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IN THE
COURT OF APPEALS OF INDIANA

EUGENE GRAVES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0905-CR-406
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Evan Goodman, Senior Judge
The Honorable Rebekah Pierson-Treacy, Judge
Cause No. 49F19-0812-CM-284113

December 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Eugene Graves appeals his conviction for Class A misdemeanor possession of marijuana. Graves contends there is insufficient evidence that he constructively possessed marijuana found in the borrowed truck he was driving and the trial court abused its discretion in allowing the State to introduce evidence during cross-examination of Graves' prior outstanding warrant for drug possession. Finding sufficient evidence to sustain Graves' conviction and concluding the trial court did not abuse its discretion in determining the scope of cross-examination, we affirm.

Facts and Procedural History

In December 2008 Officer Robert Pyatskowit of the Indianapolis Metropolitan Police Department stopped the truck Graves was driving during an investigation for fraud. Graves was the only person in the truck. When Officer Pyatskowit asked Graves for his driver's license, Graves responded that he did not have one and instead gave him his name and date of birth. Upon running a check of Graves' personal information and discovering that he had an outstanding warrant from Henry County, Officer Pyatskowit placed Graves under arrest. Officer Kevin Kern arrived on the scene at some point to assist Officer Pyatskowit. When Officer Kern looked through the window of the truck, he saw marijuana on the passenger floorboard of the truck. Officer Pyatskowit then looked through the passenger-side window and also saw marijuana on the passenger floorboard. He collected the marijuana from the passenger floorboard and also the marijuana he consequently found underneath the passenger seat. The marijuana was later determined to have a combined weight of 4.22 grams.

The State charged Graves with Class A misdemeanor possession of marijuana.[1] He was tried to the bench. Officers Pyatskowit and Kern testified to the foregoing events for the State. In addition, Officer Pyatskowit testified that the marijuana was within arm's reach of Graves as he was driving, and Officer Kern testified that an emaciated pit bull was initially in the bed of the truck, but after it fell out, landed on its face, and started bleeding, Graves put the pit bull in the cab. Graves testified in his own defense that he borrowed the truck from a friend, George Osborn, so that he could pick up the pit bull from Osborn's yard because it suffered from malnutrition and Osborn wanted it out of his yard. He further testified that he had been in the truck "[r]oughly an[] hour or more" before he was pulled over. Tr. p. 48. During direct examination, defense counsel questioned Graves as follows:

> [DEFENSE COUNSEL:] And to your knowledge, did the officer run your identity?
> [GRAVES:] Yes.
> [DEFENSE COUNSEL:] What did he find?
> [GRAVES:] That it was me.
> [DEFENSE COUNSEL:] What holds did you have on you from other counties at that time?
> [GRAVES:] Failure to appear. I missed a court appearance, so –
> [DEFENSE COUNSEL:] Was that a warrant?
> [GRAVES:] Yes.

Id. at 46-47. On cross-examination, the following discussion occurred:

> [STATE:] Your attorney asked you what all you had outstanding warrants on, correct?
> [GRAVES:] Yes.
> [STATE:] And you said it was Henry County.
> [GRAVES:] Yes.
> [STATE:] Was that the possession you're on probation for?

[1] Ind. Code § 35-48-4-11.

[DEFENSE COUNSEL:] Your Honor, I would object to relevance and the State didn't provide notice and intent to use past criminal history.
[STATE:] Judge, he asked him what all he was wanted on. I could just say we have a fair right.
[COURT:] Overruled.
[DEFENSE COUNSEL:] I asked him what he had a hold for.
[STATE:] What all he had a hold for.
[COURT:] Well, overruled.
[STATE:] Isn't it true that you are on probation for the possession case?
[GRAVES:] I had a failure to appear for a court case.
[DEFENSE COUNSEL:] I would actually object again, your Honor, because the State hasn't provided a purpose for using this. The State's not allowed to show that he had conformity therewith on this case by trying to introduce his past record, so without showing a purpose of why they're using it, I would object to the admittance of this testimony.
[STATE:] Judge, we're going at the credibility of the witness here, and, Judge, I think the State has every right to question the witness.
[COURT:] Well, you can ask him without his Ashton convictions, right?
[STATE:] Well, Judge, I think they have opened up the door about this one, and if he asks yes or no it's a proper answer.
[DEFENSE COUNSEL:] We haven't opened up the door to his credibility.
[COURT:] Just a minute. Your question was on direct what were you being held for, right?
[DEFENSE COUNSEL:] That is it and only go into that. We haven't opened the door to his credibility and anything further than discussing that hold would go beyond the scope of direct and the State has not provided the required notice by statute. You know, the door hasn't been opened further tha[n] that hold.
[COURT:] I think they can ask about Ashtons at the very – they can ask about Ashtons.
[DEFENSE COUNSEL:] The State would have to show or provide defense counsel proper notice.
[COURT:] I think if you've opened the door as you have, then they're entitled to go forward with it.
[DEFENSE COUNSEL:] See, the hold is not the Ashton. There might possibly be one but at that point the State would still have to show evidence on that because that's something that we did open the door to.
[COURT:] Well, I'm sorry, you've brought it up here and if you wouldn't have brought it up they wouldn't have – they didn't have any time to give you notice. How would they have known that you were going to bring it up?
[DEFENSE COUNSEL:] State can run an NCIC.
[COURT:] Overruled. You may ask.
[STATE:] Was that a yes or no?

