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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0894**

State of Minnesota,
Respondent,

vs.

Joshua Scott Hacken,
Appellant.

**Filed April 9, 2018
Affirmed
Kirk, Judge**

Ramsey County District Court
File No. 62-CR-16-5795

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

John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges his conviction of possession of a firearm by an ineligible person, arguing that the evidence is insufficient to establish that he possessed the firearm. Because we conclude that the evidence presented is sufficient to support the jury's verdict, we affirm.

FACTS

On August 7, 2016, Ramsey County dispatch received a report of a man with a gun at a hotel in St. Paul. At around 4:30 p.m., surveillance cameras in the hotel captured a white male, later identified as appellant Joshua Scott Hacken, wearing boots and carrying a red bag, walking down a hallway on the second floor of the hotel while H.M., a hotel porter, vacuumed. H.M. testified that he saw the man walk past him and enter an open hotel room that was still being cleaned. H.M. followed him into the room and asked for his reservation paperwork. In response, the man pulled out a gun and said, “This is my paperwork.” The man then pulled out a knife and said, “This is also my paperwork.”¹ H.M. testified that he was “not really [scared.]” The surveillance video showed appellant and then H.M. enter room 230, and then H.M. leave the room and walk immediately to the hotel’s front desk. The front-desk employee then called 911.

H.M. told dispatch that the man had “brandished” a weapon by showing it to him. At approximately 4:43 p.m., appellant left room 230, walked to the first floor of the hotel, and then entered the pool area. When police officers arrived, hotel employees identified appellant, who was standing in the pool area, as the suspect. Two officers approached appellant and ordered him to put his hands up. Appellant refused and ran to the second floor of the hotel. Rather than give chase, the officers established a perimeter around the hotel to prevent appellant from escaping. The officers viewed hotel surveillance video and determined that appellant had entered room 231 after fleeing. They negotiated with appellant for several hours

¹ The police did not subsequently discover a knife in the hotel or on appellant’s person.

until he complied with their commands to leave the room, and they then took appellant into custody.

Following appellant's arrest, the officers conducted a sweep of the second-floor hotel rooms. While searching room 231, an officer noticed that a tissue box had been moved from its countertop holder over the lid of the toilet tank in the bathroom. The officer removed the toilet lid and discovered a black pistol submerged at the bottom of the water tank. Subsequent forensic testing revealed no usable fingerprint or DNA evidence on the pistol. The officers found a red duffle bag, a pair of brown boots, a sunglasses case, and a brown wallet, containing appellant's identification card, in room 230, located across the hallway from room 231.

Appellant was charged with possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) (2016), and second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2016). At trial, a responding officer identified appellant as the man shown in the surveillance video, and confirmed that appellant did not leave room 231 until his arrest and that no other person entered or left room 231 during that time. The jury found appellant not guilty of second-degree assault with a dangerous weapon and guilty of possession of a firearm by an ineligible person. The district court imposed the presumptive sentence of 60 months' imprisonment.

This appeal follows.

D E C I S I O N

In considering a claim of insufficient evidence, this court's review is limited to a thorough 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 “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 reviewing court will not disturb the verdict 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).

To convict appellant of possession of a firearm by an ineligible person, the state was required to prove that he knowingly possessed the pistol. *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 is generally proven by showing that the defendant had “actual or physical possession [of the firearm] at the time of arrest.” *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975). However, this court has held 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).

Possession may be proven by direct or circumstantial evidence. “Direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Bernhardt*, 684 N.W.2d at 477 n.11 (quotation omitted). Circumstantial evidence is “evidence based on inference and not on personal knowledge or observation.” *Id.* (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); see also *State v. Al-Naseer*, 788 N.W.2d 469, 471 (Minn. 2010) (“[T]he heightened scrutiny applies to any disputed element of the conviction that is based on circumstantial evidence.”). Here, H.M. testified that he observed a white male in physical possession of a gun in a second-floor hotel room, but he was not asked to positively identify appellant as the suspect. Instead, the state introduced surveillance video and a police officer’s testimony to identify appellant as the man H.M. encountered in room 230 who showed him a gun. Because the evidence tending to prove appellant actually possessed the firearm is based on a combination of direct and circumstantial evidence, we will review the sufficiency of the evidence under the heightened circumstantial-evidence standard. See *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013) (applying heightened standard of review for sufficiency-of-the-evidence claim when state presented both direct and circumstantial evidence to obtain conviction).

