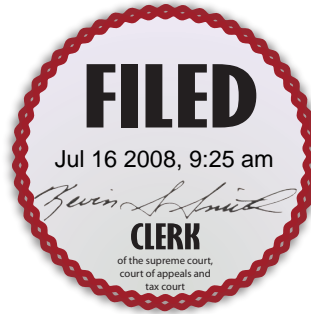


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ROGER BREWER,

)

Appellant-Defendant,

)

vs.

)

No. 49A02-0712-CR-1084

)

STATE OF INDIANA,

)

Appellee-Plaintiff.

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APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick Murphy, Commissioner
Cause No. 49G23-0701-FC-005673

July 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After a jury trial, Roger Brewer was convicted of unlawful possession of a firearm by a serious violent felon, a Class B felony, and sentenced to fifteen years in the Department of Correction. On appeal, he contends that the evidence is insufficient to prove that he possessed a firearm and that the trial court's sentencing statement is not reasonably detailed. Concluding that the evidence is sufficient and that the trial court issued a reasonably detailed sentencing statement, we affirm.

Facts and Procedural History

In early January 2007, Detective Todd Wellmann of the Indianapolis Metropolitan Police Department received information from a confidential informant that a man known as "Butch" was staying at a house on North Centennial Avenue in Indianapolis, Indiana. The confidential informant, who had provided information to Detective Wellmann numerous times in the past that had proven to be correct, alerted Detective Wellmann that the State of Kentucky had possibly issued a warrant for Butch's arrest and that Butch possessed a semi-automatic handgun, which he carried in a blue denim jacket allegedly provided to him upon his release from a Kentucky prison. The confidential informant additionally told Detective Wellmann that a prostitute by the name of "Heather" was with Butch in the house.

On the morning of January 11, 2007, Detective Wellmann and Officer Angelia Poe, also of the IMPD, arrived at the Centennial Avenue house. Detective Wellmann knocked on the house's storm door, which was locked, and Linda Watson answered. Detective Wellmann identified himself and Officer Poe as police officers and informed

Watson of the complaints about the residence. Watson unlocked the storm door and permitted the officers to enter the residence, which she told them that she rented. At first, Watson denied that anyone else was in the house. After Detective Wellmann inquired about Heather by name, however, Watson appeared nervous and led him around the main floor of the house to show him that it was empty.

Detective Wellmann then noticed a staircase in the kitchen leading to a finished attic. He loudly identified himself as a police officer and called out for anyone in the attic to make himself or herself known. He heard a male and a female voice. Detective Wellmann climbed the stairs far enough to see into the attic room and found Brewer, whose nickname is Butch, and Heather Fondrun in bed and otherwise alone in the room. After ordering them downstairs and confirming that Brewer was wanted under two outstanding warrants, Detective Wellmann placed him under arrest.

Brewer, who was not wearing pants or shoes, asked to retrieve his boots and sweatpants that were still in the attic. Detective Wellmann went to get them and found them in a pile next to the bed with a denim jacket. Upon picking up the items, Detective Wellmann noticed that the denim jacket was very heavy. He saw an eyeglass holder and a handgun in the jacket's pockets. Once back downstairs, Detective Wellmann asked Brewer whether he wore eyeglasses, to which he responded affirmatively. Detective Wellmann then asked Brewer whether the eyeglasses were his, and Brewer informed him that the jacket was his.

The State charged Brewer with possession of a handgun with an obliterated serial number, a Class C felony,¹ carrying a handgun without a license as a Class A misdemeanor,² possession of paraphernalia as a Class A misdemeanor,³ and carrying a handgun without a license as a Class C felony.⁴ The State later added a charge for unlawful possession of a firearm by a serious violent felon, a Class B felony.⁵ The case proceeded to a jury trial. Before trial began, the State informed the trial court that it intended to dismiss all of the counts except for the charge that Brewer unlawfully possessed a firearm as a serious violent felon. Tr. p. 118-19; Appellant’s App. p. 162. Jury trial followed on that count only, and Brewer was convicted of unlawful possession of a firearm by a serious violent felon. Appellant’s App. p. 161.

The trial court conducted a separate sentencing hearing.⁶ At the conclusion of the hearing, the court imposed a fifteen-year sentence, recognizing Brewer’s criminal history as an aggravating circumstance. *Id.* at 224. Brewer now appeals.

¹ Ind. Code § 35-47-2-18; Ind. Code § 35-47-2-23(b).

² Ind. Code § 35-47-2-1; I.C. § 35-47-2-23(c).

³ Ind. Code § 35-48-4-8.3(b).

⁴ I.C. § 35-47-2-1; I.C. § 35-47-2-23(c)(2)(B).

⁵ Ind. Code § 35-47-4-5. Although the Chronological Case Summary (“CCS”) also reflects that the State charged Brewer with being a habitual offender, Appellant’s App. p. 4, we have not been able to locate this count in either the original charging information, *id.* at 30-32, or in the amended charging information, *id.* at 43.

⁶ The CCS entry for the sentencing hearing inexplicably notes, “Court accepts plea of Guilty and terms of Plea Agreement.” Appellant’s App. p. 21. We find no mention in the transcript of the sentencing hearing of a guilty plea, and the record clearly reflects that Brewer was convicted by jury. We are troubled by this entry, which we presume is a typographical error. The CCS is an important document for both the trial court and on appellate review, and a defendant’s avenues for substantive review on appeal are affected by whether he or she was convicted by guilty plea or by trial. While we understand that mistakes happen, a CCS should be free of inaccuracies of this dimension.

Discussion and Decision

Brewer makes two arguments on appeal. First, he contends that the evidence is insufficient to support his conviction. Specifically, he argues that the State failed to prove that he possessed a firearm. Second, Brewer contends that the trial court abused its discretion by failing to issue a reasonably detailed sentencing statement.

