

No. 1-14-1603

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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. 10 CR 4256
)	
RAYSHAWN CHERRY,)	Honorable
)	Timothy Joseph Joyce,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices HOFFMAN and DELORT concurred in the judgment.

O R D E R

- ¶ 1 **Held:** The evidence was sufficient to convict defendant of unlawful possession of a firearm by a street gang member because defendant was in constructive possession of the loaded firearm recovered in the vehicle he was driving, and he was an admitted member of the Met Boys street gang.
- ¶ 2 Following a jury trial, defendant Rayshawn Cherry was convicted of unlawful possession

of a firearm by a street gang member and sentenced to six years' imprisonment. On appeal, defendant contends the evidence was insufficient to establish that he had constructive possession of the recovered firearm, and was a member of a street gang. We affirm.

¶ 3 At trial, Officer Todd Evans testified that he and his partner Officer Ryan Goldie were on routine patrol in the area of East 51st Street and South Calumet Avenue when he saw defendant driving a vehicle with only one operating headlight at about 7:20 p.m. on February 2, 2010. The officers stopped defendant, approached the vehicle, and Evans saw defendant lean forward in his seat. Evans could not see defendant's hands and was concerned he might be armed. Evans pulled out his firearm and ordered defendant to show his hands. Defendant complied and Evans returned the gun to his holster. When defendant could not produce a valid driver's license, the police ordered him out of the vehicle. The officers detected a strong odor of burnt cannabis emanating from the vehicle during a field interview with defendant. Evans searched the vehicle and saw a blue steel loaded handgun protruding from underneath the driver's seat, which he recovered. Defendant was arrested, brought to the police station, and read his *Miranda* rights. Defendant told Evans and Goldie that he had the firearm for his protection because he was shot about a year before.

¶ 4 On cross-examination, Officer Evans testified that the vehicle was not registered to defendant, no cannabis was recovered from the vehicle or on defendant, and defendant's alleged statement that the gun belonged to him was never memorialized. The arrest, incident, and supplemental reports generated by the police did not indicate defendant leaned forward in the vehicle causing police to be fearful for their safety. Furthermore, although the police reports

indicated the gun was recovered from underneath the seat, it did not indicate the gun was "protruding."

¶ 5 Officer Ryan Goldie testified similarly to Officer Evans. He also testified that after Evans recovered the gun, defendant put his head down, touching his chin to his chest. At the police station, police performed a custodial search of defendant. When defendant removed his jacket, Goldie noticed a tattoo on his arm that had the letters M and B, the numbers 5 and 1, and the word "crazy." Defendant told Goldie the letters meant "Met Boy," which was a faction of the Gangster Disciples street gang, the numbers indicated the location of their "hangout" at 51st Street and Calumet Avenue, and that "crazy" was his nickname because he was "crazy about being in a gang." Defendant, who was 27 years old at the time of his arrest, also indicated he had been a gang member since the age of 16, and was a "foot soldier" who would look after the younger members and have meetings to discuss rival gangs.

¶ 6 On cross-examination, Goldie testified that the arrest and case reports he filled out did not include defendant's statements regarding the meaning of his tattoos. Although Goldie testified that he did document in his arrest report that defendant admitted to being a member of the Met Boys street gang, he acknowledged the details of his gang membership, *i.e.*, when he joined and his role in the gang, were not in the reports he generated.

¶ 7 On redirect examination, Goldie testified that he indicated in his case report that defendant had the M-B, crazy, and 51st Street tattoos.

¶ 8 Sergeant Jose Lopez, an expert in the field of gang intelligence investigations, testified that the Met Boys was a street gang of about 50 members that operated in the area of 51st Street

and Calumet Avenue, and that he investigated several murders involving the gang. Lopez was shown a photograph, which was subsequently entered into evidence, depicting a person's arm with tattoos of the letters "M" and "B" over the word "crazy" followed by the number and letters "51 ST." Lopez testified that defendant's tattoos meant Met Boy, crazy, and 51st Street, and that those tattoos were in fact gang tattoos.

¶ 9 On cross-examination, Sergeant Lopez acknowledged that he had never seen defendant inside of a gang meeting, did not write a report in relation to this case, and testified that if defendant never attended a gang meeting, his tattoos would not signify he was a gang member.

¶ 10 The State admitted into evidence a certified letter from the Illinois State Police stating that defendant had never been issued a firearm owner's identification (FOID) card as of April 7, 2010.

¶ 11 Following closing arguments, the jury found defendant guilty of unlawful possession of a firearm by a street gang member and aggravated unlawful use of a weapon (AUUW). At sentencing, the court merged the AUUW conviction into the unlawful possession of a firearm by a street gang member, and sentenced defendant to six years' imprisonment.

¶ 12 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of unlawful possession of a firearm by a street gang member.

¶ 13 In resolving a challenge to the sufficiency of the evidence, we must determine whether, when viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime." *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). On

review, we will not retry defendant, and the trier of fact remains responsible for determining the credibility of witnesses and the weight to be given to their testimony. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). A defendant's 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.

