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ATTORNEY FOR APPELLANT:

CARA SCHAEFER WIENEKE
Wieneke Law Office, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

GARY SINGLETON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-1010-CR-575
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0903-FA-5

July 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Gary Singleton ("Singleton") appeals his convictions after a jury trial for dealing in cocaine[1] as a Class A felony and possession of marijuana[2] as a Class A misdemeanor. Singleton raises the following issues for our review:

I. Whether the trial court committed fundamental error by not instructing the jury on constructive possession; and

II. Whether the evidence was sufficient to support Singleton's conviction for dealing in cocaine.

We affirm.

FACTS AND PROCEDURAL HISTORY

During February and early March of 2009, the Elkhart Police Department Street Crimes Unit ("The Unit") was engaged in making controlled buys from dealers in Elkhart. The Unit learned through a cooperating source, Kim Terlap ("Terlap"), that she could possibly buy crack cocaine from a dealer later identified as Singleton at his apartment. Singleton's apartment was the upstairs unit of a house that had been divided into two apartments, one upstairs and one downstairs.

On March 5, 2009, The Unit obtained a search warrant for Singleton's apartment. While Corporal Jeffrey Eaton was securing the warrant, Officer Brian Chomer and Corporal Tim Freel arrested Singleton and waited in his apartment until Corporal Eaton arrived with the warrant. There, Corporal Freel observed that the register covering a

[1] *See* Ind. Code § 35-48-4-1.

[2] *See* Ind. Code § 35-48-4-11.

floor vent in the apartment had been removed and was sitting next to the open vent along with a flashlight and broom handle.

When Corporal Eaton arrived with the warrant, the officers searched S apartment and recovered several security cameras and monitors, a Crown Royal bag containing $430.00, a smoking device, a plastic bag containing a brown, leafy substance, a box containing $1,000.00 in currency, and a box of plastic sandwich bags. In addition, the officers found a cell phone that matched the number used by Terlap in attempting to set up the controlled buys and $307.60 on Singleton's person.

Deciding to investigate the open vent in Singleton's living room, Corporal Freel and Corporal Eaton traced the vent to the basement. There, the officers opened the vent and found a pill bottle containing thirty individually packaged off-white, rock-like items. The vent led directly from Singleton's apartment down to the basement and had no other ducts or vents attached. The thirty off-white, rock-like items found in the pill bottle were cocaine base with an aggregate weight of 8.60 grams and the brown, leafy substance found in the bag in Singleton's apartment was marijuana weighing 5.46 grams.

The State charged Singleton with multiple counts of dealing in cocaine and possession of marijuana. A jury found Singleton guilty of Class A felony dealing in cocaine and Class A misdemeanor possession of marijuana.[3] The trial court sentenced Singleton to forty-five years with two years suspended to supervised probation for

[3] The jury found Singleton not guilty of three counts of dealing in cocaine related to the controlled buys by Terlap, and the evidence related to such charges was not considered in our review.

dealing in cocaine as a Class A felony and to three hundred sixty-five days for possession of marijuana. Singleton now appeals.

DISCUSSION AND DECISION

I. Jury Instruction

Singleton argues that the trial court committed fundamental error by failing to instruct the jury on actual and constructive possession. Specifically, Singleton contends that the lack of a detailed and proper instruction left the jury free to apply its own definition of constructive possession in deciding his guilt. *Appellant's Br.* at 4.

Instructing the jury lies within the sole discretion of the trial court. *Flake v. State*, 767 N.E.2d 1004, 1006 (Ind. Ct. App. 2002). A trial court's decision regarding jury instructions will be reversed only when the reviewing court has found an abuse of discretion. *Forte v. State*, 759 N.E.2d 206, 209 (Ind. 2001). Jury instructions are to be considered as a whole and in reference to each other; error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case. *Flake*, 767 N.E.2d at 1007.

At trial, neither party tendered an instruction on the legal definition of constructive possession. Instead, the trial court instructed the jury in relevant part as follows:

> A person who knowingly possesses, with the intent to deliver cocaine, pure or adulterated, and the amount of the cocaine involved weighs three (3) grams or more, commits dealing in cocaine, a Class A felony.
> Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:
>
> 1. The Defendant;
> 2. knowingly
> 3. possessed, with intent to deliver

> 4. cocaine, pure or adulterated;
> 5. and the amount of the cocaine involved weighed three (3) grams or more.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of Dealing in Cocaine, a Class A Felony as charged in Count I.

Appellant's App. at 71. Neither party objected to the instruction given by the trial court.

Generally, where a defendant has failed to object to a jury instruction or failed to tender a jury instruction, the defendant's claim of instructional error on appeal is waived; however, the appellate court will consider a defendant's claim that the error constituted fundamental error. *Covey v. State*, 929 N.E.2d 813, 819 (Ind. Ct. App. 2010). "The fundamental error doctrine is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Id.* Before a defendant is entitled to a reversal, he has the affirmative duty to show that the instructional error prejudiced his substantial rights. *Flake*, 767 N.E.2d at 1007.

