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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0960**

State of Minnesota,
Respondent,

vs.

Suvwe Peter Ighovojah,
Appellant.

**Filed June 29, 2020
Affirmed in part, reversed in part, and remanded
Slieter, Judge**

Ramsey County District Court
File No. 62-CR-17-8453

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

John Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Reyes, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

SLIETER, Judge

In this direct appeal from the judgment of convictions for unlawful possession of a firearm and ammunition, appellant argues that (1) the evidence was insufficient to prove possession; (2) the district court erred by imposing sentences for both unlawful possession

offenses; and (3) the district court erred by allowing in-court identification of appellant because the procedure used to obtain the identification was unnecessarily suggestive. Appellant also raises multiple issues in a *pro se* supplemental brief, which we conclude are without support.

The evidence was sufficient to prove appellant knowingly possessed the ammunition found inside of the firearm and the admission of the identification evidence did not create a substantial likelihood of irreparable misidentification at trial. We therefore affirm the verdicts on those grounds. However, because both of the possession convictions arise from the same behavioral incident, we reverse and remand to allow the district court to vacate one conviction and sentence.

FACTS

This case arises from a late-night argument on a residential street in St. Paul from which the state charged appellant Suvwe Peter Ighovojah with possession of a firearm and possession of ammunition by an ineligible person, each in violation of Minn. Stat. § 624.713, subd. 1(2) (2016). The matter proceeded to a jury trial, and the following facts are based on the testimony and exhibits presented at trial.

On October 13, 2017 at approximately 11:00 p.m., police dispatch received a report that a black male with dreadlocks was yelling at a woman with “big hair” on the street and asking her where his gun was. The reporting caller was at home with his girlfriend, T.G., who also observed the incident. The caller told dispatch the woman had a gun and that the male was yelling at her and daring her to shoot him. T.G. later confirmed this account with law enforcement and testified that the gun the female was holding was black. As the

woman ran away from the man, T.G. observed the man yell at the woman to give him back his gun.

Officers arrived at the scene and could not locate the man, but did find a woman leaving a nearby alley. T.G. verified that this woman—later identified as A.B.—was the woman from the argument. An officer noted leaves and brush on her clothing such that it looked like she had been in the bushes. Another officer searched the nearby alley with a canine trained to locate firearms by scent and found a black Glock 20 semi-automatic handgun in some bushes on the side of the alley. An officer took DNA swabs from the outside of the gun, including the handgrip, slide, trigger, and muzzle. He also collected DNA from the cartridges and the magazine inside the gun. Analysis from the Minnesota Bureau of Criminal Apprehension (BCA) later confirmed that the outside slide had a mixture of DNA from four or more individuals, with a DNA profile matching appellant. Appellant's DNA was not, however, found on the cartridges or magazine inside of the gun.

The following day an officer went to T.G.'s apartment and spoke with her in attempt to identify the man from the argument. The officer showed T.G. photos of two men, both of whom were known by law enforcement as having associated with A.B. Notably, both were black men with dreadlocks. T.G. told the officer that she saw both of the men at the scene the night before and specifically identified the photo of appellant as the man from the argument. She acknowledged, however, that the man in the argument had his back turned to her for some of the time as he was chasing A.B. down the street.

Appellant stipulated prior to trial that he was ineligible to possess firearms or ammunition at the time of the incident. After hearing testimony from the officers involved

and from T.G., the jury found appellant guilty of both counts. Appellant was later convicted and sentenced to 60-months' imprisonment on each count to be served concurrently. This appeal follows.

D E C I S I O N

I. The evidence was sufficient for the jury to convict appellant of possession of ammunition.

Appellant argues that the state presented insufficient evidence for the jury to conclude beyond a reasonable doubt that he knowingly possessed ammunition. In considering a sufficiency-of-evidence challenge, we review the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *See State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

For the jury to find appellant guilty of possession of ammunition by an ineligible person, the state must prove that he knowingly possessed ammunition. *See State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). Minnesota law recognizes two types of possession: actual and constructive. *Id.* Because neither the firearm nor ammunition was found on appellant's person, the state was required to prove that appellant constructively possessed ammunition. *See State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975) (stating that constructive possession applies when the state "cannot prove actual or physical possession . . . but where the inference is strong that the defendant at one time physically possessed the [contraband] and did not abandon his possessory interest in the [contraband]"). To prove appellant was in constructive possession of ammunition, the state

was required to prove that the ammunition was found in a place under appellant's exclusive control to which others did not have access, or, if found in a place that others had access to, there was a strong possibility that he knowingly exercised dominion and control over the ammunition. *Id.* at 611.

