

IN THE COURT OF APPEALS OF IOWA

No. 3-1048 / 12-2314
Filed December 18, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RAMOND MANLEY THOMPSON JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Colleen D. Weiland, Judge.

A defendant appeals his conviction for carrying weapons. **REVERSED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha Trout, Assistant Attorney General, Carlyle D. Dalen, County Attorney, and William Hoekstra, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Tabor and Bower, JJ.

TABOR, J.

Oklahoma resident Ramond Thompson appeals his Iowa conviction for carrying weapons. He argues the prosecution failed to offer evidence he constructively possessed the loaded handgun that police found stowed in the passenger door of a stolen pickup truck occupied by two of Thompson's friends.

Thompson was not in the pickup when police found the gun, but he told another friend that the gun was in the truck's door and told police he sat next to the door during the trip to Iowa. The question on appeal is whether knowledge of the gun's presence and recent proximity to the location where it was found are sufficient to prove he "knowingly carry[ed] or transport[ed] in a vehicle a pistol or revolver" in violation of Iowa Code section 724.4(1) (2011). Because knowingly carrying or transporting denotes actual or constructive possession, and the State offered no proof Thompson had the authority or right to maintain control over the gun, we find the State's evidence of Thompson's guilt insufficient.

I. Factual Background and Prior Proceedings

Thompson traveled to Clear Lake, Iowa with three acquaintances: his friend DeMarco Gardner, Gardner's girlfriend Krista Pendleton, and Krista's friend Katie Mongan. Mongan lived with her mother in Florida but arranged to return to Iowa, where her father lived, to serve a two-day jail sentence for operating while intoxicated.

Driving Pendleton's car from Florida, the young women picked up Gardner and Thompson in Oklahoma and continued north to Iowa. The foursome arrived in Clear Lake on August 20, 2012. They checked into the Best Western Holiday

Lodge, where they had a discounted room thanks to Mongan's stepmother who worked there. At 5 p.m., Mongan turned herself in at the jail while the others napped.

But when Mongan was released from jail at 8 a.m. on August 22, 2012, her friends were nowhere to be found. Their cell phones went to voicemail when she tried to call them. Just after Mongan called her dad to pick her up, another friend came by and said Pendleton and the others were stranded in Kansas City. Mongan found some of her belongings left behind in the motel room but realized her purse was in Pendleton's car. Because Mongan was "freaking out," she called her dad and he picked her up for breakfast. Just as they were pulling out, Gardner pulled up in front of the motel in a pickup truck; Pendleton was in the passenger seat.

Mongan asked her father to turn his vehicle around. Mongan then approached the truck and confronted Pendleton and Gardner about abandoning her. During their explanation, they told her the pickup was stolen. When her father heard that information, he called the police. Meanwhile, Thompson came walking towards Mongan from the front of the motel. As the police arrived and started looking at the truck, Thompson disclosed to Mongan that there was a gun in the door.

The officers eventually determined the truck's owner in Missouri had reported it missing. During a search of the stolen truck, the police found a handgun in the map pocket of the passenger door. When checking to see if it was in working condition, officers found a live round in the chamber.

Clear Lake Officer Ryan Eskildsen questioned Thompson, who initially disassociated himself from the truck, claiming he received a ride to Iowa from Mongan's dad. But when pressed by the officer, Thompson said he did not know her dad's name. When officers learned that Thompson told Mongan about the gun being in the truck, they arrested both Thompson and Gardner.

In a later interview with Officer Eskildsen, Thompson said he, Gardner, and Pendleton returned to Oklahoma while Mongan served her two days in jail. Thompson said Gardner and Pendleton were returning to Iowa to pick up Mongan when their car broke down. According to Thompson, by the time he joined them at their motel in Missouri, they already had the truck. "He said he had no idea the vehicle was stolen and didn't ask any questions on the way there and just sat in the passenger seat the whole time." Thompson denied knowledge of the gun, saying: "[I]t's not my gun it must be Demarco's."

The State charged Gardner and Thompson in a joint trial information with two counts: exercising control over stolen property and carrying weapons. A jury heard Thompson's case on November 27 and 28, 2012. The jurors acquitted him of exercising control over stolen property but convicted him of carrying weapons, an aggravated misdemeanor under section 724.4(1). The court sentenced him to ninety days in jail, suspended the fine, and imposed a DARE surcharge. Thompson filed a timely notice of appeal.

