

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR 11-39

MARION BUTLER

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 12, 2011

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, FIFTH
DIVISION
[NO. CR-2010-188]

HONORABLE ERNEST SANDERS,
JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

In 2010, appellant Marion Butler was convicted at a jury trial of possession of a firearm by certain persons, pursuant to Ark. Code Ann. § 5-73-103(a)(1). He was sentenced to twenty years in the Arkansas Department of Correction and given a fine of \$10,000. Butler's sole point on appeal is that there was insufficient evidence to sustain his conviction. We affirm.

The events that led to this appeal occurred at a Jacksonville apartment complex in November 2009, when Butler allegedly brandished a sawed-off shotgun during a dispute over money. Butler was charged with possession of a firearm by certain persons, a felony. At trial,



the parties stipulated that Butler had prior felony convictions,¹ so the State had only to prove that Butler was in possession of a firearm.

“Possession” is defined as the “exercise [of] actual dominion, control, or management over a tangible object.”² To prove possession, the State presented testimony from three witnesses: John Teal, Willie Deon Polk, and Jacqueline Polk. Teal testified that he went to an apartment where he knew Butler to be, with the intention of discussing money Teal was owed by Butler for stereo equipment. Teal testified that after he arrived outside of the apartment, two women drove up in a black truck and entered the apartment with a “big long box.” Shortly thereafter, Teal saw Butler come outside with a shotgun. Willie Deon Polk testified that he was inside the apartment when the two women came in, and he saw Butler take a shotgun from the box they handed him. He testified that Butler then loaded the shotgun and left the apartment with it. Jacqueline Polk testified that she saw the box being delivered to the apartment, then witnessed Butler coming out of the apartment with the shotgun.

Butler’s argument on appeal challenges the weight and credibility given by the jury to the testimony of witnesses at trial. For example, he contends that the testimony of Teal and Polk was not credible because they had ulterior motives for testifying that he was in possession of the gun; *i.e.*, that Teal was lying because he was angry that Butler had not paid for the stereo equipment, and that Polk was lying because he was on parole and did not want to

¹His prior convictions included felony counts of kidnapping, burglary, and theft by receiving.

²Ark. Code Ann. § 5-1-102(15) (Supp. 2009).



displease the prosecuting attorney. He also points to the testimony of Charles Walker, who testified that he did not see Butler with a gun, as proof that there was a dispute on the issue of possession and, therefore, insufficient evidence to convict him. However, Walker also testified that he “wasn’t really paying attention” and “was just really trying to get out of there.” Butler further argues that his then-girlfriend Felicia Ward’s testimony that the gun was hers and that Butler never had possession of it should have been given more weight and credibility than that of the State’s witnesses because “[t]he trustworthiness of her testimony far exceeds that of any witness at trial.” The testimony by Ward cannot be considered by this court because it was offered at a bond revocation hearing six months before trial³ and was never presented to the jury.⁴ Regardless, Butler’s argument fails because there was substantial evidence to support the jury’s verdict.

When reviewing the sufficiency of the evidence, this court determines whether there is substantial evidence to support the verdict, viewing the evidence in the light most favorable to the State.⁵ Only evidence supporting the verdict will be considered.⁶ This court does not

³The hearing was on December 29, 2009, and the trial was held on June 15, 2010.

⁴Ward was Butler’s co-defendant, was represented by the same attorney, and was never called to testify. To the extent that Butler implies an ineffective-assistance-of-counsel claim, that argument was not raised below and may not be considered on appeal. *See, e.g., VanOven v. State*, 2011 Ark. App. 46, 380 S.W.3d 507.

⁵*Stone v. State*, 348 Ark. 661, 74 S.W.3d 591 (2002).

⁶*Id.*



weigh the credibility of witnesses on appeal: such matters are left to the fact-finder.⁷ It is the jury's role to make determinations of credibility and to weigh inconsistencies in evidence.

Here, three witnesses testified that Butler was in possession of the shotgun, and the jury weighed their credibility and believed them. A jury may accept or reject any part of a witness's testimony, and its conclusion on credibility is binding on the appellate court.⁸ When viewed in the light most favorable to the State, the testimony of John Teal, Willie Deon Polk, and Jacqueline Polk constitutes substantial evidence that Butler was in possession of a firearm. Therefore, we affirm.

Affirmed.

VAUGHT, C.J., and HOOFFMAN, J., agree.

James P. Clouette, for appellant.

Dustin McDaniel, Att'y Gen., by: *Kathryn Henry*, Ass't Att'y Gen., for appellee.

⁷*Turbyfill v. State*, 92 Ark. App. 145, 211 S.W.3d 557 (2005).

⁸*Winters v. State*, 41 Ark. App. 104, 848 S.W.2d 441 (1993).