

No. 1-14-1787

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CR 9307
)	
WALTER DAVIS,)	The Honorable
)	Charles P. Burns
Defendant-Appellant.)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pierce and Justice Neville concurred in the judgment.

ORDER

- ¶ 1 *Held:* Evidence was sufficient to prove beyond a reasonable doubt that defendant constructively possessed a firearm where a police officer testified he found the weapon on the backseat-floor of defendant's automobile in which defendant was the sole occupant. Trial court erroneously assessed "Trauma Fund Fine" where defendant was convicted of being an armed habitual criminal.
- ¶ 2 After a bench trial, the trial court found defendant Walter Davis guilty of one count of being an armed habitual criminal, one count of unlawful use of a weapon by a felon, and two counts of aggravated unlawful use of a weapon. The trial court merged the counts into a single

count of being an armed habitual criminal and sentenced Davis to a term of seven and a half years' incarceration. On appeal, Davis contends that the State failed to present sufficient evidence to prove beyond a reasonable doubt that he knew of, and thus, constructively possessed the weapon recovered because Davis and a defense witness both claimed that two other passengers had been in the car shortly before police officers stopped Davis, and the weapon was found on the rear passenger side floor. He also contends that the trial court erroneously assessed a "Trauma Fund Fine" against him.

¶ 3 We find that the State presented sufficient evidence at trial to prove beyond a reasonable doubt that Davis had knowledge of and constructively possessed the firearm recovered from his car. As Davis does not contest that the State sufficiently proved his two prior felony convictions for eligible offenses, we also find the State proved him guilty of the offense of being an armed habitual criminal beyond a reasonable doubt. Finally, we find that the trial court's assessment of the trauma fund fee was erroneous. Accordingly, we vacate the fee and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 4 **Background**

¶ 5 At trial, Chicago police officer Brian Burg testified that he was on patrol with a partner, Officer Zidak, in a marked police car at 1:50 a.m. on May 3, 2012. Burg saw a black Volvo at 1000 West 72nd Street, moving at a high rate of speed west along 72nd Street, and passing three stop signs without stopping. After the Volvo passed the first stop sign, the officers followed behind by about a block and a half to two blocks, and never lost sight of it. At 1440 West 72nd Street, the officers activated their police lights and the Volvo stopped. Burg and his partner approached the Volvo on foot. Davis was the driver and sole occupant. Zidak asked Davis for his driver's license and Davis responded that he did not have one. Zidak removed Davis from the car

and placed him in handcuffs. As Zidak searched Davis, Burg walked to the driver's side of the Volvo and looked inside with a flashlight. He saw an automatic, Intratech 9 pistol "[o]n the rear passenger side floorboard in plain sight." The weapon was uncased and loaded with 16 rounds of ammunition. It also had a 29-round extended clip. The firearm was "approximately * * * 10 inches long" and the extended clip was "[a]pproximately 10 to 12 inches." During the stop, Burg did not notice anyone on the street or on nearby porches. On cross-examination, Burg noted that when the officers initially approached the Volvo, he walked along its passenger side. On his initial pass, he was unable to see the weapon due to the angle from the passenger side and his focus on Davis. He also clarified that the firearm was 9 to 12 inches long and 9 to 12 inches in height.

¶ 6 The State also entered a certified record indicating that Davis owned a Volvo automobile, as well as certified records of Davis's conviction for the manufacture or delivery of a controlled substance and his conviction for unlawful use of a weapon by a felon.

¶ 7 Shauncey Jackson testified on Davis's behalf. Jackson lived at 1301 West 72nd Street and was an acquaintance of Davis's. She and her family were sitting on their front porch at 1:50 a.m. on May 3, 2012. She saw Davis stop at the intersection adjacent to her home and turn onto 72nd Street. Two men were with Davis, an individual in the front passenger seat and another in the rear. The man in front motioned to Davis and Davis stopped the car in front of Jackson's house. The two men got out and walked away. Davis rolled down his window and spoke with Jackson's family for 10 to 15 seconds before driving west. Seconds later a police car "c[a]me flying past" Jackson's home, turned on its police lights, and pulled Davis over a block away. Jackson also testified that she had been convicted of identity theft, a felony offense.

¶ 8 Davis testified that he left a lounge around 1:50 a.m. on May 3, 2012, with two men. One sat in the front passenger seat and the other in the back seat, passenger side. Davis let the men out of the car at 1301 West 72nd Street and had a 15-second conversation with people out on the street. He then began to drive again, but police officers pulled him over a block and a half later. Davis told the officers that he did not have a driver's license and they placed him in the back of the police car. Eventually the officers said they had recovered a weapon. According to Davis, the weapon was not his, he had never seen it, and he had not even known it was there. He also had not sped or failed to stop at any stop signs that night. Davis also testified that in addition to the convictions presented by the State, he had been convicted of aggravated battery in 2006.

