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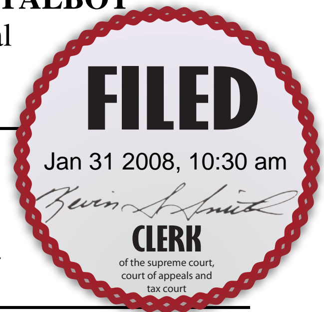

IN THE COURT OF APPEALS OF INDIANA

LARRY TABB,	)	
Appellant-Defendant,	)	
vs.	)	No. 64A03-0707-CR-308
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0304-FA-3317

January 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Larry Tabb ("Tabb") appeals his convictions for Dealing in Cocaine, a Class A felony,[1] and Possession of Cocaine, a Class C felony.[2] We affirm in part, reverse in part, and remand.

Issues

In his pro-se appellate brief, Tabb articulates seven issues for review (three of which we consolidate because they address the sufficiency of the evidence). Tabb's entitlement to relief upon his double jeopardy claim obviates the necessity of addressing two issues challenging his Class C felony conviction.[3] His claim of prosecutorial misconduct is waived.[4] Accordingly, we address the following two issues:

I. Whether the State presented sufficient evidence to support Tabb's convictions; and

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[1] Ind. Code § 35-48-4-1(2).

[2] Ind. Code § 35-48-4-6.

[3] Tabb claims he was entitled to a continuance to address the Possession of Cocaine charge and further claims that he was entitled to an instruction that Possession of Cocaine is not merely a separate offense, but is actually a lesser-included offense of Dealing in Cocaine. The Class C felony Possession conviction must be vacated on Double Jeopardy grounds, thus a continuance would have resulted in no additional relief to Tabb. Likewise, Tabb suffered no prejudice because the trial court did not specifically advise the jury that Possession of Cocaine is a lesser-included offense of Dealing in Cocaine. The jury was instructed on both offenses and was afforded the opportunity to convict Tabb of the Class C felony and not the Class A felony if convinced that the State proved the lesser offense but not the greater.

[4] Tabb takes issue with three of the prosecutor's comments during the closing argument, claiming that the prosecutor misquoted testimony and improperly offered opinions on witness credibility. However, Tabb lodged no objection at trial to any portion of the prosecutor's closing argument. Thus he preserved no such issue for appeal. See Robinson v. State, 693 N.E.2d 548, 552 (Ind. 1998) (clarifying that the proper procedure in the face of alleged improper argument is to request an admonishment, and mistrial if necessary, but that failure to so move results in waiver of the issue).

II. Whether his multiple convictions violate the Double Jeopardy provisions of the Indiana Constitution.

Facts and Procedural History

During the early evening of April 16, 2003, Porter County Drug Task Force officers were conducting surveillance of room 119 at the Dollar Inn Motel on Highway 20 in Portage, Indiana. Officers saw Kevin Easton ("Easton") enter the room and leave minutes later. Easton was stopped, searched, and found to have cocaine on his person. He told officers that he had obtained the cocaine from Tabb.

The officers saw Tabb looking out the window of Room 119. They drew their weapons, entered Room 119, and arrested Tabb and William Melton ("Melton"). Officer Brian McDonald saw a plastic bag on the floor between the two beds in the room. The bag contained four plastic baggies, each having a white powdery substance inside. The substance was tested and found to consist of four and a quarter grams of cocaine.

On April 17, 2003, the State charged Tabb with Dealing in Cocaine. His jury trial commenced on September 6, 2005. On the morning of the trial, the State charged Tabb with Possession of Cocaine, with reference to the same transaction as that of the Dealing in Cocaine count. The jury found Tabb guilty as charged. On January 3, 2006, the trial court entered judgments of conviction on each count and sentenced Tabb to thirty years for Dealing in Cocaine and four years for Possession of Cocaine, to be served concurrently.

