FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4916

BRANDON JAMES SIMS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CORRECTED PAGE: pg 1
CORRECTION IS UNDERLINED IN RED
MAILED: January 3, 2020
BY: FTA

On appeal from the Circuit Court for Escambia County.
Stephen A. Pitre, Judge.

December 10, 2019

LEWIS, J.

Appellant, Brandon James Sims, appeals his convictions and sentences for trafficking in amphetamine or methamphetamine (28 grams or more, but less than 200 grams); possession of cocaine; sale, manufacture, delivery, or possession of cannabis (more than 20 grams); and possession of drug paraphernalia. Appellant argues that the trial court erred by denying his motion for judgment of acquittal because the State failed to prove that he was in constructive possession of the contraband. We agree and reverse.

BACKGROUND

Appellant was charged with trafficking in amphetamine or methamphetamine (28 grams or more, but less than 200 grams)

(Count 1); possession of firearm, ammunition, or electronic weapon by a convicted felon (Count 2); sale, manufacture, delivery, or possession of cocaine (Count 3); sale, manufacture, delivery, or possession of cannabis (more than 20 grams) (Count 4); possession of Clonazepam (Count 5); possession of spice or bath salts (less than 3 grams) (Count 6); and possession of drug paraphernalia (Count 7). Appellant waived his right to a jury trial.

The evidence at the bench trial was circumstantial. The evidence established that in July 2017, officers from the Pensacola Police Department executed a search warrant at a residence owned by Appellant's mother. They found marijuana, narcotics, scales with residue, sandwich baggies, and bullets on top of a dresser in the first bedroom; a firearm, more marijuana, and pill bottles in the drawer of that dresser; and pills on the floor of the room. Appellant, his mother, his child, his child's mother, and his niece were at the residence during the search. Upon entering the home, Detective Barkers first saw Appellant "in, like, the entryway of the bedroom, like, in between Bed 1 and Bed 2. There's a bathroom that's right in between those two rooms, and he was -- he had slipped or he was on the ground in that area." When the detective entered the first bedroom, Brittany Dority, the mother of Appellant's child, was attempting to get out of bed. Dority was unclothed and the detective helped her get dressed after she pointed toward some clothes by the closet. Officer Bryant observed in the first bedroom male clothing in the closet, two photographs of Appellant and Dority, a chain on top of the dresser that "appear[ed] to be" the same chain Appellant was wearing in one of the photographs, though the officer conceded he could not argue with defense counsel if he said it was not the same chain, and a receipt for payment bearing Appellant's name and the subject residence's address, dated June 2016. A piece of mail from Florida Blue Cross Blue Shield addressed to Appellant at the subject residence was found somewhere in the home. Appellant's niece admitted that she had marijuana in her purse, and a handgun was found in her room, along with an essay by her expressing a desire to own a handgun.

Appellant denied ownership of the drugs that were found in the first bedroom, and when asked about the firearm located in that room, he stated that the firearm was for his mother's

protection. According to Officer Bryant, after being transported to the police station, Appellant made a spontaneous statement that he was a lower-level dealer and a user. The seized contraband was tested and turned out to be 28.77 grams of methamphetamine, over 20 grams of marijuana, and cocaine.

The defense moved for a judgment of acquittal, arguing that the State's evidence failed to prove Appellant's constructive possession of the contraband and failed to exclude his reasonable hypothesis of innocence. The State conceded that it did not present sufficient evidence as to Counts 2 and 6, and the trial court granted the motion for judgment of acquittal as to those counts. The court denied the motion with regard to the remaining counts in light of Appellant's statements, the photographs, and the contraband being found in plain view. The court, however, noted that there was no fingerprint evidence, the men's clothing was not tied to Appellant, the officer conceded the chain on the dresser could be different from the chain Appellant was wearing in the photograph, and Appellant's statement about the gun was not a statement of ownership.

Following the denial of his motion, Appellant testified as follows. He and Dority had just gotten out of the shower and he exited the bathroom upon hearing a bang at the door and his mother screaming. He went to see who was at the door and fell to the floor when a police officer held a gun to his face. Appellant was not coming out of the first bedroom and had not been in that room on the day of the search. None of the contraband was Appellant's and he had no knowledge of their presence. The chain on the dresser did not belong to Appellant. Appellant had slept in the first bedroom, but had no belongings there. Appellant was not living in his mother's house at the time of the search, though he got all his mail there. Other people used the first bedroom from time to time, and Appellant's mother allowed people, including his children, siblings, cousins, and nephews and nieces, to stay at the house. When Appellant told the police that the gun was for his mother's protection, he was just trying to explain where it could have come from; "that's my mom's house, so I figured that's what it's there for." He did not tell the police that he was a low-level drug dealer.

