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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1764**

State of Minnesota,
Respondent,

vs.

Martize Devone Roland,
Appellant

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

Hennepin County District Court
File No. 27-CR-15-35585

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

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

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his conviction of possession of a firearm by a prohibited person, arguing that the district court plainly erred in denying his motion for acquittal by

applying the incorrect standard of review to the state's circumstantial evidence, and abused its discretion in instructing the jury on constructive possession. We affirm.

FACTS

On December 18, 2015, officers received a report of a gun fired in a residence. The officers entered the residence and went to the basement staircase. The officers directed the occupants of the basement to come up the stairs. Appellant Martize Devone Roland walked up the stairs from the basement. An officer handcuffed Roland and found a live nine-millimeter cartridge in Roland's sweatshirt pocket during a pat search.

Officers went down into the basement and did not find anyone else. Under an ottoman, officers found a black handgun with a round chambered in it. Next to the handgun, officers found the handgun's magazine, a plate, a straw, a digital scale, and a credit card bearing Roland's name. Roland was charged with possession of a firearm by a prohibited person and possession of ammunition by a prohibited person.

At Roland's jury trial, he stipulated that he is prohibited, under Minnesota law, from possessing a firearm and ammunition. Officers testified regarding the events leading to the discovery of the handgun and ammunition. A forensic scientist testified that six items were submitted for DNA testing, including Roland's DNA sample, swabs from the firearm and its magazine, and swabs from the live cartridge. The handgun swab was the only item with sufficient DNA present for profiling, and it included a mixture of DNA from five or more individuals. Roland's DNA could not be excluded as a possible contributor, although 27.6% of the general population could be excluded as contributors. Due to the complexity of the mixture, the other five or more contributors could not be identified.

Following the state's case, Roland moved for judgment of acquittal. The district court denied the motion. Roland then testified that he went to the residence on the evening of December 17 for a party. When he became intoxicated, he went to the basement to sleep. Roland testified that he removed his gold hoodie before going to sleep. Roland testified that when he woke up to the police calling him, he was covered with a black jacket that did not belong to him and that he had never seen before. Roland similarly testified that he had never seen the bullet found in the jacket pocket or the gun. Roland claimed that he had not even been in the room where the ottoman was located. Roland testified that he last saw his credit card on a table upstairs where he had used it to snort cocaine. Roland testified that he did not put the gun or the credit card in the location where they were found.

The jury found Roland guilty of being a prohibited person in possession of a firearm and not guilty of being a prohibited person in possession of ammunition. The district court sentenced Roland to 60 months in prison. This appeal followed.

D E C I S I O N

Motion for judgment of acquittal

The district court denied Roland's motion for judgment of acquittal at the close of the state's case, stating: "Viewing . . . the evidence in the light most favorable to the [s]tate, I think a reasonable jury could conclude that there's sufficient evidence in this case to find [Roland] guilty." Roland argues that the district court plainly erred by applying the incorrect standard of review to the state's circumstantial evidence.

"[W]hen a district court considers a motion for judgment of acquittal, it must apply the same standard appellate courts use to review challenges to sufficiency of the evidence."

State v. Sam, 859 N.W.2d 825, 831 (Minn. App. 2015). When the state’s case rests largely or entirely on circumstantial evidence, “there is sufficient evidence to sustain a conviction if and only if ‘no other reasonable, rational inferences [exist] that are inconsistent with guilt.’” *Id.* (quoting *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010)).

Because Roland did not object to the standard that the district court applied in ruling on his motion for judgment of acquittal during trial, the district court’s alleged error may be reviewed only for plain error. See *State v. Schlien*, 774 N.W.2d 361, 365 (Minn. 2009) (stating “unobjected-to error may be reviewed for plain error”). Under the plain-error analysis, there must be error that is plain, which affects substantial rights. *State v. Simion*, 745 N.W.2d 830, 843 (Minn. 2008). If these elements are present, this court considers whether a new trial is necessary to ensure fairness and the integrity of the judicial proceedings. *Id.*

Because *Sam* states that, in a circumstantial-evidence case, the district court must review a motion for judgment of acquittal using a heightened standard, the district court plainly erred when it concluded that: “Viewing . . . the evidence in the light most favorable to the [s]tate . . . a reasonable jury could conclude that there’s sufficient evidence . . . to find [Roland] guilty.” See 859 N.W.2d at 831; see also *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010) (stating error is plain when it contravenes caselaw).

“[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). In applying the circumstantial-evidence standard, the court must first identify the circumstances proved. *Al-Naseer*, 788 N.W.2d at 473. The court then

determines “whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013) (quotation omitted). The circumstantial evidence must form a complete chain that, in view of the evidence 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. *Jones*, 516 N.W.2d at 549.

Here, the circumstances proved are: (1) officers instructed occupants of the basement to come up the stairs, (2) Roland walked up from the basement, (3) officers found nobody else in the basement, (4) an officer found a black handgun with a round chambered in it underneath an ottoman in the basement, (5) an officer found a credit card with Roland’s name on it next to the handgun, (6) Roland could not be excluded as a possible contributor to the DNA mixture on the handgun, and (7) 27.6% of the general population could be excluded as contributing to the DNA on the handgun. These circumstances proved are consistent with Roland possessing a handgun.

