



ATTORNEYS FOR APPELLANT

Valerie K. Boots
Indianapolis, Indiana

Anna Onaitis Holden
Zionsville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Robert F. Bailey,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 30, 2023

Court of Appeals Case No.
22A-CR-808

Appeal from the Marion Superior
Court

The Honorable Angela Dow
Davis, Judge

Trial Court Cause No.
49D27-2106-F2-17573

Altice, Chief Judge.

Case Summary

[1] Following a jury trial, Robert F. Bailey was convicted of Level 2 felony dealing in methamphetamine, Level 2 felony dealing in a narcotic drug (fentanyl), and Level 6 felony unlawful possession of a syringe. He was also found to be a

habitual offender. Bailey received an aggregate sentence of eighteen years in the Indiana Department of Correction (the DOC). He presents two issues on appeal, which we restate as follows:

1. Was it fundamental error to admit into evidence at trial drugs and contraband obtained by police during the search of Bailey’s person and the hotel room in which he was staying?
2. Did the State present sufficient evidence that Bailey constructively possessed drugs found under a mattress in the hotel room that he shared with another individual?

[2] On cross-appeal, the State argues that the trial court imposed an illegal sentence – nine years below the minimum sentence – for the Level 2 felony dealing in a narcotic drug. Bailey concedes this error but asks that we revise the sentence to the minimum rather than remand for resentencing.

[3] We affirm in part, reverse in part, and remand.

Facts & Procedural History

[4] On June 2, 2021, officers from the Indianapolis Metropolitan Police Department were dispatched to a Marion County Holiday Inn Express on the report of a domestic disturbance. The 911 call had been made by hotel staff at the request of Victoria Hicks, who was the registered guest renting Room 204. Bailey had also been staying in that room with Hicks.

[5] Officers Timothy Huddleston and Jason Norman initially responded to the hotel lobby where they spoke with Hicks and hotel staff. Hicks reported being

physically assaulted by Bailey, and hotel staff indicated that they wanted him removed from the premises. The officers, along with two hotel staff members, then proceeded to Room 204. Officer Huddleston knocked on the door and waited for about twenty seconds. When there was no answer, he knocked again and announced that police and management were outside and wanted Bailey to answer the door. The officers knocked a third time and informed Bailey that they could hear him inside the room. Bailey opened the door about forty-five seconds after the first knock.

[6] Officer Huddleston handcuffed Bailey in the hallway and informed him of Hicks's allegations. He also checked Bailey for weapons and learned that Bailey had a syringe in his pocket. Meanwhile, a staff member unlocked the door to the room and Officer Norman and the staff members entered, followed by Bailey and Officer Huddleston.

[7] As they all entered the bedroom area, Bailey attempted to sit on one corner of the bed, despite there being chairs nearby. This caught Officer Huddleston's attention because, based on his experience, he understood that "in many cases, if somebody tries to do that, it's to – if you're sitting on the bed, police can't pick up the bed." *Transcript Vol. 3* at 89. Officer Huddleston thus believed there might be contraband under the bed that Bailey was attempting to conceal.

[8] Bailey was directed away from the bed, and a full search of his pockets commenced after he was advised of his Miranda rights. Among other things, Officer Huddleston removed the syringe, three large bundles of cash totaling

\$7795, and separate bags of what the officers believed to be heroin. The substances in each bag were lab tested at a later date and found to be 5.3178 grams of fentanyl, 3.3602 grams of fentanyl, and 1.8799 grams of cocaine. Bailey suggested to the officers that the drugs on his person were for personal use and that he was just an addict. Based on his training and experience, however, Officer Huddleston did not believe that the larger amounts were for personal use. As Officer Huddleston explained at trial, in his experience “working the street,” a drug user is “usually buying one dose at a time, which is in small, small quantities usually.” *Id.* at 88.

[9] The officers also searched the room and began collecting Bailey’s personal belongings to remove him from the property, as requested by hotel staff. Bailey indicated that he had a bag of clothing, which was found next to the bed. There were also what appeared to be items belonging to a female in the room.

