

No. 1-16-0765

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 12 CR 22246
	)	
ANTONIO DEVINE,	)	Honorable
	)	Gregory Robert Ginex,
Defendant-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Cunningham and Connors concurred in the judgment.

**ORDER**

¶ 1 *Held:* The defendant's conviction for unlawful possession of a weapon by a felon is affirmed where there was sufficient evidence to prove that he had knowledge of the weapon's presence, and he exercised immediate and exclusive control over the area where it was found.

¶ 2 Following a bench trial, the defendant, Antonio Devine, was found guilty of unlawful possession of a weapon by a felon and sentenced to four years' imprisonment. On appeal, the defendant argues that the evidence was insufficient to prove that he had knowledge of the

weapon's presence and that he exercised control over the area where the weapon was found. For the following reasons, we affirm.

¶ 3 Based upon an incident that occurred on September 30, 2012, the defendant was charged by indictment with one count of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)), two counts of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)), and six counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)(3)(A), (a)(1)(3)(C), (a)(1)(3)(I), (a)(2)(3)(A), (a)(2)(3)(C), (a)(2)(3)(I) (West 2012)). The matter proceeded to a bench trial on all counts.

¶ 4 At trial, Illinois State Trooper Timothy Mayerbock testified that, at approximately 11:37 p.m. on September 30, 2012, he was patrolling the western end of the I-290 expressway when he observed a white vehicle traveling in the furthest right lane directly in front him. When he drove closer to the white car, it abruptly exited at the First Avenue ramp without signaling. He followed the vehicle onto First Avenue and, when he was 25 to 30 feet behind it, he noticed the driver, whom he identified in court as the defendant, "shifting in his seat as well as reaching over with his left arm towards the center of the vehicle." According to Trooper Mayerbock, "it appeared as if [the defendant] might [have been] reaching across with his left arm and his right arm towards the center area of the vehicle." Trooper Mayerbock pulled alongside the white vehicle as they approached a red stop light, and the defendant stopped approximately 15 feet behind him. Eventually, the light turned green, and the defendant continued driving westbound for several blocks before Trooper Mayerbock activated his emergency lights and pulled him over.

¶ 5 When Trooper Mayerbock walked up to the driver's window, he saw the defendant sitting in the driver's seat and a man named "Melton" was sitting in the front-passenger seat. When the defendant rolled down his window, he was "sweating profusely" and there was a "strong odor of

cannabis coming from the vehicle.” Trooper Mayerbock learned that the white vehicle belonged to the defendant’s sister; the defendant did not have proof of insurance and provided a state identification card instead of a driver’s license. The defendant became “increasingly nervous, [speaking] at a fast rate, and [his] hands [were shaking] as he was displaying his credentials.” Trooper Mayerbock then took the defendant into custody, placing him in the back of his squad car, and questioned him for approximately 12 minutes. During this time, Melton remained inside of the white car. When Trooper Mayerbock asked the defendant whether there was contraband in the vehicle, the defendant stated that he “possibly ha[d] a couple grams of cannabis \*\*\* .”

¶ 6 Thereafter, Trooper Mayerbock also took Melton into custody and proceeded to search the vehicle. He first searched underneath the seats and, as he “moved further inside the vehicle,” he saw a handgun tucked in between the driver’s seat and the center console.” Upon inspecting the weapon, he found that it was loaded. Trooper Mayerbock separated the defendant and Melton before he questioned the defendant about the gun. The defendant initially stated “that he did not know the gun was present,” but eventually said that “the gun belonged [to] and was put there by his sister’s boyfriend.”

¶ 7 On cross-examination, Trooper Mayerbock admitted that his police dashboard video camera started running only a few minutes before he turned on his emergency lights; consequently, the camera recorded the entire traffic stop, but did not capture the defendant’s “furtive” movements while he was driving. Trooper Mayerbock did not see the gun before he conducted his search of the vehicle. He acknowledged that, while he was questioning the defendant in his squad car for 12 minutes, his attention was not focused on Melton, who was alone in the vehicle. Although Trooper Mayerbock did not recall if all the windows of the white car were tinted, he testified that the rear window was “fairly dark.”

¶ 8 At the conclusion of the State's case-in-chief, it entered into evidence certified copies of the defendant's prior felony convictions; namely, two convictions for delivery of a controlled substance (case numbers 09 CR 17655 and 10 CR 10063 (02)), and one conviction for aggravated fleeing and eluding (case number 11 CR 06837 (01)). The State then rested, and the defendant moved for a directed finding, which the trial court granted as to two of the six counts of aggravated unlawful use of a weapon. With respect to the remaining counts, however, the court denied the defendant's motion for directed finding. The defendant thereafter rested without presenting evidence or testifying on his own behalf.

¶ 9 The trial court found the defendant not guilty of aggravated unlawful use of a weapon, but guilty of being an armed habitual criminal and of unlawful possession of a weapon by a felon. Before sentencing, however, the State "advised" the court that the defendant's 2009 conviction for delivery of a controlled substance had been "amended" and was no longer a felony; therefore, the armed-habitual-criminal count did not lie and the court reduced that charge to the lesser-included offense of unlawful possession of a weapon by a felon.

