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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0003**

State of Minnesota,
Respondent,

vs.

Jerome Avriell Smith,
Appellant.

**Filed December 30, 2013
Affirmed
Stauber, Judge**

Hennepin County District Court
File No. 27CR1139884

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

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

Cathryn Young Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from his conviction of prohibited person in possession of a firearm, appellant argues that (1) the circumstantial evidence was insufficient to support the jury's

finding that he constructively possessed the firearm and (2) the district court abused its discretion by allowing the state's witnesses to testify that they were members of the Violent Offender Task Force (VOTF), and by allowing the state to introduce evidence that the gun at issue was loaded and ready to fire. We affirm.

FACTS

In December 2011, law enforcement obtained a warrant to search the known residence of appellant Jerome Avriell Smith after law enforcement received information that appellant unlawfully possessed a handgun and was selling narcotics. Several members of the VOTF assisted in the execution of the search warrant. During the search, officers discovered a shoe box in a closet in one of the bedrooms containing a handgun. Appellant was subsequently charged with prohibited person in possession of a firearm.

Prior to trial, appellant moved to disallow the testimony of members of the VOTF that they are members of that task force. The district court denied the motion, concluding that such testimony would not add "any prejudice to [appellant] when [the officers] describe their total job criteria, what they do." Appellant then agreed to stipulate that he is a person prohibited by law from possessing a firearm.

At trial, the state presented evidence and testimony establishing that prior to executing the search warrant, members of the VOTF conducted surveillance of the residence to be searched. When the officers executed the warrant, the residence was occupied by a 14-year old boy and two small children. Appellant was not at the residence, but was located at an appointment and brought back to the house and kept

outside while the warrant was executed. After a family member arrived at the residence, appellant gave permission for the children to be released to the family member.

The residence was a two-story single family home with a bedroom in the basement and two bedrooms upstairs. Deputy Patrick Chelmo testified that the basement bedroom appeared to be occupied by the teenage boy, that one upstairs bedroom appeared to be associated with young children, and that the second upstairs bedroom appeared to be occupied by adults. The second upstairs bedroom has two closets, a queen-sized bed, a dresser, a television, and a small refrigerator. Under the mattress in the bedroom, officers discovered two Hennepin County jail inmate identification bracelets bearing appellant's name, and several photographs of appellant.

Deputy Chelmo testified that in one of the closets in the second upstairs bedroom, there was "some men's clothing, some boxes on the shelf, [and] a hat." One of the boxes on the shelf contained a recent letter addressed to appellant. The letter was from the Hennepin County Sheriff addressing an open property claim involving a ring. The box also contained a loaded handgun.

The jury found appellant guilty of the charged offense. The district court then sentenced appellant to 60 months in prison. This appeal followed.

D E C I S I O N

I.

In considering a claim of insufficient evidence, our review is limited to a painstaking analysis of 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. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The verdict will not be disturbed if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

“[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence.” *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). “While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence.” *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). “Circumstantial evidence must form a complete chain that, 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.” *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011).

Appellant was convicted of violating Minn. Stat. § 624.713 (2010), which prohibits certain persons from possessing firearms. Under the statute, possession can be actual or constructive. *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). Actual possession involves “direct physical control.” *Jacobson v. Aetna Cas. & Sur. Co.*, 233 Minn. 383, 388, 46 N.W.2d 868, 871 (1951). Constructive possession can be established in two ways: either (1) the state may show that the item was in a place under the defendant’s “exclusive control to which other people did not normally have access” or (2) if the item was in a place to which others had

access, the state can show that there is a strong probability that the defendant was “at the time consciously exercising dominion and control over it.” *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). The purpose of constructive possession is to include those cases “where the inference is strong that the defendant at one time physically possessed the [item] and did not abandon his possessory interest in the [item] but rather continued to exercise dominion and control over it up to the time of the [arrest].” *Id.* at 104-05, 226 N.W.2d at 610.

