STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1322

State of Minnesota,
Respondent,

vs.

Abdiqadar Salah Kasim,
Appellant.

Filed June 10, 2019
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CR-17-21471

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Kaitlin Anderson (certified student attorney), Minneapolis, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Reilly, Judge; and Klaphake, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

REILLY, Judge

Appellant argues that his conviction for being a prohibited person in possession of a firearm must be reversed because: (1) the evidence was insufficient to prove possession of a firearm; and (2) the officer provided improper opinion testimony. We affirm.

FACTS

In July 2017, Minneapolis Police officers went to a gas station to conduct a routine business check. Shortly after the officers entered the store, R.M., a clerk at the store, saw a customer place something on a shelf in the back of the store. R.M. told his co-worker, D.Z., to check the shelf. D.Z. found a firearm and waved the officers over to the area. The officers saw the firearm on the shelf behind two packages of Oreo cookies. The two officers and D.Z. did not see who placed the firearm on the shelf. Though R.M. could not identify the individual by name, he provided a description to the officers.

According to D.Z., later that same day, Kasim came to the store and threw chips on the floor from the same area where the firearm had been found. Kasim told D.Z. that he was looking for his wallet. D.Z. remembered that he had seen Kasim in the store earlier that day. D.Z. did not call the police when Kasim came to the store looking for his wallet and did not tell the detective investigating the case about this incident.

Sergeant Adam Lepinski conducted the follow-up investigation and collected video surveillance footage from the store taken at the time of the incident. The surveillance video shows D.Z. working behind the register at the front of the store and R.M., Kasim, and other individuals, standing near the registers. In the background of one of the frames, the video shows a marked squad car pull up outside of the store. Right before the officers enter the store, Kasim walks down an aisle toward the back of the store. Kasim removes a dark-colored object from his waistband and bends down at the end of the aisle. Kasim then walks down the next aisle toward the front of the store. Kasim waits in line, pays for some items, and leaves the store. R.M. speaks with D.Z., and they both walk to the back of the store, look at the end of the aisle, and motion for the officers to come over. The officers find the firearm on the store shelf.

Lepinski created photographs from the video, which he circulated to the Minneapolis Police Department (MPD) to see if anyone recognized the individual. Sergeant Mohamed Abdullahi contacted Lepinski and identified the individual in the bulletin as Kasim. Abdullahi testified at trial about his identification of Kasim and explained that he has known Kasim through the community for "[a] very long time" since Kasim was 13 years old.

Lepinski compared a photograph of Kasim to the video surveillance footage and determined that the individual in the video looked like Kasim. Lepinski then interviewed Kasim. During the interview, Kasim denied being the person in the video. Lepinski also obtained a search warrant for Kasim's DNA. Kasim did not initially cooperate, but after being brought to the hospital Kasim provided a DNA sample.

A Bureau of Criminal Apprehension (BCA) forensic scientist determined that the DNA found on the firearm was a mixture of DNA from two or more individuals. The BCA scientist developed a partial major male DNA profile from the DNA found on the firearm, and determined that the partial profile matched Kasim's DNA sample. At trial the BCA scientist testified that the “probability of selecting an unrelated individual at random from the general population having a DNA profile that matches the partial major DNA profile obtained from the pistol is approximately one in 2.1 million.”

In addition, a MPD forensic scientist found a partial right palm print on the firearm slide. The MPD scientist ran the partial palm print through two databases—which included Kasim’s fingerprints—but did not find any matches. After Lepinski provided the MPD scientist with Kasim’s name, she compared the partial palm print from the firearm to Kasim’s fingerprints and determined they came from the same source. Her supervisor and another employee verified the results.

At the conclusion of the jury trial, the jury found Kasim guilty of possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) (2016). The district court imposed a 60-month sentence.

Kasim now appeals.

D E C I S I O N

I. The evidence is sufficient to support Kasim’s conviction.

a. Standard of Review

When reviewing the sufficiency of the evidence, 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 must assume that the fact-finder “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). We 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.

