

MEMORANDUM DECISION

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.



ATTORNEY FOR APPELLANT

David W. Stone IV
Anderson, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Megan M. Smith
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Ishmon George Hester, III,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

July 8, 2022

Court of Appeals Case No.
21A-CR-2079

Appeal from the Madison Circuit
Court

The Honorable Angela Warner
Sims, Judge

Trial Court Cause No.
48C01-2001-F4-135

Robb, Judge.

Case Summary and Issues

- [1] Following a jury trial, Ishmon George Hester, III, was convicted of auto theft, a Level 6 felony, and unlawful possession of a firearm by a serious violent felon, a Level 4 felony. Hester was sentenced to an aggregate term of twelve years with two years suspended to probation. Hester now appeals, raising multiple issues for our review which we restate as: (1) whether there was sufficient evidence to support Hester’s conviction of auto theft; (2) whether there was sufficient evidence to support Hester’s conviction of unlawful possession of a firearm by a serious violent felon; and (3) whether the trial court properly instructed the jury. Concluding sufficient evidence supports Hester’s convictions and the trial court properly instructed the jury, we affirm.

Facts and Procedural History

- [2] On or around January 13, 2020, Hilda Farrow was out celebrating in Anderson with friends and was not in a condition to drive. As a result, Farrow allowed an acquaintance she had recently met to drive her home in her car (“Vehicle”). On the way to her home, Farrow had the acquaintance make a stop at a local CVS Pharmacy. Farrow went inside the CVS while the acquaintance remained in the Vehicle. When Farrow returned, the acquaintance and the Vehicle were gone, and she called the authorities to report the Vehicle as stolen.
- [3] On January 17, Officer Steven White was on patrol in Anderson and observed the Vehicle, driven by Hester, changing lanes. Officer White ran the license

plate number which indicated the Vehicle was stolen. As a result, Officer White initiated a traffic stop and Hester pulled over. However, as Officer White exited his patrol car and approached the Vehicle, Hester drove away. Officer White returned to his patrol car, radioed for assistance, and pursued the Vehicle. After a pursuit that damaged property and yards and at times exceeded 100 miles per hour, the Vehicle came to an abrupt stop and Hester fled on foot. Officer White noted that it appeared as if Hester had blown the engine, making the Vehicle inoperable. Officer White also noticed that Hester was wearing a black sock cap and a grey sweatshirt with stars and stripes on it when he exited the Vehicle. As he was running away, Hester was holding onto his midsection as if he were carrying a weapon or other contraband.

[4] Officer White pursued Hester but lost him after Hester rounded the corner of a nearby house. At this time, Officer White halted his pursuit of Hester and waited for assistance. Once back-up arrived, a K9 unit tracked Hester to a small apartment complex. Officer White entered the complex and began knocking on apartment doors. Hester opened one of the doors. Although Hester was no longer wearing the hat or sweatshirt, Officer White immediately recognized him as the driver of the Vehicle. Hester informed Officer White there was one other person in the apartment and Officer White entered to clear the apartment for safety reasons.

[5] As Officer White was clearing the apartment, Samantha Hostetler exited the bathroom. Hostetler indicated the apartment was hers and Hester was a friend of her roommate, Michaela Moneyhun. She stated she did not know Hester

was inside the apartment as she had been in the shower. Although Hester had spent the night at the apartment with Moneyhun on previous occasions in the last week or two, Moneyhun was not present, and Hostetler did not give Hester permission to be there. No one else was in the apartment.

[6] During his conversation with Hostetler, Officer White noticed a pile of clothes on the floor inside Hostetler's bedroom that matched those worn by Hester when he fled the Vehicle. Officer White bent down toward the floor to retrieve the clothes and noticed a handgun on the floor within inches of the clothes. A mattress overhanging its box springs had obscured his view of the gun until the moment he bent over. Hostetler said the gun did not belong to her, she had not known it was there, and she did not allow guns into her home. Hester would later admit the clothes were his and that he had placed them in Hostetler's room, although he acknowledged the only area he expected to stay in was Moneyhun's area of the apartment, not Hostetler's room.

[7] Hester was arrested and Officer White retrieved the gun and clothes with separate hands. However, while Officer White escorted Hester to his patrol car, he briefly placed the clothes and the gun in the same hand. A forensic analysis would later determine that Hester's DNA was on the gun. A forensic biologist for the Indiana State Police testified that although it was "not impossible" for Hester's DNA to get on the gun by simply coming into contact with his clothing while in Officer White's hand, such an explanation was "less likely" as "there usually has to be some sort of friction to transfer the cells." Transcript, Volume II at 124. "[I]f something just comes into contact, it's probably not

going to have enough friction to remove enough cells from the item to . . . have enough DNA on the subsequent item.” *Id.*

[8] After being transported to the Madison County Sheriff’s Department, Hester denied having been in the Vehicle, but later acknowledged the “high-speed chase” he engaged in. *Id.* at 138. Additionally, Hester said he had a working car of his own and was unable to explain how he obtained the Vehicle. The State charged Hester with auto theft and resisting law enforcement, each a Level 6 felony, and unlawful possession of a firearm by a serious violent felon, a Level 4 felony.

