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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0654**

State of Minnesota,
Respondent,

vs.

James Edward Smith,
Appellant.

**Filed June 21, 2021
Reversed
Gaïtas, Judge**

Hennepin County District Court
File No. 27-CR-19-4410

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant James Edward Smith appeals his conviction for possession of a firearm by an ineligible person, arguing that the district court erred in denying his pretrial motion

to suppress the evidence and that the jury's verdict rests on insufficient evidence. Because we agree that the verdict rests on insufficient evidence, we reverse.

FACTS¹

In February 2019, Minneapolis police applied for a no-knock warrant to search an apartment for evidence of drug sales. The search warrant application identified three individuals involved in the suspected drug activity: Smith's father E.S., Smith's mother T.C., and Smith. A judge issued the requested search warrant, and, around 7:00 a.m. on February 20, 2019, a team of police officers executed it. Much of the search was recorded by the officers' body-worn cameras.

When they arrived to execute the warrant, officers entered the living room of the apartment. On the right, there was a bedroom separated from the living room by two "French doors." To the left was a hallway that led to the kitchen, two other bedrooms, and a bathroom. Officers announced their presence and called out for any occupants to show themselves.

They first encountered Smith walking down the hallway from the rear bedroom and through the kitchen. He was in his boxer shorts and seemed to have been awakened by the officers' entry. Officers instructed Smith to come forward with his hands up. Smith complied, and officers then handcuffed him. In the front bedroom to the right of the living room, officers encountered T.C. and two children in the bed. After seating Smith, T.C., and the children in the living room, officers began their search.

¹ Our summary of the facts is derived from the evidence presented at Smith's jury trial.

Some officers searched the rear bedroom where Smith had come from. One officer described the room as a “porch that was made into a bedroom . . . [b]ecause there was a bed there, clothing, shoes, [and] other personal items.” There were also a space heater, sheets covering the windows as curtains, and about 12 to 15 shoeboxes stacked on a table. Inside the shoeboxes officers found brass knuckles, a birth certificate for Smith’s child, Smith’s driver’s license, W-2 forms and a GED transcript bearing Smith’s name, suspected marijuana seeds, drug paraphernalia, and nine-millimeter-caliber ammunition and a nine-millimeter firearm magazine both wrapped in a red t-shirt. Nearby, officers located a satchel containing white plastic bottles with marijuana residue, labeled “Sweet Leaf” and “THC.” And inside other shoeboxes in the room, officers also discovered mail addressed to Smith and various documents with Smith’s name and the apartment’s address on them.

Other officers searched the front bedroom where T.C. and the children had been located. On the top shelf of the bedroom closet, officers found a green woman’s purse. Inside the purse, concealed within a white sock, they discovered a nine-millimeter pistol with a loaded magazine and an additional nine-millimeter magazine. Officers also found marijuana, mail addressed to T.C., a checkbook bearing E.S.’s name, and a digital scale.

The pistol, ammunition, and magazines found in the apartment were later swabbed for DNA. Those swabs, and a DNA sample taken from Smith, were submitted to the Minnesota Bureau of Criminal Apprehension (BCA) for forensic testing.

The swabs from the ammunition and gun magazine found in the back bedroom contained insufficient DNA for further testing. Likewise, the extra magazine concealed with the pistol in the front bedroom did not contain identifiable DNA.

Swabs from the pistol found in the front bedroom, however, had a mixture of DNA from three or more individuals. The BCA scientist identified Smith as the contributor of a partial major male DNA profile on the gun, noting that there was a “1 in 7.8 billion” chance that another randomly selected person would have the same DNA profile. There was insufficient DNA for the BCA scientist to identify the additional two contributors. The BCA scientist was unable to determine how or when Smith’s DNA was deposited on the pistol. She observed that DNA can remain on an item for years unless it is disturbed by subsequent handling or the environment. The BCA scientist also acknowledged that DNA on one item can be transferred to another item by touch or contact with clothing. Transferred DNA appears as a minor profile, however, and not as a major profile.

