

NOT DESIGNATED FOR PUBLICATION

No. 104,529

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

RODNEY HUNT,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ROBB W. RUMSEY, judge. Opinion filed October 21, 2011.
Reversed.

Dustin L. Kirk, legal intern, and *Randall L. Hodgkinson*, of Kansas Appellate Defender Office,
for appellant.

Lesley A. Isherwood, assistant district attorney, *Nola Tedesco Foulston*, district attorney, and
Derek Schmidt, attorney general, for appellee.

Before LEBEN, P.J., PIERRON and ATCHESON, JJ.

LEBEN, J.: Rodney Hunt was convicted of criminal possession of a firearm based upon his possession of a gun within 10 years of his being convicted of a felony. But the State did not present any evidence about the date of Hunt's prior felony conviction, and Hunt asks that his conviction be overturned based on insufficient evidence.

The State has the burden to prove the defendant guilty beyond a reasonable doubt "of every fact necessary to constitute the crime with which he is charged." See *In re*

Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The State did not do so in Hunt's case, and we must reverse his conviction.

The circumstances in this case help explain the State's failure. Hunt was arrested in the parking lot of a Wichita night club when police officers mistook him for another man for whom there was an outstanding arrest warrant. As officers were looking at Hunt from a distance of about 20 yards, he began walking away. An officer announced, "[S]top, I need to talk to you," but Hunt kept going. With the officers' view obstructed by rows of cars, they heard a metal banging noise on the concrete—apparently Hunt dropping a gun there. The officers drew weapons and apprehended Hunt; they then retrieved a loaded gun from the spot where they had heard the banging noise.

After handcuffing Hunt and placing him in a squad car, the officers for the first time asked him to identify himself, and the officers learned they didn't have their original suspect. But they detained Hunt for violation of a city ordinance against concealed weapons, and they then discovered he had a past felony conviction and arrested him for criminal possession of a firearm.

At the time of Hunt's 2008 arrest, K.S.A. 21-4204(a)(4) defined criminal possession of a firearm to include possession of a firearm by a person who had been convicted "within the preceding 10 years" of one of several listed Kansas felonies, a similar felony under another state's law, or a juvenile adjudication for an act that if done by an adult would have been covered by the listed felonies. One of the covered crimes was felony possession of marijuana, for which Hunt had been convicted about 2 months before this arrest. (We now know the time frame from the presentence-investigation report, which was prepared after trial and before sentencing.)

Before trial, Hunt filed a motion to suppress the evidence against him based on a claim that the police had violated his rights by stopping him when he had done nothing

wrong. The court held an evidentiary hearing on that motion and then denied it; when police have probable cause to arrest someone and mistakenly, but reasonably, get the wrong man, what's inadvertently discovered is not thrown out. See *Maryland v. Garrison*, 480 U.S. 79, 87-88, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987); *Hill v. California*, 401 U.S. 797, 802, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971); *State v. Henderson*, No. 99,364, 2009 WL 248102, at *2 (Kan. App. 2009) (unpublished opinion).

After denying Hunt's motion to suppress the evidence against him, the court asked whether the parties were ready to proceed to the bench trial. The prosecutor and the defense attorney then talked with each other, after which they reported to the court that the case could be tried based on the evidence just heard on the suppression motion plus one additional stipulation:

"Mr. O'Hara [defense counsel]: Your Honor, we've had just a discussion between counsel. I think if Your Honor wants to take what was admitted at the motion to suppress, plus I think the State wants a stipulation from the defense that the firearm was working, which we so stipulate, that's all we need at this stage.

"The Court: All right.

"Mr. Breitenbach [the prosecutor]: I agree with that, Your Honor."

The district judge accepted counsel's proposal and found Hunt guilty "based on those stipulations, as well as the evidence that I've heard in this case."

But the parties' stipulation that the gun was working certainly did not prove when the prior felony conviction had occurred. And the evidence had not done so, either. The evidence on this point was one officer's testimony that "[i]t turned out Mr. Hunt actually had a felony conviction for prior marijuana possession, which would make it a felon in possession of a firearm [offense], and that is what he was booked for." The officer later confirmed that Hunt had "been previously convicted of a felony." No one asked when that conviction had occurred.

