

ARIZONA COURT OF APPEALS

DIVISION TWO

STATE OF ARIZONA,

Appellee,

v.

GARY EDWARD COX,

Appellant.

2 CA-CR 2005-0272

Pima County
Superior Court
No. CR-20043431

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QUESTIONS PRESENTED FOR REVIEW

1. When reasonable jurors could differ on the inferences to be drawn from the evidence, did the trial court abuse its discretion in denying Appellant's motion for directed verdicts of acquittal?
2. Did the trial court properly instruct the jury on constructive possession?

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STATEMENT OF THE CASE

¶ 1 Pima County Sheriff's Deputy Jeffrey Bonds stopped a car driven by Appellant in a rural area at about 3:00 a.m. (R.T. 3/1/05, at 81–83.) Appellant and his passenger, Shari Perko, complied with Bonds' request to produce identification. (*Id.* at 83–84.) As Bonds spoke with the pair through the driver's window, he noticed a spent shell casing in the vehicle's center console. (*Id.* at 85.) Appellant responded negatively when Bonds asked if there were any weapons in the car. (*Id.* at 85–86.) Perko did not respond to Bonds' question. (*Id.* at 86.) While Bonds ran records checks from his patrol vehicle, Deputy Elliot Lyle arrived to assist. (*Id.* at 86; R.T. 3/2/05, at 4–5.)

¶ 2 Bonds conversed with Appellant near the back of Appellant's car, while Lyle spoke separately with Perko near Bonds' car. (R.T. 3/1/05, at 86–88; R.T. 3/2/05, at 6–8.) When Lyle asked Perko if there was a gun in the car, she did not respond and would not meet his gaze. (R.T. 3/2/05, at 8.) He asked again and she eventually nodded her head affirmatively. (*Id.*) Lyle pulled Bonds aside and told him Perko had said there was a shotgun in the trunk. (R.T. 3/1/05, at 88–89.) Bonds then asked Appellant if he had any felony convictions, and Appellant admitted he did. (*Id.* at 89.) When Bonds again asked if there was a shotgun in the trunk, Appellant confessed there was. (*Id.*)

¶ 3 When Appellant opened the trunk, Bonds saw the shotgun. (*Id.*) Appellant explained that he and Perko had just gotten the gun from a friend's house and were taking it back to their residence. (*Id.* at 90.) Bonds took the shotgun out of the trunk and found a pistol case containing two loaded handguns. (*Id.*) Bonds found more spent shell casings and live ammunition during a subsequent search of the interior of Appellant's car. (*Id.* at 91.)

¶ 4 A grand jury charged Appellant with three counts of possession of a dangerous weapon by a prohibited possessor. (R.O.A., item 1.) The State alleged that Appellant had seven prior historical convictions. (*Id.*) After a 2-day trial, a jury found Appellant guilty of all charges. (*Id.* at 54; R.T. 3/3/05, at 7–10.) The trial court found he had six prior convictions and sentenced Appellant to substantially mitigated, concurrent 6-year terms of imprisonment. (R.O.A., items 73, 93; R.T. 5/6/05, at 27; R.T. 7.25.05, at 9.) On August 4, 2005, Appellant filed a timely notice of appeal from the judgment and sentence. (R.O.A., item 97.) This Court has jurisdiction under Arizona Constitution Article VI, Section 9, and Arizona Revised Statutes §§ 12–120.21(A)(1), 13–4031, and –4033(A).

ARGUMENTS

I

THE QUANTUM OF EVIDENCE THE STATE PRESENTED SHOWING THAT APPELLANT CONSTRUCTIVELY POSSESSED THE GUNS REQUIRED THE TRIAL COURT TO DENY HIS MOTION FOR DIRECTED VERDICTS OF ACQUITTAL.

¶ 5 Appellant contends that the trial court erred in denying his motion for directed verdicts of acquittal under Arizona Rule of Criminal Procedure 20, claiming the State failed to show that he exercised dominion and control over the guns in the trunk of his car. (Opening Brief at 3–9; R.T. 3/2/05, at 31–32.) A trial court’s decision to deny a Rule 20 motion will not be disturbed absent an abuse of discretion. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989); *State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003). The trial court had no discretion to direct the verdicts.

