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IN THE  
COURT OF APPEALS OF INDIANA

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Edgar Pimentel, Jr.,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

February 18, 2022

Court of Appeals Case No.  
21A-CR-994

Appeal from the Jay Circuit Court

The Honorable Brian D.  
Hutchison, Judge

Trial Court Cause No.  
38C01-2006-F5-41

**Pyle, Judge.**

## Statement of the Case

[1] Edgar Pimentel, Jr., (“Pimentel”) appeals his convictions, following a jury trial, of Level 5 felony possession of a narcotic drug<sup>1</sup> and Level 6 felony unlawful possession of a syringe<sup>2</sup> as well as his adjudication as an habitual offender.<sup>3</sup> He argues that: (1) the trial court abused its discretion when it denied his motion to dismiss the charge of unlawful possession of a syringe; and (2) there is insufficient evidence to support his convictions. Concluding that the trial court did not abuse its discretion and that there is sufficient evidence to support Pimentel’s convictions, we affirm the trial court’s judgment.

[2] We affirm.

## Issues

1. Whether the trial court abused its discretion when it denied Pimentel’s motion to dismiss the charge of unlawful possession of a syringe.
2. Whether there is sufficient evidence to support Pimentel’s convictions for Level 5 felony possession of a narcotic drug and Level 6 felony unlawful possession of a syringe.

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<sup>1</sup> IND. CODE § 35-48-4-6.

<sup>2</sup> IND. CODE § 16-42-19-18.

<sup>3</sup> I.C. § 35-50-2-8.

## Facts

- [1] The facts most favorable to the verdict reveal that, at approximately 3:00 a.m. on June 12, 2020, Portland Police Department Officer Eric Fields (“Officer Fields”) was working his overnight shift when he noticed Pimentel, Christina Bishop (“Bishop”), and a third person engaged in suspicious behavior near a downtown theater (“the theater”). When Officer Fields approached the group, Pimentel told the officer that they were doing laundry. Officer Fields asked Pimentel about a white car (“the white car”) that was parked nearby in the theater’s parking lot, and Pimentel responded that it was “their vehicle.” (Tr. Vol. 2 at 31).
- [2] Thereafter, Officer Fields drove his police vehicle behind the Jay County Courthouse and began surveillance of the theater’s parking lot, including the white car and its two occupants, Pimentel and Bishop. During this three-hour surveillance, Officer Fields observed several people approach both sides of the white car, remain there for a short period, and then walk away.
- [3] At approximately 7:30 a.m., as Officer Fields approached the white car in his marked police vehicle, the officer noticed Pimentel, who was sitting in the front passenger’s seat, and Bishop, who was sitting in the driver’s seat, had “started reaching around” inside the white car. (Tr. Vol. 2 at 33). When Officer Fields walked up to the white car, the officer smelled marijuana. Officer Fields asked Pimentel and Bishop what they were doing, and Pimentel responded that he and Bishop “were discussing their relationship issues.” (Tr. Vol. 2 at 33).

[4] Based upon the odor of marijuana, Officer Fields told Pimentel and Bishop that he was going “to run [his] certified police K-9 around the vehicle to see if she indicated the presence of narcotics.” (Tr. Vol. 2 at 33). When the dog alerted to the presence of narcotics in the white car, Officer Fields ordered Pimentel and Bishop to exit the vehicle. Based on Officer Fields’ training at the Indiana Law Enforcement Academy and daily experience as a police officer, Officer Fields believed that Pimentel was “intoxicated on narcotics.” (Tr. Vol. 2 at 39). Officer Fields also noticed that Pimentel, who was wearing a short-sleeved shirt, had small marks and scabs on his arms. According to Officer Fields, the small marks and scabs were consistent with “[t]rack marks from shooting up with a hypodermic needle.” (Tr. Vol. 2 at 47).

[5] During a search of the white car, Officer Fields found a capped syringe with an attached needle in the front passenger seat “where the back and bottom portion of the seat meet.” (Tr. Vol. 2 at 35). Officer Fields also found multiple empty plastic baggies and a metal spoon with a burnt residue on it. In addition, Officer Fields found a second capped syringe with an attached needle inside a black bag in the back seat of the white car. Officer Fields also noticed that the white car was “completely full of personal belongings[,]” including both men’s and women’s clothing. (Tr. Vol. 2 at 40). Another police officer escorted Bishop to the Jay County Jail, where a female jailer searched Bishop and found a bag with one gram of fentanyl in Bishop’s bra.

