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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0274**

State of Minnesota,
Respondent,

vs.

Kenny Lashaun Robertson,
Appellant.

**Filed December 24, 2018
Affirmed
Reyes, Judge**

Hennepin County District Court
File No. 27-CR-17-4135

Lori Swanson, Minnesota 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, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

REYES, Judge

In this direct appeal from his conviction of unlawful possession of a firearm, appellant argues that insufficient evidence exists to prove the element of knowing actual

or constructive possession beyond a reasonable doubt because he only briefly handled the firearm. We affirm.

FACTS

In February 2017, Brooklyn Park police executed a search warrant at a residence. Upon entry, the officers made contact with appellant Kenny Lashaun Robertson and his fiancée, I.M. During the execution of the search warrant, I.M. told the officers that she kept a firearm in an upstairs bedroom. Officers located the firearm in the closet of the upstairs master bedroom, stored in a case, with two magazines, hidden under clothing.

Officers interviewed appellant, who waived his *Miranda* rights. During the course of the interview, appellant admitted that he handled the firearm. He explained that, approximately one month earlier, he came across the case while he was doing laundry. Appellant opened it, picked up the firearm, looked at it, and then put it back in its case. He told the officers that his DNA and fingerprints would likely be on the firearm. Appellant claimed that he did not touch the firearm again after that encounter and that he did not tell I.M. that he had come across it.

At a bench trial, appellant's account of events changed. He testified that when he discovered the firearm it was not in a case, and he came across it because he accidentally knocked it off a shelf onto the floor. He testified that his only contact with the firearm was picking it up and placing it back on the shelf. On cross-examination, appellant conceded that, in his previous interview with the officers, he described the firearm as being in a case and he omitted telling them that the firearm accidentally fell off a shelf. He also conceded

that, after the interview, the officers gave him an opportunity to add anything that he may have left out, and he declined to do so.

The district court found appellant guilty of possession of a firearm by an ineligible person under Minn. Stat. § 624.713, subd. 1(2) (2016), on the basis that he actually and knowingly possessed the firearm prior to his arrest. Although not necessary to the verdict, the district court also found that appellant constructively possessed the firearm.¹ Following the verdict, the district court sentenced appellant to an executed term of sixty months. This appeal follows.

DECISION

Appellant argues that the state failed to prove beyond a reasonable doubt that he actually or constructively possessed the firearm, because his contact with the firearm was too fleeting to constitute knowing, actual possession, and because there was insufficient evidence to prove that he exercised dominion and control over the firearm constituting constructive possession. We disagree.

In considering a claim of insufficient evidence, we undertake 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 factfinder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court assumes that “the [factfinder] believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v.*

¹ The district court based its finding of constructive possession on the fact that appellant failed to reveal to I.M. that he had come across the firearm and this “strongly suggest[ed] he wanted the gun to remain in the home.”

Caldwell, 803 N.W.2d 373, 384 (Minn. 2011) (quoting *State v. Moore*, 438 N.W.2d 101, 108 (Minn.1989)). “[W]e will not disturb the verdict if the [factfinder], 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.” *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012).²

To convict appellant of possession of a firearm by an ineligible person, the state had to prove that he knowingly possessed the firearm and is ineligible to possess a firearm. *State v. Salyers*, 858 N.W.2d 156, 161 (Minn. 2015). Appellant stipulated that he is ineligible to possess a firearm. Therefore, the state only had to prove that appellant knowingly possessed the firearm.

Possession of a firearm may be proved through actual or constructive possession. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). Actual possession is generally proved by showing that the defendant had “actual or physical possession [of the firearm] at the time of arrest.” *State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975). However, this court has held that actual physical possession at a time other than during arrest does not preclude prosecution. *State v. Barker*, 888 N.W.2d 348, 354 (Minn. App. 2016). In addition, Minn. Stat. § 624.713 does not specify that possession must be more than “brief” or “temporary.” *In re Welfare of S.J.J.*, 755 N.W.2d 316, 319 (Minn. App. 2008). For that reason, Minnesota does not recognize a “fleeting-control” exception to the crime of unlawful

² This standard of review is the same for a court or a jury acting as the factfinder and hearing the evidence. *State v. Ibarra*, 355 N.W.2d 125, 130 (Minn. 1984).

possession of a firearm. *Id.* at 318-319 (citing *State v. Houston*, 654 N.W.2d 727, 734 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003)).

Actual possession may be proved through direct evidence or circumstantial evidence. *Barker*, 888 N.W.2d at 354. “Direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Bernhardt v. State*, 684 N.W.2d 465, 477, n.11 (Minn. 2004).

Appellant argues that his contact with the firearm was too brief to constitute actual possession. At trial, he testified that he touched the firearm only after it fell from a bedroom closet shelf, and for the sole purpose of replacing it. While appellant acknowledges that Minnesota does not recognize a “fleeting-control” exception, he nevertheless encourages this court to follow other states in recognizing that actual possession requires more than a mere “passing control, fleeting and shadowy in its nature.” We decline appellant’s invitation.

Appellant’s argument lacks merit for two reasons. First, this court has definitively declined to recognize a fleeting-control exception. *S.J.J.*, 755 N.W.2d at 319. Second, appellant’s “fleeting-control” claim is undermined by direct evidence in the record that appellant had physical possession of the firearm. When officers interviewed appellant, he voluntarily admitted that he handled the firearm previously.

We conclude that, because appellant’s own statement is direct evidence that supports the district court’s finding that he had actual and knowing possession of a firearm, we need not consider the constructive-possession argument.

Affirmed.