¶ 10 The defendant filed a motion for a new trial, which the trial court denied. The matter then proceeded to a sentencing hearing where the court merged the defendant's two convictions for unlawful possession of a weapon by a felon into one conviction and sentenced him to four years' imprisonment. The defendant filed a motion to reconsider sentence, which was denied. This appeal followed.

¶ 11 On appeal, the defendant contends that the evidence was insufficient to prove him guilty of unlawful possession of a weapon by a felon because he was not the owner of the white vehicle, the gun was not found until Melton had been left alone in the car for 12 minutes, and Trooper Mayerbock's testimony was unreliable. Based on this, the defendant maintains that the State failed

to prove that he exercised immediate and exclusive control over the area where the gun was found, and that he had knowledge of the gun's presence.

¶ 12 When a defendant challenges the sufficiency of the evidence to sustain his conviction, we must determine whether, after “viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (Internal quotation marks omitted.) *People v. Gray*, 2017 IL 120958, ¶ 35. It is not the duty of this court to retry the defendant and we “will not substitute [our] judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses.” *Id.* “A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt.” *People v. Belknap*, 2014 IL 117094, ¶ 67.

¶ 13 To sustain the defendant's conviction for unlawful possession of a weapon by a felon, the State was required to prove that, as a convicted felon, he knowingly possessed on or about his person any firearm or firearm ammunition. 720 ILCS 5/24-1.1(a) (West 2012). “Because possession is often difficult to prove directly, proving possession frequently rests upon circumstantial evidence.” *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). In cases based on circumstantial evidence, the trier of fact is not required to “be satisfied beyond a reasonable doubt as to each link in the chain of circumstances.” (Internal quotation marks omitted.) *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007). Rather, we must ask, after considering all of the evidence in the light most favorable to the prosecution, whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Id.* at 117-18.

¶ 14 Criminal possession may be actual or constructive. *People v. Macias*, 299 Ill. App. 3d 480, 484 (1998). In the present case, where the defendant's possession was alleged to be constructive,

the State was required to prove that he: “(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.

¶ 15 The defendant claims that Trooper Mayerbock’s testimony regarding what he said about the gun’s ownership, *i.e.*, that it “belonged [to] and was put there by his sister’s boyfriend,” is unreliable because no audio recording of this statement was introduced into evidence. He also points out that he initially told Trooper Mayerbock that he did not know the gun was in the car.

¶ 16 It is within the province of the trier of fact to assess the credibility of witnesses and the weight to be given their testimony. *People v. McCullum*, 386 Ill. App. 495, 504 (2008). We will not over turn a defendant’s conviction solely because he asserts that a witness’s testimony is unreliable. *People v. Evans*, 209 Ill. 2d 194, 211-12; see also *People v. Smith*, 185 Ill. 2d 532, 541 (1999) (holding that the positive and credible testimony of a single witness is sufficient to support a criminal conviction). Here, Trooper Mayerbock testified that, although the defendant initially stated that he did not know about the gun, he later admitted that the gun belonged to his sister’s boyfriend and that the boyfriend had put the gun in the car. Trooper Mayerbock’s testimony did not need to be corroborated by an audio recording in order for the trial court to find it credible. Accordingly, we find that the trial court could have reasonably determined that the defendant’s statement regarding who owned the gun and placed it in the car demonstrated his knowledge of the weapon’s presence.

¶ 17 Even if the defendant's statement did not prove his knowledge, however, his knowledge may be inferred based on: (1) the weapon’s visibility from the defendant’s position in the vehicle, (2) the period of time in which the defendant could have noticed the weapon, (3) any movements by the defendant indicating an attempt to retrieve or hide the weapon, and (4) the size of the

weapon. *People v. Nesbit*, 398 Ill. App. 3d 200, 209 (2010). In order to determine whether the defendant's knowledge may be inferred in this case, we must apply this non-exclusive, four-factor test. See *id.*

¶ 18 Turning to the first factor, the defendant claims that the gun was not easily visible from his location in the vehicle because Trooper Mayerbock testified that he did not see the gun during his initial conversation with the defendant. The flaw with this argument is that the first factor emphasizes the visibility of the gun from *the defendant's* position, not the officer's. *Id.* Because Trooper Mayerbock found the gun wedged between the driver's seat and the center console of the vehicle, it would be reasonable for the trier of fact to infer that the defendant had the ability to look down from his position in the driver's seat and see the gun, which would have been next to his right leg. Although proximity alone is insufficient to prove possession, "where the other circumstantial evidence is sufficiently probative, proof of proximity combined with inferred knowledge of the presence of contraband will support a finding of guilt on charges of possession." *People v. Brown*, 277 Ill. App. 3d 989, 998 (1996).

¶ 19 With respect to the second and fourth factors of the test, there is no evidence in the record pertaining to the amount of time that the defendant was in the car or the size of the gun. Accordingly, these factors do not assist us in our determination of whether the defendant's knowledge of the gun can be inferred.

