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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0271**

State of Minnesota,
Respondent,

vs.

Peang Lee,
Appellant.

**Filed January 14, 2019
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-17-12100

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of possession of a firearm by a prohibited person, arguing that (1) the evidence was insufficient to sustain the conviction, (2) the district court abused its discretion by authorizing the state to impeach him with three unidentified felony convictions, and (3) the district court abused its discretion by admitting certain evidence without adequate chain-of-custody foundation. We affirm.

FACTS

Respondent State of Minnesota charged appellant Peang Lee with possession of a firearm by a prohibited person. The case was twice tried to a jury. The first jury could not agree on a verdict, and the district court declared a mistrial. The second jury found Lee guilty as charged.

At trial, Lee stipulated that he was ineligible to possess a firearm based on prior felony convictions. The district court ruled, over Lee's objection, that he could be impeached with three unidentified felony convictions. Lee did not testify.

At trial, Minneapolis Police Officer Daniel Ledman testified that on May 15, 2017, he was on patrol with fellow Minneapolis Police Officer Felix Alvarado, and they saw a motorcycle traveling in the area of 30th and Emerson Avenues North in Minneapolis. The officers determined that the motorcycle had been reported as stolen. Officer Ledman informed police dispatch that they had observed a stolen vehicle, and they waited for other officers to assist. Soon afterward, a second squad car pulled in behind Officer Ledman and Alvarado's vehicle.

The motorcycle pulled over between two vehicles. The backseat passenger, Lee, jumped off of the motorcycle. Lee hesitated for a moment, looked back at the officers, and then ran to a vehicle in front of him and attempted to open its doors. Officer Ledman jumped out of his squad car and yelled at Lee. Lee ran eastbound, and Officer Ledman pursued him on foot. Lee pulled on the front of his waistband with both hands as he ran. Lee ran in front of the squad car of the officers who had come to assist Officers Ledman and Alvarado. Officer Ledman testified that as Lee started to cut in front of the other squad car, he “was tugging on his waistband to the point where he was jumping up in the air.” Based on Officer Ledman’s observations of Lee pulling on his waistband, he yelled “gun.”

Officer Ledman testified that Lee stopped in the driveway of 2900 Girard Avenue with his back to Officer Ledman, looked back in Officer Ledman’s direction, and then made a tossing motion to his left. Officer Ledman heard “a loud metal object hit the pavement.” But Officer Ledman never saw a handgun or any other object in Lee’s hand. After making the tossing motion, Lee ran eastbound until he reached 2900 Fremont Avenue, where he stopped, and Officer Ledman handcuffed him. Officer Ledman searched Lee and found latex gloves, jewelry, and cell phones.

Minneapolis Police Officer Jeffrey Sworski testified that he was a passenger in the second squad car. He saw Lee “reach down into his waistband and attempt to get something out” while he was running. Officer Sworski saw Lee cut in front of his squad car when Officer Ledman was chasing him. When Lee was approximately ten feet away from Officer Sworski, the officer saw that Lee “had his hand on an object and it wasn’t his pants . . . [or] his shirt.” Officer Sworski testified that Lee was pulling “so hard that he

was almost pulling himself off the ground . . . to where he was tugging and kind of bouncing” as he was running in front of the squad car. Officer Sworski exited the squad car and yelled “gun.”

Officer Ledman testified that immediately after he saw Officer Sworski exit his squad car, he pointed to the grassy area where he saw Lee make the tossing motion. Officer Sworski testified that as he ran around the squad car to chase Lee, Officer Ledman yelled, “[H]e tossed a gun!” When Officer Sworski reached Officer Ledman, Officer Ledman pointed back and told Officer Sworski that Lee had “tossed a gun.”

Officer Sworski went to the area where Officer Ledman had pointed and found a firearm in the grass near the alley between Girard and Fremont Avenues. Officer Alvarado photographed the firearm and secured it. The photographs of the firearm depicted rust on its surface. Officer Alvarado testified that the firearm was a revolver and that its serial number had been scratched off its handle.

At trial, the district court admitted, over Lee’s chain-of-custody objection, a brace that Lee allegedly was wearing when he was booked at the jail after his arrest.

Following the jury’s finding that Lee was guilty of possession of a firearm by a prohibited person, the district court entered judgment of conviction and sentenced Lee to serve 60 months in prison. This appeal follows.

D E C I S I O N

Lee raises three issues in this appeal. First, he argues that the evidence was insufficient to sustain his conviction. Second, he argues that the district court erred by ruling that the state could impeach him with prior convictions if he testified. And third, he

argues that the district court erred by admitting the brace that he allegedly was wearing when he was arrested for the underlying offense. We address each issue in turn.

I.

