

No. 1-13-2053

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County, Illinois.
)	
v.)	No. 12 CR 16003
)	
KEJUAN JOHNSON,)	Honorable
)	James Michael Obbish,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant’s conviction for aggravated unlawful use of a weapon was reversed where State failed to present sufficient evidence of constructive possession.

¶ 2 Defendant Kejuan Johnson appeals his conviction for aggravated unlawful use of a weapon (AUUW). On August 16, 2012, officers stopped the car in which Johnson was riding for broken taillights. While approaching the car, one of the officers observed Johnson bend forward and twist from left to right at the waist. The officer ordered the occupants to leave the car and found a handgun underneath a pair of jeans on the rear passenger seat where Johnson had been

sitting. Johnson was convicted of AUUW, notwithstanding his testimony at trial that he did not know he was sitting on a gun. On appeal, Johnson argues that the evidence was insufficient to establish that he knowingly possessed the gun. We agree and reverse Johnson's conviction.

¶ 3

BACKGROUND

¶ 4

At Johnson's bench trial, Officer Brian Herman testified that on August 6, 2012, around 12:20 a.m., he saw a car with broken taillights. He turned on his emergency lights and pulled the car over; the car traveled about a block before stopping. There were five people in the car, including Johnson, who was sitting in the right rear passenger seat. As Herman walked toward the car, he observed Johnson lean forward, make a twisting motion from left to right at the waist, and then come back up. He did not see Johnson's hands. Upon observing Johnson's movement, Herman immediately ordered the passengers to show their hands. The back seat passengers complied, placing their hands on the headrests of the seats in front of them.

¶ 5

An assist unit arrived on the scene, consisting of Officer Juan Perez and another officer. Herman ordered the driver out of the car and passed him off to Perez. Herman then moved to the right rear passenger side of the car and ordered the passengers out of the car. Johnson came out first, followed by the other two people who were sitting in the back seat. Herman was able to see the hands of the back seat passengers at all times until they left the car.

¶ 6

After everyone had exited the car, Herman returned to the rear passenger door. In the spot where Johnson had been sitting, Herman saw a pair of jeans with the butt of a handgun protruding from underneath them. Herman retrieved the gun, which was loaded and uncased. He stated that he did not see the gun while ordering the passengers out of the car, since his focus was on the passengers. He was not sure if there were other clothes in the car in addition to the

jeans. He “assume[d]” there was “debris” in the car. The State presented no evidence of fingerprints on the gun. After Herman testified, the State rested.

¶ 7 Johnson testified that shortly after midnight on August 16, 2012, he was leaving a birthday party in a car with four others. The car did not belong to Johnson. He was sitting on the passenger side of the back seat, which was tightly packed; there was debris and trash on the floor and juice bottles and clothing on the seats. Johnson was sitting on a pair of jeans but did not feel anything under the jeans.

¶ 8 The car was pulled over by police officers, who told the car’s occupants to put their hands up and exit the car. Prior to being ordered out of the car, Johnson did not make any movements; he did not have a gun and was not trying to hide a gun. Once everyone was out of the car, the officers searched the car and found a handgun. It was not Johnson’s gun and he had not known it was there.

¶ 9 The State called Officer Perez as a rebuttal witness. Perez confirmed that he assisted Herman with the traffic stop. When he arrived on the scene, Herman was escorting the driver out of the car. The back seat passengers were still in the car with their hands on the headrests. Perez did not see them make any movements. Once all of the car’s occupants had been detained, Herman recovered a loaded semiautomatic weapon from the car. The weapon was a 40-caliber gun; it measured about five by seven inches.

¶ 10 The trial court found Johnson guilty of AUUW. The court found it “unbelievable” that Johnson could have been sitting on a pair of jeans with a gun underneath but not felt the gun, particularly in light of the size of the gun. Johnson’s counsel filed a posttrial motion in which he argued that the State failed to prove Johnson guilty beyond a reasonable doubt, since “[t]here is nothing to show the defendant either knew the weapon was there or placed it there or had control

over it.” The trial court denied the motion, finding that Herman’s testimony about observing Johnson’s movement and finding the gun was “very credible.” Conversely, the court found incredible Johnson’s testimony that he was sitting directly on top of a five-by-seven-inch weapon and did not notice it. The trial court sentenced Johnson to two years’ probation.

