

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	No. 67733-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
BRYAN KEITH McCORD,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: <u>September 17, 2012</u>

Spearman, A.C.J. — Bryan McCord was convicted of one count of possession with intent to deliver heroin, one count of possession with intent to deliver methamphetamine, driving while license suspended, and failure to obey a police officer. On appeal, he challenges the sufficiency of the evidence supporting the convictions for possession with intent to deliver. In a statement of additional grounds, McCord argues that he received ineffective representation, the judge was unfair, the jury instructions were “bad,” and some jurors were not impartial. We reject his challenge to the sufficiency of the evidence and decline to address his additional grounds for review. Accordingly, we affirm.

**FACTS**

On February 6, 2011, Bryan McCord was driving a sport utility vehicle ( “SUV”) with his friend, Carl Kleffel, in Oak Harbor. The SUV belonged to another friend, William Goldman. According to Kleffel, the two were going to look at a car

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that McCord was interested in buying.

Oak Harbor police officer Mike Clements saw that the SUV did not have functioning taillights. Clements accelerated to catch up to the SUV and then activated his overhead lights. McCord did not immediately pull over. Instead, he made a left turn onto another street, a right turn into a parking lot, continued into a muddy field for about fifty to sixty feet, and then got stuck. McCord climbed out the driver's side window, fell to the ground, and fled on foot. After about five minutes in pursuit, Clements found McCord lying on his back in some dense brush. Clements arrested McCord and found \$1,538 in cash in McCord's pant leg.

After Clements arrested McCord, Sergeant Jerry Baker arrived at the field and approached the SUV. Baker observed Kleffel, still sitting in the passenger seat and removed him from the SUV. Baker then began a search of the area. Because it was raining heavily that night, the field was muddy and watery, with clumps of grass sticking out of ankle-deep water. During his search, Baker found a camera case a few feet from the SUV's driver side door. The case was propped up against a grass clump and its bottom half was in the water. Baker then removed the case from the water. Its bottom third was "dripping water," but the contents and top half of the case was dry. Verbatim Report of Proceedings (VRP at 92). Kleffel testified that he did not bring the case into the SUV, never had possession of the case, and did not throw anything out the window of the SUV.

Baker gave the camera bag to Clements, who looked inside the bag and found a glass pipe, two baggies containing a white substance that appeared to be methamphetamine, a digital scale, and a small bag containing additional small bags. Clements examined the camera bag again at the police station. By this time, more of the bag appeared to be wet and its contents were “slightly contaminated by water.” VRP at 75. Clements began to dry the bag before placing it in evidence when he noticed another zipper. He opened it and discovered two bags of what appeared to be heroin.

The State charged McCord with one count of possession with intent to deliver heroin, one count of possession with intent to deliver methamphetamine, driving while license suspended, and failure to obey a police officer. At trial, Detective Carl Seim, a drug enforcement officer for the Oak Harbor Police Department, testified that a seller of controlled substances would be expected to have “a digital scale, a large amount of controlled substance, and empty baggies, and a large amount of cash.” (VRPat 194-95). The jury found McCord guilty on all four counts. McCord appeals his convictions for possession with intent to deliver.

### DISCUSSION

McCord argues that there is insufficient evidence supporting his convictions for possession with intent to deliver. When a defendant challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the State. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). “[A]ll

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reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977) overruled on other grounds by State v. Lyons, 174 Wn.2d 354, 275 P.3d 314 (2012)). We do not consider circumstantial evidence “any less reliable than direct evidence.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Evidence is sufficient to support a conviction if any rational trier of fact could have found that the State established the elements of the crime beyond a reasonable doubt. Green, 94 Wn.2d at 220-22.

Possession of a controlled substance may be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession means the substance is within the physical custody of the person charged with possession. Id. Constructive possession means the person charged with possession has dominion and control over the substance. Id. Here, the jury was instructed on both actual and constructive possession. The State argued in closing that McCord actually possessed the drugs. On appeal, McCord claims that the State did not prove actual possession of the camera case.<sup>1</sup> We disagree.

Actual possession of drugs may be proved by circumstantial evidence. In

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<sup>1</sup> McCord contends it is “undisputed that the State did not prove actual possession of the camera case.” Appellant’s Br. at 7. But the State argued at trial and on appeal that the camera case was in McCord’s actual possession. McCord also argues the evidence was insufficient to support a finding of constructive possession. We need not address that argument in light of our conclusion that the evidence was sufficient to support a finding that McCord actually possessed the drugs.

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State v. DuPont, 14 Wn. App. 22, 25, 538 P.2d 823 (1975), the court affirmed a conviction for possession of cocaine, concluding that there was adequate circumstantial evidence to support the jury's conclusion that the defendant was in actual possession. In that case, the defendant was talking to a police officer when the officer heard the defendant's keys drop to the ground. The officer looked down toward the keys and saw a tightly folded white piece of paper floating toward the ground. He picked up the keys, paper, and a \$20 bill, all of which were near the defendant's feet. The paper was later found to contain cocaine and heroin. The court noted that the issue in that case was simple: "either [the defendant] dropped [the drugs] or he didn't[.]" Id.

Similarly, circumstantial evidence here, viewed in the light most favorable to the State, supports a finding that McCord was in actual possession of the camera case before dropping it in the field. First, Baker found the case next to the driver's side window where McCord had fallen. The case was only partially wet, and its contents were dry, despite having been sitting in a puddle in the rain. When Clements later examined the bag, more of it was wet and its contents had become contaminated with water. In addition, Baker testified that he did not witness anyone else in the field during that time. Kleffel testified that he did not bring the case into the SUV, never had possession of it, and did not throw anything out of the window. Viewing this evidence in the light most favorable to the State, a rational juror could reasonably infer that the case had been in the field only for a short time and that McCord was the only likely source of the case.

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Moreover, because there was also testimony that McCord did not open the driver's side door when he escaped through the window, a rational juror could conclude that the case did not fall out of the car, but rather was dropped by McCord as he attempted to flee. Accordingly, we conclude that there was sufficient evidence from which the jury could have found that McCord was in actual possession of the case containing heroin and methamphetamine.

McCord raises several issues in a statement of additional grounds. He asserts that he was ineffectively represented because his attorney "failed to ask questions to many of the witnesses[,]" and "failed to investigate the case properly by failing to confirm where [the \$1,538] came from." We cannot review this claim. McCord does not identify which witnesses counsel allegedly failed to properly question, what questions should have been asked, or how the failure to ask such questions caused him prejudice. Likewise, McCord fails to describe with specificity what counsel should have investigated regarding the money, or how any lack of investigation caused him prejudice.

McCord also argues that the trial judge was unfair, but he does not identify any particular instances of allegedly unfair conduct, and as such, we are unable to review that claim. Likewise, we cannot review McCord's allegation that "there were bad jury instructions on how to find innocent or guilty[,]" because he fails to specify which instructions were allegedly improper, or how they caused him prejudice. McCord next claims that during jury selection, several jurors said they would summarily find him guilty. We are unable to review this argument

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because McCord did not designate any transcript of voir dire for review. Finally, McCord claims that after trial, one juror claimed to be a confidential informant. But this allegation appears to rely on matters outside the record, and moreover, McCord fails to explain how this revelation, if true, prejudiced his trial.

Affirmed.

*Spencer, A.C.*

WE CONCUR:

*Appelwick, J.*

*Schivella, J.*