

IN THE COURT OF APPEALS OF IOWA

No. 1-205 / 10-0995
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LUCAS DANIEL LUCK,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Lucas Daniel Luck appeals his conviction for possession of a firearm as a felon. **REVERSED.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha Trout, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Lucas Daniel Luck appeals from his conviction for the offense of possession of a firearm as a felon, in violation of Iowa Code section 724.26 (2009). He contends there was insufficient evidence to support his conviction and the district court erred in applying the wrong standard and in failing to grant his motion for a new trial. Considering the facts and circumstances of this case, we find Luck's movements after the traffic stop and proximity to the firearm insufficient to prove beyond a reasonable doubt he had control or dominion over the firearm. We reverse the district court's judgment of conviction and sentence. Our disposition of the case renders it unnecessary to address Luck's claim in regard to the district court's ruling on his motion for a new trial.

I. Background Facts and Proceedings.

The facts viewed most favorably to the State include the following: At approximately 2:50 a.m. on November 6, 2009, Waterloo Police Officers Dustin Brandt and Jamie Sullivan initiated a traffic stop in downtown Waterloo on a 1999 Buick Regal with a faulty brake light. The officers noticed three passengers in the vehicle and saw they "were moving around quite a bit . . . like they might be hiding stuff somewhere inside the car." Officer Brandt approached the driver's side and made contact with the driver, Willie Phillips. Officer Sullivan approached the passenger's side and observed Lakahia Rocket-Johnson in the front passenger seat and Luck alone in the backseat. Officer Sullivan noticed Luck appeared to be "very nervous" and "wouldn't make eye contact" with him. He further observed that Luck kept "looking around" and "fidgeting around."

Officer Brandt asked Phillips to get out of the vehicle so he could show him the defective brake light. Phillips told Officer Brandt the vehicle belonged to Rocket-Johnson. Officer Brandt asked Rocket-Johnson for permission to search the vehicle, which she granted. As she exited the vehicle, Officer Sullivan noticed a weapon, a .410 caliber shotgun, between the front seats and yelled, "Gun, gun." At that point, Phillips fled the scene on foot.

In the meantime, Officer Shawn Monroe and K-9 Officer Albert Bovy along with K-9 Spike, responded to assist with a search of the vehicle. Officers Monroe, Bovy, and K-9 Spike pursued Phillips. Officers Sullivan and Brandt remained at the scene with Rocket-Johnson and Luck. They asked Luck to exit the vehicle, and when he did, the officers observed another weapon, a .22 caliber rifle, "laying across the floorboard" of the backseat, which they were unable to observe until Luck exited the vehicle. Officer Sullivan retrieved the weapon from the backseat floorboard. He was "pretty certain" the gun was "not covered at all," but Officer Brandt thought was covered by a coat or possibly a blanket.

The guns were placed on the hood of the vehicle to check for ammunition. Officer Brandt unloaded the rifle; the shotgun was not loaded. Several minutes later, the guns were returned to the interior of the vehicle for photographs. Apparently, the guns were switched during this staging, as the .410 caliber shotgun was placed in the backseat and the .22 caliber rifle was placed in the front seat.

K-9 Spike apprehended Phillips several blocks from the vehicle. Phillips tried to swallow a small plastic bag as Officer Monroe tried to place handcuffs on him. Officer Monroe tased Phillips, and he spit out the plastic bag, containing

five separately wrapped packages of cocaine. Officers searched the vehicle and found a box of plastic storage bags in the backseat behind the driver's seat, a scale, and a plastic bag containing crack cocaine. Officers found more cocaine on the floorboard of the driver's seat.

The State charged Luck by trial information with possession of a firearm as a felon.¹ Luck filed a written arraignment and entered a plea of not guilty. A jury trial began on February 16, 2010. At the close of the evidence, Luck stipulated to his prior felony convictions (an October 1999 conviction for theft and four drug-related felonies from October 2002). The jury found Luck guilty of possession of a firearm as a felon. On June 7, 2010, following a hearing, the district court sentenced Luck to an indeterminate term of incarceration not to exceed fifteen years and imposed a three-year minimum sentence. Luck now appeals.

II. Scope and Standard of Review.

A challenge to the sufficiency of the evidence is reviewed for corrections of errors at law. Iowa R. App. P. 6.907; *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006). In reviewing challenges to the sufficiency of the evidence supporting a guilty verdict, we consider all of the evidence in the record in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence. *Keeton*, 710 N.W.2d at 532. A jury's verdict is binding on appeal if it is supported by substantial evidence. *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006). Evidence is substantial when a reasonable

¹ Phillips was a codefendant charged with possession with intent to deliver and possession of a firearm as a felon, but is not a party to this appeal.

mind would recognize it sufficient to reach the same findings. *State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005).

