

No. 1-08-1182

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FIRST DIVISION
February 7, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the
ILLINOIS,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 07 CR 10721
)	
RORY JONES,)	
)	Honorable
)	Catherine M. Haberkorn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court.
Justice Hoffman concurred in the judgment. Justice Rochford
dissented in the judgment.

O R D E R

Held: There was insufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant had such control of the subject apartment to support a reasonable

No. 1-08-1182

inference that he knowingly possessed the firearm hidden on top of a cabinet in the kitchen.

Following a bench trial, defendant Rory Jones was convicted of unlawful use of a weapon by a felon and sentenced to five years' imprisonment. The court also issued an order imposing various costs, fees, and fines.

The indictment alleged that defendant committed the offense by knowingly possessing in his own abode, a firearm, after having been previously convicted of the felony of manufacture/delivery of a controlled substance. The parties stipulated to defendant's prior felony convictions for intimidation and manufacture or delivery of a controlled substance.

Defendant's primary contention on appeal is that his conviction should be reversed because the State failed to present sufficient evidence proving beyond a reasonable doubt that he committed the offense of unlawful use of a weapon by a felon. For the reasons that follow, we reverse.

BACKGROUND

Prior to trial, defense counsel informed the trial court that he planned on calling Evelyn Hutcherson as a defense witness. Ms. Hutcherson is the mother of defendant's two minor daughters. She and the children lived in apartment 3N, at 5668 N. Ridge Avenue in Chicago, Illinois; the same apartment where

No. 1-08-1182

police recovered the gun.

Defense counsel informed the trial court that Ms. Hutcherson was prepared to testify that she and another man purchased the gun three months ago and that they put the gun on top of the kitchen cabinet, but did not tell defendant. Defense counsel was concerned that if Ms. Hutcherson gave such testimony she might incriminate herself in the commission of a crime. The trial court appointed Ms. Hutcherson a public defender in an advisory capacity.

The following evidence was then presented at trial. On April 21, 2007, at approximately 11:14 a.m., Chicago Police executed a search warrant at the subject apartment.

Officer Piper knocked on the front door of the apartment but received no response. The officer and his partner made a forced entry into the apartment after hearing noises inside the apartment and receiving a radio call from officers located outside at the rear of the building informing them that two men had run out the back door of the apartment.

Officer Piper ran out the back door and seized one of the men, later identified as Calvin Rainey.¹ Defendant was detained by officers at the rear of the building. Defendant and Rainey

¹ Calvin Rainey was subsequently released without being charged after officers failed to tie him to the apartment.

No. 1-08-1182

were the only individuals in the apartment.

During the search of the apartment, officers recovered the following items: a small amount of marijuana from a table in the living room; an unloaded 25-caliber semi-automatic handgun hidden on top of a cabinet in the kitchen; and a gas bill in defendant's name for the apartment, with an attached receipt indicating payment on February 16, 2007.

Defendant was taken into custody and transported to police headquarters for questioning. Officer Piper testified that he and his partner interviewed defendant after informing him of his *Miranda* rights. Officer Piper testified that after he spoke with defendant, he contacted the assistant State's Attorney's Office.

According to Officer Piper, the assistant state's attorney asked him to question defendant about the recovered gun. Officer Piper testified that upon further questioning, defendant told him he had hidden the gun on top of the kitchen cabinet to keep it out of the reach of his children.

On cross-examination, Officer Piper stated that defendant's statement concerning the gun was not contained in his police report because the report was completed before he spoke with the assistant state's attorney and before defendant made the statement. The officer acknowledged he could have amended the police report to include the statement regarding the gun, but did

No. 1-08-1182

not do so.

The parties stipulated that defendant had prior convictions for intimidation and manufacture/delivery of a controlled substance. After the State rested and the trial court denied defendant's motion for a directed finding, defendant called Ms. Hutcherson as a defense witness.

Prior to her testimony, the public defender appointed to advise Ms. Hutcherson told the trial court that he believed Ms. Hutcherson could possibly incriminate herself if she gave her proposed testimony. The public defender informed the trial court that he had advised Ms. Hutcherson to plead the fifth amendment privilege against self-incrimination regarding "anything to do with the ownership and the possession of the gun or where it came from or who had it or anything to do with the gun."

The trial court then held a discussion off the record with the attorneys. After the discussion, the trial court advised Ms. Hutcherson of her *Miranda* rights and questioned her concerning her understanding of her fifth amendment rights against self-incrimination.

