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ARKANSAS COURT OF APPEALS

DIVISION IV

No. CR-18-868

TOBEY LEE MCCARLEY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

OPINION DELIVERED: APRIL 17, 2019

APPEAL FROM THE MILLER
COUNTY CIRCUIT COURT
[46CR-17-231]

HONORABLE KIRK JOHNSON, JUDGE

REVERSED AND DISMISSED

ROBERT J. GLADWIN, Judge

Tobey McCarley was convicted in the Miller County Circuit Court of theft by receiving, possession of a controlled substance, possession of drug paraphernalia, and simultaneous possession of a controlled substance and firearms. He appeals only his conviction for simultaneous possession of illegal drugs and guns, arguing that insufficient evidence supports the verdict. We agree and reverse.

I. Facts

McCarley was charged by criminal information with possession of firearms by certain persons, theft by receiving, possession of a controlled substance (less than two grams of methamphetamine/cocaine), simultaneous possession of drugs and firearms, and possession of drug paraphernalia. He was also charged with being a habitual offender on

each count. The criminal information was amended to reflect that the theft-by-receiving charge was based on stolen property worth between \$1000 and \$5000.

The evidence presented to the jury was that Paul Murphy had been contacted by an acquaintance about vintage road signs for sale. He was told that the signs were located at a trailer home on McClure Road with a small red pickup truck in front. Murphy knew that some of his own signs had been stolen, and the signs being described for sale were like his stolen signs. Murphy reported to the Miller County Sheriff's Office that his signs were missing and the location of the signs for sale on McClure Road. Later, Cpl. Hardemon notified Murphy that the signs had been discovered at the location described. Murphy went to the location and collected his signs from police on the scene.

Corporal Hardemon testified that he had received Murphy's complaint and had investigated the lead. At the trailer home, Hardemon saw a red Toyota pickup and a black tarp leaning against the side of the porch. Under the tarp were the antique signs belonging to Murphy. It was determined that the red truck belonged to McCarley. Hardemon knocked on the trailer door, but no one answered, and no one answered a knock at the back door. Hardemon said that he spoke with Lt. Keller and obtained a search warrant because Murphy had said that some of his signs were still missing. Police watched the trailer all day while waiting for the warrant, and Hardemon said that no one left the trailer.

Hardemon said they had believed someone was in the trailer because they could smell marijuana smoke near the back of the trailer and could hear footsteps from inside. When the warrant was obtained, police breached the door and found one man under a

bed. Police identified him as Brian Mudd, and they also found a pistol and a rifle under the bed next to Mr. Mudd. Police later realized that they had missed seeing someone hiding under the couch in the living room. McCarley was found under the couch, along with a small bag of methamphetamine. On the coffee table were marijuana pipes and a marijuana joint. Hardemon said that police then stopped their search to obtain a warrant for narcotics. That warrant was obtained at about 5:00 p.m. Police then found syringes on a couch adjacent to the couch McCarley had been hiding under, another bag of methamphetamine under a television in the living room, a bag full of ammunition, a spoon with residue, and marijuana pipes. Police also realized that the television in the living room was playing a live feed from a mounted camera facing the roadway. Through a prosecutor's subpoena, police obtained a lease agreement for the trailer showing McCarley as the lessee, and McCarley's driver's license reflects the trailer's address.

At the close of the State's evidence, McCarley moved for a directed verdict based on insufficient evidence. Counsel argued in part,

Number one, simultaneous possession of drugs and firearms, we've only heard testimony that the firearms were in the immediate proximity of Brian Mudd, under a bed to which he had been there for quite some time. Number two, the .22 rifle, although it may be semantics at this point, is inoperable. I think that that came because of a missing bolt. However, there has been no testimony that the revolver is not inoperable. I think there is insufficient evidence to take this to the jury on the simultaneous possession of drugs and firearms. There has been no intent shown to possess any of those things.

The directed-verdict motion was denied. McCarley told the court that he did not wish to testify. After closing arguments were made and the jury had retired to deliberate, McCarley's counsel renewed the directed-verdict motion, and the court denied it.

The jury returned a guilty verdict, and McCarley was sentenced to imprisonment terms of ten years for theft by receiving; twelve years for possession of a controlled substance; ten years for simultaneous possession of drugs and firearms; and five years for possession of drug paraphernalia. These sentences were ordered to run consecutively for a total term of thirty-seven years. This appeal timely followed.

II. *Standard of Review*

We have recently utilized the applicable standard of review and law as follows:

On appeal from the denial of a directed-verdict motion challenging the sufficiency of the evidence, we view the evidence in the light most favorable to the verdict, considering only the evidence that supports the verdict, and determine whether the verdict is supported by substantial evidence, which is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Turner v. State*, 2014 Ark. 415, 443 S.W.3d 535. Although circumstantial evidence may provide the basis to support a conviction, it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Morgan v. State*, 2009 Ark. 257, 308 S.W.3d 147. Whether the evidence excludes every other hypothesis is a decision left to the jury. *Id.* The jury has the sole authority to evaluate the credibility of evidence and to apportion the weight to be given to the evidence. *Starling v. State*, 2016 Ark. 20, 480 S.W.3d 158.