When reviewing a conviction based on circumstantial evidence, we apply a two-step test. *Sam*, 859 N.W.2d at 833. First, we determine the circumstances proved by “resolving all questions of fact in favor of the jury’s verdict . . . [and] disregard[ing] evidence that is inconsistent with the jury’s verdict.” *Harris*, 895 N.W.2d at 600-01. Second, we “independently consider the reasonable inferences that can be drawn from the circumstances proved, when viewed as a whole.” *Id.* at 601. To sustain the conviction, the circumstances proved must be “consistent with guilt and inconsistent with any other rational or reasonable hypothesis.” *Sam*, 859 N.W.2d at 833.

Appellant contends that the jury “did not believe [appellant] actually possessed the firearm” because it acquitted appellant of second-degree assault with a dangerous weapon. On that basis, appellant argues that we should disregard the evidence presented by H.M.’s testimony that a man, later identified as appellant, showed H.M. a gun, despite the general rule that an acquittal sheds no light on the circumstances believed or disbelieved by the jury. *See State v. Montermini*, 819 N.W.2d 447, 461 (Minn. App. 2012). However, not only did the jury find that appellant knowingly possessed the firearm, as respondent points out, the jury’s acquittal of the assault charge indicates only that the state failed to prove beyond a reasonable doubt that appellant intended to cause H.M. to fear immediate bodily harm or death. H.M.’s testimony that appellant “brandished” the gun by showing it to him rather than pointing it at him and that he was “not really [scared],” evinces support for the jury’s acquittal, but does not contradict the evidence of possession.

Here, the state proved the following relevant circumstances: (1) appellant entered room 230 carrying a red bag while H.M. vacuumed the second-floor hallway; (2) H.M. entered room 230 to ask appellant for his reservation paperwork; (3) H.M. observed appellant hold up a gun and state, “This is my paperwork”²; (4) H.M. left room 230 and contacted a front-desk employee, who called 911; (5) appellant left room 230 and entered the pool area on the

² H.M.’s description of the man who showed him a gun as having “scraggly hair” and wearing a jacket and blue jeans, despite contrary evidence that appellant was bald and wore white shorts and a blue t-shirt, is evidence that we may disregard as inconsistent with the jury’s verdict. *See Harris*, 895 N.W.2d at 600-01. The surveillance video showed H.M. vacuuming the hallway when a white male who carried a red bag entered room 230. The video showed H.M. follow the man into the room, then leave the room and immediately report the man to the front-desk employee. A responding officer identified appellant as the white male shown entering room 230 in the surveillance video.

first floor of the hotel; (6) when responding police officers made contact with appellant in the pool area, he fled and entered room 231; (7) during appellant's standoff in room 231, neither appellant nor another person left or entered the room; (8) after appellant's arrest, officers discovered a black pistol submerged in the toilet tank in room 231; (9) officers discovered a red bag, brown boots, a sunglasses case, and a wallet, containing appellant's identification card, in room 230.

Next, we must determine whether the circumstances proved are consistent with a finding that appellant knowingly possessed a firearm and inconsistent with any other rational hypothesis. *See Sam*, 859 N.W.2d at 833.

Appellant argues that the evidence presented is consistent with the theory that he did not know the pistol was in the toilet tank and that some person other than appellant put it there. Appellant points out that no forensic evidence tied him to the pistol. Appellant does not identify any evidence showing that another person placed the gun in the toilet, but contends that because previous guests and employees accessed the room before appellant fled there, and because the state introduced no evidence showing when the room had been last cleaned or when the toilet was last checked, it is rational that "any one of a number of people who previously had access to the room" could have placed the gun in the toilet. Further, appellant argues that he had no reason to know that a gun was present because it was hidden inside of the toilet.

Here, the circumstances proved demonstrate that appellant was in actual possession of the firearm before his arrest. H.M.'s testimony, the surveillance video, testimony by a responding police officer, and discovery of appellant's red bag and identification in room 230

establishes appellant's identity as the man H.M. observed in physical possession of a gun in room 230. The surveillance video captured appellant leaving room 230, entering the pool area, and then fleeing to room 231 when the police arrived. *See State v. Olhausen*, 681 N.W.2d 21, 29 (Minn. 2004) (noting that evidence of flight may suggest "consciousness of guilt" when the defendant disposed of contraband after fleeing). According to the officers, no other person entered or exited room 231 from the point at which appellant entered the room until his surrender, confirming that the firearm found in room 231 was the same firearm that H.M. observed in appellant's physical possession in room 230. The officer's testimony that the tissue box in room 231 appeared to have been moved from its holder over the toilet lid indicates more recent activity to open the toilet and place the gun inside, which implicates appellant rather than a hotel employee or an unidentified alternative suspect.

Given the state's strong evidence in this case, including witness testimony and surveillance video, in conjunction with the circumstances proved, appellant's proposed hypothesis is unreasonable. We conclude that the evidence is sufficient to support appellant's conviction of possession of a firearm by an ineligible person.

Affirmed.