STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0559

State of Minnesota,
Respondent,

vs.

Kristopher Raphael Owens,
Appellant.

Filed March 13, 2017
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-14-32278

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Peterson, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from his conviction for possessing a firearm, appellant argues that (1) the district court erroneously instructed the jury on the element of constructive

possession, and (2) the evidence was insufficient to prove that he constructively possessed the firearm. We affirm.

FACTS

At about 12:30 a.m. on October 30, 2014, Minneapolis police officers Kenneth Tidgwell and Troy Carlson were conducting surveillance in their marked squad car when they saw two men, who were later identified as appellant Kristopher Raphael Owens and Kejuan Watkins, leave a house and get into a black SUV. The officers saw that Owens, the driver, did not signal when he turned away from the curb, which was a traffic violation, and, when Owens approached an intersection, he hesitated, "didn't indicate left or right with his signal," and started to go forward before turning his left signal indicator on, which was another traffic violation. The officers followed immediately behind Owens and activated their emergency lights to make him aware that he should pull over, but he did not. Instead, Owens speeded up.

Tidgwell activated his siren, but Owens still did not pull over. Owens made an abrupt turn at 16th Avenue, and Carlson saw Watkins throw a gun out of the passenger-side window. Owens then turned onto Queen Avenue, drove the wrong way on the one-way street, and narrowly missed a parked vehicle before driving through a busy intersection and causing pedestrians to scurry to get out of the way. Tidgwell was finally able to stop the SUV after Owens turned onto Olson Memorial Highway. Tidgwell estimated that the vehicles were traveling between 70 and 80 miles per hour during the pursuit.

Once stopped, Owens did not initially follow Tidgwell's directives, but he eventually got out of the SUV and was arrested. At the time of his arrest, Owens was

wearing a baseball-style cap with an Oakland Raiders emblem. During a search of the SUV, police discovered a loaded nine-millimeter Kel-Tec semi-automatic handgun in the center console. Tidgwell had another officer photograph the Kel-Tec handgun as it sat in the console. Tidgwell noted that the console "looked like it had been manipulated . . . with metal pieces and plastic inserts" and that there appeared to be blood on the gun. Police also recovered the gun that was thrown from the SUV, a Glock nine-millimeter handgun.

Owens was charged with fleeing police in a motor vehicle and possession of a firearm by a prohibited person. A squad-car video and still photos of the chase and arrest were received into evidence at Owens' jury trial. M.J. testified at trial that she was the registered owner of the SUV; she was a friend of Owens; she let Owens and about eight others, including Watkins, drive the SUV; and she allowed Owens to drive the SUV on October 29th. M.J. admitted on cross-examination that she is the mother of Owens' child. M.J. denied owning a gun or keeping one in the SUV.

The Kel-Tec and Glock handguns were swabbed for DNA evidence and latent fingerprints. No fingerprints were found. Owens could not be excluded as a contributor to the DNA found on the Kel-Tec handgun, although 93.9 percent of the general population could be excluded. The blood on the Kel-Tec handgun was not Watkins' blood.

Tidgwell completed a property inventory for Owens that included clothing, a wallet, and a cellphone. Police searched the cellphone and found photos of a person who resembled Owens wearing a baseball-style cap with an Oakland Raiders emblem and holding a gun that looked similar to the Kel-Tec handgun. Owens testified that the person in the photo was Watkins and that the cellphone belonged to Watkins' sister. Owens also

testified that he would have stopped when he realized the police were trying to direct him to stop, but Watkins urged him to "[g]o, go, go," so he speeded up and "just didn't stop." Owens testified that he did not see Watkins throw a gun out the window or know that there was a gun in the SUV, and he denied ever possessing that gun. Owens admitted that he had three prior felony convictions.

Appellant was convicted of both offenses and received a 60-month executed sentence for the weapons offense. This appeal followed.

D E C I S I O N

I.

Appellant was convicted of possession of a firearm by a prohibited person, in violation of Minn. Stat. § 624.713, subd. 1(2) (2014), which provides that a person who has been convicted of a crime of violence "shall not be entitled to possess a pistol or semiautomatic military-style assault weapon or . . . any other firearm." The statute does not define "possess," but under the case law, "the state must establish either actual or constructive possession." *State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004). Appellant argues that his conviction must be reversed because the district court's instruction to the jury on the element of possession relieved the state of its burden of proving that he committed the prohibited act.

"District courts are allowed considerable latitude in the selection of language for jury instructions." *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). This court "review[s] a district court's decision to give a requested jury instruction for an abuse of discretion." *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012).

