ATTORNEY FOR APPELLANT:

MARK I. COX
The Mark I. Cox Law Office, LLC
Richmond, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

JOSEPH L. COTTMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A01-0908-CR-384
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable Gregory A. Horn, Judge
Cause No. 89D02-0803-FA-002

March 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Joseph Cottman was convicted of Possession of Cocaine with Intent to Deal,[1] a class A felony, Possession of Marijuana with Intent to Deal,[2] a class D felony, and Resisting Law Enforcement,[3] a class D felony. On appeal, Cottman challenges the sufficiency of the State's evidence to support each of his convictions.

We affirm.

The facts most favorable to the convictions follow. On March 12, 2008, Officers Mark Sutton and Renee Gambill of the Richmond Police Department were on patrol in a fully marked police car. The officers were on the lookout for a green Mercury Sable station wagon. Shortly before 3:00 p.m., the officers observed the station wagon traveling southbound on Chester Boulevard (in Richmond) and began to follow it, hoping to effectuate a traffic stop in order to confirm the identity of the driver. The driver was the only occupant of the vehicle and was later identified as Cottman. At one point, Cottman passed by the officers allowing them to clearly view his face and observe that he was wearing "heavy" or wide sun glasses and white ball cap. *Transcript* at 186. Shortly thereafter, the officers observed Cottman make a left-hand turn without signaling.

The officers attempted to initiate a traffic stop by turning on the red and blue lights on the police car. Although Cottman initially slowed down, he never stopped. Instead, Cottman led the officers on a high-speed chase through the streets of Richmond and eventually to an area near Mitchell and Fouts Roads. At this point, the officers observed Cottman throwing

[1] Ind. Code Ann. § 35-48-4-1 (West, Westlaw through 2009 1st Special Sess.).

[2] I.C. § 35-48-4-10 (West, Westlaw through 2009 1st Special Sess.).

[3] Ind. Code Ann. § 35-44-3-3 (West, Westlaw through 2009 1st Special Sess.).

items that appeared to be baggies from the driver's side window onto the east side of the road, just north of Mitchell Road. The officers immediately relayed to dispatch the location of the discarded items and continued their pursuit. A short time later, a Wayne County deputy dispatched to the area of Mitchell and Fouts Roads found what was later determined to be baggies containing over thirty-six grams of cocaine and eighty-nine grams of marijuana, on the east side of the roadway, just north of Mitchell Road.

Officers Sutton and Gambill continued their pursuit of Cottman into Montgomery County, Ohio, until such time as officers from that state took over the pursuit. Jon Schade, an Ohio police officer who attempted to block Cottman's vehicle with his own, was able to closely observe Cottman's face as Cottman maneuvered around him. Cottman ultimately eluded the Ohio officers who had given chase and eventually parked the station wagon at a home on South Fuls Road in Montgomery County, Ohio. Cottman knocked on the door of Brittany Hawkins's home, located two houses down from where he parked the station wagon. Cottman attempted to enter Hawkins's home, but she managed to close the door on Cottman and then called 911.

Officer Gretchen Weir of the New Lebanon, Ohio police department was dispatched to the area of South Fuls Road. Upon arrival, Officer Weir observed Cottman and took him into custody. At the time he was wearing wide, wrap-around sunglasses and a white hat. A second officer responded to the scene and conducted a pat-down search of Cottman and discovered $1638 in cash in Cottman's front jeans pocket. Cottman told the officers that his car had broken down and that he was looking for a telephone to call for a ride. Footprints

matching the tread on Cottman's shoes were found in the snow leading from the location of the parked station wagon to Hawkins's front door. A K-9 unit tracked Cottman's scent from the station wagon to Hawkins's front porch to the spot where officers encountered Cottman. Pictures of Cottman's friends and relatives were found in the glove compartment of the station wagon.

On March 17, 2008, the State charged Cottman with class A felony possession of cocaine with intent to deal, class D felony possession of marijuana with intent to deal, and class D felony resisting law enforcement. A three-day jury trial commenced on June 1, 2009. During the trial, Officers Sutton and Gambill identified the green Mercury Sable station wagon found on South Fuls Road as the station wagon they had pursued on March 12, 2008, and positively identified Cottman as the driver and sole occupant of the vehicle on that date. The Ohio police officer who tried to stop Cottman during the pursuit also identified the station wagon as the vehicle involved and identified Cottman as the driver. Hawkins also affirmatively identified Cottman as the man who attempted to enter her home. At the conclusion of the evidence, the jury found Cottman guilty as charged. On July 8, 2009, the trial court sentenced Cottman to a total aggregate sentence of thirty-nine and one-half years imprisonment.

