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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1325**

State of Minnesota,
Respondent,

vs.

Jose Alarcon, Jr.,
Appellant.

**Filed July 23, 2018
Affirmed
Halbrooks, Judge**

Freeborn County District Court
File No. 24-CR-15-545

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

David J. Walker, Freeborn County Attorney, Albert Lea, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, Max Kittel (certified student attorney), St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Florey, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his convictions of possession of a firearm by an ineligible person and failure to register as a predatory offender, arguing that the evidence is

insufficient to prove that he constructively possessed the firearm and that he knowingly violated his predatory-offender registration requirement. We affirm.

FACTS

Appellant Jose Alarcon, Jr. is required to register as a predatory offender until December 14, 2024, under Minn. Stat. § 243.166, subd. 1b(a)(2) (2014). Alarcon began living in a hotel on December 15, 2014, and submitted a change of information form to the Bureau of Criminal Apprehension (BCA) that stated that the hotel would serve as his primary address four days before he moved in. A few days after moving into the hotel, Alarcon updated the BCA with his unit number. He initially paid the hotel on a monthly basis but later changed to a weekly basis. On April 3, when the hotel staff charged the credit card on file for Alarcon for the next week's payment, the card was declined. As a result, the hotel manager removed Alarcon's possessions from the unit, placed them in storage at the hotel, and placed a boot on the unit door to prevent Alarcon from entering. Alarcon did not return to the hotel that weekend.

On April 6, Alarcon was a passenger in a vehicle that was stopped by Officer Sy Vanthavong for a broken taillight. Alarcon's friend, L.H., drove the vehicle and an acquaintance, T.O., sat in the front passenger seat. Alarcon was in the rear passenger seat behind L.H. After stopping the vehicle, Officer Vanthavong walked up to the driver-side window, shined his flashlight into the vehicle, and observed the wooden grip of a handgun and the silver part of the barrel that was partially covered by a napkin in the center of the backseat. A second officer, Officer Adam Hamberg, arrived to assist. He opened the right rear door and retrieved the gun from the back seat. The police arrested Alarcon.

The state charged Alarcon with one count of unlawfully possessing a firearm under Minn. Stat. § 624.713, subd. 1(2) (2014), and one count of violating his predatory-offender registration requirements under Minn. Stat. § 243.166, subd. 5(a) (2014). Following a jury trial, Alarcon was convicted of both counts. The district court sentenced Alarcon to 60 months for the ineligible-possession-of-a-firearm conviction and 18 months for the registration-violation conviction. This appeal follows.

D E C I S I O N

I.

Alarcon argues that his ineligible-possession-of-a-firearm conviction must be reversed because the circumstances proved did not establish that he constructively possessed the gun. In considering a claim of insufficient evidence, our review is limited to a thorough analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). 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). 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 conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

To convict Alarcon of this charge, the state was required to prove that he knowingly possessed the gun and is ineligible to possess a firearm. *See State v. Salyers*, 858 N.W.2d 156, 161 (Minn. 2015). Alarcon stipulated that he is ineligible to possess a firearm under

Minnesota law. Therefore, the state was only required to prove that he knowingly possessed the gun.

The state may prove possession of a firearm through actual or constructive possession. *Id.* at 159. Actual possession is generally proven by showing that the defendant had “actual or physical possession [of the firearm] at the time of arrest.” *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975). To prove constructive possession, the state must prove that either: (1) the firearm was found in a place under the defendant’s exclusive control that other people did not normally have access to or (2) if the firearm was found in a place that others had access to, there is a strong probability, inferable from the evidence, that the defendant was consciously exercising dominion and control over the firearm. *State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004). Constructive possession may be exclusive or joint. *State v. Porte*, 832 N.W.2d 303, 308 (Minn. App. 2013). “Proximity is an important factor in establishing constructive possession.” *Id.* But proximity, by itself, is insufficient to prove constructive possession. *See State v. Ortega*, 770 N.W.2d 145, 150 (Minn. 2009) (discussing that “mere proximity to criminal activity” is insufficient to establish probable cause for contraband possession).

Possession may be proven by direct or circumstantial evidence. *State v. Sam*, 859 N.W.2d 825, 833 (Minn. App. 2015). Here, the state relied on circumstantial evidence because the jury was required to make inferences to determine whether Alarcon exercised dominion and control over the gun. *See Bernhardt*, 684 N.W.2d at 477 n.11 (providing that circumstantial evidence is evidence “based on inference and not on personal knowledge or observation” (quotation omitted)).

