COURT OF APPEALS DECISION DATED AND FILED

December 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP499-CR **Cir. Ct. No. 2009CF3764**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK E. THURMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON and REBECCA F. DALLET, Judges. *Affirmed*.

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

¶1 PER CURIAM. Patrick E. Thurman appeals from a judgment of conviction, entered after a jury trial, for one count of delivering cocaine as a party to a crime (one gram or less) and one count of being a felon in possession of a

firearm, contrary to WIS. STAT. §§ 961.41(1)(cm)1g., 939.05 and 941.29(2) (2009-10).[1] He also appeals from an order denying his postconviction motion. He argues: (1) there was insufficient evidence to support the felon-in-possession-of-a-firearm count; and (2) the trial court erroneously exercised its sentencing discretion. We reject his arguments and affirm the judgment and order.

BACKGROUND

¶2 An undercover officer telephoned a suspected drug dealer, Debronsha Marshall, and arranged to buy crack cocaine. Marshall told the officer to meet her at a restaurant parking lot. When the officer arrived, Marshall was seated in the front passenger seat of a car in the parking lot and Thurman was driving the car. Marshall gave the officer crack cocaine and the officer gave Marshall $60. Other officers then arrested Marshall and Thurman for selling drugs.

¶3 The same day, officers executed a search warrant at Marshall's house. They found correspondence and other paperwork indicating that three individuals were living there: Marshall, Thurman, and a third man. They also found cocaine, razors, and a digital scale. In one of the two bedrooms, they found a state identification card for Thurman that listed the address for Marshall's house.[2] In that same bedroom, they found drugs and a small locked safe, which they broke open. The safe contained the following: (1) Thurman's birth

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[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] There was also paperwork related to Marshall, including a state identification card, a Forward Wisconsin card, and a letter from Milwaukee Municipal Court.

certificate; (2) a Wisconsin Certificate of Title for a car belonging to Thurman, listing the same address; (3) a Wisconsin title and license plate application dated seven days earlier; (4) a gun;[3] (5) over $1600 in cash, wrapped in a rubber band; and (6) paperwork related to the brand of the safe.

¶4 Based on the drug sale in the parking lot, Thurman was charged with delivery of cocaine as a party to the crime. He was also charged with possessing the gun that the officers found in the locked safe.

¶5 At trial, Thurman did not testify. His trial counsel argued he should be acquitted because he was surprised by the drug transaction and did not intend to be a party to the crime of drug dealing. With respect to the gun, his trial counsel asserted there was insufficient proof that Thurman possessed the gun. She explained that there was no way of knowing who put the gun in the safe and argued that the presence of identification papers in the safe did not prove that Thurman knowingly possessed the gun.

¶6 The jury found Thurman guilty of both charges. Thurman faced a maximum sentence of five years of initial confinement and five years of extended supervision on each count.

¶7 At sentencing, the State urged the trial court to impose "a global sentence of five years [of] initial confinement and three years [of] extended supervision." The State said that although Thurman did not have an extensive criminal record, he was previously convicted of possessing cocaine with intent to

[3] There was testimony that technicians were unable to recover fingerprints from the gun and that there was insufficient DNA on the gun to be tested.

deliver and two counts of resisting or obstructing. The State noted that on one occasion when Thurman was previously released on extended supervision, he was revoked and returned to prison.

¶8 The State also presented information about an incident that occurred three weeks before the trial, when Thurman was released on bail. The State said that the police found Thurman in a hotel room with an underage girl and that they had been smoking marijuana. The State said it was unlikely Thurman would be charged in connection with that incident, but it urged the trial court to consider the incident when it considered Thurman's character and his performance while released on bail.

¶9 Thurman's counsel did not dispute the jury's finding that Thurman was guilty of delivering cocaine as a party to the crime, but she told the trial court that Thurman "completely denies" that the gun was his. With respect to the uncharged incident, she said that "Thurman denies anything about him smoking marijuana" and that the girl, who misrepresented her age, was the one who was smoking marijuana. Trial counsel urged the trial court to impose a two-year period of initial confinement. In his allocution, Thurman recognized he was responsible for his actions, but reiterated that he did not know about the gun and said that he "didn't know all that was going on at the time."

