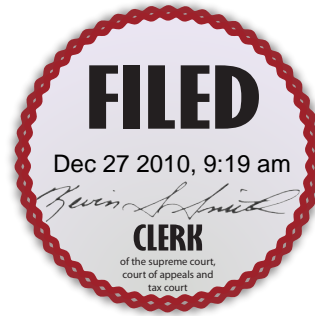


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DENON DABNEY,)
)
 Appellant-Defendant,)
)
 vs.) No. 49A02-1004-CR-474
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
The Honorable Michael S. Jensen, Magistrate
Cause No. 49G20-0910-FB-85548

December 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Denon Dabney appeals his conviction for possession of a firearm by a serious violent felon as a class B felony.¹ Dabney raises two issues, which we revise and restate as whether the evidence was sufficient to sustain his conviction. We affirm.

The facts most favorable to the conviction follow. On the night of October 3, 2009, Indianapolis Metropolitan Police Department Officer David Miller initiated a traffic stop of a Silverado pickup truck in which Dabney was a passenger for traffic violations in Indianapolis. Officer Miller approached the vehicle and obtained the identifications of Dabney and the driver of the truck, Kevin Bullock, who was Dabney's cousin. Officer Miller observed that Dabney appeared to be "very nervous." Transcript at 11. Officer Miller then returned to his police vehicle and determined that there was an open warrant for the arrest of Dabney.

Officer Miller called for an assisting officer and, while waiting for backup to arrive, observed Dabney make "several furtive movements towards the bottom of his seat underneath in the truck." Id. After Police Officer Marshall Hoskins arrived, Officer Miller approached the truck, ordered both Dabney and Kevin to exit the truck, and placed Dabney in handcuffs. Officer Miller then located a firearm under the passenger's seat of the truck, and Officer Hoskins as the evidence technician recovered the firearm.

After placing handcuffs on Kevin and reading Dabney and Kevin their Miranda rights, the officers asked Dabney and Kevin "who the handgun belonged to." Id. at 14. Kevin stated that the gun was not his. Dabney did not "claim the gun initially" but

¹ Ind. Code § 35-47-4-5 (Supp. 2006).

instead “kind of . . . looked down and shook his head” Id. at 16-17. Dabney and Kevin were separated, and Officer Miller stated to Dabney: “Look. You’re going for the warrant. If the gun is yours, tell me. Don’t let your buddy take the rap for it.” Id. at 17. Dabney then “said it was his.” Id. Officer Hoskins also overheard Dabney state: “It’s mine.” Id. at 38.

On October 5, 2009, the State charged Dabney with possession of a firearm by a serious violent felon as a class B felony. At the bench trial, the court heard testimony from Dabney, Officer Miller, Officer Hoskins, Kevin, and Jonathan Bullock, who was a cousin of Dabney and Kevin. In addition, the State presented evidence of the silver “nine millimeter handgun” located by Officer Miller, and Officer Miller identified the firearm at trial as the one he recovered on October 3, 2009, from the truck in which Dabney was a passenger. See id. at 15. Officer Miller testified that the crime lab “located no usable prints of any kind on the gun” Id. at 22. Kevin testified that he had been driving Jonathan Bullock’s truck on October 3, 2009, when he and Dabney were stopped by police. Jonathan Bullock testified that he drove the truck on a daily basis, that it was basically his truck, that the gun discovered by the officers was his gun, and that his dad was the “title owner of the truck.” Id. at 55. Dabney was found guilty as charged and sentenced to fifteen years to be executed in the Indiana Department of Correction.

The issue is whether the evidence was sufficient to sustain Dabney’s conviction for possession of a firearm by a serious violent felon as a class B felony. When reviewing the sufficiency of the evidence to support a conviction, we must consider only

the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court’s ruling. Id. We affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

In order to prove unlawful possession of a firearm by a serious violent felon as a class B felony, the State was required to prove beyond a reasonable doubt that Dabney was a serious violent felon, as defined by Ind. Code § 35-47-4-5(a), and knowingly or intentionally possessed a firearm. See Ind. Code § 35-47-4-5. Possession of an item may be either actual or constructive. Massey v. State, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004).

Dabney argues that “there is a complete lack of physical evidence demonstrating [his] knowledge that a firearm was present.” Appellant’s Brief at 8. Dabney argues that “[i]n addition to a complete lack of fingerprint and DNA evidence, the evidence demonstrated that the Silverado pickup truck from where the item was recovered did not belong to either Kevin Bullock or [Dabney]” and that “[i]nstead, the vehicle which had been borrowed for the night of October 3, 2009, belonged to Jonathan Bullock, and was registered to Jonathan’s father.” Id. at 9. Dabney further argues that the “only evidence

