

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARNOLD CORTAZ SMITH, JR.,

Defendant-Appellant.

UNPUBLISHED
December 7, 2010

No. 294465
Saginaw Circuit Court
LC No. 09-031998-FH

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Arnold Cortaz Smith, Jr. appeals as of right his jury trial convictions of carrying a concealed weapon, MCL 750.227, resisting or obstructing a police officer, MCL 750.81d(1), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Smith was sentenced to a mandatory term of two years' imprisonment for the felony-firearm conviction and placed on three years' probation for the remaining convictions. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Smith's sole claim on appeal is that there was insufficient evidence to sustain his conviction of felony-firearm. Smith contends that because he could not access the weapon, which was in his car during his struggle with police officers outside of the vehicle, the prosecutor could not prove the possession element of felony-firearm.

Due process requires that a defendant's conviction be based on sufficient evidence. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). We review claims of insufficient evidence de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), to determine "whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt." *Johnson*, 460 Mich 723, quoting *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The standard for reviewing a claim of insufficient evidence is deferential, as "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Following a traffic stop for an expired license plate and his arrest for not having car insurance, police requested that Smith exit his vehicle. Although Smith initially complied, he physically resisted the officer's attempts to handcuff him. During the brief altercation with the officer, Smith consistently remained within five feet of his vehicle. Smith admitted to officers that he had a handgun wedged between the vehicle's front seat cushion and the center console.

To convict Smith of the crime of felony-firearm, the prosecutor was required to demonstrate that Smith carried or possessed a firearm while he was committing or attempting to commit a felony. MCL 750.227b; *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Possession of the firearm “may be actual or constructive and may be proved by circumstantial evidence.” *Id.* at 437. Constructive possession of a firearm is found to exist if there is “proximity” to the weapon “together with indicia of control.” *Id.* at 438. As Smith does not dispute that he committed the underlying felony of resisting arrest, the only matter to be resolved is whether he had constructive possession of the weapon.

While mere proximity to a weapon is insufficient, constructive possession of a firearm exists when a defendant knows the location of the weapon and it is reasonably accessible to him. *People v Wolfe*, 440 Mich 508, 520; 589 NW2d 748 (1992), amended 441 Mich 1201 (1992). In other words, “[a] person has ‘possession’ of a weapon when it is ‘accessible and available . . . at the time the crime is committed.’” *People v Williams*, 198 Mich App 537, 541; 499 NW2d 404 (1993), quoting *People v Terry*, 124 Mich App 656, 662; 335 NW2d 116 (1983). Actual physical contact with the weapon during commission of the underlying felony is not necessary to establish the crime of felony-firearm. See *Williams*, 198 Mich App at 541.

To sustain his felony-firearm conviction, the prosecutor did not need to prove that Smith actually had physical contact with the weapon during his scuffle with police. It was undisputed that Smith had a loaded handgun in the passenger area of his vehicle and that he admitted the presence of the weapon to the police officers, demonstrating that he had knowledge of the weapon’s existence and its location. It was the jury’s responsibility to evaluate the evidence. In convicting Smith the jury clearly concluded that he had sufficient opportunity to access the weapon when he was pressed against the vehicle while struggling with police. Because it is “for the trier of fact, not the appellate court, to determine what inferences may be” drawn from the evidence, *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002), this Court will not substitute its judgment for that of the jury. Because Smith had constructive possession of the handgun while resisting arrest there was sufficient evidence to sustain his conviction of felony-firearm.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher