

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000784-MR

CURT F. BURKO

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL WINCHESTER, JUDGE
ACTION NO. 14-CR-00293

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON, AND THOMPSON,
JUDGES.

CLAYTON, JUDGE: This case is a direct appeal from a criminal conviction. At the conclusion of a one-day trial, a jury found Curt Burko guilty of one count of possession of a handgun by a convicted felon. Burko and the Commonwealth agreed to a seven-year imprisonment sentence, provided that Burko remain out on bond for approximately four months prior to sentencing. After Burko requested

and was granted continuances for his sentencing date, the trial court entered a judgment in accord with the agreement.

Burko claims on appeal that the trial court erred by denying his motion for a directed verdict and by failing to instruct the jury about the definition of possession. Regarding the first issue, we affirm the judgment and hold that the evidence was sufficient to deny the motion for directed verdict. Regarding the second issue, we also affirm the judgment and hold that Burko waived appellate review of the jury instruction definitions. We begin with a brief recitation of the facts adduced at trial.

BACKGROUND

A person called 911 and reported an allegedly intoxicated person driving erratically in a silver pickup truck on I-75. It was late in the evening. Two officers responded to the area, pulled over a pickup matching the description, and approached the vehicle. The driver, Burko, reached for the glovebox. When he opened it, one of the officers noticed a handgun in the glovebox. The officers separated Burko from the weapon. According to one of the officers, Burko said, “the weapon is legal, I’m a security officer.” The handgun was in a holster. Upon examination, officers discovered it was a fully-loaded, Kel-Tec 9mm semi-automatic handgun. It had a loaded magazine and a round in the chamber. A separate, loaded, 9mm magazine was in the glovebox.

Officers called in the weapon and discovered that Burko was a convicted felon. Burko was then arrested and charged with being a felon in

possession of a handgun.¹ On the passenger floorboard of the truck were duffel bags containing handcuffs, ammunition including shotgun shells, and prescription medication. Burko's name was on some of the prescriptions. They were current, valid prescriptions, many for pain medication, to treat Burko's maladies.

In his defense, Burko attempted to show that he did not knowingly possess the handgun. He claimed neither the gun nor the truck was his, and he was only driving the truck at his wife's behest. On the night that Burko was arrested, Burko's wife had been in court on a separate case and had asked Burko to drive her truck home from the courthouse, as she believed she would be harassed by the complaining witness in her case if she drove the truck home. Burko's wife, who at the time of Burko's arrest was not yet married to Burko, explained that she had only recently purchased the truck for herself and did not normally have Burko drive it.

She also explained that another person had accidentally left the gun in the truck. She explained that she had given the gun to a person in exchange for some jewelry. That person had borrowed her truck the day before Burko's arrest, and he had accidentally left the gun in the truck's glovebox when he borrowed the truck.

The jewelry seller testified and verified Burko's wife's story, except he was adamant that he did not leave a magazine in the gun. The jewelry seller explained he had been in the military, currently ran a security business, and

¹ It does not appear the officers charged Burko with any additional crimes.

considered it an “unsafe practice” to leave a loaded gun in a vehicle. He testified that he removed the magazine from the gun before placing it in the glovebox.

Burko also testified in his defense. He claimed he did not own the truck or the handgun, and he did not know the handgun was in the truck.

ANALYSIS

Burko first claims the trial court erred by denying his motion for a directed verdict. Motions for directed verdict are reviewed as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citations omitted).

In spite of this high standard, Burko claims the trial court should have granted the motion for directed verdict because there was “little-to-no evidence” placing the gun in Burko’s possession, and Burko’s witnesses were allegedly “more credible” than the police officer who testified. We disagree. First, we do

not and cannot weigh witness credibility nor assign weight to that testimony. *Benham, supra*. Only if the testimony “asserted the occurrence of physically impossible or inconceivable events” could we consider finding the witnesses lacked credibility such that the trial court should have granted a directed verdict. *Potts v. Commonwealth*, 172 S.W.3d 345, 349 (Ky. 2005). That error did not occur here, as the gun was found inside the truck, and it was possible that Burko, who was the only person in the truck at the time, possessed it.

