MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jason Scott Palmer,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 18, 2023

Court of Appeals Case No. 22A-CR-1434

Appeal from the Marion Superior Court

The Honorable Charnette D. Garner, Judge

Trial Court Cause No. 49D35-2108-CM-26735

Tavitas, Judge.

Case Summary

[1] Following a bench trial, Jason Scott Palmer was convicted of possession of marijuana, a Class B misdemeanor. Palmer appeals and presents three issues, one of which we find dispositive: whether the State presented sufficient evidence to prove that the substance found in Palmer's vehicle was marijuana. The State concedes that the evidence was insufficient. We agree and reverse.

Issue

[2] We address one issue: whether the State presented sufficient evidence to prove that the substance possessed by Palmer was marijuana.

Facts

[3] On the night of August 28, 2021, Palmer stopped his vehicle on Illinois Street in downtown Indianapolis and blocked two lanes of traffic. Sergeant Jered Hidlebaugh of the Indianapolis Metropolitan Police Department was on patrol at the time and observed Palmer's vehicle. Sgt. Hidlebaugh approached Palmer's vehicle to determine why he was blocking traffic. Sgt. Hidlebaugh eventually learned that Palmer had an outstanding warrant and arrested Palmer thereon. Because Palmer's vehicle was located on a busy street, Sgt. Hidlebaugh had the vehicle towed and conducted an inventory of the vehicle beforehand. During the inventory of the vehicle, the police found a small plastic bag containing what appeared to be marijuana. A forensic chemist

determined that the suspected marijuana contained delta-9 THC[1] but the analysis did not indicate the concentration of delta-9 THC present.

[4] On August 29, 2021, the State charged Palmer with Count I: possession of phencyclidine, a controlled substance, a Class A misdemeanor; Count II, resisting law enforcement, a Class A misdemeanor; and Count III, possession of marijuana with a prior conviction for a drug offense, a Class A misdemeanor. A bench trial was held on June 3, 2022. The trial court granted Palmer's motion for a directed verdict as to Counts I and II but found Palmer guilty of possession of marijuana. Palmer now appeals.

Discussion and Decision

[5] Palmer contends that the State failed to present sufficient evidence to prove beyond a reasonable doubt that the substance found in his vehicle was marijuana. On appeal, 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)). We 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)). "We will affirm a conviction if there is substantial evidence of probative value that would lead a

[1] THC is the common abbreviation for tetrahydrocannabinol, which is the main active chemical in marijuana. *Medina v. State*, 188 N.E.3d 897, 900 n.1 (Ind. Ct. App. 2022); *see also* https://nida.nih.gov/research-topics/cannabis-marijuana (explaining that marijuana contains "[a] mind-altering chemical delta-9-tetrahydrocannabinol (THC) and other related compounds.") (last visited Dec. 21, 2022).

reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Id*. at 263.

[6] To convict Palmer of possession of marijuana, the State was required to prove that he: (1) knowingly or intentionally; (2) possessed; (3) marijuana, pure or adulterated. Ind. Code § 35-48-4-11(a)(1). "Marijuana" is defined by statute as "any part of the plant genus Cannabis whether growing or not; the seeds thereof; the resin extracted from any part of the plant, including hashish and hash oil; any compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin." Ind. Code § 35-48-1-19(a). Importantly, however, "[t]he term [marijuana] does not include: . . . hemp (as defined by IC 15-15-13-6)." *Id*. § 19(b)(6). "Hemp" is in turn defined as:

> the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, **with a delta-9-tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis**, for any part of the Cannabis sativa L. plant.

Ind. Code § 15-15-13-6 (emphasis added). "Accordingly, in Indiana, the difference between a legal substance, such as hemp, and illegal marijuana is determined by the concentration of delta-9-THC in a particular substance: to be illegal, the concentration of delta-9-THC must be more than 0.3%." *Rojo v.*

State, 194 N.E.3d 646, WL 3586526 at *3 (Ind. Ct. App. 2022), *trans. denied*;[2] *see also Fedij v. State*, 186 N.E.3d 696, 708 (Ind. Ct. App. 2022) ("[A]s a matter of Indiana law, the difference between legal hemp and illegal marijuana is determined by the percent concentration of THC in a particular substance: to be illegal, the percent concentration of THC must be more than 0.3%").

[7] In both *Rojo* and *Fedij*, we held that testimony from a witness that a substance was marijuana, without any evidence regarding the percentage of delta-9 THC present in the alleged marijuana, was insufficient to support a conviction for possession of marijuana. *Rojo*, 2022 WL 3586526 at *4; *Fedij*, 186 N.E.3d at 709. The State acknowledges that no such evidence was presented here and concedes on appeal that the evidence is insufficient to support Palmer's conviction for possession of marijuana. We see no reason to decline the State's concession, and we reverse Palmer's conviction accordingly.

Conclusion

[8] The State failed to present sufficient evidence to support Palmer's conviction for possession of marijuana. We, therefore, reverse the judgment of the trial court.

[9] Reversed.

Altice, C.J., and Brown, J., concur.

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[2] Our decision in *Rojo* was originally designated as an unpublished memorandum decision. On September 2, 2022, we issued an order reclassifying our decision as a published opinion. As of the date of this decision, however, Westlaw still indicates, incorrectly, that *Rojo* is an unpublished memorandum decision.