When considering a claim of insufficient evidence, an appellate court carefully analyzes the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). An appellate court “assume[s] that the jury believed the State’s witnesses and disbelieved the defense witnesses,” *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008), and will not disturb a guilty 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 proved guilty of the offense charged, *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

If the state relies on circumstantial evidence to prove an element of an offense, an appellate court applies a heightened standard of review. *See State v. Al-Naseer*, 788 N.W.2d 469, 473-75 (Minn. 2010) (applying the circumstantial-evidence standard to individual elements of a criminal offense that were proved by circumstantial evidence). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist,” *State v. Hokanson*, 821 N.W.2d 340, 354 n.3 (Minn. 2012) (quotation omitted), whereas direct evidence is “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007) (quotation omitted). Circumstantial

evidence always requires an inferential step that is not required with direct evidence. *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017).

“Possession of a firearm may be proved through actual or constructive possession.” *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015). “Actual possession, also referred to as physical possession, involves ‘direct physical control.’” *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quoting *Jacobson v. Aetna Cas. & Sur. Co.*, 46 N.W.2d 868, 871 (Minn. 1951)). “The 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 of [the item].” *Id.* at 354.

Because the state relied on circumstantial evidence to prove actual possession, we evaluate the sufficiency of the evidence using the heightened circumstantial-evidence standard. See *Al-Naseer*, 788 N.W.2d at 473-75. Under that standard, we first determine the circumstances proved. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). When evaluating the circumstances proved, we “disregard evidence that is inconsistent with the jury’s verdict.” *Harris*, 895 N.W.2d at 601. Next, we determine if the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. *Loving*, 891 N.W.2d at 643. We will reverse a conviction based on circumstantial evidence only if there is a reasonable inference other than guilt. *Id.*

The state proved the following circumstances: (1) as Lee ran from the officers, he pulled on the front of his waistband with both hands; (2) as Lee ran in front of Officer Sworski’s squad car, he pulled on his waistband with such force that he was “jumping up in the air,” “almost pulling himself off the ground,” and “bouncing”; (3) as Lee ran, he had

his hand on an object that was not his shorts or his shirt; (4) Officer Ledman yelled “gun”; (5) Lee stopped in the driveway of 2900 Girard Avenue with his back to Officer Ledman, looked back in the officer’s direction, and made a tossing motion to his left; (6) after Lee made the tossing motion, Officer Ledman heard “a loud metal object hit the pavement”; (7) Officer Sworski yelled “gun” after exiting his squad car; (8) Officer Ledman told Officer Sworski that Lee tossed a gun and pointed backward; and (9) Officer Sworski proceeded in that direction and found a firearm in the grass.

These circumstances support the reasonable hypothesis that Lee possessed the firearm that Officer Sworski found, that Lee pulled at his waistband forcefully to try to remove the firearm while fleeing from Officer Ledman, and that Lee tossed the firearm while he was in the driveway of 2900 Girard Avenue.

Lee contends that because “no officer saw [him] in possession of the firearm, which did not have [his] fingerprints or DNA on it, and which could have been abandoned by anyone in North Minneapolis to be left in the grass, the evidence was insufficient as a matter of law.” Lee notes that a “firearm was never seen in [his] possession” and argues that the circumstances are easily explained by an alternate hypothesis of innocence: the firearm “could easily have been deposited or abandoned there by some other person.”

An appellate court “will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). “[A] defendant is not relying on conjecture or speculation when the defendant . . . points to evidence in the record that is consistent with a rational theory other than guilt.” *Al-Naseer*, 788 N.W.2d at 480 (quotation omitted). “[P]ossibilities of innocence do not require

reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable.” *State v. Stein*, 776 N.W.2d 709, 719 (Minn. 2010) (quotation omitted).

The only evidence that Lee points to in favor of his hypothesis of innocence is that the gun was “rusty and old” and did not contain his “fingerprints and DNA.” Given the location of the firearm near the area where Lee made the tossing motion and where Officer Ledman heard a metal object hit the pavement, as well as the lack of evidence otherwise explaining the presence of the gun, Lee’s hypothesis that some other person abandoned the gun is based on mere conjecture and unreasonable.

Lee notes that “the first trial ended in a mistrial due to the jury’s inability to unanimously agree, based on the weak, circumstantial evidence, that [he] possessed the firearm” and that “during the re-trial, the jury had questions expressing their doubts as to whether the case had been proved.” Although the initial mistrial and the jury’s questions during the second trial may show that this was a close case, we are satisfied that under the applicable standard of review, the jury could reasonably conclude, beyond a reasonable doubt, that the state proved that Lee was guilty of the offense charged. We therefore do not disturb the jury’s verdict.

II.

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its

prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.

Minn. R. Evid. 609(a). A ten-year time limit generally applies to the admission of evidence of a prior conviction for impeachment purposes. Minn. R. Evid. 609(b).