[10] During the search, Officer Huddleston lifted the corner of the mattress in the same location where Bailey had tried to sit about ten minutes earlier. He immediately discovered packaging for a cell phone accessory between the mattress and box springs. The packaging contained “two large bags of substance that [he] thought were narcotics.” *Id.* at 90. Testing later revealed that one bag contained 21.5957 grams of methamphetamine and the other contained 35.3834 grams of fentanyl. The officers also recovered from somewhere inside the room a digital scale with fentanyl residue on it.

- [11] On February 15, 2022, Bailey was tried before a jury and found guilty of Level 2 felony dealing in methamphetamine (Count I), Level 2 felony dealing in a narcotic drug (Count II), and Level 6 felony unlawful possession of a syringe (Count III). Bailey then admitted to being a habitual offender.
- [12] At the sentencing hearing on March 14, 2022, the trial court noted that Bailey’s criminal history was “terrible” and that his “entire adult history is dealing, using.” *Id.* at 161. Bailey was thirty-three years old at the time and had accumulated twenty-one arrests, six misdemeanor convictions, and five felony convictions. He also had prior probation violations, as well as a criminal case pending in another state for drug charges. The court expressly determined that the “aggravators outweigh the mitigators.” *Id.* at 168. It then sentenced Bailey on Count I to twelve years in the DOC enhanced by six years for being a habitual offender. On Counts II and III, which the trial court appears to have mistakenly believed were both Level 6 felonies, Bailey received one-year concurrent sentences.
- [13] Bailey now appeals his convictions, and the State cross-appeals regarding the sentence imposed for Count II. Additional information will be provided below as needed.

Discussion & Decision

1. Fundamental Error

- [14] Bailey initially challenges the admission into evidence of the drugs and other contraband seized by police during the search of his pockets and the hotel

room. He argues that the warrantless search and seizure violated both the Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Indiana Constitution. Acknowledging that he failed to contemporaneously object to the admission of the evidence at trial, Bailey asserts fundamental error in an attempt to avoid waiver.

[15] “On rare occasions, appellate courts may analyze an issue under the fundamental error doctrine to examine an otherwise procedurally defaulted claim.” *Matter of Eq. W.*, 124 N.E.3d 1201, 1214 (Ind. 2019). Such review is “extremely narrow” and is “available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible.” *Id.* at 1214-15.

[16] Bailey fails to recognize that our Supreme Court has long circumscribed fundamental-error review in cases involving allegations of unconstitutional searches. *See, e.g., Swinehart v. State*, 376 N.E.2d 486, 491 (Ind. 1978) (“That the evidence may have been obtained in violation of the defendant’s constitutional rights to be protected against unlawful search and seizure does not elevate the issue to the status of fundamental error that may be raised for the first time on appeal.”); *see also Membres v. State*, 889 N.E.2d 265, 272 (Ind. 2008) (observing that “the exclusionary rule that prohibits introduction into evidence of unlawfully seized materials is an example of a rule that does not go to the fairness of the trial”). The Court has observed that “improperly seized evidence is frequently highly relevant” and “its admission ordinarily does not cause us to

question guilt.” *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010). Accordingly, the admission of unlawfully seized evidence is not per se fundamental error.

See id.

[17] Rather, the Supreme Court has approved of the application of the fundamental error exception for illegally seized evidence only where there is “[a] claim of fabrication of evidence or willful malfeasance on the part of the investigating officers [or a] contention that the evidence is not what it appears to be.” *Id.* Bailey makes no such claims here, asserting only a generalized claim of fundamental error. Thus, the claimed error in this case does not rise to the level of fundamental error. *See id.* at 208 (“Brown makes no similar contention that he did not receive a fair trial, other than his assertion that the evidence was the product of an unconstitutional search and seizure.”).

2. Sufficiency of the Evidence

[18] Bailey contends that the State failed to present sufficient evidence that he constructively possessed the drugs found hidden under the mattress in the hotel room that he shared with Hicks. 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*.

