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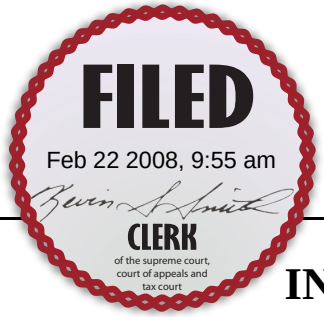

IN THE COURT OF APPEALS OF INDIANA

JAMES McCLAIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 78A01-0706-CR-252
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SWITZERLAND SUPERIOR COURT
The Honorable John D. Mitchell, Judge
Cause No. 78D01-0410-FB-447

February 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

James McClain appeals his conviction for unlawful possession of a firearm by a serious violent felon, a class B felony.[1] We affirm.

Issues

McClain raises the following issues for our review:

I. Whether the trial court abused its discretion by admitting evidence regarding firearms seized from McClain's home;

II. Whether the evidence is sufficient to sustain McClain's conviction; and

III. Whether the prosecutor engaged in misconduct sufficient to entitle McClain to a new trial.

Facts and Procedural History

On September 5, 2004, three Indiana State Police officers conducted a stakeout in a wooded area in Switzerland County. Although the stakeout was unrelated to McClain, he had a chance encounter with the officers. The officers observed McClain carrying a shotgun. One of the officers, Officer Stan Tressler, knew McClain because he had arrested him for a prior felony, which made it unlawful for McClain to possess a firearm. Not wanting to compromise the stakeout, Officer Tressler told McClain the officers were checking for unlicensed hunters. When McClain presented his hunting license, Officer Tressler told him he was free to leave.

On September 7, 2004, after Officer Tressler confirmed McClain's status as a serious violent felon, he contacted Officer Robert Schirmer, McClain's probation officer regarding

McClain's possession of the shotgun. On October 5, 2004, Officer Schirmer and three other officers conducted a warrantless search of McClain's residence. During the search, officers seized three shotguns, three muzzleloaders, and one rifle, whereupon the State charged McClain with unlawful possession of a firearm by a serious violent felon based on the firearms seized from his residence.[2] McClain was convicted on January 19, 2007, following a jury trial. McClain now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Admission of Evidence Relating to Seized Firearms

McClain contends that the trial court improperly admitted evidence obtained pursuant to a search of his residence.[3] "The evidentiary rulings of a trial court are afforded great deference and are reversed on appeal only upon a showing of an abuse of discretion." *Richard v. State*, 820 N.E.2d 749, 753 (Ind. Ct. App. 2005) (citations and quotation marks omitted), *trans. denied*. "An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id*.

McClain specifically asserts that the search of his residence was unreasonable according to the Fourth and Fourteenth Amendments to the United States Constitution and

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[1] A person convicted of any of the twenty-seven offenses listed in Ind. Code § 35-47-4-5(b) is deemed a "serious violent felon" pursuant to Ind. Code § 35-47-4-5(a). McClain is a serious violent felon by virtue of his prior conviction for child molesting. Ind. Code § 35-47-4-5(b)(10).

[2] The State did not file a notice of probation violation based on McClain's possession of the shotgun while hunting.

[3] McClain argues, and the State concedes, that the waiver McClain signed as a condition of his probation was unconstitutionally broad in that it authorized "unreasonable searches." Def. Exh. A; *see Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004) (probation condition allowing unreasonable searches held unconstitutional). We need not address this issue because we conclude that the search of McClain's residence was in fact reasonable.

Article 1, Section 11 of the Indiana Constitution. "Generally, searches should be conducted pursuant to a warrant supported by probable cause." *Allen v. State*, 743 N.E.2d 1222, 1227 (Ind. Ct. App. 2001). However, "[p]robation is a criminal sanction wherein a convicted defendant specifically agrees to accept conditions upon his behavior in lieu of imprisonment." *Bonner v. State*, 776 N.E.2d 1244, 1247 (Ind. Ct. App. 2002). "[T]he United States Supreme Court has determined that '[a] State's operation of a probation system ... presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'" *Allen*, 743 N.E.2d at 1227 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)). Therefore, if the search is conducted within the regulatory scheme of probation enforcement by probation officers or police working with probation officers, a warrant need not be obtained. *Id*. at 1228. The State has the burden of demonstrating that the warrantless search was probationary in nature and not a general investigation. *Id*. "[A]t a minimum, there must be a reasonable suspicion that the conditions of probation are being violated in order for a probation search to be reasonable." *Fitzgerald v. State*, 805 N.E.2d 857, 865 (Ind. Ct. App. 2004). "[I]t is reasonable to permit information provided by a police officer, whether or not on the basis of firsthand knowledge, to support a probationary search." *Griffin*, 483 U.S. at 869.

In *Allen*, a law enforcement officer observed the defendant in possession of a firearm in violation of the conditions of his parole. The officer then notified the defendant's parole officer, and the defendant's residence was searched. He was charged with offenses other than a parole violation stemming from items obtained in the search. This Court nonetheless held that the search was indeed a parole/probation search and that the officers' reasonable

suspicion of a parole violation was enough to bring the search within the reasonableness requirements of the United States and Indiana Constitutions. 743 N.E.2d at 1229; *see also Griffin*, 483 U.S. at 872 (upholding as reasonable warrantless search of probationer's apartment where State received information from police officer that probationer's apartment might contain a firearm).