A scientist from the Minneapolis Crime Lab examined the pistol for fingerprints. The pistol had no identifiable fingerprints or ridge markings.

Based on the evidence discovered during the search, respondent State of Minnesota charged Smith with two counts of ineligible person in possession of a firearm or ammunition, Minn. Stat. § 624.713, subd. 1(2) (2018)—a count for the ammunition and magazines found in the back bedroom of the apartment (count one) and a count for the pistol located in the closet in the front bedroom (count two). Smith moved to suppress the evidence, arguing that the search warrant was invalid because it was not supported by probable cause. The district court denied Smith’s suppression motion. Smith then had a jury trial.

During the trial, the state introduced 55 exhibits into evidence, including video of the search captured by the officers’ body-worn cameras. The state called officers who

participated in the search and the forensic scientists from the BCA and the Minneapolis Crime Lab.

Smith exercised his constitutional right not to testify and called one witness, his girlfriend, who also is the mother of his two children. His girlfriend testified that their family did not live in the apartment with T.C. in February 2019. According to his girlfriend, Smith would sometimes spend time with his family at the apartment, but he did not have a key to the apartment.

Outside of the jury's presence, the parties stipulated that Smith was ineligible to possess a firearm due to a prior felony conviction. Rather than revealing the prior conviction to the jury, the district court informed the jury:

The parties have stipulated that on or about February 20, 2019, the defendant, James Edward Smith, was ineligible to possess a firearm and/or ammunition under Minnesota law. The court instructs you that you are bound by the stipulation agreed to by the parties that defendant Smith was barred under Minnesota law from possessing a firearm and/or ammunition on all relevant dates in question. You are not to speculate about why defendant Smith was ineligible to possess a firearm and/or ammunition.

The jury found Smith not guilty of count one, which related to the ammunition and magazines in the back bedroom. But the jury found Smith guilty of count two for possessing the pistol found in the front bedroom. Following the jury's verdicts, the district court sentenced Smith to the mandatory minimum term of 60 months in prison for count two. *See* Minn. Stat. § 609.11, subd. 5(b) (2018).

Smith appeals.

DECISION

In a criminal case, due process requires the prosecution to prove every element of the charged crime beyond a reasonable doubt. *State v. Culver*, 941 N.W.2d 134, 142 (Minn. 2020). “To determine whether sufficient evidence exists to support a jury verdict, [appellate courts] view the evidence in a light most favorable to the verdict and assume the fact-finder disbelieved any testimony conflicting with that verdict.” *State v. Balandin*, 944 N.W.2d 204, 213 (Minn. 2020) (quotation omitted). We will not disturb a verdict “[i]f the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably have concluded that the defendant was guilty of the charged offense.” *State v. Thomas*, 890 N.W.2d 413, 420 (Minn. App. 2017), *review denied* (Minn. Mar. 28, 2017).

Smith was convicted for unlawfully possessing a firearm on February 20, 2019, in violation of Minnesota Statutes section 624.713, subdivision 1(2). That statute prohibits “a person who has been convicted of . . . a crime of violence” from possessing ammunition or a firearm. Minn. Stat. § 624.713, subd. 1(2). Smith contends on appeal that the state failed to prove beyond a reasonable doubt that he possessed the pistol found in the front bedroom. Thus, he argues, his conviction must be reversed for insufficient evidence.

“Possession may be proved through evidence of actual or constructive possession.” *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). Here, the parties agree that Smith was not in actual, physical possession of the pistol when the police found it. *See State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (defining actual possession as the exercise of “direct physical control” over an object). Thus, to establish the element of possession, the

state was required to prove beyond a reasonable doubt that Smith constructively possessed the pistol.