Appellant argues that the evidence was insufficient to establish that he constructively possessed the firearm. In reviewing a conviction based on circumstantial evidence, an appellate court applies a two-part test. *Hanson*, 800 N.W.2d at 622. First, the circumstances underpinning the conviction are identified, granting deference to “the jury’s acceptance of the proof of these circumstances as well as to the jury’s rejection of evidence in the record that conflicted with the circumstances proved.” *Id.* Second, the reviewing court examines “independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt.” *Id.* (quotation omitted). The court “give[s] no deference to the fact finder’s choice between reasonable inferences.” *Id.* (quotation omitted). This court must consider “whether the circumstances proved are consistent with guilt and inconsistent, on the whole, with any reasonable hypothesis of innocence.” *State v. Hawes*, 801 N.W.2d 659, 669 (Minn. 2011) (emphasis omitted) (quotation omitted).

Here, the state presented the following circumstances at trial: (1) law enforcement received information that appellant unlawfully possessed a handgun and was selling

narcotics; (2) law enforcement obtained a warrant to search for drugs and guns; (3) upon execution of the warrant, the residence was occupied by a 14-year-old and two small children, who were only released to a family member upon appellant's permission; (4) the residence that was searched had three bedrooms, one that appeared to be occupied by a teenager, one that appeared to be occupied by small children, and one that was occupied by adults; (5) the bedroom occupied by adults contained both women's and men's clothing; (6) in a closet containing exclusively men's clothing, a shoebox was discovered that contained a gun and a letter addressed to appellant; (7) the letter was from the Hennepin County Sheriff regarding a property claim involving a ring; and (8) underneath the mattress in the bedroom were two Hennepin County jail inmate identification bracelets with appellant's name and several photographs of appellant. Based on these circumstances proved, the jury concluded that appellant consciously exercised dominion and control over the gun.

Appellant argues that these circumstances do not prove that he constructively possessed the gun because it was "equally reasonable" to infer "that someone else, like the homeowner or lessee [of the house], put the gun in the shoebox." We disagree. In order to reverse appellant's conviction, this court must determine "that there are no other *reasonable, rational inferences* that are inconsistent with guilt." *Hanson*, 800 N.W.2d at 622 (emphasis added). As the supreme court has recognized, even in cases based on circumstantial evidence, "a jury is in the best position to evaluate the evidence[.]" and the reviewing court "will not overturn a conviction based on circumstantial evidence on the

basis of mere conjecture.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Our supreme court has further explained:

To successfully challenge a conviction based upon circumstantial evidence, a defendant must point to evidence in the record that is consistent with a rational theory other than guilt. However, possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable.

State v. Taylor, 650 N.W.2d 190, 206 (Minn. 2002) (citation and quotations omitted).

Here, the fact that the letter was found in the box containing the gun makes the theory that somebody else possessed the gun unreasonable. The letter was addressed to appellant at the address that was searched. Moreover, the letter was from the Hennepin County Sheriff and involved a relatively important subject—an open property claim involving a ring. The fact that the letter was found in the box indicates that the box contained appellant’s personal items, and that he was exercising dominion and control over the box and the items inside the box.

Appellant argues extensively that the testimony of the state’s witnesses along with the photographs taken of the shoebox do not support the premise that the letter was found in the shoebox. In other words, appellant claims that the state failed to prove that the letter was in the box with the gun. Thus, appellant argues that it was reasonable to infer that somebody else possessed the gun.

We agree that the letter is a key piece of evidence. Indeed, if the state failed to prove that the letter was found in the shoebox containing the gun, it is unlikely that the state could prove, beyond a reasonable doubt, that appellant constructively possessed the

gun. But Detective Michael Coleman and Deputy Erik Fleck both testified that the letter was in the shoebox with the handgun. If believed, this testimony establishes that the letter was found in the shoebox. Although there was some discrepancy in the officers' testimony regarding the location of the letter in the shoebox and the letter's location at the time the pictures were taken, the jury found the officers' testimony that the letter was found in the shoebox to be credible. It is well settled that this court defers to the jury's credibility determinations. *See State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). And, the first step of the circumstantial-evidence test requires us to defer to the circumstances found proved by the jury. *See Hanson*, 800 N.W.2d at 622. The circumstances proved—specifically, the evidence that the gun was found in a shoebox that also contained the letter addressed to appellant—are consistent with a conclusion that appellant exercised dominion and control over the gun and inconsistent with any reasonable inference that appellant did not constructively possess the gun. Accordingly, the evidence was sufficient to support appellant's conviction of prohibited person in possession of a firearm.

