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March 05, 2014
Court of Appeals
Division III
State of Washington

NO. 31115-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

BRIAN M. PARKER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-00472-8

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

1. **The defendant's conviction for possession of methamphetamine was supported by sufficient evidence.**

2. **The defendant failed to show by a preponderance of evidence that his possession was unwitting; as a result, the jury properly rejected this defense.**

II. STATEMENT OF THE CASE

Following the defendant's arrest on April 12, 2011, officers executed a search warrant on his vehicle and discovered various drug paraphernalia, marijuana, and methamphetamine. (CP 1-3). The defendant was charged with unlawful possession of a controlled substance (methamphetamine) and was found guilty on March 6, 2012. (CP 101). On the day of his arrest, the defendant was driving his 1992 red Nissan Sentra when members of the Kennewick Police Department Criminal Apprehension Team stopped the vehicle to arrest his passenger, Angelina Paradise. (RP at 74)[1]. Ms. Paradise's arrest was the result of an extensive police investigation into marijuana sales at her home on 710 South Fir Street. (RP at 61, 68, 76). After conducting two controlled buys of

[1] Unless otherwise dated, RP refers to the Verbatim Reports of Proceedings of March 5, 2012, and March 6, 2012, contained in Volumes I-II, reported by Renee L. Munoz.

marijuana at Ms. Paradise's home, officers had probable cause to arrest her and obtain a search warrant for her residence. (RP at 68).

Due to safety concerns, officers did not want to arrest Ms. Paradise or execute the search warrant until after she left the residence. (RP at 54). On the night of the arrest, Detectives Roman Trujillo and Shirrell Veitenheimer conducted surveillance at the residence and observed the defendant and Ms. Paradise arrive in the defendant's vehicle. (RP at 61-62). Detective Veitenheimer observed the defendant exit his vehicle, open the vehicle's trunk and remove items from it. (RP at 61-62, 65). At approximately 10:30 p.m., they observed the defendant and Ms. Paradise exit the residence and get into his vehicle. (RP at 54-55). Prior to entering the vehicle, the defendant was again seen at the trunk. (RP at 55, 58-59). Less than a minute after leaving the residence, the defendant's vehicle was stopped by Detectives Slocombe and Merkl. (RP at 65, 69). At that point, neither officer intended to interact with the defendant any more than necessary to effectuate the arrest of Ms. Paradise. (RP at 76).

Once the vehicle was stopped, Detective Merkl immediately contacted Ms. Paradise and placed her under arrest. (RP at 70). While observing the arrest from the driver's side of the car, Detective Slocombe noticed the smell of marijuana coming from the open driver's side window. (RP at 70-71, 76). Consequently, Detective Slocombe asked the

defendant to provide identification and exit the vehicle. (RP at 76-77). The defendant reached over to a purse located on the passenger side floorboard of the vehicle and pulled his wallet out of it prior to exiting the vehicle. (RP at 77).

After he exited the vehicle, Detective Slocombe smelled the odor of marijuana coming from the defendant's person. (RP at 77). The defendant asked "What's going on?" and was informed that, given the smell of marijuana emanating from the car and his person, he was now part of the investigation. (RP at 77-78). The defendant then asked the detective to pull a legal advice card out of his wallet which stated that he would not answer questions asked by the police. (RP at 78). From this point on, Detective Slocombe did not ask any questions of the defendant and instead only responded to the defendant's own questions. (RP at 78). The defendant made several unsolicited statements first saying "You can't smell marijuana?" (RP at 78). Then he blurted out that he had a pipe in his pocket, and "I do not give you permission to search my vehicle." (RP at 78, 131, 137).

After confirming the presence of a pipe in the defendant's pocket, Detective Slocombe placed him under arrest. (RP at 132). The pipe retrieved from the defendant's pocket smelled of marijuana and contained residue of suspected marijuana inside the bowl. (RP at 81, 156-57).

Based on his findings, Detective Slocombe sealed the vehicle and requested a search warrant. (RP at 79-80). During the execution of the search warrant, another smoking pipe with residue inside was found wrapped in a blue bandana, located between the driver's side door and the driver's seat. (RP at 82-83). A search of the purse where the defendant retrieved his identification revealed a container of marijuana. (RP at 160, 162).

Following a search of the passenger compartment, Detective Slocombe used the defendant's keys to open the trunk and continue the search. (RP at 89-90). He found a black bag "like a shaving kit" that contained drugs and drug paraphernalia in various containers and bags. (RP at 91). The contents of the black bag included a smaller bag full of marijuana, a methamphetamine pipe wrapped in a red bandana, smaller packages of marijuana, hydrocodone pills and digital scales. (RP at 92-93, 172). There were no identifying factors inside or outside of the bag. (RP at 147).

At trial, Detective Slocombe testified that prior to this incident, the defendant was not a suspect in the ongoing delivery of drugs investigation. (RP at 144-45, 162). However, Detective Slocombe did indicate that the defendant was present for at least one of the drug sales that led to her arrest. (RP at 162-63). He also stated that the defendant would have

known what was going on during the drug sale. (RP at 162-63). At the close of the State's case in chief, the defendant did not testify or present evidence. (RP at 177-98). Over the State's objections, the defendant was granted a jury instruction on "Unwitting Possession." (RP at 196-98). The jury convicted the defendant as charged, and he was sentenced to a standard range of 24 months. (CP 101, 125; RP at 244).

