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IN THE
COURT OF APPEALS OF INDIANA

MARZONO R. SHELLY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A05-0801-CR-38
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Judge
Cause No. 64D02-0612-FB-11485

July 2, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Marzono R. Shelly was convicted of possession of a firearm by a serious violent

felon[1] as a Class B felony after a jury trial. He appeals his conviction raising three issues, which we restate as:

I. Whether the trial court erred in allowing the State to remove a minority juror through the use of a peremptory challenge;

II. Whether the trial court erred in giving its final jury instruction on constructive possession; and

III. Whether insufficient evidence was presented to support Shelly's conviction.

We affirm.

FACTS AND PROCEDURAL HISTORY

Shortly after midnight on December 17, 2006, Indiana State Police Trooper Nathan Sherer observed a white Ford Taurus operating without a working license plate light in Porter County. After watching the car drive around at varying speeds and turn around at a dead end, Trooper Sherer activated his patrol car's lights to initiate a traffic stop. When he did so, the Taurus immediately accelerated and began traveling west on U.S. Highway 20. Trooper Sherer put a call out for backup and began to follow the Taurus. During this chase, the Taurus sped through a red light at a speed of fifty to sixty miles per hours and reached one hundred miles per hour soon thereafter. At the intersection of Highway 20 and State Road 249, the Taurus, traveling somewhere between eighty and one hundred miles per hour, hit a stop stick deployed by Trooper Brian White.

The Taurus then drove into Portage, Indiana at approximately eighty miles per hour. Trooper Jerry Michalak deployed more stop sticks at the intersection of Highway 20 and

[1] *See* IC 35-47-4-5.

County Line Road, but the Taurus swerved and avoided them. After this, the car's speed slowly decreased as the original encounter with the stop sticks took effect on the front passenger-side wheel. The Taurus came to rest on the side of the road, rolling to a stop against a fence. Both occupants of the car raised their hands in the air as the officers approached the car with guns drawn. The driver, Sam Fleming, was removed from the car, and then the passenger, later identified as Shelly, was removed through the driver-side door because the car was against the fence on the passenger's side. After the occupants were removed and secured, Trooper Sherer approached the Taurus and saw a shotgun on the floor, located between the front passenger seat, where Shelly had been sitting, and the passenger door. Trooper Sherer also observed many shotgun shells scattered about the car. Shelly was later discovered to be on parole for Class C felony battery at the time of this incident.

The State charged Shelly with possession of a firearm by a serious violent felon as a Class B felony. A jury trial was held on September 24, 25, and 26, 2007. During voir dire, the State exercised one of its peremptory challenges to strike Juror Number Fifteen ("Juror 15"). The trial court noted that Juror 15 was the only minority member of the panel, and because Shelly was also a minority, it asked the State's reason for striking the juror. *Jury Trial Tr.*[2] at 85. The State explained, "when I was talking to him about his criminal jury service, I just didn't like the way he was answering about his prior service." *Id.* The trial court allowed Juror 15 to be stricken. Shelly remained silent and did not make any objection. At the close of the evidence, Shelly tendered a proposed final instruction regarding

constructive possession. The State also submitted its own instruction on the issue. The trial court did not give Shelly's proposed instruction and, instead, gave its own instruction, Final Jury Instruction Number 13.16 ("Final Instruction 13.16"), which contained the language of the State's proposed instruction. After deliberations, the jury found Shelly guilty as charged, and he was sentenced to ten years incarceration. Shelly now appeals.

DISCUSSION AND DECISION

I. *Batson*[3] Challenge

[I]t has been determined that a defendant is denied equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution when he is tried before a jury from which prospective jurors have been purposefully excluded based on their race. *Boney v. State*, 880 N.E.2d 279, 287 (Ind. Ct. App. 2008), *trans. denied* (citing *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)). On appeal, a trial court's decision concerning whether a peremptory challenge is discriminatory is given great deference and will be set aside only if found to be clearly erroneous. *Id*. When a party raises a *Batson* challenge, the trial court must undertake a three-step test. *Schumm v. State*, 866 N.E.2d 781, 789 (Ind. Ct. App. 2007), *reh'g granted on other grounds*. First, it must determine whether the defendant has made a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race. *Id*. Second, the burden shifts to the

[2] We note that there are separately bound transcripts for each pretrial hearing, the jury trial, and the sentencing hearing. We will therefore refer to each transcript according to what aspect of the proceedings it contains.

