

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1170

September Term, 2017

ERIC PINKCETT

v.

STATE OF MARYLAND

Woodward C.J.,
Graeff,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: May 2, 2018

*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.

On June 15, 2015, a jury sitting in the Circuit Court for Baltimore City convicted appellant, Eric Pinkcett, of possession of a regulated firearm by a person convicted of a disqualifying crime, and wear, carry, transport of a handgun on a person. The court sentenced appellant to five years of incarceration for possession of a regulated firearm. The court further sentenced appellant to a concurrent two years of incarceration for wear, carry, transport of a handgun on a person. On September 19, 2016, appellant filed a petition seeking post-conviction relief. On August 1, 2017, and pursuant to an agreement made between the parties, the court granted appellant’s request to file a belated notice of appeal. This appeal followed, wherein appellant argues that the evidence was insufficient to sustain his convictions. We affirm.

BACKGROUND

At approximately 3:39 a.m. on September 12, 2014, the Baltimore City Police Department received two calls for service in the 1600 block of Hazel Street. The first call reported someone discharging a firearm in the area. The second call reported an “armed” person on the block. The suspect was described as a black male wearing shorts. Baltimore City police officers Steven Weichert and Matthew Zenker were on patrol in the area and responded to the call. Officer Zenker was operating a marked police vehicle and drove to the location, arriving approximately one minute after receiving the call. As the patrol vehicle entered the 1600 block of Hazel Street, the officers observed only one person, a black male wearing shorts, out on the block. He was later identified as appellant.

Officer Zenker stopped the patrol vehicle a few feet from where appellant was standing on the sidewalk. Officer Zenker exited the driver’s side of the patrol vehicle, and

Officer Weichert exited the passenger side of the patrol vehicle, whereupon appellant made eye contact with the officers and began to walk away. A van was parked along the curb, and appellant and Officer Zenker walked along the passenger's side of the van, as Officer Weichert walked along the driver's side of the van. Both officers followed behind appellant for the length of the van, approximately fifteen feet. As they reached the end of the van, appellant turned towards Officer Weichert and made a "grab motion towards his dip area," which Officer Weichert described at trial as being in the area where a belt buckle would be. Officer Weichert testified that, the movement of appellant's arm, was, in his experience, "characteristic of an armed person."

Officer Weichert told appellant to drop the gun. Officer Zenker, who was positioned behind appellant, heard a click, which he believed sounded like the "click of a gun being cocked," whereupon he fired his departmental issued taser. After Officer Zenker fired his taser, he saw something fall to the ground, and both officers heard what they described as a metallic object hit the ground. Officer Weichert apprehended appellant. Officer Zenker moved closer to where he heard the metallic object hit the ground, and discovered a .22 caliber revolver underneath the van, and approximately two feet away from appellant. Officer Zenker recovered the revolver from the scene. He also discovered that it was loaded with five live rounds and one spent cartridge. The revolver was later examined by James Wagster, a firearms examiner with the Baltimore City Police Department. Wagster, who testified as an expert in the field of identifying and testing firearms, test fired the firearm and found it to be operable. At trial the parties stipulated that appellant was

“prohibited from possession of a regulated firearm because of a previous conviction that prohibits his possession of a regulated firearm.”

At the close of the State’s case the following exchange occurred at the bench:

COURT: Why don’t we do this. Have him state as to the motion, and then you can advise him and then I’ll give you a chance to talk to him before he answers. If you want to do that, it doesn’t matter.

[DEFENSE COUNSEL]: Okay. Yeah. Okay.

[STATE]: Your Honor, as Your Honor heard the testimony is that Mr. Pinkcett had the gun in his waistband. The officers observed him pull it out, dropped it. They recovered it immediately. That’s, you know, it was two feet away from him. And that it was tested and found to be operable. And that’s per the convictions that went into evidence, that he is prohibited to carrying that firearm.

COURT: Okay. And do you think there’s sufficient evidence (indiscernible) against each element the State’s obligated to prove beyond a reasonable doubt (indiscernible) the jury to reach that decision in favor of the State?

[STATE]: Yes, ma’am.

COURT: (Indiscernible.) Do you want to (indiscernible) now?

[DEFENSE COUNSEL]: (indiscernible.)

COURT: Yeah. No, I know. Just (indiscernible.)

