MEMORANDUM DECISION

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IN THE

COURT OF APPEALS OF INDIANA

Matthew J. Gilbert,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

November 28, 2023

Court of Appeals Case No. 23A-CR-206

Appeal from the Clinton Superior Court

The Honorable Justin H. Hunter, Judge

Trial Court Cause No. 12D01-1804-F3-000500

Memorandum Decision by Judge Felix
Judges Crone and Brown concur.

Felix, Judge.

Statement of the Case

[1] Matthew Gilbert appeals his convictions for possession of a narcotic drug as a Level 3 felony and possession of methamphetamine as a Level 4 felony following a jury trial. Gilbert raises two issues[1] on appeal, which we restate as follows:

1. Whether the evidence was sufficient to support Gilbert's convictions; and
2. Whether the trial court committed reversible error by denying Gilbert's motion to separate witnesses after the State's first witness had already testified.

[2] We affirm.

Facts and Procedural History

[3] On April 11, 2018, the Clinton Circuit Court issued an arrest warrant for Gilbert for failure to appear for a morning sentencing hearing in a separate case. Gilbert lived in a house (the "House") at 7526 North State Road 39 (the "Property"), a 150-acre tree farm owned by his parents south of Rossville in

[1] Gilbert also challenged on appeal the chain of custody regarding certain evidence, framing such in terms of a sufficiency of evidence (as opposed to an admission of evidence) argument. However, Gilbert has failed to provide cogent reasoning in support of the chain of custody argument, therefore, it is waived. *See* Ind. Appellate Rule 46(A)(8)(a).

Clinton County.[2] On the afternoon of his failure to appear, his parents went to the Property to convince Gilbert to turn himself in. Gilbert's mother spoke to him on the front porch of the House. Gilbert was "upset," "agitated," and "didn't really want to turn himself in." Tr. Vol. II at 190–91. When two law enforcement officers in different vehicles pulled into the driveway of the House, Gilbert went back inside the House.

[4] At some point after Gilbert went back inside, he texted his parents that he had left the Property. Sometime later, a family member of Gilbert's former girlfriend Stephanie Creasy reported to law enforcement that she had seen Gilbert's truck drive by her house on Third Street in Frankfort, Indiana. Law enforcement officers brought Creasy to the Frankfort Police Department ("FPD"), where she spoke on the phone with Gilbert while law enforcement officers listened.

[5] Despite pinging the cell phone numbers Gilbert had used to contact Creasy, law enforcement officers were unable to determine his location. Law enforcement

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[2] Appellant's Appendix and the transcript refer to two different addresses for the Property: 7256 North State Road 39 and 7526 North State Road 39. *See* Tr. Vol. II at 33, 85, 86, 155, 156; Tr. Vol. III at 30, 49, 101, 102, 166, 173, 197, 218, 219, 225, 239, 240, 241, 246; Appellant's App. Vol. II at 85; Appellant's App. Vol. III at 2, 10, 14, 15, 18, 19, 20, 25, 33, 35. For purposes of this decision, we assume the correct address is 7526 North State Road 39 because it is the address used most often in the Record on Appeal and is also found in a part of the Pre-trial Certificate Report that appears to be from the Indiana Bureau of Motor Vehicles. Appellant's App. Vol. III at 33, 35.

officers attempting to serve the arrest warrant directed the SWAT team to enter the House to execute the warrant.[3]

[6] Narcotics Detective Chad Walker of the FPD and Detective Daniel Roudebush of the Clinton County Sheriff's Office ("CCSO") were part of the SWAT team that entered the House. They found in plain view on the floor near the master bedroom closet a pill bottle containing pills. On the bed in the same room, law enforcement officers found a coffee filter with a reddish stain and a white powder and a sawed-off shotgun. Detectives Walker and Roudebush collected as evidence the pill bottle, the red-stained coffee filter containing white powder, and the sawed-off shotgun lying near the coffee filter, among other items.

[7] Law enforcement eventually located and arrested Gilbert on April 16, 2018. The State charged him with possession of a narcotic drug as a Level 3 felony and possession of methamphetamine enhanced to a Level 4 felony for possession of a firearm. ISP laboratory technician Gozel Berkeliyeva tested the pills and the coffee filter powder Lieutenant Blacker had submitted for testing and determined the pills to be morphine and the coffee filter powder to be methamphetamine.

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[3] At a pretrial suppression hearing, officers testified that they elected to have a SWAT team execute the arrest warrant because they could not confirm Gilbert's location, believed Gilbert could be still inside the House, and had safety concerns arising from Gilbert's prior threats against law enforcement. Gilbert does not raise the nature of the execution of the arrest warrant as an issue on appeal.

[8] At trial, the State's first witness was a law enforcement officer who had assisted with the arrest but not with the execution of the search warrant. After the officer testified and while the jury was on a break, Gilbert's counsel requested a separation of witnesses, which the trial court denied, stating, "I'm not granting the request. Just ask for some courtesy among each other and we'll just deal with it that way."

