

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR09-516

VIRGIL DENNIS POGUE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered January 27, 2010

APPEAL FROM THE SEVIER
COUNTY CIRCUIT COURT
[NO. CR-2008-61-2]

HONORABLE CHARLES YEARGAN,
JUDGE

AFFIRMED IN PART; REVERSED
AND DISMISSED IN PART

JOHN MAUZY PITTMAN, Judge

Appellant was convicted of manufacturing methamphetamine, being a felon in possession of a firearm, and simultaneous possession of drugs and a firearm. His sentence was enhanced for manufacturing methamphetamine in the presence of children. On appeal, he argues that there is no substantial evidence to support his convictions and the enhancement. We reverse the conviction for simultaneous possession of drugs and a firearm and affirm in all other respects.

When an appellant challenges the sufficiency of the evidence to support a conviction on appeal, this court's test is whether there is substantial evidence to support the verdict. *Carter v. State*, 2009 Ark. App. 683. Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion

one way or another. *Id.* In determining whether the evidence is substantial, we view the evidence in the light most favorable to the State, considering only the evidence that supports the verdict. *Id.*

Viewed in light of this standard, there was substantial evidence that appellant was manufacturing methamphetamine for distribution. Police officers knowledgeable concerning the operation of methamphetamine labs testified that a functioning methamphetamine lab was present in the only bathroom of the house, and that methamphetamine was being manufactured there at the time of the search. Furthermore, a witness testified that he was waiting in the house for the methamphetamine manufacture to be completed so that he could procure some from appellant. Likewise, evidence that the ongoing manufacture took approximately twenty-four hours, and the testimony of a babysitter that appellant's children were present in the house during that period, is sufficient to establish that appellant manufactured methamphetamine in the presence of children.

Whether or not appellant was in possession of a firearm is a more complex issue. The State need not prove actual possession; constructive possession will suffice. Constructive possession may be implied when the contraband is in the joint control of the accused and another. However, joint occupancy, standing alone, is insufficient to establish possession or joint possession. The State must establish that (1) the accused exercised care, control, and management over the contraband, and (2) the accused knew the matter possessed was contraband. *See generally Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001). This control

and knowledge can be inferred from the circumstances, such as the proximity of the contraband to the accused, the fact that it is in plain view, and the ownership of the property where the contraband is found. *Young v. State*, 77 Ark. App. 245, 72 S.W.3d 895 (2002).

Here, there was evidence that the house was very small, less than 900 square feet; that appellant lived there with his wife and children; that a black powder rifle missing a bolt was leaning against the wall near the door; and that appellant answered the door when the police knocked and announced the search warrant. Police searched for but did not find the missing bolt. This evidence is sufficient to show that appellant was in constructive possession of a firearm under the standard employed in *Stanton*, *supra*.

There is substantial evidence to show that appellant was a felon in possession of a firearm, despite the missing bolt, because the definition of “firearm” includes firearms that lack a component necessary to make them immediately operable. Ark. Code Ann. § 5-1-102(6)(B)(i) (Supp. 2009); *see Ward v. State*, 64 Ark. App. 120, 981 S.W.2d 96 (1998). Therefore, the missing bolt is not fatal for purposes of the felon-in-possession charge.

Nevertheless, the missing bolt is fatal to the State’s case for simultaneous possession of drugs and a firearm. That offense requires that there be a firearm as defined in section 5-1-102(6) and *additionally* requires that the firearm be “readily accessible for use.” We have interpreted this language as requiring proof that the firearm be in a condition rendering it capable of near-immediate use:

We construe the phrase “readily accessible for use” to mean “for use” as a firearm. An unloaded weapon with no ammunition available is not usable as

a firearm. In this case, the rifle was not loaded and no ammunition was recovered. Therefore, the weapon was not readily accessible for use as a firearm. Appellant's conviction for simultaneous possession of a controlled substance and a firearm is reversed and dismissed.

Rabb v. State, 72 Ark. App. 396, 403-04, 39 S.W.3d 11, 16-17 (2001). Here, the bolt was not found, and the rifle could not be used without it. Consequently, we hold that the evidence is insufficient to support the conviction for simultaneous possession of drugs and a firearm, and we reverse and dismiss that conviction.

Affirmed in part; reversed and dismissed in part.

VAUGHT, C.J., and ROBBINS, J., agree.