Ms. Hutcherson decided to plead the fifth amendment regarding any questions pertaining to her connection to the gun or to the apartment where the gun was recovered. The trial court asked the public defender to stand by Ms. Hutcherson during her

No. 1-08-1182

examination and to advise her of any questions that might be incriminating. The trial court stated that it would also listen out for such questions.

Ms. Hutcherson was 26 years old at the time of trial. She testified that defendant was the father of her two children. She testified that on the date of the incident, defendant was not living in apartment 3N at 5668 Ridge Avenue. The public defender advised Ms. Hutcherson to invoke the fifth amendment in regard to whether she lived at that address.

Ms. Hutcherson testified that she was at work at the time of the incident. She testified that she had left her children with her mother who lived in a second floor apartment in the same building. She stated that defendant had come to apartment 3N to get his children. She claimed that defendant never had a key to her apartment.

The public defender advised Ms. Hutcherson to invoke the fifth amendment as to whether she ever saw defendant holding or handling a 25 caliber semi-automatic gun in apartment 3N. She was also advised to invoke her fifth amendment rights when asked if defendant paid the gas bill that was recovered at the apartment.

The next witness to testify on defendant's behalf was his mother, Ms. Sharon Jones. Ms. Jones testified that at the time

No. 1-08-1182

of the incident, defendant was living with her in an apartment at 2700 West Pratt in Chicago, Illinois. Ms. Jones testified that defendant had been living with her for approximately seven or eight months.

Ms. Jones stated that on several occasions she went to apartment 3N at 5668 Ridge Avenue, to visit her grandchildren. She testified that Evelyn Hutcherson lived at the address. Ms. Jones testified that she never saw defendant hold or possess a 25 caliber semi-automatic firearm.

Ms. Jones had a copy of a lease for her apartment dated February 1, 2004, ending January 31, 2005, with defendant's name on it, but claimed that she did not have a current lease with his name on it because she was presently on a month-to-month lease.

Officer Piper was recalled as a defense witness. The officer testified that other than the gas bill, police officers did not recover any other alleged proof of defendant's residency in the subject apartment. Officer Piper testified that he did not check with apartment management to ascertain if defendant was a registered tenant or resident of apartment 3N. The officer could not recall if there were any names listed on the mailbox for the apartment.

Defendant, who was 27 years old at the time of trial, testified on his own behalf. Defendant testified that on the day

No. 1-08-1182

of the incident, he was living with his mother at 2700 West Pratt. Defendant stated he had been living at that address with his mother for about seven-and-a-half months.

Defendant testified that Evelyn Hutcherson and their two children lived in apartment 3N at 5668 Ridge Avenue. Defendant testified that on the day of the incident, he received an early morning phone call from Evelyn Hutcherson asking him to go to her apartment to pick up their kids because she was working late.

Defendant testified that he took a cab from his home to the apartment building to pick up his kids. Defendant claimed he did not have a key to the apartment building.

Defendant testified that when he arrived at the apartment building he called Calvin Rainey on his cell phone to ask him to let him into the building. Defendant stated that Calvin Rainey was a family friend and had been waiting in the apartment for him to arrive. Defendant testified that Rainey came downstairs and let him into the building and they both went up to Evelyn Hutcherson's apartment.

Defendant testified that when he entered the apartment, his children were not there, so he assumed they were at their maternal grandmother's apartment located on the second floor in the same building. Defendant testified that he did not go to the second floor apartment to get his children because he believed

No. 1-08-1182

that the children's grandmother had gotten an order of protection against him prohibiting him from having contact with her.

Defendant testified that Calvin Rainey acted as a go-between for him and his children's maternal grandmother. Defendant testified that while he and Rainey were in Hutcherson's apartment, his children briefly came to the apartment and then went back downstairs to their grandmother's apartment.

Defendant stated that Rainey had agreed to get his children from their grandmother's apartment as soon as the grandmother had prepared them to leave. Defendant also claimed that he did not have any more money for a cab and therefore Rainey was the "designated driver."

Defendant stated that he and Rainey were in the apartment for about an hour waiting for the children's maternal grandmother to prepare them to leave with him, when he heard the police knock on the door. Defendant claimed he ran out the back of the apartment because he believed that his children's maternal grandmother had called the police on him in regard to the order of protection.

The trial judge then called counsels into chambers. The judge was concerned that the defendant might be unwittingly incriminating himself of the crime of violating an order of protection by his responses to defense counsel's questions

No. 1-08-1182

regarding the order of protection.

Defense counsel informed the trial judge that he had never seen an order of protection and did not know if one had been issued. The trial judge briefly passed the case to allow defense counsel to confer with defendant and determine whether an order of protection was issued against defendant.

