

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the
ILLINOIS,)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
v.)	
)	No. 11 MC1 262384
MICHAEL BROWN,)	
Defendant-Appellant)	Honorable
)	Peggy Chiampas,
)	Judge, presiding.
)	

JUSTICE COBBS delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held:* The evidence was sufficient to establish that defendant constructively possessed three firearms which police officers found in an open closet area of a home; the simultaneous possession of multiple firearms without a valid firearm owner's identification (FOID) card supports only one conviction; the mittimus is corrected to unambiguously reflect that defendant was acquitted of theft.

¶ 2 Following a bench trial, defendant Michael Brown was convicted of three counts of unlawful possession of a firearm without a valid firearm owner's identification (FOID) card, and sentenced to three concurrent 150 day terms in prison. On appeal, defendant contends that (1) the

State failed to prove beyond a reasonable doubt that he constructively possessed the firearms in question; (2) his convictions for unlawful possession of a firearm without a FOID card violated his Second Amendment right to bear arms; (3) two of his convictions for unlawful possession of a firearm without a FOID card should be vacated because the statute that he was convicted of violating permits only one conviction for the simultaneous possession of multiple firearms; and (4) the mittimus should be corrected to reflect his acquittal of theft.

¶ 3 Defendant was charged with three counts of unlawful possession of a firearm without a valid FOID card pursuant to section 2(a)(1) of the Firearm Owners Identification Card Act (the Act) (430 ILCS 65/2(a)(1) (West 2010)). The first count alleged possession of a KEL TEC P-32 .32 caliber semi-automatic pistol; the second count alleged possession of a 56 SKS rifle; and the third count alleged possession of a Mossberg 500A 12 gauge pistol grip shotgun. Defendant was also charged with theft of a .45 caliber handgun pursuant to section 16-1(a)(1)(A) of the Criminal Code of 1961 (720 ILCS 5/16-1(a)(1)(A) (West 2010)). The following facts were adduced at trial.

¶ 4 At trial, Chicago police officer Daniel Dowling testified that on August 13, 2011, he and several officers executed a search warrant at 1140 West 104th Place in Chicago on August 13, 2011, at about 12:45 a.m. He learned during a pre-execution briefing that defendant was the target of the search warrant.¹ When Dowling entered the residence, he observed that the first floor was cleared, so he proceeded up the stairs to the second floor. Upon entering the bedroom on the right side of the stairs, Dowling observed a small child sleeping on the bed. After clearing the bedroom, he found a loaded two-tone semi-automatic .45 caliber handgun on the dresser. Officer Dowling then woke the sleeping child, and gathered the other children and two women

¹ The trial court stated that this fact would be considered only to show course of conduct, and not for the truth of the matter asserted.

who were discovered throughout the residence, into the living room. Defendant was not in the residence at the time the search warrant was executed. In the bedroom, Officer Dowling also found seven photographs of defendant and several other men and three letters. One letter was postmarked June 14, 2011, and was addressed to defendant at 1140 West 104th Place. The other two letters listed defendant's name and 1140 West 104th Place as the return address. Officer Dowling observed mostly male clothing inside of the bedroom closet.

¶ 5 Chicago police officer Richard Alvarez testified that on August 13, 2011, he assisted in the execution of the search warrant at 1140 West 104th Place. At approximately 12:40 a.m., after knocking on the front door with no response, officers used force to knock down the door. Officer Alvarez then proceeded to conduct a systematic search of the first floor, where he found two females and two or three children. After clearing the first floor, he proceeded up the stairs to the bedroom on the left side of the stairs. In the bedroom, Officer Alvarez saw three to four more children on a mattress on the floor, who appeared to be less than five years old. He then learned from Officer Hronopoulos that a shotgun was found propped up against an open closet area in the second floor hallway. The closet had no door, and was located approximately five feet from the right-side bedroom in which Officer Dowling found a .45 caliber gun. In the closet, Officer Alvarez observed a Mossberg shotgun, a loaded SKS assault rifle, and a loaded .32 caliber Kel Tec handgun. The firearms, the original search warrant, and the photographs and pieces of mail found in the right-side bedroom were inventoried. After performing a "LEADS check" for each firearm, Officer Alvarez learned that the .45 caliber handgun found in the bedroom had been reported stolen in August of 2009. None of the firearms collected were submitted for fingerprint analysis or DNA. The search did not produce any valid FOID cards.

