

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kenneth Simmons,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 23, 2016

Court of Appeals Case No.
49A02-1510-CR-1629

Appeal from the Marion Superior
Court

The Honorable David M. Seiter,
Master Commissioner

Trial Court Cause No.
49G20-1304-FA-20425

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Kenneth L. Simmons (Simmons), appeals his convictions for one Count of dealing in cocaine, a Class A felony, Ind. Code § 35-48-4-1(a)(2)(C),(b)(1) (2012); one Count of possession of cocaine, a Class C felony, I.C. § 35-48-4-6(a),(b)(1)(A) (2012); one Count possession of cocaine while in possession of a firearm, a Class C felony, I.C. § 35-48-4-6(a),(b)(1)(B) (2012); and one Count of carrying a handgun without a license, a Class A misdemeanor, I.C. §§ 35-47-2-1(a); -23(c) (2012).

[2] We affirm.

ISSUE

[3] Simmons raises one issue on appeal, which we restate as follows: Whether the State presented sufficient evidence to support his convictions for dealing and possessing cocaine.

FACTS AND PROCEDURAL HISTORY

[4] On March 27, 2013, Officer Timothy Elliott (Officer Elliott) of the Indianapolis Metropolitan Police Department (IMPD) was conducting routine patrol in IMPD's North District of Indianapolis, Marion County, Indiana. Officer Elliott observed a white Chrysler sedan traveling at forty-nine miles per hour along the 3300 block of East 34th Street, where the posted speed limit is thirty-five miles per hour. Officer Elliott initiated a traffic stop.

[5] Officer Elliott approached the vehicle and noticed that the driver, later identified as Simmons, “was very angry, and irate, moving around.” (Tr. p. 48). There were no passengers in the vehicle. Officer Elliott introduced himself and requested Simmons’ driver’s license and vehicle registration. During this interaction, Officer Elliott detected the odors of marijuana and alcohol emanating from the vehicle. As a result, Officer Elliott asked Simmons to step out of the vehicle in order to conduct field sobriety testing. When Simmons exited, Officer Elliott observed “a [G]lock magazine, and . . . the handle of [a handgun] sticking out of [Simmons’] right front jacket pocket.” (Tr. p. 48). Officer Elliott immediately confiscated the weapon, to which Simmons “stated that he needed that gun, and that gun was his, and [Officer Elliott] had no right taking that gun, and that people were trying to harm him.” (Tr. p. 50). Officer Elliott handcuffed Simmons until he could verify that Simmons had a valid driver’s license and a permit to carry the firearm. When Officer Elliott checked Simmons’ information, it was confirmed that Simmons did not have a valid gun permit. Accordingly, Officer Elliott placed Simmons under arrest and administered his *Miranda* warnings.

[6] In the course of Officer Elliott’s investigation, Officer John Cowherd (Officer Cowherd) of the Indianapolis Public Schools Police Department arrived to provide assistance. Having arrested Simmons, the officers determined that Simmons’ vehicle would need to be towed, so Officer Cowherd conducted an inventory search. In a “pull[-]out cup holder ashtray combo” located in the console directly beneath the radio, Officer Cowherd found a cellophane bag

containing a large chunk of a white powdery substance. (Tr. p. 52). The cellophane bag also contained twenty-one small packages made from the corners of plastic bags tied off in knots—*i.e.*, “bindles”—that were filled with smaller chunks of the same substance. (Tr. p. 60). When Officer Elliott displayed the cellophane bag to Simmons, Simmons “didn’t seem surprised. He kind of took in a deep breath, shoulders went forward, looked down at the ground, and slowly [exhaled], a long [exhale], and then looked up at [the officer], then looked away.” (Tr. p. 64). Simmons then stated that the bag did not belong to him. In response to Officer Elliott’s questions, Simmons explained that the vehicle belonged to his sister, Maneeka Simmons, but he had “been driving it for a while.” (Tr. p. 64).¹ Simmons also informed Officer Elliott that he had purchased the firearm “off the street” “because people were trying to kill him.” (Tr. p. 62). During the inventory search, Officer Cowherd additionally found an open bottle of liquor and “[m]arijuana shake”—*i.e.*, “loose particles, small amounts, your sticks, stems, seeds, loose leaves of marijuana”—on the floorboard of the vehicle. (Tr. p. 67). Boxes of men’s shoes and some new baseball caps were located in the trunk of the vehicle.

[7] The white powdery substance was submitted to the Marion County Forensic Services Agency for testing. The large chunk of powdery substance was

¹ Records from the Indiana Bureau of Motor Vehicles confirmed that the vehicle was registered to Maneeka Simmons.

identified as crack-cocaine and had a net weight of 11.01 grams. The individual bindles also contained crack-cocaine and had a total net weight of 4.0 grams.

