STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0027

State of Minnesota,
Respondent,

vs.

Jesus Octavio Peralta,
Appellant.

Filed December 26, 2017
Affirmed
Smith, Tracy M., Judge

Pennington County District Court
File No. 57-CR-16-295

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Alan G. Rogalla, Pennington County Attorney, Thief River Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

During a search of appellant Jesus Octavio Peralta's home, probation officers discovered multiple bullets and a bag containing methamphetamine in his shared bedroom.

Peralta challenges his subsequent convictions of felon in possession of ammunition and fifth-degree possession of a controlled substance, arguing that (1) the felon-in-possession conviction violated his due process rights because ammunition was not listed as a prohibited item on his conditions of release following a previous conviction, (2) the evidence is insufficient to prove that Peralta constructively possessed the methamphetamine, (3) the district court made a number of errors amounting to a violation of Peralta's right to a fair trial, (4) the district court abused its discretion in denying a downward durational departure from the presumptive prison sentence for felon in possession of ammunition, and (5) the district court abused its discretion by functionally imposing an upward durational departure for possession of a controlled substance when it relied on an incorrect criminal history score. We affirm.

FACTS

In April 2016, probation officers searched the home that Peralta shared with his then-girlfriend R.V. and their two minor children, after R.V. failed a urine test during a routine visit with her probation officer. R.V. was present at the search, but Peralta was not. R.V. informed the probation officers that Peralta would arrive home for lunch, but he never returned. In fact, Peralta absconded to North Dakota, violating his release conditions from a prior conviction. Authorities arrested him in North Dakota five days later.

In searching the home, the probation officers observed a camera-based security system with an outdoor surveillance camera and monitors only in the master bedroom. The master bedroom, shared by Peralta and R.V., was locked with a padlock. Probation officers opened it with a key from R.V. In a chest of drawers in the bedroom, probation officers

found a bag containing a white crystalline substance (later tested positive for the presence of methamphetamine) in the top drawer, which also contained women's clothing. Probation officers also found four Winchester .30-30 bullets in another chest of drawers in the bedroom's walk-in closet. The closet contained other items, including tools and men's clothing.

Before trial, Peralta filed a motion asking the district court to allow him to admit into evidence the conditions-of-release document that he had been given by the department of corrections upon his release from prison. That document stated that Peralta "must not purchase or otherwise obtain or have in possession any type of firearm or dangerous weapon." Peralta wanted to show that the document did not identify "ammunition" as a prohibited item. The district court denied the motion.

The jury found Peralta guilty on both counts as charged. Between the verdict and final sentencing hearing, the court received a presentence investigation report and two criminal-history worksheets. The second worksheet corrected a mistake in the first worksheet regarding Peralta's criminal history score. The district court denied Peralta's motions for downward durational and dispositional departures, and imposed the presumptive mandatory minimum sentence of 60 months in prison for the felon-in-possession conviction and 17 months in prison for the possession-of-a-controlled-substance conviction. The sentences were to be served concurrently.

Peralta appeals.

D E C I S I O N

I. The felon-in-possession-of-ammunition conviction does not violate Peralta's due process rights.

Peralta asserts that his felon-in-possession conviction violates his procedural due process rights because the department of corrections document listing his conditions of release, by not explicitly prohibiting his possession of ammunition, affirmatively misled him into believing that he was eligible to possess ammunition.[1]

This court reviews de novo whether the state has violated a defendant's due process rights. *State v. Krause*, 817 N.W.2d 136, 144 (Minn. 2012). The Due Process Clause of the United States Constitution guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "The due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the Constitution of the United States." *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988).

