

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT

Mark K. Leeman
Leeman Law Office
Logansport, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General
Steven J. Hosler
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Raychel Davis,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

December 7, 2021

Court of Appeals Case No.
21A-CR-1028

Appeal from the Cass Superior
Court

The Honorable Lisa Swaim, Judge

Trial Court Cause No.
09D02-2011-F4-15

Crone, Judge.

Case Summary

- [1] Raychel Davis appeals her conviction for level 4 felony possession of methamphetamine. She contends that the State presented insufficient evidence

to support her conviction and that the trial court committed fundamental error in instructing the jury. Finding the evidence sufficient and no fundamental error, we affirm.

Facts and Procedural History

- [2] The facts most favorable to the verdict indicate that Davis rented an upstairs bedroom from Richard Baker, who owned a house in Logansport. She had a key to her bedroom and shared the common areas of the house with Baker and another tenant. Baker also had a key to Davis’s bedroom in case he “needed to get into [her] room.” Tr. Vol. 2 at 146. During the evening of November 7, 2020, a few people, including Davis, had gathered at the house to party and do drugs. Around midnight, Davis asked her friend, Nick Army, to drive her to Boone County so that she could “bond her [ex-boyfriend] out of jail.” *Id.* at 134.
- [3] Davis and Army returned to the house around 2:30 a.m. At some point, Baker asked Davis if Army had any methamphetamine to sell him. Davis told Baker that she thought he did. Davis escorted Baker upstairs to her bedroom. While in Davis’s bedroom, Baker purchased two grams of methamphetamine from Army for \$100. *Id.* at 121. At the time of the purchase, Davis was in the room and was “sitting ... beside the bed on the left-hand side.” *Id.* at 123.
- [4] In the early morning on November 8, Logansport Police Department Officers Christopher Rozzi, Tanner Prentice, and Cody Scott went to Baker’s house with an arrest warrant for an individual named Preston Walker, after a car

registered to Walker was observed at the house. Officer Rozzi knocked on the door, which was answered by Baker's adult son, who gave the officers permission to search the house for Walker. Officer Scott stayed in the living room while Officers Rozzi and Prentice began doing protective sweeps of the house. During their sweep of the second floor, Officer Prentice located Davis and Army in her bedroom. When Officer Prentice asked them to stand up from the bed, he saw a "hand-rolled cigarette roach" on the bed where Davis had been sitting. *Id.* 71-72. Based on his experience, Officer Prentice suspected the cigarette to be either marijuana or synthetic marijuana. Officer Prentice saw Davis look down at the cigarette and then sit back down on top of the roach. Officer Prentice believed that Davis was trying to "conceal an illegal substance." *Id.* Officer Prentice ordered Davis to stand up, handcuffed her, and read her a *Miranda* warning. Davis admitted to Officer Preston that the cigarette contained synthetic marijuana. Army was also subsequently handcuffed, and Officer Prentice led Davis and Army back downstairs to alert the other officers of what he had found. The officers gathered everyone into the living room and proceeded to apply for and obtain a search warrant for the residence.

[5] During a search of Davis's bedroom, Officer Scott found three syringes in a cup on a desk on the left side of the room. One of the syringes appeared to be empty, one appeared to contain blood, and one contained what appeared to be liquefied methamphetamine. *Id.* 86-87; State's Ex. 3. Also on the desk was a clear blue bag with a white residue inside. On the nightstand located on the right-hand side of the bed, Officer Scott found a black drawstring bag with

money under it. *Id.* at 87-88; State's Ex. 5-6. The black bag contained a clear plastic bag with 20.99 grams of a white crystalline substance that was later tested and determined to be methamphetamine. *Id.* at 103. Below the nightstand, Officer Scott found a clear plastic bag with a green and brown plant substance that he believed to be either marijuana or Spice. He additionally located a broken pipe with white residue on it, the remains of a hand-rolled cigarette with burnt material inside, and a plastic container with a green and brown plant-like substance. *Id.* at 91-93; State's Exs. 8-9, 11-14.

