

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kevin Leath,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 6, 2022

Court of Appeals Case No.
21A-CR-2091

Appeal from the Clinton Circuit
Court

The Honorable Bradley K. Mohler,
Judge

Trial Court Cause No.
12C01-2005-F5-347

Bradford, Chief Judge.

Case Summary

[1] Kevin Leath and Toshawa Leath are married and have children together. Around August of 2019, Leath moved out of the family home and Toshawa acquired a protective order forbidding Leath from contacting her or being on her property. After Leath moved out, Toshawa saw Leath on the property many times and observed him exit the family home's cellar on some occasions. Toshawa also heard noises and smelled cigarette smoke coming from the cellar at times. On May 4, 2020, one of Leath's children saw Leath and Ryan Winchester, a neighbor, enter the cellar and called 911. Shortly after he arrived, Frankfort Police Officer Beau Smith observed Leath and Winchester as they exited the cellar. Leath immediately informed Officer Smith that there was an active warrant for his arrest and Officer Smith arrested him shortly after confirming that was true. Officer Smith then entered the cellar and discovered cocaine in plain view and that someone had been living in the cellar. Ultimately, Leath was convicted of Level 5 felony possession of cocaine. Leath appeals, arguing that there is insufficient evidence to support his conviction. Because the evidence is sufficient, we affirm.

Facts and Procedural History

[2] Leath and Toshawa are married and have children together, including seventeen-year-old J.S. In August of 2019, Toshawa and Leath separated, and he stopped living in the family home. Around that same time a protective order was put in place forbidding Leath from contacting Toshawa or visiting her property. Toshawa's home has a small cellar that can only be accessed from outside the

house and was mostly used for storage. The last time either Toshawa or J.S. had gone in the cellar, there had been no bed, clothing, or food in it. After Leath moved out, Toshawa and J.S. saw him on the property many times. Toshawa had also seen Leath exit the cellar in the past and had smelled cigarette smoke and heard noises coming from the cellar at times. On May 4, 2020, J.S. saw Leath in their back yard talking to Winchester, a neighbor who lived in a house behind theirs. J.S. saw the two men enter the cellar and called 911. Officer Smith responded to the call and, as he was talking to Toshawa outside the home, the cellar door opened and Leath and Winchester emerged. Leath approached Officer Smith and informed him that there was an active warrant for his arrest. Officer Smith confirmed that fact and placed Leath under arrest.

[3] Officer Smith then entered the cellar to confirm that no one else was present and, based on his previous dealings with either Leath or Winchester, to ensure that the two had not left any drugs behind. Though no one else was in the cellar, Officer Smith discovered that someone appeared to have been living there. Officer Smith found a bed, outfitted with pillows and blankets; clothing on a rack; food; electronics; an Xbox 360; and numerous other personal items inside the cellar. Officer Smith also discovered a digital scale, with white residue on top of it, lying in plain view on top of the bed. Subsequent testing confirmed that the white residue on the scale was cocaine. Leath informed police that the scale was his but claimed that he had only used it to weigh pennies to sell on eBay. Leath eventually claimed that he had given Winchester the scale when they were both down in the cellar so that he could “do a line,” though he also claimed that the

cocaine should not have still been down in the cellar and that it belonged to Winchester. State's Ex. 6 at 12:10–12:50.

- [4] The State charged Leath with Level 6 felony possession of cocaine, with the intent to seek an enhanced penalty based on Leath's prior conviction for Class B felony dealing in cocaine, and Class C misdemeanor possession of paraphernalia. A jury found Leath guilty of possession of cocaine and not guilty of possession of paraphernalia. Leath admitted to the prior conviction, which enhanced his conviction to Level 5 felony possession of cocaine.

Discussion and Decision

- [5] Leath contends that the State failed to produce sufficient evidence to sustain his conviction for possession of cocaine. When evaluating a challenge to the sufficiency of the evidence to support a conviction, we do not “reweigh the evidence or judge the credibility of the witnesses,” nor do we intrude within the factfinder’s “exclusive province to weigh conflicting evidence.” *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001). Rather, a conviction will be affirmed unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000). The evidence need not exclude every reasonable hypothesis of innocence, but instead, “the evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” *Pickens v. State*, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001). When we are confronted with conflicting evidence, we must consider it “most favorably to the [factfinder’s] ruling.” *Wright v. State*, 828 N.E.2d 904, 906 (Ind. 2005).

