MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

J. Clayton Miller
Jordan Law, LLC
Richmond, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Courtney Staton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Diyante Dickens,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 13, 2022

Court of Appeals Case No. 21A-CR-1410

Appeal from the Wayne Circuit Court

The Honorable David A. Kolger, Judge

Trial Court Cause No. 89C01-2004-F2-7

Brown, Judge.

[1] Diyante Dickens appeals his convictions for possession of methamphetamine as a level 4 felony, resisting law enforcement as a class A misdemeanor, and false informing as a class B misdemeanor. He asserts that the traffic stop was inconsistent with Article 1, Section 11 of the Indiana Constitution and the evidence was insufficient to sustain his conviction for possession of methamphetamine as a level 4 felony. We affirm.

Facts and Procedural History

[2] On April 16, 2020, Wayne County Sheriff's Deputy Gabriel Ward observed Brittany Snider, who he knew had a previously-suspended driver's license, drive a vehicle and pull into a gas station. Deputy Ward approached his vehicle. Snider began to exit it, and Deputy Ward told her to remain in the vehicle. he continued to approach, observed that Dickens was a passenger in the front seat and had his hands down by his waist, and told him to keep his hands on the dashboard. At some point, Dickens told Deputy Ward that his back hurt and that it was difficult for him to reach forward. Snider exited the vehicle, and Deputy Ward told her that her license was suspended, asked her why she was driving, and placed her in handcuffs. She stated that she was cleaning out her mother's car and her mother had been sick. While Deputy Ward was patting down Snider, he again asked Dickens to keep his hands "up there." State's Exhibit 4 at 2:13-2:16. Approximately seventy seconds later, he again asked Dickens to keep his hands on the dashboard. Approximately six seconds later, Deputy Ward asked Dickens to just keep his hands "right there." *Id.* at 3:28-3:31. Deputy Ward observed that Dickens was "[v]ery nervous," not compliant

with his orders to keep his hands where he could see them by placing them on the dashboard, and "kept placing his hands [n]ear his – behind [h]is back in a sense." Transcript Volume III at 59. Centerville Police Sergeant Matthew Wright and Officer Hampton arrived at the scene, and Deputy Ward asked them to detain Dickens and told Dickens to stay right there and the other officers would "get [him] out." State's Exhibit 4 at 3:33-3:35.

[3] Sergeant Wright told Dickens to place his hands on the dash where he could see them, and it took Dickens "a longer time than normal to . . . comply with that order, but he eventually did." Transcript Volume II at 158. Sergeant Wright opened the passenger door and told Dickens that he was going to be detained for safety reasons and needed to step out of the vehicle and face away from him. Dickens took "longer to comply with this," and Sergeant Wright told him three separate times to turn around and face away from him so he could be detained. *Id.* Sergeant Wright "noticed that [] Dickens had taken a wider stance and positioned his left foot ahead of his right foot and kind of kept his body pointed," which he recognized from his training as suggestive of a common fighting stance. *Id.* Sergeant Wright also noticed that Dickens's hands were clenched into fists. Sergeant Wright placed Dickens's hands behind his back while Officer Hampton attempted to handcuff him. Officer Hampton secured Dickens's left hand, but Dickens became very tense, began pulling away, and began pushing back against Sergeant Wright. Sergeant Wright continued to tell Dickens not to resist and that he needed to comply with his order and keep his hands behind his back. "After a couple different times of

pushing away from the vehicle[, Sergeant Wright] had to use all of the strength that [he] had available . . . to try to secure" Dickens against the vehicle. *Id.* at 159. Dickens "overpowered" Sergeant Wright and began to move toward Officer Hampton. *Id.* Sergeant Wright placed his arm around Dickens's neck in a "neck lock position" in order to bring Dickens back towards him and away from Officer Hampton. *Id.* Dickens slipped from Sergeant Wright's grip and tried to enter the vehicle.

[4] Sergeant Wright delivered four to five "closed fist distractionary blows" to Dickens, but Dickens continued to proceed into the vehicle. *Id.* Sergeant Wright was "barely holding onto" Dickens and delivered a knee strike, which was unsuccessful. *Id.* at 160. Sergeant Wright informed Dickens that he would be tased if he did not comply and observed Dickens use "his feet to hook under the side of the" open door and "then formed his body back trying to slam the door shut." *Id.* Sergeant Wright deployed his taser for five seconds.

