STATE OF MINNESOTA
IN COURT OF APPEALS
A10-987

State of Minnesota,
Respondent,

vs.

Troy William Drusch,
Appellant.

Filed April 26, 2011
Affirmed
Toussaint, Judge

Ramsey County District Court
File No. 62-CR-09-14511

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

John J. Choi, Ramsey County Attorney, Afsheen D. Foroozan, Special Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Peterson, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Judge

Appellant Troy William Drusch challenges his conviction of possession of a firearm by an ineligible person, arguing that the evidence was insufficient to allow the

jury to find him guilty. Appellant also argues that the admission into evidence of bullets not belonging to either firearm recovered by the police at his residence and a witness's testimony concerning evidence previously ruled inadmissible were prejudicial error. Because the evidence is sufficient to sustain the verdict and because any errors were harmless, we affirm.

D E C I S I O N

I.

Appellate review of a sufficiency claim entails "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 jury to reach its verdict." *State v. Yang*, 774 N.W.2d 539, 560 (Minn. 2009) (quotation omitted). We presume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009).

The parties stipulated to the fact that appellant was ineligible to possess a firearm; the only dispute is whether he possessed one. Appellant argues that the evidence was legally insufficient to prove that he possessed a firearm because "the physical evidence nearly excluded [appellant] and established that [S.K.] possessed the shotgun that night" and because the eyewitness's testimony that she saw appellant was not credible. In his pro se supplemental brief, appellant contends that the gunshots were fired from S.K.'s bedroom and that only S.K. and a third person had physical access to the room where the guns were found.

The uncorroborated testimony of a single eyewitness may be sufficient to support a conviction. *State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010). Even when a witness's credibility is "seriously called into question," weighing the witness's credibility "is a function exclusively for the jury." *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002). A jury is not required to accept all or none of a witness's testimony; rather, it may "accept part and reject part" of the testimony as it deems worthy or unworthy of belief. *State v. Poganski*, 257 N.W.2d 578, 581 (Minn. 1977).

On August 14, 2009, the police received a 911 call about gunshots being fired from a house in St. Paul that was later identified as appellant's residence. The caller reported that the gunfire sounded like a shotgun. The caller's description of the person who fired the gun was consistent with appellant. As the dispatched police officers approached the area, a group of girls flagged the officers down to inform them that there was a person shooting a shotgun from the roof of a duplex. When they arrived on the scene, the officers spoke with T.M., a neighbor who had lived in the other side of the duplex for about three months. T.M. informed the officers that she heard a shotgun fired and saw her neighbor Troy—later identified as appellant—on the roof.

The officers entered the premises and arrested appellant and S.K. During their search of the duplex, the police officers found a sawed-off shotgun and a .25-caliber handgun in the upstairs east bedroom. The officers also found live shotgun shells and a spent shotgun shell in the east bedroom. Spent .25-caliber casings were found in the north bedroom. Spent .357 casings were also found in the north bedroom, as were .25-caliber and .9-millimeter live rounds. The duplex has four bedrooms, and appellant

stayed in the south bedroom by himself, while S.K. stayed with appellant's mother in the north bedroom.

Forensic analysts later found no identifiable fingerprints on either gun or on the bullets. A DNA sample from the shotgun indicated a mixture of DNA from two or more individuals. S.K. matched the predominant profile. Ninety-six percent of the population could be excluded as a contributor to the minor type, but appellant could not be excluded. A DNA mixture on the handgun indicated a mixture of three or more individuals, none of whom was appellant; S.K. could not be excluded as a possible contributor.

T.M. testified that on the night in question she saw appellant in a chair on the roof with a shotgun. She subsequently went to the gas station across the street. At that point, T.M. heard someone fire a shotgun. The duplex was visible from the gas station, and T.M. saw appellant "standing in the window." T.M. testified that she did not see S.K. that night.

This court must presume that the jury believed T.M.'s testimony, and we defer to the jury's assessments of credibility. Although appellant's mother testified that appellant could not have accessed the east bedroom where the firearms were found, and appellant's fiancée testified that appellant was asleep in bed when gunfire sounded outside, the jury disbelieved this testimony. The DNA evidence on which appellant relies indicates only that at some point S.K. *also* held the shotgun; appellant could not be excluded from the other profile, even though 96% of the population could be. That, coupled with T.M.'s testimony and identification of appellant, as well the 911 caller's description that was not inconsistent with appellant, is sufficient to sustain the verdict.

II.

Appellant argues that evidence of .357-caliber spent casings and .9-millimeter live ammunition was irrelevant and was prejudicial and inadmissible character or propensity evidence. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Before trial, appellant moved to suppress the .357-caliber casings and .9-millimeter round on relevancy grounds. The district court ruled that they were relevant as they related to possession of a firearm. Appellant also moved to suppress any character evidence or evidence of prior bad acts, although he did not tie that argument to the ammunition.

At trial, a police officer testified that he found 24 spent .357 casings in the north bedroom; the casings were offered and received as a trial exhibit. The officer also testified that he recovered a .9-millimeter live round from the north bedroom, which was received as a trial exhibit.

