

ARKANSAS COURT OF APPEALS

DIVISION II

No. CACR 08-1391

FELIPE NEVAREZ IBARRA
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered October 28, 2009

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT,
[NO. CR 2008-49-1]

HONORABLE WILLIAM A. STOREY,
JUDGE

AFFIRMED

M. MICHAEL KINARD, Judge

A Washington County jury found appellant, Felipe Nevarez Ibarra, guilty of two counts of delivery of a controlled substance (ecstasy), possession of a controlled substance with intent to deliver (ecstasy), and simultaneous possession of drugs and firearms. He was sentenced to a total of forty-five years' imprisonment in the Department of Correction. Appellant challenges the sufficiency of the evidence supporting his convictions for possession of a controlled substance with intent to deliver and simultaneous possession of drugs and firearms. We affirm.

At appellant's trial, evidence was introduced regarding two controlled drug purchases by a confidential informant (CI) from appellant at his home, which resulted in the execution of a search warrant on appellant's house. On October 22, 2007, Detective Greg Lovett and Corporal Josh McConnell participated in a controlled buy with a CI to

purchase ecstasy from appellant. They searched the CI, fitted him with a wireless recording device, and drove him to appellant's house, where the CI obtained ten ecstasy pills. These ecstasy pills were green with Christmas trees on them. On November 8, 2007, Detective Cameron Crafton assisted Corporal McConnell with another controlled buy operation, this time with the CI purchasing eight ecstasy pills from appellant, again at appellant's home.

On November 20, 2007, at 6:00 a.m., police executed a search warrant at the residence where the controlled buys from appellant had taken place. Appellant was not home at the time, but members of his family were. In a locked bedroom on top of a computer desk, police found three of the green ecstasy pills with Christmas trees. In the closet of the bedroom were several guns, one of which was loaded. Also in the room were appellant's driver's license and several uniforms from appellant's place of work. The bedroom door was locked from the outside; the emergency response team kicked it open during their initial walk-through of the house. Appellant's mother informed police that appellant had a key to the bedroom. Police were not informed that anyone else had a key.

Directed-verdict motions are treated as challenges to the sufficiency of the evidence. *Vergara-Soto v. State*, 77 Ark. App. 280, 282, 74 S.W.3d 683, 684 (2002). When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it, when viewed in the light most favorable to the State. *Id.* Substantial evidence, whether direct or circumstantial, is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another, without resort to speculation or conjecture. *Id.*

Appellant's first argument is that the evidence was insufficient to support a guilty verdict on the charge of possession of a controlled substance with intent to deliver. Specifically, appellant argues that there was insufficient evidence (1) that he was in constructive possession of the ecstasy and guns or (2) that he had the requisite intent to deliver the ecstasy. First, the State is correct that appellant's sole argument regarding the possession charge during his motion for directed verdict was that the prosecution failed to prove intent. Thus, his constructive-possession argument is not preserved for our review. See, e.g., *Benjamin v. State*, 102 Ark. App. 309, 285 S.W.3d 264 (2008).

Even if the argument had been preserved, we would still affirm because appellant constructively possessed the items at issue. Possession of ten dosage units of a hallucinogenic drug, such as ecstasy, gives rise to a rebuttable statutory presumption of intent to deliver. Ark. Code Ann. § 5-64-401(d) (Supp. 2009). Here, appellant possessed only three dosage units, so there was no presumption that he possessed them with the intent to deliver. However, the State did present substantial evidence of intent to deliver. Intent can seldom be proved by direct evidence, and a jury may consider possession, along with any other pertinent fact, in determining whether an appellant possessed the specific intent to sell or deliver a controlled substance. *Thomason v. State*, 91 Ark. App. 128, 131, 208 S.W.3d 830, 832 (2005). In the case at hand, evidence of appellant's previous sales of ecstasy and his possession of firearms provided evidence of his intent to deliver the ecstasy. See *Conley v. State*, 308 Ark. 70, 821 S.W.2d 783 (1992) (police observation of appellant's participation in sale of cocaine was substantial evidence from which the jury could find intent to deliver); *Hendrickson v. State*, 316 Ark. 182, 871 S.W.2d 362 (1994) ("when an

accused is charged with possession of a controlled substance with intent to deliver, evidence of the possession of firearms is relevant to prove intent”). Therefore, we affirm appellant’s conviction for possession of a controlled substance with intent to deliver.

For his second argument, appellant contends that the State failed to provide sufficient evidence for a finding of guilt on the simultaneous possession of drugs and firearms charge. Arkansas Code Annotated section 5-74-106(a)(1) (Supp. 2009) provides that no person shall unlawfully commit a felony violation of section 5-64-401 (manufacturing, delivering, or possessing with intent to manufacture or deliver a controlled substance) or unlawfully attempt, solicit, or conspire to commit a felony violation of section 5-64-401 while in possession of a firearm. Section 5-74-106(d) provides that it is a defense to the crime described in section 5-74-106(a) “that the defendant was in his home and the firearm was not readily accessible for use.” This does not provide a valid defense for appellant, who was not in his home at the time of the search and whose firearms were readily accessible for use. *See Vergara-Soto v. State*, 77 Ark. App. 280, 74 S.W.3d 683 (2002).

In order to obtain a conviction under section 5-74-106(a)(1), the State must prove two elements: (1) that the defendant possessed a controlled substance and a firearm, and (2) that a connection existed between the firearm and the controlled substance. *Vergara-Soto v. State*, 77 Ark. App. 280, 74 S.W.3d 683 (2002). Appellant argues that he did not have possession of the controlled substance or the guns, and that, even if the court holds that he did have constructive possession, the second element was not met. We disagree.

In arguing that a connection between the firearms and the controlled substances did not exist, appellant points to the fact that he was not present at his home when the search was conducted. Under a constructive-possession theory, appellant need not be physically present in order to establish that the elements of the statute were met. When seeking to prove constructive possession, the State must establish that the defendant exercised care, control, and management over the contraband. *McKenzie v. State*, 362 Ark. 257, 263, 208 S.W.3d 173, 175 (2005). This control can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *Id.*

Appellant also contends that “[t]he pills were not located with the guns” because the pills were on a computer desk and the guns were in a closet. In *Manning v. State*, 330 Ark. 699, 956 S.W.2d 184 (1997), the supreme court affirmed a simultaneous-possession conviction where the defendant had both a loaded handgun and a large supply of illegal drugs in his bedroom closet, and the defendant was in another room of the house when the warrant was executed. In *Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003), this court held that the evidence was sufficient to support a simultaneous-possession conviction where a loaded gun was found in the defendant’s kitchen near items used to manufacture methamphetamine. In the case at hand, the drugs and a loaded gun (plus two other firearms and ammunition) were found in appellant’s locked bedroom. There was evidence that only appellant had a key, and items distinguishing the room as appellant’s were found inside. Viewing the evidence in the light most favorable to the State, we hold that there is

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substantial evidence to sustain the conviction for simultaneous possession of drugs and a firearm.

Affirmed.

PITTMAN and BROWN, JJ., agree.