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Cite as 2011 Ark. App. 334

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR10-1162

JACOB HOWARD POPULIS APPELLANT	**Opinion Delivered** MAY 4, 2011
V.	APPEAL FROM THE GRANT COUNTY CIRCUIT COURT [NO. CR-2009-96-1B]
STATE OF ARKANSAS APPELLEE	HONORABLE CHRIS E. WILLIAMS, JUDGE
	AFFIRMED

CLIFF HOOFMAN, Judge

Appellant Jacob Populis appeals his conviction for manufacturing marijuana, for which he was sentenced by the jury as a habitual offender to thirty years' imprisonment. On appeal, appellant challenges the sufficiency of the evidence to support his conviction and also argues that the testimony of a witness who was not disclosed during discovery was erroneously admitted by the trial court. We affirm.

Appellant was charged with maintaining a drug premises, manufacture of a controlled substance, and being a habitual offender subsequent to a search of a residence near Poyen on September 2, 2009. Appellant's wife and co-defendant, Lisa Populis, was present and gave consent to a search at that time, after police had spotted marijuana plants growing near the residence by helicopter. Appellant was not present at the residence during the search.

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Immediately prior to the jury trial held on June 4, 2010, the State informed the trial court that Lisa, who was to be a material witness for the prosecution and was to verify that appellant lived at the residence where the contraband was found, had failed to appear for trial. A warrant was issued for Lisa's arrest, and the State instead sought to have appellant's probation officer, April Dorn, testify that she worked for the State of Arkansas and that she had knowledge of appellant's residence. The trial court stated that Dorn was not to wear any clothing identifying her as being employed by the Department of Community Correction and that she was to testify only as to appellant's address. Appellant objected, arguing that Dorn had not been disclosed as a witness during discovery and that it would affect his strategy during the trial. When the trial court inquired how appellant's trial strategy would change, he responded that he was not sure, that his whole case had been prepared around his wife testifying, and that the change would cause him to "scramble." The trial court stated that appellant would not be prejudiced by Dorn's testimony, as long as she did not identify her occupation in any way, and that it would deny appellant's objection and allow Dorn to testify only as to appellant's residence.

At trial, Special Agent Shannon Shepard with the Arkansas State Police testified that he had received information that marijuana was growing at a residence located on Highway 229 south of Poyen. When Shepard and another officer tried to approach the property, he testified that they were deterred by the presence of dogs, so he requested a helicopter from the National Guard. During the flyover, the sheriff saw marijuana growing in a field near the

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residence and notified officers on the ground of the location of the contraband. Agent Shepard and Agent Eddie Keathly of Group Six Narcotics went to the residence and met appellant's wife, Lisa, and Shepard testified that they saw marijuana plants growing "right outside the front door," along a fence enclosing the small front yard. Agent Shepard stated that it was his understanding that appellant and Lisa were renting the property, although appellant was not there at the time of the search.

Keathly testified that Lisa gave her signed consent to a search of the premises and that he went inside the mobile home and found leafy stems of what appeared to be marijuana on a night stand in plain view in the bedroom. According to Keathly, he also saw evidence that people were living there, such as toiletries, a stocked kitchen, and clothes. Keathly testified that he saw women's clothing and that he also saw other clothing, such as jeans and shirts that appeared to be for a man, in the closet in the bedroom. He stated that he did not see anything that would lead him to believe that appellant was not living there. Keathly testified that there were also five marijuana plants growing just outside the trailer and that there was a pasture approximately fifteen or twenty feet from the residence with a path leading to it, where 120 additional marijuana plants were found. Lisa was arrested at that time, and Keathly testified that a warrant was also issued for appellant, who was arrested at a later date.

Grant County Sheriff Robert Shepard testified that, during the flyover in the helicopter, he also saw the marijuana plants just outside the mobile home and what appeared to be 200 plants in a pasture just east of the home. Sheriff Shepard estimated that the plants

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were between three and four feet tall. Dan Hedges, a forensic chemist with the State Crime Laboratory, testified that the tests performed on the plants confirmed that they were marijuana. He stated that each plant could produce approximately one pound of usable marijuana each growing season. In accordance with the trial court's ruling prior to trial, the prosecution's last witness was April Dorn, who testified that she was a state employee, without specifying which agency, and that appellant had informed her of his address, which was also the address of the property searched in this case.

At the close of the State's case, appellant moved for a directed verdict, arguing that the State did not prove that he lived at the residence where the marijuana plants were found or that the plants were his. The trial court denied the motion, finding that these were factual issues for the jury to decide. The defense then rested without presenting any further evidence. After deliberations, the jury found appellant not guilty of maintaining a drug premises but guilty of manufacturing marijuana, and he was sentenced as a habitual offender to thirty years' imprisonment.

