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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JASON FISHER,

Defendant and Appellant.

F064811

(Super. Ct. No. CRF36959)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Christian Koster, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J. and Detjen, J.

A jury convicted defendant Michael Jason Fisher of being a felon in possession of a firearm. (Former Pen. Code, § 12021, subd. (a)(1).)¹ He admitted a prior prison term enhancement (§ 667.5, subd. (b)), and was sentenced to three years in prison. On appeal, he claims the trial court erred by denying his motion for acquittal and by overruling his objections to purportedly argumentative questions by the prosecutor. We affirm.

FACTS

I

PROSECUTION EVIDENCE

As of October 26, 2011, John Daley, Jr., lived in a residence on Jupiter Road, in Tuolumne County, with Shannon Fisher (Fisher) and their children. Daley was growing and processing marijuana at the time.

About 3:30 that afternoon, Tuolumne County Sheriff’s Detective Eric Erhardt and other investigators arrived at the residence and were met outside by Daley. Erhardt walked with Daley around the back of the house. About 10 or 15 minutes later, Erhardt returned to the front and saw defendant on the porch with the other investigators. A young child was also on the premises.

Erhardt entered the house through the front door. To the right was an unlocked, glass-doored gun cabinet that contained a rifle. The rifle was not loaded, but there was ammunition for it in the drawers in the bottom portion of the cabinet.

All of the doors inside the house were “open and unlocked.” On the first floor were two bedrooms containing beds. Defendant’s wallet, mail or documents bearing

¹ All statutory references are to the Penal Code unless otherwise stated.

Former section 12021, subdivision (a)(1) was repealed as of January 1, 2012, and its provisions reenacted without substantive change as section 29800, subdivision (a)(1). (Stats. 2010, ch. 711, §§ 4 & 6; see *People v. Correa* (2012) 54 Cal.4th 331, 334, fn. 1.) Because defendant was convicted under the repealed statute, we refer to former section 12021 — without the word “former” — throughout this opinion for clarity and convenience.

defendant's name, some adult male clothing, a beer can, a disposable razor, and deodorant were among the items found in one of these bedrooms.² A third bedroom contained drying marijuana.

Upstairs were a child's play area and the master bedroom and bath. A number of items of interest were located in the master bedroom. An unloaded rifle was found underneath the bed. Several pounds of marijuana were found in various locations in the room. Daley's wallet was in the dresser, and there were documents in the room bearing his name. Female clothing was also found. Directly behind the dresser, which had been pulled four or five inches away from the wall, were two shotguns. One was loaded and had a shell in the chamber. There was shotgun ammunition in the dresser. Six more unloaded firearms — both rifles and shotguns — were in the closet. There was an assortment of ammunition for these guns in a desk and closet downstairs.

At trial, Daley testified the shotguns had been behind the dresser for at least a week. The house was in a wilderness area and they had had problems with bears and coyotes. The rifle in the gun cabinet was his; he had put it there a night or two earlier when he went to check on why the dogs were barking. Daley normally kept the guns locked in the upstairs bedroom, to which he and Fisher had keys. Although he kept the bedroom locked 90 percent of the time, it was unlocked the day investigators arrived because Daley was home.

Daley was away at work from July until October 13, 2011. Fisher was also working at the time. At some point, defendant took over as fulltime babysitter for Daley and Fisher's younger child. Although defendant stayed at the house sometimes, Daley did not believe he lived there. Daley admitted, however, that he did not really know what

² Erhardt did not believe mail was delivered to that address, but could not recall whether the mail bore a physical address or post office box number.

went on during the week, because he left every Sunday afternoon for work and did not return until the following Friday night or Saturday morning.

Daley and defendant did not talk about guns being in the house. Daley knew defendant could not shoot or own a gun, but did not think being around guns was an issue. Defendant never asked to use Daley's guns.

II

DEFENSE EVIDENCE

Fisher, defendant's sister, lived at the residence on Jupiter, together with Daley and their two children, at the time of the incident. In October 2011, defendant was at the house from one to five times a week, depending on whether he was babysitting. If babysitting, defendant usually would watch the younger child from around 5:00 a.m. until afternoon or evening. Although he was not actually living at the house, he stayed overnight perhaps one to three times a week. He used the spare bedroom downstairs.

