

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR10-76

EBONY STEWART

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered JUNE 16, 2010

APPEAL FROM THE LONOKE COUNTY
CIRCUIT COURT
[NO. CR-2009-126-2]

HONORABLE PHILLIP T. WHITEAKER,
JUDGE

AFFIRMED

M. MICHAEL KINARD, Judge

Ebony Stewart challenges her conviction on one count of possession of a controlled substance, marijuana, with intent to deliver. On appeal, appellant argues that the trial court erred in denying her motion to dismiss. We affirm.

On April 10, 2009, the State filed an information charging appellant with possession of a controlled substance, marijuana, with intent to deliver. Appellant was tried before the Lonoke County Circuit Court, sitting without a jury. At trial, Corporal Trenton Behnke with the Arkansas State Police testified that he was sitting in the median of Interstate 40, running stationary radar, when he observed a car traveling in the left-hand lane at a high rate of speed. He visually estimated the vehicle's speed to be between seventy-six and seventy-seven miles per hour. His radar locked in a speed of seventy-five miles per hour. Behnke stopped the vehicle. He identified appellant as the driver. Behnke saw that the car was a

rental. He testified that he noticed that there were two small suitcases in the back of the vehicle. In the back passenger-side seat, there were a couple of women's handbags, fast food wrappers, and an energy drink.

Corporal Behnke asked appellant to exit the vehicle so that he could ask some questions. According to Behnke, appellant told him that she had gone to Tyler, Texas, to watch a relative play basketball. Behnke testified that appellant's posture was "nervous" and "real defensive" and that her answers to his questions seemed rehearsed. After confirming appellant's identity, Behnke checked the car's vehicle identification number (VIN). At that time, he noticed an odor of marijuana coming from the interior of the vehicle. Appellant denied that there were drugs in the vehicle. Another officer arrived shortly thereafter with a drug dog. The dog went up the driver's side front of the vehicle, turned to go around the back of the vehicle, and immediately started working an odor of narcotics. Behnke then searched the vehicle, and he found marijuana in the suitcases that were in the back of the vehicle. After this, Behnke obtained an oral statement from appellant. In the statement, appellant said that she drove straight to a motel in Tyler, Texas, where she and the passenger stayed. Appellant stated that it was the passenger's idea to make the trip. Appellant and the passenger went to an unknown location and the passenger got out of the vehicle and went inside while appellant stayed in the car and took a nap. When appellant woke from her nap, they were traveling eastbound on Interstate 40. Appellant did not indicate whether or not she was aware of the marijuana in the vehicle.

At the close of the State's evidence, appellant made a motion for a directed verdict. The trial court denied the motion. Jerome Smith, who was the passenger in the vehicle, testified that he asked appellant to travel with him to Texas and that he did not tell her why he was going there. However, on cross-examination, he said that he told her he was going to Texas to visit some family members. Smith stated that the bags in which the marijuana was found were his. He also stated that he and the appellant were involved in a relationship at the time of the arrest but were not so involved at the time of the trial.

After both sides rested their respective cases, the trial court found appellant guilty of possession of a controlled substance, marijuana, with intent to deliver. In a judgment and commitment order entered October 1, 2009, the trial court sentenced appellant to sixty months' supervised probation. Appellant filed a notice of appeal on October 23, 2009.

Appellant argues on appeal that the trial court erred in denying her motion to dismiss because the State failed to produce substantial evidence to support her conviction. The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Wertz v. State*, 374 Ark. 256, 287 S.W.3d 528 (2008). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict. *Id.*

Pursuant to Arkansas Code Annotated section 5-64-401(a) (Supp. 2009), it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance. The State does not have to prove the accused physically possessed the contraband if the location of the contraband is such that it could be said to be under the dominion and control of the accused. *Loar v. State*, 368 Ark. 171, 243 S.W.3d 923 (2006). In order to prove constructive possession, the State must show that the accused exercised “care, control, and management over the contraband” and that the accused knew it was contraband. *Morgan v. State*, 2009 Ark. 257, 308 S.W.3d 147. Joint occupancy of a vehicle, by itself, is not sufficient to show constructive possession. *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994). There must be some other factor linking the accused to the contraband and, among the factors to be considered are 1) whether the contraband is in plain view; 2) whether the contraband is found with the accused’s personal effects; 3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; 4) whether the accused is the owner of the vehicle or exercises dominion and control over it; and 5) whether the accused acted suspiciously before or during the arrest. *Id.*

Appellant argues that the only factor, other than joint occupancy, that is present in this case is that appellant exercised dominion and control over the vehicle because she is the one who rented it. Appellant argues that this case is similar to *Miller v. State*, 68 Ark. App. 332, 6 S.W.3d 812 (1999), and that the *Miller* case supports her argument. However, our reading of *Miller* shows that the case actually supports the State’s position. In *Miller*, the defendant was

charged with possession of cocaine and marijuana as a result of drugs found in a vehicle during a traffic stop. The defendant was seated in a rear passenger seat. The drugs were found in a pouch directly in front of the rear driver's side passenger, who was seated next to the defendant. In upholding appellant's conviction for possession of marijuana, this court stated "although the marijuana was not in plain view, we believe that the fact that the police officer smelled marijuana upon approaching the vehicle tends to establish that appellant had knowledge of the presence of the marijuana. It is the knowledge of the existence of the contraband that provides substantial evidence of constructive possession." 68 Ark. App. at 335, 6 S.W.3d at 814. In this case, there was testimony from Corporal Behnke that there was an odor of marijuana coming from the vehicle. In addition, Behnke testified that appellant assumed a nervous and defensive posture when he spoke with her. From Behnke's testimony, the fact-finder could have found that appellant's explanation of the purpose of the trip and what occurred during the trip changed after the marijuana was discovered. All of the above factors, in light of this court's decision in *Miller*, demonstrate that the State presented substantial evidence that appellant constructively possessed the marijuana. We affirm the judgment of the trial court.

Affirmed.

BAKER and BROWN, JJ., agree.