

NOTICE

This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2023 IL App (4th) 220422-U

NO. 4-22-0422

IN THE APPELLATE COURT

OF ILLINOIS

FILED

June 1, 2023

Carla Bender

4th District Appellate
Court, IL

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Winnebago County
JERRY COLE,)	No. 20CF2465
Defendant-Appellant.)	
)	Honorable
)	Debra D. Schafer,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice DeArmond and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted OSAD's motion to withdraw and affirmed the trial court's judgment.

¶ 2 Defendant, Jerry Cole, appeals his conviction for unlawful possession of a weapon by a felon and his sentence of two years and six months' imprisonment. The Office of the State Appellate Defender (OSAD) was appointed to represent defendant. OSAD now moves to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), on the basis that it cannot raise any potentially meritorious argument on appeal. After reviewing the record and counsel's brief, we grant OSAD's motion to withdraw and affirm the judgment of the trial court.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with possession of a firearm without the requisite firearm owner's identification (FOID) card (430 ILCS 65/2(a)(1) (West 2020)) and unlawful possession of a weapon by a felon (UPWF) (720 ILCS 5/24-1.1(a) (West 2020)). The trial court later dismissed the charge of possession of a firearm without the requisite FOID card upon motion of the State.

¶ 5 Prior to trial, defendant filed a motion *in limine* requesting that the trial court preclude the State from introducing evidence of his 2012 Wisconsin conviction for bail jumping on the basis that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The State filed a competing motion *in limine* asking that evidence of this conviction be admitted for impeachment purposes. The trial court denied defendant's motion *in limine* and granted the State's motion *in limine*, finding the probative value of the conviction substantially outweighed the potential prejudice.

¶ 6 Defendant filed a second motion *in limine* requesting that the trial court prohibit the State from introducing evidence of defendant's post-arrest statements that (1) he would beat the individual who resided at the apartment where he was arrested and (2) he would slap an officer involved in his arrest if he were not in handcuffs. The court ruled that it would bar the statement concerning defendant slapping a police officer, but it would allow the statement about defendant threatening to beat the apartment resident because it could reflect consciousness of guilt.

¶ 7 At the jury trial, the parties stipulated defendant had previously been convicted of a felony. Officer Kristine Tesnow testified that, on the evening of the incident, she and other officers were dispatched to an apartment building to respond to a domestic disturbance. As they were leaving, a man approached them and asked them to go to his apartment, Apartment 1S,

which was not the apartment they originally responded to. Tesnow approached the door to Apartment 1S and saw defendant sitting on a chair or couch inside the apartment. There was a gun on the side table next to where defendant was sitting. Defendant grabbed the gun and tucked it underneath his seat. Tesnow directed defendant to leave the apartment. Defendant told the officers not to enter the apartment and began yelling at the apartment resident. Another officer entered the apartment and recovered a gun from underneath the chair where Tesnow saw defendant place it.

¶ 8 Officer Edward Roman testified that he also responded to the apartment building on the night of the incident. While standing in the hallway, Roman observed defendant sitting on a couch in Apartment 1S. According to Roman, Tesnow indicated she saw defendant place a gun underneath the couch, and she ordered him out of the apartment. Roman stated he was looking back and forth between the apartment resident and defendant at that time and he did not see defendant touch a gun. Defendant exited the apartment and was detained in the hallway. Roman asked the apartment resident if he could enter the apartment to retrieve the gun, and the resident gave him permission to do so. Roman moved the couch he had seen defendant sitting on, and he observed a gun underneath it. The officers eventually led defendant outside. Defendant was very angry and yelled that he wanted to batter the resident of Apartment 1S. Roman identified the firearm he had recovered from the apartment, and it was admitted into evidence. Another officer testified the gun was functional.

¶ 9 The State rested, and defense counsel moved for a directed verdict. The trial court denied the motion.

