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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0035

State of Minnesota,
Respondent,

vs.

Andre Lamar Beasley,
Appellant.

Filed December 9, 2019
Affirmed
Hooten, Judge

Beltrami County District Court
File No. 04-CR-17-3120

Keith Ellison, Attorney General, St. Paul, Minnesota; and

David L. Hanson, Beltrami County Attorney, River D. Thelen, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Rich Kenly, Kenly Law Office, Backus, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Worke, Judge; and Klaphake, Judge.[*]

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

UNPUBLISHED OPINION

HOOTEN, Judge

In this direct appeal from a final judgment of conviction and sentence for being a felon in possession of a firearm, appellant argues that the district court erred by denying his request for a hearing to contest the validity of a search warrant under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978). He also argues that there was insufficient evidence to support the district court's finding of guilt. We affirm.

FACTS

On October 5, 2017, Beltrami County Sheriff's Office responded to a shooting at a gas station in Bemidji. Officers were informed by a witness that two black males were seen leaving the gas station shortly after the shooting in a silver or white Mercedes sedan. The two males were later identified as appellant Andre Beasley's son, DeAvion Beasley, and cousin, Dejounte Straub.

Shortly after the shooting, a witness flagged down law enforcement officers and led them to a residence on Ironwood Lane, appellant's home residence. The witness alleged that the car parked outside the residence, a silver Mercedes sedan, was the car involved in the shooting. Officers approached the vehicle and saw Straub standing beside it. Straub told the officers that "he and [DeAvion Beasley] were in the silver Mercedes together" and that "they threw a gun out of the vehicle" west of town.

Using this information, in an effort to find the firearm used in the gas station shooting, Sergeant Jarrett Walton submitted to the district court an application for a search warrant for the residence, a blue Honda Accord, a silver Mercedes, and other vehicles

associated with the residence. The affidavit accompanying the search warrant application described the events at the gas station and indicated that an officer observed surveillance video from the gas station, which noted that it appeared that DeAvion Beasley fired a "gun at least one time in the direction of" two other males after one of the males began "to strike [DeAvion Beasley] multiple times with a crowbar/club type weapon." The affidavit also included a statement from a witness who stated that they believed "at least one shot was fired, possibly more." The district court granted the search warrant later that day. Additional search warrants were granted in the following hours and days.

During the search of the home, appellant, who was a felon prohibited from possession of a firearm or ammunition, stood outside with an officer, while other officers searched the residence for the gun used by DeAvion Beasley in the shooting. After the officers conducting the search found a safe in the closet of his master bedroom, appellant informed them that it contained cash and two handguns. Appellant indicated that the guns in the safe did not belong to him, but he stressed that the money in the safe was his. Officers asked appellant for the combination to the safe, but he denied knowing it. He further stated that he did not "have access to the safe," but knew "who [could] open it." After police retrieved a crowbar and other tools in an attempt to open the safe, appellant told his wife to open the safe for the officers. The safe contained a 9mm semi-automatic handgun, a .380 caliber semi-automatic handgun, and several boxes of ammunition. In addition to these items, a search of appellant's master bathroom and a blue Honda Accord yielded several live rounds of 9mm ammunition in the Honda and an ammunition box containing 9mm rounds in appellant's master bathroom.

Forensic testing on the firearms revealed DNA from a mixture of four or more individuals. The testing indicated that appellant could not be excluded from contributing to the DNA found on the 9mm caliber and .380 caliber handguns, while 97.3% of the general population could be excluded from contributing to the DNA on the 9mm caliber handgun and 99.99999998% of the general population could be excluded from contributing to the DNA on the .380 caliber handgun. It was also determined that DeAvion Beasley could be excluded from contributing to the DNA found on both guns.

