**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 22, 2007**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2006AP428-CR** **Cir. Ct. No. 2003CF7280**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANTOINE A. JENKINS,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Antoine A. Jenkins appeals from a judgment entered after a jury found him guilty of one count of being a felon in possession of a firearm. *See* WIS. STAT. § 941.29(2)(a) (2003-04). On appeal, Jenkins challenges the sufficiency of the evidence. We affirm.

*Facts*

¶2 While the ultimate inference of guilt is challenged by Jenkins, the underlying facts are not disputed. Deputy Sheriff Daniel Dittberner testified that he and a partner were patrolling in a marked squad car when they saw a maroon Honda Accord traveling westbound on West Keefe Avenue at a "high rate of speed." Dittberner estimated the car's speed to be forty to forty-five miles per hour in a thirty-mile per hour speed zone. Dittberner turned his squad to follow the Accord. A computer check showed that the car's license plate was suspended due to unpaid citations. After receiving that information, Dittberner turned on the squad's emergency lights. The Accord traveled three more blocks until the driver stopped. Dittberner estimated that his squad car was no more than fifteen to twenty feet behind the Accord during the time between the activation of the emergency lights and the stop.

¶3 Dittberner testified that, after the squad's emergency lights were turned on, the front-seat passenger "slowly dip[ped] to his left" so that his left shoulder was "quite a bit" lower than the other shoulder. The passenger was "leaning to the center and to his left." Both Dittberner and his partner noticed the movement. Based on Dittberner's training and experience, the movement was "consistent with someone trying to conceal something, trying to put something under the seat." The officers were not driving a conventional squad car, but rather a Chevrolet Tahoe sports utility vehicle. Dittberner testified that officers sit "higher up" and can see better into cars than in a normal squad car.

¶4 After the Accord stopped, Dittberner obtained the names of the two occupants. A computer check informed him that a bench warrant was outstanding

for the passenger, Jenkins. Accordingly, Dittberner placed Jenkins under arrest. Because the other person's driver's license was revoked, the car had to be towed.

¶5 Dittberner conducted a search of the vehicle prior to it being towed. He found a double-bagged white plastic grocery bag in the front passenger footwell. A 9-mm handgun, a box of 9-mm ammunition and a 30-round magazine were inside the bag. Dittberner testified that the bag was found "consistent to where [Jenkins] was slowly dipping." He further testified that the barrel of the gun was pointing down to the floor of the car with the handle pointing to the rear of the car, "consistent with somebody placing something there with their left hand." Dittberner testified that he saw the plastic bag when he first spoke with Jenkins and the driver. Jenkins's calf was "up against" the bag so that his leg was "actually holding it up." When Jenkins got out of the car at the officers' request, the bag "slid" into the footwell.

¶6 Dittberner also testified about statements made by Jenkins after his arrest.[1] Jenkins told Dittberner that they would not find his fingerprints on the gun. When asked about the plastic bag, "after hesitation," Jenkins said he did not know. Jenkins said that his fingerprints might be on the bag because he had helped carry in his aunt's groceries, and that the driver could have gotten the bag from his house. However, at another point in the interview, Jenkins told Dittberner that the grocery bag was in the car before he got in.

¶7 Police found five counterfeit twenty-dollar bills in Jenkins's possession when he was searched following his arrest. When Dittberner told

[1] Jenkins did not move to suppress the statements.

Jenkins that the counterfeit money would be referred for possible federal prosecution and that he might face a gun charge, Jenkins replied that he knew he was going to be "charged with the gun" and that he could "do twenty years." Jenkins also said that it was "[n]ot like he was going to get life" and "[a] man's got to do what a man's got to do to take care of his business."

¶8 Jenkins also testified at trial. He testified that the grocery bag was already "in the middle console" when he entered the car. He testified that he did not know what was in the bag, he did not look into the bag, and he did not ask the driver what was in the bag. He denied any "dipping" movement, and he denied touching the gun or the bag. Jenkins testified he was "just basically sitting in the passenger seat" when the car was stopped. He denied holding the bag against the middle console with his leg and denied that the bag slipped to the floor when he got out of the car. He explained that he said that he knew he was going to be charged with a gun charge because Dittberner kept asking him questions about the gun.

