



ATTORNEY FOR APPELLANT

Joel M. Schumm
Indianapolis, Indiana

Colleen Morrison
Certified Legal Intern
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Tina L. Mann
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

B.R.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 28, 2021

Court of Appeals Case No.
20A-JV-1203

Appeal from the Marion Superior
Court

The Honorable Marilyn A.
Moores, Judge

The Honorable Geoffrey A.
Gaither, Magistrate

Trial Court Cause No.
49D09-1910-JD-1311

Tavitas, Judge.

Case Summary

- [1] Juvenile B.R. appeals his juvenile adjudication for acts which, if committed by an adult, would constitute carrying a handgun without a license, a Class A misdemeanor. After being stopped for traffic violations, a vehicle driven, but not owned, by B.R. was searched by a police officer who detected the odor of marijuana. During the search, the officer removed a panel to the left of the steering wheel, revealing a handgun in a hidden space inside the dashboard. After a fact-finding hearing, the juvenile court concluded that the evidence was sufficient to find that B.R. constructively possessed the handgun. Finding that such a conclusion was in error, we reverse.

Issue

- [2] B.R. raises one issue, which we restate as whether the evidence was sufficient to sustain his juvenile adjudication for acts which, if committed by an adult, would constitute carrying a handgun without a license.

Facts

- [3] On October 24, 2019, Officer Nicholas Snow of the Indianapolis Metropolitan Police Department observed a silver Chevrolet Impala fail to properly signal its turn and fail to fully stop at a stop sign. The Impala was being driven by then-seventeen-year-old B.R., who was accompanied by a passenger, K.W., whose parent owned the vehicle. B.R. was driving the car because K.W. was intoxicated, and B.R. offered to drive him home to avoid any accidents. Officer Snow later admitted that he lied by informing the boys that he pulled them over

because the vehicle may have been involved with a domestic dispute being investigated by the Officer. Officer Snow approached the Impala's driver's side and detected the odor of marijuana, apparently emanating from the car. B.R. could not produce a driver's license, Officer Snow ran a check and ascertained that B.R. had never been issued a driver's license.

[4] Officer Corey Shinn arrived at the scene to assist Officer Snow. The officers asked both boys to exit the Impala, placed both boys in handcuffs, and commanded them to sit on the curb. Officer Snow then commenced a search of the Impala based on the smell of marijuana. During the search, Officer Snow removed an intact piece of the dashboard to the left of the steering wheel. Officer Snow was aware from previous searches of similar vehicles that the panel covered a hollow compartment that could be used to conceal contraband. Officer Snow had previously discovered firearms and narcotics in similar hidden compartments located in other Impala vehicles.

[5] According to Officer Snow, “[t]here is a turn knob for the light switch, in that style of Impala, if you pull on that knob, there is a void between the dashboard and the firewall.” Tr. Vol. II p. 18. The void “is only as big as the light switch but then extends very far back.” *Id.* Upon removing the compartment panel, Officer Snow discovered a Glock 19 model handgun, which had previously not been visible. No evidence was elicited that Officer Snow's search of the Impala revealed the presence of marijuana.

- [6] While B.R. was handcuffed on the sidewalk, Officer Shinn attempted to engage B.R. in conversation, though Officer Shinn was aware that B.R. was a juvenile and B.R. had not been advised of his rights or had meaningful consultation with a parent before being questioned by police. Officer Snow performed a DNA swab on the firearm and then arrested B.R. K.W. was not arrested.
- [7] On October 25, 2019, the State filed a petition to adjudicate B.R. a delinquent child, alleging the following, all of which would constitute crimes if committed by an adult: Count I, carrying a handgun without a license, a Class A misdemeanor; Count II, dangerous possession of a firearm, a Class A misdemeanor; Count III, possession of marijuana, a Class B misdemeanor;¹ and Count IV, operating a motor vehicle without ever receiving a license, a Class C misdemeanor. The State moved to dismiss Count III on December 11, 2019.
- [8] The juvenile court held a fact-finding hearing on January 21, 2020. Officer Snow testified that both B.R. and K.W. appeared “extremely nervous” and visibly shook as they interacted with police. *Id.* at 13. Officer Snow testified that he arrested B.R. because B.R. would have been able to reach the handgun.² Officer Snow testified that he believed he overheard B.R. tell a different officer

¹ The marijuana charge was dismissed prior to the subsequent fact-finding hearing.

² K.W., despite a prior gun charge and relationship to the owner of the vehicle, was not arrested, apparently because he would not have been able to reach the handgun from the passenger seat.

that B.R. “just likes guns.” Tr. Vol. II p. 28. The State presented no DNA evidence, despite the swabs of the firearm at the scene of the traffic stop.

[9] The trial court questioned the State regarding B.R.’s knowledge of the existence of the handgun during the following colloquy:

THE COURT: What about knowledge?

STATE: Judge, he is driving the car. I think knowledge would be input[ed]—

THE COURT: - his car?

STATE: I understand it is not his car, but he is driving the car —

THE COURT: While in somebody else’s car and contraband is found in a hidden compartment. Knowledge.

STATE: Again Judge, it would be my argument that *he must have put it there* and that he is aware that it is there.

THE COURT: Okay.

Tr. Vol. II p. 40 (emphasis added).

[10] On January 21, 2020, the juvenile court entered true findings for acts of juvenile delinquency that would constitute: Count I,³ carrying a handgun without a

³ The juvenile court did not enter a delinquency finding on Count II due to double jeopardy concerns.

license, a Class A misdemeanor; and Count IV, operating a vehicle without a license, a Class C misdemeanor, if committed by an adult. This appeal followed.

Analysis

[11] B.R. challenges the sufficiency of the evidence to support his adjudication as delinquent for acts that, if committed by an adult, would be carrying a handgun without a license, a Class A misdemeanor.⁴ “In juvenile delinquency adjudication proceedings, the State must prove every element of the offense beyond a reasonable doubt.” *A.B. v. State*, 885 N.E.2d 1223, 1226 (Ind. 2008) (citing *C.D.H. v. State*, 860 N.E.2d 608, 610 (Ind. Ct. App. 2007), *trans. denied*). “When reviewing the sufficiency of the evidence in a juvenile adjudication, we do not reweigh the evidence or judge witness credibility.” *B.T.E. v. State*, 108 N.E.3d 322, 326 (Ind. 2018). “We consider only the evidence favorable to the judgment and the reasonable inferences supporting it.” *Id.* (citing *K.S. v. State*, 849 N.E.2d 538, 543 (Ind. 2006)). “We will affirm a juvenile-delinquency adjudication if a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt.” *Id.* (citing *Moran v. State*, 622 N.E.2d 157, 159 (Ind. 1993)).

[12] “[O]ur jurisprudence on the issue of ‘possession’ is rather straightforward: it can be either actual or constructive.” *Sargent v. State*, 27 N.E.3d 729, 732-33 (Ind.

⁴ B.R. raises no challenges related to Count IV.

2015). “Actual” possession of contraband, whether a handgun or an illegal substance, occurs when a person has direct physical control over the item. *See, e.g., Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004). If the State cannot prove actual possession, it may nonetheless prevail on proof of “constructive” possession. *See, e.g., Gray v. State*, 957 N.E.2d 171, 174 (Ind. 2011). “A person constructively possesses [an item] when the person has (1) the capability to maintain dominion and control over the item; and (2) the intent to maintain dominion and control over it.” *Sargent*, 27 N.E.3d at 732-33 (quoting *Gray*, 957 N.E.2d at 174).

[13] The question here is whether a reasonable trier of fact, when considering the circumstances, could determine beyond a reasonable doubt that B.R. had constructive possession of the handgun in the hidden compartment.⁵ We first consider whether the evidence demonstrated that B.R. had the capability to maintain dominion and control over the handgun. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999) (With regard to the “capability” element of constructive possession, the State must show “that the defendant is able to reduce the controlled substance to the defendant’s personal possession.”). B.R. was seated close to the hidden compartment and would have been able to reduce the

⁵ To the extent that the State argues that B.R. had exclusive dominion and control over the premises, we disagree. The relevant “premises” is the car, not an isolated portion of the dashboard, as the State suggests. State’s Br. pp. 11-12. The difficulties K.W. would have to overcome to reach the weapon do not equate to B.R.’s exclusive control and dominion over the vehicle. B.R. was not alone in the car, which he did not own, and we decline the State’s invitation to adopt a novel interpretation of a straightforward and established line of jurisprudence.

handgun to his personal possession. Accordingly, the State presented evidence of B.R.'s capability to maintain dominion and control over the handgun.

[14] We next consider whether the evidence demonstrated that B.R. had the intent to maintain dominion and control over the handgun.

