2015 IL App (1st) 123581-U

FIFTH DIVISION
February 13, 2015

No. 1-12-3581

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 MC4 1275
	)	
WILLIAM DONALD,	)	Honorable
	)	James A. Shapiro,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: The evidence at trial was sufficient to convict defendant of possession of firearm ammunition without a Firearm Owner's Identification (FOID) card where a police officer testified credibly that he saw defendant place "something" under the seat of a car and immediately thereafter recovered ammunition from that location.

¶ 2 Following a bench trial, defendant William Donald was convicted of possession of firearm ammunition without a Firearm Owner's Identification (FOID) card and sentenced to 64 days in jail. On appeal, defendant contends that the evidence was insufficient to prove him guilty beyond a reasonable doubt. For the reasons that follow, we affirm.

¶ 3 At trial, Ricky Miles testified that on March 5, 2012, he drove his mother's car to defendant's house to pick him up to go play basketball. Jason Hooks rode in the front passenger seat and Deja Barker sat in the back. When the group arrived at defendant's house, Miles saw defendant and his stepfather in a "wrestling match" in front of the house. Defendant and his stepfather stopped wrestling and went into the house. A few minutes later, defendant came back out of the house. By this time, Hooks had moved to the back seat of the car. While Miles was paying attention to a police officer in a squad car about half a block away, defendant arrived at the car and got in the front passenger seat. Miles did not recall whether defendant had anything in his hands, and did not see defendant reach underneath the seat or put anything there. Miles attempted to drive away, but was blocked by police cars.

¶ 4 Miles testified that both he and his sister drove the car regularly. He also testified that earlier in the day, before he picked up defendant, he put some incense under the front passenger seat. He did not see anything else under the seat at that time. The last time he looked under the front passenger seat on the day in question was after picking up Barker. Miles stated that to his knowledge, an ammunition magazine was not in his car before he picked up defendant.

¶ 5 Hillside police sergeant Donald Brown testified that on the day in question, he and other officers responded to a report of a fight in the street. When he arrived at the given address, he saw defendant and another man arguing in the front yard. Sergeant Brown approached defendant's stepfather, who had come out of the house and was very agitated and shouting. Sergeant Brown testified that the stepfather pointed toward a car and shouted, "My son is hiding pot."

¶ 6 At this point defense counsel objected, and the trial court sustained the objection. However, the prosecutor argued that the statement was not hearsay, because it was being offered not for the truth of the matter asserted, but to explain the officer's actions. The prosecutor also noted that defendant had not been charged with possession of cannabis. The trial court decided to allow the testimony to show why the officer searched the car.

¶ 7 Sergeant Brown then testified that defendant's stepfather pointed toward a car and said, "My son is hiding pot under the seat" and "He is hiding pot in the car." In response, Sergeant Brown directed his attention to the car. He saw defendant crouched down near the open front passenger door, pushing something under the passenger seat. Sergeant Brown stated that three other people were in the car. Officers who had responded to the scene were in the process of talking to those people and getting them out of the car. At Sergeant Brown's direction, defendant stepped away from the car. Sergeant Brown walked over to the car and looked in the open door. He testified, "As the door was still open and I looked where he had been pushing something under the seat, and I could see the butt of a firearm magazine underneath the seat." When asked whether he had to move the seat "or anything like that," Sergeant Brown stated, "I wasn't even in the car, I just looked."

¶ 8 Sergeant Brown testified that he retrieved the magazine, which had five 9 mm bullets in it. He then placed defendant under arrest and had a conversation with him. Defendant admitted that he did not have a FOID card. No weapons or cannabis were found on defendant, and Sergeant Brown did not recall coming across any incense in the car. Sergeant Brown took the magazine to the police station, where it was inventoried into evidence.

¶ 9 Defendant made a motion for a directed finding, which was denied. Defendant then waived his right to testify and rested.

¶ 10 During closing argument, defense counsel noted that there was no testimony that defendant had anything in his hands when he left the house. The trial court interjected, "Although there was testimony that the stepfather said he had pot." When counsel responded that no marijuana was recovered, the trial court stated, "I understand, but I suppose the stepdad could have been mistaken."

¶ 11 The trial court found defendant guilty of possession of firearm ammunition without a FOID card. In the course of doing so, the trial court indicated that it was "troubled" by Miles' credibility but found that Sergeant Brown testified very credibly. The trial court also discussed whether the case involved constructive or actual possession, stating as follows:

> "But here, it may be a continuum. I am not sure whether it is really a constructive possession case or not. It may be an actual possession case because the inference is clearly that your client had possession of the magazine even though no one saw him have possession of the magazine, had possession of the magazine before Sergeant Brown saw it under the seat."

