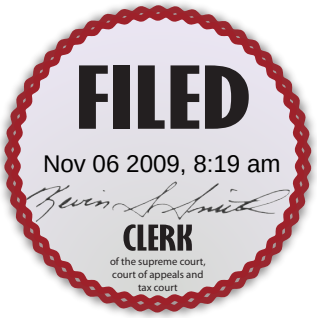
Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

JOHN PINNOW
State Public Defender's Office
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KEVIN N. JONES,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 14A01-0905-CR-244
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE DAVIESS SUPERIOR COURT
The Honorable Dean A. Sobecki, Judge
Cause No. 14D01-0804-FA-302

November 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Kevin Jones appeals his convictions, following a jury trial, for dealing in cocaine and conspiracy to commit dealing in cocaine, both Class A felonies. Jones raises two issues for our review: (1) whether the evidence is sufficient to support his conviction for dealing in cocaine; and (2) whether the evidence is sufficient to support his conviction for conspiracy to commit dealing in cocaine. Concluding the evidence is sufficient to support both convictions, we affirm.

Facts and Procedural History

During the summer of 2007, the Daviess County police department began hearing about a drug dealer named "Green Dog." During that summer, Darrell Pryor was arrested for selling methamphetamine. Pryor told police he got the methamphetamine and also bought cocaine from Green Dog. In January 2008, a friend of Leanne Tribby's was arrested for an existing methamphetamine-related charge while at her apartment. The police told Tribby that she could also be charged. Thereafter, Tribby agreed to work as a confidential informant for the police. Tribby told police she regularly purchased cocaine from Green Dog. At the time, neither Pryor nor Tribby knew Green Dog's real name, but both subsequently identified Jones as Green Dog.

With Tribby acting as a confidential informant, the police conducted three controlled buys in which Tribby purchased cocaine from Green Dog under police surveillance. The first buy took place on February 14, 2008. Tribby purchased $250 worth of cocaine from Green Dog outside a CVS in Daviess County. During the second

buy on March 13, 2008, Tribby purchased $90 worth of cocaine from Green Dog at 918 Jersey Street in Daviess County.

The third controlled buy took place on April 4, 2008. Sometime during the afternoon on April 4, 2008, police observed Tribby leaving 918 Jersey Street and pulled her over. Tribby agreed to take part in a controlled buy from Green Dog that evening. Under police surveillance, Tribby called Green Dog at 8:28 p.m. and asked if she could buy $100 worth of crack cocaine. The police gave Tribby a marked $100 bill. Tribby went back to 918 Jersey Street and gave the marked $100 bill to Green Dog in exchange for cocaine. Tribby told police to check out the garage. The police began the process of obtaining a search warrant for 918 Jersey Street, and in the meantime continued observing the house. Around 11:30 p.m., police witnessed a man leave 918 Jersey Street on a moped. They pulled the man over, and the man identified himself as Kevin Jones. Jones denied being Green Dog. Jones was searched and found to be carrying two cell phones and $1,200, including the marked $100 dollar bill. The police called the number that Tribby had called at 8:28 p.m. to initiate the buy, and one of Jones's cell phones rang.

In executing the search warrant at 918 Jersey Street, officers found approximately thirty-six grams of cocaine in a clear plastic bag that was placed on a piece of siding suspended from the rafters of the detached garage next to the house. The cocaine was divided into smaller, clear, individual bags inside the larger bag. In the house the police found digital scales and three cell phones, one of which had the same number Tribby had called during the February and March controlled buys. The police found marijuana in a

bedroom later identified as Jones's. In that bedroom the police also found a Bible bearing the name of Kevin Jones, his Tennessee identification card, and an Illinois traffic citation issued to Kevin Jones.

Jones gave a statement to police early the next morning. Jones admitted the marijuana was his. Jones twice denied being Green Dog, denied ever dealing cocaine, and claimed the money he was carrying came from his house in Mississippi. The police recorded a subsequent conversation in which Jones phoned his wife from jail and identified himself as Green Dog.

On April 9, 2008 the State charged Jones with ten counts: (1) dealing in cocaine, a Class B felony; (2) conspiracy to deal cocaine, a Class A felony; (3) dealing in cocaine, a Class A felony; (4)-(5) dealing in cocaine, both Class B felonies; (6)-(7) possession of a controlled substance, both Class D felonies; (8) maintaining a common nuisance, a Class D felony; (9) possession of marijuana, a Class A misdemeanor; and (10) possession of paraphernalia, a Class B misdemeanor.

