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IN THE
COURT OF APPEALS OF INDIANA

TOBIAH BELCHER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0708-CR-702
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William Menges, Judge
Cause No. 34D01-0506-FD-162

December 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Tobiah Belcher appeals his conviction, after a jury trial, of receiving stolen property, a class D felony.[1]

We affirm.

ISSUES

1. Whether the trial court committed reversible error when it allowed the State to amend the charging information.

2. Whether the trial court abused its discretion in admitting evidence at trial.

3. Whether the evidence is insufficient to support Belcher's conviction.

FACTS

On June 15, 2005, the Kokomo home of Aaron Masavage was burglarized; his firearms collection and some firearm-related items were stolen. Law enforcement officers learned that four teenage boys were responsible. During the execution of a search warrant, officers found some of the stolen items in possession of the boys. Based upon information obtained as a result of that discovery, officers then sought and obtained a warrant to search the premises at 1309 North Courtland in Kokomo.

Officer William Robeson was part of a team of officers assembled concerning the warrant. Anticipatory to its execution, Robeson was conducting surveillance of the Courtland residence after nightfall on June 22, 2005, when he observed three individuals that appeared to be "in the process of moving," as they were "loading a truck full of items

[1] Belcher's appeal does not challenge his conviction of possession of marijuana, a class A misdemeanor.

from the residence." (Tr. 78). He advised other officers on the team when the truck departed the Courtland residence.

Officer Bruce Rood followed the truck until it stopped at a residence on South Armstrong. Three individuals exited the truck: a white male, a black male, and a black female. Rood identified himself as a police officer and stated that he needed to talk with them. The white man and the woman cooperated, and she was determined to be Bernice Wright. The black male, who was wearing a cast on his right arm and was subsequently determined to be Belcher, ran until he was out of sight behind a building. Other officers came to the area, including a canine unit. The officers found Belcher hiding under a utility trailer behind the building. After Belcher surrendered, the officers found a baggie containing marijuana under the trailer, and Belcher was arrested.

Meanwhile, other officers executed the search warrant at the Courtland address. In the bedroom on the first floor, they found a long gun propped against the wall, but this gun was not an item stolen from Masavage. However, also in the bedroom but not in plain view, officers found five firearms that had been stolen from Masavage: a Marlin Model 39 .22 long rifle, a Ruger Model 10-22 rifle, an Armalite rifle, a Ruger Model 77 .22 rifle, and a Mossberg shotgun. Two firearms were found in a double rifle carrying case bearing a tag with Masavage's name.

On June 24, 2005, the State charged Belcher with one count of receiving stolen property, a class D felony. The information alleged that he "did knowingly receive, retain or dispose of the property of" Masavage – specifically, a Winchester pellet gun – that had "been the subject of a theft." (App. 15). The trial court held an initial hearing on

July 7, 2005, and set September 9, 2005, as the omnibus date. On September 15, 2005, the State filed an amended information, which changed the identity of the alleged property stolen from Masavage that Belcher had received or retained. Instead of being charged only with knowingly receiving or retaining a stolen pellet gun, he was charged with knowingly receiving or retaining Masavage's stolen Marlin 39 .22 caliber rifle, Ruger Model 10-22 rifle, an Armalite rifle, Ruger Model 77 .22 rifle, Mossberg 12 gauge shotgun, and some magazines and ammunition. Belcher did not object to the amended information.

Subsequently, Belcher appeared at a number of pretrial conferences at which the date for trial was progressively confirmed and then rescheduled. On October 24, 2006, the trial was rescheduled for November 13, 2006. New counsel for Belcher entered his appearance on November 2, 2006, and sought a continuance of the trial to prepare. Trial was then rescheduled for March 2, 2007. An agreed entry of February 15, 2007, states that the parties were "ready" for the trial scheduled to begin on March 2. (App. 65). On March 1, 2007, Belcher's counsel filed an objection to the amended information, citing our Supreme Court's decision six weeks earlier in *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007), and asserting that the amendment was an impermissible "amendment of substance" in violation of the statute. On March 2, 2007, the trial court heard arguments on Belcher's objection. It overruled his objection, and the jury trial commenced.