Jury instructions must "fairly and adequately explain the law of the case." *Ihle*, 640 N.W.2d at 916. "[T]he court's instructions must define the crime charged and the court should explain the elements of the offense rather than simply read statutes." *Id.* "An instruction is in error if it materially misstates the law," *Id.* or "confuses" or "misleads" the jury. *State v. Larson*, 787 N.W.2d 592, 601 (Minn. 2010). "[T]he failure to instruct the jury on an element of the charged offense is subject to review as a trial error . . . ." *State v. Watkins*, 840 N.W.2d 21, 27 (Minn. 2013).

The district court instructed the jury: "A person who is not in actual possession of a thing but who knowingly has both the power and the intention to exercise authority and control over it, either directly or through another person, is in constructive possession of it." Appellant argues that this instruction was erroneous because it was not the definition of constructive possession stated in *State v. Florine*, 303 Minn. 103, 226 N.W.2d 609 (1975).

In *Florine*, the defendant was convicted of unlawful possession of cocaine. 303 at 103, 226 N.W.2d at 610. The cocaine was found in an unlocked abandoned vehicle. *Id.* There was no evidence of actual or physical possession by the defendant, and the issue was whether there was sufficient evidence that the defendant constructively possessed the cocaine. *Id*. at 104, 226 N.W.2d at 610. The supreme court explained:

> The purpose of the constructive-possession doctrine is to include within the possession statute those cases where the state cannot prove actual or physical possession at the time of arrest but where the inference is strong that the defendant at one time physically possessed the substance and did not abandon his possessory interest in the substance but rather continued to exercise dominion and control over it up to the

> time of the arrest. Having in mind the purpose of the constructive-possession doctrine, we believe that in order to prove constructive possession the state should have to show (a) that the police found the substance in a place under defendant's exclusive control to which other people did not normally have access, or (b) that, if police found it in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.

Id. at 104-05, 226 N.W.2d at 610-11 (citation omitted). The supreme court "concluded that there was sufficient evidence of constructive possession to justify a conviction on the charge of possession of cocaine." *Id*. at 105, 226 N.W.2d at 611.

Appellant contends that the district court departed from the *Florine* standard when instructing the jury on constructive possession because the district court's instruction "eliminated the act of exercising dominion and control and reduced constructive possession to merely a mental state." Appellant argues:

> In the [district] court's instruction "knowingly" modifies the phrase "has both the power and the intention to exercise" "authority and control" over the firearm. In other words, "knowingly" is the mental state modifying the status of having something—power and intention—rather than the act of doing something—exercising dominion and control.

Appellant's argument fails to recognize that, in *Florine*, the evidence that the supreme court concluded was sufficient to prove constructive possession of cocaine did not include any evidence of the defendant doing anything. *See id.* at 103-05, 226 N.W.2d at 610-11. Rather, there was evidence that the owner of the abandoned vehicle left the vehicle with the defendant, and items found in the abandoned vehicle along with the cocaine included a utility bill and a letter that were addressed to the defendant, a receipt

from a bank money order that named the defendant as the remitter, the defendant's driver's license, and a notebook that contained a quiz that bore the defendant's name. *Id*. at 104, 226 N.W.2d at 610. It is apparent from the evidence in *Florine* that constructive possession does not require an "act" of exercising dominion and control; it requires evidence that the defendant was "consciously" exercising dominion and control.

It is also apparent that the district court selected the language it used in its constructive-possession instruction to avoid confusing the jury by suggesting that proving constructive possession required evidence of an "act" of exercising dominion and control. The district court crafted the instruction specifically for this case, in which Owens testified that he did not know that there was a gun in the SUV. The instruction informed the jury that, in order to consciously exercise dominion and control over the Kel-Tec handgun, Owens needed to know that he had the power and the intention to exercise authority and control over it; simply being within reaching distance from the gun was not enough to prove constructive possession. The instruction did not materially misstate the law, and we see no basis to conclude that the instruction misled or confused the jury. The instruction was not erroneous.

II.

When reviewing the sufficiency of the evidence, an appellate court views the evidence in the light most favorable to the verdict to determine whether the facts in the record and any legitimate inferences that can be drawn from the facts would permit the jury to reasonably conclude that the defendant was proved guilty beyond a reasonable doubt of the offense charged. *State v. Hanson*, 800 N.W.2d 618, 621 (Minn. 2011). When a

conviction depends on circumstantial evidence, the reviewing court applies a two-step analysis that first identifies the circumstances that are proved and then determines whether the circumstances proved "are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013) (quotations omitted); *see State v. Robertson*, 884 N.W.2d 864, 871 (Minn. 2016).

