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IN THE
COURT OF APPEALS OF INDIANA

RUSSEL F. COWHERD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A05-1008-CR-567
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-1002-FC-33

May 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Russel Cowherd appeals his conviction for Class C felony possession of cocaine. We affirm.

Issue

The sole issue before us is whether there is sufficient evidence to support Cowherd's conviction.

Facts

The evidence most favorable to the conviction is that on February 5, 2010, police executed a search warrant at 4808 Spatz Avenue in Fort Wayne. They rammed the door open after believing their presence had been discovered by a lookout at the residence. There were a number of people in the home at the time, including Cowherd, Angela Miller, Cowherd and Miller's two-year-old son, and Miller's nephew Michael Banks. Miller told an officer that she lived at the home with Cowherd, Banks, and her son. Other people were at the house as well, preparing for a party for Banks. During the search of the residence, police found two plates containing crack cocaine on top of the refrigerator in the kitchen. Police also found, in a bedroom, documents with Cowherd's name on them and two shotguns that belonged to Cowherd. In addition, police found items consistent with a drug dealing operation, including a digital scale and cut plastic baggies.

After Cowherd was read his Miranda rights, an officer asked Cowherd if he knew why they were there, and Cowherd responded, "Drugs." Tr. p. 143. Cowherd also said that he and friends used drugs in the house, including cocaine, marijuana, and ecstasy.

Miller told a different officer that Cowherd was "the main drug dealer of the house." Id. at 149. She said that Cowherd did not deal drugs directly from the house, but that he had other people make "runs" from the house for him. Id. at 150.

During questioning by officers, both Cowherd and Miller began vomiting. Cowherd also began sweating profusely and his eyes rolled back in his head, and the officers sought medical attention for him. Officers also observed a white residue around Cowherd's mouth. After being placed in an ambulance, Cowherd began struggling and fighting with officers and saying, "I need to get out of here." Id. at 188. Cowherd eventually told a paramedic trying to treat him that he had swallowed twenty to thirty packets of crack cocaine and some ecstasy pills.

The State charged Cowherd with Class C felony possession of cocaine, Class D felony resisting law enforcement, and Class D felony neglect of a dependent. After a jury trial held on June 30, 2010, Cowherd was convicted as charged. Cowherd now appeals, challenging only his conviction for possession of cocaine.

Analysis

Cowherd argues that there is insufficient evidence that he possessed the cocaine found on the plates on the top of the refrigerator, which formed the basis of his conviction. When reviewing the sufficiency of the evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses, and respect the fact-finder's exclusive province to weigh conflicting evidence. Jackson v. State, 925 N.E.2d 369, 375 (Ind. 2010). We consider only the probative evidence and reasonable inferences

therefrom that support the conviction. Id. We will affirm if the probative evidence and reasonable inferences from that evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

Cowherd was not in actual possession of the cocaine police found, and thus the State was required to prove that he constructively possessed it. In order to prove constructive possession, the State must show that a defendant had both: (i) the intent to maintain dominion and control over the drugs and (ii) the capability to maintain dominion and control over the drugs. Gee v. State, 810 N.E.2d 338, 340 (Ind. 2004). Proof of a possessory interest in the premises in which illegal drugs are found is adequate to show the capability to maintain dominion and control over the items in question. Id. "And this is so whether possession of the premises is exclusive or not." Id. at 341.

If, however, possession of the premises is non-exclusive, "then the inference of intent to maintain dominion and control over the drugs 'must be supported by additional circumstances pointing to the defendant's knowledge of the nature of the controlled substances and their presence.'" Id. (quoting Lampkins v. State, 682 N.E.2d 1268, 1275 (Ind. 1997)). Such "additional circumstances" may include, but are not limited to: (1) incriminating statements made 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. Id.

First, we conclude that there is sufficient evidence that Cowherd had a possessory interest in the 4808 Spatz Avenue residence. Miller originally told police that Cowherd in fact lived there. Documents and shotguns belonging to Cowherd were found in a bedroom. Miller changed her story at trial regarding whether Cowherd lived there, saying that he and she were separated, that he came by to visit their son, and that he only occasionally spent the night there. Cowherd also claims that his actual address is 4408 Spatz Avenue, not 4808 Spatz Avenue where the search took place. However, to the extent there is conflicting evidence in the record regarding whether Cowherd lived at 4808 Spatz Avenue, we must credit the evidence most favorable to the conviction, which is that he in fact lived there and had a possessory interest in the premises. This is sufficient to prove that Cowherd had the capability to maintain dominion and control over the cocaine found in the kitchen.

We now address whether there is sufficient evidence that Cowherd had the intent to maintain dominion and control over the cocaine, or in other words whether he knew of the drug's presence and nature. On that point, Cowherd made incriminating statements to officers, stating that he suspected police were at the house looking for drugs and admitting that he used illegal drugs at the house, including cocaine. Cowherd also told a paramedic that he had ingested a large quantity of crack cocaine; it would have been reasonable for the jury to infer that he did so after becoming aware that police were preparing to search the residence. That Cowherd might not have been successful in swallowing all of the cocaine in the residence does not necessarily mean that he was

unaware of the cocaine on top of the refrigerator. Cowherd's conduct in swallowing a large quantity of crack cocaine can fairly be described as a "furtive gesture," attempting to hide the presence of cocaine in the house.

The drugs also were found in a setting strongly indicative of manufacturing or dealing. In fact, Miller implicated Cowherd as being a drug dealer to a police officer. At trial, Miller attempted to explain away that statement as having been given in response to the officer's threat to have her son taken into custody by child protective services. It was for the jury, not us, to evaluate Miller's testimony; the evidence most favorable to its verdict is that Miller implicated Cowherd as a drug dealer.

Cowherd contends that his case parallels Edwards v. State, 179 Ind. App. 363, 385 N.E.2d 496 (1979). There, a defendant was convicted of possession of amphetamines that were found in the butter compartment of the refrigerator in the apartment he shared with his brother. We reversed the conviction, noting that the defendant had made no incriminating statements, no attempt to flee, and no attempt to hide or destroy the drugs. Additionally, there had been a party at the apartment two days earlier when numerous people had access to the refrigerator.

The only direct similarities between Edwards and this case are the involvement of a refrigerator and that there were a number of people present at the residence who theoretically could have put the cocaine on top of the refrigerator. The differences in the cases are much more important. Cowherd made highly incriminating statements, he attempted to dispose of crack cocaine by swallowing it just before police entered, and he

was implicated as being a drug dealer. We are satisfied that there is sufficient evidence that Cowherd intended to maintain dominion and control over the cocaine found on top of the refrigerator. When combined with evidence that he had the capability to maintain dominion and control over the drugs by virtue of his possessory interest in the premises, there is sufficient evidence that he constructively possessed the cocaine.

Conclusion

There is sufficient evidence to support Cowherd's conviction for Class C felony possession of cocaine. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.