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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1550**

State of Minnesota,
Respondent,

vs.

Devante Lemuel Johnson,
Appellant.

**Filed August 28, 2017
Affirmed
Reyes, Judge**

Hennepin County District Court
File No. 27-CR-16-1595

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Jodi Lynn Proulx, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Bjorkman, Judge; and Toussaint, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

REYES, Judge

On appeal from his conviction of possession of a firearm by an ineligible person, appellant argues that the evidence is insufficient to prove that he possessed a firearm and that he was denied a fair trial due to prosecutorial misconduct during closing arguments. We affirm.

FACTS

In October 2015, Hennepin County dispatch received a complaint reporting that the occupants of a vehicle parked in front of a Minneapolis residence were playing loud music and dealing drugs. After arriving at the residence, police officers located a parked vehicle matching the complainant's description. As the officers approached, they heard loud music, smelled burnt marijuana, and observed three men sitting in the vehicle. Two individuals were sitting in the two front seats, and the third, appellant Devante Lemuel Johnson, was sitting in the back-passenger seat on the left side of the vehicle. The officers removed the occupants and searched the vehicle. During the search, one of the officers located a handgun (the gun) lying on the floorboard between the vehicle's back-passenger seat and door on the right side of the vehicle. After discovering the gun, the officers arrested appellant.

The gun's grip and hammer were swabbed for DNA, and a DNA sample was taken from appellant. Subsequent testing revealed that the DNA on the gun belonged to two or more people, but the predominant DNA profile found on the gun matched the sample taken

from appellant. The probability of randomly selecting someone with a DNA profile that matched the predominant DNA profile found on the gun was one in twenty-five billion.

Respondent State of Minnesota charged appellant with possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) (2014). At trial, appellant stipulated that he was ineligible to possess a firearm. After a jury found appellant guilty of the charged offense, the district court sentenced him to 60 months in prison. This appeal follows.

D E C I S I O N

I. Sufficient evidence supports appellant’s conviction.

Appellant contends that his conviction must be reversed because the evidence was insufficient to prove that he possessed the gun. We disagree.

“When considering a claim of insufficient evidence, this court conducts 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 a verdict of guilty.” *State v. Porte*, 832 N.W.2d 303, 307 (Minn. App. 2013) (quotation omitted). We assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted).

To convict appellant of possession of a firearm by an ineligible person, the state had to prove that he knowingly possessed the gun. *See State v. Salyers*, 858 N.W.2d 156, 161 (Minn. 2015). “Possession of a firearm may be proved through actual or constructive possession.” *Id.* at 159. Actual possession requires “proof that [the defendant] physically had the [firearm] on his person.” *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000),

review denied (Minn. Jan. 16, 2001). Constructive possession requires proof that there is a strong probability, inferable from the evidence, that the defendant was consciously exercising dominion and control over the firearm at the time of arrest. *See State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). “Proximity is an important consideration in assessing constructive possession.” *Smith*, 619 N.W.2d at 770. Finally, “constructive possession need not be exclusive, but may be shared.” *Id.*

Constructive possession may be proved by direct or circumstantial evidence. *See Salyers*, 858 N.W.2d at 160-61. Circumstantial evidence is “[e]vidence based on inference and not on personal knowledge or observation.” *Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004) (quotation omitted). “A conviction based on circumstantial evidence . . . warrants heightened scrutiny.” *State v. Sam*, 859 N.W.2d 825, 833 (Minn. App. 2015) (quotation omitted); *see State v. Harris*, 895 N.W.2d 592, 597-601 (Minn. 2017) (reaffirming circumstantial-evidence standard). When reviewing the sufficiency of circumstantial evidence, we apply a two-step analysis, which requires that we first identify the circumstances proved, “giving due deference to the fact-finder and construing the evidence in the light most favorable to the verdict.” *Sam*, 859 N.W.2d at 833. “Second, we determine whether the circumstances proved are consistent with guilt and inconsistent with any other rational or reasonable hypothesis.” *Id.*

Here, the state proved the following relevant circumstances: (1) after arriving at the scene, the officers did not see anyone enter or exit the vehicle; (2) three men were sitting in the vehicle; (3) appellant, who was sitting in the left rear-passenger seat, was the only person sitting in the back row of seats; (4) the gun was found lying on the floorboard

between the vehicle's rear-passenger seat and door on the right side of the vehicle; (5) testing revealed that the predominant DNA profile found on the gun's grip and hammer matched appellant's DNA; (6) the probability of randomly selecting someone with a DNA profile that matched the predominant DNA profile found on the gun was one in twenty-five billion.

