This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0518

State of Minnesota,
Respondent,

vs

Tyrone Demetrius Boswell,
Appellant.

Filed March 7, 2022
Reversed and remanded
Segal, Chief Judge

Otter Tail County District Court
File No. 56-CR-20-1813

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Michelle M. Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

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

Considered and decided by Segal, Chief Judge; Ross, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this direct appeal from a conviction of being an ineligible person in possession of a firearm, appellant argues that the conviction must be reversed because the state failed to prove beyond a reasonable doubt that appellant knowingly possessed the firearm and that, even if the evidence is found to be sufficient, he is nevertheless entitled to a new trial

because there was not a valid waiver of his right to a jury trial. We conclude that the district court's failure to obtain a personal waiver of appellant's right to a jury trial constitutes plain error justifying reversal. And because the evidence was nonetheless sufficient to sustain appellant's conviction, we reverse and remand for a new trial.

FACTS

On the evening of July 27, 2020, a Minnesota State Patrol trooper responded to a report of a person walking on Interstate 94 in Otter Tail County. The trooper saw a car parked on the side of the freeway and pulled over behind the car to investigate. The trooper's squad camera recorded the stop, and video from the camera was entered into evidence at the trial.

Appellant Tyrone Demetrius Boswell was the first person out of the car after the squad car pulled up. As seen in the video from the squad camera, Boswell got out of the rear passenger side of the car and stood up. He is then seen bending back down and briefly reaching into the car through the open rear passenger-side door before standing up again and raising his arms while facing the squad car. One other male and two females were also in the car. The trooper asked the group why they were stopped and they explained that the car had a flat tire and someone had stopped to help them change it. The trooper noticed a tire and other debris on the ground near the car. The group acknowledged that the debris belonged to them. The trooper told them that they needed to pick it up.

While the group picked up the debris, the trooper ran the car's license plate. He discovered that the car had been reported stolen in Minneapolis earlier that day. The trooper called for additional officers, converted the stop to a felony stop, and ordered

everyone out of the car. Officers searched the car and found a rifle in a case in the trunk, along with ammunition. They also found a loaded handgun magazine and an empty rifle or gun magazine in the door of the driver's seat. The trooper searched the rear passenger-side seat of the car and found an object covered by a piece of canvas. When the trooper removed the canvas, he discovered a shotgun positioned so that it was leaning against the seat with the stock facing up toward the roof of the car. The canvas appeared to be a painting, and an empty picture frame was seen among the debris on the ground near the car. The trooper testified at trial that he had to remove the canvas before he could identify that the object was a shotgun.

A photograph of the shotgun was admitted into evidence. Before the photograph was taken, the shotgun was removed to check the gun to determine whether it was loaded and to "clear it." The sergeant who checked the gun testified that he located the shotgun in the rear passenger-side seat after he was told about it by the trooper and put it back into the car to be photographed after he cleared the weapon. The sergeant testified that he could not remember the exact location of the shotgun before moving it. The trooper testified that, when he first located the shotgun, it was not as close to the door of the rear passenger-side seat as is depicted in the photograph; it was "a little bit closer to the center" of the rear passenger-side seat.

The other officer who assisted with the search testified that he saw the gun "mostly on the rear passenger seat," and that the canvas was "draped over the shotgun." He said that the shotgun "would have been as you see it there in the photo[graph but] with the canvas draped over it" and that it was on the passenger side of the back seat. He added

that, "if it wasn't exactly where it was [in the photograph], it would be no more than a few more inches to the center of the rear [passenger-side] seat." The officer also testified that someone could not have sat in the rear passenger-side seat with the shotgun in that position "without knowing it was there."

After discovering the firearms and ammunition, the trooper asked the group whether any of them had been convicted of a felony before, and all four said "no." The four occupants were arrested for being in possession of stolen property. It was later discovered that Boswell had a prior conviction for first-degree aggravated robbery and Boswell was then charged with one count of being an ineligible person in possession of a firearm or ammunition under Minn. Stat. § 609.165, subd. 1b(a) (2018).

At Boswell's first appearance, his attorney waived the reading of his rights, but Boswell signed a written "statement of rights" that provided: "I understand . . . I can have a jury trial or a trial by a judge without a jury."[1] Boswell made a speedy-trial demand, and the court scheduled a jury trial for October 6. Boswell's attorney, however, sent a letter to the court stating, "[M]y client has contacted me and wants to waive his right to a jury trial and would request a court trial. Please set a court trial date in this matter." The district court scheduled a court trial to begin on October 20. The trial was scheduled to be held via remote technology because of the COVID-19 pandemic. Boswell's attorney then sent

[1] Boswell asked the district court during his first appearance, "Do I have rights?" The district court responded, "You do. They were listed on the Statement of Rights form that we have from you from today's date."

another letter to the court stating, "My client is requesting his court trial set for October 20, 2020, be set to a date sooner than the date set at this time."

