

Roderick L. Ensley (“Ensley”) appeals after a jury trial from his conviction of possession of cocaine,¹ as a Class D felony, and resisting law enforcement,² as a Class A misdemeanor. Ensley presents the following restated issues for our review:

- I. Whether the trial court abused its discretion by finding that Ensley did not have standing to challenge the search; and
- II. Whether there was sufficient evidence to support his conviction of possession of cocaine.

We affirm in part, reverse in part, and vacate.

FACTS AND PROCEDURAL HISTORY

On December 29, 2008, Detective Timothy Loe, of the Allen County Police Department received a tip that Ensley was at a residence at 621 Sturgis Street in Fort Wayne, Indiana. The officer was attempting to serve an outstanding failure to appear warrant for Ensley’s arrest on misdemeanor possession of marijuana charges. At approximately 9:00 p.m., Detective Loe, Officer Gabriel Furnish, and Officer Michael Smith went to the residence, which was leased by Aisha Henderson (“Aisha”), Ensley’s cousin. The officers observed Ensley leaving the apartment from the front door and stepping out onto the porch. Detective Loe yelled, “Police! Stop!” *Tr.* at 88. Ensley froze for a moment after making eye contact with the fully-uniformed officer, turned, and re-entered the residence, shutting and locking the door behind him.

¹See Ind. Code § 35-48-4-6(a).

² See Ind. Code § 35-44-3-3(a).

Detective Loe pursued Ensley onto the porch and kicked on the door while yelling, “Police! Open the door!” *Id.* at 90. David Henderson (“Henderson”), Aisha’s husband, unlocked and opened the door to allow the officers to come inside. The officers shouted, “Police! Show yourself, Roderick!” *Id.* at 92. Henderson was placed in handcuffs because the officers believed he was being evasive as to Ensley’s presence in the residence. Ensley, who was upstairs, shouted down to the officers that he was coming downstairs. As Ensley came down the stairs, Officer Furnish ran past him up the stairs. Detective Loe handcuffed Ensley once he reached the first floor. Aisha and her children followed Ensley down the stairs and the officers directed her and the children toward the living room.

Officer Furnish went upstairs to conduct a protective sweep of the residence and entered the bathroom. After checking behind the shower curtain, he turned and looked in the open toilet where he observed a plastic bag containing what was later determined to be .45 grams of cocaine floating there. Another baggie containing 1.14 grams of cocaine was found on top of the trash in the bathroom trashcan.

The officers then obtained consent from Aisha to search the premises. During the search of the children’s room upstairs, they found a plastic grocery bag containing plastic baggies, plates, a scale containing cocaine residue, and a court document pertaining to a previous possession of marijuana charge with Ensley’s name and signature on the paper. A box of .380 ammunition was located in a nightstand beside the bed.

The State charged Ensley with possession of cocaine as a Class C felony and resisting law enforcement as a Class A misdemeanor. Ensley filed a motion to suppress, challenging

the search of Aisha's residence. The State amended the charges to reduce the possession of cocaine charge to a Class D felony based on the actual weight of the cocaine seized. The trial court found that Ensley did not have standing to challenge the search and denied his motion to suppress.

A jury trial was held on May 13, 2009, during which Ensley objected to the admission of the evidence found as a result of the search. The jury found Ensley guilty of both charges. The trial court sentenced Ensley to two years executed for the possession of cocaine conviction and to a concurrent sentence of one year executed for the resisting law enforcement conviction. Ensley now appeals, challenging only his conviction for possession of cocaine.

DISCUSSION AND DECISION

I. Standing to Challenge the Search

Ensley challenges the trial court's determination that he did not have standing to contest the search of Aisha's apartment. Ensley challenged the search of the premises at the hearing on his motion to suppress evidence. He claims that the State failed to raise or make a standing argument at the hearing. The trial court later found that Ensley lacked standing to contest the search of the apartment and denied Ensley's motion to suppress the evidence found during the search. At trial, Ensley unsuccessfully objected to the admission of that evidence.

We initially observe that our standard of review governing the admissibility of evidence is the same whether the challenge is made by a pre-trial motion to suppress or by a

trial objection. *D.L. v. State*, 877 N.E.2d 500, 502 (Ind. Ct. App. 2007). A trial court has broad discretion in ruling on the admissibility of the evidence. *Gibson v. State*, 733 N.E.2d 945, 951 (Ind. Ct. App. 2000). We will reverse a trial court's ruling on the admissibility of the evidence only for an abuse of discretion. *Id.* An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We consider the evidence most favorable to the trial court's decision and any uncontradicted evidence to the contrary. *Id.*

Under the Fourth Amendment, an individual's right against unreasonable searches and seizures is personal. *Best v. State*, 821 N.E.2d 419, 424 (Ind. Ct. App. 2005). To challenge a search, a defendant must have a legitimate expectation of privacy in the place searched. *Id.* When the constitutionality of a search is challenged, defendant has the burden of demonstrating a legitimate expectation of privacy in the premises searched. *Matson v. State*, 844 N.E.2d 566, 570 (Ind. Ct. App. 2006). An overnight guest has a legitimate expectation of privacy in his host's home and may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the owner of the premises may not. *Id.*

