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ATTORNEY FOR APPELLANT:

JOHN PINNOW
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

PAUL McGIFFEN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 42A01-0706-CR-248

APPEAL FROM THE KNOX CIRCUIT COURT
The Honorable Sherry L. Biddinger-Gregg, Judge
Cause No. 42C01-0602-FB-10

November 9, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Paul McGiffen appeals from his conviction for Class B felony Methamphetamine Manufacture.¹ We affirm.

FACTS

In early 2006, the Knox County Sheriff's Department received complaints from an individual of a great deal of traffic at a neighbor's trailer. (Tr. 261, 265). On the evening of February 7, 2006, several police officers approached the trailer in question in order to surveil it. (Tr. 277). Officers near the trailer detected a "very strong odor of ether" that became stronger whenever one of the persons inside the trailer opened the door. Tr. p. 284. Knox County Sheriff's Deputy Jarret Ford made the decision to "raid" the trailer. Tr. p. 288.

As Deputy Ford walked up the driveway, he noticed several items that he knew to be commonly found at laboratories, including HCl generators, ether cans, jars, Tupperware, an empty Coleman fuel can, and a pitcher that appeared to contain "pill dough." Tr. pp. 290-91. As police approached the front door of the trailer, Mike Richards emerged, and police could hear others inside running and toilets flushing. (Tr. 295-96). Travis Gilbert and Stacy Poling emerged from the back of the trailer when police entered. (Tr. 301). Police also detected a "very very strong odor of ether" inside. Tr. p. 303. Meanwhile, Jack and Danny Richards were apprehended while attempting to flee out the back door. (Tr. 302). Finally, police found Paul McGiffen seated at table in the kitchen. (Tr. 302).

¹ Ind. Code § 35-48-4-2 (2006).

On the table in front of McGiffen were scales, clear baggies, and a glass pipe, items commonly used in the packaging or use of methamphetamine. (Tr. 305-06). Additionally, plastic baggies containing methamphetamine were found on the table. (Tr. 306). Foil containing a white substance later determined to be methamphetamine and coffee filters were found on a microwave cart also in the kitchen. (Tr. 379). In a kitchen broom closet, police found coffee filters, “red pills[,]” Liquid Fire, a bottle of Heet, a box of kosher salt, and two cans of starting fluid; the last three items are commonly used to “extract the Ephedrine out of the cold pills.” Tr. pp. 383-84. Two glass jars containing ether, a funnel, a box of kosher salt, and a plastic bottle believed to contain “cold pills” were found on the kitchen counter. (Tr. 304); Tr. p. 386. Also on the counter was a pair of gloves and wire cutters, commonly used to extract lithium from batteries, and a homemade pipe for ingesting methamphetamine. (Tr. 388-89). Under the sink, police found a container of Liquid Fire. (Tr. 387). In a kitchen trash can, police found empty containers of cold pills, a “light pasty substance[,]” empty pill blister packs, a two-liter bottle made into a funnel, and what appeared to be a coffee filter. (Tr. 389-91).

In a bedroom closet, police found a jar containing ether and a baggie containing a white, powdery residue. (Tr. 394). Outside, police found three liquid propane tanks that bore evidence of having contained anhydrous ammonia, a container containing “pill dough[,]”² and a “burn pile” that yielded coffee filters, HCl generators, and stripped lithium batteries. Tr. pp. 402, 403.

² It is unclear whether this container of pill dough, recovered during the execution of a search warrant, is the same one earlier observed by Deputy Ford.

The State charged McGiffen with Class B felony methamphetamine manufacture and a jury found him guilty as charged. (Appellant’s App. 6, 13). The trial court sentenced McGiffen to ten years of incarceration, with two years suspended to probation. (Appellant’s App. 7).

DISCUSSION AND DECISION

McGiffen contends that the State produced insufficient evidence to sustain his conviction for methamphetamine manufacture. Our standard of review for challenges to the sufficiency of the evidence supporting a criminal conviction is well-settled:

In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the verdict and reasonable inferences drawn therefrom. We will affirm the conviction if there is probative evidence from which a reasonable jury could have found Defendant guilty beyond a reasonable doubt.

Vitek v. State, 750 N.E.2d 346, 352 (Ind. 2001) (citations omitted).

Indiana Code section 35-48-4-2 provides, in relevant part, that “[a] person who ... knowingly or intentionally ... manufactures [methamphetamine] commits dealing in a schedule I, II, or III controlled substance, a Class B felony[.]” Indiana Code section 35-48-1-18 defines “manufacture” as

the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.”

McGiffen does not deny that the trailer contained a complete, working methamphetamine manufacturing operation, but contends that his mere presence in the

trailer is insufficient to prove that he participated. While we agree that a defendant's presence during the commission of the crime or his failure to oppose the crime are, by themselves, insufficient to establish participation, the jury may consider them along with other facts and circumstances tending to show participation. *See, e.g., Garland v. State*, 719 N.E.2d 1236, 1238 (Ind. 1999). Moreover, it is well-settled that “[c]ircumstantial evidence will be deemed sufficient if inferences may reasonably be drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt.” *Davenport v. State*, 749 N.E.2d 1144, 1152 (Ind. 2001).

Because there is no direct evidence that McGiffen manufactured methamphetamine, both parties analogize this case to one involving constructive possession. To a certain extent, we find the comparison apt. “In the absence of evidence of actual possession of drugs, our court has consistently held that “constructive” possession may support a conviction for a drug offense.” *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999) (quoting *Lampkins v. State*, 685 N.E.2d 698, 699 (Ind. 1997)). “In order to prove constructive possession, the State must show that the defendant has both (1) the intent to maintain dominion and control and (2) the capability to maintain dominion and control over the contraband.” *Id.* In this context, we believe that the State should be required to show that McGiffen had both the intent to participate in the manufacturing process and the capability to do so.

As for the intent to participate, the State must demonstrate McGiffen's knowledge of the methamphetamine manufacture. *Cf. id.* (“To prove the intent element, the State must demonstrate the defendant's knowledge of the presence of the contraband.”). “This

knowledge may be inferred from either the exclusive dominion and control over the premise containing the [manufacturing operation] or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the [operation]." *Id.*

We have little trouble concluding that the State produced sufficient evidence to establish that McGiffen knew of the presence of the methamphetamine manufacturing operation. On the table in front of McGiffen were scales, clear baggies, and plastic baggies containing methamphetamine. Foil containing a white substance later determined to be methamphetamine and coffee filters were found on a microwave cart nearby. Elsewhere in the kitchen, *i.e.*, within a few feet of where McGiffen was sitting, police found coffee filters, "red pills" two containers of Liquid Fire, a bottle of Heet, two boxes of kosher salt, two cans of starting fluid (the previous three items commonly used to extract Ephedrine from cold pills), two glass jars containing ether, a funnel, a plastic bottle believed to contain cold pills, a pair of gloves and wire cutters (commonly used to extract lithium from batteries), empty containers of cold pills, a "light pasty substance," empty pill blister packs, and a two-liter bottle made into a funnel. (Tr. 389-91).

Likewise, we conclude that the State readily established McGiffen's capability to participate in the manufacturing process. McGiffen, found sitting literally in the middle of a complete methamphetamine manufacturing operation, with many of the necessary ingredients and equipment close at hand, clearly had the capability to participate in the process. *Cf. id.* ("The capability requirement is met when the state shows that the defendant is able to reduce the controlled substance to the defendant's personal

possession.”). Although the jury certainly could have believed that McGiffen was merely an observer to the methamphetamine manufacturing process, it did not. McGiffen’s argument is an invitation to reweigh the evidence, one we must decline.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.