MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Anna Onaitis Holden
Zionsville, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Cyle Cowherd,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

July 27, 2023

Court of Appeals Case No. 23A-CR-208

Appeal from the Marion Superior Court

The Honorable Jennifer Prinz Harrison, Judge

Trial Court Cause No. 49D20-2205-F4-12388

Memorandum Decision by Judge Weissmann
Judges Riley and Bradford concur.

Weissmann, Judge.

[1] Just days after Cyle Cowherd was released from jail to serve probation, he appeared in a social media video pointing a gun. Such conduct was problematic for two reasons. First, his terms of probation barred his possession of a firearm. Second, he was a felon who could not legally possess a firearm.

[2] A search of the home where he was living revealed two guns, including one similar to the gun displayed in the video. The State charged him with illegal possession of a firearm and presented the video at his jury trial. Unpersuaded by Cowherd's claimed ignorance of the guns, the jury returned a verdict of guilty. Cowherd appeals, contending the video was inadmissible and that the State failed to prove his knowledge of the guns found in his home. Finding no error, we affirm.

Facts

[3] Upon his release from the Marion County Jail, Cowherd entered the supervision of the Marion County Probation Department. The terms of his probation prohibited his possession of a firearm or living in a residence containing a firearm. Less than a week after his release from jail, a video depicting him counting a large pile of cash and pointing a tan-colored gun was posted on Facebook. A caption on the video stated, "Brother 3rd Day Out He Ain't Playing." State's Exh. 20. The video was sent to the Marion County Prosecutor's Office with a tip that Cowherd was violating the terms of his probation.

[4] Cowherd's probation officer, assisted by police, went to Cowherd's registered address to conduct a probation compliance check. Cowherd was living with several relatives at a home belonging to his mother. During a protective sweep of the home, one of the officers noticed a handgun magazine loaded with ammunition on the kitchen table. The officers stopped the search and obtained a warrant to search the home. The warrant search yielded a black Taurus 9mm handgun in the living room and a tan 9mm gun with a loaded magazine and a laser sight attached to it. As Cowherd was a twice convicted felon who could not possess firearms, he was arrested and charged with unlawful possession of a firearm by a serious violent felon.

[5] Before trial, the State filed its notice of intent to offer the video as evidence at Cowherd's trial. Cowherd objected, arguing that the video was not relevant and, in any case, was unduly prejudicial. The trial court overruled Cowherd's objections and admitted the video. But the court instructed the jury that the video was admitted solely on the issues of motive, intent, knowledge, absence of mistake, and absence of accident and should be considered by the jury only for those purposes. After the jury returned a verdict of guilty and the trial court entered judgment of conviction, the court sentenced Cowherd to eight years imprisonment.

Discussion and Decision

[6] Cowherd raises two issues on appeal. First, he claims that the trial court abused its discretion in admitting the video because the video was neither relevant nor probative to his prosecution. He also argues that the State did not prove beyond

a reasonable doubt that he possessed a firearm. We conclude the trial court did not abuse its discretion in admitting the video and that the State proved beyond a reasonable doubt Cowherd's constructive possession of a firearm.

I. Admission of the Video

[7] The admission of evidence, such as the Facebook video, lies within the sound discretion of the trial court. *Vanryn v. State*, 155 N.E.3d 1254, 1264 (Ind. 2020). We will reverse that determination only upon an abuse of discretion, which occurs when the court's decision is clearly against the logic and effect of the facts and circumstances or misinterprets the law. *Id.*

[8] Here, the trial court admitted the video under Indiana Evidence Rule 404(b). This rule prohibits admission of evidence of a "crime, wrong, or other act" solely as character evidence "to show that on a particular occasion the person acted in accordance with the character." Ind. Evid. R. 404(b)(1). However, Indiana Evidence Rule 404(b) does not preclude admission of evidence if offered "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Ind. Evid. R. 404(b)(2).

[9] When reviewing evidence admitted under this rule, we engage in a two-step analysis. *Fairbanks v. State*, 119 N.E.3d 564, 568 (Ind. 2019). First, we determine, consistent with Indiana Evidence Rule 404(b)(2), whether the challenged evidence is relevant to a matter at issue other than the defendant's propensity to commit the crime. Indiana Evidence Rule 402(b)(2). If this hurdle

is cleared, we must then determine, consistent with Indiana Evidence Rule 403, whether "the evidence's probative value is not substantially outweighed by the danger of unfair prejudice." *Fairbanks*, 119 N.E.3d at 568 (internal quotations omitted).[1]

[10] Cowherd asserts that the Facebook video was too attenuated to the firearm possession crime to be relevant. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Evid. R. 401. Cowherd contends the Facebook video did not make his alleged possession of a firearm at his mother's home on the date of the probation check any more or less probable because the filming date of the video is unknown.

