IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-KA-01538-SCT

SYLVESTER WILLIAMS a/k/a VELP

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	09/25/2018
TRIAL JUDGE:	HON. MICHAEL M. TAYLOR
TRIAL COURT ATTORNEYS:	LESA HARRISON BAKER WILLIAM BRENDON ADAMS
COURT FROM WHICH APPEALED:	LINCOLN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: W. DANIEL HINCHCLIFF SYLVESTER WILLIAMS (PRO SE)
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS
DISTRICT ATTORNEY:	DEE BATES
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 11/14/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE RANDOLPH, C.J., MAXWELL AND BEAM, JJ.

MAXWELL, JUSTICE, FOR THE COURT:

¶1. An officer with the Mississippi Department of Wildlife, Fisheries, and Parks saw Sylvester Williams—a convicted felon—throw a pistol from the passenger seat of a fleeing vehicle the officer had been pursuing. A jury found Williams guilty of possession of a firearm by a convicted felon. On appeal, his appellate counsel has filed a ***Lindsey*** brief,

certifying he found no arguable issues to appeal.[1] Williams opted to file a pro se brief. He argues the State's evidence is insufficient and the jury's guilty verdict is against the overwhelming weight of the evidence. He also claims a judge and attorney should have recused, a defense witness was wrongly prevented from testifying, a jury instruction was incorrectly refused, and he received ineffective assistance of counsel.

¶2. After review, we find no merit to any of Williams's claims. The State sufficiently proved the charged crime. And the weight of the evidence supports the jury's guilty verdict. Williams's remaining claims lack any support. We therefore affirm Williams's conviction for possessing a firearm as a convicted felon.

Background Facts and Procedural History

¶3. On May 27, 2017, Sylvester Williams was with a group of people swimming at Lake Lincoln, a State Park in Lincoln County, Mississippi. That day, Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) Officers Sheila Smith and Gregory Holloway were patrolling the park. The officers were there to enforce state laws and park regulations.

¶4. Alcohol is prohibited at Lake Lincoln. And while observing the beach area, the officers noticed several men making trips from the beach to a parked white Grand Marquis. They would return with Styrofoam cups. The officers saw one of the men discard a large clear bottle in a trash can. Suspecting the men were drinking alcohol, the officers decided to approach them.

¶5. Officer Smith drove up to the Grand Marquis, got out of her truck, and walked to the

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[1] *See* ***Lindsey v. State***, 939 So. 2d 743 (Miss. 2005).

driver's-side window. She asked the driver, Lawrence Buie, if they had been drinking that day. Despite the odor of alcohol coming from the car, he and the occupants said they had not. Officer Holloway then pulled up. As he did, Officer Smith looked back to see who was behind her. When she turned back around, Buie slammed down the accelerator and fled from the officers. Officer Holloway immediately pursued. Officer Smith then got back in her truck and followed. The two chased the Grand Marquis for about three miles, with sirens and lights activated.

¶6. Eventually, Officer Holloway was able to drive in front of Buie's car. He positioned his truck to force Buie to stop. Buie's car struck Holloway's truck on the driver's-side door. At this point, Holloway saw the front-seat passenger, Williams, with a pistol. Officer Holloway was "four or five" feet from Williams when Williams reached out the passenger window and threw the gun over the roof of Buie's car. It landed on the left side of the road. Officer Holloway then saw Williams throw another object toward the right side of the road.

¶7. Officer Smith pulled up quickly and boxed Buie's car in, preventing him from reversing. Buie was removed from the car and handcuffed. That is when Officer Smith found a .40 caliber Hi-Point pistol on the ground on the left side of the road. The officers picked up the pistol's magazine on the right side of the road—where Officer Holloway saw Williams throw it.

¶8. Williams was indicted, tried, and convicted for possession of a firearm by a convicted felon. He was sentenced as a habitual offender to ten years in prison. His posttrial motions were denied. And Williams's appellate counsel filed a ***Lindsey*** brief, certifying he had found

no arguable issues to appeal.[2] Williams was notified of his right to file a pro se brief, which he did.

