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**IN THE
COURT OF APPEALS OF INDIANA**

JASON R. JONES,)

Appellant-Defendant,)

vs.)

No. 30A01-0603-CR-115

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE HANCOCK SUPERIOR COURT
The Honorable Terry R. Snow, Judge
Cause No. 30D01-0409-FD-130

October 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Jason Jones appeals after a jury trial in which he was found not guilty of operating a motor vehicle while driving privileges are suspended, a Class A misdemeanor, and guilty of possession of marijuana with a previous conviction, a Class D felony. Jones contends there was insufficient evidence to find he possessed marijuana, and questions the trial court's grant of the jury's request during deliberations to view a videotape previously entered into evidence and shown during trial. Because the testimony of various witnesses as well as circumstantial evidence supports a reasonable conclusion that Jones possessed marijuana, there was sufficient evidence to support his conviction. Moreover, the trial court did not abuse its discretion when it allowed the jury to view the videotape a second time. Accordingly, we affirm.

Facts and Procedural History

On September 4, 2004, Jones was observed by off-duty Greenfield Police Officer Ronald Chittum, who was attending his son's high school football game. Officer Chittum, who was familiar with Jones from previous encounters and knew Jones's driver's license was suspended, saw Jones enter the driver's side door of a pickup truck located in the parking lot. Officer Chittum also saw a young woman, Carrie McKnelly, enter the passenger side of the vehicle. After contacting Officer Jon Anderson to report what he had seen, Officer Chittum drove past the truck, saw Jones behind the steering wheel, and parked in a position to further observe the truck while he waited for other officers to arrive.

After arriving at the parking lot, Officer Anderson performed checks on the truck's

license plate and registration, which indicated ownership by Jones. A check on Jones's driver's license status showed it was suspended. Officer Anderson notified another officer, Corporal Anthony Neumeister, who was also present and aware of the situation. Corporal Neumeister followed behind the truck while Officer Anderson proceeded to the high school's main entrance. When the truck, which had exited the parking lot and entered traffic, turned left into the high school's main entrance without signaling the turn, Officer Anderson and Corporal Neumeister activated their lights and stopped the vehicle.

When the officers approached the truck, McKnelly was in the driver's seat and Jones was in the passenger's seat. Another check revealed McKnelly's license to be suspended and confirmed the truck was registered to Jones. Because neither of the truck's occupants was legally permitted to drive, the officers arranged to have the vehicle towed and impounded. They also performed an inventory search pursuant to their department's policy. The bed of the truck was covered with a camper shell, inside of which the officers found an assortment of tools belonging to Jones. Officer Anderson, while on the driver's side of the cab, opened the truck's rear window to look into the camper shell. There, between the exterior of the cab and the camper shell, Officer Anderson discovered a plastic bag filled with green plant-like material, as well as an apparent hand-rolled marijuana cigarette. Both Jones and McKnelly denied ownership of the bag. Jones was arrested while the inventory search continued. McKnelly told Corporal Neumeister that she and Jones had changed places in the truck, and that Jones had been driving when it left the parking lot. This conversation was recorded by Corporal Neumeister's in-car video camera. The material in the bag later tested positive as

forty-two grams of marijuana.

Jones was charged with possession of marijuana and operating a vehicle with a suspended license, and a jury trial ensued on November 15, 2005. During trial Officer Chittum, Officer Anderson, Corporal Neumeister and McKnelly all testified. Videotapes of the events recorded by Officer Anderson's and Corporal Neumeister's in-vehicle cameras were entered into evidence by the State and played for the jury, without objection. Jones also played a portion of Corporal Neumeister's videotape. During deliberation, unbeknownst to the parties, the jury requested to review one of the videotapes previously entered into evidence. Without notification to the parties, the trial court granted their request, brought the jury back into the courtroom, and replayed the video. The jury found Jones not guilty of driving with a suspended license, and guilty of possession of marijuana.

After Jones learned from the trial court's bailiff that the jury had requested and reviewed the videotape, he filed a motion to correct error requesting a new trial. The trial court denied Jones's motion, and sentenced him to eighteen months incarceration. Jones now appeals.

Discussion and Decision

I. Sufficiency of Evidence

When reviewing the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor judge the credibility of witnesses. Stanton v. State, 853 N.E.2d 470, 474 (Ind. 2006). We look to the evidence most favorable to the verdict together with all reasonable inferences to be drawn from that evidence. Id. We affirm the jury's verdict if

there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Id. In order for Jones to be convicted of Class D felony possession of marijuana, the State was required to establish beyond a reasonable doubt that Jones knowingly possessed marijuana and had a prior conviction for an offense involving marijuana. Ind. Code § 35-48-4-11.

Possession of an illicit substance can be shown by either actual or constructive possession. An individual has actual possession of an item when he has direct physical control over it. Goffinet v. State, 775 N.E.2d 1227, 1230 (Ind. Ct. App. 2002), trans. denied. Because Jones did not have direct physical control over the marijuana when the truck was stopped and the inventory search was conducted, the State was required to establish he constructively possessed it.