¶ 20 As to the third factor, movements made by the defendant that would suggest an effort to retrieve or hide the weapon, the defendant contends that Trooper Mayerbock is incredible based on conflicts within his testimony. Specifically, the defendant points to Trooper Mayerbock's testimony regarding which arm the defendant used to reach towards the center console while he was driving. Trooper Mayerbock first stated that he saw the defendant "reaching over with his left

arm towards the center of the vehicle,” but he later testified that the defendant was “reaching across with his left arm *and his right arm* towards the center area of the vehicle” (emphasis added). The defendant also points out that the dashboard video camera in Trooper Mayerbock’s squad car did not record these movements.

¶ 21 We will not substitute our judgment for that of the trier of fact “where the evidence is merely conflicting, *e.g.*, where there are minor variations or discrepancies in \*\*\* the testimony of prosecution witnesses.” *People v. Givens*, 46 Ill. App. 3d 1035, 1043 (1977). The trial court was in the best position to assess Trooper Mayerbock’s credibility, resolve any conflicts in his testimony, and draw reasonable inferences therefrom. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). We thus do not find that the minor inconsistencies in Trooper Mayerbock’s testimony rendered him incredible as a witness. In so holding, we note that it is also not improbable that the defendant took both hands off the wheel momentarily or reached down with each hand at separate times. The defendant’s argument that Trooper Mayerbock’s testimony is suspect because the dashboard video camera did not record his alleged furtive movements is also unavailing. As we stated above, Trooper Mayerbock’s testimony did not need to be corroborated by a recording in order for the trial court to find him credible.

¶ 22 In support of his argument that his alleged furtive movements could also be indicative of innocent conduct, the defendant relies on *People v. Ocampo*, 377 Ill. App. 3d 150 (2007), and *People v. Creagh*, 214 Ill. App. 3d 744 (1991); however, these cases are distinguishable from the case at bar. In both of those cases, the court held that probable cause to arrest the defendants was lacking because, although the defendants’ movements were consistent with drug transactions, they could also be innocuous. *Id.* Unlike in *Ocampo* and *Creagh*, probable cause is not at issue here. Rather, the State in this case used the defendant’s furtive movements as circumstantial evidence of



his knowledge and control of the gun, not as probable cause for the traffic stop or to search the defendant's vehicle. Accordingly, it was reasonable for the trial court to infer that the defendant had the requisite knowledge for constructive possession of the weapon.

¶ 23 After applying the four factors to this case, we find that the defendant's knowledge of the gun can be inferred based upon his furtive movements, the location of the gun, and his statement regarding who owned the gun and placed it in the white car. See *Nesbit*, 398 Ill. App. 3d at 210-11 (finding the defendant had the requisite knowledge for possession although factors two and four were not applicable).

¶ 24 The defendant next contends that the evidence was insufficient to establish that he exercised exclusive and immediate control over the area where the gun was found because he did not own the white car and Melton was left alone in the car for 12 minutes. We disagree.

¶ 25 Where contraband is "found on premises under [the] defendant's control, it may be inferred that he had the requisite knowledge and possession, absent other facts and circumstances which might leave a reasonable doubt as to guilt in the minds of" the trier of fact. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992). Because the defendant here was driving the car, he was in control of the premises in which the gun was found. Although his sister owned the vehicle and Melton remained alone in the car for 12 minutes while the defendant was being questioned, the mere fact that others had access to the vehicle does not defeat constructive possession because the law recognizes that possession may be joint. *People v. Hill*, 226 Ill. App. 3d 670, 673 (1992) (holding that access by the defendant's roommate to the armoire where the gun was found did not defeat a finding that the defendant constructively possessed the gun); *People v. Janis*, 56 Ill. App. 3d 160, 165 (1977) (holding that the presence of other men in a car did not negate the defendant's constructive possession of a concealed weapon).

¶ 26 Additionally, when a weapon is recovered in the same location where the defendant attempted to conceal it, we can infer that the area was within his immediate and exclusive control. *People v. Grant*, 339 Ill. App. 3d 792, 798-99 (2003) (finding that the defendant had immediate and exclusive control where the arresting officer recovered the weapon from the same location she saw the defendant reach); *Givens*, 46 Ill. App. 3d at 1041-42 (holding that, although he did not own the car, the defendant had immediate and exclusive control where he was seen “cleaning” under the seat where the weapon was found and part of his body was positioned over that part of the seat where the gun was eventually recovered). In this case, the defendant’s furtive movements—moving his arms to the center of the car where the gun was later found—could lead to an inference that he was concealing the gun and he thus had immediate and exclusive control over the white vehicle. See *id.*

¶ 27 The defendant’s close proximity to where the gun was found also evinces his immediate and exclusive control over it. Contraband is considered “sufficiently accessible to a defendant if it is within his easy reach and that of other persons who may be present.” *People v. O’Neal*, 35 Ill. App. 3d 89, 91 (1975). Here, Trooper Mayerbock found the gun wedged between the driver’s seat, where the defendant was sitting, and the center console, which was adjacent to the driver’s seat. Based on this positioning, the trial court could have reasonably inferred that the gun was within the defendant’s reach and was, therefore, easily accessible.

¶ 28 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.