Circuit Court for Harford County
Case No. 12-K-18-000455

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 285

September Term, 2019

JOSEPH LEE TURNER

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Wells,

JJ.

Opinion by Graeff, J.

Filed: May 21, 2020

Appellant was convicted, in the Circuit Court for Harford County, of possession of a firearm by a convicted felon and illegal possession of a regulated firearm. On April 17, 2019, the court sentenced appellant to 15 years, all but five suspended, on the conviction for possession of a firearm by a convicted felon, and it merged the conviction for illegal possession of a regulated firearm.

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly and reordered, as follows:

1. Did the circuit court err in failing to ask voir dire questions requested by defense counsel?
2. Was the evidence sufficient to sustain appellant's convictions for possession of a firearm?

For the reasons set forth below, we answer both questions "yes," and therefore, we shall vacate the judgments of the circuit court and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

On November 1, 2017, Detective Donald Kramer from the Harford County Sherriff's Office was conducting surveillance outside 1325 East Spring Meadow Court, Edgewood, Maryland. Appellant and Courtney Skelly got out of a car together and approached the house.[1] Appellant reached into his pocket, took what appeared to be a key

[1] Ms. Skelly's name was misspelled in the transcripts as "Courtney Scaling," we will use "Skelly," the correct spelling of her name.

from his pocket and opened the front door, and they entered the residence. Detective Kramer then obtained a search warrant for the residence.[2]

On November 3, 2017, Detective Kramer and other officers executed the search warrant. The police found a handgun with a loaded magazine in the basement bedroom of the residence. The gun was found in a "plastic drawer inside an armoire." The drawer where the gun was found contained women's clothing. To the right of the armoire, the police found a backpack and documents with appellant's name on them. The police also found a box of ammunition in another room in the house.

The police took appellant into custody, where he was interviewed by Detective Kramer and Detective Michael Berg. Appellant told the detectives that he met Ms. Skelly in October, and their relationship "really wasn't no[] big deal." Appellant initially stated that the last time he saw a gun was a month ago, and he denied "ever holding a gun in Harford County." Later, he stated that he did not know that Ms. Skelly had a gun and his DNA "shouldn't" be on the gun. He subsequently stated that, "even if" his DNA was on the gun, it did not mean that he shot anyone. Appellant then asked what would happen if he had touched the gun, stating that he "grabbed [the gun] one time," but he "never [had] it on me or nothing like that. It was in my way. It was just sitting there. What am I supposed to do[,] just leave it there?"

[2] Detective Kramer explained he was conducting surveillance of the residence to see if appellant was living there for a separate investigation.

During cross-examination, Detective Kramer testified that the handgun was registered to Ms. Skelly and that appellant had no possessory interest in the home. Detective Kramer testified that during the interview, appellant consented to providing a DNA sample.

Trial and Sentencing

Trial began on March 27, 2019. Appellant and the State stipulated that appellant had a previous conviction, prohibiting him from owning a handgun.[3]

In addition to Detective Kramer, Detective Michael Pachkoski, a member of the Harford County Sheriff's Office, testified to the discovery of the handgun in the basement bedroom inside a plastic drawer in an armoire. To the right of the armoire, there was a backpack and documents with appellant's name and address.

Detective Pachkoski testified that he collected the handgun and took it to a lab, where the trigger, handle, and slide rack were swabbed for DNA.[4] He also took a DNA sample from appellant to test against the DNA found on the handgun.

[3] At his sentencing hearing, the State outlined appellant's previous convictions as including: a 2013 second-degree assault, a 2012 robbery, and two second-degree assault convictions in 2009. As indicated, appellant does not dispute that he was prohibited from possessing a firearm.

[4] He testified that it was difficult to get fingerprints off a handgun. No prints found on the handgun were useful in this investigation.

Angela Spessard, an expert in forensic DNA testing and serology, testified about the process she used to obtain DNA from the handgun.[5] She detailed her results as follows:

> I obtained a DNA profile from at least four contributors, including a significant contributor and at least one male contributor. Joseph Turner, Jr could not be excluded as a significant contributor to that DNA profile, with a probability of selecting an unrelated individual at random who also could not be excluded as a significant contributor is approximately one in 190 quadrillion US Caucasian individuals; one in 310 quadrillion African American individuals and one in 480 quadrillion Hispanic individuals. And then the rest of that DNA profile -- so I said it was at least four contributors, I made conclusions to the significance, so the lesser contributors to that DNA profile, I can't make any conclusions to them.

During cross-examination, Ms. Spessard explained that it would not be unusual for appellant's DNA to be in a residence he frequently visited. Appellant's counsel asked whether it was possible if clothing had biological material on it, there could be a transfer of that biological material from the clothing to another object if they were in contact with each other. Ms. Spessard answered that it was possible.

Theresa Chamberlayne, an expert in firearm and tool mark examinations, testified that she examined the handgun. She determined that it was operable.

Further facts will be included, as necessary, in the discussion that follows.

[5] Ms. Spessard testified that serology is the examination of bodily fluids on evidence.

DISCUSSION

I.