Based on this information, appellant was charged with being a felon in possession of a firearm under Minn. Stat. § 609.165, subd. 1b (2016). Appellant was prohibited from being in possession of a firearm and ammunition because of a previous conviction for second-degree assault in 1998. Before the district court, appellant argued that he was entitled to a *Franks* hearing because the warrant affidavit submitted by law enforcement officers contained material misrepresentations and omissions. Appellant also requested a different district court judge make a determination on whether he was entitled to a *Franks* hearing because the judge before the motion was brought had signed the search warrant. The district court denied both requests.

Appellant agreed to a bench trial on stipulated facts. After trial, he was convicted of possession of a firearm and ammunition by an ineligible person and sentenced to 60 months. This appeal follows.

DECISION

Appellant challenges his conviction for possession of a firearm and ammunition by an ineligible person. He argues that the district court erred when it denied his request for

a *Franks* hearing to determine whether material information was deliberately or recklessly omitted from the affidavit officers submitted in support of their initial search warrant. He also argues that there was insufficient evidence to sustain his conviction.

I. The district court did not err when it denied Appellant's request for a *Franks* hearing.

A search warrant issued by a magistrate is presumed to be valid, but a defendant may challenge whether the district court erred in authorizing the search warrant based on a misrepresentation or omission by the officer asking for the warrant. *Franks*, 438 U.S. at 171, 98 S. Ct. at 2684. "When a defendant seeks to invalidate a warrant, the two-prong *Franks* test requires a defendant to show that (1) the affiant deliberately made a statement that was false or in reckless disregard of the truth, and (2) the statement was material to the probable cause determination." *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (quotation omitted). "A misrepresentation is 'material' if when set aside there is no longer probable cause to issue the search warrant." *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989). "[I]nnocent or negligent misrepresentations" are not sufficient to invalidate a warrant. *Id.*

We review a district court's determination on whether an affiant made deliberate false statements in the affidavit for clear error. *Andersen*, 784 N.W.2d at 327. On the other hand, we review de novo whether a misrepresentation or omission was material. *Id.*

Appellant claims that the affidavit submitted by Sergeant Walton contained three material misrepresentations and/or omissions. He argues that: (1) the affidavit erroneously indicated that DeAvion Beasley fired multiple shots, when only one shot was fired; (2) it

did not adequately explain that DeAvion Beasley fired his weapon in self-defense; and (3) it omitted critical information regarding a parallel drug investigation involving DeAvion Beasley by other law enforcement officials. We consider each of appellant's allegations.

Appellant's argument that officers misrepresented the number of shots fired by DeAvion Beasley during the shooting is unpersuasive. Officers reviewed the surveillance video which showed DeAvion Beasley reaching into the silver car and noted that it appeared that DeAvion Beasley "fire[d] the gun *at least one time* in the direction of" two other males. (Emphasis added). The reviewing officer did not expressly state that more than one shot was fired, but rather explained that more than one shot could have been fired. The surveillance video in the record, which is 36 seconds long, shows DeAvion Beasley raising and pointing a gun at two males. But, because the video contains no audio, it is unclear whether one or more shots were fired. The witness who observed the shooting believed "at least one shot was fired, possibly more." Based upon this information in the record, we conclude that the affidavit is consistent with the video and with the witness's statement.

Appellant argues next that officers misrepresented the nature of the shooting by failing to dispute the witness's statement that the two males who assaulted DeAvion Beasley "were running away from the shooter, unarmed, and had their backs turned to him." Precisely, appellant suggests that the witness was incorrect in her assessment of the shooting and that the warrant request should have informed the district court that DeAvion Beasley fired the gun in self-defense. This argument fails for two reasons. First, the affidavit prepared by law enforcement describes DeAvion Beasley firing a gun only *after*

the assault by two other males. The affidavit does not exclude or misrepresent any information about the assault. Therefore, the district court was aware of the circumstances. Second, appellant points to nothing in the record that suggests officers knew or should have known that the witness's statement regarding the shooting was allegedly incorrect. The surveillance video of the shooting depicts an African American male raising and pointing a gun in the direction of two other males who have their backs turned and appear not to have a gun and are running away. This is consistent with the witness's statement and with the statements of officers in the affidavit.

