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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES CASEY,)

Appellant-Defendant,)

vs.)

No. 49A05-1101-CR-40

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Richard E. Sallee, Judge
Cause No. 49F19-1007-CM-58487

September 1, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

James Casey appeals his convictions for dealing in marijuana, as a Class A misdemeanor, and possession of marijuana, as a Class A misdemeanor, following a bench trial. Casey presents three issues for our review:

1. Whether his convictions violate double jeopardy.
2. Whether the trial court abused its discretion when it permitted a police officer to testify as a skilled witness.
3. Whether the evidence is sufficient to support his dealing in marijuana conviction.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On July 28, 2010, shortly after midnight, Officer Michael McKenna of the Lawrence Police Department observed Casey and another man standing outside of a gas station in Indianapolis. Officer McKenna had observed the men at that location “several times” during his patrol that night, and he watched as they approached several vehicles and patrons in the gas station parking lot. Transcript at 11. At one point, Officer McKenna saw Casey walk to the rear corner of the building and out of sight momentarily before walking back into the officer’s view. Based upon his training and experience as a police officer handling narcotics investigations, Officer McKenna knew that someone “approaching vehicles and . . . people in a parking lot” in the same manner usually indicated drug dealing. *Id.* at 13.

Officer McKenna parked his vehicle in the gas station parking lot, exited, and approached Casey on foot. Officer McKenna identified himself to Casey and asked him

to walk to the front of his police vehicle, which Casey did. Officer McKenna asked Casey what he was doing, and Casey responded that he was waiting for his cousin to arrive from across the street so that Casey could pay the cousin's phone bill. Officer McKenna then saw a closed donut box sitting on the ground near where Casey had been standing at the corner of the building. When Officer McKenna had observed Casey throughout the evening, Casey had repeatedly returned to that spot after each contact with patrons in vehicles and on foot.

Two other officers arrived at the scene, and Officer McKenna walked over to the donut box and lifted the lid open with his foot. At that point, Casey was approximately ten feet away from the box, and both Officer McKenna and his vehicle were between Casey and the donut box. Casey could not see the contents of the donut box. But once Officer McKenna opened the box, Casey stated, without being asked any questions, "That's not my weed." Transcript at 24. Officer McKenna saw that inside the donut box was a baggie containing eleven smaller baggies of marijuana. One of the other officers placed Casey under arrest. During a search incident to that arrest, Officer McKenna found on Casey's person \$41 in cash and three cell phones.

The State charged Casey with dealing in marijuana, as a Class A misdemeanor, and possession of marijuana, as a Class A misdemeanor. Following a bench trial, the trial court found Casey guilty as charged and entered judgment and conviction accordingly. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Double Jeopardy

Casey contends, and the State concedes, that his convictions violate double jeopardy. Possession of marijuana is a lesser-included offense of dealing in marijuana. And it is undisputed that the same marijuana was used to prove the element of possession in both the possession and dealing charges. Accordingly, the trial court erred when it entered judgment of conviction and sentence on both crimes. See, e.g., Harrison v. State, 901 N.E.2d 635, 643 (Ind. Ct. App. 2009), trans. denied. We remand to the trial court with instructions to vacate Casey's possession of marijuana conviction. See Ind. Code § 35-38-1-6 (where defendant is found guilty of both offense and included offense, judgment and sentence may not be entered against the defendant for the included offense).

Issue Two: Skilled Witness Testimony

Casey next contends that the trial court abused its discretion when it permitted Officer McKenna to testify as a skilled witness that Casey's behavior at the gas station was indicative of drug dealing. Our standard of review of a trial court's admission of evidence is an abuse of discretion. Speybroeck v. State, 875 N.E.2d 813, 818 (Ind. Ct. App. 2007). A trial court abuses its discretion only if its decision is clearly against the logic and effect of the facts and circumstances before the court. Id. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. Dawson v. State, 786 N.E.2d 742, 745 (Ind. Ct. App. 2003), trans. denied.

