

Cite as 2023 Ark. App. 469
ARKANSAS COURT OF APPEALS
DIVISION III
No. CR-23-141

MARK MOSIER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 25, 2023

APPEAL FROM THE DREW
COUNTY CIRCUIT COURT
[NO. 22CR-21-182]

HONORABLE CREWS PURYEAR,
JUDGE

AFFIRMED

BART F. VIRDEN, Judge

A Drew County jury convicted appellant Mark Mosier of possession of methamphetamine and possession of drug paraphernalia. He was sentenced as a habitual offender to an aggregate term of forty-five years in prison. He argues that (1) there was insufficient evidence to support his conviction for possession of contraband; (2) there was insufficient evidence that a glass pipe constituted drug paraphernalia; and (3) the trial court abused its discretion by allowing a law enforcement officer to speculate about his (Mosier's) state of mind. We affirm.

I. *Background*

The evidence presented at trial revealed the following sequence of events. On June 30, 2021, Officer Shawn Curtis with the Monticello Police Department stopped a truck being driven by Mosier with his wife, Tracie Mosier, as a passenger. Officer Curtis knew that

Mosier was driving with a suspended license. When Officer Curtis approached the truck, Mosier opened the door, and Officer Curtis observed in plain view a glass pipe on the floorboard. Agent James Slaughter, a member of the drug task force, agreed with Officer Curtis's assessment that the glass pipe was the type that is commonly used to smoke methamphetamine. Officer Curtis also said that the glass pipe had "some crystal-like substance" on it.

Officer Curtis's body-camera footage of the interaction was played without objection. Officer Curtis asked Mosier about the glass pipe on the floorboard, and Mosier said, "I don't know how that got there." Officer Curtis testified that Mosier had "acted surprised," picked up the pipe, and handed it to him. Mosier can be heard telling Officer Curtis, "[B]ust it if you want to."

Officer Curtis and other law enforcement officers searched the truck and found underneath the driver's seat a zippered sunglasses case containing a set of digital scales and a plastic Ziploc baggie of what a chemist later determined was 6.8257 grams of methamphetamine. After the State rested its case, Mosier moved for a directed verdict, which was denied.

The defense then called Tracie to testify. According to Tracie, she had been driving the truck earlier that day. She said that the sunglasses case and its contents belonged to her. She explained that she had failed to fully zip the case, which resulted in the glass pipe rolling out of the case and onto the floorboard. Tracie claimed that Mosier knew nothing about any of the contraband that was found because she had not told him about it. Mosier renewed

his directed-verdict motion. The trial court denied this motion as well, and the jury found Mosier guilty of possessing over two grams of methamphetamine, for which he received a thirty-year sentence of imprisonment; and of possession of drug paraphernalia, for which he was sentenced to fifteen years' imprisonment. The trial court ordered that the sentences be served consecutively.

II. Discussion

A. Sufficiency of the Evidence

It is not necessary for the State to prove literal physical possession of contraband in order to prove possession. *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994). Possession of contraband can be proved by constructive possession. *Id.* Constructive possession requires the State to prove that (1) the defendant exercised care, control, and management over the contraband, and (2) the accused knew the matter possessed was contraband. *Baltimore v. State*, 2017 Ark. App. 622, 535 S.W.3d 286. Constructive possession can be inferred when the contraband is in the joint control of the accused and another. *Id.* However, joint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession. *Id.* There must be some other factor linking the accused to the contraband. *Id.* There is no requirement that all, or even a majority, of the linking factors be present to constitute constructive possession of the contraband. *Jarrett v. State*, 2023 Ark. App. 354.

Mosier argues on appeal that there was no substantial evidence that he constructively possessed any of the contraband that was found in the jointly occupied vehicle. Mosier analyzes each of the five linking factors established in *Mings*, *supra*, and argues that the State

proved, at most, two of the five linking factors with respect to the methamphetamine and three of the five factors as to the drug paraphernalia.

