STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2216

State of Minnesota,
Respondent,

vs.

Lamont Gerome Jiggetts,
Appellant.

Filed February 3, 2014
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CR-12-7877

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

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

Mark D. Nyvold, Special Assistant State Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Peterson, Judge; and Ross, Judge.

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

ROSS, Judge

Police searching a closet in an apartment rented by a woman found men's clothing, identification bracelets belonging to appellant Lamont Jiggetts, a baseball cap

having DNA material that matches Jiggetts's DNA profile, a wallet containing Jiggetts's social security card, and a 9-millimeter handgun with DNA material that matches Jiggetts's DNA profile. Jiggetts appeals his conviction of being a prohibited person possessing a firearm, contending that the state did not prove he knowingly possessed the gun. He also contends that the prosecutor committed misconduct during her closing argument by suggesting that a witness may have embellished her testimony and that defense counsel's role is to confuse the jury. Because direct DNA evidence supports the finding that Jiggetts knowingly possessed the gun and because the district court's failure to prevent or correct the prosecutor's statements does not constitute plain error prejudicing Jiggetts's substantial rights, we affirm.

FACTS

A Hennepin County jury found Lamont Jiggetts guilty of being a prohibited person possessing a firearm after it heard evidence describing the following facts.

Police executed a search warrant in October 2011 on a Minneapolis apartment that Tatiana Franklin had been renting for less than two months. Franklin and five men, including Lamont Jiggetts, were inside the apartment when police arrived. Officers searched a bedroom closet and found a Warner Star Model BM 9-millimeter semiautomatic handgun, men's clothes, men's shoes, baseball caps, a wallet containing Jiggetts's social security card, and identification bracelets naming Jiggetts. Franklin denied knowing about the gun. Police seized it and two of the caps for DNA testing. They also collected DNA samples from everyone present. The DNA material on one of the caps was a mixture from at least four individuals. The other cap did not have enough

DNA to test. DNA testing excluded about 77 percent of the world's population, and it excluded everyone in the apartment except Jiggetts. The DNA material taken from the handgun was also a mixture from at least four people, with the predominant profile matching Jiggetts and being unlikely to occur more than once among unrelated persons in the world's population.

Franklin changed her story at trial. Contrary to what she had told police, she testified that she knew about the gun, that she had found it, and that it was left when a former roommate moved away. She claimed that she had lifted the gun with a shirt and put it in the closet, but that she could not be sure whose shirt she used because she let various men into her apartment and they routinely left dirty clothes behind. Franklin acknowledged that she had been sexually involved with Jiggetts for about a year, that she was expecting his child, and that he sometimes shared her bed. She claimed that she and Jiggetts had been selling clothes and shoes online and had stored inventory in her bedroom. Confronted on cross-examination with inconsistencies, Franklin admitted that she had changed her story about the gun after she met with Jiggetts's defense team before the trial.

The forensic scientist who performed the DNA testing testified that Jiggetts likely handled the gun because more of his DNA material was present than she would expect if the material had been merely transferred to the gun without his direct contact with it. And an investigating officer testified that Jiggetts's Facebook page featured a September 2011 image of Jiggetts inside Franklin's apartment wearing a baseball cap that appeared to be one found in the closet.

The prosecutor's closing argument highlighted the discrepancies in Franklin's testimony about the gun. She insinuated that Franklin concocted her trial testimony after meeting with Jiggetts's lawyers, hoping to prevent Jiggetts from going to prison, and she told the jury to consider Franklin's motive to lie, including her relationship with Jiggetts. The prosecutor also rebutted Jiggetts's counsel's argument by telling the jury that it was "the defense attorney's job to make you think [the case is] more complicated than it is . . . to go beyond the obvious, to try to confuse common sense with creativity." Jiggetts did not object to the prosecutor's closing argument. The prosecutor told the jury it could convict Jiggetts of possession on two theories: actual possession, based on the DNA evidence, and constructive possession, based on the circumstantial evidence. The jury found Jiggetts guilty of being a prohibited person possessing a firearm.

Jiggetts appeals.

