MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Zachariah Charles Kiskaden,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 14, 2023

Court of Appeals Case No. 22A-CR-2949

Appeal from the Huntington Circuit Court

The Honorable Davin G. Smith, Judge

Trial Court Cause No. 35C01-2208-F2-251

Memorandum Decision by Judge Crone
Judges Robb and Kenworthy concur.

Crone, Judge.

Case Summary

[1] Zachariah Charles Kiskaden appeals his convictions, following a jury trial, for level 2 felony dealing in a narcotic drug and level 2 felony dealing in methamphetamine. He contends that the State presented insufficient evidence to support his convictions and also that fundamental error occurred during his trial. Finding the evidence sufficient and that he has waived our review of his fundamental error claim, we affirm.

Facts and Procedural History

[2] On August 3, 2022, Huntington Police Department officers executed a search warrant at a house that Kiskaden and his wife Chelsea were "rent[ing]" from Troy Riley. Tr. Vol. 2 at 233. The house belonged to Riley's mother, and Kiskaden's "rent" was providing Riley with seven grams of heroin each month. *Id.* at 234. At the time the search warrant was executed, Riley did not possess a key to the house and had no belongings at the house.

[3] When officers entered the house, Kiskaden was in the bathroom. Inside the bathroom, officers found a digital scale, a glass smoking device, and a canvas bag that contained individual baggies. The baggies contained a white powdery substance, a crystal substance, or a tan powdery substance. Subsequent forensic testing revealed that the baggies contained 35.97 grams of fentanyl and 9.07 grams of methamphetamine. State's Ex. 34. Officers also found a notebook, with a small ledger inside, on the couch in the living room.

[4] Officers interviewed both Kiskaden and Chelsea. Although Kiskaden initially told police that he did not know anything about the drugs found in the bathroom, he then indicated that they might belong to Chelsea or Riley. He asked the interviewing officer "how much was found" and stated that "he didn't want to admit to anything and then find out that [police] had found 59 grams of dope" in the house. Tr. Vol. 3 at 29. Kiskaden admitted that he had used drugs in the home shortly before it was searched.

[5] The State charged Kiskaden with one count of level 2 felony dealing in a narcotic drug and one count of level 2 felony dealing in methamphetamine. The State also alleged that Kiskaden was a habitual offender. The State later amended both dealing counts to reflect that fentanyl was the narcotic drug involved in the first count, and that the weight of the methamphetamine in the second count was less than ten grams, but the offense was still a level 2 felony because Kiskaden had a prior dealing conviction.

[6] A jury trial began in November 2022. The jury found Kiskaden guilty as charged. The jury also found that Kiskaden was a habitual offender. The trial court sentenced Kiskaden to an aggregate term of forty-eight years. This appeal ensued.

Discussion and Decision

Section 1 – The State presented sufficient evidence to support the convictions.

[7] Kiskaden first challenges the sufficiency of the evidence to support both of his dealing convictions.[1] In reviewing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of witnesses, and we consider only the evidence that supports the judgment and the reasonable inferences arising therefrom. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). It is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)). "We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt." *Bailey*, 907 N.E.2d at 1005.

[8] To convict Kiskaden, the State was required to prove that he knowingly or intentionally possessed, with intent to deliver, fentanyl having a weight of at least ten grams, Ind. Code § 35-48-4-1(a)(2), -(e)(1), and that he knowingly or intentionally possessed, with intent to deliver, methamphetamine having a weight of at least five grams but less than ten grams, and an enhancing

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[1] Kiskaden's methamphetamine conviction was enhanced to a level 2 felony based upon a prior conviction for dealing in a controlled substance. He was also found to be a habitual offender. However, he "does not challenge the jury's finding of his prior conviction that enhanced Count II and also does not challenge the jury's finding of the Habitual Offender Enhancement." Appellant's Br. at 14 n.3.

circumstance applies. Ind. Code § 35-48-4-1.1(a)(2), -(e)(2). Kiskaden "solely challenges the issue of whether or not the State proved that he constructively possessed [the] two illegal substances." Appellant's Br. at 17.

