



Jacqueline N. Gaff appeals her conviction of Possession of a Controlled Substance,<sup>1</sup> a class D felony, presenting the following restated issues for review:

1. Did the trial court properly conduct *voir dire*?
2. Was the search warrant supported by probable cause?
3. Did the trial court commit reversible error in permitting testimony concerning a handgun?
4. Was the evidence sufficient to sustain the conviction?

We affirm.

The facts favorable to the conviction are that on August 13, 2009, the Fort Wayne Police served a search warrant at 2251 Westbrook Drive in Allen County. Gaff was inside the house at the time, and she told the officers that she lived there. Gaff informed them that she slept in the west bedroom on the first floor. Detective Anthony Shefferly searched this bedroom and observed many prescription drugs and over-the-counter medications. He noted that some prescription drugs were stored in over-the-counter-medication bottles. He asked who owned the pills and Gaff replied that the pills belonged to her and Keenan Davis, her roommate. It was an investigation of Davis's activities that led police to seek a warrant to search the Westbrook Drive premises. Police found pills wrapped in cellophane and stored in a Bayer nutritional supplement bottle located on a closet shelf. Subsequent tests revealed that the pills were Lorazepam, a Schedule IV controlled substance.

On August 19, 2009, Gaff was charged with possession of a controlled substance. On

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<sup>1</sup> Ind. Code Ann. § 35-48-4-7 (West, Westlaw through 2010 2nd Regular Sess.).

May 13, 2010, she was convicted as charged following a jury trial. She was sentenced to eighteen months, all of which was suspended, and placed on probation for six months.

1.

Gaff contends the trial court erred in conducting *voir dire*, specifically claiming that the prosecutor engaged in a detailed discussion of the law and the facts as it related to the State's theory of the case. Citing *McCormick v. State*, 437 N.E.2d 993 (Ind. 1982), Gaff contends that "[s]uch inquiry runs the risk or potential for conditioning jurors toward the party's view of the elements of the offense charged." *Appellant's Brief* at 4-5.

"A trial court has broad discretionary power to regulate the form and substance of voir dire." *Ward v. State*, 903 N.E.2d 946, 955 (Ind. 2009). During voir dire, the parties may pose hypothetical questions designed to disclose "the jurors' attitudes towards the offense charged and to uncover preconceived ideas about defenses that the defendant intends to use", so long as they do not suggest prejudicial evidence not adduced at trial. *Adcock v. State*, 933 N.E.2d 21, 26 (Ind. Ct. App. 2010), *trans. denied*.

In this case, the prosecutor questioned the jurors to determine whether they understood the concept of constructive possession. In so doing, the prosecutor began by illustrating the concept of actual possession (e.g., "Just to give you an idea, if I'm holding this pen, I'm in actual possession of it. Would anybody disagree with that?"). *Transcript* at 20. The prosecutor then moved on to examples of constructive possession, utilizing personal property of the prospective jurors, such as a purse brought by a prospective juror but that the juror was not then touching, and a television set located in the prospective juror's home. Nowhere in the prosecutor's remarks do we find allusions to prejudicial evidence not adduced at trial.

*See Adcock v. State*, 933 N.E.2d 21. Inasmuch as the challenged remarks merely probed the prospective jurors' ability to grasp the concept of constructive possession – a concept central to the State's theory of the case – the remarks were not improper and the trial court did not abuse its discretion in overruling an objection thereto.

2.

Gaff contends the search warrant was not supported by probable cause. When called upon to decide whether to issue a search warrant, the issuing magistrate must make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place. *State v. Spillers*, 847 N.E.2d 949 (Ind. 2006). The reviewing court's duty is to determine whether the issuing magistrate had a "substantial basis" for concluding that probable cause existed. *Id.* at 953. A substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the finding of probable cause. *State v. Spillers*, 847 N.E.2d 949. For this purpose, "reviewing court" includes both the trial court ruling on a motion to suppress and an appellate court reviewing that decision. *Id.* at 953. We conduct a de novo review of the trial court's substantial-basis determination, but afford the magistrate's determination significant deference as we focus on whether reasonable inferences drawn from the totality of the evidence support that determination. *State v. Spillers*, 847 N.E.2d 949. Search warrants are presumed to be valid, and the defendant bears the burden of overcoming that presumption. *Ramsey v. State*, 853 N.E.2d 491, 503 (Ind. Ct. App. 2006), *trans. denied*. Doubtful cases are to be resolved in favor of

upholding the warrant. *Id.*

Gaff contends the information in the warrant was provided by an informant whose credibility was not established and thus required corroboration, which Gaff contends was lacking. Also, Gaff contends the warrant was “stale and untimely and could not establish probable cause.” *Appellant’s Brief* at 6.