¶ 6 Where reasonable jurors could fairly differ on the inferences to be drawn from the evidence, the case must be submitted to the jury. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). The facts and all reasonable inferences therefrom are viewed in the light most favorable to sustaining the jury’s verdict. *State v. Stroud*, 209 Ariz. 410, 411–12, ¶ 6, 103 P.3d 912, 913–14 (2005). The trial court may grant a Rule 20 motion only if there is no substantial evidence to warrant a conviction. *Id.* “Substantial

evidence is more than a mere scintilla and is such proof that ‘reasonable persons could accept as adequate and sufficient to support a conclusion of defendant’s guilt beyond a reasonable doubt.’” *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). When a defendant makes a Rule 20 motion, he raises a question of the sufficiency of the evidence, not its competency. *State ex rel. Hyder v. Superior Court*, 128 Ariz. 216, 224, 624 P.2d 1264, 1272 (1981).

¶ 7 A.R.S. § 13–105(30) defines “possess” as knowingly “hav[ing] physical possession or otherwise to exercise dominion or control over property.” “‘Possession’ means a voluntary act if the defendant knowingly exercised dominion or control over property.” § 13–105(31). One who exercises dominion or control over property has constructive possession of it even if it is not in his physical possession. *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, ¶ 13, 965 P.2d 94, 97 (App. 1998). To prove constructive possession, the State must show by specific facts or circumstantial evidence that the defendant exercised dominion or control over contraband. *State v. Villalobos-Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987). Contrary to Appellant’s contention, “[e]xclusive, immediate and personal possession is not necessary to establish constructive possession.” *State v. Carroll*, 111 Ariz. 216, 218, 526 P.2d 1238, 1240 (1974). (Opening Brief at 8.)

¶ 8 When Deputy Bonds specifically asked Appellant if there was a shotgun in the trunk of Appellant’s car, he admitted there was. (*Id.* at 89, 93.) Appellant explained that he and Perko had just gotten the gun from a friend’s house and were taking it back to their residence. (*Id.* at 90.) After Bonds discovered the other guns and Deputy Lyle read Appellant his *Miranda* rights, Appellant told Bonds that all the guns belonged to Perko and that they had picked them up from a friend’s house and were taking them to their home. (*Id.* at 92–93.) That police found guns in the trunk of a car owned by, registered to, and driven by Appellant is sufficient to prove constructive possession. (R.T. 3/1/05 at 83, 87.) *See State v. Floyd*, 120 Ariz. 358, 362–63, 586 P.2d 203, 207–08 (App. 1978) (the jury could reasonably infer constructive possession where police found contraband on a motorcycle owned and driven by defendant); *State v. Aikins*, 17 Ariz. App. 328, 336, 497 P.2d 835, 843 (1972) (“Constructive possession can be assumed from the evidence that narcotics were found in a car owned by, registered to, and driven by defendant at the time of arrest.”).

¶ 9 Appellant misplaces his reliance on *State v. Miramon*, 27 Ariz. App. 451, 555 P.2d 1139 (1976), for the proposition that his mere presence near the guns did not show that he exercised dominion and control over them. In that case, police found a bag of marijuana under the seat of a car in which the

defendant was a passenger. *Id.* at 452, 555 P.2d at 1140. Here, police found guns in the trunk of a car owned by, registered to, and driven by Appellant. *Floyd*, 120 Ariz. at 362–63, 586 P.2d at 207–08; *Aikins*, 17 Ariz. App. at 336, 497 P.2d at 843; *see also State v. Coley*, 158 Ariz. 471, 472, 763 P.2d 535, 536 (App. 1988) (defendant properly convicted on constructive possession theory when evidence showed he knew a weapon was being transported in his van).

¶ 10 Although Perko testified that she and her friend had loaded the guns into the car without Appellant’s knowledge and that she did not tell Appellant about the guns until after Bonds had stopped them, the jury was free to disbelieve her testimony. (*Id.* at 119–21, 125, 130.) *See State v. Rivera*, 210 Ariz. 188, 190, ¶ 11, 109 P.3d 83, 85 (2005) (the jury must determine witnesses’ credibility); *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004) (“Although the record contains some conflicting evidence, it was for the jury to weigh the evidence and determine the credibility of the witnesses.”). Moreover, the State, in proving a criminal case, is not required to negate every conceivable hypothesis of innocence. *State v. Harvill*, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970); *State v. Olivas*, 119 Ariz. 22, 23, 579 P.2d 60, 61 (App. 1978); *State v. Bullock*, 26 Ariz. App. 149, 153, 546 P.2d 1158, 1162 (1976).

