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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1456**

State of Minnesota,
Respondent,

vs.

Jonathan Eugene Jackson,
Appellant.

**Filed July 31, 2017
Affirmed
Reilly, Judge**

Hennepin County District Court
File No. 27-CR-15-946

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

Michael O. Freeman, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis,
Minnesota (for respondent)

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Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

REILLY, Judge

On appeal from his conviction of unlawfully possessing a firearm in violation of
Minn. Stat. § 624.713, subd. 1(2) (2014), appellant Jonathan Eugene Jackson argues that

the district court (1) erred when it failed to suppress evidence discovered during an unlawful stop and search of a motor vehicle, and (2) committed plain error that affected his substantial rights when it failed to instruct the jury on the definition of constructive possession. We affirm.

FACTS

On January 10, 2015, at approximately 6:30 p.m., Minneapolis Police Officers Ringgenberg and Bloss were on patrol in a marked squad car; there was snow on the ground and the roads were slippery. As the officers drove westbound on 30th Avenue North, they saw a sedan traveling northbound on Dupont Avenue toward the four-way stop at the intersection of 30th Avenue North and Dupont Avenue. The officers saw the sedan fail to stop at the stop sign and drive into the intersection, and then briefly stop in the middle of the intersection. The officers turned right onto Dupont Avenue and followed the sedan for a short distance before activating the emergency lights to stop the sedan.

As Officer Ringgenberg approached the driver's side of the sedan, he detected an odor of unburnt marijuana emanating from the vehicle; Officer Ringgenberg also noticed that Jackson was sweating, which he considered "odd" in light of the freezing temperature. In response to Officer Ringgenberg's request for identification, the driver produced a card that identified him as Jonathan Eugene Jackson. A routine record check revealed that the sedan was not registered to Jackson and that Jackson's driving privileges had been revoked. After performing the record check, Officer Ringgenberg asked Jackson to step out of the vehicle, performed a protective pat-search, and placed Jackson under arrest.

While Officer Bloss attended to Jackson, Officer Ringgenberg returned to the sedan and searched the inside of the vehicle for marijuana. As part of this search, Officer Ringgenberg peered inside an unzipped, black backpack on the floor of the front passenger's side of the vehicle. Inside of the backpack, Officer Ringgenberg found a black, partially loaded, semiautomatic handgun. A subsequent inventory search revealed that the backpack also contained a letter addressed to Jackson from the United States Department of Education and a credit card in Jackson's name. Marijuana was not found inside of the backpack or anywhere else in the sedan. Following the stop and search of the sedan, Jackson was charged with one count of unlawful possession of a firearm.

At the evidentiary hearing, the district court heard testimony from Officer Ringgenberg, whom the district court found to be credible. Officer Ringgenberg testified that he stopped the sedan after witnessing the driver fail to properly stop at the intersection, a violation of Minn. Stat. § 169.06, subd. 4(a) (2014). The squad camera did not record this traffic violation.¹ Officer Ringgenberg also testified that he smelled an odor of unburnt marijuana coming from the sedan and that, in his experience, it is not uncommon for the odor of marijuana to linger even after the substance is removed because the substance often has a potent and lasting odor. At the conclusion of the evidentiary hearing, the district court noted that the sedan is only visible after "it is in the intersection, . . . due to the relatively narrow angle of the camera." The district court also found Officer Ringgenberg's

¹ The squad car was equipped with a camera that activated when the squad lights turned on. The camera recorded 30 seconds prior to its activation. The officer testified that appellant drove several blocks before the officer activated his overhead emergency lights.

testimony—that he detected an odor of unburnt marijuana coming from inside of the sedan—to be credible, even though marijuana was not found in the vehicle. The district court explained that Officer Ringgenberg “has been trained in identifying marijuana, sees marijuana nearly every week through the course of his work, and through that experience became able to identify marijuana odors,” noting that it “was not surprising” that marijuana was not found “because marijuana’s strong and distinctive odor can linger for some time after the substance is removed.” For these reasons, the district court concluded that the stop and search of the vehicle was lawful under the automobile exception, and denied Jackson’s suppression motion.

At trial, the state introduced expert testimony that Jackson could not be excluded as a contributor to the DNA mixture found on the firearm. Jackson’s defense at trial was that he did not know that there was a firearm in the backpack, did not own the backpack, and did not know how his personal belongings ended up in the backpack. At the close of the trial, the district court provided copies of the proposed jury instructions to counsel and suggested the parties amend the definition of possession to omit reference to shipping or receiving the firearm; and counsel agreed. The instructions provided to the jury stated:

[U]nder Minnesota law a person who is prohibited from possessing a firearm but nonetheless transports or possess[es] a firearm is guilty of a crime. . . . The first element is that the defendant knowingly transported or possessed a firearm. The second element is that . . . the defendant is prohibited from possessing a firearm. And the third element is that his actions took place on January 10, 2015 in Hennepin County.