Second, Burko’s “little-to-no evidence” argument likewise fails. To secure a conviction, the Commonwealth needed to prove that Burko had been convicted of a felony and “possesse[d], manufacture[d], or transport[ed] a firearm[.]” Kentucky Revised Statute (KRS) 527.040(1). *See Acosta v. Commonwealth*, 391 S.W.3d 809, 816 (Ky. 2013) (“A directed-verdict motion is reviewed in light of the proof at trial and the statutory elements of the alleged offense.”) (citing *Lawton v. Commonwealth*, 354 S.W.3d 565, 575 (Ky. 2011)). Possession under KRS 527.040 may be constructive, which exists when a person has the power and intention to exercise dominion and control of an object that the person does not actually possess. *Johnson v. Commonwealth*, 90 S.W.3d 39, 42 (Ky. 2002), *overruled on other grounds by McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010) (citing *United States v. Kitchen*, 57 F.3d 516, 520 (7th Cir. 1995)). Case law has affirmed constructive possession when a person resided in his wife’s residence while she possessed guns, *Johnson, supra*, and while the defendant was the owner and operator of a motor vehicle that had guns hidden

inside the vehicle, *Deboy v. Commonwealth*, 214 S.W.3d 926, 929-30 (Ky. App. 2007). “[P]roof that a defendant has possession and control of a vehicle is evidence to support a conviction for constructive possession of contraband found within the vehicle.” *Ibid.* (quoting *Burnett v. Commonwealth*, 31 S.W.3d 878, 880 (Ky. 2000)) (alteration in original).

The instant case presents a hybrid between *Johnson* and *Deboy*. Burko’s wife owned the truck, but Burko controlled the vehicle. Burko did not deny that the gun was in the truck that he was driving. Burko likewise did not deny that he was a convicted felon, so the Commonwealth needed only prove actual or constructive possession of the handgun to secure a conviction. Viewing the evidence in a light most favorable to the Commonwealth, as the directed-verdict standard requires, it would not be unreasonable for a jury to find Burko possessed the fully-loaded handgun, especially given Burko’s statement to the officer that, “the weapon is legal, I’m a security officer.” This statement could indicate that Burko knew the weapon was in the vehicle, and he had the power and intention to exercise control over the weapon. Thus, the evidence presented during the Commonwealth’s case-in-chief was sufficient to survive the directed-verdict motion.

Likewise, additional evidence from Burko’s own defense witnesses showed Burko possessed the gun. The jewelry seller claimed he had placed the gun – unloaded – in the vehicle just hours before the officers discovered the weapon. As the gun was loaded when the officers discovered it, someone had to

have loaded the gun after it was accidentally left in the glovebox. Burko's wife can be eliminated as the person who loaded the gun, as she claimed she had given the gun to the jewelry seller before she had Burko drive the truck. And, according to Burko's evidence, the only other person who operated the vehicle in the relevant timeframe was Burko himself. This evidence is more than sufficient to demonstrate that Burko knowingly exercised dominion and control over the weapon because he had to be the person who loaded the gun after the jewelry seller left the unloaded gun in the glovebox.

Viewing the evidence in a light most favorable to the Commonwealth, it was not unreasonable for a jury to find Burko guilty. The trial court properly denied the directed-verdict motion. Accordingly, we AFFIRM the judgment and sentence on this issue.

We next address the alleged error with the jury instructions. Burko claims the trial court erred by not defining possession. He avers that this issue is "arguably preserved." It is not. In fact, the alleged error was waived and is not reviewable on direct appeal. Burko had tendered an instruction including a definition of actual possession, but, following discussions with the trial court, Burko asked the trial court to not give the instruction. The Commonwealth requested the instruction, noting that if Burko were convicted, he may attempt to raise the failure to give the instruction as a palpable error. The trial court followed Burko's request and declined to give the definition.

Any alleged error relating to this instruction was invited by Burko when he expressly declined the instruction. Our law does not permit a party to invite error then raise it on appeal. *Tackett v. Commonwealth*, 445 S.W.3d 20, 29 (Ky. 2014) (“[A] party cannot ask a trial court to do something and, when the court does it, complain on appeal that the court erred.”); *Mullins v. Commonwealth*, 350 S.W.3d 434, 438 (Ky. 2011) (waived appellate review of jury instructions when defense counsel stated no evidence supported giving extreme emotional disturbance instruction, and trial court did not give such instruction). Accordingly, we hold that the alleged error was waived, and we AFFIRM the judgment and sentence entered against Burko.

Having rejected both of Burko’s alleged errors, we AFFIRM the judgment and sentence.

ALL CONCUR.

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