MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Jeffrey Canen,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 30, 2024

Court of Appeals Case No.
23A-CR-1949

Appeal from the Tippecanoe Superior Court

The Honorable Randy J. Williams, Judge

Trial Court Cause No.
79D01-2203-F4-20

Memorandum Decision by Judge Brown
Judges Riley and Foley concur.

Brown, Judge.

[1] Jeffrey Canen appeals his convictions for unlawful possession of a firearm by a serious violent felon as a level 4 felony, unlawful possession of a syringe as a level 6 felony, possession of marijuana as a class B misdemeanor, and maintaining a common nuisance as a level 6 felony.[1] He raises issues regarding the sufficiency of the evidence to support his convictions and double jeopardy. He also challenges the sentence imposed by the trial court. We affirm.

Facts and Procedural History

[2] In February of 2022, Canen married Martha Haynes. The couple, who had been in a relationship for two years, resided together in a residence in Lafayette. Haynes suffered from stage four pancreatic cancer. She stayed in the rear bedroom of the residence while Canen stayed in the front bedroom. On March 16, 2022, Canen called 911 from the residence to report that his girlfriend, Mollie, had overdosed on heroin and was not breathing. Haynes, who was hospitalized due to her illness on or about March 14, 2022, was not in the residence at the time.[2] James Hauser, of the Lafayette Fire Department, responded to the scene and discovered Mollie Kimbrough[3] lying in the

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[1] Canen was also convicted of intimidation as a level 6 felony and resisting law enforcement as a class A misdemeanor. He does not challenge those convictions on appeal.

[2] Haynes died on March 31, 2022.

[3] The transcript refers to the overdose victim as "Molly K. Kimbrough." Transcript Volume II at 37. The parties' stipulation of evidence refers to her as "Mollie Kate Kimbrough." State's Exhibit 180.

bathroom where Canen was attempting to perform CPR. Hauser observed some syringes next to a purse in the bathroom. Hauser began CPR until paramedics arrived. Attempts to revive Kimbrough proved unsuccessful, and she was pronounced dead at the scene. Kimbrough died of an "acute mixed drug intoxication with said mixture, including fentanyl." Transcript Volume II at 37.

[3] Due to Kimbrough's death, Lafayette Police officers arrived to secure the scene for investigation. Officer Carson Smith asked Canen if he would consent to a search of the residence, but he refused. Officer Smith informed Canen that he needed to step out of the residence while officers applied for a search warrant. Canen became wholly uncooperative and stood in the doorway of the front bedroom refusing requests to dress and leave the residence. Instead, he threatened to "get a firearm to make [the officers] leave the residence." *Id.* at 46-47. Officers determined that Canen should be detained for officer "safety." *Id.* at 47. Several officers attempted to detain Canen, but he forcibly resisted. He also threatened, "I'll come for you," which the officers took as a threat to cause harm to them. *Id.* at 48. Officers handcuffed Canen and escorted him from the premises.

[4] Officers obtained and executed a search warrant for the residence. In the front bedroom where Canen stayed and had been standing in the doorway making

threatening remarks, officers found a loaded firearm in a box on a dresser.[4] In that same bedroom, they also found a small safe containing syringes and smoking pipes with burnt residue. Officers found syringes with black liquid residue in the dining room dresser and a nightstand in the back bedroom.[5] Also, in the rear of the residence, officers found mail addressed to Canen located in the same drawer with a black pouch containing marijuana, a burnt marijuana joint, a metal clip, rolling papers, and a grinder. Inside a wallet located in the bathroom, officers found syringes and a spoon with burnt residue. Officers also found a baby food jar filled with what appeared to be marijuana roaches that had been smoked and discarded.

[5] The State charged Canen with Count I, unlawful possession of a firearm by a serious violent felon as a level 4 felony; Count II, unlawful possession of a syringe as a level 6 felony; Count III, possession of marijuana as a class B misdemeanor; Count IV, possession of paraphernalia as a class C misdemeanor; Count V, maintaining a common nuisance as a level 6 felony; Count VI, resisting law enforcement as a class A misdemeanor; and Count VII, intimidation as a level 6 felony. A jury found Canen guilty on all counts except for Count IV. Canen admitted to being a serious violent felon. The court sentenced Canen to seven years on Count I, one year on Counts II, V, and VI,

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[4] Although officers found the firearm during the search, they declined to seize the firearm. Haynes's son, Peter Luttrell, later provided the firearm to law enforcement.

[5] Heroin and fentanyl can produce liquid with a dark tint to it. *See* Transcript Volume II at 139.