Roland argues that the state failed to prove that he resided in the home or had any control over any part of the house. But the state did not need to prove that Roland resided in the home or had control over the house to show that he constructively possessed a gun found in the basement where he had been. Roland asserts that the circumstances proved “do not exclude the reasonable inferences that one of the other three adults at the premises, or person(s) unknown, had put the gun under the ottoman . . . , that Roland had never been in that room, and that he thus had never previously had physical possession of the gun.” But Roland fails to offer a reasonable alternative hypothesis based on the circumstances

proved; rather, he is speculating about circumstances not proved, i.e., someone else putting the gun under the ottoman and Roland not being in the specific room in the basement. See *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (stating this court will not overturn a conviction based on circumstantial evidence by relying on conjecture). Review of Roland's motion for judgment of acquittal following the state's case shows that had the district court considered the motion under the heightened circumstantial-evidence standard, it would still have denied the motion. Therefore, Roland's substantial rights were not affected and he fails to meet the plain-error test.

Jury instruction

Roland was convicted of possession of a firearm by a prohibited person. A person who has been convicted of a crime of violence shall not be entitled to possess a firearm. Minn. Stat. § 624.713, subd. 1(2) (2014). The statute does not define "possess," but under caselaw, "the state must establish either actual or constructive possession." *State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004). At trial, the district court overruled Roland's objection to the jury instruction regarding constructive possession.

The district court instructed the jury on constructive possession: "A person who is not in actual possession of a thing but who knowingly has both the power and the intention at a given time to exercise authority and control over it, either directly or through another person, is then in constructive possession of it." Roland argues that this instruction "relieved the [s]tate of its burden to prove a completed act of possession."

"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). Jury instructions

must “fairly and adequately explain the law of the case.” *Id.* “[T]he court’s instructions must define the crime charged and the court should explain the elements of the offense rather than simply read statutes.” *Id.* “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). This court “review[s] a district court’s decision to give a requested jury instruction for an abuse of discretion.” *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012).

Roland argues that the district court’s instruction misstated the law because it varied from the definition of constructive possession stated in *State v. Florine*, 303 Minn. 103, 226 N.W.2d 609 (1975). In *Florine*, the defendant was convicted of unlawful possession of cocaine. 303 Minn. at 103, 226 N.W.2d at 610. Because there was no evidence of actual or physical possession, the supreme court reviewed whether there was sufficient evidence of constructive possession. *Id.* at 104, 226 N.W.2d at 610. The supreme court explained:

The purpose of the constructive-possession doctrine is to include within the possession statute those cases where the state cannot prove actual or physical possession at the time of arrest but 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. Having in mind the purpose of the constructive-possession doctrine, we believe that in order to prove constructive possession the state should have to show (a) that the police found the [item] in a place under defendant’s exclusive control to which other people did not normally have access, or (b) that, if police found it in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.

Id. at 104-05, 226 N.W.2d at 610-11 (citation omitted). The supreme court concluded that there was sufficient evidence of constructive possession to support the conviction. *Id.* at 105, 226 N.W.2d at 611.

Roland claims that the district court's instruction "erroneously allowed the [s]tate to obtain a conviction based on constructive possession by not requiring proof of the *act* of possession." But the evidence in *Florine* that the supreme court concluded was sufficient to prove constructive possession did not include an act. *See id.* at 103-05, 226 N.W.2d at 610-11. In *Florine*, an officer found cocaine in a packet on top of a notebook on the back seat of an unlocked abandoned vehicle. *Id.* at 103, 226 N.W.2d at 610. In the vehicle, the officer found several items belonging to the defendant. *Id.* at 103-04, 226 N.W.2d at 610. While the defendant did not own the vehicle, the owner had left it with the defendant to sell for him. *Id.* at 104, 226 N.W.2d at 610. *Florine* does not require an "act" of exercising dominion and control to establish constructive possession; rather, it requires evidence that the defendant was "consciously" exercising dominion and control. *Id.* at 105, 226 N.W.2d at 611.

In *State v. Owens*, this court concluded: "It is apparent from the evidence in *Florine* that constructive possession does not require an 'act' of exercising dominion and control." No. A16-0559, 2017 WL 958474, at *3 (Minn. App. Mar. 13, 2017). The district court's instruction on constructive possession in *Owens* was identical to the instruction given in this case and determined not to be erroneous. *See id.* at *2-3; *see also State v. Nelson*, No. A09-956, 2010 WL 2484668, at *4-5 (Minn. App. June 22, 2010) (holding identical

instruction on constructive possession “fairly and accurately explained the law regarding constructive possession”), *review denied* (Minn. Aug. 24, 2010).

The district court’s instruction did not materially misstate the law or confuse or mislead the jury. *See Ihle*, 640 N.W.2d at 916; *Larson*, 787 N.W.2d at 601. In fact, as the prosecutor argued at trial, the instruction was less likely to confuse the jury than the instruction Roland proposed. The prosecutor stated: “[i]f you give the dominion and control definition, undoubtedly the jury will always return with, can you tell us what dominion and control means. It’s just antiquated language.” The clarity of the jury instruction was recognized in *Owens*:

[T]he district court selected the language it used in its constructive-possession instruction to avoid confusing the jury by suggesting that proving constructive possession required evidence of an “act” of exercising dominion and control. . . . Owens testified that he did not know that there was a gun in the SUV. The instruction informed the jury that, in order to consciously exercise dominion and control over the . . . handgun, Owens needed to know that he had the power and the intention to exercise authority and control over it; simply being within reaching distance from the gun was not enough to prove constructive possession.

2017 WL 958474, at *3. Similarly, here, Roland testified that he had not gone into the room where the ottoman was located and had never seen the gun before. The instruction informed the jury that Roland needed to know that he had the power and the intention to exercise authority and control over the gun in order to constructively possess it. The district court did not abuse its discretion in instructing the jury on constructive possession.

Affirmed.