UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1911

September Term, 2015

DAVON TYRELL RAY

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Berger, J.

Filed: September 9, 2016

Tried by a jury in the Circuit Court for Prince George's County, appellant, Davon Tyrell Ray, was convicted of armed robbery, robbery, theft less than $1000, illegal possession of a regulated firearm, use of a firearm in a crime of violence, and wearing, carrying, or transporting a handgun on his person.[1] The trial court sentenced Ray to a total of 35 years in prison, suspending all but 15 years, after which he timely noted this appeal.

Ray asks us to consider whether the evidence was legally sufficient to sustain his convictions. For the reasons that follow, we shall affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

On the morning of September 6, 2014, Derrick Jerome Crowder called Robert Brown and proposed that the two men get together to get high, as they had on several prior occasions. They agreed that Brown would obtain two "dippers," cigarettes dipped in phencyclidine ("PCP"), to share with Crowder assuming half the $30 cost of the drugs.[2]

When Brown arrived at Crowder's residence in Forestville, Prince George's County, Crowder got into the front passenger seat of Brown's car, and another man, whom

[1] The trial court granted Ray's motion for judgment of acquittal as to charges of conspiracy to commit armed robbery and wearing, carrying, and transporting a handgun in a vehicle, and the jury acquitted him of first-degree and second-degree assault.

[2]Prior to the start of trial, Brown, from whose testimony these facts are gleaned, was advised by an attorney of his right against self-incrimination regarding drug possession.

Brown did not know and did not expect to be present but whom he identified in court as Ray, got into the back seat.[3] Brown informed Crowder that he had already purchased the dippers and asked for Crowder's share of the cost; Ray gave him a "few bucks," but not the $15 Crowder had agreed to pay.[4]

Crowder and Ray then took both dippers from Brown, and Crowder pulled a gun from his "crotch area." To Brown's query about what was happening, Crowder answered, "you know what this is, you know about to rob, you know what this is." Crowder placed the gun on the console between himself in the front passenger seat and Brown in the driver's seat. Crowder and Ray then smoked the dippers while Crowder berated Brown.

Crowder instructed Brown to drive to another location in an attempt to purchase more dippers, but, as Crowder's drug contact was not available, Brown returned to the parking lot at Crowder's apartment complex. After Brown parked the car, Crowder twice punched him in the face, grabbed him by his shirt, and called him derogatory names. At the same time, Ray exited the car and reached into the driver's side of the car where Brown had stowed his wallet. Ray took the wallet and tried to remove the car keys from the ignition, but Brown was able to move the keys out of Ray's reach.

When Ray realized there was no money in Brown's wallet (he and Crowder had taken back the money Ray had paid Brown for the dippers), he threw it at Brown. Crowder asked Ray for the gun, intending to force Brown to withdraw money from an ATM. At

[3] Crowder and Ray were tried together as co-defendants.

[4] Upon cross-examination, Brown amended his testimony to state that Ray may have given him the full $15.

that point, Brown was able to wriggle out his shirt, by which Crowder was still holding him; he ran to the nearby Forestville Mall and called 911.

From photo arrays the investigating police officer presented to him, Brown identified Crowder and Ray as the men who robbed him. He further stated that a photograph of the gun the police recovered from a house containing mail addressed to Crowder, pursuant to a search warrant executed on September 23, 2014, appeared to represent the one Crowder and Ray had employed in the robbery.[5] When shown the gun itself at trial, Brown agreed that it appeared to be the same one in the picture.

At the close of the State's case-in-chief, Ray moved for judgment of acquittal and made the following arguments, as pertinent to the sufficiency argument he raises on appeal:

> 1.) Robbery and armed robbery charges—the State had not proved that Ray took or carried away any property belonging to Brown by force or threat of force because Brown testified that he had not seen Ray brandish or possess a handgun. In addition, Ray did not encourage, aid, or assist Crowder in robbing Brown, so accomplice liability would not apply. Finally, Ray did not take or carry away any property belonging to Brown, as he returned Brown's wallet to him, and Brown voluntarily returned to Ray the money Ray had paid for Crowder's share of the dippers.
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> 2.) Theft charge—Brown's testimony established that he had handed the money Ray had given him for the dippers back to Ray and that, although Ray took Brown's wallet, Ray returned it to him when he found it was empty. Therefore, Ray did not take or carry away any property that belonged to Brown.
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> 3.) Wearing, carrying, or transporting a handgun on his person, use of a firearm in a crime of violence, and illegal possession of a regulated firearm—Ray "never had [the gun] on his actual

[5] The gun was test-fired and found to be operable.

