MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Katelyn Bacon
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

George P. Sherman
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Andre Naylor,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 23, 2022

Court of Appeals Case No. 22A-CR-66

Appeal from the Marion Superior Court

The Honorable Sheila A. Carlisle, Judge

The Honorable Stanley E. Kroh, Magistrate

Trial Court Cause No. 49D29-2009-F4-28873

Najam, Senior Judge.

Statement of the Case

[1] Andre Naylor appeals his conviction for unlawful possession of a firearm by a serious violent felon, as a Level 4 felony, following a bench trial. Naylor raises the following four issues for our review:

1. Whether the trial court abused its discretion when it permitted the State to reopen its case.

2. Whether Naylor's voluntary statements to officers inside his home should be suppressed under *Miranda v. Arizona* and its progeny.

3. Whether the evidence seized from the apartment searched by officers should be suppressed under the Fourth Amendment to the United States Constitution.

4. Whether the State presented sufficient evidence to support Naylor's conviction.

[2] We affirm.

Facts and Procedural History

[3] On November 6, 2019, Naylor executed a parole release agreement with the Indiana Parole Board ("the Board"). The conditions of his parole required Naylor to have the permission of his supervising officer to change his place of residence and to purchase a motor vehicle. The conditions also required him not to engage in illegal conduct and not to possess firearms. Naylor further agreed to the following conditions:

> a) [Naylor] will allow [his] supervising officer or other authorized officials to visit [his] residence and place of employment at any reasonable time.
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> b) [Naylor] understand[s] that [he is] legally in the custody of the Department of Correction and that [his] person and residence or property under [his] control may be subject to reasonable search by [his] supervising officer or authorized official of the Department of Correction if the officer or official has reasonable cause to believe that the parolee is violating or is in imminent danger of violating a condition to remaining on parole.

Ex. Vol. at 4.

[4] On September 9, 2020, Kristi Horton, Naylor's supervising officer, received a tip that Naylor was living in an apartment at an unreported address on Bavarian West Drive in Indianapolis and that Naylor was in possession of drugs and a firearm. The tip also informed Horton that Naylor had recently purchased a black Chevy Malibu with a specific license plate number.

[5] Officer Horton and other officers went to the identified apartment and observed a Malibu in front of the apartment matching the description provided. The officers then knocked on the apartment door and announced themselves. After "several knocks," Naylor's girlfriend answered the door and informed the officers that Naylor was in the shower. Tr. Vol. 2 at 24. One of the officers went to the bathroom and informed Naylor that he needed to get out of the shower. Naylor did so and got dressed. Officers then placed him in handcuffs and had him sit in a chair in the living room.

[6] The officers also identified Naylor's infant child in the apartment. The apartment was a two-bedroom apartment. One bedroom was plainly a child's room, and the other, main bedroom was for adults.

[7] Upon being seated in the living room, Naylor asked the officers what was going on, and Officer Horton responded that "this is a compliance check to see" if Naylor had "moved without permission." *Id.* at 28. Naylor initially denied living at the apartment. However, he then told Horton, without prompting, that he had "just moved" to the apartment "a couple of days ago." *Id.* at 32. Officer Horton responded, "I thought you didn't move here," and Naylor replied that it was "ours," i.e., Naylor's and his girlfriend's, before stating, "Well, it's my sister's . . . . I don't really live here." *Id.*

[8] Officers then searched the apartment and discovered several items of male clothing; a key to the apartment on Naylor's keychain; paperwork for the Malibu in Naylor's name; mail addressed to Naylor on a dresser in the main bedroom; and a firearm in a laundry basket in the main bedroom. Upon discovering the firearm, the parole officers contacted the Indianapolis Metropolitan Police Department ("IMPD"). IMPD officers arrived soon thereafter, seized the firearm, and arrested Naylor. After reading him his *Miranda* rights, Naylor stated that he did not live at the apartment and it was his sister's apartment. IMPD officers located Naylor's sister, and she eventually informed officers that the firearm was not hers. A subsequent DNA test of the firearm identified an unspecified male's DNA on the weapon.