Due process prohibits representatives of the state from misleading individuals as to their legal obligations. *Whitten v. State*, 690 N.W.2d 561, 565 (Minn. App. 2005) (citation omitted). Minnesota "follows the long-established rule that a government may not

[1] In his pretrial motion, Peralta did not seek dismissal of the felon-in-possession charge on due-process grounds but rather sought leave to present evidence of his release conditions to the jury to defend against the charge. Generally, "this court will address only those issues that the record shows were presented to and considered by the district court." *Ernster v. Scheele*, 895 N.W.2d 262, 265 (Minn. App. 2017). But regardless of whether the district court's denial of Peralta's motion encompassed a ruling on the constitutionality of the ammunition charge, we may, on appeal, still address the issue. *See State v. Mellett*, 642 N.W.2d 779, 784 (Minn. App. 2002) (invoking Minn. R. Civ. App. P. 103.04 to review constitutional challenge not raised in district court).

officially inform an individual that certain conduct is permitted and then prosecute the individual for engaging in that same conduct." *Id.* at 564 (quotation omitted); *see also Raley v. Ohio*, 360 U.S. 423, 79 S. Ct. 1257 (1959) (reversing contempt convictions after state commissioner informed defendants they had the right to refuse to answer questions).

In *Whitten*, this court held that the district court affirmatively misled the defendant at his felony-probation-discharge hearing by informing him that "[the court is] restor[ing] . . . all civil rights . . . the same as if said conviction had not taken place" and not checking a box on the discharge form that barred Whitten from possessing a firearm. 690 N.W.2d at 562. We vacated Whitten's subsequent felon-in-possession conviction because he was convicted for "exercising a privilege which the State clearly had told him was available to him . . . the most indefensible sort of entrapment." *Id.* at 565 (quotation omitted) (citation omitted).

Minnesota law bars Peralta from possessing ammunition. *See* Minn. Stat. § 624.713, subd. 1(2) (Supp. 2015). Peralta's conditions of release stated that he was barred from "possess[ing] any type of firearm or dangerous weapon" and did not list ammunition. But merely failing to list a law that Peralta must follow does not amount to affirmatively misleading him about his rights. Unlike in *Whitten*, here no representative of the state indicated in any manner to Peralta that he was exempt from the law prohibiting violent offenders from possessing an item.

We conclude that Peralta's conviction for felon-in-possession does not violate his due-process rights because the state did not affirmatively mislead Peralta into thinking he could legally possess ammunition.

II. Sufficient evidence supports Peralta's conviction of fifth-degree possession of a controlled substance.

Peralta argues that circumstantial evidence presented at trial failed to support his conviction of fifth-degree possession of a controlled substance because a rational theory exists that R.V. alone possessed the methamphetamine.

In considering a claim of insufficient evidence, this court conducts a thorough analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, supports the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (citation omitted). We 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). We 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 find the defendant guilty. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

To support a conviction of fifth-degree controlled-substance crime, the state must prove that Peralta unlawfully possessed one or more mixtures containing methamphetamine. Minn. Stat. §§ 152.02 (Supp. 2015), .025, subd. 2(a)(1) (2014). "[T]he state must prove that [the] defendant consciously possessed . . . the substance and that [the] defendant had actual knowledge of the nature of the substance." *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975).

When, as here, a controlled substance is not found on the defendant's person, the state must prove the defendant constructively possessed it by showing (1) that the

controlled substance was in a place under the defendant's exclusive control or (2) that there is a strong probability that the defendant was, at the time of discovery, consciously exercising dominion and control over the substance. *Id.* at 105, 226 N.W.2d at 611; *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015) (noting that Minnesota courts "have consistently applied *Florine*'s analysis as the test for constructive possession"). The constructive-possession doctrine allows a conviction where the state cannot prove actual possession, but where "the inference is strong that the defendant physically possessed the item at one time and did not abandon his possessory interest in it." *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). Constructive possession may be joint or exclusive. *See State v. Ortega*, 770 N.W.2d 145, 150 (Minn. 2009) (stating "[a] person may constructively possess contraband jointly with another person"); *Florine*, 303 Minn. at 105, 226 N.W.2d at 611 (discussing exclusive control).