The law regarding constructive possession is also well settled. It is not necessary for the State to prove that an accused physically held the contraband, as possession of contraband can be proved by constructive possession, which is the control or right to control the contraband. *Tubbs v. State*, 370 Ark. 47, 257 S.W.3d 47 (2007). In cases involving joint occupancy of the premises where the contraband is found, some additional factors must be present to link the accused to the contraband. *Loggins v. State*, 2010 Ark. 414, 372 S.W.3d 785. Those factors include

(1) that the accused exercised care, control, or management over the contraband; and (2) that the accused knew the matter possessed was contraband. The control and knowledge can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *Id.* In addition, an accused's suspicious behavior coupled with proximity to the contraband is clearly indicative of possession. *Pokatilov v. State*, 2017 Ark. 264, 526 S.W.3d 849.

McDaniel v. State, 2019 Ark. App. 66, at 1-3, ___ S.W.3d ___, ___.

III. *Link Between Firearms and Controlled Substances*

To prove simultaneous possession of firearms and a controlled substance, the State must prove that McCarley possessed both a controlled substance and a firearm and that there was a connection between the firearm and the controlled substance. Ark. Code Ann. § 5-74-106 (Repl. 2016); *Kourakis v. State*, 2015 Ark. App. 612, 474 S.W.3d 536. McCarley argues that insufficient evidence supports the jury's finding of guilt on this charge because the State failed to prove that (1) he possessed the firearms and (2) there was a connection between the drugs and the guns. We do not address McCarley's argument regarding the link between the guns and the drugs because he failed to preserve this argument by omitting it from his motion for directed verdict. Parties are bound by the scope of their directed-verdict motions and cannot change their grounds on appeal. See *Warren v. State*, 2019 Ark. App. 33, 567 S.W.3d 105; *Harjo v. State*, 2017 Ark. App. 337, 522 S.W.3d 839; *Stover v. State*, 2014 Ark. App. 393, 437 S.W.3d 695; *Arroyo v. State*, 2011 Ark. App. 523.

IV. *Possession of Firearms*

McCarley argues that the State failed to prove that he possessed the firearms. The State relies on the proximity and ownership factors in arguing that McCarley had

possession. The State claims that the contraband need not be in the same room as the accused to constitute close proximity for the purposes of establishing constructive possession. See *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000) (holding that Gilbert possessed the gun when he conceded that the house was small, and although the physical relationship between Gilbert and the gun was not entirely clear from the trial testimony, Gilbert, who admitted having rented the house, was the only person present in the house when it was searched). The State also contends that an accused's suspicious behavior coupled with close proximity to the contraband indicates possession. E.g., *Loggins v. State*, 2010 Ark. 414, 372 S.W.3d 785 (inference that Loggins exercised control of the contraband and knew it was contraband when he resisted police entry into the bathroom where codefendant Carter was found standing over the crack cocaine in the toilet).

The State contends that substantial evidence establishes that McCarley constructively possessed the guns in the bedroom. McCarley is the lessee on the lease agreement for the home, and McCarley's driver's license lists the home's address. The truck in the front yard is registered to McCarley, and a work-uniform shirt with McCarley's name on it was found in the trailer. The firearms were found under a bed, approximately forty to fifty feet from where McCarley was hiding at the time of his arrest. The State argues that, taken together, these facts constitute substantial evidence from which the jury could reasonably conclude that McCarley constructively possessed the guns found in the home.

We disagree. This court has repeatedly stated,

To convict one of possessing contraband, the State must show that the defendant exercised control or dominion over it. *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001). Neither exclusive nor actual physical possession, however, is necessary to sustain a charge of possessing contraband; rather, constructive possession is sufficient. *Id.* Constructive possession may be implied when the contraband is in the joint control of the accused and another; however, joint occupancy alone is insufficient to establish possession or joint possession. *Id.* The State must establish in a prosecution for possessing contraband (1) that the accused exercised care, control, and management over the contraband, and (2) that the accused knew the matter possessed was contraband. *Id.*

Abshire v. State, 79 Ark. App. 317, 321-22, 87 S.W.3d 822, 826 (2002). The control and knowledge can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *McDaniel, supra*.

The State failed to prove that McCarley had possession of the firearms located in the back bedroom with Mr. Mudd. McCarley was found in the living room, and the firearms were found in the bedroom, under the bed, within arm's reach of Mr. Mudd. There is no additional factor present that allows an inference that he had control or knowledge of the firearms. The guns were found under the bed with Mr. Mudd, not in a common area of the home; thus, they were not found in McCarley's proximity nor in plain view. There was no evidence that the bedroom in which the guns were found belonged to McCarley. Accordingly, the State failed to prove that McCarley constructively possessed the firearms because it did not show that the guns were in McCarley's care, control, or management.

Reversed and dismissed.

VIRDEN and WHITEAKER, JJ., agree.

The Potter Law Firm, by: *Joshua Landes Potter*, for appellant.

Leslie Rutledge, Att’y Gen., by: *Jacob H. Jones, Ass’t Att’y Gen.*, for appellee.