A court trial was held beginning on October 29.[2] The court heard testimony from the trooper who initiated the stop, along with the sergeant and the other officer who had assisted with the search of the car. Boswell and Boswell's wife, who was one of the two females in the car, also testified.

Boswell's wife testified that she was sitting in the rear driver's-side seat. She said she was in the car to get a ride from Minneapolis to visit her mother in Fargo and did not know there were any firearms in the car or that the car was stolen.

Boswell testified that he had paid the car's other two occupants $40 to give him and his wife a ride from Minneapolis to Fargo. He also denied knowledge of any firearms or that the car was stolen. He testified that the shotgun was not in the back seat during the drive from Minneapolis, and that he thought another occupant might have put it there along with other items while removing the spare tire from the trunk. Boswell explained that he had only been back in the car briefly when the trooper drove up. He stated that, before the trooper's arrival, he had been out of the car assisting while the tire was being changed.

Following the trial, the district court found Boswell guilty of being an ineligible person in possession of a firearm based on its determination that Boswell was in possession of the shotgun found in the rear passenger-side seat. The district court also found that

[2] The start date of the trial was delayed at the request of Boswell's attorney because Boswell's attorney was exposed to COVID-19. As background, we take judicial notice of the fact that certain public-health protocols and precautions were in place at the time due to the COVID-19 pandemic.

Boswell was not in possession of either the rifle found in the trunk or the ammunition found in the driver's-seat door.

The district court set out in its findings that the shotgun "was concealed in such a way and positioned in the back seat so that it would be obvious that it was a firearm to a passenger sitting directly next to it." The district court also found that Boswell "was located in the seat in closest proximity to the shotgun at the time [the trooper] arrived on the scene" and that, when Boswell "got out of the car, he leaned down and reached into the vehicle, appearing to adjust something in the area where he had been seated." The district court found that Boswell's testimony about the location of the shotgun was not credible and determined "that the shotgun had been in the vehicle's interior the entire trip from Minneapolis." The district court concluded that it could "infer from these facts that [Boswell] knew that the shotgun was immediately next to him and that he was exercising direct physical control over the shotgun."

Boswell filed a motion for a new trial which the district court denied; the motion did not assert that there was an invalid jury-trial waiver. The district court also denied Boswell's motion for a downward departure and sentenced him to 60 months in prison. Boswell now appeals.

DECISION

Boswell argues in this appeal that he is entitled to a reversal of his conviction because the state failed to prove that he was in knowing possession of the shotgun. He also argues, in the alternative, that even if we conclude that the evidence was sufficient to prove

his guilt, he is entitled to a new trial based on his argument that he did not validly waive his right to a jury trial.

We will address first, as a threshold issue, Boswell's argument that the state failed to present sufficient evidence to prove his guilt. If we were to determine that the evidence was not sufficient to support his conviction, Boswell would be entitled to have his conviction reversed. Double jeopardy would then bar a retrial, and we would not need to reach the question of whether Boswell's jury-trial waiver was valid. *See generally State v. Harris*, 533 N.W.2d 35, 36 n.1 (Minn. 1995) (noting that double jeopardy bars further prosecution of a defendant whose conviction has been reversed because the evidence is insufficient as a matter of law).

I. The evidence at trial was sufficient to prove beyond a reasonable doubt that Boswell knowingly possessed the shotgun.

Boswell claims that the state failed to prove beyond a reasonable doubt that he possessed the shotgun found in the rear seat of the car. The statute under which Boswell was convicted provides that "[a]ny person who has been convicted of a crime of violence . . . and who ships, transports, possesses, or receives a firearm or ammunition, commits a felony . . . ." Minn. Stat. § 609.165, subd. 1b(a).

