

Case Summary

Brian Ruby appeals his convictions for Class A felony dealing methamphetamine, Class A felony dealing cocaine, Class B felony dealing a schedule III controlled substance, Class C felony dealing in a schedule IV controlled substance, and Class A misdemeanor possession of marijuana. We affirm.

Issues

The issues before us are:

- I. whether the trial court erred in admitting evidence of Ruby's prior dealing of controlled substances; and
- II. whether the trial court erred in instructing the jury.

Facts

On September 11, 2008, Kokomo Police Officers Brian Hunt and Aaron Tarrh stopped Brian Ruby's vehicle because it did not have a working license plate light. Ruby was driving the vehicle. The officers observed Ruby lean toward the center of the vehicle and toward the feet of the passenger, Shawna Walden.

Officer Tarrh approached the passenger side of the vehicle and observed what appeared to be marijuana inside Walden's open purse. Officer Hunt obtained Ruby's license and registration. Officer Hunt then guided his K-9, Remco, around the truck, and Remco alerted on the driver's side door. Ruby was searched, and the officers found \$800. The officers searched Ruby's vehicle and found a Rural King bag on the passenger side floorboard. The bag contained several tools, pill bottles containing eighty-eight

hydrocodone pills and ninety alprazolam pills, a bag containing 27.88 grams of marijuana, and a Crown Royal bag. The Crown Royal bag contained 21.68 grams of cocaine and 51.35 grams of methamphetamine. Ruby admitted the Rural King bag was his and he accurately described the tools found in the bag, which he had purchased that same day.

Ruby was charged with Class A felony dealing methamphetamine, Class A felony dealing cocaine, Class B felony dealing a schedule III controlled substance, Class C felony dealing in a schedule IV controlled substance, and Class A misdemeanor possession of marijuana. Prior to trial, Ruby filed a motion in limine to exclude testimony by Walden that Ruby had previously dealt drugs to her. Over Ruby's objection, the trial court denied the motion. During the trial Walden testified that Ruby had provided her with methamphetamine two nights before Ruby's arrest. Again, Ruby objected to this testimony, but his objection was overruled. Officer Hunt also testified at trial that he had "heard of [Ruby]" and that he had "been to his house before." Tr. p. 50. Ruby objected to this testimony but the trial court overruled the objection.

After the close of evidence, both the State and Ruby tendered final jury instructions on constructive possession of drugs. The trial court rejected both parties' instructions and instead gave Pattern Jury Instruction No. 14.156. Ruby objected, arguing the pattern instruction did not adequately explain to the jury that the State must prove a defendant's actual knowledge of the presence of the contraband beyond a reasonable doubt.

The jury found Ruby guilty on all counts. Ruby was sentenced to forty years with five years suspended. Ruby now appeals.

Analysis

I. 404(b) Evidence

Ruby argues that Walden's testimony that he provided her with methamphetamine two days prior to the arrest, and Officer Hunt's testimony that he had previous contact with Ruby, were impermissible character evidence under Indiana Evidence Rule 404(b) and that the trial court abused its discretion by allowing the testimony.

We review a trial court's ruling on the admission of evidence for an abuse of discretion. Allen v. State, 925 N.E.2d 469, 477 (Ind. Ct. App. 2010) (citing Helsley v. State, 809 N.E.2d 292, 296 (Ind. 2004)), trans. denied. We will reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Id. (citing Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997)).

Indiana Evidence Rule 404(b), in part, states:

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[.]

In assessing the admissibility of 404(b) evidence, we determine whether the evidence is relevant to a matter at issue other than the defendant's propensity to commit the charged act, and we balance the probative value of the evidence against its prejudicial effect.

Smith v. State, 891 N.E.2d 163, 177 (Ind. Ct. App. 2008) (citing Spencer v. State, 703 N.E.2d 1053, 1055-56 (Ind. 1999)), trans. denied.

