

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1066

September Term, 2015

KEVIN SMITH A/K/A KEON GRAY

v.

STATE OF MARYLAND

Wright,
Arthur,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 30, 2016

*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.

Appellant, Kevin Smith, was charged by the State with being a prohibited person in possession of a firearm.¹ On May 6, 7, and 8, 2015, a jury trial was held in the Circuit Court for Baltimore City. At trial, the circuit court granted Smith’s motion for judgment of acquittal as to the charge of being a prohibited person in possession of ammunition. The jury then convicted Smith of the remaining count of being a prohibited person in possession of regulated firearm. On July 17, 2015, Smith was sentenced to 15 years, with all but 12 years suspended and the first five without parole, and four years’ probation.

Smith presents the following questions for our review:

1. Did the trial court err by instructing the jurors that they could consider Mr. Smith’s prior conviction in determining guilt or innocence?
2. Was the evidence insufficient to convict Mr. Smith of possession [of] a firearm?

For the reasons discussed below, we hold that the language in the circuit court’s instruction regarding Smith’s prior conviction was erroneous, and we reverse and remand on that basis. We do determine, however, that sufficient evidence existed to sustain the conviction of Smith.

BACKGROUND

On August 14, 2014, at approximately 9:45 p.m., Officer David Bodine and other Baltimore City Police Department officers in plain clothing were in an unmarked police vehicle near West Franklin Street and Normandy Avenue in Baltimore City, an area

¹ Smith was also charged as a prohibited person wearing, carrying, or transporting firearm; involved in the sale, transfer, or disposal of a stolen firearm; and prohibited person in possession of ammunition. Prior to trial, the State *not proseed* these counts.

described as “[v]ery high in crime-related homicides, shootings, and a high drug-trafficking area.” The police came upon a group of “at least ten unknown Black males loitering” near the intersection. The police officers pulled up alongside the men and ordered them to move away from the area. Officer Bodine testified that he noticed Smith standing next to a parked Chevrolet Cavalier vehicle, slightly further away from the group of men. He testified that he took notice of Smith’s clothing: an all black outfit with a T-shirt that had all white lettering. When the men complied with the police officers’ order and dispersed, Smith joined and dispersed with the rest of the men in the group.

After the men walked away, the police officers began to look for “ground stashes” of hidden narcotics or handguns. Using a flashlight, Officer Bodine began searching each tire well on the vehicles parked on the 500 block of Normandy, because tire wells are “a very common place for a handgun to be stored[, a]nd based on how many people were outside, there was most likely a handgun in the area.” When he got to the Chevrolet Cavalier, Officer Bodine found a handgun on the driver’s side rear tire. The gun was only visible to someone kneeling or bending down so that the top of the tire was at eye level. Officer Bodine then continued to search the tire wells of other cars to avoid drawing attention to the Cavalier. When he was approached by Sergeant Jeffrey Young, Officer Bodine showed him the gun, and continued to search other tire wells on the other side of the street to draw attention away as Sgt. Young recovered the gun. Sgt. Young testified that there were five cartridges and one spent shell casing in the revolver. He wore gloves when he collected and secured the gun. Sgt. Young testified that he gave the gun back to Officer Bodine.

In order to apprehend the individual who had concealed the gun, Officer Bodine hid in a tree approximately 100 feet away. At approximately 10:30 p.m., Officer Bodine observed Smith walking down the sidewalk, wearing the same clothes he wore earlier. As he approached the Cavalier, Smith slowed down but kept walking up to the end of the block, where he stopped and looked up and down the street nervously. He then returned to the Cavalier, looked around again, then got down on his knees by the rear bumper and reached into the tire well. He then stood up and walked away from the car into the street. Officer Bodine called the arrest team, and two police vehicles approached Smith. Officer Bodine testified that Smith initially put his hands up over his head but then began running up Normandy Avenue. Smith was apprehended by police a few blocks away.

Officer Victor Villafane testified that he took possession of the handgun from Officer Bodine and submitted it for fingerprint testing. The fingerprint results came back negative. At trial, the State and Smith stipulated that the gun was operable, that Smith had a prior conviction that prohibited him from possessing a firearm, and that Smith had requested the gun be submitted for DNA testing but the State refused.