Knowing possession is typically proved through circumstantial evidence. *State v. Ali*, 775 N.W.2d 914, 919 (Minn. App. 2009), *review denied* (Minn. Feb. 16, 2010). We apply a two-step analysis when reviewing a conviction supported by circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, we identify the circumstances proved, which are the circumstances supporting the jury's verdict. *Id.* at 598-99. Second, we "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 599 (quotation omitted). If the reasonable inferences are consistent with guilt, a defendant must point to evidence in the record that is consistent with a rational hypothesis other than guilt. *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

The circumstances proved here include the following: (1) Peralta lived at the home with R.V. and shared the master bedroom where probation officers found the methamphetamine; (2) the entrance to Peralta and R.V.'s home contained a surveillance camera and the shared master bedroom held the only monitor to view its footage; (3) the shared master bedroom was locked with a padlock, and R.V. possessed a key to open it; (4) probation officers found methamphetamine in the shared master bedroom in a dresser drawer containing women's undergarments; (5) there were tools, men's clothing, and other personal items presumed to belong to Peralta found throughout the shared master bedroom; (6) Peralta was expected to return home for lunch on the day of the search but instead absconded to North Dakota in violation of his probation conditions; (7) Peralta had a history of methamphetamine use.

We next consider whether the above circumstances are consistent with Peralta's guilt. *See Silvernail*, 831 N.W.2d at 599. The security system and the location of the methamphetamine in Peralta's locked bedroom lead to the reasonable inference that Peralta constructively possessed the methamphetamine. Peralta also has a history of using methamphetamine, from which the jury could reasonably infer he knows what a bag of methamphetamine looks like. Finally, because Peralta did not return home when he was supposed to but instead absconded to North Dakota, the jury could reasonably infer that he had purposefully absconded from the state because he knew what the probation officers would find while searching his home. *See State v. Bias*, 419 N.W.2d 480, 485 (Minn. 1988) ("[E]vidence of flight suggests consciousness of guilt."). Together, all of these circumstances allow a jury to reasonably infer that Peralta exercised dominion and control

over the substance in the bedroom sufficient to establish constructive possession of the methamphetamine.

While Peralta acknowledges that the state presented evidence that he and R.V. shared the master bedroom, Peralta asserts that this fact does not rule out the reasonable inference that R.V. alone possessed the methamphetamine. No deference is given to "the fact finder's choice between reasonable inferences." *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010). "[I]f any one or more circumstances found proved are inconsistent with guilt, or consistent with innocence, then a reasonable doubt as to guilt arises." *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010) (quotation omitted).

"A person may constructively possess a controlled substance alone or with others." *State v. Denison*, 607 N.W.2d 796, 799 (Minn. App. 2000), *review denied* (Minn. June 13, 2000). We concluded in *Denison* that the fact that marijuana was found in close proximity to a wife's personal effects in areas of the home over which she exercised at least joint dominion and control with her husband was sufficient to establish joint constructive possession and to support the conviction. *Id.* at 800. Likewise, here, although it may be reasonable to infer from the circumstances that R.V. exercised dominion and control over the substance, that inference is not inconsistent with Peralta's guilt under the theory of joint constructive possession.

Peralta argues that the fact that the methamphetamine was found in a drawer containing women's undergarments, especially in light of R.V.'s history of methamphetamine use, leads to the reasonable inference that R.V. alone knowingly possessed it. But the narrow fact of the women's clothing does not reasonably lead to the

inference of R.V.'s exclusive possession of the substance in light of the totality of the circumstances—specifically, that R.V. and Peralta shared the locked bedroom, and the bedroom contained the personal effects of Peralta in close proximity to the dresser where the substance was found. In addition, Peralta also had a history of methamphetamine use and absconded the day of the search. This case is distinguishable from *State v. Sam*, cited by Peralta, because in that case the defendant's conviction was reversed when it was based on constructive possession of a controlled substance found in the glove box of a borrowed car, not in a home where the defendant resided. 859 N.W.2d 825, 835 (Minn. App. 2015).

Peralta argues that other inferences besides knowledge of the methamphetamine could be drawn from his absconding, specifically, that he fled because he feared retaliation by his probation officers for a grievance he had filed earlier or because R.V. was using methamphetamine. Even if these alternative inferences were supported by more than conjecture, however, the fact of Peralta's absconding is just one among several circumstances proved that are consistent with guilt. We are persuaded that the only reasonable inference from the circumstances proved is that Peralta constructively possessed the methamphetamine jointly with R.V. On this record, we conclude that the evidence is sufficient to prove beyond a reasonable doubt that the Peralta knowingly possessed a controlled substance.