¶10 The trial court sentenced Thurman to two concurrent terms of five years of initial confinement and three years of extended supervision. New counsel was appointed for Thurman and he filed a postconviction motion challenging the sufficiency of the evidence on the felon-in-possession count and the severity of the

sentences.[4] The trial court denied the motion in a written order.[5] This appeal follows.

DISCUSSION

¶11 Thurman argues that there was insufficient evidence to support his conviction for being a felon in possession of a weapon and that the trial court erroneously exercised its sentencing discretion by imposing excessive sentences. We consider each issue in turn.

I. Sufficiency of the evidence.

¶12 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 (1990). This standard is applied to cases involving circumstantial evidence, which "is oftentimes stronger and more satisfactory than direct evidence." ***Id.*** 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 (Ct. App. 1996). When the evidence supports more than one

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[4] Thurman also challenged the imposition of a DNA surcharge. The trial court denied his motion and Thurman has not pursued the DNA surcharge issue on appeal, so we deem it abandoned. *See* ***Reiman Assoc., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed deemed abandoned).

[5] The Honorable Patricia D. McMahon presided over the trial and sentenced Thurman. The Honorable Rebecca F. Dallet denied the postconviction motion.

inference, this court must accept the inference that supports the jury's verdict. ***State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530.

¶13 The crime of possession of a firearm by a felon has two elements: a prior felony conviction and the possession of a firearm. ***State v. Black***, 2001 WI 31, ¶18, 242 Wis. 2d 126, 624 N.W.2d 363 (citing WIS. STAT. § 941.29(2)). The crime is "a strict liability offense" that requires the State "to show that the felon 'possessed' the firearm with knowledge that it is a firearm." ***Id.***, ¶19. "In this context, 'possess,' according to the legal definition, simply 'means that the defendant knowingly had actual physical control of a firearm.'" ***Id.*** (citations omitted). A person need not own the firearm in order to possess it. *See* ***id.***

¶14 When a criminal statute requires the State to prove possession, the State may prove physical possession or constructive possession. *See* ***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). Mere proximity to a firearm is insufficient to prove possession. *See* ***State v. Allbaugh***, 148 Wis. 2d 807, 812, 436 N.W.2d 898 (Ct. App. 1989) (concluding in drug possession case that "more than mere proximity to the drugs must be shown in order to support a finding of possession").

¶15 In this case, Thurman stipulated that he had a prior felony conviction. Therefore, the only issue is whether the State proved the second element of the crime: possession of a firearm.

¶16 Thurman argues the evidence that he possessed the gun was insufficient. He explains in his brief to this court:

> The State's case in this prosecution was based entirely on a theory of proximity. The safe was found in the proximity of the defendant's bedroom. The gun in the safe was found in proximity to paperwork belonging to the defendant. The only evidence that the State presented to link the defendant to the firearm at issue here was that both his paperwork and the gun were found in a safe to which, so far as the evidence shows, any of the three occupants of the house had access.
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> It is undisputed that the mere presence of a gun in the same room with a defendant is insufficient to support a finding of felon in possession[.] ***State v. Allbaugh***, 148 Wis. 2d 807, 812, 436 N.W.2d 898 (Ct. App. 1989). Given this, the mere presence of a gun in a locked safe with legal documents belonging to the defendant, where the State has not shown that the defendant had unfettered or, indeed, any access to that safe cannot be said to be sufficient to support this verdict.

¶17 In response, the State disputes Thurman's assertion that it "base[d] its case 'entirely on a theory of proximity.'" (Quoting Thurman's brief.) Instead, the State argues, it "presented evidence that clearly linked Thurman to a gun." The State points to testimony that two officers found the safe in a bedroom in which they also found Thurman's identification card, and the safe contained three documents related to Thurman: his birth certificate, his car title, and his title and license plate application. The State asserts that a jury "could reasonably conclude based on this evidence that Thurman possessed the gun."

¶18 We agree with the State. Relying on the circumstantial evidence, the jury, acting reasonably, could have found that Thurman knew about the gun that was in the safe with his important papers and that he exercised "exclusive or joint dominion and control" over the gun. *See* ***Poellinger***, 153 Wis. 2d at 501; ***Schmidt***, 77 Wis. 2d at 379.