[9] During the trial, the pills seized from the House were admitted as Exhibit 5 and the coffee filter and powder seized from the House were admitted as Exhibit 6. ISP lab technician Berkeliyeva testified that tests confirmed the presence of 43.64 grams of morphine from the pill bottle and 7.1 grams of methamphetamine from the coffee filter. Following the two-day jury trial, the trial court entered judgment on a verdict convicting Gilbert on both counts. Gilbert now appeals his convictions.

Discussion and Decision

1. Sufficiency of Evidence

[10] Gilbert asserts that the evidence is insufficient to support his convictions. "Sufficiency-of-the-evidence arguments trigger a deferential standard of appellate review, in which we 'neither reweigh the evidence nor judge witness credibility, instead reserving those matters to the province of the jury.'" *Owen v. State*, 210 N.E.3d 256, 264 (Ind. 2023) (quoting *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018)), *reh'g denied* (Aug. 17, 2023). The jury's verdict "comes before us with a presumption of legitimacy, and we will not substitute our judgment

for that of the fact-finder." *Thacker v. State*, 62 N.E.3d 1250, 1251 (Ind. Ct. App. 2016) (citing *Binkley v. State*, 654 N.E.2d 736, 737 (Ind. 1995), *reh'g denied*).

[11] Reversal of a conviction based on sufficiency of the evidence "is appropriate only when no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Thacker*, 62 N.E.3d at 1251 (citing *Drane v. State*, 867 N.E.2d 144, 146 (Ind.2007)). The evidence need not "overcome every reasonable hypothesis of innocence"; rather, the evidence is sufficient "if an inference may reasonably be drawn from it to support the verdict." *Id*. (citing *Drane*, 867, N.E.2d at 147).

[12] To support a conviction for possession of a narcotic as a Level 3 felony, the State had to show beyond a reasonable doubt that Gilbert knowingly or intentionally possessed a Schedule I or II narcotic drug, here morphine, in an amount of at least 28 grams without a valid prescription. Ind. Code § 35-48-4-6. Morphine is a Schedule II controlled substance. Ind. Code § 35-48-2-6. To support a conviction for possession of methamphetamine as a Level 4 felony, the State had to show beyond a reasonable doubt that Gilbert knowingly or intentionally possessed methamphetamine in an amount of at least five but less than ten grams without a valid prescription and that he was in possession of a firearm. I.C. § 35-48-4-6.1.

[13] "A person actually possesses contraband if he has direct physical control over it." *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011). A person constructively

possesses contraband when the person has (1) the capability to maintain dominion and control over the item; and (2) the intent to maintain dominion and control over it." *Id.* "And this is so whether possession of the premises is exclusive or not." *Gee v. State*, 810 N.E.2d 338, 341 (Ind. 2004).

[14] When a defendant does not have exclusive possession of the location where contraband was found, the State may demonstrate an inference of intent to maintain dominion and control through evidence of other circumstances, such as:

> (1) incriminating statements 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.

Gray, 957 N.E.2d at 175 (Ind. 2011) (citing *Henderson v. State*, 715 N.E.2d 833, 836 (Ind. 1999)). We have also recognized the nature of the place where the contraband is found as an additional circumstance that demonstrates the defendant's knowledge of the contraband. *Johnson v State*, 59 N.E.3d 1071, 1074 (Ind. Ct. App. 2016). 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. *Id*. (citing *Gray*, 957 N.E.2d at 174–75).

[15] Here, the evidence shows that Gilbert lived in the House. In the master bedroom, law enforcement officers found a bottle containing pills later confirmed to be morphine and a coffee filter containing a powder later

confirmed to be methamphetamine lying near a sawed-off shotgun. All of these items were in plain view. Further, there is no evidence that his parents entered the House on April 11, 2018, the day the arrest warrant was executed. In fact, Gilbert's mother specifically denied entering the House.

[16] Because Gilbert was not in the House when law enforcement officers found the morphine and methamphetamine, the evidence does not show that he was in actual possession of the drugs. However, evidence that he constructively possessed the contraband would be sufficient to support his convictions. *See Gray*, 957 N.E.2d at 174.

[17] Gilbert does not dispute that he had the capability to maintain dominion and control over the drugs and shotgun, but he disputes the sufficiency of the evidence used to show he intended to maintain dominion and control over those items. In support, he asserts others may have had access to the House. Specifically, Gilbert asserts that Creasy had keys—implying access—to the House to bring into question his intent to assert dominion and control over the contraband. He also points to testimony that a stain on the coffee filter that contained methamphetamine could be lipstick, apparently creating an inference that someone else, perhaps Creasy, had been in the House during the relevant time period.

[18] Gilbert's argument that Creasy had keys—and access—to the House is mere conjecture and not supported by any evidence that Gilbert cites on appeal. He has also pointed to no evidence to support his theory that Creasy or anyone else

was in the House at any relevant time prior to law enforcement officers' discovery of the morphine, methamphetamine, and sawed-off shotgun. Indeed, the only evidence at trial regarding Creasy's access to the House pertained to her possession of keys to the House in 2017, one year before law enforcement officers found the contraband while executing the arrest warrant. Additionally, Gilbert's mother testified that Gilbert and Creasy "*used to be* in a relationship," indicating Gilbert and Creasy were no longer in a relationship. Tr. Vol. II at 185 (emphasis added). Finally, Gilbert's reliance on Detective Walker's testimony that a stain on the coffee filter could be lipstick, without more, merely amounts to a request that we reweigh the evidence, which we will not do. *See Owen v. State*, 210 N.E.3d at 264 (quoting *Brantley*, 91 N.E.3d at 570).

