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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08—CF—2801
)	
BENJAMIN TAMAYO,)	Honorable
)	Thomas E. Mueller,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: The defendant was proved guilty beyond a reasonable doubt of unlawful possession of a weapon by a felon under the theory of constructive possession. Accordingly, any alleged error in the giving of a jury instruction on the theory of accountability was harmless. The trial court did not abuse its discretion in sentencing the defendant.

Following a jury trial, the defendant, Benjamin Tamayo, was convicted of one count of unlawful possession of a weapon by a felon (720 ILCS 5/24—1.1(a) (West 2008)) and one count of unlawful sale of a firearm (720 ILCS 5/24—3(A)(k) (West 2008)). The defendant was sentenced to concurrent sentences of six years on the former offense and two years on the latter offense. On appeal, the defendant argues that with respect to his conviction for unlawful possession of a weapon

by a felon, he was not proved guilty beyond a reasonable doubt, the jury was improperly instructed on the theory of accountability, and his sentence was an abuse of discretion. We affirm.

On October 1, 2008, the defendant was charged with unlawful use of a weapon by a felon (count I), unlawful sale of a firearm (count II), and unlawful possession of a firearm without a firearm owner's identification card (430 ILCS 65/2(a)(1) (West 2008)) (count III). On November 16, 2008, following a preliminary hearing, the trial court found probable cause to indict the defendant on all three counts. On May 8, 2009, at the final pretrial conference, the State moved to amend count I to a class 3 felony and moved to nol-pros count III. The trial court allowed the amendment and rearraigned the defendant as to count I. The trial court then dismissed count III. A jury trial commenced May 11, 2009.

The facts relevant to the issues raised on appeal are as follows. At trial, Detective Miguel Pantoja of the Elgin police department testified that on August 6, 2008, he was assigned to work undercover and purchase a rifle. On that evening, he met with the defendant at the Aztec de Oro restaurant in Elgin. During that meeting, the defendant showed the detective two photographs of an AK—47 assault rifle that was for sale. The defendant stated that the rifle belonged to his brother Carlos and that Carlos wanted to sell the rifle. The defendant also told the detective that he and his brother were asking \$1,100 for the rifle and that the rifle was at his brother's house in Chicago. After the detective expressed interest in purchasing the gun, the detective and the defendant exchanged phone numbers.

The detective telephoned the defendant the next day and said he was interested in immediate purchase of the rifle and that he would pay extra for the immediate sale. The defendant said he would call his brother and then call the detective back. The defendant called the detective back

about a half hour later. The defendant stated that Carlos had agreed to bring the rifle from his house in Chicago. The defendant then suggested that they meet in a grocery store parking lot at 6 p.m.

At the specified time, the detective arrived in the agreed upon parking lot in an unmarked squad car. He was accompanied by three unmarked police cars and one marked police car. Shortly thereafter, the defendant and Carlos arrived in a blue Chevy Astro minivan. Carlos was the driver and the defendant was seated in the passenger seat. The defendant and his brother parked next to the detective. All three men exited their vehicles and walked to the rear of the minivan. Carlos asked the detective if he had the money. The detective responded affirmatively and asked whether Carlos had the rifle. Carlos then removed a blue bag from the back of the minivan and placed it in the rear passenger seat of the detective's vehicle. The detective opened the bag and saw the rifle with several magazines. The detective expressed concern that the rifle was not new and requested a reduced price. Carlos agreed to lower the price to \$1,300 and the detective accepted. The detective then handed the money to Carlos, who handed the money to the defendant. The defendant counted the money and put it in his pocket. After the transaction was completed, they all returned to their cars and left the parking lot. The detective returned to the debriefing location where he was shown an old booking photo. He identified the photo as that of the defendant. On September 30, 2008, the defendant was arrested near his home in Elgin. On October 15, 2008, Carlos was arrested at his home in Chicago.

People's Exhibit 10 was admitted into evidence. That exhibit was a certified copy of conviction for the defendant, showing that he was previously convicted of a felony.

Detective Jason Morales testified that on August 6, 2008, he was part of the drug unit for the Elgin police department. He was assigned to observe the meeting that occurred on that date between

the defendant and Detective Pantoja at the Aztec de Oro restaurant. He observed Detective Pantoja and the defendant speaking for a little over a half hour, but was not close enough to hear the conversation. Detective Pantoja and the defendant exited the restaurant at the same time.