¶ 6 The State proceeded by way of stipulation that if called to testify, Chicago police officer Susnis would state that on September 28, 2011, at approximately 8:45 a.m., he arrested

defendant, whom he would identify in open court, under an active investigation alert for unlawful possession of a firearm. Officer Susnis would also testify that he generated complaints to be signed for theft and three counts of a firearm without a valid FOID card.

¶ 7 The State proceeded by way of stipulation and tendered People's Exhibit No. 12, a self-authenticating certification from the Illinois State Police Department indicating that as of March 13, 2012, defendant was never issued a FOID card.

¶ 8 The defense moved for a directed verdict, and it was granted with regard to the one theft charge related to the .45 caliber gun found in the right bedroom. However, defendant's motion for a directed verdict with regard to the three unlawful possession of a firearm without a valid FOID card charges was denied.

¶ 9 The court found defendant guilty of all three counts of unlawful possession of a firearm without a valid FOID card. The court found that Officer Dowling and Officer Alvarez testified credibly before the court. The court noted that Officer Dowling testified that in the room in which he recovered the .45 caliber gun, he observed "primarily mostly men's clothing, [and] three letters that the Court admitted into evidence." The court then stated that:

"One of those letters is addressed to [defendant] specifically to 1140 West 104th Place, Chicago Cook County, Illinois *** There are two separate letters with return addresses both of which are [defendant] at that same address, 1140 West 104th Place, Chicago, Illinois, 60643, one of which is stamped and ready to go ***. There is another letter, sealed, again return address [defendant], 1140 West 104th Place ***. In addition there are Photos 1 through 7 which this Court has in evidence and will take judicial notice of the fact that in each of these photographs [defendant] who is present in open court is depicted in each one of those photographs that was found in the front bedroom where the .45 caliber was recovered, some of which he is depicted by himself in

other photographs he is depicted with other individuals and, yes, one of them is on vacation at the El San Juan Hotel and Casino in Puerto Rico.*** The Court finds there is substantial proof of residency in this matter to connect [defendant] to not only that property but to the gun specifically on the dresser, the .45 caliber, and the open closet that was immediately outside that room and accessible."

¶ 10 At the sentencing hearing, defendant filed a motion for a new trial, which the trial court denied. The defense argued in mitigation that defendant's large family was present during his trial and sentencing hearing, he was working at the time of the offense, and that defendant has one child. The State argued in aggravation that defendant was 12 days into serving 30 months' probation on a previous robbery charge when he was arrested for the instant offenses. After the court asked about the factual details of the robbery, the State further noted that the conviction stemmed from defendant robbing a 55 year old man of a white vehicle; defendant then led the police on a high speed chase until he crashed the vehicle. In allocution, defendant stated, "those were not my guns. *** It was a house full of fellas, and I wasn't even there. I don't even reside there. I got a family. I just want to get back to work." The court sentenced defendant to three concurrent 150 day terms in prison for each unlawful possession of a firearm without a valid FOID card conviction.

¶ 11

ANALYSIS

¶ 12

Sufficiency of the Evidence

¶ 13 We first address defendant's contention that the State's evidence was insufficient to prove beyond a reasonable doubt that he constructively possessed the three firearms found in the closet because there was insufficient proof that defendant lived at the residence and exercised control over the firearms. The State responds that the evidence at trial proved beyond a reasonable doubt

that defendant lived in the residence where the firearms were found and exercised control over the firearms.

¶ 14 When a defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant question on review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). In a bench trial, it is for the trial judge, sitting as the trier of fact, to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). In reviewing the evidence, it is not the function of the court to retry the defendant, nor will we substitute our judgment for that of the trier of fact. *People v. Collins*, 214 Ill. 2d 206, 217 (2005). A conviction will only be overturned where the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *Beauchamp*, 241 Ill. 2d at 8.