[9] On September 16, the State charged Naylor with unlawful possession of a firearm by a serious violent felon, as a Level 4 felony. At his ensuing bench trial, Naylor's counsel objected to the admission of evidence seized from the search of a pair of pants inside the apartment. The following colloquy ensued:

> MR. SMITH [for the State]: Your Honor, . . . the Parole Release Agreement permits parole agents to search a residence and anywhere where they may have their own personal property when they have reasonable cause to believe there may be a possible violation of Parole. Based off the information the agents received, the agents have reasonable cause. *And Defense agrees they had reasonable cause to go to the residence*. So as to what the scope of the search is, then I believe that the release agreement provides for a full search of the residence once there is reasonable cause.
>
> THE COURT: All right. And can you articulate the reasonable cause that you believe is here?
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> MR. SMITH: *I believe Defense wants to keep that out, so we agree that there was reasonable cause*.

Id. at 34 (emphases added). Naylor's counsel did not object to or question the State's representations and instead clarified that his objection was only "for the search of [the] pant pockets." *Id.* The trial court overruled Naylor's objection.

[10] Naylor also objected to the admission of his statements to the parole officers inside the apartment prior to having been read his *Miranda* rights, which objection the trial court also overruled. However, the trial court permitted the parties to file supplemental briefs on the *Miranda* question following the close of the parties' evidence on November 2, 2021. *See id.* at 45, 100-01, 124-25.

[11] On November 19, Naylor filed his supplemental brief. In his brief, in addition to his *Miranda* arguments, Naylor argued that the State had failed to present evidence to show it had reasonable cause to enter the apartment. Appellant's App. Vol. 2 at 98-99. In response, the State moved to reopen its case to present evidence of reasonable cause underlying the parole officers' entry into the apartment. In support of that motion, the State asserted:

> 2. . . . [C]ounselors for the State . . . and the Defendant had an agreement to not include testimony that would reveal specific information relating to a tip received by parole agents concerning the Defendant, and that the Defendant would then agree that the parole agents had reasonable cause to . . . search the residence.
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> 3. This agreement was made in an e-mail exchange between the attorneys, and said e-mail is attached . . . .

Id. at 114. In the attached e-mail exchange, Naylor's counsel stated: "I am assuming that you [the State] are not going to put in testimony about the content of the tip: concerning drugs and guns about Mr. Naylor . . . ." *Id.* at 115. The State responded: "As long as we agree that parole had reasonable cause to go for a home visit then I don't need any content from the tip. Sound good?" *Id.* Naylor's counsel agreed, replying "Yes" to that question. *Id.*

[12] Nonetheless, Naylor objected to the State's motion to reopen its case. In his objection, Naylor asserted that the State "should not get another bite at the apple" in proving its case. *Id.* at 117. The trial court overruled Naylor's objection and permitted the State to reopen its case for the purposes of establishing the officers' reasonable cause to enter the apartment. At that

hearing, the State established, over Naylor's repeated interruptions, that the tip relied on by Officer Horton came from a source known to Officer Horton; that the person who provided the tip had a personal relationship to Naylor and was concerned for the safety of Naylor's girlfriend; and that the tip had reported that Naylor was living at the unreported address, was driving the Malibu, and was in possession of drugs and a firearm. The trial court found that the State had established reasonable cause for the officers' entry into the apartment and, thus, rejected Naylor's argument in his supplemental brief. Thereafter, the court found Naylor guilty of Level 4 possession of a firearm by a serious violent felon, and this appeal ensued.

Discussion and Decision

Issue One: Reopening of the State's Case

[13] On appeal, Naylor first asserts that the trial court abused its discretion when it permitted the State to reopen its case to show that the parole officers had reasonable cause to enter the apartment. As we have explained:

> The granting of permission to reopen a case is generally within the discretion of the trial court, and the decision will be reviewed only to determine whether there has been an abuse of discretion. *Ford v. State*, 523 N.E.2d 742, 745 (Ind. 1988). A party should be afforded the opportunity to reopen its case to submit the evidence which could have been part of its case-in-chief. *Id.* Factors the trial court uses to weigh its discretion include whether there is any prejudice to the opposing party, whether the party seeking to reopen appears to have rested inadvertently or purposely, the stage of the proceedings at which the request is made, and whether any real confusion or inconvenience would result from granting the request. *Id.* at 745-46. Two conditions must be met

> in order for an appellate court to set aside the ruling of a trial court made in the exercise of its discretion: 1) the action complained of must have been unreasonable in light of all attendant circumstances or it must have been clearly unattainable and 2) the action was prejudicial to the rights of the complaining party. *Id.* at 746.

