STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1370

State of Minnesota,
Respondent,

vs.

Kymone Leandre Scott,
Appellant.

Filed October 3, 2022
Affirmed
Bryan, Judge

Hennepin County District Court
File No. 27-CR-20-15685

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

Michael O. Freeman, Hennepin County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Slieter, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this direct appeal from conviction of possession of a firearm by a prohibited person, appellant makes the following two arguments: (1) the district court plainly erred in instructing the jury on the law concerning possession; and (2) the prosecutor committed

misconduct in closing argument. Because we conclude that the district court did not err in its jury instructions and that the prosecutor's alleged misconduct did not affect appellant's substantial rights, we affirm the district court.

FACTS

On July 15, 2020, respondent State of Minnesota charged appellant Kymone Leandre Scott with possession of a firearm by a prohibited person, in violation of Minnesota Statutes section 624.713, subdivision 1(2) (2018). Given the issues on appeal, we summarize the evidence presented at trial, the relevant portions of the jury instructions, and the attorneys' closing arguments.

At trial, the state presented the testimony of two eyewitnesses, six Minneapolis Police Department officers, two Minneapolis crime lab unit employees, and two employees of the Bureau of Criminal Apprehension. One witness, K.D., testified that she was in her home when she received a voice message from her son, T.D., who can see K.D.'s backyard from his house. T.D. stated that K.D. should not go into her backyard because there was a man with a gun. K.D. testified that she looked out her window and saw a man holding a gun, crouching in her backyard. K.D. then called 911 and officers arrived within a few minutes after her call. T.D. testified that he heard gunshots nearby and saw a man run into his mother's backyard. T.D. stated that the man was wearing a black hat, white t-shirt, and black shorts, which was consistent with the description given by K.D. during the 911 call. T.D. did not see the man holding a gun but saw a heavy object in the pocket of his shorts that he believed was a gun. T.D. further testified that he sent his mother a voice message through his smart home device to tell her that there was a man with a gun in her backyard.

Multiple Minneapolis police officers testified that they were on patrol, heard multiple gunshots, and were given the information provided by K.D. in the 911 call. In the area near K.D.'s backyard, responding officers found only one person. This person was shirtless, wearing black shorts, and later identified as Scott. According to a video recording from an officer's body camera, Scott told officers that he was not alone but was with another man. Scott also stated that he was "just running" nearby and that he "got nothing" on his person. Under a bush close to the location where officers encountered Scott, one officer recovered a firearm wrapped in a white t-shirt. Officers also recovered a black hat nearby. Investigators tested several items for DNA, including the sweatband of the hat; the cuff, collar, and a blood stain on the t-shirt; and the firearm. According to trial testimony, the major male DNA profiles from the samples collected from the hat, shirt collar, and blood stain on the shirt all matched Scott's DNA. The DNA profiles from the hat and t-shirt would not be expected to occur more than once among unrelated individuals in the world's population. The partial major male DNA profile from the firearm also matched Scott's DNA. The DNA profile from the firearm would not be expected to match more than one out of every 58,000 people.

After the defense rested, the district court instructed the jury as follows on the law of possession:

> Under Minnesota law, whoever knowingly possesses a firearm or ammunition and is a person prohibited from possessing a firearm or ammunition is guilty of a crime.
>
> Possession of a firearm or ammunition by a prohibited person, elements: The elements of possession of a firearm or ammunition are: First, the defendant knowingly possessed a

> firearm or ammunition or consciously exercised dominion and control over it.
>
> . . . .
>
> The law recognizes two kinds of possession: actual possession and constructive possession. A person is in actual possession of a firearm or ammunition if he has it on his person or is exercising direct physical control over the firearm or ammunition at a given time. A person is in constructive possession of a firearm or ammunition if the firearm or ammunition was in a place under his exclusive control to which other people did not normally have access, or if found in a place to which others had access, the person knowingly exercised dominion and control over the firearm or ammunition. You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession.

During Scott's closing argument, defense counsel anticipated an argument the state might make on rebuttal regarding officers not conducting an in-person or "show-up" identification of Scott. Defense counsel stated: "[The state's] going to say: Well, that's really a red herring. That doesn't mean anything. That doesn't mean anything. They don't need to do that . . . . I mean, some steps that even you as members of the jury might think is something that would be important to do, even if you're not police officers."

In its rebuttal argument, the state made the following statement:

> I want to address some things that the defendant does say when the officers are arriving on scene and taking him into custody. You can hear him say in the body camera: I was just running. I was just with the person. To which the officers reply: Well, where did he go? That's because the defendant panics when the officers arrive and points the other way: I was just with someone. He's running somewhere else. I'm just running. I didn't have anything to do with anything. But,

> members of the jury, he's lying. He's lying because he's about to get caught.
>
> . . . .
>
> His statement that: There was somebody else there, and I was just running, and they ran away. [Defense counsel] is right. It's the defense['s] feeble attempt at creating a red herring. But the reality is no one else was there.