Additional facts will be included below as they become relevant to our discussion.

DISCUSSION

I. The circuit court erred by instructing the jury that it could consider Smith’s prior conviction in determining his “guilt or innocence.”

At the conclusion of Smith’s trial, the circuit court instructed the jury on the regulated firearm charge as follows:

The State and the defense have agreed to three stipulations. They are written and signed and you will have them in the jury room for your review. These facts are now not in dispute and should be considered proven.

Now this is the instruction, is the charge that you must consider. The Defendant is charged with possessing a firearm after having been convicted of a crime that prohibits his possession of a regulated firearm. In order to convict the Defendant the State must prove beyond a reasonable doubt that one, the Defendant possessed a regulated firearm. And two, the Defendant had previously been convicted of a crime that prohibits his possession of a regulated firearm.

A stipulation has been presented that the Defendant was previously convicted of a criminal offense that is defined under the law of Maryland as a disqualifying crime. *You may consider this conviction in determining guilt or innocence of the Defendant with respect to this count.*

(Emphasis added). Smith avers that the circuit court erred in instructing the jurors that they may consider his prior conviction when “determining guilt or innocence” because it “allowed the jury to convict based on propensity and bad acts evidence.” We agree and reverse Smith’s conviction on that basis.

During the discussion on jury instructions following the close of evidence, Smith’s counsel objected to the above instruction.² Smith’s counsel explained that Smith had already stipulated that he had a prior conviction, and that this stipulation would

² The State argues that Smith failed to preserve this issue for appeal by failing to timely object at trial. We disagree. The record shows that Smith’s counsel clearly and explicitly expressed concern about the instruction: (continued...)

be before the jury and it speaks for itself The problem comes in in the next sentence where we start talking about the idea that the jury can consider the conviction in determining the guilt or innocence of the Defendant with respect to this count

The circuit court, in response, explained that the language was there to let the jury know that one element – prohibited person – was satisfied, but that the jury still needed to

[SMITH’S COUNSEL]: First things [sic], Your Honor, in looking at the State’s proposed jury instructions, second page, middle paragraph, I don’t know if the Court’s referenced that yet.

THE COURT: Of what?

[SMITH’S COUNSEL]: The State proposed jury instruction.

THE COURT: What instruction are you concerned about?

[SMITH’S COUNSEL]: Well the evidence, its [sic] not typed. Evidence was presented that the Defendant was previously convicted of a criminal offense that is defined under the Maryland laws as a disqualifying crime.

[SMITH’S COUNSEL]: Well Your Honor, the way it’s written notes that the jury may consider this conviction in determining guilt or innocence of the Defendant with respect to this count. And I understand there’s a catchall, or I guess it’s designed to be a catchall, however, you may not consider this conviction as evidence of guilt in respect to any of the other charged offenses

The State contends that Smith failed to object because he never said that the instruction was incorrect as statement of law, but rather that it “lured the jury into a sequence of bad character reasoning.” However, the underlying reasoning of preserving issues for appeal directly conflicts with the State’s reasoning. “Fairness and the orderly administration of justice is advanced by requiring counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings.” *Robinson v. State*, 410 Md. 91, 103 (2009) (citation omitted). Here, Smith’s counsel appropriately and timely brought the error to the circuit court’s attention, and the court rejected it. Further, the circuit court acknowledged Smith’s objection when it stated, in response to Smith’s counsel’s statements, “[I]f your [sic] objecting, your objection is noted.”

consider the other element. It stated that it would “leave that paragraph,” but it would modify the instruction to say that a stipulation had been presented.

We have previously held that “when a defendant stipulates to the prior conviction element of the offense, the judge ‘should inform the jury that the defendant admits that he or she has been convicted of a crime for which he or she is prohibited from possessing a regulated firearm under the law.’” *Nash v. State*, 191 Md. App. 386, 401 (2010) (citing *Carter v. State*, 374 Md. 693, 722 (2003)). That instruction, like the stipulation itself, must be limited to only the fact of the conviction:

We hold that, when the defendant admits or the parties stipulate to the previous-conviction element of a charge [of possession of a handgun by a prohibited person], the trial judge should inform the jury that the defendant admits that he or she has been convicted of a crime for which he or she is prohibited from possessing a regulated firearm under the law. The judge should not describe the previous conviction with any more particularity or by using the categories of crimes under Section [5-133] (such as “crime of violence” or “felony”).

