ind. Ct. App. 2001)), *trans. denied*. “Intent, being a mental state, can only be established by considering the behavior of the relevant actor, the surrounding circumstances, and the reasonable inferences to be drawn from them.” *Id.*

[17] Deputy Hudgens testified that in his two-and-a-half years as a police officer, despite frequent discoveries of illegal drugs, he had never found in excess of 80 grams of methamphetamine and only once made a discovery of heroin in excess of ten grams. Notwithstanding the fact that Bush admitted to police officers that he intended to resell the drugs, the amount of the drugs was significant and the reasonable inference is that the drugs were not for personal use. Moreover, the proximity of the drugs to the recovered sandwich bags, which are frequently used to package drugs, adds to the circumstantial evidence of intent to distribute. It was reasonable for the jury to infer that Bush possessed the intent to distribute the drugs. Accordingly, there was “substantial evidence of probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt.” *Powell*, 151 N.E.3d at 262.

Conclusion

[18] The evidence is sufficient to sustain Bush's convictions for dealing methamphetamine and dealing a narcotic. We affirm.

[19] Affirmed.

Mathias, J., and Weissmann, J. concur.