If the state's evidence on one or more elements of a charged offense consists solely of circumstantial evidence,[1] this court applies a heightened standard of review. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013); *see also Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004). When reviewing a conviction based on circumstantial evidence, appellate courts apply a two-step test to determine the sufficiency of the evidence. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we must "identify the circumstances proved." *Id*. (citing *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). In identifying the circumstances proved, this court assumes that the fact-finder resolved any factual disputes in a manner that is consistent with its verdict. *Id*. Second, we independently examine the "reasonableness of the inferences that might be drawn from the circumstances proved," and then "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id*. (quotations omitted). We must consider the evidence as a whole and not examine each piece in isolation. *Andersen*, 784 N.W.2d at 332.

[1] Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017 (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).

Here the parties dispute the applicable standard of review. Kasim asserts that his conviction is based upon circumstantial evidence and the heightened standard of review applies. The state asserts that Kasim's possession conviction is supported by direct DNA evidence and the traditional standard applies. We need not reach the merits of this argument in this case because there is sufficient evidence under either standard of review.

b. Possession

Kasim argues that the evidence was insufficient to prove he either actually or constructively possessed the firearm found in the store. Possession may be either actual or constructive. *Harris*, 895 N.W.2d at 601. Actual possession is defined as "direct physical control." *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quotation omitted). 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 of contraband." *Id*. at 354; *see also State v. Olhausen*, 681 N.W.2d 21, 23, 26 (Minn. 2004) (affirming first-degree controlled substance offenses, including possession, where there was a wealth of circumstantial evidence that the defendant had possessed methamphetamine but did not possess the substance when arrested). Constructive possession may be established either (1) by proof that the item was in a place under the defendant's "exclusive control to which other people did not normally have access" or (2) by proof of a strong probability that "the defendant was at the time consciously exercising dominion and control over it," even if the item was in a place to which others had access. *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975).

Even under the heightened standard of review, Kasim's sufficiency-of-the-evidence claim is unpersuasive for both actual and constructive possession. The circumstances proved include: (1) Minneapolis police officers entered the store to perform a routine business check; (2) as the officers entered, Kasim left his place near the front and walked down an aisle, grabbed a black object from his waistband-area, turned by an endcap, crouched down, and then returned to check out; (3) moments later, D.Z. checked the shelf[2] and he waved the officers over to the area; (4) the officers retrieved a firearm from the shelf; (5) later in the evening on July 5, Kasim returned to the store and threw chips onto the floor in the same area where the firearm was found—claiming that he was looking for a lost wallet; (6) an investigator obtained surveillance video; (7) an officer, who was familiar with Kasim, identified him as the individual in the surveillance video; (8) Kasim denied being in the store when questioned by police; (9) a partial majority DNA profile found on swabbings taken from the firearm match Kasim's DNA sample; (10) the probability of selecting an unrelated individual at random from the general population

[2] D.Z. testified at trial that he checked the shelf because R.M. told him that he saw someone place something on the shelf. R.M. did not testify at trial. Kasim argues that this court should not consider R.M.'s out-of-court statements in identifying the circumstances proved. On one hand, Kasim argues that the statements are not substantive evidence because the statements were admitted, over defense counsel's hearsay objection, to explain "why [D.Z.] did what he did next." Kasim argues, on the other hand, that even if R.M.'s out-of-court statements were substantive evidence, we should not consider them in identifying the circumstances proved. Kasim asserts that because the jury must have disregarded R.M.'s description (which differed slightly from the surveillance video evidence), we must "assume the jury ignored all of [his] hearsay statements in reaching its verdict." We need not make a determination whether R.M.'s out-of-court statements are substantive evidence or could be considered in identifying the circumstances proved because R.M.'s statements are not of particular importance in light of the other evidence offered by the state.

having a DNA profile that matches the partial major DNA profile obtained from the firearm is approximately one in 2.1 million; (11) secondary transfer of DNA occurs at a much higher rate when involving saliva, blood, and semen than simply touching an item with one's bare hands; and (12) a partial palm print found on the firearm slide matched Kasim's right palm print.