[6] After searching the white car, Officer Fields returned to the police station, uncapped the syringes, and verified that they had needles attached to them.

Officer Fields then recapped the syringes and photographed them together. Because the syringes were capped, the needles were not visible in the photographs. Due to safety concerns, the syringes were subsequently disposed of pursuant to Portland Police Department policies.

- [7] In June 2020, the State charged Pimentel with Level 5 felony possession of a narcotic drug for possessing the fentanyl and Level 6 felony unlawful possession of one syringe. The charging information did not identify which syringe Pimentel was being charged with unlawfully possessing. The State subsequently alleged that Pimentel was an habitual offender.
- [8] In March 2021, Pimentel filed a motion to dismiss the charge of unlawful possession of a syringe. In his motion, Pimentel argued that the State had denied him due process because it had failed to preserve a syringe for him to examine. The gravamen of his argument was that he had been denied the opportunity to uncap the syringe and determine if there was, in fact, a needle attached to it. According to Pimentel, “[t]he negligent destruction or withholding of material evidence by the police or prosecution m[ight] present grounds for reversal because it denie[d] due process[.]” (App. Vol. 2 at 42).
- [9] Following a hearing, the trial court issued a March 2021 order denying Pimentel’s motion to dismiss. In its order, the trial court pointed out that the State had asserted that Officer Fields would testify that a needle was attached to the syringe barrel. Thereafter, the trial court concluded that “[t]he record [was] devoid of any indication that the syringe[] w[as] materially exculpatory

evidence[]” and that “[a]ssuming, without finding, that the syringe[] m[ight] have constituted potentially useful evidence, . . . the destruction of the syringe[] was not done in bad faith.” (App. Vol. 2 at 46).

[10] At the April 2021 trial, the jury heard the evidence regarding the charged offenses as set forth above. In addition, there was no evidence presented at trial that the syringes did not have needles attached to them. Further, Pimentel did not object when the trial court admitted into evidence a photograph of the capped syringes. Pimentel also did not object when Officer Fields testified that he had uncapped the syringes, verified that they had needles attached to them, and recapped them.

[11] During closing argument, Pimentel argued as follows: “[Officer] Fields claims that he uncapped those syringes and verified there were needles[.] I would submit to you, he never did that. He assumed those needles were there[.] Don’t take his word for it.” (Tr. Vol. 2 at 110).

[12] The jury convicted Pimentel of Level 5 felony possession of a narcotic drug and Level 6 felony unlawful possession of a syringe, and the trial court adjudicated him to be an habitual offender. Pimentel now appeals.

## **Decision**

[13] Pimentel argues that: (1) the trial court abused its discretion when it denied his motion to dismiss the charge of unlawful possession of a syringe; and (2) there is insufficient evidence to support his convictions. We address each of his contentions in turn.

## 1. Motion to Dismiss

- [14] Pimentel first argues that the trial court abused its discretion when it denied his motion to dismiss the charge of unlawful possession of a syringe. Pimentel specifically contends that the trial court should have granted his motion to dismiss because the State violated his right to due process when it failed to preserve a syringe.
- [15] We review a trial court’s decision on a defendant’s motion to dismiss a criminal charge for an abuse of discretion. *State v. Sturman*, 56 N.E.3d 1187, 1195 (Ind. Ct. App. 2016). An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.*
- [16] The defendant in a criminal case has the right to examine physical evidence in the hands of the State. *Terry v. State*, 857 N.E.2d 396, 406 (Ind. Ct. App. 2006), *trans. denied*. The failure of the State to preserve such evidence may present grounds for reversal based on denial of due process. *Id.*
- [17] To determine whether a defendant’s due process rights were violated by the State’s failure to preserve evidence, we must first determine whether the evidence was “materially exculpatory” or “potentially useful.” *Land v. State*, 802 N.E.2d 45, 49 (Ind. Ct. App. 2004) (quoting *Chissell v. State*, 705 N.E.2d 501, 504 (Ind. Ct. App. 1999), *trans. denied*), *trans. denied*. Evidence is materially exculpatory if it “possesses an exculpatory value that was apparent before the evidence was destroyed” and must “be of such a nature that the defendant