Actual and constructive are the two possible ways of proving the element of possession, the third prong required in order to sustain a conviction for dealing in cocaine. Ind. Code § 35-48-4-1(b)(1). Actual possession occurs when a defendant had direct physical control over an item. *Jones v. State*, 881 N.E.2d 1095, 1098 (Ind. Ct. App. 2008). Constructive possession occurs when the defendant had the intent and capability to maintain dominion and control over the item, but does not have direct physical control. *Id.*

The definition of actual possession is consistent with the plain meaning of the term, and it was not necessary for the court to instruct the jury on matters within their common knowledge. "Where terms are in general use and can be understood by person of ordinary intelligence, they need not be defined for jury." *Roche v. State*, 690 N.E.2d 1115, 1128 (Ind. 1997). *See also Manley v State*, 656 N.E.2d 277, 279 (Ind. Ct. App. 1995). Constructive possession is more expansive than actual possession because it does not require that the contraband be under the defendant's direct dominion and control. As a result, a jury instruction defining constructive possession would make a jury conviction more likely, not less likely, and the party prejudiced by the lack of a jury instruction on constructive possession was the State, not Singleton. The fundamental error doctrine requires a showing of blatant violations of basic elementary principles and potential harm to substantial rights resulting in a denial of due process. *Covey*, 929 N.E.2d at 819. Singleton has failed to show any violation of or any prejudice to his substantial rights. Accordingly, we find that the trial court did not commit fundamental error in failing to instruct the jury on actual and constructive possession.

II. Sufficient Evidence

Singleton was convicted by a jury of Class A felony dealing in cocaine. In order to convict Singleton of this crime, the State was required to prove that Singleton: 1) knowingly or intentionally; 2) possessed; 3) cocaine, pure or adulterated; 4) in an amount of three grams or more; 5) with intent to deliver. Ind. Code § 35-48-4-1(b)(1). Singleton's sole argument is that the State failed to present evidence that he possessed the cocaine in question. *Appellant's Br.* at 8-9.

The law is well settled as to our standard of review for sufficiency claims. This court will not reweigh the evidence nor judge the credibility of the witnesses. *Williams v. State*, 873 N.E.2d 144, 147 (Ind. Ct. App. 2007). When reviewing a conviction for sufficiency of the evidence, we consider only the evidence most favorable to the judgment and all reasonable inferences are to be drawn from such evidence. *Robinson v. State*, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005). Thus, this court will affirm a conviction unless there is no way a reasonable fact finder could have found the defendant guilty. *Conrad v. State*, 747 N.E.2d 575, 582 (Ind. Ct. App. 2001). Even where the evidence is purely circumstantial, the evidence need not exclude every reasonable hypothesis of innocence; it is enough if an inference that reasonably tends to support the verdict can be drawn from the circumstantial evidence. *Hampton v. State*, 873 N.E.2d 1074, 1079 (Ind. Ct. App. 2007).

A conviction for possession can be based on either actual or constructive possession. *Washington v. State*, 902 N.E.2d 280, 288 (Ind. Ct. App. 2009), *trans. denied.* "Circumstantial evidence of intent to deliver, such as possession of a large quantity of drugs, large amounts of currency, scales, plastic bags, and other paraphernalia as well as evidence of other drug transactions, can support conviction of possession of cocaine with intent to deliver." *McGuire v. State*, 613 N.E.2d 861, 864 (Ind. Ct. App. 1993).

Constructive possession requires that Singleton have the intent and capability to maintain dominion and control of the cocaine at the time of his arrest. To prove the intent element, the State was required to demonstrate that Singleton had knowledge of the

cocaine in the vent. *Henderson v. State*, 715 N.E.2d 833, 835 (Ind. 1999). Knowledge of the contraband can be inferred either from exclusive dominion or control over the premises or, if the control is non-exclusive, evidence of additional circumstances can be used to show knowledge of the presence of the contraband. *Id.* Additional circumstances may include flight or furtive gestures, proximity to the contraband, the contraband being in plain view, or the location of the contraband in close proximity to items owned by the defendant. *Id.*

Here, the officers observed an open vent in Singleton's apartment together with a flashlight and broom handle. The vent descended directly from Singleton's apartment to the basement where the cocaine was found. Moreover, the evidence of security cameras, over $1,700.00 in cash, sandwich bags, which are associated with drug dealing, and a cell phone matching the number used in arranging the controlled buys provide additional circumstances sufficient to support the jury's finding that Singleton had the requisite intent required to prove constructive possession.

Singleton also had a possessory interest in the property where the contraband was found. "The proof of a possessory interest in the premises on which illegal drugs are found is adequate to show the capability to maintain dominion and control over the items in question." *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004).

The evidence was sufficient to prove that Singleton had both the intent and capability to maintain dominion and control over the cocaine and to support his conviction for dealing in cocaine. Affirmed.

VAIDIK, J., and MATHIAS, J., concur.