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**IN THE
COURT OF APPEALS OF INDIANA**



ISAAH WHEELER,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 71A03-1103-CR-109

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-1009-FC-223

October 24, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Isaiah Wheeler appeals his conviction for Class C felony carrying a handgun without a license. Wheeler contends that the trial court erred by giving a jury instruction on constructive possession and that the evidence is insufficient to support his conviction. Finding that the trial court did not err by giving an instruction on constructive possession and that the evidence is sufficient to show that Wheeler committed the offense in question, we affirm.

Facts and Procedural History

In the early morning hours of September 19, 2010, two South Bend police officers, Anthony Dawson and Jeffrey Chester, initiated a traffic stop of a green Oldsmobile. The vehicle had no light illuminating its license plate in violation of state law.¹

When the officers activated their emergency lights, they noticed Wheeler, who was sitting in the back seat behind the driver, immediately turn around to look at them. The officers then observed Wheeler turn forward, rise in his seat, and raise his shoulders and elbows as if he was retrieving or moving an object. Both officers were concerned that Wheeler was hiding a weapon. Officers Dawson and Chester approached the vehicle with their guns drawn and ordered all four passengers to show their hands. As they approached, the officers observed a strong odor they believed to be burnt marijuana. After additional officers arrived at the scene, Officer Dawson ordered all the passengers to exit the vehicle and began searching for the source of the odor. While the search did not reveal any marijuana, Officer Dawson found a fully-loaded revolver between the seat

¹ See Ind. Code § 9-19-6-4(e).

and the sidewall of the vehicle where Wheeler had been sitting. *See* Tr. p. 140, 193. Officer Dawson indicated that the revolver was “sticking out” where it would have been visible to Wheeler if he looked down. *Id.* at 144.

The State charged Wheeler with carrying a handgun without a license, a Class A misdemeanor with a Class C felony enhancement for a prior felony conviction.² During the jury trial, the trial court instructed the jury on constructive possession over Wheeler’s objection. After the jury found Wheeler guilty of carrying a handgun without a license, Wheeler admitted to his prior felony conviction. The trial court entered judgment of conviction on the Class C felony only and sentenced Wheeler to three years. Wheeler now appeals.

Discussion and Decision

Wheeler raises two issues on appeal. He contends that the trial court erred by giving a jury instruction on constructive possession. Wheeler also argues that the State presented insufficient evidence to prove that he committed the crime of carrying a handgun without a license.

I. Jury Instructions

Wheeler argues that the trial court erred by instructing the jury on constructive possession. The trial court gave the following instruction:

The word “possess” means to own or to exert control over. The word “possession” can take on several different, but related meanings. There are two kinds of “possession” – actual possession and constructive possession. A person who knowingly has direct physical control of a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time

² *See* Ind. Code § 35-47-2-23(c)(2)(B).

to exercise control over a thing, is then in constructive possession of it.³

Appellant's App. p. 7. Wheeler argues that because Indiana Code section 35-47-2-1 refers to *carrying* a handgun, rather than *possessing* it, only actual possession is the appropriate analysis when determining whether a defendant is guilty of carrying a handgun without a license.

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. *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. 2003). We review a trial court's decision on how to instruct a jury for an abuse of discretion. *Treadway v. State*, 924 N.E.2d 621, 636 (Ind. 2010). When evaluating a jury instruction on appeal, we look to whether the tendered instruction: (1) correctly states the law, (2) is supported by the evidence in the record, and (3) is covered in substance by other instructions. *Id.*

Wheeler first claims that the jury instruction was an incorrect statement of the law. We disagree. In *Grim v. State*, we addressed the argument raised here by Wheeler, recognizing that there has been a difference of opinion among panels of this Court regarding the application of constructive possession when determining if a defendant was "carrying" a handgun. 797 N.E.2d 825, 830 (Ind. Ct. App 2003). Nonetheless, we noted that our Supreme Court has stated that constructive possession is applicable to handgun cases:

The liberality of the Indiana text has nevertheless obliged us to examine the sort of evidence adequate to demonstrate that a defendant "carried" the

³ We note that this is the Indiana Pattern Jury Instruction on constructive possession. See 1 Ind. Pattern Jury Instructions—Criminal, Instruction No. 14.156 (3d ed. 2004).

weapon. We have approached this task, and the similar question of “possessing” drugs, by characterizing the possession of contraband as either actual or constructive.

Henderson v. State, 715 N.E.2d 833, 835 (Ind. 1999). Regarding the issue in this case, the Supreme Court concluded:

When a car has multiple passengers, each with a gun at his feet, and no one has a license for any of them, a jury can find them all guilty of carrying. Just a step away analytically, when a car has multiple passengers, a gun near a backseat passenger and no permit, the jury can infer possession by that passenger, especially when the testimony indicates that the passenger tried to hide the weapon.