The probable cause affidavit in question was executed by Detective Shefferly and stated that on May 20, 2009, the Fort Wayne Police Department received information concerning 2251 Westbrook Drive. According to that information, Davis lived there, drove a green minivan, and was dealing narcotics from his residence at that address. On May 28, 2009, Fort Wayne Police conducted surveillance of Keenan’s residence and observed a green minivan leave the residence and drive to a Wal-Greens pharmacy. The green minivan parked near a Mercury Topaz, and the vehicles were together for approximately two minutes before they departed. Police stopped the Topaz and discovered that one of the occupants had a Schedule IV narcotic in his possession. A passenger in the Topaz told police they had come from out of town to purchase pills.

On July 13, 2009, Detective Shefferly met with Samantha Mineweaser, who was under investigation for drug offenses. Mineweaser indicated that she knew Davis and that he lived at 2251 Westbrook Drive. Mineweaser provided an accurate description of Davis and stated that he drove a green minivan. Mineweaser told Detective Shefferly that she had information to the effect that Davis “deals any kind of narcotic that he can get in his possession.” *Appellant’s Appendix* at 14(B). Mineweaser reported that her friend, Lindsley Gaskill, told her that on July 12, 2009, she purchased marijuana from Davis at his residence.

The probable cause affidavit further stated that on July 21, 2009, Detective Shefferly went to the 2251 Westbrook Drive to obtain evidence that may have been discarded in the trash. He removed one trash bag from a trash can that had been placed beside the road and took it to the police department to inspect its contents. He observed a “green, weedy, plant like substance” that field-tested positive for the presence of THC. *Id.* at 14(C).

The foregoing reflects that police were alerted to possible drug activity by Davis at his house on Westbrook Drive on May 20 and conducted surveillance at that address on May 28, when they observed what appeared to be a drug transaction involving Davis. It was not until after this, i.e., July 13, that Detective Shefferly met with Mineweaser, who advised the detective that she had information that Davis was dealing drugs from his house. A trash-pull eight days later resulted in the discovery of marijuana in Davis’s trash from that residence. We conclude that the information provided by Mineweaser was sufficiently corroborated by police surveillance and that, given all the circumstances set forth in the affidavit as recounted above, there was a fair probability that evidence of a crime would be found at 2251 Westbrook Drive. *State v. Spillers*, 847 N.E.2d 949. In so holding, we reject Gaff’s claim that the information provided by Mineweaser, such as it was, was not sufficiently corroborated.

As to the issue of staleness, this court has observed:

Although the age of the information supporting an application for a warrant can be a critical factor when determining the existence of probable cause, our courts have not established a bright-line rule regarding the amount of time which may elapse between obtaining the facts upon which the search warrant is based and the issuance of the warrant. Instead, whether the information is tainted by staleness must be determined by the facts and circumstances of each particular case.

*Scott v. State*, 883 N.E.2d 147, 157 (Ind. Ct. App. 2008) (quoting *Frasier v. State*, 794 N.E.2d 449, 457 (Ind. Ct. App. 2003), *trans. denied*) (internal citations omitted). We note at the outset that the warrant was obtained less than two weeks after the successful trash pull. This, in turn, came approximately two months after police conducted surveillance of the house after being advised of possible drug activity. During one such period of surveillance, they observed Davis participating in what appeared to be a drug transaction. Mineweaser's activities with Davis occurred approximately two weeks later. The span of time in which there appeared to be drug activity at the house, coupled with Mineweaser's representation to Detective Shefferly that Davis "deals any kind of narcotic that he can get in his possession," *Appellant's Appendix* at 14(B), permitted a reasonable inference that Davis was involved in an ongoing drug trafficking venture at the Westbrook Drive residence. The ongoing nature of Davis's drug activity and the fact that it took place at his residence, versus, for example, an apartment rented month-to-month or a storage facility, indicates that the information recounted in the probable cause affidavit was not stale. *See, e.g., Scott v. State*, 883 N.E.2d at 157 ("[i]n light of the C.I.'s information that Scott was involved in ongoing methamphetamine manufacture, [the officer's] information regarding detecting the odor of ether at [the defendant's] residence within the previous two months was not stale"). The search warrant was supported by probable cause.

3.

Gaff contends the trial court "erred in permitting the State to introduce into evidence a handgun which evidence was not relevant[.]" *Appellant's Brief* at 7. We review challenges

to the admission of evidence pursuant to the following standard:

Our standard of review for the admissibility of evidence is well settled. The admission or exclusion of evidence lies within the trial court's sound discretion and is afforded great deference on appeal. We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor.

*Meister v. State*, 912 N.E.2d 412, 414 (Ind. Ct. App. 2009) (internal citations omitted), *trans. denied*. "Evidence which is not relevant is not admissible." Ind. Evidence Rule 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid. R. 401.