In appellant's very brief, one and one-half page argument on appeal, it is unclear whether he is merely challenging the evidence supporting his conviction or is also separately arguing that Dorn's testimony should not have been admitted due to a discovery violation. However, as the State does in its brief, we will address both arguments.

Appellant first argues that the trial court erred in denying his motion for a directed verdict. A directed-verdict motion is a challenge to the sufficiency of the evidence. *Draper v.*

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State, 2010 Ark. App. 628, ___ S.W.3d ___. When reviewing a challenge to the sufficiency of the evidence, the appellate court will affirm the conviction if there is substantial evidence to support it, when viewed in the light most favorable to the State. *Id*. Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another without resort to speculation or conjecture. *Id*.

Appellant argues, as he did in his directed-verdict motion to the trial court, that the State presented insufficient evidence to connect him with the residence where the contraband was found and seized. According to appellant's argument, without Dorn's testimony as to his address, which he contends was erroneously admitted, there was no evidence presented to show that he lived at the residence. However, contrary to appellant's assertion, when reviewing the sufficiency of the evidence supporting a conviction, this court considers all of the evidence introduced at trial, whether correctly or erroneously admitted, and disregards any alleged trial errors. *Camacho-Mendoza v. State*, 2009 Ark. App. 597, 330 S.W.3d 46.

It is not necessary to prove that the defendant had actual or exclusive possession of the contraband; rather, constructive possession is sufficient to sustain a conviction. *Abshure v. State*, 79 Ark. App. 317, 87 S.W.3d 822 (2002). Although constructive possession can be implied when the contraband is in the joint control of the accused and another, joint occupancy alone is not sufficient to establish possession. *Id*. In a joint-occupancy situation, the State must prove some additional factor, which links the accused to the contraband and demonstrates the accused's knowledge and control of the contraband. *Draper v. State*, *supra*. This control and knowledge

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may be inferred from the circumstances where there are additional factors linking the accused to the contraband, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *Abshure*, *supra*.

Here, evidence was introduced that appellant's wife was present at the residence where the contraband was found, that appellant and his wife were renting the property, that appellant gave a state employee that same address, that three- to four-feet-tall marijuana plants were found growing right outside the front door of the mobile home, that there was a path leading to approximately 120 additional plants in a pasture less than twenty feet from the residence, that marijuana stems were found in plain view on a bedside table inside the home, and that both men's and women's clothing was found in a closet in that bedroom. In *Wolf v. State*, 10 Ark. App. 379, 664 S.W.2d 882 (1984), this court upheld a conviction for manufacturing marijuana under an almost identical set of facts where, even though the defendant was not present at the time of the search, the sheriff had knowledge that the defendant was renting and living on the property, the woman who was living with the defendant was present during the search, and there were several trails leading from the house into outlying acreage where the marijuana plants were found. Similarly, we find that there is substantial evidence to support appellant's conviction in this case, and we affirm on this point.

Appellant also contends that the trial court erred in allowing the testimony of his probation officer where she was not disclosed as a witness prior to the trial. Pursuant to Ark.

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R. Crim. P. 17.1(a)(i) (2010), appellant filed a pretrial motion for discovery requesting the names of the State's witnesses. When there is a failure to comply with a discovery rule, the trial court may permit the discovery or inspection of the previously undisclosed material, grant a continuance, prohibit the State from introducing the undisclosed evidence, or enter any other order that it deems proper under the circumstances. *Hill v. State*, 370 Ark. 102, 257 S.W.3d 534 (2007). Where testimony is not disclosed in discovery, the burden is on the appellant to establish that this omission was sufficient to undermine confidence in the outcome of the trial. *Id.* Also, we will not reverse due to a discovery violation absent a showing of prejudice. *Id.*

The State asserts that appellant has not demonstrated prejudice from the admission of Dorn's testimony. We agree. Appellant's wife, Lisa, was expected to testify for the State that appellant lived at the residence where the search was conducted, and when she did not appear at trial, the State sought to replace this testimony with that of Dorn. The trial court questioned appellant as to how this would change his trial strategy, and he responded, "Well, I'm not sure." Appellant stated that he had prepared his case around Lisa's testimony and that now he would have to "scramble." The substance of both witnesses' testimony was the same, in that both were to testify as to appellant's address, and he has not demonstrated how the admission of Dorn's testimony prejudiced him or undermined confidence in the outcome of his trial. Also, as the State argues, appellant could have requested to interview Dorn prior to trial. This court has previously found that a recess to interview the witness may be sufficient

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to remedy a discovery violation. *Newsome v. State*, 73 Ark. App. 216, 42 S.W.3d 575 (2001). Appellant did not make such a request, however. Given the limited nature of Dorn's testimony, appellant has not demonstrated prejudice in this case, and we find that no reversible error occurred.

Affirmed.

VAUGHT, C.J., and GLADWIN, J., agree.