When evaluating whether prior convictions are admissible for impeachment of the defendant, the district court considers the following five factors, which the supreme court set forth in *State v. Jones*:

(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of [the] defendant's testimony, and (5) the centrality of the credibility issue.

271 N.W.2d 534, 537-38 (Minn. 1978).

If a court finds that “the prejudicial effect of disclosing the nature of a felony conviction outweighs its probative value, then it may still allow a party to impeach a witness with an unspecified felony conviction if the use of the unspecified conviction satisfies the balancing test of Rule 609(a)(1).” *State v. Hill*, 801 N.W.2d 646, 652-53 (Minn. 2011). This court “will not reverse a district court’s ruling on the impeachment of a witness by prior conviction absent a clear abuse of discretion.” *Id.* at 651 (quotation omitted). And even if a district court “abused its discretion by ruling that [a] conviction could be used for impeachment,” we will not grant relief if there is no reasonable possibility that the ruling “significantly affected the verdict.” *State v. Vanhouse*, 634 N.W.2d 715, 721 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001).

The state moved to impeach Lee with three prior felony convictions: a 2012 conviction of domestic assault, a 2010 conviction of third-degree assault, and a 2008 conviction of furnishing alcoholic beverages to an underage person resulting in death. Lee objected, arguing that such impeachment “would be prejudicial to him and would diminish his ability to put on a full and fair defense,” because it would impact his decision whether to testify.

The district court’s impeachment ruling was as follows:

First, Mr. Lee’s prior felony convictions have impeachment value in allowing the jury to perceive his whole person and may also bear on credibility, since repeated violations of the law may illustrate a lack of trustworthiness. . . . Thus, that factor weighs in favor of admission.

Second, Mr. Lee’s prior convictions are relatively recent within the ten years of the current offense as required by Rule 609. We have 2008, 2010 and 2012, respectively. So, this factor also weighs in favor of admission.

Third, the prior convictions are for furnishing an alcoholic beverage to underage person resulting in death, assault in the third degree, and domestic assault, whereas the present offense is for possession of a firearm by prohibited person. These charges are substantially different from one another, and there is nothing in the title of the old charges to suggest that Mr. Lee used a firearm on those prior occasions. This factor also weighs in favor of admission.

The fourth factor concerns the importance of Mr. Lee’s testimony, and based on argument of counsel, it appears that Mr. Lee may want to argue that he was not in possession of a firearm on the date of offense, making his testimony important.

Even if Mr. Lee does not testify, he may present his case through his own witnesses, cross-examination, and the arguments of counsel and any other means allowed under the

statute and rules. . . . [T]his factor tends to weigh against admission.

Fifth, if Mr. Lee testifies, credibility is likely to be central in this trial, as the jury will need to judge the credibility of Mr. Lee's version of events. Therefore, this factor weighs in favor of admission.

Based upon my balancing of the *Jones* factors, I conclude that [Lee's] prior convictions are admissible for impeachment purpose[s], however, allowing the names of the convictions [is] . . . probably more prejudicial than probative on the issue of credibility and, therefore, I will . . . allow the State to impeach Mr. Lee with three unnamed felony convictions

The record shows that the district court thoroughly analyzed the *Jones* factors, balanced them, and explained its reasoning. On this record, we do not discern a clear abuse of discretion.

Lee contends that because "the evidence was only circumstantial, the ruling that [he] could be impeached if he testified chilled his right to present a defense and testify on his own behalf." He argues that he "had no way to communicate what happened to the jury unless he testified."

Lee suggests that if he had testified, he would have been able to "tell his side of the story to the jury as to why he was on a stolen motorcycle, why he had been tugging on his waistband and fleeing the officers, or why he had jewelry, latex gloves and a brace on him." He complains that "[h]e was wholly unable to explain his activities that day to establish he had not possessed the firearm." But Lee did not make an offer of proof in the district court regarding what his testimony would have been if he had testified.

“[A]ppellate courts . . . experience difficulty in evaluating the effect of any abuse of discretion in this area without knowing the substance of any possible testimony.” *State v. Ihnot*, 575 N.W.2d 581, 587 n.3 (Minn. 1998). “It is, of course, the responsibility of the defendant to make an offer of proof as to what would have been the substance of [his] testimony, had it been provided.” *Id.* Thus, even if the district court had abused its discretion by ruling that Lee could be impeached with his prior convictions, we would have a difficult time concluding that the error was prejudicial. *See Vanhouse*, 634 N.W.2d at 721 (stating that this court will not grant relief if there is no reasonable possibility that a district court’s erroneous ruling that a conviction could be used for impeachment “significantly affected the verdict”).