[GRAVES:] Possession? No.

Id. at 51-54. The trial court found Graves guilty of Class A misdemeanor possession of marijuana and sentenced him to sixty days in the Marion County Jail, which was suspended. Graves now appeals.

Discussion and Decision

Graves raises two arguments on appeal: (1) whether there is sufficient evidence that he constructively possessed the marijuana and (2) whether the trial court abused its discretion in allowing the State to introduce evidence during cross-examination of Graves' prior outstanding warrant for drug possession.

I. Sufficiency of the Evidence

Graves first contends that there is insufficient evidence that he was in constructive possession of the marijuana. Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, we do not reweigh the evidence or judge the credibility of the witnesses. *Fought v. State*, 898 N.E.2d 447, 450 (Ind. Ct. App. 2008). We consider only the evidence most favorable to the judgment and the reasonable inferences drawn therefrom and affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id.* A conviction may be based upon circumstantial evidence alone. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

A person commits Class A misdemeanor possession of marijuana if he or she knowingly or intentionally possesses pure or adulterated marijuana. Ind. Code § 35-48-4-

11. A conviction for possession of contraband may rest upon proof of either actual or constructive possession. *Washington v. State*, 902 N.E.2d 280, 288 (Ind. Ct. App. 2009), *trans. denied*. Actual possession occurs when a person has direct physical control over the contraband. *Massey v. State*, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004). Graves did not have direct physical control over the marijuana; therefore, we consider whether the State established that he constructively possessed it.

Constructive possession occurs when someone has the intent and the capability to maintain dominion and control over the contraband. *Atwood v. State*, 905 N.E.2d 479, 484 (Ind. Ct. App. 2009), *trans. denied*. To prove the intent element, the State must demonstrate the defendant's knowledge of the presence of the contraband. *Iddings v. State*, 772 N.E.2d 1006, 1015 (Ind. Ct. App. 2002), *trans. denied*. This knowledge may be inferred from the defendant's exclusive dominion and control over the premises containing the contraband. *Ables v. State*, 848 N.E.2d 293, 297 (Ind. Ct. App. 2006). Graves was the driver and sole occupant of the truck when Officer Pyatskowit stopped him. Although Graves stated that he borrowed the truck from a friend, such testimony is not enough to disprove exclusive possession. *See Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999) ("The defendant contends that he borrowed the car and, thus, was not in exclusive possession. The issue, however, is not ownership but possession. The defendant was the only person in the vehicle when police stopped it. His exclusive possession of the vehicle was sufficient to raise a reasonable inference of intent."); *see also Whitney v. State*, 726 N.E.2d 823, 826 (Ind. Ct. App. 2000) (finding that the trial court could reasonably conclude the defendant was in exclusive possession of the vehicle where he was the

driver and sole occupant when stopped by the police).[2] Because Graves had exclusive possession of the truck, we therefore infer knowledge of the presence of the contraband, which in turn demonstrates Graves' intent to maintain dominion and control over the marijuana found in the truck.

Despite our finding of exclusive possession, the State assumes, and Graves implicitly agrees, that Graves' possession of the truck was nonexclusive. *See* Appellee's Br. p. 4; Appellant's Br. p. 6. No citations or further explanation is provided by either party. Even if Graves' possession was nonexclusive, which we conclude that it was not, we would still find intent to maintain dominion and control. When a defendant's control over the premises is nonexclusive, the State must show evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband and his or her ability to control it. *Ables*, 848 N.E.2d at 297. Among such circumstances are proximity of the contraband to the defendant and location of the contraband within the defendant's plain view. *Id.* Officer Pyatskowit testified that the marijuana was within arm's reach of Graves as he sat in the driver's seat. We thus have proximity. Although it is unclear through which window Officer Kern viewed the marijuana, Officer Pyatskowit viewed the marijuana through the passenger-side window. During the time Graves had possession of the truck, the record reveals that he first went to a check cashing business and then picked up the pit bull from his friend's house. Given that the marijuana was in plain view from the passenger-side window, Graves went in and out of

[2] We note that the fact that a defendant has exclusive possession of a vehicle is not always sufficient evidence of knowledge of the presence of contraband in that vehicle. In situations in which contraband is found in a hidden compartment, additional evidence is necessary to demonstrate guilty knowledge. *See Whitney*, 726 N.E.2d at 826 (citing *United States v. Richardson*, 848 F.2d 509, 513 (5th Cir. 1988)).

the truck multiple times, and Graves had the truck for at least an hour, it is reasonable to infer that the marijuana was within Graves' plain view.