Here, Officer Tressler observed McClain carrying a shotgun and recognized him from an arrest in a prior felony case. As a result, Officer Tressler initiated an investigation and notified McClain's probation officer regarding his observations. The probation officer then took charge of the situation, and he and three other officers conducted the search that produced the firearms. The State's choice to pursue a charge other than a probation violation does not remove this search from the category of a probation search. *See Allen*, 743 N.E.2d 1222 (State charged probationer with burglary and theft based on items found pursuant to the probation search); *see also Griffin*, 483 U.S. 868 (State charged probationer with possession of firearm by convicted felon after probation search produced a handgun). Further, the search was conducted on the basis of an eyewitness account of McClain carrying a shotgun. Therefore, a reasonable suspicion existed, and the search did not violate McClain's constitutional rights against unreasonable search and seizure. The trial court did not abuse its discretion in admitting evidence relating to the search.

II. Sufficiency of Evidence

McClain also asserts that the State failed to present evidence sufficient to sustain his conviction for unlawful possession of a firearm by a serious violent felon. When reviewing a sufficiency claim, we neither reweigh evidence nor judge witness credibility. *Gall v. State*,

811 N.E.2d 969, 974 (Ind. Ct. App. 2004). Rather, we consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom. *Id*. Where substantial evidence of probative value exists to support the verdict, it will not be disturbed. *Id*. We will affirm a conviction unless we conclude that no reasonable trier of fact could find the elements of the crime proven beyond a reasonable doubt. *Bethel v. State*, 730 N.E.2d 1242, 1244 (Ind. 2000).

Pursuant to Indiana Code Section 35-47-4-5, the State was required to prove beyond a reasonable doubt that (1) McClain was a serious violent felon, and (2) he knowingly or intentionally possessed a firearm. McClain stipulated at trial that he met the requirements of a serious violent felon. Therefore, the only issue before the jury was whether McClain knowingly or intentionally possessed a firearm.

McClain contends that the State failed to meet its burden of proof in this regard. "Illegal possession of a firearm may be proven by either actual or constructive possession." *Tate v. State*, 835 N.E.2d 499, 511 (Ind. Ct. App. 2005), *trans. denied*. None of the seized firearms was found on McClain's person. Therefore, with regard to these weapons, the State had the burden of proving that McClain constructively possessed the firearms, meaning that he had knowledge of the firearms and the intent and capability to maintain dominion and control over them. *Id*. Proof of a possessory interest in the premises in which contraband is found is adequate to show the capability to maintain dominion and control over the items in question. *Massey v. State*, 816 N.E.2d 979, 989 (Ind. Ct. App. 2004). This is true even where possession of the premises is non-exclusive. *Chandler v. State*, 816 N.E.2d 464, 467 (Ind. Ct. App. 2004).

Here, the evidence most favorable to the verdict indicates that firearms were found at the residence McClain shared with his wife and stepsons. The firearms were not locked away or in cases and did not have trigger locks. They were found in highly accessible areas, including the garage and a closet in McClain's bedroom. Notwithstanding that his stepsons owned some of the firearms, the location and condition of the firearms indicate that McClain had "the ability to reduce [them] to his personal possession or otherwise direct [their] disposition or use." *Person v. State*, 764 N.E.2d 743, 750 (Ind. Ct. App. 2002), *trans. denied*. Under Indiana Code Section 35-47-4-5, possession, not ownership, is dispositive. *See Meadows v. State*, 785 N.E.2d 1112, 1121 (Ind. Ct. App. 2003) (presentation of additional evidence regarding true ownership of firearm not crucial to establishing possession of firearm or status as serious violent felon), *trans. denied*. Based on this evidence, the trier of fact could reasonably conclude that McClain had the power to exercise control over the firearms. *Id*.

McClain next asserts that he lacked the intent to maintain dominion and control over the firearms. To prove the element of intent, the State must demonstrate the defendant's knowledge of the presence of the firearm. *Causey v. State*, 808 N.E.2d 139, 143 (Ind. Ct. App. 2004). When a person has non-exclusive control over the premises, intent to maintain dominion and control over the firearm found therein may be inferred from additional circumstances that indicate the person knew of its presence. *Hardister v. State*, 849 N.E.2d 563, 574 (Ind. 2006). These circumstances include incriminating statements by the defendant, attempted flight or furtive gestures, proximity of the defendant to the weapons, and whether the weapons were in plain view. *Id*. The record reveals that McClain told the

officers where one of the firearms was located. Regarding other firearms discovered on the premises, one of McClain's stepsons testified that McClain was present when he received his shotgun as a birthday gift. Tr. at 266. The other stepson testified that he showed McClain his shotgun after he received it as a gift. *Id*. at 259-60. Moreover, police found firearms in areas highly accessible to McClain, including his garage and a closet in his bedroom. We also note that Officer Tressler provided eyewitness testimony that McClain was in physical possession of both a shotgun and a hunting license during the September 5 encounter in the woods. As the jury instructions indicate, the trial court received this evidence for the limited purpose of establishing whether McClain had the requisite intent to possess the firearms seized from his residence. Appellant's App. at 351. In light of the foregoing, the trier of fact could reasonably infer that McClain had the requisite intent to maintain dominion and control over the seized firearms, and we decline his invitation to reweigh the evidence. We conclude that the State presented sufficient evidence that McClain knowingly or intentionally possessed firearms.

