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IN THE COURT OF APPEALS OF INDIANA

TRAVIS L. ANDERSON,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 12A02-1103-CR-194
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE CLINTON SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 12D01-0810-FC-132

December 6, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

After a jury trial, Travis Anderson was convicted of possession of a controlled substance (Alprazolam) and possession of a controlled substance (Hydrocodone), Class C felonies, possession of marijuana, a Class D felony due to prior convictions, and visiting a common nuisance, a Class B misdemeanor. The trial court sentenced Anderson to five years for each controlled substance conviction, with four years executed and one year suspended to probation for each; one year for possession of marijuana; 180 days for visiting a common nuisance; and his possession of a controlled substance (Hydrocodone) conviction was enhanced by one year after he was adjudged an habitual substance offender. All sentences were ordered concurrent for a total sentence of six years with one year suspended to probation.

Anderson raises five issues for our review: 1) whether the trial court abused its discretion in denying his motion to strike a juror for cause; 2) whether the trial court abused its discretion in denying his motion to suppress evidence; 3) whether the evidence was sufficient to support his possession of a controlled substance convictions; 4) whether the trial court abused its discretion in replaying the testimony of a witness to the jury during deliberations; and 5) whether his sentence is inappropriate. Concluding the trial court did not abuse its discretion by denying Anderson's motion to strike a juror for cause or motion to suppress evidence, the evidence supporting his convictions is sufficient, the trial court did not abuse its discretion in replaying testimony, and Anderson's sentence is not inappropriate, we affirm.

Facts and Procedural History

In October 2008, the Frankfort Police Department obtained a search warrant to search for evidence of illegal drug activity at "[an address on] S. Columbia, a one story, white house." Appellant's Appendix at 26. Police pursued the search warrant after investigating activity at the home, owned by Juan Salinas, and the actions of Michael Dodd, who was living at the home. When Frankfort Police decided to execute the warrant, they utilized the SWAT team due to the size of the home and the number of people who had been seen entering and leaving it. The officers secured the home by placing its occupants, including Anderson, in hand restraints and patting them down for weapons. A silver key chain with a pill container attached and a bag of marijuana were retrieved during the search of Salinas' home. Detective Albaugh also retrieved a bag with green leafy material, later identified as marijuana, from Anderson's vehicle located just outside Salinas' home. A lab analysis revealed the contents of the pill container were Hydrocodone, Alprazalam, and Clonozapam, none of which were prescribed to Anderson. Officers determined the front of Salinas' property is just under 1000 feet from a nearby park, and the rear of the property is less than 900 feet from the park.

Anderson filed a motion to suppress evidence in February 2010, but on the morning of the motion to suppress hearing, Anderson withdrew his motion. On August 17, 2010, Anderson filed a second motion to suppress less than an hour before his trial was scheduled to begin. The trial court held a suppression hearing while jurors were away at lunch, and the trial court denied Anderson's motion to suppress evidence.

While deliberating after closing arguments, the jury requested the trial court replay the testimony of Detective Albaugh. Anderson objected, arguing private conversations

between him and his counsel may have been recorded on the audio segment, but he admitted this was mere conjecture. The trial court overruled Anderson's objection and replayed Detective Albaugh's testimony for the jury. The jury found Anderson guilty on all counts. The trial court sentenced him to five years in the Department of Correction for both possession of a controlled substance (Hydrocodone) and possession of a controlled substance (Alprazolam), Class C felonies, with four years executed and one year suspended to probation for each conviction. His sentence for possession of a controlled substance (Hydrocodone) was enhanced by one year after the trial court found him to be an habitual substance offender. Because Anderson had a prior conviction for possession of marijuana, a fact he volunteered to police, his conviction for possession of marijuana was elevated to a Class D felony and the trial court sentenced him to one year in the Department of Correction. The trial court sentenced him to 180 days for visiting a common nuisance, a Class B misdemeanor. Anderson's sentences were all ordered concurrent for a total sentence of six years with one year suspended to probation. Anderson now appeals.

Discussion and Decision

I. Anderson's Motion to Strike a Juror for Cause

> As a general rule, whether a particular juror should be excused for cause rests within the sound discretion of the trial court. An appellate court will not reverse a trial court's exercise of its discretion in this regard so long as that discretion is not exercised in an illogical or arbitrary manner. . . . When a prospective juror's preliminary or initial responses suggest the possibility of prejudicial bias, further questioning of the juror by the trial court is common practice to ascertain the depth of bias, or a juror's amenability to setting aside any such bias and to rendering a decision based solely on the evidence and the court's subsequent instructions.

