

MEMORANDUM DECISION

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IN THE Court of Appeals of Indiana

Lakesha Mitchell,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff



February 14, 2024

Court of Appeals Case No.
23A-CR-1449

Appeal from the Marion Superior Court

The Honorable Cynthia L. Oetjen, Judge
The Honorable Anne M. Flannelly, Magistrate

Trial Court Cause No.
49D30-2203-F4-6568

Memorandum Decision by Judge Bradford
Chief Judge Altice and Judge Felix concur.

Bradford, Judge.

Case Summary

- [1] Lakesha Mitchell was charged with Level 4 felony possession of a firearm by a serious violent felon (“SVF”) after a firearm was discovered in the apartment she shared with her mother. At the conclusion of phase one of a bifurcated trial, the jury determined that Mitchell had knowingly possessed a firearm. Before the start of the second phase of the trial, Mitchell admitted to having a prior conviction for armed robbery, which qualified her as an SVF. The trial court subsequently sentenced Mitchell to seven years of incarceration.
- [2] Mitchell contends that several alleged errors warrant reversal. Specifically, Mitchell alleges that the trial court abused its discretion in allowing her ankles to be shackled during trial, the State misstated the law during voir dire, the trial court abused its discretion in admitting certain evidence, and the manner in which the trial court polled the jury after it had reached its verdict subjected her to harm. We affirm.

Facts and Procedural History

- [3] In March of 2022, Mitchell was living at her mother’s apartment in Indianapolis while serving a sentence in community corrections. As a condition of her community-corrections placement, Mitchell was not allowed to possess firearms. On March 9, 2022, Indianapolis Metropolitan Police Department (“IMPD”) officers, including Detective Jeremy Torres, went to Mitchell’s residence and knocked on the door. No one answered for “over five

minutes.” Tr. Vol. III p. 150. While the officers were waiting, they heard noises coming from inside the apartment that “sounded like movement, as if furniture was being moved.” Tr. Vol. III p. 150. Mitchell eventually answered the door after an officer “place[d] a call to [her]” and instructed her to “come to the door.” Tr. Vol. III p. 147.

[4] Once inside the apartment, officers encountered Mitchell, her brother Charles Mitchell, and her cousin Chais Rudolph. Mitchell lived in the apartment, but Charles did not. After completing a protective sweep of the apartment, officers received a search warrant. In a bedroom immediately above the front door, officers found a “.40 caliber Glock magazine” on the bed, a handgun box in the closet, a tax document belonging to Mitchell, a pair of jeans with Mitchell’s identification in the pocket, and a black hat that was later connected to Mitchell. Tr. Vol. III p. 154. Officers also found a “.40 caliber Glock handgun” wrapped in a t-shirt in an air vent in the bedroom. Tr. Vol. III p. 163. Mitchell denied that the bedroom in question was hers, claiming that she stayed in an adjacent bedroom. However, no evidence was recovered from the adjacent bedroom “that would link [Mitchell] to that bedroom.” Tr. Vol. III p. 155.

[5] The firearm that was recovered from the air vent had an extended magazine that was longer than “would typically come with that firearm.” Tr. Vol. III p. 165. It also had a distinctive “metal clip that was bolted to the back of it and ran down the side of the slide.” Tr. Vol. III p. 166. Detective Torres and

Officer Zachary Mauer both subsequently testified that they had never seen this type of clip attached to a Glock handgun or any comparably large handgun.

[6] In completing their investigation, officers found that Mitchell had posted pictures taken in the apartment on Facebook on two occasions in January of 2022 where the “distinctive clip” was attached to her pants and an extended ammunition magazine appeared to be protruding from her pocket. Tr. Vol. III p. 182. In one of the pictures, Mitchell had been wearing the jeans and hat that had been found in the same bedroom as the firearm.

[7] After finding the firearm, officers questioned Rudolph, Charles, and Mitchell. Charles initially “denied [that] the gun belong[ed] to him.” Tr. Vol. III p. 187. After Mitchell had been interviewed and officers had determined that she would be arrested, Mitchell spoke to Charles. Charles then asked to speak to an officer, at which time he recanted his prior denial that the firearm belonged to him and stated that he had hidden it in the air vent after he heard police knock on the door. Charles claimed that he had hidden the firearm because he had purchased it “off the streets[,]” did not know its history, and did not know from whom he had bought it. Tr. Vol. III p. 222. Charles also claimed that he had acquired the tan grip that was on the firearm “out the street.” Tr. Vol. III p. 207. Charles was not legally restricted from possessing firearms but claimed at trial that he had thought he might have been in light of his prior legal troubles.