Shortly thereafter, the jury found Jackson guilty of unlawfully possessing a firearm.

This appeal follows.

DECISION

I. The district court did not err by denying Jackson’s suppression motion.

Jackson argues that the district court erred by not suppressing the evidence obtained during the search of a vehicle he was driving because (1) the police lacked a particularized and objective basis for suspecting that he engaged in criminal activity, and (2) the smell of unburnt marijuana did not justify a warrantless search of the vehicle. “When reviewing a district court’s pretrial order on a motion to suppress evidence, the district court’s factual findings are reviewed under a clearly erroneous standard.” *State v. McCabe*, 890 N.W.2d 173, 175 (Minn. App. 2017) (quotation omitted). But legal determinations, such as whether a search was reasonable, are reviewed de novo. *Id.*

A. The observation of Jackson’s minor traffic violation provided the reasonable suspicion that is necessary to justify a limited investigatory stop.

The United States and Minnesota Constitutions guarantee “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.” U.S. Const. amend. IV; Minn. Const. art. 1, § 10. A search or seizure that is conducted without a warrant is presumptively unreasonable. *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016). One exception to the warrant requirement that permits police to “conduct a brief, investigatory stop” occurs when police have “a reasonable, articulable suspicion that criminal activity is afoot.” *Id.* (quoting *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008)). When reviewing the district court’s determinations of the legality of a limited investigatory stop, we assess the question of reasonable suspicion based on the

“totality of the circumstances.” *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981).

Reasonable suspicion is defined as “a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *Id.* (quotations omitted). The reasonable-suspicion standard is not high; a law enforcement officer’s articulation of facts which, if viewed together with rational inferences from those facts, may objectively support an officer’s suspicion of criminal activity. *Id.*; *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (“[R]easonable suspicion requires something more than an unarticulated hunch[; an] officer must be able to point to something that objectively supports the suspicion at issue.” (quotation omitted)). A trained police officer is entitled to draw inferences and make deductions that may well elude a person who is not similarly trained. *Cortez*, 449 U.S. at 418, 101 S. Ct. at 695.

In this case, the district court found that Jackson failed to obey a traffic sign, a violation of Minn. Stat. § 169.06, subd. 4(a). Even an insignificant violation of a traffic law may provide a sufficient basis for a valid investigatory stop. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). But Jackson argues that “under the specific facts of this case[, his] actions . . . failed to amount to an objective and reasonable basis to suspect [him] of criminal activity” because “sliding through an intersection on a road that is slick and snow-packed does not establish a ‘prima facie’ showing of reasonable articulable suspicion of criminal conduct justifying the stop of [his] vehicle.”

Failure to obey a stop sign is a violation of Minn. Stat. § 169.06, subd. 4(a), and under Minnesota law all drivers are required to “drive at an appropriate reduced speed . . .

when special hazards exist . . . by reason of weather or highway conditions,” Minn. Stat. § 169.14, subd. 3(a) (2014); *see also George*, 557 N.W.2d at 578 (“[I]f an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle.”). The evidence is sufficient to support the district court’s finding that Jackson violated a traffic law by failing to stop at a stop sign. On these facts, it is clear that the officer had an objective basis for stopping Jackson.

B. The smell of unburnt marijuana provides probable cause to search a vehicle under the automobile exception.

Jackson argues that the district court improperly denied his suppression motion because the smell of unburnt marijuana did not give the officers probable cause to search the vehicle. We review *de novo* a district court’s probable cause determination as it relates to a warrantless search. *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016).

The Fourth Amendment to the United States Constitution and article 1, section 10 of the Minnesota Constitution protect against unreasonable searches and seizures. “Warrantless searches are generally unreasonable unless they fall within a recognized warrant exception.” *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). If a warrantless search does not fall within a recognized exception, any evidence collected from a warrantless search must be suppressed. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). The state bears the burden of establishing that at least one exception to the warrant requirement applies. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001).

Under the automobile exception, police may search a vehicle without a warrant if police have “probable cause to believe the search will produce evidence of a crime.”

