

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Devonte D. Sharp,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 30, 2022

Court of Appeals Case No.
22A-CR-638

Appeal from the Marion Superior
Court

The Honorable Mark Stoner,
Judge
The Honorable Jeffrey Marchal,
Magistrate

Trial Court Cause No.
49D32-2006-F4-20565

Bailey, Judge.

Case Summary

- [1] Devonte Dujuan Sharp (“Sharp”) appeals his conviction, following a bench trial, for unlawful possession of a firearm by a serious violent felon, a Level 4 felony.¹ He raises one issue, which we restate as whether the State provided sufficient evidence to support his conviction. We affirm.

Facts and Procedural History

- [2] On June 28, 2020, Officer Charles Ward (“Officer Ward”) of the Indianapolis Metropolitan Police Department responded to a dispatch about a dispute at a vending machine at the Inn Town Suites. Officer Ward arrived at the hotel at approximately 6:00 p.m., where he met up with two other officers who had also responded to the dispatch. Officer Ward met Brian McKenney (“McKenney”), who claimed to be one of the two men involved in the dispute involving the vending machine. McKenney gave Officer Ward a description of the other man involved in the dispute, who later was identified as Sharp, and said that he was in a tan Chevy Malibu in the hotel’s parking lot next to a blue truck.
- [3] Officer Ward found the tan Malibu and approached the car from the front passenger’s side. Officer Ward saw Sharp sitting in the front passenger seat holding a lit cigar with his right hand. Officer Ward observed Shaw look up at Officer Ward and abruptly sit up while still holding the cigar in his right hand.

¹ Ind. Code § 35-47-4-5(c).

At the same time, Sharp's left hand "disappeared as if he was leaning down or reaching down." Tr. v. II at 56. Sharp's left hand went "straight down," and Officer Ward could not see if Sharp was holding anything in that hand. *Id.* at 57.

[4] When Officer Ward reached the front passenger's window, he saw smoke coming from the open window of the car and the sunroof, and he smelled marijuana. Officer Ward saw the driver, Kendall Murphy ("Murphy"), light a cigarette, and both Murphy and Sharp appeared "very nervous" and "really shifty in their seat[s]." *Id.* at 60. Sharp asked Officer Ward if he should extinguish his cigar at the same time as he did so.

[5] Based on the smell of marijuana, Officer Ward asked Sharp and Murphy to step out of the car. Sharp and Murphy exited and walked to the front of the car, where a second officer was waiting. Officer Ward then searched the car and found a small baggie of marijuana and a second package of marijuana lying "on top of the center console." *Id.* at 68. Officer Ward also found a handgun with a black frame and grey slide underneath the front passenger's seat. The barrel of the handgun was facing towards the back of the car and within reach of Sharp, who had been seated in the front passenger seat. The handgun was a 9mm Smith and Wesson and was registered to Ashley Sykes, Murphy's fiancé. Murphy's fingerprints were found on the magazine inserted in the handgun. There was also an empty "bottle and a package of cigarettes" on the floor under the front passenger seat. *Id.* at 65.

- [6] The tan Chevy Malibu belonged to Sykes. Sykes told law enforcement that the gun—which she misidentified as a Smith and Wesson .40 caliber, rather than 9mm, handgun—belonged to her. Sykes told law enforcement that she had put the handgun underneath the front passenger seat of her car.
- [7] The State charged Sharp with unlawful possession of a firearm by a serious violent felon, a Level 4 felony; theft, as a Class A misdemeanor;² and possession of marijuana, as a Class B misdemeanor.³ On October 20, 2021, the matter proceeded to bench trial at which the parties stipulated that Sharp had a prior offense that qualified him as a serious violent felon, and the court granted the State’s motion to dismiss the theft and marijuana charges. The court found Sharp guilty of unlawful possession of a firearm by a serious violent felon. The court sentenced Sharp to four years and suspended the entire sentence except for time served. The court also ordered Sharp to serve two years of probation. This appeal ensued.

Discussion and Decision

- [8] Sharp challenges the sufficiency of the evidence to support his conviction.

When reviewing the sufficiency of the evidence to support a conviction, “appellate courts must consider only the probative evidence and reasonable inferences supporting the [judgment].”

² I.C. § 35-43-4-2(a).

³ I.C. § 35-48-4-11(a)(11).

McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Wright v. State*, 828 N.E.2d 904, 906 (Ind. 2005). It is not necessary that the evidence “overcome every reasonable hypothesis of innocence.” *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995). “[E]vidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (citations omitted.)

