

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1696**

State of Minnesota,
Respondent,

vs.

Deshawn Nairfe Jones,
Appellant.

**Filed August 27, 2018
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CR-17-2593

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, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Reyes, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant challenges his conviction for possession of a firearm by an ineligible person, arguing the evidence presented to the jury was insufficient to support a guilty verdict and that the district court erred by providing an instruction to the jury on appellant's

right not to testify without first obtaining appellant's direct consent. Because the state presented sufficient evidence to support a guilty verdict and because any error in giving the instruction did not result in prejudice to appellant, we affirm.

FACTS

Appellant Deshawn Nairfe Jones was charged with unlawfully possessing a firearm after he fled from officers and a gun was found in a dumpster that appellant passed while he was fleeing. The case proceeded to trial.

During voir dire, defense counsel asked the district court to question the prospective jurors about whether they would have any concerns if the defendant did not testify, indicating he would support the district court using CRIMJIG 3.17 when putting the issue before the jury. *See 10 Minnesota Practice*, CRIMJIG 3.17 (2015) (providing a model instruction on the defendant's right not to testify and that no adverse inference may be drawn from that fact). The district court granted the request and gave the following instruction:

The State must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant has no obligation to prove innocence. The defendant has the right not to testify. This right is guaranteed by the federal and state Constitutions. Hearing this instruction, is there anyone who would or could not follow this instruction?

Nobody answered in the affirmative. Defense counsel separately questioned the jury on whether anyone would have strong feelings if appellant did not testify.

At trial, a deputy testified that, on January 9, 2017, he was conducting surveillance on a residence in Brooklyn Center and it had snowed "off and on" throughout the day. He

testified that a subject of the surveillance had multiple warrants for his arrest and that he was seen coming and going from the residence. That person eventually exited the residence with three other men, including appellant. The deputy and his partner attempted to stop the group in order to take the man with the warrants into custody. The deputy and his partner raised their guns and told the men to stop and to raise their hands.

Appellant initially put his hands up, but “within a second,” he “reached for his waistband with both hands, turned around and started fleeing.” The deputy saw appellant run with one arm “hugging the front of his waistband like he was holding something heavy” with the other arm swinging “like . . . when you run.” The deputy immediately chased appellant, but he was about 40 yards behind him and lost sight of him for “approximately three to four seconds as [appellant] rounded [a] corner.” Immediately before the deputy lost sight of appellant, the deputy saw him digging around in the front part of his waistband with both hands “like as if he was . . . trying to grab something.” When the deputy turned the corner, he “immediately regained visual of [appellant] running still, only this time, he was running with two hands” and “not holding his waistband anymore.” At that point, other officers intercepted appellant as he ran into a parking lot.

The deputy then turned around to see if appellant had discarded anything. There were two inches of fresh snow on the ground, and the deputy retraced their two sets of footprints in the snow back towards a dumpster. He immediately noticed a firearm inside of the dumpster. The firearm was located near the front of the dumpster and on top of other trash. The deputy never saw appellant with a gun, but the gun stood out to him “because

as the snow was hitting it, it was melting” which indicated to the deputy that it was warm. The rest of the trash in the dumpster was covered in fresh snow.

Appellant stipulated to the element that he was prohibited from possessing a firearm and waived his right to testify. When discussing jury instructions, the district court indicated that it would add CRIMJIG 3.17 and clarified that defense counsel wanted the instruction. Defense counsel answered, “Yes.” The district instructed the jury, “The defendant has the right not to testify. This right is guaranteed by the federal and the state constitutions. You should not draw any inference from the fact that the defendant has not testified in this case.” The jury returned a guilty verdict and appellant was sentenced to 60 months’ imprisonment.

This appeal followed.

D E C I S I O N

I. The state presented sufficient evidence to support a conviction.

Appellant argues that the evidence was insufficient to convict him because the circumstances proved support a reasonable hypothesis that someone else placed the gun in the dumpster.

When reviewing whether there is sufficient evidence to support a conviction, this court undertakes a “painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient” to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (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).

“[W]e 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.” *Ortega*, 813 N.W.2d at 100.

Appellant was convicted of being an ineligible person in possession of a firearm, in violation of Minn. Stat. § 624.713, subd. 1(2) (2016). Appellant stipulated that he was ineligible to possess a firearm. To convict appellant, the state was required to prove that he knowingly possessed a firearm. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). Possession may be proved through direct or circumstantial evidence of actual or constructive possession. *State v. Barker*, 888 N.W.2d 348, 354 (Minn. App. 2016). “Where direct evidence is not available, a conviction based on circumstantial evidence can be entitled to the same weight as direct evidence.” *State v. Olhausen*, 681 N.W.2d 21, 26 (Minn. 2004) (quotation omitted).