When the case was recalled, defense counsel informed the trial judge that he had found no record indicating that defendant had been served with an order of protection. Defense counsel stated that according to defendant, Evelyn Hutcherson had told defendant that her mother had obtained an order of protection against him when he was incarcerated.

The trial judge then questioned defendant about the alleged order of protection. Defendant stated that he received a letter from Evelyn Hutcherson informing him that her mother had gotten an order of protection against him, but that he had never been served with such an order and had never seen such an order.²

² Defendant's presentence investigation report disclosed that he was "named as the respondent in an Order of Protection issued September 7, 2006 with an expiration date of September 5, 2008, naming the protected persons as: Evelyn Johnson (Petitioner), Evone Jones, and Lancese Hutcherson. Per report there is to be "No Contact By Any Means". Evone Jones and

No. 1-08-1182

In regard to the subject apartment, defendant testified that he was not listed on the lease for the apartment. He further testified that he did not pay the gas bill for the apartment, he did not apply for the gas service, and did not know why the bill was in his name.

Defendant stated he had never seen the recovered handgun and was unaware of it until he was taken to police headquarters and questioned about the firearm. Defendant testified that at the police station, several guns were laid out on a table in front of him.

Defendant also denied ever telling police he hid a gun on top of the kitchen cabinet to keep it out of the reach of his children. Defendant testified he was unaware that a gun was hidden on top of the kitchen cabinet.

On cross-examination, defendant testified that after he was released from prison in October 2006, he visited the subject apartment approximately three times in 2006, which included Thanksgiving and Christmas. He claimed that in 2007, he visited the apartment approximately two times, once for his birthday in February and the second time on the date of the incident.

The trial court found defendant guilty of unlawful use of a weapon by a felon. Defendant filed a motion for a new trial,

Lancese Hutcherson are defendant's minor daughters.

No. 1-08-1182

which the trial court subsequently denied, and he was sentenced to five years' imprisonment. The trial court also issued an order imposing various costs, fees, and fines. This appeal followed.

ANALYSIS

Defendant contends the evidence was insufficient to prove beyond a reasonable doubt that he was guilty of the offense of unlawful use of a weapon by a felon. When reviewing a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304 (2004).

To sustain a conviction for unlawful use of a weapon by a felon, the State must prove beyond a reasonable doubt that the defendant knowingly possessed a prohibited firearm and that he had a prior felony conviction. 720 ILCS 5/24-1.1(a) (West 2006); *People v. Rasmussen*, 233 Ill. App. 3d 352, 369-70, 598 N.E.2d 1368 (1992). Defendant claims the State provided insufficient evidence that he "knowingly" possessed a firearm, and therefore failed to prove beyond a reasonable doubt an essential element of the offense of unlawful use of a weapon by a felon.

In a possession case, because the element of knowledge is

No. 1-08-1182

rarely susceptible to direct proof (*People v. Sanchez*, 292 Ill. App. 3d 763, 771, 686 N.E.2d 367 (1997)), actual possession need not be demonstrated in order to uphold a conviction if constructive possession can be inferred from the facts. *People v. Ray*, 232 Ill. App. 3d 459, 462, 597 N.E.2d 756 (1992). Where a prohibited firearm or illegal drugs are found on the premises rather than on defendant, the State must prove that defendant had control of the premises in order to permit the inference that he had knowledge and control over the illegal items. *Ray*, 232 Ill. App. 3d at 462; *People v. Adams*, 242 Ill. App. 3d 830, 832, 610 N.E.2d 763 (1993). Knowledge and possession are questions of fact to be resolved by the trier of fact whose findings will not be disturbed on review unless the evidence is so unbelievable, improbable, or palpably contrary to the verdict that it creates a reasonable doubt of guilt. *People v. Luckett*, 273 Ill. App. 3d 1023, 1033, 652 N.E.2d 1342 (1995); *People v. Butler*, 242 Ill. App. 3d 731, 733, 611 N.E.2d 603 (1993).

In the instant case, we do not believe the evidence was sufficient to establish that defendant had such control of the subject apartment to support a reasonable inference that he knew a firearm was hidden on top of a cabinet in the kitchen. Defendant had no keys to the apartment and the State presented no evidence that he kept any personal belongings in the apartment

No. 1-08-1182

that might have indicated he lived there.

Officer Piper testified that he did not check with apartment management to determine if defendant was a registered tenant or resident of the subject apartment. The officer also could not recall if there were any names listed on the mailbox for the apartment.