[11] But we disagree that the jury could not determine the video's timing. The record reveals the video was posted on Facebook six days after Cowherd's release from jail. The video's caption—"Brother 3rd Day Out He Ain't Playing"—can reasonably be construed as indicating that the video was filmed three days after Cowherd's release from jail. Further, the probation check

---

[1] Evidence Rule 403 provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

occurred only 11 days after Cowherd's release, and the gun pictured in the video resembled the tan gun recovered at Cowherd's home.

[12] Under these circumstances, the video was highly relevant to the charged offense. As Cowherd was not caught holding the gun in his home, the State necessarily relied on a constructive possession theory. A person constructively possesses contraband when the person has the capability and intent to maintain dominion and control over the item. *Gray v. State*, 957 N.E.2d 171, 174 (Ind 2011). When the person shares a home where the contraband is found, the State's proof of intent to maintain dominion and control over the item must include evidence showing the defendant's knowledge of the presence and nature of the item. *Id.* at 174-75.

[13] The video was such evidence. It reasonably could be construed as showing Cowherd's knowledge of and intent to possess the tan gun found in his home because the jury could reasonably conclude that the gun pictured in the video was the same gun found in the home where Cowherd was living.

[14] Not only was the video relevant, but its probative value also outweighed its prejudicial impact under Evidence Rule 403. Cowherd's undue prejudice claim rests entirely on his assumption that the timing of the video could not be determined—an argument that we have already rejected. As Cowherd has failed to show that the video either was irrelevant or unduly prejudicial, the trial court did not abuse its discretion in admitting the Facebook video.

II. Sufficiency of Evidence

[15] Cowherd next argues that the evidence could not support his conviction for unlawful possession of a firearm by a serious violent felon, a Level 4 felony. When reviewing a sufficiency of the evidence claim, we consider only the probative evidence and reasonable inferences supporting the verdict. *Carmouche v. State*, 188 N.E.3d 482, 485 (Ind. Ct. App. 2022). Without reassessing witness credibility or reweighing evidence, we will affirm unless no reasonable factfinder could conclude each element of the crime was proven beyond a reasonable doubt. *Id.*

[16] For Cowherd's conviction to stand, the record must contain proof beyond a reasonable doubt that Cowherd, while being a serious violent felon, knowingly or intentionally possessed one of the two firearms found in his mother's home. *See* Ind. Code 35-47-4-5(c) (2021). Cowherd does not dispute he qualified as a serious violent felon. Instead, he challenges the adequacy of the State's evidence showing he constructively possessed the guns at his mother's house.

[17] As previously noted, constructive possession requires proof of the accused's capability and intent to maintain dominion and control over the item. *Gray*, 957 N.E.2d at 174. Because Cowherd was one of six people occupying the home where the guns were found, the State could not prove his intent to maintain dominion and control over either of the two guns without evidence that Cowherd knew of the presence and nature of it. *See id.*

[18] Cowherd contends the State presented inadequate evidence on that point. Cowherd notes that the tan gun was found halfway under the bed in the room that Cowherd identified as belonging to his 12-year-old brother, and the black gun was found in the living room, to which all six people and others had access.

[19] First, the jury reasonably could have determined that Cowherd knew about the tan gun based on the Facebook video, which Cowherd ignores in his sufficiency argument. That video not only showed Cowherd pointing a gun much like the tan gun recovered from his mother's home but also showed Cowherd with a brand of cigarettes that also were found in the nightstand of the bedroom where the tan gun was found. The cigarettes in the bedroom were next to a soda can used as an ashtray. Cowherd's 12-year-old brother who purportedly slept in the bedroom did not smoke. In addition, mail addressed to Cowherd, as well as other documents bearing his name, were found in the top drawer of the dresser in that bedroom. The jury could reasonably infer Cowherd's knowledge of the gun under the bed from its close proximity to Cowherd's belongings. *See*, *e.g.*, *Mack v. State*, 23 N.E.3d 742, 759 (Ind. Ct. App. 2014) (finding adequate evidence of constructive possession of firearms found in the bedroom of a home, given that the defendant's clothing and other belongings were found in the bedroom and bathroom).

[20] The State also proved Cowherd's constructive possession of the black gun in the living room. The firearm was found just a few feet from the couch where Cowherd confirmed he slept every night. Specifically, the weapon was on a television stand, its grip protruding and clearly visible from the couch. From

that evidence, the jury reasonably could infer Cowherd's knowledge of the presence of the gun. *See Massey v. State*, 816 N.E.2d 979, 989 (Ind. Ct. App. 2003) (noting that where a defendant's possession of the premises is non-exclusive, evidence that the contraband on the premises is in plain view supports a finding the defendant had the intent and capability to maintain control and dominion over the contraband).

[21] Given all this evidence, the State proved beyond a reasonable doubt that Cowherd, a serious violent felon, knowingly or intentionally possessed one or both of the firearms found in his mother's home.

[22] We affirm.

Riley, J., and Bradford, J., concur.