[6] In order to convict Leath of Level 6 possession of cocaine, the State was required to prove that he “knowingly or intentionally” possessed cocaine. Ind. Code § 35-48-4-6(a). “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.” Ind. Code § 35-41-2-2(b). He “engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so.” Ind. Code § 35-41-2-2(a). Further, in order to enhance Leath’s conviction to the Level 5 felony, the State was required to prove that “an enhancing circumstance” applied. *See* Ind. Code § 35-48-4-6-(b)(2). Leath admitted to a prior conviction before trial which supported the enhancement of his conviction to a Level 5 felony. *See Id.*

[7] “Possession can be actual or constructive.” *Parks v. State*, 113 N.E.3d 269, 273 (Ind. Ct. App. 2018). As the cocaine was not recovered from Leath’s person, Leath did not have actual possession of the cocaine at the time of his arrest. We must therefore determine whether the State proved that he constructively possessed it. *Id.* It is accepted that a factfinder may infer that a defendant “had the capability to maintain dominion and control over contraband from the simple fact that the defendant had a possessory interest in the premises on which an officer found the item.” *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011).

However, the law takes a different view when applying the intent prong of constructive possession. When a defendant’s possession of the premises on which drugs are found is not exclusive, then the inference of intent to maintain dominion and control over the drugs “must be supported by additional circumstances pointing to the defendant’s knowledge of the nature of the controlled substances and their presence.” [*Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997), *on reh’g*, 685 N.E.2d 698 (Ind. 1997)]. The

“additional circumstances” have been shown by various means: (1) incriminating statements made 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).

Gee v. State, 810 N.E.2d 338, 341 (Ind. 2004).

[8] Leath argues that the State failed to present sufficient evidence from which a jury could reasonably infer that he had a possessory interest in the cellar where law enforcement found cocaine, and therefore failed to prove that he had constructive possession of the cocaine. The cellar where the cocaine was found was a small, lightly furnished room, located underneath Leath’s estranged wife’s home. Toshawa had observed Leath exiting the cellar on prior occasions after he no longer lived with her in the home. Leath would also have known, because he lived on the property previously, that the cellar was unoccupied, usually left unlocked, and that Toshawa and their children rarely entered the cellar. Leath also admitted that the scale, which had cocaine on it and was recovered from the cellar, was his. *See Jones v. State*, 807 N.E.2d 58, 65–66 (Ind. Ct. App. 2006) (“And again, personal items of Jones were found inside the residence, and Johnson identified the duplex as Jones’ residence. Based on that evidence, the State proved that Jones had a possessory interest in the premises.”)

[9] Leath argues that “[i]t is just as likely, however, that Winchester, not Leath, had a possessory interest in the cellar.” Appellant’s Br. p. 13. Specifically, Leath points to the facts that Winchester walked through Toshawa’s yard frequently; the cellar

door did not have a lock; the cellar door faced Winchester's residence; and, Toshawa had observed Winchester, to whom she had given her internet password, standing on the back porch using her internet. Leath's argument amounts to nothing more than a request that we reweigh the evidence, which we will not do. *Alkhalidi*, 753 N.E.2d at 627. The State provided sufficient evidence for the jury to conclude that Leath had a possessory interest in the cellar, and therefore had constructive possession of the cocaine.

[10] Further, even if Leath had no possessory interest in the cellar, the State has provided sufficient evidence to establish constructive possession by "pointing to the defendant's knowledge of the nature of the controlled substances and their presence." *Gee*, 810 N.E.2d at 341. Leath was observed entering the cellar with Winchester and exiting the cellar with Winchester. Immediately after police observed Leath and Winchester exit the cellar, police discovered cocaine in plain view in the cellar. "[A]n inference of intent to maintain dominion or control" is supported as long as a "contraband's incriminating character" is "immediately apparent" and a defendant is in "proximity to contraband in plain view[.]" *Gray*, 957 N.E.2d at 175 (quotations omitted). Again, Leath admitted to owning the scale on which the cocaine was found, another circumstance from which the jury could infer that Leath constructively possessed the cocaine. *See Gee*, 810 N.E.2d at 341. Leath also admitted that he was aware of the presence of cocaine in the cellar.

[11] Leath argues that his behavior does not "point to the defendant's knowledge of the nature of the controlled substances and their presence." *Id.* Specifically, Leath

points to the fact that, upon exiting the cellar with Winchester and noticing the officer observing him, he approached Officer Smith and informed him that there was an active warrant for his arrest. First, one could just as easily infer that Leath's decision to be forthcoming regarding the warrant for his arrest is suggestive of an intent to redirect Officer Smith's attention away from the cellar. Second, this is another request that we reweigh the evidence, which we will not do. *See Alkhalidi*, 753 N.E.2d at 627.

[12]The judgment of the trial court is affirmed.

Najam, J., and Bailey, J., concur.