III. Sufficiency of the Evidence.

Luck argues there was insufficient evidence to support his conviction. The State was required to prove beyond a reasonable doubt both elements of possession of a firearm as a felon: Luck (1) knowingly possessed or exercised dominion or control of a firearm² and (2) was previously convicted of a felony. Iowa Code § 724.26. Luck stipulated to the second element.

Luck contends there was insufficient evidence to prove that he “knowingly possessed” or had “dominion or control” over either of the weapons found in the vehicle. He argues “there was testimony that both the weapons were covered” and “[t]he exact location of the weapons is unknown as the weapons were removed from the car and then replaced in the wrong locations before photographs were taken.” He further points out he was not the owner of the vehicle and there was no testimony when he entered the vehicle, which may have been “just seconds prior to the car being stopped by the police.”

Possession of a firearm can be actual or constructive. *State v. Eickelberg*, 574 N.W.2d 1, 3 (Iowa 1997). A defendant has actual possession of a firearm if he or she has “direct physical control” over the firearm. See *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003); *Eickelberg*, 574 N.W.2d at 3. Possession is constructive when the defendant has knowledge of the presence of the firearm and maintains dominion and control of the place where the firearm was found.

² The jury was instructed that “dominion and control” means “ownership or right to the firearm and the power or authority to manage, regulate, or oversee its use.”

State v. Atkinson, 620 N.W.2d 1, 3 (Iowa 2000). “This is a constructive-possession case; actual possession requires [the item] to be found on the defendant’s person, and that was not the case here.” *Id.*; see also *Cashen*, 666 N.W.2d at 569; *Eickelberg*, 574 N.W.2d at 3.

As a guide in determining whether a defendant had constructive possession, we consider a number of factors, including incriminating statements made by the defendant; incriminating actions of the defendant upon the police’s discovery of contraband among or near the defendant’s personal belongings; the defendant’s fingerprints; and any other circumstances linking the defendant to the contraband. *Cashen*, 666 N.W.2d at 571.

Even if some of these facts are present, we are still required to determine whether all of the facts and circumstances, including those not listed above, allow a reasonable inference that the defendant knew of the [contraband’s] presence and had control and dominion over the contraband.

Id.; *State v. Webb*, 648 N.W.2d 72, 79 (Iowa 2002) (observing the peculiar facts and circumstances of each case determine whether the defendant had constructive possession of the contraband).

In this case, Luck, along with two other people, was present in the vehicle where the firearms were found. Therefore, Luck “was not in the exclusive possession of the premises—the car.” *Cashen*, 666 N.W.2d at 571. In situations where the defendant is in joint possession of the premises, knowledge and the ability to maintain control or dominion over the contraband will not be inferred.

As our supreme court has instructed:

If the premises on which such substances are found are in the exclusive possession of the accused, knowledge of their presence on such premises coupled with his ability to maintain control over

such substances may be inferred But where the accused has not been in exclusive possession of the premises but only in joint possession, knowledge of the presence of the substances on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof. Such proof may consist either of evidence establishing actual knowledge by the accused, or evidence of incriminating statements or circumstances from which a jury might lawfully infer knowledge by the accused of the presence of the substances on the premises.

State v. Reeves, 209 N.W.2d 18, 23 (Iowa 1973), quoted with approval in *Cashen*, 666 N.W.2d at 570; *State v. McDowell*, 622 N.W.2d 305, 308 (Iowa 2001).

Luck was the only passenger in the back seat with the .22 caliber rifle, so he had access to the place where that firearm was found. *Cashen*, 666 N.W.2d at 571. However, “[p]roof of opportunity of access to a place where [contrabands] are found will not, without more, support a finding of unlawful possession.” *Reeves*, 209 N.W.2d at 22. The State was required to introduce other evidence that proved Luck’s knowledge of the firearm and his authority or right to maintain control of it. See *Cashen*, 666 N.W.2d at 571.

The State contends Luck had knowledge the gun was in the back seat because he was “nervous” and “appeared disturbed by the officers’ presence around the vehicle.” The State further asserts, “[t]he jury could have reasonably found that when Luck was moving around in the vehicle after the stop, he was trying to hide the weapon.” The State argues Luck had dominion or control of the firearm “because he was the only person in the back seat and the .22 caliber rifle was found where he had been sitting.” As the State contends, “Luck had the easiest and most direct access” to the weapon, and “[s]ome part of his body must have literally been in contact with the loaded weapon.”

However, the officers' testimony concerning the movement of the occupants of the vehicle, Luck's demeanor, and Luck's access to the gun was the only evidence offered by the State relevant to the questions of knowledge and control and dominion to support the charge. *But see State v. Carter*, 696 N.W.2d 31, 40 (Iowa 2005) (finding driver defendant was in constructive possession of controlled substances found in console of vehicle when defendant did not immediately stop the vehicle but instead veered across several lanes of traffic while his head was down and struck the curb while attention was focused on console; defendant exited vehicle while engine was still running and officer believed they would have to chase him on foot; and defendant appeared nervous and gave false name when asked for identification). We are unable to find this evidence is sufficient to support a finding that Luck was in constructive possession of the weapon discovered on the floorboard of the backseat.