For the intent element, the State must demonstrate that the defendant had knowledge of the presence of the substance, and such knowledge “may be inferred from either the exclusive dominion and control over the premise containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant’s knowledge of the presence of the contraband.” *Id.* (quoting *Taylor v. State*, 482 N.E.2d 259, 261 (Ind. 1985)). A non-exhaustive list of examples of possible “additional circumstances” showing knowledge may include:

- (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 175; *see also Gee v. State*, 810 N.E.2d 338, 344 (Ind. 2004) (“[T]he State is required to show that whatever factor or set of factors it relies upon in support of the intent prong of constructive possession . . . demonstrate the probability that the defendant was aware of the presence of the contraband and its illegal character.”).

Shorter v. State, 151 N.E.3d 296, 305-06 (Ind. Ct. App. 2020), *trans. denied*.

[15] The State points to three “additional circumstances” that supposedly establish knowledge beyond a reasonable doubt: (1) B.R.’s alleged “furtive movements”; (2) B.R.’s “incriminating” comment; and (3) the handgun’s proximity to B.R.

[16] The testimony regarding B.R.’s “furtive movements” is questionable. Neither shaking nor being visibly nervous is “furtive.” To establish that a suspect has engaged in furtive movements, the act must connote evasion or concealment. *See, e.g., Jones v. State*, 924 N.E.2d 672, 675 (Ind. Ct. App. 2010) (including a description of furtive movement as: “reaching in the rear seat around the rear floorboard and around the front floorboard of the vehicle”); *Deshazier v. State*, 877 N.E.2d 200, 208 (Ind. Ct. App. 2007) (assessing defendant’s “acts of moving his hands towards his legs, resisting arrest, and fleeing. . .”), *trans. denied*. The evidence does not indicate that B.R. attempted to conceal anything or that he was being secretive or evasive. It is reasonable to conclude that B.R. was nervous because he was driving a car without a license; moreover, Officer Snow lied to B.R. and informed him that the car—which B.R. did not own—was pertinent to an investigation into domestic violence, and B.R.’s passenger was underage and intoxicated. The descriptions of B.R.’s demeanor fail to establish that B.R. had knowledge of the existence of the firearm.

[17] Next, we address B.R.’s allegedly “incriminating” comment that he “just likes guns.” The State argues that “the factfinder could reasonably conclude that there was *no other reason* for B.R. to volunteer that he ‘just liked guns’ other than to explain why he had a gun with him.” State’s Br. p. 12 (emphasis added). We disagree. The State asserts that the statement was volunteered, but our

reading of the record shows that conflicting accounts of the statement actually seem to suggest that it was in response to improper questioning from Officer Shinn, a fact recognized by the juvenile court.⁶ Moreover, we find no testimony in the record establishing B.R.’s awareness that Officer Snow had discovered a handgun when the alleged statement was made. We find that, in the absence of additional context, the alleged comment does not rise to the level of an “additional circumstance” proving B.R.’s knowledge of the existence of the concealed handgun beyond a reasonable doubt.

[18] Finding that neither the alleged furtive movements nor the alleged incriminating statement would be persuasive to a “reasonable trier of fact,” we are left with B.R.’s proximity to the concealed handgun. The State is required to show that the factors “it relies upon in support of the intent prong of constructive possession . . . demonstrate the probability that the defendant was aware of the presence of the contraband and its illegal character.” *Shorter*, 151 N.E.3d at 305-06 (quoting *Gee*, 810 N.E.2d at 344). The circumstances here, however, do not demonstrate that B.R. was aware of the handgun despite his proximity. B.R. merely offered to drive his intoxicated friend home and, in the friend’s car, a handgun was hidden in a compartment not readily noticeable.

⁶ When Officer Shinn attempted to relay the alleged statement, B.R. objected and sought to suppress the comment. The juvenile court sustained the objection. Officer Snow testified that he overheard B.R. make the same comment, apparently to someone other than Officer Shinn.

Accordingly, we find that the proximity of the handgun to B.R., standing alone, does not establish that B.R. knew of the handgun's existence.

[19] The State has identified no other factors to demonstrate B.R.'s knowledge of the handgun. The State failed to provide "additional circumstances" to determine beyond a reasonable doubt that B.R. knew of the concealed handgun.

Although the State did prove that B.R. had the capability to exercise "dominion and control" over the concealed handgun, it failed to prove that B.R. possessed the intent to do so. *Sargent*, 27 N.E.3d at 732-33 (quoting *Gray*, 957 N.E.2d at 174). Accordingly, the State failed to prove that B.R. constructively possessed the handgun, and, therefore, the evidence is insufficient to sustain B.R.'s adjudication for carrying a handgun without a license. We reverse the adjudication.

Conclusion

[20] Because the evidence is insufficient, we reverse B.R.'s adjudication for carrying a handgun without a license.

[21] Reversed.

Bailey, J., and Robb, J., concur.