[19] The State may prove that a defendant possessed contraband by showing that he either had actual or constructive possession of it. *See id.* “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.” *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011).

[20] “The capability element of constructive possession is met when the State shows that the defendant is able to reduce the contraband to the defendant’s personal possession.” *Canfield*, 128 N.E.3d at 572. Bailey does not dispute that this element was sufficiently established, as he was alone in the hotel room when the officers arrived and would have been able to easily access the drugs. *See Gee v. State*, 810 N.E.2d 338, 340-41 (Ind. 2004) (holding that the law infers that the person in possession of the premises is capable of exercising dominion and control over all items on the premises, whether the person is the owner, renter, or merely an invitee).

[21] The element at issue in this case is the intent element, which requires the State to demonstrate that the defendant had knowledge of the presence of the contraband. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999). Such knowledge may

be inferred from either the exclusive dominion and control over the premises containing the contraband, or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of its presence.

Canfield, 128 N.E.3d at 572. Such circumstances may 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.

Gray, 957 N.E.2d at 175. This list is not exhaustive. *Id.* "Rather, the State is required to show that whatever factor or set of factors it relies upon in support of the intent prong of constructive possession, those factors or set of factors must demonstrate the probability that the defendant was aware of the presence of the contraband and its illegal character." *Gee*, 810 N.E.2d at 344.

[22] Here, the evidence presented by the State established that Bailey occupied the hotel room with Hicks and was the only one in the room at the time the officers knocked on the door. He delayed opening the door for the officers, which gave him ample opportunity to secret the two large bags of drugs under the mattress. Once he was handcuffed and brought into the bedroom area, Bailey attempted to sit on the corner of the bed where the drugs were later discovered. Officer Huddleston saw this as a furtive movement to keep the officers from searching that area of the bed.

[23] In addition to Bailey’s furtive behavior and the fact that his personal belongings were near the bed, substantial evidence of drug dealing was discovered on his actual person. Bailey had nearly \$7795 in cash, separated into three bundles, two of which had different colored bands around them. Officer Huddleston described the “banded wad[s] of money” as “in, like, \$20 denominations, which is not uncommon for us to see if – you know, for narcotics sales or purchases.” *Transcript Vol. 3* at 94. Bailey also had actual possession of three separate packages of drugs, at least the largest of which Officer Huddleston opined, based on his training and experience, was not typical for a user. Further, there was a digital scale with fentanyl residue on it found in the hotel room.

[24] A reasonable factfinder could infer from the State’s evidence that Bailey was engaged in drug dealing from the hotel room and had knowledge of the large quantities of methamphetamine and fentanyl found under the mattress in the hotel room that he shared with Hicks. Accordingly, the State presented sufficient evidence that Bailey constructively possessed these drugs.

3. Illegal Sentence

[25] On cross-appeal, the State argues, and Bailey concedes, that the trial court imposed an illegal sentence on Count II. That is, the trial court imposed a one-year sentence for this Level 2 felony conviction in violation of Ind. Code § 35-50-2-4.5, which requires imposition of a sentence between ten and thirty years.

[26] The trial court’s statement at the sentencing hearing reveals that this error was an oversight, as the court stated that it was sentencing Bailey to one year “for

each of the Level 6” felonies. *Transcript Vol. III* at 168. Bailey, however, was convicted of only one Level 6 felony – Count III. Counts I and II were Level 2 felonies.

[27] The State asks that we vacate the illegal sentence and remand to the trial court for resentencing, while Bailey requests that we revise the sentence to the minimum sentence of ten years without remanding. We agree with the State that it would not be appropriate for us to revise the sentence on Count II to the minimum term of ten years. The trial court expressly determined that the aggravating circumstances outweighed the mitigating circumstances, and the trial court did not impose minimum sentences for any of Bailey’s convictions. Thus, we elect to remand with instructions for the trial court to resentence Bailey on Count II within the proper statutory range.

[28] Judgment affirmed in part, reversed in part, and remanded for resentencing.

Brown, J. and Tavitas, J., concur.