[8] On March 10, 2022, the State charged Mitchell with Level 4 felony unlawful possession of a handgun by a SVF, Level 6 felony escape, and Class B

misdemeanor possession of marijuana. The State later dismissed the escape and marijuana-possession charges. Mitchell's case proceeded to a bifurcated trial.

[9] Prior to the first phase of trial, Mitchell filed a motion *in limine*, seeking to exclude (1) any evidence which would tend to show either that she had been serving a placement in community corrections or that she was restricted from possessing a firearm at the time of her arrest, (2) evidence suggesting that she had possessed a firearm approximately a month prior to her arrest, and (3) any evidence relating to her criminal history. The trial court granted Mitchell's motion in part, denied it in part, and found that if Charles testified that he had been in possession of the firearm, it would open the door to evidence demonstrating that Mitchell could not possess a firearm given Charles's previous denial. The trial court also denied Mitchell's request to exclude a statement that she had made in a jail telephone call indicating that she was concerned the case might be "going Fed." Tr. Vol. III p. 126.

[10] On the morning of trial, the bailiff explained that Mitchell would be wearing shackles pursuant to a policy of the Marion County Sheriff's Department and that the shackles were "insulated" to "avoid any signs" of their presence. Tr. Vol. III p. 30. Mitchell objected to the use of shackles. In permitting the use of shackles, the trial court verified that the shackles were not causing Mitchell any pain and noted that "there is a wooden structure around her, so there is no way that the jury would see that she has shackles on" and "she is not being treated in any unique way." Tr. Vol. III p. 30.

- [11] Mitchell objected to certain statements made by the State during voir dire regarding constructive possession. The trial court overruled Mitchell's objection and properly instructed the prospective jurors on the definitions of actual and constructive possession.
- [12] During trial, Mitchell requested a mistrial after Detective Torres testified regarding his experience as a police officer and his job responsibilities as a member of the IMPD Violent Crimes Task Force prior to testifying about the specifics about the search that led to Mitchell's arrest. The trial court denied Mitchell's request for a mistrial. Mitchell also objected to the admission of other evidence that she claimed was unduly prejudicial because it had referenced her prior bad acts, including statements by Mitchell which tended to prove that she had been aware of the firearm and had attempted to convince Charles to recant his prior denial that the firearm belonged to him. The trial court admitted the challenged evidence over Mitchell's objection.
- [13] After the jury returned a guilty verdict, the trial court polled the jury. One juror expressed some confusion and, after a colloquy between the trial court and the juror, the trial court sent the jury back for further deliberations. Mitchell requested a mistrial, arguing that the colloquy between the juror and the trial court had tainted further jury deliberations. The trial court denied Mitchell's request for a mistrial. After additional deliberations, the jury returned a second guilty verdict. The trial court polled the jury, after which it determined that the jury's verdict was unanimous.

[14] Mitchell then admitted to being an SVF. The trial court accepted Mitchell's admission and sentenced her to seven years of incarceration.

Discussion and Decision

I. Shackles

[15] Mitchell contends that the trial court "abused its discretion in declining to remove the metal shackles from [her] legs at her jury trial." Appellant's Br. p. 41.

It is clearly established under both state and federal law that a criminal defendant cannot be forced to appear in either jail clothing or shackles during the guilt or penalty phase of trial without an individualized finding that the defendant presents a risk of escape, violence, or disruption of the trial. An accused should not be compelled to go before the jury dressed in jail clothes or shackled because: (1) the risk of diluting the presumption of innocence, (2) the risk that the jury might find guilt based on these extraneous influential factors rather than probative evidence subject to the rigors of cross-examination, and (3) the shackles could hinder the right to participate with counsel.

Ritchie v. State, 875 N.E.2d 706, 718 (Ind. 2007) (internal citations omitted).

The Indiana Supreme Court has held that unnecessary shackling is "inherently prejudicial and, if proper objection is made, require[s] reversal *unless* the State establishes beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict." *Stephenson v. State*, 864 N.E.2d 1022, 1029 (Ind. 2007) (cleaned up, brackets and emphasis added).

