IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Mark Allen Gordon, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20050996-CA F I L E D (March 1, 2007) 2007 UT App 66

Fourth District, Provo Department, 051402836
The Honorable Claudia Laycock

Attorneys: Margaret P. Lindsay, Orem, for Appellant
Mark L. Shurtleff and Jeffrey S. Gray, Salt Lake City, for Appellee

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Before Judges Greenwood, McHugh, and Thorne.

McHUGH, Judge:

Mark Allen Gordon appeals his conviction of possession of a controlled substance in a drug free zone, a second degree felony, see Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 2006), and possession of drug paraphernalia in a drug free zone, a class A misdemeanor, see id. § 58-37a-5(1) (2002). Gordon argues that the evidence presented at trial was insufficient to establish that he possessed the contraband.[1] We affirm.

On the night of July 9, 2005, Orem City police officer William Crook stopped a car driven by Eric Wahlburg after Officer Crook ran the license plate and discovered that Wahlburg, its registered owner, had an outstanding felony drug warrant. As Officer Crook pulled the car over he observed Gordon, the backseat passenger on the driver's side, making "furtive movements" and "movements as though he w[ere] hiding something." After arresting Wahlburg on his outstanding warrant, Officer Crook searched the car and found an Altoids tin containing crack

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[1]Gordon waived his right to trial by jury and the case was tried to the bench.

cocaine hidden in the backseat cushion, close to where Gordon was sitting and in the same area where Officer Crook witnessed Gordon making furtive movements.

Officer Crook arrested Gordon for possession of a controlled substance. During the arrest, Gordon denied knowing the contents of the tin. Later, however, Gordon revealed that he knew the tin contained crack cocaine when he yelled from his holding cell to Officer Crook that "it wasn't his crack cocaine in the car."

Because the tin was not found on Gordon's person and was hidden in a location accessible to other passengers in the car, Gordon argues there was insufficient evidence at trial to find that he possessed the contraband. "When reviewing a bench trial for sufficiency of evidence, we must sustain the trial court's judgment unless it is against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made." Spanish Fork City v. Bryan, 1999 UT App 61,¶5, 975 P.2d 501 (quotations and citation omitted).

Here, the trial court found that Gordon had constructive possession of both the controlled substance and the drug paraphernalia. See State v. Workman, 2005 UT 66,¶31, 122 P.3d 639 (noting that "[a] person who does not have actual physical possession may still be convicted . . . if the State can prove constructive possession").

> "To find that a defendant had constructive possession of a drug or other contraband, it is necessary to prove that there was a sufficient nexus between the accused and the drug to permit an inference that the accused had both the power and the intent to exercise dominion and control over the drug."

Id. (quoting State v. Fox, 709 P.2d 316, 319 (Utah 1985)). Whether a sufficient nexus exists depends upon the facts and circumstances of each case. See id.

While no exhaustive checklist of factors govern in determining whether the nexus in a particular case is sufficient, several of the following combined factors may be useful:

> [1] ownership and/or occupancy of the residence or vehicle where the drugs were found, [2] presence of a defendant at the time drugs were found, [3] defendant's proximity to the drugs, [4] previous drug

> use, [5] incriminating statements or behavior, [and 6] presence of drugs in a specific area where the defendant had control . . . .

Id. at ¶32 (citing State v. Anderton, 668 P.2d 1258, 1264 (Utah 1983)); see also United States v. Bowen, 437 F.3d 1009, 1016 (10th Cir. 2006) (holding that a passenger's furtive movements supported a finding of constructive possession); United States v. Flenoid, 718 F.2d 867, 868 (8th Cir. 1983) (holding "testimony that the defendant may have placed something in the spot where the police later found the weapon can support a finding of possession").

We apply a similar analysis to determine whether Gordon constructively possessed the contraband. First, Gordon occupied not only the car in which the contraband was found, but the specific area in the vehicle where the tin was hidden. Of the four occupants in the car Gordon was closest to the contraband, and eye-witness testimony established that he made furtive movements as if he were hiding something in the exact spot in the car where police later located the drugs. Moreover, after claiming he had no knowledge of the substance in the tin, Gordon made incriminating statements revealing that he did, in fact, know that the tin contained crack cocaine. Overall, the trial court found Gordon's explanation regarding the contraband unbelievable. Accordingly, the cumulative effect of these factors is such that a trier of fact reasonably could have concluded that a sufficient nexus existed between Gordon and the contraband to satisfy the possession element of the relevant statutes. See Workman, 2005 UT 66 at ¶35 (noting that taken alone, or even in a small group, such factors would not have established a sufficient nexus between a defendant and contraband to infer possession, but the cumulative effect of the factors could have caused a reasonable jury to conclude a sufficient nexus existed).

Gordon further argues the trial court erred when it concluded that he possessed the contraband without first engaging in an analysis under the reasonable alternative hypothesis doctrine. Under the reasonable alternative hypothesis doctrine, if a conviction is based solely on circumstantial evidence the evidence supporting the conviction must exclude every reasonable hypothesis of innocence. See State v. Hill, 727 P.2d 221, 222 (Utah 1986). Gordon argues, under this doctrine, that the trial court failed to consider the following favorable facts: (1) Wahlburg, not Gordon, owned the vehicle; (2) there were four people in the car, all trading places as they traveled; and (3) the other backseat passenger also had access to the tin.

Contrary to Gordon's arguments, the reasonable hypothesis doctrine is not the appropriate analytical framework for determining whether there was sufficient evidence before the trial court to support a conviction of possession. See State v. Layman, 1999 UT 79,¶¶2, 10, 985 P.2d 911 (noting that discussion of the reasonable alternative hypothesis doctrine in a similar possession case was "problematic" and "unnecessary," and that the case should have been determined by an "ordinary sufficiency of the evidence test"). Accordingly, we decline to employ this analysis and instead hold that there was sufficient evidence to support the findings of the trial court.

Affirmed.

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Carolyn B. McHugh, Judge

WE CONCUR:

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Pamela T. Greenwood,
Associate Presiding Judge

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William A. Thorne Jr., Judge