DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MARQUIS SHARKEAR HUDSON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D14-4167

[August 3, 2016]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Okeechobee County; Sherwood Bauer, Jr., Judge; L.T. Case No. 472013CF000647A.

Carey Haughwout, Public Defender, and Mara C. Herbert, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Luke R. Napodano, Assistant Attorney General, West Palm Beach, for appellee.

MAY, J.

The defendant appeals his conviction and sentence for possession of a short-barreled shotgun. He argues the trial court erred in denying his motion for judgment of acquittal and for admitting a videotaped recording of him. We agree with him on the denial of the motion for judgment of acquittal and reverse.

The State charged the defendant with contributing to the delinquency of a child, driving while license suspended or revoked, possession of a short-barreled shotgun, and carrying a concealed weapon.[1] The key issue at trial was whether the defendant possessed the short-barreled shotgun that was found in the trunk.

The defendant moved in limine to redact a portion of the State's videotape of him with one of his co-defendants. The tape revealed the

[1] The State ultimately nolle prossed the first two counts and the concealed weapons charge.

defendant stating: "It's a good thing that we didn't bring any drugs because they would have been in the trunk." The State argued the statement was not unduly prejudicial because the defendant states that they did not have drugs, and it was probative because they were speaking about the trunk as a hiding place for contraband, precisely where the short-barreled gun was found. The defendant argued it was prejudicial because it made it sound as if he had been trafficking in drugs. The trial court denied the motion, explaining that the statement was relevant and the "prejudicial effect is pretty low."

The State called a trooper, who testified that he stopped the subject vehicle for speeding. The vehicle had four occupants. The defendant was the driver and the co-defendant was the front-seat passenger.[2] When the trooper approached the vehicle, he could smell the odor of marijuana, and then saw marijuana on the two back-seat passengers. He called for back-up, and placed the back-seat passengers in the back of his patrol vehicle.

When his back-up arrived, he waited with the defendant and co-defendant, while another trooper searched the vehicle. The search revealed a sawed-off short-barrel shotgun. He did a more thorough search of the vehicle and found it was rented by the co-defendant's father.

The defendant and co-defendant were placed in the back-up trooper's patrol vehicle, which was equipped with a camera. The camera recorded audio and video of the defendant and co-defendant.

No fingerprints were located on the shotgun. A firearms examiner testified that he tested the shotgun. It fired properly. Based on the marks on the barrel, he could tell that the barrel had been sawed-off.

Before resting, the State published the recording of the defendant and co-defendant, and provided the jury with transcripts. In the video, the defendant indicated that the shotgun did not belong to him. He stated that it belonged to the juvenile in the back seat of the vehicle. He thought his fingerprints might be on the shotgun, "but that don't mean it's mine. I can touch it, so what. I could touch your gun and whose it is, it's not mine." The conversation continued:

> [Defendant]: I'm worried about that f-----g gun. Who they gonna put the gun on? They -- they could put the gun on

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[2] There is some confusion in the testimony about who was actually driving because the defendant blamed the co-defendant for speeding, which led to the stop.

either -- all -- any one of us.

[Co-defendant]: Yeah.

[Defendant]: They can't put it on all of us, just one person. So you know what they going to do?

[Co-defendant]: What?

[Defendant]: They going to make us sit in jail and then they gonna talk to us try to make us snitch.

[Co-defendant]: Well, what are you going to say?

[Defendant]: I'm going to say it's not mine.

[Defendant]: Good thing we didn't bring no drugs.

[Co-defendant]: Uh huh, I would have thrown the s--t away though.

[Defendant]: Yeah, but it -- it would have been in the trunk.

[Co-defendant]: No, it would have -- the s--t would have been in the front. Same reason, you know what I mean.

The State rested.

The defendant moved for a judgment of acquittal. Defense counsel argued there was no evidence to establish that the defendant had dominion and control over the shotgun, and the State failed to rebut his reasonable hypothesis of innocence. The trial court denied the motion. The defendant rested without putting on any evidence, and renewed his motion for judgment of acquittal, which the trial court denied.

The jury found the defendant guilty of possession of a short-barreled shotgun. The trial court adjudicated him guilty, and sentenced him to five years in prison.

On appeal, the defendant argues the trial court erred in denying his motion for judgment of acquittal. We have de novo review. *Burkell v. State*, 992 So. 2d 848, 851 (Fla. 4th DCA 2008).

"Possession of a firearm may be actual or constructive." *Sinclair v.*

State, 50 So. 3d 1223, 1225 (Fla. 4th DCA 2011). "Constructive possession requires the State to prove "'that the defendant had knowledge of the presence of the [contraband] and the ability to exercise dominion and control over the same.'" *Id.* (alteration in original) (quoting *Ubiles v. State*, 23 So. 3d 1288, 1291 (Fla. 4th DCA 2010)).