Ward v. State, 908 N.E.2d 595, 597 (Ind. 2009), cert. denied, 130 S.Ct. 2060 (2010).

During voir dire, the prosecuting attorney asked the potential jurors if they had any issues that would interfere with their ability to serve as jurors. Juror Hancock responded, telling the court she had a sick two-year old at home and she felt "like something's gone wrong because we are here." Tr. at 80. The court then asked Juror Hancock if she would be able to base her decision on the evidence and instructions presented at trial, and she replied that she could.

After moving on and questioning other potential jurors, the court came back to Juror Hancock because Anderson expressed concern. He had already used his ten allotted peremptory challenges. The trial court questioned Juror Hancock to determine her fitness to serve as a juror. She stated that based on conversations with her sister, an attorney, she has "a very high regard for the state presenting cases" because "if you didn't have enough proof, we wouldn't be here." Tr. at 114. She was then asked if she could set aside her preconceived notions to decide the case based on evidence and the guidance of the judge, and she replied "I believe I could in my heart of hearts." Id. at 115. When asked if she would be comfortable as a defendant on trial with someone like her as a juror, she replied, "[y]es I would." Id.

When asked whether she would presume Anderson to be innocent, she stated that although she did not think he was guilty, she thought they would not be there "if there wasn't something to this." Id. at 116. The court asked her what she thought the presumption of innocence meant, and she replied "[i]t means the State can present all the evidence. And the defendant the way I understand it is . . . they don't have to say or do anything." Id. She then confirmed once again that she would be able to follow jury

instructions. At the conclusion of questioning, Anderson moved to strike Juror Hancock for cause, and the trial court denied Anderson's motion.

Anderson contends the trial court abused its discretion by denying his motion to strike Juror Hancock. In support of this argument, Anderson claims Hancock had "formed an opinion" and repeatedly stated her opinion. Appellant's Br. at 11. First, we note that her opinion was not as clear as Anderson would have us believe. Although she stated she has a very high regard for the State's case and they would not have been there to begin with if there was not something to the State's case, she also stated she did not think he was guilty at that point in time and she was "tossed between" the presumption of innocence and her conception that if the State did not have evidence they would not have pursued trial. Id. Being "tossed between" these two notions is not the same as having "formed an opinion" in the case considering the first notion favors Anderson and the second favors the State.

Even if Hancock expressed a level of bias against Anderson, when the court questioned her further she said she would base her decision on the evidence at trial and the court's instructions. See Ward, 908 N.E.2d at 597 ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.") (quoting Monserrate v. State, 265 Ind. 153, 352 N.E.2d 721 (1976)); Timberlake v. State, 690 N.E.2d 243, 262 (Ind. 1997) (trial court did not abuse its discretion by denying a motion to strike where a juror stated she would have a difficult time considering mitigation and be biased against anyone who has committed murder because she also stated she would follow the law as instructed), cert. denied, 525 U.S. 1073 (1999). Thus, because Hancock stated she would make a decision from the evidence at

trial and follow the court's instructions, the trial court's denial of Anderson's motion to strike Hancock was not illogical or arbitrary.

II. Anderson's Motion to Suppress Evidence

The evidentiary rulings of a trial court are afforded great deference on appeal and overturned only upon a showing of a manifest abuse of discretion resulting in the denial of a fair trial. Willingham v. State, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). Abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances. Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001).

Anderson argues, as he did during the trial court's suppression hearing, that the police officers who entered Salinas' home "exceeded the scope of the authority granted by the search warrant."[1] Appellant's Br. at 11. Anderson testified during the suppression hearing that after police entered the home they ordered him to the ground, zip-tied his hands behind his back, and searched him. Anderson stated Officer Myers searched him, and he claims that during the search Officer Myers removed the silver keychain with a pill container attached and bag of marijuana from Anderson's pockets and threw them behind Anderson. Because the search warrant's scope only included the home, and not particular individuals, Anderson contends that this unconstitutionally exceeded the scope of the search warrant and the evidence obtained during the search of his person should

[1] Anderson also claims police questioned him without proper consent; however, other than making this statement at the beginning of his argument section, Anderson makes no further argument in support of this claim. Indiana Appellate Rule 46(A)(8)(a) states that an appellant's argument section of his or her appellate brief "must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . ." We will not become an advocate for a party, nor will we address arguments which are either inappropriate, too poorly developed, or improperly expressed to be understood. See Thacker v. Wentzel, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003). We therefore do not discuss the merits of Anderson's contention that police questioned him without proper consent.

have been suppressed, citing McAllister v. State, 159 Ind. App. 340, 306 N.E.2d 395 (1974).

