2018 WL 4845804
Supreme Court, Appellate Division,
Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
James D. THOMAS, Jr., also known as
Wayne Thomas, Defendant–Appellant.

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KA 15–00006
|
Entered: October 5, 2018

Synopsis

Background: Defendant was convicted in the Supreme Court, Monroe County, Thomas E. Moran, J., of possession of a weapon in the second degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] evidence was sufficient to establish defendant **constructively possessed** the firearm, as required to support conviction;

[2] defendant was not deprived of a fair trial based on prosecutorial misconduct during summation;

[3] trial court did not abuse its discretion in making *Sandoval* ruling allowing admission of prior charges for forgery and criminal impersonation and conviction of attempted burglary; and

[4] trial court did not abuse its discretion in making *Sandoval* ruling allowing admission of prior charge of leaving the scene of accident and conviction of unlawfully fleeing a police officer in motor vehicle.

Affirmed.

West Headnotes (5)

[1] Weapons

Evidence was sufficient to establish that defendant **constructively possessed** the firearm, as required to support conviction for **possession** of a weapon in the second degree; firearm was located and positioned on the floorboard of the passenger seat and defendant was seated in that passenger seat. N.Y. Penal Law § 265.03(3).

Cases that cite this headnote

[2] Criminal Law

Defendant was not deprived of a fair trial based on prosecutorial misconduct during summation, in prosecution for possession of a weapon in the second degree; majority of the comments in question were within the broad bounds of rhetorical comment permissible during summations and they were either a fair response to defense counsel's summation or fair comment on the evidence.

Cases that cite this headnote

[3] Criminal Law

Trial court did not abuse its discretion in making *Sandoval* ruling allowing admission of defendant's prior charges for forgery and criminal impersonation and conviction upon guilty plea of attempted burglary in the second degree in prosecution for possession of a weapon in the second degree; prior charges and conviction involved acts of dishonesty and thus were probative with respect to defendant's credibility.

Cases that cite this headnote

[4] Criminal Law

Trial court did not abuse its discretion in making *Sandoval* ruling allowing admission of defendant's prior charge of leaving the scene of personal injury accident without reporting and conviction upon a guilty plea of unlawfully fleeing a police officer in a motor vehicle in the third degree in prosecution for possession of a weapon in the second degree; prior charge and conviction showed the willingness of defendant to place the advancement of his individual self-interest ahead of principle or interest of society and thus was probative of defendant's credibility.

Cases that cite this headnote

[5] Criminal Law

A dismissal in satisfaction of a plea is not an acquittal which would preclude a prosecutor from inquiring about the underlying acts of the crimes because it is not a dismissal on the merits.

Cases that cite this headnote

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 15, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

Attorneys and Law Firms

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT–APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

MEMORANDUM AND ORDER

***1** It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

[1] Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]), arising from a vehicle stop during which the police discovered a firearm on the floorboard of the front passenger seat where defendant had been sitting. We reject defendant's contention that the conviction is not supported by legally sufficient evidence. Viewing the evidence in the light most favorable to the People, we conclude that "the evidence is legally sufficient to establish that defendant **constructively possessed** the firearm, i.e., that he exercised dominion and control over the area in which [the firearm was] found" (*People v. Boyd,* 153 A.D.3d 1608, 1608, 61 N.Y.S.3d 431 [4th Dept. 2017], *lv denied* 30 N.Y.3d 1103, 77 N.Y.S.3d 2, 101 N.E.3d 388 [2018] [internal quotation marks omitted]). "Based on the location and position of the firearm, which was visible [on the floorboard] of the passenger seat ..., and the fact that defendant was seated in that passenger seat, ... 'the jury was ... entitled to accept or reject the permissible inference that defendant possessed the weapon' " (*id.* at 1609, 61 N.Y.S.3d 431). In addition, there was sufficient evidence that defendant's possession of the firearm was knowing (*see People v. Muhammad,* 16 N.Y.3d 184, 188, 920 N.Y.S.2d 760, 945 N.E.2d 1010 [2011]; *see generally People v. Diaz,* 24 N.Y.3d 1187, 1190, 3 N.Y.S.3d 745, 27 N.E.3d 459 [2015]; *People v. Lawrence,* 141 A.D.3d 1079, 1082, 34 N.Y.S.3d 827 [4th Dept. 2016], *lv denied* 28 N.Y.3d 1029, 45 N.Y.S.3d 380, 68 N.E.3d 109 [2016]).