The only piece of physical evidence arguably suggesting that defendant resided at the subject apartment was the recovered utility gas bill. However, under the factual circumstances in this case, this evidence was insufficient to show that defendant lived at the apartment. See, e.g., *Ray*, 232 Ill. App. 3d at 462 (evidence of lone cable-television bill was insufficient to show that defendants lived in apartment where "no testimony was presented which established that any of the defendants admitted that the apartment was their residence or that they kept clothing or other personal belongings there or that they had a key to the premises"); *Williams v. State*, 498 S.W.2d 340, 341 (Tex. Cr. App. 1973) (fact that utilities were registered in defendant's name, standing alone, was insufficient to show he occupied the premises).

Besides the utility gas bill, the only other evidence the State used in an attempt to establish that defendant resided at the subject apartment was his alleged statement. Officer Piper

No. 1-08-1182

testified that defendant told him he hid the gun on top of the kitchen cabinet to keep it out of the reach of his children.

However, this alleged statement was not included in the officer's police report. Officer Piper attempted to explain the omission by stating that after he initially interviewed defendant, he contacted the assistant State's Attorney's Office, who asked him if he would reinterview defendant concerning the firearm. Officer Piper testified that upon further questioning, defendant told him he had hidden the gun on top of the kitchen cabinet to keep it out of the reach of his children.

On cross-examination, Officer Piper stated that defendant's statement was not included in his police report because the report was completed before he spoke with the assistant state's attorney and before defendant made the statement. The officer acknowledged he could have amended the police report to include the statement regarding the gun, but did not do so.

In light of the evidentiary significance of the statement and the lack of an explanation as to why it was not included in an amended police report, we believe that the omission renders Officer Piper's testimony on this issue untrustworthy. See, e.g., *People v. Pugh*, 36 Ill. 2d 435, 437, 223 N.E.2d 115 (1967) (police officers' testimony that defendant told them he lived in apartment held to be unreliable since statement did not appear in

No. 1-08-1182

police report).

Moreover, even if the officer's testimony is viewed as entirely true, it is insufficient to establish that defendant resided at the apartment where the gun was recovered. Defendant visited the apartment on occasion to pick up his children. It is possible he saw the gun while at the apartment, and wanting to hide it from his children who resided there, placed it on the cabinet. Simply placing a firearm out of the reach of his children does not establish that defendant had such control of the subject apartment to support a reasonable inference that he was in knowing possession of the firearm.

In addition, under the circumstances in this case, we do not believe that defendant's conduct in running out of the apartment when the police knocked on the front door, is sufficient to support a reasonable inference that he knowingly possessed the firearm.

Defendant testified that he ran out the back of the apartment because he believed that his children's maternal grandmother had called the police on him in regard to an order of protection. Defendant's testimony was at least partly corroborated by the record showing that he was named as a respondent in an *ex parte* order of protection barring him from having any contact with his children or their maternal

No. 1-08-1182

grandmother.

In sum, we believe that the evidence, viewed as a whole, fails to support a finding that the subject apartment was under defendant's control. See *Pugh*, 36 Ill. 2d at 438. There was insufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant had such control of the subject apartment to support a reasonable inference that he knowingly possessed the firearm hidden on top of a cabinet in the kitchen. In light of our decision, we need not address defendant's remaining arguments on appeal.

The judgment of the Circuit Court of Cook County is therefore reversed; order imposing costs, fees, and fines vacated.

Reversed and order vacated.

JUSTICE ROCHFORD dissenting.

I respectfully dissent from the majority's reversal of defendant's conviction of unlawful use of a weapon by a felon. As noted by the majority, to sustain a conviction for unlawful use of a weapon by a felon, the State must prove beyond a reasonable doubt that defendant knowingly possessed a prohibited firearm and had a prior felony conviction. 720 ILCS 5/24-1.1(a) (West 2006). Defendant does not dispute he had a prior felony conviction; the issue here is whether the circuit court correctly found he knowingly possessed a prohibited firearm. The standard of review is whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.

No. 1-08-1182

People v. Cunningham, 212 Ill.2d 274, 278 (2004).

Criminal possession may be actual or constructive. *People v. Ingram*, 389 Ill. App. 3d 897, 899 (2009). The circuit court here did not state whether it found defendant had actual possession or constructive possession of the weapon. We may affirm for any reason warranted by the record, regardless of the reasons stated (or not stated) by the lower court. *People v. Sawczenko*, 328 Ill. App. 3d 888, 897 (2002).