To prove constructive possession, the State must show that Jones had the intent and capability to maintain dominion and control over the contraband. Collins v. State, 822 N.E.2d 214, 222 (Ind. Ct. App. 2005), trans. denied. Intent may be demonstrated through the defendant's knowledge of the presence of the contraband, and may be inferred from either the exclusive dominion and control over the premises containing the contraband, or if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. Id. Such additional circumstances may include: (1) incriminating statements 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) location of the contraband in close proximity to items owned by the defendant. Id. Capability may be demonstrated by the defendant's "capability to exercise control over the item, that is, the ability to reduce the item to his personal possession or to otherwise direct its disposition or use." Conrad v. State, 747 N.E.2d 575, 582 (Ind. Ct. App. 2001), trans. denied.

Here, Jones was identified in his truck, on both the driver's side and the passenger's side. The bag of marijuana was discovered in Jones's truck, concealed in a location just outside the rear window on the top edge of the truck bed, and accessible only from within the vehicle. The rest of the truck's contents also belonged to Jones. A reasonable inference arises that Jones, as the truck's owner, had knowledge of this hiding spot and how to access it. From this the jury could conclude Jones constructively possessed the marijuana.

Jones also contends that McKnelly's testimony was "inherently unbelievable." Brief of Appellant at 13. He calls for application of the incredible dubiousity rule, which dictates that a reviewing court may "impinge on the factfinder's responsibility to judge the credibility of the witness only when it has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of 'incredible dubiousity.'" Copeland v. State, 802 N.E.2d 969, 971 (Ind. Ct. App. 2004). The standard under this rarely applied rule is whether a witness's testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. Id. If so, "[w]hen a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed." Id. Because McKnelly was not the only person to testify, and

because there was no lack of circumstantial evidence against Jones, the incredible dubiousity rule does not apply in the present context. Therefore, we will not reassess McKnelly's credibility. We also decline to reassess the credibility of the other witnesses and to reweigh the evidence. The evidence and testimony were sufficient to sustain Jones's conviction for possession of marijuana.

II. Jury Review of Videotape

Jones argues the trial court violated his rights and prejudiced his case when it failed to notify him of the jury's request for a second viewing of a videotape entered into evidence and shown during trial. Without notice, Jones asserts he was prevented from being present at the replay of the videotape, and denied the opportunity to object or protest against possible harm to his case.

Preliminarily, Jones claims a violation of Article I, section 13, of the Indiana Constitution, which protects a defendant's right to be present in the courtroom at every stage of the proceedings that requires the presence of the jury. A similar contention was made in Robinson v. State, 699 N.E.2d 1146 (Ind. 1998), with regard to the viewing of photographs by a jury during deliberations. Our supreme court rejected the implication of this state constitutional right, explaining that "[t]here is no statutory or constitutional requirement that the jury be returned to the courtroom for the viewing of photographs." Id. at 1151 (emphasis added). Likewise, no requirement exists for the jury's review of a videotape, and Jones's Indiana constitutional right was not violated.

Indiana Code section 34-36-1-6 governs instances where a jury requests further

information after it has retired for deliberation. It requires notice to the parties of the jury's request for information, or the presence of the parties in the courtroom when the information is given to the jury, but only where there is a "disagreement among the jurors as to any part of the testimony" or the jury wishes to be informed about a point of law. Id. Here, the record is clear that the jury wished to review one of the videotapes entered into evidence and played during trial. However, as Jones acknowledges, the jury's request does not indicate disagreement among jury members. When coupled with the fact that the request did not relate to a point of law, the absence of explicit disagreement renders the statute inapplicable. See Hillenburg v. State, 777 N.E.2d 99, 108 (Ind. Ct. App. 2002), trans. denied (explaining that provisions in Indiana Code section 34-36-1-6 are not triggered without explicit disagreement among the jury).

Where the statute does not apply, a trial court exercises its discretion in permitting the jury to review material during deliberations, and should consider three factors: "(1) whether the material will aid the jury in a proper consideration of the case; (2) whether any party will be unduly prejudiced by submission of the material; and (3) whether the material may be subjected to improper use by the jury." Goodrich v. Ind. Mich. Power Co., 783 N.E.2d 793, 797-98 (Ind. Ct. App. 2003), trans. denied. Jones makes no argument that replaying the videotape for the jury would not have aided the jury, or would have amounted to improper use by the jury. Instead, Jones contends the record does not reflect that the trial court assessed the jury's request in light of these three considerations, and that it was unknown which tape was played, therefore preventing Jones from determining if it was unduly

prejudiced by the jury's second viewing.

Both videotapes depicted the events surrounding the charges against Jones, which could aid the jury in determining Jones's involvement in criminal activity, as well as the credibility of Officer Chittum and Corporal Neumeister. Furthermore, there is no indication that the videotape that was replayed was subject to improper use by the jury. Regardless of which tape was requested and shown to the jury during deliberations, Jones has failed to establish prejudice. Both videotapes were items of evidence in the case, previously shown to the jury without objection. We fail to see how a second viewing could therefore unduly prejudice Jones when a first viewing did not. Thus, we cannot say the trial court abused its discretion in replaying one of the videotapes at the request of the jury during its deliberations. However, we note that even if the trial court erred in replaying the videotape, it would have been harmless error given the other evidence and testimony at trial.

Conclusion

Sufficient evidence exists to support Jones's conviction for possession of marijuana. The trial court did not abuse its discretion when it replayed for the jury, during deliberations, a videotape entered into evidence and shown during trial without objection. We therefore affirm Jones's conviction.

Affirmed.

SULLIVAN, J., and BARNES, J., concur.