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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0553**

State of Minnesota,
Respondent,

vs.

David Alan Nielsen,
Appellant.

**Filed April 8, 2019
Affirmed
Larkin, Judge**

St. Louis County District Court
File No. 69VI-CR-17-550

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Bonnie A. Thayer, Assistant County Attorney,
Virginia, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina Schulz, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Cleary, Chief Judge; and
Halbrooks, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of possession of a firearm by a prohibited person, arguing that the evidence was insufficient to sustain the conviction. Appellant also makes several pro se arguments. We affirm.

FACTS

Respondent State of Minnesota charged appellant David Alan Nielsen with possession of a firearm by a prohibited person. Nielsen stipulated that he was ineligible to possess a firearm, and the case was tried to a jury. At trial, State Trooper David Rock testified that on May 17, 2017, he was on patrol and observed a vehicle without working taillights. Trooper Rock stopped the vehicle and approached the driver's side. The trooper spoke with the driver, who stated that he did not have his driver's license with him. The driver identified himself as Michael Alvin Nielsen and provided a date of birth. Trooper Rock determined that Michael Alvin Nielsen had a date of birth different than the one the driver had provided and that appellant was the driver.

Trooper Rock testified that he asked Nielsen where he was headed, and Nielsen "mentioned something about moving." As the trooper was speaking with Nielsen, he observed that Nielsen was sweaty, had dilated pupils, and was making furtive movements. Trooper Rock called for assistance and asked Nielsen to step out of the vehicle to perform field sobriety tests.

Officer Elijah Allen of the Eveleth Police Department responded to the scene. While standing on the passenger side of the vehicle, Officer Allen observed a gunstock

sticking out of clothes and other items in the vehicle. Officer Allen testified that the barrel of the firearm was on the “passenger side floorboard . . . leaning up against the front of the seat.” The gunstock was visible from outside the vehicle and was within reach of the driver’s seat. Officer Allen alerted Trooper Rock to the presence of the firearm.

Trooper Rock testified that initially, he did not notice the firearm because he was focused on Nielsen’s hands and movements. Trooper Rock testified that only the gunstock was visible because the vehicle was filled with garbage bags and “miscellaneous household items.” Trooper Rock also testified that when he observed the firearm, it was located on the “front passenger side [of the vehicle], . . . leaning up against the seat from the floor.” Trooper Rock removed the firearm from the vehicle. The officers did not photograph the firearm in the vehicle before removing it. The police stored the firearm in an evidence locker and did not arrange any DNA or fingerprint testing of the firearm. Investigation revealed that the firearm did not have a registered owner.

The officers searched the vehicle and found a wallet containing Nielsen’s Minnesota identification card and prescription bottles with his name on them. Police eventually determined that the vehicle was registered to S.C., and not to Nielsen.

The jury found Nielsen guilty of possession of a firearm by a prohibited person. The district court entered judgment of conviction and sentenced Nielsen to serve a 60-month prison term. Nielsen appeals.

DECISION

I.

Nielsen contends that the evidence was insufficient to sustain his conviction. 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). The appellate court “assume[s] that the jury believed the state’s witnesses and disbelieved contrary evidence.” *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). An appellate court 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 state proved that the defendant was guilty of the offense charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

When 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. Harris*, 895 N.W.2d 592, 601-03 (Minn. 2017) (applying circumstantial-evidence standard to individual element of criminal offense that was proved by circumstantial evidence). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Id.* at 599 (quotation omitted). Direct evidence is “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* (quotation omitted). Circumstantial evidence always requires an inferential step that is not required with direct evidence. *Id.*

“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 purpose of the constructive-possession doctrine is to establish possession in

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.

State v. Florine, 226 N.W.2d 609, 610 (Minn. 1975).