III. The district court did not commit reversible plain error at trial.

Peralta next argues that the cumulative effect of alleged trial errors violated his right to a fair trial. Peralta asserts errors in the district court's evidentiary rulings, jury instructions, and allowance of prosecutorial misconduct. Peralta failed to raise these issues

at trial; therefore, this court applies the plain-error standard. Minn. R. Crim. P. 31.02 ("Plain error affecting a substantial right can be considered by the court . . . on appeal even if it was not brought to the trial court's attention."). The plain-error standard requires that there be (1) error, (2) that was plain, and (3) that affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If we find the three plain-error prongs present, then we should address the error only if we need to ensure the fairness and integrity of the judicial proceedings. *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010).

As to the first and second prongs, an error is plain if it is "clear and obvious; usually this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct." *Id.* As to the third prong—whether the error affected substantial rights—we must consider if the error was prejudicial and affected the outcome of the case. *Id.* Where the alleged error is based on prosecutorial misconduct, however, the burden shifts to the state to show that "there is no reasonable likelihood that the absence of the misconduct . . . would have had a significant effect on the verdict." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). If the claimed error did not affect substantial rights, we need not consider the other plain-error factors. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011).

A. The court did not commit reversible plain error in admitting the officers' testimony concerning constructive possession.

Peralta argues that the court erroneously admitted expert testimony from two law enforcement officers who testified that they arrested Peralta for "constructively possess[ing]" the ammunition and methamphetamine. He contends that admission of the

testimony was plain error because the testimony went to an element of the offense, was not helpful to the jury, and usurped the jury's role as factfinder.

First, we consider whether the district court erred. Courts may permit inquiry into underlying facts when the defendant "introduc[es] certain material . . . creat[ing] in the [state] a right to respond with material that would otherwise have been inadmissible." *State v. Guzman*, 892 N.W.2d 801, 814 (Minn. 2017) (quotation omitted). Known as the opening-the-door doctrine, this doctrine prevents either party from presenting the jury with a "misleading or distorted representation of reality." *Id.* at 815 (quotation omitted). A district court does not plainly err by admitting otherwise impermissible testimony under this doctrine. *Id.* (holding that the district court did not plainly err by finding that Guzman opened the door to testimony about selling guns when on cross-examination the defense asked a witness why inmates discuss money).

Here, on direct examination, neither witness opined whether they thought Peralta constructively possessed the bullets or the methamphetamine. But on cross-examination, Peralta questioned each officer about whether they had witnessed or had any knowledge of Peralta actually possessing the bullets or the methamphetamine. Similar to *Guzman*, Peralta's line of questioning "opened the door" for the state to clarify on redirect examination why the officers arrested Peralta even though they had not found him in actual possession of the items. The state elicited the officers' opinions as to why they thought they could arrest Peralta to clarify the implication of Peralta's questioning that there could be no basis for the arrest. Therefore, the district court did not commit error by admitting the officers' statements after Peralta "opened the door."

Second, even if admission of the evidence was error, the error must also be plain. "Minnesota's rules of evidence permit expert opinion testimony on ultimate issues if such testimony is helpful to the factfinder." *State v. Moore*, 699 N.W.2d 733,740 (Minn. 2005). Peralta has not cited any case holding that opinion testimony by a law-enforcement officer that a defendant constructively possessed contraband is necessarily unhelpful and therefore inadmissible, including in circumstances such as exist here. We conclude that any error was not "clear and obvious." *See Matthews*, 779 N.W.2d at 549.

Third, even if the district court did plainly err, the error must have substantially affected the verdict. When determining if erroneously admitted evidence substantially affected the verdict, we consider "(1) the manner in which the State presented the testimony; (2) whether the testimony was highly persuasive; (3) whether the State used the testimony in closing argument; and (4) whether the defense effectively countered the testimony." *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016) (citation omitted). In analyzing these factors, we observe that the state presented the testimony during redirect examination after Peralta "opened the door" and did not reference it during opening statement; although the testimony was highly persuasive, the state presented other evidence to persuade the jury of Peralta's guilt; the state did not mention the testimony during closing argument; and the defense had the opportunity to effectively recross-examine both witnesses. The *Peltier* factors weigh against the conclusion that the officers' testimony substantially affected the verdict.

