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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

280

STATE OF IOWA,)

Plaintiff-Appellee,) Filed February 25, 1987

vs.)

DENNIS ROSS SMITH,) 6-367
85-1545

Defendant-Appellant.)

Appeal from the Iowa District Court for Tama County (No. CR1889) - Paul J. Kilburg, Judge.

Defendant appeals from his conviction for possession of a firearm by a felon in violation of Iowa Code section 724.26. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney General; and Richard Vander Mey, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J. 281

The defendant, Dennis Ross Smith, appeals from his conviction for possession of a firearm by a felon in violation of Iowa Code section 724.26 (Iowa 1983). The defendant argues on appeal that the evidence was insufficient to support a verdict of guilty and that the jury should have been specifically instructed that mere proximity to a firearm is insufficient to constitute possession. We affirm.

On November 21, 1984, two state conservation officers, while on patrol in rural Tama County at approximately 10:30 p.m., spotted a 1971 Chevrolet pickup truck with a red light shining from the driver's side. Testimony at trial revealed that the defendant and his seventeen-year-old son were hunting raccoon and were using the red spotlight to aid their effort in locating them. The officers, concluding that the occupants of the vehicle might be using the light to hunt illegally, stopped the vehicle and observed that the defendant was sitting on the driver's side and his son on the passenger side. The occupants were requested to step out of the truck. A subsequent search of the truck's cab revealed (1) an unloaded .22 caliber rifle in a partially-closed case between defendant and his son and accessible to both, (2) two red spotlights, (3) another .22 caliber rifle with a shortened barrel in a partially-closed case under the driver's seat, and (4) twelve rounds of ammunition. The butt end of the rifle under the driver's seat was partially out of its case and was visible to the officers upon looking into the vehicle.

The two officers issued citations to both men for illegal hunting with artificial lights. The officers seized the rifle found on the seat between the defendant and his son, but did not seize the rifle observed underneath the driver's seat. Such gun was later retrieved at the defendant's home pursuant to a search warrant. Officer Mullins, one of the conservation officers, asked the defendant

and his son who owned the guns. The defendant replied that the guns were his son's and further stated that he did not know the second gun was underneath the seat. Officer Mullins subsequently checked with the county vehicle registration office and learned that the vehicle was registered to the defendant.

At trial, the defendant's son, Terry Smith, testified that the gun found on the seat, exhibit 1, had belonged to him and that it had been given to him as a Christmas present. Terry also testified that exhibit 4, the rifle found under the driver's seat, was his as well, but had not told his father the rifle was kept there. Terry testified that he kept the gun in the truck because of a defective firing pin. Terry additionally testified that he had bought the truck from James Wandling.

Wandling testified that he had sold the pickup to Terry, but had registered it under the defendant's name based on advice from the sheriff that the car should be registered in the parent's name. Brenda Smith testified that she had given Terry exhibit 1 as a Christmas gift. Douglas Zerba testified that he had previously owned exhibit 4, that it had a faulty firing pin, and that he had given it to Terry.

The defendant testified that he did not know that exhibit 4 was underneath the seat of the truck and at no time did he have possession or control of the rifles. Defendant admitted that he had previously been convicted of a felony.

At the close of the State's case-in-chief and again at the close of all the evidence, the defendant moved for a judgment of acquittal on the ground the State had failed to prove he possessed a firearm. The trial court overruled these motions. In its instructions to the jury, the judge gave the following instruction on possession:

> The term "possession" as used in these instructions means the having or keeping of a firearm by the defendant. It must be conscious possession and control of the firearm;

> and he must exercise dominion and control over it or have the actual care and management of it.
>
> You are further instructed that "possession" as herein defined may be in more than one person.

The defendant requested the following addition to the above instruction, which the court refused:

> However, mere proximity to a firearm does not constitute possession in more than one person. In order to find the defendant guilty you must find beyond a reasonable doubt that he exercised dominion and control over a firearm on the date in question.

The jury subsequently returned a verdict of guilty.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. We are not bound by the court's determination of law. Mosebach v. Blythe, 282 N.W.2d 755, 759 (Iowa 1979).

In order to prove that the defendant had possession of the firearms, the State had the burden of presenting sufficient evidence such that a rational trier of fact could find, beyond a reasonable doubt, that the defendant possessed a firearm. See Jackson v. Virginia, 443 U.S. 307, 317-18, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560, 572-73 (1979). Thus, pursuant to Iowa Code section 724.26 (1983), the State had to prove two elements: (1) that defendant possessed a firearm, and (2) that defendant had previously been convicted of a felony. Since the defendant had already admitted being convicted of a felony, the only real issue in this case is whether the defendant possessed a firearm subsequent to his felony conviction.

In reviewing cases where a defendant claims there is insufficient evidence to support a conviction for a criminal offense, we view the evidence in a light most favorable to the State. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981).

"All legitimate inferences which may fairly and reasonably be deducted therefrom will be accepted." Id. We must, however, examine all the evidence. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). If there is substantial evidence for the verdict in the record, the jury verdict is conclusive. Id. at 338. Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. Id. at 339. The crucial question is thus "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 317-19, 99 S. Ct. at 2788-89, 61 L. Ed. 2d at 572-73 (emphasis added).