[6] The State charged Davis with level 4 felony possession of methamphetamine, class A misdemeanor possession of a controlled substance, and class B misdemeanor violating a common nuisance. The State subsequently dismissed the controlled substance charge, and a jury trial was held on the remaining charges. During preliminary jury instructions, the trial court gave the following instruction tendered by the State on constructive possession:

In order for the State to prove the Defendant constructively possessed an item, the State must show the Defendant had both the intent to maintain dominion and control over the item or items and the capability to maintain dominion and control over the items. The prove [sic] of a possessory interest in the premises on which illegal items are found is adequate to show the capability to maintain dominion and control over the items in question. In essence, the law infers that the party in possession of the premises is capable of exercising dominion and control over all items on the present, premises. When the Defendant's possession of the premises on which the items are found is not exclusive then the inference of intent to maintain dominion and control over the items or the drugs must be supported by

additional circumstances pointing to the Defendant's knowledge of the nature of the items and their presence. The additional circumstances can be shown by various means, including but not limited to, incriminating statements made by the Defendant, attempted flight or furtive gestures, location of substances like drugs in settings that suggest manufacturing, proximity of the contraband to the Defendant, location of the contraband within the Defendant's plain view, and the mingling of the contraband with other items owned by the Defendant.

Id. at 53; Appellant's App. Vol. 2 at 78-79. Davis did not object to the instruction. The jury found Davis guilty of both possession of methamphetamine and visiting a common nuisance. The trial court sentenced Davis to concurrent terms of six years with two years suspended to probation on the possession conviction, and 180 days of probation on the common nuisance conviction. This appeal ensued.

Discussion and Decision

Section 1 – Sufficient evidence supports Davis's possession of methamphetamine conviction.

[7] Davis first asserts that the State presented insufficient evidence to support her conviction for level 4 felony possession of methamphetamine. When reviewing the sufficiency of the evidence required to support a criminal conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). Instead, we consider only the evidence supporting the verdict and any reasonable inferences that can be drawn therefrom. *Morris v. State*, 114 N.E.3d 531, 535 (Ind. Ct. App. 2018), *trans.*

denied (2019). And we consider conflicting evidence most favorably to the verdict. *Silvers v. State*, 114 N.E.3d 931, 936 (Ind. Ct. App. 2018). “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. It is not necessary for the evidence to overcome every reasonable hypothesis of innocence; it is sufficient if an inference may reasonably be drawn from the evidence to support the verdict. *Silvers*, 114 N.E.3d at 936.

[8] To convict Davis of possession of methamphetamine as a level 4 felony, the State was required to prove that she knowingly or intentionally possessed at least ten grams but less than twenty-eight grams of pure or adulterated methamphetamine. Ind. Code § 35-48-4-6.1. Davis contends that the State presented insufficient evidence to prove that she possessed the methamphetamine found in her bedroom. We disagree.

[9] It is well established that possession can be either actual or constructive. *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011). “A person actually possesses contraband when [he or she] has direct physical control over it.” *Id.* The parties agree that only constructive possession is at issue here. “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). “The capability element is met when the State shows that the defendant is able to reduce the controlled substance to the defendant’s personal possession.” *Ables v. State*, 848 N.E.2d

293, 297 (Ind. Ct. App. 2006). The intent element is shown if the State demonstrates the defendant's knowledge of the presence of the contraband. *Id.*

[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.* “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.* at 175. However, when possession of the premises in which the contraband is found is not 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.* Examples of those additional circumstances include: (1) a defendant's incriminating statements; (2) a defendant's attempting to leave or making furtive gestures; (3) the location of contraband like drugs in settings suggesting manufacturing; (4) the item's proximity to the defendant; (5) the location of contraband within the defendant's plain view; and (6) the mingling of contraband with other items the defendant owns. *Id.*; see *Carnes v. State*, 480 N.E.2d 581, 586 (Ind. Ct. App. 1985) (noting that list is not exhaustive, as other circumstances could just as reasonably demonstrate requisite knowledge).

[11] We find that the evidence presented in this case sufficiently established that Davis constructively possessed the methamphetamine. First, regarding the

capability element, there is no question that Davis had the ability to reduce the methamphetamine to her personal possession. Indeed, the methamphetamine was found in the bedroom that she alone rented from Baker, and she and Army were the sole occupants of the bedroom at the time the drugs were found. As far as the intent element and her knowledge of both the presence and nature of the contraband, the evidence demonstrates that Davis brought Baker up to her bedroom specifically for him to buy methamphetamine because she knew it was there, and she remained in the room when Army sold some of that methamphetamine to Baker. Moreover, the methamphetamine was found in a black bag on the nightstand right next to Davis's bed in close proximity to where she was sitting when police arrived. A reasonable jury would have little difficulty inferring that Davis had actual knowledge of the presence and nature of the methamphetamine in her bedroom.