[16] The record is clear that the jury was not aware that Mitchell had been wearing shackles at any point during the trial. As the trial court noted, Mitchell could stand without impairment and “there [was] a wooden structure around her, so there is no way that the jury would see that she ha[d] shackles on.” Tr. Vol. III p. 30. The State argues that “the trial court did not abuse its discretion in allowing [Mitchell] to remain shackled because the evidence shows that the jury was entirely unaware of the shackles.” Appellee’s Br. p. 39. While we acknowledge that Mitchell has a constitutional interest in appearing before the jury free of shackles, the record in this case makes it clear that the shackles did not restrict Mitchell’s ability to stand or communicate with counsel and were not visible to the jury. Given that the jury was not aware of the shackles at any point during the trial, the State has established beyond a reasonable doubt that the decision to require Mitchell to wear shackles did not contribute to the verdict in this case. *See Stephenson*, 864 N.E.2d at 1029. We therefore cannot say that the trial court abused its discretion in this regard.

II. Voir Dire

[17] Mitchell next contends that the “trial court erred by allowing the state to misinform prospective jurors on the elements of constructive possession during voir dire.” Appellant’s Br. p. 16.

Trial courts have broad discretionary power in regulating the form and substance of voir dire. We thus review a trial court’s management of voir dire for manifest abuse of discretion, requiring a showing of prejudice to warrant reversal.

The purpose of voir dire is to ascertain whether prospective jurors can render an impartial verdict based upon the law and the evidence, and weed out those who show they cannot be fair to either side. Thus, the parties may inquire into jurors' biases or tendencies to believe or disbelieve certain things about the nature of the crime itself or about a particular line of defense.

Gibson v. State, 43 N.E.3d 231, 237–38 (Ind. 2015) (internal citations and quotations omitted).

[18] We need not determine whether the State had misstated the law relating to constructive possession during its questioning of prospective jurors, however, because the record reveals that the prospective jurors were properly instructed on the elements of constructive possession. Specifically, the trial court instructed the jury that

The word possess means to own or to exert control over. The word possession can take on several different 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 give[n] 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 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, and either alone or jointly with others.

To establish constructive possession, the State must prove a person had both the capability and the intent to maintain dominion and control over the contraband. The capability requirement means the State must show a person was able to reduce the contraband to his or her personal possession. The intent requirement means the State must show a person had knowledge of the contraband's presence. Knowledge may be inferred from additional circumstances tending to show a person's knowledge of the presence of the contraband. Examples of such circumstances include, but are not limited to, incriminating statements made by a person, attempted flight or furtive gestures, location of substances like drugs and settings that suggest manufacturing, proximity of the contraband to a person, contraband within a person's plain view, and mingling of the contraband with items owned by the person.

Tr. Vol. III pp. 81–82. Mitchell concedes on appeal that the trial court's instruction was a correct statement of the law. The record also reveals that the trial court subsequently instructed the jury, without objection, on the elements of constructive possession in both its preliminary and final instructions.

[19] “When the jury is properly instructed, we will presume they followed such instructions.” *Weisheit v. State*, 26 N.E.3d 3, 20 (Ind. 2015) (internal quotation omitted). The record demonstrates that the trial court properly instructed the jury on the elements of constructive possession at least three times, as well as informed it that the court's instructions were the “best source in determining the law.” Appellant's App. Vol. II p. 110. Nothing in the record even suggests that the jury did not follow the trial court's correct instructions. As such, even assuming that the State had made imprecise arguments relating to the elements

of constructive possession during voir dire, the trial court did not abuse its discretion in regulating the form and substance of voir dire.

III. Denial of Request for Mistrial During Detective Torres's Testimony

[20] Mitchel contends that the trial court abused its discretion in denying her request for a mistrial during Detective Torres's testimony outlining his then-current assignment at IMPD. A mistrial is an extreme remedy and to "prevail on appeal from the denial of a motion for mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that [s]he was placed in a position of grave peril to which [s]he should not have been subjected." *Turner v. State*, 216 N.E.3d 1179, 1184 (Ind. Ct. App. 2023) (internal quotation omitted).

The decision to grant or deny a motion for a mistrial lies within the discretion of the trial court. The trial court's determination will be reversed only where an abuse of discretion can be established. To prevail, the appellant must establish that [s]he was placed in a position of grave peril to which [s]he should not have been subjected.

Randolph v. State, 755 N.E.2d 572, 575 (Ind. 2001) (internal citations omitted).