Sallee v. State, 51 N.E.3d 130, 133 (Ind. 2016).

[9] To support a conviction for unlawful possession of a firearm by a serious violent felon, the State must prove beyond a reasonable doubt that: (1) Sharp, (2) knowingly or intentionally, (3) possessed, (4) a firearm, (5) and had previously been convicted, (6) of one of the twenty-nine crimes listed as “serious violent felon[ies].” I.C. § 35-47-4-5. The parties stipulated that Sharp had a prior conviction of a serious violent felony, i.e., robbery.⁴ Nor does Sharp dispute that there was a firearm found under the passenger seat in which he was sitting. However, Sharp maintains that there was insufficient evidence to show that he had constructive possession of that firearm.

[10] Possession may be actual—where a person has direct physical control over the contraband—or constructive—where a person has (1) the capability to maintain

⁴ In addition to the stipulation made in open court, the State also admitted, without objection, documents related to Sharp’s prior felony conviction of robbery. See State’s Ex. 4, Ex. at 20; I.C. § 35-47-4-5(b)(13) (listing robbery as one of the qualifying serious violent felonies).

dominion and control over the item; and (2) the intent to maintain dominion and control over it. *Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011). The trier of fact may infer a defendant had capability and intent to maintain dominion and control over contraband when the defendant had a possessory interest in the premises in which an officer found the item, even when that possessory interest is not exclusive. *Id.* “The capability requirement is met when the state shows that the defendant is able to reduce the controlled substance to the defendant’s personal possession.” *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999). The intent inference is met when the defendant’s possessory interest is not exclusive, but the State proves

additional circumstances pointing to the defendant’s knowledge of the presence and the nature of the item. We have previously identified some possible examples, including (1) a defendant’s incriminating statements; (2) a defendant’s attempting to leave or making furtive gestures; (3) the location of contraband like drugs in settings suggesting manufacturing; (4) the item’s proximity to the defendant; (5) the location of contraband within the defendant’s plain view; and (6) the mingling of contraband with other items the defendant owns.

Gray, 957 N.E.2d at 174-75 (citations omitted).

[11] The State is not required to prove all of the additional circumstances listed above in order to prove constructive possession. *See, e.g., Canfield v. State*, 128 N.E.3d 563, 573 (Ind. Ct. App. 2019), *trans. denied*. Thus, in *Causey v. State*—a case very similar to Sharp’s case—a panel of this Court held the State provided sufficient evidence to support a conviction for unlawful possession of a firearm

by a serious violent felon where the defendant did not dispute that he met the definition of a serious violent felon, a handgun was found in a vehicle under the passenger seat in which the defendant had been sitting (i.e., the gun was in close proximity to the defendant), and the defendant made furtive movements when the police stopped the vehicle. 128 N.E.3d 563, 573 (Ind. Ct. App. 2019), *trans. denied*. Here, as in *Causey*, the State proved Sharp was in close proximity to the handgun and was therefore capable of controlling it, and he had made furtive movements by reaching down from the passenger's seat when he saw law enforcement approaching the vehicle. That was sufficient evidence from which the trial court could reasonably infer that Sharp was in constructive possession of the firearm. *See id.*; *see also, e.g., Johnson v. State*, 59 N.E.3d 1071, 1074 (Ind. Ct. App. 2016) (holding evidence was sufficient to prove constructive possession where the defendant was in close proximity to the contraband, was in the best position to access the contraband, and made furtive movements upon being stopped by law enforcement).

[12] Sharp contends on appeal that the evidence could also support an inference that he was reaching down under the passenger seat, not to hide a firearm, but to reach for the package of cigarettes that was under the seat so that he could give a cigarette to the driver to light in order to hide the smell of marijuana. First, we note that there was no evidence that the package of cigarettes under Sharp's seat was open or that Sharp handed a cigarette to Murphy. Second, it is unclear why Sharp would believe Murphy needed to light a cigarette to hide the smell of marijuana when Sharp had been, and still was, smoking a cigar. Third, and

most importantly, the State is not required to “overcome every reasonable hypothesis of innocence.” *Sallee*, 51 N.E.3d at 133. The State need only provide evidence from which a reasonable inference may be drawn to support the conviction. *Id.* The State has done so in this case. Sharp’s arguments to the contrary are requests that we reweigh the evidence, which we will not do. *Id.*

[13] Affirmed.

Riley, J., and Vaidik, J., concur.