Constructive possession can be proven in two ways. *Id.* at 353-54. The state can provide “proof that the item was in a place under the defendant’s exclusive control to which other people did not normally have access.” *Id.* (quotation omitted). Alternatively, when an item was found in a place accessible to others, “the [s]tate must show that there is a strong probability (inferable from other evidence) that at the time the defendant was consciously or knowingly exercising dominion and control over it.” *Harris*, 895 N.W.2d at 601. An individual can possess an item jointly with another person. *Id.*; *see also State v. Lorenz*, 368 N.W.2d 284, 287-88 (Minn. 1985) (determining that evidence was sufficient to prove defendant’s joint possession with roommate where marijuana was found in the shared kitchen).

The state may prove possession through either direct or circumstantial evidence. *State v. German*, 929 N.W.2d 466, 472 (Minn. App. 2019). “[D]irect evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Harris*, 895 N.W.2d at 599 (quotation omitted). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Id.* (quotation omitted). The key distinction between these two forms of evidence is that circumstantial evidence inherently “requires an inferential step to prove a fact that is not required with direct evidence.” *Id.* (citing *State v. Silvernail*, 831 N.W.2d 594, 604 (Minn. 2013) (Stras, J., concurring)).

When an element of an offense is supported by circumstantial evidence alone, the appellate court reviews the sufficiency of the evidence underlying that element with greater scrutiny, applying a heightened standard of review. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010); *see also State v. Porte*, 832 N.W.2d 303, 309-10 (Minn. App. 2013) (discussing heightened standard of review for circumstantial evidence). We must initially decide whether to apply that heightened standard of review here.

Smith asks us to utilize the heightened standard of review. He argues that the state's evidence that he possessed the gun on or about February 20, 2019, was entirely circumstantial. On the other hand, the state requests the traditional standard of review that we apply in sufficiency-of-the-evidence cases. Although the state acknowledges that the evidence of possession was mostly circumstantial, it contends that the DNA evidence was direct evidence that Smith possessed the gun. In support of its argument that DNA evidence is direct evidence of possession, the state cites two unpublished decisions of this court. *See State v. Nickson*, No. A16-1286, 2017 WL 2535698, at *3 (Minn. App. June 12, 2017); *State v. Jiggetts*, No. A12-2216, 2014 WL 349609 at *3 (Minn. App. Feb. 3, 2014).

The cases cited by the state are not precedential. *See Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 801 (Minn. App. 1993) (explaining that unpublished opinions are not binding precedent). And the state cites no controlling authority holding that the presence of an individual's DNA on an item is direct evidence that the individual currently possesses the item. Moreover, under the circumstances here, we disagree that the presence of Smith's DNA on the firearm was direct evidence that he constructively possessed it at the time of the alleged offense. The DNA evidence certainly indicated that Smith touched or handled

the gun at some point in time. But to conclude from the DNA evidence that Smith was consciously exercising dominion and control over the gun on February 20, 2019—when it was located in a woman’s purse in Smith’s mother’s bedroom closet—requires an inferential step. *Harris*, 895 N.W.2d at 599 (“[C]ircumstantial evidence always requires an inferential step to prove a fact that is not required with direct evidence.”). The DNA evidence therefore was circumstantial evidence of possession. Because the DNA evidence, and the other evidence that Smith constructively possessed the gun, was entirely circumstantial, we apply the circumstantial-evidence standard of review in considering the sufficiency of the evidence of possession.

The first step in evaluating the sufficiency of circumstantial evidence is to identify the “circumstances proved” by the state at trial. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). A reviewing court assumes the trier of fact believed the state’s witnesses and rejected all evidence contrary to the verdict; all conflicting evidence is resolved in the state’s favor. *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008). After identifying the circumstances proved, the reviewing court next determines whether those circumstances are “consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Silvernail*, 831 N.W.2d at 599 (quotation omitted). At this step of the analysis, unlike the first step, appellate courts do not defer to the fact-finder’s choice among reasonable inferences. *Al-Naseer*, 788 N.W.2d at 474. If the circumstances proved are consistent with a reasonable inference other than guilt, the evidence is insufficient and the resulting conviction must be reversed. *See Harris*, 895 N.W.2d at 603.