We conclude that Peralta has not satisfied the plain-error test regarding admission of the officers' testimony.

B. The court did not commit reversible plain error by failing to sua sponte strike prior-bad-acts evidence.

Peralta argues that the court committed plain error by admitting into evidence testimony concerning Peralta's prior use of methamphetamine that had led to probation violations.

Courts cannot admit evidence of a defendant's prior bad acts, also known as *Spreigl* evidence, to prove his or her propensity to act in conformity with a bad character. Minn. R. Evid. 404(b); *see State v. Spreigl*, 272 Minn. 488, 490-91, 139 N.W.2d 167, 169 (1965). Courts may admit *Spreigl* evidence to prove other relevant issues, such as knowledge. *Id.* at 491, 139 N.W.2d at 169. But, for the evidence to be admissible, the state must, among other things, give notice of its intent to admit the evidence and clearly indicate the purpose of the evidence. *State v. Ness*, 707 N.W.2d 676, 686 (Minn. 2006).

Here, one of the state's witnesses mentioned during redirect examination that "Peralta has a history of methamphetamine use and has had some [probation] violations in regards to that." This testimony is the sole evidence concerning Peralta's prior use of methamphetamine, and Peralta did not object.

In *State v. Vick*, the Minnesota Supreme Court addressed a plain-error challenge to admission of *Spreigl* evidence for which the state gave no notice and to which the defendant made no objection. 632 N.W.2d 676, 685 (Minn. 2001). The supreme court explained that the issue in those circumstances is "*not* whether the trial court erred in admitting the testimony, because the court was not given the opportunity to make that decision." *Id.* Rather, "the precise question . . . is whether the trial court's failure to sua sponte strike the

testimony or to provide a cautionary instruction constituted plain error." *Id*. In rejecting the defendant's argument, the *Vick* court wrote that it was "not compelled to depart from the rule that a trial court's failure to sua sponte strike unnoticed *Spreigl* evidence or provide a cautionary instruction is not ordinarily plain error." *Id.* Peralta has not given us any reason to depart from that rule here.

Even if the district court did plainly err, Peralta has not established that the failure to strike the testimony or give a limiting instruction affected the outcome of the case. Peralta argues that the jury convicted him based on his propensity to possess methamphetamine. But the prosecutor used this testimony to argue that Peralta knew what methamphetamine was, when he stated in closing, "Obviously [Peralta] knew what meth was. [Peralta has] been violated before for meth use." The prosecutor did not suggest that Peralta's prior methamphetamine use should be used for any purpose other than showing that he knew what methamphetamine was. That knowledge, along with other evidence, tended to show that Peralta knowingly possessed methamphetamine when he jointly possessed the substance discovered in his bedroom. Using *Spreigl* evidence for a non-propensity purpose did not affect Peralta's substantial rights.

We conclude that the district court did not commit reversible error by failing to sua sponte strike testimony and issue a limiting instruction concerning Peralta's prior methamphetamine use.

C. The jury instructions did not materially misstate the law.

Peralta argues that the court committed plain error by instructing the jury improperly about the knowledge requirement for constructive possession. District courts are allowed

"considerable latitude" in phrasing jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Jury instructions are erroneous if they materially misstate the law. *State v. Hunter*, 857 N.W.2d 537, 542 (Minn. App. 2014).

The district court instructed the jury regarding possession of ammunition, explaining that an ineligible person who "knowingly possesses ammunition" is guilty of a crime. The district court then explained that the first element of the crime is that the defendant "knowingly possessed ammunition or consciously exercised dominion and control over it." The district court then read the definition of "possession," to include both actual possession and constructive possession. The court explained that "[a] person is in actual possession of ammunition if he has it on his person or is exercising direct physical control over the ammunition at a given time." Next, the court explained that "[a] person is in constructive possession of the ammunition if the ammunition 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, the person knowingly exercised dominion and control over the ammunition."