Appellant also suggests that officers knew or should have known of a parallel drug investigation involving DeAvion Beasley by other law enforcement officials, but deliberately failed to inform the district court of such an investigation. Again, however, appellant points to nothing in the record that supports his contention that officers knew or should have known of the drug investigation, or why such knowledge would be material to the district court's granting of the search warrant. Appellant seems to suggest that the district court may not have granted the search warrant had it known about the parallel drug investigation, but the district court itself disputed that notion.

Appellant has failed to establish that police officers deliberately made any statements that were false or in reckless disregard of the truth. *See Andersen*, 784 N.W.2d at 327. Because of this, the district court did not err when it denied his request for a *Franks* hearing.

Lastly, appellant is incorrect to suggest that the district court judge who granted the search warrant should have recused himself from determining whether appellant was

entitled to a *Franks* hearing. A party may remove a judge if he files and serves a notice to remove "within ten days after the party receives notice of which judge . . . [will] preside at the trial or hearing." Minn. R. Civ. P. 63.03. A judge who has presided over a motion or other proceeding may be removed only by a "showing that the judge . . . is disqualified under the Code of Judicial Conduct." *Id.* Appellant seems to suggest that the district court judge could not be impartial because he authorized the initial search warrant. "A judge is disqualified for a lack of impartiality under [Minn. R. Jud. Conduct] Rule 2.11(A) if a reasonable examiner, from the perspective of an objective layperson with full knowledge of the facts and circumstances, would question the judge's impartiality." *Troxel v. State*, 875 N.W.2d 302, 314 (Minn. 2016) (quotations omitted). The supreme court has determined that prior adverse rulings by a judge are not sufficient to show impartibility. *Schneider v. State*, 725 N.W.2d 516, 523 (Minn. 2007); *Greer v. State*, 673 N.W.2d 151, 157 (Minn. 2004). Appellant did not file a notice to remove the district court judge before he presided in this action, and he failed to show impartiality that would support recusal. Therefore, the district court judge was not required to recuse himself from hearing appellant's motion requesting a *Franks* hearing.

II. There was sufficient evidence to sustain appellant's conviction of being a felon in possession of a firearm and ammunition.

Appellant challenges the sufficiency of the evidence to support his conviction of felon in possession of a firearm and ammunition. When reviewing a sufficiency of the evidence claim, this court undertakes a thorough review of the record to determine whether the evidence, when viewed in the light most favorable to the verdict, was sufficient to

permit the jury to reach the decision it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Under this standard, the jury is said to have "believed the state's witnesses and disbelieved any contrary evidence." *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). A court should not disturb a jury's verdict unless the jury could not have reached the decision that it did on the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004).

To prove a violation of Minn. Stat. § 609.165, subd. 1b, the state must show that (1) the defendant was previously convicted of a crime of violence; and (2) has knowingly possessed, received, shipped, or transported a firearm and/or ammunition. Appellant does not dispute that he was ineligible to possess a firearm as a result of a previous felony conviction, but he argues that he did not knowingly possess a firearm and ammunition.

The state contends that appellant's conviction is based on circumstantial evidence, and appellant does not challenge this. We agree that the evidence to prove appellant knowingly possessed a firearm and ammunition was circumstantial. As such, we base our analysis regarding the sufficiency of the evidence based on circumstantial evidence. When a conviction is based on circumstantial evidence, we apply a higher standard of review. *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010). Under this standard, "the circumstances proved must be consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt." *Id.* (quotations omitted).

The heightened-scrutiny analysis comes in the form of a two-prong test. First, we must "identify the circumstances proved." *Andersen*, 784 N.W.2d at 329 (quotation omitted). Second, we must determine whether the circumstances proven are "consistent

with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt." *Id.* (quotation omitted). "Circumstantial evidence must form a complete chain that, 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." *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011).

