

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1056-CR

Cir. Ct. No. 2013CF115

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS WARREN PITTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
ROBERT P. VANDEHEY, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Thomas Pitts appeals a judgment of conviction for one count of felon in possession of a firearm and one count of possession of property with altered identification marks. Pitts contends that the evidence was

insufficient to support the convictions. We conclude that the evidence was sufficient to support the conviction for felon in possession of a firearm, but insufficient to support the conviction for possession of property with altered identification marks. We affirm in part and reverse in part and remand with directions.

¶2 Pitts was charged with multiple criminal counts based on evidence obtained during a search conducted on January 29, 2013, of the home shared by Pitts and Kathy Cullen. During the search, police discovered a firearm with filed-off serial numbers. The charges against Pitts included two counts based on Pitts's possession of the firearm on January 29, 2013. At a jury trial, Pitts defended against the firearm charges by arguing that he did not possess the firearm as charged because the firearm belonged to Cullen, not Pitts, and because Pitts was incarcerated on January 29, 2013. Pitts was convicted of possession of a firearm by a felon and possession of property with altered identification marks.

¶3 Pitts argues that the evidence was insufficient to support the two convictions. *See State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752 (1990) (evidence is insufficient to sustain a conviction where “the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt”). As to the conviction for felon in possession of a firearm, Pitts contends that the State did not prove that he “possessed” the firearm on January 29, 2013 because Pitts was incarcerated on that date and there was no evidence presented that Pitts had actual or constructive possession of the firearm. It is undisputed that Pitts did not have actual physical possession of the firearm while he was incarcerated, and thus the only question is whether the evidence was sufficient to prove constructive possession.

¶4 As to constructive possession, Pitts contends that he could not have constructively possessed the firearm during his incarceration because he did not have any ability to exercise control over the firearm during that time. *See* WIS JI—CRIMINAL 920 (defendant constructively possesses an object if the object is “in an area over which the person has control and the person intends to exercise control over the item”); *see also State v. Kueny*, 2006 WI App 197, ¶9, 296 Wis. 2d 658, 724 N.W.2d 399 (constructive possession established where items “were in an area over which [the defendant] had control and he intended to exercise control over them,” and defendant would have had access to items upon request). Pitts contends that, by virtue of his incarceration, he lacked the power to exercise the control or have the access necessary for proof of constructive possession. *See Kueny*, 296 Wis. 2d 658, ¶9; *see also Schmidt v. State*, 77 Wis. 2d 370, 379, 253 N.W.2d 204 (1977). He argues that any possessory relationship he had with the firearm was necessarily severed upon his incarceration.

¶5 Pitts also contends that, even if it were possible to constructively possess a firearm while incarcerated, the evidence did not prove that Pitts did so in this case. Pitts argues that the evidence established that Cullen was the only one with the ultimate control over the firearm. He points to evidence that the firearm was kept in Cullen’s underwear drawer, and contends that was a private area of Cullen’s over which Pitts did not exercise control. He also points out that Cullen had the power to give the firearm to the police during the search. He contends that there was no evidence that Pitts had the power to direct Cullen to act regarding the firearm. *See United States v. Folk*, 754 F.3d 905, 916-17 (11th Cir. 2014) (defendant had constructive possession over firearms while incarcerated where he

gave specific instructions to people on the outside as to handling and disposition of the firearms, and those instructions were followed).

¶6 We conclude that the evidence was sufficient to support the jury's finding that Pitts constructively possessed the firearm while he was incarcerated. First, we disagree with Pitts's contention that incarceration necessarily severs any possessory relationship with outside objects. Rather, a person in custody may still maintain constructive possession over items in his or her home. *See, e.g., United States v. Moreno*, 933 F.2d 362, 372-73 (6th Cir. 1991) (evidence was sufficient to support a finding that the defendant constructively possessed firearms discovered in his residence during his incarceration, because the defendant's "incarceration did not affect his power to exercise control over the firearms through other persons").

¶7 Second, turning to the trial evidence, we conclude that the evidence was sufficient to support the finding of constructive possession. The trial evidence included testimony that Pitts left all of his possessions in the home he shared with Cullen when he reported to jail, and that Cullen told the police during the search that the gun belonged to Pitts. That evidence was sufficient for the jury to find that the firearm belonged to Pitts and that Pitts left the firearm in his home while he was incarcerated, intending to continue to exercise control over the firearm. The jury was not required to accept contrary evidence that the firearm belonged to Cullen or that Cullen was the only one with control over the firearm. Additionally, we are not persuaded that a finding of constructive possession over the firearm during Pitts's incarceration required proof that Pitts actually exercised control over the firearm during that time. The evidence was sufficient for the jury to draw the inference that Pitts had control over his home while he was incarcerated and that he *intended* to exercise control over the firearm in his home.

See WIS JI—CRIMINAL 920 (constructive possession shown where the item is “in an area over which the person has control and the person intends to exercise control over the item”). Accordingly, we affirm as to the conviction for felon in possession of a firearm.

¶8 Next, Pitts contends that the evidence was insufficient to support the conviction for possession of property with altered identification marks because, as to that count, the circuit court instructed the jury that it had to find that Pitts physically possessed the firearm on January 29, 2013, to find him guilty. Pitts contends that it was impossible for him to have physical possession on that date due to his incarceration, and the jury was not instructed that it could find Pitts guilty of possession of property with altered identification marks based on constructive possession. Thus, Pitts asserts, the evidence was plainly insufficient on that count. We agree.¹ Because the evidence was insufficient to prove that Pitts had physical possession of the firearm on January 29, 2013, as instructed for the charge of possession of property with altered identification marks, we reverse as to that conviction. Therefore, we remand with directions to vacate the conviction for possession of property with altered identification marks.

¹ The State does not dispute that the evidence was insufficient to support a finding of physical possession as the jury was instructed using the particular instruction for the charge of possession of property with altered identification marks. The State contends that we should affirm that conviction because the jury instructions as to other charges explained the concept of constructive possession to the jury. *See State v. Lohmeier*, 205 Wis. 2d 183, 194, 556 N.W.2d 90 (1996) (we “view the jury instructions in light of the proceedings as a whole, instead of viewing a single instruction in artificial isolation”). We disagree with the State’s contention that the jury instructions for constructive possession as to other charges were sufficient to instruct the jury that it could find Pitts guilty of possession of property with altered identification marks based on constructive possession.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2013-14).