Peralta challenges two aspects of these instructions. First, he argues that the district court's use of "or" between "knowingly possessed ammunition" and "consciously exercised dominion and control over [ammunition]" when explaining the first element of the offense erroneously indicated two alternative mens rea requirements. We agree that the district court's instruction was not precise. It discussed "knowing possession" and just one type of constructive possession (consciously exercising dominion and control over the substance). But while the instruction may not have been precise, neither is it materially

wrong. Knowing possession does, in fact, establish guilt. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). And so does constructive possession as defined by "consciously or knowingly exercising dominion and control" over the item. *Id.* The district court did not materially misstate the law when it used the disjunctive in this part of the instructions.

Second, Peralta argues that the district court erred in its instruction explaining actual possession (relating to both the ammunition and the methamphetamine charges) because the court made no reference to the knowledge requirement. As explained above, however, the district court had already explained that a person is guilty if the person "knowingly possesses ammunition" and had already discussed "knowingly possess[ing]" or "consciously exercis[ing] dominion and control." Consistent with these instructions, actual possession would have to be knowing. The district court thus did not materially misstate the law by not repeating "knowing" when it described actual possession of ammunition, and the district court carried over its instructions regarding actual possession to the methamphetamine charge. In any event, this case was entirely a constructive-possession case, so any error, even if plain, in instructing on actual possession did not prejudice Peralta or substantially affect the outcome.

D. The prosecutor's alleged misconduct did not affect Peralta's substantial rights.

Peralta argues that the state committed prosecutorial misconduct by misleading the jury about the law under which they could convict Peralta and that the court plainly erred by not sua sponte striking the prosecutor's remarks. Specifically, Peralta challenges the prosecutor's statement that "[t]he State believes that that was proven here today, that

[Peralta] was in constructive possession of methamphetamine. He exercised exclusive control over where that methamphetamine was found, along with his girlfriend, and the same with the ammunition, exclusive control, a locked bedroom in his castle." Peralta failed to object. As noted above, we apply a modified plain-error test to unobjected-to prosecutorial misconduct, which places the burden of establishing a lack of prejudice on the state. *Ramey*, 721 N.W.2d at 302.

We need not analyze whether the district court committed a plain error if the prosecutor's remarks during closing did not affect Peralta's substantial rights under the third prong. *See Montanaro*, 802 N.W.2d at 732 ("Accordingly, if we find that any one of the [plain-error doctrine] requirements is not satisfied, we need not address any of the others."). In determining if a prosecutor's remarks during closing affect a defendant's substantial rights, this court considers (1) the strength of the evidence against the defendant, (2) the pervasiveness of the erroneous conduct, and (3) whether the defendant had a chance to rebut any improper remarks. *Peltier*, 874 N.W. 2d at 805-06.

While the state lacked direct evidence against Peralta, as previously explained, it presented enough circumstantial evidence for the jury to reasonably find Peralta guilty of controlled-substance crime on the ground that he jointly exercised dominion and control over the methamphetamine. The same is true regarding the ammunition, which Peralta does not contest. Moreover, any alleged misstatement of law was not pervasive throughout the state's closing. While the state may not have articulated the knowingly-possesses element clearly, it nonetheless did not pervasively misstate the law. In addition, Peralta had a chance to rebut any confusing statements in the state's closing argument, and, indeed,

did so. Defense counsel, in closing argument acknowledged that the state had correctly referenced the knowledge requirement, stating, "You've been instructed [that constructive possession requires knowledge] by the judge, and [the prosecutor] referenced that fact in her closing argument." Peralta's acknowledgement that the district court instructed on knowledge and that the state correctly referred to the knowledge requirement undercuts Peralta's argument that any alleged misstatements substantially affected the verdict. *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015) (holding defendant's substantial rights unaffected where court failed to sua sponte strike improper testimony but the proper jury instructions corrected any confusion). We conclude that any alleged erroneous statements by the state in its closing argument did not affect Peralta's substantial rights.

IV. The district court did not abuse its discretion by denying Peralta's motion for a downward durational departure in sentencing for felon in possession.

Peralta argues that his conduct represents significantly less-serious conduct than typically involved in committing a felon-in-possession offense and provides a substantial and compelling reason to depart durationally from the sentencing guidelines.