The defense called Carlos as its only witness. Carlos asserted his fifth amendment right against self-incrimination.

During closing argument, the State argued that there were two propositions that had to be proved to find the defendant guilty of unlawful possession of a weapon: (1) that the defendant, or one for whose conduct he was legally responsible, knowingly possessed a firearm; and (2) that the defendant had previously been convicted of a felony. The State argued that the first proposition had been proved because the evidence showed that the defendant had constructive possession of the weapon in that he was in control of and actively engaged in the sale of the weapon. The State also argued that the first proposition was proved because the defendant was legally accountable for Carlos's actual possession of the weapon. The State argued that the second proposition was proved by People's Exhibit No. 10, a certified copy of the defendant's prior felony conviction. With respect to the charge for unlawful sale of a firearm, the State also argued that the defendant was proved guilty beyond a reasonable doubt because he was legally responsible for Carlos's actions. The defendant argued that he was merely an agent who was helping in the process but he did not have possession or legal responsibility for the weapon. The defendant argued that Carlos had ultimately negotiated the sale price and sold it to Detective Pantoja.

Following closing arguments, the jury was instructed on the theory of accountability pursuant to Illinois Pattern Jury Instructions, Criminal, No. 5.03 (4th ed. 2000). The instruction provided as follows:

“A person is legally responsible for the conduct of another person when, either before or during the commission of an offense, and with the intent to promote or facilitate the commission of the offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of the offense.”

The jury was also instructed about possession as follows:

“Possession may be actual or constructive. A person has actual possession when he has immediate and exclusive control over a thing. A person has constructive possession when he lacks actual possession of a thing but he has both the power and the intention to exercise control over a thing either directly or through another person.

If two or more persons share the immediate and exclusive control or share the intention and the power to exercise control over a thing, then each person has possession.”

Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000).

Following deliberation, the jury returned guilty verdicts on both counts. The defendant subsequently filed a motion for a new trial, which the trial court denied. At the conclusion of the sentencing hearing the trial court noted that unlawful possession of a weapon by a felon is a Class X felony if the weapon is a machine gun. The trial court further stated that:

“What we’re dealing with here today is an AK—47 which is an assault rifle. I guess being totally ignorant about guns, probably totally ignorant about guns, I don’t know the difference between an assault rifle and machine gun, but it would seem to me that they’re awfully close.

But this is treated as a Class 3 felony, punishable by 2 to 10 years in the Illinois Department of Corrections.”

The trial court then noted that the defendant had four prior convictions for driving under the influence (DUI), a prior felony conviction, and a prior deportation. The trial court noted that in each of the four DUI convictions the defendant was arrested under a different name. The trial court noted that the defendant was an illegal immigrant and “that probably in excess of 95 percent of the people who are in this country are law-abiding, hard-working individuals *** [and the defendant] is now before the Court, having made arrangements to sell an AK—47 to undercover police officers, when he could have just as easily been selling that AK—47 to gang members in our county.” The trial court stated that a minimum term was not appropriate given the nature of the offense and the defendant’s criminal history. The trial court sentenced the defendant to six years of imprisonment on the conviction for unlawful possession of a weapon by a felon and a concurrent two year sentence on the conviction for unlawful sale of a firearm.

On July 7, 2009, the defendant filed a motion to reconsider his sentence. Following argument on the motion, the trial court again noted that the defendant’s criminal history included four DUI convictions under four different names and a prior felony conviction for obstruction of justice. The trial court stated that due to the defendant’s deportation, his probation for the latter offense was terminated unsatisfactorily. The trial court also noted that the defendant had made all the arrangements for the sale of the weapon to the detective. Accordingly, the trial court found that based on all the evidence that was presented, the defendant was not entitled to a minimum term and that the previous sentence of six years was appropriate. Thus, the trial court denied the defendant’s motion to reconsider his sentence. The defendant filed a timely notice of appeal.

The defendant’s first contention on appeal is that he was not proved guilty beyond a reasonable doubt of unlawful possession of a weapon by a felon. When a defendant challenges his

conviction based on the sufficiency of the evidence, we must determine whether, after considering all of the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Gibson*, 403 Ill. App. 3d 942, 949 (2010). In Illinois, in order to prove unlawful possession of a weapon by a felon, the State must prove beyond a reasonable doubt that the defendant (1) knowingly possessed a firearm and (2) has been convicted of a felony. 720 ILCS 5/24—1.1(a) (West 2008). In the present case, People's Exhibit No. 10 affirmatively established that the defendant had a prior felony conviction. Thus, all that remained at issue was whether defendant knowingly possessed a firearm.

