

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Tauheed T. Sabir,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 14, 2023

Court of Appeals Case No.
22A-CR-2891

Appeal from the Marion Superior
Court

The Honorable Jennifer Harrison,
Judge

The Honorable Steven Rubick,
Magistrate

Trial Court Cause No.
49D20-1907-F2-28256

Memorandum Decision by Judge Riley
Judges Bradford and Weissmann concur.

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Defendant, Tauheed Tawan Sabir (Sabir), appeals his convictions for Count I, dealing in methamphetamine, a Level 2 felony, Ind. Code § 35-48-4-1.1(a)(1); Count II, possession of methamphetamine, a Level 3 felony, I.C. § 35-48-4-6.1(a); Count III, possession of a controlled substance with an enhancing circumstance, a Level 6 felony, I.C. § 35-48-4-7(a); and Count V, possession of a firearm by a serious violent felon, a Level 4 felony, I.C. § 35-47-4-5(c).
- [2] We affirm in part, reverse in part, and remand with instruction.

ISSUES

- [3] Sabir presents this court with three issues on appeal, which we restate as:
- (1) Whether the State presented sufficient evidence beyond a reasonable doubt to sustain his convictions for dealing in methamphetamine and possession of a firearm by a serious violent felon;
 - (2) Whether the trial court erred when it failed to inquire if Sabir wished to exercise his right to allocution; and
 - (3) Whether the trial court erred when it merged, rather than vacated, Sabir's conviction for possession of methamphetamine with his conviction for dealing in methamphetamine.

FACTS AND PROCEDURAL HISTORY

- [4] On July 2, 2019, Sabir was on home detention with Marion County Community Corrections. That day, four police officers with the Indianapolis Metropolitan Police Department's flex team assisted community corrections officer Jill Jones (Jones) with a home visit and compliance check at Sabir's residence at 2927 North Capitol Avenue, in Indianapolis, Indiana. As the officers approached Sabir's residence, Officer Craig Solomon (Officer Solomon) observed Sabir standing by the front passenger side of a black SUV parked on the street in front of his residence. The black SUV was the only vehicle parked near the residence and Sabir was the only person on the street at that time.
- [5] Sabir then walked down an alley between his residence and another building. While in the alley, Officer Richard Stratman (Officer Stratman) noticed Sabir make a throwing gesture towards an open window of his house. Sabir continued to walk towards the front of his residence while Officer Stratman informed the other officers of his observation over the radio. When Officer Solomon arrived in the alley, he noticed a window unit air conditioner sitting in the window towards which Sabir had made the throwing gesture. Upon further investigation, Officer Solomon saw that cardboard was taped on either side of the window unit air conditioner. While the cardboard was intact on the left side of the window unit, the right side was peeled up and damaged. When he looked inside the room, Officer Solomon observed an orange pill bottle directly underneath where the cardboard had been punched out. The officer

maintained a visual observation of the pill bottle until he was notified that the protective sweep of the residence was concluded.

[6] Meanwhile, Sabir approached the officers outside his residence. An officer detained Sabir pursuant to a warrant and, while conducting a search of Sabir's person, the officer found \$1,976 in mixed denominations in Sabir's pocket. After securing Sabir, the officers conducted a sweep of Sabir's residence where the officers located three other individuals: Brittany Hughes (Hughes) and two minors. Inside the house and near the window where Sabir had been gesturing, the officers located the orange pill bottle, which had a prescription label in Sabir's name and contained Xanax and methamphetamine pills. The methamphetamine pills, which weighed 7.81 grams, were pink and blue with a double C-logo. A chair and a small amount of marijuana were also located in that room.

