

Circuit Court for Washington County
Case No. C-21-CR-19-000504

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 606

September Term, 2020

BARRY LOFTON

v.

STATE OF MARYLAND

Graeff,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 21, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury in the Circuit Court for Washington County found Barry Lofton, appellant, guilty of possession of a regulated firearm after being convicted of a disqualifying crime, wearing, carrying, or transporting a loaded handgun on his person, wearing, carrying, or transporting a handgun on his person, and two counts of possession of ammunition while being prohibited from possessing a regulated firearm. The court sentenced appellant to 15 years' imprisonment, all but eight years suspended, on the conviction for possession of a regulated firearm, and three years' imprisonment, concurrent, on the conviction for wearing, carrying, or transporting a loaded handgun on his person. The court merged all the other convictions into these sentences.

On appeal, appellant raises the following question for this Court's review, which we have rephrased slightly, as follows:

Was the evidence sufficient to sustain appellant's convictions?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Shortly after 1:00 a.m. on June 7, 2019, Hagerstown City police officers were dispatched to disperse a crowd outside the Elks Lodge.¹ Officer Charles Johnson logged into the State's surveillance camera system at the police department and retrieved a live camera feed of the area around the Elks Lodge. Officer Johnson testified that the live video of the intersection of Henry Avenue and Murph Avenue showed a large crowd of people.

¹ This location is referred to both as the Elks Lodge and the Elks Club in the transcript. We will refer to the location throughout this opinion as the Elks Lodge.

One individual, a black male wearing a white shirt and blue jeans, “walk[ed] into a cut between two apartments.”² Officer Johnson knew that the walkway led to a tall chain-link fence, essentially making it a dead end, but the camera did not show this area. He saw the male “stooped down under a set of steps,” walk on the sidewalk out of the camera’s view and behind a building, and then return to the crowd of people. He then “stooped down underneath [a] car and appeared to retrieve something,” and then walked away. Officer Johnson notified the officers responding to the scene of what he had observed. During trial, the surveillance footage was admitted into evidence and published to the jury.

The city surveillance video evidence shows a black male wearing a white shirt and blue jeans walking into the alley and crouching underneath the staircase for more than a minute. He then exited the alley. Several minutes later, just before the police approached that area, he returned to the staircase and crouched underneath the staircase again. When he exited the alley the second time, he looked over his shoulder in the direction of the officers. He paused at a car parked on the street and then continued walking with the crowd away from the officers. Seconds later, he went back to that car, crouched behind the bumper, and looked around the car in the direction of Officer Joseph Brady, who was walking up the street and approaching the alley. When Officer Brady turned the corner to enter the alley, the male stood up and began walking away.

Officer Brady, one of the officers who responded to the Elks Lodge to disperse the crowd outside, testified that he received information from Officer Johnson about a

² A “cut” is a narrow alley between buildings.

suspicious male in the area wearing a white shirt. Officer Johnson relayed that he saw a “male wearing a white shirt” go between two houses on Murph Avenue and go behind a staircase, and he believed that the man had concealed something underneath a staircase between two buildings on Murph Avenue. As Officer Brady proceeded down the block, he saw a man wearing a white polo shirt emerge from between two apartment buildings.³ Officer Brady had his body camera on during this time, but the bodycam footage did not show appellant exit the cut.

Officer Brady checked for contraband in the area that Officer Johnson had described. He got down on his hands and knees and reached up under the first step of the staircase and found a small, loaded revolver. He seized the gun and identified it as a North American Arms .22 caliber revolver, which he stated is a regulated firearm in Maryland. He testified that there was an apartment that led up to the stairwell, and there was an apartment below the stairwell, so there was a door behind the stairwell. The gate at the end of the walkway was secured, and the fence was very high. The firearm was entered into evidence.

Officer Emily Daveler testified that, on June 7, 2019, at 1:00 a.m., she responded to the Elks Lodge to disperse the crowd. She was monitoring a portion of the crowd walking in one direction, when she received Officer Johnson’s radio communication that he observed a black male wearing a white shirt and blue jeans stooped behind a stairway,

³ Officers Johnson, Daveler, and Moczydlowsky all described appellant as wearing a white tee shirt.

appearing to hide something. She saw a man emerge from the cut who fit the description that Officer Johnson had provided. She identified that man as appellant. She then saw the man stoop down in front of a vehicle. She did not see anyone else emerge from the cut.

