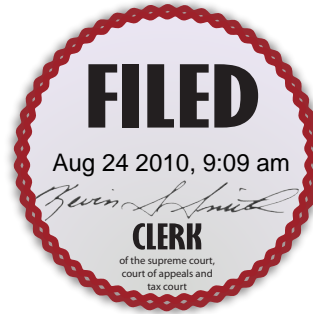


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JOSEPH DEARBORN,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 13A05-0910-CR-618

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APPEAL FROM THE CRAWFORD CIRCUIT COURT  
The Honorable K. Lynn Lopp, Judge  
Cause No. 13C01-0708-FA-3

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August 24, 2010

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Joseph Dearborn appeals from his convictions after a jury trial of dealing methamphetamine,<sup>1</sup> as a Class A felony, maintaining a common nuisance,<sup>2</sup> as a Class D felony, and possession of paraphernalia,<sup>3</sup> as a Class A misdemeanor. Dearborn raises the following issues for our review, which we restate as:

- I. Whether Dearborn's statement that he used methamphetamine a week before his arrest was inadmissible under Indiana Evidence Rule 404(b); and
- II. Whether the evidence was sufficient to establish that Dearborn constructively possessed both methamphetamine and paraphernalia.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On August 25, 2007, Dearborn, who lived with his girlfriend and her two children in Birdseye, Indiana, called the town marshal to report that Joe Sturgeon was intoxicated and had shot a gun at Dearborn's house. Meanwhile, Sturgeon had called the Indiana State Police and reported that Dearborn had battered him because he had discovered that Dearborn was manufacturing methamphetamine at his mobile home. A town marshal and State Trooper Ryan Conrad went to Sturgeon's house and found him intoxicated.

The next day, Trooper Conrad returned to Sturgeon's home to complete a battery report based on Sturgeon's allegation against Dearborn. Sturgeon told Trooper Conrad that he smelled an odor he associated with methamphetamine when he went to Dearborn's home

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<sup>1</sup> See Ind. Code § 35-48-4-1.1(b).

<sup>2</sup> See Ind. Code § 35-4-4-13(b).

<sup>3</sup> See Ind. Code § 35-48-4-8.3(b).

the day before. He said that when he asked Dearborn if he was “cooking off a batch,” Dearborn hit him in the head with a stool as he returned to his car. *Tr.* at 39.

Trooper Conrad then went to the mobile home where Dearborn resided. Melinda Cook, Dearborn’s girlfriend, came to the door and the trooper told her he was there to investigate the battery complaint and information related to drug activity at the residence. Cook told Trooper Conrad that Dearborn was the home owner and would have to give his consent for a search of the mobile home. Cook agreed to inform Dearborn that the trooper needed to speak with him.

The following day, Indiana State Police Troopers Brian LaRoche and Justin Bean returned to Dearborn’s residence to continue the investigation. Troopers Conrad and Mark Green, and the town marshal were also present. Trooper LaRoche knew that Dearborn had lived in the mobile home for a couple of years. They found Dearborn working on a tractor in the outbuilding area behind the mobile home. Dearborn said that the tools in the shed belonged to him.

Dearborn consented to a search of the premises, and Troopers La Roche and Bean entered the mobile home through the back door. Cook and her two children were inside the very dirty and cluttered mobile home. Some of the items cluttering the home had “a greasy, mechanic look” to them. *Id.* at 58. Trooper LaRoche observed a piece of burnt tin foil, a type of foil that is a common indicator of the use of methamphetamine, in a trash can in the living room area. There were work boots next to the couch in the living room, and men’s clothes were mixed with women’s and children’s clothes throughout the house.

Trooper Bean searched the kitchen and found a Folger's coffee can that contained several small baggies of methamphetamine cumulatively weighing over three grams, glass smoking pipes, and a straw. He also found a container with white residue in it on a corner table in the living room. The table was cluttered with nuts and bolts, and other "junk". *Id.* at 144. Additionally, the trooper found other containers commonly used to hide narcotics. There were television monitors in the living room and the outbuilding that were connected to cameras pointed toward the road and down the road. The type of cameras and monitoring units are commonly found in residences where there is drug activity. Trooper LaRoche advised Dearborn of his rights, and Dearborn admitted that he had used methamphetamine approximately one week prior, but claimed that Sturgeon had broken into Dearborn's mobile home to plant evidence.

The State charged Dearborn with dealing in methamphetamine, possession of methamphetamine, maintaining a common nuisance, and possession of paraphernalia. At the conclusion of a jury trial, Dearborn was found guilty of all four counts. The trial court vacated the conviction for possession of methamphetamine due to double jeopardy concerns and sentenced Dearborn to thirty years for the Class A felony conviction with fifteen years suspended, eighteen months on the Class D felony, and twelve months on the Class A misdemeanor, all to be served concurrently. Dearborn now appeals.

## **DISCUSSION AND DECISION**

### **I. Admission of Evidence**

Dearborn claims that the trial court erred by admitting his statement about his use of

methamphetamine approximately one week prior to the discovery of narcotics and paraphernalia in his mobile home. More specifically, he argues that the statement was inadmissible as it was evidence of prior bad acts under Indiana Evidence Rule 404(b).