Officer Brandt recalled that Officer Sullivan pointed out to him that after the stop, the occupants in the vehicle were moving around "like they may be hiding stuff somewhere inside the vehicle." However, Officer Brandt could not recall any specific movements by Luck nor did Officer Sullivan identify any specific movement by Luck. None of the occupants made any admissions or claimed the drugs and firearms were possessions of the other two. There was also no suspicious behavior by Luck when he was asked to exit the vehicle, any claim that Luck lied to the officers, and there was no ammunition found near or on Luck. *See State v. Garcia*, 116 P.3d 72, 76 (N.M. 2005) (concluding backseat defendant was in constructive possession of firearm found on floor of vehicle when defendant had placed his beer bottle under the seat in a position right next

to the gun, such that it would be hard for anyone not to be aware of the gun; that upon getting out of the car, defendant acted in a manner that arguably showed a consciousness of guilt; and that defendant had been sitting on the ammunition clip that matched the gun); *Gamble v. State*, 105 S.W.3d 801, 803-04 (Ark. Ct. App. 2003) (finding backseat defendant was in constructive possession of firearm found underneath seat when defendant gave several different dates of birth and repeatedly gave a false name when officers attempted to determine his identity; and repeatedly bent over in his seat during driver's attempt to evade officers).

Here, Luck was not the owner of the vehicle. There were three passengers, but only two guns were found. See *Hoffman v. State*, 520 N.E.2d 436, 438 (Ind. 1988) (retrieving weapons under each of the seats of three occupants in vehicle created inference that each man was armed and each discarded the weapon under the seat at the time the officers required them to leave the vehicle). There was no testimony Luck had any motive to have a weapon on him. See *In re F.T.J.*, 578 A.2d 1161, 1161 (D.C. 1990), *abrogated by Rivas v. United States*, 783 A.2d 125 (D.C. 2001) (observing defendant testified he had been shot a month earlier and therefore "had a motive to have some weapons on him").

Further, the gun on the backseat floorboard was not in plain view. The vehicle was stopped when it was dark and officers needed to use a flashlight to search the car. See *In re M.I.W.*, 667 A.2d 573, 576 (D.C. 1995) (noting officer's use of flashlight to search vehicle stopped at night created inference that passenger could not see firearm on floorboard). There was no testimony whether the car had a functional interior light. See *id.*

The gun was not found with Luck's personal effects. In fact, Officer Brandt testified the weapon "was covered by either a coat or blanket." The photographs taken at the scene depict the handle of the gun was pointing away from where Luck was sitting. There was a bulky base to a child's car seat between the gun's handle and Luck. Further, the photographs depict the wrong gun in the backseat, because the guns were switched when the officers tried to reconstruct the original location of the guns. And significantly, the officers did not track the guns' serial numbers or fingerprint either gun. See *People v. Bailey*, 776 N.E.2d 824, 828 (Ill. App. Ct. 2002).

There was no testimony as to when Luck entered the vehicle. *But see F.T.J.*, 578 A.2d at 1161 (observing defendant was in the car for fifteen or twenty minutes and at some point "would have, virtually, kicked the machine gun" found with him in the backseat). Luck was not charged with possession of cocaine, even though some cocaine was located on the backseat floorboard near the weapon. When the vehicle was stopped, the driver ran, but not Luck. *State v. Haskins*, 316 N.W.2d 679, 681 (Iowa 1982) ("An inference of guilt may be drawn from flight for the purpose of avoiding or retarding prosecution."). The driver's flight may be an inference of guilt of possession of drugs or possession of firearms, or both. *Id.* Further, none of the passengers in the vehicle, including Luck, testified at trial. Therefore, there were no admissions by Luck or the other passengers.

Upon our review of all the evidence in the record in the light most favorable to the State, and making all reasonable inferences that may fairly be drawn from the evidence, we are unable to conclude substantial evidence

supports the jury's verdict in this case. "A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive." *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). However, even if we infer knowledge from the facts of this case, Luck's proximity to the firearm is insufficient to prove control and dominion. *Atkinson*, 620 N.W.2d at 3-4; see also *Cashen*, 666 N.W.2d at 572 ("We do not presume possession where the defendant does not own the car and a finding of constructive possession cannot rest on mere proximity.").

IV. Conclusion.

This evidence was insufficient to support the conviction of possession of a firearm as a felon. Considering the facts and circumstances, Luck's proximity is insufficient to prove beyond a reasonable doubt he had control or dominion over the firearm. We therefore reverse the district court's judgment of conviction and sentence. Our disposition of the case renders it unnecessary to address Luck's claim in regard to the district court's ruling on his motion for a new trial.

REVERSED.