IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. COURTNEY MARIE MACKAY, Appellant.	)	No. 77344-5-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: January 22, 2019

SMITH, J. — Courtney Mackay appeals her conviction for possession of a controlled substance and requests that the criminal filing fee assessed at sentencing be stricken. While the State concedes that the filing fee should be stricken, Mackay's conviction was supported by sufficient evidence. Therefore, we affirm in part and remand to the trial court to amend Mackay's judgment and sentence by striking the criminal filing fee.

FACTS

Officers contacted and arrested Mackay on May 25, 2014, after locating her in a car that had been reported stolen. A search incident to arrest revealed a baggie containing a substance later confirmed as heroin. The State charged Mackay by information with possession of a controlled substance. A stipulated bench trial was held on agreed documentary evidence, and the trial court found Mackay guilty as charged. Mackay appeals.

ANALYSIS

Sufficiency of the Evidence

Mackay contends that there was insufficient evidence to support the trial court's finding that Mackay was in possession of heroin.[1] We disagree.

Evidence is sufficient when any rational trier of fact could find beyond a reasonable doubt the essential elements of the crime. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). When considering a sufficiency challenge, we view the evidence in the light most favorable to the State and "we must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Killingsworth, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012). Whether evidence is sufficient is a question of constitutional law that we review de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Here, the State charged Mackay with possession of a controlled substance. Therefore, the State was required to prove the fact of possession beyond a reasonable doubt. RCW 69.50.4013; State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Possession may be actual or constructive. Staley, 123 Wn.2d at 798. "Actual possession means that the goods are in the physical custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods."

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[1] Mackay does not challenge any of the trial court's other findings. Therefore, those findings are verities on appeal. State v. Homan, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

We conclude that the documentary evidence considered at trial was sufficient to support the trial court's possession finding. Mackay wrote in her statement that for a few days leading up to her arrest, she and her boyfriend tried to find heroin. She also wrote that on Sunday, May 25, 2014, "we spent the day trying to get a sack; we were finally able to pick up around 11:00 p.m. We then went to Walmart whe[n] the cops came." Deputy James Sadro, Jr., who contacted Mackay after observing her at Walmart in the driver's seat of an allegedly stolen car, wrote in his report that Mackay had an open purse sitting in plain view on her lap and that clearly visible in that open purse was a partially opened sunglasses case. Deputy Sadro arrested Mackay for vehicle theft and searched the sunglasses case incident to arrest, discovering a baggie containing a dark substance that later tested positive as heroin. Finally, Mackay's written confession states that "[o]n May 25, 2014, in Snohomish Co[unty], WA, [she] did unlawfully possess Heroin, a controlled substance." Considered in the light most favorable to the State, this evidence was sufficient to prove beyond a reasonable doubt that Mackay had physical custody of—and actually possessed—heroin. Cf. State v. Easterlin, 126 Wn. App. 170, 174, 107 P.3d 773 (2005) (defendant actually, not just incidentally, possessed firearm while it was in his physical custody on his lap), aff'd, 159 Wn.2d 203, 149 P.3d 366 (2006).

Relying on State v. Summers, 107 Wn. App. 373, 28 P.3d 780, 43 P.3d 526 (2002), Mackay argues that "the mere finding of items of contraband next to a person where they are sitting is not proof of the actual possession necessary to

convict." But here, the contraband was not found next to Mackay—it was found in an open purse sitting in her lap. Summers does not require reversal.

Criminal Filing Fee

Mackay argues that the criminal filing fee imposed by the trial court should be stricken from her judgment and sentence. We agree.

When Mackay was sentenced, the trial court assessed a mandatory filing fee under former RCW 36.18.020(2)(h). That statute was amended during the pendency of this appeal to provide that the filing fee "shall not be imposed on a defendant who is indigent." LAWS OF 2018, ch. 269, § 17, at 1632. In State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), our Supreme Court held that the amendment applies to cases that were pending on direct review and not final when the amendment was enacted. Ramirez, 191 Wn.2d at 747.

It is undisputed that Mackay was indigent at sentencing, and the State concedes that the criminal filing fee should be stricken here in light of Ramirez. We accept the State's concession.

We affirm in part and remand to the trial court to amend Mackay's judgment and sentence by striking the criminal filing fee.

WE CONCUR: