

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR 11-1105

JOSE BARRERA

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 26, 2012

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT
[NO. CR-2010-377]

HONORABLE GARY COTTRELL,
JUDGE

AFFIRMED

DOUG MARTIN, Judge

Appellant Jose Barrera was charged with one count of possession of more than 100 pounds of marijuana with intent to deliver and one count of possession of drug paraphernalia. A Crawford County jury found Barrera guilty of both counts, and he was sentenced to a total of twelve years in the Arkansas Department of Correction.¹ The judgment and commitment order was entered on June 13, 2011, and Barrera filed a timely notice of appeal on June 15, 2011. On appeal, Barrera challenges the sufficiency of the evidence supporting his convictions. We find no error and affirm.

Barrera was pulled over on July 10, 2010, about four miles inside the Arkansas state line on Interstate 40 by Sergeant Jason Aaron of the Arkansas State Police after Aaron observed Barrera's vehicle drifting over the fog line onto the shoulder and rumble strip.

¹ The jury sentenced Barrera to twelve years for possession with intent and three years for possession of drug paraphernalia; the circuit court ordered that the sentences be served concurrently.



Barrera was driving a Ford F-250 pickup truck and was hauling a flat-bed trailer with a Chevrolet pickup truck on it. Aaron asked to see Barrera's driver's license, insurance, and registration, and Barrera produced his license, registration information for the Ford pickup, insurance paperwork on both trucks, and a title for the Chevrolet truck. The title to the Chevy indicated that it had been sold, but it did not contain the name of the new owner of the vehicle. Aaron testified at trial that, in his experience, when a vehicle title is left "open," it is often being used in the transportation of narcotics or criminal contraband. He stated that "a lot of times it's used for payment," in the sense that, if the vehicle makes it to its destination, the title is then signed over to the person who drove it there.

Aaron asked Barrera about his destination, and Barrera replied that he was on his way to Atlanta to help a friend start a construction business. When Aaron asked whose truck was on the trailer, Barrera said that a friend of his had bought it and asked Barrera to drive it to Atlanta for him. Aaron observed that the insurance for both vehicles had been purchased on July 7, 2010; in addition, the title to the Chevy truck, which had been issued by the state of Arizona, was dated July 7, 2010. Aaron's suspicions were aroused by the fact that, while Barrera had said that "a friend" had purchased the Chevy truck, the insurance for that truck was issued in Barrera's name. Aaron also noted that the undercoating of the Chevy pickup had been freshly—and poorly—spray-painted black. Aaron also saw that, aside from a couple of tires, the bed of the truck was empty. This struck Aaron as odd, as he would have expected someone going to help start a construction business to have some tools or construction equipment with him.



After observing a gap in the Chevy's bed behind the driver's side door, Aaron discovered an unusual "empty void" in the bed; in that void, Aaron saw "green bundles."² At that point, Aaron placed Barrera under arrest and called for Investigator Lanny Reese to come out and take over the investigation.

Barrera, whom Reese described as cooperative, asked what had been found in the truck, and Reese told him that it was marijuana. Barrera told Reese that he had been paid \$1,000 to drive the truck from Arizona to Atlanta by a man named Jorge Dominguez, and Barrera reiterated that he was hauling the truck to Atlanta to help with some kind of construction business. Barrera attempted to call Dominguez, who had purportedly been driving ahead of Barrera, but Dominguez said that he knew Barrera had been arrested and was not coming back.

Barrera testified in his own defense at his trial, saying that he was helping Dominguez by driving the truck to Atlanta for some construction work. Barrera said that Dominguez loaded the Chevy truck onto Barrera's trailer, and Dominguez drove a moving truck that was hauling his wife's car. Barrera denied knowing that there was any marijuana in the truck and stated that he would not have delivered the truck for Dominguez if he had known there was marijuana in it. Barrera also said that Dominguez had purchased the Chevy truck from Edgar Soto, and he denied that he had entered into an agreement whereby he would get title to the truck once he delivered it to Atlanta. Barrera further denied purchasing insurance for the Chevy truck and said that he did not know who purchased the insurance for that vehicle.

²At trial, forensic chemist Gene Bangs testified that the "green bundles," once weighed and analyzed, consisted of 221.6 pounds of marijuana.



