IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. SAMUEL HICKS, Defendant-Appellant.	: : : : :	APPEAL NO. C-220540 TRIAL NO. B-2105986-B *O P I N I O N.*

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 30, 2023

Melissa A. Powers, Hamilton County Prosecuting Attorney, and *Keith Sauter,* Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy J. McKenna, for Defendant-Appellant.

BOCK, Judge.

{¶1} In two assignments of error, defendant-appellant Samuel Hicks challenges his convictions for carrying a concealed weapon and improperly handling a firearm in a vehicle, raising sufficiency and manifest-weight challenges. Specifically, he argues that the evidence failed to prove that he constructively possessed the rifle in the car. We disagree and affirm his convictions.

I. Facts and Procedure

{¶2} Sergeant Deshawn Brooks and Officer Rami Khayo of the Springfield Township Police Department initiated a traffic stop for a speeding violation. Hicks was in sitting in the back seat of the car, next to a rifle covered by a jacket. The state charged Hicks with carrying a concealed weapon in violation of R.C. 2923.12(A)(2) and improperly handling a firearm in a vehicle in violation of R.C. 2923.16(B).

{¶3} At the bench trial, Brooks testified that he smelled marijuana coming from the car during the stop. Brooks detained the driver and informed him that officers were going to search the car. Brooks recalled that Khayo found a gun in the front passenger's waistband during a pat-down. Brooks testified that Hicks

> was sitting in the back seat and he kept reaching with his left hand over to the [left] side of him. And he just kept reaching around, wasn't really reaching, -- you know, he didn't grab anything, but he kept touching to the left of him, which was a jacket, was unsure what was underneath the jacket.

Brooks trained his firearm on Hicks before placing him into custody in the back of the police cruiser. Officers located and recovered a "rifle where [Hicks]'s left hand was, which was underneath the jacket he was touching." The rifle was loaded and had a bullet in the chamber.

{¶4} On cross-examination, Brooks acknowledged that the driver's mother owned the car and phoned both the property clerk and Brooks to retrieve the rifle. And Brooks testified that the officers had not observed Hicks touching the rifle; instead, he touched only the jacket. Khayo explained that Brooks trained his firearm on Hicks because Hicks "was moving around so much and wouldn't obey our commands."

{¶5} The trial court found Hicks guilty of both carrying a concealed weapon in violation of R.C. 2923.12(A)(2) and improperly handling a firearm in a motor vehicle in violation of R.C. 2923.16(B), explaining that the case "come[s] down to reason and common sense." The trial court sentenced Hicks to two years of community control for each conviction.

{¶6} On appeal, Hicks challenges the sufficiency and manifest weight of the evidence underlying his convictions in two assignments of error.

II. Law and Analysis

The evidence sufficiently established constructive possession of the rifle

{¶7} Hicks argues that the evidence failed to establish that he possessed the rifle. Hicks does not dispute that he sat in the backseat of the car near the rifle, which was laying across the driver's-side backseat underneath the jacket.

{¶8} A sufficiency challenge tests the adequacy of the state's evidence and whether the state satisfied its burden of production at the trial. *State v. Messenger*, 2021-Ohio-2044, 174 N.E.3d 425, ¶ 44 (10th Dist.). When we evaluate the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether " 'any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt.' " *State v. MacDonald*, 1st Dist. Hamilton No. C-180310, 2019-Ohio-3595, ¶ 12, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶9} Hicks was convicted of carrying a concealed weapon in violation of R.C. 2923.12(A)(2) and improperly handling a firearm in a vehicle in violation of R.C. 2923.16(B). First, under R.C. 2923.12(A)(2) "[n]o person shall knowingly carry or have, concealed on the person's person or concealed ready at hand * * * [a] handgun other than a dangerous ordnance." Second, under R.C. 2923.16(B) "[n]o person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger." As an element of both offenses, "to have" a firearm means that the offender has "actual or constructive possession of the gun." *State v. Philpott*, 8th Dist. Cuyahoga Nos. 109173, 109174 and 109175, 2020-Ohio-5267, ¶ 45, citing *State v. Gardner*, 2017-Ohio-7241, 96 N.E.3d 925, ¶ 33 (8th Dist); *see State v. Tucker,* 2016-Ohio-1353, 62 N.E.3d 903, ¶ 21 (9th Dist.) ("A person must actually or constructively possess a firearm in order to 'have' it for purposes of R.C. 2923.13(A)(2)").

{¶10} The parties dispute whether the evidence established Hicks's constructive possession of the rifle. Constructive possession is knowingly controlling or maintaining power over a firearm "either directly or through others." *State v. Phillips,* 10th Dist. Franklin No. 14AP-79, 2014-Ohio-5162, ¶ 121. But a person's mere presence in the vicinity of a firearm, alone, does not create an inference of constructive possession. *Id.* at ¶ 47. Rather, constructive possession may be inferred from a combination of facts, such as an awareness of a firearm that is within easy reach. *Id.*; *Gardner* at ¶ 63, quoting *State v. McPherson*, 8th Dist. Cuyahoga No. 63168, 1993 Ohio App. LEXIS 3721, 6 (July 29, 1993). Constructive possession may be demonstrated through circumstantial evidence. *See State v. English*, 1st Dist. Hamilton No. C-080872, 2010-Ohio-1759, ¶ 32; *see also State v. Hankerson*, 70 Ohio St.2d 87, 92, 434 N.E.2d 1362 (1982).