Voir Dire

Appellant contends that the circuit court erred in refusing to ask several voir dire questions that he requested. Specifically, he asserts that the court erred in declining to ask the potential jurors: (1) questions about their relationship with law enforcement officers; (2) questions regarding whether they were willing to apply constitutional questions; and (3) a question relating to racial bias.

The State agrees that, pursuant to *Kazadi v. State*, 467 Md. 1 (2020), a case decided after appellant's trial, the circuit court's failure to ask on voir dire questions regarding the willingness to comply with jury instructions regarding the State's burden of proof, the presumption of innocence, and the defendant's right not to testify was error requiring a new trial. As explained below, we agree.

The Sixth Amendment of the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee the right to a "fair and impartial jury," and "[v]oir dire is the primary mechanism through which" this right is preserved. *Curtin v. State*, 393 Md. 593, 600 (2006). The purpose of voir dire is to determine, through questioning, whether the prospective jurors have "any bias or prejudice." *Id.*

"An appellate court reviews for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question." *Kazadi*, 467 Md. at 24 (quoting *Pearson v. State*, 437 Md. 350, 356 (2014)). A trial court has discretion regarding the "scope and form of the

questions" posed, and it does not need to make a particular inquiry unless it is "directed toward revealing cause for disqualification." *Thomas v. State*, 454 Md. 495, 504 (2017) (quoting *Dingle v. State*, 361 Md. 1, 13–14 (2000)). This includes questions that will reveal "biases directly related to the crime, the witnesses, or the defendant." *Pearson,* 437 Md. at 357 (quoting *Washington v. State*, 425 Md. 306, 313 (2012)).

Appellant's counsel objected to the court's failure to ask several questions that he requested be asked on voir dire. Those questions included the following:

> 10. Would any of you draw any inference of guilt from the fact that a person has been arrested or charged with a crime?
>
> 11. If the Defendant elects to testify on his own behalf, would any of you assume that he is testifying falsely because he is the person on trial? Would any of you be unable to weigh his testimony in the same manner as any other witness in the case?
>
> 12. The Defendant has an absolute constitutional right not to testify. Would any of you draw any inference of guilt from the Defendant's election to exercise his right not to testify?
>
> 13. The State has the burden of proving guilt beyond a reasonable doubt. The Defendant does not have to prove his innocence. Would any of you draw any inference of guilt if the Defendant elects not to present any evidence?
>
> * * *
>
> 20. If, after hearing all the evidence in this case, you think it is more likely than not that the Defendant is guilty but you are not convinced beyond a reasonable doubt as to his guilt, would you have any difficulty finding the Defendant not guilty?

In declining to ask these questions, the court stated that it was not going to "ask questions relating to constitutional rights, or explanations of what the constitution requires

or jury instructions" because the jury would "be instructed more specifically with respect to those things."

Appellant contends that the court erred in declining to ask the above questions, which he asserts sought to uncover whether the potential jurors were unwilling to apply fundamental constitutional principles and were not covered by other questions during voir dire. The State concedes that, based on the recent decision in *Kazadi*, the circuit court erred in failing to ask questions 12 and 13, and therefore, appellant is entitled to a new trial.

At the time of appellant's trial, the law was that a trial judge did not abuse its discretion in refusing to ask on voir dire questions relating to the presumption of innocence or the State's burden of proof. *Twining v. State*, 234 Md. 97, 100 (1964). After appellant's trial, the Court of Appeals reversed course and held:

> [O]n request, during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the long-standing fundamental principles of the presumption of innocence, the State's burden of proof, and the defendant's right not to testify.

Kazadi, 467 Md. at 9, 35–36. The Court explained that it reversed course because, since *Twining* was decided, "it has become apparent that not all jurors are willing and able to follow jury instructions on the presumption of innocence and the burden of proof." *Id*. at 36–37.[6]

[6] The Court also indicated that its holding applied to a case such as appellant's, which was pending on direct appeal when *Kazadi* was decided and the question was preserved for review. *Kazadi v. State*, 393 Md. 1, 47 (2020).

Accordingly, we agree with the State that the court abused its discretion in not asking defense counsel's requested voir dire questions number 12 and 13, which addressed the presumption of innocence, the State's burden of proof, and the defendant's right not to testify. Accordingly, appellant is entitled to a new trial.[7]

II.

Sufficiency of the Evidence

We must still address the sufficiency of the evidence claim to determine if appellant can be retried on these charges. *See Lockhart v. Nelson*, 488 U.S. 33, 39 (1988) ("[W]hen a defendant's conviction is reversed by an appellate court on the . . . ground that the evidence was insufficient to sustain the jury's verdict, the Double Jeopardy Clause bars a retrial on the same charge."). A reversal based on sufficiency of the evidence has different implications than a reversal based on a trial error. *See Scott v. State*, 454 Md. 146, 171 (2017) (quoting *Lockhart*, 488 U.S. at 40), *cert. denied*, 138 S. Ct. 652 (2018)). In the first instance, the State failed to prove its case. *Id*. The second instance "implies nothing with respect to the guilt or innocence of the defendant" and only means that there was something defective about the first trial. *Id*. at 172 (quoting *Lockhart*, 488 U.S. at 40). When a decision is reversed for trial error, Double Jeopardy principles do not prevent a new trial. *Id*.