We apply an abuse-of-discretion standard to a sentencing court's decision to deny a motion for a downward sentencing departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). We will affirm the imposition of a presumptive sentence when "the record shows that the sentencing court carefully evaluated all the testimony and information presented before making a determination." *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *review denied* (Minn. Sept. 17, 2013). By affirming a presumptive sentence, this court is merely stating that the district court acted within its

discretion. *State v. Dokken*, 487 N.W.2d 914, 918-19 (Minn. App. 1992), *review denied* (Minn. Sept. 30, 1992). Only a "rare case . . . warrant[s] reversal of the refusal to depart" from a presumptive sentence. *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008).

This is not such a case. The presumptive mandatory minimum sentence for unlawfully possessing ammunition is a 60-month prison term. Minn. Stat. § 609.11, subds. 5(b), 8(b), (2014), subd. 9 (Supp. 2015) (referencing Minn. Stat. § 624.713, subd. 1(2) (Supp. 2015)).[2] The district court sentenced Peralta to the presumptive 60-month sentence. The district court considered, and rejected, Peralta's arguments that his crime was significantly less serious than the typical felon-in-possession offense, and the record supports the district court's conclusion. Peralta emphasizes that he possessed only four bullets, and they were not found with a weapon. But the felon-in-possession statute does not require more than possession of ammunition to convict an offender—it does not require a gun or an intent to endanger someone. *See* Minn. Stat. § 624.713, subd. 1(2). Moreover, Peralta committed the offense while on supervised release. The district court did not abuse its discretion by denying Peralta a downward durational departure.

V. The district court properly sentenced Peralta for possession of a controlled substance.

The district court imposed a 17-month concurrent sentence for possession of a controlled substance. At Peralta's sentencing hearings, the district court stated that 17

[2] While Minn. Stat. § 609.11, subd. 9, was amended in 2015, the change did not affect Peralta's conviction as requiring a mandatory-minimum sentence.

months was the presumptive sentence and the parties did not disagree.[3] On appeal, however, Peralta argues that the district court based the sentence on an incorrect criminal-history score and that the presumptive sentence based on his actual criminal-history score was 15 months. By adding two months to the presumptive sentence without finding any aggravating circumstance, Peralta argues, the district court abused its discretion. The state agrees.

Peralta and the state claim error based on a sentencing worksheet that listed Peralta's criminal-history score as three. But the district court received a revised sentencing worksheet that listed Peralta's criminal-history score as four, and at sentencing the district court stated it was relying on the amended sentencing worksheet.

We do not discern error in the amended sentencing worksheet. The date of the offense determines which sentencing guidelines apply. Minn. Sent. Guidelines 3.G (Supp. 2015). Peralta's offense occurred in April 2016; therefore the 2015 sentencing guidelines apply. *See* Minn. Sent. Guidelines (2016) ("[not] [e]ffective [until] August 1, 2016"). The initial sentencing worksheet assigned three criminal-history points based, in part, on the determination that Peralta's felon-in-possession offense had a severity level of three. But the amended sentencing worksheet correctly adjusted the severity level of that offense to six. Minn. Sent. Guidelines 5.A (Supp. 2015). Based on the adjusted severity level, the sentencing worksheet changed Peralta's criminal-history score from three to four. The

[3] The presumptive sentence is a stayed term, but the district court granted Peralta's request to execute the sentence so he could serve it concurrently with his felon-in-possession sentence. Minn. Sent. Guidelines 4.A. (Supp. 2015).

amended sentencing worksheet correctly lists fifth-degree possession as a severity-level two offense. A severity-level two offense with a criminal-history score of four carries a presumptive (stayed) sentence of 17 months. Minn. Sent. Guidelines 4.A (Supp. 2015). Thus, the district court imposed the proper presumptive sentence based on the corrected criminal history score.

The parties do not identify, and we not discern, any error in the calculations in the amended sentencing worksheet or in the district court's reliance on that worksheet. Without a basis in the record to support the parties' claim of error, we cannot conclude that district court abused its discretion. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) ("[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights . . . .") (citation omitted).

Affirmed.