II. Standard of Review

We review Thompson's challenge to the sufficiency of evidence for errors at law. See Iowa R. App. P. 6.907; *State v. Lamb*, 573 N.W.2d 267, 268 (Iowa

1998). We examine the evidence in the record in the light most favorable to the State, looking for substantial evidence, including any fair inferences, which would support the verdict. *Lamb*, 573 N.W.2d at 268. Substantial evidence is the kind of proof that would convince a rational jury the defendant is guilty beyond a reasonable doubt. See *State v. McCullah*, 787 N.W.2d 90, 93 (Iowa 2010). It is not enough for evidence to raise “suspicion, speculation, or conjecture” as to the defendant’s guilt. *Id.*

III. Analysis

To convict Thompson of carrying weapons, the State had the burden to prove the following elements:

1. On or about the 22nd day of August, 2012, the defendant knowingly carried or transported a pistol or revolver in a vehicle.¹
2. The pistol or revolver was:
 - a. loaded; or
 - b. unloaded and not inside a closed and fastened container or a securely wrapped package that is too large to be concealed on the person; or
 - c. unloaded and not inside a cargo or luggage compartment where the pistol or revolver will not be readily accessible to any person riding in the vehicle.

See Iowa Code § 724.4(1). The jury instructions did not define the terms “carried” or “transported” as used in the marshaling instruction.

At trial, defense counsel moved for judgment of acquittal by arguing there was no proof Thompson ever drove the vehicle and no proof he ever touched the gun. The court agreed the State’s case was “not particularly strong” but found

¹ The district court instructed the jury that to “know” something means having a “conscious awareness” of it.

sufficient circumstantial evidence to submit it to the jury. The court also reasoned Thompson knew the gun was in the vehicle and “didn’t object.”

On appeal, Thompson argues the State only proved he was “likely in the same vehicle with a loaded gun.” Thompson acknowledges the strength of Mongan’s testimony that he knew police might find the gun but points out “no evidence established when he became aware that a gun was in the truck.” And even if he knew the gun was in the door when he was a passenger in the truck, those facts alone do not prove he had any control over the weapon. Thompson contends because the gun was not found on his person, the State was required to prove he constructively possessed it.

In response, the State does not discuss whether constructive possession is an element of carrying weapons, instead arguing: “While there may have been no direct evidence to establish the knowing transportation of the gun, there is ample circumstantial evidence to establish this fact.” The State highlights Mongan’s testimony that Thompson told her about the gun being in the truck before police found it, as well as her testimony that Thompson called her from jail to tell her it would be “best” for her not to “come to court.”

To determine whether the State proved the offense of carrying weapons, we look to the statutory elements. The verbs at issue are “carried” and “transported.” See Iowa Code § 724.4(1). The legislature did not define these terms in Iowa Code chapter 702 or chapter 724. In interpreting undefined statutory language, we, like the jury, give words their common and ordinary meaning. See *State v. Bush*, 518 N.W.2d 778, 780 (Iowa 1994). As sources for

the common and ordinary meaning of words, we consult prior judicial interpretations and dictionary definitions. See *State v. White*, 668 N.W.2d 850, 856 (Iowa 2003).

The United States Supreme Court, in an opinion interpreting a federal criminal statute that prohibits carrying a firearm in relation to drug trafficking, defined “carry” as implying “personal agency and some degree of possession.” *Muscarello v. United States*, 524 U.S. 125, 134–35 (1998). The *Muscarello* court concluded the word “transport” encompassed a broader category of activity than the word “carry,” and “transport” implied the movement of goods over great distances. *Id.* at 135.

The dictionary offers multiple definitions for “carry.” *Id.* at 140 (Ginsburg, J., dissenting) (“Without a doubt, ‘carries’ is a word of many meanings, definable to mean or include carting about in a vehicle.”). We find the dictionary’s first listing applies best to carrying weapons: “to bear or convey from one place to another, transport.” *The American Heritage Dictionary* 243 (2nd College ed. 1985). The definition of “transport” is similar: “to carry from one place to another, convey.” *Id.* at 1288.