[DEFENSE COUNSEL]: Right.

COURT: Right, of course.

[DEFENSE COUNSEL]: I just, I feel like I should talk to him for a minute.

COURT: That’s fine.

The jury was then excused from the courtroom, and appellant was advised of his right to testify. Ultimately appellant elected to testify, during which time he denied possessing the firearm. At the close of appellant’s testimony, defense counsel rested, and counsel for appellant did not move for a motion for judgment of acquittal.

DISCUSSION

Appellant contends that the evidence is insufficient to sustain his convictions, because the “State failed to prove that [he] had possession of the handgun at issue.” The State responds that the issue has not been preserved, because “the defense did not formally move for judgment of acquittal.” We hold that appellant’s claim was not preserved for our review. Nevertheless, even if preserved, the evidence was sufficient to convict him.

In a jury trial, Md. Rule 4-324(a) requires that a motion for judgment of acquittal be made at the “close of all evidence.” Where a motion for judgment of acquittal is made at the close of the State’s case, and the appellant then testifies on his own behalf, the motion has been effectively withdrawn. *Steward v. State*, 218 Md. App 550, 557 (2014). Appellate courts are precluded “from entertaining a review of the sufficiency of the evidence, in a criminal case tried before a jury, where the defendant failed to move for judgment of acquittal at the close of all the evidence.” *Ennis v. State*, 306 Md. 579, 585 (1986).

If preserved for appeal, “we review the evidence in the light most favorable to the prosecution and determine whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Perry v. State*, 229 Md. App. 687, 696 (2016) (quoting *State v. Smith*, 374 Md. 527, 533 (2003)). The reviewing court will affirm

the conviction, “[i]f the evidence ‘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 offenses charged beyond a reasonable doubt.’” *Bible v. State*, 411 Md. 138, 156 (1998) (quoting *State v. Stanley*, 351 Md. 733, 750 (1998)). “It is not the function of the appellate court to determine the credibility of witnesses or the weight of the evidence.” *Smith v. State*, 138 Md. App. 709, 718 (2001) (citations omitted). It is the fact finder’s “task to resolve any conflicts in the evidence and assess the credibility of witnesses.” *Id.*

The record reveals that the parties discussed some sort of motion at the close of the State’s case. The exact details of the motion are unclear, however, due to some statements being indiscernible to the transcriber. While it appears that the State argued with some particularity against a motion for judgment of acquittal, is not clear whether defense counsel ever actually made the motion. Nevertheless, what is clear, is that after appellant testified on his own behalf, defense counsel never made, renewed, or argued the motion with any particularity. As a result, the requirements of Rule 4-324(a) were not satisfied, and appellant’s claim is not preserved for our review.

Even had appellant’s claim been preserved, however, we would have held that the evidence was sufficient to sustain his convictions. Appellant was convicted of possession of a regulated firearm by a prohibited person, and wear, carry, transport of a handgun on a person. Appellant argues that there was “no direct evidence that he was in possession of the handgun,” nor was there “evidence that [he] had any possessory interest in the gun or actual knowledge of the gun that was located on the ground on a public street.”

“In order for the evidence supporting the handgun possession conviction to be sufficient, it must demonstrate either directly or inferentially that [the accused] exercised “some dominion or control over the prohibited” firearm. *Parker v. State*, 402 Md. 372, 407 (2007) (internal quotations and citations omitted). Possession may be actual or constructive, and “[k]nowledge of the presence of an object is normally a prerequisite to exercising dominion and control.” *Id.* (internal quotations and citations omitted).

Officers Weichert and Zenker responded to the area for a report of a discharge of a firearm by a black male wearing shorts. When they arrived on the scene, the only person on the block was appellant, a black male wearing shorts. As the officers approached appellant, Officer Weichert observed him make a movement “characteristic of an armed person.” Officer Zenker then saw an object fall out of appellant’s hand, and both officers heard what they described as a metallic object hit the ground. A .22 caliber revolver was then recovered two feet from appellant. This testimony, if believed, could have supported a rational inference that appellant had possession of the firearm, that it fell from his waistband as the officers made contact with him, and that the metallic sound the officers heard was the handgun falling to the pavement. The testimony of the officers, along with the location of the handgun when recovered, was sufficient for a rational trier of fact to find that appellant had dominion or control over the firearm.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**