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. But relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Minn. R. Evid. 403.

Appellant contends that this evidence was not relevant because it was not ammunition for the shotgun or the handgun that the police seized. We agree. This

evidence is not probative of whether appellant possessed the seized shotgun or handgun, since the ammunition did not belong to either weapon. Whether or not this ammunition was, as appellant contends, also inadmissible character or bad-acts evidence, it did not make more likely the fact that appellant was guilty of possessing a firearm when it did not match either firearm that the police recovered. Again, appellant could not be excluded from the DNA profile found on the shotgun, and a shotgun was both seen and heard by witnesses—*that* was the key weapon in the case, and ammunition not belonging to it or the handgun was more likely to lead to confusion of the issue than to prove any fact of consequence.

Because we conclude that the district court abused its discretion by admitting the .357-caliber and .9-millimeter casings and ammunition, we must determine whether the error was harmless. *See* Minn. R. Crim. P. 31.01 (stating that error not affecting substantial rights must be disregarded); *State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) (stating that a defendant is entitled to a fair trial, not a perfect or error-free trial). The erroneous admission of evidence is harmless unless there is a reasonable possibility that it significantly affected the verdict. *State v. Utter*, 773 N.W.2d 127, 133 (Minn. App. 2009).

Evidence in this case included eyewitness testimony from appellant's neighbor as well as corroborating testimony and physical evidence relating to the firearms found at appellant's residence. On this record, we find no reasonable possibility that evidence of ammunition for two other firearms significantly affected the verdict. The district court's erroneous admission of that evidence was therefore harmless.

III.

Appellant argues that a testifying police officer's reference to mail addressed to appellant and found at his residence was prosecutorial error because it violated a previous district court order.[1]

Before trial, appellant sought to exclude from evidence a court notice found at his residence and addressed to him there. The district court and both parties ultimately agreed that the state could introduce evidence that there was mail if the state's witness did not identify the content of the mail or the fact that it was a court notice. But at trial, the prosecutor asked a police officer whether he found mail addressed to appellant at the duplex. The officer replied, "Yes, we did. We recovered a Court Notice." That was the extent of the reference to a court notice.

Because appellant did not object, the alleged error is reviewed under the modified plain-error standard applicable to claims of prosecutorial error. This court asks whether (1) there was error, (2) the error was plain, and (3) the error affected the defendant's substantial rights. *Cao*, 788 N.W.2d at 715. The defendant bears the burden to show that there was error and that it was plain; the burden then shifts to the state to show that the defendant's substantial rights were not affected. *Id.* If all three prongs are met, we then

[1] We have previously recognized an "important distinction" between prosecutorial misconduct and prosecutorial error: misconduct implies a deliberate or grossly negligent violation of a rule or practice, whereas error implies a mistake or misstep of the sort that trial lawyers will occasionally make. *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009). The standard of appellate review for prosecutorial error is the same as the standard of review for prosecutorial misconduct, however. *Id.* Here, there is no indication that the prosecutor intentionally elicited prohibited testimony, and we take appellant's claim as one of prosecutorial error.

must determine "whether to address the error to ensure fairness and integrity in judicial proceedings." *Id.*

An error is plain if it is clear or obvious, such as when it contravenes caselaw, a rule, or a standard of conduct. *Id.* A plain error affects a defendant's substantial rights if it was prejudicial and affected the outcome of the case, that is, if there is a reasonable likelihood that it had a significant effect on the jury's verdict. *Id.* at 717. "On review, we consider the strength of evidence against the defendant, the pervasiveness of improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *Id.*

Caselaw has consistently recognized that the "prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Prosecutorial misconduct results from violations of established standards of conduct, including "orders by a district court," and "attempting to elicit or actually eliciting clearly inadmissible evidence may constitute misconduct." *Id.* Indeed, "Minnesota law is crystal clear [that] the state has an absolute duty to prepare its witnesses to ensure that they are aware of the limits of permissible testimony." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). A prosecutor must prepare his witnesses so that they "will not blurt out anything that might be inadmissible and prejudicial." *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978).

The district court specifically ruled before trial that this evidence was inadmissible. The prosecutor had a duty to prepare the witness—a veteran police

officer—to testify regarding the receipt of mail without mentioning the inadmissible fact that the mail included a court notice. The prosecutor's failure to do so violated the district court's ruling. Thus, appellant has shown plain error.

But the error consists of a single improper remark during a two-day trial. Even if the jury assumed that appellant's receipt of a court notice meant that he was in some way in trouble with the law, there is no reasonable likelihood that this had a significant effect on the verdict. The jury found appellant guilty of possession of a firearm, but it found him not guilty of recklessly discharging that firearm, which is consistent with the fact that T.M. testified that she saw appellant holding a shotgun and heard gunfire but did not see him shoot it—this shows that the jury based its decision on the evidence supporting the charges rather than any improper inferences it could have drawn. The record contains substantial evidence of guilt, including eyewitness testimony and corroborating testimony and physical evidence. On this record, we conclude that the state has met its burden to show that the plain error did not affect appellant's substantial rights.

Affirmed.