A jury trial was conducted on November 19-21, 2008. Jennifer Tedford testified that she leased the residence at 918 Jersey Street. Tedford met Jones sometime around the summer of 2007 through a mutual friend. Jones told Tedford he was interested in leaving his current residence. Thereafter, Jones began living with Tedford at 918 Jersey Street. Tedford testified she had an agreement with Jones by which Jones would live at her house and sell drugs and in return Jones would pay rent to Tedford. Jones never paid Tedford any money for rent but did give her methamphetamine at least twice. Jones had a key to the house. His bedroom was five to ten feet from the garage, and he kept his

moped just outside the back of the garage. Tedford saw approximately fifteen to twenty people coming and going from the house on a daily basis. The traffic would stop when Jones went out of town. Tedford personally witnessed Jones give cocaine to one person. On one occasion Tedford saw large amounts of cocaine and methamphetamine on a table in Jones's room. Tedford told Jones not to keep any drugs in the house, instead asking him to keep the drugs in his moped or on his person.

Also at trial, Pryor testified he purchased crack cocaine from Jones 100 times or more at a variety of locations including 918 Jersey Street. Tribby estimated the number times she purchased cocaine from Jones to be "[t]housands probably." Transcript at 123. Tribby testified her purchases were made at a variety of locations including 918 Jersey Street. Although the police did not know the identity of Green Dog when they conducted the controlled buys, the police subsequently identified Jones as the man who sold drugs during each controlled buy.

The jury found Jones guilty of Counts 1-5 and 8-9.[1] On January 5, 2009, the trial court sentenced Jones to concurrent terms of ten years for Count 1, thirty years with five suspended for Count 2, thirty years with five suspended for Count 3, ten years for Count 4, ten years for Count 5, one and half years for Count 8, and one year for Count 9, for an aggregate sentence of thirty years with five suspended. Jones appeals from his convictions for Count 2, conspiracy to deal cocaine, and Count 3, dealing in cocaine, both Class A felonies.

[1] The State moved to dismiss Count 10, conceding the evidence was insufficient to support possession of paraphernalia. The trial court agreed and granted the motion. The trial court neither instructed nor provided verdict forms to the jury for Counts 6-7. Presumably the State elected not to proceed on those counts.

Discussion and Decision

I. Standard of Review

Jones argues that insufficient evidence supports both of his convictions. Our standard of review for sufficiency of the evidence claims is well settled:

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations, footnotes, and citations omitted) (emphasis in original).

II. Sufficiency of Evidence for Dealing in Cocaine

Jones challenges the sufficiency of the evidence supporting his conviction of dealing in cocaine. To convict Jones of dealing in cocaine, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally possessed with intent to deliver an amount of cocaine weighing three grams or more. Ind. Code § 35-48-4-1(a)(2), -(b)(1). Jones was charged with possessing with intent to deliver the approximately thirty-six grams of cocaine found in the garage at 918 Jersey Street. Jones did not have actual possession of the cocaine when police recovered it in the garage. However, the possession element may be supported by proof of actual or constructive possession. Whitney v. State, 726 N.E.2d 823, 825 (Ind. Ct. App. 2000). Constructive

possession requires proof of the capability and intent to maintain dominion and control over the contraband. Hardister v. State, 849 N.E.2d 563, 573 (Ind. 2006).

Jones had the capability to maintain dominion and control over the cocaine in the garage. The capability element is established when the defendant is able to reduce the controlled substance to the defendant's personal possession. Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999). Proof of the defendant's possessory interest in the premises is adequate; actual ownership is not required. Jones v. State, 807 N.E.2d 58, 66 (Ind. Ct. App. 2004), trans. denied. "A house or apartment used as a residence is controlled by the person who lives in it, and that person may be found in control of any drugs discovered therein, whether he is the owner, tenant, or merely an invitee." Id. Although Jones was not the owner, Tedford testified Jones had been living at 918 Jersey Street for about six months. Jones had a key to the house and maintained a bedroom there. Accordingly, Jones had a possessory interest in the premises and was capable of exercising dominion and control over the cocaine in the garage.