*Discussion*

¶9 When reviewing the sufficiency of the evidence, we will reverse a conviction only if "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752, 755 (1990). Thus, an appellate court must "search the record to support the conclusion reached by the fact finder." ***State v. Owen***, 202 Wis. 2d 620, 634, 551 N.W.2d 50, 56 (Ct. App. 1996).

¶10 On appeal, Jenkins states that there is "no dispute" that he did not have "actual physical possession" of the gun. He further concedes the obvious—that a gun was found in the bag and the bag was found between himself and the driver. He goes on to argue, however, that the State was required to prove that he knew that a gun was in the bag, and the "only meaningful evidence" of knowledge was "the dip" observed by the officers prior to the stopping of the car. Jenkins argues that, as a matter of law, such a furtive movement is not enough to show that he knew a gun was in the bag.

¶11 The crime of possession of a firearm by a felon has two elements—a prior felony conviction and possession of a firearm. WIS. STAT. § 941.29(2); ***State v. Black***, 2001 WI 31, ¶18, 242 Wis. 2d 126, 141–142, 624 N.W.2d 363, 370–371. The statute "makes no reference to intent and … the State is only required to show that the felon 'possessed' the firearm with knowledge that it is a firearm." ***Id.***, ¶19, 242 Wis. 2d at 142, 624 N.W.2d at 371. Possession "'means that the defendant knowingly had actual physical control of a firearm.'" ***Ibid.*** (quoted source omitted). The pattern jury instruction addressing "Possession" further explains that "[a]n item is ... in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item." WIS JI—CRIMINAL 920. Possession "may be imputed when the [firearm] 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 [firearm]." ***Schmidt v. State***, 77 Wis. 2d 370, 379, 253 N.W.2d 204, 208 (1977).

¶12 Jenkins does not suggest that the plastic bag was not immediately accessible to him or not subject to his control. As noted above, Jenkins does take

issue with the quantum of evidence to show that he knew that a gun was in the bag. We are not persuaded.

¶13 The State did not rely solely on Jenkins's dipping movement. Rather, additional credible evidence was introduced from which the jury could conclude that Jenkins knew that a gun was in the plastic bag. Dittberner testified that when he first saw the plastic bag, Jenkins was holding his calf against the bag, effectively holding it up, and that when Jenkins got out of the car, the bag slid into the footwell. From that testimony, the jury could infer that Jenkins was attempting to conceal the bag from the officers' view. The jury could also infer that he was doing so because he knew the bag contained a gun and, as a convicted felon, he could not possess a gun. Dittberner testified that Jenkins gave inconsistent statements about whether the plastic bag was in the car when he entered it. Finally, Jenkins effectively admitted to Dittberner that he possessed the gun when he said that he knew he could be "charged with the gun."

¶14 Jenkins relies on ***State v. Johnson***, 2006 WI App 15, ¶17, 288 Wis. 2d 718, 727–728, 709 N.W.2d 491, 496 (Ct. App. 2005), in which this court held that "furtive or suspicious movements do not automatically give rise to an objectively reasonable suspicion that the occupant of the vehicle is armed and dangerous." (Internal quotations omitted.) The supreme court granted review, and held that "[d]epending upon the totality of the circumstances in a given case, a surreptitious movement by a suspect in a vehicle immediately after a traffic stop could be a substantial factor in establishing that officers had reason to believe that the suspect was dangerous and had access to weapons." ***State v. Johnson***, 2007 WI 32, ¶37, __ Wis. 2d __, __, 729 N.W.2d 182, 194. The officers in ***Johnson*** observed only "a traffic violation for failure to signal a turn, and the head and shoulders movement." ***Id.***, ¶40. The supreme court held that "[w]ithout more to

demonstrate that, under the totality of circumstances, an officer possesses specific, articulable facts supporting a reasonable suspicion that a person is dangerous and may have immediate access to a weapon, such an observation does not justify a significant intrusion upon a person's liberty." ***Id.***, ¶43. Jenkins's reliance on ***Johnson*** is misplaced because in this case, the State's case did not rest exclusively on the "dipping" movement observed by Dittberner. Rather, as discussed above, there was additional evidence from which a reasonable jury could infer that Jenkins knew that a gun was in the plastic bag.

¶15 Because a reasonable jury could find from the evidence that Jenkins knew there was a gun in the bag, Jenkins's challenge to the verdict fails.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).