would be unable to obtain comparable evidence by other reasonably available means.” *Chissell*, 705 N.E.2d at 504 (quoting *California v. Trombetta*, 467 U.S. 479, 489 (1984)). “While a defendant is not required to prove conclusively that the evidence was exculpatory, there must be some indication in the record that the evidence was exculpatory.” *Chissell*, 705 N.E.2d at 504. “Exculpatory is defined as ‘[c]learing or tending to clear from alleged fault or guilt; excusing.’” *Land*, 802 N.E.2d at 49 (quoting *Wade v. State*, 718 N.E. 2d 1162, 1166 (Ind. Ct. App. 1999), *trans. denied*). When the State fails to preserve materially exculpatory evidence, a due process violation occurs regardless of whether the State acted in bad faith. *Terry*, 857 N.E.2d at 406.

[18] On the other hand, evidence is merely potentially useful if “no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” *Chissell*, 705 N.E.2d at 504 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988)). The State’s failure to preserve potentially useful evidence does not constitute a denial of due process unless the defendant can show that the State acted in bad faith. *Terry*, 857 N.E.2d at 406.

[19] Here, Pimentel appears to argue that the syringe was materially exculpatory evidence. Pimentel specifically contends that “[i]t is a requirement of the Unlawful Possession of a Syringe statute that the State prove, beyond a reasonable doubt, that the . . . syringe . . . was ‘adapted for the use of a controlled substance by injection in a human being.’ I.C. 16-42-19-18.” (Pimentel’s Br. 16-17). Therefore, according to Pimentel, “[t]he only way to determine whether an item meets that statutory requirement is to determine



whether it has a needle or some method by which a substance could be injected into a human being.” (Pimentel’s Br. 17).

[20] In support of his argument, Pimentel directs us to *Roberson v. State*, 766 N.E.2d 1185 (Ind. Ct. App. 2002), *trans. denied*. In the *Roberson* case, Roberson was an inmate in a county jail. During a routine security shakedown, a jail officer found under Roberson’s bed mat “two wooden sticks wrapped on the one end and sharpened to a point on the other end[.]” *Id.* at 1186. The State charged Roberson with possession of a dangerous device or material by a prisoner. The charging information specifically alleged that the device was “used or [was] intended to be used in a manner that [was] readily capable of causing bodily injury.” *Id.* Before trial, the State discarded the device. Thereafter, Roberson moved to dismiss the charge because he had not been given the opportunity to examine the device. According to Roberson, he could not prepare a defense without the device because the condition of the device was crucial to his case. The only photograph of the device was of poor quality.

[21] At a hearing on Roberson’s motion to dismiss, the evidence regarding the device revealed as follows:

The wooden sticks referred to in the information were two halves of a food spreader (similar to a tongue depressor). These spreaders were sold in the commissary to spread food items such as peanut butter and were allowed in the prisoners’ cells. The spreader had been split long-ways and had rough edges. The halves were laid on top of each other, with one of the ends wrapped in toilet paper.

*Id.* Three jail employees testified that, in their opinions, the device was a weapon capable of causing bodily injury. Following the hearing, the trial court denied Roberson’s motion to dismiss.

[22] On interlocutory appeal, this Court reversed, holding that the device was materially exculpatory. *Id.* at 1189. Specifically, we held that the evidence of “the character of the device [was] the sole basis of the defendant’s defense.” *Id.* at 1188. Regarding whether the device had exculpatory value that was apparent before its destruction, the State pointed to the testimony of the three jail employees who had each opined that the device was fashioned to be a weapon and was capable of causing bodily injury. We held that:

The glaring question is whether the device had an exculpatory value that was apparent before its destruction. In this regard, the State points to the testimony of three government officials who each opined that the device was fashioned to be a weapon and was capable of causing bodily injury. Under the specific circumstances of this case, however, these are clearly *subjective opinions*. It is a troubling prospect when the primary evidence is lost or destroyed while in the care of the State, and the State is then permitted to argue that the evidence had no exculpatory value because government officials ‘knew’ that the device was indeed a weapon[.]