To establish constructive possession the state must show either (1) the prohibited item was found “in a place under [the] defendant’s exclusive control to which other people did not normally have access” or (2) if police found the prohibited item “in a place to which others had access, there is a strong probability (inferable from other evidence) that [the] defendant was at the time consciously exercising dominion and control over it.” *Id.* at 611.¹

¹ Nielsen argues that the “strong probability” language in *Florine* “relieves” the state of its burden to prove every element of a crime beyond a reasonable doubt. Thus, Nielsen argues, “the *Florine* standard is constitutionally infirm.” *Florine* is supreme court precedent. And “[t]he court of appeals is bound by supreme court precedent.” *State v. Curtis*, 921 N.W.2d 342, 342 (Minn. 2018). We therefore follow the standard set forth in *Florine* when deciding this case. However, we note that the concern that Nielsen raises is not an issue here because we ultimately conclude that the state proved, beyond a reasonable doubt, that Nielsen consciously exercised dominion and control over the firearm.

Because the state relied on circumstantial evidence to prove constructive possession, we evaluate the sufficiency of the evidence using the heightened standard of review. *See Harris*, 895 N.W.2d at 601-03. First, we determine the circumstances proved. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). When evaluating the circumstances proved, the court “disregard[s] evidence that is inconsistent with the jury’s verdict.” *Harris*, 895 N.W.2d at 601. Next, we “determine whether 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 circumstances proved are as follows: (1) police discovered a firearm in the vehicle that Nielsen was driving; (2) Nielsen was alone in the vehicle; (3) the firearm was in the front passenger compartment, within reach of the driver’s seat; (4) the stock of the firearm was clearly visible from outside the vehicle; (5) police found Nielsen’s state identification card and other items with his name on them in the vehicle; and (6) Nielsen gave the police a false name.

The state argues that, when Trooper Rock stopped Nielsen, “the firearm was under [Nielsen’s] exclusive control.” However, the relevant inquiry is whether the firearm was found “in a *place*” under Nielsen’s exclusive control, that is, in a place “to which other people did not normally have access.” *Florine*, 226 N.W.2d at 611 (emphasis added). Because the vehicle was registered to another person, it is reasonable to infer that at least one other person (the registered owner) normally had access to the vehicle. We therefore

ask whether there was a strong probability that Nielsen was consciously exercising dominion and control over the firearm as he drove the vehicle.

When the trooper stopped Nielsen, he was alone in the vehicle. The firearm was in the front passenger compartment, and the stock of the firearm was visible and within reach of the driver's seat. In *State v. Prigge*, the supreme court held that "carry," in the context of a statute prohibiting the carrying of a pistol by certain persons, includes "having the [firearm] in one's personal vicinity while moving." 907 N.W.2d 635, 639 (Minn. 2018). Nielsen's transportation of a visible firearm within his reach while driving a vehicle constitutes "carrying" the firearm and shows that Nielsen consciously exercised dominion and control over the firearm. Thus, the circumstances proved are consistent with guilt.

Nielsen argues that the circumstantial evidence is insufficient because "the circumstances proved support another rational hypothesis [other than guilt]: the firearm belonged to the owner of the [vehicle] and Nielsen never consciously exercised dominion or control over it." Moreover, Nielsen argues, even if he was aware of the firearm's presence, "knowledge and proximity alone are not sufficient to prove constructive possession."

Nielsen does not explain, and we do not discern, why another person's ownership of the firearm would be inconsistent with guilt, that is, a conclusion that Nielsen consciously exercised dominion and control over the firearm by knowingly transporting it in the vehicle. The relevant standard focuses on the conscious exercise of dominion and control over the firearm, and not on ownership. Thus, the evidence could be sufficient to prove guilt even if the firearm belonged to the vehicle's owner.

Nielsen also argues that to prove constructive possession, the state must prove prior actual possession. Nielsen argues that, “[u]nder *Florine*, the State needed to prove that Nielsen ‘at one time physically possessed the [gun] and did not abandon his possessory interest in the [gun] but rather continued to exercise dominion and control over it up to the time of the arrest,’” and that “[t]he State did not prove that Nielsen ever physically possessed the gun prior to the arrest.”