After Officer Brady went to the cut, he radioed to the officers that he “found a 32,” a firearm, and he said “go ahead and grab him.” Officer Daveler and appellant were making eye contact the entire time, and after Officer Brady’s radio message, appellant took off running. Officer Daveler and Officer Jonathan Moczydlowsky chased appellant. Officer Daveler lost sight of him, but she rounded a corner and saw Officer Moczydlowsky and Lieutenant Woodring apprehend appellant on Bethel Street. Officer Jason Batistig testified that, during the background check for purposes of the arrest, he learned that appellant was prohibited from possessing a handgun or ammunition.

Officer Moczydlowsky similarly testified that, upon receiving the description of appellant, he and Officer Daveler walked toward the area Officer Johnson referenced. They saw appellant, the only male wearing a white shirt and blue jeans, and he was looking back at them. When they got Officer Brady’s radio message, appellant took off running, and he was the only person to do so in the crowd. After police apprehended appellant, Officer Moczydlowsky searched him and found no contraband on his person.

Both Officer Daveler and Officer Moczydlowsky returned to the cut at Murph Avenue. Officer Daveler went back to the cut that night, and she observed that the fence was secured and the gate was locked. She testified that the fence was eight feet high. She was unsure as to whether there was a door underneath the step. Officer Moczydlowsky

similarly testified that he was unsure whether there was a door behind the staircase, but the gate was closed and locked.

Jeffrey Kercheval, a forensic scientist for the Western Maryland Regional Crime Laboratory, testified as an expert in the field of latent print development. He processed and test-fired the gun that Officer Brady had recovered. Mr. Kercheval tested the firearm for latent fingerprints, but there were no latent fingerprint impressions on the firearm or the ammunition that were suitable for comparison purposes.⁴ Mr. Kercheval successfully fired two rounds of live ammunition from the gun. The firearm and the bullets and rounds found in it were not tested for any DNA or touch DNA.

The parties stipulated that appellant was prohibited from possessing a regulated firearm or ammunition.

This appeal followed.

DISCUSSION

Appellant contends that the evidence was insufficient to support his convictions because the State failed to prove that he was in possession of the firearm found under the staircase. He does not dispute that he went to the area where the revolver was located, but

⁴ Mr. Kercheval testified that they found a suitable print for comparison purposes “in less than five percent of the cases.”

he contends that this fact “loses significance in light of the fact that he did not have exclusive access to that location.”

The State contends that there was sufficient evidence “for the jury to infer that [appellant] was wearing, carrying, and/or transporting the revolver on his person (and the ammunition that it contained) before he discarded it under the staircase and, therefore, he had possession of the firearm.” It notes that, in addition to evidence of appellant’s presence underneath the staircase, his “flight from the police and/or the crime scene is textbook consciousness of guilt evidence.”

This Court has set forth the applicable standard of review in determining the sufficiency of the evidence, as follows:

The test of appellate review of evidentiary sufficiency is 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.’” *State v. Coleman*, 423 Md. 666, 672 (2011) (quoting *Facon v. State*, 375 Md. 435, 454 (2003)). The Court’s concern is not whether the verdict is in accord with what appears to be the weight of the evidence, “but rather is only with whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant’s guilt of the offense charged beyond a reasonable doubt.” *State v. Albrecht*, 336 Md. 475, 479 (1994). Further, “the finder of fact has the ‘ability to choose among differing inferences that might possibly be made from a factual situation’ That is the fact-finder’s role, not that of an appellate court.” *Smith v. State*, 415 Md. 174, 183 (2010) (quoting *State v. Smith*, 374 Md. 527, 534 (2003)).

Kamara v. State, 205 Md. App. 607, 632 (2012). *Accord State v. Wilson*, 471 Md. 136, 159 (2020); *Fuentes v. State*, 454 Md. 296, 307–08 (2017).