The trial court denied Appellant's renewed motion for a judgment of acquittal and adjudicated him not guilty on Counts 2, 5, and 6, guilty of the lesser-included offense of possession of cocaine on Count 3, and guilty as charged in the remaining counts. Appellant was sentenced to a mandatory minimum term of 7 years of imprisonment on Count 1, 40.2 months of prison on Counts 3 and 4, and 11 months and 30 days in jail on Count 7, all to run concurrently. This appeal followed.

ANALYSIS

We review the trial court's denial of a motion for judgment of acquittal *de novo* to determine whether the evidence is legally sufficient to sustain a conviction. *Kemp v. State*, 166 So. 3d 213, 216 (Fla. 1st DCA 2015). In doing so, we must consider the evidence and all reasonable inferences therefrom in a light most favorable to the State. *Id.* In a wholly circumstantial evidence case, a special standard applies, whereby a conviction cannot be sustained unless there is competent, substantial evidence inconsistent with any reasonable hypothesis of innocence. *McWatters v. State*, 36 So. 3d 613, 631 (Fla. 2010).

Appellant's convictions required proof that he possessed the alleged contraband. *See* § 893.135(1)(f)1.b., Fla. Stat. (2017) (making it a crime to sell, purchase, manufacture, deliver, or bring into this state or to be knowingly in actual or constructive possession of amphetamine or methamphetamine); § 893.13(6)(a), Fla. Stat. (2017) (making it unlawful to be in actual or constructive possession of a controlled substance unless lawfully obtained from a practitioner); § 893.13(1)(a)2., Fla. Stat. (2017) (making it a crime to sell, manufacture, or deliver or possess with intent to sell, manufacture, or deliver a controlled substance); § 893.147(1), Fla. Stat. (2017) (making it unlawful to use or possess with intent to use drug paraphernalia).

Where the convictions are based on a theory of constructive possession, the State is required to prove that the defendant knew of the presence of the contraband and had the ability to maintain dominion and control over it. *Nolley v. State*, 237 So. 3d 469, 474 (Fla. 1st DCA 2018); *see also Knight v. State*, 186 So. 3d 1005, 1012 (Fla. 2016). When the premises where the contraband is found are in joint possession, the elements of constructive possession may

not be inferred and must be established by independent proof. *Nolley*, 237 So. 3d at 475-76; *see also Nugent v. State*, 275 So. 3d 721, 724 (Fla. 2d DCA 2019) (explaining that independent proof may consist of the defendant's pre-trial statement, witness testimony, or scientific evidence). While knowledge can be established by proof that the contraband was in plain view in the common areas, dominion and control must be established by independent proof beyond mere proximity where the premises were in joint possession or the defendant was a mere visitor. *Smith v. State*, 125 So. 3d 359, 361 (Fla. 1st DCA 2013); *see also Sundin v. State*, 27 So. 3d 675, 677 (Fla. 2d DCA 2009) (explaining the same); *Bennett v. State*, 46 So. 3d 1181, 1184 (Fla. 2d DCA 2010) (concluding that the appellant's knowledge of the contraband found on the entertainment center in the living room could be inferred because the contraband was in plain view, but his control and dominion of the contraband could not be inferred because the evidence failed to show that he had control over the premises and showed at most that he was a visitor).

Here, Appellant's convictions were based on a theory of constructive possession, and the subject residence was undisputedly in joint possession—four people besides Appellant were present at the time of the search of the home, which was owned by his mother. Because the residence where the officers found the contraband was in joint rather than exclusive possession, the knowledge and ability to maintain dominion and control elements could not be inferred from Appellant's mere proximity to the contraband. Further, the detective testified that she saw Appellant on the floor in the area of the bathroom between the two bedrooms, and Appellant's testimony that he was not in the first bedroom on the day of the search was unrefuted. Given that the contraband was on top of the dresser in the first bedroom, not in a common area of the residence, and no witness placed Appellant in the bedroom with the contraband, the State had to establish Appellant's knowledge of the presence of the contraband, as well as his ability to maintain dominion and control over it, with independent proof. The State failed to meet its burden of proof.

Appellant's pre-trial statement that the firearm was for his mother's protection, made in response to an officer's inquiry about the firearm located in her home, did not evince his knowledge of or

control over the firearm, much less the illegal drugs and drug paraphernalia underlying his convictions. Appellant testified that he was merely trying to explain to the police where the firearm could have come from; it was his mother's house, so he assumed it was there for her protection. Appellant's pre-trial statement that he was just a lower-level dealer and a user likewise was not proof of his knowledge of or control over the contraband found in the first bedroom. Appellant denied ownership of the contraband on the day of the search and at trial. He testified that he had slept in the first bedroom, but had no belongings in the room and was not living in the house at the time of the search. The house was owned by Appellant's mother and the State presented no evidence that Appellant was an occupant of the first bedroom. The evidence established only that Appellant was a visitor at the residence.

