MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Layton E. Laramore,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 1, 2022

Court of Appeals Case No. 22A-CR-716

Appeal from the Adams Superior Court

The Honorable Samuel K. Conrad, Judge

Trial Court Cause No. 01D01-2010-CM-416

Mathias, Judge.

[1] Layton Laramore was convicted in Adams Superior Court of Class A misdemeanor possession of a controlled substance and Class C misdemeanor

possession of paraphernalia. Laramore appeals, arguing that the evidence is insufficient to support his convictions.

[2] We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Facts and Procedural History

[3] On October 28, 2020, at approximately 3:45 a.m., Sergeant Derek Loshe and Officer Colyn Torson with the Decatur Police Department observed a vehicle parked in Homestead Park. Because the vehicle was in the closed park in violation of a city ordinance, the officers approached the vehicle to speak to the driver and passenger.

[4] While Sergeant Loshe was speaking to the passenger, he noted the distinct odor of marijuana emanating from the vehicle. The sergeant indicated to Officer Torson that he smelled "something." Tr. p. 33. Officer Torson stepped closer to the vehicle, and he also smelled the odor of marijuana. Tr. pp. 33-34.

[5] Officer Torson asked the driver, Laramore, to step out of the vehicle, but Laramore refused. The officer asked Laramore to exit the vehicle two more times, but he argued with the officer and remained in the driver's seat. The officers finally told Laramore that they could smell the odor of marijuana and they needed him to exit the car. Tr. p. 34. Laramore complied and exited the vehicle.

[6] Officer Torson told Laramore that he needed to conduct a pat-down search for officer safety. The officer conducted the pat-down search and did not find anything on Laramore's person. Next, he asked Laramore if there was anything in the vehicle that the officer needed to be aware of. Tr. pp. 33, 34. Laramore replied that there was paraphernalia in the storage compartment on the driver's side door. Tr. p. 34. The officer searched the compartment and found a black bag. Inside the bag, the officer discovered "a pipe . . . or a bong used to smoke dab" and blue dab. Tr. p. 35. According to Officer Torson, dab is "a waxy material that contains THC and marijuana." Tr. p. 35. Laramore admitted that the items in the bag were used to consume dab. Tr. p. 53.

[7] The State charged Laramore with Class B misdemeanor possession of marijuana, Class C misdemeanor possession of paraphernalia, Class A misdemeanor possession of a controlled substance, and Level 6 felony possession of a narcotic drug. The possession of a narcotic drug charge was dismissed prior to trial.

[8] Laramore's bench trial was held on February 15, 2022. At trial, forensic scientist Melinda McNair testified that the substance that Laramore referred to as "dab" contained THC, which is classified as a schedule one controlled substance. Tr. p. 46. McNair did not perform a quantitative analysis on the substance, and, therefore, she did not determine the percentage of THC present in the substance. Tr. p. 49. McNair testified that the percentage of THC in the "dab" could be lower than 0.3%. Tr. pp. 49-50. There were also no botanical

features present in the substance. Tr. p. 50. McNair testified that "[m]arijuana has a distinction of botanical features that must be present[.]" Tr. pp. 46-47.

[9] During closing argument, the State moved to dismiss the possession of marijuana charge for lack of sufficient evidence. Tr. p. 55. The trial court granted that motion to dismiss. Laramore argued that the State failed to present sufficient evidence to prove possession of a controlled substance because it failed to prove the percentage concentration of THC in the "dab." Tr. p. 56. After considering the parties' arguments, the court found Laramore guilty of Class A misdemeanor possession of a controlled substance and Class C misdemeanor possession of paraphernalia. The trial court ordered Laramore to serve 365 days on the Class A misdemeanor conviction with sixty days served on home detention or work release and the remainder suspended to probation. For the Class C misdemeanor conviction, the court ordered Laramore to serve a consecutive term of 60 days executed.

[10] Laramore now appeals.

Discussion and Decision

[11] Laramore argues that the evidence is insufficient to support his conviction. Our standard of review is well-settled:

> For sufficiency of the evidence challenges, we consider only probative evidence and reasonable inferences that support the judgment of the trier of fact. On sufficiency challenges, we will neither reweigh evidence nor judge witness credibility. We will

affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.

Hall v. State, 177 N.E.3d 1183, 1191 (Ind. 2021).

Possession of a Controlled Substance

[12] First, we address Laramore's Class A misdemeanor possession of a controlled substance conviction. To prove that Laramore committed this offense, the State had to establish that he, "without a valid prescription or order of a practitioner acting in the course of the practitioner's professional practice, knowingly or intentionally possesse[d] a controlled substance or controlled substance analog (pure or adulterated), classified in schedule I, except marijuana, hashish, or salvia[.]" *See* I.C. § 35-48-4-7; Appellant's App. Vol. 2, p. 78. Indiana Code section 35-48-2-4(d)(31) defines THC as a schedule I controlled substance. McNair testified that the tested substance contained THC.

