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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0896**

State of Minnesota,
Respondent,

vs.

Patrick Lamar Newsom, Jr.,
Appellant.

**Filed April 20, 2020
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-18-17385

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

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Senior Assistant
County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jodi L. Proulx, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Johnson, Judge; and Bjorkman,
Judge.

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

BJORKMAN, Judge

Appellant challenges his convictions of first-degree criminal sexual conduct and
unlawful possession of a firearm. He argues that (1) the district court abused its discretion

by admitting a video of the victim's forensic interview as a prior consistent statement, (2) the district court plainly erred by admitting other out-of-court statements, and (3) the evidence was insufficient to support his unlawful-possession conviction. We affirm.

FACTS

Respondent State of Minnesota charged appellant Patrick Lamar Newson, Jr.,¹ with one count of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct. The complaint alleged that, in 2015, Newson engaged in numerous instances of sexual penetration with his then 12-year-old nephew. It also alleged that, starting in 2016, Newson had sexual contact with two of his cousin's sons who were under the age of 13. The state later amended the complaint to add a charge of unlawful possession of a firearm.

The following facts were established at trial. In June 2018, Newson's former boyfriend, A.F., called Newson's cousin. A.F. informed Newson's cousin that he saw inappropriate videos and photos on Newson's phone. The photos showed the private parts of her sons, K.W. and X.W. The video showed Newson sexually penetrating a third boy. Newson's cousin questioned her sons; both admitted that Newson had taken photos of their private parts while they were traveling together on an airplane.

¹ The captions in the district court and this court identify appellant by the last name "Newson." See Minn. R. Civ. App. P. 143.01 (indicating that the title of an action shall not be changed on appeal). But appellant spells his last name "Newson" in his pro se supplemental brief, and the parties used that spelling during the trial. Therefore, we use that spelling in this opinion.

Newson's cousin eventually told Newson's sister about the allegations, suspecting that the third boy was the sister's son, N.J. Newson's sister confronted N.J. about the alleged videos and photos. After some hesitation, N.J. indicated that there had been a video, but he refused to provide any details. The sister brought N.J. to CornerHouse, a children's advocacy center. A forensic interviewer questioned N.J., who stated that Newson had engaged in oral and anal sex with him three years earlier.

Newson's cousin and sister contacted the police. Officers searched Newson's apartment, seizing numerous items, including various electronic devices. During the search, the police found a handgun in a bag on a shelf near the top of Newson's closet. Newson was not permitted to possess a firearm because of a prior conviction.

The case proceeded to a one-week jury trial. At the outset, defense counsel objected to the state's proposed admission of the video of the CornerHouse interview as a prior consistent statement, arguing that N.J.'s credibility had not yet been challenged. The district court deferred ruling on the issue. After N.J. testified, the state renewed its request to admit the CornerHouse video. Defense counsel again objected, stating that he had not challenged N.J.'s credibility and that the video was not a consistent statement because it was more detailed than N.J.'s actual testimony. The district court granted the state's request but redacted portions of the video at defense counsel's request.

Defense counsel also objected to the admission of A.F.'s out-of-court statements to Newson's cousin about the photos and video on Newson's phone. The state argued that the statements were not offered to show the truth of the matter asserted, but rather to show why Newson's cousin asked her children about the allegations. Defense counsel contended

that the statements were unfairly prejudicial. The district court admitted the statements, reasoning that they were offered to show “what prompted the domino effect in this case and why [Newson’s cousin] initially confronted her children.”

N.J. testified that Newson engaged in sexual acts with him in 2015, when he was 12 years old, at Newson’s apartment. He stated that Newson performed oral sex on him once and had anal sex with him on two separate occasions. N.J. also acknowledged being interviewed at CornerHouse in 2018, after his mother found out about the incidents. On cross-examination, N.J. admitted that he did not tell his mother about the incidents when they occurred, initially told his mother nothing happened when she inquired, and did not report the abuse to a doctor.

The CornerHouse interviewer testified, and the redacted video was played for the jury. Among other things, N.J. told the interviewer that Newson licked his “butt,” tried to convince N.J. to perform oral sex on him, performed oral sex on N.J. multiple times, recorded multiple videos of their sexual acts, and took pictures of them showering together.

Both K.W. and X.W. testified that they saw Newson holding a handgun in his apartment. X.W. described the firearm as silver and black, and testified that he told the police that Newson kept it in a green Nike bag at the top of his closet. The officer who found the handgun testified that he found it in a white Lacoste bag near the top of Newson’s closet. The firearm, which was admitted as evidence, is silver and black.