180 days on Count III, and a one-and-one-half years on Count VII. The court ordered the sentences for Counts II, III, and V to run concurrent with each other but consecutive to Count I, and the sentences on Counts VI and VII to run concurrent with each other but consecutive to Count I. This resulted in an aggregate sentence of nine and one-half years, with six years executed to the Department of Correction, one year executed in community corrections, and two and one-half years suspended to probation.

Discussion

I.

[6] Canen challenges the sufficiency of the evidence to support his convictions for unlawful possession of a firearm by a serious violent felon, unlawful possession of a syringe, and possession of marijuana. Specifically, he argues that the State presented insufficient evidence that he constructively possessed the firearm, syringes, or marijuana. He further challenges the sufficiency of the evidence to support his conviction for maintaining a common nuisance, asserting that the evidence failed to show that he "maintained" the residence or that he was guilty of "a continuous or recurrent violation." Appellant's Brief at 18-19.

[7] 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*.

[8] Regarding the possession charges, it is well established that possession of an item may be either actual or constructive. *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).

[9] The intent element of constructive possession is shown if the State demonstrates the defendant's knowledge of the contraband's presence. *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").

[10] First, as to Canen's capability to maintain dominion and control over the contraband items, Haynes's son, Peter Luttrell, testified that Haynes and Canen were married and lived together in the residence. The front bedroom, where Canen stayed, contained a closet with male clothing, and Canen told police that the residence was his home and that he was neither consenting to a search nor agreeing to leave. Canen's current denial of "ownership of the house" is of no moment. Appellant's Brief at 15. It is well established that "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." *Mack v. State*, 23 N.E.3d 742, 758 (Ind. Ct. App. 2014) (citation omitted), *trans. denied*. Sufficient evidence shows that Canen lived in the residence and had the capability to maintain dominion and control over the firearm, syringes, and marijuana found in the house.

[11] We reach a similar conclusion regarding Canen's intent because "additional circumstances" point to Canen's knowledge of the presence of contraband and its illegal character. *See Gee*, 810 N.E.2d at 344. The firearm was found in

Canen's bedroom, near some of his clothing, and in close proximity to where he was standing when threatening officers. Syringes were found in a safe in the nightstand in Canen's bedroom. Marijuana was found in a dining room drawer comingled with mail addressed to Canen. These circumstances point to Canen's knowledge and presence of the contraband and its illegal character. The State presented sufficient evidence that Canen constructively possessed the firearm, syringes, and marijuana.[6]

[12] As for his conviction for maintaining a common nuisance, the State was required to prove that Canen knowingly or intentionally maintained the residence to unlawfully use, manufacture, keep, sell, deliver, or finance the delivery of controlled substances or items of drug paraphernalia. Ind. Code § 35-45-1-5(c). An offender maintains a site when he exerts control over it. *Gaynor v. State*, 914 N.E.2d 815, 819 (Ind. Ct. App. 2009), *trans. denied*. Moreover, a location is a common nuisance only if it is one where "continuous or recurrent prohibited activity takes place." *Leatherman v. State*, 101 N.E.3d 879, 884 (Ind. Ct. App. 2018).

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[6] Canen complains that the "police left the gun in the house after their investigation and search" and that Luttrell turned it over to police. Appellant's Brief at 15-16. He therefore argues that "there is an improper chain of custody regarding the firearm." *Id.* Canen did not object to the admission of the firearm or raise this issue below and therefore it is waived on appeal. *See Batchelor v. State*, 119 N.E.3d 550, 556 (Ind. 2019) (party's failure to object to, and thus preserve, alleged trial error results in waiver of claim on appeal). To the extent that Canen suggests that the search of the residence exceeded the scope of the search warrant, that claim is similarly waived both for failure to raise it below and for failure to develop a cogent argument. *See* Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning."); *Keller v. State*, 987 N.E.2d 1099, 1121 n.11 (Ind. Ct. App. 2013) (noting that defendant's failure to make cogent argument results in waiver of issue on appeal), *trans. denied*.

[13] There was sufficient evidence that Canen maintained the residence. Haynes's son testified that Canen lived in the residence with his mother. The couple had been together for two years, and Canen told police more than once that the residence was his home and that he lived there. Indeed, the undisputed evidence showed that Haynes was hospitalized several days before the overdose death, giving Canen exclusive control over the residence.

[14] There was also sufficient evidence that the residence was one where continuous or recurrent prohibited activity took place. In addition to the syringes found in the bathroom presumably used by Kimbrough to overdose on heroin the day of her death, officers found several used syringes in a dresser drawer in the dining room. Officers found smoking pipes with burnt heroin residue and more syringes in a safe in Canen's bedroom. In addition, officers found a bag of marijuana for future use, as well as burnt marijuana roaches that had been used and discarded from prior use. Canen told officers that he was not under the influence of any drugs when they arrived, indicating that all items found were from prior or recurrent use by himself, Kimbrough, Haynes, or other individuals. Based upon this evidence, the jury could reasonably infer that the various items of contraband were kept and used in the residence by multiple individuals on a recurring basis and not simply on an isolated occasion. The State presented evidence of probative value from which a jury could find Canen guilty beyond a reasonable doubt.