"Possession may be proved through evidence of actual or constructive possession." *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). Actual possession "involves direct physical control." *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quotation omitted). Constructive possession arises in cases where actual possession cannot be proven, but where police found the item (1) "in a place under the defendant's exclusive

control to which other people normally did not have access" or (2) "in a place to which others had access . . . [but] there is a strong probability (inferable from other evidence) that at the time the defendant was consciously or knowingly exercising dominion and control over it." *Harris*, 895 N.W.2d at 601 (citing *State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975)). "A defendant may possess an item jointly with another person." *Id.* Here, because the shotgun was found inside a car that had four occupants, we address whether Boswell constructively possessed the shotgun.[3]

Boswell argues that the circumstantial evidence provided was insufficient to prove that he knowingly possessed the shotgun found in the car. "When considering a claim of insufficient evidence, [this court] conduct[s] a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the [fact-finder] to reach its verdict." *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (quotations omitted). A heightened two-step standard of review is applied when evaluating circumstantial

[3] The district court stated in its findings that Boswell "was exercising direct physical control over the shotgun." This suggests a finding of actual possession, which requires "direct physical control." *Barker*, 888 N.W.2d at 353. However, the gun was not found on Boswell's person, and Boswell contends that "there is no evidence that [he] was holding the shotgun." It is sometimes possible to infer actual possession from circumstantial evidence where a defendant did not physically possess the item at the time of apprehension. *See id.* at 351-52, 354 (holding that defendant, who was arrested while fleeing from a car, could be found in actual possession of drugs found in a ditch near the car). However, because the district court mainly discussed constructive possession, because the facts in this case more closely fit the doctrine of constructive possession, and because the state does not argue that Boswell actually possessed the shotgun, we only address the question of whether the evidence was sufficient to prove that Boswell constructively possessed the shotgun.

evidence.[4] *Id.*; *see also State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). "The first step is to identify the circumstances proved," deferring to the fact-finder's acceptance of proof of those circumstances (including credibility determinations) and rejecting any conflicting evidence. *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013). "The second step is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted).

The circumstances proved in this case include the following. Four people, including Boswell and his wife, were traveling in a stolen car. When the trooper approached in his squad car, Boswell was sitting in the rear passenger-side seat of the car. Boswell got out of the car from the rear passenger side and then bent down and briefly reached back inside the car through the open rear passenger-side door. He stood up again and raised his arms in the air, facing the trooper's squad car. Boswell then bent down a bit later and, for a second time, reached back inside the car through the open rear passenger-side door. When the trooper searched the rear back seat of the car, he found a shotgun with a piece of canvas draped over it. The shotgun was located approximately in the center of the rear passenger-side seat, leaning against the seat.

Under the second step of the circumstantial-evidence standard, this court must "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved." *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (quotation omitted). For a conviction to stand, "all the circumstances proved must be consistent with

[4] Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *Harris*, 895 N.W.2d at 599 (quotation omitted).

the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt." *Id.* (quotation omitted). Boswell argues here that the circumstances proved show nothing more than mere proximity. He states, correctly, that mere proximity by itself is not sufficient to demonstrate that Boswell "consciously or knowingly exercise[ed] dominion and control over" the gun; proof of possession requires a showing that Boswell had both "an ability and intent" to exercise dominion and control over the shotgun. *Harris*, 895 N.W.2d at 601-02.

We conclude, however, that the circumstances proved in this case are consistent with the hypothesis of guilt. First, the shotgun was found concealed under a piece of canvas in the center of the seat on the rear passenger side of the car where Boswell had been sitting. And one of the officers testified that someone could not have sat in that seat with the shotgun in that position "without knowing it was there." The trooper's testimony and the squad car video also show that, after initially getting out of the car, Boswell bent down and reached back inside "as if manipulating an object," according to the district court's characterization of his actions. In addition, Boswell can be seen later in the video, before the trooper searched the car, bending back down and reaching again with his hands into the rear passenger side of the car. Finally, Boswell made a false statement to the trooper that he had no prior felony conviction.[5] *See Eggersgluss v. Comm'r of Pub. Safety*, 393 N.W.2d 183, 185 (Minn. 1986) (noting that lack of truthfulness may show consciousness of guilt). From this evidence, it is reasonable to infer that Boswell knew that the shotgun was present

[5] It should be noted that we place no weight in our analysis on the fact that Boswell raised his arms in the air when the trooper approached.

on the seat next to him and that he exercised dominion and control over the shotgun by, if nothing else, making sure it was concealed under the piece of canvas.

The next step is to determine whether there are "other reasonable, rational inferences that are inconsistent with guilt." *Al-Naseer*, 788 N.W.2d at 474 (quotation omitted). Boswell argues that the circumstances proved could be consistent with a rational hypothesis that one of the other occupants of the car placed the shotgun on the seat when trying to get to the spare tire in the trunk and that Boswell therefore never exercised dominion or control over the shotgun. While it is possible that someone else may have placed the shotgun on the seat, it is not reasonable or rational to draw the inference based on the record in this case that Boswell never exercised dominion or control over the shotgun.

