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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1239

State of Minnesota,
Respondent,

vs.

David Donald Ducado Menton,
Appellant.

Filed July 31, 2017
Affirmed
Peterson, Judge

Anoka County District Court
File No. 02-CR-15-6004

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

Anthony C. Palumbo, Anoka County Attorney, Blair Buccicone, Assistant County Attorney, Anoka, Minnesota (for respondent)

Charles F. Clippert, Clippert Law Firm, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Smith, Tracy M., 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 convictions of ineligible person in possession of a firearm or ammunition and fifth-degree controlled-substance crime while using or possessing a

firearm, appellant argues that the convictions must be reversed because the district court erred when instructing the jury. Appellant also raises several issues pro se. We affirm.

FACTS

While on routine patrol in his marked squad car during the evening of September 14, 2015, Officer Daniel Freiberg checked the license plate of a car driven by appellant David Donald Ducado Menton.[1] As Freiberg drove behind Menton, Menton suddenly made an evasive turn or lane change, then a U-turn, and dramatically increased his speed to 73 miles per hour in a posted 45-mile-per-hour zone. Freiberg needed to drive "about 90 to 100 miles an hour" to keep up with Menton, and Menton's car was finally disabled by police after he drove the wrong way on a busy street. Patricia Myers was sitting in the front passenger seat of Menton's car. Menton ran from the car and was apprehended by police a short time later.

Police found various items of identification and contraband inside and outside the car. A short distance from the car, they found a purse that contained a hypodermic needle and a glass pipe with a white residue that tested positive for methamphetamine; the purse also contained identification for Menton and Myers. Inside the car, they found Menton's driver's license in the center console. On the driver's side of the back seat, there were a green-and-black "DC" brand backpack, a black backpack, and an open computer case.[2] The computer case held a box that contained 54 rounds of .22 caliber ammunition. The

[1] Menton was not the registered owner of the vehicle.

[2] On the passenger's side of the back seat, there was a smaller black bag that contained no contraband.

black backpack held men's clothing and personal items, and, inside separate compartments within the backpack, police found a holster, more ammunition, and two handguns: a loaded .22 caliber silver revolver and a .25 caliber black Beretta. Inside two pairs of jeans in the black backpack, police found a medium-size plastic bag that contained numerous smaller plastic bags of the type that is typically used for packaging drugs, a metal pipe that had marijuana residue, two hypodermic needles, and two bags of methamphetamine with a total stipulated weight of less than 3 grams. The "DC" backpack contained women's clothing, a laptop computer with Myers's name lit up on the screen, miscellaneous drug paraphernalia, and 22 grams of methamphetamine.

Menton was charged with two counts of fifth-degree controlled-substance crime, in violation of Minn. Stat. § 152.025, subd. 2(b)(1) (2014), one count of fleeing a peace officer in a motor vehicle, in violation of Minn. Stat. § 609.487, subd. 3 (2014), and one count of possession of a firearm by an ineligible person, in violation of Minn. Stat. § 624.713, subd. 1(2) (2014). Menton did not testify at trial, but he stipulated that the drugs found in the black backpack were methamphetamine weighing less than three grams. Menton also stipulated that he had a prior felony conviction in another state for manufacturing or delivering methamphetamine, which made him "ineligible to possess any firearms and ammunition pursuant to Minn. Stat. § 624.713 and is an enhancing factor as to [Minn. Stat.] § 152.025."

The jury convicted Menton of all charges. The district court imposed a 60-month executed sentence for the firearm conviction and concurrent executed sentences of lesser durations for the other convictions. This appeal follows.

D E C I S I O N

I.

Menton argues that the district court's jury instructions were erroneous. Menton did not object to the instructions at trial.

> Failure to object to jury instructions generally results in a waiver of the issue on appeal. Even in the absence of objection at trial, however, we have discretion to review a claim of error on appeal if the jury instructions contain plain error affecting substantial rights or an error of fundamental law. Such errors may be addressed on appeal if there was (1) error, (2) that is plain, and (3) affects substantial rights. If the error was prejudicial and affected the outcome of the case, the third prong of this test is met. Plain error will be considered prejudicial if there is a reasonable likelihood that the error had a significant effect on the jury's verdict. If all three prongs of the plain error test are met, we then determine whether we should address the error to ensure fairness and the integrity of the judicial proceedings.
>
> We analyze jury instructions with the understanding that trial courts possess significant discretion in the selection of instruction language and that instructions must be read as a whole to determine whether they accurately describe the law. If the instructions, when read as a whole, correctly state the law in language that can be understood by the jury, there is no reversible error.

State v. Laine, 715 N.W.2d 425, 432 (Minn. 2006) (citations and quotations omitted).