¶ 15 Section 2(a)(1) of the Act (430 ILCS 65/2(a) (West 2010)) provides, in pertinent part, as follows:

"(a)(1) No person may acquire or possess any firearm, stun gun, or taser within this State without having in his or her possession a [FOID] Card previously issued in his or her name by the Department of State Police under the provisions of this Act."

¶ 16 Defendant does not dispute that he did not possess a FOID card at the time that the police recovered the firearms; therefore, the only point of contention is whether defendant possessed the firearms.

¶ 17 Absent actual possession, as in the instant case, the State must prove constructive possession. To establish constructive possession, the State must prove beyond a reasonable doubt that the defendant (1) had knowledge of the presence of the weapons; and (2) exercised

immediate and exclusive control over the area where the weapons were found. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003) (citing *People v. Brown*, 327 Ill. App. 3d 816, 824 (2002)). "The defendant's control over the location where weapons are found gives rise to an inference that he possessed the weapons." *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. "Habitation in the premises where contraband is discovered is sufficient evidence of control to constitute constructive possession." *Id.* The mere presence of contraband on premises under the control of the defendant gives rise to an inference of knowledge and possession sufficient to sustain a conviction absent other factors which might create a reasonable doubt as to the defendant's guilt. *People v. Smith*, 191 Ill. 2d 408, 413 (2000).

¶ 18 Here, we find that the evidence established that defendant exercised control over the area where the three firearms were found. According to the testimony of Officer Dowling, in the bedroom where he found the .45 caliber handgun, he also found one letter addressed to defendant at 1140 West 104th Place and two other letters bearing defendant's name and 1140 West 104th Place as his return address. In addition, he observed seven photographs with defendant and several other men in them. Officer Dowling also noted that he observed mostly male clothing in the closet of the bedroom. Additionally, Officer Alvarez testified that Officer Hronopoulous found a shotgun propped up against an open closet area in the hallway located about five feet from the bedroom in which Officer Dowling found the .45 caliber handgun. In this closet, Officer Alvarez, observed a Mossberg shotgun, a loaded SKS assault rifle, and a loaded .32 caliber Kel Tec handgun. Both men testified that a number of children and two women were the only people present at the household at the time the search warrant was executed.

¶ 19 In its findings, the trial court specifically noted that the letters, one of which was "stamped and ready to go" and the photographs, some of which depicted defendant by himself and one of which depicted him on vacation, provided "substantial proof of residency in this

matter to connect defendant not only to the property but to the gun on the dresser, *** and the open closet that was immediately outside that room and accessible." We believe that the credible testimony of Officer Dowling regarding the photographs, letters, and male clothing located in the front-right bedroom provided sufficient evidence to support the trial court's finding that defendant controlled both the bedroom and nearby open closet area in which the firearms were found. From defendant's control of the area the court could reasonably infer that defendant knew of the firearms. *Smith*, 191 Ill. 2d at 413. Therefore, viewing the evidence in the light most favorable to the State, coupled with the reasonable inferences drawn from the evidence, we find the evidence was sufficient to support the trial court's determination that defendant constructively possessed the firearms found during the execution of the search warrant at 1140 West 104th Place.

¶ 20 Nonetheless, defendant contends that the State did not present enough evidence to connect defendant to either the home at 1140 West 104th Place or the firearms found in the closet. Specifically, defendant argues that the evidence was insufficient because (1) he was not in the home when the warrant was executed; (2) the police did not test the recovered firearms for fingerprints or DNA; (3) he never made an inculpatory statement when he was arrested; and (4) no evidence was presented that he had keys to the home or any identification that listed 1140 West 104th Place as his address when he was arrested, nor did the State present any evidence that he told the police that he lived at that address. Although we believe that the introduction of such evidence would have strengthened the State's case, where the uncontradicted evidence is sufficient to establish knowledge and control of the weapons in question, none of these pieces of evidence are necessary to support a finding of constructive possession. See *McCarter*, 339 Ill. App. 3d at 879-80.