Next, we must determine whether these circumstances proved are consistent with guilt and inconsistent with any other rational hypothesis. *Id.* Appellant admits that the circumstances proved are consistent with a finding that he knowingly possessed the gun. But, according to appellant, the circumstances proved are also consistent with reasonable hypotheses other than his guilt.

Appellant first posits that, because he spent a great deal of time and had sex in the vehicle, his DNA could have transferred from "throughout the vehicle" and onto the gun's grip and hammer, without him knowingly possessing the gun, in a quantity sufficient to become the predominant DNA profile. Second, appellant argues that one of the vehicle's other occupants may have possessed the gun and left it on the floorboard. Appellant relies on this court's decision in *State v. Harris*, which was affirmed by the supreme court after the parties submitted their briefs in this case. No. A15-0711, 2016 WL 1396689 (Minn. App. Apr. 11, 2016), *aff'd* 895 N.W.2d 592 (Minn. 2017).

In *Harris*, the defendant-driver was convicted of possession of a firearm by an ineligible person after officers effected a traffic stop and discovered a firearm concealed in the vehicle's sunroof. *Id.* at *1-2. The vehicle belonged to the defendant's brother, and there were three individuals in the vehicle at the time of the stop. *Id.* at *2. At trial, the

state introduced forensic evidence showing that there was DNA from several people on the firearm, and approximately 25% of the world's population, including each of the vehicle's occupants, could have contributed to the DNA mixture. *Id.* at *3. This court reversed the defendant's conviction in light of the rational hypothesis that another person concealed the firearm without the defendant's knowledge. *Id.* at *5.

Harris is readily distinguishable. The state's DNA evidence in this case is substantially stronger than the evidence presented in *Harris*, where only approximately 75% of the general population could be excluded as contributors to the DNA mixture found on the firearm. 895 N.W.2d at 597. Here, the probability of randomly selecting someone with a DNA profile that matched the predominant DNA profile found on the gun was one in twenty-five billion. Moreover, the concentration and location of the DNA evidence on the gun directly contradicts appellant's theory that his DNA was transferred from other parts of the vehicle and onto the gun without him knowingly possessing it.

Accordingly, given the state's strong DNA evidence in this case, in conjunction with the other circumstances proved, appellant's proposed hypotheses are unreasonable. Therefore, we conclude that the evidence is sufficient to support appellant's conviction.

II. Appellant was not deprived of his right to a fair trial.

Appellant argues that prosecutorial misconduct during closing arguments deprived him of his right to a fair trial, including (1) vouching for the Bureau of Criminal Apprehension (BCA) analyst; (2) speculating about facts not in evidence; and (3) misstating the law and the state's burden of proof. We address each issue in turn.

When the defendant fails to object, prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The burden is on the defendant to show that the “error occurred and that the error was plain.” *Id.* “An error is plain if it was clear or obvious.” *Id.* (quotation omitted). “Usually this is shown if the error contravenes case law, a rule, or a standard of conduct.” *Id.* If the defendant demonstrates plain error, then the burden shifts to the state to show its misconduct did not prejudice the jury. *Id.* at 299-300.

A. Vouching for BCA analyst

Appellant argues that he is entitled to a new trial because the prosecutor inappropriately vouched for the BCA analyst’s credibility by telling the jury to “assume” and “trust” that the BCA analyst “was telling the truth.” We are not persuaded.

