

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 12AP-326
Plaintiff-Appellee,	:	(C.P.C. No. 10CR-6505)
v.	:	
	:	(REGULAR CALENDAR)
Lawaun D. Divens,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 26, 2013

Ron O'Brien, Prosecuting Attorney, *Steven L. Taylor* and *Michael P. Walton*, for appellee.

Yeura R. Venters, Public Defender, and *Timothy E. Pierce*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Lawaun D. Divens ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty of having a weapon under disability. Because we conclude that the trial court's judgment was supported by sufficient evidence, we affirm.

{¶ 2} On October 25, 2008, Columbus police officers were called to respond to a shooting at 594 Mithoff Street. When the first officer arrived, he saw appellant backing out of the door of the residence with a gun in his hand. The officer instructed appellant to place the gun on the ground, and appellant complied with this instruction. Upon entering the house, the officer found a man, later identified as Steven Schmitz ("Schmitz"), suffering from a gunshot wound. Schmitz later died from the gunshot wound.

{¶ 3} Appellant was charged with having a weapon under disability, in violation of R.C. 2923.13. He waived his right to a jury trial and the case proceeded to trial before a judge. Appellant did not testify at trial, but the state presented a video of his interview with a Columbus police detective. In the interview, appellant stated that on October 25, 2008, he was at home and heard a knock on the front door. When appellant opened the door, he saw Schmitz, who asked for a cigarette. Appellant said that he did not know Schmitz but recognized him from the neighborhood. Appellant stated that, when he turned around to get a cigarette, Schmitz tried to grab him in a choke hold. The two men struggled as Schmitz choked and punched appellant. Appellant tried to dial 911, and Schmitz reached for appellant's phone. Appellant then broke free from Schmitz and struck him with a glass vase that was near the door. Appellant stated that he then ran upstairs to his bedroom and retrieved a gun from under the nightstand. When appellant returned downstairs, Schmitz rushed at him from the living room. Appellant fired a single gunshot, and Schmitz fell backward onto the floor. Appellant stated that he then called 911.

{¶ 4} The trial court concluded that appellant could not be convicted of having a weapon under disability for the period of time between when Schmitz entered his house and when he turned the gun over to the police because appellant was acting in self-defense. However, the trial court held that appellant could be prosecuted for having a weapon under disability during the period prior to Schmitz intruding into appellant's home. Based on the evidence presented at trial, the trial court found appellant guilty of having a weapon under disability before the encounter with Schmitz and sentenced appellant to one year of imprisonment.

{¶ 5} Appellant appeals from the trial court's judgment, assigning two errors for this court's review:

FIRST ASSIGNMENT OF ERROR

The trial court erred in its legal interpretation of R.C. 2923.13 by finding that an individual can constructively possess a weapon, based merely on proximity to the gun and knowledge of its existence, in the absence of proof that the person exercised dominion and control over the weapon.

SECOND ASSIGNMENT OF ERROR

There was insufficient competent, credible evidence to support the jury's verdict, thereby, denying Appellant due process under the state and federal constitutions.

{¶ 6} In his first assignment of error, appellant asserts that the trial court erred in its legal interpretation of R.C. 2923.13 by concluding that appellant constructively possessed the gun in the absence of proof that he exercised dominion and control over it. However, the trial court held that the evidence presented at trial demonstrated that appellant had the ability to exercise dominion and control over the gun for two months prior to this incident, and therefore appellant had constructive possession of the gun. Thus, although the first assignment of error is phrased as a challenge to the trial court's legal interpretation, it effectively challenges the trial court's conclusion that there was sufficient evidence to establish dominion and control over the gun. In his second assignment of error, appellant directly argues that the evidence was insufficient to support the trial court's verdict. Because both assignments of error turn on the sufficiency of the evidence presented at trial, we will consider them together.

{¶ 7} "Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict." *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶ 36, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In reviewing a challenge to the sufficiency of the evidence, an appellate court must determine "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 proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded by constitutional amendment on other grounds as recognized in *State v. Smith*, 80 Ohio St.3d 89, 102 (1997).