Turning to the first prong, the circumstances proved are as follows: (1) appellant knew of the contents of the safe; (2) appellant told police that he knew how to get access to the safe; (3) the safe was located in appellant's bedroom; (4) ammunition was found in a car that appellant's admitted to driving earlier in the day; (5) ammunition was found in appellant's bathroom; (6) the ammunition discovered in the car and bathroom matched the 9mm caliber firearm found in the safe; (7) appellant's DNA could not be excluded from contributing to the DNA found on the firearms; and (8) DNA evidence on the firearms excluded DeAvion Beasley.

Having identified the circumstances proved, we determine:

> [W]hether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt. We review the circumstantial evidence not as isolated facts, but as a whole. We examine independently the reasonableness of all inferences that might be drawn from the circumstances proved; including the inferences consistent with a hypothesis other than guilt. . . . We give no deference to the fact finder's choice between reasonable inferences.

State v. Silvernail, 831 N.W.2d 594, 599 (Minn. 2013) (quotations and citations omitted). Appellant challenges his conviction based on his constructive possession of the firearms and ammunition found in the safe, the Honda Accord, and the master bathroom.

A. Firearms & Ammunition Located in Safe

Appellant challenges the district court's determination that he constructively possessed the safe and its contents. Constructive possession may be established by proof that: (1) "the police found the [firearm or ammunition] in a place under defendant's exclusive control to which other people did not normally have access"; or (2) "if police found [the firearm or ammunition] 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." *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975). A defendant can jointly possess an item with another individual. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). In such a case, the circumstances proved at trial must support a reasonable inference that the defendant, whether alone or jointly at the time, was consciously exercising dominion and control over the item. *Id.* Proximity is an important factor to consider when establishing dominion or control. *State v. Porte*, 832 N.W.2d 303, 308 (Minn. App. 2013).

Appellant argues that the circumstances proved are inconsistent with guilt because it is reasonable to infer that he did not constructively possess the firearms and ammunition in the safe because he did not have access to the safe. He contends therefore that there is a rational hypothesis inconsistent with his guilt. We disagree.

The evidence in the record shows that the only reasonable inference is that appellant constructively possessed the firearms and ammunition found in the safe. The safe was found in appellant's master bedroom in the home he owns. Appellant knew what was in the safe and even told officers that the gun used in the gas station shooting was not in the

safe. Title to appellant's vehicles were also found in the safe. *See State v. Colsch*, 284 N.W.2d 839, 841 (Minn. 1979) (concluding there was sufficient evidence to prove constructive possession when paperwork identifying the defendant was found near the prohibited item). Although appellant claimed that he could not open the safe, he stated that he knew who could give the officers access and claimed that the money in the safe belonged to him.[1] DNA evidence also demonstrated that he could not be excluded from the DNA found on the firearms in the safe,[2] while DeAvion Beasley could be excluded. This evidence, taken as a whole, shows that appellant owned the safe, or at least used the safe as it held his important documents and more than $100,000 in cash. *See State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) (noting that we must consider evidence as a whole rather than examining each piece of evidence in isolation). This is consistent with the district court's determination that appellant constructively possessed the firearms and ammunition found in the safe.

We are not persuaded by appellant's contention that there is a rational hypothesis inconsistent with his guilt. He argues that the state cannot prove he constructively possessed the firearms because he did not know the combination to the safe and his wife opened the safe for the officers. But the mere fact that appellant was not the one who opened the safe for officers does not prove that he did not have dominion or control of the

[1] Appellant seems to argue that the statements he made to officers during the search of his home should be excluded as a violation of *Miranda*. Because appellant has failed to adequately brief this issue, we do not reach it. *See Larson v. State*, 801 N.W.2d 222, 229 (Minn. App. 2011), *review denied* (Minn. Aug. 7, 2012).

[2] Although appellant argues that the BCA report did not support the assertion that he constructively possessed the firearms in the safe, we disagree.

safe. As noted above, constructive possession need not be exclusive. *State v. Sam*, 859 N.W.2d 825, 833 (Minn. App. 2015). Here, the record shows that appellant knew the contents of the safe and told his wife to open the safe for the officers. He also told the officers that some of the items in the safe belonged to him. Those facts are entirely inconsistent with the hypothesis that he did not constructively possess the firearms and ammunition in the safe.