III. ARGUMENT

1. The defendant's conviction for possession of methamphetamine was supported by substantial evidence that he had dominion and control of the methamphetamine located in the trunk of his vehicle.

Evidence is sufficient to sustain a criminal conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Drum*, 168 Wn.2d 23, 34, 225 P.3d 237 (2010). In a claim of insufficiency, the defendant necessarily admits the truth of the State's evidence and all inferences that can be reasonably drawn from it. *Id.* All reasonable inferences from the evidence are drawn strongly in favor of the State and interpreted most strongly against the defendant. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

A reviewing Court defers to the fact finder on issues of conflicting testimony, credibility of witnesses, and persuasiveness of evidence. *State v. Thomas,* 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) *abrogated on other grounds by Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). A jury may rely equally on both circumstantial and direct evidence. *State v. Varga,* 151 Wn.2d 179, 201, 86 P.3d 139 (2004). In order to show a defendant was in constructive possession of drugs, the State must prove he had dominion and control over them. *State v. Staley,* 123 Wn.2d 794, 798, 872 P.2d 502 (1994).

Dominion and control is determined by the totality of the circumstances. *State v. Cote,* 123 Wn.App 546, 549, 96 P.3d 410 (2004); *Staley,* 123 Wn.2d at 802. A person's dominion and control over premises raises a rebuttable inference of dominion and control over the drugs located therein. *State v. Cantabrana,* 83 Wn.App. 204, 208, 921 P.2d 572 (1996). Since the defendant admits the truth of the State's evidence, the only issue is whether the evidence at trial was sufficient to support the jury's determination that he was in constructive possession of methamphetamine.

The defendant's argument that the jury had to "resort to speculation" disregards the totality of the circumstances in this case. (App. Brief at 7). Here, the defendant was both the owner and the driver of the

vehicle. (RP at 74-75). As the owner and driver, he had dominion and control over the vehicle where all of the drugs were found. He was not merely a passenger or passerby. The defendant's dominion and control over the vehicle created a rebuttable inference of dominion and control over the drugs located in the trunk of his vehicle. *See Cantabrana,* 83 Wn.App at 208. At trial, neither the direct evidence nor the circumstantial evidence rebutted this inference.

Furthermore, since the defendant had the keys, he could exclude others from accessing the bag of drugs. (RP at 89-90). The evidence shows the defendant also had the immediate ability to take actual possession of the bag of drugs. Nothing at trial indicated he would have been restrained from stopping the vehicle at any time and accessing the bag of drugs. To the contrary, both Detectives Veitenheimer and Trujillo testified that they saw the defendant at the trunk of the vehicle. (RP at 55, 61-62, 65). Detective Veitenheimer also testified that the defendant opened the trunk and removed items into the house. (RP 55, 61-62, 65). These facts, in conjunction with the defendant's admission and the discovery of the marijuana pipes in the vehicle, provided ample evidence for the jury to reach its verdict.

Consequently, the jury was provided with sufficient evidence to reach their verdict. When viewed in a light most favorable to the State,

any rational trier of fact could have concluded that the defendant had dominion and control over the drugs located in his trunk.

2. The defendant failed to meet his burden of proving that the possession of methamphetamine was unwitting.

Since the plain language of the possession statute does not contain a knowledge element, the defendant bore the burden of proving by a preponderance that his possession was unwitting. *State v. Bradshaw,* 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004). The defendant argues in part that since he was not originally a suspect and since the bag looked more like one owned by a drug dealer, he met his burden of showing unwitting possession. (App. Brief at 7). However, the facts simply do not support this viewpoint. Despite not being suspected of *anything* prior to the stop, the defendant quickly became a suspect based on the odor of marijuana and his conduct. (RP at 70-71, 76-78).

During the stop, officers detected the odor of marijuana emanating from the defendant's vehicle and his person. (RP at 70-71, 76-78). Once contacted, and after asserting his rights through a legal advice card, the defendant made a series of unsolicited statements to Detective Slocombe. (RP at 78). The defendant admitted he had a marijuana pipe in his pocket, and despite not being suspected of possessing marijuana prior to this time,

the defendant was arrested for possession. (RP at 132). Upon a search of the vehicle, another marijuana pipe with residue inside of it was found between the driver's seat and the driver's door. (RP at 82). The methamphetamine at issue was found in a bag containing marijuana and other drug paraphernalia. (RP at 92-93). This bag was inside the defendant's trunk, the same trunk that the defendant was observed removing items out of only moments before the stop. (RP at 61-62, 65, 91-93). At trial, the defendant did not offer any evidence that supported a finding of unwitting possession. Moreover, neither the direct nor circumstantial evidence presented by the State supported such a finding.

Consequently, the defendant's argument goes more to the persuasiveness of the evidence presented against him, rather than any lack of evidence. Since questions of witness credibility and persuasiveness of the evidence are for the finder of fact alone, the jury was correctly tasked with that assignment. They did not find that the defendant's possession was unwitting. Even the low standard of preponderance of the evidence did not support a finding of unwitting possession.

IV. CONCLUSION

Because the evidence is sufficient to support the jury's verdict of guilty, the State respectfully asks this Court to affirm the defendant's conviction.

RESPECTFULLY SUBMITTED this 5th day of March, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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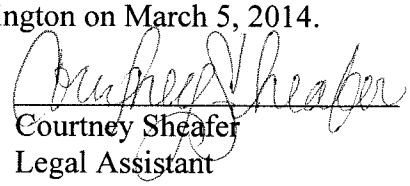

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