Criminal possession may be actual or constructive. In the present case, the State alleged that the possession was constructive. A defendant has constructive possession of a weapon if he has the intent and capability to maintain control and possession, and the defendant knows of the presence of the weapon. *People v. Zambetta*, 132 Ill. App. 3d 740, 750 (1985). If two or more people share immediate and exclusive control over an object, or share the intention and power to exercise control over it, then each person has possession. *People v. Pittman*, 216 Ill. App. 3d 598, 603 (1991).

In the present case, the defendant concedes that the evidence showed that he had knowledge of the presence of the rifle in Carlos's vehicle. The defendant argues only that he did not have immediate or exclusive control over the weapon because it was not within his easy reach inside the vehicle. Theoretically, however, it would have been possible for the defendant, as a passenger in a minivan, to go to the backseat of the van and retrieve the rifle. Nonetheless, whether or not the rifle was within reach is merely a factor to consider in determining whether the defendant had knowledge of and control over the weapon (see, *eg.*, *People v. O'Neal*, 35 Ill. App. 3d 89, 91 (1975) (contraband may be considered under the defendant's immediate control if it is within his easy reach)) but is not

dispositive of the issue (see *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003) (upholding finding of constructive possession where the defendant was not present at the time of the weapon's seizure)).

We conclude that, viewing the evidence in the light most favorable to the State, it was sufficient to establish that the defendant had the intent and the capability to maintain control and possession of the rifle. The defendant met with the undercover detective to discuss the sale. The defendant stated that “he and his brother were asking \$1,100 for the rifle.” The defendant spoke with the detective over the phone to arrange for the actual sale in the grocery store parking lot. The defendant and his brother arrived at the meeting place with the rifle in the back of the vehicle. The defendant exited the vehicle with his brother and overlooked the transaction. Once the detective and Carlos negotiated the final price, the detective handed the money to Carlos who then handed it to the defendant. The defendant then counted the money and put it in his pocket. Based on this evidence, showing that the defendant was in charge of the transaction from its inception, a rational trier of fact could conclude that the defendant had both the ability and the intention to exercise dominion and control over the rifle.

The fact that Carlos drove the minivan and physically removed the rifle from the van does not defeat a finding that the defendant possessed the rifle because constructive possession may be joint. Courts have held:

“ ‘The law is clear that the exclusive dominion and control required to establish constructive possession is not diminished by evidence of others’ access to the contraband. [Citation.] When the relationship of others to the contraband is sufficiently close to constitute possession, the result is not vindication of the defendant, but rather a situation of joint possession. To hold otherwise would enable persons to escape criminal liability for

possession of contraband by the simple expediency of inviting others to participate in the criminal enterprise.’ (Emphasis added.)” *People v. Hill*, 226 Ill. App. 3d 670, 673 (1992), quoting *People v. Williams*, 98 Ill. App. 3d 844, 849 .

Accordingly, the evidence was sufficient for a rational trier of fact to conclude that the defendant was guilty of unlawful possession of a weapon by a felon under the theory of constructive possession.

The defendant’s next contention on appeal is that the jury was improperly instructed on the theory of accountability because there was no evidence to support that theory. However, the defendant did not object to the jury instruction at trial and did not raise the issue in a posttrial motion. A defendant forfeits review of an alleged jury instruction error if the defendant does not object to the instruction or offer an alternative instruction at trial and does not raise the instruction issue in a posttrial motion. *People v. Mohr*, 228 Ill. 2d 53, 64-65 (2008). Accordingly, the defendant has forfeited review of this issue.

Even absent forfeiture, instructional errors are reviewed under a harmless error analysis. *People v. Pena*, 317 Ill. App. 3d 312, 319 (2000). “A jury instruction that was defective with respect to accountability does not constitute reversible error where sufficient evidence was adduced from which the jury could find a defendant guilty as a principal.” *Id.* As such, assuming, *arguendo*, that the jury instruction was erroneous, it would be harmless error because we have already determined that there was sufficient evidence to find the defendant guilty beyond a reasonable doubt of unlawful possession of a weapon by a felon as a principal under the theory of constructive possession.

