NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II

No. CACR08-446

DANIELLE MITCHNER, APPELLANT	**Opinion Delivered** 19 NOVEMBER 2008
V.	APPEAL FROM THE DESHA COUNTY CIRCUIT COURT, [NO. CR-06-126-1]
STATE OF ARKANSAS, APPELLEE	THE HONORABLE SAMUEL B. POPE, JUDGE
	AFFIRMED

D.P. MARSHALL JR., Judge

A jury convicted Danielle Mitchner of possessing cocaine with intent to deliver. Mitchner's appeal turns on whether substantial evidence supports her drug conviction and whether the circuit court abused its discretion by refusing an alternative-sentence instruction.

A police officer pulled over a Chevrolet Caprice because the vehicle was moving unusually slowly and displayed tags registered to a Ford F150. After the officer approached the vehicle, he noticed that the driver seemed impaired, while the passenger, Mitchner, appeared asleep. The officer asked both occupants to get out. After obtaining the driver's consent, the officer began searching the vehicle. On the console between the driver's and passenger's seats, the officer saw a purse with a brown

paper sack, dryer sheets, and the corner of a plastic bag sticking out of it. The officer lifted the dryer sheets and found what turned out to be 173.9 grams of cocaine. Mitchner told the officer that the purse belonged to her. But she also said that she had not put anything in the purse and seemed shocked that the officer had found cocaine in it. The driver had white powder on his face. The officer then placed Mitchner and the driver under arrest. Both individuals were convicted of possessing cocaine with the intent to deliver it.

Mitchner first argues that the State failed to prove that she constructively possessed the cocaine. Constructive possession may be implied when contraband is in the joint control of the accused and another; however, joint occupancy of a vehicle, standing alone, does not establish joint possession. *Bradley v. State*, 347 Ark. 518, 522, 65 S.W.3d 874, 877 (2002). There must be some additional factor linking Mitchner to the cocaine. *Dodson v. State*, 341 Ark. 41, 47, 14 S.W.3d 489, 493 (2000). There were at least two. The drugs were found in Mitchner's purse. And the purse was in plain view on the car's console—right between Mitchner's seat and the driver's seat. Viewing the evidence in the light most favorable to the jury's verdict, substantial evidence supports Mitchner's drug conviction. *Ibid.*

Mitchner also argues that the circuit court abused its discretion by refusing to provide the jury with an alternative-sentence instruction. Mitchner was a first offender, and thus an alternative sentence such as probation may have been a

possibility. *Compare* Ark. Code Ann. § 5-4-301 (Repl. 2006) *with Buckley v. State*, 341 Ark. 864, 877, 20 S.W.3d 331, 340 (2000). After her attorney asked if Mitchner would be eligible for this kind of instruction, the circuit judge said, "I believe this is above the transfer eligibility line on the sentencing grid. And I do not make it a practice to give alternative instructions when that is the case." This was error. Though the statute does not require the circuit court to instruct the jury on alternative sentences, it does require that the court exercise its discretion in deciding whether to give the instruction based on the facts of each case. Ark. Code Ann. § 16-97-101(4) (Repl. 2006); *Miller v. State*, 97 Ark. App. 285, 287, 248 S.W.3d 487, 489 (2007). Having a standard practice is not exercising discretion in particular cases. But Mitchner waived this error because she failed to proffer her requested instruction. *Williams v. State*, 363 Ark. 395, 411, 214 S.W.3d 829, 838–39 (2005). We therefore must affirm on this issue too.

BIRD and BAKER, JJ., agree.