STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1286

State of Minnesota,
Respondent,

vs.

Fernell Damon Nickson,
Appellant.

Filed June 12, 2017
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CR-16-8987

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

Michael Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Cleary, Chief Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Following his conviction of unlawful possession of a firearm, appellant argues that (1) the evidence was insufficient to convict him because the state failed to prove that he was in possession of a firearm; (2) a new trial is required because the district court wrongfully denied his request for alternative jury instructions; and (3) he is entitled to a new trial because the prosecutor engaged in misconduct during closing argument. Because the evidence in the record was sufficient to prove that appellant possessed the firearm, the district court's instructions were appropriate, and there was no prosecutorial misconduct, we affirm.

FACTS

On November 17, 2015, a van carrying five men was stopped for driving with an expired registration. At first, the driver was unable to provide a proper driver's license, claiming he did not have one. Later, the driver gave the police officer his driver's license. Most, if not all, of the occupants of the vehicle were smoking. The van was registered to the driver's ex-wife, who, at the time, had a restraining order against him. Appellant Fernell Damon Nickson was identified as a passenger in the vehicle, sitting in the back behind the middle seats of the van on a pile of clothing. There was no seat installed in this location. Appellant was the only passenger who gave a false name to the police officer.

The police officer suspected that one or more of the occupants of the vehicle were involved in controlled-substance activity because (1) the driver said that he did not have a license when he actually did have one; (2) the driver said he did not know whose vehicle

it was when it actually belonged to his ex-wife, who had a no-contact order against him; (3) the driver did not want to look for his insurance; (4) when the vehicle was pulled over, several of the occupants started smoking, which is sometimes done to mask the odor of a controlled substance; and (5) while obtaining information from the passengers of the vehicle, the police officer observed multiple BB's[1] on the floor along with "what appeared to be [a] plunger [and] a white plastic piece of a syringe sticking out from under some clothing."

Based on these observations, the police officer conducted a K-9 sniff of the exterior of the vehicle. The dog, trained to search for and recognize cocaine, crack, heroin, methamphetamine, and marijuana, alerted to the presence of a controlled substance. Once the K-9 alerted to the exterior of the van, the police officer searched the vehicle and found a syringe, a strap, some Q-tips, and a glass ball pipe with residue consistent with smoking methamphetamine.

Under the pile of clothes on which appellant was sitting, the police found a 40-caliber semiautomatic handgun (the gun). Appellant was identified as the individual sitting closest to the gun. Several 40-caliber bullets were found in the pockets of another passenger. Throughout the search, the police officer was wearing rubber gloves. The police officer did not remember if he changed gloves between searching through the van and picking up the gun. The police officer carried the gun to the squad car by the sides of its handle and the base of the magazine.

[1] A shot pellet for use in an air gun. *Webster's Ninth New Collegiate Dictionary* 136 (1985).

The gun was examined after it was transported to the police station. Fingerprint analysis was done on the gun and the magazine cartridge, but the police did not discover any fingerprints that they were able to analyze. Respondent's DNA analyst stated that "[t]here [were] too many contributors of DNA [on the gun]." She admitted that there was some DNA on the gun but she could not make a comparison to the DNA of the four people that were arrested.

However, on the magazine there was a mixture of DNA from two or more individuals. The DNA analyst testified that she "obtained a predominant DNA profile[2] [from the magazine] that matched the DNA profile from [appellant] and [did] not match the DNA profile from [the other men in the vehicle]." She also testified that a person who touched something more often than another person might have a more predominant profile on the object.

On cross-examination, the DNA analyst testified that there were too many contributors to the DNA on the grip, the trigger, and the slide of the gun to test it for DNA. She also testified that there were at least two contributors to the magazine sample and the predominant DNA profile was appellant's, but there was no match for the other contributor. On redirect, the DNA analyst testified that a predominant profile is not likely to occur from a secondary type transfer.[3]

---

[2] A predominant profile "occurs when you have evidence of a single individual or single profile within [a] mix sample [of DNA] that's present at a disproportionately high level."

[3] A secondary transfer occurs when person A touches item one with person B's DNA on it or shakes hands with person B and then touches item two and places person B's DNA on item two.

Appellant requested special jury instructions be given defining "dominion," "control," and the elements of "constructive possession." The district court denied the request.

The jury found appellant guilty, and he was sentenced to 60 months in prison.

