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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1852**

State of Minnesota,
Respondent,

vs.

Devontay Deshaun Hines,
Appellant.

**Filed October 29, 2018
Affirmed
Larkin, Judge**

Dakota County District Court
File No. 19HA-CR-17-1364

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

James C. Backstrom, Dakota County Attorney, Cassandra K. Shepherd, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Christopher L. Mishek, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Kalitowski,

Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of possession of a firearm by a prohibited person, arguing that the evidence was insufficient to sustain the conviction. We affirm.

FACTS

Respondent State of Minnesota charged appellant Devontay Deshaun Hines with possession of a firearm by a prohibited person and fleeing a peace officer in a motor vehicle. The case was tried to a jury. Hines stipulated at trial that he was ineligible to possess a firearm.

At trial, Officer Joshua Swenson of the Rosemount Police Department testified that at approximately 2:48 a.m. on April 1, 2017, he followed a Volvo station wagon because it looked like a vehicle that he had had contact with in the past. Although there was a 2017 registration sticker on the vehicle, Officer Swenson determined that the vehicle's registration had expired in 2015.

Officer Swenson initiated a traffic stop. After the vehicle came to a stop, Officer Swenson observed the driver "lean over from the driver's seat towards the rear seat." Officer Swenson walked to the passenger side of the vehicle and spoke to its two occupants. Hines was in the driver's seat, and he admitted that he did not have a driver's license. V.H. was in the front passenger seat.

Officer Alexander Luck of the Rosemount Police Department arrived on the scene to assist Officer Swenson. Officer Luck also approached the vehicle on the passenger's side, and he stood behind Officer Swenson. Officer Luck testified that he shined his

flashlight in the backseat area of the vehicle and observed the butt and handgrip of a handgun in a storage compartment that was slightly ajar. Officer Luck quietly told Officer Swenson that there was a gun in the backseat of the vehicle. Officer Swenson took a step backwards, looked through the rear passenger's side window, and saw a gun wedged in the back passenger seat. Officer Swenson testified that the firearm was black and had a metal loop at the bottom of the grip.

Immediately after the officers observed the gun, Hines put the vehicle in drive and took off at a high rate of speed. The officers pursued the vehicle for approximately two-and-a-half miles, traveling at speeds of over 100 miles per hour. Once the vehicle stopped, the officers removed Hines and V.H. from the vehicle, and searched them and the vehicle. The officers did not find a gun in the vehicle, on Hines, or on V.H. However, Rosemount Police Department Officer Jacob Grabow testified that he found a black handgun in the ditch along the road on which Hines fled, between the locations of the initial traffic stop and the post-flight stop, on the passenger side of the road. Officer Grabow also testified that although the grass in the ditch had frost on it, the firearm did not. Officer Luck testified that the gun that Officer Grabow found in the ditch was the same one that he had observed in Hines's vehicle during the initial traffic stop.

V.H. testified that during the high-speed chase, she screamed at Hines to stop and "went in shock." V.H. testified that she did not know why Hines drove away from the traffic stop, that she did not know there was a firearm in the vehicle, and that if there was a firearm in the vehicle, it was not hers. V.H. testified that she did not recall Hines throwing

anything out the window or telling law enforcement that she saw him throw something out the window.

The jury found Hines guilty as charged. The district court imposed a 60-month prison sentence on the firearm-possession charge and a concurrent 15-month sentence on the fleeing charge. Hines appeals.

D E C I S I O N

Hines contends that the evidence was insufficient to sustain his conviction of possession of a firearm by a prohibited person.¹

When considering a claim of insufficient evidence, an appellate court carefully analyzes the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The appellate court “assume[s] that the jury believed the state’s witnesses and disbelieved contrary evidence.” *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). An appellate court will not disturb a guilty 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 proved guilty of the offense charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

When the state relies on circumstantial evidence to prove an element of an offense, an appellate court applies a heightened standard of review. *See State v. Al-Naseer*, 788 N.W.2d 469, 473-75 (Minn. 2010) (applying the circumstantial-evidence standard to

¹ Hines initially alleged prosecutorial misconduct as an additional basis for relief, but later withdrew this argument.

individual elements of a criminal offense that were proved by circumstantial evidence). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *State v. Hokanson*, 821 N.W.2d 340, 354 n.3 (Minn. 2012) (quotation omitted). Direct evidence is “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007) (quotation omitted). Circumstantial evidence always requires an inferential step that is not required with direct evidence. *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017).

“Possession of a firearm may be proved through actual or constructive possession.” *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015). “Actual possession, also referred to as physical possession, involves ‘direct physical control.’” *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quoting *Jacobson v. Aetna Cas. & Sur. Co.*, 46 N.W.2d 868, 871 (Minn. 1951)). The purpose of the constructive-possession doctrine is to establish possession in

those cases where the state cannot prove actual or physical possession at the time of arrest but where the inference is strong that the defendant at one time physically possessed the [item] and did not abandon his possessory interest in the [item] but rather continued to exercise dominion and control over it up to the time of the arrest.