[19] In sum, the only evidence regarding people besides Gilbert in the House was that Gilbert's mother owned the Property, his mother had used a locksmith to enter the House in 2017 to facilitate a window repair, Creasy had been in and had keys to the House in 2017, and his parents went to the Property on April 11, 2018, to encourage Gilbert to turn himself in but did not enter the House or see Gilbert or anyone else come out.

[20] The evidence admitted at trial shows that a reasonable factfinder could conclude Gilbert knew of the nature and presence of the drugs and sawed-off shotgun in the House, *see Johnson*, 59 N.E.3d at 1073 (citing *Gray*, 957 N.E.3d at 174–5), and, therefore, had both the capability and the intent to maintain dominion and control over that contraband, *see Gray*, 957 N.E.2d at 174. Thus,

we hold that the evidence is sufficient to show that Gilbert constructively possessed the morphine, methamphetamine, and shotgun found in the House.

2. Separation of Witnesses

[21] Finally, we address Gilbert's argument that the trial court erred by refusing his request for separation of witnesses during the State's presentation of its case. A trial court must order the separation of witnesses when requested except in limited circumstances. Ind. Evidence Rule 615; *In re K.L.*, 137 N.E.3d 301, 306 (Ind. Ct. App. 2019) (citing *Hernandez v. State*, 716 N.E.2d 948, 950 (Ind. 1999)). The purpose of Evidence Rule 615 is to insulate the testimony of a witness from another's testimony. *In re K.L.*, 137 N.E.3d at 306 (citing *Long v. State*, 743 N.E.2d 253, 256 (Ind. 2001)).

[22] Although a trial court errs when it denies a motion to separate witnesses, *see Anderson v. State*, 743 N.E.2d 1273, 1277 (Ind. 2001), the error is harmless error if the opposing party can show that no prejudice occurred, *In re K.L.*, 137 N.E.3d at 306. Courts have found no prejudice has occurred when there was substantial evidence of the defendant's guilt. *See K.L.*, 137 N.E.3d at 306 (citing *Williams v. State*, 924 N.E.2d 121, 126 (Ind. Ct. App. 2009), *trans. denied*).

[23] We initially observe that Gilbert did not request the separation of witnesses until after the State's first witness had already testified. Evidence Rule 615 does not address when such a motion must be made, although, ideally, it should be made before any testimony has been offered. Nevertheless, making a separation of witness motion after testimony has begun "may be permissible as

long as basic notions of fundamental fairness are not offended." *In re K.L.*, 137 N.E.3d at 306 (citing *Anderson v. State*, 743 N.E.2d 1273, 1277 (Ind. Ct. App. 2001)).

[24] Without supporting argument or citation to the record on appeal, Gilbert asserts that the denial of his motion to separate witnesses constituted reversible error. Here, there is no indication in the record that any witness overheard or observed the testimony of another witness during the two-day trial. Additionally, the State explained that it "generally [] separates its witnesses." Tr. Vol. II at 178-79.

[25] In any event, the evidence overwhelmingly supports Gilbert's conviction. *See In re K.L.*, 137 N.E.3d at 306 (citing *Ray*, 838 N.E.2d at 488–89). Here, upon entering the House to serve the arrest warrant, law enforcement officers found in plain view a pill bottle containing multiple tablets of morphine. The morphine had a total weight of 43.64 grams, far in excess of the 28 grams required for a conviction of morphine possession as a Level 3 felony. *See* I.C. § 35-48-4-6.

[26] On the bed in the master bedroom, law enforcement officers found a coffee filter containing methamphetamine lying near a sawed-off shotgun. The methamphetamine weighed 7.1 grams. The State demonstrated possession of at least five grams of methamphetamine without a valid prescription and possession of a firearm.

[27] Again, Gilbert points to no evidence offered at trial that anyone else lived at the Property or in the House where law enforcement officers found the evidence that supports his convictions. As explained above, he has pointed to no evidence in the record to show that anyone else was regularly or recently in the House when law enforcement executed the search warrant in 2018. Because we conclude there is substantial evidence to support Gilbert's convictions, the trial court's error in denying the motion to separate witnesses was harmless. *See In re K.L.*, 137 N.E.3d at 306 (citing *Ray v. State*, 838 N.E.2d at 488–89).

Conclusion

[28] The evidence is sufficient to support Gilbert's convictions for possession of morphine as a Level 3 felony and possession of methamphetamine as a Level 4 felony. Additionally, the trial court erred by denying Gilbert's motion for a separation of witnesses, but given the overwhelming evidence supporting the convictions, that error was harmless. We therefore affirm Gilbert's convictions.

[29] Affirmed.

Crone, J., and Brown, J., concur.