B. Ammunition Found in Honda Accord

Next, appellant challenges the district court's determination that he constructively possessed the ammunition discovered in the Honda Accord. He argues that the ammunition was likely placed in the car by another person.

As we have already determined the circumstances proved, we must determine if the circumstances proved are consistent with the hypothesis that appellant is guilty of possessing the ammunition found in the Honda Accord. The record shows that title to the Honda Accord was in appellant's name; he told police that the car was his and that he drove the "vehicle home earlier in the afternoon from work"; and the ammunition found in the vehicle was 9mm, which matched the 9mm firearm found in the safe. A verdict by a factfinder will not be disturbed if the factfinder could have reasonably determined that the defendant was guilty of the crime. *State v. Brazil*, 906 N.W.2d 274, 279 (Minn. App. 2017), *review denied* (Minn. Mar. 20, 2018). Here, the circumstances proved are consistent with appellant's constructive possession of the ammunition.

Next, we must determine whether the circumstances proved are inconsistent with any rational hypothesis of guilt. Appellant argues that the ammunition was placed in the

Honda Accord by a third party, but does not suggest, nor does the record support, that anyone else had access to the car or had ever driven it. *See Sam*, 859 N.W.2d at 834 (holding that it was reasonable to assume that a defendant did not have knowledge of a prohibited item in a vehicle when there was a reasonable inference that the item was placed in the vehicle prior to the defendant's operation of the vehicle). Appellant was the last person to drive the car. It is unreasonable to assume that a third party had access to the vehicle because nothing in the record supports this conclusion. The only reasonable inference in light of the circumstances proved, therefore, is that appellant "consciously exercis[ed] dominion and control over" the ammunition, *see Florine*, 226 N.W.2d at 611, which means that the circumstances are "inconsistent with any rational hypothesis except that of guilt," *see Moore*, 846 N.W.2d at 88 (quotations omitted).

C. Ammunition Found in the Master Bathroom

Last, appellant contends that the state failed to prove that he constructively possessed the ammunition discovered in his master bathroom. He argues that the ammunition was unknown to him and likely placed in the bathroom by another person.

Based on the circumstances proved, we determine that it was reasonable to infer that appellant constructively possessed the ammunition found in the master bathroom. The evidence in the record establishes that the ammunition was found in the home's master bathroom, which was part of appellant's bedroom. Appellant therefore had access to it. Further, the type of ammunition found in the bathroom matched the 9mm firearm found in the safe in appellant's master bedroom, which he conceded to officers he was holding for two friends. The circumstances proved are consistent with a reasonable inference of guilt.

We are also not persuaded by appellant's suggestion that a third party placed the ammunition in the master bathroom. In essence, appellant argues that there is no way to prove he knew of the ammunition. But, it is reasonable to infer that appellant had knowledge of the ammunition because it was discovered by officers in plain sight on a shelf in the bathroom. We have upheld convictions numerous times when a prohibited item is found in the defendant's home. *See State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004) (finding a firearm in the defendant's apartment); *State v. Barnes*, 618 N.W.2d 805, 813 (Minn. App. 2000) (finding drugs in the defendant's bedroom), *review denied* (Minn. Jan. 16, 2001). In this case, in light of the circumstances proved and viewing the evidence in the light most favorable to the conviction, the only reasonable inference is that appellant constructively possessed the ammunition found in the master bathroom.

Therefore, we conclude that the circumstances proved are consistent with the district court's determination that appellant constructively possessed the firearms and ammunition found in the safe, the ammunition found in the Honda Accord, and the ammunition found in the bathroom. And the circumstances proved are inconsistent with any other rational hypothesis. As such, there was sufficient evidence in the record to sustain appellant's conviction of being a felon in possession of a firearm and ammunition.

Affirmed.