After reviewing these definitions, we agree with Thompson’s position that he cannot be convicted of carrying or transporting a weapon without foundational proof he actually or constructively possessed the gun. Transportation or physical movement of the weapon presupposes possession. See *Commonwealth v. Magwood*, 538 A.2d 908, 909 (Pa. Super. Ct. 1988) (holding conviction for

carrying firearm without a license required proof of defendant's power of control over the weapon and his intention to exercise that control).

Possession can be actual or constructive. *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003). Actual possession means direct physical control; constructive possession means knowledge of an item's presence and the authority or right to maintain control of the item. *Id.*

The State did not offer any evidence Thompson had direct physical control over the handgun. He was not in the truck when the police found the gun in the passenger side door. The police did not submit the gun for fingerprinting because it had been handled by several different officers, and they did not believe it was "feasible to send it down to the lab."

Because Thompson did not have direct physical control of the gun, the State was required to show constructive possession. A finding of constructive possession cannot rest on mere proximity. *Id.* at 572. When, as here, contraband is found in a vehicle occupied by more than one person, we consider the following questions: (1) Was the contraband in plain view? (2) Was it among the defendant's personal effects? (3) Was it near the defendant? (4) Did the defendant own the vehicle? and (5) Did the defendant engage in suspicious activity? See *State v. Atkinson*, 620 N.W.2d 1, 4 (Iowa 2000).

Thompson did not own the truck; it was stolen. No evidence suggests the gun was with his personal effects. But the jury did learn from Mongan's testimony that Thompson knew the police would find a gun in the truck. The police found the gun in the passenger door. Officer Eskildsen testified that

Thompson admitted sitting in the passenger seat on the trip from Missouri to Iowa (though he did not admit knowledge or ownership of the gun in the interview).

The question is whether the jurors could fairly infer the gun's location remained the same from the time Thompson was in the truck until police found it. And if that is a fair inference, does sufficient evidence establish Thompson "had the authority or right to maintain control" of the gun, i.e., constructive possession. *Id.* at 5. Regarding a defendant's "right to maintain control," our Iowa Supreme Court has instructed:

While it seems anomalous to look at a defendant's "right" to control [contraband] in order to establish possession, that concept basically distinguishes a defendant's *raw physical ability* to exercise control over contraband simply because of the defendant's proximity to it and the type of rights that can be considered constructive possession.

Id. (emphasis added).

Here, could the jurors further infer from the evidence that Thompson knew the gun was in the door when he was a passenger in the stolen truck that Thompson had some proprietary interest or immediate right to exercise control over the gun? See *State v. Bash*, 670 N.W.2d 135, 139 (Iowa 2003) (ruling "knowledge of the presence of [contraband] and the authority or right to maintain control of it, that is, constructive possession, could not be inferred by the jury from the defendant's joint control of the premises"). Only by building inference upon inference, could the jury reasonably conclude Thompson had constructive possession of the gun and knowingly carried or transported the gun found by police. See *State v. Snyder*, 635 So. 2d 1057, 1058-59 (Fla. Dist. Ct. App. 1994)

(rejecting State’s contention that (1) defendant’s proximity to drugs as passenger in the car and (2) prior knowledge of drug delivery gave rise to the inference defendant had dominion and control over the drugs—“the ultimate existence of constructive possession requires an impermissible pyramiding of inferences”). Even viewing the evidence in the light most favorable to the State, the proof of Thompson’s proprietary interest in the gun falls into the category of speculation and conjecture.²

We conclude the district court should have granted Thompson’s motion for judgment of acquittal. His knowledge of the gun and his lack of objection to it being carried or transported in the truck was not substantial evidence that he was guilty beyond a reasonable doubt.³

REVERSED.

² We recognize Thompson’s attempt to dissuade Mongan from testifying may be viewed as consciousness of guilt. See generally *State v. Langlet*, 283 N.W.2d 330, 334 (finding spoliation evidence implies consciousness of guilt). But we do not see that general testimony from Mongan as sufficient to establish the missing connection between Thompson and the gun.

³ Because we reverse Thompson’s conviction, we do not need to address his issue concerning the DARE surcharge imposed at sentencing.