NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-1126

	Opinion Delivered May 6, 2009
THOMAS EARL ALEXANDER APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CR-08-542]
V.	
STATE OF ARKANSAS APPELLEE	HONORABLE WILLARD PROCTOR JR., JUDGE
	AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Thomas Earl Alexander was found guilty of possession of less than ten pounds of marijuana with intent to deliver, a Class C felony. He was sentenced pursuant to Arkansas Code Annotated section 5-64-413 (Repl. 2005), whereby he received two years' probation, his driver's license was suspended for six months, and he was ordered to pay $100 in fines. Appellant argues on appeal that the evidence was insufficient to support his conviction. We affirm.

Appellant's bench trial took place on June 9, 2008. Officer Daniel Haley of the North Little Rock Police Department testified that he was working the midnight shift on January 19, 2008, when he came in contact with appellant. According to Officer Haley, appellant was a passenger in a white Chevy Caprice he stopped on Highway 185. Officer Haley stated that the vehicle was stopped because it appeared not to have a license plate light and the windows

on the vehicle were "extremely dark." The vehicle pulled into a Shell Station, and Officer Haley initially made contact with appellant. Officer Haley said, "[t]he windows were so dark [that] I could not see in at all. And I just felt more comfortable, safer for me, to come up on that side of the car." Officer Haley tapped the passenger's side window and appellant opened the door. Officer Haley testified that he immediately observed what looked like marijuana sprinkles all over appellant's pants. He further testified, "I could see the plastic baggie of - - it was marijuana, protruding from the - - it is a bubble style Caprice where the - - I want to say the doors - - the seats kind of sit lower than them. And between the seat, the side of the seat and the door panel, the floorboard, they were poking out from right there." Officer Haley stated that he saw one bag of marijuana, pulled appellant out of the car, and patted him down. Appellant was sent to the front of the car and the driver was arrested due to having a warrant. Officer Haley said that after he had the driver in custody, he went to retrieve the marijuana he had observed. Officer Haley stated that he "ended up pulling out several small baggies of marijuana and then a large bag out from underneath the passenger seat." Appellant was placed in custody. Appellant was wearing a black sweat hoodie with a large front pocket. Officer Haley indicated that "several stems and leaves of what appeared to be marijuana" were found inside the pocket of the sweat top. According to Officer Haley, the material was the same as the material he had noticed on appellant's lap when he first made contact with appellant. He testified that he was "99 percent sure that [appellant] had the marijuana probably in that sweat top pocket, especially with all the sprinkles on [appellant's] shirt." Officer Haley stated that appellant told him that the sweat top belonged to his brother.

On voir dire, Officer Haley stated that the vehicle had a light on the license plate but that it was not working; that he did not know how dark the tint on the vehicle was; that the gas station they pulled into was closed and the highway was dark except for an occasional street light; and that the driver of the vehicle was arrested for a warrant. Officer Haley testified that he did not see appellant exercise any control over the items; that he did not field test the material found on appellant to determine if it was marijuana; that he did not know how long appellant had been in the vehicle before it was stopped; that appellant did not tell him that he exercised control over the items or that the items were his; and that based on eleven years and thousands of arrests, he was pretty sure that the vegetable material found on appellant was marijuana. Officer Haley stated that he could not see the vegetable material on appellant's lap without shining his flashlight into the vehicle because it was dark. He also stated that when he showed appellant the material inside the pocket of the sweat top appellant stated that the top was his brother's.

On redirect, Officer Haley stated that appellant was "real nervous." According to Officer Haley, appellant was "[b]reathing quickly, was kind of looking around a lot. His chest was pounding enough that you could actually see it and even with that thick jacket or the sweat top, you could tell it was beating really fast."

Claire Carly Putt of the Arkansas State Crime Lab testified that the material retrieved from the vehicle on the night in question was marijuana. She stated that the large bag of marijuana weighed thirty-three point six (33.6) grams. According to Putt, the small bags of

marijuana had an aggregate weight of eleven point five (11.5) grams. The total weight of the marijuana recovered from the vehicle was forty-five point one (45.1) grams.

On cross, Putt stated that she tested a representative sample from each of the items and they all tested positive for marijuana. She stated that it was possible for the police to place something in "that bag that wasn't marijuana [and] that I wouldn't know about it." According to Putt, her testing would only see the marijuana, it would not see grass or any other vegetable material. Putt testified that she did not see anything different than marijuana in the samples she tested.

Appellant testified that he was catching a ride from North Little Rock to his home in England when the vehicle was stopped and that he had only been in the vehicle approximately ten minutes. Appellant said that the vehicle was very dark because there were no lights inside the vehicle. Appellant testified that he was cold when he got in the vehicle so he put on the jacket that was in the back seat. According to appellant, the driver told him the jacket belonged to appellant's brother. Appellant stated that he was wearing the jacket when Officer Haley made contact with him. Appellant testified that Officer Haley told him that there was some "weed" on the back of his pants. Appellant stated that there was not any "weed" on the front of his pants. According to appellant, he looked at the seat that he had been sitting in and was able to see "just a little dust. It was nothing like this. It was just like a little dust." Appellant testified that Officer Haley arrested the driver and then came back and searched him. Appellant said that Officer Haley told him that there was "'some drugs, or some weed somewhere.' I don't know. It was my brother's jacket." According to

appellant, he was only shown the big bag of marijuana, he did not see any of the small baggies. Appellant stated that both he and the driver denied ownership of the marijuana. Appellant further stated:

> I am telling the Court that even though I was in a car where that dope was found, and even though the officer thought there was some dope on me, I didn't know it was there. I didn't see it. I didn't exercise any control over it at any time. If there was any found in the jacket, I didn't know anything about that until the police pointed it out to me. I don't hang around with (sic) like that. When they do drugs - - like Darrel smoke weed. I know he smokes weed. Like when he stays in the house, I told him, "Ain't no smoking in the house. Nothing. I know you smoke weed." He know that I don't hang around that typed of stuff, like it being in the car. See - - that's all.
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> I am going to college at Shorter College this summer. . . . I am getting my GED now. I am going to do that at Shorter College. I have never been convicted of a crime before.

