

Matthew Russ appeals his conviction of Class A misdemeanor carrying a handgun without a license.¹ He asserts the evidence was insufficient to support his conviction. We affirm.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of April 13, 2008, Indianapolis Police Officer Ronald Clayton was on routine patrol when he heard gunshots. As he proceeded north in his police cruiser, he received a dispatch reporting an African-American male firing a handgun two blocks north of his initial location, and he heard two more gunshots. When he neared the location, he saw a blue vehicle traveling west away from the area and he decided to follow it. Moments thereafter, Officer Clayton received another dispatch reporting the shooter and three other African-Americans were fleeing westbound in a dark Chevrolet Impala or Chevrolet Caprice. The car Officer Clayton was following matched that description and contained three or four African-American males. Officer Clayton initiated a traffic stop, and a number of other police officers arrived to assist.

The officers ordered all the men in the car to raise their hands. They complied, but then Russ, who was in the back seat on the passenger side of the car, lowered his left hand. Officers again ordered all the men to raise their hands, and Russ again complied. Officers then removed the occupants from the car one person at a time, beginning with those in the front seat. Each time a man exited the car, Russ dropped his left hand and moved his body around. As Russ was exiting the car, he leaned his body back into the

¹ Ind. Code § 35-47-2-1.

car and put his left hand down. After all four of the car's occupants were secured, two officers approached the car and found a handgun in plain view on the backseat in the imprint of where Russ had been sitting.

Police arrested Russ. After finding Russ did not have a license for the handgun, the State charged him with carrying a handgun without a license. Russ waived his right to a jury trial. The court found him guilty as charged and gave him a 365 day suspended sentence.

DISCUSSION AND DECISION

Our standard of review for allegations of insufficient evidence is well settled. We look only to the facts most favorable to the judgment, and without reweighing the evidence or reassessing the credibility of the witnesses, we determine whether a reasonable trier of fact could have found evidence beyond a reasonable doubt supporting each element of the crime. *Donnegan v. State*, 809 N.E.2d 966, 976 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 972 (Ind. 2004).

Russ asserts the evidence was insufficient to demonstrate he possessed the gun found in the car, especially when he denied knowledge of the gun. We disagree.

“Actual possession occurs when a person has direct physical control over the item.” *Henderson v. State*, 715 N.E.2d 833, 835 (Ind. 1999). In the absence of actual possession, a conviction may be supported by constructive possession. *Donnegan*, 809 N.E.2d at 976. Constructive possession occurs when a person has both the intent and the capability to maintain dominion and control over an item. *Id.*

To prove a defendant had intent to maintain dominion and control, the State must demonstrate he had “knowledge of the presence of” the item. *Id.* Knowledge “may be inferred from either the exclusive dominion and control over the premises containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant’s knowledge of the presence of the contraband.” *Id.* (quoting *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999)). The “additional circumstances” can include:

- (1) incriminating statements by the defendant,
- (2) attempted flight or furtive gestures,
- (3) location of substances like drugs in settings that suggest manufacturing,
- (4) proximity of the contraband to the defendant,
- (5) location of the contraband within the defendant’s plain view, and
- (6) the mingling of the contraband with other items owned by the defendant.

Henderson, 715 N.E.2d at 836.

The handgun was found in the indentation in the vinyl seat where Russ had been sitting. As Russ was last to exit the car, none of the other men could have placed the gun in his seat. Neither is it likely Russ did not know he was sitting on the handgun. Russ made four or five “furtive gestures” before exiting the vehicle. This was sufficient evidence to demonstrate Russ’ constructive possession of the handgun.² Accordingly, we affirm.

Affirmed.

BRADFORD, J., and FRIEDLANDER, J., concur.

² Russ asserts the evidence in his case is like that found insufficient in *D.C.C. v. State*, 695 N.E.2d 1015 (Ind. Ct. App. 1998). The gun in *D.C.C.* was “in a position under D.C.C.’s seat where it could not be seen by the passenger in that seat,” *id.* at 1016, such that D.C.C.’s knowledge of the gun could not be inferred. Here, by contrast, the gun was not found under the seat where Russ had been sitting; rather, it was on top of the seat directly where Russ had been sitting.

