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ARKANSAS COURT OF APPEALS
DIVISION II
No. CR-22-743

TIMOTHY RAY BURTON

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 10, 2023

APPEAL FROM THE SALINE
COUNTY CIRCUIT COURT
[NO. 63CR-21-817]

HONORABLE KEN CASADY, JUDGE

AFFIRMED; REMANDED TO
CORRECT THE SENTENCING
ORDER

RITA W. GRUBER, Judge

A Saline County jury convicted appellant Timothy Burton of possession of firearms by certain persons and fleeing. He was sentenced as a habitual offender to consecutive sentences of 180 months' and 360 months' imprisonment, respectively. On appeal, appellant contends that the evidence was insufficient to support the convictions. We affirm the convictions but remand with instructions to correct the sentencing order.

On September 30, 2021, the State filed a felony information charging appellant with simultaneous possession of drugs and firearms under Ark. Code Ann. § 5-74-106 (Repl. 2016) and fleeing under Ark. Code Ann. § 5-54-125 (Supp. 2021). An amended information was filed on March 21, 2022, charging appellant with possession of firearms by certain persons pursuant to Ark. Code Ann. § 5-73-103 (Repl. 2016) and fleeing pursuant to Ark.

Code Ann. § 5-54-125. The information also alleged that appellant was a habitual offender pursuant to Ark. Code Ann. § 5-4-501(b) (Supp. 2021). A jury trial was held on August 2, 2022.

Sergeant Jeffery Plouch with the Arkansas State Police, who was the supervisor for Saline County, testified that on the night of August 1, 2021, he was on Interstate 30 in Saline County when he initiated a traffic stop on a white Dodge Charger. The Charger would not pass Plouch even when he slowed down to approximately fifty miles an hour in a seventy-mile-an-hour zone. Plouch pulled over and then returned to the interstate to catch up to the Charger. The driver of the Charger “hit the brakes,” so Plouch could not get behind him. Plouch perceived that the Charger did not want the trooper behind him and ran the license plate through ACIC and NCIC, which returned on a 2008 white Charger. Because troopers drive Chargers, Plouch knew that the model he was following was newer than a 2008 model. When Plouch turned on his blue lights, the Charger stopped on the right shoulder, briefly put the car in park, and then accelerated and did a U-turn. The Charger proceeded to drive eastbound in the westbound lanes of the interstate.

Plouch notified other nearby units in the area. The Charger exited the interstate and went the wrong way down a service road. Trooper Kade Cash performed a PIT (precision intervention technique) maneuver at Alcoa Road and Highway 5, which caused the Charger to spin out into construction. This was done because the Charger had traveled in the wrong direction and at speeds exceeding one hundred miles an hour in forty-five-mile-an-hour zones, which endangered the public. Trooper Trevor Stevenson arrived, and they attempted

to box the Charger from proceeding, and Plouch also bumped the Charger with his vehicle to stop it. The Charger proceeded to travel on Highway 5 before turning south on Alcoa Road. Plouch then performed a second PIT maneuver, which caused the Charger to spin to the edge of the roadway. Corporal Trent Behnke arrived on the scene. Trooper Cash then rammed the passenger side of the vehicle to disable it. Plouch explained that PIT maneuvers had been attempted, and it was time to stop the driver. Troopers drew their guns and ordered the driver out of the vehicle. Instead, the Charger accelerated in reverse and drove southbound on Alcoa Road, made a quick turn into a car dealership, drove into a ditch, and overturned.

Appellant attempted to flee on foot and was apprehended by Trooper Stevenson and Corporal Behnke. Appellant initially resisted being placed in handcuffs but eventually complied. The car was searched after being pulled out of the ditch. Fourteen firearms were found in the trunk, including a 7.0 mm large caliber rifle, three 12-gauge shotguns, two multi-caliber rifles, a 20-gauge shotgun, a .308 rifle, a Colt .45 revolver, a .38-caliber pistol, three 9 mm pistols, and a .22-caliber pistol. A check of the Charger's VIN revealed that it had been reported stolen two days before in North Little Rock. The license plate, which had expired eight months earlier and was registered to a couple from Murfreesboro, did not match the Charger.

On cross-examination, Plouch stated that he had not made contact with the female owner. He testified that once appellant was arrested, Plouch had no further involvement, although he was aware that a woman named Whitney Reynolds had claimed ownership of

the weapons. In addition to Sergeant Plouch, Trooper Cash, Trooper Stevenson, and Corporal Behnke all testified to their involvement in pursuing the Charger as described by Plouch. In addition to the firearms, women's clothing was found in the trunk. The troopers' dashcam videos were admitted into evidence and played for the jury.

Appellant moved for a directed verdict at the close of the State's case, arguing that there was insufficient evidence that he constructively possessed the firearms because they were not within his dominion and control, and he had no knowledge that they were in the trunk of the car. He stipulated that he had previously been convicted of a violent felony. Other than saying the evidence was insufficient, appellant did not make an argument on the fleeing charge, indicating that it was "not going to make it on appeal." The State responded to the constructive-possession argument, stating that the firearms were in the trunk of the car in which appellant was in control and the sole occupant; he had access to the firearms; and he was fleeing. The court denied the motion. Appellant rested without calling any witnesses and renewed his directed-verdict motion, which was again denied. The jury found appellant guilty of both offenses and sentenced him as a habitual offender to an aggregate term of forty-five years' imprisonment. He timely appealed from the August 5 sentencing order.