D E C I S I O N

I. Was there sufficient evidence for a jury to find that appellant was in possession of a firearm?

Appellant argues that respondent failed to provide sufficient evidence to prove, beyond a reasonable doubt, that appellant had possession of the gun. In considering a claim of insufficient evidence, an appellate court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "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). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

In order to convict appellant, respondent must establish either actual or constructive possession of a firearm. *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001). In order to prove constructive possession, respondent was required to show that there is a

strong probability, inferable from the evidence, that defendant was consciously exercising dominion and control over it at the time. *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). "Proximity is an important factor in establishing constructive possession." *Breaux*, 620 N.W.2d at 334.

Respondent argues that it provided direct evidence of appellant's constructive possession of the gun, citing an unpublished decision holding that "in a gun-possession case, physical evidence that the defendant's DNA is on the gun[,] corroborated by uncontested scientific testimony that the DNA likely got there by the defendant's handling of the gun[,] is direct evidence of possession." *State v. Jiggetts*, 2014 WL 349609 at *3 (Minn. App. Feb. 3, 2014). Direct evidence is evidence that, if believed, directly proves the existence of a fact without requiring any inferences by the fact-finder. *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). Circumstantial evidence, on the other hand, is evidence based on inference and not on personal knowledge or observation. *Bernhardt*, 684 N.W.2d at 477 n.11.

Although *Jiggetts* is unpublished, we conclude that it is persuasive. In *Jiggetts*, the DNA material taken from the gun was a mixture from at least four people, with the predominant profile matching the appellant and testimony indicating that the profile was unlikely to occur more than once among unrelated persons in the world's population. *Id.* at *1. Applying the rationale in *Jiggetts* to this case, we conclude that, because appellant's DNA was the predominant profile on the gun's magazine, there is direct evidence that he possessed the gun. As in *Jiggetts*, scientific evidence indicated that a secondary transfer was unlikely to result in a predominant DNA profile. The DNA analyst testified that there

were at least two contributors to the DNA on the magazine but only one predominant profile, which belonged to appellant. The DNA profile obtained from the item "would not be expected to occur more than once among unrelated individuals in the world's population." She also testified that a person who touches an object more often than another person might have a more predominant DNA profile on the object.

We also conclude that there is sufficient circumstantial evidence to prove that appellant possessed the gun. "[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). "While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *Jones*, 516 N.W.2d at 549. A jury, however, is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430.

In applying the circumstantial evidence standard, the reviewing court uses a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). "The first step is to identify the circumstances proved. In identifying the circumstances proved, we defer to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id*. at 598-99 (quotation and citation omitted). "The second step is to determine whether the circumstances proved

are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 599 (quotation omitted).

In this case, the circumstances proved are: (1) the predominant DNA profile on the gun's magazine was appellant's and it was the only one that matched; (2) appellant was sitting on top of the clothes pile where the gun was found and the person closest to the gun; (3) appellant was the only person in the vehicle to give a false name; (4) appellant had an outstanding warrant for his arrest; (5) bullets for the gun were found in the pockets of another passenger in the van; and (6) the police officer *may* have picked up the gun near the magazine without first changing his gloves to prevent contamination from the other items in the van.

Appellant argues that it is a reasonable and rational inference that the gun was possessed by either the driver and owner of the van or the passenger who was in possession of the bullets. We disagree. Neither of appellant's suggested alternatives had a predominant DNA profile anywhere on the gun; appellant did. Appellant was also the closest person to the gun at the time the vehicle was stopped. Proximity is significant when considering constructive possession. *Breaux*, 620 N.W.2d at 334.

Appellant attempts to discredit having the predominant profile on the gun magazine by arguing that the police officer did not change his gloves when he touched the gun after searching through the vehicle. But the police officer's testimony does not support that argument. When he was asked if he changed his rubber gloves or used the same for the search and the removal of the gun, he responded, "I don't recall. I don't recall." Viewing the evidence in the light most favorable to the verdict, we assume the jury concluded that

the officer changed his gloves, thus eliminating the potential for secondary transfer of DNA. Moreover, the DNA analyst testified that a predominant profile would likely not occur from a secondary transfer. Viewed in the light most favorable to the verdict, appellant cannot point to any evidence that indicates the police officer did not follow proper protocol in collecting the gun or that suggests a secondary transfer is likely to have resulted in a predominant DNA profile.