Florine’s statement regarding the purpose of the constructive possession doctrine does not make prior physical possession an element of constructive possession that must be proved beyond a reasonable doubt. When a case involves direct evidence of prior physical possession, the case is treated as an actual-possession case. *See State v. Olhausen*, 681 N.W.2d 21, 23-25 (Minn. 2004) (affirming conviction based on actual possession where undercover agent testified that defendant agreed to sell him methamphetamine and later produced package of methamphetamine); *State v. Loyd*, 321 N.W.2d 901, 902 (Minn. 1982) (affirming conviction of unlawful possession of firearm based on actual possession where evidence showed that defendant threatened victim with firearm). The constructive-possession doctrine is used when there is no proof of physical or actual possession, either at the time of arrest or earlier. *See State v. Lee*, 683 N.W.2d 309, 316-17 & n.7 (Minn. 2004) (affirming conviction of unlawful possession of firearm based on constructive possession where evidence showed that stolen firearms were stored in defendant’s garage); *State v. Olson*, 326 N.W.2d 661, 662-63 (Minn. 1982) (affirming conviction of unlawful possession of firearm based on constructive possession where evidence showed that loaded firearm was found “within reach of where defendant had been seated” in car). In sum, the

state did not have to prove that Nielsen physically or actually possessed the firearm prior to his arrest to prove constructive possession.

Lastly, Nielsen relies on two cases to argue that the state did not prove constructive possession. In *Harris*, the defendant was driving a vehicle with two passengers when police pulled him over. 895 N.W.2d at 596-97. After removing all three occupants from the vehicle, police discovered a firearm partially hidden in the headlining near the sunroof. *Id.* at 597. The supreme court held that “the circumstances proved do not preclude a reasonable inference that [the defendant] did not know the firearm was in the car.” *Id.* at 602.

In *State v. Sam*, the defendant was driving a vehicle with one passenger when police pulled him over. 859 N.W.2d 825, 828 (Minn. App. 2015). The defendant did not own the vehicle. *Id.* Police observed the passenger make furtive movements after the vehicle was stopped. *Id.* Police removed both occupants from the vehicle and discovered a firearm in the center console. *Id.* at 828-29. Police also discovered controlled substances in the glove compartment. *Id.* at 829. This court held that “the state did not meet its burden of proving constructive possession” because the circumstances proved did not preclude reasonable inferences that either the vehicle’s owner or the passenger had placed the controlled substances and the firearm in the vehicle. *Id.* at 835-36.

In both *Harris* and *Sam*, the defendant was not alone in the vehicle and the firearm was not clearly visible. These facts distinguish those cases from the circumstances here, where Nielsen was alone in the vehicle and the stock of the firearm was clearly visible and within his reach in the front seat. By contrast, in *State v. Smith*, police discovered the

defendant alone and asleep in the driver's seat of a rented vehicle. 619 N.W.2d 766, 768-69 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). Police found a firearm on the vehicle's driver's seat "sticking out from underneath the right side of [the defendant's] leg." *Id.* (quotation omitted). The defendant testified that he had never seen the firearm and believed that another man, who got a ride from the defendant the day before, had placed the firearm in the vehicle. *Id.* at 769. This court affirmed the defendant's constructive-possession conviction based on that evidence. *Id.* at 770-71. In *Smith*, unlike in *Harris* and *Sam*, the defendant was alone in the vehicle. Moreover, the firearm was visible and in close proximity to the defendant. The same reasoning used to affirm the constructive-possession conviction in *Smith* applies to Nielsen's case.

In sum, we are satisfied that the evidence shows, beyond a reasonable doubt, that Nielsen consciously exercised dominion and control over the firearm and that the record does not support a rational hypothesis other than guilt.

II.

Nielsen raises more than one dozen arguments in a pro se brief. Before addressing his arguments, we set forth the principles that govern our review.