Various witnesses testified to the foregoing facts concerning the Masavage burglary and the evening of June 22, 2005. Also, Arthur Linville testified that he owned the residence at 1309 North Courtland and had rented it to Bernice Wright. Linville

testified that although Belcher was not an authorized tenant, he had periodically observed Belcher "staying there." (Tr. 44). Linville testified that once when he had gone to the residence to collect the rent, Belcher "got up off of the mattress . . . on the living room floor" and came to the door. (Tr. 44). Belcher then "went into the bedroom and came back with cash and paid [Linville] in cash." (Tr. 44-45). Another time, Linville testified, Belcher came to his office and paid the rent with cash. Linville further testified that on two other occasions he had gone to the residence to collect rent and "saw [Belcher] at the residence." (Tr. 46).

Robin Byers testified that she was employed at the Howard County Sheriff's Department, which kept computerized records of persons' addresses. Byers testified that on three separate dates in 2004 and 2005, Belcher's "home address" address was shown as 1309 North Courtland. (Tr. 110). Detective Sherri Galloway – who had investigated the burglary of Masavage's home, sought the warrant to search the residence at 1309 North Cortland, and both coordinated and participated in the execution of the search warrant – testified that five firearms, entered into evidence as exhibits, were found in the bedroom of the residence. Masavage testified that his home had been burglarized on June 15, 2005 and various firearms stolen. He further testified that the five firearms entered into evidence were those specified in the amended information and that they belonged to him.

The jury returned a verdict finding Belcher guilty of receiving stolen property, a class D misdemeanor. The trial court subsequently sentenced him to serve a three-year term.[2]

DECISION

1. Amendment of Information

On this issue, Belcher cites only to the Indiana statutory provision governing the amendment of an information, Indiana Code section 35-34-1-5, and the recent holding of *Fajardo*, 859 N.E.2d 1201 (Ind. 2007). He summarily asserts that the State's amendment was an "amendment of substance" in that "the change was an element of the charge." Belcher's Br. at 10. Therefore, Belcher concludes, we must "reverse the trial court's order overruling his objection and his conviction for receiving stolen property." *Id.* We cannot agree.

Fajardo stated that the initial analysis for determining the permissibility of an information that is alleged to have been untimely amended is "to determine whether the amendment is addressed to [1] a matter of substance or [2] one of form or [3] immaterial defect." 859 N.E.2d at 1207. In *Fajardo*, the amendment "change[d] a one-count information charging Child Molesting as a class C felony" by adding a charge of "Child

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[2] We bring to the attention of Belcher's counsel Indiana Appellate Rule 9(J), which requires that "documents and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Indiana Administrative Rule 9(G)(1)(b) states that records "excluded from public access" and constituting "confidential" information include "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13." *Id.* at (viii). Pursuant to Indiana Trial Rule 5(G), when documents are filed in a case but are excluded from public access by Administrative Rule 9(G)(1), they "shall be tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

The PSI included in Belcher's Appendix does not comply with the above.

Molesting as a Class A felony." *Id.* *Fajardo* then proceeded to analyze the initial and amended charges in that case to determine whether the amendment was one "of substance" or "of form." *Id.*

Here, the amendment did not add another charge; Belcher remained charged with one count of receiving stolen property, a class D felony. Moreover, we find that in this case, the amendment was one of an "immaterial defect," the third alternative mentioned in *Fajardo*. Such is governed by the initial provision of the statute, which reads as follows:

> (a) An indictment or information which charges the commission of an offense may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including
> (1) Any miswriting, misspelling, or grammatical error;
> (2) Any misjoinder of parties defendant or offenses charged;
> (3) The presence of any unnecessary repugnant allegation;
> (4) The failure to negate any exception, excuse, or provision contained in the statute defining the offense;
> (5) The use of alternative or disjunctive allegations as to the acts, means, intents, or results, or results charged:
> (6) Any mistake in the name of the court or county in the title of the action, or the statutory provision alleged to have been violated;
> (7) The failure to state the time or place at which the offense was committed where the time or place is not of the essence of the offense;
> (8) The failure to state an amount of value or price of any matter where that value or price is not of the essence of the offense; or
> (9) Any other defect which does not prejudice the substantial rights of the defendant.