Instruction for Possession of Controlled Substance While Possessing a Firearm

Minnesota imposes mandatory minimum sentences for certain offenses committed by a defendant who possesses a firearm. Any defendant who commits a felony violation of Minn. Stat. §§ 152.01-.205 (2014),[3]

> in which the defendant or an accomplice, at the time of the offense, had in possession or used, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm, shall be committed to the commissioner of corrections for not less than three years, nor more than the maximum sentence provided by law.

Minn. Stat. § 609.11, subd. 5 (2014). "Possession of a firearm may be proved through actual or constructive possession." *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015).

The district court gave the following instruction on the possession-of-a-firearm element of the controlled-substance offense:

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[3] "'Felony' means a crime for which a sentence of imprisonment for more than one year may be imposed." Minn. Stat. § 609.02, subd. 2 (2014). "A person is guilty of controlled substance crime in the fifth degree . . . if . . . the person unlawfully possesses one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV." Minn. Stat. § 152.025, subd. 2(a)(1).

> [I]f a person is guilty of a controlled substance crime in the fifth degree and the conviction is a subsequent controlled substance conviction, the person convicted shall be committed to the commissioner of corrections or to a local correctional authority for not less than six months nor more than ten years . . . if . . . the person unlawfully possesses one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV.

Minn. Stat. § 152.025, subd. 2(b)(1). Methamphetamine is classified in Schedule II. Minn. Stat. § 152.02, subd. 3(d)(2). Menton stipulated that he was previously convicted of manufacturing or delivering methamphetamine. Thus, his current conviction of possessing methamphetamine is a felony violation.

> If you find defendant guilty of controlled substance crime in the fifth degree, you have an additional issue to determine, and it will be put to you in the form of a question on the verdict form. The question is: At the time of the commission of the offense, was the defendant in possession of a firearm?
>
> A firearm is a device designed to be used as a weapon that expels a projectile in the form of any explosion or force of combustion. You are further advised that possession can be actual or constructive. Constructive possession can be inferred when a firearm is in reasonable proximity to the defendant or to the drugs.
>
> *In deciding whether to draw this inference, you should consider, among other factors, whether the presence of the firearm increased the risk of violence and the degree the risk was increased, the nature, type, condition of the firearm, its ownership, whether it was loaded, its ease of accessibility, its proximity to the drugs and to the defendant, why the firearm was present, and whether the nature of the offense of controlled substance crime in the fifth degree is frequently or typically accompanied by the use of a firearm.*
>
> Possession defined. A person possesses a firearm if it is on his person. A person also possesses a firearm if it was in a place under his exclusive control to which other people did not normally have access or if found in a place to which others had access, he knowingly exercised dominion and control over it.

(Emphasis added.)

Citing only the emphasized language in this instruction, Menton argues that the instruction significantly alters the plain language of Minn. Stat. § 609.11, subd. 5. Menton contends that

> the jury should have been instructed to consider whether Menton possessed or used a firearm during the offense. Instead the jury was asked to consider whether the firearm increased the risk of violence and instructed the jury to consider the type of gun, its ownership, whether it was loaded. All these facts are irrelevant in determining whether Menton used or possessed a firearm at the time of the offense. The instruction

> seems to presume possession and then ask the jury to determine whether the presence of the gun increased the risk of violence.

This argument ignores the language of the instruction in the two paragraphs immediately preceding the emphasized language where the jury was explicitly instructed that it would have to answer the question, "At the time of the commission of the offense, was the defendant in possession of a firearm?" The emphasized language in the instruction was used to comply with the supreme court's decision in *State v. Royster*, 590 N.W.2d 82 (Minn. 1999).

In *Royster*, the supreme court considered "what should be the test for determining when constructive possession while committing the predicate offense should trigger the mandatory minimum sentence under Minn. Stat. § 609.11, subd. 5." *Id.* at 85. The supreme court said:

> The sentence enhancement amendment reflects the obvious reality that possession of a firearm while committing a predicate felony offense substantially increases the risk of violence, whether or not the offender actually uses the firearm. The firearm in possession was recognized by the legislature as an insurance policy to be used to further the crime if need be and clearly raises the stakes of severe injury or death as a result of the commission of the predicate offenses. It seems reasonable then to examine all aspects of the firearm in possession to determine whether it was reasonable to assume that its presence increased the risk of violence and to what degree the risk is increased: the nature, type and condition of the firearm, its ownership, whether it was loaded, its ease of accessibility, its proximity to the drugs, why the firearm was present and whether the nature of the predicate offense is frequently or typically accompanied by use of a firearm, to name a few considerations.