Cottman argues that the State's evidence was insufficient to prove beyond a reasonable doubt that he was the person who resisted Officers Sutton and Gambill by flight and who possessed cocaine and marijuana with intent to deal. When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive

province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the conviction, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id*. at 126 (*quoting Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

The State charged Cottman with resisting law enforcement as follows:

> [O]n or about march 12, 2008, in Wayne County, State of Indiana, Joseph L. Cottman did knowingly or intentionally flee from a law enforcement officer, to-wit: Officers Gambill and/or Sutton, after the officer had, by visible or audible means, identified himself or herself and ordered the person to stop, all occurring while Cottman was operating a motor vehicle. . . .

Appellant's Appendix at 12. Thus, in order to convict Cottman of resisting law enforcement, the State was required to establish beyond a reasonable doubt that Cottman fled from the officers after being visibly or audibly ordered to stop. Cottman's sole challenge to the State's evidence with regard to his conviction for resisting law enforcement is that the State did not prove that he was the driver of the green Mercury Sable station wagon because no one saw Cottman get out of the vehicle and there was no evidence linking Cottman to the vehicle.

The State's evidence established that prior to the pursuit, both Officers Sutton and Gambill were able to clearly view Cottman's face as he drove by the police car in which they were riding. Both officers positively identified Cottman in open court as the driver of the green Mercury Sable station wagon that fled from them after they had activated the red and blue lights on the police cruiser. An Ohio officer, who also had the opportunity during the

pursuit to clearly view the driver of the vehicle, also identified Cottman in open court as the individual driving the station wagon. Additionally, Cottman's footprints were found between the driveway where the station wagon was found parked and Hawkins's home and a K-9 unit tracked Cottman's scent from the station wagon to Hawkins's home to the spot where Cottman was apprehended. Pictures of Cottman's friends and relatives were found in the glove compartment of the station wagon. All of this evidence either directly or circumstantially indicates that Cottman was the driver of the station wagon. Cottman's attempts to question the validity of the witnesses' testimonies are simply requests that we reweigh the credibility of the witnesses, a task we will not undertake on appeal. We therefore conclude that the State presented sufficient evidence from which the jury could have concluded that Cottman was the individual who fled from the officers in the station wagon after the officers, by visible means, ordered him to stop.

We turn now to Cottman's challenge to the sufficiency of the State's evidence supporting his convictions for cocaine and marijuana possession with intent to deal. The State charged Cottman as follows:

> [O]n or about March 12, 2008, in Wayne County, State of Indiana, Joseph L. Cottman did possess, with intent to deliver, cocaine in an amount weighing three (3) grams or more . . . .
>
> [O]n or about March 12, 2008, in Wayne County, State of Indiana, Joseph L. Cottman did possess, with intent to deliver, marijuana in an amount weighing more than thirty (30) grams but less than ten (10) pounds . . . .

Appellant's Appendix at 12. Cottman argues that the State's evidence failed to establish that he possessed the cocaine or marijuana under a theory of constructive possession. In support

of his argument, Cottman notes that the cocaine and marijuana were found on the side of the road, not in the vehicle he was driving or on Cottman's person. Cottman further notes that no attempts were made to collect DNA or fingerprints off of the baggies that were recovered from the side of the road. Finally, Cottman points to his testimony that he was never in the car and his explanation for the large amount of money found on his person.

In order to convict Cottman of the possession offense, the State was required to prove that Cottman was the person who possessed the drugs at issue. A conviction for possession of contraband may rest upon proof of either actual or constructive possession. *Deshazier v. State*, 877 N.E.2d 200 (Ind. Ct. App. 2007), *trans. denied*. "Actual possession occurs when the defendant has direct physical control over the item, while constructive possession involves the intent and capability to maintain control over the item even though actual physical control is absent." *Britt v.* State, 810 N.E.2d 1077, 1082 (Ind. Ct. App. 2004). Here, we need not address Cottman's argument that the State's evidence is insufficient to establish constructive possession because we find the evidence is sufficient to show Cottman's actual possession of the cocaine and marijuana.

As our Supreme Court has observed, to establish actual possession there is no requirement that the defendant be "caught red-handed" with drugs in his possession at "precisely the same time" as the police discover it. *Wilburn v. State*, 442 N.E.2d 1098, 1101 (Ind. 1982). Here, Officers Sutton and Gambill both observed Cottman throw baggies from the driver's side window during their high-speed pursuit of him. The officers were able to discern that the baggies contained dark and white substances. Although they continued their

pursuit of Cottman, Officer Sutton informed dispatch of the location where the items were thrown from the car. Within thirty minutes, an officer responding to the exact location identified by Officer Sutton found alongside the road baggies containing what was later determined to be over thirty-six grams of cocaine and eighty-nine grams of marijuana. Cottman was the sole occupant of the car from which the items were discarded. Thus, the officers observed Cottman exercising direct physical control over the cocaine and marijuana before jettisoning them from the station wagon. The State presented sufficient evidence to support a finding of that Cottman had actual possession of the cocaine and marijuana. We therefore affirm Cottman's convictions for possession of cocaine with intent to deal and possession of marijuana with intent to deal.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.