

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1248

COMMONWEALTH

vs.

VINCENT A. TISCIONE, THIRD.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In June 2013, State police recovered a handgun, shotgun, and ammunition from the apartment where the defendant lived with his girlfriend and her family. A Superior Court jury subsequently found the defendant guilty of six counts relating to unlawful storage and possession of those items,¹ and a Superior Court judge found the defendant guilty of four sentencing enhancements. Before us now is the defendant's appeal.² We affirm.

¹ Specifically, the jury found the defendant guilty of the following offenses: one count of unlawful possession of a firearm (shotgun), one count of unlawful possession of a firearm (handgun), two counts of unlawful possession of ammunition, and two counts of failure to secure a firearm.

² The defendant was convicted of the same offenses after a previous trial. However, those judgments were vacated by the Supreme Judicial Court because a deliberating juror improperly had been discharged. See Commonwealth v. Tiscione, 482 Mass. 485, 487-494 (2019).

Discussion. 1. Sufficiency of evidence -- constructive possession. The defendant argues that the evidence was insufficient to prove that he had constructive possession of the firearms and ammunition. In evaluating that argument, we view the evidence, including all reasonable inferences therefrom, in the light most favorable to the Commonwealth, and ask whether based on such evidence, any rational juror could find the essential elements of constructive possession beyond a reasonable doubt. See Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). To prove constructive possession, the Commonwealth must demonstrate the defendant had "knowledge coupled with the ability and intention to exercise dominion and control." Commonwealth v. Dagraca-Teixeira, 471 Mass. 1002, 1004 (2015), quoting Commonwealth v. Brzezinski, 405 Mass. 401, 409 (1989).

The evidence was particularly strong as to the defendant's possession of the handgun. The defendant's girlfriend's mother, Dorothy Gain, testified that she had seen him brandish a handgun and, on multiple occasions, place a handgun in the bureau in the closet of the bedroom that he shared with his girlfriend (Gain's daughter). Gain further testified that she entered the defendant's bedroom using a key she had obtained from her daughter and removed a gun from a drawer in the closet. She

then temporarily hid the handgun elsewhere in the apartment before turning it over to the police. According to Gain, when the defendant discovered the handgun missing, he asked her "where his gun was" and told her, "You better find my gun."

Pursuant to a search warrant, the police discovered the shotgun in the closet of the bedroom in which the defendant lived. They also found two safes there, one containing a shotgun shell, a couple of boxes of ammunition, and a holster, and the other safe containing additional ammunition, two identification cards belonging to the defendant, and multiple pieces of paper with "Vinnie" written on them.

Although the evidence that the shotgun and ammunition belonged to the defendant was not as strong as the evidence regarding the handgun, it was sufficient.³ There was testimony that the defendant used the closet in his bedroom to store his handgun, and the jury readily could have concluded that the ammunition and shotgun also stored there were his. See Commonwealth v. Rivera, 31 Mass. App. Ct. 554, 556-557 (1991)

³ In its opinion, the Supreme Judicial Court found that the evidence at the first trial was sufficient. See Tiscione, 482 Mass. at 494-495. At oral argument, we asked both parties how the evidentiary records at the first and second trial differed. Both parties agreed that the main area of difference has to do with the evidence regarding the shotgun, and we therefore devoted particular attention to that issue in assessing the sufficiency of the evidence at the second trial.

(defendant's personal belongings in room and closet in which drugs were found sufficient to support inference of constructive possession). This is particularly true given the intermingling in one of the safes of ammunition and the defendant's identification cards. See Commonwealth v. Rarick, 23 Mass. App. Ct. 912, 912 (1986), and cases cited (constructive possession supported by "evidence that the contraband was found in proximity to personal effects of the defendant in areas of the dwelling . . . to which other evidence indicates the defendant has a particular relationship"). See also Dagraca-Teixeira, 471 Mass. at 1003 (evidence of constructive possession sufficient where defendants' presence in apartment and their personal documents were found in proximity to contraband); Commonwealth v. Clarke, 44 Mass. App. Ct. 502, 505-506 (1998) (defendant's birth certificate, social security card, and shirt found in bedroom supported inference of constructive possession).⁴ The fact that the safes contained a shotgun shell and an empty holster also provided evidence that the same person possessed the handgun, shotgun, and ammunition.

⁴ Commonwealth v. Delarosa, 50 Mass. App. Ct. 623 (2000), is not to the contrary. In Delarosa, there was no "evidence, such as clothing or papers, of a personal connection between the defendant and the room in which the [contraband] was located." Id. at 628. Here, both the room and closet contained numerous personal belongings of the defendant.