{¶ 8} In relevant part, R.C. 2923.13(A)(2) prohibits an individual from knowingly acquiring, having, carrying, or using a firearm if the individual has been convicted of a felony offense of violence. In this case, the parties stipulated that appellant had previously been convicted of aggravated assault, which is a felony offense of violence. R.C. 2901.01(A)(9)(a); *State v. Scarl*, 11th Dist. No. 2003-P-0125, 2004-Ohio-7227, ¶ 21. As explained above, the trial court concluded that appellant could not be convicted under

this statute from the time that Schmitz, the intruder, entered his house until he handed the gun over to the police because appellant was acting in self-defense, and the state has not challenged that conclusion. Thus, the question for the trial court was whether appellant knowingly acquired, had, carried, or used the gun during the period prior to the incident with Schmitz.

{¶ 9} For purposes of R.C. 2923.13, "acquire" generally means to purchase, obtain, or receive a firearm. *See, e.g., State v. Hardy*, 60 Ohio App.2d 325, 327 (8th Dist.1978) (noting that the term "acquire" in R.C. 2923.13 appears to be equivalent to the terms "purchase" and "receive" used in the predecessor statute). In his police interview, appellant indicated that the gun belonged to his girlfriend and that she received it from her father. There was no contrary evidence presented at trial to establish that appellant acquired the gun. Similarly, there was no evidence that appellant handled or carried the gun before the incident with Schmitz. Appellant told the police that he had not fired the gun before shooting Schmitz, and there was no other evidence to suggest that he had used the gun before. Therefore, the trial court's analysis turned on the question of whether appellant knowingly "had" the gun prior to the confrontation with Schmitz.

{¶ 10} To "have" a firearm under R.C. 2923.13, an individual must either actually or constructively possess it. *State v. Smith*, 10th Dist. No. 08AP-736, 2009-Ohio-2166, ¶ 41. "Constructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Wolery*, 46 Ohio St.2d 316, 329 (1976). "[T]he mere fact that property is located within premises under one's control does not, of itself, constitute constructive possession." *State v. Hankerson*, 70 Ohio St.2d 87, 91 (1982). "It must also be shown that the person was conscious of the presence of the object." *Id.*

{¶ 11} In the police interview that was introduced into evidence at trial, appellant indicated that he knew exactly where the gun was located, which was under a nightstand in his bedroom. He was able to retrieve the gun from the upstairs bedroom and return downstairs within moments, further indicating that he knew precisely where the gun was located and did not need to search for it. Appellant knew that the gun was kept in a holster and also knew where extra ammunition was located. Appellant also indicated that his girlfriend had been away from the home for a "couple of months" and that, for at least

part of that time she was living in another state. (Tr. 40.) Although the lease for the home was in his girlfriend's name, appellant's signature also appeared on the lease agreement. Moreover, appellant referred to the owner of the house as "the guy I rent from," and he referred to the home as a "bachelor crib" when asked about the volume of people coming and going to and from the house. (Tr. 66.)

{¶ 12} The trial court concluded that appellant had lived alone in the home while his girlfriend was away for at least two months prior to the incident. The court concluded that, during this period of time, appellant had exclusive dominion and control over everything within the home. The court noted that appellant knew where the gun was located, that it was kept in a holster, and where extra ammunition was located. Based on this evidence, the court concluded that, for at least two months prior to the incident, appellant had the ability to exercise dominion and control over the gun and that this constituted constructive possession of the gun.

{¶ 13} In similar cases, this court and other Ohio courts have found sufficient evidence to prove constructive possession of a firearm. In *Smith*, 2009-Ohio-2166, the defendant's girlfriend testified that he lived at her apartment and that he sometimes hid a gun in the backyard. *Id.* at ¶ 11-12. The police recovered a gun from a window well of the apartment. *Id.* at ¶ 12. The defendant's girlfriend testified that she did not place the gun in the window well and that it looked familiar to one that she had seen the defendant with previously. *Id.* at ¶ 42. On appeal, this court affirmed a conviction for having a weapon under disability, concluding that, because defendant lived at the apartment, "he had power and intention at any time to exercise dominion and control over the gun found in the window well." *Id.* See also *State v. Dorsey*, 10th Dist. No. 04AP-737, 2005-Ohio-2334, ¶ 32-33 (finding sufficient evidence to conclude that the driver of a car had constructive possession of a firearm that was located between the console and the side of the passenger seat in close proximity to the gear shift because the driver "had the ability to easily exercise dominion and control over the firearm").