In identifying the circumstances proved, the appellate court defers to the jury's "acceptance of the proof of these circumstances and rejection of evidence . . . that conflicted with the circumstances proved by the State." *Robertson*, 884 N.W.2d at 871 (quotation omitted). In applying the second step, the appellate court must determine the reasonableness of all inferences "that might be drawn from the circumstances proved." *Id.* (quotations omitted). However, "possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995).

The circumstances proved are that appellant was driving M.J.'s SUV; when police attempted to stop the SUV for traffic violations, appellant fled and engaged in a high-speed chase; during the chase, Watkins threw a Glock handgun out the passenger-side window; when police stopped the SUV, appellant and Watkins did not initially follow police commands; a Kel-Tec handgun was found in the console between the two front seats of the SUV; the console appeared to have been modified; a mixture of DNA on the Kel-Tec handgun did not include Watkins' DNA, but appellant could not be ruled out as a contributor to the DNA mixture (although 93.9 percent of the general population could be ruled out); when he was stopped, appellant was wearing a baseball-style cap with an

Oakland Raiders emblem; appellant's property inventory included a cellphone that contained photos of a male who resembled appellant wearing a baseball-style cap with an Oakland Raiders emblem and holding a handgun that looked like the Kel-Tec handgun.

Appellant argues that the circumstances proved are consistent with the rational hypothesis that Watkins possessed the Kel-Tec handgun and hid the gun in the center console before police stopped the SUV. This hypothesis, however, does not account for the photos on appellant's cellphone or the fact that Watkins threw the Glock handgun out the window but not the Kel-Tec. Appellant contends that the person in the photos may not be him and the state produced no evidence that the gun in the photos was the gun found in the center console. But, in addition to holding a gun that looks like the gun found in the console, the man in the photos is wearing a cap that is identical to the cap that appellant was wearing when police stopped the SUV. This combination of circumstances creates a strong inference that the man in the photos is appellant and he is holding the gun that was found in the console. This strong inference makes the alternative hypothesis that Watkins hid the Kel-Tec in the console unreasonable.

Appellant argues that another reasonable hypothesis is that the gun was placed in the center console by one of the other people that M.J. allowed to drive her SUV. Like appellant's first alternative hypothesis, however, this hypothesis does not account for the photos on appellant's cellphone. The photos make this hypothesis unreasonable in the same way that they make appellant's first hypothesis unreasonable; they create a strong inference that appellant was holding the Kel-Tec in the photos. In addition, there is no evidence that any of the other people who drove the SUV possessed a gun, and this

hypothesis requires us to accept the coincidence that a gun left in the console by an unknown driver looks like the gun in the photos.

Furthermore, the supreme court has explained that

> we do not reverse convictions simply because the defendant can point to facts in the record that arguably support a rational inference other than guilt. We consider the inferences that can be drawn from the circumstances proved, which do not include every circumstance as to which there may be some testimony in the case, but only such circumstances as the jury finds proved by the evidence. . . . [T]here may well be in any case testimony on behalf of the defendant as to inconsistent facts and circumstances, not conclusively proved, and which the jury may have a right to and do reject as not proved. Where the jury has rejected conflicting facts and circumstances, we do not draw competing inferences from those facts on appeal.

State v. Stein, 776 N.W.2d 709, 715 (Minn. 2010) (quotations and citation omitted).

The jury had a right to reject M.J.'s testimony that she allowed Owens and about eight others, including Watkins, to drive the SUV, and, even if the jury found the testimony credible, it proved only that several people drove the SUV. Under our standard of review, we defer to the jury's rejection of evidence that conflicted with the circumstances proved by the state. *Robertson*, 884 N.W.2d at 871. The jury's verdict demonstrates that the jury rejected as not proved the circumstance that one of the other eight drivers placed the gun in the center console.

Appellant argues that it is incongruous for a reviewing court to require him to point to evidence in the record that supports his hypothesis of innocence and then refuse to consider the hypothesis on review because, by finding him guilty, the jury must have rejected the hypothesis. But appellant is not required to just point to evidence that supports

his hypothesis of innocence; he is required to point to circumstances proved that support his hypothesis. We determine the reasonableness of all inferences that might be drawn from the circumstances proved, but the jury determines the circumstances that are proved.

The testimony of both M.J. and appellant, if found credible by the jury, would have established facts inconsistent with the hypothesis that appellant was in constructive possession of the Kel-Tec handgun. But we must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). When we apply this assumption, appellant's alternative hypotheses are not reasonable.[1]

Affirmed.

[1] Appellant also presents an alternative hypothesis that he did not immediately stop for police because he knew that there was a warrant for his arrest. The evidence that appellant cites to support this hypothesis, however, is the transcript of his first-appearance hearing. He does not cite evidence that was presented to the jury.