II. Sentencing.

¶19 The second issue Thurman raises is whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

¶20 The sentencing court is generally afforded a strong presumption of reasonability, and if our review reveals that discretion was properly exercised, we follow "'a consistent and strong policy against interference'" with the trial court's sentencing determination. ***Id.***, ¶18 (citation omitted). We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion. *See* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). A sentence is unduly harsh when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶21 Thurman argues that the trial court erroneously exercised its sentencing discretion "by imposing an excessive sentence where, as here, the allegedly aggravating factors identified by the trial court … constituted nothing more than the bare elements of the crime itself." (Bolding omitted.) He explains:

> Although the trial court judge's sentencing statement contains a number of references to aggravating factors, the factors which the court considered to be aggravating are most succinctly stated as follows:
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> The defendant had a prior felony conviction.
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> The defendant had constructive possession of a gun.
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> The gun was loaded.
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> With regard to the drug charge, the aggravating factors found by the court were that the defendant was with Debronsha Marshall when she was selling drugs and doing a hand-to-hand delivery to an undercover officer, and that he was driving the car and in possession of marked drug money.
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> There was, quite simply, nothing about the defendant's conduct in this case with regard to either of the charges that he faced that went beyond that of the bare elements of the crimes with which he was charged. The defendant has not been able to find any authority for the proposition that a court may find the existence of aggravating factors—may find that a defendant's conduct in a case was more serious and therefore deserving of a longer sentence than might otherwise be imposed—based on the fact that the defendant's conduct fulfills all of the required elements of the crime and nothing more. For a court to do so, as was done in this case, is to violate fundamental principles of fairness and wreak havoc with the goal of individualized sentencing that is to guide a court's actions at the time of sentencing.

¶22 We are unconvinced that the trial court erroneously exercised its sentencing discretion. First, we reject Thurman's characterization of the trial court's comments on "aggravating factors." The trial court used that phrase only once, stating:

> In terms of the amount of time, as stated I think there are a number of aggravating factors here, and I'm concerned. I know there are no charges associated with whatever happened while you were awaiting trial, but certainly, being in a hotel room with someone who's underage—whether she is cooperative or not—is of concern. And then there's somebody smoking marijuana, and who knows if you were or if you weren't, but I'll accept the representation that you were not smoking marijuana.
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> But once again, you're putting yourself in difficult situations, and it's especially troubling when it is during a time when you should be on your best behavior. So I think that that's a concern. There's a concern that the firearm was loaded, and there's a concern that there was evidence of drugs and involvement with drug delivery that was strong.

The trial court's statements identify facts that go beyond "the bare elements of the crime," including Thurman's uncharged behavior in the hotel room and the fact that the gun was loaded. We interpret the trial court's reference to "strong" involvement in delivering drugs to include both Thurman's participation in the sale to the undercover officer and the fact that his bedroom contained evidence of drug dealing—which the trial court had previously noted—including cocaine, razors, baggies and a digital scale. There was nothing improper about the trial court discussing these facts, which are relevant to the gravity of the offenses, Thurman's character, and the protection of the public.

¶23 The transcript is clear that the trial court considered proper factors, including the gravity of the offenses, Thurman's character, and the protection of the public. *See* ***Odom***, 294 Wis. 2d 844, ¶7. The trial court rejected Thurman's suggestion that he was unaware of the drug activity in the house, stating: "[T]here were drugs, there were razor blades, the baggies, the scales, all of those things that would indicate … at least extensive use if not selling, and selling illegal drugs is a very serious offense." The trial court considered Thurman's criminal history,

which it said was not "the worst record," but was still "of concern." The trial court also considered the fact that while out on bail, Thurman was found in a hotel room with marijuana and an underage girl, noting that Thurman was blaming the girl, just as he blamed Marshall, for his involvement with drugs. The trial court concluded: "If you really are so easily swayed, then you're a danger to this community if you're so easily led to criminal behavior."

¶24 We conclude that the trial court focused on proper sentencing factors and adequately explained the basis for Thurman's sentences. We further conclude that the sentences were not unduly harsh. By ordering that the two sentences be concurrent, the trial court imposed less than half the total time that could have been imposed. "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

By the Court.—Judgment and order affirmed.

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