{¶ 14} The First District Court of Appeals found sufficient evidence of constructive possession of a firearm under similar circumstances in *State v. English*, 1st Dist. No. C-080872, 2010-Ohio-1759. In *English*, the police executed a search warrant at a residence and found drugs, evidence of drug trafficking, and two firearms. *Id.* at ¶ 1. One of the

firearms was a revolver, which was recovered from a first-floor bedroom where the police found the defendant when they entered to perform the search. *Id.* at ¶ 16. The only occupants of the residence at the time of the search were the defendant and a woman. *Id.* The defendant did not own the residence or pay utilities, but many of his personal belongings were found in the living room and the first-floor bedroom where the revolver was located. *Id.* at ¶ 1. On appeal, the court found that there was sufficient evidence that the defendant had constructively possessed the revolver. *Id.* at ¶ 33. The court noted that the defendant was one of only two occupants of the residence when the search warrant was executed and that there was evidence that he had been in the residence for several days. *Id.* The court further noted that the police recovered the revolver from a room containing the defendant's personal possessions, and the gun was located such that he had immediate access to it. *Id.* Under these circumstances, the evidence was sufficient to support a conviction for having a weapon under disability based on constructive possession of the revolver. *Id.* at ¶ 34.

{¶ 15} In *State v. Pitts*, 4th Dist. No. 99 CA 2675 (Nov. 6, 2000), the police recovered drugs and related materials, along with nine firearms, from various outbuildings and a camper located near the defendant's house. The defendant was charged with various crimes, including nine counts of having a weapon while under disability. The defendant was convicted on eight counts of having a weapon while under disability, with the jury acquitting on the count related to the firearm found in the camper. Although the defendant's son testified that he owned the property where the firearms were found and was purported to own eight of the nine firearms, the defendant lived on the property and had control over it. The defendant possessed a key to the outbuildings where the police found the firearms. On appeal, the Fourth District Court of Appeals found that this constituted competent, credible evidence of constructive possession of the firearms, which supported guilty verdicts.

{¶ 16} The Eleventh District Court of Appeals also considered a similar scenario in *Scarl*, 2004-Ohio-7227. In that case, the police recovered five weapons from a room in the basement of the home that the defendant shared with his wife. *Id.* at ¶ 13. The defendant's wife testified that the room had previously been occupied by a boarder, who passed away two months prior to the police search. *Id.* She further testified that the

weapons belonged to her and that she stored them in the boarder's room in the basement to keep them away from her children. *Id.* at ¶ 27. The defendant's wife testified that the defendant did not know about the weapons. *Id.* However, one of the police officers who recovered the weapons testified that the defendant asserted that the weapons belonged to the former boarder and that the defendant was aware that the weapons were in the house. *Id.* at ¶ 37. The appellate court determined that there was sufficient evidence to support a conclusion that the defendant had constructive possession of the weapons and was guilty of having a weapon while under disability. *Id.* at ¶ 82. There was testimony that, after the boarder passed away, the defendant and his wife returned the boarder's belongings to his family. *Id.* at ¶ 76. The court of appeals concluded that this demonstrated that the defendant and his wife had reestablished control of the room where the weapons were later found. *Id.* The court further concluded that it could be presumed that both the defendant and his wife had rightful access to the entire home, including the room where the weapons were found. *Id.* at ¶ 77. Accordingly, a rational trier of fact could have found that the defendant had access to the weapons and therefore exercised constructive possession of them. *Id.* at ¶ 77, 82.

{¶ 17} In this case, the evidence established that, for approximately two months prior to the incident with Schmitz, appellant was the sole occupant of the home. Appellant's statements to the police indicated that he considered it to be his home, rather than viewing himself as a guest in his girlfriend's home. Appellant argues that his girlfriend's absence from the home did not give him ownership or special privileges over the gun or his girlfriend's other possessions. However, ownership is not required to establish constructive possession. *See State v. Brooks*, 9th Dist. No. 23236, 2007-Ohio-506, ¶ 23. Although his girlfriend's absence did not give appellant special privileges over her possessions, appellant had de facto control of the contents of the home, including the gun, while she was away. Appellant's statements further indicated that he knew exactly where the gun was located, how it was stored, and where extra ammunition was located. The gun was located within premises under appellant's control and he was conscious of its location and condition. Viewing this evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that appellant had

constructive possession of the gun and that, therefore, the elements of having a weapon under disability were proven beyond a reasonable doubt.