The jury found appellant guilty based upon circumstantial evidence. We review convictions based on circumstantial evidence with particular scrutiny, *see State v. Bolstad*, 686 N.W.2d 531, 539 (Minn. 2004), and apply a two-step analysis when reviewing the sufficiency of such evidence, *see State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, we identify the circumstances proved and construe the evidence in the light most favorable to the verdict. *See id.* at 598-99. Then, we “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *See State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) (quotation omitted). The state's evidence need not exclude all inferences other than guilt, but must exclude all *reasonable* inferences other than guilt. *State v. Tscheu*, 758 N.W.2d 849, 857 (Minn. 2008). The circumstances proved must form a “complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *See State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted).

The following circumstances were proved at trial:

- Through their apartment window, T.G. and her boyfriend heard an argument on the street between a man and a woman. They observed the man yell at the woman multiple times to give him back “his” gun and tell her to “shoot him,” and saw the woman holding a black handgun.

- Soon after the argument, law enforcement arrived and saw a woman who appeared to have been in bushes leaving a nearby alley. T.G. identified her as the same woman from the argument.
- Law enforcement searched the alley and found a black handgun loaded with ammunition in bushes on the side of the alley.
- The day after the argument, T.G. identified the appellant as the man involved in the argument.
- Appellant's DNA was found on the outside of the gun. Appellant's DNA was not found on any ammunition cartridge or on the magazine inside of the gun.

The circumstances proved are consistent with the jury's verdict of guilty for the possession of ammunition offense though appellant contends that they allow for a reasonable hypothesis other than guilt because his DNA was not found on the ammunition and no evidence was presented at trial establishing that he held the gun recently or knew that the gun was loaded. We disagree that a reasonable hypothesis other than guilt exists.

The jury reasonably inferred that appellant possessed the ammunition located within the firearm because of the evidence of his DNA on the outside of the firearm and because he repeatedly referred to the firearm as "his" and asked the woman to give "his" gun back to him. His statement asking the woman to "shoot him" also provided an inference for the jury that he knew the gun was loaded. Moreover, because the circumstances proved demonstrate that he was exercising dominion and control over the firearm itself, it is not reasonable that he was not also in constructive possession of the ammunition inside the magazine inside that same firearm. The circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except guilt.

II. The district court did not err in declining to suppress the pretrial identification procedure.

Appellant argues that the district court violated his right to due process and a fair trial by allowing T.G. to identify him in court after she had previously identified him based on an identification procedure that was unnecessarily suggestive. Appellant previously sought to suppress the out-of-court identification on the same grounds in a pretrial motion. The district court delayed ruling until trial when T.G.'s identification was ultimately admitted over appellant's objection.

“The district court has broad discretion when it comes to the admission of evidence, and [appellate courts] therefore will upset such rulings only if it can be said that the court abused its discretion.” *See State v. Hall*, 764 N.W.2d 837, 841 (Minn. 2009) (quotation omitted). Whether an identification procedure is so suggestive as to violate due process is an issue reviewed *de novo*. *State v. Hooks*, 752 N.W.2d 79, 83-84 (Minn. App. 2008).

We follow a two-part process in addressing the admissibility of identification testimony. *See State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). First, we determine whether the procedure used to elicit the identification was unnecessarily suggestive. *Id.* In doing so, we look to “whether the defendant was unfairly singled out for identification.” *Id.* (citing *Simmons v. United States*, 390 U.S. 377, 383, 88 S. Ct. 967, 970–71 (1968)). If the identification process is unnecessarily suggestive, the second part of the process requires an analysis of whether the totality of the circumstances surrounding the identification created “a very substantial likelihood of irreparable misidentification.” *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) (quotation omitted). If not, it is considered

reliable despite any suggestive procedure. *Ostrem*, 535 N.W.2d at 921. If the out-of-court identification procedure is faulty, the identification must be suppressed. *Id.*

We need not decide whether the identification process was impermissibly suggestive because we conclude that the identification is reliable under the totality of the circumstances. In considering the totality of the circumstances, our court must assess five factors: “1. The opportunity of the witness to view the criminal at the time of the crime; 2. The witness’s degree of attention; 3. The accuracy of the witness’ prior description of the criminal; 4. The level of certainty demonstrated by the witness at the photo display; [and] 5. The time between the crime and the confrontation.” *Id.* We next consider each factor.

