

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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Jimmy N. Mitchell,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff*

August 2, 2022

Court of Appeals Case No.  
22A-CR-260

Appeal from the  
Wabash Circuit Court

The Honorable  
Robert R. McCallen, III, Judge

Trial Court Cause No.  
85C01-1901-F6-109

**Vaidik, Judge.**

## Case Summary

- [1] During a search of Jimmy N. Mitchell’s house, police found syringes and various pills for which he did not have prescriptions. Mitchell was convicted of possessing the syringes and pills and now appeals, arguing the evidence is insufficient to prove he constructively possessed the items and that the trial court erred in refusing his jury instruction on non-exclusive possession. We affirm.

## Facts and Procedural History

- [2] In January 2019, Mitchell lived in a house in Wabash. He had a girlfriend, Alma. Alma didn’t live with Mitchell, but “she stayed there on occasion.” Tr. Vol. II p. 118.
- [3] On January 4, officers from the Wabash City Police Department responded to a domestic dispute at Mitchell’s house. When officers arrived, they encountered Alma and another man outside the house; Mitchell was inside. Officers ordered Mitchell to exit his house. When Mitchell exited, officers detained him and performed a protective sweep of the house. During the sweep, officers smelled marijuana and applied for a search warrant, which was granted.
- [4] During the later search of Mitchell’s house, officers found two syringes and “various types of pills.” *Id.* at 132. The two syringes were found in the living room—one was on a shelf “next to all the VHS tapes” beside a spoon with residue and the other was “in a drawer” with liquid “[d]rawn back.” *Id.* at 133;

Exs. 8-9. In Mitchell’s bedroom, officers found a pill bottle containing oxycodone-acetaminophen pills inside a pillowcase on a pillow on Mitchell’s bed. The pill bottle was in the name of Sally Burkholder, Mitchell’s mother. Tr. Vol. II pp. 108-09, 132-33; Ex. 3. On top of a nightstand next to Mitchell’s bed officers found a Mentos gum container with cyclobenzaprine hydrochloride, tizanidine, and methocarbamol pills. In the nightstand drawer, officers found a pill bottle containing additional oxycodone-acetaminophen pills along with another pill bottle containing Relistor pills. Mitchell didn’t have a prescription for any of the pills.

[5] The State ultimately charged Mitchell with Level 6 felony unlawful possession of a syringe; Level 6 felony possession of a controlled substance (for the oxycodone pills), which was enhanced from a Class A misdemeanor based on Mitchell’s prior conviction for dealing in a controlled substance; and Level 6 felony unlawful possession of a legend drug (for the methocarbamol, tizanidine, cyclobenzaprine hydrochloride, and Relistor pills).

[6] At trial, the judge gave Indiana Pattern Jury Instruction 14.3060 on “Possession”:

The word “possess” means to own or to exert control over. The word “possession” can take on several, but related, meanings.

There are two kinds of “possession”—actual possession and constructive possession. A person who knowingly has direct physical control of a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time

to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, then the possession is sole. If two or more persons share actual or constructive possession of a thing, then possession is joint.

Possession may be actual or constructive.

Appellant's App. Vol. II p. 136. Defense counsel argued the pattern jury instruction didn't address non-exclusive possession, which was "central" to their case. Tr. Vol. II p. 184. Defense counsel asked the judge to give an additional instruction:

Possession of something may take two forms. One can possess an item directly, meaning that he or she has actual physical control over the item. Or, one can possess[] something constructively, meaning that he or she has the capability and intent to possess the item, even though actual physical control is absent. Evidence has been presented that other individuals may have visited the Defendant's home. As such, possession of those premises was not exclusive to him/her. When possession of the premises on which drugs or items is not exclusive, the inference of intent to maintain dominion and control over the items must be supported by additional circumstances pointing to the accused's knowledge of the nature of the drugs or items in her home. These additional circumstances can include incriminating statements the accused made, attempted flight or furtive gestures, proximity of the substances to the accused, location of the substances within the accused's plain view, and the combining of the substances with other items that the accused owned.

Appellant's App. Vol. II p. 120. The court denied defense counsel's request but said he could make that argument to the jury. During closing arguments, defense counsel argued Mitchell was not in exclusive possession of his house because Alma stayed there occasionally and therefore the State had to present "additional evidence" connecting the syringes and pills to Mitchell, which it couldn't do. Tr. Vol. II p. 212.

[7] The jury found Mitchell guilty on all three counts, following which Mitchell admitted having the prior conviction for dealing in a controlled substance. The trial court sentenced Mitchell to two years for each of the three Level 6 felonies, to be served concurrently.

[8] Mitchell now appeals.

