

IN THE COURT OF APPEALS OF IOWA

No. 3-550 / 12-1626
Filed August 7, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TED JAMES MCPHAIL,
Defendant-Appellant.

Appeal from the Iowa District Court for Mitchell County, Christopher C. Foy (sentencing) and DeDra L. Schroeder (trial), Judges.

A defendant appeals from jury verdicts finding him guilty of being a felon in possession of firearms. **JUDGMENTS OF CONVICTION REVERSED AND REMANDED FOR DISMISSAL.**

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, Mark L. Walk, County Attorney, and Aaron R. Murphy, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

A jury convicted Ted McPhail of four counts of being a felon in possession of a firearm after police discovered two revolvers, one rifle, and ammunition at his girlfriend's residence, where he regularly stayed. McPhail first argues it is not a crime under Iowa law for a felon to possess ammunition. He also contends the State offered insufficient evidence to prove he possessed the three guns.

The State concedes McPhail could not be convicted for his alleged possession of ammunition but urges us to affirm the remaining firearm counts based on constructive possession. Because the State's proof fell short of showing McPhail had knowledge of the firearms or the right to exercise control over them, we reverse the judgments of conviction and remand for dismissal of the charges.

I. Background Facts and Proceedings.

On November 16, 2011, the North Central Iowa Narcotics Task Force Special Operations Group executed a search warrant at Shannon Henaman's residence in Osage. The warrant application identified both Henaman and McPhail, her boyfriend. The warrant authorized the officers to search for illegal narcotics, as well as firearms and ammunition.

McPhail was the only person in the residence when officers executed the search warrant. They handcuffed him in the living room area. He declined to answer the officers' questions.

During the search of the residence, officers found three firearms: a Rossi Puma .45 caliber Colt rifle, a Ruger .22 caliber revolver, and a Smith & Wesson

.45 caliber Colt revolver. All three firearms were inside separate cases, closed but not locked, atop a shelf located above a window over the kitchen sink. The officers also found a tackle box containing ammunition on that shelf. The search team located a single .45 caliber bullet in a kitchen drawer concealed under another item.

Inside a nightstand in the master bedroom, the officers found a device known as a speed loader, which is used to quickly insert six rounds into a six-cylinder revolver. The speed loader contained rounds of .45 caliber ammunition. The officers removed the speed loader from the drawer to photograph it. The seizing officer could not recall if the speed loader was stored beneath other items in the drawer.

In addition to firearms and ammunition, officers discovered marijuana and paraphernalia in the home.

On December 20, 2011, the State charged McPhail with four counts of being a felon¹ in possession of a firearm, in violation of Iowa Code section 724.26 (2011): count I was based on his possession of ammunition; count II was based on his possession of the rifle; count III was based on his possession of the Ruger revolver; and count IV was based on his possession of the Smith & Wesson revolver. The State also charged McPhail with one count of possession of marijuana, in violation of Iowa Code section 124.401(5). Following a May 30, 2012 trial, a jury found McPhail guilty on all charges.

¹ McPhail, who has been convicted three times for operating while intoxicated (OWI), does not challenge his status as a felon.

McPhail filed motions in arrest of judgment and for a new trial. The district court granted McPhail a new trial on the possession-of-marijuana charge. It denied the motions with respect to the felon-in-possession verdicts. The district court sentenced McPhail to incarceration not to exceed five years on each of the four counts and ordered the sentences to run concurrently. McPhail filed a notice of appeal the same day.

II. Ammunition Charge.

McPhail first challenges his conviction for possessing ammunition. He argues his trial counsel was ineffective in failing to challenge the sufficiency of the evidence to support his conviction and in failing to object to the jury instructions regarding this charge.

A person is only prohibited from possessing ammunition if he or she has been convicted of a crime of domestic violence or is subject to a domestic violence protective order. See Iowa Code § 724.26(2)(a). The State did not allege McPhail had been convicted of domestic abuse assault or was subject to a domestic violence protective order. Accordingly, it could not prove he committed a crime by possessing ammunition. The State concedes this point on appeal. We reverse the judgment of conviction on this charge and remand for its dismissal.

III. Firearm Charges.

McPhail next targets his three convictions for possessing the guns found in his girlfriend's kitchen—critiquing the State's proof of constructive possession. He claims no evidence permitted the jury to conclude that he "had knowledge of

the existence of the firearms, let alone that he had any right of authority over them.”

We review challenges to the sufficiency of the evidence to correct legal error. *State v. Kern*, 831 N.W.2d 149, 158 (Iowa 2013). We consider whether substantial evidence supports a guilty verdict beyond a reasonable doubt. *Id.* If so, we uphold the verdict. *State v. Webb*, 648 N.W.2d 72, 75 (Iowa 2002). We view the evidence in the light most favorable to the State. *Id.* at 76. We consider all the evidence in the record, not just the evidence supporting the verdict. *Id.* “The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.” *Id.*

To establish McPhail’s guilt, the State had to prove beyond a reasonable doubt that McPhail “knowingly possessed, received, transported, caused to be transported, or had under his dominion and control [a firearm],” and that he was previously convicted of a felony. McPhail does not dispute the weapons found in the residence were firearms or his status as a felon. He claims the prosecution offered insufficient evidence to show he knowingly possessed or exercised dominion and control over the firearms.