Maryland v. Dyson, 527 U.S. 465, 467, 119 S. Ct. 2013, 2014 (1999). Probable cause to search a vehicle exists when “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985). Probable cause is an objective inquiry that is dependent upon the totality of the circumstances. *Lester*, 874 N.W.2d at 771. “It is a common-sense, nontechnical concept that involves the factual and practical considerations of everyday life on which reasonable and prudent people . . . act.” *Id.* (quotations omitted). Police have probable cause to conduct a warrantless search when, in light of the totality of the circumstances, “there are facts and circumstances sufficient to warrant a reasonable prudent person to believe that the vehicle contains contraband.” *State v. Johnson*, 277 N.W.2d 346, 349 (Minn. 1979). Additionally, the totality of the circumstances includes “reasonable inferences that police officers draw from facts, based on their training and experience, because police officers may interpret circumstances differently than untrained persons.” *Lester*, 874 N.W.2d at 771. For these reasons, appellate courts give due weight to the reasonable inferences drawn by police and to district court findings that these inferences were reasonable and the officer was credible. *Ornelas v. United States*, 517 U.S. 690, 699-700, 116 S. Ct. 1657, 1663 (1996).

“[T]he detection of odors alone, which trained police officers can identify as being illicit, constitutes probable cause to search automobiles for further evidence of crime.” *State v. Pierce*, 347 N.W.2d 829, 833 (Minn. App. 1984). And there is published caselaw from this court stating that the odor of marijuana emanating from a vehicle establishes probable cause to search the vehicle. *State v. Schultz*, 271 N.W.2d 836, 837 (Minn. 1978);

State v. Hodgman, 257 N.W.2d 313, 315 (Minn. 1977). When probable cause exists, the scope of the warrantless search under the automobile exception extends to closed containers inside of the vehicle, and is “defined by the object of the search” and confined to “the places in which there is probable cause to believe [the object] may be found.” *United States v. Ross*, 456 U.S. 798, 824, 102 S. Ct. 2157, 2172 (1982).

Jackson nevertheless argues that the district court erred by finding that there was probable cause to search the vehicle based on the odor of unburnt marijuana alone. As a threshold matter, we note the search was not based on the odor alone: the district court also found that Jackson appeared nervous and was sweating at the time of the stop, which the officer testified was “odd” given that the stop occurred in January. *See State v. Smith*, 814 N.W.2d 346, 351 (Minn. 2012) (articulating that extreme shaking and evasive responses may provide the reasonable suspicion necessary to justify the expansion of a traffic stop).

Jackson relies on *State v. Ortega*, in which the Minnesota Supreme Court noted that “probable cause to suspect that a person possesses a non-criminal amount of marijuana, in and of itself, does not trigger the search-incident-to-arrest exception to the warrant requirements of the Fourth Amendment.” 770 N.W.2d at 149 n.2. Specifically, Jackson contends that the odor of marijuana cannot establish probable cause to believe that the vehicle contained a criminal amount of marijuana. Under Minn. Stat. § 152.027, subd. 3 (2014), possession of less than 1.4 grams of marijuana in a motor vehicle is a petty misdemeanor.² But the Minnesota Supreme Court has held that the smell of marijuana—

² The statute criminalizing marijuana was amended in 1976 to provide that possessing a small amount of marijuana is now a petty misdemeanor.

without distinguishing between the smell of unburnt and burnt marijuana—is sufficient to justify the warrantless search of a vehicle under the automobile exception, as the human nose is unable to discern a criminal amount of marijuana. *Schultz*, 271 N.W.2d at 836. We therefore conclude that the smell of unburnt marijuana, combined with Jackson’s nervousness and sweating, established a fair probability that the vehicle contained contraband or evidence of a crime.

II. The district court did not err in its instruction to the jury.

Jackson also argues that the district court erred by failing to properly instruct the jury on the expanded definition of “possession” as the term is defined in CRIMJIG 32.42. Because the firearm was found in a backpack in the front passenger’s seat of the vehicle, Jackson contends that the state was required to prove constructive possession of the firearm, and, where constructive possession is at issue, the district court must instruct the jury on the elements of actual and constructive possession. The state, however, argues that it may obtain a conviction for a violation of Minn. Stat. § 624.713, subd. 1(2), by establishing actual or constructive possession, and because the state only argued actual possession at trial, the district court did not err by failing to instruct the jury on the elements of constructive possession.

Because “district courts are allowed considerable latitude in the selection of language for jury instructions,” *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002), appellate courts review a district court’s decision to give a jury instruction for an abuse of discretion, *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). Jury instructions must “fairly and adequately explain the law of the case,” meaning that the instructions must “define the

crime charged and the court should explain the elements of the offense rather than simply read statutes.” *Ihle*, 640 N.W.2d at 916. “An instruction is in error if it materially misstates the law,” *id.*, or “confuses” or “misleads” the jury. *State v. Larson*, 787 N.W.2d 592, 601 (Minn. 2010). “[T]he failure to instruct the jury on an element of the charged offense is subject to review as a trial error.” *State v. Watkins*, 840 N.W.2d 21, 27 (Minn. 2013).