D E C I S I O N

I

Jiggetts argues that the state introduced insufficient evidence to convict him. We review challenges to the sufficiency of the evidence to determine if the evidence, viewed in the light most favorable to the conviction, could allow the jury to find the defendant guilty. *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). We therefore assume that the jury credited the state's witnesses and drew all reasonable inferences from disputed evidence in favor of the conviction. *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007). We will not disturb the verdict if the jury, giving due regard to the presumption of

innocence and the requirement of proof beyond a reasonable doubt, could have found the appellant guilty. *State v. Crow*, 730 N.W.2d 272, 280 (Minn. 2007).

We scrutinize more closely those convictions in which at least one element was proved substantially by circumstantial evidence. *State v. Al-Naseer*, 788 N.W.2d 469, 473–74 (Minn. 2010). But despite Jiggetts's argument, we do not need to engage in this closer scrutiny here because we conclude that the direct DNA evidence proves that Jiggetts actually possessed the gun. The state had the burden to prove that Jiggetts actually or constructively possessed the gun while prohibited from doing so. *See* Minn. Stat. § 624.713, subd. 1 (2010); *State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004). The doctrine of constructive possession serves "to include within the possession statute those cases where the state cannot prove actual or physical possession." *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975). The state here provided evidence of actual possession. The jury heard and accepted direct evidence that Jiggetts physically handled the gun, and it was instructed on the meaning of actual possession. The predominant DNA material on the gun was Jiggetts's and testing of this evidence excluded virtually all the rest of the world's population. And the parties' stipulation that Jiggetts was prohibited from possessing a firearm is supported directly by Jiggetts's convictions of controlled-substance crimes (in 2005, 2006, and 2008) and fourth-degree assaults (in 2006). These are all crimes of violence under Minnesota Statutes section 624.712, subdivision 5 (2010), which prohibit the offender from possessing firearms under section 624.713, subdivision 1(2). And Franklin, with whom Jiggetts had been in a

relationship since June 2011, had moved into the apartment where police found the gun only a month and a half before the October 2011 search.

On the mistaken assumption that this is all merely circumstantial proof, Jiggetts argues that the evidence is not sufficient to exclude the inference that he did not possess the gun. "[D]irect evidence [is evidence that], if believed, directly proves the existence of a fact without requiring any inferences by the fact-finder. Circumstantial evidence, on the other hand, is evidence based on inference and not on personal knowledge or observation." *State v. Silvernail*, 831 N.W.2d 594, 604 (Minn. 2013) (Stras, J., concurring in part) (quotation omitted). On that definition, we hold that, in a gun-possession case, physical evidence that the defendant's DNA is on the gun corroborated by uncontested scientific testimony that the DNA likely got there by the defendant's handling of the gun is direct evidence of possession. On our direct-evidence review, we are satisfied that the jury reasonably found that Jiggetts actually handled the gun. The additional, circumstantial evidence that Jiggetts's other personal property was in the closet with the gun merely corroborates the direct physical evidence of his illegal possession. We conclude that the evidence supports Jiggetts's conviction on the state's theory of actual possession.

Jiggetts also contends that, even if the state proved that he actually possessed the gun, it failed to offer sufficient evidence that he did so *knowingly*. At trial, Jiggetts contested the forensic scientist's testimony and argued that Jiggetts's DNA found its way onto the gun when Franklin handled it with a dirty shirt that belonged to Jiggetts. The jury rejected that theory, reasonably, and the new theory on appeal, which is that Jiggetts

may have handled the gun unknowingly, cannot overcome our deference to a reasonable jury's fact finding. Knowledge is generally inferred from the circumstances, *Al-Naseer*, 788 N.W.2d at 474, and a reasonable jury can easily infer that one who handles a 9-millimeter semiautomatic handgun knows he is handling a firearm. We are therefore not convinced that this is a case of mere "innocent touching," as Jiggetts argues. Jiggetts does not offer any logical basis for a reasonable jury to suppose that, when Jiggetts handled the gun, he did not know he was handling a gun. And we can conceive of none. The evidence supports the jury's inferred finding that Jiggetts knew he was holding a firearm when he handled it.