¶ 11 Because reasonable jurors could fairly differ on the inferences to be drawn from the evidence, the trial court had no discretion to grant Appellant’s Rule 20 motion, and the challenged convictions for possession of dangerous weapons by a prohibited possessor must stand. *Landrigan*, 176 Ariz. at 4, 859 P.2d at 114; *see also State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (“To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury.”) (citation omitted). Accordingly, the trial court did not abuse its discretion in denying Appellant’s motion for directed verdicts on the charges of possession of a dangerous weapon by a prohibited possessor.

¶ 12 Appellant also contends that the evidence is insufficient to support his convictions—claims that fail for the same reasons as the Rule 20 claims. (Opening Brief at 4, 19.) In reviewing claims of insufficient evidence, courts do not reweigh the evidence, but view it in the light most favorable to sustaining the jury’s verdicts and resolve all reasonable inferences against the defendant. *Guerra*, 161 Ariz. at 293, 778 P.2d at 1189. Viewing the entire record in that light, rational jurors could conclude that the essential elements of Appellant’s crimes were proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Atwood*, 171

Ariz. 576, 597, 832 P.2d 593, 614 (1992). Appellant has provided no basis for disturbing his convictions and sentences.

II

THE TRIAL COURT CORRECTLY DEFINED CONSTRUCTIVE POSSESSION FOR THE JURORS.

¶ 13 Appellant argues that the trial court abused its discretion in refusing to give a proffered jury instruction defining constructive possession, claiming that the evidence and *State v. Tyler*, 149 Ariz. 312, 718 P.2d 214 (App. 1986), supported the instruction. (Opening Brief at 9–15.) In a related argument, Appellant contends that the trial court fundamentally erred in giving its constructive possession instruction. (*Id.* at 15–18.) A trial court’s decision to grant or refuse a jury instruction cannot be disturbed absent a clear abuse of discretion. *State v. Lopez*, 209 Ariz. 58, 60, ¶ 10, 97 P.3d 883, 885 (App. 2004); *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10, 72 P.3d 343, 347 (App. 2003). No abuse of discretion occurred.

¶ 14 A jury instruction should be given if it is a correct statement of the law and there is evidence to support it. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995); *State v. Barraza*, 209 Ariz. 441, 450, ¶ 37, 104 P.3d 172, 181 (App. 2005). The jury instructions must be viewed in their entirety to determine whether they adequately reflect the law. *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994); *State v. Noriega*, 187 Ariz. 282, 284, 928

P.2d 706, 708 (App. 1996). Whether the instructions given properly state the law is subject to *de novo* review. *Lopez*, 209 Ariz. at 60, ¶ 10, 97 P.3d at 885; *State v. Rosas-Hernandez*, 202 Ariz. 212, 220, ¶ 31, 42 P.3d 1177, 1185 (App. 2002). A conviction cannot be reversed based on the trial court’s jury instructions unless, when taken as a whole, they would mislead the jurors. *Gallegos*, 178 Ariz. at 10, 870 P.2d at 1106; *State v. Rutledge*, 197 Ariz. 389, 393, ¶ 15, 4 P.3d 444, 448 (App. 2000). Appellant provides no basis for disturbing his convictions.

A. THE TRIAL COURT CORRECTLY REFUSED APPELLANT’S INSTRUCTION.

¶ 15 Appellant requested an instruction modeled after a Kansas statute and approved in *dicta* in *Tyler*. In that case, a defendant charged with possessing a prohibited weapon defended on the basis that someone had planted the weapon in his home and he had taken possession of it “to insure its safe disposal” with a neighbor. 149 Ariz. at 313, 315, 718 P.2d at 215, 217. The court stated that, had the defendant asked, it would have been proper to instruct the jury that the prosecution must prove beyond a reasonable doubt “[t]hat the defendant . . . did wilfully have or keep a pistol in his possession with the intent to control the use and management thereof, or that the defendant did wilfully have a pistol in his control with the power and intent to guide or manage such pistol.” *Id.* at

316–17, 718 P.2d at 218–19, quoting *State v. Runnels*, 203 Kan. 513, 515–16, 456 P.2d 16, 19 (1969).