[9] On July 28, 2021, a jury trial was conducted. The State offered the testimony of multiple witnesses including that of Officer White and Farrow. Officer White testified to his pursuit of Hester both in the Vehicle and on foot as well as his interactions with Hester and Hostetler at the apartment. *See supra*, ¶¶ 3-7. Farrow testified she did not know Hester and did not give him permission to drive the Vehicle. Also, at the time Hester was driving the Vehicle, her original license plate remained on the Vehicle. On cross examination, Farrow stated she could not remember the acquaintance’s name but described him as a bald white male with tattoos. Evidence admitted at trial indicated Hester is friends with a man called “Joker” who matches that description. Moreover, Hostetler testified that Joker and Hester had been spending time together around the time the Vehicle was stolen. Joker had been in Hostetler’s apartment with Hester approximately a week prior to Hester’s arrest. Joker had brought a gun and passed it around for people to see. Hester touched the gun during this visit.

[10] After the close of evidence, the parties discussed final instructions. Hester objected to the State’s proposed final instruction number six regarding accomplice liability. Hester argued that the instruction “allows the jury to . . . find [him] guilty without any evidence or . . . any substantial evidence” that he partook in the theft of the Vehicle or that he helped steal the Vehicle. Tr., Vol. II at 157. The trial court overruled Hester’s objection and instructed the jury as follows:

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person has not been prosecuted for the offense; has not been convicted of the offense; or has been acquitted of the offense.

Id. at 198.

[11] The jury found Hester guilty of auto theft, resisting law enforcement, and possession of a firearm. Hester then pleaded guilty to being a serious violent felon. Hester was sentenced to an aggregate term of twelve years with two years suspended to formal probation. Hester now appeals his convictions for auto theft and possession of a firearm.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

[12] When reviewing the sufficiency of the evidence required to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Rather, we consider only the evidence supporting the judgment and reasonable inferences that can be drawn therefrom. *Id.* Where there is conflicting evidence, we must consider the evidence in the light most favorable to the conviction. *Id.* We will affirm if there is substantial evidence of probative value from which the trier of fact could find guilt beyond a reasonable doubt. *Trotter v. State*, 838 N.E.2d 553, 557 (Ind. Ct. App. 2005). The evidence need not overcome every reasonable hypothesis of innocence; it is sufficient if an inference may be reasonably drawn from it to support the verdict. *Drane*, 867 N.E.2d at 147.

B. Auto Theft

[13] Hester argues that his conviction of auto theft is not supported by the evidence. To convict Hester of auto theft as a Level 6 felony, the State was required to prove beyond a reasonable doubt that Hester knowingly or intentionally exerted unauthorized control over the Vehicle, with intent to deprive the owner of the Vehicle's value or use. Ind. Code § 35-43-4-2(a)(1)(B)(ii).

[14] Hester does not dispute the Vehicle was stolen from Farrow. Instead, Hester claims he did not steal the Vehicle and there is no evidence to suggest that he knew the Vehicle was stolen when he was driving it. However, a conviction for

auto theft may be supported by the unexplained possession of a stolen vehicle when considered along with other evidence in the case, such as how recent or distant in time the vehicle was stolen, and the circumstances of the defendant's possession. *Fortson v. State*, 919 N.E.2d 1136, 1143 (Ind. 2010). Here, Hester was both in possession of the Vehicle and additional circumstances demonstrate that he, at the very least, knew the Vehicle was stolen and continued to exercise unauthorized control of the Vehicle.

[15] In *Gibson v. State*, we determined that the defendant's possession of a car two days after it was stolen, combined with his presence in the car just before his arrest and possession of a screwdriver used to start the car supported his conviction for auto theft. 533 N.E.2d 187, 189-90 (Ind. Ct. App. 1989). Similarly, in *Thacker v. State*, we held that a defendant's possession of a vehicle six days after it was stolen combined with damage to the car and an attempt to flee from authorities supported an inference the defendant knew he was exerting unauthorized control over someone else's vehicle. 62 N.E.3d 1250, 1252 (Ind. Ct. App. 2016).