[21] When the State was attempting to establish Detective Torres's credentials at the beginning of his testimony, Detective Torres testified that he had joined IMPD in 2014. Detective Torres then detailed the positions that he had held since 2014, up to his then-current position with IMPD, testifying as follows:

So I was a patrol officer on East District, where I responded to calls of other police officers. I was a field training officer where I was in charge of training new recruits to IMPD. Then, I was on Flex Team, which is a proactive unit where we were responsible for proactively hitting hot spots in the areas where a lot of crime and violence has occurred. Then after that, I was with our Violence Reduction Team, which is kind of the same, really, as the Flex Team. We are a uniformed component. We proactively would go after violent offenders, hit hot spots on the East District in the City of Indianapolis. And then most recently, I'm with the Violent Crimes Task Force, where we are in charge of investigating crimes involving firearms, narcotics, and going after crime contributors in the City of Indianapolis.

Tr. Vol. III p. 145. Mitchell objected to Detective Torres's testimony and requested a mistrial, claiming that Detective Torres's testimony had suggested that she was a violent criminal. The trial court denied Mitchell's request for a mistrial and the State continued to question Detective Torres about his training and qualifications as a police officer.

[22] We have previously concluded that a trial court did not abuse its discretion in admitting similar evidence. *Echeverria v. State*, 146 N.E.3d 943, 947–48 (Ind. Ct. App. 2020), *trans. denied*. In *Echeverria*, the defendant objected to the admission of Officer Clayton Powell's response to the State's question regarding what the IMPD "Flex" team, the team that executed the underlying search and arrest, in which Officer Powell replied that the "Flex" team is "a proactive unit tasked with reducing violent crime, going after targeted violent offenders involved with firearms, narcotics." *Id.* at 947 (cleaned up). In concluding that the trial court had not abused its discretion in admitting the challenged evidence, we observed

that Officer Powell had “simply answer[ed] the question of what he does for a living and the purpose of the flex team ... [and i]t was important for the jurors to understand Officer Powell’s position and the work that the ‘Flex’ team does in these types of situations.” *Id.* at 948 (cleaned up, brackets added). We noted that Officer Powell had made but a single remark about his current job responsibilities and had not ever directly characterized the defendant as violent before stating that “we have a difficult time believing that Echeverria was unduly prejudiced by this lone statement.” *Id.*

[23] We agree with the State that “[h]ere, the challenged testimony is not meaningfully different than the testimony at issue in *Echeverria* and did not support [Mitchell’s] extraordinary request for a mistrial.” Appellee’s Br. p. 32. Like Officer Powell in *Echeverria*, Detective Torres “was simply answering the question of what he does for a living” when he described his placement and responsibilities on the violent crimes task force. *Echeverria*, 146 N.E.3d at 948. He did not make any direct allegation or statement indicating that Mitchell was a violent offender. While Mitchell argues that Detective Torres’s testimony placed her in grave peril as it could have supported the inference that she was a violent offender, we cannot say that Detective Torres’s single statement about his then-job responsibilities would reasonably support such an inference. The trial court, therefore, did not abuse its discretion in denying Mitchell’s request for a mistrial.

IV. Admission of Evidence

[24] Mitchell also contends that the trial court abused its discretion in admitting the following evidence at trial: (A) evidence that Mitchell was serving a sentence through community corrections at the time of the instant offense, (B) evidence that Mitchell could potentially face a federal gun charge, and (C) evidence suggesting that Mitchell had possessed the firearm in question in the past.

Generally, a trial court's ruling on the admission of evidence is accorded a great deal of deference on appeal. Because the trial court is best able to weigh the evidence and assess witness credibility, we review its rulings on admissibility for abuse of discretion and only reverse if a ruling is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights.

Hall v. State, 36 N.E.3d 459, 466 (Ind. 2015) (internal quotations omitted).

[25] Under Evidence Rule 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith but may, however, be admissible to prove motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In order to admit 404(b) evidence, the court must (1) determine that the evidence is relevant to a matter at issue other than the defendant's propensity to commit the charged act, and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. This balancing is reviewed for an abuse of discretion. In addition, otherwise inadmissible evidence may become admissible where the defendant opens the door to questioning on that evidence.

Jackson v. State, 728 N.E.2d 147, 151–52 (Ind. 2000) (cleaned up).