[12] Contrary to Davis's assertions, the fact that the evidence indicates that Army, and not Davis, may have had actual possession of the methamphetamine the night before, or that the evidence supports a conclusion that Army was also in constructive possession of the methamphetamine when it was found by police, is of no moment. It is well established that a substance can be possessed jointly by a defendant and another without any showing that the defendant physically possessed the object. *Armour v. State*, 762 N.E.2d 208, 216 (Ind. Ct. App. 2002), *trans. denied*. Moreover, our supreme court has previously appeared to at least acknowledge that it would be possible for a defendant to have nonexclusive constructive possession of contraband (assuming sufficient evidence of

“additional circumstances” demonstrating intent) when another has actual and simultaneous possession of the same contraband. *Henderson v. State*, 715 N.E.2d 833, 836 (Ind. 1999).¹ We conclude that the State presented sufficient evidence to establish that Davis constructively possessed the methamphetamine found in her bedroom.

Section 2 – The trial court did not commit fundamental error in instructing the jury.

[13] Davis next argues that the trial court committed fundamental error in instructing the jury on constructive possession. She specifically challenges only preliminary instruction number 10. Davis did not object to this instruction, so she asserts fundamental error to avoid waiver of her challenge on appeal. Fundamental error is an “extremely narrow exception to the waiver rule,” and a defendant “bears the heavy burden of showing that a fair trial was impossible.” *Harris v. State*, 76 N.E.3d 137, 139 (Ind. 2017). “In considering whether a claimed error denied the defendant a fair trial, we determine whether the resulting harm or potential for harm is substantial.” *Baker v. State*, 948 N.E.2d 1169, 1178-79 (Ind. 2011). Harm is not shown by the fact that the defendant was ultimately convicted, but by whether her right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he would have been entitled. *Id.* at 1179.

¹ Davis’s claim that *Henderson* “provides a remarkably persuasive argument for reversing” her conviction is unavailing. Reply Br. at 5.

“Fundamental error will be found only in egregious circumstances.” *Harbert v. State*, 51 N.E.3d 267, 277 (Ind. Ct. App. 2016), *trans. denied*. We will not reverse for an instructional error where the conviction is clearly sustained by the evidence and the jury could not properly have found otherwise. *Hayden v. State*, 19 N.E.3d 831, 838 (Ind. Ct. App. 2014), *trans. denied* (2015).

[14] Davis concedes that preliminary instruction number 10 on constructive possession contains “very similar” language to that set out by our supreme court in *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004), and therefore the instruction is a correct statement of law. Davis maintains, however, that the instruction constituted fundamental error in this case where “there is undisputed evidence that another person [held] actual possession of the contraband.” Appellant’s Br. at 21. Specifically, Davis posits that the jury was misled because it was allowed to make inferences regarding her constructive possession of the methamphetamine based solely upon her possessory interest in the bedroom but “was not instructed that possession [of the contraband] could not be simultaneously actual in one person and constructive in another.” *Id.* at 24.

[15] There are several problems with Davis’s argument. First, we do not agree that there is undisputed evidence that another person (Army) had actual possession of the methamphetamine. The methamphetamine was not found on Army’s person but was found in a bag on the nightstand in Davis’s bedroom that she had permitted Army to share with her the night before. Indeed, at the time the methamphetamine was confiscated by police, it is arguable that neither Army

nor Davis had “direct physical control” over the methamphetamine. *See Gray*, 957 N.E.2d at 174. Second, as we stated above, it is possible for possession to be simultaneously actual in one person and constructive in another, or as appears to be the case here, a substance can be constructively possessed jointly by a defendant and another. *See Armour*, 762 N.E.2d at 216 (recognizing joint constructive possession of cocaine found in hotel room). Under the circumstances, Davis has failed to demonstrate that the trial court committed error, much less fundamental error. Accordingly, we affirm.

[16] Affirmed.

Bradford, C.J., and Tavitas, J., concur.