A defendant's possession is actual when he exercises "present personal dominion" over the weapon, by acts such as hiding or trying to dispose of the item. *People v. Brown*, 277 Ill. App. 3d 989, 997 (1996). In the present case, defendant testified he was at the apartment for approximately one hour prior to the officers' arrival. The officers discovered the weapon on top of a kitchen cabinet inside the apartment. Officer Piper testified to defendant's statement that he hid the weapon on the kitchen cabinet to keep it out of his children's reach. This evidence supports a finding that defendant knowingly had actual possession of the weapon at the time the officers entered the apartment.

The majority cites *People v. Pugh*, 36 Ill.2d 435 (1967), for their holding that Officer Piper's testimony regarding defendant's statement was untrustworthy because he did not

No. 1-08-1182

include it in his amended police report. In *Pugh*, the supreme court reversed Jesse James Pugh's conviction for unlawful possession of a narcotic drug, holding that the State failed to prove beyond a reasonable doubt that the apartment where the narcotics were found was under Pugh's control. *Pugh*, 36 Ill.2d at 437. In so holding, the supreme court noted the absence of any evidence that Pugh's personal effects were in the apartment, or that he paid the rent or routinely frequented the apartment. *Pugh*, 36 Ill.2d at 437-38. The supreme court also noted that while officers testified Pugh told them he had lived in the apartment for two months, that fact did not appear in the police report. *Pugh*, 36 Ill.2d at 437. However, the supreme court made no express finding that the failure to document Pugh's statement rendered the officers' testimony untrustworthy. Thus, *Pugh* does not support a holding that Officer Piper's failure to document defendant's statement renders his testimony about the statement untrustworthy.

Further, Officer Piper testified he completed his police report before the assistant state's attorney asked him to question defendant about the weapon and before defendant made his statement. It was for the trier of fact to determine Officer Piper's credibility taking into consideration any omissions in his police report and his explanations for the omissions. This

No. 1-08-1182

court may not substitute its judgment therefor. *People v. Sutherland*, 155 Ill.2d 1, 17 (1992).

The evidence at trial also supports a finding here that defendant knowingly had constructive possession of the weapon. "Constructive possession exists without actual personal present dominion over [the weapon], but with an intent and capability to maintain control and dominion." *People v. Frieberg*, 147 Ill.2d 326, 361 (1992). Constructive possession may be proved by showing defendant had knowledge of the presence of a weapon and had immediate and exclusive control over the area where the weapon was found. *Ingram*, 389 Ill. App. 3d at 899-900; *People v. Stewart*, 366 Ill. App. 3d 101, 111 (2006). Proof of residency in the form of utility bills is relevant to show defendant lived on the premises where the weapon was found and therefore constructively possessed the weapon. See *People v. Scott*, 367 Ill. App. 3d 283, 286 (2006); *People v. Macias*, 299 Ill. App. 3d 480, 487-88 (1998). Here, the State presented evidence of the recovery of a gas bill in defendant's name for the apartment, with an attached receipt indicating payment on February 16, 2007. The majority cites *People v. Ray*, 232 Ill. App. 3d 459 (1992), for the proposition that the lone utility bill is insufficient to show defendant resided in, and therefore controlled, the apartment where the weapon was found. However, *Ray* is

No. 1-08-1182

distinguishable, where the appellate court there noted that evidence of a lone cable television bill was insufficient to show constructive possession because the bill was six months old. *Ray*, 232 Ill. App. 3d at 463. In contrast to *Ray*, the utility bill here was only three months old, and the receipt attached to the utility bill indicated the bill had been paid two months prior to the recovery of the weapon.

Also, unlike in *Ray*, defendant's presence in the apartment for approximately one hour prior to the officers' arrival, coupled with his flight from the apartment when the police knocked on the door, provides further evidence supporting the inference that defendant knowingly had constructive possession of the weapon found therein. See *Ingram*, 389 Ill. App. 3d at 901 (defendant's flight from car following a traffic stop supported the inference he possessed the gun found in the car). The majority holds otherwise, positing from defendant's testimony that he fled the apartment only because he believed his children's maternal grandmother had called the police on him in regard to an order of protection. However, it is equally plausible from Officer Piper's testimony that defendant fled the apartment because he knew the police were about to discover his weapon. The circuit court here found the officer's testimony to be credible. It is the function of the trier of fact to

No. 1-08-1182

determine the credibility of the witnesses and the weight to be given their testimony, to resolve conflicts in the evidence and to draw reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill.2d 236, 259 (2001).

In sum, viewing the evidence in the light most favorable to the State (*Cunningham*, 212 Ill.2d. at 278), a rational trier of fact could find defendant guilty of unlawful use of a weapon by a felon. I would affirm defendant's conviction.