IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JEFFREY SALOMON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 4D17-2610

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution below. Appellee may also be referred to as the State. The following symbols will be used, each followed, as applicable, by citation to the electronic record by "PDF":

IB = Appellant's Initial Brief;

R = Record on Appeal;

T = Trial Transcripts.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's Statement of the Case and Facts to the extent that it represents an accurate non-argumentative recitation of the procedural history and facts of this case, subject to the additions, corrections and/or clarifications noted below and within the argument section of this brief.

Officer Herny testified that, at the time of his initial identification of the firearm, Appellant's shirt came to "rest[] on top of the firearm." (T 244). Officer Herny explained he could see more of the firearm because the process of Appellant raising his hands and then bringing them down to be handcuffed by Officer Berben caused Appellant's shirt to rest atop the firearm. (T 268-69).

On renewed motion for judgment of acquittal, the trial court, citing to Dorelus factors, found that the evidence in a light most favorable to the State showed: (1) "the Defendant moved his body inside the vehicle in such a way as to conceal the firearm on his waistband by bending over and turning in a different direction;" (2) the firearm "was on his waistband completely covered by an object. That is, his shirt;" (3) the firearm was a handgun that "is easily secreted and concealed;" and, (4) that the "police officer, through his training and experience, did recognize it to be a firearm from the imprint of the firearm on the shirt." (T 375-80).

Based on these factors, the court found "the Defendant intended to conceal the weapon, moved his body in a way to conceal it. It was concealed while he was in the car. When he got out of the car it was still covered." (T 378).

SUMMARY OF THE ARGUMENT

The trial court correctly analyzed the relevant Dorelus[1] factors and lawfully decided that this was a question properly submitted to the jury. Appellant's arguments that the "printing" of the firearm on Appellant's shirt meant the firearm was not concealed is contrary to the holding in Dorelus and in this Court's Marsh.[2]

[1] Dorelus v. State, 747 So. 2d 368 (Fla. 1999).
[2] State v. Marsh, 138 So. 3d 1087 (Fla. 4th DCA 2014).

Argument

THE TRIAL COURT CORRECTLY SUBMITTED THE QUESTION OF FIREARM CONCEALMENT TO THE JURY.

Appellant argues that, as a matter of law, the firearm under Appellant's shirt and recovered from Appellant's waistband was not concealed because the firearm was identifiable as such by the outline or "print" under the shirt. (IB 5-11; PDF 9-15).

A) Preservation

As the trial court ruled on this argument in Appellant's motion and renewed motion for judgment of acquittal, (R 317-19, 369-80), this issue is preserved. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) ("the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved.").

B) Standard of Review

An appellate court reviews the denial of a "motion for judgment of acquittal de novo and affirms the conviction if it is supported by competent, substantial evidence." Boyd v. State, 910 So. 2d 167, 180 (Fla. 2005). A judgment of conviction comes to an appellate court clothed "with the presumption of correctness and a defendant's claim of insufficiency of the evidence cannot prevail where there is

substantial competent evidence to support the verdict and judgment." Terry v. State, 668 So. 2d 954, 964 (Fla. 1996).

C) **Discussion**

"A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). "Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts," the case must go to the jury. Id.

The State must establish a *prima facie* case by providing competent, substantial evidence for "each and every element of the offense." See Greenwade v. State, 124 So. 3d 215, 220 (Fla. 2013). "[T]he State has presented sufficient evidence to sustain a conviction if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt." Id. "The state is not required to 'rebut conclusively every possible variation' of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's

theory of events." State v. Law, 559 So. 2d 187, 189 (Fla. 1989) (footnote omitted; quoting State v. Allen, 335 So. 2d 823, 826 (Fla. 1976)).

"Once the State meets this threshold burden, it is the responsibility of the jury to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt." Greenwade, 124 So. 3d at 220.

An appellate court may not reweigh the evidence or assess the credibility of a witness. See Tibbs v. State, 397 So. 2d 1120, 1125 (Fla. 1981); State v. Smyly, 646 So. 2d 238, 241 n. 1 (Fla. 4th DCA 1994).