[3] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

prosecution to present a race-neutral reason for striking the juror. *Id*. Third, the trial court must evaluate the persuasiveness of the State's justification. *Id*.

Shelly argues that the trial court erred when it allowed the State to use one of its peremptory challenges to strike the only minority juror on the panel. He contends that he established a *prima facie* showing of discrimination, and that the State's explanation for striking Juror 15 did not rebut this presumption of discrimination. Because the State failed to present a specific race-neutral reason for striking Juror 15, the trial court erred in allowing the juror to be stricken.

Initially, we note that the State claims that Shelly has waived this argument because he did not make a timely objection to the trial court. A defendant's failure to make a timely objection constitutes a failure to preserve the matter and waives it as an issue. *Long v. State*, 867 N.E.2d 606, 618 (Ind. Ct. App. 2007); *Chambers v. State*, 551 N.E.2d 1154, 1158 (Ind. Ct. App. 1990). During voir dire, Shelly made no objection to the State's strike of Juror 15. Instead, after the State struck Juror 15, the trial court itself noted that Juror 15 was the only minority juror on the panel and requested the State's reason for striking the juror. *Jury Trial Tr*. at 85. The State then gave its explanation, which the trial court accepted. At no time did Shelly make any objection, protest, or comment regarding the State's striking of Juror 15; in fact, he remained mute during the entire dialog about striking Juror 15.

We conclude, therefore, that Shelly has waived this issue as he failed to make a timely objection at any time during the discussion of the State's striking of Juror 15. Shelly did not object to the initial strike of Juror 15 or make any protest that the State's reason was inadequate. Without such an objection, the trial court was not given an opportunity to correct any mistakes that Shelly thought had been made. While we have serious reservations

whether the State's given explanation was a race-neutral reason,[4] because Shelly failed to object and failed to add anything at all to the dialog regarding the strike of Juror 15, he has waived this issue.

II. Jury Instruction

"The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." *Snell v. State*, 866 N.E.2d 392, 396 (Ind. Ct. App. 2007). The manner of instructing the jury is generally within the sound discretion of the trial court, and we review its decision only for an abuse of that discretion. *Boney*, 880 N.E.2d at 293. When reviewing a challenge to a jury instruction, we consider whether: (1) the instruction is a correct statement of the law; (2) there was evidence in the record to support giving the instruction; and (3) the substance of the instruction was covered by other instructions given by the trial court. *Id*. The ruling of the trial court will not be reversed unless the instructions, taken as a whole, misstate the law or mislead the jury. *Snell*, 866 N.E.2d at 396. In order to be entitled to a reversal, the defendant must affirmatively show that the erroneous instruction prejudiced his substantial rights. *Id*.

At the close of evidence during the jury trial, Shelly submitted the following proposed jury instruction:

> Constructive possession of an item is the intent and capacity to maintain dominion and control over the item. Proof of a possessory interest in the

[4] *See Jones v. State*, 859 N.E.2d 1219, 1225-26 (Ind. Ct. App. 2007), *trans. denied* (Kirsch, C.J., dissenting) (stating that "the burden of showing purposeful racial discrimination has proved largely unsustainable within the confines of any individual jury selection process," and that the burden should be placed on the party who exercises peremptory challenges to strike all members of a racial group to show an absence of racial motivation, not on the party who opposes such challenges).

> vehicle where the item is found might be adequate to show the capability to maintain control over the item. However, when possession of the vehicle is not exclusive, the inference of intent must be supported by additional circumstances that point to the Accused's knowledge of the nature of the item and its presence. Mere presence where an item is located or associated with the person who possess[es] the item is not alone sufficient to support a finding of constructive possession.

