NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

VERSUS

RICHARD D. FLUKER, JR.

NO. 05-KA-172

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 03-6129, DIVISION "E"
HONORABLE GREG G. GUIDRY, JUDGE PRESIDING

October 6, 2005

JAMES C. GULOTTA
JUDGE, PRO TEMPORE

Panel composed of Judges James L. Cannella,
Clarence E. McManus, and James C. Gulotta, Pro Tempore

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AFFIRMED

Richard D. Fluker, Jr. appeals his conviction and sentence for possession of a firearm by a convicted felon. On appeal, defendant argues that the evidence is insufficient to support his conviction and that the sentence is excessive. Finding no merit in either assignment of error, we affirm the sentence and conviction.

The Jefferson Parish District Attorney filed a bill of information charging defendant, Richard D. Fluker, Jr., with possession of a firearm by a convicted felon in violation of La. R.S. 14:95.1. He pled not guilty and filed several pre-trial motions, which are not at issue herein. Defendant proceeded to trial before a twelve-person jury on June 29, 2004, and the jury returned a verdict of guilty as charged. After denying defendant's motion for new trial, the trial judge sentenced defendant to twelve and one-half years at hard labor without benefit of parole, probation or suspension of sentence and imposed a $1,000 fine. The trial judge denied defendant's motion for reconsideration of sentence, but granted the motion for appeal.

FACTS

On August 22, 2003, Agent Lisa Thornton of the Jefferson Parish Sheriff's Office and STAR Deputy Thelma Hill were conducting surveillance to identify individuals selling narcotics to undercover agents. The two went to the area of 209 Glendella Avenue after receiving a lead from an undercover agent who had just purchased narcotics from a black female. A black female meeting the description of this individual was then observed in what was believed to be a narcotics transaction. After the female saw Agent Thornton and Deputy Hill exit their unit, she ran into the house at 209 Glendella where defendant lived.

Agent Thornton testified that the black female opened the door of the house without hesitation and closed it behind her. Thereafter, Agent Thornton and Deputy Hill went to the house, knocked on the door, and announced their presence. Moments later, defendant opened the door. Defendant stated that he was home all day and denied that someone had just run through the house. Having a clear view of defendant's living room once the door was opened, Agent Thornton and Deputy Hill noticed a plate of marijuana on the coffee table. As a result, they asked defendant to step outside to speak with the officers. Defendant remained outside, but went in again. Agent Thornton conducted a criminal background check on defendant and discovered that that defendant was a convicted felon.

Agent Thornton went to the rear of the house to see if anyone had come from either side of the house. She also contacted Sergeant Joseph Williams to inform him of the situation. Other officers arrived and secured the scene. One man and two women, (neither of whom was the suspect who had run inside the house), were located in back rooms of defendant's residence. Sergeant Williams asked defendant for consent to search his residence and defendant executed a consent form.

By the time the police entered the residence, the plate of marijuana was gone. After being questioned about the marijuana, defendant admitted that he moved it and put it under the sofa. After lifting the sofa, the police found the marijuana and a loaded .38 caliber gun. According to Agent Thornton, the police determined that the gun was not registered to defendant or to any of the other occupants in the house.

At trial, the defense called no witnesses, but stipulated defendant had prior felony convictions for distribution of cocaine on August 22, 1994 and July 27, 1998.

ASSIGNMENT OF ERROR NUMBER ONE

The evidence was insufficient to support the conviction.

DISCUSSION

Defendant contends that the evidence, even when viewed in the light most favorable to the State, does not exclude other reasonable hypotheses of innocence and is insufficient to support his conviction. Further, defendant contends that there was no evidence to show he knew the gun was under the sofa. The State responds that the evidence was sufficient to support the conviction.

In reviewing the sufficiency of evidence, an appellate court must determine whether the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime have been proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Tilley, 99-0569 (La. 7/6/00), 767 So.2d 6, 24, cert. denied, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001).

Under La. R.S. 15:438, "[t]he rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." However, this

requirement does not establish a standard separate from the Jackson standard, but provides a helpful methodology for determining the existence of reasonable doubt. State v. Jones, 98-842 (La. App. 5 Cir. 2/10/99), 729 So.2d 57, 63. In assessing other possible hypotheses in circumstantial evidence cases, the appellate court does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events. State v. Davis, 92-1623 (La. 5/23/94), 637 So.2d 1012, 1020, cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359 (1994). Instead, the reviewing court evaluates the evidence in the light most favorable to the prosecution and determines whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt under the Jackson standard. Id.