[13] Laramore acknowledges McNair's testimony but argues that the State did not exclude the possibility that the substance contained low THC hemp extract, which is not classified as a controlled substance.[1] Therefore, "the State left open the reasonable doubt that Defendant possessed hemp." Appellant's Br. at 13.

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[1] [1] Laramore argues that the State proved that "dab" is marijuana, "which by definition is exempted from inclusion in the possession of a controlled substance statute." Appellant's Br. at 11; *see also* I.C. § 35-48-4-7. Therefore, the State only proved possession of marijuana, the count that it moved to dismiss. But McNair unequivocally testified that the "dab" lacked botanical features, and, therefore, it was not marijuana. Tr. pp. 46-47, 50.

[14] Indiana Code section 35-48-1-9 defines a controlled substance as "a drug, substance, or immediate precursor in schedule I, II, III, IV, or V" but "[t]he term does not include low THC hemp extract." Low THC hemp extract is defined in pertinent part as

> a substance or compound that:
>
> (1) is derived from or contains any part of the plant Cannabis sativa L. that meets the definition of hemp under IC [§] 15-15-13-6;
>
> (2) contains not more than three-tenths percent (0.3%) total delta-9-tetrahydrocannabinol (THC), including precursors, by weight; and
>
> (3) contains no other controlled substances.

I.C. § 35-48-1-17.5.

[15] The term "low THC hemp extract" does not include "smokable hemp."[2] *Id.* And hemp is "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9-tetrahydrocannabinol concentration of not more than three-tenths of one

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[2] Indiana Code section 35-48-1-26.6 provides in relevant part that smokable hemp "means a product containing not more than three-tenths percent (0.3%) delta-9-tetrahydrocannabinol (THC), including precursors and derivatives of THC, in a form that allows THC to be introduced into the human body by inhalation of smoke."

percent (0.3%) on a dry weight basis, for any part of the Cannabis sativa L. plant." I.C. § 15-15-13-6.

[16] In sum, "to be illegal, the percent concentration of THC must be more than 0.3%." *Fedij v. State*, 186 N.E.3d 696, 709 (Ind. Ct. App. 2022). It is certainly possible that the "dab" found in Laramore's vehicle had a percent concentration of THC that was more than 0.3%. But a possibility is not proof beyond a reasonable doubt. The forensic chemist concluded only that the "dab" contained THC. She was not asked to do a quantitative analysis and did not determine the percent concentration of THC of the substance. And she agreed that the percentage of THC in the "dab" could be lower than 0.3%. Tr. pp. 49-50.

[17] Because the State did not present any evidence of the percent concentration of THC in the "dab," it failed to prove whether Laramore possessed a substance that contained the controlled substance THC or a substance that contained low THC hemp extract. *See Fedij*, 186 N.E.3d at 709 (explaining that when a "statute proscribes possession of a specific substance, and if the State seeks to obtain a conviction under that statute, it is entirely the State's burden to prove that the proscribed substance was in fact in the defendant's possession. Leaving the fact-finder to simply guess whether a substance is legal or illegal from equivocal evidence is not a sufficient basis to sustain a criminal conviction."). For this reason, we agree with Laramore that the State failed to present sufficient evidence to establish that he possessed a controlled substance.

Accordingly, we reverse Laramore's conviction for Class A misdemeanor possession of a controlled substance.

Possession of Paraphernalia

[18] Laramore also argues that the evidence is insufficient to support his possession of paraphernalia conviction. To prove this offense, the State had to establish that Laramore "knowingly or intentionally possesse[d] an instrument, a device, or another object" that he "intend[ed] to use for: (1) introducing into the person's body a controlled substance...." I.C. § 35-48-4-8.3(b). Laramore claims that the State failed to prove that he intended to use the pipe for the purpose of introducing a controlled substance into his body.

[19] In *Fedij,* 186 N.E.3d at 709, our court observed:

> The possession-of-paraphernalia statute does not require the State to prove possession of a controlled substance. It required the State to prove possession of an instrument and the defendant's intent to use that instrument to introduce a controlled substance into her body. We think it is beyond dispute that the bong, smoking pipe, and smoking bowl met that burden.

[20] Although it is expressly excluded from the possession of a controlled substance statute, marijuana is classified as a controlled substance. *See* I.C. §§ 35-48-1-9; 35-48-2-4. It was reasonable for the fact-finder to conclude that the intended use of the bong or pipe that Laramore possessed was to introduce marijuana or some other controlled substance into his body. Moreover, the officers smelled the odor of marijuana when they approached Laramore's vehicle.

[21] For all of these reasons, we conclude that the State presented sufficient evidence to prove that Laramore possessed paraphernalia, and we affirm his Class C misdemeanor conviction.

Conclusion

[22] The State failed to prove that Laramore possessed THC with a percent concentration of more than 0.3%. For this reason, we reverse his Class A misdemeanor conviction for possession of a controlled substance and instruct the trial court to vacate his conviction and sentence for that conviction. However, the evidence is sufficient to support Laramore's conviction for Class C misdemeanor possession of paraphernalia, and we affirm that conviction.

[23] Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Robb, J., and Foley, J., concur.