A. Placement in Community Corrections

[26] Mitchell argues that the trial court abused its discretion in admitting evidence referring to her then-placement in community corrections, namely a telephone call from jail (“the jail call”) in which Mitchell referred to the fact that she had been serving a sentence in community corrections at the time of her arrest in this case. During the jail call, Mitchell indicated that, after hearing the police knock on her door, she had received a telephone call and had believed it was community corrections calling her, stating “[t]hat’s how I knew it was some bulls[****], so I didn’t answer. They called back, I said hello. They said this is community corrections, you need to come down.” Tr. Vol. III p. 16. In challenging the admission of her statements in the jail call, Mitchell had requested that the recording be redacted to eliminate any reference to community corrections because

[t]he fact that [community corrections was] calling her personal cell phone, that would bias the jury against [Mitchell]. It would tell them that she is involved, whether she has a pending case, a prior conviction. It would tell the jurors that she has been in trouble in some way in the past, in which a law enforcement officer or community corrections officer is call her.... I don’t think that [Mitchell] would have a fair trial if the jurors were to hear that she was on community corrections, because it goes to her prior convictions, or her status in general.... As I have stated, they could redact it in order to show that she is aware that police are at the door, and that she went downstairs at some point, but didn’t immediately go downstairs, which is what they are arguing they are using it for, is that she had this time to go do things. However, by just saying the police are there. I went to the bathroom. I am not going to unlock the door. That is the

same purpose, I think it gets the same effect that the State says they are trying to use it for.

Tr. Vol. III pp. 118–19.

[27] The State argued that Mitchell’s statements should not have been redacted because the jail call would not “make sense” without them. Tr. Vol. III p. 119. The State also argued that Mitchell’s acknowledgment that she was serving a placement in community corrections was relevant to show her motive for hiding the firearm in the air vent. The State points to our opinion in *Kirby v. State*, 774 N.E.2d 523, 533 (Ind. Ct. App. 2002), *trans. denied, overruled on other grounds*, for the proposition that evidence of a defendant’s state of mind is relevant to prove why they acted in a particular manner. The State also points to the Indiana Supreme Court’s decision in *Fry v. State*, 748 N.E.2d 369, 372 (Ind. 2001), for the proposition that “[e]vidence of motive is always relevant in the proof of a crime.”

[28] The trial court denied Mitchell’s request to redact the jail call and allowed for its admission in its entirety. With respect to Charles’s testimony, the trial court determined that given Charles’s prior inconsistent statements regarding his possession of the firearm, it “would open the door to evidence to show that [Mitchell] was prohibited from possession of a firearm” if Charles were to testify that it was his firearm. Tr. Vol. III p. 200. This scenario occurred with Charles acknowledging that he had originally claimed that the firearm in question had not belonged to him before claiming that it did.

[29] Mitchell claims that evidence demonstrating that she had been serving an unrelated sentence in community corrections was unfairly prejudicial and the prejudice “far outweighed any probative value.” Appellant’s Br. p. 33. We cannot agree. The firearm in question was found hidden in an air vent after it had taken Mitchell and Charles an extended amount of time to open the door after police first knocked. While waiting for someone to open the door, officers had heard noises consistent with movement, and some of Mitchell’s possessions were found intermingled in the bedroom near the “.40 caliber Glock magazine” and handgun box. Tr. Vol. III p. 154. Mitchell’s statements in the jail call are relevant to prove that she had been aware that police had been at the door and would support the inference that she had delayed in answering the door in order to hide the firearm. Charles’s inconsistent statements also opened the door to evidence establishing that he had had a motive to change his testimony and lie to police, *i.e.*, the fact that he could have legally possessed a firearm coupled with his knowledge that Mitchell could not have, due to her then-present placement in community corrections. The probative value of the challenged evidence outweighed the potential prejudice to Mitchell. As such, we cannot say that the trial court abused its discretion in this regard. *See Jackson*, 728 N.E.2d at 152 (providing that the balancing of the probative value versus the prejudice stemming from 404(b) evidence is reviewed for abuse of discretion).