II.

Appellant next argues that the district court abused its discretion by (1) allowing the state's witnesses to testify that they are members of the VOTF and (2) allowing the state to introduce evidence that the gun was loaded and ready to fire. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing

that the [district] court abused its discretion and that appellant was thereby prejudiced.”
State v. Amos, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

A. VOTF

“Relevant evidence” is “evidence having 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. Relevant evidence is generally admissible but “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Minn. R. Evid. 403; *see also* Minn. R. Evid. 402. “Unfair prejudice under rule 403 is . . . evidence that persuades by illegitimate means, giving one party an unfair advantage.” *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

Over appellant’s objection, the district court allowed each of the state’s four witnesses to testify that they are members of the VOTF. Appellant argues that this evidence “was utterly irrelevant and overtly prejudicial, as it amounted to evidence of [appellant’s] supposed violent character.”

We agree that this evidence is marginally relevant. But, the district court concluded that the VOTF references were admissible because the case involved a drug warrant. The reference was relevant because it provided the jury with the context of the officers’ investigation and explained why officers from several different jurisdictions were involved in investigating appellant. Moreover, and more importantly, appellant is unable to establish that the outcome of the proceeding would have been different if the

evidence had not been admitted. The outcome of the case hinged on whether the jury believed that appellant constructively possessed the gun. The key piece of evidence was the location of the letter that the state claimed was found in the same shoebox as the gun. It is unlikely that the VOTF references had any effect on the jury's conclusion that the letter was found in the same shoebox as the gun and, therefore, that appellant exercised dominion and control over that gun.

B. Loaded gun evidence

Appellant also challenges the district court's admission of evidence that the gun "was loaded and ready to fire." Appellant, however, failed to object to this evidence at trial. When a defendant fails to object to an alleged error at trial, the appellate court reviews for plain error. *State v. Hayes*, 826 N.W.2d 799, 807 (Minn. 2013). In applying plain-error review, this court will reverse only if (1) there is error, (2) the error is plain, and (3) the error affected the defendant's substantial rights. *Id.* An error affects a defendant's substantial rights if the error was "prejudicial and affected the outcome of the case." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). If the first three prongs of plain-error review are satisfied, the reviewing court then assesses whether the court should address the error to ensure the fairness and the integrity of the judicial proceedings. *Hayes*, 826 N.W.2d at 807.

The ineligible-persons statute does not require proof that a weapon is loaded or in firing position. Minn. Stat. § 624.713, subd. 1(2). The statute defines the types of firearms included within the prohibition; the prohibited weapons are generally defined as "designed" to perform in a certain way. Minn. Stat. § 624.712 (2010). Both the supreme

court and this court have ruled that the definition of “firearm” as it applies to various offenses includes inoperable weapons. *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982) (Minn. Stat. § 609.67 (1980), possession of a short-barreled shotgun); *LaMere v. State*, 278 N.W.2d 552, 556-57 (Minn. 1979) (Minn. Stat. § 609.225 (1974), aggravated assault with a dangerous weapon); *State v. Knaeble*, 652 N.W.2d 551, 555 (Minn. App. 2002) (Minn. Stat. § 609.165, subd. 1b(a) (2000), felon in possession), *review denied* (Minn. Jan. 21, 2003).

Here, because the state is not required to prove that a firearm is operable to show that an ineligible person possessed the firearm, the fact that it is loaded is irrelevant. *See* Minn. R. Evid. 401. Irrelevant evidence is generally not admissible. Minn. R. Evid. 402. Accordingly, admission of evidence that the gun was loaded and ready to fire could be plain error.

However, the issue at trial was possession of the weapon, not whether the weapon was loaded or operable. As a result, a description of the gun as being loaded and ready to fire was irrelevant to the question of possession. Therefore, appellant is unable to sustain his burden of showing that his substantial rights were affected by the challenged evidence.

Affirmed.