Gaff's mother (Mother) testified on Gaff's behalf. Mother claimed that some of the controlled substances found in Gaff's closet were, in fact, her (i.e., Mother's) prescription medications. Mother claimed that she normally kept the pills on a shelf in her room. When asked how the pills ended up in Gaff's closet, Mother claimed that she was gone at the time and that Gaff had removed the pills to a high shelf in her (Gaff's) closet for the safety of Gaff's two young children, who were home at the time. In order to rebut Mother's claim in this regard, the State asked the following question: "[Gaff] placed the drugs out of reach of the kids for their safety. Why wouldn't the loaded [.].357 handgun be removed from the cushion of the chair in the living room for their safety then as well?" *Transcript* at 89. The handgun referred to was observed by police lying in plain view on a chair in the living room when they entered the house. We agree with the trial court's determination that the question

about the handgun was relevant to rebut Mother's claim that the pills were kept in Gaff's closet for child safety purposes.

Finally in this regard, we note that Gaff cites Evid. R. 403 in noting that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." We presume that, by invoking Rule 403, Gaff means to assert that even if relevant, the probative value of the handgun outweighed its prejudicial impact and was excludable on that basis. Gaff's entire argument in support of her claim of unfair prejudice consists of the following: "Clearly, the handgun evidence had it's [sic] intended affect [sic], but nonetheless was inadmissible." *Appellant's Brief* at 8. This single conclusory statement is devoid of independent analysis or citation to authority. Therefore, we find this argument waived for lack of cogency. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring the argument section to be supported by cogent reasoning with citations to relevant authorities).

4.

Gaff's conviction for possession of a controlled substance was based upon Lorazepam pills found wrapped in cellophane in a Bayer pill bottle in Gaff's closet when the police executed the search warrant. Gaff contends the evidence was insufficient to prove that she possessed the Lorazepam.

Our standard of review with respect to such claims is well settled.

When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Henley v. State*, 881 N.E.2d 639, 652 (Ind. 2008). "We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence." *Id.* We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.*

*Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009).

A conviction for possession of contraband may rest upon proof of either actual or constructive possession. *See Washington v. State*, 902 N.E.2d 280 (Ind. Ct. App. 2009), *trans. denied*. “Actual possession occurs when the defendant has direct physical control over the item, while constructive possession involves the intent and capability to maintain control over the item even though actual physical control is absent.” *Britt v. State*, 810 N.E.2d 1077 (Ind. Ct. App. 2004). To show that Gaff was capable of maintaining dominion and control, the State was required to demonstrate that she was able to reduce the controlled substance to her personal possession. *Grim v. State*, 797 N.E.2d 825 (Ind. Ct. App. 2003). Proof of a possessory interest in the premises on which contraband is found is adequate to show the capability to maintain dominion and control over the items in question. *Id.* Essentially, this is because the law infers that the party in possession of the premises is capable of exercising dominion and control over all items on the premises. *See id.* Our Supreme Court has noted, however, that the law takes a different view when applying the intent element of constructive possession. “When a defendant’s possession of the premises on which drugs are found is not exclusive, then the inference of intent to maintain dominion and control over the drugs ‘must be supported by additional circumstances pointing to the defendant’s knowledge of the nature of the controlled substances and their presence.’” *Gee v. State*, 810 N.E.2d 338, 341 (Ind. 2004) (quoting *Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997)). Such “additional circumstances” include:

- (1) incriminating statements made by the defendant,
- (2) attempted flight or furtive gestures,
- (3) location of substances like drugs in settings that suggest

manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant.

*Gee v. State*, 810 N.E.2d at 341.

In this case Gaff does not contest that she held a possessory interest in the Westbrook Drive residence. Accordingly, she does not challenge the inference that she had the capability to maintain dominion and control of the drugs found in the home. She contends, however, that there were no additional circumstances demonstrating that she had knowledge of the Lorazepam in the Bayer bottle.

We note first that Gaff informed the police officers on the scene that the west bedroom on the first floor was her bedroom. The contraband was found in a bottle on a shelf in a closet located in that bedroom. In fact, State's Exhibit 1 depicts five pill bottles on that closet shelf, two of which appear to be bottles of prescription medication and the other three appear to be bottles for over-the-counter medications. The Lorazepam was found in one of the latter three bottles. Detective Shefferly asked Gaff at the scene whose pills they were, apparently referring generally to all of the bottles on the shelf, and she responded that they belonged to both her and Davis. We understand that Mother testified at trial that she had a prescription for Lorazepam, that the pills in question belonged to her, and that Gaff moved the Lorazepam onto the shelf in her closet for her children's safety. We note, however, that this testimony was not uncontradicted. First, as discussed previously, Gaff's overriding concern for her children's safety was called into question by the officer's testimony that there was a loaded handgun lying in plain view on a sofa in the living room when they entered the residence. Second, although there was testimony that Mother did indeed have a prescription for

Lorazepam, the pills found in the closet of Gaff's room were not contained in a prescription bottle belonging to Mother, or indeed in a prescription bottle at all. They were instead wrapped in cellophane and found in a Bayer bottle. Third, Gaff told the officers at the scene that the pills belonged to her and Davis. The jury was not required to believe Mother's claim at trial to the contrary.

The evidence was sufficient to prove, via the doctrine of constructive possession, that Gaff had the intent and capability to maintain control over the Lorazepam pills found in her closet and therefore was sufficient to support her conviction for possession of a controlled substance.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.