Id. (quotation and footnote omitted). The supreme court concluded in *Royster* that the evidence of the defendant's constructive possession of a firearm was sufficient to trigger the sentence enhancement when police recovered narcotics from a boot in the defendant's bedroom and a "fully-loaded .22 revolver from underneath [the defendant's] mattress located approximately three feet from the boot." *Id.* at 83, 85.

Menton argues that relying on *Royster* is no longer appropriate because, in *State v. Barker*, 705 N.W.2d 768 (Minn. 2005), the supreme court recognized that section 609.11 is unconstitutional. But, in *Barker*, the supreme court held that "section 609.11 is unconstitutional to the extent that it authorizes the district court to make an upward durational departure upon finding a sentencing factor without the aid of a jury or admission by the defendant." *Id.* at 773. The holding of *Barker* addresses whether sentencing enhancement under section 609.11 violates a defendant's Sixth Amendment jury-trial rights as set forth in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *Id.* at 771-73. *Barker* does not address a jury-instruction issue in a constructive-possession case. Menton's reliance on *Barker* is misplaced.

Contrary to Menton's argument, and consistent with *Royster*, when considering whether constructive possession of a firearm should trigger the mandatory minimum sentence under Minn. Stat. § 609.11, subd. 5, the jury may consider "all aspects of the firearm" to determine whether its presence increased the risk of violence. 590 N.W.2d at 85. The instructions, when read as a whole, correctly stated the law in language that could be understood by the jury, and there was no plain error in the jury instructions.

Menton also argues that the jury instruction for possession or use of a firearm while possessing a controlled substance misstated the law and improperly deviated from the pattern jury instruction. The district court instructed the jury that "[c]onstructive possession can be inferred when a firearm is in reasonable proximity to the defendant or to the drugs" and "[i]n deciding whether to draw this inference, you should consider, among other factors, whether the presence of the firearm increased the risk of violence and the degree the risk was increased." Menton contends that this instruction was plain error because it "included an improper inference and did not state the proper burden of proof."

A district court should avoid giving "jury instructions advising that a particular fact may be inferred from other particular facts, if proved." *State v. Litzau*, 650 N.W.2d 177, 185-86 (Minn. 2002) (reversing for cumulative errors that included an erroneous inference instruction on possession of a controlled substance). In *State v. Flowers*, the supreme court reiterated the "admonition that jury instructions indicating that a particular fact may be inferred from other particular facts, if proved, should be avoided." 734 N.W.2d 239, 262 (Minn. 2007). The supreme court concluded that the district court's failure "to properly inform the jury that any inference was permissive" or "that [the jury] was not required to accept that the inference necessarily followed from the facts" was error. *Id.* at 262.

In this case, the district court used the phrase, "in deciding whether to draw this inference, you should consider, among other factors," which properly informed the jury that any inference was permissive and that it was the jury's decision whether to draw an inference. The instruction identified factors to consider, but it did not identify any particular

fact that would establish an inference. And the instruction did not limit the factors that the jury could consider. The instruction did not include an improper inference.

Menton also argues that the jury instruction improperly deviated from the pattern jury instruction and reduced the burden of proof because it asked the jury to find whether the firearm *increased* the risk of violence. The pattern jury instruction states: "In determining whether Defendant possessed a firearm in a manner that *substantially increased* the risk of violence, you may consider the nature, type and condition of the firearm . . . , its proximity to the [drugs] . . . , why the firearm was present, and any other factor that bears upon the risk of violence." 10 *Minnesota Practice*, CRIMJIG 8.01 (2015) (emphasis added).

In *Royster*, the supreme court referred to "the obvious reality that possession of a firearm while committing a predicate felony offense *substantially increases* the risk of violence" and stated that "[i]t seems reasonable then to examine all aspects of the firearm in possession to determine whether it was reasonable to assume that its presence *increased* the risk of violence." 590 N.W.2d at 85 (emphasis added). And in a decision that applied *Royster*, this court stated that the issue was "'whether the constructive possession *increased* the risk of violence.'" *Salcido-Perez v. State*, 615 N.W.2d 846, 848 (Minn. App. 2000) (quoting *Royster*, 590 N.W.2d at 85 (emphasis added)), *review denied* (Minn. Sept. 13, 2000). Because these decisions do not clearly establish that a substantially increased risk of violence, rather than a mere increased risk of violence, is the standard to apply when determining constructive possession, instructing the jury to find whether the firearm

increased the risk of violence was not plain error. *See State v. Ayala-Leyva*, 848 N.W.2d 546, 555 (Minn. App. 2014) (finding no plain error in jury instruction when the state of the law was "cloudy" or "unsettled"), *review denied* (Minn. Aug. 11, 2015).

