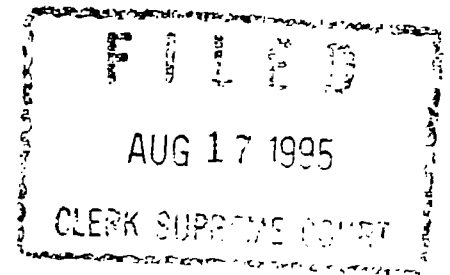


IN THE COURT OF APPEALS OF IOWA

No. 5-315 / 93-1916



STATE OF IOWA,

Appellee.

vs.

RICCO T. COOPER,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, John Bauercamper, Judge.

Cooper appeals judgment and sentences, following a jury trial, entered upon his convictions of possession of an offensive weapon, carrying a dangerous weapon, and interference with official acts. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sharon Ruth Stevens, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

HAYDEN, J.

Scherie Nelson testified under a grant of immunity at the trial of Ricco Cooper and Robert McCoy, who were charged with possession of an offensive weapon, carrying a dangerous weapon, and interfering with official acts. Nelson testified that on March 21, 1993, she and "a lot of people" went to Schells Sporting Goods to buy a gun. One of those accompanying Nelson was her boyfriend, Ricco Cooper, and another was Nelson's roommate's boyfriend, Robert McCoy. Nelson picked out three automatic handguns, ammunition, and holsters. The bill for the purchases was over \$1200, which was paid in cash. Nelson had \$500; the rest was pooled from the men that were with her, including Cooper. (Cooper argues that no one testified he helped pay for the weapons. However, in response to a question of who pulled money out of their pockets, Nelson specifically named "Ricco.")

Nelson testified that that evening she, Cooper, McCoy, and two other males were in her bedroom looking at her purchases. She testified Cooper was trying to show her how to break a gun down. Later, the males took the guns out of Nelson's apartment. When Nelson noted that she would be without a handgun, someone said, "You got your gauges in the house," referring to three shotguns.

Police officers received reports about persons carrying weapons and located the car. The car attempted to evade a police car, and when it was stopped five of the six male occupants ran. Eventually Cooper and McCoy were captured. Both were wearing holsters, but neither was armed. A handgun was found on the ground between them

Police searched Nelson's residence, which was very near where the car was stopped. Three shotguns were found. Two were found in the closet of Nelson's bedroom. A sawed-off shotgun was found in her roommate's bedroom. Police officers testified that Nelson told them her bedroom was hers and Ricco's. Prescription bottles with Cooper's name were found in Nelson's closet. A police officer testified that male clothing was found in both bedrooms.

Cooper was convicted as charged. The district court imposed a term of imprisonment not to exceed five years on the offensive weapon conviction and two concurrent terms not to exceed two years on the other convictions.

Cooper appeals.

I. Standard of Review.

The standard of review is for assigned errors. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984); *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983) (citation omitted). The weight of the evidence and credibility of witnesses is to be determined by the fact finder, as this court's review of the evidence is not de novo. *Phams*, 342 N.W.2d at 795.

II. Actual or Constructive Possession of Weapons.

On appeal, defendant challenges the sufficiency of the evidence. The State must provide sufficient evidence so a rational trier of fact can find, beyond a reasonable doubt, defendant committed each and every element of the offense. *State v. O'Connell*, 275 N.W.2d 197, 204-05 (Iowa 1979). All legitimate inferences arising reasonably and

fairly from the evidence may be utilized to support the verdict. *State v. Mulder*, 313 N.W.2d 885, 888 (Iowa 1981) (citations omitted), *cert. denied*, 459 U.S. 841, 103 S. Ct. 90, 74 L. Ed. 2d 83 (1982).

Ricco Cooper was convicted of two crimes involving weapons. First, he was convicted of carrying weapons in violation of Iowa Code section 724.4 (1993). Second, defendant was convicted of possession of an offensive weapon in violation of Iowa Code section 724.3 (1993). Cooper challenges both convictions on the ground the State failed to prove actual or constructive possession of the weapons.

Possession is actual when the substances are found on the person of the accused. Possession is constructive when the accused maintains dominion and control of the place where the substances are found. The dominion and control can be direct or indirect. It is direct when the accused is in such close proximity to the substances as to claim immediate dominion over them. It is indirect when the accused maintains or closely shares exclusive dominion over the premises where the substances are found.

State v. Rudd, 454 N.W.2d 570, 571 (Iowa 1990). Constructive possession is all that is necessary for a finding of possession. *Id.* (citation omitted). To prove constructive possession, the State must establish defendant's knowledge of the weapon and his right to control it. *State v. Pierce*, 240 N.W.2d 678, 679 (Iowa 1976); *State v. Torres*, 506 N.W.2d 470, 472 (Iowa App. 1993).

A. Conviction for Carrying Weapons.

Defendant and other men were with Scherie Nelson when she bought three 9 mm caliber handguns. Ms. Nelson did not have enough money to purchase the guns and received contributions from some of the men, possibly defendant. After admiring

the handguns at Ms. Nelson's residence, defendant and the men left with two of the guns to shoot in a field. Defendant's knowledge of the guns is apparent. *See, e.g., State v. Reeves*, 209 N.W.2d 18, 23 (Iowa 1973) (knowledge of the presence of contraband -- which supports finding a right and ability to control the object can be shown by "incriminating statements or circumstances from which a jury might lawfully infer knowledge by the accused of the presence" of contraband).

After an attempt to elude the police officers, the automobile came to a halt, and everyone except the driver fled on foot. Police officers found one of the handguns very close to where defendant was apprehended. Defendant's close proximity to the handgun supports a finding he had the authority or right to control the offensive weapon. *See id.*, at 22 (possession may be imputed when contraband is found in a place under the joint dominion and control of defendant and another) (citations omitted).