[8] On April 3, 2013, the State filed an Information, charging Simmons with Count I, dealing in cocaine, a Class A felony, I.C. § 35-48-4-1(a)(2)(C),(b)(1) (2012); Count II, possession of cocaine, a Class C felony, I.C. § 35-48-4-6(a),(b)(1)(A) (2012); Count III, possession of cocaine while in possession of a firearm, a Class C felony, I.C. § 35-48-4-6(a),(b)(1)(B) (2012); Count IV, carrying a handgun without a license, a Class A misdemeanor, I.C. §§ 35-47-2-1(a); -23(c) (2012); and Count V, possession of marijuana, a Class A misdemeanor, I.C. § 35-48-4-11(1) (2012). The State also charged Simmons with Count VI (renumbered from Part II of Count IV), carrying a handgun without a license with a prior conviction for the same offense, a Class C felony, I.C. §§ 35-47-2-1; -23(c)(2)(A)(i) (2012); and Count VII (renumbered from Part II of Count V), possession of marijuana with a prior conviction for a marijuana offense, a Class D felony, I.C. § 35-48-4-11 (2012). On April 12, 2013, the State amended the Information by adding a sentence enhancement as Count VIII, alleging that Simmons used a firearm in a controlled substance offense, I.C. § 35-50-2-13(a)(2) (2012).

[9] On April 30, 2015, the trial court conducted a jury trial. Although Simmons was present in the courtroom during some preliminary matters, when the court reconvened from a recess, Simmons was gone and did not return for the trial. Over the objection of Simmons' counsel, the trial court determined that the trial would proceed in Simmons' absence. At the close of the evidence, the jury

returned a guilty verdict for Counts I through IV. The jury found Simmons not guilty of Count V.² A warrant was subsequently issued, and Simmons was taken into custody. On July 21, 2015, the trial court held a sentencing hearing. The trial court sentenced Simmons to thirty-five years, with twenty years executed and fifteen years suspended, on Count I; six years executed each on Counts II and III; and one year executed on Count IV. All sentences were ordered to run concurrently, resulting in an aggregate term of thirty-five years, with twenty years executed in the Indiana Department of Correction and fifteen years suspended. At the State's request, the trial court dismissed Counts VI and VIII.

[10] Simmons now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Standard of Review

[11] Simmons challenges the sufficiency of the evidence supporting his convictions for Counts I through III. On review, our court will not reweigh evidence or assess the credibility of witnesses. *Whitney v. State*, 726 N.E.2d 823, 825 (Ind. Ct. App. 2000). We will consider the evidence most favorable to the verdict, together with all reasonable inferences to be drawn therefrom, and we will affirm the conviction “if the probative evidence and reasonable inferences to be

² Based on his acquittal of Count V, possession of marijuana as a Class A misdemeanor, Simmons was necessarily found not guilty of Count VII, possession of marijuana with a prior marijuana offense conviction as a Class D felony.

drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.” *Id.* Where the evidence is circumstantial, our court must determine “whether reasonable minds could reach the inferences drawn by the jury; if so, there is sufficient evidence.” *Id.* (quoting *Bruce v. State*, 375 N.E.2d 1042, 1080 (Ind. 1978), *cert. denied*, 439 U.S. 988 (1978)). It is not necessary that we find the circumstantial evidence “adequate to overcome every reasonable hypothesis of innocence, but rather whether inferences may be reasonably drawn from that evidence which supports the verdict beyond a reasonable doubt.” *Id.* (quoting *Bustamante v. State*, 557 N.E.2d 1313, 1318 (Ind. 1990)).

II. *Possession of Cocaine*

- [12] Counts I through III all required proof that Simmons *possessed* cocaine. Specifically, for Count I, dealing in cocaine as a Class A felony, the State was required to prove that he “possesse[d], with intent to . . . deliver” three or more grams of cocaine. I.C. § 35-48-4-1(a)(2)(C),(b)(1) (2012). Count II, possession of cocaine as a Class C felony, required proof that Simmons, without a valid prescription, “knowingly or intentionally possesse[d]” three or more grams of cocaine. I.C. § 35-48-4-6(a),(b)(1) (2012). Finally, to prove Count III, a Class C felony, the State was obligated to establish that Simmons, without a valid prescription, “knowingly or intentionally possesse[d] cocaine” and that he “was also in possession of a firearm.” I.C. § 35-48-4-6(a),(b)(1)(B) (2012).
- [13] On appeal, Simmons claims that the convictions on Counts I through III must be vacated because the State failed to present sufficient evidence that he

possessed the cocaine. A possession offense may be supported by either actual or constructive possession of the contraband. *Houston v. State*, 997 N.E.2d 407, 409-10 (Ind. Ct. App. 2013). “Actual possession occurs when a person has direct physical control over the item,” whereas constructive possession “is the intent and capability to maintain dominion and control over the illegal drugs.” *Goodner v. State*, 685 N.E.2d 1058, 1061 (Ind. 1997) (quoting *Fassoth v. State*, 525 N.E.2d 318, 323 (Ind. 1988)); *Houston*, 997 N.E.2d at 410. Because the cocaine at issue was found in the vehicle rather than on his person, Simmons contends that the State was obligated to establish that he constructively possessed the cocaine, which, according to Simmons, the State failed to do.³