As we have noted, the shotgun was found in the middle of the rear passenger-side seat where Boswell had been sitting and one of the officers testified that there is no way someone could have sat in the seat and not known it was there. In addition, the videotape depicts Boswell not once, but twice reaching into the back passenger-side seat with his arms. The only reasonable inference is that Boswell was aware of the shotgun and exercised dominion and control over it if for no other reason than to conceal it from law enforcement. We thus conclude that Boswell's alternate hypothesis is neither reasonable nor rational.

Boswell also argues that there was no affirmative evidence showing that the shotgun was next to Boswell for the entire trip. But the state was not required to prove that the shotgun was next to Boswell for the entire trip. The state only needed to prove that he

exercised dominion and control over the firearm at the time of his arrest. *Harris*, 895 N.W.2d at 592; *Florine*, 226 N.W.2d at 610. We therefore conclude that the state offered sufficient evidence to prove Boswell's guilt beyond a reasonable doubt.

II. The district court's failure to obtain Boswell's personal jury-trial waiver constitutes plain error.

Boswell next argues that, even if the state's evidence was sufficient to prove guilt, he is nevertheless entitled to a new trial because his purported jury-trial waiver was not valid. The United States and Minnesota Constitutions guarantee a criminal defendant the right to a jury trial. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. A defendant may waive this right with approval of the court, but only if the defendant "does so personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd. 1(2)(a). "Whether a criminal defendant has been denied the right to a jury trial is a constitutional question that we review de novo." *State v. Kuhlmann*, 806 N.W.2d 844, 848-49 (Minn. 2011). In our analysis of this issue, we first address the question of whether Boswell validly waived his right to a jury trial and, second, the question of whether Boswell is entitled to a new trial.

Validity of the Waiver

Boswell argues that he never personally waived his right to a jury trial. Boswell notes that the only reference in the record to a waiver by Boswell of his right to a jury trial was a statement in a letter to the court from Boswell's attorney. The letter, which is dated September 8, 2020, states: "I am writing to inform you that my client has contacted me and

wants to waive his right to a jury trial and would request a court trial. Please set a court trial date in this matter." The letter is not signed by Boswell. The state does not contest the fact that the letter does not satisfy the personal-waiver requirement of Minn. R. Civ. P. 26.01, subd. 1(2)(a).

The state argues, however, that there was a personal waiver by Boswell on the record at a pretrial hearing held on October 9. At the hearing, which was also held using remote technology, the court and the parties discussed the need to reschedule the trial date because Boswell's attorney had been exposed to COVID-19. After a new trial date was agreed upon, the district court addressed Boswell directly, advising him that he had "the right to a speedy trial." The district court then explained that the trial needed to be rescheduled, despite the speedy-trial demand, because Boswell's attorney had been exposed to COVID-19. This exchange followed:

> THE COURT: This is intended to be a court trial which means we can proceed via Zoom. And actually [your attorney] and you would not need to be in the same room and things like that; however, I can also tell you that if indeed [your attorney] does end up with COVID and he has certain symptoms that it can affect people cognitively . . . . He is asking this matter be reset given his restrictions. . . . So—is that something you've understood from all this conversation?
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Okay. So it is not my wish to make [your attorney] be ready, prepared to go next week when we don't know how the test and the results and if he should get symptoms are going to go . . . . So he is asking the Court to make a finding of good cause because of the COVID situation but to set this on as soon as possible . . . and right now we're hoping for October 27th if other matters get, are able to settle. But if not, we'd be looking at the following week on November 4th. You understand that?
> THE DEFENDANT: Yes, ma'am.

> THE COURT: So at this time do you have any comments you want to make about the situation or any request given the circumstances?
> THE DEFENDANT: Just, just same thing [my attorney] said, just as soon as possible would be best. That's really all I care about.

We conclude that this colloquy also fails to satisfy the requirement of a personal waiver. The district court's comments were all in the context of the speedy-trial demand and the reason for delaying the start of trial. No reference was made to jury-trial rights and the district court never inquired whether Boswell intended to waive his right to a jury trial.

We note that a thorough explanation and questioning "is not an absolute requirement," *State v. Johnson*, 354 N.W.2d 541, 543 (Minn. App. 1984), and that even a very short query may be sufficient to establish a valid waiver. *See State v. Pietraszewski*, 283 N.W.2d 887, 890 (Minn. 1979) (holding that a waiver was valid when the district court merely asked: "your counsel tells me that you were willing and in fact preferred to waive a jury for the purpose of this Trial, but I want to confirm that for the record at this time"). *But see State v. Osborne*, 715 N.W.2d 436, 442 (Minn. 2006) (advising that a court should ask "searching questions to be satisfied that the defendant was informed of his rights [to a jury trial] and that the waiver was voluntary" (quotations omitted)). Here, however, there was no inquiry by the court of any sort regarding the alleged waiver. The court stated as fact that a "court trial" was going to be held; this does not come close to ensuring that Boswell actually decided to waive his right to a jury trial. *See, e.g.*, *State v. Little*, 851 N.W.2d 878, 885-86 (Minn. 2014). We therefore conclude that Boswell's jury-trial waiver was not valid.