¶ 9 The trial court found Davis guilty of one count of being an armed habitual criminal, one count of unlawful use of a weapon by a felon, and two counts of aggravated unlawful use of a weapon. During its findings, the court said the case turned on the credibility of the witnesses. The court noted Jackson's prior conviction for identity theft and, as an acquaintance of Davis's, she had a motive, interest, or bias as to the outcome. The trial court found that Jackson's testimony was "incredible" and "flies in the face of my interpretation and my own common sense." The court also called Davis's testimony "very, very vague." Burg's testimony was credible. At sentencing, the trial court merged the counts into a single count of being an armed habitual criminal and sentenced Davis to seven and a half years' incarceration. The trial court also assessed fines and fees totaling \$429 after credit for time spent in custody, including a \$100 "Trauma Fund Fine" under to section 5-9-1.10 of the Unified Code of Corrections (730 ILCS 5/5-9-1.10 (West 2012)).

¶ 10 Analysis

¶ 11 Davis contends that the State had not proven constructive possession of the firearm because the State failed to prove beyond a reasonable doubt that he knew the firearm was present. Davis asserts that the presence of two other passengers, the handgun's location behind the passenger's seat, and that he made no movement towards the firearm, weigh against a finding of constructive possession. He also notes that the State did not present fingerprint evidence and he did not make any inculpatory statements. The State responds that Officer Burg's testimony established Davis's constructive possession of the firearm beyond a reasonable doubt, particularly where the trial court found Jackson's and Davis's statements to be incredible.

¶ 12 Due process requires the State prove each element of a criminal offense beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004), citing *In re Winship*, 397 U.S. 358, 364 (1970). When reviewing the sufficiency of evidence, a reviewing court must decide "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." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); see also *Cunningham*, 212 Ill. 2d at 278. A reviewing court will not overturn a guilty verdict unless the evidence is "so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005). This court may not retry a defendant on appeal. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). A reviewing court must resolve all reasonable inferences in favor of the prosecution. *Cunningham*, 212 Ill. 2d at 280.

¶ 13 The State is not required to produce physical evidence. *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23. The positive and credible testimony of a single witness may support a criminal conviction. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). A reviewing court must give due consideration to the ability of the trial court to see and hear the witnesses. *People v. Ortiz*,

196 Ill. 2d 236, 267 (2001). A fact finder's determination of a witness's credibility "is entitled to great deference but is not conclusive." *Cunningham*, 212 Ill. 2d at 279. Where a conviction depends on eyewitness testimony, the reviewing court may find testimony insufficient "only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *Id.*

¶ 14 An individual commits the offense of being an armed habitual criminal when "he or she receives, sells, possesses, or transfers any firearm" after being previously convicted two or more times of any of an enumerated list of felonies. 720 ILCS 5/24-1.7(a) (West 2012).

¶ 15 A defendant can actually or constructively possess a weapon. *People v. Hannah*, 2013 IL App (1st) 111660, ¶ 28. Constructive possession occurs when a defendant (i) knows a firearm is present; and (ii) exercises immediate and exclusive control over the area where the firearm is found. *People v. Sams*, 2013 IL App (1st) 121431, ¶ 10. Evidence of constructive possession is "often entirely circumstantial." *People v. Alicea*, 2013 IL App (1st) 112602, ¶ 24. A defendant's control over the location where a weapon is found gives rise to an inference that the defendant knew of and possessed the weapon. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17.

¶ 16 Taking the evidence in the light most favorable to the prosecution, the State proved beyond a reasonable doubt that Davis had constructive possession of a firearm. According to Burg, Davis was the driver and sole occupant of his automobile when the officers stopped him. The officers had followed Davis down 72nd Street for more than four blocks. During this time, Burg did not observe Davis stop and did not see any individual enter or exit. This testimony established that Davis had immediate and exclusive control over the car during and before the traffic stop. During the stop, Burg observed a handgun on the floor behind the passenger's seat. Davis's exclusive control over the car leads to the reasonable inference that he had knowledge of

the weapon. Moreover, the weapon appeared in plain sight—not hidden beneath a seat or within a closed compartment. The handgun sat openly on the floor of Davis's vehicle. Burg also testified that the handgun was 9 to 12 inches in both length and height. Given these facts, the trial court could reasonably infer that Davis knew of the weapon's presence. Therefore, taking the evidence in the light most favorable to the prosecution, a reasonable fact-finder could find Davis constructively possessed the recovered handgun.