Scott's counsel did not object during the state's rebuttal argument. The jury found Scott guilty. The district court sentenced Scott to 60 months in prison. Scott appeals.

DECISION

Scott challenges the jury instructions regarding constructive possession and the prosecutor's statement in its rebuttal argument. We conclude that the district court did not commit plain error when it instructed the jury and that Scott's substantial rights were not affected by any error committed by the prosecutor in rebuttal argument.[1]

I. Jury Instructions

Scott argues that his conviction for unlawful possession of a firearm must be reversed because the district court plainly erred in its jury instructions. Because the district court's instructions did not confuse, mislead, or materially misstate the law, we conclude that the district court did not plainly err when it instructed the jury on the law of possession.

[1] Scott also raises a third argument: that the cumulative effect of the two asserted errors denied him a fair trial. *See State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017) (noting that a defendant may be entitled to a new trial "in rare cases where the errors, when taken cumulatively, have the effect of denying the [defendant] a fair trial" (quotation omitted)). Because we conclude that the district court did not plainly err and that any error by the prosecutor did not affect the verdict, we necessarily conclude that the cumulative effects of these alleged errors did not deny Scott a fair trial.

"[J]ury instructions must define the crime charged and explain the elements of that crime to the jury," and we typically afford the district court "broad discretion and considerable latitude in choosing the language of jury instructions." *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (quotations omitted). A district court abuses this discretion if it provides instructions that "confuse, mislead, or materially misstate the law," *State v. Taylor*, 869 N.W.2d 1, 14-15 (Minn. 2015) (quotation omitted), or if they omit an element of the charged offense, *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019). Under this analysis, we typically determine whether the error was harmless beyond a reasonable doubt. *State v. Pollard*, 900 N.W.2d 175, 181 (Minn. App. 2017). In this case, however, Scott did not object to the jury instructions at trial. Absent an objection, we review the district court's jury instructions for plain error. *Milton*, 821 N.W.2d at 805. Under a plain-error analysis, we consider whether the jury instructions contained "an (1) error (2) that was plain and (3) that affected the defendant's substantial rights." *Id*. "If these three prongs . . . are met, we then decide whether we must address the error to ensure fairness and the integrity of the judicial proceedings." *Id*. (quotation omitted).

Scott's argument focuses on the first portion of the district court's instruction, which explained that the state must prove that "the defendant knowingly possessed a firearm or ammunition or consciously exercised dominion and control over it." We are not convinced that the instructions constitute plain error for two reasons. First, this court determined that very similar jury instructions did not misstate the law or constitute plain error in *State v. Peralta*, No. A17-0027, 2017 WL 6567652, at *7 (Minn. App. 2017), *rev. denied* (Minn. Mar. 20, 2018). Just as in this case, the district court in *Peralta* explained that the first

element requires the state to prove that the defendant "knowingly possessed ammunition or consciously exercised dominion and control over it." *Id.* While we acknowledged that this portion of the instruction was "not precise," we determined that it was not "materially wrong" because both knowingly possessing ammunition and consciously exercising dominion and control over ammunition can establish guilt. *Id.* (citing *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017)). Although *Peralta* was nonprecedential, we believe its analysis is persuasive, *see* Minn. R. Civ. App. P. 136.01, subd. 1(c), and we reach the same conclusion here. *See Harris*, 895 N.W.2d at 601 (stating that to establish guilt, "the State must show that . . . the defendant was consciously or knowingly exercising dominion and control over [the firearm]."). This portion of the instruction is a correct statement of law.

Second, any misunderstanding that the first portion of the instruction might have created was resolved by the remainder of the instruction. The district court explained that Minnesota law "recognizes two kinds of possession" and defined both types, correctly stating the mens rea for constructive possession. Thus, we conclude that the district court did not plainly err by providing instructions that "confuse, mislead, or materially misstate the law." *Taylor*, 869 N.W.2d at 14-15.

II. Prosecutorial Misconduct

Scott argues that the prosecutor committed misconduct during closing argument that entitles him to a new trial. Because we conclude that any such misconduct did not affect Scott's substantial rights, we affirm the district court.