Discussion

¶9. In his pro se brief, Williams claims: (1) the State's evidence was insufficient to prove he possessed a firearm; (2) the jury's verdict was against the overwhelming weight of the evidence; (3) a "lower court judge" and an attorney each failed to recuse; (4) a defense witness was not allowed to testify; (5) the trial court erred by refusing a requested jury instruction; and (6) he received ineffective assistance of counsel.

I. Sufficiency of the Evidence

¶10. Williams argues the evidence is insufficient to uphold his firearm-possession conviction. We disagree.

¶11. When testing the sufficiency of evidence, this Court views the evidence in the light most favorable to the State. ***Martin v. State***, 214 So. 3d 217, 222 (Miss. 2017). We determine if any rational juror could have found the essential elements of the crime beyond a reasonable doubt. ***Id.*** The State is given the benefit of all favorable inferences reasonably

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[2] ***Lindsey*** requires a defendant's appellate counsel to file a brief certifying

> that there are no arguable issues supporting the client's appeal, and he or she has reached this conclusion after scouring the record thoroughly, specifically examining: (a) the reason for the arrest and the circumstances surrounding arrest; (b) any possible violations of the client's right to counsel; (c) the entire trial transcript; (d) all rulings of the trial court; (e) possible prosecutorial misconduct; (f) all jury instructions; (g) all exhibits, whether admitted into evidence or not; and (h) possible misapplication of the law in sentencing.

Lindsey v. State, 939 So. 2d 743, 748 (Miss. 2005). Counsel must then send a copy of said brief to the defendant and advise the defendant of his or her right to file a pro se brief. ***Id.***

drawn from the evidence. ***Hughes v. State***, 983 So. 2d 270, 276 (Miss. 2008).

¶12. The State charged Williams with possession of a firearm by a convicted felon. Miss. Code Ann. § 97-37-5 (Rev. 2014). The State must prove two elements beyond a reasonable doubt—(1) the defendant possessed a firearm, and (2) the defendant had previously been convicted of a felony crime. *Id.* At trial, Williams stipulated he was a convicted felon. And on appeal, he does not challenge the proof supporting this element. Instead, he argues the State offered insufficient evidence that he possessed the firearm.

¶13. "Possession of [contraband] may be actual or constructive, individual or joint." ***Dixon v. State***, 953 So. 2d 1108, 1112 (Miss. 2007) (citing ***Berry v. State***, 652 So. 2d 745, 748 (Miss. 1995)). Here, direct evidence showed Williams actually possessed the gun. Officer Holloway saw Williams holding a pistol. He was "four or five feet" away when he watched Williams toss the pistol over the car's roof. Officer Holloway also saw Williams throw what ended up being the gun's magazine on the right side of the road. Officer Smith found the.40 caliber Hi-Point pistol and the magazine in these locations. And Buie—who at that time was neither a convicted felon nor prohibited from possessing firearms—admitted owning another gun found at the scene.[3] But Buie testified the Hi-Point pistol was not his. Viewed in the light most favorable to the State, sufficient evidence supports Williams's firearm-possession conviction.

II. Weight of the Evidence

¶14. Williams also challenges the weight of the evidence supporting his conviction. He

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[3] Buie pled guilty to felony fleeing stemming from his flight from these officers.

claims the trial judge wrongly denied him a new trial on this basis.

¶15. A trial judge's denial of a new trial is reviewed for abuse of discretion. ***Little v. State***, 233 So. 3d 288, 292 (Miss. 2017). When reviewing challenges to the weight of the evidence, this Court views the evidence "in the light most favorable to the verdict[.]" ***Id.*** (citing ***Lindsay v. State***, 212 So. 3d 44, 45 (Miss. 2017)). This Court will only disturb a verdict "'. . . when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.'" ***Id.*** (quoting ***Lindsay***, 212 So. 3d at 45).

¶16. Williams's weight-of-the-evidence challenge is based on perceived inconsistencies between the officers. He points to varying testimony about how long they observed Williams, about who removed the occupants from the car, and about a discrepancy in Officer Holloway's report listing the pistol's magazine as silver when it was black.

¶17. When evidence or testimony conflicts, the jury is the sole judge of the weight and worth of evidence and witness credibility. ***Id.*** This Court does not reweigh evidence or determine a witness's credibility. ***Id.*** Considering the evidence in the light most favorable to the verdict, Williams stipulated his felony conviction prohibited him from possessing firearms. And the officers testified about their pursuit leading to Officer Holloway seeing Williams possessing and throwing the Hi-Point pistol. Officer Smith recovered the firearm from that area. So the trial judge did not err by finding the jury's verdict was not against the overwhelming weight of the evidence.