The Opportunity of the Witness to View the Criminal at the Time of the Crime

T.G. testified about what she observed outside of her apartment the night of the incident. She testified that she provided officers with a detailed description of the woman and was able to positively identify her. She also got a “good look” at the man and saw him several times that night. T.G. recalled describing the man as “wearing light colored clothing, white, I believe, or cream, maybe” and as having approximately shoulder-length dreadlocks. She testified that she could identify the man again if asked, and that she had a clear, unobstructed look at both individuals involved in the argument, and that streetlights were on so she could see him clearly despite it being nighttime.

Appellant argues that seeing a suspect for only a few minutes is not enough to make a credible identification. He also asserts that T.G.’s observation may be tainted because it was made when it was dark. However, T.G. testified that the street was well-lit by the

streetlights, that she had a clear view of the argument through a large glass window for about 10 to 15 minutes, and that she was focused on the man. Taken together, her testimony supports a finding of reliability of the identification of appellant.

The Witness's Degree of Attention

Appellant asserts that T.G. was distracted because there was a weapon involved, thus limiting her ability to focus on his appearance. The record demonstrates that T.G. was attentive during the incident, viewed the argument for between 10 and 15 minutes, and provided officers with a detailed description of the man, including his hairstyle and clothing, and a detailed account of the dialogue between the man and woman. She was also able to accurately identify the woman. Such information would likely not have been provided unless T.G. was paying particular attention. This factor supports reliability of the identification of appellant.

The Accuracy of the Witness's Prior Description of the Criminal

As noted, T.G. gave officers a detailed description of the man's hairstyle, clothing, and race. Appellant urges us to consider that these descriptions are vague and could describe many people. However, the incident occurred on the street in front of T.G.'s apartment building and the streetlights were on at the time. This factor suggests reliability of the prior identification of appellant.

The Level of Certainty Demonstrated by the Witness at the Photo Display

T.G. testified that she was very certain in her identification, and the video of the encounter in which she identified appellant's photo in the photo display shows that T.G. recognized both men in the photos as having been present during the incident the night

before, and was confident in her identification of appellant. She was able to recall several details about the clothing, size and hairstyles of the men from the night before. These factors support the reliability of her identification of the appellant.

The Time Between the Crime and the Confrontation

T.G. made the identification the day after the incident, which supports the accuracy of her identification of the appellant.

The totality of the circumstances show that T.G.'s pretrial identification of the appellant was reliable and did not create a substantial likelihood of irreparable misidentification at trial. Therefore, it was not error for the district court to permit T.G.'s in-court identification of appellant.

III. The district court erred in imposing a conviction and sentence for both offenses.

When a defendant's conduct constitutes more than one offense under the laws of Minnesota, the defendant may be punished for only one of the offenses. Minn. Stat. § 609.035, subd. 1 (2016); *see also* Minn. Stat. § 609.04, subd. 1 (2016) ("Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both."). Minnesota Statutes section 609.035 provides an exception to this rule for certain crimes involving firearms, stating that "a prosecution for or conviction of a violation of section[. . . 624.713, subdivision 1, clause (2)], is not a bar to conviction of or punishment for *any other crime* committed by the defendant as part of the same conduct." Minn. Stat. § 609.035, subd. 3 (2016) (emphasis added).

Appellant argues that the ammunition-possession conviction and sentence must be vacated because that offense is fundamentally the same as the firearm-possession offense. Therefore, appellant argues, the ammunition-possession offense is not “any other crime,” but instead the same crime, and so the exception does not apply and the conviction and sentence must be vacated. The state disagrees, contending that the ammunition possession is “any other crime” such that the exception applies and the multiple convictions and sentences is proper.

A recent published opinion from our court, *State v. Nowels*, 941 N.W.2d 430 (Minn. App. 2020), *review denied* (Minn. June 16, 2020), resolves this issue and directs our decision to conclude it was an error to enter multiple convictions and sentences.