The act of carrying a weapon underneath a shirt, in Florida and other jurisdictions, has been found to indicate an intent to conceal a weapon or is an appropriate question for the jury. See State v. Marthaller, 436 So. 2d 413 (Fla. 3d DCA 1983) (reversing an order of suppression where an officer arrested Marthaller for carrying a concealed firearm found in Marthaller's waistband underneath his shirt); State v. Reid, 542 So. 2d 453, 454 (Fla. 3d DCA 1989) ("There exists a genuine issue of material fact concerning the extent to which the firearm in question was concealed by Reid's shirt."); C.J.R. v. State, 429 So. 2d 753, 754 (Fla. 1st DCA 1983) ("There was competent substantial evidence before the trial court to support its conclusion that the 'num-chucks' concealed by C.J.R. in his shirt were 'deadly weapons'"); see also Holtzendorf v. State, 247 S.E.2d 599, 600 (Ga. Ct. App. 1978) (upheld conviction for carrying a concealed weapon when the pistol was "concealed

by the defendant's jacket and stuck in his pants or pants belt."); Marshall v. State, 200 S.E.2d 902, 903 (Ga. Ct. App. 1973) ("the handle of the pistol being visible to some witnesses through a split in defendant's shirt but not seen by others" does not indicate the weapon was openly carried) (superseded by statute stated in Goss v. State, 301 S.E.2d 662, 663 (Ga. Ct. App. 1983)); Shell v. Com., 220 S.W.2d 842, 842 (Ky. 1949) (conflicting testimony whether the pistol was covered by defendant's shirt was a question for the jury); Thompson v. City of Little Rock, 105 S.W.2d 537, 538 (Ark. 1937) (the court impliedly indicated the defendant carried a concealed pistol when the "pistol was found in appellant's shirt bosom"); State v. Jones, 492 So. 2d 1261, 1263 (La. Ct. App. 1986) (the court upheld a jury finding of a concealed weapon when, in the middle of a struggle, the arresting officer felt the blade of a knife through defendant's shirt); State v. Werner, 181 N.W.2d 221, 223 (Iowa 1970) (affirmed conviction for a concealed weapon offense where "defendant was wearing a knit type shirt and pulled it down over the top of his slacks with the gun and holster in the waistband.").

Further, the observation of an outline or imprint of a weapon has been found by other jurisdictions to show intent to carry concealed. See People v. Lopez, 243 N.Y.S.2d 333, 334 (N.Y. App. Div. 1963) (the evidence "was clearly sufficient to sustain the conclusion that the arresting officer saw the outline of a revolver in defendant's pocket and was warranted in the belief that defendant was carrying a

concealed weapon, as he, in fact, was."); Gainer v. State, 334 S.E.2d 385, 386 (Ga. Ct. App. 1985) (recognition of a bulge as a pistol was not carried in an open manner and fully exposed to view); State v. Bateman, 526 S.W.3d 357, 359–60 (Mo. Ct. App. 2017) ("being able to discern by ordinary observation the *outline* of a firearm under clothing is not the equivalent of seeing the *actual* firearm itself. Most importantly for purposes of this crime, the fact that an officer could tell that the bulge in Appellant's pants was a firearm does not change the fact that Appellant clearly intended to carry this weapon in a concealed manner.").

Recently, the Florida Supreme Court's Dorelus v. State, 747 So. 2d 368, 371 (Fla. 1999), further analyzed the issue of carrying a concealed weapon. Dorelus is distinguishable from this case as it concerns concealment of a weapon **in a vehicle**, not on a person. Id. at 371-73. However, the factors enumerated in Dorelus are instructive. In Dorelus, the court explained that determination of concealment must focus on the **manner** of carrying. Id. Further, the court listed factors for determining whether a weapon was concealed. Id. These factors include: (1) the nature and type of weapon; (2) the location of the weapon in the vehicle; (3) the extent to which the weapon was covered by another object; (4) the intent of the defendant; and, (5) the officer's observations of the weapon. See id. at 371-72. The court emphasized that "in all instances **common sense should prevail**" in consideration of these variables. Id. at 372 (emphasis added).

Here, the totality of facts and common sense inferences, when viewed in a light most favorable to the State, indicate what the trial court determined; that Appellant intended to obscure the firearm from the ordinary sight of another person. See (T 378).

(1) Appellant placed the handgun in a holster inside of his waistband so that only the butt of the firearm extended out of his pants. (T 251-52, 266-69). Officer Herny acknowledged that the gun was not holstered in a way to make it "immediately visible to the naked eye[.]" (T 248-49). Common sense indicates this action was intended to obscure most of the firearm.