II

Jiggetts next argues that the prosecutor committed misconduct during her closing argument. Jiggetts did not object to the argument that he now contends was improper. When a defendant does not object to an alleged error at trial, he ordinarily waives his right to raise the issue on appeal. *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). We may consider the challenge nonetheless if the error is sufficiently grievous. *Id.* We will consider reversing only if we determine that an error occurred, that the error was plain, and that the error affected the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006). If the defendant establishes plain error due to prosecutorial misconduct, the burden shifts to the state to show that the error did not prejudice a substantial right. *Id*. at 302. Even then, we will order a new trial only if fairness and the integrity of the judicial process require it. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Jiggetts argues that two statements made by the prosecutor require reversal. Jiggetts has not shown that the prosecutor's first challenged closing statement reflects plain error. But his second challenge has some merit. Error is plain if it is contrary to law, rules, or standards of conduct. *Ramey*, 721 N.W.2d at 302. We review the closing argument as a whole when considering alleged prosecutorial misconduct. *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000).

Jiggetts first criticizes the prosecutor's statements suggesting that Franklin may have tailored her testimony to fit the defense's theory of the case. The prosecutor stated,

> eight months later, after talking about the case with Mr. Jiggetts's . . . defense team, . . . now [Franklin]'s trying to minimize the relationship that she had with the defendant, claiming that they weren't boyfriend and girlfriend, claiming that he only stayed a couple of nights . . . . She's now . . . trying to claim that she, I'm not sure, picked up a T-shirt that she wants you to think was drenched or doused in the defendant's DNA, and she wrapped it around the gun that . . . no one else knew about, the defendant never knew about.

The prosecutor may not accuse a witness of tailoring her testimony to fit the facts or circumstances of the case "[w]ithout specific evidence of tailoring." *See State v. Swanson*, 707 N.W.2d 645, 657–58 (Minn. 2006) (applying this principle where prosecution suggested defendant tailored testimony merely because he testified after the state rested its case). But arguable suspicion of tailoring exists here because Franklin offered one story about the gun to police before any DNA testing had occurred, and then she gave the jury a different story about the gun after she met with defense counsel who had learned the results of the DNA testing. Franklin's revised account was inconsistent with her original story but consistent with Jiggetts's trial theory. Franklin had initially

disavowed any knowledge of the gun. And she admitted that she changed her story after she had met with Jiggetts's defense counsel before testifying. The prosecutor's argument reasonably and fairly accused Franklin of tailoring her story and challenged her credibility because the circumstances supported the accusation. The argument reflects no error.

Jiggetts also challenges the prosecutor's statement that defense counsel's task is to complicate matters to distract or confuse the jury. The prosecutor stated during her rebuttal, "It's the defense attorney's job to make you think [this case is] more complicated than it is, to try to distract you, to try to go beyond the obvious, to try to confuse common sense with creativity." Jiggetts contends that this argument was error because it denigrated the integrity and professionalism of his attorney. We agree that the statement—a general attack on defense attorneys rather than a specific attack on the attorney's argument—constitutes error. It is true that it is not misconduct for a prosecutor to argue that the defense attorney had introduced evidence to confuse or distract the jury. *State v. Lasnetski*, 696 N.W.2d 387, 397 (Minn. App. 2005). And it is also true that a prosecutor does not improperly disparage defense counsel by arguing that the defense attorney presented evidence that "was meant to 'hid[e] the ball'" and urging the jury not to be distracted. *Id.* But the challenged statement here does not identify any apparently confusing or distracting defense conduct. It instead declares sweepingly, and erroneously, that "the defense attorney's job" is to complicate and confuse and distract. Deeming this isolated statement to be error does not lead us to reverse, however, even if we assume the error is plain. This is because, given the overwhelming direct evidence of Jiggetts's guilt,

we are convinced beyond any reasonable doubt that the error did not influence the verdict or prejudice Jiggetts's substantial rights.

Jiggetts also challenges his sentence in a pro se supplemental brief. Jiggetts mistakenly asserts he was sentenced under an incorrect statute. Because the district court sentenced him under the proper statute, we affirm.

Affirmed.