Hunt cites *State v. Roose*, 41 Kan. App. 2d 435, 203 P.3d 18 (2009), a similar case in which our court reversed a conviction for insufficient evidence. There, the defendant was charged with criminal possession of a firearm under a different subsection of the statute, K.S.A. 21-4202(a)(2), which made it unlawful to possess a firearm if the defendant had been convicted of a person felony within the past 5 years. The State had proved a prior burglary conviction within 5 years but hadn't shown that the dwelling was used or intended for use as a residence, which is required for the crime to be a person felony. Our court noted that a house might well be considered a dwelling used or intended for use as a residence under a more-likely-than-not standard of proof, but held that the mere description of it as a "house" was not enough to prove beyond a reasonable doubt that it was a dwelling used or meant for use as a residence. Thus, the evidence wasn't sufficient to support a criminal conviction. 41 Kan. App. 2d at 442.

The State counters that a charge may be proved "by circumstantial evidence and the logical inferences therefrom," *State v. Gholston*, 272 Kan. 601, 605, 35 P.3d 868 (2001). The State suggests that it's logical to infer that Hunt's prior conviction occurred within 10 years. In its brief, the State essentially argues that Hunt wouldn't have been charged with this offense if he hadn't done it: "In order for the defendant to be booked for that offense and the prosecution to legitimately commence[,] the prior conviction at issue had to have occurred within the preceding ten years." As in *Roose*, it's just not a strong enough inference that we can make it beyond a reasonable doubt.

We do recognize, although the State does not make this specific argument, that Hunt was 22 years and 9 months old at the time of this arrest. Thus, for his past conviction to have been more than 10 years old at that time, he would need to have received the equivalent juvenile adjudication sometime before he was 12 years and 9 months old. Is that likely? No. But can we say beyond a reasonable doubt—based solely on the evidence presented at trial—that he didn't receive a juvenile adjudication for the

equivalent of felony marijuana possession before he was 12 years and 9 months old? No. Even 12-year-olds can be adjudicated for marijuana possession. See, e.g., *State v. Grams*, 311 Mont. 102, 103, 53 P.3d 897 (2002) (noting drug investigation that began in part when 12-year-old sold marijuana to 14-year-old at middle school); *In re J.A.A.*, No. 04-07-00105-CV, 2008 WL 312688, at *1 (Tex. App. 2008) (unpublished opinion) (noting that defendant's juvenile adjudications included one for marijuana possession at age 12 and a second 2 months later); *People v. Spells*, No. D057602, 2011 WL 3299859, at *4 (Cal. App. 2011) (unpublished opinion) (noting defendant's criminal history began with multiple offenses from age 11 to age 15, including selling marijuana); See also *In re D.D.M.*, 291 Kan. 883, 896, 249 P.3d 5 (2011) (noting that juvenile offender committed theft at age 12 and had been using marijuana since age 11).

The State cites *State v. Mitchell*, 285 Kan. 1070, 179 P.3d 394 (2008), to argue that it need not prove the exact time frame of the prior conviction. In *Mitchell*, the defendant stipulated to his status as a person covered by the firearms-possession statute so he could avoid proof of the prior crime being presented to the jury. With such a stipulation, our Supreme Court held that the State need not prove the factual basis for that status to the jury. But the court recognized that a separate and specific stipulation to the court would be required, one that included sufficient facts to make the person subject to the firearms-possession statute. 285 Kan. at 1072. The only thing Hunt stipulated to was that the gun was working. That did not relieve the State of its burden to prove that Hunt was otherwise covered by the firearms-possession statute.

Last, the State also contends that defense counsel "intended to communicate . . . that he was of the opinion all legal elements of the crime had been addressed in a manner sufficient to enable the court to enter a ruling," although the State concedes that it was "short of a formal stipulation." Based on this, the State contends that it would be "somewhat disingenuous" now to allow the defendant to suggest the evidence was insufficient. Our court rejected a similar argument a few years ago in *State v. Folley*, No.

89,368, 2004 WL 1714918, at *1 (Kan. App. 2004) (unpublished opinion), and the words used there also apply here:

"It is not the defendant's role to make sure he or she is convicted of each and every element of a crime. Rather, it is the State's burden to prove each and every element of a crime beyond a reasonable doubt. [The defendant] did not invite this error. Even if he had, invited error cannot trump a defendant's constitutional rights. A defendant has a due process right to be found guilty on each and every element beyond a reasonable doubt. *In re Winship*, 397 U.S. [at 364]." *Folley*, 2004 WL 1714918, at *1.

We can understand how the State's lapse occurred in this case. Presumably, both parties initially thought all of the elements needed to convict had been proved. But a trial was held, and the evidence wasn't sufficient to prove the defendant guilty beyond a reasonable doubt. The State bears that burden.

The judgment of the district court is reversed; and the defendant's conviction is set aside.