¶ 10 Defendant testified on his own behalf. At the outset, defendant admitted he had a 2012 felony conviction for bail jumping. Defendant stated that on the night of the incident, he

was at the apartment of his downstairs neighbor. After approximately 15 minutes, defendant heard a knock on the door. His neighbor opened the door, and defendant observed three police officers. Defendant reached for his beer. Tesnow asked what he was doing and directed him to leave the apartment. A male officer entered the apartment, and Tesnow told him to look under the couch. The male officer found a gun. Defendant stated the gun did not belong to him, and he had never seen or touched the gun. Defendant was confused and told his neighbor that he did not have to let the officers enter his apartment. Defendant stated he never threatened to beat up his neighbor, noting his neighbor also appeared confused.

¶ 11 The State indicated it wished to introduce a certified copy of defendant's bail jumping conviction in rebuttal as impeachment evidence. Defense counsel objected on the basis that defendant had already testified concerning the existence of the conviction. The trial court allowed the State to introduce the certified copy of conviction, and it was admitted into evidence.

¶ 12 Defense counsel renewed his motion for a directed verdict, and the trial court denied the motion.

¶ 13 During the jury instruction conference, the State requested that Illinois Pattern Jury Instructions, Criminal, No. 4.16 (approved Dec. 8, 2011) (hereinafter IPI Criminal No. 4.16) be given. That instruction stated:

“Possession may be actual or constructive. A person has actual possession when he has immediate and exclusive control over a thing. A person has constructive possession when he lacks actual possession of a thing but he has both the power and the intention to exercise control over a thing.

If two or more persons share the immediate and exclusive control or share the intention and the power to exercise control over a thing, then each person has possession.” *Id.*

Defense counsel objected to the instruction on the basis that neither party was alleging that constructive or joint possession was at issue. Counsel asserted the case concerned only actual possession. The trial court allowed the instruction, finding joint possession could be an issue based on the evidence because there were two people in the apartment.

¶ 14 During closing argument, the State argued the evidence showed defendant possessed the firearm by grabbing it and hiding it under the couch. The jury found defendant guilty of UPWF.

¶ 15 A presentence investigation report showed defendant had an adult criminal history consisting of misdemeanor and felony offenses committed between 1987 and 2017. He had nine prior felony convictions, the last of which was the 2012 bail jumping offense. At the sentencing hearing, the trial court noted the sentencing range was 2 to 10 years’ imprisonment and imposed a sentenced of 2 years and 6 months’ imprisonment. The court stated defendant had a long criminal history but noted it had been a long time since he had a felony conviction. The court stated: “The half [of a year] is because of the history that you have. The two years is based on your pulling it together.”

¶ 16 This appeal followed. OSAD was appointed to represent defendant in this appeal. OSAD now moves to withdraw pursuant to *Anders* on the basis that it cannot raise any potentially meritorious argument on appeal. Appointed counsel indicates that he informed defendant of the necessity of his *Anders* motion by phone and letter. Counsel also indicates he mailed defendant a copy of the motion. Defendant has filed no response.

¶ 17

II. ANALYSIS

¶ 18 On appeal, appointed counsel indicates he considered raising the following issues on defendant's behalf: (1) whether the trial evidence was sufficient to prove defendant guilty beyond a reasonable doubt, (2) whether the trial court erred in denying defendant's motion *in limine* to bar the State from using his 2012 bail jumping offense for impeachment purposes, (3) whether the court erred in denying defendant's motion *in limine* to bar testimony from officers concerning a statement he made while being arrested, (4) whether the court erred by admitting a certified copy of defendant's bail jumping conviction at the State's request when defendant had already admitted to the conviction, (5) whether the court erred by instructing the jury on both actual and constructive possession, and (6) whether the court abused its discretion by sentencing defendant to two and a half years' imprisonment. However, counsel indicates he has concluded the foregoing issues would be without arguable merit.

¶ 19

A. Sufficiency of the Evidence

¶ 20 Counsel first asserts he considered arguing the trial evidence was insufficient to prove defendant guilty beyond a reasonable doubt or that the trial court erred by denying defendant's motions for a directed verdict. When considering a challenge to the sufficiency of the evidence, the question for the reviewing court is “ ‘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.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶ 21

To prove defendant guilty of UPWF, the State was required to prove (1) defendant knowingly possessed on or about his person any firearm and (2) defendant had been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2020). Possession of a firearm under this

section may be actual or constructive. *People v. Wise*, 2021 IL 125392, ¶¶ 24-25. “Actual possession is proved by testimony that the defendant exercised some form of dominion over the firearm, such as that he had it on his person, tried to conceal it, or was seen to discard it.” *People v. Jones*, 2019 IL App (1st) 170478, ¶ 27. “[C]onstructive possession of a firearm may be shown where the person has knowledge of the presence of the weapon and exercises immediate and exclusive control over the area where the firearm is found.” *People v. Brown*, 2020 IL 124100, ¶ 11.

