

Following a bench trial, Appellant-Defendant Kevin Potter appeals his conviction and sentence for Possession of Marijuana, a Class A misdemeanor.¹ Upon appeal, Potter challenges the sufficiency of the evidence to establish his conviction or the corpus delicti of his offense. We affirm.

FACTS AND PROCEDURAL HISTORY

On June 23, 2008, at approximately 4:45 p.m., Indiana Department of Natural Resources Conservation Officer Joshua Kilgore saw Potter, Micah Atkinson, and Allison Myers, among others, fishing on the bank of the Mississinewa River. Officer Kilgore heard Potter tell Myers, “You’d better come get this.” Tr. p. 4. Myers then walked toward Potter, retrieved an object appearing to be a cigar, and took several “drags” from the apparent cigar. Tr. p. 4. She then turned, saw Officer Kilgore, and threw the object into the river. Officer Kilgore approached the group, identified himself, and observed Atkinson attempt to sink the object with his fishing pole, at which point Officer Kilgore retrieved the object, which he determined to be a cigar, from the river.

Officer Kilgore discovered that Potter had walked approximately fifty to sixty yards away from him, so Officer Kilgore told Potter to return and approached him. Potter admitted to Officer Kilgore that he had brought marijuana to the river in a plastic baggie and had then placed the marijuana into a hollowed-out Swisher Sweet cigar. When asked why he had walked away, Potter stated that he had had a small amount of marijuana in his hand which he had walked away to throw into the river.

¹ Ind. Code § 35-48-4-11(1) (2007).

According to Officer Kilgore, the cigar contained a green plant-like material which Officer Kilgore suspected to be marijuana and which tested positive for marijuana in a field test. Officer Kilgore estimated that the marijuana weighed less than thirty grams.

On July 7, 2008, the State charged Potter with possession of marijuana as a Class A misdemeanor as well as a Class D felony due to what it claimed was Potter's prior conviction for marijuana possession. During a December 3, 2008 bench trial, the State sought to introduce as State's Exhibit 1 the alleged cigar, including its contents, into evidence, but this evidence was excluded on chain-of-custody grounds. The trial court subsequently found Potter guilty of Class A misdemeanor possession of marijuana. The trial court entered judgment of conviction and sentenced Potter to one year in jail, suspended to probation.² This appeal follows.

DISCUSSION AND DECISION

I. Corpus Delicti

Because there was no physical marijuana evidence admitted at trial, Potter argues that the only evidence presented against him was his confession and that there was therefore no corpus delicti to support his conviction. The corpus delicti rule holds that a crime may not be proven based solely on a confession. *Malinski v. State*, 794 N.E.2d 1071, 1086 (Ind. 2003). "The purpose for requiring proof of the corpus delicti is to prevent the admission of a defendant's confession to a crime that never occurred."

² The trial court directed a verdict in favor of Potter on the Class D felony enhancement on the grounds that the State failed to introduce certified documents relating to the alleged prior conviction.

Ackerman v. State, 774 N.E.2d 970, 983-84 (Ind. Ct. App. 2002) (quotation omitted), *trans. denied*. For purposes of satisfying the corpus delicti requirement, “each element of the crime need not be proven beyond a reasonable doubt; the evidence need only provide an inference that a crime was committed.” *Id.* at 984 (quotation omitted). Such an inference may be established through circumstantial evidence. *Sweeney v. State*, 704 N.E.2d 86, 112 (Ind. 1998).

Potter’s argument presumes that the marijuana evidence must be established through actual physical evidence. In fact, even though contraband is not recovered, the identity of a drug can be proven by circumstantial evidence. *Clifton v. State*, 499 N.E.2d 256, 258 (Ind. 1986). The type of circumstantial evidence usually contemplated is the testimony of someone experienced with the drug who identifies the substance. *Id.*

Here, Officer Kilgore identified the substance contained in the cigar to be marijuana based upon his extensive training and experience testing and identifying the drug. Officer Kilgore further testified that the results of a field test similarly established that this substance was marijuana. The mere fact that marijuana was found inside a standard cigar is adequate independent evidence of the corpus delicti of marijuana possession. *See Brown v. State*, 239 Ind. 184, 191, 154 N.E.2d 720, 722 (Ind. 1959) (“[T]he independent evidence [of a corpus delicti] must be of such a character that reasonable inferences may be drawn to support a conclusion that a crime of the nature and character charged has been committed by someone.”) Because there was ample evidence at trial, besides Potter’s confession, providing an inference that the crime of

marijuana possession was committed, Potter's challenge on corpus delicti grounds warrants no relief.

II. Possession

Potter further points to evidence demonstrating that Myers, not he, was seen holding the cigar and claims that the State failed to demonstrate that he possessed the marijuana. In evaluating the sufficiency of the evidence to support Potter's conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Kien v. State*, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), *trans. denied*. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. *Id.* We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.* It is the function of the trier of fact to resolve conflicts of testimony and to determine the weight of the evidence and the credibility of the witnesses. *Jones v. State*, 701 N.E.2d 863, 867 (Ind. Ct. App. 1998).

Actual possession of contraband occurs when a person has direct physical control over the item. *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004). Here, while there was evidence that Myers held the cigar, there was also evidence that she retrieved it from Potter, who was heard to say to her, "You'd better come get this." Tr. p. 4. This evidence supports the reasonable inference that Potter was in direct physical control over the cigar prior to handing it to Myers. Perhaps most importantly, Myers confessed that he had brought the marijuana, in a baggie, to the river, and had placed it into the

hollowed-out cigar.³ The trial court was within its fact-finding discretion to find this evidence credible. Accordingly, we conclude that there was sufficient evidence to support Potter's conviction for possession of marijuana.

The judgment of the trial court is affirmed.

CRONE, J., and BROWN, J., concur.

³ Potter analogizes his case to *Loudermilk v. State*, 523 N.E.2d 769, 771 (Ind. Ct. App. 1988), wherein this court reversed a possession conviction because there was no evidence demonstrating that the defendant, who had briefly touched a bag of marijuana while it was passed among individuals, had dominion and control over the marijuana. In contrast with the instant case, the defendant in *Loudermilk* did not confess to possessing the marijuana. Potter's reliance on *Loudermilk* is unpersuasive.