[16] Hester was in possession of the Vehicle four days after it was reported stolen. Moreover, just as in *Gibson* and *Thacker*, there is additional evidence in the record indicating that Hester knew the Vehicle had been stolen and continued to exercise unauthorized control of the Vehicle. After being pulled over, instead of speaking with Officer White, Hester sped off and led Officer White on a high-speed chase through the city of Anderson. *See Myers v. State*, 27 N.E.3d 1069, 1077 (Ind. 2015) (indicating that flight may be considered as

circumstantial evidence of consciousness of guilt). Further, after Hester drove through yards, damaged property, and rendered the Vehicle inoperable, he exited the Vehicle and fled on foot. Hester's attempts to evade Officer White and related conduct allow a jury to reasonably infer that Hester knew he was exerting unauthorized control over someone else's vehicle.

[17] Additionally, Hester's flight and related conduct are not the only evidence to suggest that he knowingly or intentionally exerted unauthorized control over the Vehicle. Here, Farrow never gave Hester permission to drive the Vehicle; the Vehicle still had the original license plate, registered to Farrow, attached to it; and Hester's operation of the vehicle was never explained. Accordingly, sufficient evidence supports Hester's conviction of auto theft.

C. Possession of a Firearm

[18] To convict Hester of unlawful possession of a firearm by a serious violent felon, the State was required to show that Hester is a "serious violent felon who knowingly or intentionally possess[e] a firearm[.]" Ind. Code § 35-47-4-5(c). Hester pleaded guilty to being a serious violent felon and on appeal, only contends there is insufficient evidence to support that he was in possession of a firearm. Possession of a firearm may be either actual or constructive. *Tate v. State*, 835 N.E.2d 499, 511 (Ind. Ct. App. 2005), *trans. denied*. A person who has direct and physical control over a firearm has actual possession, whereas a person who has the intent and capability to maintain control has constructive possession of a firearm. *Id.*

[19] Hester was not in physical possession of the gun when Officer White entered the apartment; thus, the State must prove his intent and capability to maintain control over it. The capability requirement is met when the State shows the defendant can reduce the contraband to his personal possession or otherwise direct its disposition or use. *Causey v. State*, 808 N.E.2d 139, 143 (Ind. Ct. App. 2004). Hester was in the apartment with Hostetler and the gun was found in Hostetler’s bedroom. However, the capability requirement was established here because the gun did not belong to Hostetler, Hostetler did not know the gun was there, and the gun was found within inches of where Hester had admittedly placed his clothing. *See Lampkins v. State*, 685 N.E.2d 698, 699 (Ind. 1997) (holding the “capability element was established because the [contraband] was within reach of defendant”) (opinion on rehearing).

[20] To prove the intent element, the State must show the defendant knew of the firearm’s presence. *Tate*, 835 N.E.2d at 511. Knowledge may be inferred from either exclusive dominion over the premises or, if there is no exclusive dominion, from evidence of additional circumstances showing that the defendant had knowledge of the firearm’s presence. *Id.* Recognized additional circumstances include attempted flight or furtive gestures, proximity of the contraband to the defendant, and mingling of the contraband with other items owned by the defendant. *Gray v. State*, 957 N.E.2d 171, 175 (Ind. 2011). These circumstances are not an exhaustive list and ultimately, the question is whether a reasonable factfinder could conclude from the evidence that the defendant

knew of the nature and presence of the contraband. *Johnson v. State*, 59 N.E.3d 1071, 1074 (Ind. Ct. App. 2016).

[21] Hester was not in exclusive possession of the premises and therefore, the State must have shown additional circumstances pointing to Hester's knowledge of the gun. The evidence demonstrates that after Hester rendered the Vehicle inoperable, he fled from Officer White on foot to Hostetler's apartment while holding his midsection as if he were carrying a weapon or other contraband. At the time he fled from Officer White, he was wearing a black hat and grey sweatshirt with stars and stripes on it. Hester admittedly placed those same clothes on the floor of Hostetler's bedroom. Furthermore, when Officer White saw and attempted to collect Hester's clothes, Officer White found the handgun placed within inches of Hester's clothing. Although the gun was obscured by a mattress overhanging its box springs, Officer White noticed the gun as soon as he bent down to grab Hester's clothing. Accordingly, Hester's attempted flight from Officer White while holding something near his midsection, acknowledgment that he placed his clothing in Hostetler's bedroom, and the proximity of his clothing to the gun demonstrates additional circumstances of Hester's knowledge of the gun and intent to maintain control of the gun.

[22] Further, Hostetler had no idea that Hester was in her apartment, and she was the only other person present. Hostetler told Officer White the gun was not hers and that she did not allow guns in her apartment. Additionally, Hester's DNA was ultimately found on the gun. To the extent Hester now argues either that the gun was Joker's or that his DNA could have been transferred to the gun

when Officer White allowed his clothing and the gun to touch or when Joker allowed Hester to briefly handle Joker's gun, his argument is an invitation to reweigh the evidence, which we will not do on appeal. *McHenry v. State*, 820 N.E.2d 124, 126-27 (Ind. 2005). The State presented additional circumstances of Hester's knowledge of the gun and intent to maintain control of the gun.