Carter, 374 Md. at 722 (footnote omitted). This limitation exists because of the “high potential” a description of the conviction would have to “lure jurors into a sequence of bad character reasoning.” *Id.* (internal quotation marks omitted). The danger of such propensity reasoning lies with the possibility that the jury will “utilize improperly the evidence to conclude that the defendant is a ‘bad person’ and, therefore, should be convicted of the charges for which he is on trial.” *Wynn v. State*, 351 Md. 307, 317 (1998) (citations omitted).

In the instant case, the stipulation did not contain any information beyond the fact that a conviction had occurred. But, as Smith noted, the circuit court’s instruction

stripped the protection of the straightforward stipulation by instructing the jury that they may consider Smith’s conviction in determining guilt or innocence. With this language, the circuit court permitted the jury to engage in propensity reasoning. The circuit court’s language went beyond informing the jury that the stipulation went to an *element* of the crime. Rather, the wording of the instruction suggested that the jury could take a deeper consideration of the previous crime as to Smith’s current “guilt or innocence.”

The State reminds us that “the instructions must be read in context” and “considered as a whole,” *Smith v. State*, 403 Md. 659, 663-64 (2008), and the language in dispute was limited enough in context of the whole instruction. We do not disagree with the State’s statement of the law, and “we make the threshold observation that [the instructions] must be viewed as a whole and that portions should not be read out of their proper context.” *State v. Grady*, 276 Md. 178, 185 (1975) (citations omitted). However, when the instruction contains language that has at least “one rational interpretation” as misstating the law, the circuit court commits reversible error. *See id.* (“The Achilles’[s] heel of the instruction is that it could be understood as meaning that, while the State must prove its case against the accused beyond a reasonable doubt, the defendant has the responsibility of establishing his alibi, and apparently must even do so conclusively. Though, from the trial judge’s words, the jury may have properly construed the respondent’s obligation, we must assume that the improper inference was drawn because the latter portion of the instruction . . . is misleading, ambiguous and confusing.”).

Here, even when looking at the circuit court’s instruction as a whole, the language, “You may consider this conviction in determining guilt or innocence of the Defendant

with respect to this count,” had the very plausible interpretation of being a propensity statement. As such, it was extremely prejudicial because it permitted jurors to reason that because Smith was someone who was previously convicted of a crime, he was more likely to have possessed the particular gun at issue in the trial. The circuit court’s instruction was, therefore, erroneous in including the prejudicial language, and Smith’s conviction is hereby reversed and the case remanded for a new trial.

II. The evidence to convict Smith of possessing the handgun was sufficient.

Smith argued that the evidence presented at trial was insufficient to prove that he “ever actually possessed the handgun or that he had constructive possession of it.” “In cases where this Court reverses a conviction, and a criminal defendant raises the sufficiency of the evidence on appeal, we must address that issue, because a retrial may not occur if the evidence was insufficient to sustain the conviction in the first place.” *Benton v. State*, 224 Md. App. 612, 629 (2015) (citation omitted). We, therefore, address the issue of sufficiency of evidence.

In determining whether the evidence presented at trial was sufficient, the reviewing court must determine whether “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) (citations omitted). To do so, we must view “the evidence in the light most favorable to the prosecution.” *Id.* We do not “undertake a review of the record that would amount to a retrial of the case.” *Handy v. State*, 175 Md. App. 538, 562 (2007) (citation omitted). It is the responsibility of the fact-finder to weigh the credibility of the witnesses and resolve any conflicting evidence. *State v. Stanley*, 351 Md. 733, 750

(1998) (citing *Binnie v. State*, 321 Md. 572, 580 (1991)). Thus, it is not the duty of this Court to determine the weight of the evidence, but only whether enough of it existed:

[T]he reviewing court is not to “ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt;” rather, the duty of the appellate court is only 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.”

State v. Albrecht, 336 Md. 475, 479 (1994) (citations omitted) (emphasis in original).