[9] To prove that a defendant possessed contraband, the State may prove either actual or constructive possession. *Eckrich v. State*, 73 N.E.3d 744, 746 (Ind. Ct. App. 2017), *trans. denied*. Actual possession occurs "when a person has direct physical control over [an] item." *Sargent v. State*, 27 N.E.3d 729, 733 (Ind. 2015). When a person does not have direct physical control over an item, as was the case here, the person may still have constructive possession of the item if he "'has (1) the capability to maintain dominion and control of [it]; and (2) the intent to maintain dominion and control over it.'" *Id*. (quoting *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011)).[2]

[10] "A trier of fact 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*, 957 N.E.2d at 174. This inference is permitted even when that possessory interest is not exclusive. *Id*. Here, Kiskaden clearly had a nonexclusive possessory interest in the home he was residing with Chelsea in which the

[2] We decline the State's invitation to also find that the State presented sufficient evidence that Kiskaden had actual possession of the drugs found in the bathroom, as we think that the jury more likely resolved this case on a constructive possession theory.

contraband was found and therefore, the jury could infer that he had the capability to maintain dominion and control over the contraband.

[11] "A trier of fact may likewise infer that a defendant had the intent to maintain dominion and control over contraband from the defendant's possessory interest in the premises, even when that possessory interest is not exclusive." *Id*. However, when possession of the premises is non-exclusive, "the State must support this second inference with additional circumstances pointing to the defendant's knowledge of the presence and the nature of the item. *Id*. "Some of these recognized additional circumstances include: (1) incriminating statements made by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the contraband; (5) the contraband being in plain view; and (6) the location of the contraband being in close proximity to items owned by the defendant." *Negash v. State*, 113 N.E.3d 1281, 1291 (Ind. Ct. App. 2018). These enumerated circumstances are nonexhaustive; ultimately, our question is whether a reasonable factfinder could conclude from the evidence that the defendant knew of the nature and presence of the contraband. *Johnson v. State*, 59 N.E.3d 1071, 1074 (Ind. Ct. App. 2016).

[12] Additional circumstances support a reasonable inference that Kiskaden knew of the nature and presence of the drugs found in the home. First, Kiskaden made incriminating statements about the drugs. Although he initially denied awareness of any drugs, he later admitted to using those same types of drugs in the home shortly before police arrived. Moreover, he questioned officers about

the quantity of drugs found during the search and indicated that he did not want to admit to anything and later learn that officers had found "59 grams of dope." Tr. Vol. 3 at 29. This estimate of what had potentially been found by officers was very close to the amount of drugs Kiskaden would have possessed that day, considering that police recovered an aggregate of forty-four grams of drugs, that Riley testified that Kiskaden had paid his rent by giving him seven grams of drugs, and Kiskaden admitted to using some of the drugs just prior to the search.

[13] Second, there was some evidence suggestive of a distribution/dealing setting. In addition to finding a large quantity of drugs in the home, officers located numerous empty small plastic baggies and a digital scale. Riley testified that Kiskaden would deliver drugs to him packaged in baggies just like those found in the home. Chelsea further testified that she saw Kiskaden and Riley at the kitchen island earlier that day with the bag of drugs when Kiskaden was paying the rent to Riley.

[14] Finally, the drugs were found in close proximity to Kiskaden as he was found in the bathroom and the bag of drugs was found just inside the bathroom door. Based upon the foregoing, we have little difficulty concluding that there was sufficient evidence from which the jury could infer that Kiskaden had both the capability and intent to maintain dominion and control over the contraband found in the home. We conclude that the State presented sufficient evidence to prove constructive possession.

Section 2 – Kiskaden has waived his claim of fundamental error due to lack of cogent argument.

[15] We next address Kiskaden's broad claim that a "voluminous amount of fundamental error" occurred during trial. Appellant's Br. at 21. Specifically, he argues that "the trial court did not properly evaluate [his] arguments regarding his motion to dismiss pertaining to a [cellphone] search warrant issued by the Honorable Jennifer E. Newton, actions committed by the State relating [to] witness manipulation, and verbal denial of [his] Motion to Suppress." *Id.* at 18. Regarding each of these alleged errors, however, Kiskaden fails to adequately develop an argument, cite any legal authority, or explain in a cogent manner the doctrine of fundamental error or how it applies here. This is simply inadequate, and therefore he has waived our review. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring that contentions in appellant's brief be supported by cogent reasoning and citations to authorities); *see also Griffith v. State*, 59 N.E.3d 947, 958 n.5 (Ind. 2016) (noting that defendant waives issues by failing to provide cogent argument). His convictions are affirmed.

[16] Affirmed.

Robb, J., and Kenworthy, J., concur.