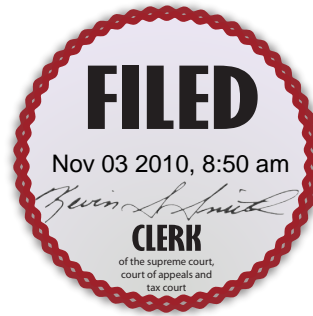


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DORIS MITCHELL,

Appellant/Defendant,

vs.

STATE OF INDIANA,

Appellee/Plaintiff.

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No. 48A05-1003-CR-274

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Rudolph D. Pyle, III, Judge
Cause No. 48C01-0907-FD-366

November 3, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Doris Mitchell appeals from her conviction of Class D felony Marijuana Possession,¹ contending that the State failed to produce evidence sufficient to sustain her conviction and that the trial court committed reversible error in allowing the State to introduce evidence of a prior marijuana possession conviction. We affirm.

FACTS

On July 9, 2009, Anderson Police Officer Chris Frazier was dispatched to 1911 West 18th Street to investigate the possibility of domestic violence. A 911 call had been placed from the address and, although the call was a “hang-up[,]” the operator was able to hear “yelling and screaming in the background.” Tr. p. 26. When Officer Frazier arrived, resident Mitchell explained that she had been arguing with “friend” Gene White and that White had left only minutes before. Tr. p. 27. White had asked to use Mitchell’s bathroom to clean up before going to donate at the blood bank and became jealous and angry when he saw another person in Mitchell’s bed.

White was soon located, and when Officer Frazier interviewed him, White indicated that there was a “potted plant of marijuana located on the back porch of [Mitchell’s] residence.” Tr. p. 29. When Officer Frazier returned to Mitchell’s residence via an alleyway, he saw a potted marijuana plant in plain view on the back porch. When Officer Frazier approached and attempted to seize the plant, Mitchell came outside, appeared to be trying to move the plant or take it from the porch, and said, “That marijuana plant’s not mine. A neighbor put it there on my porch.” Tr. p. 31. When Officer Frazier asked Mitchell who the neighbor was, she gave him several different

¹ Ind. Code § 35-48-4-11(1) (2009).

names and was inconsistent in explaining from where the plant had come. Mitchell also indicated that she lived alone in the residence.

On July 10, 2009, the State charged Mitchell with Class A misdemeanor marijuana possession and Class D felony marijuana possession by virtue of a prior marijuana possession conviction. At trial, Mitchell testified, *inter alia*, that she knew that the plant on her back porch was a marijuana plant “from T.V.” Tr. p. 64. Afterwards, the trial court allowed the State to introduce evidence regarding Mitchell’s prior conviction for marijuana possession on the basis that she had given the jury a false impression as to how she knew what marijuana looked like. The jury found Mitchell guilty of Class A misdemeanor marijuana possession, and, in the second phase of her bifurcated trial, she pled guilty to Class D felony marijuana possession. On March 22, 2010, the trial court sentenced Mitchell to three years of incarceration with all but sixty-four days suspended to probation.

DISCUSSION AND DECISION

I. Whether the State Produced Sufficient Evidence to Sustain Mitchell’s Conviction

Our standard of review for challenges to the sufficiency of the evidence supporting a criminal conviction is well-settled:

In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the [finding of guilt] and reasonable inferences drawn therefrom. We will affirm the conviction if there is probative evidence from which a reasonable [finder of fact] could have found Defendant guilty beyond a reasonable doubt.

Vitek v. State, 750 N.E.2d 346, 352 (Ind. 2001) (citations omitted).

In order to convict Mitchell of marijuana possession, the State was required to establish that she knowingly or intentionally possessed marijuana. Ind. Code § 35-48-4-11. Mitchell contends only that the State failed to establish that the marijuana plant on her back porch was hers. “[C]onviction for possessory offenses does not depend on the accused being ‘caught red-handed’ in the act by the police.” See *Wilburn v. State*, 442 N.E.2d 1098, 1101 (Ind. 1982).