[7] Outside the residence, officers observed that the black SUV had not been driven in a while, had an expired license plate that did not match the vehicle, had an expired registration, was surrounded by debris, and had flat and mud-caked tires. Determining that the vehicle was a nuisance, the officers decided to have the vehicle towed. During the inventory search of the vehicle, the officers located a repair invoice for the vehicle in Hughes' name and mail in another individual's name, but all documents listed Sabir's address. They also found two bags: a black bag on the rear driver's side floorboard and a white backpack on the rear driver's side seat. The black bag contained 111.56 grams of methamphetamine pills that matched those found in the orange pill bottle inside

the residence and a digital scale. The white backpack contained a purple bag which, in turn, contained a handgun, a loose empty and rusty magazine, ammunition, and a box of plastic sandwich bags. Subsequent latent fingerprint testing of nine prints revealed one of Sabir's fingerprints on the loose magazine.

[8] On July 19, 2019, the State filed an Information, charging Sabir with Count I, dealing in methamphetamine, a Level 2 felony; Count II, possession of methamphetamine, a Level 3 felony; Count III, possession of a controlled substance with an enhancing circumstance, a Level 6 felony; and Count IV, possession of marijuana, a Class B misdemeanor. On November 16, 2019, the State amended the Information and added Count V, possession of a firearm by a serious violent felon, a Level 4 felony. On October 25, 2022, the State moved to dismiss the possession of marijuana charge, which was granted by the trial court the following day. On October 26, 2022, the trial court conducted a bifurcated jury trial. At the close of the evidence, the jury returned a guilty verdict for Counts I, II, and III. As to Count V, the jury found that Sabir unlawfully possessed a handgun and Sabir waived a jury trial for the second phase of the serious violent felon determination. On November 15, 2022, the trial court conducted the second phase of the serious violent felon proceeding and found Sabir guilty as to that charge. The trial court immediately proceeded to the sentencing hearing. During the hearing, the trial court did not ask Sabir if he wished to make a statement in allocution. At the close of the hearing, the trial court merged the dealing in methamphetamine conviction with the possession of methamphetamine conviction at Sabir's request. The court

sentenced Sabir to fifteen years for dealing in methamphetamine, one year for possession of a controlled substance with an enhancing circumstance, and four years for possession of a firearm by a serious violent felon, with sentences to be served concurrently.

[9] Sabir now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

[10] Sabir contends that the State failed to provide sufficient evidence beyond a reasonable doubt to sustain his convictions for dealing in methamphetamine and possession of a firearm by a serious violent felon. When reviewing the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor assess the credibility of witnesses. *Fix v. State*, 186 N.E.3d 1134, 1138 (Ind. 2022). “When there are conflicts in the evidence, the jury must resolve them.” *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022). Thus, on appeal, we consider only the probative evidence and the reasonable inferences supporting the conviction and will affirm “unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Fix*, 186 N.E.3d at 1138 (quoting *Jackson v. State*, 50 N.E.3d 767, 770 (Ind. 2016)). That is, the evidence need not “overcome every reasonable hypothesis of innocence.” *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007). “The evidence is sufficient if an inference may reasonably be drawn from it to support the

verdict.” *Canfield v. State*, 128 N.E.3d 563, 572 (Ind. Ct. App. 2019), *trans. denied*.

A. *Dealing in Methamphetamine*

[11] To convict Sabir of dealing in methamphetamine, the State was required to established that Sabir “knowingly or intentionally possess[ed], with the intent to deliver, methamphetamine, pure or adulterated, said methamphetamine having a weight of at least ten (10) grams.” See I.C. § 35-48-4-1.1(a)(1). At trial, the State argued, and the jury agreed, that the circumstances showed Sabir constructively possessed, with the requisite intent to deal, the methamphetamine found inside the vehicle parked in front of Sabir’s residence.

[12] Sabir only disputes the possession element of the dealing charge. Possession can be either actual or constructive. Actual possession occurs when a person has direct physical control over the contraband in question. *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011). When actual possession cannot be shown, such as in Sabir’s case, then the conviction may instead rest on proof of constructive possession. *Id.* Constructive possession occurs when a person has both the intent and the capability to maintain dominion and control over the contraband. *Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997). To prove capability, the State must demonstrate that the defendant is able to reduce the contraband to his or her personal possession. *Smith v. State*, 113 N.E.3d 1266, 1270 (Ind. Ct. App. 2018), *trans. denied*. A fact-finder may infer that the capability prong is met if the defendant had a possessory interest, even a non-

exclusive interest, in the premises on which the contraband was found. *Gray*, 957 N.E.2d at 174. In this case, Sabir was standing next to the vehicle in which the illegal substances were located. The car was parked on the street in front of his residence; it was the only vehicle parked near the residence and Sabir was the only person on the street at that time. Although the doors to the vehicle were closed, they were not locked. Documentation found inside the vehicle linked the car to Sabir's residence. Accordingly, as Sabir was standing next to the unlocked vehicle, the illegal substances were within his reach. Thus, Sabir had the ability to reduce the methamphetamine to his personal possession.