¶ 16 Relying on *Tyler*, Appellant asked the trial court to instruct the jury that “for each count of the indictment, the State must prove beyond a reasonable doubt that [Appellant] did willfully have or keep a deadly weapon in his possession with the intent to control the use and management thereof, or that [Appellant] did willfully have a deadly weapon in his control with the power and intent to guide or manage such deadly weapon.” (R.O.A., item 32, #1.) The trial court refused Appellant’s instruction, explaining that *Tyler* was legally inapplicable, that the instruction was incompatible with Appellant’s defense that he did not know the guns were in the trunk, and that the court’s instructions covered the theory that Appellant knew the guns were there but did not exercise dominion or control over them. (R.T. 3/2/05, at 40–45.)

¶ 17 The trial court correctly refused Appellant’s proffered instruction for the reasons it cited. First, the instruction is an incorrect statement of Arizona law because it adds the *mens rea* of intent to the offense. Under A.R.S. § 13–3102(A)(4), “[a] person commits misconduct involving weapons by *knowingly* . . . [p]ossessing a deadly weapon or a prohibited weapon if such a person is a prohibited possessor.” (Emphasis added.)

¶ 18 Second, the substance of Appellant’s instruction—to the extent it was legally correct—was covered by the court’s instructions. “[W]hen the substance of a proposed instruction is adequately covered by other instructions, the trial court is not required to give it.” *State v. Hoskins*, 199 Ariz. 127, ¶ 75, 14 P.3d 997, 1015 (2000). As noted above, § 13–105(30) defines “possess” as knowingly “hav[ing] physical possession or otherwise to exercise dominion or control over property, and “[p]ossession’ means a voluntary act if the defendant knowingly exercised dominion or control over property.” § 13–105(31). After instructing the jury on reasonable doubt pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), and defining the elements of § 13–3102(A)(4), the trial court continued as follows:

Possess means to knowingly exercise dominion and control over property. The law recognizes two kinds of possession, actual possession and constructive possession.

A person who knowingly has direct physical control over a thing is in actual possession of it. A person who, although not in actual possession, knowingly exercises the right of control over a thing, either directly or through another person, is then in constructive possession of it.

The law also recognizes that one person may have possession alone or two or more persons jointly may share actual or constructive possession.

There is a distinction between possession and ownership. A person may possess something without being the owner of it.

The mere presence of a person at a place where weapons are found is insufficient to establish that person knowingly possessed or exercised control over the weapons.

Knowingly means that a defendant acted with awareness of or belief in the existence of conduct or circumstances constituting an offense. It does not mean that a defendant must have known that the conduct is forbidden by law.

(R.T. 3/3/05, at 68–70; R.O.A., item 45 at 31.01 and 2.12). The court’s mere presence instruction covered the theory that Appellant knew the guns were there but did not exercise dominion or control over them.

¶ 19 Third, the *Tyler* court approved the instruction in *dicta*; it was not the subject of the court’s holding that the trial court had properly refused a proffered instruction that added the element of intent to § 13–3102(A)(3), knowing possession of prohibited weapon. 149 Ariz. at 315, 718 P.2d at 318. *See also State v. Lopez*, 209 Ariz. 58, 61, ¶ 13, 97 P.3d 883, 886 (App. 2004) (referring to the *Tyler* instruction as “hypothetical”). Moreover, despite his claim that the evidence supported his instruction, Appellant fails to specify which evidence allegedly supports it. (Opening Brief at 9–15.) Under these circumstances, the trial court did not abuse its discretion in refusing Appellant’s proffered instruction.