I.C. § 35-34-1-5(a). Thus, this provision permits an amendment at any time "because of any immaterial defect." *Id.* The provision lists eight examples and then indicates that an unenumerated "immaterial defect" would be one "which does not prejudice the substantial rights of the defendant." *Id.*

The statute states that a person commits the offense of receiving stolen property, as a class D felony, by knowingly or intentionally receiving, retaining or disposing "of the property of another person that has been the subject of theft." I.C. § 35-43-4-2(b). The amended information is consistent with the original information as to the date of the offense being June 22, 2005. Also, the location of the offense remains 1309 North Courtland in Kokomo, where all the stolen items were found in the same residence pursuant to the search warrant. Also, the allegedly stolen property continues to be that belonging to Masavage and taken from him in a burglary. The only difference between the original and the amended informations is the identity of the stolen property. We find this change to reflect an "immaterial defect" in the original information akin to several of those enumerated in I.C. § 35-34-1-5(a). *See* (5) (amending the "results charged,"); (7) (amending "the time or place at which the offense was committed where the time or place is not of the essence of the offense"); or (8) amending as to "an amount of value or price in any matter where that value or price is not of the essence of the offense"). Accordingly, the amendment is permissible "at any time" so long as it "does not prejudice the substantial rights of" Belcher. I.C. § 35-34-1-5(a)(9).

The information was amended in September of 2005. Belcher's trial did not take place until March of 2007. Belcher had notice of the amended charge in September of 2005, and an adequate opportunity to prepare to respond thereto. In fact, as noted above, two weeks before trial, Belcher expressly agreed that he was ready for trial. We find no prejudice to Belcher's substantial rights and conclude that the trial court did not err in overruling Belcher's March 2007 objection to the amendment.

2. Admission of Evidence

The trial court has inherent discretionary power on the admission of evidence. *McManus v. State*, 814 N.E.2d 253, 264 (Ind. 2004), *cert. denied*. The trial court's decisions in this regard are reviewed only for an abuse of that discretion. *Id.* In the setting of a trial court's decision to admit evidence, an abuse of discretion occurs when the trial court's decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court. *Saunders v. State*, 848 N.E.2d 1117, 1122 (Ind. Ct. App. 2006) (citing *Carpenter v. State*, 786 N.E.2d 696, 702-03 (Ind. 2003)).

Belcher first argues that the trial court abused its discretion when it permitted, over his objection, Byers to testify "while dressed in her County uniform." Belcher's Br. at 11. Her dress, Belcher claims, allowed the jury to "infer[] that Belcher had some involvement with the Sheriff's department," a "negative" involvement that "dealt with a criminal past." *Id.* at 12. We are not persuaded.

Upon Belcher's objection, in a conference outside the presence of the jury,[3] Belcher was directed to limit her employment-related testimony to the facts that she was an employee of the Sheriff's Department and that she maintained its records, including address records. As indicated above, Byers so testified, and further testified that the Department's records reflected Belcher's home address on three dates in 2004 and 2005 as being 1309 North Courtland. Nothing in this testimony suggested that Belcher had a criminal record. There was no questioning by the State or argument by the State that

[3] Preliminary questioning established that Byers was responsible for maintaining "in the regular course of business" certain computerized records of the Department. (Tr. 98).

drew attention to Byers' uniform. In both preliminary and final instructions, the jury was instructed that it was to reach its decision by considering the testimony and evidence admitted. We do not find the logic and effect of the circumstances before the trial court to establish that it was an abuse of discretion for the trial court to overrule Belcher's objection to Byers' testifying in her uniform.

Next, Belcher argues that it was an abuse of discretion for the trial court to admit a photograph of the bedroom at 1309 North Courtland because it included a firearm leaning against the wall and that firearm was not one of those identified as having been stolen from Masavage. As he did to the trial court, Belcher asserts that the photograph "was irrelevant and unfairly prejudiced" him. Belcher's Br. at 13. We are not persuaded.