Appellant's convictions all involve the unlawful possession of a loaded handgun. *See* Md. Code Ann., Crim. Law Art. ("CR") § 4-203(a)(1)(i) (Repl. Vol. 2021) (a person may not wear, carry, or transport a handgun, "whether concealed or open, on or about the person"); CR § 4-203(a)(1)(v) (a person may not from wear, carry, or transport "a handgun loaded with ammunition"); Md. Code Ann., Pub. Safety Art. ("PS") § 5-133(c) (a person may not possess a regulated firearm if he or she was previously convicted of a crime of violence or other offenses); PS § 5-133.1(b) (a person may not possess ammunition if he or she is prohibited from possessing a regulated firearm under PS § 5-133(c)).⁵

To possess an item "means to exercise actual or constructive dominion or control over a thing by one or more persons." CR § 5-101(v). To support a conviction for a possessory offense, the "evidence must show directly or support a rational inference that the accused did in fact exercise some dominion or control over the prohibited [item] in the sense contemplated by the statute, i.e., that the accused exercised some restraining or direct influence over it." *State v. Gutierrez*, 446 Md. 221, 233 (2016) (cleaned up). *See also Williams v. State*, 231 Md. App. 156, 200 (2016) (applying the CR § 5-101(v) definition of possession when assessing whether the evidence was sufficient to support convictions for illegal firearm possession under PS § 5-133(c)).

Here, the evidence was sufficient for a rational juror to infer that appellant had actual possession of the loaded revolver, and the ammunition within it, before he discarded it

⁵ As articulated above, appellant stipulated at trial that he was previously convicted of an offense that disqualified him from having a firearm.

under the staircase. Two key evidentiary foundations support that inference, the city surveillance video and appellant's actions.

The surveillance video evidence showed that, at approximately 1:14 a.m., appellant entered the alley, crouched underneath the staircase there for more than minute, and then exited the alley. He returned to the alley at approximately 1:21 a.m., just before the officers arrived to disperse the crowd. Appellant again bent underneath the staircase—this time only for a few seconds. Appellant then went out of the camera view in the back of the alley. He then reappeared on the footage, exited the alley, and walked down the sidewalk away from the arriving officers. During that time, and until Officer Brady's arrival at the staircase at approximately 1:23 a.m., appellant was the only person who went near the staircase. At approximately 1:23 a.m., Officer Brady entered the alley and discovered the loaded revolver underneath that staircase where appellant had been.

Appellant does not dispute that he was the person seen in the stairway. He argues, however, relying on *Wilson v. State*, 319 Md. 530 (1990), that the State failed to prove that he was in possession of the firearm, as opposed to another person storing the firearm in the staircase. In that case, Wilson, a housecleaner, was convicted of theft for stealing rings from a bedroom closet at a residence where he was employed. *Id.* at 532. Wilson was present at that residence on the day that the rings went missing, and he had access to the bedroom closet where the rings were last seen. *Id.* at 537. The evidence showed, however, that five other people, as well as other cleaning personnel, were present at the residence on that day and had access to the rings in that bedroom. *Id.* at 537–38. The Court of Appeals

concluded that the evidence was insufficient to support that conviction, noting that, aside from Wilson's presence at the crime scene, "[t]here was no other evidence of Wilson's behavior, acts or conduct, that implicated him as the person who stole the rings." *Id.* at 538.

Here, however, in addition to the surveillance footage, which showed that appellant twice walked directly underneath the staircase in the alley right where the gun was found, there was evidence of appellant's behavior, acts, and conduct that implicated him as the person who possessed the gun. Appellant crouched behind a car to observe whether the police would enter the alley where the gun was located. When appellant saw Officer Brady enter that alley, he stood up and walked away. After Officer Brady communicated with the officers near appellant that he had found the gun, appellant ran from the police. When the police apprehended appellant, appellant had no contraband on his person that would explain his flight. Under these circumstances, appellant's conduct, including his flight, permitted an inference of consciousness of guilt regarding the gun under the staircase. *See, e.g., Cerrato-Molina v. State*, 223 Md. App. 329, 332 (2014) ("[F]light permits the inference of consciousness of guilt"), *cert. denied*, 445 Md. 5 (2015).

In support of his claim that the State failed to prove actual possession, appellant argues that the gun could have been under the staircase for any length of time. That argument misses the mark because "[w]e do not second-guess the jury's determination where there are competing rational inferences available." *Smith*, 415 Md. at 183.

Based on the evidence, a rational juror could conclude that appellant had actual possession of the loaded revolver. The evidence was sufficient to sustain his convictions.

**JUDGMENTS OF THE CIRCUIT COURT
FOR WASHINGTON COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**