III. Prosecutorial Misconduct

McClain contends that the prosecutor committed misconduct sufficient to entitle him to a new trial. When reviewing a properly preserved claim of prosecutorial misconduct, we determine (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, considering all the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002). "The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct." *Id*. "A

defendant waives appellate review of the issue of prosecutorial misconduct when he fails to immediately object, request an admonishment, and then move for a mistrial." *Reynolds v. State*, 797 N.E2d 864, 868 (Ind. Ct. App. 2003).

Here, the State began its opening statement with: "Murder, kidnapping, rape, robbery, child molesting, these are all crimes." Tr. at 97.[4] McClain's counsel promptly objected, and the trial court admonished the jury to disregard the statement. However, McClain did not move for a mistrial and therefore has failed to preserve a claim of prosecutorial misconduct absent a showing of fundamental error. *Reynolds*, 797 N.E.2d at 869. "Fundamental error is a substantial blatant violation of basic principles rendering the trial unfair and depriving the defendant of fundamental due process." *Id*. The error must have prejudiced the defendant's rights to such an extent that a fair trial was impossible. *Id*. The error will be considered harmless when overwhelming independent evidence supports a guilty verdict. *Hackney v. State*, 649 N.E.2d 690, 693 (Ind. Ct. App. 1995), *trans. denied*.

Prior to opening statements, the trial court held a conference with counsel outside the presence of the jury to discuss, among other issues, the issue of McClain's prior conviction. The following interchange took place regarding the prior conviction:

> [DEFENSE COUNSEL]: And Your Honor, the Court had previously issued a ruling on a Motion in Limine regarding prior criminal record and under the pre-trial ruling of the Court, the Court indicated that there could be no mention of basically other than the fact of a prior conviction, I believe, there could be no mention of that.
>
> THE COURT: In fact, I'll change that and there will be no mention of the prior conviction. Basically, the Defendant is conceding on the issue as to

[4] The prosecutor's statement constituted a partial list of the serious violent felonies enumerated in Ind. Code. § 35-47-4-5(b).

> whether or not there was a prior conviction of a crime listed in the particular section involved so therefore, that's the ruling of the Court.
>
> [PROSECUTOR]: For clarification purposes, you're saying that we can't mention the name of the prior crime but we can certainly reference that he has been convicted under Indiana Code 35-47-4-5?
>
> THE COURT: Oh yeah. I'm just not going to allow you to tell what it is.
>
> [PROSECUTOR]: To say child molesting, okay. Just so we're clear on what the ground rules are.
>
> THE COURT: That's part of the crime.
>
> [PROSECUTOR]: I would certainly agree. It's an element of the offense.
>
> THE COURT: Essentially what they're doing, they're conceding on that argument. And, of course, one of their, the Court might have had a different decision on bifurcation. Basically, the proof of the prior conviction is not really needed and the only issue would be whether or not there is knowing and intentional possession and that's essentially another thing we've got going in this Court today. That's the only thing we are deciding.

Tr. at 77-79.

The State contends that the prosecutor did not commit misconduct because she merely listed the statutory serious violent felonies and did not specify that McClain had been convicted of child molesting. We disagree. The trial court made it clear that the only issue to be argued before the jury was whether McClain knowingly or intentionally possessed a firearm. The court specifically noted that it might have bifurcated the proceedings but for McClain's stipulation as to his status as a serious violent felon. The prosecutor committed misconduct in reciting the serious violent felonies to the jury.

We now address whether the prosecutor's misconduct so blatantly violated McClain's constitutional rights that a fair trial became impossible. "Reversible error is seldom found

when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement." *Agilera v. State*, 862 N.E.2d 298, 307 (Ind. Ct. App. 2007), *trans. denied*; *see also Underwood v. State*, 644 N.E.2d 108, 111 (Ind. 1994) (admonishment was appropriate where police officer made statement in violation of ruling on motion in limine); *Guy v. State*, 755 N.E.2d 248, 258 (Ind. Ct. App. 2001) (admonishment was held to cure any prejudice from prosecutor's improper comment), *trans. denied*.

Here, the trial court held a sidebar conference following defense counsel's objection to the prosecutor's improper statement. Immediately thereafter, the court admonished the jury to "disregard the previous statement." Tr. at 97. Unless demonstrated to the contrary, a trial court's proper admonishment is presumed to cure any alleged error. *Hackney*, 649 N.E.2d at 694. Given the trial court's timely and proper admonishment and the substantial independent evidence of guilt, we conclude that McClain has failed to demonstrate fundamental error stemming from the prosecutor's improper statement.

Affirmed.

BAILEY, J., and NAJAM, J., concur.