A skilled witness is a person with “a degree of knowledge short of that sufficient to be declared an expert under [Indiana Evidence] Rule 702, but somewhat beyond that possessed by the ordinary jurors.” 13 Robert Lowell Miller, Jr., Indiana Evidence § 701.105, at 318 (2d ed. 1995). Under Indiana Evidence Rule 701, a skilled witness may provide an opinion or inference that is “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.”

Here, Officer McKenna testified that he had been trained through the Indiana Law Enforcement Academy and had been a law enforcement officer for four years. He testified that he had been involved in “upwards of fifty or so” arrests for possession or dealing in marijuana. Transcript at 10. And he had been assigned to the Narcotics Division and investigated narcotics crimes for one year. Officer McKenna testified regarding Casey’s behavior in the gas station parking lot as follows:

Q: Was there anything, based on your training and experience, unusual about this behavior [of approaching several cars and patrons at the gas station]?

A: If someone is approaching vehicles and cars and people in a parking lot, yes. That’s unusual.

Q: And what does that, as a trained law enforcement officer, what does that signal to you?

A: Most of the time it’s dealing in narcotics.

Transcript at 13 (emphasis added). At that point, Casey objected, alleging lack of foundation for Officer McKenna’s opinion. The trial court responded by asking the

prosecutor to “get a little more specific about what he observed by [Casey] going to these vehicles.” Id. at 14. And the colloquy continued:

Q: Okay. Could you describe a little more specifically what you observed them doing towards these vehicles?

A: They would approach the vehicles, spend no more than three or four seconds at each vehicle window talking to the driver and/or passenger, then walk back over to the same spot on the southwest corner of the gas station.

Q: How many times did this occur?

A: Four or five that I’d observed.

Q: And this was you said at midnight?

A: Right.

* * *

Q: And what does this signify to you?

Id. at 14-15. At that point, Casey objected for lack of foundation “to show that he has the training and the experience to testify as to what a person dealing drugs. . . .” Id. at 15. And the trial court stated, “Well, I think that’s what he’s getting into about what he’s observed in the past, the way they operate, and so I guess we could hear that and whether he lays [a] good foundation, I’ll have to hear it first.” Id.

The colloquy continued:

Q: What does this signify to you again?

A: Again, the possible dealings of narcotics.

Q: And what training or experience are you relying upon for that determination?

A: My training through [Indiana Law Enforcement Academy] and, again, I was also assigned to the Narcotics Division for a year and I investigated narcotic crimes.

* * *

Q: Okay. How many times have you observed this behavior during your not only year in drug enforcement, but four years of law enforcement?

A: Again, over fifty times, I'd say.

Q: And what specific training have you had to recognize signs of what you believe to be drug dealing?

A: Just through other narcotics detectives that I'd done training with, done buys with, and of the nature.

Q: And because you've observed this behavior, is that why you approached the Defendant?

A: Yes.

Id. at 15-16.

On appeal, Casey maintains that this testimony was “inadmissible proof of intent to deliver” and that Officer McKenna’s opinion was “purely speculative.” Brief of Appellant at 8. Casey offers alternative explanations for his behavior at the gas station, asserting that he could have been “asking for a ride somewhere, to borrow money, to use a phone, or for a cigarette.” Id. And Casey asserts that Officer McKenna’s opinion “was not one a reasonable person could normally form from the perceived facts[.]” Id. at 9.

We agree with the State that Officer McKenna’s testimony was properly admitted under Evidence Rule 701 in light of his experience and training in investigating dealing

in narcotics.¹ His opinion was rationally based on his perception and was helpful to a clear understanding of the determination of a fact in issue. See Evid. R. 701. Because Officer McKenna, by experience and training, knew that Casey's behavior indicated drug dealing "most of the time," that opinion was properly admitted. See Transcript at 13.