These circumstances are inconsistent with any other reasonable hypothesis besides guilt. Kasim argues that one rational hypothesis is that he simply touched the firearm when attempting to grab merchandise, and never possessed the firearm actually or constructively. However, the video surveillance evidence establishes that Kasim was in the store, saw the officers, left the front of the store, grabbed something from his waistband, and placed it on the shelf. Shortly thereafter, store employees and police discovered a firearm in the location that Kasim placed the object. Kasim came back to the store later that same day to look for an item on the same shelf that the firearm was found. Considering the evidence as a whole, we determine that there is sufficient evidence to support both actual and constructive possession.

II. The officer's opinion testimony did not affect Kasim's substantial rights.

Kasim argues that the district court erred in allowing Lepinski to provide his opinion on two issues (1) whether the individual in the video placed a firearm on the shelf and (2) whether the individual was Kasim.

a. Standard of Review

This court applies a plain-error review for unobjected-to errors at trial. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To obtain relief from an unobjected-to error, Kasim must show that there was an error, that the error was plain, and that the error affected his substantial rights. *See State v. Kelley*, 855 N.W.2d 269, 273 (Minn. 2014). An error is plain if it is clear or obvious. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Plain error "affects a defendant's substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Milton*, 821 N.W.2d 789, 809 (Minn. 2012) (quotations omitted). If the first three elements are met, this court will reverse only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Kelley*, 855 N.W.2d at 274. If an appellate court concludes that any prong of the plain-error analysis is not satisfied, it need not consider the other prongs. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

b. Lepinski's Identification of Kasim

At trial, the state posed a series of questions regarding Lepinski's investigation. After Lepinski explained that he received the case, retrieved the video surveillance footage, captured images from the surveillance video and issued a police bulletin, and received information from an officer identifying Kasim, Lepinski provided the following information:

> PROSECUTOR: And after you received that information, Sergeant, what did you do next?
>
> LEPINSKI: At that point, I began conducting checks on Mr. Kasim. I wanted to look at a photograph of Mr. Kasim next to the still photo that I had isolated. I wanted to see for myself whether or not I thought it looked like the defendant or not.
>
> PROSECUTOR: And what did you determine?
>
> LEPINSKI: I determined that it did.

> PROSECUTOR: Okay. And then after you developed Mr. Kasim as the suspect, did you put out a request to have him picked up?
>
> LEPINSKI: Yes, I did.

The parties do not dispute that this was lay-witness-opinion testimony. Lay witnesses can provide opinion testimony, but only if the opinions are "rationally based on the perception of the witness . . . [and] helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Minn. R. Evid. 701.

We have previously determined that opinions that are rationally based on a witness's perceptions are admissible if they are helpful to a jury. *See State v. Washington*, 725 N.W.2d 125, 137 (Minn. App. 2006) (holding that a 911-call operator's testimony that she believed the caller was being assaulted was admissible lay-opinion testimony under rule 701 because it "was 'rationally based' on her perceptions and was helpful to the jury"), *review denied* (Minn. Mar. 20, 2007). Evidence is generally admissible to give jurors the context for an investigation. *Griller*, 583 N.W.2d at 743; *see also State v. Ali*, 855 N.W.2d 235, 247-50 (Minn. 2014) (determining that the officer's testimony regarding his identification of the defendant was admissible to provide context for the investigation). Here, Lepinski's testimony was admissible lay-opinion testimony because it was rationally based on his perception and helped the jury to understand his investigation and his focus on Kasim.