Instruction for Possession of Firearm by an Ineligible Person

Menton argues that the district court's jury instruction for possession of a firearm or ammunition by an ineligible person did not properly define the crime charged and explain the elements of the crime. He contends that the district court should have instructed the jury on the meanings of "firearm" and "ammunition." Because "firearm" and "ammunition" are both common words with well-known meanings, and the firearms and ammunition in this case were common types of those items, we observe no error in the district court's failure to define those words in its instruction for the offense of possession of a firearm or ammunition by an ineligible person. The instruction, when read as a whole, correctly stated the law in language that the jury could understand.

Menton argues that the district court erred by instructing the jury that, if ammunition or a firearm "were found in a place where others had access," to find Menton guilty, the jury needed to find that "he knowingly exercised dominion *or* control over the ammunition or the firearm." (Emphasis added.) Menton contends that the phrase "dominion *and* control" should have been used in the instruction. Using the disjunctive "or" rather than the conjunctive "and" was of no import because "dominion" and "control" have the same meaning. *See Black's Law Dictionary* 594 (10th ed. 2009) (defining "dominion" as "[c]ontrol."). Further, the phrase "dominion and control" was used three other times in the

instructions to define constructive possession of a firearm with reference to the controlled-substance conviction. The isolated use of "or" suggests that the district court merely misspoke when orally delivering the instructions. The district court also permitted the written instructions, which stated "dominion and control," to be used by the jury during deliberations.

Even if every instruction that Menton challenges had constituted plain error, we would not conclude that Menton's substantial rights were affected under the plain-error analysis.

> An error affects substantial rights if it is prejudicial and affected the outcome of the case. An error in instructing the jury is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury's verdict. The court's analysis under this third prong of the plain error test is the equivalent of a harmless error analysis.

Ayala-Leyva, 848 N.W.2d at 555 (quotations and citations omitted). Police found the following items in a backpack behind the driver's seat in the car that Menton was driving: a loaded handgun, an empty handgun, bullets, methamphetamine, drug-packaging materials, and clothing and other items that typically would belong to a male. Menton, a male, stipulated that he was ineligible to possess a firearm. Other controlled substances and drug paraphernalia were found inside and outside the car. No fact issue was raised at trial regarding whether the handguns were firearms, whether the bullets were ammunition, or whether the drugs found were other than the types or amounts set forth by the state. There is no reasonable likelihood that the claimed errors in the jury instructions given had a significant effect on the jury's verdict.

II.

In a pro se brief, Menton argues that (1) police illegally recorded his conversations while he was in jail, (2) a police officer incorrectly testified that Myers identified Menton as the driver of the car, and (3) the prosecutor and an arresting officer were related and went to lunch together on the second day of trial. Menton cites no factual support for these claims in the record, and the only legal authority he cites is *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), and he does not explain how that case supports the claims.

"Pro se litigants are generally held to the same standards as attorneys." *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). Claims are deemed waived if they fail to "contain an argument or citation to legal authority in support of the allegations raised." *Id*. Menton did not provide a record of the jail recordings that he challenges and offers no legal support for his assertion that law-enforcement officers were prohibited from recording his conversations while he was in jail. *See State v. Palmer*, 391 N.W.2d 857, 859 n.1 (Minn. App. 1986) (requiring appellant to provide reviewing court with record sufficient to demonstrate error); *State v. Taylor*, 869 N.W.2d 1, 22 (Minn. 2015) (considering and rejecting claim that district court abused its discretion by admitting recording of telephone call defendant made from jail).

Menton cites no admissible evidence to support his claim that he was not the driver of the car. Menton argues that Myers told an officer at the scene of the stop that Menton was not the driver. That evidence was hearsay, however, and it was contradicted by Officer

Freiberg, who testified that he saw Menton when he got out of the driver's side of the car. *See* Minn. R. Evid. 802 (stating that hearsay is generally inadmissible).

Menton also argues that there is a family relationship between the prosecutor and Officer Freiberg and that the two had lunch together on the second day of trial. Menton contends that this family relationship had a very big impact on how poorly this case was handled and that the two having lunch together during the trial seems unlawful or, at least, unprofessional. The record, however, does not establish that the contact occurred or that the issue was brought to the district court's attention.

Finally, Menton argues that, although Myers did have his identification in her possession, that evidence does not show that he is guilty of any of the charges. But the evidence that Myers possessed Menton's identification is not the only evidence that was admitted at trial. On appeal, this court reviews the entire record in the light most favorable to the conviction in deciding whether the evidence is sufficient to support a jury verdict. *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004). The record evidence is sufficient to support the verdict.

Affirmed.