We also reject defendant's contention that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v. Danielson,* 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 880 N.E.2d 1 [2007]), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see People v. Bleakley,* 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 [1987]; *Boyd,* 153 A.D.3d at 1610, 61 N.Y.S.3d 431).

[2] Defendant further contends that he was denied a fair trial by prosecutorial misconduct on summation. Even assuming, arguendo, that defendant's contention is preserved for our review with respect to all of the instances of alleged misconduct, we nevertheless conclude that it is

without merit. Contrary to defendant's contention, "[t]he majority of the comments in question were within the broad bounds of rhetorical comment permissible during summations ..., and they were either a fair response to defense counsel's summation or fair comment on the evidence ... Even assuming, arguendo, that some of the prosecutor's comments were beyond those bounds, we conclude that they were not so egregious as to deprive defendant of a fair trial" (*People v. McEathron,* 86 A.D.3d 915, 916, 926 N.Y.S.2d 249 [4th Dept. 2011], *lv denied* 19 N.Y.3d 975, 950 N.Y.S.2d 358, 973 N.E.2d 768 [2012] [internal quotation marks omitted]).

[3] **[4]** **[5]** We also reject defendant's contention that Supreme Court's *Sandoval* ruling constituted an abuse of discretion (*see People v. Sandoval,* 34 N.Y.2d 371, 374, 357 N.Y.S.2d 849, 314 N.E.2d 413 [1974]). Contrary to defendant's contention, the prior charges against him for forgery in the second degree and criminal impersonation in the second degree, and his conviction upon a guilty plea of attempted burglary in the second degree in satisfaction of those charges, " 'involved acts of dishonesty and thus were probative with respect to the issue of defendant's credibility' " (*People v. Bynum,* 125 A.D.3.d 1278, 1279, 1 N.Y.S.3d 724 [4th Dept. 2015], *lv denied* 26 N.Y.3d 927, 17 N.Y.S.3d 89, 38 N.E.3d 835 [2015]; *see People v. Walker,* 83 N.Y.2d 455, 461–462, 611 N.Y.S.2d 118, 633 N.E.2d 472 [1994]; *People v. Taylor,* 11 A.D.3d 930, 930–931, 782 N.Y.S.2d 215 [4th Dept. 2004], *lv denied* 4 N.Y.3d 749, 790 N.Y.S.2d 661, 824 N.E.2d 62 [2004]). Contrary to defendant's related contention, the other prior charge against him for leaving the scene of a personal injury incident without reporting, and his conviction upon a guilty plea of unlawfully fleeing a police officer in a motor vehicle in the third degree in satisfaction of that charge, were probative of defendant's credibility inasmuch as such acts showed the "willingness ... [of defendant] to place the advancement of his individual self-interest ahead of principle or of the interests of society" (*Sandoval,* 34 N.Y.2d at 377, 357 N.Y.S.2d 849, 314 N.E.2d 413; *see People v. Salsbery,* 78 A.D.3d 1624, 1626, 911 N.Y.S.2d 547 [4th Dept. 2010], *lv denied* 16 N.Y.3d 836, 921 N.Y.S.2d 200, 946 N.E.2d 188 [2011]). To the extent that defendant contends otherwise, we conclude that the court did not err in permitting inquiry into the prior charges satisfied by defendant's guilty pleas (*see People v. Walker,* 66 A.D.3d 1331, 1332, 885 N.Y.S.2d 791 [4th Dept. 2009], *lv denied* 13 N.Y.3d 942, 895 N.Y.S.2d 333, 922 N.E.2d 922 [2010]). " 'A dismissal in satisfaction of a plea is not an acquittal which would preclude a prosecutor from inquiring about the underlying acts of the crime[s] because it is not a dismissal on the merits' " (*id.*; *see People v. Flowers,* 273 A.D.2d 938, 938–939, 710 N.Y.S.2d 295 [4th Dept. 2000], *lv denied* 95 N.Y.2d 905, 716 N.Y.S.2d 646, 739 N.E.2d 1151 [2000]). We conclude on this record that defendant failed to meet his burden "of demonstrating that the prejudicial effect of the admission of evidence [of the prior convictions and charges] for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion" (*Sandoval,* 34 N.Y.2d at 378, 357 N.Y.S.2d 849, 314 N.E.2d 413).

***2** Finally, the sentence is not unduly harsh or severe.

All Citations

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