¶ 21 Defendant also contends that that the State failed to prove that he constructively possessed the firearms found in the hallway closet because it was located in a common area, and at least two other adults lived in the residence. However, this court has held that mere proof of others' access to the weapons does not defeat a finding of constructive possession, as possession may be exclusive and joint. See *People v. Hill*, 226 Ill. App. 3d 670, 673 (1992). Moreover, the room in which Officer Dowling recovered the loaded .45 caliber handgun, located merely five feet away from the closet that held the other firearms, contained only male clothing, and according to both officers, the only other occupants of the home were two women and a number of children. Thus, we reject defendant's invitation to conclude that the firearms belonged to any of the other known residents of the home. We also reject defendant's contention that the State was required to produce evidence which established a relationship between defendant and the two women found in the home, as such evidence is unnecessary to determine whether defendant exercised control over the area where the firearms were found.

¶ 22 Defendant rejects the State's reliance on *McCarter*, 339 Ill. App. 3d 876 to support its contention that the evidence in this case was sufficient to prove constructive possession. In *McCarter*, although the defendant was not present in the home at the time that the search warrant was executed, this court found that the State proved beyond a reasonable doubt that he had constructively possessed the weapons and ammunition that police found in a bedroom of the home. *Id.* at 870. There, the State presented evidence that the police knew from previous encounters that the defendant lived at the home, his mother had implied to police that the defendant lived there, and police found photographs of defendant and two pieces of mail addressed to him in the same drawer where they recovered rounds of ammunition. *Id.* We agree with defendant that *McCarter* is distinguishable from the instant case in that the evidence establishing defendant's residency was overwhelming; however, we note that the facts

determining a defendant's guilt need not be overwhelming to be sufficient to support a conviction. See *People v. Hall*, 194 Ill. 2d 305, 330 (2000) (noting that even when a case is based on circumstantial evidence, evidence is sufficient when it satisfies the trier of fact beyond a reasonable doubt that the defendant is guilty)). Thus, we find that the facts in this case were sufficient to support the trial court's determination of defendant's guilt beyond a reasonable doubt.

¶ 23 Validity of the Firearm Owners Identification Card Act

¶ 24 Defendant concedes this argument in light of our supreme court's recent opinion in *People v. Mosley*, 2015 IL 115872, ¶¶ 26-50, which upheld the constitutionality of requiring a FOID card to possess a firearm.

¶ 25 Simultaneous Possession of Multiple Firearms

¶ 26 Next, defendant contends that two of his convictions for unlawful possession of a firearm without a FOID card should be vacated because the simultaneous possession of multiple firearms supports only one conviction under section 2(a)(1) of the Act (430 ILCS 65/2(a)(1) (West 2010)). The State responds that defendant's separate and individual possession of each firearm without a valid FOID card constitutes separate and individual offenses, and therefore, the three convictions should be affirmed.

¶ 27 Our primary goal when construing a statute is to give effect to the legislature's intent, best indicated by giving the statutory language its plain and ordinary meaning. *People v. Elliott*, 2014 IL 115308, ¶ 11. A reviewing court may also consider the reason for the law and the problems intended to be remedied. *People v. Perez*, 2014 IL 115927, ¶ 9. We review *de novo* the question of whether the statute authorizes separate convictions for the simultaneous possession of a firearm and ammunition because it presents a question of statutory interpretation. *Elliott*, 2014 IL 115308, ¶ 11.

¶ 28 Here, defendant was convicted of three counts of unlawful possession of a firearm without a valid FOID pursuant to section 2(a)(1) of the Act, which provides in relevant part, "[n]o person may acquire or possess any firearm, *** without having in his possession a [FOID] card." The convictions were based on the three firearms recovered from the open closet area.

