IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

BRIAN KENDALL,
Defendant-Appellant.

Supreme Court No. 2013-SCC-0029-CRM

Superior Court No. 13-0045

OPINION

Cite as: 2015 MP 14

Decided December 29, 2015

Brian Flaherty, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee.

Benjamin Petersburg and Michael Sato, Public Defenders Office, Saipan, MP, for Defendant-Appellant.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

MANGLONA, J.:

¶ 1 Defendant-Appellant Brian Kendall ("Kendall") appeals his Possession of a Controlled Substance conviction, arguing there is insufficient evidence to uphold the conviction. For the reasons below, we REVERSE the trial court's order and REMAND for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In 2013, Kendall, while visiting the Governor's Office in Capitol Hill, Saipan, made remarks about physically harming former governor Benigno Fitial. As a result, an arrest warrant for Kendall was issued. Several Department of Public Safety officers, including detectives Simon Manacop ("Manacop") and Jesse Dubrall ("Dubrall"), arrested Kendall at his home on suspicion of Making a Terroristic Threat. During the execution of the arrest warrant, Dubrall found a marijuana plant to the east of Kendall's home.[1] A narcotics identification kit presumptively confirmed the plant as marijuana. The detectives then took several pictures of the plant and secured it as evidence.

¶ 3 The Commonwealth charged Kendall with one count of Making a Terroristic Threat, in violation of 6 CMC § 3503(a), and one count of Possession of a Controlled Substance, in violation of 6 CMC § 2142(a). The jury acquitted Kendall of the Making a Terroristic Threat charge, but the trial court found him guilty of Possession of a Controlled Substance. Kendall appeals his conviction.

II. JURISDICTION

¶ 4 We have jurisdiction over Superior Court final judgments and orders. NMI CONST. art. IV, § 3.

III. STANDARDS OF REVIEW

¶ 5 Sufficiency of the evidence is reviewed under a highly deferential standard. *Commonwealth v. Taman*, 2014 MP 8 ¶ 17. In our review, we neither weigh the evidence nor make credibility evaluations of witnesses. *Id*. Instead, "we consider the evidence in the light most favorable to the government and then determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. (internal quotation marks and citations omitted).

IV. DISCUSSION

¶ 6 Under 6 CMC § 2142(a), there are three essential elements of the crime of illegal possession of a controlled substance: (1) possession, (2) a controlled substance, and (3) the *mens rea* "knowingly" or "intentionally."

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[1] Although noted as "indiscernible" in the transcript, in the audio recording Detective Manacop identified the location of the plant. *See* Tr. 57.

¶ 7 "Possession of a controlled substance may be either actual or constructive." *United States v. Duenas*, 691 F.3d 1070, 1084 (9th Cir. 2012). Actual possession occurs when an individual "knowingly has direct physical control over a thing at a given time." *United States v. Meza*, 701 F.3d 411, 419 (5th Cir. 2012) (quoting *United States v. Munoz*, 150 F.3d 401, 416 (5th Cir. 1998)). In contrast, constructive possession occurs when one exercises "(1) ownership, dominion or control over the item itself or (2) dominion or control over the premises in which the item is found." *Id.* (citing *United States v. Hinojosa*, 349 F.3d 200, 203 (5th Cir. 2003); *United States v. De Leon*, 170 F.3d 494, 496 (5th Cir. 1999)).

¶ 8 Mere proximity to a controlled substance and the individual's presence on property where the substance is found are insufficient to prove constructive possession. *Duenas*, 691 F.3d at 1084; *United States v. Starks*, 309 F.3d 1017, 1022 (7th Cir. 2002); *United States v. Jenkins*, 90 F.3d 814, 818 (3d Cir. 1996); *United States v. McKnight*, 953 F.2d 898, 901 (5th Cir. 1992). Rather, a constructive possession finding is only appropriate if a relationship or nexus between the defendant and the substance is established. *United States v. Cardenas*, 748 F.2d 1015, 1020 (5th Cir. 1984).