Id. at 837. The trial court’s constructive possession instruction is a correct statement of the law.⁴

The instruction is also supported by the evidence in the record. The visibility of the handgun, its proximity to where Wheeler was sitting, and the furtive gestures noted by both officers supported the tendering of the instruction on constructive possession. Finally, the trial court gave no other instruction on constructive possession. We conclude that the trial court did not err by instructing the jury on constructive possession.

II. Sufficiency of Evidence

Wheeler contends that the State did not present sufficient evidence to prove he had possession of the handgun found in the Oldsmobile. Wheeler points out that the handgun was concealed in a vehicle he did not own, his fingerprints were not on it, no witness testified that they saw Wheeler with it, and any furtive gestures are attributable to an

⁴ We reject Wheeler’s argument that the rule of lenity should apply here, as we find no ambiguity in the statute to support such application.

attempt to hide alcohol, not a weapon.⁵ This evidence, Wheeler claims, is insufficient to show that he had constructive possession of the handgun.

When reviewing a claim of insufficient evidence, we neither reweigh evidence nor judge the credibility of witnesses. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We will only consider evidence favorable to the judgment, as well as reasonable inferences drawn therefrom, to determine if there is sufficient evidence of probative value to support a conviction. *Id.* We must affirm the conviction if a reasonable trier of fact, using reasonable inferences drawn from the evidence, could have concluded that the defendant was guilty of the crime charged beyond a reasonable doubt. *Id.*

In order to convict Wheeler, the State was required to prove beyond a reasonable doubt that Wheeler carried a handgun in a vehicle or on or about his body without a license. Ind. Code Ann. § 35-47-2-1 (West Supp. 2009).⁶ Specifically, to convict a defendant of carrying a handgun in a vehicle, the State must put forth evidence that a handgun was found in a vehicle and that the defendant had control of either the weapon or the vehicle with knowledge of the weapon's presence. *Grim*, 797 N.E.2d at 831.

The element of control may be proven by either actual or constructive possession of the handgun. *Id.* In order to establish actual possession, the State must show that the

⁵ Wheeler testified that all of the vehicle's occupants, including the driver, had "cups of vodka" in the vehicle, and that an open bottle of vodka was in the back seat. Tr. p. 233. Officer Dawson testified that there were cups inside the vehicle when it was stopped but that he did not know what the cups contained. *Id.* at 143. The State did not present evidence of alcohol or charge Wheeler with any alcohol-related crimes.

⁶ We note that effective July 1, 2011, which is after the events in this case, Indiana Code section 35-47-2-1 was amended to allow a person without a license to carry a handgun while lawfully present in a vehicle that is "owned, leased, rented, or otherwise legally controlled by another person, if the handgun is: (A) unloaded; (B) not readily accessible; and (C) secured in a case." Ind. Code Ann. § 35-47-2-1 (West Supp. 2011) (formatting altered).

defendant had direct physical control over the handgun. *Jones v. State*, 924 N.E.2d 672, 675 (Ind. Ct. App. 2010). Intent and capability to maintain dominion and control over the handgun are required to establish constructive possession. *Id.* Such a showing by the State necessarily involves establishing that the defendant had knowledge of the handgun's presence. *Id.* This knowledge may be inferred from a defendant's exclusive dominion and control over the premises containing the contraband, or, if the control is non-exclusive, evidence of "additional circumstances" that indicate the defendant's knowledge of the presence of the contraband and his ability to control it. *Iddings v. State*, 772 N.E.2d 1006, 1015 (Ind. Ct. App. 2002), *trans. denied*. 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). The capability requirement is met when the State shows that the defendant is able to reduce the contraband to the defendant's personal possession. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999).

Here, Wheeler did not have exclusive control over the premises containing the handgun because there were three additional passengers in the car. The "additional circumstances," however, are sufficient to support the finding that Wheeler was aware of the presence of the handgun. Officer Dawson testified that when he and Officer Chester stopped the Oldsmobile, Wheeler turned to look at them and then made furtive gestures, indicating to the officers that he was attempting to retrieve or stow a weapon. Officer

Dawson also testified that the handgun was “sticking out” and that from where Wheeler had been sitting in the vehicle, the handgun was visible if Wheeler looked down. Finally, Officer Dawson testified that he found the gun where Wheeler was sitting and where Wheeler was seen reaching when the officers stopped the vehicle. It was therefore reasonable for the trier of fact to infer that Wheeler had knowledge of the presence of the handgun, which establishes his intent to maintain dominion and control over the gun. *See Iddings*, 772 N.E.2d at 1015. Further, Wheeler’s capability of maintaining dominion and control over the handgun was established by Officer Dawson’s testimony that the handgun was found in the area where Wheeler had been sitting and where Wheeler was seen reaching when the officers made the traffic stop.

Wheeler’s contention that we should interpret the additional circumstances surrounding the traffic stop in his favor—particularly his arguments that his furtive gestures were an attempt to hide illegal alcohol rather than a handgun and that the handgun was concealed, rather than visible, as Officer Dawson testified—is an invitation to reweigh the evidence, which we are not at liberty to do.

We conclude that there is sufficient evidence to support Wheeler’s conviction for carrying a handgun without a license.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.