[13] To prove intent, the State must establish the defendant's knowledge of the presence of the contraband, which may be inferred from either exclusive dominion and control of the premises or, where as here, if control is not exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. *K.F. v. State*, 961 N.E.2d 501, 510 (Ind. Ct. App. 2012), *trans. denied*. Recognized additional circumstances include: (1) incriminating statements 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 is in plain view; and (6) the location of the contraband is in close proximity to items owned by the defendant. *Griffin v. State*, 945 N.E.2d 781, 784 (Ind. Ct. App. 2011). These factors are not exclusive and ultimately, the State must establish "the probability that the defendant was aware of the presence of the contraband and its illegal character." *Wilkerson v. State*, 918 N.E.2d 458, 462-63 (Ind. Ct. App. 2009).

[14] Contesting the intent element of the constructive possession charge, Sabir argues that his position near the closed door of the vehicle, in the absence of other additional incriminating circumstances, is insufficient to demonstrate he knew that illegal substances were inside the vehicle. In support of his argument, Sabir relies on *Brent v. State*, 957 N.E.2d 648, 649 (Ind. Ct. App. 2011), which he advises stands for the premise that “a defendant’s position near contraband is insufficient to demonstrate constructive possession where contraband and the defendant are separated by the closed door of a vehicle.” (Appellant’s Br. p. 12).

[15] In *Brent*, the defendant was a front seat passenger, rather than the driver. *Id.* at 652. Police officers were investigating a possible illegal drug transaction and initiated a traffic stop. *Id.* Although the vehicle did not stop initially, it did briefly stop next to a parked vehicle and then proceeded on. *Id.* The driver eventually stopped the vehicle, and during the traffic stop, the officers smelled fresh marijuana. *Id.* The driver was arrested for resisting law enforcement, and the passenger, Brent, was removed from the car and handcuffed. *Id.* When an officer returned to the area where the driver had briefly stopped the vehicle, he found a plastic baggie containing marijuana. *Id.* Thereafter, Brent was charged with and convicted of possession of marijuana. *Id.* Contrary to the premise proposed by Sabir, on appeal, our court observed that Brent did not make incriminating statements, the marijuana was not found in close proximity to any items owned by him, and the driver’s flight was beyond Brent’s control. *Id.* at 651. Brent did not flee or make any furtive gestures when the driver finally

stopped the vehicle. *Id.* Moreover, our court attributed any suspicion resulting from the suspect car stopping briefly so close to another vehicle to the driver, and not to Brent. *Id.* Our court noted that the officer did not observe anything thrown out of the vehicle’s passenger side window and did not testify that he observed “a throwing motion.” *Id.* at 651. Finally, our court discussed the trial court’s reliance on the fact that the marijuana was found where the vehicle had briefly stopped and agreed that it was not simply a coincidence that a baggie containing marijuana was found in that spot. *Id.* However, we observed that “[t]he fact that Brent’s driver momentarily stopped the suspect vehicle so that Brent, as the passenger, was sitting (inside the car) in the same spot where [an officer] later found the marijuana outside the car, would not lead a fact-finder to reasonably infer Brent’s constructive possession of the marijuana.” *Id.* at 651-52.