I. Sufficiency of the Evidence

Brewer argues that the State presented insufficient evidence that he possessed a firearm and that, therefore, his conviction for unlawful possession of a firearm by a serious violent felon must be reversed. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Id.*

Possession of contraband may be either actual or constructive. *Holmes v. State*, 785 N.E.2d 658, 660 (Ind. Ct. App. 2003). Actual possession occurs when a person has direct physical control over the item. *Massey v. State*, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004). The State may alternatively show that a defendant constructively possessed contraband by proving that the defendant had both the intent and the capability to maintain dominion and control over it. *Iddings v. State*, 772 N.E.2d 1006, 1015 (Ind. Ct. App. 2002), *trans. denied*. 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 the defendant's exclusive dominion and control over the premises containing the contraband, or, if the control is non-exclusive, evidence of "additional circumstances" pointing to the defendant's knowledge of the presence of the contraband and his or her ability to control it. *Id.* Where a firearm is involved, these additional circumstances include: (1) incriminating statements from the defendant, (2) attempted flight or furtive gestures, (3) a drug manufacturing setting, (4) proximity of the defendant to the firearm, (5) location of the firearm within the defendant's plain view, and (6) close proximity of the firearm to other items owned by the defendant. *Ables v. State*, 848 N.E.2d 293, 297 (Ind. Ct. App. 2006). As for the capability element of constructive possession, a defendant is capable of maintaining dominion and control over contraband when he or she is able to reduce the contraband to his or her personal possession or to otherwise direct its disposition or use. *Id.*

The firearm upon which Brewer's conviction is based was found in the pocket of a denim jacket left in a pile on the floor of Watson's attic. Brewer was not in actual possession of the firearm when Detective Wellmann located it. The question, then, is whether the State presented sufficient evidence of Brewer's constructive possession of the firearm.

Here, Brewer did not have exclusive control over the premises in which the firearm was found because the tenant of the house was Watson, not him, and another houseguest shared the attic bedroom where the jacket and firearm were located. However, there are "additional circumstances" that point to his knowledge of the firearm and his ability to control it. *Iddings*, 772 N.E.2d at 1015. First and foremost, the firearm

was found inside of the pocket of a jacket which Brewer admitted to Detective Wellmann belonged to him. Tr. p. 148, 193. Brewer's contention on appeal that he never admitted to the officer that the jacket belonged to him is simply a request that we reweigh the evidence, which we cannot do. *Jones*, 783 N.E.2d at 1139. Additionally, the denim jacket was found in a room where Brewer and Fondren had been sleeping. The only items of clothing found in the room were Brewer's boots and sweatpants and the denim jacket, all piled together on one side of the bed, and Fondren's tennis shoes, found on the other side of the bed. *Id.* at 145; Ex. p. 2. Brewer suggests that the jacket belonged to Fondren and that she may have piled it on top of his belongings. Appellant's Br. p. 8. However, testimony at trial established that Fondren is a petite woman, measuring approximately 5'1 or 5'2 and weighing 105 to 110 pounds, Tr. p. 191, and the jacket is a size extra large, described at trial as "[d]efinitely a man's," *id.* at 198. Also, because the firearm was inside of the pocket of a jacket located piled with Brewer's possessions and left easily accessible to Brewer next to the bed where he slept, he was able to exercise control over it. We conclude that the evidence of Brewer's statement to Detective Wellmann, the proximity of the jacket and the firearm contained therein to other items owned by Brewer, and these other circumstances sufficiently prove Brewer's knowledge of the firearm and ability to control it. The evidence is sufficient to support Brewer's conviction.

II. Sentencing Statement

Brewer contends that the trial court abused its discretion because its sentencing statement does not set forth a reasonably detailed explanation for his sentence. Indiana

trial courts imposing sentences for felony offenses are required to enter sentencing statements. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). Such statements “must include a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence.” *Id.* Adequate sentencing statements serve the primary purposes of guarding against arbitrary and capricious sentencing and providing an adequate basis for appellate review. *Id.* at 489 (citing *Dumbsky v. State*, 508 N.E.2d 1274, 1278 (Ind. 1987)). They also serve the additional goals of “contribut[ing] significantly to the rationality and consistency of sentences” and “help[ing] both the defendant and the public understand why a particular sentence was imposed.” *Id.* (quoting *Abercrombie v. State*, 275 Ind. 407, 417 N.E.2d 316, 319 (1981)).

Here, Brewer received a fifteen-year sentence, five years above the advisory sentence for a Class B felony. Ind. Code § 35-50-2-5. He contends that the trial court did not adequately explain its reasons for imposing an above-advisory sentence. However, at the conclusion of Brewer’s sentencing hearing, the trial court said the following:

Mr. Brewer, I mean it does cut both ways. I understand and do appreciate the fact that you’re not young any more and doing time is not any – does not get any easier I assume the older you get. But at the same time, too, I know you know that you’re not supposed to have a weapon. You can’t have one at all in this state or Kentucky or anywhere.
What I’m going to do is – it is required, I think more than the presumptive, based on his arrests – or criminal history. I’m imposing a 15 year sentence.

Tr. p. 224. Thus, the trial court explained to Brewer that it decided to impose an above-advisory sentence based upon his criminal history. From both the presentence investigation report and the State’s argument at the sentencing hearing, the trial court

knew that Brewer's criminal history is lengthy—consisting of three felonies and a misdemeanor and dating back to the mid-1970s—and includes crimes involving the use of violence. *Id.* at 223-24. The trial court did not fail to issue a reasonably detailed sentencing statement.

Affirmed.

MAY, J., and MATHIAS, J., concur.