The gun cabinet just inside the front door belonged to Fisher. She owned four of the guns investigators found; Daley owned the rest, including the rifle in the gun cabinet. None of the firearms belonged to defendant. Fisher never gave defendant permission to use any of her weapons.

The master bedroom had a key lock. The gun cabinet also had a lock. Fisher was not aware the gun cabinet was unlocked. There was no gun in it when she left for work the morning of the incident. Fisher was not concerned about having firearms in the house with her brother, a convicted felon, because the weapons were locked up. She did not know how they came to be unlocked when law enforcement arrived. She did not lock her bedroom door when she left for work at 5:00 that morning, but Daley was asleep in the room when she left. She could not speak for Daley as to whether his presence would have stopped defendant from getting a gun if he wanted to do so. Fisher and Daley had an understanding that the bedroom was to be locked when Fisher was not there.

DISCUSSION

I

DENIAL OF MOTION FOR ACQUITTAL

At the close of evidence, defendant moved for acquittal, pursuant to section 1118.1, on the ground the People failed to present sufficient evidence to show defendant had possession of the firearms or that he took any steps to actually exercise control over them, either directly or indirectly.³ After argument, the trial court denied the motion, finding sufficient evidence from which the jury reasonably could infer defendant had control over the weapons, either directly or through Fisher or Daley. Defendant now says the court erred.

“A trial court should deny a motion for acquittal under section 1118.1 when there is any substantial evidence, including all reasonable inferences to be drawn from the evidence, of the existence of each element of the offense charged. [Citations.]” (*People v. Mendoza* (2000) 24 Cal.4th 130, 175.) In other words, “the trial court applies the same standard as an appellate court reviewing the sufficiency of the evidence.” (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.) Under this standard, the test of sufficiency of the

³ Section 1118.1 provides, in pertinent part: “In a case tried before a jury, the court on motion of the defendant ..., at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal....”

Where a motion is made under section 1118.1 at the close of the prosecution’s case-in-chief, “the sufficiency of the evidence is tested as it stood at that point’ in the trial [citation] — in other words, based on the prosecution’s case alone, and without considering the evidence subsequently adduced during the presentation of the defense case” (*People v. Watkins* (2012) 55 Cal.4th 999, 1019.) Apparently believing defendant’s motion was made at the close of the prosecution’s case, the Attorney General does not address Fisher’s testimony. In reality, the motion was made at the conclusion of the defense case, after both sides had rested.

evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is “reasonable, credible, and of solid value.” (*People v. Johnson, supra*, at p. 578.)

We independently review a ruling on a motion under section 1118.1 (*People v. Harris, supra*, 43 Cal.4th at p. 1286), keeping in mind that where the trial court has denied the motion, “we must ... assume in favor of its order the existence of every fact from which the jury could have reasonably deduced from the evidence whether the offense charged was committed and if it was perpetrated by the person or persons accused of the offense. [Citations.] Accordingly, we may not set aside the trial court’s denial of the motion on the ground of the insufficiency of the evidence unless it clearly appears that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached by the court below. [Citations.]” (*People v. Wong* (1973) 35 Cal.App.3d 812, 828; accord, *People v. Cuevas* (1995) 12 Cal.4th 252, 261; *People v. Allen* (2001) 86 Cal.App.4th 909, 913-914.) However, “[e]vidence which merely raises a strong suspicion of the defendant’s guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. [Citations.]” (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

“The elements of the offense proscribed by section 12021 are conviction of a felony and ownership, possession, custody or control of a firearm. [Citations.] Knowledge is also an element of the offense. [Citation.]” (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922; accord, *People v. Snyder* (1982) 32 Cal.3d 590, 592.) “Implicit in the crime of possession of a firearm is that a person is aware both that the item is in his or her possession and that it is a firearm.” (*People v. Kim* (2011) 193 Cal.App.4th 836, 846.) “The elements of unlawful possession may be established by circumstantial

evidence and any reasonable inferences drawn from such evidence. [Citations.]” (*People v. Williams* (1971) 5 Cal.3d 211, 215.)