The trial court appointed a public defender to represent Tabb in pursuing an appeal or a motion to correct error. On January 4, 2006, Tabb filed a pro-se motion to correct error. On March 15, 2006, Tabb's counsel filed a notice of appeal. However, counsel apparently

failed to perfect an appeal. On February 6, 2007, Tabb filed a petition for a belated appeal. On March 5, 2007, the Porter Superior Court ordered the Porter County Public Defender's Office "to look into this matter and, if no appeal is being prosecuted, to prosecute an appeal on Defendant's behalf." (App. 39.) Public Defender Bryan Truitt ("Truitt") filed a notice of appeal on June 8, 2007. Tabb moved for Truitt's dismissal and subsequently tendered a pro-se brief and appendix.

On September 4, 2007, this Court ordered Truitt's appearance withdrawn and granted Tabb's pro-se motion to amend his brief. Tabb was granted until September 4, 2007 to file his Brief of Appellant. He complied and this appeal proceeded.

Discussion and Decision

I. Sufficiency of the Evidence

Tabb claims that the evidence is insufficient to support each of his convictions. More specifically, he alleges that the State failed to prove his constructive possession of cocaine and failed to prove that he had the intent to deliver it.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and the reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). In so doing, we do not assess witness credibility or reweigh the evidence. Id. We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

In order to convict Tabb of Dealing in Cocaine, a Class A felony, as charged, the State was required to establish that he knowingly or intentionally possessed cocaine in an amount of three grams or more with the intent to deliver the cocaine. Ind. Code § 35-48-4-1(a)-(b). In order to convict Tabb of Possession of Cocaine, a Class C felony, as charged, the State was required to establish that he knowingly or intentionally possessed cocaine in an amount of three grams or more. Ind. Code § 35-48-4-6(a)-(b).

Actual possession of drugs occurs when a person has direct physical control over the drugs, while constructive possession occurs when the person has (i) the intent to maintain dominion and control over the drugs and (ii) the capability to maintain dominion and control over the drugs. Gee v. State, 810 N.E.2d 338, 340 (Ind. 2004). When a defendant's possession of the premises where drugs are found is non-exclusive, an 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 substance and of its presence. Id. at 341.

Here, the evidence most favorable to the verdicts is as follows. Porter County Drug Task Force officers received a complaint from Dollar Inn personnel that Room 119 had numerous visitors and might be in use as a drug sales site. The officers staked out the location. Easton, who entered and exited the room within minutes, was found in possession of cocaine. Easton told officers that he got the cocaine from Tabb.

When officers entered room 119, they found a bag with four smaller "baggies" inside (each containing a substance laboratory-tested and identified as cocaine). The bag was in

open view, located on the floor between the beds, and was nearer to Tabb than the other occupant. The total weight of its contents was over four grams. Officer Brian McDonald testified that, in his experience, the amount and packaging of the cocaine was consistent with anticipated sales rather than personal use.

Additionally, Officer McDonald testified that Tabb had made several incriminating statements, including the admission that he had obtained cocaine from "Hook" and given it to Easton "as a party favor." (Tr. 149, 152.) Tabb further admitted he had been "cooking" cocaine in Room 119 and had provided cocaine to Melton and his brother. (Tr. 149, 152.)

The State presented sufficient evidence from which the jury could conclude that Tabb knowingly or intentionally possessed more than three grams of cocaine with the intent to deliver the cocaine for sale.

II. Double Jeopardy

Tabb argues, and the State concedes, that Tabb was improperly subjected to double jeopardy when he was convicted and punished for Possession of Cocaine, a crime that is a lesser-included offense of another crime for which he was convicted and punished, Dealing in Cocaine. We agree.

Here, Count I charged that, on April 16, 2003, Tabb possessed more than 3 grams of cocaine, with the intent to deliver it. Count II alleged that, on April 16, 2003, Tabb possessed more than 3 grams of cocaine. When the second count was added, the prosecutor advised the trial court "it's the same date and the same alleged occurrence [as Count I]." (Tr. 4.) The evidence presented concerned a single transaction. The State proved the offense of

Dealing in Cocaine, and, as charged, the offense of Possession of Cocaine was an included offense rather than a separate offense. We remand to the trial court with instructions to vacate Tabb's conviction and sentence for Possession of Cocaine.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and CRONE, J., concur.