

FIFTH DIVISION
AUGUST 28, 2015

No. 1-14-0962

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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. 13 C 330833
)	
ENRIQUE NAPOLES,)	Honorable
)	Bridget J. Hughes,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held:* The evidence was sufficient to support defendant's constructive possession of a weapon found under the seat of the van in which he was riding, where a man fitting his description was seen earlier with other men, one of whom had a gun, and defendant attempted to flee the scene after police parked behind the van.

¶ 2 Following a bench trial in 2014, defendant Enrique Napoles was convicted of the Class 4 felony offense of aggravated unlawful use of a weapon (U UW) for knowingly carrying a weapon on or about a public street without a valid firearm owner's identification (FOID) card (720 ILCS 5/24-1.6 (a)(2), (a)(3)(C) (West Supp. 2013) (eff. July 9, 2013)). Defendant was sentenced to 18

months in prison. On appeal, defendant contends his conviction should be reversed because the State failed to prove his constructive possession of the weapon. He also contends the trial court erred in failing to sentence him to probation. For the reasons stated below, we affirm.

¶ 3 At defendant's joint trial with codefendant Laurel Mercado, Norridge police officer Ted Vasilakopoulos testified that at 12:30 p.m. on September 11, 2013, he was at the Norridge police station when he received a radio call. The call indicated that an unidentified resident of the 4100 block of Oriole Avenue observed three men in a nearby alley. The resident described the men as "possibly Hispanic" and said one of the men wore black clothing, one man had a tattoo of a dollar sign on his neck, and one man was holding a gun. The resident reported the men were standing next to a white Dodge Caravan with the license plate number R316798.

¶ 4 Officer Vasilakopoulos testified the police station was about three blocks from the 4100 block of Oriole Avenue. He learned that the Dodge Caravan was registered to Laurel Mercado at 4007 North Oketo Avenue in Norridge, which was three blocks from the police station in the opposite direction from Oriole Avenue. Officer Vasilakopoulos heard radio reports that other units were en route to Oriole Avenue, and he and a police detective immediately left the station to go to Mercado's address to "check for the suspect vehicle heading to the residence."

¶ 5 Finding no activity at the Oketo Avenue address, Officer Vasilakopoulos proceeded south on Oriole Avenue toward the 4100 block. Before reaching that block, however, he observed a white van with a Hispanic male driver and passenger driving north on Oriole Avenue. The driver, later identified as Mercado, wore a light blue shirt and the passenger, later identified as defendant, wore black. The van was slowing down to stop in traffic.

¶ 6 After Officer Vasilakopoulos passed the van, he stopped his vehicle and noted the van's license plate was R316798. He turned around and followed the van as it entered the parking lot

of a Dollar General store to avoid traffic stopped at a red light at Oriole Avenue and Irving Park Road. The officer stopped his vehicle behind the van to prevent it from backing out of the parking lot.

¶ 7 When Officer Vasilakopoulos ordered the occupants of the van to exit the vehicle, defendant exited the van and "attempted to go across Irving Park Road." The officer testified defendant walked across the road "into traffic" and "wasn't running, but he was in a rush." The detective who was with Officer Vasilakopoulos ordered defendant to return to the vehicle, and defendant was "brought back" to the area of the police vehicle. The officer observed defendant had a tattoo of a dollar sign on the left side of his neck.

¶ 8 Officer Vasilakopoulos testified that neither defendant provided an FOID card. On cross-examination, the officer stated the radio dispatch did not describe the clothing worn by the person holding the gun in the alley and did not describe the weapon.

¶ 9 Norridge police officer Efrain Velazquez testified he was dispatched to the Dollar General parking lot at 12:40 p.m. to search a white Dodge Caravan, and he recovered a loaded pistol wrapped in a bandana from under the front passenger seat. He testified the weapon was "right underneath" the seat and would have been within arms' reach of the passenger. Officer Velazquez identified photographs of the weapon and the van. On cross-examination, he said he did not observe defendant or Mercado touching the weapon.