Convictions based on circumstantial evidence are reviewed with heightened scrutiny and require a two-step analysis. *Sam*, 859 N.W.2d at 833. First, we determine the circumstances proved by “resolving all questions of fact in favor of the jury’s verdict” and disregarding evidence that is inconsistent with the jury’s verdict. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017). Second, we “independently consider the reasonable inferences that can be drawn from the circumstances proved, when viewed as a whole.” *Id.* at 601. To sustain a conviction based on circumstantial evidence, the circumstances proved must be “consistent with guilt and inconsistent with any other rational or reasonable hypothesis.” *Sam*, 859 N.W.2d at 833.

At trial, the state proved the following circumstances: L.H. testified that Alarcon rode as a passenger in the backseat of the vehicle for approximately 20 minutes before Officer Vanthavong stopped the vehicle. Officer Vanthavong testified that he saw a gun’s wooden handle and silver barrel sticking out from underneath a napkin in the backseat of the vehicle near the center of the seat. He described the gun as “hastily covered up” by the napkin. Officer Hamberg and Officer Vanthavong’s testimony established that Alarcon was approximately 13 to 15 inches from the gun, he would not have had to move to reach the gun, and nothing was between Alarcon and the gun. T.O. and L.H. both denied owning the gun or knowing that a gun was in the vehicle. And L.H. informed the police that she did not know of anyone who would have left the gun in her vehicle.

We next address whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. *Id.* at 834. The gun was found in a place that others had access to. Therefore, the circumstances must show that there is

a strong probability that Alarcon was “consciously exercising dominion and control over it.” *Porter*, 674 N.W.2d at 427.

Alarcon argues that the circumstances proved only establish his proximity to the gun. We disagree. The state proved circumstances that are consistent with circumstances in which the supreme court held that the defendant exercised dominion and control over the contraband, in addition to being in close proximity to it.

In *State v. Olson*, for example, the supreme court held that a defendant, the driver of a vehicle stopped by police officers, consciously exercised dominion or control over a gun when the gun stuck out from between the driver’s seat and the backrest. 326 N.W.2d 661, 662-63 (Minn. 1982). The gun’s loaded cylinder was on the front passenger seat. *Id.* Both the gun and the cylinder were in reach of the defendant, and both parts put together would have made the gun operable. *Id.*

Like *Olson*, the circumstances proved here establish more than mere proximity. They establish that Alarcon consciously exercised dominion and control over the gun because (1) he was the only person next to the gun, (2) the gun was visible to Officer Vanthavong immediately when he walked up to the vehicle, (3) L.H. and T.O. were not aware of the gun’s presence in the vehicle and did not own the gun, and (4) Alarcon could have picked up the gun from his position in the backseat. Those circumstances are consistent with guilt.

Alarcon argues that the facts support the rational inference that “the firearm belonged to and was left in the car by the ‘black guy from Owatonna’ who had borrowed the car right before appellant had gotten into it.” This hypothesis is not rational based on

the circumstances proved at trial. When Officer Hamberg questioned L.H. about the gun, L.H. stated that she let another man use her vehicle earlier that day but did not know anyone who would have left a gun in the vehicle. Additionally, neither L.H. nor T.O. testified that they noticed a gun in the vehicle when they entered it.

Alarcon also contends that the facts support an inference that he was completely unaware of the gun's presence in the vehicle. We disagree. Alarcon rode as a passenger in the backseat for at least 20 minutes, the gun was approximately 13 to 15 inches from him, the gun was "hastily covered up" by a napkin with the handle sticking out from beneath the napkin, and Officer Vanthavong noticed the gun immediately upon walking up to the driver-side window. The only rational hypothesis that is supported by the evidence is that Alarcon had constructive possession of the gun. We conclude that there is sufficient evidence to support Alarcon's conviction of ineligible possession of a firearm.

II.

Alarcon argues that his failure-to-register conviction must be reversed because the evidence does not sufficiently prove that he knowingly failed to register, particularly because he did not know that he left his primary address. Minn. Stat. § 243.166, subd. 1b(a)(2), requires Alarcon to register as a predatory offender based on his 2014 conviction of soliciting a child to engage in sexual conduct. Under the statute, Alarcon must register at least five days before he starts living at a new primary address by giving written notice to his corrections agent. Minn. Stat. § 243.166, subd. 3(b) (2014). If he leaves a primary address and does not have a new primary address, he must register with his corrections agent and inform the agent of where he will be staying within 24 hours of the time that he

leaves his primary address. *Id.*, subd. 3a(a) (2014). A person’s primary address is the mailing address of his “dwelling.” *Id.*, subd. 1a(g) (2014). A “dwelling” is defined as “the building where the person lives under a formal or informal agreement to do so.” *Id.*, subd. 1a(c) (2014). Minn. Stat. § 243.166, subd. 5(a), makes it a crime to “knowingly” violate any part of the predatory-offender registration statute. To prove a violation of Minn. Stat. § 243.166, subd. 5(a), the state must show that Alarcon is required to register, that Alarcon knowingly violated his requirement to register, and that the time period in which Alarcon is required to register had not elapsed.