Relevant evidence is that which has "any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable that it would be without the evidence." Ind. Evidence Rule 401. Belcher was charged with having committed the offense of receiving stolen property at the residence. At the point where the photograph was admitted, it had been established that Belcher was not at the residence when the search warrant was executed or an authorized tenant of the residence. However, he had been observed as one of three people carrying household items to a truck that then moved those items to another address. The photograph at issue depicts a bedroom in considerable disarray – a condition making it more probable that a move from the residence was being undertaken by Belcher. Moreover, the bedroom photographed is the room in which the stolen firearms were found. Hence, it is relevant.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Evid. R. 403. Belcher argues that admission of the photograph unfairly prejudiced him because the sight of the firearm depicted "could" support an inference of other crimes. Belcher's Br. at 13. However, as noted by the State at trial, "The Constitution says people have the right to have guns in their houses so there's nothing illegal" suggested by the photograph. (Tr. 59). Having found the photograph to be relevant based upon the facts of the case, we do not find that the simple fact that the photograph of the bedroom includes a firearm in its view -- even though the firearm is not one alleged to have been stolen -- subjected Belcher to unfair prejudice such that the trial court abused its discretion in admitting the photograph in evidence.

3. Sufficiency of the Evidence

The standard of review we apply when considering an appellant's claim that the conviction is not supported by sufficient evidence has been recently summarized by Indiana's Supreme Court as follows:

> When reviewing the sufficiency of the evidence to support the conviction, appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder *could* find the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted, emphasis in original).

Belcher argues that the State failed to prove his constructive possession of the firearms. He reminds us that he was not the leaseholder, and asserts that "other people were seen going into and out of the property"; there was no evidence that he "was even in the room where the stolen items were"; "none of the stolen items were in plain view"; and that his "flight" took place at the Armstrong address. *Id.* Again, we are not persuaded.

Actual possession of contraband occurs when a person has direct physical control over the item. *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004). Here, because Belcher was not present when officers seized the firearms, he was not "in actual possession" of them. *Id.* Therefore, the State proceeded on the theory of constructive possession.

A defendant is "in constructive possession of" contraband when the State "shows that the defendant has both (i) the intent to maintain dominion and control over" the contraband, and "(ii) the capability to maintain dominion and control over" the contraband. *Id.* "The proof of a possessory interest in the premises on which" contraband is found "is adequate to show" the latter, the "capability to maintain dominion and control over" the contraband. *Id.* The law infers that one in possession of the premises is "capable of exercising dominion and control over all items on the premises." *Id.* at 341. "And this is so whether possession of the premises is exclusive or not." *Id.*

The evidence reflected that records had shown 1309 North Courtland as Belcher's home address. The landlord had seen Belcher several times at the residence. On one

occasion, Belcher was lying on a mattress in the living room and retrieved cash from the bedroom to pay the rent. Belcher had also personally paid the rent to the landlord on several other occasions. This evidence is sufficient to establish that Belcher had "a possessory interest" in the premises, and that he had the capability of exercising dominion and control over the firearms there. *Id.*

When applying the "intent prong of constructive possession" in instances in which the defendant's possession of the premises on which the contraband is found "is not exclusive," then the "inference of intent to maintain dominion and control over" the contraband "must be supported by additional circumstances pointing to" the defendant's knowledge of the nature of the contraband and its presence. *Id.* Such "additional circumstances" may include (1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) locations of the contraband in settings that suggest illegality, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant. *Id.*

Here, the search warrant for the residence was obtained after the perpetrators of the original burglary had been apprehended. Further, according to Officer Robeson's testimony, after the truck had been stopped, Robeson learned that the items being moved belonged to Belcher and Wright. Thus, evidence supports the reasonable inference that Belcher was moving stolen items in his possession from the residence. Moreover, when the truck had come to a stop and an officer asked to talk to him, Belcher ran. Hence,

there is substantial evidence of Belcher's attempted flight and furtive gestures in relationship to his connection with the residence for consideration by the jury.

Byers also testified that on the date of his arrest, Belcher's address was shown to be at the location where the truck had stopped. This is consistent with evidence that the belongings being moved were those of both Belcher and Wright. Further, this evidence supports the reasonable inference that Belcher also occupied the bedroom with Wright. His occupation of the bedroom with Wright would be circumstances showing both his proximity to the stolen firearms and that his personal belongings had been mingled with them in the bedroom.

The evidence presented is sufficient to support the jury's reasonable inference that Belcher constructively possessed the stolen firearms. *See Drane*, 867 N.E.2d at 147.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.