Moreover, the DNA witness testified that the DNA profile of a person who touched an object more than others might be more predominant. Thus, a jury could reasonably find that appellant handled the handgun more often than anyone else in the vehicle. Further, an item that is constructively possessed may be possessed by more than one person. *State v. Porte*, 832 N.W.2d 303, 308 (Minn. App. 2013). This supports the conclusion that, because appellant's was the predominant profile on the gun magazine, appellant constructively possessed the gun.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that there was sufficient evidence that appellant possessed the gun.

II. Did the district court err in denying appellant's requested jury instructions?

Prior to trial, appellant submitted proposed jury instructions defining "dominion" and "control" and giving the elements of constructive possession. The district court rejected the proposed instructions. At trial, the district court instructed the jury:

> The law recognizes two kinds of possession: "[a]ctual possession" and "constructive possession." A person who knowingly has direct physical control over a thing is in actual possession of it. A person who is not in actual possession of a thing, but *who knowingly has the power and the intention to*

> *exercise authority and control over it, is in constructive possession of it.*

(Emphasis added.) Appellant argues that this instruction provided the jury with an erroneous definition of "constructive possession" and prejudiced appellant's right to a fair trial. We disagree.

A district court has "considerable latitude" in the selection of language for the jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). The refusal to give a requested jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

We conclude that the instructions given by the district court are the functional equivalent of the model jury instruction, which has been found to state the correct legal standard, and that the district court did not abuse its discretion in its instruction on constructive possession.[4] However, we caution the district court that, while the model jury instructions are guidelines and are not mandatory rules, *State v. Kelley*, 734 N.W.2d 689,

[4] In several unpublished opinions this court has considered and upheld the use of similar jury instructions as functional equivalents of the model jury instruction. *See e.g.*, *State v. Nelson*, 2010 WL 24846688 at *4-5 (Minn. App. June 22, 2010). Although an unpublished decision and therefore of no precedential value, this court's analysis in *Nelson* is persuasive and applicable to this case. *See* Minn. Stat. § 480A.08, subd. 3 (2016).

695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007), the district court should use them, unless there is a clear reason not to do so.

Appellant also argues that the district court erred when it failed to use his proposed instructions defining "dominion" as "'supreme authority'; 'absolute ownership'; [and t]he right of the owner of a thing to use it or dispose of it at his pleasure" and "control" as "to direct the actions or function of an object: to cause the object to act or function in a certain way." But this court "hold[s] that 'dominion' simply means 'control' in the context of the 'dominion and control' standard . . . much like 'null and void,' 'force and effect,' 'free and clear,' 'full and complete,' and so on." *State v. Arnold*, 794 N.W.2d 397, 404 (Minn. App. 2011). Moreover, defining "dominion" as "supreme authority" or "absolute ownership," as appellant proposed would undermine *State v. Robinson*, 517 N.W.2d 336, 340 (Minn. 1994) (holding that "dominion may be shared with others").

In any event, it would have been confusing to the jury to define "dominion," because the district court did not use the word "dominion" anywhere in its instructions, and it was not necessary to define "control." The jury was instructed that, if a word or phrase was not defined, it was to "apply the common, ordinary meaning of that word or phrase." Common meanings of "control" include "to exercise restraining or directing influence over," or "to have power over." *Webster's Ninth New Collegiate Dictionary* 285 (1986). A district court is not required to define words of common usage that are within the jurors' ordinary understanding. *See State v. Harlin*, 771 N.W.2d 46, 52 (Minn. App. 2009) (lack of definition of "intent" was not error because it has a common meaning). Because "control"

has a common meaning within the jury's ordinary understanding, the failure to define "control" was not in error.

We conclude that the district court did not abuse its discretion in instructing the jury.

III. Is appellant entitled to a new trial because of prosecutorial misconduct in respondent's closing arguments?

"If the defendant failed to object to the misconduct at trial, he forfeits the right to have the issue considered on appeal, but if the error is sufficient, this court may review." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). When the defendant fails to object, prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Appellant must show that an error occurred and that the error was plain, but the burden shifts to the prosecution on the third or "prejudice" prong, to prove that there is no reasonable likelihood that the absence of the misconduct would have a significant effect on the jury's verdict. *Id.*

Appellant failed to object to the misconduct at trial, but he now argues that the prosecutor committed misconduct by (1) arguing facts not in evidence, (2) misstating the law on constructive possession, and (3) shifting the burden of proof.

Facts Not in Evidence

Appellant argues that the prosecutor argued facts not in evidence when he told the jury that (1) methamphetamine was being smoked in the van, and (2) appellant hid the gun

under himself. We conclude that the prosecutor made reasonable inferences and did not argue facts not in evidence.