¶ 10 The State presented evidence that the vehicle was registered to Mercado. In closing, defendant's counsel argued the vehicle was not registered to defendant, he was not observed handling the gun or placing it under the seat, and no physical evidence tied him to the weapon.

¶ 11 In finding defendant had constructive possession of the weapon, the trial court found that defendant's act of exiting the van and walking away "very quickly" into traffic could be

construed as flight from the scene. The court found a reasonable person could conclude the passenger had access to the item below that seat, and defendant's flight "is an indication of his knowledge of the fact that he knew that there was a weapon, and he was not allowed to possess it underneath the seat of the car."

¶ 12 The court found defendant guilty of aggravated UUC and found Mercado not guilty. Mercado is not a party to this appeal. The court sentenced defendant to 18 months in prison.

¶ 13 On appeal, defendant contends the State failed to prove beyond a reasonable doubt that he had constructive possession of the weapon. Defendant argues he had no knowledge the firearm was present and no evidence was offered that the weapon was visible as he sat in the passenger seat. He also asserts the testimony failed to establish how long he was a passenger in the van or that he made furtive motions suggesting he tried to conceal a weapon. In addition, defendant contends the record does not support the trial court's conclusion that his actions constituted flight from the scene. The State responds the evidence was sufficient to establish defendant's constructive possession of the weapon because the gun was recovered from beneath his seat and he fled when the police arrived.

¶ 14 Where a defendant raises a challenge to the sufficiency of the evidence to establish his guilt, a reviewing court must consider all of the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). This standard gives deference to the role of the trier of fact in resolving the conflicts in testimony, weighing the evidence and drawing reasonable inferences from the facts; therefore, a reviewing court will not substitute its judgment for that of the trial court on those issues. See *Brown*, 2013 IL 114196,

¶ 48. Rather, a criminal conviction will be reversed only where the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48.

¶ 15 To prove defendant guilty of aggravated UUC as charged in this case, the State was required to show defendant knowingly carried a weapon on a public street and had not been issued a currently valid FOID card. 720 ILCS 5/24-1.6 (a)(2), (a)(3)(C) (West Supp. 2013) (eff. July 9, 2013). When, as here, a defendant is not found in actual possession, the State must prove constructive possession, *i.e.*, that defendant had knowledge of the presence of the weapon and that he had immediate and exclusive control over the area where it was found. *People v. Hunter*, 2013 IL 114100, ¶ 19; *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17.

¶ 16 Evidence of constructive possession is "often entirely circumstantial." *People v. Alicea*, 2013 IL App (1st) 112602, ¶ 24. The element of knowledge may be shown by evidence of a defendant's acts, declarations or conduct from which it can be inferred that the defendant knew the contraband existed in the place where it was found. *Spencer*, 2012 IL App (1st) 102094, ¶ 17. In deciding whether constructive possession has been shown, the trier of fact is entitled to rely on reasonable inferences of knowledge and possession, absent other factors that might create a reasonable doubt as to the defendant's guilt. *Spencer*, 2012 IL App (1st) 102094, ¶ 17.

¶ 17 Here, the undisputed evidence established a weapon was found under the front passenger seat of a vehicle in which defendant was the front passenger. The weapon was within arms' reach of defendant. The police stopped the van based on a report that three men had been seen in a nearby alley and that one man carried a gun. The black clothing and neck tattoo of defendant matched the description by the witness of one of the men. Defendant attempted to leave the

scene when the police stopped the van. We find this evidence was sufficient to establish defendant's constructive possession of the weapon.

¶ 18 Defendant contests constructive possession on the basis that the weapon was not in plain view, his gestures were not consistent with attempting to conceal a weapon, and his conduct did not constitute flight for the purpose of implying knowledge through consciousness of guilt.

None of these arguments is persuasive enough to raise a reasonable doubt of guilt for purposes of constructive possession.