Appellant's App. at 79. The State submitted the following instruction in response:

> Constructive possession is the actual knowledge of the presence and illegal character of the contraband and the intent and capability to maintain dominion and control over it. Where there is exclusive possession of the vehicle where the contraband is found, an inference is permitted that the defendant knew of its presence and was capable of controlling it. When possession is non-exclusive, however, additional circumstances must be present to support the inference that there was intent to maintain dominion or control over the contraband and that there was actual knowledge of its presence and illegal character. The intent to maintain control over the contraband must be shown by additional circumstances, such as 1) attempted flight, 2) proximity of the contraband to the defendant, and 3) the location of the contraband within the defendant's plain view.

Id. at 88. The trial court did not give Shelly's proposed instruction and, instead, gave Final Instruction 13.16, which included the language on additional circumstances from the State's instruction and stated:

> "Constructive possession of an item" is the actual knowledge of the presence and illegal character of the item with the intent and capacity to maintain dominion and control over the item.
>
> Proof of a possessory interest in the vehicle where the item is found might be adequate to show the capability to maintain control over the item. However, when possession of the vehicle is not exclusive, the inference of intent must be supported by additional circumstances that point to the Defendant's knowledge of the nature of the item and its presence. Some, but not all, of the possible additional circumstances could be: (1) attempted flight; (2) proximity of the item to the Defendant; (3) location of the item within the Defendant's plain view. Mere presence where an item is located or associated with the person who possess[es] the item is not alone sufficient to support a finding of constructive possession.

Id. 102.

Shelly argues that the trial court abused its discretion when it gave Final Instruction 13.16 because this instruction was misleading and unduly emphasized the State's evidence. Citing to *Dill v. State*, 741 N.E.2d 1230 (Ind. 2001) and *Bellmore v. State*, 602 N.E.2d 111 (Ind. 1992), he contends that Indiana courts have disapproved of the use of flight as evidence of consciousness of guilt and that, by including attempted flight as an additional circumstance to prove intent to maintain dominion and control, the trial court authorized "an evidentiary presumption regarding the element of knowledge upon which the State had the burden of proof." *Appellant's Br*. at 10-11. Additionally, he claims that, here, unlike as recommended in *Bellmore*, the trial court did not give an admonishment that flight was not proof of guilt. Shelly believes that such an admonishment was necessary to prevent the presumption of guilt.

Here, Final Instruction 13.16 properly stated the law and was not covered in substance by any other instructions given by the trial court. *See Massey v. State*, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004) (stating the law defining constructive possession); *Macklin v. State*, 701 N.E.2d 1247, 1251 (Ind. Ct. App. 1998) (stating the law defining constructive possession). Additionally, the instruction was support by the evidence. The shotgun was found on the floor of the vehicle between the passenger seat and door, and Shelly had been seated in the passenger seat prior to being removed by the officers. In the position where it was found, the shotgun was out of reach of Fleming, the driver, and in plain view of Shelly.

Further, the Final Instruction 13.16 is distinguishable from the instructions disapproved of in *Dill* and *Bellmore*. In both cases, our Supreme Court disapproved of discrete instructions that informed the jury that flight and other actions calculated to hide a crime are evidence of consciousness of guilt and are circumstances, which may be considered by the jury along with all the other evidence. *Dill*, 741 N.E.2d at 1231; *Bellmore*, 602 N.E.2d at 119. In *Dill*, our Supreme Court held that the trial court erred in giving the flight instruction because it was confusing, unnecessarily emphasized certain evidence, and had great potential to mislead the jury. *Id.* at 1232. The Court stated that, "instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disproved." *Id.* Unlike the instructions given in *Dill* and *Bellmore*, Final Instruction 13.16 is not confusing, misleading, or unduly focused on specific evidence. Rather, the instruction demonstrated circumstances that may be used to infer knowledge of the nature of contraband and its presence in a situation of non-exclusive possession of a vehicle where contraband is found. Therefore, the trial court did not abuse its discretion in giving Final Instruction 13.16.