In addition, defendant was wearing a holster at the time of his arrest. This further supports defendant's knowledge of the handguns and his right to control one of them. The evidence establishes defendant possessed one of the handguns in the car. The State **provided** sufficient evidence for a jury to reasonably find defendant guilty of carrying **weapons** in violation of Iowa Code section 724.4 (1993).

B. Possession of an Offensive Weapon.

We will now address defendant's conviction for possession of an offensive weapon in violation of Iowa Code section 724.3 (1993). Again, defendant claims the

State did not have sufficient evidence to prove constructive possession of the sawed-off shotgun.

Defendant claims he was not a resident of the home where the gun was found. Full-time residency, however, is not required for a finding of constructive possession. *Reeves*, 18 N.W.2d at 23. Our supreme court recently held, "We continue to allow an inference of constructive possession when the substance [object] is found in a place where the defendant is not in sole dominion or control." *State v. Simpson*, 528 N.W.2d 627, 632 (Iowa 1995) (citation omitted).

Police discovered the sawed-off shotgun in the home of defendant's girlfriend, Scherie Nelson. Nelson testified defendant resided with her overnight three days a week and was present at the house every day. In addition, male clothing and prescription pill bottles with defendant's name were found in the home. Defendant's joint residency with his girlfriend is probative evidence of possession by defendant of the offensive weapon. *United States v. Thomas*, 914 F.2d 139, 142 (8th Cir. 1990).

Knowledge of the presence of weapons and the ability to maintain control over them by defendant may be inferred when the substance is found in a place accessible to the defendant and is subjected to the joint dominion and control of the defendant and other persons. *Rudd*, 454 N.W.2d at 572. Constructive possession, however, is not established from the mere discovery of objects found on the premises over which defendant shared dominion and control. *Id.*

In the case at bar, sufficient evidence existed for the jury to reasonably find defendant guilty. Ms. Nelson testified asking defendant and the others what she could do if the drive-by shooter returned, and, "[t]hey replied that she still had her gauges," referring to the shotguns. Nelson's testimony is evidence defendant knew of the shotguns in the home. Although it is not clear if the reference was to all three shotguns, circumstantial evidence may be used to establish constructive possession. *Reeves*, 209 N.W.2d at 21-22.

Furthermore, the sawed-off shotgun was purchased by defendant's girlfriend. This implicitly suggests defendant knew of the weapon and had the ability to control it. In addition, the presence of numerous guns and ammunition in the house supports defendant's conviction for possession of the sawed-off shotgun. *See, e.g., United States v. Rivera*, 844 F.2d 916, 925-26 (2d. Cir. 1987) (proximity, presence, or association is sufficient when accompanied by evidence connecting defendant with incriminating surrounding circumstances) (citations omitted).

The totality of the evidence indicates defendant had knowledge of the offensive weapon and the right to exercise control over the weapon. The State had sufficient evidence to convict defendant for possession of an offensive weapon in violation of Iowa Code section 724.3 (1993).

III. Evidence of a Witness's Prior Inconsistent Statement.

Defendant contends the trial court abused its discretion in admitting evidence which was inadmissible hearsay. Error was properly preserved by codefendant's

counsel at trial. *See Howard v. Gonzales*, 658 F.2d 352, 355 (5th Cir. 1981); *United States v. Brown*, 562 F.2d 1144, 1147 n. 1 (9th Cir. 1977); *United States v. Love*, 472 F.2d 490, 496 (5th Cir. 1973); *United States v. Bagby*, 451 F.2d 920, 927 (9th Cir. 1971); *United States v. Lefkowitz*, 284 F.2d 310, 313 n. 1 (2d Cir. 1960). The standard of review is for abuse of discretion. *See State v. Maniccia*, 355 N.W.2d 256, 260 (Iowa App. 1984) (citation omitted). A trial court's ruling will be upheld as long as there is one hearsay theory of admission applicable under the circumstances. *Id.*

During a police officer's testimony, the prosecutor asked whether he had any conversations with Scherie Nelson concerning who occupied one of the bedrooms in the house. The officer answered, "She said that it was hers and Ricco Cooper's room." Defendant claims the evidence was inadmissible hearsay proffered to establish defendant's joint residency with Nelson.

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Iowa R. Evid. 801(c). We will look to the purpose of the statement to determine whether the challenged testimony is hearsay. *State v. Horn*, 282 N.W.2d 717, 724 (Iowa 1979) (citation omitted); *State v. Mueller*, 344 N.W.2d 262, 264 (Iowa App. 1983).

The statement by the police officer was elicited after defendant's girlfriend denied defendant had any possessions in one of the bedrooms. In addition, Nelson denied telling police officers at the time of the search defendant stayed with her in the

bedroom. The testimony by the officer was evidence of the witness's prior inconsistent statement. In *State v. Hill*, our supreme court held:

[A] witness may be impeached by showing his testimony upon a material matter is inconsistent with a prior statement made by him. The impeaching testimony is not admissible to prove its truth, but solely to demonstrate the witness is not reliable because what he says now is contrary to what he said at some previous time. Since both statements cannot be true, the jury is entitled to weigh one against the other to decide if such a fickle witness is worthy of belief.

State v. Hill, 243 N.W.2d 567, 570 (Iowa 1976) (citations omitted). The evidence at issue was not presented for the truth of the matter asserted and does not constitute inadmissible hearsay.

We affirm the trial court on all issues presented. Convictions affirmed.

AFFIRMED.