¶ 19 When contraband is found near the defendant, but not on his person, constructive possession may be inferred when the State can demonstrate that the defendant exhibited an intent or opportunity to continue exercising control over the item. *People v. Scott*, 2012 IL App (4th) 100304, ¶ 19. The lack of furtive gestures and the concealed nature of the weapon in this case do not defeat the trial court's finding of constructive possession. Officer Velazquez recovered the weapon, wrapped in a bandana, from under the front passenger seat, which creates an inference that it was deliberately concealed there. The lack of any furtive movements by defendant consistent with attempting to conceal a gun may simply reflect defendant's belief that the gun was already concealed by being wrapped in a bandana and hidden under the seat.

¶ 20 We further disagree with defendant's contention that his departure from the scene is not probative. Evidence of flight is admissible as tending to demonstrate a defendant's consciousness of guilt. *Scott*, 2012 IL App (4th) 100304, ¶ 18 (citing *People v. Harris*, 52 Ill. 2d 558, 561 (1972)). Officer Vasilakopoulos testified he observed defendant in the passenger seat of the van as the van passed him going in the opposite direction. When the officer stopped his police vehicle behind the van, defendant exited and attempted to cross the road. The officer testified that defendant was not running but "was in a rush." The fact that defendant was not running does

not defeat a finding that defendant was fleeing the scene. See *People v. Ingram*, 389 Ill. App. 3d 897, 901 (2009).

¶ 21 Defendant further argues the testimony at trial did not establish how long he was a passenger in the van or that he attempted to conceal the weapon under the seat. The testimony of the two officers indicated that about 10 minutes elapsed between the radio call to the police station at 12:30 p.m. and the search of the van after Officer Velazquez arrived at the scene at 12:40 p.m. The police officers did not observe defendant until he was already in the van and also did not view defendant during the entire sequence of events. Given that timeline, a period of several minutes elapsed between the time the witness observed defendant in the alley with the other men and when defendant was observed in the van, during which defendant or one of the other men could have concealed the weapon under the passenger seat.

¶ 22 Moreover, even though the resident who viewed the men in the alley with a gun told police that one man wore black clothing and one man had a tattoo of a dollar sign, as was observed on defendant's neck, those facts did not establish the witness was describing two different people or preclude the possibility that the person with the tattoo also wore black clothing. See *People v. Lara*, 2012 IL 112370, ¶ 43 (discrepancies in testimony do not necessarily create inconsistencies that establish reasonable doubt); see also *People v. DeLuna*, 334 Ill. App. 3d 1, 24 (2002) (minor discrepancies go to weight of testimony, which is for the trier of fact to determine).

¶ 23 Relying on *People v. Bailey*, 333 Ill. App. 3d 888 (2002), and *People v. Wright*, 2013 IL App (1st) 111803, defendant argues the evidence did not prove his knowledge of the weapon. In *Bailey*, police conducted a traffic stop and, during an inventory search, recovered a weapon from under the passenger seat in which the defendant was riding. The defendant told police that when

he and the driver of the vehicle were at the defendant's house, the driver showed him a weapon, and when the driver handed him the gun inside the vehicle, the defendant gave it back to the driver and exited the car. *Bailey*, 333 Ill. App. 3d at 889-90. In addition, one of the police officers who initiated the traffic stop testified that he did not observe any movements from either occupant of the vehicle and the other officer said he only observed the driver move slightly as he drove. *Bailey*, 333 Ill. App. 3d at 892. The evidence also established that gun was owned by a third party, not the driver or the defendant, and there was no evidence linking the defendant to the vehicle in which the weapon was found. *Bailey*, 333 Ill. App. 3d at 892.

