COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2007

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1428-CR **Cir. Ct. No. 2003CF560**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREEMAN E. BELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: DOROTHY L. BAIN, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Freeman Bell appeals a judgment of conviction for possession of a short-barreled shotgun, in violation of WIS. STAT. § 941.28(2).[1]

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

He argues the evidence was insufficient to support the jury's verdict that he possessed the shotgun. We disagree and affirm the judgment.

BACKGROUND

¶2 Bell's conviction stems from a September 2, 2003 traffic stop. Bell was a passenger in a Chevrolet TrailBlazer SUV that was pulled over after the driver flicked a lit cigarette out of the window. During a search of the SUV, police found drugs and a short-barreled shotgun. The shotgun was behind the rear seat under some clothing.

¶3 Bell was charged with five counts. Four were drug related, and the other alleged possession of a short-barreled shotgun, as party to a crime. At trial, the State called police officers who testified about the traffic stop and the discovery of the drugs and guns. In addition, the State called officer Dan Klatt, who recounted his interview of Michael Gregory. Gregory had been a passenger in the SUV earlier that day, but had been riding in another vehicle at the time of the stop. Klatt testified that in the interview Gregory said he had seen Bell with the shotgun and had seen Bell put the shotgun in the SUV.[2] Bell was acquitted of the four drug-related counts but found guilty of possession of the short-barreled shotgun.

DISCUSSION

¶4 When a defendant challenges the sufficiency of the evidence supporting his conviction, we will reverse only if "the evidence, viewed most

[2] Gregory also testified at trial. Contrary to what he had told Klatt, Gregory denied knowing the shotgun was in the SUV or who put it there.

favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶5 Bell argues the evidence is insufficient to show he possessed the shotgun found in the SUV. When a criminal statute requires the State to prove possession, the State may prove physical possession or constructive possession. ***State v. Peete***, 185 Wis. 2d 4, 9, 517 N.W.2d 149 (1994). Constructive possession exists when "the contraband is found in a place immediately accessible to the accused and subject to his exclusive or joint dominion and control, provided that the accused has knowledge of the presence of" the contraband. ***Schmidt v. State***, 77 Wis. 2d 370, 379, 253 N.W.2d 204 (1977).

¶6 Bell's discussion of constructive possession is limited to a single page and does not include any citations to case law. His argument boils down to an assertion that the shotgun was not "immediately accessible" to him or subject to his control because the rear cargo area of the SUV was not within his reach. However, this is contrary to ***State v. Allbaugh***, 148 Wis. 2d 807, 436 N.W.2d 898 (Ct. App. 1989).

¶7 Allbaugh shared a house with a roommate and the roommate's son. ***Id.*** at 808, 812. In a search of the house, police discovered a total of twenty-two pounds of marijuana. ***Id.*** at 808. Nineteen pounds were found in the roommate's son's room, two and one-half pounds were found in an unoccupied second floor bedroom, and the remainder was found in the living areas of the house. ***Id.*** at 811-812. No marijuana was found in Allbaugh's bedroom. ***Id.*** at 812. We held this evidence was sufficient to show Allbaugh possessed the marijuana. ***Id.*** at 813. We reasoned that all of the rooms containing marijuana were unlocked and

therefore accessible to Allbaugh, and that the obvious presence of the marijuana throughout the house, including in the common areas, was evidence on which a jury could conclude Allbaugh had control over the marijuana. ***Id.*** at 814-15.

¶8 Here, the shotgun was in the cargo compartment of the SUV behind the rear seat. Just as a jury found Allbaugh had immediate access to marijuana behind an unlocked door, a jury could find Bell had immediate access to a shotgun he could have picked up by reaching over the rear seat. And just as a jury found Allbaugh, as a resident of the house, exercised control over the obvious contents of the house, a jury could find Bell, as a passenger in the SUV, exercised control over the known contents of the SUV.[3] Therefore, there was sufficient evidence for a jury to conclude Bell possessed the shotgun.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[3] In his initial brief to this court, Bell also argues there is no evidence that Bell knew the shotgun was in the SUV. However, in his brief Bell does not mention Gregory's statement, as recounted by Klatt, that Bell placed the shotgun in the SUV. He does not reply to the State's argument that the jury could reasonably have concluded Bell knew about the shotgun based on that evidence. Bell therefore concedes he knew the shotgun was in the SUV. *See* ***State v. Alexander***, 2005 WI App 231, ¶15, 287 Wis. 2d 645, 706 N.W.2d 191 (arguments not refuted are deemed admitted).