Defendant was convicted of violating La. R.S. 14:95.1, which makes it unlawful for any person who has been convicted of certain felonies, such as distribution of cocaine, to possess a firearm. To sustain a conviction under La. R.S. 14:95.1, the following elements must be proved: 1) the status of defendant as a convicted felon; 2) possession by defendant; and 3) the instrumentality possessed was a firearm. State v. Crawford, 03-1494 (La. App. 5 Cir. 4/27/04), 873 So.2d 768, 784; writ denied, 04-1744 (La. 5/6/05), 901 So.2d 1083; State v. Knight, 99-138 (La. App. 5 Cir. 6/30/99), 738 So.2d 1179, 1181. In addition, general intent is required to commit this crime. State v. Crawford, supra. Further, the State must prove that ten years has not elapsed since the date of completion of the punishment for the prior felony conviction. State v. Crawford, supra.

At trial, defendant stipulated to having two prior felony convictions for distribution of cocaine in 1994 and 1998. Defendant does not challenge his prior felony convictions or argue the ten-year statutory limitation period has expired. Instead, defendant argues that the State failed to exclude every reasonable

hypothesis of innocence regarding the possession of the firearm. Defendant suggests that one of the other occupants of the residence or the woman running from the police could have placed the gun under the sofa.

The facts of each case determine whether the proof is sufficient to establish possession. State v. Johnson, 03-1228 (La. 4/14/04), 870 So.2d 995, 998. Guilty knowledge may be inferred from the circumstances and proved by direct or circumstantial evidence. Id. To satisfy the possession element of La. R.S. 14:95.1, actual possession of a firearm is not required; that is, constructive possession is sufficient. State v. Storks, 02-754 (La. App. 5 Cir. 12/30/02), 836 So.2d 638, 640. Constructive possession of a thing exists when it is subject to a person's dominion and control. Id. Even if the person's dominion over the weapon is only temporary in nature and if control is shared, constructive possession exists. State v. Storks, supra. In addition, our jurisprudence has added an aspect of awareness to an offense of La. R.S. 14:95.1. Id. As such, "the State must also prove that the offender was aware that a firearm was in his presence and that the offender had the general criminal intent to possess the weapon." State v. Storks, supra. Mere presence in an area where a firearm is discovered does not necessarily establish possession. State v. Curtis, 99-45 (La. App. 5 Cir. 7/27/99), 739 So.2d 931, 944.

In State v. Jackson, 97-1246 (La. App. 5 Cir. 4/13/98), 712 So.2d 934, writ denied, 98-1454 (La. 10/16/98), 726 So.2d 37, this Court held that the evidence was sufficient to prove defendant knowingly possessed the gun found in his bedroom under the mattress where he regularly slept. Despite the argument that other friends and relatives had recently stayed in defendant's bedroom while visiting and the gun could have belonged to them, this Court found the evidence was sufficient to affirm defendant's conviction for possession of a firearm by a convicted felon. See also, State v. Johnson, 98-604, 98-605 (La. App. 5 Cir.

1/26/99), 728 So.2d 901, writ denied, 99-0624 (La. 6/25/99), 745 So.2d 1187, where this Court found that the evidence presented was sufficient to prove constructive possession of a gun found between lying between the mattress and box spring of the defendant's bed.

Whether a defendant possessed the requisite intent in a criminal case is for the trier of fact, and a review of the correctness of this determination is guided by the Jackson standard. State v. Tran, 97-640 (La. App. 5 Cir. 3/11/98), 709 So.2d 311. It is not the function of the appellate court to second-guess the credibility determinations of the trier of fact or to reweigh the evidence. State v. Carter, 98-24 (La. App. 5 Cir. 5/27/98), 712 So.2d 701, 708, writ denied, 98-1767 (La. 11/6/98), 727 So.2d 444. The trier of fact evaluates the credibility of witnesses, and when faced with a conflict in testimony, is free to accept or reject, in whole or in part, the testimony of any witness. State v. Crawford, 873 So.2d at 786.

While defendant's mere presence in the home where the gun was found would not alone establish the requisite possession, nonetheless, the State proved more than defendant's mere presence. The testimony at trial established that the gun was found under the sofa where defendant admitted to hiding the marijuana shortly before the police entered the house. Because of the proximity of the gun to the marijuana that defendant had just concealed, the jury could have inferred that defendant would have known that the gun was under the sofa and thus, that the gun was in his dominion and control.