“It is improper for a prosecutor in closing argument to personally endorse the credibility of witnesses.” *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995). “Prosecutorial misconduct occurs when the [prosecutor] implies a guarantee of a witness’s truthfulness.” *State v. Jackson*, 773 N.W.2d 111, 123 (Minn. 2009) (quotation omitted). “While a prosecutor must not personally endorse a witness’s credibility, the State may, in closing argument, argue that a witness was or was not credible.” *Id.*

We conclude that the comments at issue amounted to an impermissible guarantee of the analyst’s truthfulness. Because appellant has established error that is plain, the burden shifts to the state to show that the misconduct did not prejudice the jury. *See Ramey*, 721 N.W.2d at 299-300. In light of the strength of the state’s case, the district court’s numerous instructions to the jury that it was their duty to determine witness credibility, and the fact

that these comments only comprised a small part of the prosecutor's closing argument, we further conclude that there is no reasonable likelihood that such isolated comments had an impact on the jury's decisions to believe the analyst's testimony and find appellant guilty. See *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006).

B. Facts not in evidence

Appellant argues that the prosecutor's comments about how appellant (1) might have obtained the gun; (2) attempted to conceal the gun in the vehicle; and (3) possessed the gun were speculation on facts not in evidence. We disagree.

"It is misconduct for a prosecutor to intentionally misstate evidence or to appeal to the passions of the jury. . . . [A] prosecutor should not refer to facts not in evidence." *State v. McArthur*, 730 N.W.2d 44, 53 (Minn. 2007). However, a prosecutor may make reasonable inferences from evidence produced at trial. *State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006).

Appellant first takes issue with a portion of closing argument where the prosecutor suggested various ways in which appellant might have obtained the gun. We conclude, as the state argues, that such comments were not intended to "fill the gaps" in the state's case. The state was not required to prove how appellant acquired the gun, and the prosecutor's comments, when viewed in the context of the full closing argument, permissibly served to reiterate that point.

Appellant next argues that the prosecutor committed misconduct by stating that "the most likely thing that happened was . . . when [the vehicle's occupants] saw the police coming, [appellant] tossed [the gun] behind him to the right, and that's where the cops

found it.” This statement did not constitute misconduct as it is a reasonable inference based on the evidence. Therefore, appellant has failed to show error.

Appellant also claims that the prosecutor committed misconduct when explaining that multiple people can constructively possess an item jointly. To illustrate this concept, the prosecutor explained, “So if we have three people sitting in the car, [appellant and the two other individuals], and they are passing a gun back and forth . . . that’s still possession because possession can be joint.” Appellant argues that these comments were impermissible because the state offered no evidence to prove that appellant constructively possessed the gun jointly with the other occupants. However, like the comments regarding how appellant obtained the gun, when considered in the broader context of the prosecutor’s closing argument, this statement was permissible.

C. Misstating the law and burden of proof

Appellant’s final prosecutorial-misconduct argument asserts that the prosecutor misstated the law of constructive possession and the state’s burden of proof. If demonstrated, a prosecutor’s misstatement of the law or the burden of proof constitutes prosecutorial misconduct. *See State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002); *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000).

Appellant’s argument relies on two of the prosecutor’s statements: (1) “The statute with the definition of possession has a very low threshold for what qualifies as possession,” and (2) “I am not proving that [appellant] intended to rob somebody or shoot somebody—or anything like that, just that he possessed a gun in the same way that if a 16-year-old touches a liquor bottle . . . the DNA on the liquor bottle is enough to prove possession.”

These statements did not have the effect of misstatements of the law or the burden of proof. First, as the state points out, the prosecutor's low-threshold comment "was part of his larger theme that there is a broad range of conduct that qualifies as possession." A review of the prosecutor's opening and closing statements supports this characterization. As such, we disagree with appellant's claim that such a statement "diluted" the state's burden to prove each element beyond a reasonable doubt. Similarly, the prosecutor's liquor-bottle comment was not improper as the prosecutor was merely using defense counsel's own analogy to argue the strength of the state's case and emphasize that "[t]here is no legitimate explanation for how . . . anybody else's DNA got on the gun."

Affirmed.