

No. 1-13-0869

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CR 150
)	
MARK TERRY,)	Honorable
)	William Timothy O'Brien,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Evidence sufficient to convict defendant of unlawful possession of a firearm by a street gang member. All other charges vacated as based on possession of one firearm.
- ¶ 2 Following a bench trial, defendant Mark Terry was convicted of unlawful possession of a firearm by a street gang member and sentenced to 5 years' imprisonment. On appeal, defendant contends that the evidence was insufficient to convict him beyond a reasonable doubt. He also contends that various additional counts of conviction should be vacated.

¶ 3 Defendant and codefendant Jesus Zepeda were charged with unlawful possession of a firearm by a street gang member and various counts of aggravated unlawful use of a weapon, all allegedly committed on or about November 29, 2011. The charges of possession of a firearm by a street gang member alleged that they possessed – had immediately accessible – a firearm and ammunition in a vehicle in a parking lot while neither was in his abode or had a firearm owner's identification card (FOID) and while both were members of a street gang. The case proceeded to severed but simultaneous bench trials.

¶ 4 At trial, police officer Mary Via testified that, shortly before midnight on November 29, 2011, she and Officer Garrett Suderski responded to a report of a person with a gun in a restaurant parking lot at Cicero Avenue and Addison Street. The restaurant was open, but only for drive-through service. When they arrived there, she saw two Hispanic men in "hoodies" leaving a car parked in the lot, matching the description from the report. Codefendant exited the passenger side of the car and walked towards the restaurant, then towards the intersection of Cicero and Addison when he found the restaurant door locked. Defendant exited the driver's side, leaving the door ajar, and walked towards the Addison sidewalk. He was thus walking towards the officers' marked police car. Officers Via and Suderski stopped and detained codefendant and defendant respectively. They returned to the car, and Officer Via saw a large handgun – a blue-steel .357 with an eight- or nine-inch barrel – on the passenger side of the floorboard. She denied that the gun was even partially under the passenger seat. Officer Suderski recovered the gun, which was loaded with six rounds, and Officer Via later inventoried the gun and bullets.

¶ 5 Officer S. Martin testified that he brought codefendant to the police station following his arrest in the restaurant parking lot by Officers Via and Suderski, and that defendant was also

taken to the station. Officer Martin saw the car in the parking lot, a 2000 Dodge Neon, and later found that it was registered to Cynthia Morales, defendant's mother. Officer Martin identified post-arrest photographs of defendant and codefendant, including their tattoos.

¶ 6 Officer Martin then went to interview defendant, first informing him of his *Miranda* rights. After acknowledging his rights, defendant admitted to being an unranked member of the Latin Kings gang for about two months, and previously an unranked member of the Spanish Cobra gang. On the night in question, defendant picked up codefendant because codefendant "wanted to shoot up some Maniac Disciples" due to an earlier altercation at Cicero and Addison. Defendant saw the gun for the first time when codefendant put it on the passenger-side floorboard upon seeing the approaching officers.

¶ 7 Officer Jon Ohlicher testified to being a gang or organized crime investigator. Based on lengthy investigations by himself and other officers, he identified Familia Stone, Spanish Four Corner Hustlers, Spanish Cobras, and Latin Kings as street gangs. Officer Ohlicher viewed the post-arrest photographs of defendant and codefendant and identified their tattoos as gang-related. In particular, defendant had tattoos linking him to the Spanish Cobras and codefendant had a tattoo linking him to Familia Stone.

¶ 8 The court admitted without objection certifications to the effect that defendant (and codefendant) had never been issued an FOID and that the Neon was registered to Morales.

¶ 9 Motions for directed findings by defendant and codefendant were denied without argument or findings. Defendant and codefendant chose, after admonishment, not to testify. Following closing arguments, the court found defendant and codefendant guilty on all counts. The court found that the gun was clearly found in the Neon registered to defendant's mother, that

the gun was "very large," that the State proved both defendant and codefendant to be gang members and to not have FOIDs, and that this was a case of constructive possession. Regarding defendant, the court found that the gun was only a few feet away from him in the car, that he admitted that "the purpose of the drive was retribution against another gang," and that walking away from the car without closing the door indicated haste to leave and thus knowledge of the gun. Regarding codefendant, the court found that the gun was at his feet and thus within both his knowledge and control, that he admitted knowing the gun was in the car, and that he tried to distance himself from the gun by walking away rather than returning to the car when he found the restaurant closed.