Generally, the admission or exclusion of evidence is a determination within the sound discretion of the trial court. *Smith v. State*, 839 N.E.2d 780, 784 (Ind. Ct. App. 2005). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *McVey v. State*, 863 N.E.2d 434, 440 (Ind. Ct. App. 2007), *trans. denied*.

Indiana Evidence Rule 404(b) provides as follows:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Dearborn filed a motion in limine prior to trial seeking to exclude his statement to Trooper LaRoche, in which he admitted that he had used methamphetamine approximately one week prior to the discovery of the narcotics and paraphernalia in his mobile home. The trial court denied Dearborn's motion and his subsequent objection to the admission of the statement at trial.

We find that the trial court did not abuse its discretion in concluding the statement was admissible. The statement was not offered for the purpose of showing Dearborn's propensity to commit crime, a purpose prohibited by Evidence Rule 404(b). Instead, the challenged

evidence constituted an uncharged criminal act that is intrinsic to the charged offense. The rule does not bar evidence of uncharged criminal acts that are intrinsic to the charged offense. *Lee v. State*, 689 N.E.2d 435, 439 (Ind. 1997).

Dearborn's admission of recent drug use, use of the exact kind found in his home, was inextricably bound to his possession of methamphetamine and pipes found in his mobile home and was not overly prejudicial. *See e.g., Whatley v. State*, 908 N.E.2d 276, 281-82 (Ind. Ct. App. 2009) (evidence of prior drug use and delivery necessary to aid jury in comprehension of relationships among people involved, and context of arguments culminating in crime and not overly prejudicial); *Willingham v. State*, 794 N.E.2d 1110, 1116-17 (Ind. Ct. App. 2003) (evidence of dealing in cocaine one week prior to arrest for dealing cocaine was inextricably bound to and probative of motive to sell cocaine, the instant charge, and not overly prejudicial). The trial court did not err.

## **II. Sufficiency of the Evidence**

Our standard of review for a challenge to the sufficiency of the evidence is well-settled. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the conviction. *Boyd v. State*, 889 N.E.2d 321, 325 (Ind. Ct. App. 2008). We do not assess witness credibility or reweigh the evidence. *Id.* We consider conflicting evidence most favorably to the trial court's ruling. *Id.* We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* The evidence is sufficient if an inference may reasonably be drawn from it to support the conviction. *Id.*

“Where the evidence of guilt is essentially circumstantial, the question for the reviewing court is whether reasonable minds could reach the inferences drawn by the jury; if so, there is sufficient evidence.” *Whitney v. State*, 726 N.E.2d 823, 825 (Ind. Ct. App. 2000). Further, we need not determine if the circumstantial evidence is capable of overcoming every reasonable hypothesis of innocence, but whether the inferences may be reasonably drawn from that evidence which support the conviction beyond a reasonable doubt. *Bustamante v. State*, 557 N.E.2d 1313, 1318 (Ind. 1990).

Dearborn only challenges the sufficiency of the evidence supporting his convictions of dealing in cocaine and possession of paraphernalia. In particular, Dearborn challenges the sufficiency of the State’s evidence of the possession element of both offenses.

In order to establish that Dearborn had committed the offense of dealing in cocaine and possession of paraphernalia, the State was required to establish that Dearborn knowingly or intentionally possessed methamphetamine and paraphernalia. At trial, the State relied upon the theory of constructive possession. A conviction for possession of contraband may rest upon proof of either actual or constructive possession. *Britt v. State*, 810 N.E.2d 1077, 1082 (Ind. Ct. App. 2004). “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.” *Id.* The proof of a possessory interest in the premises on which illegal drugs are found is adequate to show the capability to maintain dominion and control over the items in question. *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004). The law infers that the party in possession of the premises is

capable of exercising dominion and control over all items on the premises. *Id.* at 340-41.

When a defendant's possession of the premises on which drugs are found is not exclusive, then the inference of intent to maintain dominion and control over the drugs must be supported by additional circumstances pointing to the defendant's knowledge of the nature of the controlled substances and their presence. *Id.* at 341. The "additional circumstances" have been shown by various means: (1) incriminating statements made by the defendant; (2) attempted flight or furtive gestures; (3) location of substances like drugs in settings that suggest manufacturing; (4) proximity of the contraband to the defendant; (5) location of the contraband within the defendant's plain view; and (6) mingling of the contraband with other items owned by the defendant. *Henderson v. State*, 715 N.E.2d 833, 836 (Ind. 1999).

Here, the evidence is clearly sufficient for a trier of fact to conclude that Dearborn constructively possessed both the methamphetamine and the paraphernalia. Dearborn lived in the mobile home with Cook and her two children, his clothes were strewn about the home, and his tools were both in the home and the outbuilding. Dearborn admitted to the troopers that he had used methamphetamine in the past week. His boots were located in the living room where a trash can was found to contain burnt tin foil. Individually wrapped baggies of methamphetamine and a glass pipe were found in a large coffee container on a shelf above the stove in the kitchen. The jury properly inferred from the evidence that Dearborn had the capability to maintain dominion and control of the methamphetamine and paraphernalia. We conclude that sufficient evidence was presented to support Dearborn's convictions.

Affirmed. RILEY, J., and BAILEY, J., concur.