Even if the testimony was plainly erroneous, it did not affect Kasim's substantial rights because there is no reasonable likelihood that the jury's verdict was affected. When determining whether a jury verdict is surely unattributable to an erroneous admission of evidence, appellate courts consider the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant. *State v. Ferguson,* 581 N.W.2d 824, 833 (Minn. 1998); *see also State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011) (providing that the "third prong of the plain error test is the equivalent of [the] harmless error analysis" and analyzing the four factors outlined in *Ferguson*). First, Lepinski's testimony was one line out of over fifty pages of trial transcript attributable to Lepinski. Second, Lepinski's opinion was not highly persuasive for multiple reasons. Lepinski did not testify that the individual was definitively Kasim, but rather, that the individual looked like Kasim in his opinion. At the time Lepinski offered his lay-witness-opinion testimony, Adbullahi had already identified Kasim as the individual in the video. Because an identification was already properly admitted at trial, admission of additional evidence on this point had little evidentiary value. Third, Kasim had an opportunity to cross-examine Lepinski regarding his testimony. Fourth, Lepinski's testimony regarding the identification was not heavily relied upon in closing arguments. We therefore determine that the lay-opinion testimony did not affect Kasim's substantial rights.

c. Lepinski's Opinion on the Firearm

On direct examination, Lepinski provided the following information:

> PROSECUTOR: Now, are you able—were you able to actually observe a firearm being removed and placed on the shelf based on your review of the video surveillance tapes?
>
> LEPINSKI: Based on my review, it appeared to me that it was a firearm. It was kind of a dark colored, longer object. It's not—that particular portion isn't very clear. It all happens very

> fast, as you'll see, but in my training and experience and where the defendant removed the item from, i.e. the waistband, it was consistent to me in my training and experience as being a firearm.

The parties dispute whether Lepinski's testimony was expert or lay-witness testimony. We need not decide whether Lepinski's testimony qualified as expert testimony because the third prong of our plain-error analysis is determinative. *See Brown*, 815 N.W.2d at 620 (stating that if an appellate court concludes that any prong of the plain-error analysis is not satisfied, it need not consider the other prongs).

When determining whether a jury verdict is surely unattributable to an erroneous admission of evidence, appellate courts consider the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant. *Ferguson*, 581 N.W.2d at 833.

The content of Lepinski's testimony was not highly persuasive. Courts should be cautious about the influence of a law enforcement officer's opinion on ultimate issues. *See State v. Hogetvedt*, 623 N.W.2d 909, 915 (Minn. App. 2001) (explaining that, "[g]iven [the officer]'s status as a police officer," his opinion as to guilt "may have unduly influenced the jury"), *review denied* (Minn. May 29, 2001). Here, however, Lepinski did not testify definitively that Kasim possessed a firearm. Instead, Lepinski's testimony was that, in his opinion, Kasim removed an object from his waist-band area. Lepinski was careful not to provide an opinion regarding the ultimate issue. Additionally, Kasim had the opportunity to counter Lepinski's testimony on cross-examination. The defense counsel asked whether

Lepinski's testimony was that Kasim had a firearm, and Lepinski refuted that assertion multiple times:

> DEFENSE: Sergeant Lepinski, your sworn testimony is that you can clearly see this suspect place a firearm on the shelf where the gun was recovered; is that right?
>
> LEPINSKI: No, sir.
>
> DEFENSE: In fact, it's not true, is it? You can't clearly see that.
>
> LEPINSKI: I was saying no, sir, that's not my testimony. You can see that the individual places an object on the shelf, in my opinion.

Lepinski's testimony was also countered by Kasim during closing argument when the defense attorney stated that the surveillance video did not clearly show a firearm. Additionally, the prosecutor's closing did not highlight Lepinski's testimony, but rather encouraged the jury to "parse out whatever is in that video" and "decide whether or not you see or you don't see a gun" which is "subject to interpretation."

Lastly, we note that "overwhelming evidence of guilt is a factor, often a very important one, in determining whether, beyond a reasonable doubt, the error has no impact on the verdict." *Townsend v. State*, 646 N.W.2d 218, 224 (Minn. 2002). The state presented a strong case with surveillance video, DNA evidence, fingerprint evidence, identification by the officer and the store employee, and the store employee's testimony that Kasim returned to the store later that day looking for an item. The strength of the state's case mitigates the effect of Lepinski's testimony regarding the firearm. After weighing all of the factors for assessing whether appellant's substantial rights were affected in context with the overwhelming evidence showing that Kasim possessed the firearm, we conclude that the admission of Lepinski's opinion testimony did not affect Kasim's substantial rights.

Affirmed.