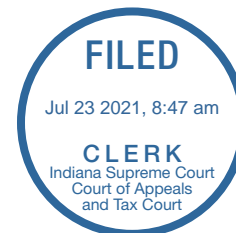


MEMORANDUM DECISION

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.



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IN THE COURT OF APPEALS OF INDIANA

Vedarious Cole,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 23, 2021

Court of Appeals Case No.
21A-CR-154

Appeal from the Morgan Superior
Court

The Honorable Peter R. Foley,
Judge

Trial Court Cause No.
55D01-1904-F5-604

Weissmann, Judge.

[1] Vedarious Cole appeals his conviction for carrying a handgun without a license, taking aim at the trial court’s instruction to the jury on constructive possession. He claims the instruction did not hit the target because the State must present evidence of actual, rather than constructive, possession of a weapon. Cole’s argument misses the mark because it is premised on an unfounded distinction between “carrying” and “possessing” a weapon. We affirm.

Facts

[2] Cole was a passenger in a vehicle involved in a police chase. During the pursuit, Cole dropped a handgun from his passenger seat out the window onto the ground. The driver later threw another handgun from the vehicle before eventually stopping. Police recovered both weapons after arresting both the driver and Cole. The State charged Cole with obstruction of justice, a Level 6 felony, and carrying a handgun without a license as a Level 5 felony based on his prior conviction for the same offense. As to the latter count, the State alleged Cole “knowingly carr[ied] a handgun in or upon the defendant’s person or in any vehicle, without a license in the defendant’s possession” App. Vol. II, p. 15.

[3] During his trial, Cole objected to the trial court’s jury instruction on constructive possession. The jury found Cole guilty of both offenses, but the trial court entered judgment of conviction on the handgun count only. Cole received a three-year sentence.

Discussion and Decision

[4] Cole raises only one issue on appeal: whether the trial court abused its discretion when it instructed the jury on constructive possession. He specifically challenges Final Instruction 4, which stated:

The word “possess” means to own or exert control over. There are two kinds of “possess”—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 to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, then possession is sole. If two or more persons share actual or constructive possession of a thing, then possession is joint.

Possession may be actual or constructive, and either alone or jointly with others.

App. Vol. II, p. 101.

[5] We initially note that Cole’s argument is without merit because ample evidence demonstrated Cole’s actual possession of the handgun. Notably, the arresting officer testified that Cole dropped the weapon out the car window. Therefore, the portions of the instruction defining constructive possession were surplusage. Regardless, Cole misinterprets the law.

[6] We afford trial courts broad discretion in the manner of instructing a jury and review such decisions only for an abuse of that discretion. *Hatchett v. State*, 33

N.E.3d 1125, 1128 (Ind. Ct. App. 2015). An instruction is not improper if: (1) it correctly states the law; (2) there is evidence in the record to support giving the instruction; and (3) the substance of the proffered instruction is covered by other instructions. *Id.* We only will reverse a conviction based on a defective jury instruction where the error prejudiced the appellant’s substantial rights. *Id.*

[7] Cole argues that Final Instruction 4 incorrectly stated the law. Claiming Indiana Code § 35-47-2-1 criminalizes only “carrying” a handgun, not “possessing” it, Cole contends he could only be convicted of actual possession of the handgun. Indiana Code § 35-47-2-1 provides in relevant part:

(a) Except as provided in subsections (b) and (c) and sections 2 through 2.1 of this chapter, a person shall not carry a handgun in any vehicle or on or about the person’s body without being licensed under this chapter to carry a handgun . . .

(b) Except as provided in subsection (c), a person may carry a handgun without being licensed under this chapter to carry a handgun if: . . .

(4) the person carries the 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

[8] Cole asserts only that the instruction erroneously informed the jury that proof of Cole’s constructive possession of the handgun was sufficient to convict him

of carrying a handgun without a license. But our Supreme Court has ruled that “carrying” a handgun in this context “encompasses more than moving about with a firearm attached to one’s body.” *Henderson v. State*, 715 N.E.2d 833, 835 (Ind. 1999). “Carrying” may be proved through evidence of either actual or constructive possession. *Id.* at 835-36.

[9] Therefore, Cole is wrong in suggesting that a conviction for carrying a handgun without a license cannot be based solely on a constructive possession theory. *See, e.g., id.* (“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” a handgun without a license under a constructive possession theory); *Grim v. State*, 797 N.E.2d 825, 831 (Ind. Ct. App. 2003) (ruling that conviction for carrying a handgun in a vehicle requires proof that defendant had control of either the weapon or the vehicle with knowledge of the weapon’s presence and control is proved through evidence of either actual or constructive possession).

[10] Moreover, the substance of the challenged instruction is consistent with our Supreme Court’s ruling in *Henderson*. 715 N.E.2d at 835-836. The instruction also is nearly identical to Indiana Criminal Pattern Jury Instruction No. 14.3060. Using pattern jury instructions is the preferred practice. *Buckner v. State*, 857 N.E.2d 1011, 1016 (Ind. Ct. App. 2006). Contrary to Cole’s contention, the instruction correctly states the law.

[11] The judgment of the trial court is affirmed.

Kirsch, J., and Altice, J., concur.