Viewing the evidence here in the light most favorable to the verdict, the relevant circumstances proved are as follows. Early in the morning on February 20, 2019, officers executed a no-knock search warrant on a Minneapolis apartment as part of an ongoing narcotics investigation. Smith, T.C., and two small children were in the apartment. Officers immediately detained Smith, who came from the back bedroom in his boxer shorts. During a search of the back bedroom, officers found Smith's documents and mail, marijuana and drug paraphernalia, and nine-millimeter-caliber ammunition and a nine-millimeter magazine. T.C. and the two children were found in the front bedroom next to the living room.² When the police searched the closet in the front bedroom, they found a green woman's purse containing a pistol and a magazine concealed in a sock. They also found marijuana, a checkbook belonging to E.S., and a digital scale. The ammunition, magazines, and pistol were swabbed for DNA for comparison with Smith's DNA. The partial major profile found on the swabs from the pistol matched Smith's DNA sample. There is a 1 in 7.8 billion chance that a random individual's DNA profile would match the profile found on the pistol. A small amount of DNA from at least two other individuals was also found on the pistol but could not be identified. And DNA can remain on an item for years unless it is subsequently handled by others or exposed to environmental factors.

Having identified the circumstances proved, we next examine the reasonable inferences that may be drawn from them. The circumstances are certainly consistent with

² In the second step of this analysis, the state suggests that the fact that T.C. was found in the same room where the pistol was discovered is not a circumstance proved. But this fact is not contrary to the verdict, so we include it here in our consideration of the circumstances proved.

a reasonable inference of Smith's guilt, as they support the conclusion that Smith jointly possessed the firearm with T.C. But Smith argues that the circumstances do not exclude a reasonable alternative hypothesis that he was not exercising dominion and control over the firearm on February 20, 2019. We agree.

Initially, we note that the possession charge related to a specific date—on or about February 20, 2019. Indeed, the prosecutor argued to the jury, “If you think he touched [the gun] six months ago, . . . then the answer is not guilty.” Although the DNA evidence may have established that Smith touched the gun at some point, it did not establish when he had contact with it. The evidence proved that the gun was present in the apartment where Smith stayed and kept some of his belongings. But it was not found in the bedroom where Smith appeared to be sleeping and storing his belongings. Rather, it was in the bedroom where T.C. was found sleeping. And the gun was not in plain sight. It was in the closet, hidden in a sock inside a woman's purse. Given these circumstances, there is a reasonable hypothesis that Smith was not consciously exercising dominion and control over the gun on or about February 20, 2019.

Because the jury found Smith not guilty of possessing the ammunition and magazine in the back bedroom, it may be inappropriate to include this evidence among the circumstances proved. But even including this evidence, the circumstances proved support a reasonable hypothesis of innocence. The presence of the items in the back bedroom do support an inference that Smith also possessed the pistol found in the front bedroom. On the other hand, because the pistol in the front bedroom was loaded and found with a spare magazine, the items in the back bedroom could have been wholly unrelated to the pistol.

Thus, the presence of the ammunition and magazine in the back bedroom does not change our conclusion that the circumstances proved support a rational hypothesis other than guilt.

The state argues that Smith's possession of the pistol could have been joint. A joint-possession theory cannot save the conviction, however, because the reasonable alternative hypothesis remains—Smith may not have constructively possessed the pistol *at all* on or about February 20, 2019.

The circumstances proved cannot exclude the reasonable possibility that Smith did not possess the firearm on or about the date of the alleged offense. Thus, we must reverse Smith's conviction for insufficient evidence. Because we reverse Smith's conviction, we do not address his challenge to the constitutionality of the search warrant.

Reversed.