Even if the trial court erred in admitting the testimony, such error was harmless. Evidence that was erroneously admitted is deemed harmless if there is “substantial independent evidence of guilt.” Davis v. State, 907 N.E.2d 1043, 1056 (Ind. Ct. App. 2009). Here, there was considerable other evidence that proved Ruby’s guilt. Ruby admitted that the Rural King bag was his. The officers observed Ruby lean toward the center of the vehicle and toward the floor by Walden’s feet, where the drugs were later discovered. Walden was allergic to some of the pills that were found. Ruby did not have a job but he had over \$800 in cash on his person and there was over \$9000 worth of drugs in the vehicle. The testimony by Walden was minimally relied upon by the State in its closing argument and Officer Hunt’s testimony was never mentioned during closing argument. Walden’s testimony was a small portion of the overwhelming evidence pointing to Ruby’s guilt. Therefore, any error by the trial court in admitting the testimony of Walden or Officer Hunt was harmless.

II. Jury Instruction

Ruby contends the trial court erred in instructing the jury. The trial court has wide discretion when giving jury instructions, and we will reverse only where there has been an abuse of discretion. Gravens v. State, 836 N.E.2d 490, 493 (Ind. Ct. App. 2005), trans. denied. A defendant must affirmatively show that the instructional error prejudiced his substantial rights. Townsend v. State, 934 N.E.2d 118, 127 (Ind. Ct. App. 2010),

trans. denied. We will only reverse “when we cannot say with complete confidence that a reasonable jury would have rendered a guilty verdict had the [tendered] instruction been given.” Id. (quoting Filice v. State, 886 N.E.2d 24, 37 (Ind. Ct. App. 2008), trans. denied). We use a three-part test to determine whether a tendered jury instruction was properly rejected: whether the tendered instruction stated the law correctly, whether there was evidence to render the instruction applicable to the issues, and whether the subject matter of the tendered instruction was covered by other instructions given by the trial court. Treadway v. State, 924 N.E.2d 621, 636 (Ind. 2010).

Ruby argues that the pattern jury instruction did not inform the jury that constructive possession requires proof beyond a reasonable doubt that a defendant had actual knowledge of the presence of the contraband. Ruby’s tendered instruction read:

The law recognizes two kinds of possession: Actual possession and Constructive possession. Actual possession means actual physical control of the item.

Constructive possession requires that the State prove beyond a reasonable doubt that the defendant had both (1) intent to maintain dominion and control and (2) the capability to maintain dominion and control over the item. When possession is nonexclusive, it must be shown beyond a reasonable doubt that defendant had actual knowledge of the presence of the item.

The defendant’s mere presence where drugs are located or his association with persons who possess drugs is not alone sufficient to support a finding of constructive possession.

The State has the burden to prove constructive possession beyond a reasonable doubt.

Appellant’s App. p. 118. The trial court declined to give this instruction and instead gave Pattern Jury Instruction Number 14.156, which provided:

The word “possess” means to own or to exert control over. The word “possession” can take on several different, but related, meanings.

There are two kinds of “possession” – actual possession and constructive possession. A person who knowingly has direct physical control of a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, then possession is sole. If two or more persons share actual or constructive possession of a thing, then possession is joint.

Possession may be actual or constructive, and either alone or jointly with others.

Appellant’s App. p. 146.

Ruby argues that the given jury instructions failed to tell the jury that constructive possession requires proof beyond a reasonable doubt that a defendant had actual knowledge of the presence of the contraband. The jury instructions taken as a whole, however, did properly instruct the jury. Each crime was broken down into its essential elements and each crime had an element of possession. Pattern Jury Instruction Number 14.156 was the definition of possession, which included an element of knowingly. The jury was also instructed on the meaning of the word “knowingly.” Appellant’s App. pp. 144. Therefore, the instructions, taken as a whole, properly informed the jury that constructive possession required the State to prove, beyond a reasonable doubt, that the defendant had actual knowledge of the presence of the contraband. The tendered instruction was sufficiently covered by the other instructions given at trial and was properly rejected. Further, “the preferred practice is to use the pattern jury instructions.”

Gravens, 836 N.E.2d at 493. Because the instructions as a whole properly instructed the jury, we cannot say that Ruby's substantial rights were affected or that the jury would have found him not guilty if his tendered instruction had been used. The trial court did not err in giving the pattern jury instruction and rejecting Ruby's tendered instruction.

Conclusion

Any error by the trial court in admitting improper character evidence was harmless, and the trial court did not err in giving the pattern jury instruction instead of Ruby's tendered instruction. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.