Article I, Section 11 of the Indiana Constitution provides an independent prohibition against unreasonable searches and seizures. This state constitutional right is also a personal right. *Peterson v. State*, 674 N.E.2d 528, 533 (Ind. 1996), *reh'g denied*. To establish standing to challenge a search under Article I, Section 11, a defendant must show that the illegal search or seizure actually concerned his person, house, or effects. *Id.* at 534. When

challenging the search of a dwelling, a defendant must establish that he had ownership, control, possession, or interest in either the premises searched or the property seized. *Id.*

Here, the officers testified that they received a tip that Ensley would be at Aisha's residence on December 29, 2008, and that he would be driving a particular vehicle. The officers saw the vehicle parked outside the apartment and then saw Ensley exit the apartment. At the suppression hearing, Ensley testified that he lived with his mother at another house in Fort Wayne and was just visiting his cousin. He testified that he kept no clothes at her apartment, that his name was not on the lease, and that if he was sleepy he would stay overnight in the children's room at Aisha's apartment. Ensley denied ownership of the cocaine or any of the items found in the children's room. Aisha's name was on the lease, and she signed the consent to search the premises. Aisha did not testify at the suppression hearing or at trial. However, the officers testified without objection at the suppression hearing that she explained that Ensley had been staying at her apartment for approximately two weeks rent free and that he was not listed on the lease.

Although there was somewhat conflicting evidence of the frequency with which Ensley had stayed at Aisha's apartment, there is evidence in the record to support the trial court's determination that Ensley lacked standing to challenge the search of the apartment. The record reflects that the State did not waive the issue of standing because the argument was made near the conclusion of the suppression hearing. *Motion To Suppress Tr.* at 56-62. The trial court did not abuse its discretion in admitting the evidence discovered during the search.

II. Sufficiency of the Evidence

Our standard of review for a sufficiency of the evidence claim is well-settled. In reviewing such a claim, we will affirm the conviction unless, considering only the evidence and all reasonable inferences favorable to the judgment, and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *See Blackman v. State*, 868 N.E.2d 579, 583 (Ind. Ct. App. 2007).

Indiana Code section 35-48-4-6 provides that a person who, without a valid prescription, knowingly or intentionally possesses cocaine, commits the offense of possession of cocaine as a Class D felony. Ensley argues that there is insufficient evidence to establish beyond a reasonable doubt that he had actual or constructive possession of the cocaine. We agree.

A conviction for possession of contraband may rest upon proof of either actual or constructive possession. *See Britt v. State*, 810 N.E.2d 1077, 1082 (Ind. Ct. App. 2004). “Actual possession occurs when the defendant has direct physical control over the item, while constructive possession involves the intent and capability to maintain control over the item even though actual physical control is absent.” *Id.* To demonstrate constructive possession where control is non-exclusive, intent to maintain dominion and control may be inferred from additional circumstances that indicate the person knew of the presence of the contraband. *White v. State*, 772 N.E.2d 408, 413 (Ind. 2002). Additional circumstances that support finding a defendant had the intent and capability to maintain dominion and control

over contraband kept in non-exclusive premises may include, among other things:

“(1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the drugs; (5) drugs in plain view; and (6) location of the drugs in close proximity to items owned by the defendant.”

Massey v. State, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004) (quoting *Ladd v. State*, 710 N.E.2d 188, 190 (Ind. Ct. App. 1999)).

Ensley was charged with possession of the cocaine located in the bathroom of Aisha’s apartment, not with possession of the paraphernalia later found in the children’s bedroom. The record before us reveals a paucity of evidence connecting Ensley to the cocaine found in the bathroom. The same evidence that supports Ensley’s lack of standing to challenge the search, *i.e.*, no possessory interest in the premises, also supports the conclusion that Ensley did not possess the cocaine found therein. Although there was testimony that Ensley was upstairs when the officers entered the apartment and the bathroom in which the cocaine was found also was located upstairs, Aisha, the named tenant, and her children were the last ones upstairs, and followed Ensley downstairs. There was no evidence that Ensley had recently been in the bathroom in which the cocaine was located. Moreover, the inference of guilt that can be drawn from Ensley’s flight from police to the upstairs of the apartment could just as easily apply to Ensley’s knowledge of the existence of the outstanding warrant for his arrest for failure to appear on misdemeanor possession of marijuana charges, as it could apply to the knowledge of the presence of the cocaine in the apartment. The homeowners did not testify at the suppression hearing or at trial. Without more, we are hesitant to apply the inference of guilty knowledge to both possible scenarios.

We conclude that the evidence was insufficient to support Ensley's conviction of Class D felony possession of cocaine. Accordingly, we reverse that conviction and direct the trial court to vacate the conviction and the attendant sentence.

Affirmed in part, reversed in part, and vacated.

RILEY, J., and BAILEY, J., concur.