¶ 9 In *Jenkins*, the appellant challenged his conviction of possession of cocaine with intent to distribute, arguing essential elements of the crime were unsupported by the evidence. 90 F.3d at 817–21. At the time of the appellant's arrest, he was found seated in front of, amongst other things, 55.3 grams of cocaine and two scales. *Id.* at 816. The court held there was insufficient evidence to support the possession element of the crime because only proximity linked him to the drugs and the drug distribution paraphernalia, noting that no cocaine residue was found on him, his fingerprints were not on the drugs, and no evidence suggested that he operated the scales. *Id.* at 818.

¶ 10 Similarly, in *United States v. White*, the appellant challenged his conviction of possession of a controlled substance with intent to distribute. 932 F.2d 588 (6th Cir. 1991). There, the appellant was arrested because a 450 square foot patch of cultivated marijuana was discovered three feet behind his residence. *Id.* at 589. The Sixth Circuit reversed the appellant's conviction, because although the plants were found three feet behind his home, "[t]he patch was not on property owned by [the appellant], there was no testimony that [he] was ever seen in the patch, and there was no path between the trailer and the patch." *Id.* at 590. Further, the court noted that "some overgrowth was evident between the trailer and the patch," the fertilizer found at the appellant's home and the fertilizer used in the patch "were not matched up," drug paraphernalia was not found in the appellant's home, and the appellant's physical disabilities did not indicate the capacity to care for a 450 square foot patch. *Id.* In light of this evidence, the court stated that "[i]n this case, there is simply no evidence [that] supports an inference of possession . . . [of] marijuana." *Id.*

¶ 11 Kendall claims, and it remains uncontested, that he was not in actual possession of marijuana at the time of the arrest. Indeed, there is no evidence

that marijuana was found on Kendall himself. Therefore, the issue turns on whether he had constructive possession of the plant.

¶ 12 Here, only a minor portion of the record is devoted to the Possession of a Controlled Substance charge—less than five pages of the eighty-nine page transcript discussed the marijuana plant and only three photos of the plant were introduced as exhibits. Of those five pages, the testimony pertaining to the marijuana plant was provided by Manacop. He stated that he "was informed that [Dubrall] found a marijuana plantation [to the east of the residence] or the house," that the plant was potted and "about a foot and a half in height, and the top was trimmed off," and that the plant "tested or presumptive positive for marijuana." Tr. 57–58; *see supra* ¶ 7 n.1. The prosecutor then presented photos of the plant, and Manacop confirmed the photos were a fair and accurate representation of the plant on that day. Later, Manacop testified that after the field test was conducted, the plant was "turned in to evidence," meaning the plant was taken to an evidence locker and a receipt detailing the chain of custody was submitted. Tr. 59.

¶ 13 Like *Jenkins* and *White*, no direct or circumstantial evidence was adduced that could tie Kendall with possession of the plant. The record, viewed in the light most favorable to government, merely indicates that a potted marijuana plant was found to the east of Kendall's home. There was no testimony that the plant was found on Kendall's property or in close proximity to the house, and the photos were only identified as a fair and accurate representation of the plant—not its location—on the day it was found. Even if it is assumed that the photos are an accurate representation of the plant as it was found, it would remain unclear whether the plant was found positioned against the outer wall of Kendall's home, some other structure on his property, or a structure of an adjacent property. We require more evidence than a mere statement that a marijuana plant was found to the east of Kendall's home to find constructive possession.

¶ 14 Because the Commonwealth failed to show Kendall exercised actual or constructive possession of the marijuana plant, we need not analyze the second and third elements of the crime, and we conclude there is insufficient evidence supporting Kendall's conviction for Possession of a Controlled Substance.

V. CONCLUSION

¶ 15 We REVERSE the judgment of the Superior Court because there is insufficient evidence supporting Kendall's Possession of a Controlled Substance conviction and REMAND for further proceedings consistent with this opinion.

SO ORDERED this 29th day of December, 2015.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice