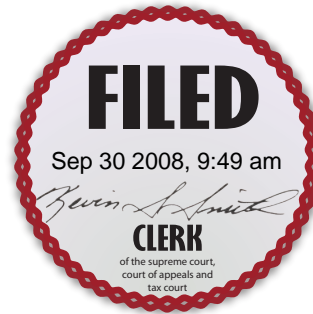


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

BILLY MOORE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 69A01-0804-CR-168

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl H. Taul, Judge
Cause No. 69C01-0701-FC-2

September 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Billy Moore (“Billy”) appeals his conviction for Prohibited Sale or Transfer of Ownership of a Handgun, a Class C felony, following a jury trial. He presents three issues for our review:

1. Whether the trial court abused its discretion when it instructed the jury on accomplice liability.
2. Whether the State presented sufficient evidence to support his conviction.
3. Whether his sentence is inappropriate in light of the nature of his offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

In June 2006, George Moore (“George”), who was on probation for a felony conviction, was living in a separate room in the back of his auto shop in Holton. On June 1, Shannon Schmaltz, George’s probation officer, stopped by George’s auto shop to perform a sobriety test as part of the terms of his probation. After conducting the sobriety test, which George passed, Schmaltz asked whether he could see George’s bedroom. George agreed, and, as they walked towards the bedroom, Schmaltz asked George whether he had any weapons. George told Schmaltz that he had “his son’s gun,” and he directed Schmaltz to a handgun lying on the floor next to his bed. Appellant’s App. at 6. George was not permitted to possess a handgun under the terms of his probation.

Schmaltz telephoned the Sheriff’s Department and requested that a deputy come to the auto shop to retrieve the handgun. In the meantime, Billy arrived at the shop, and

Billy told Schmaltz that the gun was his.¹ Billy asked Schmaltz whether he could take the gun, but Schmaltz did not let him take it. The sheriff's deputy who confiscated the gun found that it was loaded, with a bullet in the chamber.

On June 6, Billy left a voice message for Ripley County Prosecutor Ric Hertel. In that message, Billy stated that he had left the gun at George's body shop in order that Derrick Moore ("Derrick"), George's son, could pick it up and sell it for him. On June 25, Indiana State Police Detective Tracy Rohlring interviewed Derrick, who stated that: Billy had left the gun at the auto shop; Derrick picked up the gun and showed it to a coworker; the coworker did not buy the gun; and Derrick returned the gun to George's bedroom at the auto shop. Billy told Detective Rohlring that he knew that George was a convicted felon, but he had "forgotten" about his conviction. *Id.* at 8. Billy stated that he made a "mistake" by leaving the gun at George's auto shop.

The State charged Billy with prohibited sale or transfer of ownership of a handgun, a Class C felony. A jury found him guilty as charged, and the trial court entered judgment accordingly. The trial court sentenced Billy to the advisory sentence of four years, with all four years suspended to probation. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Jury Instruction

Billy first contends that the trial court abused its discretion when it instructed the jury on accomplice liability. In particular, Billy maintains that the instruction was

¹ Billy was Holton's Town Marshall at the time.

incomplete and misleading to the jury and that the evidence did not support giving the instruction. We address each contention in turn.

The trial court instructed the jury in relevant part as follows:

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person:

- (1) Has not been prosecuted for the offense;
- (2) Has not been convicted of the offense; or
- (3) Has been acquitted of the offense.

Appellant's App. at 80. Billy is correct that the instruction is incomplete and misleading. See Peterson v. State, 699 N.E.2d 701, 706 (Ind. Ct. App. 1998) (holding same instruction "misleading" and stating that pattern jury instruction on accomplice liability should be used). However, at trial, Billy did not object to the instruction on the basis that it was incomplete or misleading, nor did he tender an alternate instruction on accomplice liability. As such, the issue is waived. See Smith v. State, 765 N.E.2d 578, 584 (Ind. 2002).

Billy also contends, and we agree, that the evidence did not support giving the accomplice liability instruction. It is error to give an instruction that is not applicable to the evidence. Penn Harris Madison School Corp. v. Howard, 861 N.E.2d 1190, 1197 (Ind. 2007). Neither party discussed an accomplice liability theory in the opening or closing arguments. The trial court erred when it tendered the accomplice liability instruction.

However, the error was harmless. Our Supreme Court has observed that "where an instruction presents a correct statement of the law, but no evidence supports it, the

objecting party is generally unharmed by the instruction.” Id. Here, while the instruction might have been incomplete, we cannot say that it was an incorrect statement of the law. And because the evidence shows that Billy transferred possession of the handgun to George himself, and because the parties’ opening and closing statements did not refer to an accomplice liability theory, Billy cannot show that he was prejudiced by the instruction. See id.