The police observed men's clothing in the closet of the first bedroom, but there was no evidence that the clothes were Appellant's or were even his size. The officers' testimony, on the other hand, established that Dority's clothes were in the first bedroom. Unlike Appellant, Dority was found in the first bedroom at the time of the search. The presence of the two photographs of Appellant and Dority in the first bedroom also failed to serve as independent proof because there is nothing unusual about it given that it was his mother's house and he had apparently lived there in the past. As for the chain, the State's evidence established only that the chain located on the dresser looked like Appellant's chain in the photograph—it may or may not have been the same chain. Appellant testified that it was not his chain. The State's reliance on the two pieces of mail addressed to Appellant at the subject residence is just as unavailing. There was no evidence about the location of the Florida Blue mail within the home or when it was dated. The receipt for payment was found in the first bedroom, but there was no testimony about where specifically it was found in relation to the contraband and it was dated June 2016, over a year before the search. Additionally, Appellant testified that he received all his mail at his mother's house.

Moreover, while the evidence suggested that Appellant could have placed the mail, chain, and photographs in the first bedroom, that inference provided no time frame as to when the contraband was placed there or any insight into his present dominion over the

contraband. *See Nugent*, 275 So. 3d at 724 (explaining that "the presence of some of a defendant's personal items in the same area as contraband merely supports an inference that the defendant had knowledge of and dominion and control over the substance"); *Evans v. State*, 32 So. 3d 188, 189-91 (Fla. 1st DCA 2010) (concluding that the State failed to offer independent proof of the appellant's knowledge of the contraband hidden in a duffel bag on top of his bed where his passport was found in the outer part of the bag, two others were present at his residence during the search, and people frequently visited the home and had access to his bedroom and explaining that the presence of the appellant's passport in the bag suggested that he could have placed it there, but provided no time frame as to when the contraband came to reside in the bag or any insight into his present dominion over the contraband); *Kemp*, 166 So. 3d at 219 ("Furthermore, as in *Evans,* although the presence of the T–Mobile receipt bearing Appellant's name suggests Appellant may have placed the receipt there, '[s]uch an inference, however, provides no time frame with regard to when the [gun] came to reside' in the console, 'nor any help as to appellant's present dominion over the [gun].'").

There were multiple people at the residence during the search, including Dority, who was located in the first bedroom along with some of her belongings, and Appellant's niece, who was found in possession of marijuana and a gun. Appellant's unrefuted testimony was that his mother allowed people to stay at the house and other people used the first bedroom from time to time. The State presented no scientific evidence, witness testimony, or pre-trial statement linking Appellant to the contraband. There were items in the bedroom that supported the State's theory that Appellant constructively possessed the contraband, but the evidence tied at least one other person to the room and the strong suspicion of Appellant's guilt was insufficient. *See Thomas v. State*, 269 So. 3d 681, 682-85 (Fla. 2d DCA 2019) (concluding that the State failed to introduce independent proof to establish the appellant's knowledge of and control over the illegal drugs found in a bedroom of the house where he and at least two others resided and explaining that while "many items in the room supported the State's theory that Thomas constructively possessed the drugs found in the dresser drawer: namely, the prescription pill bottle with his name on it, a court document relating to him, CDs with

his picture on it, empty shoe boxes displaying the same shoe size he was wearing when arrested, and a picture collage displaying photographs of him and a woman," the evidence tied at least one other person to the room given the presence of women's clothing and his mother's testimony about numerous people having access to each of the bedrooms and a strong suspicion of his guilt was insufficient to sustain his convictions).

The State simply failed to offer independent proof of Appellant's knowledge of and control over the contraband. Moreover, the State's circumstantial evidence was not inconsistent with Appellant's reasonable hypothesis of innocence that the contraband belonged to someone else. Thus, the trial court erred by denying Appellant's motion for judgment of acquittal.

CONCLUSION

For the foregoing reasons, we reverse Appellant's convictions and sentences and remand with instructions to discharge him.

REVERSED and REMANDED.

RAY, C.J., and BILBREY, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Jason Cromey of Cromey Law, P.A., Pensacola, for Appellant.

Ashley Moody, Attorney General, and Heather Flanagan Ross, Assistant Attorney General, Tallahassee, for Appellee.