The state relied on circumstantial evidence in proving that appellant possessed the gun. “A conviction based on circumstantial evidence warrants heightened scrutiny.” *State v. Sam*, 859 N.W.2d 825, 833 (Minn. App. 2015) (quotation omitted). We therefore apply a two-step analysis to determine whether the circumstantial evidence was sufficient to support a conviction. *See Harris*, 895 N.W.2d at 598-601. First, we identify the circumstances proved. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). In doing so, we “assume that the jury resolved any factual disputes in a manner that is consistent with the jury’s verdict.” *Id.* Second, we “examine independently the reasonableness of the inferences that might be drawn from the circumstances proved” and “determine whether

the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotations omitted). We do not give deference to the jury’s choice between reasonable inferences. *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010).

The state proved the following circumstances: (1) police were surveilling a property on a snowy evening; (2) they attempted to apprehend appellant along with other men; (3) appellant raised his hands when told to do so by the officers, but immediately lowered them, grabbed his waistband with both hands, and fled on foot; (4) a deputy chased appellant; (5) the deputy saw appellant running with one hand holding his waistband; (6) right before losing sight of appellant, the deputy saw him grab his waistband with both hands; (7) the deputy lost sight of appellant for three to four seconds; (8) when the deputy regained sight of appellant, he was no longer holding his waistband and was moving both of his arms while running; (9) appellant was apprehended by other officers shortly after the deputy regained sight of him; (10) the deputy retraced their two sets of footprints in the snow while looking for contraband, eventually reaching a dumpster; (11) the deputy found a gun on top of trash covered in fresh snow in the dumpster; and (12) there was no snow accumulated on the gun, and any snowflakes that landed on it melted.

It is reasonable to infer from these circumstances that the gun was warm when the deputy located it and that it was warm because it had not been exposed to the winter temperatures and snow for very long. It is also reasonable to infer that appellant possessed the gun and placed it in the garbage dumpster while running from the deputy. Appellant asserts that it is also reasonable to infer from the circumstances proved that he did not place

the gun in the dumpster and that it was placed there by another. We disagree. The evidence at trial indicated that it had been snowing throughout the day, and it was snowing at the time the officer found the gun. The gun did not have snow on it, and the snow melted as it landed on the gun. Appellant's footprints led the deputy directly to the dumpster, where the gun sat on top of all other trash. The circumstances proved make appellant's theory that someone else brought the gun to the dumpster before he ran by, close enough in time that the gun retained heat, seem unreasonable. *See State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) (indicating reversal is not required if the "evidence taken as a whole" makes the defendant's theory "seem unreasonable"). As such, the circumstances proved are not consistent with a rational hypothesis other than guilt.

II. Appellant has not established that he was prejudiced by the district court's instructions on appellant's right not to testify.

Appellant argues that the district court reversibly erred by providing instructions on appellant's right not to testify without his express and personal permission.

Appellant did not object to the giving of the instruction at trial or during voir dire. We therefore review this issue for plain error. *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006). "For there to be plain error: (1) there must have been error; (2) the error was plain; and (3) the error must have affected the party's substantial rights." *Id.* To prove prejudice, appellant must establish that "there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury verdict." *Id.* The defendant bears a heavy burden of proving prejudice. *Id.* "Giving the no-adverse-inference instruction without consent, absent a showing of prejudice, is harmless." *Id.* If we conclude that one of the

requirements of the plain-error standard has not been satisfied, we need not consider the other requirements. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

Appellant has not established that he was prejudiced by the district court's giving of the instructions without his express and personal permission. We are satisfied that there is no reasonable likelihood that the giving of the instruction impacted the verdict in light of the evidence adduced at trial. Absent a showing of prejudice, it is not reversible error for the district court to fail to receive a defendant's express permission before giving an instruction on the defendant's right not to testify. *See Gomez*, 721 N.W.2d at 880; *State v. Darris*, 648 N.W.2d 232, 240-41 (Minn. 2002); *State v. Thompson*, 430 N.W.2d 151, 153 (Minn. 1988); *State v. Rosen*, 280 Minn. 550, 550-51, 158 N.W.2d 202, 202 (1968).

Affirmed.