In McAllister, we held the scope of a search warrant authorizing the search of a building was exceeded where a person inside the building was searched without any alleged justification other than the search warrant itself. Id. at 396. We noted that such an improper exercise of authority should be distinguished from cases where a search warrant authorizes the search of a building for particular items and an officer sees such items in plain view inside the building. In that circumstance, seizing the items that are in plain view would not exceed the scope of a search warrant authorizing the search of the building. Id. at 397. Here, although Anderson claimed at the suppression hearing that the evidence used against him, the pill container and bag of marijuana, was seized from his person, the State provided evidence showing that the container and bag were in plain view on a table close to where Anderson was sitting when police initially entered the home.

Officer Myers testified his purpose in searches like the one at issue is to enter and secure the premises by locating all individuals present, handcuffing them, and conducting brief pat-downs to ensure they do not have weapons. He testified that he remembered the search of Salinas' home and some of the individuals present, including Anderson, but that he was not sure if he personally patted down Anderson and did not recall removing a keychain or bag or marijuana from anyone's pocket. He further testified that during a pat-down for weapons he would not customarily remove a keychain from someone's pocket and that if he had removed a bag of marijuana he would have remembered the

incident. He also stated that while securing the residence, he did not specifically remember seeing any drug contraband out in plain view.

Officer Albaugh then testified that he entered the home after it had been secured and the inhabitants were patted down for weapons, and that the pill container and bag of marijuana were located on a table near Anderson. Because he entered after the initial pat-down, he did not know whether they were initially on the table or removed from Anderson's pockets.

Anderson's contention on appeal is nothing more than a second attempt to argue his stance at the suppression hearing. The trial court was presented with conflicting evidence. Anderson stated the paraphernalia was removed from his pockets by Officer Myers during an initial pat-down search. Officer Myers, however, testified that he would not typically remove a keychain from someone's pocket during a pat-down for weapons, that he did not recall removing a bag of marijuana from someone's pocket, and that if he had removed a bag of marijuana he would have remembered. Officer Albaugh testified that when he entered the home after the pat-down search was finished, the drug container and bag of marijuana were located on top of the table. We reverse a trial court's evidentiary determinations only when the court's decision is clearly against the logic and effect of the facts and circumstances. Smith, 754 N.E.2d at 504. Because the State presented evidence at the suppression hearing that the pill container and bag of marijuana were in plain view and not seized from Anderson's person, the trial court's denial of Anderson's motion to suppress was not an abuse of discretion.

III. Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id. Therefore, the evidence does not need to overcome every reasonable hypothesis of innocence. Id. at 147. Evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

A possession conviction requires evidence demonstrating actual or constructive possession. Holmes v. State, 785 N.E.2d 658, 660 (Ind. Ct. App. 2003) (citing Goodner v. State, 685 N.E.2d 1058, 1061 (Ind. 1997)). Constructive possession is established by showing that the defendant had the intent and capability to maintain dominion and control over the contraband. Id. If the defendant had exclusive possession of the premises on which contraband is found, we can infer that he or she knew of the contraband's presence and was capable of controlling it. Id. at 661. Where possession of the premises is non-exclusive, the inference is not permitted absent additional circumstances indicating the defendant's knowledge of the presence of the contraband and his or her ability to control it. Id. Additional circumstances indicating knowledge could include: 1) incriminating statements made by the defendant; 2) attempted flight or furtive gestures; 3) a drug manufacturing setting; 4) proximity of the defendant to the contraband; 5) contraband in plain view; and 6) contraband located in close proximity to items owned by the defendant. Id.

