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IN THE
COURT OF APPEALS OF INDIANA

JOHNNY W. JORDAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1011-CR-1230
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G20-1003-FA-21050

August 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Johnny W. Jordan appeals his conviction following a bench trial for dealing in cocaine as a class A felony.[1]

We affirm.

ISSUE

Whether there is sufficient evidence to support Jordan's conviction for dealing in cocaine.

FACTS

On the evening of March 16, 2010, Indiana State Police Trooper Jonathan Caddell went to a Quality Inn hotel in response to a complaint about someone named "JJ" dealing narcotics in Room 234. As Caddell ran the license plates of several vehicles parked in the hotel's parking lot, he discovered a vehicle registered to Jordan and that Jordan had an outstanding arrest warrant for strangulation and battery. Caddell obtained Jordan's Bureau of Motor Vehicle photograph and radioed other Indiana State Police Troopers for assistance.

Caddell then asked the front desk clerk for the log of all the rooms rented that night. Caddell did not find Jordan's name in the log but discovered that Tara Hamilton was renting Room 234.

Caddell went to Room 234, knocked on the door twice, and identified himself as a State Police officer. Caddell heard a toilet flushing after he knocked twice, and a woman asked Caddell to identify himself, which he did. A few seconds later, a male, later

[1] Ind. Code § 35-48-4-1(a)(2).

identified as Jordan, also asked Caddell to identify himself, which again he did. Caddell asked if he could enter the room, and Jordan opened the door. Caddell saw Jordan and two females, later identified as Tara Hamilton and Roxanna Higginbotham in the room, and drug paraphernalia in plain sight on a television stand.

Caddell continued to hear the toilet flushing after entering the room, so he entered the bathroom to conduct a protective sweep in order to ensure that no other individuals or weapons were in the bathroom. Once inside the bathroom and in plain view, Caddell observed a plastic bag containing what appeared to be crack cocaine and other plastic bags on the bathroom counter, next to the toilet. Tests later confirmed that the bag contained 8.35 grams of crack cocaine.

Caddell then arrested Higginsbotham, Hamilton, and Jordan and read them their *Miranda* rights. Caddell took Jordan into a passageway outside the room and asked him who possessed the drugs and paraphernalia, to which Jordan replied that he did not know. Jordan, however, acknowledged that he was going to the bathroom when Caddell knocked on the door. Hamilton consented to a search of the room, during which Caddell found numerous items of drug paraphernalia; two handguns in a drawer that also contained male clothing; plastic baggies; and a scale.

On March 19, 2010, the State charged Jordan with Count I, dealing in cocaine as a class A felony, Count II, possession of cocaine as a class A felony, and Count III, possession of cocaine as a class C felony. A bench trial commenced on October 4, 2010. Higginbotham testified that she met Jordan in Room 234 on March 16, 2010 and purchased crack cocaine from him. Caddell testified that he saw crack cocaine in the

bathroom that Jordan stated he had occupied only moments before, and he further observed other evidence of drug use and manufacturing including guns, weight scales, and drug paraphernalia. The trial court found Jordan guilty on Count I, dealing in cocaine, and not guilty on the other two charges. The trial court sentenced Jordan to thirty years.

DECISION

Jordan asserts that there is insufficient evidence to support his conviction for dealing in cocaine because Higginbotham's testimony was inherently dubious and there was no evidence that he actually or constructively possessed cocaine. We disagree.

> The standard for reviewing a claim of insufficient evidence is firmly established. When reviewing the sufficiency of evidence, reviewing courts must consider only the probative evidence and reasonable inferences supporting the verdict. Appellate courts must affirm if the probative evidence and reasonable inferences drawn from that evidence could have allowed a reasonable trier of fact to find a defendant guilty beyond a reasonable doubt. It is not necessary that the evidence overcome every reasonable hypothesis of innocence, but evidence is sufficient if reasonable inferences from it support the verdict.

Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007) (quotations and citations omitted.)

1.Dubious Testimony

Jordan argues that his conviction for dealing in cocaine should be overturned because the testimony of Higginbotham was inherently dubious. Jordan argues that the fact the prosecutor subpoenaed Higginbotham a month before the trial started and gave her a plea deal that modified her sentence from house arrest to daily reporting renders her testimony inherently dubious.