Additionally, any possible error in giving Final Instruction 13.16 instead of Shelly's proposed instruction was harmless. "Errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise." *Dill*, 741 N.E.2d at 1233. An instruction error will result in reversal only when we cannot say with complete confidence that a reasonable jury would have found the defendant guilty had the instruction not been given. *Id.* The evidence supporting Shelly's conviction indicated that the shotgun was located between the passenger

seat, where he was seated, and the car door and, in the position where it was found by the police, it was in his plain view. Shelly was the only one in the car who could have reached the gun as it was located out of the driver's grasp. Based on this evidence, any reasonable jury could have convicted Shelly even if the instruction had not been given. Shelly has not shown that the trial court erred in giving Final Instruction 13.16 and in refusing his proposed instruction.

III. Sufficient Evidence

Our standard of review for sufficiency claims is well settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Williams v. State*, 873 N.E.2d 144, 147 (Ind. Ct. App. 2007). We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. *Id*.; *Robinson v. State*, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005). We will affirm the conviction if sufficient probative evidence exists from which the fact finder could find the defendant guilty beyond a reasonable doubt. *Williams*, 873 N.E.2d at 147; *Robinson*, 835 N.E.2d at 523. A conviction may be based purely on circumstantial evidence. *Hayes v. State*, 876 N.E.2d 373, 375 (Ind. Ct. App. 2007), *trans. denied* (citing *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)). On appeal, the circumstantial evidence is not required to overcome every reasonable hypothesis of innocence; "[i]t is enough if an inference reasonably tending to support the conviction can be drawn from the circumstantial evidence." *Id*.

Shelly argues that insufficient evidence was presented to support his conviction for possession of a firearm by a serious violent felon. He specifically contends that the State failed to prove that he knowingly or intentionally possessed a firearm because he did not

have exclusive possession of the shotgun. He claims that this is because the gun was found in a car registered to another person, which was being driven by a third person and that no items, which showed his intent to maintain control over the gun, were found on his person.

In order to convict Shelly of possession of a firearm by a serious violent felon, the State was required to prove that he knowingly or intentionally possessed a firearm and that he was a serious violent felon. IC 35-47-4-5. Possession of an item may be either actual or constructive. *Massey*, 816 N.E.2d at 989. Actual possession occurs when a person has direct physical control over the item. *Id.* "Constructive possession occurs when someone has 'the intent and capability to maintain dominion and control over the item.'" *Id*. (quoting *Henderson v. State*, 715 N.E.2d 833, 835 (Ind. 1999)). To prove the intent element, the State must demonstrate the defendant's knowledge of the presence of the contraband. *Id*. This knowledge may be inferred from either the exclusive dominion and control over the premises containing the contraband or, if the control is non-exclusive, evidence of additional circumstances that point to the defendant's knowledge of the presence of the contraband. *Id*. These additional circumstances may include flight or furtive gestures, proximity to the contraband, the contraband being in plain view, or the location of the contraband in close proximity to items owned by the defendant. *Id.* To establish the capability requirement, the State must show that the defendant is able to reduce the contraband to his personal possession. *Id*.

Here, the evidence demonstrated that the State Troopers found the shotgun in between the front passenger seat and the passenger-side door of the Taurus. Shelly was seated in the front passenger seat of the car when the officers removed him. While the car was not

registered to Shelly, the shotgun was found in close proximity to him and in a location inaccessible to the driver. Because the shotgun was in such close proximity to Shelly, a reasonable inference could be made that he could easily have reduced it to his personal possession. In the photographs taken at the scene, the shotgun's barrel protruded into the area where Shelly's feet would have been, and thus, supported an inference that the shotgun was in Shelly's plain view. Further, the Taurus led the officers on a high-speed chase for ten to fifteen miles. It was reasonable to infer that Shelly was fleeing due to his unlawful possession of the shotgun. Therefore, we conclude that the evidence was sufficient to prove that Shelly had both the intent and capability to maintain dominion and control over the shotgun and to support his conviction.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.