Anderson contends the evidence is insufficient to show actual or constructive possession of Alprazolam or Hydrocone,[2] noting the State claims the drugs were found in plain view on a table top rather than in his actual possession and Anderson had no ownership interest in Salinas' home. Further, Anderson argues that Salinas testified that he was in possession of Alprazolam but did not give any to Anderson, Dodd testified she was in possession of Hydrocodone but did not give any to Anderson, and Officer Albaugh testified that there were two sets of keys located on the table when he arrived. However, the testimony and evidence supporting the verdict includes: when Officer Albaugh entered the residence he discovered the paraphernalia on top of a table near Anderson; Anderson told Officer Albaugh the keychain and pill container were his property; Anderson told Officer Albaugh the specific contents of the pill container, facts later confirmed by lab analysis; Officer Albaugh discovered a bag of marijuana in Anderson's vehicle after Anderson consented to a search of his vehicle.

We will not reweigh the evidence. Considering the evidence and reasonable inferences supporting Anderson's convictions, a reasonable fact-finder could conclude Anderson had knowledge of the controlled substances and an ability to control them, and thus could find him guilty beyond a reasonable doubt of each of his possession of a controlled substance convictions.

IV. Replaying Testimony During Jury Deliberations

Trial courts have discretion to replay testimony, and if the jury explicitly indicates a disagreement as to any part of the testimony, Indiana Code section 34-36-1-6 requires

[2] Anderson does not challenge the sufficiency of the evidence supporting his convictions for possession of marijuana or visiting a common nuisance, nor does he challenge the sufficiency of the evidence supporting his habitual substance offender enhancement. We therefore limit our discussion to his convictions for possession of controlled substances.

the trial court to replay testimony. Parks v. State, 921 N.E.2d 826, 831 (Ind. Ct. App. 2010), trans. denied. Anderson objected to the replaying of Officer Albaugh's testimony at trial, and the trial court overruled Anderson's objection. Anderson's objection was that the audio recording of Officer Albaugh's testimony could include communication between Anderson and his counsel that the microphone at their table picked up. The trial court concluded there was no reason to believe the recording contained any prejudicial discussion and that Anderson's argument was waived because the microphone has a mute button that Anderson or his counsel could have pressed while communicating to each other.

We need not address whether Anderson's argument is waived because there was no evidence presented at trial, nor is there now, suggesting that the trial court abused its discretion in replaying the testimony due to prejudicial statements made by Anderson or his counsel. To the extent the trial court violated Anderson's rights, as he contends, the error would be harmless because Anderson has not shown that the recording contained any prejudicial communications, much less that they had a prejudicial effect.

V. Anderson's Sentence

This court has authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). In making this determination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The defendant bears the burden to persuade us that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Our assessment of a sentence turns on our sense of the

culpability of the defendant, the severity of his crime, the damage done to others, and myriad other factors that come to light in a given case. Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008). The question under Appellate Rule 7(B) is not whether another sentence is more appropriate, but whether the sentence imposed is inappropriate. King v. State, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008).

Anderson's possession of a controlled substance convictions are Class C felonies, with a statutory sentencing range of two to eight years and an advisory sentence of four years. Ind. Code § 35-50-2-6(a). He was sentenced to five years for both and contends his sentence is inappropriate for both.[3] As to the nature of his offenses, Anderson points out that the State even conceded at trial the quantity of drugs was small. Nonetheless, he did possess them. Nothing else about the nature of the offenses is particularly noteworthy. As to the nature of his character, Anderson cooperated with the police and admitted that he had a prior marijuana charge. As the State points out, Anderson has failed to provide a presentence investigation report in his appellate appendix. However, Anderson admitted to having numerous prior convictions during the sentencing hearing. His criminal record is far from clean. Thus, we cannot say that Anderson has persuaded us that either sentence for his controlled substance convictions, just one year above the advisory sentence, is inappropriate.

Conclusion

We conclude the trial court did not abuse its discretion by denying Anderson's motion to strike Juror Hancock for cause or Anderson's motion to suppress evidence; the

[3] Anderson does not argue his sentences for possession of marijuana or visiting a common nuisance are inappropriate. Thus, we do not address them.

evidence supporting Anderson's convictions was sufficient; the trial court did not abuse its discretion by replaying testimony of a witness; and Anderson's sentence is not inappropriate. We therefore affirm.

Affirmed.

BARNES, J., and BRADFORD, J., concur.