[23] Accordingly, the State presented sufficient evidence to allow the jury to reasonably find that Hester, a serious violent felon, knowingly or intentionally possessed a firearm.

II. Jury Instruction

A. Standard of Review

[24] “The purpose of a jury 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.” *Dill v. State*, 741 N.E.2d 1230, 1232 (Ind. 2001) (internal quotation omitted). We review a trial court's jury instructions for an abuse of discretion. *Isom v. State*, 31 N.E.3d 469, 484 (Ind. 2015), *cert. denied*, 577 U.S. 1137 (2016). An abuse of discretion occurs when the instruction is erroneous and the instructions taken as a whole misstate the law or otherwise mislead the jury. *Id.* at 484-85. On appeal, we review whether the instruction correctly states the law, whether there is evidence in the record to support giving the instruction, and whether the substance of the instruction is covered by other instructions. *Id.* at 485.

B. Accomplice Liability

[25] The trial court instructed the jury on accomplice liability as follows:

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person has not been prosecuted for the offense; has not been convicted of the offense; or has been acquitted of the offense.

Tr., Vol. II at 198. Hester objected to the instruction as allowing the jury to convict him without “any evidence or . . . any substantial evidence” that he acted as an accomplice in the theft of the Vehicle. *Id.* at 157. On appeal, he makes substantially the same the argument in that he argues the instruction “was not applicable under the evidence and was not relevant to [t]he issues the jury was to decide.” Brief of Appellant at 18. However, where the facts in a case raise a reasonable inference that the crime was carried out with an accomplice, it is appropriate for the judge to give such an instruction. *Hampton v. State*, 719 N.E.2d 803, 807 (Ind. 1999). Further, accomplice liability is not a separate crime, but merely a separate basis of liability for the charged crime. *Id.*

[26] Here, the evidence admitted at trial indicated that a friend of Hester’s called Joker matched the description of the acquaintance who left Farrow at CVS the night the Vehicle was stolen. Hester and Joker were spending time together during the week the Vehicle was stolen. Further, Officer White observed Hester driving the Vehicle within days of its theft. Instead of submitting to a traffic stop, Hester led Officer White on a high-speed chase while in the Vehicle,

damaged property, rendered the Vehicle inoperable, and ultimately fled from Officer White on foot. Based on the evidence at trial, a reasonable inference could be made that Hester knew he was continuing to exercise Joker's unauthorized control over another person's vehicle and thus, aiding the crime of auto theft. Accordingly, the trial court's instruction on accomplice liability was not an abuse of discretion.

[27] However, even if the instruction was improper, any error would have been harmless as Hester's conviction for auto theft is clearly supported by the evidence. *See supra* ¶¶ 16-17; *see also Cardosi v. State*, 128 N.E.3d 1277, 1288 (Ind. 2019) (indicating that “[i]nstructional error is harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise”). Accordingly, any error committed by the trial court in instructing the jury on accomplice liability is harmless.

[28] Hester also alleges the trial court's instruction on accomplice liability was “not a correct statement of the law since it eliminated any requirement that the person who [Hester] was supposed to aide [sic] cause or induce to commit [auto theft] was not identified.” Br. of Appellant at 16. Further, he contends that because the instruction was an incorrect statement of law, it “could only have been confusing to the jury” and therefore, the trial court should have used a pattern jury instruction instead. *Id.* However, this is not an argument that Hester made at trial and thus, it is not properly preserved for review on appeal and is waived. *Treadway v. State*, 924 N.E.2d 621, 631 (Ind. 2010).

- [29] Waiver notwithstanding, the jury instruction was not an incorrect statement of law. Although it might be a better practice to use a pattern jury instruction, our standard of review does not require it. *O'Connell v. State*, 970 N.E.2d 168, 175 (Ind. Ct. App. 2012). Further, the trial court's jury instruction on accomplice liability tracks the statutory language and therefore is a correct statement of law. *See* Ind. Code § 35-41-2-4. Additionally, the language of the statute does not require the trial court to instruct the jury regarding the specific individual who has been aided and it is unlikely that the jury would not understand that Joker, the man matching Farrow's description of the acquaintance who left her at CVS, was the individual Hester was supposed to be helping. Accordingly, the trial court's instruction on accomplice liability was not an incorrect statement of law capable of confusing the jury.
- [30] Therefore, the trial court did not abuse its discretion when it instructed the jury on accomplice liability.

Conclusion

- [31] We conclude sufficient evidence supports Hester's convictions for auto theft and unlawful possession of a firearm by a serious violent felon, and the trial court did not abuse its discretion in instructing the jury on accomplice liability. Consequently, we affirm Hester's convictions.
- [32] Affirmed.

Pyle, J., and Weissmann, J., concur.