Jones also had the intent to maintain dominion and control over the cocaine in the garage. The intent element is established when the State proves the defendant had knowledge of the presence of contraband. Goliday, 708 N.E.2d at 6. "This knowledge may be inferred from either the exclusive dominion and control over the premise containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband." Id. (internal quotations and citation omitted). Jones did not have exclusive dominion and control over the garage, and therefore Jones's knowledge of the cocaine must be inferred

from additional circumstances. "Additional circumstances may include: (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 or weapons; (5) drugs or weapons in plain view; and (6) location of the drugs or weapons in close proximity to items owned by the defendant." Hardister, 849 N.E.2d at 574. Jones's only argument on appeal is there were no additional circumstances pointing to his knowledge of the cocaine in the garage. We disagree.

First, Jones made incriminating statements. In statements to police, Jones denied being Green Dog three times. However, during a subsequent phone call to his wife from jail, Jones identified himself as Green Dog. Jones also told police that the money he was carrying after the third controlled buy came from his home in Mississippi, but the marked $100 bill used in the third controlled buy was part of that money. In short, Jones lied about his identity and the source of his money. Jones admits these lies incriminate him with respect to the three Class B felony dealing counts,[2] but argues they do not incriminate him with respect to the possession of the thirty-six grams of cocaine found in the garage. See Brief of Defendant-Appellant at 10 ("His denial of being 'Green Dog,' and his later identification of himself as 'Green Dog' incriminated him on the three delivery counts. His incriminating behavior in that context did not necessarily incriminate him on possession of the cocaine in the garage."). We disagree.

Police knew drugs were being dealt from 918 Jersey Street by a man named Green Dog because Tribby had made two controlled buys of cocaine from Green Dog at that

[2] Each of these counts stems from one of the three controlled buys police conducted with Tribby's assistance. Jones does not challenge his conviction of these counts on appeal.

location. If police learned Jones was Green Dog, he would inevitably be tied to the drug sales at 918 Jersey Street and to any drugs discovered there. Moreover, possession of the marked $100 dollar bill used in the third controlled buy provided a link to the sale of cocaine that had occurred within the previous three hours at 918 Jersey Street and to the stash of cocaine found there. Accordingly, the jury could reasonable infer from Jones's denial that he was Green Dog and from his lie about the source of the money that he knew about the cocaine in the garage and was attempting to distance himself from the drug dealing operation at 918 Jersey Street.

Also pointing to Jones's knowledge of the cocaine in the garage is Jones's close proximity to the drugs. Jones had been living at 918 Jersey Street for about six months. Jones had a key to the house and maintained a bedroom there. Although the cocaine was not found in Jones's bedroom, his bedroom was very near the garage. Tedford testified Jones's bedroom was between five and ten feet from the garage. Further, Jones kept his moped outside the back door of the garage, and police observed him leaving 918 Jersey Street on his moped the night of his arrest. During the third controlled buy, Tribby purchased cocaine from Jones at 918 Jersey Street, and told police to check the garage. The police executed a search warrant and discovered thirty-six grams of cocaine in the garage. Stated quite simply, it is reasonable for a jury to infer that the cocaine in the garage at 918 Jersey Street was Jones's cocaine given he had sold cocaine from that same location a few hours earlier.

In an attempt to undermine his proximity to the cocaine, Jones argues other people had access to the garage. Jones emphasizes the garage was not locked and lacked a front

door. Jones points out another drug dealer was at the house earlier in the day on April 4, 2008. This fact, assuming it is true, allows the inference that the cocaine in the garage may not have been Jones's cocaine; however, it does not change that Jones (1) lived at 918 Jersey Street; (2) regularly sold cocaine from 918 Jersey Street; and (3) sold cocaine from 918 Jersey Street hours before the police discovered the cocaine in the garage. At best, Jones has presented us with conflicting evidence. However, "when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling." Drane, 867 N.E.2d at 146 (quotations omitted). The inference most favorable to the trial court's ruling is that it was Jones's cocaine found in the garage.

Finally, in addition to Jones's incriminating statements and his proximity to the drugs, there are other circumstances supporting the inference Jones knew about the cocaine and intended to maintain dominion and control over it. Tedford testified that on one occasion she saw Jones with large amounts of drugs at the house. Tedford testified between fifteen and twenty people would come and go from the house on a daily basis, and the traffic would stop when Jones was out of town. Pryor and Tribby testified they had each purchased cocaine from Jones hundreds of times at a variety of locations including 918 Jersey Street. All of this evidence indicates Jones dealt drugs from 918 Jersey Street. It is therefore reasonable for a jury to conclude Jones knew about and intended to maintain dominion and control over a large amount of drugs found in the garage at 918 Jersey Street.