B. Potential Federal Charge

[30] The State also sought to admit statements that Mitchell had made during a telephone call from jail in which she had indicated that she had told Charles

that she would be “going Fed” if she got arrested and that after the conversation, Charles “change[d] his story” to say that the firearm in question was his. Tr. Vol. III p. 124. Mitchell points to the Indiana Supreme Court’s decision in *Fox v. State*, 497 N.E.2d 221, 224 (Ind. 1986), in which the Court held that “[e]vidence of prior offenses committed by a defendant may not be introduced either to establish guilt of the crime charged or to show the defendant’s propensity to commit crime.” However, the Indiana Supreme Court proceeded to outline the following exception, “[p]rior offenses are admissible as substantive evidence when a common scheme or plan, intent, or motive is established between the prior offense and the charged crime.” *Id.*

[31] Mitchell’s statement about “going Fed” is relevant to prove her motive for convincing Charles to claim that the firearm in question belonged to him. As such, we agree with the State that it was “probative to the jury’s assessment of whether [Mitchell] possessed the gun and to assess the veracity of Charles’[s] claim to the gun” as it showed that Mitchell was “highly concerned that she would be found in possession of the gun and can be readily interpreted as her recounting a request that he brother claim possession of” it. Appellee’s Br. p. 34. We also agree with the State that Mitchell’s limited reference to the federal government falls short of being an explicit statement that the federal government’s “interest would be based on prior bad acts.” Appellee’s Br. p. 34. Any potential prejudice resulting from Mitchell’s statement about possibly “going Fed” is outweighed by the probative value of the evidence. The trial court, therefore, did not abuse its discretion in this regard.

C. Evidence Suggesting Prior Possession of Firearm in Question

[32] Mitchell also argues that the trial court abused its discretion in admitting photographs that had been posted to her Facebook account on January 25, 2022, which the State argued tended to show that Mitchell had previously possessed the firearm in question. Mitchell asserts that the challenged photographs “improperly prejudice[d]” the jury against her, claiming that it was speculative at best as to whether the firearm in the photographs was the firearm she had been charged with possessing. Appellant’s Br. p. 39.

[33] Detective Torres testified about the photographs stating, “there’s a distinctive clip you can see that’s the same -- that’s -- the very distinctive clip that’s clipped on her pocket holding the item in her -- in her pocket” and that he had never “seen another Glock with a clip” in “well over a hundred” other firearms investigations. Tr. Vol. III pp. 182, 184–85. He further testified that the item protruding from Mitchell’s pocket seemed to have had an extended magazine, similar to the extended magazine connected to the firearm in question. Detective Torres also testified that the jeans that Mitchell had been wearing in the photographs were the “same jeans that were photographed in the bedroom that had her identification card in them” and the hat that Mitchell had been wearing in the photographs was found on top of the bed in the bedroom when police executed the search warrant. Tr. Vol. III p. 182.

[34] When constructive possession is asserted, the State must demonstrate the defendant’s knowledge of the contraband. This knowledge may be inferred from either the exclusive dominion and control over the premise containing the contraband, or,

where as [*sic*] here, the control is non-exclusive, with evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. Proof of dominion and control of contraband has been found through a variety of means: (1) incriminating statements 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.

Ericksen v. State, 68 N.E.3d 597, 601 (Ind. Ct. App. 2017) ([internal citations omitted](#)), *trans. denied*. Even assuming that the clip and the apparent extended magazine depicted in the photographs are not the same as were found connected to the firearm in question, the pictures were relevant to prove that the firearm had been recovered from a bedroom containing Mitchell's personal belongings, suggesting that it had been comingled with other items owned by Mitchell. In fact, at trial, Mitchell had claimed that she did not use the bedroom from which the firearm had been recovered, but the presence of her personal property in the room suggests otherwise. The trial court did not abuse its discretion in admitting the challenged photographs.

V. Denial of Request for Mistrial During Polling of the Jury

[35] Mitchell contends that the trial court abused its discretion in denying her request for a mistrial after the trial court polled the jury regarding their verdict. Again,

[t]he decision to grant or deny a motion for a mistrial lies within the discretion of the trial court. The trial court's determination

will be reversed only where an abuse of discretion can be established. To prevail, the appellant must establish that [s]he was placed in a position of grave peril to which [s]he should not have been subjected.

Randolph, 755 N.E.2d at 575 (internal citations omitted).