B. THE COURT’S POSSESSION INSTRUCTIONS CORRECTLY STATED THE LAW.

¶ 20 For the first time on appeal, Appellant challenges the trial court’s constructive possession instruction. (Opening Brief at 15–16.) The failure to

object to an alleged error in the trial court “forfeits the right to obtain appellate relief except in those rare cases that involve ‘error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.’” *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). This is the “doctrine of ‘fundamental error.’” *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991); *see also State v. Martinez*, 210 Ariz. 578, 580, ¶ 4 n.2, 115 P.3d 618, 620 (2005) (“[D]efendants who fail to object to an error below forfeit the right to obtain appellate relief unless they prove that fundamental error occurred.”). The Arizona Supreme Court, acknowledging that “prior appellate decisions have not consistently described the showing necessary to establish fundamental error,” recently set forth the standard all Arizona appellate courts must follow where a defendant has forfeited the right to appellate relief by failing to make an appropriate objection in the trial court, expressly stating, “[t]o the extent that any prior decisions are inconsistent with today’s holding, we disapprove of them.” *Henderson*, at ¶ 21. The court made clear, “[t]he scope of review for fundamental error is limited.” *Id.* at ¶ 19. The supreme court also stated, “we place the burden of persuasion in fundamental error review on the defendant.” *Id.*

¶ 21 The court set forth a three-step analysis. First, the defendant “must prove error.” *Id.* at ¶ 23. Second, the defendant must prove that the error is “fundamental”—“that the error goes to the foundation of his case, takes away a right that is essential to his defense, *and* is of such magnitude that he could not have received a fair trial.” *Id.* at ¶ 24 (emphasis added). It is important to note that the supreme court chose the conjunctive “and.” In prior cases it had set forth those standards in the disjunctive “or.” *See, e.g., Gendron*, 168 Ariz. at 155, 812 P.2d at 628; *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988); *State v. Thomas*, 130 Ariz. 432, 435–36, 636 P.2d 1214, 1217–18 (1982). Requiring that all three conditions be met is entirely consistent with the court’s statement that only in “rare cases” will a defendant’s forfeiture of appellate relief by failing to object in the trial court be excused. *Henderson*, at ¶ 19. Though the court did not specify what errors could be deemed “fundamental,” it strongly indicated that they would be limited to those approaching the level of “structural error.” *See id.* at ¶ 25 (discussing denial of a jury trial on aggravating facts, applying the wrong burden of proof, and shifting the burden of proof to the defendant).¹

¹ “[E]rrors are considered structural rather than trial errors when they ‘affect the “entire conduct of the trial from beginning to end,” and thus taint “the framework within which the trial proceeds.”’” *Henderson*, at ¶ 12, *quoting* (continued ...)

¶ 22 Third, if the defendant carries the burden of proving error and proving that his is one of the “rare cases” where the error is deemed “fundamental,” the defendant must *also* “demonstrate that the error caused him prejudice.” *Henderson*, at ¶ 26. This “involves a fact-intensive inquiry,” and, “[t]he showing a defendant must make varies, depending upon the type of error and the facts of a particular case.” *Id.* For example, in *Henderson*, “Because the nature of the error involved here deprived Henderson of the opportunity to require that a jury find facts sufficient to expose him to an aggravated sentence, Henderson must show that a reasonable jury, applying the appropriate standard of proof, could have reached a different result than did the trial judge.” *Id.* at ¶ 27.

¶ 23 Without citing authority, Appellant asserts that the trial court fundamentally erred in instructing the jury on constructive possession “because it eliminated the dominion requirement.” (Opening Brief at 17.) However, the definitions of “possess” and “possession” are disjunctive—“dominion *or* control”—and do not require the State show both. § 13–105(30), (31). (Emphasis added.) As the trial court instructed without objection from

(... continued)

State v. Anderson, 197 Ariz. 314, 323, ¶ 22, 4 P.3d 369, 378 (2000), *quoting Arizona v. Fulminante*, 499 U.S. 279, 307–08, 309–10, 111 S. Ct. 1246, 1265 (1991).

Appellant, a person need not own or have dominion over an item to possess it. (R.T. 3/2/05, at 69.) Appellant has failed to demonstrate error, much less prejudicial fundamental error, and therefore has forfeited this argument. *Henderson*, 210 Ariz. at 68, ¶ 24, 115 P.3d at 608.

CONCLUSION

¶ 24 Based on the foregoing authorities and arguments, Appellee respectfully requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 31.13, Arizona Rules of Criminal Procedure, undersigned counsel certifies that this brief is double spaced, uses a 14-point proportionately spaced typeface, and contains 3,913 words.

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