¶ 11

ANALYSIS

¶ 12

Johnson argues that his conviction for AUUW must be reversed because the State did not present sufficient evidence to prove beyond a reasonable doubt that he was aware of the gun’s presence. Where a defendant challenges the sufficiency of the evidence, the reviewing court must determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979); *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004). In doing so, we draw all reasonable inferences from the record in favor of the prosecution, keeping in mind that it is the role of the fact-finder to assess the credibility of witnesses and resolve any conflicts in the evidence. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009); *People v. Collins*, 106 Ill. 2d 237, 261-62 (1985).

¶ 13

In this case, one of the elements of AUUW is that the defendant possessed a firearm. 720 ILCS 5/24-1.6(a) (West 2012). Possession of a weapon may be either actual or constructive. *People v. Hunter*, 2013 IL 114100, ¶ 19; *People v. Bailey*, 333 Ill. App. 3d 888, 891 (2002). It is undisputed that the gun was not recovered from Johnson’s actual person; rather, the State charged him under a constructive possession theory. A defendant constructively possesses a weapon if he has knowledge of the presence of the weapon and has immediate and exclusive control over the area where it is found. *Hunter*, 2013 IL 114100, ¶ 19; *Bailey*, 333 Ill. App. 3d at 891. Johnson does not dispute that he had control over the area where the gun was found (nor

could he, since he was sitting directly on it), but he argues that the State did not present sufficient evidence to prove beyond a reasonable doubt that he knew of the gun's presence. We agree.

¶ 14 It is well established that a defendant's mere presence in a car, without more, is insufficient to prove that he knew a weapon was in the car. *People v. Nesbit*, 398 Ill. App. 3d 200, 209 (2010); *People v. Ingram*, 389 Ill. App. 3d 897, 900 (2009); see *People v. Cogwell*, 8 Ill. App. 3d 15 (1972) (evidence was insufficient to convict defendant of possession of shotgun shells where the shells were found in a vehicle close to defendant's feet but there was no other evidence of possession). The State must present other evidence to establish defendant's knowledge. As this court has explained:

“Knowledge could be inferred from several factors, including: (1) the visibility of the weapon from defendant's location in the vehicle, (2) the amount of time in which defendant had an opportunity to observe the weapon, (3) gestures or movements made by defendant that would suggest an effort to retrieve or conceal the weapon, and (4) the size of the weapon.” *Ingram*, 398 Ill. App. 3d at 900; see *Nesbit*, 398 Ill. App. 3d at 209 (citing *Ingram*).

Courts may also consider other circumstantial evidence of knowledge, including whether the defendant owned the weapon or the vehicle in which the weapon was found. *People v. Bailey*, 333 Ill. App. 3d 888, 892 (2002).

¶ 15 In light of these factors, the State did not present sufficient evidence to establish that Johnson had constructive possession over the gun found in the car. The State did not prove that the gun would have been visible at any time to defendant, since it was found under a pair of jeans. The State argues that the gun was at least partially visible based upon Herman's testimony that, when he searched the car, he saw the butt of the handgun protruding from under the jeans.

But two other passengers slid across the back seat to exit the vehicle after Johnson got out. They could easily have moved the jeans to expose the butt of the gun. This is consistent with Herman's testimony that he did not see the gun while he was escorting Johnson and the other back seat passengers out of the car; he only saw it upon returning to the car once all of the back seat passengers had exited and been secured.

¶ 16 In any case, the trial court did not make any explicit finding regarding the visibility of the gun. Instead, it relied upon its finding that Johnson had to have felt the gun since he was sitting on it. But the evidence shows that Johnson was not sitting directly on the weapon; as noted, it was under a pair of jeans. Furthermore, it was Johnson's uncontradicted testimony that the back seat of the car was crowded and strewn with clothing and bottles. In order to sustain its burden of proof, the State would have had to show, beyond a reasonable doubt, that Johnson not only felt that he was sitting on *something*, but he accurately recognized it as a gun, despite it being above a cushioned car seat and beneath a pair of jeans. Unlike the trial court, we do not find this to be self-evident merely from the size of the gun. Although the gun was five by seven inches—a fact that the trial court found significant—handguns are also relatively flat in shape, and it is entirely reasonable under the circumstances that Johnson might not have realized what he was sitting on amidst all the other debris in a car that he did not own.¹