¶ 17 We note that Davis's arguments on appeal rely largely on the presence of two passengers before the traffic stop. But, consideration of the alleged passengers becomes unnecessary if one rejects the testimony of Davis and Jackson. Both Davis's and Jackson's testimony directly contradict Burg's testimony. According to Jackson and Davis, Davis turned onto 72nd Street at the corner next to Jackson's home at 1301 West 72nd Street, where his two passengers got out. Burg's testimony, in contrast, placed Davis on 72nd Street three blocks east of Jackson's home. Contrary to the defense witnesses' accounts, Burg stated he saw Davis drive for over four blocks without stopping, and without any passengers present. The trial court explicitly found Burg to be credible while finding Jackson's testimony incredible. It similarly dismissed Davis's testimony as vague. As there is nothing in the record which indicates the trial court's credibility analysis was unreasonable, we must defer to the trial court's credibility determinations. See *Cunningham*, 212 Ill. 2d at 279.

¶ 18 We also find Davis's arguments that the evidence of his knowledge was insufficient due to a lack of fingerprint evidence or inculpatory statements to be unpersuasive. The State need not present physical evidence (*Herron*, 2012 IL App (1st) 090663, ¶ 23), nor prove an individual's mental state through his or her own statements (see *People v. Ford*, 2015 IL App (3d) 130810, ¶

38). As discussed, Officer Burg's testimony sufficiently supports the trial court's finding of constructive possession.

¶ 19 In arguing that knowledge of contraband is not presumed merely on the basis of a defendant's proximity to the contraband, Davis relies on the opinion in *People v. Bailey*, 333 Ill. App. 3d 888 (2002). There, the defendant was the passenger in another man's car when police officers found a gun beneath the defendant's seat. *Id.* at 890-91. The gun was not visible to the defendant and he made no movements when approached by officers. *Id.* The appellate court considered four factors in finding insufficient proof that the defendant knew of the firearm's presence: (i) the weapon's visibility from defendant's position in the car, (ii) length of time in which the defendant had an opportunity to see the weapon, (iii) any gestures by the defendant indicating an effort to retrieve or hide the weapon, and (iv) the weapon's size. *Id.* at 891-92. The court's list of factors was not exclusive. *Id.* Not all of those factors are as instructive here. Davis was the sole occupant and owner. We note that we have already considered those factors in *Bailey* that we find particularly relevant in Davis's case: the weapon's size and visibility.

¶ 20 Davis also analogizes his case to *People v. Seibech*, 141 Ill. App. 3d 45 (1986). In *Seibech*, the appellate court reversed defendant's conviction for unlawful use of a weapon because it found the State did not prove the defendant had knowledge of the rifle found on the floor behind the driver's seat of defendant's car. *Id.* at 46, 50. The defendant testified at trial that he had driven two hunters home on the day he was arrested and did not know the rifle had been left in the car. *Id.* at 47. One of the hunters corroborated the defendant, testifying that he had been in a hurry when the defendant dropped him off, and in his haste, he forgot his weapon. *Id.* at 48. While in the current case Davis and Jackson did provide an alternative explanation for the

gun's presence, their accounts were directly contradicted by Burg's testimony. Thus, we find *Seibich* to be distinguishable from the facts here.

¶ 21 Taking the evidence in the light most favorable to the State, we find that a reasonable fact-finder could rationally conclude beyond a reasonable doubt that Davis knew of the firearm's presence, and thus constructively possessed it. Because Davis does not contest that the State proved he has the requisite prior convictions, we find the State proved Davis guilty of being an armed habitual criminal beyond a reasonable doubt.

¶ 22 Davis next contends, and the State concedes, that the trial court erroneously assessed the trauma fund fine against Davis. We note that Davis asserts that his fees are void, and may therefore be challenged at any time, citing *People v. Dalton*, 406 Ill. App. 3d 158, 162 (2010). After *People v. Castleberry*, 2015 IL 116916, ¶ 19, this rule no longer applies. On appeal, however, the reviewing court may modify the fines and fees order without remand to the circuit court. Ill. S. Ct. R 615(b)(1) (eff. Aug. 27, 1999) ("[o]n appeal the reviewing court may *** modify the judgment or order from which the appeal is taken"); see also *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995). The trauma fund fine is a statutorily mandated fine which is applied only on an individual's conviction of several specified firearm offenses. 730 ILCS 5/5-9-1.10 (West 2012). As the offense of being an armed habitual criminal is not one of the specified offenses, we vacate it. *People v. Williams*, 394 Ill. App. 3d 480, 483 (2009) aff'd, 239 Ill. 2d 503 (2011).

¶ 23 Affirmed in part; fee vacated.