As noted previously, the device was allegedly fabricated from items that Roberson was allowed to possess in his cell – items that have legitimate uses and that are generally not construed as weapons. It is certainly conceivable that had Roberson and the trier of fact been able to examine the device, a different conclusion regarding its intend[ed] use and ability to cause bodily injury might have been reached. Therefore, we conclude that there is some indication that the evidence possessed an

exculpatory value that, however tenuous, was evident to the State prior to its destruction. Without such evidence, Roberson is faced with the monumental task of presenting a defense in which he is obliged to accept the *subjective opinions* of three governmental officials. Under the specific circumstances of this case, we hold that it would be fundamentally unfair and a violation of due process to allow the State to proceed in this manner.

*Id.* at 1189-90 (internal citations and footnotes omitted) (emphases added).

[23] However, the facts before us are distinguishable from those in *Roberson*. Here, Officer Fields did not give a subjective opinion describing the character of the evidence. Rather, the officer simply gave eye-witness testimony that the syringe had a needle attached to it. The testimony was objectively binary in nature; the syringe either had a needle attached to it or it did not. Specifically, Officer Fields testified that, after finding the syringe in the white car, the officer returned to the police station, uncapped the syringe, and verified that it had a needle attached to it. Officer Fields then recapped the syringe and photographed it. Pimentel did not object to Officer Fields' testimony or the admission into evidence of a photograph of the syringe. Further, during his closing argument, Pimentel challenged Officer Fields' testimony. Specifically, Pimentel told the jury that the officer had only assumed that the needle was there and asked the jurors not to take the officer's word for it. We note that although Officer Fields should have photographed the syringe while it was uncapped so that the needle would have been visible, the officer's failure to do so does not render the syringe materially exculpatory.

[24] We further note that in *Chissell*, 705 N.E.2d at 504, we held that the videotapes of the defendant taking field sobriety tests were not materially exculpatory because the defendant had presented no evidence that the tapes would show him passing the tests and instead had asked us to speculate as to the tapes' contents. Similarly, Pimentel presents no evidence that an examination of the syringe would have revealed that there was no needle attached to it, and our review of the record reveals no such evidence. We will not speculate as to what the results of an examination of the syringe might have been. *See Terry*, 857 N.E.2d at 407 (refusing to speculate as to what the results of testing a pager might have been and concluding that the pager was not materially exculpatory evidence).

[25] Although the syringe was not materially exculpatory evidence, the syringe does fit the definition of potentially useful evidence. As previously stated, where the evidence is only potentially useful, the defendant must establish bad faith on the part of the State. *See Terry*, 857 N.E.2d at 406. In order to show that the State acted in bad faith, it is not enough to show simply bad judgment or negligence. *Land*, 802 N.E.2d at 51. Rather, a defendant must show that the State failed to preserve the evidence pursuant to a “conscious doing of wrong because of dishonest purpose or moral obliquity.” *Id.* (quoting *Wade*, 718 N.E.2d at 1166).

[26] Here, however, Pimentel has neither alleged nor established that the Portland Police Department acted in bad faith when it disposed of the syringe. Indeed, our review of the record reveals that the Portland Police Department disposed

of the syringe pursuant to its established policy, and there is no evidence suggesting that the police department was otherwise acting in bad faith.

Because Pimentel has failed to establish bad faith on the part of the Portland Police Department, we conclude that Pimentel's due process rights were not violated. *See Chissell*, 705 N.E.2d at 504 (concluding that the defendant was not denied due process where the evidence was not materially exculpatory and the defendant failed to demonstrate bad faith on the part of the police).

Accordingly, the trial court did not err in denying Pimentel's motion to dismiss the unlawful possession of a syringe charge.

## **2. Sufficiency of the Evidence**

[27] Pimentel also argues that there is insufficient evidence to support his convictions for Level 5 felony possession of a narcotic drug and Level 6 felony unlawful possession of a syringe.<sup>4</sup> Again, we disagree.

[28] Our standard of review for sufficiency of the evidence claims is well-settled. We consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We do not reweigh the evidence or judge witness credibility. *Id.* We will affirm the

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<sup>4</sup> We note that Officer Fields found two syringes in the white car. Specifically, the officer found one syringe in the passenger seat and the other syringe in a black bag in the backseat. However, the State only charged Pimentel with unlawful possession of one of the syringes, and the charging information does not indicate which syringe Pimentel was charged with unlawfully possessing. In his appellate brief, Pimentel only challenges the evidence to support the possession of the syringe found in the passenger seat. We will therefore analyze the sufficiency of the evidence to support Pimentel's unlawful possession of that syringe.

conviction unless no reasonable fact finder could find the elements of the crime proven beyond a reasonable doubt. *Id.* The evidence is sufficient if an inference may be reasonably drawn from it to support the verdict. *Id.* at 147.

