

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-1156

WILLIE PATTON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered MAY 26, 2010

APPEAL FROM THE BRADLEY
COUNTY CIRCUIT COURT
[CR-2008-54-4]

HONORABLE DON GLOVER,
JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Appellant Willie Patton was convicted by a jury of possessing cocaine with intent to deliver, simultaneously possessing drugs and firearms, and being a felon in possession of a firearm. He was sentenced to three consecutive twenty-year terms of imprisonment. On appeal, he admits that he illegally possessed cocaine, but he contends that the evidence was insufficient to sustain his other convictions because there was insufficient evidence presented that he possessed a firearm. We disagree and affirm his convictions.

On November 3, 2008, officers of the Warren Police Department conducted a traffic stop of appellant in an Exxon parking lot. Appellant got out of his car and approached Officer Timothy Nichols while appellant's wife, Kimberly Patton, got out of the car and went inside the Exxon station. Officer Nichols followed appellant back to his car to get his license and insurance documents. After seeing what appeared to be a marijuana cigarette in the front

seat, Officer Nichols attempted to arrest appellant, who fled. Appellant was eventually caught and arrested. On his way back to the station, appellant told Officer Nichols that there was crack cocaine in the car, which was later discovered in a bag during a search of appellant's car.

Officer Jeremy Chapman testified that, before appellant was caught and arrested, Ms. Patton came out of the station carrying her purse and demanded to know what was going on. Officer Chapman explained that she was under arrest, at which point they struggled, and Officer Chapman placed her in custody. He searched her purse and discovered a large amount of cash and a handgun.

Officer Shaun Hildreth testified that he took appellant's statement, which was played for the jury. Appellant told Officer Hildreth that the gun found in Ms. Patton's purse was his and that he put it in her purse when the police pulled up behind him. During the taped statement, Officer Hildreth told appellant that he did not want appellant to make a statement in order to get any charges against his wife dismissed. Appellant said he was not doing that and the gun was his.

A jury convicted appellant of possession of cocaine with intent to deliver and simultaneous possession of drugs and firearms. After the jury returned verdicts of guilty on those two charges, the court read to the jury the third charge, felon in possession of a firearm, and the State presented evidence on that charge. The jury returned a guilty verdict on the third charge also. Appellant filed this appeal.

When the sufficiency of the evidence is challenged, we consider only the evidence that supports the verdict, viewing the evidence in the light most favorable to the State. *LeFever v. State*, 91 Ark. App. 86, 88–89, 208 S.W.3d 812, 815 (2005). The test is whether there is substantial evidence to support the verdict, which is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000). Witness credibility is an issue for the fact-finder, who is free to believe all or a portion of any witness’s testimony and whose duty it is to resolve questions of conflicting testimony and inconsistent evidence. *Baughman v. State*, 353 Ark. 1, 110 S.W.3d 740 (2003).

On appeal, appellant contends that there was insufficient evidence to prove that he possessed the firearm and therefore that the guilty verdicts of simultaneous possession of drugs and firearms and felon in possession should be reversed and dismissed. The State asserts that this issue was not properly preserved for appeal because appellant did not timely renew his motion for directed verdict on the simultaneous-possession charge and never moved for directed verdict as to the felon-in-possession charge.

Rule 33.1 of the Arkansas Rules of Criminal Procedure requires a motion for directed verdict in a jury trial to be made at two times during the trial: “at the close of the evidence offered by the prosecution and at the close of all of the evidence.” Ark. R. Crim. P. 33.1(a) (2009). The failure of a defendant to challenge the sufficiency of the evidence in this manner constitutes a waiver of the issue. Ark. R. Crim. P. 33.1(c) (2009). In this case, appellant

moved for a directed verdict on the simultaneous-possession charge at the close of the prosecution's case but did not renew this motion until after the jury retired to deliberate: that is, after jury instructions and after closing arguments. Generally, a renewal made after the jury has been instructed is untimely. *Bell v. State*, 371 Ark. 375, 380, 266 S.W.3d 696, 701 (2007). But if the close of the prosecution's evidence and the close of all of the evidence are one and the same, then defendant's failure to renew its earlier motion for directed verdict does not constitute a waiver of the issue. *Id.* Where the defense offers no testimony or evidence—as occurred in this case—the renewal of a directed-verdict motion previously made at the close of the State's case is unnecessary and the failure to renew the motion does not constitute a waiver of the issue. *Id.* Here, appellant properly made a motion for directed verdict at the close of the evidence offered by the prosecution. The defense did not put on any evidence. So renewal of appellant's motion was not required. Accordingly, appellant's argument on the simultaneous-possession conviction is preserved for our review.

Appellant's argument regarding the felon-in-possession conviction is not preserved, however. The trial in this case was bifurcated: the State tried the first two charges against appellant; after a guilty verdict was rendered on those charges, the State presented its case on the felon-in-possession charge. The jury retired to deliberate and found appellant guilty on that charge, too. But appellant never made a motion for directed verdict during the second trial regarding the felon-in-possession charge. Therefore his argument on this conviction is not preserved for our review. *Jacobs v. State*, 317 Ark. 454, 460, 878 S.W.2d 734, 737–38

(1994).

We now turn to the merits of appellant's sufficiency challenge on simultaneous possession. Appellant was convicted of possessing cocaine with intent to deliver while in possession of a firearm pursuant to Ark. Code Ann. § 5-74-106(a)(1) (Repl. 2005). Appellant claims that the only evidence that he was in possession of a firearm was his statement to police. Because he did not have actual physical possession of the gun, he argues that there is no other evidence of possession and therefore substantial evidence does not exist to support the charge. He cites *Eaton v. State*, 255 Ark. 45, 498 S.W.2d 648 (1973), in support of his contention that there must be some other evidence in addition to the defendant's confession to sustain a conviction. While appellant is correct that a defendant's out-of-court confession "will not warrant a conviction unless accompanied with other proof that the offense was committed," Ark. Code Ann. § 16-89-111(d) (Repl. 2005), sufficient proof exists in this case.

The State is not required to establish actual physical possession; constructive possession is sufficient and may be established by circumstantial evidence. *Cherry v. State*, 80 Ark. App. 222, 95 S.W.3d 5 (2003) (affirming simultaneous-possession conviction when firearm was found in defendant's kitchen next to drug paraphernalia); *Polk v. State*, 348 Ark. 446, 73 S.W.3d 609 (2002) (affirming simultaneous-possession conviction where firearm was found in back seat of car defendant allegedly borrowed from his girlfriend). Constructive possession is the exercise of care, control, and management over the contraband. *McKenzie v. State*, 362 Ark. 257, 263, 208 S.W.3d 173, 175 (2005). In his confession, appellant told Officer Hildreth

that he put the gun in his wife's purse when the officers pulled up behind him. Other proof that the offense was committed existed to corroborate appellant's statement. When the officers pulled up behind appellant's car, appellant and his wife were in the car together. The gun was found in appellant's wife's purse, which was in the car with appellant and his wife. Appellant fled the scene when officers attempted to arrest him after discovering a marijuana cigarette in the car. Jurors are instructed to consider the evidence as a whole and are entitled to draw reasonable inferences from circumstantial evidence. *Chrobak v. State*, 75 Ark. App. 281, 288, 58 S.W.3d 387, 391 (2001). We hold that there is substantial evidence to support the jury's verdict, and we affirm appellant's convictions.

Affirmed.

ROBBINS and HENRY, JJ., agree.