No evidence was presented at trial that defendant actually physically possessed a firearm at any time.⁴ Unlawful possession may be physical or constructive, however. (*People v. Williams, supra*, 5 Cal.3d at p. 215.) “Constructive possession occurs when the accused maintains control or a right to control the contraband; possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another. [Citation.]” (*Ibid.*) “The accused also has constructive possession of [contraband] that [is] in the physical possession of his agent or of any other person when the defendant has an immediate right to exercise dominion and control over the [contraband]. [Citations.]” (*People v. Francis* (1969) 71 Cal.2d 66, 71.) “The inference of dominion and control is easily made when the contraband is discovered in a place over which the defendant has general dominion and control: his residence [citation], his automobile [citation], or his personal effects [citation]. However, when the contraband is located at premises other than those of the defendant, dominion and control may not be inferred solely from the fact of defendant’s presence, even where the evidence shows knowledge of the presence of the [contraband]” (*People v. Jenkins* (1979) 91 Cal.App.3d 579, 584.)

“[W]hether possession is actual or constructive, it must be intentional.” (*People v. Jeffers, supra*, 41 Cal.App.4th at p. 922.) Although “a general intent to commit the proscribed act is sufficient” (*People v. Snyder, supra*, 32 Cal.3d at p. 592), “[w]rongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. [Citation.] A person who commits a prohibited act ‘through misfortune or by accident, when it appears that there was no evil design,

⁴ The parties stipulated defendant was previously convicted of a felony.

intention or culpable negligence' has not committed a crime. (§ 26.) Thus, a felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent.” (*People v. Jeffers, supra*, 41 Cal.App.4th at p. 922.)

In the present case, the rifle defendant was specifically convicted of possessing was in plain view in an unlocked cabinet in the common area of a house in which defendant stayed on an almost daily basis and frequently overnight.⁵ Defendant had a close familial relationship with Daley, the gun’s owner, and Daley considered defendant free to “come over [to the house] and hang out” even when not babysitting. In light of these circumstances and the fact defendant was in the kitchen, cooking, when investigators arrived, jurors reasonably could have concluded he had unfettered access to common areas of the residence regardless of whether Daley and Fisher were home. Moreover, defendant alone was in charge of the house when babysitting, and was left alone as the only adult inside the house when Daley went outside to speak to investigators upon their arrival. Under the circumstances, jurors reasonably could have concluded the prosecutor proved all elements of the charged offense. (Compare *People v. Williams, supra*, 5 Cal.3d at pp. 213-214, 215 [sufficient circumstantial evidence supported inference defendant had dominion and control over, and knowledge of presence of, single Benzedrine tablet found in plain sight on floor in front of car’s passenger seat where defendant was sitting]; *People v. Clark* (1996) 45 Cal.App.4th 1147, 1151, 1156 [evidence sufficiently proved defendant had knowledge he possessed firearm where shotgun was found in motor home in which defendant was living with girlfriend, defendant told girlfriend he “did not want to deal with it” and girlfriend agreed

⁵ The accusatory pleading charged possession of multiple firearms in a single count. Jurors were instructed that in order to convict defendant, they all had to agree on which firearm defendant possessed. The jury indicated on its verdict form that the gun was pictured in exhibit 6. Exhibit 6 showed the gun cabinet and rifle inside.

to ask owner to remove weapon] with *People v. Stanford* (1959) 176 Cal.App.2d 388, 391 [insufficient evidence Coleman, a visitor to Stanford's house, constructively possessed drugs found in bathroom where Coleman was present when Stanford sold heroin to another, as Coleman did not have possession or control of premises].) Accordingly, the trial court correctly denied defendant's motion for acquittal.