Moss v. State, 13 N.E.3d 440, 446 (Ind. Ct. App. 2014), *trans. denied*.

[14] Naylor asserts that the trial court abused its discretion in permitting the State to reopen its case because the State's additional evidence was prejudicial, substantive evidence about the basis for reasonable cause for officers to enter the apartment, which came some twenty-seven days after the State had purposefully rested. Naylor further asserts that the reasonable cause to enter the apartment was a "key issue in the case," and that he had objected to the admission of the evidence "on the first day of trial during the first . . . witness'[s] testimony." Appellant's Br. at 16.

[15] This is a bold argument from Naylor. Unmentioned by Naylor is that his counsel e-mailed the State before trial and expressly agreed that the parole officers had reasonable cause to enter the apartment, and that he would not challenge that issue at trial because he did not want certain unfavorable information to be before the court. Also, Naylor does not acknowledge that that the State expressly relied on his counsel's agreement or that the State stated in open court—without objection—that reasonable cause had been conceded by Naylor's counsel. And on appeal, Naylor misunderstands the basis for the objection he made at trial, which was limited to the search of pants inside the

apartment and did not involve the entry itself. Further undiscussed by Naylor is that the State's motion to reopen its case was premised on Naylor's apparent gamesmanship in raising this "key issue" for the first time in the post-trial supplemental briefing, which briefs were requested by the court on a different legal issue.

[16] We are not persuaded by Naylor's argument on appeal, which disregards the record. We conclude that Naylor's argument is not supported by cogent reasoning and is not persuasive in any event. *See* Ind. Appellate Rule 46(A)(8)(a). The trial court did not abuse its discretion when it permitted the State to reopen its case to establish a factual basis for the parole officers' reasonable cause to enter the apartment.

Issue Two: Whether the Trial Court Erred When It Admitted Naylor's Statements to the Parole Officers

[17] Naylor next asserts that the trial court abused its discretion when it admitted his statements to the parole officers prior to him having been read his *Miranda* rights. This issue turns on whether Naylor was subject to a custodial interrogation at the time he made his statements. As our Supreme Court has explained:

> Whether a defendant is in custody is a mixed question of fact and law. The circumstances surrounding the interrogation are matters of fact and we consider conflicting evidence most favorably to the suppression ruling. Whether those facts add up to *Miranda* custody is a question of law which we review de novo.

State v. Diego, 169 N.E.3d 113, 116-17 (Ind. 2021) (citations and quotation marks omitted). And, as the Supreme Court of the United States has made clear, "[o]ur decision in *Miranda* set forth rules of police procedure applicable to 'custodial interrogation.' By custodial interrogation, we mean *questioning initiated by law enforcement officers* after a person has been taken into custody . . . ." *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977) (emphasis added; quotation marks omitted).

[18] Here, upon entering the residence, the parole officers located Naylor, placed him in handcuffs, and had him sit down in a chair in the living room. Naylor then asked the officers why they were there, and Officer Horton responded that they were there for a compliance check to see if Naylor had moved into the apartment without her prior permission. Naylor then volunteered—not in response to any question initiated by the officers, let alone any questioning on par with "station house questioning"—both that he did not live there and also that he had "just moved" to the apartment "a couple of days ago."[1] Tr. Vol. 2 at 32. As Naylor's statements were not in response to any questions initiated by the officers, there was no custodial interrogation to which *Miranda* would have applied, and we affirm the trial court's admission of Naylor's statements.

[1] Officer Horton responded to Naylor's statement that he had just moved in by stating, "I thought you didn't move here," to which Naylor replied that the apartment was his and his girlfriend's before again back-tracking and stating it was his sister's and he did not live there. Tr. Vol. 2 at 32. These additional statements were in relevant part cumulative to Naylor's initial, unprompted statements.

Issue Three: Whether the Search of the Apartment Violated Naylor's Fourth Amendment Rights

[19] Naylor also asserts that the search of the apartment violated his Fourth Amendment rights. Naylor's argument here is that the parole officers did not know at the time of the entry into the apartment that it was in fact Naylor's apartment. Thus, he continues, they could not use the conditions of his release to parole as a basis to enter the apartment and instead needed a search warrant.