Ultimately, the evidences supports a finding that Jones constructively possessed the approximately thirty-six grams of cocaine found in the garage at 918 Jersey Street.

Jones had the capability to maintain dominion and control over the cocaine. Although he was not in exclusive control of the garage, there are additional circumstances indicating that Jones knew about and intended to maintain dominion and control over the cocaine. Jones lied about his identity and the source of his money in an attempt to distance himself from the cocaine. Jones was identified as Green Dog, a drug dealer who regularly sold cocaine from 918 Jersey Street, and he sold cocaine from 918 Jersey Street on the night the drugs were found. Therefore, sufficient evidence supports Jones's conviction for dealing in cocaine as a Class A felony.

III. Sufficiency of Evidence for Conspiracy to Commit Dealing in Cocaine

Jones also challenges the sufficiency of the evidence supporting his conviction for conspiracy to commit dealing in cocaine, a Class A felony. To convict Jones of conspiracy to commit dealing in cocaine, the State was required to prove beyond a reasonable doubt that the he conspired with another person to commit the crime of dealing in cocaine with the intent to commit that crime. Ind. Code § 35-41-5-2(a). The State must also prove either Jones or a co-conspirator performed an overt act in furtherance of the conspiracy. Ind. Code § 35-41-5-2(b). "It is sufficient if the minds of the parties meet understandingly to bring about an intelligent and deliberate agreement to commit the offense." Porter v. State, 715 N.E.2d 868, 870-71 (Ind. 1999) (quotations omitted). "Such an agreement may be shown by either direct or circumstantial evidence, including the acts of the parties to the agreement." Drakulich v. State, 877 N.E.2d 525, 532 (Ind. Ct. App. 2007), trans. denied.

On appeal, Jones's only argument is that there is insufficient evidence he had an agreement with Tedford. We disagree. Tedford testified that she and Jones had an agreement that he could live at her house and deal drugs and in return he would pay some rent. Jones had a key to the house and maintained a bedroom there. Some of Jones's possessions were found at the house. Although Jones never paid any rent, he did give Tedford methamphetamine at least twice. On one occasion, Tedford saw Jones with large amounts of drugs at the house. Tedford personally witnessed Jones give cocaine to one person, and witnessed between fifteen and twenty people coming and going from the house on a daily basis. Pryor and Tribby testified each had purchased cocaine from Jones hundreds of times at a variety of locations including 918 Jersey Street. Tedford also pled guilty to the conspiracy and admitted conspiring to deal cocaine with Jones. All of this evidence supports the existence of an agreement between Jones and Tedford.

Jones points out Tedford confronted him and asked him not to keep drugs in the house. Jones argues this demonstrates there was no conspiracy; that is, because Tedford asked him not to keep drugs in the house, they did not have an agreement for him to use the residence as a base for a drug dealing enterprise. If anything, the fact that Tedford asked Jones not to keep drugs in the house and he complied further supports the existence of a conspiracy. When police executed a search warrant, thirty-six grams of cocaine were found, not in the house, but in the garage. This supports the inference Jones was complying with Tedford's request and demonstrates specific details of their agreement: Jones would live at 918 Jersey Street and in return would occasionally provide drugs to Tedford, however, Jones would have to keep his drugs elsewhere than in the house.

Considering Tedford's testimony about the agreement and all the other corroborating evidence, we conclude sufficient evidence supports Jones's conviction for conspiracy to commit dealing in cocaine.

We recognize that witness testimony provided much of the evidence in this case, namely the testimony of Tedford, Tribby, and Pryor. Jones's challenge to the sufficiency of the evidence in large part asks us to reconsider the credibility of these witnesses, which under our standard of review we cannot do. See Drane, 867 N.E.2d at 146. We view the evidence in a light favorable to the verdict and reverse only when no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id. Such is not the case here. There is sufficient evidence to support both of Jones's convictions.

Conclusion

Sufficient evidence supports Jones's convictions for dealing in cocaine and conspiracy to commit dealing in cocaine.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.