III. Recusal

¶18. Williams claims that "lower court Judge Joe Poultry" and "court appointed attorney

Jason Tate" each should have recused from his case. But the record makes no mention of these two. Neither participated in Williams's circuit court trial. And there is no recusal motion in the record. This Court cannot consider issues not raised at trial or preserved in the record. ***Hampton v. State***, 148 So. 3d 992, 995-96 (Miss. 2014).

IV. Defense Witness

¶19. Williams also insists the court denied him a fair trial because it prevented defense witness Phoenix Collins from testifying. He attaches to his pro se brief a purported letter from Collins claiming "the DEA" purposely held her in a room near the courtroom during his trial and refused to let her testify. He claims his trial counsel knew about this.

¶20. First, this unsworn letter is not in the record. And this Court does not consider matters outside the record. ***Id.*** Second, Collins had been subpoenaed but apparently did not show up. Williams's trial counsel checked for Collins several times, even sending someone to her house. Williams neither accepted the judge's offer to help bring Collins in to testify, nor did he request a recess or continuance to try to find her. He made no related motions or objections. There is no record evidence to support this claim.

V. Jury Instruction

¶21. Williams next suggests the trial court erred by refusing to give a peremptory instruction. He argues the judge should have directed a verdict in his favor after the State rested and before the case went to the jury. Peremptory instructions test the sufficiency of the evidence. And a trial judge must deny a peremptory instruction when the State's evidence, taken as true, together with all sound or reasonable inferences supports a guilty

verdict. ***Cochran v. State***, 278 So. 2d 451, 453 (Miss. 1973). Because the State offered sufficient evidence to prove the firearm offense, the court rightly denied a peremptory instruction.

VI. Ineffective Assistance of Counsel[4]

¶22. Williams final complaint is about his trial lawyer. He argues his lawyer's performance was constitutionally deficient. He cites his lawyer's supposed involvement with the DEA ploy to prevent Phoenix Collins from testifying. And he claims his lawyer failed to argue "possession is 9/10 the law."

¶23. To demonstrate ineffective assistance of counsel, Williams must prove his counsel was (1) deficient and (2) the deficiency deprived him of a fair trial. ***Woods v. State***, 242 So. 3d 47, 55 (Miss. 2018). This Court presumes a trial lawyer's assistance is effective. The burden is on the defendant to rebut that presumption and to show both deficient performance and prejudice. ***Id.*** On appeal, Williams shows neither.

¶24. First, the record refutes Williams's claim his trial counsel plotted to prevent Collins from testifying. His lawyer called several witnesses. And his lawyer had subpoenaed Collins and made attempts to locate her. When she failed to appear, counsel discussed the missing witness with Williams before the defense presented its case. Furthermore, Williams makes no showing about Collins's proposed testimony or how she would have contributed to his defense. So he has not shown prejudice.

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[4] Williams also declares, without specifics, that "Jason Tate" rendered ineffective assistance. But there is no reference to a Jason Tate in this record. And this Court cannot consider a matter not in the record. ***Hampton***, 148 So. 3d at 995-96.

¶25. Second, Williams is simply wrong that "possession is 9/10 the law" on this charge. In fact, possession—which can be either actual or constructive—is an element that must be proved 100 percent of the time in felon-in-possession cases. Miss. Code Ann. § 97-37-5. Williams's more general claim that trial counsel failed to challenge his gun possession is untrue. His defense centered on his claim that he had just left the lake after swimming, so it was not possible for him to be carrying a gun. The defense argued the only gun in the car belonged to Buie. And his attorney also called several witnesses, including Williams himself, to testify he did not possess a gun that day. Thus, Williams has failed on both prongs of his ineffective-assistance-of-counsel claim.

Conclusion

¶26. After reviewing Williams's counsel's ***Lindsey*** brief, we find no arguable issues for appeal. And Williams's pro se brief presents no meritorious arguments. We therefore affirm Williams's conviction for possessing a firearm as a convicted felon.

¶27. **AFFIRMED.**

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.