[36] After the jury returned its guilty verdict, the trial court polled the jury, asking each juror “whether or not it’s your individual finding that [Mitchell], did knowingly possess a firearm.” Tr. Vol. IV p. 55. Each of the jurors answered in the affirmative, except for juror number ten (“Juror 10”), who answered “[a]ccording to the Court’s definition, yes.” Tr. Vol. IV p. 55. As the trial court was preparing to release the jury, defense counsel requested that the trial court “individually voir dire [Juror 10,]” stating that “[h]is answer’s concerning that he – he didn’t seem – he kind of gave a weird response. He said yes, according to the instructions, so it sounds like he’s hesitating, and I want to ask him what” he meant. Tr. Vol. IV p. 56. The trial court questioned Juror 10, who reiterated that “[a]ccording to the definition, she definitely was in knowing possession of a firearm.” Tr. Vol. IV p. 57. After the trial court indicated that Juror 10’s response demonstrated that the jury had not reached a unanimous verdict, Juror 10 responded “yes, we do. We have a – yes. We have a unanimous decision, yes.” Tr. Vol. IV p. 57. After defense counsel asked if the court would “individually question him,” the trial court informed Juror 10 that “[t]he issue for the Court is whether it’s your finding that [Mitchell] did knowingly possess a firearm.” Tr. Vol. IV p. 57. Juror 10 responded “[t]he answer is yes.” Tr. Vol. IV p. 57.

[37] Counsel for both Mitchell and the State expressed concern for whether the verdict was unanimous, leading the trial court to engage in the following exchange with Juror 10:

THE COURT: All right, [Juror 10]. I mean, this is important, so it needs to be clear. And I'm not trying to pick on you, but this has to be clear to all of us.

JUROR: Okay.

THE COURT: Because you made some statements that were confusing to some of us. So you heard all of the instructions, both preliminary and final.

JUROR: Yes.

THE COURT: So you were aware that there were two stages to this case.

JUROR: Uh-huh.

THE COURT: And that in the first stage, the State had to prove beyond a reasonable doubt that Lakesha Mitchell did knowingly possess a firearm. And the Court defined for you what a firearm was, what knowingly meant –

JUROR: Right.

THE COURT: – what possession was, what beyond a reasonable doubt meant.

JUROR: The Court defined possession, and I, [Juror 10], agree she was knowingly in possession of a firearm according to the Court's definition of possession.

THE COURT: All right.

So you have no hesitancy, no one's –

JUROR: No one's telling me nothing.

THE COURT: – no one's putting any pressure on you –

JUROR: Not at all.

THE COURT: – to say that you agree with this finding.

JUROR: Nope.

THE COURT: This is your free and voluntary finding.

JUROR: Yes.

THE COURT: And do you have any questions about saying

that?

JUROR: No.

THE COURT: You have no hesitancy?

JUROR: No hesitancy.

Tr. Vol. IV pp. 58–60. Upon further questioning by defense counsel, it became clear that while Juror 10 did not feel that the State had proven actual possession beyond a reasonable doubt, he did feel the evidence was sufficient to prove constructive possession. When the trial court indicated that it would send the jury back for further deliberations, Juror 10 indicated that he had “kept the same answer the entire time.... The answer’s yes.” Tr. Vol. IV p. 62.

[38] After the trial court sent the jury back for further deliberations, Mitchell requested a mistrial, arguing that a mistrial was necessary “because the jury now knows about the second phase, and that she has a prior conviction that doesn’t make her eligible to have a firearm.” Tr. Vol. IV p. 62. The trial court denied Mitchell’s request for a mistrial, stating

the Defense stated they felt there should be a mistrial because of my comments to the jury. And I said to the jury, after I took their finding, that there was to be a second phase as to her status, which would make it illegal for her to possess a firearm. I did not describe her as a serious violent felon. I did not explain what that was. And in my view, those comments are not inconsistent with the very instructions they were given, in final and preliminary, as far as the fact that there were two phases and what would be decided at each phase.

Tr. Vol. IV p. 63. Mitchell then made a second request for a mistrial, arguing

that based on that confusion of [Juror 10], the rest of the jurors had pretty expressive reactions and expressed upset with him every time he said, not beyond a reasonable doubt, and making statements that were not clear and equivocal, if I can say it correctly, that he was finding her guilty. Every time he made a statement about being confused, not sure, saying, not beyond a reasonable doubt, there was an expression made. And ... so now our fear is they go back there, every time the Court said that they'd go back there ... they all got even more upset.

So now at this point, if that truly wasn't his verdict, and he's back there right now, and he's feeling like he's the reason we're all held up right now, he's under undue influence to now find her guilty[.]