Issue Three: Sufficiency of the Evidence

Finally, Casey contends that the State presented insufficient evidence to support his dealing in marijuana conviction. When the sufficiency of the evidence to support a conviction is challenged, we neither reweigh the evidence nor judge the credibility of the witnesses, and we affirm if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Wright v. State, 828 N.E.2d 904, 905-06 (Ind. 2005). It is the job of the fact-finder to determine whether the evidence in a particular case sufficiently proves each element of an offense, and we consider conflicting evidence most favorably to the trial court's ruling. Id. at 906.

To prove dealing in marijuana, as a Class A misdemeanor, the State was required to show that Casey knowingly possessed, with intent to deliver, marijuana. See Ind. Code § 35-48-4-10. At trial, Casey stipulated that the substance found in the donut box was marijuana. On appeal, he contends that the evidence is insufficient to prove either possession of the marijuana or intent to deliver. We cannot agree.

In the absence of actual possession of drugs, our court has consistently held that constructive possession may support a conviction for a drug offense. Jones v. State, 807

¹ Officer McKenna also testified that Casey's possession of three cell phones was indicative of drug dealing. For the first time on appeal, Casey contends that that testimony was inadmissible. Because Casey did not object to that testimony to the trial court, the issue is waived.

N.E.2d 58, 65 (Ind. Ct. App. 2003) (internal quotations and citations omitted), trans. denied. In order to prove constructive possession, the State must show that the defendant has both (1) the intent to maintain dominion and control and (2) the capability to maintain dominion and control over the contraband. Id. Control in this sense concerns the defendant's relation to the place where the substance is found: whether the defendant has the power, by way of legal authority or in a practical sense, to control the place where, or the item in which, the substance is found. Id.

To prove the intent element of constructive possession, the State also must demonstrate a defendant's knowledge of the presence of the contraband. See Armour v. State, 762 N.E.2d 208, 216 (Ind. Ct. App. 2002), trans. denied. "This 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 the presence of the contraband." Id. (citations omitted). Such additional circumstances include, but are not limited to, the following: (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. Macklin v. State, 701 N.E.2d 1247, 1251 (Ind. Ct. App. 1998). "[A] substance can be possessed jointly by the defendant and another without any showing that the defendant had actual physical control thereof." Armour, 762 N.E.2d at 216 (citing Godar v. State, 643 N.E.2d 12, 14 (Ind. Ct. App. 1994), trans. denied).

Here, the State presented ample evidence that Casey constructively possessed the marijuana Officer McKenna found in the donut box. When Casey volunteered to Officer McKenna the statement, “That’s not my weed,” Casey indicated his knowledge that there was marijuana inside the closed donut box. Transcript at 24. In addition, Officer McKenna testified that the donut box containing the marijuana was on the ground near where Casey had been standing throughout the night.

Next, we consider the sufficiency of the evidence on the element of Casey’s intent to deliver the marijuana. Because intent is a mental state, a trier of fact generally must resort to the reasonable inferences arising from the surrounding circumstances to determine whether the requisite intent exists. Love v. State, 741 N.E.2d 789, 792 (Ind. Ct. App. 2001). Here, again, Officer McKenna testified that in his experience, Casey’s behavior in the gas station parking lot and possession of three cell phones were indicative of dealing drugs. And Casey had constructive possession of marijuana split into eleven individual baggies, which Officer McKenna testified “indicates the selling of the drug, and not personal consumption.” Transcript at 26. That evidence is sufficient to prove that Casey intended to deliver the marijuana. See, e.g., Dandridge v. State, 810 N.E.2d 746, 750 (Ind. Ct. App. 2004) (holding evidence sufficient to prove dealing in cocaine where officer with experience in narcotics investigations testified that quantity of cocaine, its packaging, and the money found in defendant’s pocket indicated dealing in cocaine), trans. denied.

Affirmed in part, reversed in part, and remanded with instructions.

RILEY, J., and MAY, J., concur.