Like appellant, Nowels was charged with possession of both a firearm and ammunition by an ineligible person pursuant to Minnesota Statutes section 624.713, subdivision 1(2), after police found him with a loaded gun. *Id.* at 435, 440. After being found guilty by a jury, Nowels was convicted and sentenced to concurrent 60-month prison sentences involving each possession count. *Id.* at 436. Nowels appealed his conviction and sentence, arguing that his possession of a loaded gun did not warrant two convictions and sentences. *Id.* at 439.

We reversed and remanded with instruction to vacate one of the convictions, determining that the statute required proof of the same elements: ineligibility to possess a firearm or ammunition based on a previous conviction for a crime of violence, and a subsequent possession of a firearm or ammunition. *Id.* at 443. Further, we concluded that

the possession of the loaded firearm constituted one course of unlawful conduct and was not subject to multiple convictions and sentences. *Id.* at 442-43.

Because the elements for proving each charge are identical and are charged under the same statute, this court's holding in *Nowels* is directly applicable here and compels us to reverse and remand to the district court to vacate one conviction and sentence of the appellant.

IV. Appellant raises no meritorious claims in his *pro se* supplemental brief.

Appellant raises three arguments in his *pro se* brief: (1) his conviction of possession of a firearm by an ineligible person must be reversed due to insufficient evidence; (2) the district court erred by allowing T.G. to testify about her identification of appellant in-court; and (3) his conviction should be reversed on grounds of ineffective assistance of counsel. The second argument was already addressed above. The other two arguments are addressed below.

Possession of Firearm¹

The relevant sufficiency-of-evidence standard and circumstances proved were set forth earlier in this opinion. Appellant contends that the state did not meet its burden of proof because it could not prove that he recently held or possessed the gun. We disagree. Just like with possession of the ammunition, appellant's possession of the gun was established by circumstantial evidence. The jury concluded from the circumstances proved

¹ We recognize that consistent with *State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) we typically need address the sufficiency of evidence only as to the offense for which a conviction or sentence is imposed. However, the unique situation here compels us to address sufficiency of evidence for each possession offense.

that appellant possessed the firearm, and disregarded the circumstances suggesting he did not possess it, including the BCA analyst's testimony that she could not definitively state whether he had recently held the firearm. Even if appellant had not recently held the firearm, constructive possession does not require recent possession. *Florine*, 226 N.W.2d at 610 (holding that constructive possession applies when "the inference is strong that the defendant at one time physically possessed the [contraband]"). Lastly, appellant's possession of the gun was also established by direct evidence when appellant referred to the gun as "his." A defendant's statements may be considered direct evidence. *State v. Horst*, 880 N.W.2d 24, 39-40 (Minn. 2016).

The circumstances proved supporting possession of the firearm are stronger than those supporting the ammunition possession in that—unlike the ammunition—appellant's DNA was found on the outside of the firearm. Viewing the circumstances proved in the light most favorable to the verdict, the evidence was sufficient for the jury to find appellant guilty of this charge and there is no rational hypothesis inconsistent with his guilt.

Ineffective Assistance of Counsel

Appellant argues his counsel provided ineffective assistance because his attorney did not adequately object to leading questions during direct examination by the state of its witnesses. He raises this issue because the judge—outside the presence of the jury—told defense counsel that the state was asking "a lot of leading questions on some pretty crucial points" and that defense counsel was "not objecting." The district court went on to state "it should not fall to the court to stop that kind of inquiry" and "I implore you to be more vigilant about objecting."

When an ineffective-assistance-of-counsel claim is properly raised in a direct appeal, we examine the claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984). “We review a district court’s application of the *Strickland* test de novo because it involves a mixed question of law and fact. If a claim fails to satisfy one of the *Strickland* requirements, we need not consider the other requirement.” *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017) (citation omitted).

Pursuant to *Strickland*, a defendant “must show that counsel’s representation fell below an objective standard of reasonableness” and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 687-88, 694, 104 S. Ct. at 2064, 2068. The burden falls on appellant to overcome the strong presumption that his trial attorney’s conduct was reasonable. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). The record does not show that appellant’s counsel’s performance fell below an objective standard of reasonableness, or that appellant has overcome the presumption that his attorney’s conduct was reasonable.

There may be times when an attorney chooses not to object as a means of trial strategy, and “[m]atters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts.” *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). Because appellant has not established that his attorney’s conduct fell below an objective standard of reasonableness, we need not address the second *Strickland* prong. In sum, appellant has not established a meritorious ineffective-assistance-of-counsel claim.

Affirmed in part, reversed in part, and remanded.