On cross, appellant stated that he does not "hang around people that do marijuana when they're doing it. I don't hang around people that do it. If they're fixing to smoke, I leave. If they've got it around, I leave. I don't go around them." Appellant testified that he did not see the bags of marijuana right by his seat or underneath his seat. Appellant said that there was no marijuana on his lap. He stated that he did not know what was in his pocket because he did not put his hands in his pocket and "spin it around." According to appellant, there was only dust in the jacket pocket. He said that "[i]t was like dust off the ground, like - - . It was real little. It was not even this big. It was just like dust." Appellant testified that the small baggies of marijuana were found somewhere in the middle of the car between his seat and the driver's seat. He stated that he was in the front of the vehicle and did not know where Officer Haley found the baggies.

On redirect, appellant stated that it was dark when the car was stopped and that he was not looking to see where the officer "got the stuff." Appellant testified that he did not place the marijuana in the vehicle.

Appellant made a motion to dismiss at the end of the State's evidence and again at the conclusion of all the evidence. The motions were denied. The trial court found appellant guilty of possession of less than ten pounds of marijuana with intent to deliver. Appellant was sentenced pursuant to Ark. Code Ann. § 5-64-413, which states in pertinent part:

> (a) When any person who has not previously pleaded guilty or been found guilty of any offense under this chapter or under any statute of the United States or of any state relating to a narcotic drug, marijuana, stimulant, depressant, or a hallucinogenic drug pleads guilty to or is found guilty of possession of a controlled substance under § 5-64-401, with the exception of a conviction for possession of a substance listed under Schedule I, the court without entering a judgment of guilt and with the consent of the defendant may defer further proceedings and place the defendant on probation for a period of not less than one (1) year under such terms and conditions as may be set by the court.

Appellant was placed on probation for two years, he was fined $100, and his driver's license was suspended for six months. Appellant's sentence was entered on June 25, 2008. This appeal followed.

Appellant was charged under Ark. Code Ann. § 5-64-401(a)(4)(A)(i) (Supp. 2007), which makes it illegal for someone to possess marijuana with the intent to deliver. If the amount possessed is less than ten pounds, it is a Class C felony, subject to four to ten years' imprisonment and/or fines up to $25,000. Appellant argues that the evidence was insufficient to support his conviction.

A motion to dismiss in a bench trial is identical to a motion for a directed verdict in a jury trial in that it is a challenge to the sufficiency of the evidence. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006). In reviewing a challenge to the sufficiency of the evidence, we will not second-guess credibility determinations made by the fact-finder. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002). Instead, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm the conviction if there is substantial evidence to support it. *Wilson v. State*, 88 Ark. App. 158, 196 S.W.3d 511 (2004). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty, without resorting to speculation or conjecture. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991). Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *McKenzie v. State*, 362 Ark. 257, 208 S.W.3d 173 (2005).

The question before us is whether there was substantial evidence to show that appellant was in constructive possession of the marijuana found on the passenger's side of the car, where he was sitting. To prove constructive possession, the State must establish that the defendant exercised "care, control, and management over the contraband." *McKenzie*, *supra*. Our supreme court has held that constructive possession may be implied when the contraband is in the joint control of the accused and another; however, joint occupancy of a car, standing alone, is not sufficient to establish possession. *Jones v. State*, 355 Ark. 630, 634, 144 S.W.3d 254, 256 (2004); *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995). There must be

some other factor linking the accused to the contraband. *Id.* In other words, there must be some evidence that the accused had knowledge of the presence of the contraband in the vehicle. *Jones*, *supra*. Other factors to be considered in cases involving vehicles occupied by more than one person are:

> (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion and control over it; and (5) whether the accused acted suspiciously before or during the arrest.

McKenzie, *supra* (citing *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994)).

In the present case, the State had to show more than appellant's presence in the vehicle in which the marijuana was found. There had to be some other factor linking appellant to the marijuana. Appellant contends that he was not in control of the vehicle and that he was not the owner of the vehicle. According to appellant, he did not even know that marijuana was in the vehicle since it was not in plain view. This argument is not convincing.

Although the marijuana was not in plain view, it was located on appellant's side of the car. Officer Haley testified that once appellant opened the door, he immediately observed marijuana "sprinkles" on appellant's lap and saw a bag of marijuana between appellant's seat and the door. Upon searching the vehicle Officer Haley found a little over forty-five grams of marijuana under and around appellant's seat. Officer Haley searched appellant and found stems in the front pocket of the jacket appellant was wearing. There was also testimony that appellant was acting very nervous and that Officer Haley could see appellant's heart beating

through his jacket. Based on these facts there was enough evidence linking appellant to the marijuana. Accordingly, we affirm.

Affirmed.

GLOVER and HENRY, JJ., agree.