In sum, viewing the evidence in the light most favorable to the Commonwealth, a rational trier of fact could have found the essential elements of constructive possession beyond a reasonable doubt. Thus, the trial judge did not err in denying the defendant's motion for required findings of not guilty.

2. Sufficiency of evidence -- improper firearm storage.

The defendant argues that there was insufficient evidence that he improperly stored the firearms on the theory that the bedroom itself constituted a securely "locked container" pursuant to G. L. c. 140, § 131L (a).⁵ See Commonwealth v. Parzick, 64 Mass. App. Ct. 846, 848-850 (2005) (considering but not adopting position that bedroom could be securely locked container). Because this argument was not raised at trial, we review only for whether any error caused a "substantial risk of a miscarriage of justice." Commonwealth v. Freeman, 352 Mass. 556, 564 (1967).

Without resolving the issue of whether a locked room might in other circumstances constitute a securely locked container, we reject the defendant's argument on the facts. Under the

⁵ The defendant separately argues that once Gain removed the handgun from the bedroom, the defendant no longer was the "storer" of that firearm, and he could not be charged with how it was kept thereafter. This argument has some force as far as it goes, but it is ultimately beside the point. The defendant was charged with the improper storage of the handgun before Gain removed it.

statute, a securely locked container must "render . . . weapons inoperable by any person other than the owner or other lawfully authorized user." G. L. c. 140, § 131L (a). Here, the record establishes that -- at a minimum -- the defendant's girlfriend had access to the room and thus to the guns.⁶ This fact alone is enough to defeat the defendant's argument that the bedroom was a securely locked container.

3. Prior convictions. Pursuant to G. L. c. 233, § 21, witnesses may be impeached with prior convictions, subject to strict timing limitations.⁷ If these limitations apply, the judge has no authority or discretion to admit the evidence. See Commonwealth v. Childs, 23 Mass. App. Ct. 33, 35-36 (1986) (judge erred in permitting impeachment of defendant's credibility with convictions that were time barred under G. L. c. 233, § 21). Before trial, the defendant filed a motion in limine to allow impeachment of Gain with twelve prior convictions. When the motion was heard, defense counsel realized that all of Gain's convictions were time barred under

⁶ Some evidence suggests children also had access to the room. For example, Gain testified that the defendant's young child was in the room with the defendant when he was searching for his gun. This, too, would defeat the defendant's argument.

⁷ The limitations are five years for a misdemeanor and ten years for a felony. See G. L. c. 233, § 21. These limitations can be overcome if the witness has been convicted of a crime within five years of testifying if the conviction was of a misdemeanor and ten years of testifying if the conviction was of a felony. See id.

the statute. He therefore acknowledged that "there's nothing [he] can use" and stated that he was withdrawing the motion. The judge nevertheless went ahead and denied the motion, "assuming no recent convictions."

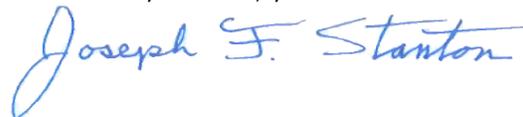
The defendant now argues that the denial of his motion to allow impeachment of Gain by use of previous convictions violated his right of confrontation under the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. Because this argument was not raised in the trial court, our review is limited to whether any error caused a substantial risk of a miscarriage of justice. See Freeman, 352 Mass. at 564.

Viewed in its strongest light, the defendant's argument is that evidence of time-barred convictions might be so probative as to a witness's truth-telling capacity that a statute that bars a defendant from impeaching the witness with those convictions could be unconstitutional as applied. Cf. Commonwealth v. Bohannon, 376 Mass. 90, 93-94 (1978) (despite rule against impeachment via prior bad acts, evidence of prior false allegations allowed when credibility of chief witness was critical issue). Because the Legislature itself has declared past convictions of this vintage off limits for impeachment purposes, the defendant faces a heavy burden in showing that the statute is unconstitutional as applied. See Pielech v.

Massasoit Greyhound, Inc., 441 Mass. 188, 193 (2004) ("A statute is presumed to be constitutional and every rational presumption in favor of the statute's validity is made"). Whatever the merits of such an argument in other circumstances, it has little force here. Gain's last conviction for an offense directly involving dishonesty (larceny by check) occurred thirty years before the defendant's trial. Any bearing that Gain's past convictions had on her credibility at the defendant's trial was so insubstantial that we can state with confidence that the defendant's inability to impeach her with those convictions caused no substantial risk of a miscarriage of justice.

Judgments affirmed.

By the Court (Milkey, Henry & Walsh, JJ.⁸),



Clerk

Entered: November 24, 2021.

⁸ The panelists are listed in order of seniority.