Possession can be either actual or constructive. *State v. Bash*, 670 N.W.2d 135, 138 (Iowa 2003). A defendant actually possesses contraband when police find it on his or her person. *Id.* Because the officers did not find the firearms on McPhail’s person, we turn to a constructive possession analysis. A person constructively possesses an item when he or she has knowledge of its

presence and the authority or right to maintain control of the item. *State v. Nickens*, 644 N.W.2d 38, 41 (Iowa Ct. App. 2002).

Where authorities find contraband in a location exclusively occupied by the accused, we may infer knowledge of its presence coupled with the ability of the accused to maintain control over the contraband. *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004). Here, searchers found the firearms at the residence of McPhail's girlfriend. McPhail stayed at the house three to five nights per week and received at least one piece of mail at the address.

The State argues McPhail's "degree of access and control" is demonstrated by the frequency of his stays at the residence and his "free reign" over the rooms. But showing the opportunity to access to a place where the verboten item is found—without more—does not prove constructive possession. See *State v. McDowell*, 622 N.W.2d 305, 308 (Iowa 2001) (citing *State v. Reeves*, 209 N.W.2d 18, 22 (Iowa 1973)). Here, police discovered the firearms in the kitchen. While McPhail was alone in the house when police executed the search warrant, Henaman, her teen-aged daughter, and McPhail mutually used the kitchen and had joint control over the shelf where the guns were kept.

In joint occupancy cases, we cannot infer the defendant's knowledge of and the ability to maintain control over contraband. "More proof is needed to draw the constructive possession inference." *Kern*, 831 N.W.2d at 161. Additional proof may include: (1) incriminating statements, (2) incriminating actions when police discover the contraband among or near the defendant's belongings, (3) fingerprints, or (4) any other circumstances linking the defendant

to the contraband. *Id.* The instant record contains no incriminating statements or actions by McPhail. The police did not test the firearms for fingerprints. Accordingly, the jury was left to look for other circumstances to link McPhail to the firearms.

The circumstance most strongly suggesting McPhail's knowledge of the guns is their relatively open storage on a kitchen shelf. An officer who executed the search warrant testified the guns were "one of the very first things" he noticed when he looked into the kitchen. But the guns were not in plain view. A photographic exhibit depicts a plain, wooden box with a metal latch; another smaller black box on top; and a long, black case which is wider at one end than the other. The black case was partially obscured by contact paper. Henaman testified she put the guns up on the shelf over the kitchen sink while remodeling because she "figured that was the safest place for it at the time because everything was tore apart." The shelf was more than six feet above the floor, well above eye level.²

The visibility of the containers does not prove, without more, that McPhail knew firearms were inside. Nothing brands these containers as obviously holding guns, especially in the view of a lay person. *Cf. United States v. Bonitz*, 826 F.2d 954, 957 (8th Cir. 1987) (finding presence of a gun case in plain view did not support the conclusion a rifle was in plain view during warrantless search); *see also United States v. Banks*, 514 F.3d 769, 775 (8th Cir. 2008) (discussing possibility gun case would be less obvious to casual observer than

² An officer testified he was six feet tall and had to reach his arm above his head to touch the shelf. McPhail is five feet, nine inches tall.

trained law enforcement officers). Moreover, nothing about McPhail's felony conviction for third-offense OWI suggests he had any prior experience with firearms.

The State argues McPhail "must have known" about the firearms' presence because the residence was "littered with ammunition and quick loaders." This argument exaggerates the record. While the evidence shows a great deal of ammunition in the home, it was largely confined to a closed tackle box placed on the same kitchen shelf as the firearms. Nothing about the tackle box signaled the presence of ammunition inside. In addition to this ammunition, the search disclosed a single bullet inside a kitchen drawer with other items, and the officer who discovered it had to "lift something up" to find it. The search also uncovered a quick loader with ammunition in a bedroom nightstand. The quick loader occupied a drawer with other items, and the officer could not recall how many other items were in the drawer or if the quick loader was covered up. The meager presence of ammunition did not prove McPhail's knowledge of the guns.

Even if Henaman stored her guns so openly a fact finder could infer McPhail's knowledge of their presence, the State's proof of his authority or right to maintain control over them is still missing. Authority or right to maintain control means more than the "raw physical ability" to reach out and hold the contraband. *See Bash*, 670 N.W.2d at 139. The State must offer proof of "some proprietary interest or an immediate right to control or reduce the [item] to the defendant's possession." *Id.* (reversing wife's conviction for possession of marijuana when substance was in a box on husband's side of the bed and the State offered no

evidence wife “shared any ownership of the box or the marijuana in it or had any right to control either item”). The prosecution offered no proof McPhail had any interest in or right to control the guns. See *State v. Atkinson*, 620 N.W.2d 1, 5 (Iowa 2000) (recognizing it seems “anomalous” to examine a defendant’s “right” to control something it is illegal for him to possess). The prosecutor asserted in closing argument that because McPhail was alone in the house “he’s in charge and he’s in charge of the guns.” That assertion is inconsistent with *Bash*.

Even viewed in the light most favorable to the State, the evidence fell short of generating a jury question on the issue of constructive possession; the district court should have granted McPhail’s motion for judgment of acquittal. Accordingly, we reverse the judgments and sentences on all three counts of being a felon in possession of firearm and remand for dismissal of the charges.³

**JUDGMENTS OF CONVICTION REVERSED AND REMANDED FOR
DISMISSAL.**

³ McPhail also argues his trial counsel was ineffective for failing to object to the jury instruction defining the term “knowing” as related to the firearm charges. Given our resolution of his sufficiency-of-the-evidence claim, we need not consider this claim.