Moreover, a defendant is not kept from testifying when he chooses

not to testify based on the evidence that would have been admitted had he taken the stand. . . . The mere fact that a [district] court would allow impeachment evidence if a defendant chooses to testify does not necessarily implicate his constitutional right to testify in his own defense. At a minimum, in order to prevail on this argument, [a defendant] would have to show that the [district] court abused its discretion in ruling that the probative value of the impeachment evidence outweighed its prejudicial effect; *it is only when a [district] court has abused its discretion that a defendant’s right to testify may be infringed by the threat of impeachment evidence.*

Ihnot, 575 N.W.2d at 587 (quotation omitted). Because Lee has not shown that the district court abused its discretion in ruling that the probative value of Lee’s felony convictions outweighed their prejudicial effect, Lee’s constitutional right to testify was not infringed.

Lee also argues that “[b]y allowing the stipulation [regarding his prior felony convictions] but then ruling [he] could be impeached if he testified, the district court undermined the advantage of his right to stipulate to the element of the offense requiring proof of a prior conviction.” Lee does not cite authority indicating that any tension between his stipulation and the district court’s impeachment ruling is relevant when assessing the admission of his prior convictions for impeachment purposes. Indeed, this court has upheld the admission of a prior conviction for impeachment purposes in a trial for possession of a firearm by an ineligible person even though the defendant stipulated that he was ineligible to possess a firearm. *State v. Craig*, 807 N.W.2d 453, 466, 469-70 (Minn. App. 2011), *aff’d on other grounds*, 826 N.W.2d 789 (Minn. 2013). We therefore limit our review to the district court’s application of the *Jones* factors, which does not reveal an abuse of discretion.

In sum, the district court’s ruling regarding impeachment by prior conviction does not provide a basis for relief.

III.

The chain-of-custody rule requires “the prosecution to account for the whereabouts of physical evidence connected with a crime from the time of its seizure to its offer at trial.” *State v. Johnson*, 239 N.W.2d 239, 242 (Minn. 1976). The rule “serves the dual purpose of demonstrating that (1) the evidence offered is the same as that seized, and (2) it is in substantially the same condition.” *Id.* The chain-of-custody rule does not create a “rigid formulation of what showing is necessary in order for a particular item of evidence to be admissible.” *Id.* Instead, it requires that the district court “be satisfied that, in all

reasonable probability, the item offered is the same as the item seized and is substantially unchanged in condition.” *Id.*; see Minn. R. Evid. 901(a) (“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”). This court reviews a decision regarding the adequacy of chain-of-custody foundation for an abuse of discretion. *State v. Hollins*, 789 N.W.2d 244, 251 (Minn. App. 2010), *review denied* (Minn. Dec. 22, 2010).

Lee contends that the district court erred by admitting a brace that he allegedly was wearing when he was arrested.¹ Lee objected to the admission of the brace at trial. If a defendant objects to the admission of evidence at trial, the district court’s ruling is reviewed under the harmless-error standard. *State v. Matthews*, 800 N.W.2d 629, 633 (Minn. 2011). When an error does not implicate a constitutional right, the error is harmless unless it “substantially influenced the jury’s verdict.” *State v. Morrow*, 834 N.W.2d 715, 729 n.7 (Minn. 2013).

Lee argues that “[t]he chain of custody was not established” for the brace because “the jailer who removed [his] clothing [from him] and the officer receiving the bag from the jailer are the key and necessary links in the chain of custody” and “the prosecutor did not have the jailer who removed [his] clothing testify.” Lee’s foundation argument has merit. Officer Alvarado testified that when people are admitted to jail, jail staff place their

¹ Although the prosecutor referred to the brace as a “back brace” in his closing argument, Lee objected to this description, noting that Officer Alvarado testified only that it was a “brace of some sort.” The record is unclear regarding the type of brace at issue.

clothing in a bag and “tell [police] what is given to [them] and [police] . . . sign off on it.” Officer Alvarado testified that officers then take the bag and perform a property inventory by recording each item inside it. Officer Alvarado testified that he recognized the brace as something that was part of Lee’s property inventory. But Officer Alvarado did not testify that he saw the brace on Lee. In fact, no witness testified that he saw the brace on Lee.

However, the record does not suggest that the brace substantially influenced the jury’s verdict. Although the state argued to the jury that the brace “may have confined the firearm that was stored between the brace and [Lee]” and explained why Lee was pulling at his waistband, the state largely focused on the officers’ observations and the reasonable inferences to be drawn from those observations. As noted above, Officer Ledman testified that he saw Lee make a tossing motion and that he heard “a loud metal object hit the pavement” near the location where the gun was found. That testimony provided strong support for the jury’s verdict.

On this record, we need not decide whether the district court erred by admitting the brace into evidence because even if the district court did so, the error was harmless and does not provide a basis for relief.

Affirmed.