Although defendant asserts that the gun could have been placed underneath the sofa by one of the other individuals in his residence at the time, the record reflects that the other individuals were located in the back rooms of the residence, not in the living room where the gun was discovered. Further, while defendant contends that the female who was fleeing the police could have discarded the gun,

we note that the defendant told the police that he did not see anyone run through his house. We find that the jury in the instant case could have reasonably concluded, based on the evidence, that defendant had possession of the gun.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

The trial court imposed an illegally excessive sentence.

DISCUSSION

Defendant argues his sentence of twelve and one-half years is excessive. The State responds that the record contains ample support for the sentence imposed and a comparison of this sentence to sentences imposed for similar crimes does not warrant relief.

The Eighth Amendment to the United States Constitution and Article I, § 20 of the Louisiana Constitution prohibit the imposition of excessive punishment. A sentence is considered excessive, even if it is within the statutory limits, if it is grossly disproportionate to the severity of the offense or imposes needless and purposeless pain and suffering. State v. Lobato, 603 So.2d 739, 751 (La. 1992). Trial judges have great discretion in imposing sentences and such sentences will not be set aside as excessive absent clear abuse of that broad discretion. State v. Allen, 03-1205 (La. App. 5 Cir. 2/23/04), 868 So.2d 877, 879.

In reviewing a sentence for excessiveness, the reviewing court must consider the crime and the punishment in light of the harm to society and gauge whether the penalty is so disproportionate as to shock its sense of justice, recognizing at the same time the wide discretion afforded the trial judge in determining and imposing the sentence. State v. Allen, supra. There is no requirement that specific matters be given any particular weight at sentencing. State v. Tracy, 02-0227 (La. App. 5 Cir. 10/29/02), 831 So.2d 503, 516, writ denied, 02-2900 (La. 4/4/03), 840 So.2d

1213. The issue on appeal is whether the trial court abused its discretion, not whether another sentence might have been more appropriate. State v. Allen, supra at 879-880.

In reviewing a trial court's sentencing discretion, three factors are considered: 1) the nature of the crime, 2) the nature and background of the offender, and 3) the sentence imposed for similar crimes by the same court and other courts. State v. Allen, 868 So.2d at 880. The trial judge is afforded wide discretion in determining a sentence, and the court of appeal will not set aside a sentence for excessiveness if the record supports the sentence imposed. State v. Uloho, 04-55 (La. App. 5 Cir. 5/26/04), 875 So.2d 918, 933, writ denied, 04-1640 (La. 11/19/04), 888 So.2d 192.

According to La. R.S. 14:95.1(B),

> [w]hoever is found guilty of violating the provisions of this Section shall be imprisoned at hard labor for not less than ten nor more than fifteen years without the benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars.

Defendant was sentenced to twelve and one-half years at hard labor without the benefit of probation, parole or suspension of sentence and received a fine of $1,000. In imposing this sentence, the trial judge stated that the sentence was based on the nature of the offense and the evidence presented, as well as defendant's dangerous propensities.

A review of the jurisprudence reflects that defendant's sentence is in line with similarly situated offenders. In State v. Taylor, 04-689 (La. App. 5 Cir. 12/14/04), 892 So.2d 78, this Court held that a sentence of fifteen years was not excessive for possession of a firearm by a convicted felon where the defendant had several prior convictions, including for possession of cocaine, marijuana and for

possession of drugs while in jail. See also, State v. Crawford, supra, this Court held that the maximum sentence of fifteen years for possession of a firearm by a convicted felon was not excessive where the defendant had previously been convicted of aggravated battery and manslaughter. Crawford, 873 So.2d at 784. See also, State v. Elliott, 04-936 (La. App. 5 Cir. 2/15/05), 896 So.2d 1110, which held that a sentence of fourteen years for possession of a firearm by a convicted felon was not excessive where the defendant had previously been convicted of two counts of armed robbery and was carrying a loaded gun.

Under the circumstances in this case and after considering the jurisprudence, we find that the trial court did not abuse its discretion by imposing a mid-range sentence of twelve and one-half years at hard labor and a mandatory minimum fine of $1,000 for this defendant, who had two prior convictions for distribution of cocaine. This assignment of error lacks merit.

ERROR PATENT DISCUSSION (ASSIGNMENT OF ERROR NUMBER THREE)

The record was reviewed for errors patent, according to La. C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); and State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). We find no errors requiring corrective action.

For the foregoing reasons, we affirm defendant's conviction and sentence.

AFFIRMED

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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **OCTOBER 6, 2005** TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

PETER J. FITZGERALD, JR
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