

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001739-MR

BURNIE L. CREW

APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT  
HONORABLE JAMES G. WEDDLE, JUDGE  
ACTION NO. 06-CR-00012

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

MOORE, JUDGE: This is an appeal by Burnie Crew from a Casey Circuit Court judgment convicting him of Possession of a Handgun by a Convicted Felon. A jury found Crew guilty, and he was sentenced to five years in prison. Crew insists the trial court erred by not granting his motion for a directed verdict because the Commonwealth failed to produce evidence proving he knowingly possessed the handgun. After a careful review of the record, we affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On January 14, 2006, Crew was pulled over by Kentucky State Trooper Tyson Lawson and Casey County Deputy Sheriff Freeman Luttrell for failing to come to a complete stop at the intersection of HWY 910 and KY 501. Trooper Lawson informed Crew why he had been pulled over and requested his driver's license.

After Deputy Luttrell ran Crew's driver's license through his computer system, Trooper Lawson testified that while returning to Crew's vehicle, he noticed the driver's side window was now closed, but the driver's side door was ajar. Trooper Lawson stated that he pulled the door open and immediately noticed a handgun sticking out of the side compartment of the door. He said Crew then reached for the gun, but he was able to grab Crew's arm and secure the gun himself.

Trooper Lawson gave the gun to Deputy Luttrell to check its registration. There was no record of the handgun in the computer system, and Crew was subsequently arrested. Trooper Lawson testified that he asked Crew why he had the handgun, to which Crew replied it was for protection.

Crew was indicted on the charge of Possession of a Handgun by a Convicted Felon, KRS 527.040.<sup>1</sup> At trial, Paula Humphrey, who has lived with Crew for twenty years, testified that it was her car Crew was driving when he was arrested, and it

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<sup>1</sup> Crew was also indicted for carrying a concealed deadly weapon, operating a motor vehicle while under the influence, disregarding a stop sign, trafficking in a controlled substance in the third degree, possession of marijuana and failure to produce an insurance card. These charges were severed from the charge for possession of a handgun by a convicted felon. The issue on appeal before this Court only pertains to the possession of a handgun by a convicted felon charge.

was also her handgun. She acknowledged that the vehicle was registered in Crew's name but stated that it is her everyday vehicle. She testified that Crew was going to visit his cousin the night of his arrest and chose to drive her vehicle because it got better gas mileage than his car. Humphrey claimed she has been stalked a couple times and prefers not to leave home without the handgun, but forgot to remove it from her car before Crew left.

## **II. STANDARD OF REVIEW**

On appeal, the test for a directed verdict of acquittal is whether, viewed under the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983)). When the sufficiency of the evidence is challenged on appeal, this Court, after viewing the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *U.S. v. Crayton*, 357 F.3d 560 (6<sup>th</sup> Cir. 2004). Further, on appeal, we do not have to reassess the proof; our role is to review the trial court's decision in light of the evidence presented at trial. *Bussell v. Commonwealth*, 882 S.W.2d 111, 114 (Ky. 1994).

## **III. ANALYSIS**

Kentucky Revised Statutes (KRS) 527.040 states, in part, “[a] person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures,

or transports a firearm when he has been convicted of a felony . . . .” Crew does not contest he is a convicted felon. Rather, he denies that he knowingly possessed the handgun or entertained the intent to do so.

According to the jury instructions at trial, “possession” requires one “to have actual physical possession or otherwise to exercise dominion or control over a tangible object.” The jury instructions also defined “knowingly” as: “a person acts knowingly with respect to conduct or to a circumstance when he is aware that his conduct is of that nature or that the circumstance exists.”

Possession may be established through either actual or constructive possession. *Johnson v. Commonwealth*, 90 S.W.3d 39, 42 (Ky. 2002). Contrary to actual possession, constructive possession exists when a person knowingly has the power and intention at a given time to exercise dominion and control of an object. *Id.*

Relying heavily on his own testimony to discount Trooper Lawson’s statements at trial, Crew contends the Commonwealth failed to prove beyond a reasonable doubt that he had actual knowledge of the handgun's presence in the vehicle. In fact, Crew insists in his brief “he was not even aware that the gun was there.” (Appellant’s Brief p. 6). He maintains that because it was dark outside, the car was dark inside, the handgun was black, and the handgun was located in the side compartment of the door, this is evidence of his lack of knowledge of the handgun’s presence.

However, as the Commonwealth correctly states in its brief, the credibility of a witness “has since time immemorial been a question for the jury.” *Bush v.*

*Commonwealth*, 457 S.W.2d 495, 497 (Ky. 1970); see also *Gillispie v. Commonwealth*, 279 S.W. 671, 672 (Ky. 1926). Moreover, the question of whose story to believe is the jury's responsibility. *Webb v. Commonwealth*, 904 S.W.2d 226, 229 (Ky. 1995).

Accordingly, upon viewing the totality of the evidence in the light most favorable to the Commonwealth, we believe the trial court correctly concluded that reasonable minds could find Crew guilty beyond a reasonable doubt. See *Sawhill*, 660 S.W.2d at 4. Therefore, based on Trooper Lawson's testimony alone, absent any conclusive evidence to the contrary, it was clearly reasonable for the case to be submitted to the jury.

In addition, Crew cites *State v. Heacox*, 543 So.2d 101 (La. App. 1989) to support his argument. Because this Court is not bound by Louisiana caselaw, we need only consider *Heacox* as persuasive authority. Nonetheless, as the Commonwealth properly argues, the case before this Court is distinguishable from the facts in *Heacox*.

In *Heacox*, the defendant was a passenger in a vehicle with one other person, the driver, during a drug transaction. An undercover police officer made a drug purchase from the defendant and noticed part of a handgun sticking out from between the seats. The court held the handgun was not subject to the defendant's dominion and control because he did not own the car, he was merely a passenger, and he never was seen touching the handgun or exercising the intent to do so.

Whereas, in this case, Crew was the registered owner and sole occupant of the car, and according to Trooper Lawson, he attempted to grab the handgun and claimed it was for his protection. Therefore, we do not see the relevance in comparing this case to the facts in *Heacox*.

The trial court did not commit error by denying Crew's motion for a directed verdict because evidence presented at trial was sufficient to provide the jury with ample proof that Crew was guilty of the charged offense beyond a reasonable doubt. Accordingly, we affirm the Casey Circuit Court's judgment of conviction.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roy Alyette Durham II  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General

Michael L. Harned  
Assistant Attorney General  
Frankfort, Kentucky