¶ 12 Defendant filed a motion for a new trial, arguing, among other things, that the State had failed to prove possession. Following a hearing, the trial court denied the motion. In announcing its decision, the court again addressed constructive and actual possession:

> "In terms of actual versus constructive possession, I guess I think it's both. I'll make a finding, in the alternative, that it's actual possession based on the circumstantial evidence of [defendant] reaching under the front seat, that it's

> reasonable for Sergeant Brown to have believed, and I believe, that [defendant] had actual possession of the magazine immediately before he put the magazine under the front seat. That's my finding. And in terms of constructive possession, I don't even know if it is constructive possession."

After further discussion with the attorneys, the trial court reiterated that it found defendant had actual possession of the magazine and that it was "not sure if it's really a constructive possession case." The trial court subsequently sentenced defendant to 64 days in jail.

¶ 13 On appeal, defendant contends that the State failed to prove the element of possession beyond a reasonable doubt. He argues that because the magazine was not recovered from his person, the State was required to prove that he knew it was under the seat and that he constructively possessed it by exercising immediate and exclusive control over the area where it was found. He argues that the State did not meet this burden, as the car did not belong to him, the car's other occupants were all within reach of the area where the magazine was found, the magazine was barely visible from the passenger seat, Sergeant Brown did not see anything in his hands, and there was conflicting testimony as to whether he was a passenger inside the car or was crouched down next to the car. Defendant further argues that the trial court improperly considered the hearsay statement of defendant's stepfather to bolster Sergeant Brown's testimony that he observed defendant putting something under the seat.

¶ 14 When reviewing the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The credibility of the witnesses, the weight to be given

their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). Reversal is justified where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 15 Section 2(a)(2) of the Firearm Owners Identification Card Act provides, in relevant part, that "No person may acquire or possess firearm ammunition within this State without having in his or her possession a Firearm Owner's Identification Card previously issued in his or her name by the Department of State Police under the provisions of this Act." 430 ILCS 65/2(a)(2) (West 2012). Possession may be actual or constructive and is often proved with circumstantial evidence. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Where a case is based on circumstantial evidence, it is not necessary for each link in the chain of circumstances to be proved beyond a reasonable doubt; it is sufficient if all the evidence, considered collectively, satisfies the trier of fact beyond a reasonable doubt that the defendant is guilty. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 16 Actual possession exists where a defendant exercises present personal dominion over illicit material and has immediate and exclusive dominion or control over the material. *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000). "Dominion" includes attempts to conceal or throw away illicit material. *People v. Dismuke*, 2013 IL App (2d) 120925, ¶ 16; *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987). Present personal touching of the illicit material is not required, and the requirement of "exclusive" possession does not mean that the possession may not be joint.

Schmalz, 194 Ill. 2d at 82. Once possession has been shown, the trier of fact may draw an inference of guilty knowledge from the surrounding facts and circumstances. *Id*.

¶ 17 Viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence that defendant had actual possession of the magazine. At trial, Sergeant Brown testified that he witnessed defendant crouched down near the open front passenger door, pushing something under the passenger seat. Immediately thereafter, Sergeant Brown recovered the magazine from that location. This testimony sufficiently establishes that defendant exercised present and personal dominion over the magazine as he attempted to conceal it underneath the passenger seat.

¶ 18 We are mindful of defendant's argument that there was conflicting evidence at trial as to whether or not he crouched down next to the car's open passenger door. In essence, this argument is a challenge to the trial court's credibility determinations. At trial, the court heard two witnesses. Miles testified that defendant got into the front passenger seat, and that he did not see defendant reach underneath the seat or put anything there. In contrast, Sergeant Brown testified that defendant was not in the car, but rather, crouched down beside the open door as he pushed something under the seat. Since neither version of events was so implausible or improbable as to call its veracity into question, the decision of which version to believe rested with the trial court. *People v. Daniel*, 311 Ill. App. 3d 276, 283 (2000). After hearing both versions of events and viewing the witnesses while testifying, the trial court chose to believe Sergeant Brown over Miles. This was its prerogative in its role as the trier of fact. *People v. Moser*, 356 Ill. App. 3d 900, 911 (2005). Because the trial court is in a superior position to assess the credibility of

witnesses, we will not disturb its determination. *Brooks*, 187 Ill. 2d at 131; *Daniel*, 311 Ill. App. 3d at 283. Defendant's challenge to the sufficiency of the evidence fails.

¶ 19 As for defendant's argument regarding hearsay, we are not troubled by the trial court's comment during defendant's closing argument that "there was testimony that the stepfather said [defendant] had pot." Defendant argues that this comment "reveals that the court did improperly use [defendant's] stepfather's hearsay statement that [defendant] had something illegal to corroborate and bolster [Sergeant] Brown's testimony that he observed [defendant] putting something under the seat." We disagree with defendant that the trial court was using the statement for the truth of the matter asserted, *i.e.*, as evidence that defendant had contraband in his hands. Moreover, even if the trial court did err in this manner, any error would be harmless, as there was more than ample evidence of actual possession of firearm ammunition without the hearsay testimony.

¶ 20 Finally, because we find the evidence sufficient to support a finding that defendant had actual possession of the magazine, we need not address his arguments regarding constructive possession.

¶ 21 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.