The state specifically alleged that, under Minn. Stat. § 243.166, subd. 3a(a), Alarcon failed to report to a corrections agent that he left his primary address within 24 hours of April 3—the date the hotel manager put a boot on his door. Alarcon stipulated that he was required to register as a predatory offender and that the time period in which he was required to register had not yet elapsed. Therefore, the state was only required to prove that he knowingly violated his registration requirements.

Alarcon argues that the evidence does not prove beyond a reasonable doubt that he “knowingly” violated his registration requirement because the evidence does not demonstrate that he understood that he left his primary address. Although ignorance of the law generally does not excuse criminal liability, the supreme court has previously stated that when knowledge of the law is an element of the offense, mistake of law is a defense because it negates the existence of the required mental state. *State v. Watkins*, 840 N.W.2d 21, 30 (Minn. 2013). To be convicted under Minn. Stat. § 243.166, subd. 5(a), Alarcon must have known that he violated the statute when the violation occurred. *State v. Mikulak*,

903 N.W.2d 600, 603-04 (Minn. 2017). To determine whether Alarcon knowingly violated the registration statute, the jury was required to make inferences about Alarcon's state of mind based on the state's evidence. Therefore, in evaluating the sufficiency of the evidence, we again rely on the two-step circumstantial-evidence analysis. *Sam*, 859 N.W.2d at 833.

The state introduced BCA records that demonstrate that on August 26, 2014, and January 12, 2015, Alarcon confirmed that he understood the following language, "I understand that if I do not have a primary address I must report to the law enforcement authority with jurisdiction in the area where I will be staying *within 24 hours of leaving my former primary address.*" Alarcon's corrections agent also testified that she informed Alarcon of his duty to register at least four times between December 15, 2014, and January 28, 2015. Alarcon submitted a change-of-information form to the BCA to update his address before he moved into the hotel and later updated his address to include the unit number four days after moving in.

The hotel manager testified that Alarcon was required to pay in advance for the next week's stay, but that Alarcon did not pay for the week of April 3 and therefore could not live at the hotel until he paid. The hotel manager attempted to communicate this information to Alarcon by placing a note on his door, stating "Mr. Alarcon, your rental is due today at 11 a.m. It was not paid due to a declined credit card. We have secured your room, and to gain access to the room and your property, payment must be made." The hotel manager removed Alarcon's property from the room and placed it in storage. The

hotel manager testified that Alarcon did not return to the hotel until approximately two weeks later to pick up his belongings.

These circumstances are consistent with guilt. Alarcon's primary address is the mailing address of the building where he lives under a formal or informal agreement to live there. Minn. Stat. § 243.166, subds. 1a(c), (g). Because Alarcon no longer had access to a room at the hotel and had no arrangement to continue living there once his payment was declined, the hotel no longer served as his primary address. Alarcon's history with his registration requirements demonstrates that he previously understood his registration requirements and supports a rational inference that he continued to understand his registration requirements at the time he left his primary address.

But Alarcon argues that he intended on returning to the hotel and therefore did not knowingly violate his registration requirements. Alarcon relies on *Mikulak*, in which the supreme court determined that the defendant did not "knowingly" violate his registration requirement when the defendant repeatedly made statements indicating that he did not know that he was required to register within 24 hours of entering a new county. 903 N.W.2d at 604-05. The supreme court concluded that these statements "negated the mens rea element of the charged offense." *Id.* at 605. *Mikulak*'s conclusion does not guide our analysis here because no evidence suggests that Alarcon did not understand his registration requirements.

Alarcon also relies on an unpublished case, *State v. Reynolds*, No. A15-0241, 2016 WL 208207 (Minn. App. Jan. 19, 2016), to argue that he intended to return to the hotel because he left his belongings there. Unpublished cases are not binding authority on this

court. Minn. Stat. § 480A.08, subd. 3 (2016). We conclude that the state proved beyond a reasonable doubt that Alarcon knowingly violated his registration requirements under Minn. Stat. § 243.166, subd. 5(a).

Affirmed.