II.

[15] Canen next contends that the "trial court erred in entering judgments of conviction for unlawful possession of [a] syringe, possession of marijuana, and maintaining a common nuisance because they constitute a double jeopardy violation." Appellant's Brief at 19.

[16] Although Canen does not cite to Article 1, Section 14 of the Indiana Constitution which provides that "no person shall be put in jeopardy twice for the same offense," it is clear that his argument is one concerning substantive double jeopardy which refers to claims related to multiple convictions for the same offense in a single proceeding. *Wadle v. State*, 151 N.E.3d 227, 246-47 (Ind. 2020). Double jeopardy claims are reviewed de novo. *Id*. at 237. *Wadle* established a three-part test that applies "when a single criminal act or transaction violates multiple statutes with common elements and harms one or more victims." *Id*. at 247. The dispositive question under *Wadle* is one of statutory intent. *Id*. In *A.W. v. State*, 229 N.E.3d 1060, 1066 (Ind. 2024), the Indiana Supreme Court recently applied the *Wadle* test step by step, clarifying "perhaps misunderstood directions" and "adding a modification at Step 2."

[17] Under the first step, the court examines the statutory language of the offenses. *Id.* "If the language of either statute clearly permits multiple punishment, either expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy." *Id*. (quoting *Wadle*, 151 N.E.3d at 248).

[18] If the statutory language does not clearly permit multiple punishments, the court moves to Step 2 and "must then apply our included-offense statutes to determine statutory intent." *Id.* (citations omitted). An "[i]ncluded offense," as defined by our legislature, is an offense that:

> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged,"
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> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein," or
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> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission."

Ind. Code § 35-31.5-2-168. "'If neither offense is an included offense of the other (either inherently or as charged), there is no violation of double jeopardy' and the analysis ends—full stop." *A.W.*, 229 N.E.3d at 1067 (quoting *Wadle*, 151 N.E.3d at 248).

[19] Due to confusion about the meaning and application of two key phrases: "inherently" and "as charged," the Court has attempted to "bridge any analytical gaps" by clarifying that the evaluation of an "inherently included" offense is to be made under all three subsections of Ind. Code § 35-31.5-2-168, and that the concept of "factually included" should be treated as synonymous with the concept of "as charged" under *Wadle*. *Id*. Thus, when assessing

whether an offense is factually included, a court may examine only the facts as presented on the face of the charging instrument. *Id.* This includes examining the "means used to commit the crime charged," which must "include all of the elements of the alleged lesser included offense." *Id*. (quoting *Wadle,* 151 N.E.3d at 251 n.30). Significantly, "Step 2 has core constraints: it does not authorize courts to probe other facts, such as evidence adduced from trial." *Id*. The factually included inquiry at this step is limited to facts on the face of the charging instrument. *Id.*[7] In short, courts must confine their Step 2 analysis to (1) the included-offense statute (whether the offenses are "inherently" included), and (2) the face of the charging instrument (whether the offenses "as charged" are factually included). *Id.* at 1068.[8] If Step 2 is not met, the analysis ends. *Id*.

[20] In the third step, "if a court has found that one offense is included in the other—either inherently or as charged—the court must then (and only then) 'examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial.'" *Id.* at 1071 (quoting *Wadle*, 151 N.E.3d at

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[7] "Otherwise, Step 2 would be another formulation of the now-retired *Richardson* approach" in which courts, using their discretion, typically focused on actual evidence rather than the statutory elements, "which led to a mélange of inconsistency." *A.W.*, 229 N.E.3d at 1067.

[8] We note that limiting the Step 2 analysis to the statutory elements and the facts alleged in the charging instrument is not a change in the law as it existed under *Wadle*; rather, this is merely a clarification to the extent there is confusion. However, the *A.W.* Court went on to modify the analysis. Specifically, to avoid double jeopardy outcomes turning solely on the facts the prosecutor elects to include or exclude in the charging instrument, the *A.W.* Court held that "where ambiguities exist in a charging instrument about whether one offense is factually included in another," a court "must construe those ambiguities in the defendant's favor, and thus find a presumptive double jeopardy violation at Step 2." *A.W.*, 229 N.E.3d at 1069. The charging instrument here is unambiguous and thus this "modification" of Step 2 of *Wadle* is not at issue. *Id.* n.11.