[20] Naylor's argument is a nonstarter. If we were to take at face value Naylor's position on appeal that we should assume the apartment was not his at the time of the officers' entry, Naylor would lack standing under the Fourth Amendment to challenge the warrantless entry into a third-party's residence. *See, e.g.*, *Peterson v. State*, 674 N.E.2d 528, 532 (Ind. 1996) ("A defendant 'aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by the search of a third person's premises has not had any of his Fourth Amendment rights infringed.'") (quoting *Rakas v. Illinois*, 439 U.S. 128, 134 (1978)). And Naylor has no grounds to argue that, if the apartment was his residence, the officers could not search it given reasonable cause. Therefore, we affirm the trial court's admission of the evidence seized from the apartment.

Issue Four: Sufficiency of the Evidence

[21] Last, Naylor asserts that the State failed to present sufficient evidence to show that he committed Level 4 felony possession of a firearm by a serious violent

felon. Our standard for reviewing the sufficiency of the evidence needed to support a criminal conviction is as follows:

> First, we neither reweigh the evidence nor judge the credibility of witnesses. Second, we only consider the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence. A conviction will be affirmed if there is substantial evidence of probative value supporting each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. It is the job of the fact-finder to determine whether the evidence in a particular case sufficiently proves each element of an offense, and we consider conflicting evidence most favorably to the trial court's ruling.

Willis v. State, 27 N.E.3d 1065, 1066-67 (Ind. 2015) (citations and quotation marks omitted).

[22] Specifically, Naylor asserts that the State did not present sufficient evidence to show that he constructively possessed the firearm found inside the apartment.[2] As we have explained:

> In order to prove constructive possession of [contraband], the State must show that the defendant has both: (1) the *intent* to maintain dominion and control over the [contraband]; and (2) the *capability* to maintain dominion and control over the [contraband]. *Wilkerson v. State*, 918 N.E.2d 458, 462 (Ind. Ct. App. 2009) (emphasis added) (quoting *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004)). "The capability prong may be satisfied by 'proof of a possessory interest in the premises in which illegal

[2] We need not consider Naylor's argument that the State failed to show that he had actual possession of the firearm.

> [contraband is] found.'" *Monroe v. State*, 899 N.E.2d 688, 692 (Ind. Ct. App. 2009) (citing *Gee*, 810 N.E.2d at 340). "This is so regardless of whether the possession of the premises is exclusive or not." *Id.* . . .
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> With regard to the intent prong of the test, where, as here, a defendant's possession of the premises upon which contraband is found is not exclusive, the inference of intent to maintain dominion and control over the drugs must be supported by additional circumstances pointing to the defendant's knowledge of the nature of the [contraband] and [its] presence. *Id.* (citing *Gee*, 810 N.E.2d at 341). Those additional circumstances include:
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> > (1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant.
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> *Wilkerson*, 918 N.E.2d at 462.

Houston v. State, 997 N.E.2d 407, 410 (Ind. Ct. App. 2013). In addition to the above six circumstances, we have also recognized that the nature of the place in which the contraband is found can be an additional circumstance that demonstrates the defendant's knowledge of the contraband. *E.g.*, *Carnes v. State*, 480 N.E.2d 581, 587 (Ind. Ct. App. 1985), *trans. denied*. Those enumerated circumstances are nonexhaustive; ultimately, our question is whether a reasonable fact-finder could conclude from the evidence that the defendant

knew of the nature and presence of the contraband. *See Gray v. State*, 957 N.E.2d 171, 174-75 (Ind. 2011).

[23] The State presented sufficient evidence to show that Naylor constructively possessed the firearm. The firearm was located in a laundry basket in the main bedroom and was found to have on it an unspecified male's DNA. There is no evidence of another male having been in the apartment, and Naylor had a key to the apartment on his keychain. The main bedroom also contained mail addressed to Naylor, and Naylor had paperwork in his name in the living room. Further, his infant child was in the apartment with him, and the other bedroom in the apartment was dedicated to a child. Thus, the State presented sufficient evidence from which a reasonable fact-finder could have concluded that Naylor knew of the nature and presence of the firearm in the apartment, and we affirm his conviction for Level 4 felony possession of a firearm by a serious violent felon.

Conclusion

[24] In sum, we affirm Naylor's conviction for unlawful possession of a firearm by a serious violent felon, as a Level 4 felony.

[25] Affirmed.

Bradford, C.J., and Bailey, J., concur.