{¶ 18} Appellant argues that the trial court's ruling conflicts with the decision of the Eighth District Court of Appeals in *Hardy*, 60 Ohio App.2d 325. In *Hardy*, the defendant was employed at a beverage store owned by his wife. *Id.* at 325. A fellow employee confronted the defendant and attempted to take money from the store's cashbox. *Id.* at 325-26. The defendant objected and both men reached for a rifle that was located at the corner of a counter in the store; ultimately, the defendant took control of the rifle and fired it twice at the other employee, who had grabbed a razor. *Id.* at 326. The defendant had a prior conviction for a drug-related offense, and he was charged with and convicted of having a weapon under disability. *Id.* at 325-26. The appellate court reversed the conviction, concluding that the defendant could not be convicted for using the rifle in his own self-defense and that there was no evidence that he ever exercised dominion or control over the rifle prior to the incident. *Id.* at 327, 330.

{¶ 19} We find *Hardy* to be distinguishable from the present case on its facts. Unlike *Hardy*, this case involved a private residence, rather than a business. In *Hardy*, there were multiple employees of the business who were aware of the presence of the rifle and had the ability to control it. By contrast, in the present case, appellant was the sole occupant of the home for at least two months and was the only individual with the ability to control the gun. In this case, the gun was located in appellant's bedroom; whereas, in *Hardy*, the rifle was located near the store's counter, presumably a common area accessible to all employees. Under these circumstances, there is greater evidence that appellant exercised dominion and control over the gun than there was in *Hardy*.

{¶ 20} We also find the present case to be distinguishable from our recent decision in *State v. Burney*, 10th Dist. No. 11AP-1036, 2012-Ohio-3974. In *Burney*, the police located three weapons in a house belonging to the defendant's mother. *Id.* at ¶ 3, 5. One of the weapons was in the basement and the other two were underneath a couch in the living room. *Id.* at ¶ 5. Shortly before the police search, the defendant had informed his parole officer that he had a new address. *Id.* at ¶ 4. A police department DNA analyst identified a mixture of DNA on two of the three guns; the analyst testified that the defendant could not be excluded as a contributor to the DNA mixture on one of the guns.

Id. at ¶ 7. A jury found the defendant guilty of possession of a dangerous ordnance and having a weapon under disability. *Id.* at ¶ 8. On appeal, this court reversed the convictions, concluding that there was insufficient evidence that the defendant had actual or constructive possession of the guns. With respect to constructive possession, the court noted that multiple individuals lived at the home where the guns were recovered, including the defendant, his mother, two of his siblings, and an unidentified child. *Id.* at ¶ 24, 29. Moreover, the only gun that could potentially be connected to the defendant through DNA evidence was found hidden under furniture, rather than in plain view. *Id.* at ¶ 29. The court found that there was insufficient evidence that the defendant had knowingly exercised dominion or control over the gun. *Id.* at ¶ 32.

{¶ 21} Unlike *Burney*, in the present case, appellant was the only occupant of the home during his girlfriend's absence. Although appellant stated that the gun was located under a nightstand, he had sufficient awareness of its location to retrieve it within moments and return downstairs to confront Schmitz. By contrast, in *Burney*, there was no evidence that the defendant was aware of the gun hidden under the couch. Although in both cases there was no conclusive evidence of physical possession of the weapons, there is greater evidence in this case that appellant had control over the area where the gun was located and was conscious of its presence, thus permitting a conclusion that he exercised dominion and control over it.

{¶ 22} We conclude that, based on the evidence presented at trial, a rational trier of fact could find that all the elements of having a weapon under disability were proven beyond a reasonable doubt. Thus, appellant's conviction was supported by sufficient evidence. Accordingly, appellant's first and second assignments of error are without merit and are overruled.

{¶ 23} For the foregoing reasons, we overrule both of appellant's assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