[5] Dickens crawled out of the vehicle, lay on the ground, and reached with his hand straight out underneath the vehicle. The officers continued to order Dickens to place his hands where they could see them, and Dickens would not "show his right hand whatsoever." *Id.* at 161. Dickens appeared to be shaking and stated that he could not stop. Defense Exhibit F at 4:55-5:10. One of the officers stated that the taser was "not even on." *Id.* at 5:02-5:04. Deputy Ward crouched down near Dickens and told Dickens to put his hands out and stop resisting. Dickens yelled that the officers were trying to kill him, and Deputy

Ward said: "We're not trying to kill you, buddy." *Id.* at 5:18-5:20. After approximately a minute, the officers handcuffed Dickens and told him to relax.

[6] Wayne County Sheriff's Sergeant Adam Blanton arrived on the scene with his K-9, Ozzy. Dickens initially told Sergeant Blanton his name was Dejuante Dickens, then said it was Diamonte Hariford,[1] gave that name two or three times while Sergeant Blanton placed him in his vehicle, and also gave an incorrect date of birth.

[7] Officer Hampton looked under the vehicle and located a blue headphone case on the ground under the vehicle near the location where Dickens had his right hand. Sergeant Blanton placed the case which contained 25.45 grams of methamphetamine on the rear of the vehicle and completed a K-9 sweep. Ozzy positively indicated to the odor of narcotics. Sergeant Blanton detected the odor of marijuana and retrieved two digital scales from the center console. Officers learned that Dickens had an arrest warrant through Wayne County for carrying a handgun without a license.

[8] On April 17, 2020, the State charged Dickens with: Count I, dealing in methamphetamine as a level 2 felony; Count II, possession of methamphetamine as a level 4 felony; Count III, resisting law enforcement as a class A misdemeanor; and Count IV, false informing as a class B misdemeanor.

[1] The transcript contains multiple spellings for this name.

On April 30, 2021, the State filed a motion to dismiss Count I, and the court later granted the motion.

[9] In May 2021, the court held a jury trial. The State presented the testimony of Sergeant Wright, Sergeant Blanton, and Deputy Ward. Without objection, the court admitted a panoramic video recording of one of the dashboard cameras in Deputy Ward's video as State's Exhibit 4. The court also admitted the same video "just focused on the right side" as Defense Exhibit F. Transcript Volume II at 211. The jury found Dickens guilty as charged. The court sentenced Dickens to an aggregate sentence of eight years.

Discussion

I.

[10] The first issue is whether Dickens's rights under Article 1, Section 11 of the Indiana Constitution were violated. Dickens argues there was no evidence to support any suspicion that he was engaged in criminal activity or that criminal activity involving Dickens was afoot. He asserts that the officers unnecessarily and unreasonably determined he should be handcuffed. He argues it is "not implausible to consider [he] was actually angry by the time he exited the car" and "[m]aybe his fists were clenched" and "[m]aybe his posture was not relaxed." Appellant's Brief at 16. He contends that "[i]t is time to reconsider whether *Terry* stops of mere passengers are consistent with the values embedded in Article I, Section 11 of the Indiana Constitution." *Id.* He asserts that, even if

we find that *Terry* stops continue to be permissible under the Indiana Constitution, we should declare his detention unreasonable.

[11] The State argues that Dickens waived his claim by failing to object to the admission of the evidence at trial on the basis of Article 1, Section 11. It asserts that Dickens failed to raise a claim of fundamental error, his claim is not cognizable under the fundamental error exception, and, waiver notwithstanding, Article 1, Section 11, permits an officer to briefly detain a passenger during a lawful traffic stop to ensure officer safety.

[12] To the extent Dickens is essentially challenging the admission of evidence, generally, we review the trial court's ruling on the admission or exclusion of evidence for an abuse of discretion. *Roche v. State*, 690 N.E.2d 1115, 1134 (Ind. 1997), *reh'g denied*. We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Joyner v. State*, 678 N.E.2d 386, 390 (Ind. 1997), *reh'g denied*. In reviewing the trial court's ruling on the admissibility of evidence from an allegedly illegal search, an appellate court does not reweigh the evidence but defers to the trial court's factual determinations unless clearly erroneous, views conflicting evidence most favorably to the ruling, and considers afresh any legal question of the constitutionality of a search or seizure. *Meredith v. State*, 906 N.E.2d 867, 869 (Ind. 2009). "[T]he ultimate determination of the constitutionality of a search or seizure is a question of law that we consider de novo." *Carpenter v. State*, 18 N.E.3d 998, 1001 (Ind. 2014).

