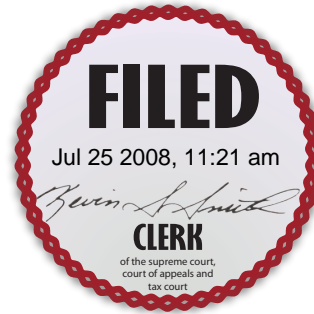


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TERRENCE WHEELER,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 71A04-0804-CR-233

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0604-FD-390

July 25, 2008

MEMORANDUM DECISION- NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Terrence Wheeler challenges his conviction for Maintaining a Common Nuisance,¹ a class D felony, arguing that the State presented insufficient evidence to sustain his conviction. Specifically, Wheeler directs us to Hook v. State, 775 N.E.2d 1125 (Ind. Ct. App. 2002), and argues that the State did not present evidence that more than one person was unlawfully using a controlled substance inside the residence pursuant to our previous interpretation of the applicable statute. Finding that the State did not present sufficient evidence, we reverse Wheeler's conviction.

FACTS

On April 4, 2006, South Bend Police Department Officer Douglas Bagarus, Sergeant Culp, and Officer Timothy Medich executed a search warrant on a house in South Bend. During the search, Sergeant Culp found a utility bill for the house in Wheeler's name. Additionally, the officers found marijuana on Wheeler's person. Officer Medich interviewed four occupants, including Wheeler, after advising him of the Miranda² rights, and Wheeler admitted to smoking marijuana at the residence "every now and then." Tr. p. 14-15; Ex. 3.

On April 6, 2006, the State charged Wheeler with class D felony maintaining a common nuisance. A bench trial was held on January 31, 2008, and Wheeler was found guilty as charged. The trial court held a sentencing hearing on February 29, 2008, and sentenced Wheeler to eighteen months imprisonment. Wheeler now appeals.

¹ Ind. Code § 35-48-4-13(b).

² Miranda v. Arizona, 384 U.S. 436 (1966).

DISCUSSION OR DECISION

When addressing sufficiency of the evidence challenges, we neither reweigh the evidence nor judge the credibility of the witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We consider only the probative evidence and reasonable inferences therefrom that support the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). If there is conflicting evidence, we consider that evidence only in the light most favorable to the judgment. Id. The evidence is sufficient if an inference may reasonably be drawn from it to support the judgment. Id. at 147. A conviction will be upheld if there is substantial evidence of probative value from which the trier of fact could have found the defendant guilty beyond a reasonable doubt. Overstreet v. State, 783 N.E.2d 1140, 1152 (Ind. 2003).

Indiana Code section 35-48-4-13 provides:

(b) A person who knowingly or intentionally maintains a building, structure, vehicle, or other place that is used one (1) or more times:

(1) by persons to unlawfully use controlled substances; or

(2) for unlawfully:

(A) manufacturing;

(B) keeping;

(C) offering for sale;

(D) selling;

(E) delivering; or

(F) financing the delivery of;

controlled substances, or items of drug paraphernalia as described in I.C. § 35- 48-4-8.5;

commits maintaining a common nuisance, a Class D felony.

The existence of paraphernalia might be conclusive of whether a controlled substance was used in the residence. Zuniga v. State, 815 N.E.2d 197, 200 (Ind. Ct. App. 2004).

In Hook, the defendant emphasized that Indiana Code section 35-48-4-13 contains the word “persons” and argued that the State was required to prove that more than one person had used marijuana inside her home. 775 N.E.2d at 1127. In construing the statute, we noted:

Statutes that are criminal or penal in nature must be strictly construed. Although an act may fall within the spirit of the statute, it will not constitute a crime unless it is also within the words of the statute. Also, criminal statutes may not be enlarged by construction, implication, or intendment beyond the fair meaning of the words used. Words and phrases are thought to have their plain, ordinary, and usual meaning unless a different meaning is shown by the statute.

The [maintaining a common nuisance] statute uses the word “persons” and is a criminal statute, so it must be strictly construed. The word “persons” is the plural form of the noun “person” and means more than one person and nothing within the statute directs us to a different meaning. Indiana Code section 35-48-4-13 therefore requires the evidence to show that more than one person unlawfully used controlled substances within the home.

Id. (citations omitted). Applying this interpretation of the statute, we reversed Hook’s conviction after noting that

[a]t Hook’s trial, the evidence presented showed only that Jones unlawfully used marijuana inside of Hook’s home. . . . Construing the applicable statute strictly as we must, we find that the evidence was not sufficient to sustain Hook’s conviction for maintaining a common nuisance because there was no competent evidence to show that more than one person was using marijuana inside of Hook’s home.

Id. at 1127-28.

Here, the State presented evidence at trial that a utility bill for the residence was

addressed to Wheeler, establishing his maintenance of the premises. Ex. 1. Additionally, the officers found marijuana on Wheeler’s person and Wheeler admitted to smoking marijuana at the residence “every now and then.” Tr. p. 14-15, 36; Ex. 3. While four people were present at the home when the officers executed the search warrant and Officer Medich testified that he interviewed all of them, tr. p. 13-14, the State presented absolutely no evidence that anyone else had unlawfully used a controlled substance inside the residence. Moreover, the State does not direct us to evidence rebutting Wheeler’s argument. Because the State did not present evidence to show that more than one person was unlawfully using a controlled substance inside the home, we must conclude that insufficient evidence was presented to sustain Wheeler’s conviction. Thus, we reverse the judgment of the trial court.³

The judgment of the trial court is reversed.

MATHIAS, J., and BROWN, J., concur.

³ Alternatively, the State argues that it presented sufficient evidence to sustain Wheeler’s conviction under the second subsection of the maintaining a common nuisance statute—specifically, that scales with cocaine residue allegedly found at the residence prove beyond a reasonable doubt that Wheeler maintained a structure to unlawfully keep controlled substances or items of drug paraphernalia. However, after examining the record, we note that neither officer who testified mentioned anything about the scales and the scales were not admitted into evidence. As support for its argument, the State cites Exhibit 3—Wheeler’s post-Miranda interview—which was admitted into evidence at trial. After listening to Exhibit 3, the only mention of the scales is approximately three minutes and thirty seconds into the interview when an officer asks Wheeler, “What about the scales and all that, what about the scales down there that got cocaine residue on them?” Wheeler, sounding genuinely surprised, responds, “Scales with cocaine residue? I don’t know nothing about that.” Because we do not believe that this passing reference is substantial evidence of probative value from which the trier of fact could have found Wheeler guilty beyond a reasonable doubt, we will not sustain Wheeler’s conviction on this basis.