Barrera explained the lack of construction tools by saying that Dominguez originally had some tools in the back of the Chevy but took them out and put them in his moving van.

As noted, Barrera was convicted of possession of marijuana with intent to deliver and possession of drug paraphernalia and sentenced to a total of twelve years' imprisonment. On appeal, he argues that the circuit court erred in denying his motion for directed verdict because the State failed to present sufficient evidence to support the conviction. A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Tryon v. State*, 371 Ark. 25, 263 S.W.3d 475 (2007); *Conley v. State*, 2011 Ark. App. 597, 385 S.W.3d 875. When reviewing the sufficiency of the evidence, we determine whether there is substantial evidence to support the verdict, viewing the evidence in a light most favorable to the State. *Tryon, supra*. Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* Circumstantial evidence can be sufficient to sustain a conviction when it excludes every other reasonable hypothesis consistent with innocence. *Ashley v. State*, 2012 Ark. App. 131, 388 S.W.3d 914. The question of whether the circumstantial evidence excludes every hypothesis consistent with innocence is for the jury to decide. *Id.*

Barrera's argument is that there was no evidence presented to indicate that he knew there was contraband in the vehicle he was towing. He urges that the Chevy truck that he was towing on the flatbed trailer was open to access from the general public. Barrera contends that, because anyone could have had access to the truck on the trailer, the State failed to present any evidence linking him more definitely to the contraband.



In support of his argument, Barrera cites *Malone v. State*, 364 Ark. 256, 217 S.W.3d 810 (2005), *McKenzie v. State*, 362 Ark. 257, 208 S.W.3d 173 (2005), and *Hodge v. State*, 303 Ark. 375, 797 S.W.2d 432 (1990). *McKenzie* and *Malone*, however, involve the legal standard for constructive possession in situations where there is joint occupancy of a vehicle and are thus inapposite, as Barrera was undisputedly the only person in the vehicle. *Hodge* is also a joint-occupancy case, but it is additionally not instructive because the contraband in that case was found only after police officers retraced their route from a high-speed vehicle chase and discovered two baggies of methamphetamine “scattered up to twenty-five feet beyond an intersection where Hodge had turned” and thus “in an area entirely outside the control of the defendant and exposed to the public at large.” *Hodge*, 303 Ark. at 377, 378, 797 S.W.2d at 433, 434. Under those circumstances, the supreme court held, the State must “provide more definite factors linking the defendant to the contraband.” *Id.* at 378, 797 S.W.2d at 433.

Possession may be established by proof of actual possession or constructive possession. *Poland v. State*, 2011 Ark. App. 537; *Warren v. State*, 2010 Ark. App. 226. Actual possession of a thing is direct physical control over it. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). In the instant case, more than 200 pounds of marijuana were found in a vehicle that only Barrera had been driving. Given this fact, we conclude that there was sufficient evidence to find that Barrera was in actual possession of the drugs.

Alternatively, however, possession of contraband can be proved by constructive possession, which is the control or right to control the contraband. *Polk v. State*, 348 Ark. 446, 73 S.W.3d 609 (2002); *Banks v. State*, 315 Ark. 666, 869 S.W.2d 700 (1994). In order



to prove constructive possession, the State must establish beyond a reasonable doubt that the defendant exercised care, control, and management over the contraband. *Polk, supra*. Possession may be implied when the contraband is found in a place that is immediately and exclusively accessible to the accused and subject to his dominion and control. *Tryon, supra*. Furthermore, an accused's suspicious behavior coupled with proximity with the contraband is clearly indicative of possession. *Polk, supra*.

Barrera was the sole driver of the Ford pickup truck hauling the flatbed trailer and truck in which a large quantity of marijuana was discovered. The Ford was registered to Barrera, and the Chevy truck, which had an open title, was insured in Barrera's name. As Barrera had immediate and exclusive access to the Chevy truck in which the marijuana was found, the jury could reasonably conclude that Barrera constructively possessed the contraband. To the extent that Barrera relies on his testimony that he was merely driving the truck for Dominguez and did not know the marijuana was in the Chevy, the jury was not required to believe his self-serving testimony. *Johns v. State*, 2011 Ark. App. 217, 378 S.W.3d 857.

Affirmed.

VAUGHT, C.J., and GLOVER, J., agree.

David L. Dunagin, for appellant.

Dustin McDaniel, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellee.