

Appellant-Defendant James R. Almy (“Almy”) appeals his conviction in Boone Superior Court, following a jury trial, for Class D felony possession of marijuana. Concluding that there was sufficient evidence to sustain his conviction, we affirm.

Facts and Procedural History

The facts most favorable to the conviction indicate that on February 18, 2005, Deputy Marshall Frank Clark (“Officer Clark”), while on patrol in Thorntown, Indiana, initiated a traffic stop after observing an automobile that failed to use a turn signal and to make a complete stop at a stop sign. Immediately prior to stopping the vehicle, Officer Clark observed the back seat passenger turn around numerous times to look at Officer Clark. After stopping the vehicle, Officer Clark asked for the driver’s and passengers’ identification, and ran a warrant check whereby he discovered that the driver and front seat passenger had outstanding warrants for their arrest. Both subjects were subsequently taken into custody. Several additional police units arrived on the scene to assist Officer Clark. When one of the police officers conducted a search of the car incident to arrest, 100.8 grams of marijuana were discovered in a bag under the front passenger seat, surrounded by trash. Almy was the only passenger in the back seat. Upon discovering the bag containing marijuana, one of the police officers Mirandized all three occupants of the vehicle.

Another police officer on the scene, Officer Keith Bruner (“Officer Bruner”) subsequently transported Almy to the Boone County Jail. During the ten-minute drive to the jail, Officer Bruner had a conversation with Almy regarding the marijuana found in the car. Officer Bruner testified at trial regarding his conversation with Almy as follows:

[Bruner]: I asked, I asked [Almy] . . . if he, in reference to the marijuana that was in the vehicle, that he was out, of a lot of money, that that was a lot of marijuana, he was out a lot of money.

Q: And what if anything did he say in response?

[Bruner]: He said it wasn't, it wasn't that much money. And I responded to that with, it's four ounces or so, so you're out at least four hundred bucks or more. And if you just got it that's, you know, a bad deal. And he, he said it didn't cost him that much, only cost him two hundred and fifty.

Tr. p. 76.

On February 22, 2005, Almy was charged with Class D felony possession of marijuana. On May 16, 2006, a jury trial was commenced, after which Almy was found guilty as charged. On June 29, 2006, Almy was sentenced to two years, with all but 180 days suspended. This appeal ensued.

Discussion and Decision

Almy claims that there was insufficient evidence to sustain his conviction. Specifically, he asserts that he did not have actual possession of the marijuana, and that the State failed to prove that he had constructive possession of the marijuana as well because: (1) he did not have exclusive possession of the motor vehicle where the marijuana was found; and, (2) there was no evidence that he had the intent or ability to maintain dominion or control over the marijuana. Br. of Appellant at 10.

Initially, we note our well-settled standard of review for claims of insufficient evidence. When reviewing the sufficiency of the evidence, we will neither reweigh the evidence nor judge the credibility of witnesses. Hibbard v. State, 858 N.E.2d 255, 255 (Ind. Ct. App. 2006). We examine only the evidence most favorable to the judgment

together with all reasonable inferences to be drawn therefrom. Id. We will affirm the conviction if there is substantial evidence of probative value to support the conviction. Id.

In order to prove Almy committed Class D felony possession of marijuana, the State was required to show that Almy knowingly or intentionally possessed more than thirty grams of marijuana (pure or adulterated). Ind. Code § 35-48-4-11(1) (2004). A conviction for possession of contraband may rest upon proof of either actual or constructive possession. Goffinet v. State, 775 N.E.2d 1227, 1230 (Ind. Ct. App. 2002), trans. denied. An individual has actual possession of an item when he or she has direct physical control over the item. Id. Because Almy did not have possession of the bag of marijuana when he was arrested, the State was required to establish that Almy constructively possessed the marijuana.

To prove constructive possession, the State was required to show that Almy had (1) the intent to maintain dominion and control over the contraband and (2) the capability to maintain dominion and control over the contraband. Ladd v. State, 710 N.E.2d 188, 190 (Ind. Ct. App. 1999). Knowledge is a key element in proving intent. Tardy v. State, 728 N.E.2d 904, 908 (Ind. Ct. App. 2000). Knowledge may be inferred from the exclusive dominion and control over the premises containing the contraband, or, if the control is nonexclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. Id. These additional circumstances have been found to 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; (5) drugs in plain view; and, (6) location of the drugs in close proximity to items owned by the defendant. Ladd, 710 N.E.2d at 190. Mere presence at the location where contraband is found is not alone sufficient to establish constructive possession. Bradley v. State, 765 N.E.2d 204, 212 (Ind. Ct. App. 2002).

Almy's knowledge of the presence of the contraband and his intent to maintain dominion and control over the contraband was established through Almy's own incriminating statements, made to Officer Bruner at the time of his arrest, that Almy had only paid "two [hundred and] fifty [dollars]" for the marijuana. Tr. p. 76. From this testimony, it is clear that Almy had knowledge of the presence of the marijuana. See Bradley, 765 N.E.2d at 212 (concluding that although defendant denied ownership of the bag and its contraband at trial, there was sufficient evidence for the trier of fact to reasonably infer constructive possession where contraband was found in bag under defendant's seat in truck, and where defendant made incriminating statements to police officers at the scene that the bag containing the contraband belonged to him and that he had previously asked co-defendant to stop on a country road so that he could retrieve the bag). Almy's knowledge and intent to maintain dominion and control over the contraband could further be inferred from the evidence of Almy's furtive gestures, made while Officer Clark was following the vehicle just prior to when he initiated the traffic stop, and by the close proximity of Almy to the location of the drugs at the time of his arrest.

As to the second element of constructive possession, "the evidence must demonstrate the capability to exercise control over the item, that is, the ability to reduce the item to his personal possession or to otherwise direct its disposition or use." Ladd,

710 N.E.2d at 190. The record reveals that Almy was the only passenger in the back seat and could have easily taken exclusive control over the marijuana by simply reaching his hand under the seat in front of him. Thus, Almy had the capability to exercise control over the contraband. See Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999) (in concluding that the evidence was sufficient to establish the defendant had constructive possession of contraband where contraband was locked in the trunk of the car, but defendant had the keys to the trunk, our supreme court held that “[t]he capability requirement is met when the state shows that the defendant is able to reduce the controlled substance to the defendant’s personal possession”).

Based on the foregoing, we conclude that the State presented sufficient evidence for the trier of fact to infer that Almy had constructive possession of the recovered contraband. Thus, there was sufficient evidence to sustain his conviction.

Affirmed.

NAJAM, J., and MAY, concur.