Tr. Vol. IV p. 64. The State responded "Judge, I think it's pretty speculative to assume there's going to be any undue influence placed on Juror 10. It sounded to me like he's confused, and that they need to deliberate more." Tr. Vol. IV p. 65. In denying the second request for a mistrial, the trial court stated

I do agree, that it's speculative as to whether or not there's going to be an undue influence. We don't know what they're going to come back with. My impression from listening to him and listening again was that he was confused about the difference between actual and constructive possession. I think what he was saying was the State never proved anybody actually possessed this firearm.... They never proved actual possession.

But if you look at all the definitions, he agreed with the finding. So I think that's what the confusion was. I'm clearly not going to eliminate him as a juror because I don't find that he's not cooperating with the jury. I don't have evidence of that. I think there is some confusion.

Tr. Vol. IV p. 66.

[39] When the jury returned a second guilty verdict, the trial court re-polled the jury, stating,

I'm going to poll the jury and ask each one of you to answer my question yes or no as to whether or not this is your individual finding. And by saying, yes, you're saying that this is your finding, that you find Lakesha Mitchell did knowingly possess a firearm, and that possession does not have to be actual; it can be constructive. You know all the instructions that you've been given. If you say yes, you're telling me that this is your free and voluntary judgment, that no one has pressured you to agree with the other jurors.

Tr. Vol. IV pp. 69–70. Each juror, including Juror 10, answered in the affirmative.

[40] Mitchell cites to our opinion in *Jelks v. State*, 720 N.E.2d 1171, 1173 (Ind. Ct. App. 1999), to support her assertion that the trial court engaged in an improper “extended colloquy with Juror 10 in front of the other jurors.” Appellant’s Br. p. 27. In *Jelks*, the trial court had engaged a dissenting juror in an extended colloquy, during which the trial court discussed the elements of the crime that the State had been required to prove in front of the other jurors. 720 N.E.2d at 1173. The dissenting juror asked the trial court what would happen if the jury could not come to a unanimous decision and indicated that she had reasonable doubt as to whether the defendant had committed the charged offense. *Id.* The trial court then sent the jury back to the jury room for further deliberations. *Id.*

In concluding that the trial court had erred in engaging in its colloquy during its polling of the jury, we stated that

[t]he statute clearly provides that the remedy for juror dissent that arises during the polling procedure is to return the jury for deliberations, not engage in an extended colloquy about the elements of the crime, the State's burden, or the role of a juror. By doing so, the trial court tainted further deliberations and placed the defendant in a position of grave peril.

Id. at 1174.

[41] This case is distinguishable from *Jelks*. In *Jelks*, the trial court could be said to have crossed the line from simply polling the jury to providing individualized legal definitions and instructions to a single juror. *Id.* at 1173–74. Here, while the trial court engaged in a colloquy with Juror 10, the trial court did not discuss the elements of the crime or the role of a juror. The trial court only referenced the State's burden in response to Juror 10's statements relating to what he believed the State had proven and what he believed it had not. In making his statements to the trial court, Juror 10 demonstrated some confusion regarding the concepts of actual and constructive possession. Juror 10 consistently indicated that while he did not feel that the State had proven actual possession, he was steadfast in his belief that, pursuant to the trial court's instruction regarding constructive possession, Mitchell was guilty. In polling Juror 10, the trial court did not reinstruct him on the concepts of actual and constructive possession, but rather merely indicated that the jury would be sent

back for further deliberations since it did not appear that it had reached a unanimous verdict.

[42] As we stated above, a mistrial is an extreme remedy and to “prevail on appeal from the denial of a motion for mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that [s]he was placed in a position of grave peril to which [s]he should not have been subjected.” *Turner*, 216 N.E.3d at 1184 (internal quotation omitted). Mitchell claims that the colloquy “had a probable persuasive effect not only on Juror 10 but also on the other jurors, who watched with visible annoyance and exasperation.” Appellant’s Br. p. 28. We cannot agree. Any effect the colloquy had on any member of the jury is purely speculative. Further, unlike in *Jelks*, it does not appear from the record that the trial court’s statements to Juror 10 tainted further jury deliberations or had any probable effect on the jury’s ultimate verdict. The jurors, including Juror 10, were consistent in their determination that Mitchell had constructively possessed the firearm. Mitchell has failed to convince us that she had been subjected to grave peril as a result of the trial court’s polling of the jury. The trial court, therefore, did not abuse its discretion in denying Mitchell’s request for a mistrial.

[43] The judgment of the trial court is affirmed.

Altice, C.J., and Felix, J., concur.

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