¶ 10 Defendant filed a post-trial motion arguing insufficiency of the evidence: that constructive possession of contraband is not proven by mere knowledge of the contraband's location or mere proximity, and that the driver of a vehicle does not inherently have possession of everything in the passenger compartment when there are also passengers in the vehicle. Following argument, the court denied the motion, finding that the size of the gun and its location on the floorboard meant that defendant was aware of the gun and that his knowledge was corroborated by walking away from the car hastily, without closing the door.

¶ 11 Following argument in aggravation and mitigation, the court sentenced defendant to 5 years' imprisonment. The mittimus lists only one count of conviction, for unlawful possession of a firearm by a street gang member, but also states "C001 THRU C007 CONCURRENT." This appeal timely followed.

¶ 12 On appeal, defendant contends that the trial evidence was insufficient to convict him beyond a reasonable doubt, and in particular that his constructive possession of the firearm was unproven.

¶ 13 In reviewing a challenge to the sufficiency of the evidence, we determine, after taking the evidence in the light most favorable to the prosecution, whether the fact finder could rationally find every element of the offense beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. We generally refrain from substituting our judgment for that of the fact finder on issues involving the weight of evidence or witness credibility because the fact finder resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences. *Id.* We will not reverse a conviction merely because the defendant argues that a witness was not credible. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. The fact finder need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, all the evidence taken together must satisfy the fact finder beyond a reasonable doubt of the defendant's guilt. *Id.* Similarly, the fact finder need not disregard inferences that flow normally from the evidence or seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Brown*, 2013 IL 114196, ¶ 48.

¶ 14 For purposes of the Criminal Code (720 ILCS 5/-11 *et seq.* (West 2012)), "[p]ossession is a voluntary act if the offender knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have been able to terminate his possession." 720 ILCS 5/4-2 (West 2012). When a defendant is not found in actual possession of contraband such as a firearm, the State must prove constructive possession; that is, that the defendant (1) knew a

firearm was present and (2) exercised immediate and exclusive control over the area where the firearm was found. *People v. Sams*, 2013 IL App (1st) 121431, ¶ 10. The State may establish knowledge through evidence of a defendant's acts, declarations, or conduct, from which it may be inferred that he knew of the firearm's presence, and a defendant's control over the location where a weapon is found gives rise to an inference that he possesses that weapon. *Id.* While a defendant who is the owner and/or driver ("owner/driver") of a vehicle is not *ipso facto* in possession of everything in the passenger area of the vehicle if there are also passengers who may be in possession of the contraband, possession may be jointly held by the owner/driver and passengers if the evidence supports a conclusion that the defendant had control, or the ability to exercise control, over the contraband. *People v. McIntyre*, 2011 IL App (2d) 100889, ¶ 17.

¶ 15 Here, defendant and codefendant were seen exiting a car where, virtually immediately thereafter, a large gun was found on the passenger-side floorboard in plain view; that is, not under the passenger seat. In that location, the gun would have been easily visible to and readily reachable by both defendant and codefendant while they were in the car. This is in stark contrast to the gun in *McIntyre*, which was "in an opening between the plastic base of the front-passenger seat and the leather portion of that seat, on the side of the seat that was closest to the front-passenger door" so that the court could not infer that the owner/driver "had control, or the ability to exercise control, over the weapon." *McIntyre*, 2011 IL App (2d) 100889, ¶ 18. Both defendant and codefendant demonstrated knowledge of the gun by their actions after leaving the car: defendant walked away in such haste that he left his door open, and codefendant did not return to the car upon finding the restaurant closed to walk-in customers. On such evidence, taken in the light most favorable to the State as we must, a reasonable finder of fact could conclude that both

defendant and codefendant constructively possessed the firearm in the car in that each was aware of and could have exercised control over it. We find sufficient evidence to convict defendant.

¶ 16 Defendant also contends that we must vacate his additional convictions; that is, other than unlawful possession of a firearm by a street gang member. While the court found him guilty of all charges, it sentenced him on only one charge: it did not specify in pronouncing sentence that it was for any particular offense or offenses, and the mittimus lists only one count of conviction and one sentence. A conviction without a sentence is not a final judgment nor must it be vacated. *People v. Johnson*, 392 Ill. App. 3d 127, 132 (2009). That said, we agree with the parties that all charges were based on possession of a single gun and, as defendant requests in his reply brief, we "thus vacate his remaining convictions pursuant to the one-act, one-crime doctrine."

¶ 17 Accordingly, the judgment of the circuit court is affirmed, except that all counts other than unlawful possession of a firearm by a street gang member are vacated. Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct the mittimus by deleting "C001 THRU C007 CONCURRENT."

¶ 18 Affirmed in part, vacated in part, and mittimus corrected.