(2) Appellant's shirt was over the firearm. (T 310). Common sense indicates this action was intended to obscure the butt of the firearm.

(3) Officer Berben observed that Appellant was positioned in the vehicle in "a weird way" that was "tilted towards" Officer Herny. (T 307-08). Also, both officers commented that seeing the imprint of the firearm depended upon where you were positioned. (T 248, 268-69, 308) (Officer Berben only saw the print of the firearm **after** Appellant "corrected" his body to exit the vehicle). It was reasonable to infer Appellant's body positioning was intended to prevent observation of the firearm.

(4) Appellant's odd exit of the vehicle ("slid his legs out") and difficulty standing up indicated to Officer Berben that Appellant appeared to be concealing

something. (T 296-97). It was reasonable to infer that these actions were intended to prevent observation of the firearm by Officer Berben.

(5) Appellant's behavior (e.g. sweating, breathing heavily, appearing extremely nervous, staring straightforward) indicated Appellant was inordinately uncomfortable as a **passenger** during a traffic stop where the driver was the primary focus. (T 239-40, 252-53, 293, 296-97). It was reasonable to infer that Appellant was concerned that the officers would discover the hidden firearm.

(6) Despite Officer Berben's seemingly immediate identification of the firearm underneath Appellant's shirt,[3] (T 297-99), the trial court determined this factor did not outweigh other factors indicating Appellant's intent to carry the weapon concealed. (T 378).

Thus, in compliance with Dorelus, the trial court properly determined that there was competent substantial evidence that the firearm was carried in a concealed manner and was properly presented to the jury.

Appellant's reading of Dorelus is antithetical to common sense and ignores a principal purpose of Dorelus, which was to emphasize that determination of concealment in a vehicle must focus on the **manner** of carry. Dorelus, 747 So. 2d at 372. Appellant's failed attempt to obscure the firearm from ordinary sight did not

[3] Officer Berben described this observation as based on his training and experience. See (314-15).

change his intended manner of carrying the firearm. Appellant's use of his body and shirt indicated a clear intent to conceal. Simply because Appellant's firearm "printed" on his shirt, see (T 298), did not magically transform the intended method of carry to open carry. Such an interpretation would undoubtedly expose numerous, licensed concealed weapon carriers to prosecution under § 790.053, Fla. Stat. (making it unlawful for any person to openly carry a firearm).

Illustrative of this point is this Court's Marsh, which reversed an order dismissing an information when the facts indicated Marsh:

> plac[ed] the firearm in the wheel well of the vehicle next to which Defendant was seen "crouching" and/or "hiding," one may certainly surmise (by an exercise of "common sense") that such placement of the firearm was an attempt to conceal the weapon from the ordinary sight of another person within the meaning of the statute—**even if the attempt was insufficient to shield the firearm from the perceptive gaze of the officer who also happened to be standing at the perfect vantage point to see the gun.** In fact, the arresting officer testified that he was able to see the gun only because he "got a good angle."

State v. Marsh, 138 So. 3d 1087, 1090-91 (Fla. 4th DCA 2014) (emphasis added). The instant case is analogous because, if not for Appellant's shirt "print," Officer Berben may not have readily seen the firearm.

Further, Appellant's characterization of the "immediate identification" as being completely dispositive is a misinterpretation of Dorelus. In context, the Dorelus court intended an arresting officer's observations to be one of many factors

to be weighed according to the totality of circumstances. See Dorelus, 747 So. 2d at 372-73. This Court came to a similar conclusion in Marsh stating:

> Using only portions of [Dorelus], it is certainly conceivable to infer that one cannot be said to have "concealed"—as a matter of law—that which is immediately recognizable by officers as a firearm. The entirety of the *Dorelus* opinion, however, does not dictate such logic. *Dorelus* explicitly states that an officer's immediate recognition of the object as a firearm, while relevant to the issue of concealment, is "not the only method to resolve the issue of concealment as a matter of law."

Marsh, 138 So. 3d at 1090.

Accordingly, the trial court correctly submitted the question of concealment to the jury which was supported by competent, substantial evidence.

CONCLUSION

Based on the foregoing arguments and authorities, the proceedings below should be AFFIRMED.

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I certify that on November 29, 2017 a true and accurate copy of this document has been sent by e-mail to:

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