A defendant is in the constructive possession of drugs when the State shows that the defendant has both (i) the intent to maintain dominion and control over the drugs and (ii) the capability to maintain dominion and control over the drugs. *Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997), *on reh’g*, 685 N.E.2d 698 (Ind. 1997). The proof of a possessory interest in the premises on which illegal drugs are found is adequate to show the capability to maintain dominion and control over the items in question. *Davenport v. State*, 464 N.E.2d 1302, 1307 (Ind. 1984). In essence 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.*; *Martin v. State*, 175 Ind. App. 503, 372 N.E.2d 1194, 1197 (1978) (“[A] house or apartment used as a residence is controlled by the person who lives in it and that person may be found in control of any drugs discovered therein, whether he is the owner, tenant, or merely an invitee.”). And this is so whether possession of the premises is exclusive or not.

However, the law takes a different view when applying the intent prong 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.” *Lampkins*, 682 N.E.2d at 1275. The “additional circumstances” have been shown by various means: (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. *Henderson v. State*, 715 N.E.2d 833, 836 (Ind. 1999).

Gee v. State, 810 N.E.2d 338, 340-41 (Ind. 2004).

The marijuana plant was found on Mitchell's back porch, which shows the capability to maintain dominion and control over the plant. *See Davenport*, 464 N.E.2d at 1307. As for Mitchell's intent to maintain dominion and control over the plant, we conclude that the State produced ample evidence to establish this. The fact that Mitchell provided several different names when asked to which neighbor the plant belonged indicates evasion. Mitchell also appeared to be attempting to remove the plant from her porch when Officer Frazier seized it. When the plant was seized, Mitchell was in close proximity to it, and it was in her plain view. Finally, the plant was seized from Mitchell's back porch, which obviously places it in close proximity to her belongings. Mitchell points to her testimony that the plant did not belong to her and that she had not been on her back porch in the thirty days prior to the seizure, but this is merely an invitation to reweigh the evidence, which we will not do. The State produced sufficient evidence to sustain Mitchell's conviction.

II. Whether the Trial Court Abused its Discretion in Admitting Evidence Regarding Mitchell's Prior Conviction for Marijuana Possession

Mitchell contends that the trial court abused its discretion in allowing the State to introduce evidence of her April 2, 2009, conviction for marijuana possession. The admissibility of evidence is within the sound discretion of the trial court. *Curley v. State*, 777 N.E.2d 58, 60 (Ind. Ct. App. 2002), *trans denied*. We will reverse a trial court's decision on the admissibility of evidence only upon a showing of an abuse of that discretion. *Id.* An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court

has misinterpreted the law. *Id.* The Court of Appeals may affirm the trial court's ruling if it is sustainable on any legal basis in the record, even though it was not the reason enunciated by the trial court. *Moore v. State*, 839 N.E.2d 178, 182 (Ind. Ct. App. 2005), *trans. denied*. We do not reweigh the evidence, and consider the evidence most favorable to the trial court's ruling. *Hirse v. State*, 852 N.E.2d 1008, 1012 (Ind. Ct. App. 2006), *trans. denied*.

Under the Indiana Rules of Evidence, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Ind. Evidence Rule 404(b). This is not to say that evidence of other crimes is never admissible, however. One instance where this is the case is where a defendant has “opened the door” to such evidence during her testimony. As the Indiana Supreme Court has held, “the evidence relied upon to ‘open the door’ must leave the trier of fact with a false or misleading impression of the facts related.” *Gilliam v. State*, 270 Ind. 71, 77, 383 N.E.2d 297, 301 (1978).

We conclude that Mitchell's testimony that she knew what marijuana looked like from watching television opened the door to evidence that she acquired her familiarity in another way. Mitchell's testimony strongly implied that she had never had any first-hand experience with marijuana, an implication the State was entitled to rebut. If Mitchell had not wanted evidence of her prior conviction to come in, she should not have given the jury the false impression that she had no personal knowledge of marijuana. The trial court did not abuse its discretion in this regard.

In any event, any error the trial court may have made in admitting the evidence of

Mitchell's previous marijuana possession conviction can only be considered harmless. "The improper admission of evidence is harmless error if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court that there is no substantial likelihood the challenged evidence contributed to the conviction." *Beach v. State*, 816 N.E.2d 57, 59 (Ind. Ct. App. 2004) (citing *Pavey v. State*, 764 N.E.2d 692, 703 (Ind. Ct. App. 2002)). Here, a potted marijuana plant was discovered in plain view on the back porch of Mitchell's home, a home in which she lived alone. Moreover, Mitchell appeared to be trying to hide the plant when it was seized. We conclude that there was no substantial likelihood that evidence of her prior marijuana possession conviction contributed to Mitchell's conviction.

We affirm the judgment of the trial court.

DARDEN, J., and BROWN, J., concur.