¶ 14 In order to prove defendant guilty of unlawful possession of a firearm by a street gang member, the State had to prove that he possessed while in a vehicle a firearm and firearm ammunition, which are both immediately accessible at the time of the offense, while on any street or alley, without a valid FOID card, and is a member of a street gang. 720 ILCS 5/24-1.8(a)(2) (West 2010).

¶ 15 Defendant first maintains the State failed to prove he had both the control and knowledge necessary to establish constructive possession of the weapon.

¶ 16 When a defendant is not found in actual possession of contraband such as a firearm, as here, the State must prove constructive possession, *i.e.*, that the defendant knew a firearm was present, and 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.*

¶ 17 Viewing the evidence in the light most favorable to the State, as we must, the evidence showed that defendant possessed the firearm underneath the driver's seat of the car he was

driving. When the police approached defendant's car, Officer Evans saw defendant, who was the only person inside of the car, lean forward in the driver's seat with his hands hidden. After defendant was ordered out of the car, police searched it and recovered a loaded handgun from underneath the driver's seat. Defendant put his head down, with his chin to his chest, upon observing the police recover the gun. Defendant was arrested, read his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and admitted that he had the firearm for his protection because he was shot one year prior to his arrest.

¶ 18 Nevertheless, defendant maintains that the State failed to prove he possessed the firearm where he was not the registered owner of the car he was driving, no independent evidence supported the impeached testimony of the officers that a gun was "protruding" from the driver's seat, and neither officer requested any fingerprint or DNA testing to see if there was some physical connection between defendant and the gun. Despite defendant's contentions to the contrary, it is unnecessary to prove a defendant's ownership of the place where the contraband is found in order to establish constructive possession. *People v. O'Neal*, 35 Ill. App. 3d 89, 91 (1975); see also *People v. Ingram*, 389 Ill. App. 3d 897, 898, 901 (2009) (the jury's finding of guilty was affirmed even though the car was registered to a person who was not in the vehicle at the time of the traffic stop).

¶ 19 Moreover, no independent evidence that the gun was protruding from the driver's seat was necessary where Officer Evans, whom the jury implicitly found credible, testified to that effect. See *People v. Williams*, 252 Ill. App. 3d 1050, 1060 (1993) ("[t]he testimony of one witness if credible and positive is sufficient to convict, even if contradicted by the accused"). In

reaching this conclusion, we find it of no consequence that the officers testified that they did not include all of their observations in their police reports. See *People v. Allgood*, 242 Ill. App. 3d 1082, 1088 (1993) (although two officers testified to observations not included in their police reports, the officers' statements merely showed that they omitted observations from their reports); *People v. Guidry*, 220 Ill. App. 3d 406, 410 (1991) (although the witness testified to a statement that was not included in the officer's police report, there was nothing in the record to suggest that the report contained a verbatim account of the witness' statement). Additionally, the lack of physical evidence connecting defendant to the gun is not fatal, particularly where evidence of constructive possession is often entirely circumstantial. *People v. Faulkner*, 2015 IL App (1st) 132884, ¶ 29.

¶ 20 Defendant next asserts that the State failed to provide sufficient evidence showing he was a member of a street gang.

¶ 21 A street gang means any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining of three or more persons with an established hierarchy that, through its membership or through the agency of any member engages in a course or pattern of criminal activity. 740 ILCS 147/10 (West 2010). A gang member is defined as "any person who actually and in fact belongs to a gang, and any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity, whether in preparatory, executory, or cover-up phase of any activity, or who knowingly performs, aids, or abets any such activity." *Id.*

¶ 22 Here, defendant admitted to Officer Goldie that he had been a gang member since the age

of 16, was a "foot soldier" in the gang, and that his tattoos meant "Met Boy," the location of their hangout, and his nickname "crazy" to show he was "crazy about being in a gang." Sergeant Lopez, an expert in the field of gang intelligence investigations, testified that defendant's tattoos were "Met Boy" gang tattoos. Based on this evidence, we conclude that a rational trier of fact could have determined beyond a reasonable doubt that defendant was a member of the Met Boys street gang. In so finding, we are not persuaded by defendant's argument that the State failed to establish his membership in a gang where Lopez offered no testimony of seeing him in a gang meeting or participating in any gang-related activities, particularly where defendant's gang tattoos and admission to being in the Met Boys proved his membership.

¶ 23 We will not address defendant's additional arguments regarding the sufficiency of his AUUW conviction because no sentence was imposed on it. The record shows that the trial court merged the AUUW conviction into, and imposed the sentence only on the conviction of unlawful possession of a firearm by a street gang member. In the absence of a sentence, there is no final judgment (*People v. Caballero*, 102 Ill. 2d 23, 51 (1984)), and therefore, the AUUW conviction is not before this court. Additionally, for the reasons stated above, we are not vacating or reversing defendant's conviction for unlawful possession of a firearm by a street gang member, and thus his AUUW conviction is not reinstated. See *People v. Dixon*, 91 Ill. 2d 346, 351-56 (1982) (allowing reinstatement of unsentenced conviction for a lesser charge when the greater conviction was vacated).

¶ 24 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 25 Affirmed.