Circumstantial evidence alone can sustain a conviction. *Montgomery v. State*, 206 Md. App. 357, 385 (2012) (explaining that a “conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence”).

Sufficient evidence supporting a handgun possession “must 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) (internal quotations and citations omitted). “It has long been established that the mere fact that the contraband is not found on the defendant’s person does not necessarily preclude an inference by the trier of fact that the defendant had possession of the contraband.” *State v. Suddith*, 379 Md. 425, 432-33 (2004) (citations omitted). One key element in a possession charge is whether the individual had knowledge of the contraband, “and that knowledge may be proven by inferences from the totality of the evidence, circumstantial or direct, presented to the trier of fact.” *Id.* (citation omitted). “[A]n individual ordinarily would not be deemed to exercise “dominion or control” over an object about which he is unaware. Knowledge of the presence of an object is normally a prerequisite to exercising dominion

and control.” *Moye v. State*, 369 Md. 2, 14 (2002) (quoting *Dawkins v. State*, 313 Md. 638, 649 (1988)).

In contrast with actual possession, which places an item directly with the defendant, constructive possession requires that “the law engage[] in the legal fiction of . . . imput[ing] inferentially criminal responsibility when the actor would be expected to disclaim ownership or control in order to avoid criminal responsibility.” *Price v. State*, 111 Md. App. 487, 498-99 (1996) (citing *Folk v. State*, 11 Md. App. 508, 518 (1971)). Two key factors that permit “the inference of control or dominion over” the contraband are (1) “the proximity between the defendant and the contraband,” and (2) “the fact that the contraband was within the view or otherwise within the knowledge of the defendant.” *Id.*

There was sufficient evidence at trial that Smith had constructive possession of the handgun. Officer Bodine testified that he saw Smith standing next to the Cavalier where the handgun was found and away from the group of men the officers initially asked to disperse. The handgun was located in an area that was completely hidden from view of someone just standing by the car – Officer Bodine had to kneel down on one knee and use his flashlight to locate it. Officer Bodine observed Smith purposely return to the exact spot where the handgun was hidden, where someone who had hidden the handgun would know where to look in the first place. Finally, Smith behaved nervously as he was walking towards the Cavalier by walking up and down the street and checking more than once for pedestrian and vehicular traffic. The jury could reasonably infer that he was nervous about being discovered in the act of recovering the gun. These facts, taken

together and in the light most favorable to the State, *see Coleman*, 423 Md. at 672, permit the reasonable inference that Smith knew where the gun was concealed because he put it there, and that he intended to retrieve it when he bent down and reached into the tire well. Where the available evidence presents more than one possible inference, that a defendant either possessed or did not possess a gun, the jury is *not* required to draw an inference in favor of the defendant. *McDonald v. State*, 141 Md. App. 371, 380 (2001). Here, the jury could have inferred that Smith was not returning for his handgun or was simply in the wrong place at the wrong time, but the jury did not make those inferences.

Smith further points out that Officer Bodine provided inconsistent testimony regarding whether Smith looked into the tire well of the left side or right side of the car, and such inconsistencies in the officer’s testimony make for insufficient evidence. However, such discrepancy does not go to a sufficiency analysis, but rather to the weight of the evidence. The jury, as fact-finder, must “decide which evidence to accept and which to reject.” *Bayne v. State*, 98 Md. App. 149, 155 (1993) (noting that the jury also “may believe part of a particular witness’s testimony but disbelieve other parts”). Officer Bodine explained the discrepancy in his directions in his report on redirect examination,³ and it was up to the jury to either accept or reject his testimony.

³ Officer Bodine’s testimony explained that Normandy Street, where the Cavalier was parked, was a north-south street that allowed for one-way traffic driving north. The car was parked on the left side of the street, or, as Officer Bodine referred to it, the “west-side sidewalk.”

In sum, there was sufficient evidence presented at trial to permit a reasonable inference that Smith knowingly exercised dominion and control over, and thus constructively possessed, the gun.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY REVERSED.
CASE REMANDED FOR A NEW TRIAL.
COSTS TO BE PAID BY THE MAYOR
AND CITY COUNCIL OF BALTIMORE.**