Although some accommodations may be made for pro se litigants, they are generally held to the same standards as attorneys. *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). "[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. . . . [T]he burden of showing error rests upon the one who relies upon it." *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (quotation omitted). Mere assertions of error without supporting legal authority or argument are

waived unless prejudicial error is obvious on mere inspection. *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015). “[I]ssues not adequately briefed are waived.” *Brooks v. State*, 897 N.W.2d 811, 819 (Minn. App. 2017), *review denied* (Minn. Aug. 8, 2017). Lastly, the appellate court does not retry the case, weigh the evidence, or assess witness credibility on appeal. See *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (recognizing that “the trier of fact is in the best position to determine credibility and weigh the evidence”); *DeMars v. State*, 352 N.W.2d 13, 16 (Minn. 1984) (“The credibility of the witnesses and the weight to be given their testimony are determinations to be made by the factfinder.”).

Nielsen’s pro se brief primarily challenges the sufficiency of the evidence to sustain his conviction, arguing that the state shifted the burden of proof to him by failing to test the firearm for DNA or fingerprints and by failing to photograph the firearm in the vehicle. Nielsen also complains that he was not allowed to see the firearm before trial. Although he argues that testing the firearm and photographing the scene would have provided evidence of his innocence, it is also likely that such evidence could have been incriminating. Because Nielsen has not demonstrated prejudice, this claim does not warrant relief. See Minn. R. Crim. P. 31.01 (“Any error that does not affect substantial rights must be disregarded.”). Moreover, Nielsen’s sufficiency arguments based on witness credibility are unavailing because we view the evidence in the light most favorable to the verdict and assume the jury believed the state’s witnesses. *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998).

Nielsen contends that evidence that he gave the police a false name was character evidence, which should have been excluded under Minn. R. Evid. 404(b). Rule 404(b)(1) provides that “[e]vidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith.” Evidence of offenses committed as part of a single course of conduct, also called immediate-episode evidence, does not fall under the rule 404(b) exclusion. *State v. Kendell*, 723 N.W.2d 597, 608 (Minn. 2006). Appellate courts have “repeatedly affirmed the admission of immediate-episode evidence when there is a close causal and temporal connection between the prior bad act and the charged crime.” *State v. Riddley*, 776 N.W.2d 419, 425 (Minn. 2009). To be inadmissible, the probative value of immediate-episode evidence must be “substantially outweighed” by the danger of unfair prejudice. Minn. R. Evid. 403.

“[T]he fact of an accused’s flight, escape from custody, resistance to arrest, concealment, *assumption of a false name*, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.” *State v. McTague*, 252 N.W. 446, 448 (Minn. 1934) (emphasis added). Nielsen’s use of a false name suggests that he was aware of the firearm and gave the false name to avoid police detection of his ineligibility to possess it. This falls within the immediate-episode exception to rule 404(b), and the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice. See *Kendell*, 723 N.W.2d at 608 (“When a defendant commits a second crime to avoid apprehension for a previous crime committed close in time and location to the second crime, the offenses constitute a single behavioral incident.”).

Nielsen contends that he received ineffective assistance of counsel because his counsel (1) failed to inform him of his rights to a pretrial suppression hearing and to demand suppression of the firearm, (2) failed to provide him with discovery and would not meet with him to discuss the case, and (3) conceded his guilt in closing argument.

An ineffective-assistance-of-counsel claim involves a mixed question of law and fact that is reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). Appellate courts generally analyze such claims as trial errors under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Id.* “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

Nielsen’s arguments regarding counsel’s failure to move for suppression of the firearm do not warrant relief because Officer Allen observed the firearm from a legal vantage point and therefore had probable cause to search the vehicle and seize the firearm. *See State v. Willis*, 320 N.W.2d 726, 728 (Minn. 1982) (upholding search of a vehicle where police officer observed, in plain view, a firearm); *see also State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (stating that, under the “automobile exception,” police “may search a car without a warrant, including closed containers in that car, if there is probable cause to believe the search will result in a discovery of evidence or contraband” (quotation omitted)). Here, Officer Allen saw the firearm from where he was standing outside the vehicle, and the district court determined that the traffic stop was lawful. Under

the circumstances, we do not discern a basis to suppress the firearm, and Nielsen's counsel's decision not to move for suppression therefore was not objectively unreasonable.

Nielsen's assertions that his attorney failed to provide him with discovery and would not meet with him to discuss the case are contradicted by the record. Nielsen's attorney told the district court that his office had "sent no less than four letters to [Nielsen] asking him to make an appointment" and that Nielsen "still [had] a CD disc with all the discovery."

