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**IN THE
COURT OF APPEALS OF INDIANA**

ARNOLD BURTON,)
)
 Appellant-Defendant,)
)
 vs.) No. 40A01-0701-CR-49
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0604-FB-72

August 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Arnold Burton appeals his jury conviction for aiding in the manufacturing of methamphetamine¹ as a Class B felony, possession of precursors² as a Class B felony, and maintaining a common nuisance³ as a Class D felony. Burton raises the following restated issues on appeal:

- I. Whether the State's erroneous comments during closing argument constituted fundamental error;
- II. Whether the trial court's admission of his non-verbal statements was fundamental error;
- III. Whether the State presented sufficient evidence to sustain his convictions.

We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

Jennings County Deputy Sheriff Eric Pettit, experienced in methamphetamine investigations, responded to a call from a citizen concerning a trailer at County Squire Lakes. The caller said that a local woman, Roseanne Philpot, had visited the caller to obtain coffee filters, which the caller knew were used in the manufacturing of methamphetamine. Deputy Pettit and two other officers went to the residence described by the caller and immediately smelled an odor they knew to be associated with the manufacturing of methamphetamine.

The officers knocked on the door and no one immediately answered. As they waited for a response, the officer's saw various precursors for the manufacturing of

¹ See IC 35-48-4-1; *see also* IC 35-41-2-4.

² See IC 35-48-4-14.5.

³ See IC 35-48-4-13.

methamphetamine in an open trashcan outside the trailer. About ten minutes later, the owner of the trailer, Danny Whiteman, emerged and met with the officers in the driveway. The officers asked if Whiteman would consent to a search, and he refused. Philpot then emerged from the trailer. The police instructed Whiteman not to move, but he began moving away from them and then suddenly he “broke and ran for the trailer,” while two officers followed him into the trailer. *Tr.* at 135. The officers reported that inside the trailer, the chemical cloud was so overwhelming that later they had to receive oxygen. Inside the trailer, the officers observed several precursors and other items used in the manufacturing of methamphetamine. The officers were able to secure Whiteman, Philpot, and another male outside. At that time, Philpot informed the police that a fourth person was still inside the trailer. The officers entered the trailer and discovered Burton hiding in a bedroom closet under a pile of clothes. .

The police took Burton along with the others to jail where he was later interviewed. The police read Burton his *Miranda*⁴ rights, and he received and signed a written waiver. During his interview with police, Burton admitted that he was living at Whiteman’s trailer. At first, Burton denied any involvement with the methamphetamine lab and stated he was gone all day fishing, and when he returned, he fell asleep until the police arrived. When the officers indicated their disbelief, Burton told them “[y]ou’re right.” *Id.* at 292. Burton then disclosed information about the operation of the methamphetamine lab. When he was asked whether he helped Whiteman with the lab, Burton nodded yes. *Id.* at 282.

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

The State charged Burton with four counts: (I) aiding in the manufacturing of methamphetamine; (II) possession of two or more precursors with the intent to manufacture methamphetamine; (III) maintaining a common nuisance; and (IV) visiting a common nuisance. The State later added a habitual offender charge. During closing argument, the State, without Burton's objection, argued that Burton aided Whiteman by "not doing something." *Id.* at 333-34. A jury found Burton guilty of counts I through III, and, in exchange for an agreed sentence, Burton pled guilty to being an habitual offender. The trial court entered judgment on all four counts. Burton now appeals.

DISCUSSION AND DECISION

I. Closing Argument

Burton contends that the prosecutor's comments during closing argument that doing nothing to prevent an offense is the equivalent of aiding constituted fundamental error because it was a blatant misstatement of the law. Fundamental error is a substantial violation of the basic principles of law rendering the trial unfair to the defendant and, thereby, depriving him of fundamental due process. *Seide v. State* 784 N.E.2d 974, 977 (Ind. Ct. App. 2003). The error must be so prejudicial that it subjected the defendant to grave peril and had a probable persuasive effect on the jury's decision as to make a fair trial impossible. *Id.*

Burton argues that the prosecutor's following statements constituted fundamental error:

He aided him by not doing something. He aided Danny Whiteman by never picking up a telephone and can I talk to Sheriff Earl Taggart Because Danny Whiteman's running a meth lab. That's aiding, allowing it to go on.

That's helping. That's aiding.

Tr. at 334.

The prosecutor's statement is a misstatement of the law. A defendant is criminally liable for aiding when:

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense. To "aid" under the law is to knowingly aid, support, help or assist in the commission of a crime. It is knowingly doing some act to render aid to the actual perpetrator of the crime, though [sic] without taking a direct share in its commission.

Proof of the defendant's presence at the crime scene, failure to oppose the commission of the crime, companionship with the person committing the offense, and conduct before, during and after the offense may be considered in determining whether aiding may be inferred.