[13] Dickens does not point to the record to indicate that he objected on the basis of Article 1, Section 11 of the Indiana Constitution. Failure to timely object to the erroneous admission of evidence at trial will procedurally foreclose the raising of such error on appeal unless the admission constitutes fundamental error. *Stephenson v. State*, 29 N.E.3d 111, 118 (Ind. 2015). The Indiana Supreme Court has held that, even if evidence was obtained in violation of constitutional protections against unlawful searches and seizures, its introduction at trial "does not elevate the issue to the status of fundamental error that may be raised for the first time on appeal." *Swinehart v. State*, 268 Ind. 460, 466-467, 376 N.E.2d 486, 491 (1978); *see also Covelli v. State*, 579 N.E.2d 466, 471 (Ind. Ct. App. 1991), *trans. denied*. This is consistent with the Court's more recent pronouncement that "the exclusionary rule that prohibits introduction into evidence of unlawfully seized materials is an example of a rule that does not go to the fairness of the trial." *Membres v. State*, 889 N.E.2d 265, 272 (Ind. 2008), *reh'g denied*. In other words, the products of unlawful searches and seizures are not excluded because they are unreliable or immaterial or unduly prejudicial evidence, but only because it is an effective means of deterring improper intrusions into the privacy of all citizens. *Id.*

[14] More recently, in *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010), *reh'g denied*, the Indiana Supreme Court indicated that there may be some occasions when an illegal seizure of evidence may amount to fundamental error. In *Brown*, the Court held that "an error in ruling on a motion to exclude improperly seized evidence is not per se fundamental error." 929 N.E.2d at 207. "Indeed,

because improperly seized evidence is frequently highly relevant, its admission ordinarily does not cause us to question guilt." *Id.* "We do not consider that admission of unlawfully seized evidence ipso facto requires reversal." *Id.* The Court observed that there was no claim of fabrication of evidence or willful malfeasance on the part of the investigating officers and no contention that the evidence was not what it appeared to be and concluded that "[i]n short, the claimed error does not rise to the level of fundamental error." *Id.* There are no such claims in this case. Thus, we cannot say that the admission of the challenged evidence constituted fundamental error in the context of the Indiana Constitution. *See id.*

[15] Even assuming that Dickens did not waive this argument, we cannot say that reversal is warranted. Article 1, Section 11 of the Indiana Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

[16] Although its text mirrors the federal Fourth Amendment, we interpret Article 1, Section 11 of our Indiana Constitution separately and independently. *Robinson v. State*, 5 N.E.3d 362, 368 (Ind. 2014). "When a defendant raises a Section 11 claim, the State must show the police conduct 'was reasonable under the totality of the circumstances.'" *Id.* (quoting *State v. Washington*, 898 N.E.2d

1200, 1205-1206 (Ind. 2008), *reh'g denied*). Generally, "[w]e consider three factors when evaluating reasonableness: '1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs.'" *Id.* (quoting *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005)).

[17] With respect to the degree of suspicion, we observe that, while Dickens phrases the issue as whether a "*Terry* stop of a mere passenger is not consistent with the values embedded in Article I, Section 11 of the Indiana Constitution," he does not challenge the initial stop or argue that Deputy Ward should not have stopped the vehicle driven by Snider whose license had been previously suspended. Appellant's Brief at 5 (footnote omitted). Further, Dickens failed to comply with Deputy Ward's multiple requests to keep his hands on the dashboard, and Deputy Ward observed that Dickens was very nervous. We cannot say that the degree of intrusion into Dickens's privacy was high. Finally, the extent of law enforcement needs was high given Dickens's failure to comply with the multiple requests to keep his hands in view and his actions of becoming very nervous and very tense, clenching his fists, positioning his left foot ahead of his right foot, pulling away, pushing back against Sergeant Wright, entering the vehicle, and remaining partially under the vehicle. We note that Sergeant Wright testified that he used the neck lock to try to bring Dickens away from Officer Hampton and to escort Dickens to the ground because Dickens had the loose handcuff hanging from his left hand and he had

not complied long enough for them to complete a pat-down for weapons. Under the totality of the circumstances, we conclude that the police conduct was reasonable and did not violate Dickens's rights under Article 1, Section 11 of the Indiana Constitution. *See Tawdul v. State*, 720 N.E.2d 1211, 1214, 1217 (Ind. Ct. App. 1999) (observing that the defendant alleged that his arrest was made in violation of Article 1, Section 11 of the Indiana Constitution and holding that "[t]he police may detain the passenger in order to ascertain the situation and to alleviate any concerns the officer has for his or her safety"), *trans. denied*.