Issue Two: Sufficiency of the Evidence

Billy next contends that the State presented insufficient evidence to support his conviction. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

The State was required to prove that Billy knowingly or intentionally sold, gave, or transferred the ownership or possession of a handgun to George, whom Billy knew or had reasonable cause to know had been convicted of a felony. On appeal, Billy challenges the sufficiency of the evidence showing that Billy transferred possession of the gun to George and that “Billy acted with criminal culpability in so doing.” Brief of Appellant at 5. We address each contention in turn.

Billy maintains that while the evidence shows that he “used George’s auto shop as a drop off point for the gun[,]” the evidence does not show that Billy “gave the gun

directly to George.” Id. at 6. Billy asserts that, “[t]he fact that George’s back room was used as the transfer point does not mean that George was the intended recipient.” Id. at 8. We cannot agree.

First, contrary to Billy’s contention, the State need not have shown that Billy handed the gun to George. It is sufficient if the State shows that Billy transferred possession of the gun to George, and possession of contraband may be either actual or constructive. See Henderson v. State, 715 N.E.2d 833, 835 (Ind. 1999). Constructive possession is established by showing that the person has the intent and capability to maintain dominion and control over the contraband. See Person v. State, 661 N.E.2d 587, 590 (Ind. Ct. App. 1996), trans. denied. Essentially, in cases where the person has exclusive possession of the premises on which the contraband is found, an inference is permitted that he or she knew of the presence of contraband and was capable of controlling it. See id. But when possession of the premises is non-exclusive, the inference is not permitted absent some additional circumstances indicating knowledge of the presence of the contraband and the ability to control it. Id. Among the circumstances which will support such an inference are: (1) incriminating statements by the alleged person in possession; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the alleged person in possession to the contraband; (5) contraband in plain view; and (6) location of the contraband is in close proximity to items owned by the alleged person in possession. See id. These circumstances apply to show constructive possession even where the alleged person in possession is only a visitor to

the premises where the contraband is found. See Ledcke v. State, 260 Ind. 382, 296 N.E.2d 412, 416 (1973).

Here, the evidence shows that the gun was found next to a bed in George's living quarters in the auto shop. And, while the evidence shows that other people visited the shop and entered the bedroom from time to time, there is no evidence that anyone else lived there. Regardless, Schmaltz found the handgun in George's bedroom in plain view. In fact, George showed Schmaltz where the gun was when Schmaltz asked whether he had any weapons. The evidence is sufficient to show that George constructively possessed the gun after Billy left it in George's bedroom.

And we hold that the act of Billy placing the gun in George's bedroom is sufficient to show a "transfer" of possession under the statute.² Regardless of whether the ultimate recipient was intended to be Derrick, Billy initially transferred possession of the gun to George. We reject Billy's argument that no transfer to George occurred because Derrick was the ultimate recipient. The jury was entitled to disregard the testimony that Derrick was the intended recipient.³ And the evidence shows that George constructively possessed the handgun.

Still, Billy maintains that the State did not show that he knowingly or intentionally transferred possession of the gun to George. But, again, Billy admitted having left the

² Billy argues that a determination of a transfer under these circumstances would also support "inadvertent violations" of the statute. Brief of Appellant at 10. But the hypotheticals Billy describes are clearly distinguishable from the facts of this case. His argument on this point is not well-taken.

³ Indeed, the jury could well have disbelieved Derrick's testimony that he had tried to sell the gun to one of his coworkers. Derrick initially told police that he had tried to sell the gun to a coworker named Mike Smith, but Smith testified to the contrary at trial. The evidence as a whole supports a reasonable inference that Billy had not attempted to sell the gun, but made up the story to protect George, who is Billy's cousin.

gun in George's bedroom. And Billy admitted to having known that George was a convicted felon. Whether Billy was using George's shop as a "drop[-]off point" is irrelevant. See Brief of Appellant at 11. Any transfer of possession is prohibited, no matter the duration or purpose. The State presented sufficient evidence to support Billy's conviction.

Issue Three: Sentence

Finally, Billy contends that his sentence is inappropriate in light of the nature of his offense and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Revision of a sentence under Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. See Ind. Appellate Rule 7(B); Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Roush, 875 N.E.2d at 812 (alteration in original).

Billy's four-year suspended sentence is not inappropriate in light of the nature of the offense. George pleaded guilty to criminal recklessness, as a Class D felony, and he was on probation at the time that Billy transferred possession of the handgun to him. Billy has maintained that he was not aware that he was committing a crime when he left the gun with George, but it is well-settled that ignorance of the law is no excuse.

Neither is Billy's sentence inappropriate in light of his character. The trial court acknowledged that dozens of members of the community wrote letters in support of Billy's good character. But the trial court expressly found that Billy should be held to a "higher standard" as Holton's Town Marshall. Transcript at 707. The trial court imposed the advisory sentence for that reason, but suspended the entire term to probation. We do not see grounds to revise the sentence on appeal.

Affirmed.

ROBB, J., and MAY, J., concur.