[14] In order to prove that Simmons constructively possessed the cocaine, the State was required to show that he had both “(1) the capability to maintain dominion and control over the item; and (2) the intent to maintain dominion and control over it.” *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011). “A trier of fact may infer that a defendant had the capability to maintain dominion and control over contraband from the simple fact that the defendant had a possessory interest in the premises on which an officer found this item” even if that possessory interest is not exclusive. *Id.* Here, Simmons clearly had a possessory interest in the vehicle in which the cocaine was discovered. Simmons explained to the police that he had borrowed the vehicle from his sister and had “been driving it

³ The State argues that the evidence establishes that Simmons had both actual *and* constructive possession of the cocaine. Because we can affirm Simmons’ conviction based on the theory of constructive possession, we need not address whether Simmons had actual possession of the cocaine.

for a while.” (Tr. p. 64). In fact, officers found men’s shoes and hats in the trunk of the vehicle. Therefore, Simmons had the capability to maintain dominion and control over the cocaine.

[15] Regarding Simmons’ intent, as with his capability, “[a] trier of fact may . . . infer that [he] had the intent to maintain dominion and control over contraband from the defendant’s possessory interest in the premises, even when that possessory interest is not exclusive.” *Gray*, 957 N.E.2d at 174. However, if the defendant’s possessory interest is non-exclusive, the State must set forth “additional circumstances pointing to the defendant’s knowledge of the presence and the nature of the item.” *Id.* at 174-75. Such additional circumstances may include:

(1) a defendant’s incriminating statements; (2) a defendant’s attempting to leave or making furtive gestures; (3) the location of contraband like drugs in settings suggesting manufacturing; (4) the item’s proximity to the defendant; (5) the location of contraband within the defendant’s plain view; and (6) the mingling of contraband with other items the defendant owns.

Id. at 175 (citing *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004)).

[16] Simmons contends that he did not have exclusive possession over the vehicle, which he borrowed from his sister, “because there is no evidence in the record to suggest for how long he had possession of the vehicle before the police pulled him over and searched it.” (Appellant’s Br. pp. 8-9). Simmons relies on *Parson v. State*, 431 N.E.2d 870, 872 (Ind. Ct. App. 1982), where the defendant was the lessee of a motor home in which a handgun was seized. This court found that

the defendant had constructive possession of the handgun because “the motor home had been reduced to [the defendant’s] exclusive possession for longer than a brief period of time.” *Id.* Here, Simmons asserts that his admission that he had been driving the car “for a while” does not indicate whether he had the vehicle for “ten seconds, ten minutes or ten days—or some other time-frame” that was “longer than a brief period.” (Appellant’s Br. p. 9).

[17] As previously mentioned, whether or not Simmons had exclusive possession of the vehicle is not dispositive. Rather, evidence of additional circumstances demonstrating that Simmons had knowledge of the cocaine may establish his intent to maintain dominion and control over the contraband. *Gray*, 957 N.E.2d at 174-75. In this case, although there is no indication that Simmons made incriminating statements as to the cocaine or attempted to flee from the police, nor is there evidence that the cocaine was seized in a drug manufacturing setting, Officer Elliott testified that Simmons was the sole occupant of the vehicle, and at the inception of the traffic stop, he observed Simmons to be “very angry, and irate, moving around.” (Tr. p. 48). When Officer Cowherd searched the vehicle, he observed a knotted plastic bag sticking up over the top of a cup holder. This cup holder was located directly below the radio, at arm’s length from the driver’s seat. Thus, the cocaine was both within close proximity to Simmons and within his plain view. Moreover, when Officer Elliott displayed the cellophane bag to Simmons, Simmons did not seem surprised. Instead, he dropped his shoulders, slowly exhaled, and looked away from the officer before ultimately denying that the cocaine

belonged to him. While the cocaine itself was not directly commingled with other items of Simmons' property, Simmons did have other belongings in the car. He admitted that the open bottle of liquor near the driver's seat belonged to him, and there were boxes of men's shoes and hats in the trunk. From this evidence, we find that a jury could reasonably infer that Simmons had the intent to maintain dominion and control over the cocaine. Although Simmons attempts to persuade our court that the drugs were not in his plain view based on the fact that Officer Cowherd observed the cellophane bag while he was standing on the passenger's side of the vehicle, we find that this argument amounts to nothing more than a request to reweigh evidence, which we decline to do. We find that there is sufficient evidence to support Simmons' convictions for Counts I, II, and III based on his constructive possession of the cocaine.

CONCLUSION

[18] Based on the foregoing, we conclude that the State presented sufficient evidence that Simmons constructively possessed the cocaine to support his convictions.

[19] Affirmed.

[20] Kirsch, J. and Pyle, J. concur