[7] If, on retrial, appellant requests that the court ask questions similar to questions 10, 11, 12, and 20, the parties can address, and the circuit court can decide, whether those questions are adequately covered by the rest of the questions on voir dire.

Accordingly, although we are vacating appellant's convictions and remanding for a new trial, we will address appellant's contention that the evidence was not sufficient to support his convictions. Specifically, he asserts that there was not sufficient evidence that he possessed the handgun found in the residence.

The State contends that the evidence was sufficient to support appellant's convictions of illegal possession of a firearm. It argues that appellant's DNA on the handgun made it clear that "he had 'actually used' the gun," and appellant's statements to the police provided sufficient evidence that he possessed the gun.

This Court explained the standard of review for determining sufficiency of the evidence in *Williams v. State*, 231 Md. App. 156, 199–200 (2016) (alterations in original), *cert. dismissed*, 452 Md. 47 (2017), as follows:

> When reviewing the sufficiency of the evidence, our task is to determine "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Hobby v. State*, 436 Md. 526, 537–38, 83 A.3d 794 (2014) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)) (emphasis in *Jackson*). This standard applies regardless of whether the verdict rests upon circumstantial or direct evidence "since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *State v. Suddith*, 379 Md. 425, 430, 842 A.2d 716 (2004) (quotation marks and citation omitted). "[R]esolving conflicts in the evidence, and weighing the credibility of witnesses, is properly reserved for the fact finder." *Longshore v. State*, 399 Md. 486, 499–500, 924 A.2d 1129 (2007) (citations omitted). A jury is given the responsibility to "choose among differing inferences that might possibly be made from a factual situation and [a reviewing court] must give deference to all reasonable inferences the fact-finder draws, regardless of whether we would have chosen a different reasonable inference." *Suddith*, 379 Md. at 430, 842 A.2d 716 (quotation marks and citations omitted).

Our review is not concerned with the "weight of the evidence; rather, our concern is only whether the verdict was supported by sufficient evidence . . . which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Taylor v. State*, 346 Md. 452, 457 (1997).

Here, appellant was convicted of possession of a firearm by a convicted felon, and illegal possession of a regulated firearm. To "possess" an item, an individual must "exercise actual or constructive dominion or control over a thing." Md. Code (2018) § 5-101(v) of the Criminal Law Article ("CR"). *Accord Taylor*, 346 Md. at 459 (Possession "requires the exercise of dominion or control over the thing allegedly possessed."). A firearm "need not be found on a defendant's person in order to establish possession." *Handy v. State*, 175 Md. App. 538, 563, *cert. denied*, 402 Md. 353 (2007). "Control may be actual or constructive, joint or individual." *Williams*, 231 Md. App. at 200.

> In cases involving joint possession, the following factors are instructive:
>
> > 1) proximity between the defendant and the contraband, 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant, 3) ownership or some possessory right in the premises or the automobile in which the contraband is found, or 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband.

Handy, 175 Md. at 564. *Accord State v. Gutierrez*, 446 Md. 221, 234 (2016). To be sufficient to support a conviction, the evidence need only "demonstrate either directly or inferentially that [the defendant] exercised 'some dominion or control over the prohibited

[item]. . . .'" *Parker v. State*, 402 Md. 372, 407 (2007) (second alteration in *Parker*) (quoting *Moye v. State*, 369 Md. 2, 13 (2002)).

Although the gun was found in a drawer in an armoire with women's clothing, there was evidence to support an inference that appellant had possessory rights in the premises. The jury could infer that appellant had a key to the apartment, and documents with appellant's name on them were found near the armoire in the bedroom.

Moreover, there was evidence of circumstances from which the jury could have drawn the inference that appellant was participating with his girlfriend in the mutual use and enjoyment of the firearm. Appellant's DNA was on the handgun, and he admitted to the police that he had touched the gun, switching his story from never touching the gun to asking about the ramifications if he had touched the gun, to finally admitting that he had touched it. Given this evidence, a reasonable jury could have found that appellant possessed the firearm.[8]

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY VACATED AND REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY HARFORD COUNTY.

[8] Appellant also contends that the evidence was insufficient to show that he possessed the firearm on the date in the indictment. Md. Rule 4-202(a) requires that the indictment provide the time and place the offense occurred "with reasonable particularity." Here, the indictment stated that appellant possessed the gun "on or about" October 22, 2017. Appellant told the police that he had known Ms. Skelly since October 2017. Accordingly, the jury could infer that appellant's possession occurred after that. *See generally Harmony v. State*, 88 Md. App. 306, 314 (1991) (quoting *Bonds v. State*, 51 Md. App. 102, 107, *cert. denied*, 293 Md. 331 (1982)) ("Where the exact time and date of the crime alleged is impossible to establish, we will not allow a criminal defendant to 'thwart justice' by demanding specific dates and times[.]"). *See also Brunner v. State,* 154 Md. 655 (1982). Thus, his claim has no merit.

The correction notice(s) for this opinion(s) can be found here:

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