"'Knowledge of and ability to control the contraband cannot be inferred solely from the defendant's proximity to the contraband in a jointly-occupied vehicle; rather, the State must present independent proof of the defendant's knowledge and ability to control the contraband.'" *Martoral v. State*, 946 So. 2d 1240, 1242–43 (Fla. 4th DCA 2007) (quoting *Hargrove v. State*, 928 So. 2d 1254, 1256 (Fla. 2d DCA 2006)). Because the vehicle was occupied by three other individuals, the fact that the shotgun was found in the trunk cannot serve as the only proof of the defendant's constructive possession of the shotgun. Instead, there must be independent proof of knowledge and ability to exercise dominion and control.

The knowledge element in this case is satisfied by the defendant's acknowledgment of the shotgun in the recording. In fact, the defendant does not dispute this element of constructive possession. The sole question is whether the defendant had the requisite ability to exert dominion and control over the shotgun.

"It is conceivable that an accused might be well aware of the presence of the [gun] but have no ability to maintain control over it." *Jean v. State*, 638 So. 2d 995, 996 (Fla. 4th DCA 1994). "In cases relying on circumstantial evidence, such as this one, the evidence must also exclude any reasonable hypothesis of innocence propounded by the defense." *Gizaw v. State*, 71 So. 3d 214, 219 (Fla. 2d DCA 2011). "The evidence must lead to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must be inconsistent with innocence." *Id.* (citation and internal quotation marks omitted).

In *Gizaw*, the Second District analyzed the issue in a case with similar facts. 71 So. 3d at 215–21. There, the driver of a car gave officers permission to search her vehicle after she was stopped for speeding. *Id.* at 215. When officers searched the trunk, they found a suitcase, containing two bundles of cannabis and three pairs of men's jeans, which looked like they would fit the passenger. *Id.* at 216. The trunk also contained some textbooks belonging to the driver, but no fingerprints were obtained. *Id.*

The defendant said she was driving back from visiting the passenger's ill grandmother in Miami. *Id.* She never accessed the trunk after they left, and the passenger had the car keys while they were with his grandmother. *Id.* The officers found money on both the defendant and the passenger. *Id.* The defendant claimed she had no knowledge of the cannabis, but both were arrested for trafficking. *Id.* She was convicted. *Id.* at 217.

The Second District reversed the defendant's conviction. *Id.* at 221. Even though the car belonged to the defendant, the passenger held the keys and had access to the trunk while they were in Miami. *Id.* at 218–19. There was no evidence that the money found was connected to the drugs, the suitcase had only jeans which looked to fit the passenger, and "the suitcase had no fingerprints or belongings of [the defendant]." *Id.*

Here, the defendant denied ownership or possession of the shotgun. Although he thought his fingerprints might be on the shotgun, there was no indication of when that might have occurred. The defendant did not own the vehicle, and there is some confusion about who was actually driving the vehicle.

In *Williams v. State*, 110 So. 3d 59 (Fla. 2d DCA 2013), the Second District reviewed numerous cases where the State failed to establish dominion and control. *Id.* at 63–65. The Second District specifically noted: "[The defendant] and her passengers had equal access to the black bag containing marijuana in the hatchback of the car, but the State did not present *any evidence tying the bag to her specifically* to the exclusion of her reasonable hypothesis of innocence." *Id.* at 64 (emphasis added).

A tie between the contraband and the accused is a critical factor in determining the ability to exercise dominion and control. That factor was missing in this case.

The shotgun was not in plain view or in an area over which the defendant had immediate control. The defendant did not own the car. It is even questionable whether the defendant was the driver of the car.

The trunk was accessible to all occupants. *See Brown v. State*, 428 So. 2d 250, 252 (Fla. 1983) (stating that knowledge and dominion and control cannot be inferred where the area the contraband is found is in "joint, rather than exclusive, possession of a defendant").

Nothing in the trunk tied the defendant to the shotgun. There were no fingerprints or DNA linking the defendant to the shotgun. There was no

evidence that the defendant ever opened the trunk. The defendant denied ownership and in fact indicated the shotgun belonged to the juvenile backseat passenger. His comment that his fingerprints might be on the shotgun was insufficient to establish constructive possession because the comment lacked indicia of the defendant's current ability to exert dominion and control over it. For these reasons, we reverse the defendant's conviction and sentence.

Reversed.

WARNER, J., concurs.
CONNER, J., dissents with opinion.

CONNER, J., dissenting.

I respectfully dissent because the record supports the trial court's denial of the defendant's motion for judgment of acquittal.