The defendant’s final contention on appeal is that the trial court abused its discretion in sentencing him to six years’ imprisonment on his conviction for unlawful possession of a weapon by a felon. The defendant argues that the trial court considered improper aggravating factors in

reaching its sentencing determination. Specifically, the defendant argues that the trial court improperly considered that the rifle was an AK—47 and that it could have been sold to gang members. The State argues that this issue is forfeited because, in the defendant's written motion to reconsider his sentence, he argued only generally that his sentence was excessive. At the hearing on the motion to reconsider sentence, the defendant did argue, in part, that the trial court improperly considered the type of weapon at issue but did not raise the trial court's alleged error in stating that the rifle could have been sold to gang members. Nonetheless, to the extent that the defendant failed to preserve these issues in the trial court, we find no forfeiture because the forfeiture rule is less rigidly applied when the claimed error is based on the trial court's conduct. *People v. Chirchirillo*, 393 Ill. App. 3d 916, 927 (2009).

Turning to the merits, a defendant convicted of unlawful possession of a weapon by a felon faces a sentence of between 2 and 10 years' imprisonment. 720 ILCS 5/24—1.1(e) (West 2008). When a sentence falls within the statutory limits for the offense, it will not be disturbed unless the trial court abused its discretion. *Chirchirillo*, 393 Ill. App. 3d at 927. A trial court abuses its discretion when the penalty imposed does not comport with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Id.*

It is well established that a factor inherent in the offense should not be considered as a factor in aggravation at sentencing. *People v. Dowding*, 388 Ill. App. 3d 936, 942 (2009). However, there is a presumption that the trial court based its sentencing determination on proper legal reasoning and it is the defendant's burden to establish that the sentence was based on improper considerations. *Id.* at 942-43. In determining whether the trial court based the sentence on proper aggravating and

mitigating factors, a reviewing court should consider the record as a whole, rather than focusing on a few words or statements by the trial court. *Id.* at 943.

In the present case, reviewing the record as a whole, we cannot say that the trial court's comment that the weapon at issue was an AK—47 assault rifle was considered as a factor in aggravation. At the outset of its sentencing determination, the trial court noted that, pursuant to the statute, the offense was a Class X felony if the weapon was a machine gun. The trial court then noted that although an assault rifle and a machine gun may be awfully close, the present offense was still a Class 3 felony, punishable by 2 to 10 years' imprisonment. The trial court then went on to note the factors it was considering in aggravation, namely the defendant's criminal history, and that there were "very little, if any mitigating factors." Moreover, the trial court's statements at the hearing on the defendant's motion to reconsider demonstrate that the factors it considered in sentencing the defendant were the defendant's criminal history and the nature of the offense, both of which are proper factors upon which to base a sentence (*People v. Roberts*, 331 Ill. App. 3d 15, 21 (2002)). Accordingly, the record shows that the trial court merely noted the type of weapon in determining the appropriate sentencing range but did not consider it as an aggravating factor.

Nonetheless, even if the trial court had considered the type of weapon as an aggravating factor it would not have been improper. The rule precluding the consideration of an element of the offense as a sentencing factor should not be applied rigidly. *People v. Spicer*, 379 Ill. App. 3d 441, 468 (2007). Rather, sound public policy dictates that a sentence be varied in accordance with the circumstances of the offense. *Id.* Thus, for example, nothing prevents a trial court, when imposing a sentence, from considering the specific facts of the case or the degree of harm at issue, such as the extremely young or old age of the victim of an aggravated criminal sexual assault. *Id.* Recently, this

court, in *Chirchirillo*, held that a trial court, in sentencing a defendant for the offense of residential burglary involving a stolen firearm, could consider that stealing and selling a gun was more serious than stealing and selling something like a television or stereo. *Chirchirillo*, 393 Ill. App. 3d at 928.

As such, in the present case it was not improper for the trial court to consider that much more harm could result from a felon in possession of an assault rifle than a simple revolver. Similarly, it was not improper for the trial court to consider that the defendant “could have just as easily been selling that AK—47 to gang members in our county.” See *id.* (the trial court did not err in considering “the harm that the gun could cause to future unknown victims”); see also *People v. Robinson*, 221 Ill. App. 3d 1045, 1052 (1991) (holding that among the factors a sentencing court can consider is the threat posed to society by the defendant's crimes). After reviewing the record, we conclude that the trial court did not abuse its discretion when it sentenced the defendant to the 6-year term, as it was well within the statutory range for this offense and the trial court considered proper aggravating factors.

For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

Affirmed.