A motion for a directed verdict at a jury trial is a challenge to the sufficiency of the evidence. *Bens v. State*, 2020 Ark. App. 6, at 4-5, 593 S.W.3d 495, 498. In reviewing a challenge to the sufficiency of the evidence, this court determines whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is

evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* We view the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *Id.* The credibility of witnesses is an issue for the fact-finder. *Id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

No person who has been convicted of a felony shall possess or own any firearm. Ark. Code Ann. § 5-73-103(a)(1). A showing of constructive possession, which is the control or right to control the contraband, is sufficient to prove possession of a firearm. *Bens, supra.* Constructive possession may be inferred when the contraband is found in a place immediately and exclusively accessible to the accused and subject to his or her control. *Id.* Constructive possession may be established by circumstantial evidence, but when such evidence alone is relied on for conviction, it must indicate guilt and exclude every other reasonable hypothesis. *Id.*

Appellant first argues that there was insufficient evidence that he constructively possessed a firearm. He points out that the firearms were in the trunk; no fingerprint testing was conducted to show that he handled the firearms; he made no statements indicating awareness of the firearms; he was not the registered owner of the vehicle; the license plate was registered to a couple in Murfreesboro and had been reported stolen by a female in North Little Rock; nothing found in the vehicle associated him with the vehicle; women's clothing was found in the vehicle; and officers testified that a female named Whitney Reynolds claimed the firearms found in the vehicle belonged to her.

The State argues that appellant was the sole occupant of the vehicle, and as such, he had exclusive access and control over the trunk. The State further contends that his flight after law enforcement attempted to pull him over indicates his knowledge of the firearms in the trunk. The State cites *Polk v. State*, 348 Ark. 446, 453, 73 S.W.3d 609, 614 (2002), in which the supreme court stated that “an accused’s suspicious behavior coupled with proximity with the contraband is clearly indicative of possession.” In his reply brief, appellant states that *Polk* is inapposite because the contraband in that case was found under the floor mat in the back seat of the vehicle and was therefore immediately and exclusively accessible to Polk in the driver seat.

Here, appellant was the sole occupant of a vehicle that had fourteen firearms in the trunk. See *Malone v. State*, 364 Ark. 256, 262, 217 S.W.3d 810, 813 (2005) (analyzing constructive possession of marijuana found in trunk of vehicle in joint-occupancy case, the supreme court noted that “[a]s the driver of the car, Malone exercised dominion and control over it and had keys to the trunk[.]”). Appellant’s flight from law enforcement when a traffic stop was initiated included him making a U-turn and driving on the interstate in the wrong direction, driving at speeds exceeding one hundred miles an hour, continuing to flee after officers attempted multiple PIT maneuvers, and attempting flight on foot once the vehicle entered a ditch and overturned. As stated in *Polk, supra*, an accused’s suspicious behavior coupled with proximity with the contraband is clearly indicative of possession. In addition, flight following the commission of an offense is a factor that may be considered with other evidence in determining guilt. *Jones v. State*, 2010 Ark. App. 775, at 5 (a sole-occupancy case

affirming constructive possession of marijuana found in Jeep, noting that appellant attempted to flee during the search). Given the facts of this case, there was sufficient evidence that appellant constructively possessed the firearms located in the trunk of the Charger. Accordingly, we affirm appellant's conviction for possession of firearms by certain persons.

For his second point on appeal, appellant contends that the State failed to prove his identity as the perpetrator of the crimes for which he was convicted. He suggests that the jury had to resort to speculation and conjecture to determine that he was driving the car. The State argues that appellant's argument is not preserved for review, and we agree.

Rule 33.1(a) of the Arkansas Rules of Criminal Procedure provides that a motion for directed verdict shall state the specific grounds therefor. The failure to challenge the sufficiency of the evidence in a manner consistent with Rule 33.1(a) constitutes a waiver of any question pertaining to the sufficiency of the evidence. Ark. R. Crim. P. 33.1(c). When he made his directed-verdict motions at trial, appellant did not raise the argument that there was insufficient evidence regarding his identity as the perpetrator of the crimes. Therefore, the argument being raised in this appeal is procedurally barred. See *Walton v. State*, 2009 Ark. App. 170, at 3. Furthermore, even if it had been preserved, as pointed out by the State, there was dashcam video introduced from which the jury could have identified appellant.

Finally, we note that there is a clerical error in the sentencing order. Appellant was charged as a habitual offender with four or more felonies; the convictions were introduced at trial; and the jury sentenced appellant as a habitual offender. However, the box that would indicate that appellant was sentenced as a habitual offender is not checked on the sentencing

order. The trial court is free to correct a clerical error to have the judgment speak the truth. *Carter v. State*, 2019 Ark. App. 57, at 17, 568 S.W.3d 788, 798. Thus, we affirm appellant's convictions but remand to the trial court with instructions to correct the sentencing order.

Affirmed; remanded to correct the sentencing order.

ABRAMSON and MURPHY, JJ., agree.

Lassiter & Cassinelli, by: *Michael Kiel Kaiser*, for appellant.

Tim Griffin, Att'y Gen., by: *Christopher R. Warthen, Ass't Att'y Gen.*, for appellee.