Failure to object to a jury instruction before it is given at trial generally constitutes a forfeiture of the right to appellate review of that error. *State v. Lilienthal*, 889 N.W.2d 780, 784 (Minn. 2017). Minnesota Rule of Criminal Procedure 31.02, however, allows appellate courts to correct forfeited errors that are not timely raised in district court when there is a “plain error affecting a substantial right.” *Id.* (quoting *State v. Beaulieu*, 859 N.W.2d 275, 279 (Minn. 2015)). Under the plain-error doctrine, Jackson must show: (1) an error, (2) that was plain, and (3) that affected his substantial rights. *Id.* (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). Even if Jackson establishes these three prongs, “we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *State v. Washington-Davis*, 881 N.W.2d 531, 541 (Minn. 2016).

Jackson’s argument fails under the plain-error analysis. The state charged Jackson with possession of a firearm by a prohibited person in violation of Minn. Stat. § 624.713, subd. 1(2). Because Jackson stipulated that he is prohibited from possessing a firearm, the only remaining issue for the jury was whether Jackson possessed the firearm found during the traffic stop. At trial, the state only argued that Jackson actually possessed the gun; the

state did not argue constructive possession, and Jackson did not request a constructive possession instruction.

In *State v. Arnold*, we clarified that “[t]he purpose of the constructive-possession doctrine is to include within the possession statute those cases where the state cannot prove actual or physical possession.” 794 N.W.2d 397, 400 (Minn. App. 2011) (quotation omitted). An instruction on constructive possession is necessary when a defendant is not exercising direct physical control over the contraband, and the contraband is instead found in a place to which other people had access. *See State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004) (noting that the state bears the burden of proving constructive possession, and an instruction on constructive possession is necessary when a firearm is found in an apartment defendant shared with other people). However, this court has previously clarified that “[t]he mere fact that an item is not in a defendant’s physical possession at the time of apprehension does not preclude prosecution for actual possession.” *State v. Barker*, 888 N.W.2d 348, 354 (Minn. App. 2016).

In this case, the firearm was found in a backpack that was within arm’s reach of Jackson. The backpack contained a letter addressed to Jackson from the United States Department of Education and a credit card in Jackson’s name. Although the vehicle was not registered to Jackson, he was the sole occupant of the vehicle at the time of the traffic stop, and there is no evidence in the record to suggest that anyone other than Jackson had access to the backpack at the time of the stop. Before the district court instructed the jury on the elements of the offense, the court discussed the proposed jury instructions with counsel and noted the following revisions:

THE COURT: I would just note in looking at the proposed final instructions on the elements of the offense, which is CRIMJIG 32.17, I like to tailor the elements as much as possible to fit the theory or the evidence in the case, and so the first element currently reads, ‘The defendant knowingly shipped, transported, possessed, or received a firearm.’ It would seem as if at least shipped and received could be dropped out. I wanted to see what counsel’s thoughts were on that or if you wanted . . .

COUNSEL FOR JACKSON: That’s fine.

. . . .

COUNSEL FOR THE STATE: The state would want transport or possess, I have no theory that [Jackson] was shipping or receiving this.

COUNSEL FOR JACKSON: That’s fine with us, Judge.

THE COURT: Okay. So we’ll make that change, have transport and/or possessed a firearm.

. . . .

THE COURT: . . . Okay. Any other corrections?

COUNSEL FOR JACKSON: No.

Based on these discussions, the district court instructed the jury as follows:

[U]nder Minnesota law a person who is prohibited from possessing a firearm but nonetheless transports or possesses a firearm is guilty of a crime. These are the [three] elements that the state needs to prove beyond a reasonable doubt in order to obtain a conviction. . . . The first element is that the defendant knowingly transported or possessed a firearm. The second element is that . . . the defendant is prohibited from possessing a firearm. And the third element is that his actions took place on January 10, 2015 in Hennepin County.

These instructions accurately state the law in Minnesota. See Minn. Stat. § 624.713, subd. 1(2) (“[A] person who has been convicted of . . . a crime of violence,” “shall not be entitled to possess ammunition or a pistol or semiautomatic military-style assault weapon.”); see also 10 *Minnesota Practice*, CRIMJIG 32.17 (“The elements of a felon in possession of a firearm are . . . [(1)] defendant knowingly . . . possessed or received a

firearm . . . [(2)] defendant [was] convicted of . . . a crime of violence . . . [(3)] defendant's act took place on [a specific date]."). Because the instruction was a correct statement of the law, and was not misleading or confusing to the jury, it was not erroneous. *State v. Laine*, 715 N.W.2d 425, 433 (Minn. 2006). Jackson has not satisfied his burden of establishing that an error occurred.

Affirmed.