249). At this final step, "a court may only then probe the underlying facts—as presented in the charging instrument and adduced at trial—to determine whether a defendant's actions were 'so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.'" *Id*.

[21] Here, the statutes at issue do not clearly permit multiple punishments. Accordingly, we move to the second step of the *Wadle* analysis. With regard to this step, Canen does not argue that his offenses are inherently included; rather he asserts that they are factually included. Specifically, he asserts that the offenses of possession of marijuana and unlawful possession of a syringe are factually included in the offense of maintaining a common nuisance. Our review of the charging instrument reveals otherwise.[9]

[22] The charging information for maintaining a common nuisance alleged that Canen did "knowingly or intentionally maintain a building, structure, vehicle, or other place that was used for one (1) or more of the following purposes: to unlawfully use, manufacture, keep, offer for sale, sell, deliver, or finance for delivery a controlled substance or an item of drug paraphernalia[.]" Appellant's Appendix Volume II at 19. The information for possession of marijuana alleged that Canen did knowingly or intentionally possess marijuana, pure or

[9] Canen relies on *Philips v. State*, 174 N.E.3d 635 (Ind. Ct. App. 2021) and *Hunter v. State*, 72 N.E.3d 928 (Ind. Ct. App. 2017), for the proposition that offenses may be factually included depending, in part, on the evidence produced at trial. As the *A.W.* Court has made clear, this is not a proper inquiry pursuant to Step 2 of the *Wadle* analysis.

adulterated. The information for unlawful possession of a syringe alleged that Canen, with the intent to violate the Indiana Legend Drug Act, Ind. Code Chapter 16-42-19, or commit a controlled substances offense, did possess or have under his control "a hypodermic syringe . . . for the use of a legend drug or a controlled substance by injection in a human being[.]" *Id*. at 16.

[23] As is clear from the above language, the offenses of possession of marijuana and unlawful possession of a syringe are not factually included offenses of maintaining a common nuisance as charged. Looking solely to the face of the charging instrument, the information for maintaining a common nuisance did not allege, as the means used to commit that crime, that Canen unlawfully possessed a syringe or possessed marijuana. Moreover, the information for unlawful possession of a syringe alleges the specific intent to violate the Indiana Legend Drug Act or commit a controlled substances offense. In other words, the "means used to commit" maintaining a common nuisance do not "include all of the elements" of unlawful possession of a syringe or possession of marijuana. Our analysis ends here, and we find no double jeopardy violation.

III.

[24] Canen argues that his sentence is inappropriate. Although his nine-and-one-half-year aggregate sentence is well below the maximum allowable sentence he could have received, Canen requests that we revise his aggregate sentence so that "all of his sentences run concurrently" which would result in a two-and-one-half-year sentence reduction. Appellant's Brief at 28.

[25] Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[26] Ind. Code § 35-50-2-5.5 provides that a person who commits a level 4 felony shall be imprisoned for a fixed term between two and twelve years, with the advisory sentence being six years. Ind. Code § 35-50-2-7(b) provides that a person who commits a level 6 felony shall be imprisoned for a fixed term between six months and two and one-half years, with an advisory sentence of one year. A person who commits a class A misdemeanor shall be imprisoned for a fixed term of not more than one year. Ind. Code § 35-50-3-2. A person who commits a class B misdemeanor shall be imprisoned for a fixed term of not more than one hundred eighty days. Ind. Code § 35-50-3-1.

[27] Our review of the nature of the offenses reveals that Canen is a serious violent felon who not only unlawfully possessed a handgun, but he also threatened to use that firearm against officers who responded to the scene of an overdose death. He impeded the officers' investigation, and forcibly resisted their attempts to detain him for officer safety. He was found in possession of numerous items of contraband in a residence that was used recurrently for illegal activity, one of those occasions resulting in an overdose death.

[28] Our review of Canen's character reveals that he has a criminal history dating back four decades. He has three prior felony convictions and three misdemeanor convictions. Two of his prior convictions are for drug-related offenses. Additionally, at the time of sentencing, Canen had a pending charge for possession of marijuana based on an arrest that occurred while he was out on bond for the current charges.

[29] After due consideration, we conclude that Canen has not sustained his burden of establishing that his aggregate sentence of nine-and-one-half years, with six years executed to the Department of Correction, one year executed in community corrections, and two and one-half years suspended to probation, is inappropriate in light of the nature of the offenses and his character.

[30] For the foregoing reasons, we affirm Canen's convictions and sentence.

[31] Affirmed.

Riley, J., and Foley, J., concur.

ATTORNEY FOR APPELLANT

Carlos I. Carrillo
Carrillo Law LLC
Greenwood, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Kathy Bradley
Deputy Attorney General
Indianapolis, Indiana