Mosier's challenge to the sufficiency of the evidence is not preserved for appellate review because his directed-verdict motions were not specific enough to encompass the arguments he now raises on appeal. Arkansas Rule of Criminal Procedure 33.1 provides that a directed-verdict motion based on insufficient evidence must specify the manner in which the evidence is deficient; a motion merely stating that the evidence is insufficient does not preserve issues concerning a specific deficiency, such as insufficient proof on the elements of the offense. *Cano v. State*, 2022 Ark. App. 340. Moreover, Rule 33.1 is strictly construed. *Id.*

Defense counsel made the following directed-verdict motion at trial with respect to both counts 1 and 2—possession of methamphetamine and possession of drug paraphernalia:

Yes, Your Honor. Defense will make their motion for directed verdict. While you may have evidence that drugs were found, you may have evidence that the drugs were found in the car with the defendant—defense asserts that there's no conclusive proof that any of the items found were in the possession of the defendant at the time.

Defense counsel added the following after the State's response: "One tiny detail—knowledge doesn't constitute possession." When defense counsel renewed the directed-verdict motion at the close of all of the evidence, the only statement she added was that Tracie's action of "basically throwing herself under the bus" during her testimony "lends an additional level of credibility here."

In his directed-verdict motions below, Mosier did not argue constructive possession or joint occupation and linking factors. A party is bound by the scope and nature of his

directed-verdict motion made at trial and cannot change the grounds on appeal. *Scott v. State*, 2015 Ark. App. 504, 471 S.W.3d 236; *see, e.g., Mead v. State*, 2023 Ark. App. 384 (holding that counsel’s motion for directed verdict was not specific enough to preserve her arguments for appeal where counsel did not mention constructive possession or joint occupancy in the motion); *Porchay v. State*, 2021 Ark. App. 64, at 3, 616 S.W.3d 699, 702 (holding that the appellant failed to preserve his argument that the State presented insufficient evidence of the necessary “linking factors” needed to establish constructive possession of contraband in a jointly occupied vehicle where, although he mentioned constructive possession in his directed-verdict motion, he challenged only whether the State had proved that he “knew” or “had reason to know” about the presence of the drugs); *McKinney v. State*, 2018 Ark. App. 10, 538 S.W.3d 216 (holding that the appellant’s motions for directed verdict were too general to preserve his constructive-possession argument raised on appeal because below he merely stated that he did not possess the firearm); *Conley v. State*, 2011 Ark. App. 597, at 6, 385 S.W.3d 875, 878 (holding that the appellant’s directed-verdict motion was too general to advise the trial court of the exact element of the crime that he believed the State had failed to prove—constructive possession—where he simply said that “the State never proved Mr. Conley had the marijuana in his possession when they found it”). Because Mosier’s directed-verdict motions were not specific, we do not address the sufficiency of the evidence supporting his convictions.

Mosier makes a separate sufficiency argument with respect to the glass pipe. He argues that the State failed to prove that he possessed drug paraphernalia used to ingest, inject, or

inhale methamphetamine because the glass pipe was not tested for the presence of drugs by the Arkansas State Crime Laboratory.¹ He argues that mere visual identification is insufficient to show that the glass pipe was indeed drug paraphernalia.

This argument is likewise not preserved. *Newton v. State*, 2011 Ark. App. 190, 382 S.W.3d 711 (holding that a motion for directed verdict in which counsel argued that the State failed to show that the appellant had custody and control of scales was not sufficient to preserve his argument that the State failed to show that the scales constituted drug paraphernalia). Although Mosier referred to “items” in his initial motion, Mosier did not argue, as he does now, that the State failed to prove that the glass pipe was drug paraphernalia. Because this argument is not preserved, we do not address it. In any event, we note that Mosier’s possession of the set of digital scales, which he does not challenge on appeal, is alone sufficient to support Mosier’s conviction for possession of drug paraphernalia.

B. Evidentiary Ruling

Mosier argues that the trial court erred in permitting Officer Curtis to speculate as to his (Mosier’s) state of mind upon finding the glass pipe. If a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences that are rationally based on the perception of the witness and helpful to a clear

¹The chemist had testified that it is the policy of the lab to test only those items that would support a conviction for the most serious offense, which, in this case, was Mosier’s possession of over two grams of methamphetamine.

understanding of his testimony or the determination of a fact in issue. Ark. R. Evid. 701. Trial courts have broad discretion in deciding evidentiary issues, and their rulings are not reversed on appeal in the absence of an abuse of discretion. *Mabry v. State*, 2020 Ark. 72, 594 S.W.3d 39. Abuse of discretion is a high threshold that does not simply require error in the trial court’s decision but requires that the trial court act improvidently, thoughtlessly, or without due consideration. *Id.*

Officer Curtis testified on direct examination that when he asked Mosier about the glass pipe on the floorboard, Mosier had “acted surprised and said he didn’t know how that got there.” Later, on cross-examination, defense counsel asked Officer Curtis three times whether he had earlier testified that Mosier had “seemed surprised and didn’t know how [the pipe] got there.” Officer Curtis agreed that he had so testified.