Plain Error

Because the waiver was not valid, we must next determine whether Boswell is entitled to a new trial. Boswell argues that he is entitled automatically to a new trial because an invalid waiver of the right to a jury trial constitutes a structural error. A structural error occurs when there are "defects in the constitution of the trial mechanism," such that "the entire conduct of the trial from beginning to end is obviously affected" and "no criminal punishment may be regarded as fundamentally fair." *Kuhlmann*, 806 N.W.2d at 851 (quotation omitted). The state characterizes the error as a procedural, not a structural, error in the conduct of the trial, and maintains that plain-error analysis should apply because Boswell never raised the waiver issue before the district court. *See State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016) (noting that plain-error analysis is appropriate when a defendant fails to raise an objection to an alleged trial error before the district court). Because we conclude that the failure to obtain a personal waiver was reversible error under the more onerous plain-error standard, we need not address this issue.

"In order to meet the plain error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights." *Id.* (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). If a defendant establishes these three elements, this court must then determine "whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740.

The first prong of this standard is addressed by our discussion above: because Boswell did not validly waive his right to a jury trial, there was an error. Under the second

prong, "[a]n 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." *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010). "It is well established that a defendant's waiver of his right to a jury trial on the elements of an offense must be knowing, intelligent, and voluntary." *State v. Dettman*, 719 N.W.2d 644, 651 (Minn. 2006). Thus, the parties agree, as do we, that if Boswell's waiver was invalid then the error was plain.

Under the third prong of the plain-error standard, we examine whether the error affected Boswell's substantial rights. "An error affects substantial rights if the error was prejudicial and affected the outcome of the case." *Little*, 851 N.W.2d at 884 (quotation omitted). In *Little*, the supreme court held that a defendant's substantial rights were affected by the failure to obtain a second jury-trial waiver when a new, more serious charge was added to the case and it was not clear that the defendant was aware of the more serious charge. *Id.* at 885-86. The defendant had personally waived his jury-trial right to the charges in the original complaint. *Id.* at 882. The supreme court noted that the record in the case was "silent and provide[d] no reliable evidence suggesting that, had [the defendant] known of the amended charge, he would have waived his right to a jury trial." *Id.* at 886. Thus, it reasoned that because there was "a reasonable possibility that [the defendant] would not have waived his right to a jury trial . . . the district court's failure to obtain a waiver and then concluding [his] trial without a jury deprived [him] of his right to a jury trial and was prejudicial." *Id.*

The state argues that *Little* is distinguishable because a more serious charge was added against the defendant in that case and the defendant was not given an opportunity to

state whether he still wanted to waive his jury-trial right. But here, the charge against Boswell was also a serious charge with a presumptive commitment to prison and a potential sentence of up to 15 years. Minn. Stat. § 609.165, subd. 1b(a). And, in this case, *no* inquiry was made by the district court and Boswell *never* personally declared that he wished to waive his right to a jury trial. Indeed, it does not appear that a jury-trial waiver was ever even mentioned on the record in this case in Boswell's presence, let alone through a personal query directed to Boswell.

The state argues that, regardless of any failure to obtain a personal waiver, Boswell's substantial rights were not affected because Boswell "had a trial to the court, which was consistent with the request . . . made through his attorney," Boswell and his wife both had the opportunity to testify "about his version of the facts," and "[t]he presentation of evidence would have been similar in a jury trial as it was in [the] court trial." The state contends that, consequently, "[t]he record does not indicate that Boswell would have been better off having a jury trial." The supreme court rejected this argument in *Little*, and so do we. 851 N.W.2d at 885-86. "[O]ur focus is on what the defendant *would* have done, not what we think the defendant *should* have done." *Id.* at 886 (quotation omitted).

Finally, we address the fourth prong of the plain-error standard—whether we "should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740. Based on the importance of the right to a jury trial in our criminal justice system, the seriousness of the charge faced by Boswell, and the complete failure to inquire or discuss the jury-trial waiver on the record, we conclude that a reversal and remand for a new trial are required to ensure the fairness and integrity of judicial

proceedings. We therefore reverse Boswell's conviction and remand to the district court for a new trial.

Reversed and remanded.