State v. Florine, 226 N.W.2d 609, 610 (Minn. 1975).

To establish constructive possession the state must show either (1) the prohibited item was found “in a place under [the] defendant’s exclusive control to which other people did not normally have access” or (2) if police found the prohibited item “in a place to which

others had access, there is a strong probability (inferable from other evidence) that [the] defendant was at the time consciously exercising dominion and control over it.” *Id.* at 611.

The state argues that it “submitted direct evidence to the jury proving that [Hines] constructively possessed the firearm.” The state notes that Officers Swenson and Luck testified that they personally observed the firearm in a backseat compartment of the vehicle that Hines was driving and that Officer Swenson testified that he observed Hines lean into the backseat area of the vehicle immediately prior to the traffic stop. The state also notes that V.H. testified that she did not know there was a firearm in the vehicle and that if there was a firearm, it was not hers.

However, the officers’ testimony that they observed a gun in the car that Hines was driving directly proves only that the gun was in the car. Officer Swenson’s testimony that Hines leaned into the backseat area directly proves only that he leaned into the backseat area. V.H.’s testimony directly proves only her lack of knowledge and ownership of the gun. Because the jury needed to make an inference based on that evidence to conclude that there was a strong probability that Hines consciously exercised dominion and control over the gun, the state’s evidence of constructive possession was circumstantial, and not direct.

Because the state relied on circumstantial evidence to prove constructive possession, we evaluate the sufficiency of the evidence using the heightened circumstantial-evidence standard. *See Al-Naseer*, 788 N.W.2d at 473-75. First, we determine the circumstances proved. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). When evaluating the circumstances proved, we “disregard evidence that is inconsistent with the jury’s verdict.” *Harris*, 895 N.W.2d at 601. Next, we determine if the circumstances proved are consistent

with guilt and inconsistent with any rational hypothesis other than guilt. *Loving*, 891 N.W.2d at 643. The appellate court will reverse a conviction based on circumstantial evidence only if there is a reasonable inference other than guilt. *Id.*

As to the circumstances proved, Hines argues that because V.H.'s testimony was "confusing and logically incoherent," the circumstances proved should not include that V.H. did not actually or constructively possess the firearm. Hines notes that V.H. testified that she did not recall Hines throwing anything out of the vehicle window, she did not know if there was a firearm in the vehicle, and if there was a firearm, it was not hers because she does not touch guns. Hines asserts that it is "extremely improbable" that V.H. would not have seen him throw the firearm because he "would have had to somehow reach into the backseat while driving at a high rate of speed and secretly throw a firearm out the back passenger-seat window for it to land in the passenger-side ditch."

In construing the evidence in the light most favorable to the verdict, this court must assume that the jury believed the state's witnesses. *State v. Tschou*, 758 N.W.2d 849, 858 (Minn. 2008). "[E]ven though verdicts based on circumstantial evidence may warrant stricter scrutiny, [appellate courts] still construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the State's witnesses and disbelieved the defense witnesses." *Id.* We therefore assume that the jury believed V.H. Thus, V.H.'s lack of knowledge and ownership of the firearm is a circumstance proved.

The trial evidence established the following additional circumstances: (1) during the initial traffic stop, Hines leaned toward the backseat area where the gun was observed, (2) a gun was visible in the backseat area, (3) Hines took off at a high rate of speed after the

officers observed the gun, (4) Hines drove at speeds of over 100 miles per hour, attempting to evade the police, but he abruptly stopped after approximately two-and-a-half miles, (5) the police did not find a gun in the vehicle after the chase, (6) the police found a gun in a ditch along the flight route, and (7) that gun resembled the one the police had observed in Hines's vehicle.

“[E]vidence of flight suggests consciousness of guilt.” *State v. Bias*, 419 N.W.2d 480, 485 (Minn. 1988). Thus, the circumstances proved support the reasonable hypothesis that Hines knew the gun was in the car and fled to dispose of the gun. In doing so, Hines exercised dominion and control over the gun.

Hines's hypothesis of innocence rests on the following assertions: (1) he did not know the gun was in the vehicle, (2) he never touched the gun, (3) V.H. or a third party owned the gun, (4) V.H. tossed the gun during the high-speed chase, and (5) he fled only because he feared an arrest for driving without a license.

An appellate court “will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). “[P]ossibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable.” *State v. Stein*, 776 N.W.2d 709, 719 (Minn. 2010) (quotation omitted). Hines's hypothesis of innocence is not reasonable because it is inconsistent with V.H.'s testimony disavowing knowledge and ownership of the gun, which we assume the jury believed. It is also inconsistent with Hines's leaning toward the backseat of the vehicle during the initial traffic stop and fleeing long enough for the gun to disappear from the car, which suggest he knew the gun was in the car.

The only reasonable conclusion that can be drawn from the circumstances proved is that Hines consciously exercised dominion and control over the firearm while it was in the vehicle. The evidence was therefore sufficient to establish, beyond a reasonable doubt, that Hines constructively possessed the firearm, and we do not disturb the jury's guilty verdict.

Affirmed.