> person" nor had dominion or control over it. Moreover, the gun recovered by the police was never adequately established to be the gun used in the robbery. Finally, the State did not prove that the recovered gun belonged to, or was possessed by, Crowder, as the only evidence presented that Crowder had ever lived in the house subject to the execution of the search warrant was a single piece of mail addressed to him and another document bearing his name.

After the court denied the motion regarding the charges identified above, Ray declared his election to remain silent. The court denied the renewed motion for judgment of acquittal at the close of all the evidence.[6]

DISCUSSION

Ray argues that the evidence adduced at trial was insufficient to sustain his convictions of armed robbery, illegal possession of a regulated firearm, use of a firearm in a crime of violence, and wearing, carrying, or transporting a firearm on his person because each of those crimes requires proof of knowing possession of a firearm. As Brown testified that he had not seen Ray hold or take the gun, the State did not prove his knowing possession. He adds that accomplice liability would not serve to support the convictions of those crimes because the State presented no evidence that he encouraged, aided, or assisted Crowder in the robbery. Finally, he contends there was insufficient evidence that the gun produced at trial was the gun used to effectuate the robbery.

Ray also avers that the evidence was insufficient to sustain the convictions of robbery and theft because Brown did not testify that Ray used or threatened force to take

[6] Just prior to the court's instructions to the jury, the parties stipulated that Ray was prohibited from owning or possessing a regulated firearm.

any of Brown's property, and he returned Brown's wallet to him. Therefore, no rational trier of fact could have found that he robbed, or stole from, Brown. Moreover, when Brown testified that "they" re-took the money they had given him for the drugs, the testimony by an admitted PCP user was too general to implicate Ray.

In reviewing an appellate challenge to the sufficiency of the evidence,

> '[w]e examine the record solely to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In so doing, it is not our role to retry the case. Rather, because the fact-finder possesses the unique opportunity to view the evidence . . ., we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We defer to any possible reasonable inferences the [finder of fact] could have drawn from the admitted evidence and need not decide whether the [finder of fact] could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.'

Schmitt v. State, 210 Md. App. 488, 495-96 (quoting *State v. Mayers*, 417 Md. 449, 466 (2010)), *cert. denied*, 432 Md. 470 (2013).[7]

The same standard applies to all criminal cases, including those resting upon circumstantial evidence. *Handy v. State*, 175 Md. App. 538, 562 (2007). "'Circumstantial evidence is as persuasive as direct evidence. With each, triers of fact must use their

[7] We disregard the State's argument that Ray failed to preserve the issue of the sufficiency of the evidence. The State claims that during his argument on the motion for judgment of acquittal, Ray merely stated that he was reiterating various arguments he had earlier made with regard to each count of the indictment, and such argument did not meet the particularity requirement of Maryland Rule 4-324. Ray made virtually the same arguments during the hearing on his motion as he does on appeal, and we reject the State's argument that a reiteration of argument made mere moments earlier on related charges did not render the argument sufficiently particular.

experience with people and events to weigh probabilities.'" *Mangum v. State*, 342 Md. 392, 400 (1996) (quoting *Mallette v. Scully*, 752 F.2d 26, 32 (2d Cir. 1984)).

With regard to the charges requiring a possessory interest in a firearm, the evidence was sufficient to establish that Ray was at least in constructive possession of the weapon. It is not necessary that the gun be found on Ray's person to establish possession thereof. In *Price v. State,* 111 Md. App. 487, 498 (1996), we explained that "[i]n a possessory crime or one in which control or dominion over contraband or the instrumentality of the crime constitutes, or is an element of, the *actus reus,* the law engages in the legal fiction of constructive possession to impute inferentially criminal responsibility. . . ." Factors relevant "to establish the nexus" of control or dominion over the instrumentality of the crime, *id.* at 499, include the proximity between the defendant and the firearm, whether the firearm was visible to the defendant, and any other evidence of mutual use and enjoyment of the firearm by the defendant and the person in actual possession. *Herring v. State*, 198 Md. App. 60, 85-6 (2011).

In the instant case, although Brown testified that he had not seen Ray holding the gun, there was sufficient evidence by which the jury reasonably could have inferred that Ray constructively and jointly possessed the gun with Crowder. Brown testified that in taking the dippers from him, Crowder pulled the gun from "his crotch area," advised that he planned to rob Brown, and placed the gun on the center console between the front driver's and passenger's seats. If that testimony was believed, it was sufficient to prove that the gun was in close proximity, and accessible, to Ray in the close confines of the back seat of the car and visible to him. In addition, Crowder's exhibition of the gun scared

Brown enough that he returned the money Ray had paid for the dippers and drove to another location in an attempt to purchase more drugs for Ray's and Crowder's use and enjoyment. As such, even if Ray did not touch the gun, he can be said to have constructively possessed it, along with Crowder, to facilitate the theft of the drugs and the money he had paid Brown for them.