¶ 22 Here, viewed in the light most favorable to the State, the trial evidence was sufficient to prove both elements of the offense of UPWF. The parties stipulated that defendant had a prior felony conviction at the time of the offense. Also, a rational trier of fact could have found from the trial evidence that defendant actually possessed a firearm. Tesnow testified she observed defendant pick up a gun from a table and place it under his seat. Shortly after Tesnow saw defendant handle the gun, Roman recovered it from underneath the couch where defendant had been sitting. While defendant denied handling the gun or having knowledge that it was under the couch, the jury was free to find his testimony not credible. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009) (“[A] reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of evidence or the credibility of witnesses.”).

¶ 23 For the same reasons we have found the trial evidence presented by the State in its case in chief was sufficient to prove defendant guilty beyond a reasonable doubt of UPWF, the trial court did not err in denying defendant’s motion for a directed verdict. See *People v. Shakirov*, 2017 IL App (4th) 140578, ¶ 81 (“A directed verdict *** is appropriate when a trial court concludes, after viewing all of the evidence in a light most favorable to the State, that no

reasonable juror could find that the State had met its burden of proving the defendant guilty beyond a reasonable doubt.”).

¶ 24 B. Motion *in Limine*—Prior Conviction

¶ 25 Appointed counsel next asserts that he considered arguing the trial court abused its discretion in denying defendant’s motion *in limine* to bar the use of his 2012 bail jumping conviction as impeachment evidence.

¶ 26 Under Illinois Rule of Evidence 609(a) (eff. Jan. 6, 2015), evidence that a witness has been convicted of a crime is admissible for impeachment purposes if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or involved dishonesty or a false statement. However, such a prior conviction is not admissible if the trial court determines the probative value of the conviction is substantially outweighed by the danger of unfair prejudice. *Id.* Moreover, evidence of such a conviction is not admissible if more than 10 years has passed from the date of conviction or release from confinement, whichever is later. Ill. R. Evid. 609(b) (eff. Jan. 6, 2015). A trial court’s ruling on a motion *in limine* to exclude evidence of a defendant’s prior conviction for impeachment is reviewed for an abuse of discretion. See *People v. Harvey*, 211 Ill. 2d 368, 392 (2004); *People v. Melton*, 2013 IL App (1st) 060039, ¶ 17.

¶ 27 Here, the trial court did not abuse its discretion in denying defendant’s motion *in limine* to bar the State from using his 2012 bail jumping conviction for impeachment purposes. This conviction was entered less than 10 years before the trial, and it was punishable by up to six years’ imprisonment (see Wis. Stat. Ann. §§ 939.50(3)(h), 946.49(1)(b) (West 2012)). Moreover, the court properly conducted the requisite balancing test, weighing the probative value of the

conviction against the danger of unfair prejudice. Accordingly, the court was within its discretion in finding the conviction was admissible.

¶ 28 C. Motion *in Limine*—Defendant’s Prior Statement

¶ 29 Counsel asserts he also considered arguing that the trial court abused its discretion in denying defendant’s motion *in limine* to bar the State from introducing evidence that, while being arrested, defendant stated he wanted to beat the occupant of Apartment 1S.

¶ 30 A party’s own statement that is offered against the party is not hearsay. Ill. R. Evid. 801(d)(2) (eff. Oct. 15, 2015). However, such a statement must be relevant to be admissible. See *Moran v. Erickson*, 297 Ill. App. 3d 342, 358 (1998). “ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ill. R. Evid. 401 (eff. Jan. 1, 2011). “Statements or conduct indicating the defendant’s consciousness of guilt may serve as circumstantial evidence supporting a conviction.” *People v. Sanchez*, 2013 IL App (2d) 120445, ¶ 35.