On redirect examination, the prosecutor asked whether Officer Curtis had testified that Mosier “had acted like he didn’t know [the pipe] was there,” which Officer Curtis confirmed. The prosecutor then said, “Do you have any way—is there anything—” to which defense counsel objected to any testimony as to Mosier’s state of mind, but the trial court overruled that objection. The following colloquy ensued:

PROSECUTOR: Is there anything that made you think that [Mosier] didn’t know what (sic) pipe was at his feet?

OFFICER CURTIS: My personal experience—I would say that he knew that it was in the vehicle and was surprised that it was in plain view.

PROSECUTOR: The reaction we saw from the defendant,—

DEFENSE COUNSEL: Objection, Your Honor. I’m going to go back to speculation.

THE COURT: Approach please. I agree on that. I'm not going to allow [Officer Curtis] to speculate on what he—I thought the question was was there any way for [Officer Curtis] to know [Mosier] actually didn't know it was there and I think leave it at that. I think you're stretching it now, so I'll sustain the objection on that. Anything that [Officer Curtis] testified to as to what he thinks [Mosier] was thinking is completely speculative, so I'll sustain the objection on that.

The prosecutor then asked Officer Curtis about Mosier's reaction in the video when the glass pipe was found, and defense counsel objected on the basis that the question had been asked and answered. The trial court overruled the objection and said that Officer Curtis could be asked how he had gotten the impression that Mosier was surprised. The following colloquy between the prosecutor and Officer Curtis then occurred without objection:

PROSECUTOR: Officer Curtis, what did you observe, hear, see—that brought you to the impression that the defendant may have been surprised that this pipe was in the floor?

OFFICER CURTIS: Just based off of audio—I think he said “dang.” To me it wasn't that he was surprised that the pipe was magically there, it was just that it was in plain view. I was led to believe that he knew that that was there in the vehicle.

On appeal, Mosier argues that Officer Curtis's testimony was speculative and misleading because it implied Mosier's knowledge of the contraband despite the lack of any evidence to substantiate his having such knowledge. Mosier maintains that his state of mind was a key element in the possession charges and that Officer Curtis's speculation on the subject had prejudiced him. Mosier contends that the trial court's sustaining of his objection

and its clarification that Officer Curtis's testimony as to what Mosier was thinking was completely speculative did not cure the prejudice that had already occurred.

The State argues that Mosier's argument is not preserved, and we agree. A timely objection must be made to preserve an argument on appeal. *Morgan v. State*, 2021 Ark. App. 344, 632 S.W.3d 759. A defendant must object at the first opportunity, and he must then renew his objection each time the issue is raised; otherwise, he has waived his argument. *Conte v. State*, 2015 Ark. 220, 463 S.W.3d 686. Also, evidence that is merely cumulative or repetitious of other evidence admitted without objection cannot be claimed to be prejudicial. *Id.*

As a preliminary matter, we note that defense counsel actually misconstrued what Officer Curtis had testified to earlier on direct examination. Officer Curtis had testified that Mosier *said that he did not know* how the glass pipe had come to be on the floorboard. Although Officer Curtis agreed with defense counsel that he had testified about what Mosier knew, it was defense counsel who first attributed the objectionable state-of-mind testimony to Officer Curtis and then reinforced it by repeating it. Afterward, the trial court sustained defense counsel's objection to Officer Curtis's testimony about Mosier's supposed knowledge, but counsel did not again object when Officer Curtis said that he had been led to believe that Mosier knew about the glass pipe's presence.

In addition to Mosier's argument that Officer Curtis's testimony was impermissibly speculative, he also argues on appeal that Officer Curtis's testimony invaded the province of the jury on whether the elements of the charged offenses had been proved. Mosier, however,

did not raise this objection below, and we do not address arguments made for the first time on appeal. *Williams v. State*, 2023 Ark. App. 222.

Affirmed.

ABRAMSON and HIXSON, JJ., agree.

Lassiter & Cassinelli, by: *Michael Kiel Kaiser*, for appellant.

Tim Griffin, Att’y Gen., by: *Kent G. Holt*, Ass’t Att’y Gen., for appellee.