As to Nielsen's assertion that his attorney conceded his guilt, "if a defense counsel impliedly admits a defendant's guilt without the defendant's permission or acquiescence, the defendant should be given a new trial even if it can be said that the defendant would have been convicted in any event." *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn.1984). Although an appellate court can never condone an attorney admitting a defendant's guilt without his consent or acquiescence, it "must be cautious in defining an 'implied admission' to not allow the semantics of every questioned word, statement or misstatement of counsel by inadvertence, negligence or perhaps cleverness to be an automatic ground for a new trial." *Dukes v. State*, 660 N.W.2d 804, 812 (Minn. 2003). "We will find an implied concession only where a reasonable person viewing the totality of the circumstances would conclude that counsel conceded the defendant[']s guilt." *Torres v. State*, 688 N.W.2d 569, 573 (Minn. 2004) (quotation omitted).

Nielsen complains that his attorney said, in closing argument, "For one time in [Nielsen's] life, he possesses a gun that's not stolen." When viewed in isolation, that statement could suggest an implied concession of guilt. But the statement stands in stark contrast to the remainder of defense counsel's closing argument, which spans over six

pages of transcript. In that argument, defense counsel vigorously argued that Nielsen did not know the gun was in the car and that he therefore was not guilty of knowing possession. Although one might question the efficacy of the statement Nielsen quotes, when it is read in the context of the entire closing argument, it is not a concession of guilt. *See State v. Vick*, 632 N.W.2d 676, 688 (Minn. 2001) (“Because [defendant’s] attorney’s comments, viewed in context, do not constitute a confession, a new trial is not warranted on this basis.”).

Nielsen challenges the jury instructions, and in particular, the district court’s instruction that “[t]he jury verdict must be unanimous.” Appellate courts “review the jury instructions as a whole to determine whether the instructions accurately state the law in a manner that can be understood by the jury.” *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). When a defendant fails to object to jury instructions at trial, this court reviews those instructions for plain error. *State v. Milton*, 821 N.W.2d 789, 802 (Minn. 2012). Nielsen did not object to the jury instructions at trial, and the record indicates that the district court followed the Criminal Jury Instruction Guides when instructing the jury. Nielsen has not provided, and we do not discern, a basis to conclude that the district court plainly erred in instructing the jury.

Nielsen alleges that because the district court scheduled his omnibus hearing as a telephone conference, he was not allowed to attend or participate in the hearing. Nielsen also alleges that the district court closed his trial to the public, barred his family from attending the trial, and prevented witnesses from being called. The record indicates that Nielsen waived his omnibus hearing and asked the district court to determine probable

cause based solely on “the file” given to the court. The district court found that probable cause existed and set a date for a scheduling conference to be held via telephone conference. The record does not indicate that the district court closed any part of the trial to the public or otherwise barred any person’s attendance. In sum, the record does not support Nielsen’s allegations.

Lastly, Nielsen alleges prosecutorial misconduct by the state. He states that “[d]uring [the prosecutor’s] presentation she pointed the gun at the members of the jury, making the gun jump against her shoulder, mimic[k]ing the recoil like she was shooting at them. All the while quietly saying ‘pew, pew, pew.’” The record does not support this allegation. There is absolutely no indication in the record that the alleged misconduct occurred.

Nielsen’s remaining assertions of error are either unsupported by legal authority or argument or inadequately briefed. Such assertions are waived unless prejudicial error is obvious on mere inspection. *See Andersen*, 871 N.W.2d at 915. We conclude that there is no obvious prejudicial error stemming from Nielsen’s unsupported assertions of error, including his challenges to venue, discovery, voir dire, and chain of custody; his allegations of perjury; and his complaint that he was referred to throughout trial as “defendant” rather than as “Mr. Nielsen.”

In conclusion, Nielsen’s pro se brief does not establish a basis for relief. And because appellate courts 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 state proved that the defendant was guilty of the offense charged, we affirm.

Affirmed.