Under the incredible dubiosity rule, a court will impinge on the jury's responsibility to judge the credibility of the witness only when it is confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. *Altes v. State*, 822 N.E.2d 1116, 1122 (Ind. Ct. App. 2005), *trans. denied*. We will reverse a conviction where a "'sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence . . . .'" *Id.* (quoting *White v. State*, 706 N.E.2d 1078, 1079 (Ind. 1999)). The application of the rule is rare, however, "and is limited to cases where the sole witness' testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it." *Id.*

The incredible dubiosity rule does not apply in this case because there was not a lack of circumstantial evidence, and Higginbotham was not the sole witness. Police found cocaine, drug paraphernalia, scales, and guns in the hotel room. Jordan also testified that he knew that crack cocaine was in the room. Caddell corroborated Higginbotham's testimony by testifying that he saw cocaine, drug paraphernalia, scales, and guns in the room.

As to Jordan's argument, that Higginbotham's testimony was inherently dubious because Higginbotham received a prosecutor's subpoena to testify and received a reduced sentence, we find this argument unpersuasive.

A subpoena to testify only assures that the witness attends the trial. *See* Ind. T.R. 45(A)(F). It does not compel the witness to give certain testimony. *Id.* In addition, the fact that a witness received a lenient sentence in exchange for testifying is not of itself

sufficient to show that the witness perjured himself or herself at trial. *Gubitz v State*, 360 N.E.2d 259, 265 (Ind. Ct. App. 1977). The credibility of Higginbotham's testimony is a matter exclusively in the province of the trial court because the trial court as the trier of fact at a bench trial has the duty to determine the credibility of witnesses. *Kilpatrick v. State*, 746 N.E.2d 52, 61 (Ind. 2001). Jordan's argument is an invitation to judge credibility, which this Court refuses to do.

2. Constructive Possession

Jordan also asserts that there is no evidence that he actually or constructively possessed cocaine. For the State to convict Jordan of dealing in cocaine as a class A felony, it had to prove beyond a reasonable doubt that he possessed with the intent to deliver three grams or more of cocaine. *See* I.C. § 35-48-4-1(a)(6).

Possession of cocaine can be actual or constructive. *Henderson v. State*, 715 N.E.2d 833, 835 (Ind. 1999). "Actual possession occurs when a person has direct physical control over the item." *Walker v. State*, 631 N.E.2d 1, 2 (Ind. Ct. App. 1994). Constructive possession occurs when a defendant has the intent and the capability to maintain dominion and control over drugs. *Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997). An inference of intent may be shown through the defendant's knowledge of the nature of the controlled substance and their presence. *Tate v. State* 835 N.E.2d 499, 511 (Ind. Ct. App. 2005). The capability requirement is met when the State shows that the defendant is able to reduce the controlled substance to the defendant's personal possession. *Lampkins*, 682 N.E.2d at 1275.

In cases in which a person has exclusive control over the premises where the contraband is located, there is an inference that the person had control over the contraband. *Person v. State,* 661 N.E.2d 587, 590 (Ind. Ct. App. 1996). Here, Jordan did not have exclusive control over the hotel room.

> If the control of the premises that the contraband is located is non-exclusive, there is no inference made about control unless there are certain circumstances indicating the knowledge of the presence of the contraband and the ability to control it such as (1) incriminating statements by the defendant, (2) attempted flight or furtive gestures, (3) a drug manufacturing setting, (4) proximity of the defendant to the contraband, (5) contraband is in plain view, and (6) the location of the contraband is in close proximity to items owned by the defendant.

Holmes v State, 785 N.E. 2d 658, 660-61 (Ind. Ct. App. 2003).

There was sufficient circumstantial evidence to support a reasonable inference that Jordan constructively possessed cocaine. Here, the record shows that Jordan admitted to knowing there was cocaine in the hotel room. Jordan further admitted that he was in the bathroom just moments before Caddell entered and found cocaine in the bathroom. Jordan also acknowledged that he had just flushed the toilet when Caddell knocked on the door, from which the trier of fact could infer Jordan knew about the cocaine and flushed it down the toilet. Room 234 had drug scales and guns inside it, which could indicate a manufacturing site for drugs. Higginbotham testified that she saw Jordan several times pull cocaine out of his pocket, which he distributed to others. Caddell saw cocaine in the bathroom along with guns, drug paraphernalia, and weight scales. Given these circumstances, the State has presented sufficient evidence doubt to support the conviction beyond a reasonable doubt.

We affirm.

RILEY, J., and BARNES, J., concur.