I agree with the majority that proof of the defendant's guilt is based on constructive possession of the shotgun and circumstantial evidence. A number of the cases cited by the majority involve fact patterns of joint occupants of a vehicle where contraband is found in the *passenger compartment* of a vehicle, which I do not find to be particularly helpful in resolving the instant case in which contraband was found in the trunk of a rental car.

Because the car was rented and most modern cars do not require a key to open the trunk, I concede that possession of the car keys does not sufficiently prove control over the contents of the trunk. However, I think the majority misses the mark for two reasons: (1) the majority has not given due weight to the defendant's admission in the back of the patrol car that he was afraid his fingerprints would be found on the shotgun, and (2) the majority seems to contend that the State had to prove the defendant "immediately" had control over the shotgun when the vehicle was stopped (or was the one who put the shotgun in the trunk).

First, the majority cites to *Williams v. State*, 110 So. 3d 59 (Fla. 2d DCA 2013), specifically quoting:

> "[The defendant] and her passengers had equal access to the black bag containing marijuana in the hatchback of the car, but the State did not present *any evidence tying the bag to her specifically* to the exclusion of her reasonable hypothesis of innocence." *Id.* at 64 (emphasis added).

The majority even adds emphasis to the portion that was missing in the case: evidence tying the defendant to the contraband.

However, in this case, specific evidence tying the defendant to the shotgun was introduced by the State. The defendant's admission that he feared his fingerprints would be found on the shotgun was not just proof that the defendant had knowledge of the gun; it was also proof that *he physically touched the shotgun*. There is little difference, in terms of evidentiary value, between a lab test confirming fingerprints on contraband, and a defendant admitting that his or her fingerprints may be found. Both provide the same factual proof: that the defendant touched the contraband. Proof that the defendant touched the shotgun in this case certainly supports an inference that he held the shotgun. Proof that the defendant held the shotgun was sufficient to deny a motion for judgment of acquittal, regardless of who put the shotgun in the trunk and who had immediate control over the shotgun at the time the vehicle was stopped.[3]

However, there was also sufficient evidence in this case to show that the defendant had dominion and control over the contraband at the time of the offense. "'In many instances . . . the ability to control [contraband] will be inferred from the ability to exercise control over the premises where they are found.'" *Jennings v. State*, 124 So. 3d 257, 263 (Fla. 3d DCA 2013) (quoting *Johnson v. State*, 456 So. 2d 923, 924 (Fla. 3d DCA 1984)). Here, although there was conflicting testimony, there was at least evidence submitted that the defendant was the driver of the vehicle. This means that he had the ability to move the contraband, to stop the contraband from moving, and to "pop" the trunk and remove the contraband. "Control" is defined as "[t]o exercise power or influence over." Black's Law Dictionary (10th ed. 2014). It is commonly understood that dominion and control of an item includes the ability to knowingly manipulate the movement of the item.

This is also why the majority's reliance on *Gizaw v. State*, 71 So. 3d 214 (Fla. 2d DCA 2011), is misplaced. There, the receptacle in which the contraband was found was *not* tied to the defendant. The contraband was found in a suitcase, which was tied to the passenger. *Id.* at 216. This

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[3] Although the information alleged the defendant possessed the shotgun "on or about November 9, 2013," proof of the date of the crime is not an element of the crime. *See Sparks v. State*, 273 So. 2d 74, 75 (Fla. 1973) ("It is not even essential that the date proved at trial be the date stated in the indictment or information.").

means that there was more than one layer concealing the contraband: the contraband was in the suitcase, and the suitcase was in the trunk of the car. Therefore, although the defendant driver controlled the car, there was nothing tying her to the suitcase where the contraband was actually found. This type of "stacked" control is not necessary in this case, since the defendant had control over the entire vehicle, and the shotgun was not found within any additional container.

Moreover, as the State argued in closing argument, the defendant's comments and exchange with his co-defendant,

> [Defendant]: Good thing *we* didn't bring no drugs.
>
> [Co-defendant]: Uh huh, I would have thrown the s--t away though.
>
> [Defendant]: Yeah, but it -- *it would have been in the trunk*.
>
> [Co-defendant]: No, it would have -- the s--t would have been in the front. Same reason, you know what I mean.

(emphasis added), indicated that the defendant was involved in using the trunk to transport contraband (the shotgun), even though the co-defendant contended drugs would have been in the passenger compartment, so the drugs could easily be thrown out of the window.

I would affirm the denial of the motion for judgment of acquittal because the evidence was sufficient to show the defendant was connected to the shotgun found in the trunk of the car by at least temporary possession and control of it.

* * *

Not final until disposition of timely filed motion for rehearing.