Examining the evidence in a light most favorable to the State, we find that there was sufficient evidence for a rational finder of fact to conclude that defendant was in possession of a firearm beyond a reasonable doubt. To prove possession, the State had to prove that the defendant consciously controlled the firearm and exercised dominion and control over it. II Iowa Uniform Jury Instructions No. 2404. In addition, the State had to prove that the defendant was aware of the presence of the gun. State v. Krana, 246 N.W.2d 293, 295 (Iowa 1976).

In the present case, both the defendant and the State introduced evidence to support their case. The defendant's son, Terry, testified that he owned both guns and that he had not told his father about exhibit 4, which was underneath the seat. Terry further testified that he was the actual owner of the pickup. The defendant testified that he was unaware that exhibit 4 was underneath the seat and that indeed his son owned the truck. Several witnesses called on the defendant's behalf testified that they had given Terry the rifles and that Terry was the owner of the truck. By contrast, the State's evidence showed that the defendant was the registered owner of the pickup. The State's evidence

also tended to show that the defendant could easily have exercised dominion or control of exhibit 1, which was on the seat between the defendant and his son. Likewise, the jury could infer from the location of the rifle in the pickup that the defendant was aware of the presence of exhibit 4 and from this could reasonably infer that the defendant exercised dominion and control over it, since the conservation officers testified that exhibit 4 was sticking out from underneath the seat and the butt of the rifle was visible when the officers looked inside the pickup.

It has long been recognized that the determination of the credibility of witnesses and the weight to be given their testimony is specifically within the province of the trier of fact. Knight v. Anderson, 292 N.W.2d 411, 415 (Iowa 1980). The trier of fact is not bound to accept testimony as true, even where such testimony is uncontroverted. In Interest of G.R., 348 N.W.2d 627, 632 (Iowa 1984). Moreover, circumstantial and direct evidence are equally probative; the substantial evidence rule requires that the circumstances have sufficient probative force to constitute the basis for a legal inference and not for mere speculation. Harsha v. State Savings Bank, 346 N.W.2d 791, 800 (Iowa 1984). Additionally, we find this case analogous to State v. Hall, 301 N.W.2d 729, 731 (Iowa 1981), wherein the court found that there was sufficient evidence to uphold the defendant's conviction for possession of a firearm by a felon where the evidence showed that the guns were kept in defendant's home and defendant made conflicting statements to detectives concerning ownership of the guns, notwithstanding defendant's claim at trial that his mother owned the guns. From this we conclude that a rational trier of fact could have found beyond a reasonable doubt from the evidence introduced at trial that the defendant was in possession of a firearm in violation of Iowa Code section 724.26 (1983).

The defendant additionally contends that the trial court erred in refusing to instruct the jury that mere proximity to a firearm does not constitute possession. We find no merit in defendant's contention.

It is the duty of the trial court to fairly present the issues and the laws of the case to the jury in order that they may have an intelligent conception of the questions for decision. State v. Gilroy, 313 N.W.2d 513, 520 (Iowa 1981). When determining whether the trial court erred in refusing to accept the defendant's requested instruction, it is necessary to read the court's instructions as a whole. State v. Lindsay, 302 N.W.2d 98, 102 (Iowa 1981), citing State v. Horn, 282 N.W.2d 717, 730 (Iowa 1979). "A trial court is not required to instruct in the language of requested instructions if the subject is covered in the court's own instructions." Id. "A party cannot complain if instructions fail to emphasize circumstances favorable to him. This is precisely what instructions should avoid." Id.

Instruction No. 5 presented to the jury by the court followed the model instruction set forth in II Iowa Uniform Jury Instructions No. 2404. Instruction 5 accurately points out to the jury the elements of possession for purposes of section 724.26, namely that possession means (1) the having or keeping of the firearm, (2) that there must be a conscious possession, and (3) that the defendant must exercise dominion and control over the firearm. Instruction No. 5 also states that possession may be in more than one person. The defendant, however, requested the court to adopt an additional instruction stating that mere proximity to a firearm does not constitute possession in more than one person.

In refusing defendant's request, the trial court stated:

> I have thought about it, and I think everything that I wanted to say is in [Instruction] Five. I don't think what you say is necessarily an incorrect statement, but I think the two elements taken One and Two do define the standard the State is under, the obligation to prove, and

> I believe that's a correct statement, and we will leave it that way.

We find that Instruction No. 5 was the proper instruction to be given concerning the elements needed to be proved by the State in regards to possession. We find the case of State v. Krana, 246 N.W.2d 293 (Iowa 1976), to be factually distinct from the present case. In Krana, the court failed to instruct the jurors on the issue of whether or not the defendant knew of the presence of the gun. 246 N.W.2d at 295. Such is not the case here. In State v. Hall, 301 N.W.2d 729 (Iowa 1981), the trial court did not include in its instruction defining the elements of possession the portion of the uniform instruction that defendant must have had "dominion or control over it or have the actual care or management of it." 301 N.W.2d at 733. The Iowa Supreme Court held that the defendant's request to add these words would have added little to the instruction as given, since the given instruction told the jury possession must be conscious and must include control. Id. The court stated that the defendant's requested instruction "was but a repetition of that in somewhat different form." Id.

From the above outlined principles, we conclude that the instruction on possession given in the case fairly presented the issues and the law of the case to the jury. We therefore hold that the trial court did not err in refusing to adopt the defendant's requested instruction.

AFFIRMED.