[29] In order to convict Pimentel of Level 5 felony possession of a narcotic drug, the State had the burden to prove beyond a reasonable doubt that Pimentel knowingly or intentionally possessed the fentanyl. *See* I.C. § 35-48-4-6. In order to convict Pimentel of Level 6 felony unlawful possession of a syringe, the State had to prove that Pimentel possessed the syringe. *See* I.C. § 16-42-19-18.

[30] Pimentel specifically contends that the State failed to prove that he possessed the fentanyl and the syringe. Although Pimentel was not in actual possession of either the fentanyl or the syringe, “a conviction for a possessory offense does not depend on catching a defendant red-handed.” *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011). In cases where the State cannot show actual possession, a conviction for the possession of contraband may rest instead on proof of constructive possession. *Id.* “A person constructively possesses contraband when the person has (1) the capability to maintain dominion and control over the item; and (2) the intent to maintain dominion and control over it.” *Id.*

[31] The capability element may be inferred “from the simple fact that the defendant had a possessory interest in the premises” where the contraband was found, regardless of whether the possessory interest is exclusive. *Id.* “To prove the intent element, the State must demonstrate the defendant’s knowledge of the presence of the contraband.” *Iddings v. State*, 772 N.E.2d 1006, 1015 (Ind. Ct.

App. 2002), *trans. denied*. Such knowledge may be inferred from evidence of additional circumstances indicating the defendant's knowledge of the presence of the contraband. *Id.* These additional circumstances may include: (1) a defendant's incriminating statements; (2) attempted flight or furtive gestures; (3) the location of contraband like drugs in settings suggesting manufacturing; (4) the contraband's proximity to the defendant; (5) the location of contraband within the defendant's plain view; and (6) the mingling of the contraband with other items the defendant owns. *Gray*, 957 N.E.2d at 175. Further, the listed additional circumstances are not exclusive. *Gee v. State*, 810 N.E.2d 338, 344 (Ind. 2004). "Rather, the State is required to show that whatever factor or set of factors it relies upon in support of the intent prong of constructive possession, those factors or set of factors must demonstrate the probability that the defendant was aware of the presence of the contraband and its illegal character." *Id.* "Possession of the contraband by the defendant need not be exclusive and it can be possessed jointly." *Iddings*, 772 N.E.2d at 1015.

[32] Here, our review of the evidence reveals that Pimentel told Officer Fields that he had a possessory interest in the white car. Additionally, during Officer Fields' three-hour surveillance of the vehicle and its occupants, the officer noticed several people approach both sides of the white car, remain there for a short period, and then walk away. Three hours later, as Officer Fields approached the white car in his marked police vehicle, the officer noticed Pimentel and Bishop reaching around inside the car. When Pimentel exited the vehicle, Officer Fields, based on his training and experience, believed that

Pimentel was “intoxicated on narcotics.” (Tr. Vol. 2 at 39). The officer also noticed that Pimentel had small marks and scabs on his arms that were consistent with “shooting up with a hypodermic needle.” (Tr. Vol. 2 at 47). During a search of the white car, Officer Fields found a syringe in the front passenger seat where Pimentel had been sitting and a metal spoon with a burnt residue on it. Pimentel and Bishop were engaged in a relationship, and the white car was filled with personal belongings, including both men’s and women’s clothing. Based on this evidence, a jury could have reasonably inferred Pimentel’s capability and intent to maintain dominion and control over both the fentanyl and the syringe. *See Bailey v. State*, 131 N.E.3d 665, 684 (Ind. Ct. App. 2019) (finding sufficient evidence that the defendant constructively possessed contraband found in areas in which the defendant did not have exclusive access), *trans. denied*. Pimentel’s alternate explanations regarding the factors of constructive possession are invitations for us to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See Drane*, 867 N.E.2d at 146. There is sufficient evidence to support Pimentel’s convictions.

[33] Affirmed.

May, J., and Brown, J., concur.