"It is misconduct for a prosecutor to intentionally misstate evidence or to appeal to the passions of the jury. . . . [A] prosecutor should not refer to facts not in evidence or vouch for the veracity of any particular evidence." *State v. McArthur*, 730 N.W.2d 44, 53 (Minn. 2007) (citation omitted). The state's closing argument "must be based on the evidence produced at trial, *or the reasonable inferences from that evidence*." *State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006) (emphasis added).

Evidence in the record shows that (1) a syringe and a glass pipe containing methamphetamine residue were on the floor of the van; (2) the K-9 alerted to the smell of narcotics in the van; (3) several of the van's occupants were smoking which, based on the officer's training and experience, is common when attempting to mask the smell of drugs; and (4) several people in the vehicle were "smoking in . . . nervousness," which was reasonable if someone had recently been smoking methamphetamine in the van. Based on this evidence in the record, the officer's inference that someone in the van had been smoking methamphetamine was reasonable. Even if there were other reasons that the occupants of the vehicle would be nervous, the inference that they were nervous because someone had been smoking illegal drugs in the car was reasonable.

Evidence in the record also reflects that (1) appellant's DNA was on the gun magazine, (2) appellant was sitting on the pile of clothing concealing the gun, and (3) appellant lied about his identity. From this evidence, the prosecutor could reasonably

infer that, because a gun is not commonly kept under a pile of clothing, appellant hid the gun under himself.

Appellant's argument that the prosecutor wrongfully referred to appellant as nervous is unfounded. The prosecutor does not state that appellant specifically was acting nervously, but rather that "the people in the van became nervous." Because the closing argument was supported by reasonable inferences, we conclude that the prosecutor did not argue facts not in evidence.

Misstating the Law on Constructive Possession

Appellant next argues that the prosecutor misstated the law on constructive possession by saying that "the law of Minnesota is that if you put something somewhere, you have the authority and control over that item." Appellant argues that this is a misstatement of the law because it "expand[s] constructive possession to include any item that a person may have 'put somewhere,' regardless of whether the person had abandoned the item." While we recognize that this is a misstatement of the law of constructive possession, we conclude that, in the context of the argument, the misstatement was harmless.

"This court has . . . held that a defendant may constructively possess a firearm if he placed the firearm where it was discovered." *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). In his closing argument, the prosecutor said that appellant actually possessed the gun and shoved it in the clothes under him, and that, even though appellant was no longer in physical possession of the gun, he still had possession of it under the law. The prosecutor then added, "The law of Minnesota is that

if you put something somewhere, you have the authority and control over the item." Taken out of context, this is a misstatement of the law because it does not account for a person abandoning the weapon so anyone who held a gun and set it down could be said to be in constructive possession. However, in context, it was clear that appellant did not abandon the gun, but rather hid it from the police.

Shifting the Burden of Proof

Appellant argues that the prosecutor improperly shifted the burden of proof onto appellant by stating: "They're going to suggest he had no knowledge of the gun. He had nothing to do with the gun. *There is no evidence to support that.* The only evidence here shows he had the gun, touched the gun and held the gun. He hid the gun. He possessed the gun."

A prosecutor improperly shifts the burden of proof when he implies that a defendant has the burden of proving his innocence. *State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009). "A prosecutor's misstatement of the burden of proof is highly improper and constitutes misconduct." *Id.* (quotation omitted). A prosecutor may not comment on a defendant's failure to call a witness. *State v. Mayhorn*, 720 N.W.2d 776, 787 (Minn. 2006). But "a prosecutor's comment on the lack of evidence supporting a defense theory does not improperly shift the burden." *State v. Nissalke*, 801 N.W.2d 82, 106 (Minn. 2011) (quotation omitted).

While the prosecutor's comment was inappropriate, we conclude that, in this particular case, the comment was not an improper burden-shifting statement. Rather, it was a comment that there was "an absence of evidence to support theories that [appellant]

put before the jury." *See id.* at 107. It was not a comment on appellant's failure to call witnesses or his failure to testify, but rather a statement that nothing in the record indicated that appellant had no knowledge of the gun and had nothing to do with it. In this case, the prosecutor's comments, taken as a whole, do not show plain error. *See Finnegan v. State*, 764 N.W.2d 856, 865 (Minn. 2009).

Because there was no misstatement of the law and no improper burden shifting, we conclude that there was no prosecutorial misconduct.

Affirmed.