II.

[18] The next issue is whether the evidence is sufficient to sustain Dickens's conviction for possession of methamphetamine as a level 4 felony. Dickens argues that Snider could have dropped the methamphetamine under the car when she initially tried to exit the car. He asserts that he did not have control or dominion of the underside of the car. He contends that, while he was briefly and partially under the car after being tased, the officers testified both his fists were clenched and no officer saw any contraband on his person or in his hands when they initially attempted to handcuff him.

[19] When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995), *reh'g denied*. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. *Id.* We will affirm the

conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.* "Elements of offenses and identity may be established entirely by circumstantial evidence and logical inferences drawn therefrom." *Bustamante v. State*, 557 N.E.2d 1313, 1317 (Ind. 1990). On appellate review of circumstantial evidence of guilt, this Court need not determine whether the circumstantial evidence is adequate to overcome every reasonable hypothesis of innocence, but rather whether inferences may be reasonably drawn from that evidence which support the verdict beyond a reasonable doubt. *Id.* at 1318.

[20] Ind. Code § 35-48-4-6.1 provides that "[a] person who, without a valid prescription or order of a practitioner acting in the course of the practitioner's professional practice, knowingly or intentionally possesses methamphetamine (pure or adulterated) commits possession of methamphetamine" and "[t]he offense is a Level 4 felony if . . . the amount of the drug involved is at least ten (10) but less than twenty-eight (28) grams . . . ."

[21] It is well-established that possession of an item may be either actual or constructive. *See Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997), *modified on reh'g*, 685 N.E.2d 698 (Ind. 1997). Constructive possession occurs when a 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.* The capability element of constructive possession is met when the State shows that the defendant is able to reduce the contraband to the defendant's personal possession. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999).

[22] The intent element of constructive possession is shown if the State demonstrates the defendant's knowledge of the presence of the contraband. *Id.* A defendant's knowledge may be inferred from either the exclusive dominion and control over the premises containing the contraband, or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of contraband. *Id.* These additional circumstances may include: "(1) a defendant's incriminating statements; (2) a defendant's attempting to leave or making furtive gestures; (3) the location of contraband like drugs in settings suggesting manufacturing; (4) the item's proximity to the defendant; (5) the location of contraband within the defendant's plain view; and (6) the mingling of contraband with other items the defendant owns." *Gray v. State*, 957 N.E.2d 171, 175 (Ind. 2011). The State is not required to prove all additional circumstances when showing that a defendant had the intent to maintain dominion and control over contraband. *See Gee v. State*, 810 N.E.2d 338, 344 (Ind. 2004) (explaining that the additional circumstances "are not exclusive" and that "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").

[23] The record reveals that Sergeant Wright testified that Officer Hampton looked under the vehicle and discovered "a blue zip up pouch of some sort that was in direct proximity of where [Dickens's] hand was." Transcript Volume II at 176.

During the direct examination of Deputy Ward while the prosecutor was playing the video in State's Exhibit 4, the prosecutor asked if "this is the eventual resting place of this car that you're about to pull over," and Deputy Ward answered affirmatively. Transcript Volume III at 40. When asked if he was "able to see anything that's lying on the ground there prior to driving up," he answered: "I can see that area and it appears nothing is there." *Id.* He also indicated that he did not see anything lying on the ground similar to the blue case that had been admitted into evidence. He testified that his eyes were focused in Snider's direction when she opened the door and began to step out of the vehicle and he did not see anything "come off of her person" or her drop or toss anything. *Id.* at 41. He also testified that he did not see anything come off of Snider when he was dealing with her. When asked if Sergeant Wright said that Dickens "threw it under the car during all the scuffle," he answered affirmatively. *Id.* at 54. We conclude that the State presented evidence of probative value from which a reasonable jury could have determined beyond a reasonable doubt that Dickens was guilty of possession of methamphetamine as a level 4 felony.

[24] For the foregoing reasons, we affirm Dickens's convictions.

[25] Affirmed.

May, J., and Pyle, J., concur.