## Discussion and Decision

### I. Sufficiency of the Evidence

[9] Mitchell contends the evidence is insufficient to support his convictions. When reviewing sufficiency-of-the-evidence claims, we neither reweigh the evidence nor judge the credibility of witnesses. *Willis v. State*, 27 N.E.3d 1065, 1066 (Ind. 2015). We only consider the evidence supporting the verdict and any reasonable inferences that can be drawn from the evidence. *Id.* A conviction will be affirmed if there is substantial evidence of probative value to support each element of the offense such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

[10] Mitchell argues the evidence is insufficient to prove he constructively possessed the syringes and pills found during the search of his house. Constructive possession requires proof that “the defendant has both (1) the intent to maintain dominion and control and (2) the capability to maintain dominion and control over the contraband.” *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999). Mitchell doesn’t dispute he was capable of maintaining dominion and control over the syringes and pills; he only disputes whether the State proved he had the intent to do so.

[11] “To prove the intent element, the State must demonstrate the defendant’s knowledge of the presence of the contraband.” *Id.* When the defendant has exclusive possession of the premises where the contraband is found, an inference is permitted that he knew of its presence. *Collins v. State*, 822 N.E.2d 214, 222 (Ind. Ct. App. 2005), *trans. denied*. But where possession of the premises is non-exclusive, the inference is not permitted absent some additional circumstances indicating knowledge of the presence of the contraband. *Id.* The “additional circumstances” have been shown by various means: (1) incriminating statements by the defendant, (2) attempted flight or furtive gestures, (3) a drug-manufacturing setting, (4) proximity of the contraband to the defendant, (5) contraband in plain view, and (6) the mingling of the contraband with other items owned by the defendant. *Id.* These “additional circumstances” are non-exhaustive; ultimately, the question is whether a reasonable factfinder could conclude from the evidence that the defendant had

knowledge of the contraband. *Johnson v. State*, 59 N.E.3d 1071, 1074 (Ind. Ct. App. 2016).

[12] Here, even assuming Mitchell's possession of the premises was non-exclusive, the presence of additional circumstances supports the inference that Mitchell had knowledge of the syringes and pills. We first point out the obvious: the syringes and pills were found in Mitchell's house, not a house in which he was a guest. Alma didn't live there and stayed there only occasionally. As Mitchell concedes on appeal, the two syringes were found "in open view" in the living room, "a common area" in his house. Appellant's Br. p. 18. In Mitchell's bedroom, officers found a pill bottle inside a pillowcase on a pillow on his bed. Although Mitchell speculates this pill bottle could have belonged to Alma, the bottle was in Mitchell's mother's name. Officers also found pills in a Mentos gum container on top of a nightstand next to Mitchell's bed and various pills located within the drawer of the nightstand. *See Tate*, 835 N.E.2d at 511 (finding it "reasonable to infer that the firearms were near other items owned by Tate because the facts show that he was staying in the motel room at the time"). The evidence is sufficient to prove Mitchell constructively possessed the syringes and pills.

## II. Jury Instruction

[13] Mitchell next contends the trial court erred by rejecting his proposed jury instruction on non-exclusive possession. "The trial court has broad discretion as to how to instruct the jury, and we generally review that discretion only for

abuse.” *McCowan v. State*, 27 N.E.3d 760, 763 (Ind. 2015) (quotation omitted). To determine whether a jury instruction was properly refused, we consider: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the instruction; and (3) whether the substance of the instruction was covered by other instructions given. *Id.* at 763-64.

[14] The State concedes Mitchell’s proposed instruction is a correct statement of the law and was supported by the evidence presented at trial. However, it claims the instruction was covered by the pattern jury instruction. *See* Appellee’s Br. p. 16. While the pattern instruction covered the part of Mitchell’s proposed instruction about actual versus constructive possession, it did not cover the nuanced concept of non-exclusive possession (which requires the State to present additional circumstances indicating the defendant’s knowledge of the presence of the contraband).

[15] But this doesn’t mean the trial court should have given Mitchell’s proposed instruction. As the State points out, the instruction has some improper parts. For example, the instruction provides “Evidence has been presented that other individuals may have visited the Defendant’s home. As such, possession of those premises was not exclusive to him/her.” This part gives the impression that the judge had already determined Mitchell didn’t have exclusive possession of the house, which was a question for the jury. The instruction also gives a non-exhaustive list of circumstances that can be used to determine whether the defendant had knowledge of the presence of the contraband, such as



incriminating statements, attempted flight, and furtive gestures. Jury instructions giving examples have been found to be “misleading” because they “emphasize[] particular factual scenarios, thereby minimizing other potentially relevant evidence.” *Spencer v. State*, 129 N.E.3d 209, 212 (Ind. Ct. App. 2019), *trans. denied*; *see also Batchelor v. State*, 119 N.E.3d 550, 563 (Ind. 2019) (holding that language in appellate opinions is not necessarily proper language for a jury instruction “especially” where the instruction “is rooted in reasoning found in a sufficiency-of-the-evidence case”). The trial court did not err by rejecting Mitchell’s proposed jury instruction.

[16] Affirmed

Crone, J., and Altice, J., concur.