Moreover, Brown testified that when he returned Ray and Crowder to Crowder's residence, Ray exited the car, after which the gun was no longer on the car's console, leading to his belief that Ray had the gun. That belief was reinforced by Crowder's request that Ray give him the gun. Such testimony, if believed by the jury, was sufficient to prove circumstantially that Ray had actual possession of the gun. We therefore conclude that Ray was in either actual or constructive possession of the handgun so as to support the convictions of the possessory crimes of illegal possession of a regulated firearm and wearing, carrying, or transporting a handgun.[8]

Accomplice liability is another vehicle by which the jury reasonably could have convicted Ray of all the charged crimes. Generally, when two or more people undertake a criminal offense, "'each is ordinarily responsible for the acts of the other done in

[8] Ray also challenges the sufficiency of the evidence to prove that the gun recovered during the execution of the search warrant was the one used in the robbery. Brown, however, testified that the gun introduced into evidence at trial, recovered from a home containing documents with Crowder's name on them, looked like the gun Crowder had employed during the robbery, which was silver-blue with numbers on it. Although not entirely sure it was the gun used in the robbery, as he "didn't pick it up and examine it and look at the serial number and all that to make sure that it was the exact same gun," he testified it looked like the gun Crowder and Ray had on the day of the robbery, and he believed it to be the same gun. In our view, that testimony, if believed, was sufficient to tie the recovered gun to the one used to effectuate the robbery.

furtherance of the commission of the offense[.]'" *Owens v. State*, 161 Md. App. 91, 105-106 (2005) (quoting *Sheppard v. State*, 312 Md. 118, 121-22 (1988)). An accomplice may actually participate by knowingly assisting, supporting, or supplementing the efforts of another, or, if not by actively participating, then by being present and advising or encouraging the commission of a crime. *Silva v. State*, 422 Md. 17, 28 (2011). Mere presence during the commission of the crime is not, however, sufficient to establish participation in the crime. *Warfield v. State*, 315 Md. 474, 491 (1989).

In this case, the evidence was sufficient for the jury to conclude that Ray was not merely present during the robbery but acted as an accomplice with Crowder in robbing Brown and committing the related offenses. Brown's testimony, if believed by the jury,[9] established that Brown purchased dippers for him to share with Crowder. Although Ray initially gave Crowder's half of the cost of the drugs to Brown, Crowder grabbed the dippers from Brown, depriving Brown of the one he had purchased for his own use. In addition, Brown said, "they took back the money they gave . . . me for the dippers;" the use of the word "they" instead of "he" permits an inference that both Crowder and Ray retrieved the money. And, Crowder announced a robbery after placing a gun on the console next to Brown, presumably as an implicit threat.

[9] Ray, while not specifically calling into question Brown's credibility as a witness, alludes to his lack of credibility when he challenges the too general testimony of "an admitted PCP user." Of course, the resolution of witness credibility must be left to the jury. *Spain v. State*, 386 Md. 145, 166 (2005).

Ray and Crowder together smoked the dippers taken from Brown, and Ray later reached into the driver's side of Brown's car to take Brown's wallet. Ray also attempted to take Brown's car keys, but Brown thwarted his attempt. When Crowder grabbed Brown, he asked Ray to give him the gun because he wanted to take Brown to his bank and force Brown to withdraw money from his account.

From these events, a reasonable juror could have inferred that Ray assisted and supported Crowder in committing the crimes. Hardly a mere bystander to Crowder's malfeasance, Ray enjoyed the spoils of the drugs Crowder took from Brown, and he and Crowder took back the money Ray had given Brown for the drugs. Ray also took Brown's wallet, hoping to find money therein, and attempted to take Brown's car keys. Moreover, Brown later identified Crowder from a photo array as a person who "helped in robbing" him, implying that Ray had also participated in the robbery. Brown also identified Ray from a separate photo array as someone who grabbed his wallet and had a gun.

If believed by the jury, Brown's testimony was sufficient to establish proof that Ray was either a principal or an accomplice with Crowder in each of the charged crimes. The weight of the evidence was for the jury, and viewing the evidence in a light most favorable to the State, there is nothing that persuades us that the jury acted unreasonably or erred in its verdict.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.