[16] We find *Brent* to be easily distinguishable. While no additional incriminating circumstances were present in *Brent* to permit an inference of the defendant’s dominion and control over the marijuana, in Sabir’s case, we can point to several additional circumstances. Although the black SUV was not listed in Sabir’s name and did not contain any documents with his name, the vehicle did reveal documents which listed his address. It was the only vehicle parked in front of the house and Sabir was the only person on the street. While the record does not contain evidence indicating that Sabir noticed the police officers when he was standing next to the vehicle, a reasonable inference as to his knowledge of their presence can be made as Sabir walked away from the SUV containing

illegal substances and walked into the alley, next to the house. Unlike *Brent*, Sabir made a throwing gesture towards an open window of his house, where further investigation located an orange pill bottle containing methamphetamine. The orange pill bottle contained Xanax and methamphetamine pills, weighing 7.81 grams and having the same color and logo as the methamphetamine pills located in the vehicle. One of the officers of the flex team, who was also involved in the apprehension of Sabir, testified at trial that it is not uncommon for drug dealers to use cars titled to someone else to insulate themselves in case illegal substances are found in the vehicle. He also informed the jury that drug dealers often live with other people, have money that is inversely proportional to the amount of drugs, and split up their main stockpile of drugs while carrying a smaller quantity of drugs that they are actively selling.

[17] Accordingly, based on the evidence before us, we conclude that the jury could reasonably infer that Sabir constructively possessed the methamphetamine located in the black SUV, with intent to deliver, as he had the intent and the capability to maintain dominion and control over the contraband.

B. *Possession of Firearm*

[18] As with the methamphetamine in the black SUV, Sabir, without contesting the capability prong, contends that the State failed to present sufficient evidence beyond a reasonable doubt that he intended to constructively possess the firearm that was located in the vehicle. Again, there are several additional circumstances from which a jury could have reasonably inferred that Sabir

knew the handgun was in the vehicle. Officers first observed Sabir standing near the passenger side of the SUV, with no other people or cars in the vicinity. During an inventory search of the vehicle, officers found documents linking the vehicle to Sabir's address and located the gun inside a backpack, together with a loose empty and rusty magazine, ammunition, and a box of plastic sandwich bags. Subsequent latent fingerprint testing of nine prints revealed one of Sabir's fingerprints on the loose gun magazine Sabir conceded he had touched at one point. Accordingly, based on this evidence and Sabir's concession, the jury could reasonably infer that Sabir constructively possessed the weapon.

II. *Right to Allocution*

[19] Sabir argues that he is entitled to a new sentencing hearing because the trial court failed to provide him with an opportunity to exercise his right of allocution. The "right of allocution" refers to a defendant's right to make a statement on his or her behalf before the trial court issues its sentence. *Abd v. State*, 120 N.E.3d 1126, 1136 (Ind. Ct. App. 2019), *trans. denied*. The right to allocution is codified at Indiana Code section 35-38-1-5, which provides:

When the defendant appears for sentencing, the court shall inform the defendant of the verdict of the jury or the finding of the court. The court shall afford counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant may also make a statement personally on the defendant's own behalf and, before pronouncing sentence, the court shall ask the defendant whether the defendant wishes to make such a statement. Sentence shall then be pronounced, unless a sufficient cause is alleged or appears to the court for delay in sentencing.

A defendant who claims that his right to allocution has been denied faces a “strong burden in establishing his claim.” *Vicory v. State*, 802 N.E.2d 426, 429 (Ind. 2004), *disapproved of on other grounds by Strack v. State*, 186 N.E.3d 99, 103 n.1 (Ind. 2022).

[20] Although the State does not contest that the trial court failed to ask Sabir if he wished to make a statement, the State argues that Sabir waived this claim by failing to object or speak out when the trial court proceeded to sentence him without offering him an opportunity to speak. We agree. In *Robles v. State*, 705 N.E.2d 183, 187 (Ind. Ct. App. 1998), the trial court did not ask Robles or Robles’ counsel if either wished to make a statement prior to sentencing, and Robles did not object. This court concluded that Robles had waived any alleged error for failing to object at sentencing, noting that “[m]oreover, Robles has not made any assertion as to the content of any purported statement that he might have made, how a statement may have benefited him, or that he intended to call any witnesses to testify on his behalf.” *Id.* Our supreme court reached a similar conclusion in *Angleton v. State*, 714 N.E.2d 156, 159 (Ind. 1999), where Angleton failed to object at sentencing to the trial court’s failure to enquire if he wished to make a statement, holding that a defendant “may not sit idly at a sentencing hearing, fail to object to a statutory defect in the proceeding, then seek a new sentencing hearing on that basis on appeal.” The *Angleton* court also noted that Angleton, who had been an attorney, did not contend that he was unaware of his right to allocution or that he would have made a statement if asked. *Id.*