We find Graves' argument that the pit bull may have "stir[red] up the contents of the passenger floorboard thereby revealing the marijuana" unpersuasive. Appellant's Br. p. 7. The record shows that the pit bull suffered from malnutrition, was emaciated, and had just fallen from the bed of the truck, landed on its face, and started bleeding. No evidence was presented that the dog was in any way active, and thus, the trial court could reasonably infer that the dog did not take the marijuana from an obscured location to a place within Graves' plain view.

Graves' citation to *Jones v. State*, 881 N.E.2d 1095 (Ind. Ct. App. 2008), for the proposition that proximity and plain view are not enough to show intent to maintain dominion and control over contraband, is also unavailing. In that case, Jones was intoxicated, reclining in the front passenger seat of a borrowed vehicle parked in a driveway, and the only person in the vehicle. *Id.* at 1097. A handgun was lying on top of a pile of clothes in the middle of the back seat. *Id.* Another panel of this Court concluded that because the handgun was found in the rear of the vehicle and Jones was in the front passenger seat, Jones did not constructively possess the handgun. *Id.* at 1099 (citing *Henderson v. State*, 715 N.E.2d 833, 838 (Ind. 1999) (concluding that "[a] passenger in the front seat, without more, is not deemed to possess a gun located on the floor behind the driver")). The instant case is clearly distinguishable. Here, the marijuana was not located in the rear of the truck, but in the front passenger area, and Graves was not a passenger, but the driver.

Finding the additional circumstances of proximity and plain view, even if Graves had nonexclusive possession of the truck, we would still conclude that Graves had knowledge of the presence of the marijuana and thus the intent to maintain dominion and control over it.

As for the capability element of constructive possession, a defendant is capable of maintaining dominion and control over contraband when he or she is able to reduce the contraband to his or her personal possession or to otherwise direct its disposition or use. *Id.* Proof of an exclusive possessory interest in the premises in which contraband is found is adequate to show the capability to maintain dominion and control. *Davenport v. State*, 464 N.E.2d 1302, 1307 (Ind. 1984). Here, Graves had exclusive possession of the truck at the time he was stopped. In addition, the marijuana was on the passenger floorboard and within arm's reach. Thus, Graves had the capability to maintain dominion and control over the marijuana. We find the evidence sufficient to show that Graves constructively possessed the marijuana.

II. Scope of Cross-Examination

Graves next contends that the trial court abused its discretion "in allowing the State to introduce evidence of Graves' prior outstanding warrant for drug possession." Appellant's Br. p. 1. The contested testimony regarding Graves' outstanding warrant was elicited during cross-examination. A trial court has broad discretion to determine the scope of cross-examination, and its decision will be reversed only for an abuse of discretion. *Bullock v. State*, 903 N.E.2d 156, 160 (Ind. Ct. App. 2009). The scope of permissible cross-examination extends to all phases of the subject matter covered on

direct examination. *Lyles v. State*, 834 N.E.2d 1035, 1047 (Ind. Ct. App. 2005) (quoting *Smith v. State*, 765 N.E.2d 578, 588 (Ind. 2002), *reh'g denied*), *reh'g denied*, *trans. denied*. Once a party opens up a subject on direct examination, he or she cannot close the subject to cross-examination at his or her own convenience. *Id.* (quoting *Smith*, 765 N.E.2d at 588).

On direct examination, defense counsel asked Graves about his outstanding warrants: "What holds did you have on you from other counties at that time?" Graves responded that he had an outstanding warrant for failure to appear. On cross-examination, the State asked about this outstanding warrant: "Was that the possession you're on probation for?" As the subject matter of Graves' outstanding warrants was covered on direct examination, it was permissible for the State to continue in this line of questioning. Once defense counsel opened up the subject of Graves' outstanding warrants on direct examination, he was not permitted to close that subject to cross-examination at his convenience.

Furthermore, Graves' ultimate answer was: "Possession? No." Therefore, the State did not introduce evidence of Graves' prior outstanding warrant for drug possession as contended by Graves.[3] The trial court did not abuse its discretion in determining the scope of cross-examination.

Affirmed.

RILEY, J., and CRONE, J., concur.

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[3] We note that both Graves and the State analyzed this issue as whether the trial court abused its discretion in admitting evidence. As we have concluded that the State did not introduce evidence of Graves' prior outstanding warrant for drug possession, we similarly conclude that the trial court did not admit such evidence.