¶ 29 We find this court's analysis in *People v. Sotelo*, 2012 IL App (2d) 101046, instructive. In *Sotelo*, the defendant was convicted of three counts of unlawful possession of a firearm without a FOID card in violation of section 2(a)(1) of the Act and one count of unlawful possession of ammunition without a FOID card in violation of section 2(a)(2) of the Act. 430 ILCS 65/2(a)(1), (a)(2) (West 2008). *Id.* at 1. The trial court found the defendant guilty on all counts based on evidence that he possessed three different firearms and a box of ammunition without a FOID card; however, on review, this court concluded that the possession of multiple firearms without a FOID card supported only one conviction. *Id.*

¶ 30 The *Sotelo* court reasoned that under *People v. King*, 66 Ill. 2d 551 (1977), multiple convictions are prohibited for offenses carved from a single physical act, but *King* does not prohibit multiple convictions for the simultaneous possession of multiple firearms without a FOID card. *Sotelo*, 2012 IL App (2d) 101046, ¶ 3. The court explained that "although the singular act of failing to possess a FOID card could not sustain multiple convictions of an offense comprised *solely of that act*, failing to possess a FOID card may serve as a common element of multiple offenses that include additional physical acts - possession of different firearms, or of firearm ammunition." *Id.* Nonetheless, the court concluded that although multiple convictions are permissible under *King*, it is not clear from the FOID Act whether the General Assembly intended to permit multiple convictions for the simultaneous possession of multiple weapons without a FOID card. *Id.* ¶ 4-5. The *Sotelo* court, relying on *People v. Carter*, 213 Ill. 2d 295, 302 (2004), explained that in determining whether the legislature intended to permit

multiple convictions, a court is required to determine a statute's "allowable unit of prosecution." *Sotelo*, 2012 IL App (2d) 101046, ¶ 3. In *Carter*, our supreme court addressed whether the simultaneous possession of two handguns and two clips of ammunition could support separate convictions under the pre-amended unlawful use of a weapon by a felon (UUWF) statute (720 ILCS 5/24-1.1 (West 1996)).² *Carter*, 213 Ill. 2d at 299. The *Carter* court held that the UUWF statute which prohibited the possession of "any firearm or any firearm ammunition" by a felon was ambiguous because the term "any" did not adequately define the "allowable unit of prosecution." *Id.* at 301-02. Specifically, the court found that the term "any" as used in the statute could refer to either "some," "one out of many," or "an indefinite number." *Id.* at 301. Because the statute was ambiguous, the *Carter* court, pursuant to the rule of lenity which allows ambiguous statutes to be construed in favor of the accused, adopted an interpretation that favored the defendant and held that the simultaneous possession of multiple firearms and ammunition constituted only a single offense. *Id.* at 302.

¶ 31 Based on the holding of *Carter*, the *Sotelo* court concluded that section 2(a)(1) of the Act, which similarly cites "any firearm " to define the allowable unit of prosecution, supports only a single conviction for the possession of multiple firearms without a FOID card. *Sotelo*, 2012 IL App (2d) 101046, ¶ 10. We reach the same conclusion in the instant case. Thus, we vacate defendant's convictions on counts two and three for unlawful possession of a firearm without a FOID card. Although the State contends that interpreting the Act in a way that only permits a single conviction misconstrues the legislative intent behind the statute, we decline to depart from

² In 2005, the General Assembly amended the UUWF statute to specifically authorize multiple convictions based on the possession of multiple weapons.

the holding in *Sotelo* absent guidance from the legislature clarifying whether multiple convictions for the simultaneous possession of multiple firearms is permissible under the Act.³

¶ 32

Mittimus

¶ 33 Finally, defendant argues, and the State agrees, that his mittimus should be corrected to reflect that he was acquitted of theft. The mittimus currently lists all four charges brought against defendant; three counts for unlawful possession of a firearm without a valid FOID card and one count for theft. We order the clerk of the circuit court to strike the theft count from the list of offenses to unambiguously reflect the fact that he was acquitted of theft. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 34

CONCLUSION

¶ 35 For the foregoing reasons, we vacate defendant's convictions on counts two and three for unlawful possession of a firearm without a valid FOID card, and affirm a single conviction of the offense. We also amend defendant's mittimus to reflect that he was acquitted of theft.

¶ 36 Vacated in part; affirmed in part; mittimus is corrected.

³ Although the General Assembly amended the UUWF statute to diminish ambiguity regarding whether multiple convictions are authorized following our supreme court's decision in *Carter*, it did not similarly amend the FOID statute which contains the same ambiguous language regarding the allowable unit of prosecution. Thus, the relevant analysis in *Carter* is still applicable as it applies to determining whether multiple convictions are authorized under the FOID statute.