¶ 31 Here, it could be inferred from defendant’s statement that he was angry that the apartment resident allowed the police to enter the apartment because defendant had knowledge of the firearm the officers found under his seat. Accordingly, the trial court was within its discretion in finding the statement to be relevant and admissible on the basis that it could show consciousness of guilt.

¶ 32 D. Certified Copy of Prior Conviction

¶ 33 Counsel indicates he also considered arguing that the trial court erred by allowing the State to offer a certified copy of defendant’s 2012 bail jumping conviction as rebuttal evidence when defendant had already admitted to the conviction on direct examination.

¶ 34 Generally, “[w]hen the defendant testifies in a criminal case, the State may not impeach the defendant’s testimony by cross-examination as to his or her prior conviction, but rather only by introducing the record of the prior conviction.” *People v. Naylor*, 229 Ill. 2d 584, 594 (2008). Here, however, defendant testified concerning his prior conviction on direct examination. Accordingly, defense counsel argued in the trial court that it was unnecessary to also introduce a certified copy of the conviction.

¶ 35 Even if the trial court erred in allowing the State to also introduce a certified copy of the bail jumping conviction, any error in this regard was harmless. The certified copy was cumulative of defendant’s own testimony concerning the conviction. See *People v. Becker*, 239 Ill. 2d 215, 240 (2010) (“[W]hen deciding whether error is harmless, a reviewing court may *** determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence.”). The court instructed the jury on the proper purpose of the evidence of defendant’s prior conviction—namely, to impeach his credibility and to establish that he had been previously convicted of a felony (which was an element of the offense). Also, the remaining evidence in the case supported the verdict. *Supra* ¶ 22.

¶ 36 E. Jury Instruction on Actual and Constructive Possession

¶ 37 Counsel next indicates he considered arguing the trial court erred by instructing the jury with IPI Criminal No. 4.16. Jury instructions “convey the legal rules applicable to the evidence presented at trial and thus guide the jury’s deliberations toward a proper verdict.” *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). “There must be some evidence in the record to justify an instruction, and it is within the trial court’s discretion to determine which issues are raised by the evidence and whether an instruction should be given.” *Id.*

¶ 38 The committee note for IPI Criminal No. 4.16 indicates that the instruction is generally unnecessary when there is no evidence that the possession was either constructive or joint. IPI Criminal No. 4.16. The committee note states that the first paragraph of the instruction should be given only when there is an issue as to whether the defendant was in constructive possession, and the second paragraph should only be given when there is an issue of joint possession. *Id.*

¶ 39 Here, the trial court did not abuse its discretion in giving this instruction. Possession was an element of the offense of UPWF. While the State’s theory of the case was that defendant actually possessed the firearm, the trial court found there could be issues of joint possession based on the evidence presented. Also, even if defendant’s testimony that he did not move the gun from the table was believed by the jurors, they could have potentially found he constructively possessed the gun because it was recovered under the couch where he had been sitting and defendant’s comments as he was being arrested could be interpreted as expressing consciousness of guilt. Accordingly, the court was within its discretion in giving the instruction, as there was some evidence in the record to support giving it.

¶ 40 F. Sentencing

¶ 41 Finally, counsel considered arguing on appeal that the trial court abused its discretion by sentencing defendant to two years and six months’ imprisonment. Counsel notes that no postsentencing motion was filed; therefore, any sentencing claim would have to survive plain error review. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010).

¶ 42 “A reviewing court may not alter a defendant’s sentence absent an abuse of discretion by the trial court.” *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). “[A] sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the

trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.” *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). Here, defendant was subject to a mandatory sentencing range of 2 to 10 years’ imprisonment. See 720 ILCS 5/24-1.1(e) (West 2020).

¶ 43 The trial court did not abuse its discretion in sentencing defendant to two and a half years’ imprisonment. The court indicated it had considered the applicable factors in aggravation and mitigation. The court’s imposition of a sentence six months above the minimum was within its discretion in light of defendant’s extensive criminal history, which the court properly found to be an aggravating factor. See 730 ILCS 5/5-5-3.2(a)(3) (West 2020).

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we allow OSAD’s motion to withdraw and affirm the trial court’s judgment.

¶ 46 Affirmed.