that supported the State's contention . . . was the contradicted, singular testimony from Officer Miller that [Dabney] admitted to ownership of the item," that "[t]his testimony is inherently unreliable," and that it was only after the officer's "statement threatening to arrest his family member that Dabney said it was his." Id. at 9-10 (internal quotation marks omitted). Dabney also argues that the State "failed to introduce any evidence whatsoever that the recovered item was a 'firearm' within the definition of Indiana Code § 35-47-1-5." Id. at 11. Dabney does not argue that he was not a serious violent felon. The State argues that there was sufficient evidence to sustain Dabney's conviction and that "it would have taxed the court's common sense to deny that the weapon, which virtually every witness, including [Dabney] and his counsel, referred to as a gun, handgun, pistol, or a 9mm Smith & Wesson was anything other than a handgun." Appellee's Brief at 8. In his reply brief, Dabney argues that "[t]he object that is the subject of this litigation is not available to the Court of Appeals for review as part of the record" and that "[a]t best, the State has proven that [Dabney] is guilty of possessing a 'look-alike' or replica to a firearm." Appellant's Reply Brief at 4.

Here, the evidence most favorable to the conviction as set forth above indicates that Officer Miller observed Dabney making furtive movements and reach under his seat in the truck. A firearm was located and recovered from under his seat. Dabney later stated that the firearm belonged to him. To the extent that Dabney argues that the testimony of Officer Miller conflicts with the testimony of Kevin Bullock, Jonathon Bullock, or other witnesses at trial, the argument is an invitation for this court to judge

the credibility of the witnesses and reweigh the evidence, which we will not do. See Drane, 867 N.E.2d at 146.

To the extent that Dabney argues that his admission of ownership of the firearm was coerced, we agree with the State that Officer Miller's statement to Dabney after separating Kevin and Dabney did not rise to the level of eliciting a false confession and was not inherently coercive under the circumstances as set forth in the record. See Lamb v. State, 511 N.E.2d 444, 445 (Ind. 1987) (addressing the defendant's argument that the evidence was insufficient in part because statements he had given to police were coerced and holding that the statements were voluntarily given and that the evidence was sufficient to sustain the defendant's conviction); see also Neal v. State, 522 N.E.2d 912, 913 (Ind. 1988) (rejecting the defendant's argument that he gave an untrue confession in order to obtain the release of his girlfriend where the police told the defendant that if his girlfriend were arrested her children would be taken care of by the welfare department and observing that the police statement was a factual statement concerning the situation); Bailey v. State, 473 N.E.2d 609, 609-611 (Ind. 1985) (finding that the defendant's confession was not involuntary where the defendant and his friend were stopped in a car containing merchandise stolen and noting that it was unlikely that one would involuntarily confess to a crime for the sake of another's liberty).

Further, to the extent Dabney suggests that the evidence was insufficient for the trier of fact to conclude that the item recovered by the officers from under the passenger seat of the truck on October 3, 2009, was a firearm, we disagree. Officer Miller testified

that he “located under the passenger seat of the vehicle a silver Smith and Wesson handgun, nine millimeter.” Transcript at 13. The State presented its Exhibit 1 and asked Officer Miller to “open . . . and take a look at it” Id. at 14. Officer Miller then testified the exhibit contained “the nine millimeter handgun that [he] found under the passenger seat in the truck.” Id. at 15. When asked how he was able to tell, Officer Miller explained: “I just recognize that it was silver in color. It has the same serial number it looks like from my report.” Id. Further, to the extent Dabney suggests that this court should reverse because the handgun itself is not included in the record on appeal and thus this court cannot physically examine the evidence to determine that it is in fact a firearm, we note that we do not reweigh the evidence on appeal.² See Drane, 867 N.E.2d at 146. The evidence is sufficient to permit the trier of fact to conclude beyond a reasonable doubt that the item located and identified under the passenger seat of the truck on October 3, 2009 was a firearm.

Based upon the evidence presented at trial as set forth in the record, we conclude that evidence of probative value existed from which the trier of fact could conclude beyond a reasonable doubt that Dabney was guilty of unlawful possession of a firearm by a serious violent felon as a class B felony. See Calvert v. State, 930 N.E.2d 633,

² In addition, we note that Ind. Appellate Rule 29 relates to exhibits in a record on appeal and provides in part:

Nondocumentary and oversized exhibits shall not be sent to the Court, but shall remain in the custody of the trial court or Administrative Agency during the appeal. Such exhibits shall be briefly identified in the Transcript where they were admitted into evidence. Photographs of any exhibit may be included in the volume of documentary exhibits.

Ind. Appellate Rule 29(B).

641 (Ind. Ct. App. 2010) (holding that the evidence was sufficient to sustain the defendant's conviction for possession of a firearm as a serious violent felon); Craig v. State, 883 N.E.2d 218, 222-223 (Ind. Ct. App. 2008) (holding that the evidence was sufficient to establish that the defendant possessed a firearm and to sustain the defendant's conviction for unlawful possession of a firearm by a serious violent felon).

Affirmed.

RILEY, J., and ROBB, J., concur.