¶ 24 In *Wright*, 1 of 10 police officers executing a search warrant testified that when he went to the basement of the residence, he observed two people, including the defendant, on the floor against the wall. *Wright*, 2013 IL App (1st) 111803, ¶ 10. The officer observed a gun protruding from under the defendant's body, inches away from the defendant's hands. *Wright*, 2013 IL App (1st) 111803, ¶ 11. In finding that the State did not prove beyond a reasonable doubt that the defendant knowingly possessed the gun, so as to establish constructive possession, this court noted none of the three officers who testified at trial observed the gun in the defendant's hands or observed the defendant discard the weapon. *Wright*, 2013 IL App (1st) 111803, ¶ 26. The court observed that three other people were in the basement along with the defendant, and another person present had fallen over the defendant as police chased those two men down the stairs into the basement. *Wright*, 2013 IL App (1st) 111803, ¶ 26.

¶ 25 The circumstances of *Bailey* and *Wright* are distinct from those here. In *Bailey*, the trial court heard evidence that the defendant immediately told police he did not know the gun was there. In *Wright*, the weapon was observed in the defendant's arms' reach but no other evidence tied him to the gun. Here, in contrast, defendant had been observed in the presence of the gun by

the witness who called the Norridge police station. Defendant's clothing and tattoo matched the description of a witness who observed one man holding a gun with two other men, along with a van meeting the description of the vehicle in which the gun was recovered. Police recovered a weapon from under the vehicle seat where defendant had been observed as a passenger.

Defendant attempted to flee the scene when a police vehicle stopped behind the vehicle. Viewing the evidence and any reasonable inferences in the light most favorable to the State, a rational trier of fact could have found defendant constructively possessed the weapon recovered from under the passenger seat of the van.

¶ 26 As a final matter in this appeal, defendant asserts the trial court misapprehended the law and erred when it failed to consider and sentence him to probation as opposed to a prison sentence. Since this presents a question of law, we will review it *de novo*. *People v. Carlson*, 185 Ill. 2d 546, 551 (1999). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). Defendant was convicted of knowingly carrying a weapon on or about a public street (720 ILCS 5/24-1.6(a)(2) (West Supp. 2013) (eff. July 9, 2013)) without a currently valid FOID card (720 ILCS 5/24-1.6(a)(3)(C) (West Supp. 2013) (eff. July 9, 2013)). That offense is a Class 4 felony, which carries a sentence of between one and three years in prison. 720 ILCS 5/24-1.6(d)(1) (West Supp. 2013) (eff. July 9, 2013); 730 ILCS 5/5-4.5-45(a) (West 2010). Defendant was sentenced to 18 months in prison.

¶ 27 Defendant contends a prison term was not mandatory in his case because the portion of the statute underlying one of the two factors of his conviction, *i.e.*, the ban against carrying weapons in public pursuant to section (a)(1) or (a)(2) of the aggravated UUW statute, was held unconstitutional in *People v. Aguilar*, 2013 IL 112116. The Illinois Supreme Court held in

Aguilar that the Class 4 felony form of section 24-1.6(a)(1), (a)(3)(a) of the Criminal Code of 1961 violated the right to keep and bear arms as guaranteed by the second amendment to the United States Constitution and was therefore unconstitutional. *Aguilar*, 2013 IL 112116, ¶ 22.

¶ 28 However, as the State points out, the *Aguilar* decision affected the version of the statute prior to its amendment in 2013. On July 9, 2013, the Illinois General Assembly enacted the Firearm Concealed Carry Act, which in part "amended the AUUW statute to allow for a limited right to carry certain firearms in public." *Aguilar*, 2013 IL 112116, ¶ 22 n.4 (citing Pub. Act 98-0063 (eff. July 9, 2013)). Defendant committed this offense on September 11, 2013. Since the version of the aggravated UUW statute that applied to defendant did not suffer from any constitutional infirmity, defendant was subject to the sentencing range set out in the statute, and the trial court did not err when it imposed a sentence within that range.

¶ 29 Accordingly, the judgment of the trial court is affirmed.

¶ 30 Affirmed.