

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN JAMAL SMITH,

Defendant-Appellant.

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UNPUBLISHED

December 14, 2004

No. 248655

Genesee Circuit Court

LC No. 03-011285-FH

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of carrying a concealed weapon in a vehicle (CCW), MCL 750.227(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), 750.227b. Defendant was sentenced as a fourth habitual offender to concurrent sentences of thirty-two months to life in prison for the CCW and felon in possession convictions, and a consecutive five years' imprisonment for felony-firearm. We affirm defendant's convictions, but remand for resentencing on the CCW and felon in possession convictions. This case is being decided without oral argument under MCR 7.214(E).

On New Year's Eve 2002, defendant was pulled over by a Flint police officer because the officer believed that defendant was driving without his headlights on. Defendant was driving a van owned by a friend who had lent the vehicle to defendant for the evening. When the officer discovered that the van's license plate belonged to a different vehicle, he told defendant the van would be impounded. A subsequent on-scene search of the van uncovered a handgun located in the seat pocket located on the back of the front passenger seat.

Defendant first argues that there was insufficient evidence presented establishing possession of the gun to support his three weapons convictions. We disagree. This Court reviews de novo a claim regarding the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992). This Court will not interfere with the jury's role in determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515.

To convict defendant of CCW, the prosecution had to show that defendant was carrying the gun found. *People v Courier* 122 Mich App 88, 90; 332 NW2d 421 (1982). “‘Carrying’ means possession, whether the weapon is carried on or about the person or in a car.” *People v Butler*, 413 Mich 377, 394 n 3; 319 NW2d 540 (1982) (Levin, J., concurring). “Felony-firearm is the crime of carrying or possessing a firearm during the commission or attempted commission of a felony.” *People v Moore*, 470 Mich 56, 58; 679 NW2d 41 (2004). See also MCL 750.224b. The felon in possession of a firearm statute prohibits a person convicted of a specified felony from possessing a firearm within five years of completion of the punishment imposed and until the person’s right to possess a firearm has been restored. MCL 750.224f.

Possession may be actual or constructive, joint or exclusive, and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). “[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant.” *Id.* at 470-471. See also *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (observing that “a person has constructive possession if there is proximity to the article together with indicia of control”); *Courier, supra*, 122 Mich App 90-91 (observing that factors considered when determining whether a defendant is carrying a weapon in a vehicle include “the proximity of the weapon to the person of the defendant and the defendant’s ownership or operation of the vehicle”).

We conclude that a reasonable jury could have found that defendant had constructive possession of the gun and knowledge of its presence. The evidence adduced established that the gun was situated on top of other items located in the pocket with the gun handle pointing up. The officer who stopped and arrested defendant testified that the gun could be retrieved from the seat pocket by anyone driving the van. Defendant was the only person in the van when it was stopped. Marcius Cook, a friend of defendant, did testify that he brought the gun into the vehicle that night, and that defendant did not know about it. Cook could not provide an explanation for how the gun got from his coat pocket into the seat pocket. We defer to the trier of fact’s superior position to judge and weigh the credibility of the witness presented. *People v Cunningham*, 20 Mich App 699, 701-702; 174 NW2d 599 (1969). Viewing these facts in a light most favorable to the prosecution, we conclude that a reasonable jury could have found that defendant constructively possessed the gun.

Defendant also argues that the sentences imposed by the trial court for his convictions for CCW and felon in possession are invalid under MCL 769.9(2). We agree. Again, defendant was sentenced to concurrent sentences of thirty-two months to life imprisonment on these convictions. The prosecution concedes that these sentences are invalid because they violate the clear language of MCL 769.9(2), which forbids the imposition of a sentence “in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.”

We affirm defendant’s convictions, but remand for resentencing on defendant’s CCW and felon in possession of a firearm convictions. We do not retain jurisdiction.

/s/ Jane E. Markey  
/s/ E. Thomas Fitzgerald  
/s/ Donald S. Owens