People v. Sifuentes (2011) 195 Cal.App.4th 1410 does not compel a different conclusion. In that case, police found convicted felons Sifuentes and Lopez in a motel room. Sifuentes was lying on top of the bed nearest the door, while Lopez was kneeling on the floor on the far side of the second bed. A loaded handgun was found under the mattress next to where Lopez knelt. (*Id.* at pp. 1413-1414.) At trial, a gang expert testified Sifuentes and Lopez were active participants in a particular criminal street gang; guns play a prominent role in the gang subculture and a "gang gun" is a gun passed freely among gang members for use in their criminal endeavors; aside from certain restrictions, a "gang gun" is accessible to all gang members at most times; and a gang member possessing a gun will inform other gang members that he has a firearm. (*Id.* at pp. 1414-1416.)

Sifuentes was convicted, inter alia, of possession of a firearm by a felon, based on the doctrine of constructive possession. (*People v. Sifuentes, supra*, 195 Cal.App.4th at pp. 1413, 1417.) On appeal, he claimed the evidence was insufficient to support a finding he had the right to control the firearm discovered near Lopez. (*Id.* at p. 1413.) The Court of Appeal agreed, concluding: "The prosecutor failed to elicit from the expert any substantial evidence Sifuentes had the right to control the firearm. The expert did not testify all gang members had the right to control communal gang guns, assuming this firearm fell into that category. Rather, ... he testified certain restrictions applied concerning 'access' to a gang gun and did not explain these restrictions or whether he equated access with a right to control. Nor did the expert link Sifuentes to the particular firearm found next to Lopez." (*Id.* at p. 1419, fn. omitted.)

In the present case, by contrast, the rifle in the gun cabinet was in plain view in a common area of the premises, and defendant recently had been in physical control of the premises. Moreover, this was not a case that depended on expert opinion. (Compare *People v. Sifuentes, supra*, 195 Cal.App.4th at p. 1419 [law does not accord to expert's opinion same degree of credence as it does data underlying opinion].)

II

ARGUMENTATIVE QUESTIONS

During Fisher's testimony, both counsel explored at length the circumstances under which Fisher obtained a doctor's marijuana recommendation. Fisher testified, in essence, that she lied to get the recommendation, but was coerced into doing so by Daley. This led to several rounds of questioning designed to attack or bolster Fisher's credibility, particularly concerning her alleged fear of Daley. When defense counsel questioned Fisher on how long Daley had been growing marijuana at the house, the prosecutor followed up by questioning Fisher concerning her knowledge of how much marijuana was at the house, to which Fisher replied she was "not aware." This ensued:

"Q. [by Mr. Hovatter, prosecutor] Now, it's your testimony today ... that you were glad to see John Daley go.

"A. [by Shannon Fisher] Correct.

"Q. You could finally be honest with the police and about the coercion and the bogus marijuana recommendation.

"A. That's correct.

"Q. Yet any time before that, before October -- so September, August, July, June, and the months before, you could have, at any time, called the police, told them that someone was growing marijuana out at your house, and they could have come out, and the police would have been there and you could have been honest with them, but you never did?

"MS. WOODALL [defense counsel]: Your Honor, I'm going to object. Argumentative, and asked and answered.

“THE COURT: Overruled. [¶] ... [¶]

“Q. You knew there was marijuana growing outside, something going on with marijuana inside your house, right?

“A. Correct.

“Q. Long before October 26th, 2011?

“A. That’s correct.

“Q. You never called law enforcement to report it?

“A. That’s correct.

“Q. And yet had you done that, the police would have come and you could have come clean and all that?

“A. I didn’t know what the outcome would be had I done that.

“Q. You’re bright enough to figure that out, aren’t you?

“MS. WOODALL: Objection, argumentative.

“THE COURT: I’m going to sustain that.

“MR. HOVATTER: Q. Did you ever think about it? Did you ever lie awake at night thinking about your 13-year-old daughter and your two-year-old son being in a house with guns and marijuana? Did you ever think about, ‘Maybe I could do this and things would happen’?

“MS. WOODALL: Your Honor, I’m going to object. Again, argumentative. And at this point, he is just harassing the witness.