Scott did not object at trial to the prosecutor's argument, so we apply a modified plain-error test to review his claims of misconduct. *State v. Peltier*, 874 N.W.2d 792, 803

(Minn. 2016); *see also State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (extending the plain-error doctrine to unobjected-to claims of prosecutorial misconduct). "Under this approach, the defendant must establish the existence of an error that was plain, and then the burden shifts to the State to establish that the plain error *did not* affect the defendant's substantial rights." *State v. Epps*, 964 N.W.2d 419, 423 (Minn. 2021) (citing *Ramey*, 721 N.W.2d at 302). An error affects the defendant's substantial rights "if there is a reasonable likelihood that the error substantially affected the verdict." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002); *see also State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011) ("The court's analysis under the third prong of the plain error test is the equivalent of a harmless error analysis."). If any element of the plain-error test is not satisfied, we need not consider the others. *State v. Webster*, 894 N.W.2d 782, 786 (Minn. 2017).

Scott argues that the prosecutor committed misconduct during the state's closing argument by making two improper statements. Scott challenges the portion of the state's rebuttal closing argument during which the prosecutor told the jury that the defendant was lying to police officers who initially encountered him at the scene of the arrest: "You can hear him say in the body camera: I was just running. I was just with the person . . . . I'm just running. I didn't have anything to do with anything. But, members of the jury, he's lying. He's lying because he's about to get caught." Scott also asserts misconduct in the portion of the rebuttal argument during which the prosecutor addressed defense counsel's criticism that the officers did not conduct a show-up identification.[2] The prosecutor stated:

[2] We observe that defense counsel prompted these comments by anticipating that the state would label this a "red herring" on rebuttal: "[The state's] going to say: Well, that's really

"[Defense counsel] is right. It's the defense['s] feeble attempt at creating a red herring. But the reality is no one else was there."

Scott is correct that, in certain circumstances, a prosecutor commits misconduct by stating that a witness is lying, *see State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn. 2006) (concluding that the prosecutor committed misconduct by making a personal assessment of a witness's credibility),[3] or by disparaging the defense, *Peltier*, 874 N.W.2d at 804; *State v. Pearson*, 775 N.W.2d 155, 164 (Minn. 2009) (noting that prosecutors "may not belittle a line of defense"). We need not determine whether the prosecutor's statements constitute misconduct, however, because the state has established that Scott's substantial rights were not affected by any error.

The evidence presented against Scott included the testimony of T.D. and K.D., the video recording from multiple responding officers' body cameras, and DNA evidence.

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a red herring. That doesn't mean anything. That doesn't mean anything." These comments place the prosecutor's rebuttal arguments in a different context than those in *State v. Moseng*, 379 N.W.2d 154, 156 (Minn. App. 1985) (rejecting appellant's argument of prosecutorial misconduct when prosecutor used the phrase "red herring" to describe "aspects of the evidence that the state need not prove at all but [to which] the defense [is expected to] attach unwarranted significance"). Because we conclude that the reference to a "red herring" in this case did not affect Scott's substantial rights, we need not determine whether *Moseng* permits the state's use of the phrase "feeble attempt at creating a red herring" or whether defense counsel's invitation and introduction of the term "red herring" justifies the state's subsequent use of the term.

[3] We also note that a prosecutor does not commit misconduct by referring to a defendant's statements as lies when there is "a clear basis in the record" for that argument. *See State v. Washington*, 725 N.W.2d 125, 134 (Minn. App. 2006) (holding that the prosecutor did not commit misconduct by calling the defendant a liar in closing argument when referring to defendant's prior conviction for providing false information to a police officer), *rev. denied* (Minn. Mar. 20, 2007). Given our determination that Scott's substantial rights were not affected by this statement, we need not determine whether there was a clear basis in the record for the prosecutor's statement.

Specifically, T.D. testified that he heard gunshots very close by and saw a man wearing a black hat, white t-shirt, and black shorts run into K.D.'s backyard. In the 911 call, K.D. described looking into her backyard and seeing a man holding a gun and wearing a black hat, white shirt, and black shorts or pants. Officers arrived within minutes of K.D.'s 911 call and encountered only one person near the backyard, Scott. He was not wearing a shirt when officers encountered him. Officers retrieved a firearm wrapped in a white t-shirt from under a bush nearby. They also recovered a black hat in the area. The DNA samples collected from the hat, shirt, and firearm all matched Scott's DNA. The DNA profiles from the hat and shirt would not be expected to occur more than once among unrelated individuals in the world's population. Similarly, the DNA profile from the firearm would not match more than one person out of every 58,000 people. Given the testimony of K.D. and T.D., the proximity of Scott to the firearm, the fact that he was alone and not wearing a shirt, the fact that the firearm was wrapped in the t-shirt, and the DNA evidence from the shirt, hat, and firearm, we conclude that there is no reasonable likelihood that the jury's verdict would have been different had the prosecutor not made the challenged statements in the rebuttal closing argument. Any misconduct, therefore, did not affect Scott's substantial rights.

Affirmed.