{¶11} Hicks acknowledges that the evidence establishes that he sat near the rifle but argues that there is no evidence demonstrating that he had dominion or control over the rifle. We disagree. At the trial, officer testimony established that Hicks was the only passenger in the backseat next to the rifle, which was covered by a jacket, and "[Hicks] kept touching to the left of him, which was a jacket." Brooks testified that Hicks "kept reaching for it" in a suspicious manner. Hicks's actions indicate that he was aware of the rifle which was within reaching distance.

{¶12} This evidence is similar to the evidence in *State v. Philpott,* which was sufficient to establish that Deshawn Philpott constructively possessed a firearm found in his vehicle and supported his convictions for improper handling of firearms in a motor vehicle and carrying a concealed weapon. *See Philpott,* 8th Dist. Cuyahoga Nos. 109173, 109174 and 109175, 2020-Ohio-5267, at ¶ 51. In *Philpott,* officer testimony established that police "saw Philpott, and only Philpott, reaching for the floorboard as the car pulled over" and "the gun was found in the very spot where the officers observed Philpott reaching." *Id.* at ¶ 49. The *Philpott* court found this evidence sufficient to establish constructive possession. *Id.*

{¶13} Hicks analogizes the evidence in this case to the evidence in *State v. Devaughn*, 1st Dist. Hamilton No. C-180586, 2020-Ohio-651, a recent case from this court where we held that the evidence failed to establish Devaughn's constructive possession of drugs in a car's center console and was therefore insufficient to sustain a conviction for drug possession. *See id.* at ¶ 37. In *Devaughn,* we explained,

> [T]he car where the drugs were found was not registered to Devaughn. There was no testimony that he had ever driven the car or possessed the keys to the car. The officers who saw Devaughn lean into the car did not testify, so the record contains no evidence regarding how far he leaned

> into the car, how long he leaned into the car, or whether he made any furtive movements while leaning into the car. The state did not present any DNA or fingerprint evidence connecting him to the center console where the drugs were found or connecting him to the drugs and scale that were found in the console. Finally, the state did not present any evidence that Devaughn placed any items into the car or removed any items from the car.

Id. at ¶ 35. But unlike *Devaughn*, the officers in this case testified that Hicks was inside the car, next to the rifle, and touched the jacket covering the rifle.

{¶14} When viewed in a light most favorable to the state, the evidence established that Hicks had constructive possession of the rifle and was therefore sufficient to sustain his convictions for carrying a concealed weapon and improperly handling a firearm in a motor vehicle. We overrule his first assignment of error.

The convictions were not against the manifest weight of the evidence

{¶15} In his second assignment of error, Hicks maintains that the manifest weight of the evidence demonstrated that he did not possess the rifle. In contrast to a sufficiency argument, a manifest-weight argument tests whether the state carried its burden of persuasion. *Messenger,* 2021-Ohio-2044, 174 N.E.3d 425, at ¶ 44. When an appellant argues that his conviction is against the manifest weight of the evidence, he asks this court to

> review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and rendered a verdict that created a manifest miscarriage of justice that we must reverse the conviction and order a new trial.

State v. Wilks, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.3d 1092, ¶ 168, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A manifest-weight challenge tests the believability of the evidence. *State v. Strietelmeier*, 1st Dist. Hamilton No. C-210409, 2022-Ohio-2370, ¶ 7. But a conviction will be reversed as being against the manifest weight of the evidence only in exceptional cases " 'because "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." ' " *Id.,* quoting *State v. Hudson,* 1st Dist. Hamilton No. C-170681, 2019-Ohio-3497, ¶ 16, quoting *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). That is particularly true when the evidence at trial was testimonial as the trier of fact " 'is free to believe or disbelieve all or any of the testimony.' " *Id.*, quoting *Hudson* at ¶ 16.

{¶16} Hicks emphasizes the lack of DNA evidence connecting him to the rifle and the fact that the driver's mother asked the police for the rifle. First, the lack of DNA evidence in *Devaughn* was significant because there was no evidence connecting the defendant to the drugs recovered from the car. But here, officer testimony connected Hicks to the rifle. Turning to the lack of DNA evidence, as the *Philpott* court explained, "the lack of DNA or fingerprints on the gun is not persuasive because there was no evidence that the gun was tested for either DNA or fingerprints." *Philpott,* 8th Dist. Cuyahoga Nos. 109173, 109174 and 109175, 2020-Ohio-5267, at ¶ 50. While the evidence suggests that the driver's mother owned the rifle, "a person may knowingly possess or control property belonging to another." *State v. Davis*, 8th Dist. Cuyahoga No. 104221, 2016-Ohio-7964, ¶ 14, quoting *State v. Bray*, 8th Dist. Cuyahoga No. 92619, 2009-Ohio-6461, ¶ 21; *see State v. Raphael,* 12th Dist. Warren No. CA2017-01-010, 2018-Ohio-140, ¶ 22.

{¶17} In this case, the officers presented credible testimony that established Hicks's constructive possession of the rifle. This is not an exceptional case in which the trial court clearly lost its way and created a manifest miscarriage of justice. Hicks's second assignment of error is overruled.

III. Conclusion

{¶18} We overrule Hicks's two assignments of error and affirm his convictions.

Judgment affirmed.

ZAYAS, P.J., and **WINKLER, J.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.