[21] During sentencing, the trial court offered the State the opportunity to present evidence, then inquired with the defense whether it had any evidence. Sabir’s counsel elicited sworn testimony from Sabir related to sentencing and then the State cross-examined Sabir. After the State advised the trial court that it did not have any questions for Sabir, the trial court immediately proceeded to the State’s argument on sentencing. At no point did the trial court ask Sabir if he wanted to make a personal statement on his behalf. *See* I.C. § 35-38-1-5. However, Sabir did not object when the trial court proceeded to sentencing without offering him an opportunity for allocution. Therefore, we conclude that Sabir waived his claim for failing to object at sentencing. *See Robles*, 705 N.E.2d at 187.

III. *Double Jeopardy*

[22] Lastly, Sabir contends—and the State agrees—that the trial court erred when it merged his conviction for dealing in methamphetamine with his conviction for possession of methamphetamine and entered judgment of conviction on both Counts without vacating his possession conviction.

[23] When a defendant is found guilty of both an offense and a lesser-included offense, on separate counts, judgment and sentence may “not be entered against the defendant for the included offense.” I.C. § 35-38-1-6. The merger of offenses does not remedy the double jeopardy violation if a conviction is entered on both counts. *Bass v. State*, 75 N.E.3d 1100, 1103 (Ind. Ct. App. 2017). Instead, the conviction for the included offense must be vacated. *Id.*

[24] We have recently held that possession of methamphetamine is a lesser-included offense of dealing methamphetamine. *Phillips v. State*, 174 N.E.3d 635, 646-47 (Ind. Ct. App. 2021); *see also Mason v. State*, 532 N.E.2d 1169, 1172 (Ind. 1989) (“Possession of a narcotic drug is an inherently included lesser offense of dealing in a narcotic drug[.]”); *Richardson v. State*, 856 N.E.2d 1222, 1230 (Ind. Ct. App. 2006) (finding convictions for possession of methamphetamine and dealing methamphetamine violated double jeopardy because possession was lesser-included offense of dealing), *trans. denied*. At the beginning of Sabir’s sentencing phase, the trial court entered judgment of conviction on both Counts—dealing in methamphetamine and possession of methamphetamine. After argument by the parties, the trial court entered a sentence on each of the Counts Sabir was found guilty of, with sentences to be served concurrently. At the request of Sabir’s counsel, the trial court then merged the possession of methamphetamine conviction with the dealing in methamphetamine conviction. The abstract of conviction describes the conviction for possession of methamphetamine as “Conviction Merged.” (Appellant’s App. Vol. II, p. 26).

[25] We agree with Sabir and the State that the conviction for possession of methamphetamine must be vacated. *Phillips*, 174 N.E.3d at 646-47. As the merging of the two offenses, as was done here, does not remedy the double jeopardy violation when conviction was entered on both Counts, the conviction for the included offense must be vacated. *See Bass*, 75 N.E.3d at 1103. Accordingly, we remand to the trial court with instruction to vacate Count II,

possession of methamphetamine and for the issuing of a new abstract of judgment.

CONCLUSION

- [26] Based on the foregoing, we hold that the State presented sufficient evidence beyond a reasonable doubt to support Sabir's convictions for dealing in methamphetamine and possession of a handgun by a serious violent felon. In addition, we hold that Sabir waived his right to allocution, but we remand to the trial court with instruction to vacate Sabir's conviction for possession of methamphetamine and to issue a new abstract of judgment.
- [27] Affirmed in part, reversed in part, and remanded with instruction.
- [28] Bradford, J. and Weissmann, J. concur