“THE COURT: I’m going to allow this question to be asked, and let’s move off to another subject, Mr. Hovatter. [¶] ... [¶]

“THE WITNESS: There is nothing illegal about owning weapons as long as you are safe with them. I do own weapons, and I keep them safe from my kids.

“And as far as marijuana is concerned, I was trying to leave. I was looking for a place to go and a way out at the time, but I would -- I’m a single mom and I’m not rich.

“MR. HOVATTER: Q. You’re talking about being safe with weapons, and yet there is testimony there is a loaded shotgun in your bedroom. Did that gun become loaded after you left that morning?

“A. I was unaware there was a loaded shotgun in my room.

“Q. It’s right behind the dresser not feet from where you are sleeping. Can you explain to this jury how something so obvious could just be completely unknown to you?

“MS. WOODALL: Objection, argumentative.

“THE COURT: I’ll overrule that.

“THE WITNESS: Do you look behind your dresser on a daily basis?”

Defendant now contends the trial court erred by overruling his objections to the prosecutor’s allegedly argumentative cross-examination. He says the questions suggested the prosecutor had superior knowledge regarding safety precautions taken to keep guns inaccessible to third parties, and that due process was violated because his trial was rendered fundamentally unfair as a result.

Although a trial court is required to “exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment” (Evid. Code, § 765, subd. (a)), the court has “broad discretion ... to keep cross-examination within reasonable bounds. [Citations.]” (*People v. Jones* (1962) 207 Cal.App.2d 415, 421-422.) This discretion includes the power to exclude argumentative questioning (*People v. White* (1954) 43 Cal.2d 740, 747), and a prosecutor should refrain from asking questions ““designed to engage a witness in argument rather than elicit facts within the witness’s knowledge.’ [Citation.]” (*People v. Pearson* (2013) 56 Cal.4th 393, 435-436; see also *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1236.)

Assuming the trial court erred by overruling defense objections to questions that were truly argumentative, as opposed to merely being “barbed and accusatory at times” (*People v. Pearson, supra*, 56 Cal.4th at p. 436), we discern no prejudice.⁶ The erroneous admission of evidence warrants reversal only if the evidence should have been excluded on the ground stated and it is reasonably probable a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.) We conclude it is not reasonably probable defendant would have obtained a more favorable result had the trial court sustained the defense objections to the challenged questions, particularly since the jury focused on the rifle downstairs and not the firearms in the master bedroom.

Defendant says, however, that he was deprived of due process. He claims the challenged questions implied the guns were being stored unsafely, “which was not derived from any testimony given by the witness but by an assumption that [the prosecutor] himself made. Therefore, the prosecutor implied that he ha[d] superior knowledge over Ms. Fisher as to the circumstances within the household.” Defendant further asserts the questions implied the prosecutor was aware of facts not before the jury.

We disagree. There was evidence apart from Fisher’s testimony from which a rational inference could be drawn that multiple firearms — at least one of which was loaded and most or all of which had ammunition readily at hand — were left unlocked and accessible despite the presence of children in the house. We find no implication of supposed superior knowledge or awareness of facts not before the jury. Rather, it is

⁶ Defendant has forfeited any claim of error with respect to questions to which he did not object at trial. (See Evid. Code, § 353.) Moreover, although defendant points out that a witness may not be examined on matters that are irrelevant to the issues in the case (*id.*, § 350; *People v. Mayfield* (1997) 14 Cal.4th 668, 755), defendant never raised a relevance objection in the trial court and thus also forfeited any such claim on appeal (*People v. Pearson, supra*, 56 Cal.4th at p. 438).

apparent from the record that the prosecutor was attempting to challenge Fisher's credibility. "[A]lways relevant for impeachment purposes are the witness's capacity to observe and the existence or nonexistence of any fact testified to by the witness. [Citations.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9; see also Evid. Code, § 780.) The challenged questions and resultant admission of evidence, even if error, simply did not render defendant's trial fundamentally unfair. Accordingly, there was no due process violation. (*People v. Hunt* (2011) 196 Cal.App.4th 811, 817.)

DISPOSITION

The judgment is affirmed.