Specht v. State, 838 N.E.2d 1081, 1088 (Ind. Ct. App. 2005). While the prosecutor's statement was erroneous because the factors cited do not in themselves constitute aiding, the factors cited are all legitimate factors for the jury to consider in determining whether Burton committed aiding. Moreover, Burton makes no claim that the jury was not properly instructed on the elements of aiding. The prosecutor also argued the other factors to be considered by the court. As such, Burton was not deprived of fundamental due process, and there was no fundamental error.

II. Non-Verbal Admission

Burton claims that the admission of portions of his videotaped interrogation with police where he nodded his head in response to questions was fundamental error since he was not warned that his non-verbal responses could be used against him.

"*Miranda* protects all testimonial responses, including nonverbal conduct." *Smith*

v. State, 829 N.E.2d 64, 75 (Ind. Ct. App. 2005) (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 595 n.9 (1990) (“ . . . non verbal conduct contains a testimonial component whenever the conduct reflects the actor’s communication of his thoughts to another.”))).

There was no violation of Burton’s rights (fundamental or otherwise) regarding the admission of the non-verbal communication. Burton received the Miranda warnings to which he was entitled and thereafter voluntarily elected to speak with police. The fact that Burton nodded in response to certain police questions and gave verbal answers in response to others is of no moment. *See* Indiana Evidence Rule 801(a) (defines statement as: “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.”). Since Burton made a knowing waiver of his right to remain silent, his voluntary statements, spoken or otherwise, were properly admitted.

III. Sufficiency of the Evidence

A. Standard of Review

Burton challenges the sufficiency of the evidence supporting each of his convictions. In reviewing an appellate claim that the evidence was insufficient, we will not reweigh the evidence or judge the credibility of witnesses. *Culbertson v. State*, 792 N.E.2d 573, 576 (Ind. Ct. App. 2003). We examine the evidence most favorable to the judgment and all reasonable inferences that may be drawn therefrom. *Id.* We will sustain a conviction only when each material element of the charge is supported by evidence in the record from which a rational trier of fact could have found guilt beyond a reasonable doubt. *Id.*

B. Possession of Precursors

Burton argues that the state failed to prove possession of precursors with the intent to manufacture methamphetamine because it did not establish Burton knew the items were going to be used in the manufacturing of methamphetamine. In order to convict Burton of possession of precursors, the State was required to prove Burton constructively possessed precursors with the intent to manufacture methamphetamine. Constructive possession may be established when a person has the intent and capability to maintain dominion and control over an item. *Wallace v. State*, 722 N.E.2d 910, 913 (Ind. Ct. App. 2000). Proof of dominion and control can be proven by circumstantial facts, such as, attempted flight, furtive gestures, and proximity to the contraband. *Id.*; *see also Floyd v. State*, 791 N.E.2d 206, 210 (Ind. Ct. App. 2003), *trans denied*. (“ . . . when possession of the premises is non-exclusive, the inference is not permitted absent some additional circumstances indicating knowledge of the presence of the contraband and the ability to control it.”).

Here, evidence was sufficient for the jury to convict Burton of possession of precursors. Burton lived in the trailer where precursors were found. Thus, he had the capability to maintain dominion and control over these precursors. Burton admitted to police that he knew methamphetamine was being manufactured. When the police entered, Burton was hiding in a closet in the residence while the manufacturing was taking place. This evidence was sufficient for the jury to infer possession with intent to manufacture methamphetamine.

C. Maintaining a Common Nuisance

Finally, Burton claims that the evidence was insufficient to support his conviction for maintaining a common nuisance, because there was no evidence that he maintained Whiteman's trailer. In order to convict Burton of maintaining a common nuisance, the State was required to prove that Burton knowingly or intentionally maintained a structure that was unlawfully used on one or more occasions to manufacture or sell methamphetamine. IC 35-48-4-13

Burton submits that the meaning of "maintain" is not specifically defined in Indiana's criminal code, but that under IC 8-23-1-29 it states that "'maintain' means allow to exist." Under this definition Burton claims there was insufficient evidence to support a finding that he maintained Whiteman's trailer.

The State counters that "maintain" does not require one own or legally possess something, only that they have control. *Jones v. State*, 807 N.E.2d 58, 66 (Ind. Ct. App. 2004). The State argues that if we are to hold that Burton's status as a tenant and not an owner exculpates his guilt for maintaining a common nuisance, then landlords, not tenants, will be held criminally liable for the tenant's conduct. While the State is correct that maintaining a common nuisance does not require ownership or legal possession, it does require control. Here, there was no evidence that Burton had "control" of Whiteman's trailer. *Id.*

Burton lived in Whiteman's trailer and had lived there for some time; but he did not own the trailer, and the State failed to show that he controlled it. Whiteman also lived in the trailer. There is no showing that Whiteman, the owner of the trailer, ever

gave Burton control over it or that Burton's presence in the trailer was a result of anything other than Whiteman's sufferance. We hold that the evidence was insufficient for the jury to convict Burton of maintaining a common nuisance. We reverse Burton's conviction for maintaining a common nuisance.

Affirmed in part and reversed in part.

ROBB, J., and BARNES, J., concur.