¶ 17 Nor does Johnson's motion as described by Herman suffice to prove that he was aware of the gun's presence. Herman testified that he saw Johnson lean forward, make a twisting motion from left to right at the waist, and then sit back up. The State argues that this motion could have

¹ We note that, in his brief, Johnson cites multiple scientific articles purportedly demonstrating that the buttocks are among the least touch-sensitive parts of the human body. These studies were not presented to the trial court, nor are they common knowledge or of readily verifiable accuracy, such that we may take judicial notice of them. *People v. Mehlberg*, 249 Ill. App. 3d 499, 531 (1993) (declining to take judicial notice of scientific articles and reference works presented by the defendant for the first time on appeal). Accordingly, we do not consider these articles.

been an attempt to hide the gun. But Herman did not see Johnson's hands, nor did he see Johnson raise his body, as he would presumably need to have done in order to place the gun underneath him. We are unable to say that this motion proves beyond a reasonable doubt that Johnson was attempting to conceal a weapon. This is particularly true in light of the fact that after Herman turned on his emergency lights, the car traveled about a block before stopping. Common experience dictates that if Johnson was going to hide a gun, he would have done so immediately, instead of waiting until Herman was approaching the car. See *People v. Vasquez*, 233 Ill. App. 3d 517, 527 (1992) ("a conviction based upon testimony that is improbable, unconvincing, and contrary to human experience requires reversal").

¶ 18 In sum, the State has not met its burden of proof under the factors articulated in *Ingram* and *Nesbit*. *Ingram*, 398 Ill. App. 3d at 900; *Nesbit*, 398 Ill. App. 3d at 209. The gun was found under a pair of jeans, rather than in plain view, and it is highly questionable under the circumstances whether the gun would have been in "plain touch." Johnson's motion was ambiguous at best, since the officer did not see him lifting himself up to place the gun underneath his body, did not see his hands at all, and did not see him reaching toward any particular area. Moreover, there was no evidence that Johnson owned the gun, and it is undisputed that he did not own the car in which the gun was found. See *Bailey*, 333 Ill. App. 3d at 892 (evidence was not sufficient to convict defendant for AUUW where officers found gun under front passenger seat, where defendant was sitting, but car did not belong to defendant and gun would not have been visible to defendant from where he sat).

¶ 19 The State argues that the present case is analogous to *People v. Grant*, 339 Ill. App. 3d 792 (2003). We disagree. In *Grant*, police pulled over a vehicle in which defendant was the front seat passenger. *Id.* at 795-96. An officer ordered defendant out of the car; as he was

getting out, the officer saw defendant reach back and put something on the seat. *Id.* at 796-97. The officer then searched the car and found a gun lying on the front passenger seat. *Id.* at 797. The *Grant* court found this evidence sufficient to convict defendant of AUUW. *Id.* at 798-99. But the gun in *Grant* was presumably in plain view—and, more importantly, defendant was actually seen reaching toward the area where the gun was later found. See also *Nesbit*, 398 Ill. App. 3d at 210 (AUUW conviction sustained where officers observed defendant reaching toward the floorboard of the vehicle, where a gun was later found); *Ingram*, 389 Ill. App. 3d 897 (State proved constructive possession of weapon where defendant fled vehicle on foot and police found gun in plain view on the car floor within defendant’s reach). Both of these factors are notably absent in this case.

¶ 20 Thus, even making all reasonable inferences in favor of the prosecution (*Cardamone*, 232 Ill. 2d at 511), a reasonable doubt remains as to whether Johnson was aware of the gun—a gun that was hidden under a pair of jeans, in a crowded backseat that was strewn with debris, and in a car that did not belong to him.

¶ 21 CONCLUSION

¶ 22 We reverse Johnson’s conviction for AUUW because there was insufficient evidence to prove beyond a reasonable doubt that Johnson knew of the gun’s presence. Accordingly, we need not reach Johnson’s other contentions of trial error.

¶ 23 Reversed.