A forensic scientist at the Minnesota Bureau of Criminal Apprehension tested DNA from the firearm and Newson’s DNA sample. Testing of the firearm revealed a mixture of three or more individuals and a partial major male profile that matched Newson. The

scientist testified that the partial profile matched approximately one in 2.7 million members of the general population.

Newson denied engaging in sexual conduct with any of the boys. And he testified that the handgun belonged to another person, T.D., who had a license to carry it and was living with him at the time the police searched his apartment. Newson claimed that K.W. and X.W. knew about the firearm because T.D. showed it to them. A receipt entered as evidence shows that T.D. purchased the firearm in 2013.

The jury found Newson guilty of first-degree criminal sexual conduct and unlawful possession of a firearm. But it acquitted him on both counts of second-degree criminal sexual conduct. Newson appeals.

D E C I S I O N

I. The district court did not abuse its discretion in admitting the video of N.J.'s forensic interview as a prior consistent statement.

Appellate courts review a district court's evidentiary ruling for an abuse of discretion. *State v. Nunn*, 561 N.W.2d 902, 906-07 (Minn. 1997). A defendant challenging the admission of evidence must show that the district court abused its discretion and that he was prejudiced as a result. *Id.* at 907.

Hearsay is an out-of-court statement that is offered in evidence to prove the truth of the matter asserted. Minn. R. Evid. 801(c). Such statements are generally inadmissible. Minn. R. Evid. 802. An out-of-court statement is not hearsay when it is a prior consistent statement. Minn. R. Evid. 801(d)(1)(B). A prior statement is consistent when: (1) the declarant testifies at the trial, (2) the declarant is subject to cross-examination concerning

the statement, and (3) the statement is “consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility as a witness.” *Id.* But prior statements are not automatically admissible under the rule. Rather, the district court must make a threshold determination that the witness’s credibility has been challenged, and “the statement must bolster the witness’ credibility with respect to that aspect of the witness’ credibility that was challenged.” *Nunn*, 561 N.W.2d at 909; *see State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 23, 2000) (following *Nunn*). We have indicated that “videotaped statements of children who allegedly have suffered sexual abuse,” such as the CornerHouse video, are commonly admitted as prior consistent statements. *State v. Wembley*, 712 N.W.2d 783, 789 (Minn. App. 2006), *aff’d*, 728 N.W.2d 243 (Minn. 2007).

It is undisputed that the out-of-court declarant, N.J., testified at trial. But Newson contends that the remaining requirements for admission of a prior consistent statement were not satisfied. We address each in turn.

A. Challenge to Credibility

At trial, the prosecutor argued that defense counsel had challenged N.J.’s credibility during his opening statement by characterizing the accusations as rumors created “because the family was uneasy that we had a flamboyant gay black man.” Newson aptly observes that statements of counsel are not evidence. But defense counsel did more than comment on N.J.’s credibility during his opening statement. Defense counsel’s cross-examination prompted N.J. to admit that he did not tell his mother about the incidents of abuse for three years, initially denied that anything had happened when his mother confronted him with

A.F.'s report, and never sought medical treatment. Implicit in this line of questioning is the suggestion that N.J. fabricated the abuse. We are satisfied that N.J.'s credibility was challenged.

B. Subject to Cross-Examination

Newson argues that N.J. was not subject to cross-examination regarding his CornerHouse interview because the district court did not rule on the admissibility of the video until after N.J.'s testimony. According to Newson, this situation created an "unfair dilemma"; cross-examining N.J. before knowing whether and how much of the video would be admitted made it difficult to determine how to combat the prejudicial evidence. He also points out that he would have had to serve N.J. with a subpoena in order to recall him as a witness. We are not persuaded.

As noted above, a prior consistent statement cannot be admitted unless the witness's credibility has been challenged. *Nunn*, 561 N.W.2d at 909. Accordingly, the district court could not have ruled on the admissibility of the CornerHouse video until after N.J. testified. Defense counsel expressly questioned N.J. about the CornerHouse interview during cross-examination. Although Newson may have faced a difficult situation in determining how to cross-examine N.J. about the interview before the video was admitted, that difficulty is inherent in the rule regarding prior consistent statements. It does not change the fact that N.J. was subject to cross-examination concerning the statement.

C. Consistency with Trial Testimony

Consistency does not require a trial witness to recite his prior statement verbatim. *Bakken*, 604 N.W.2d at 109. It is sufficient if the prior statement simply is "reasonably

consistent” with the trial testimony. *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005) (quoting *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998)). But a prior statement is not reasonably consistent with trial testimony when the “inconsistencies directly affect the elements of the criminal charge.” *Bakken*, 604 N.W.2d at 110. In *Bakken*, the child complainant’s prior statements to police contained additional details that, if believed by the jury, would escalate the criminal conduct from third-degree to first-degree criminal sexual conduct. *Id.* This court concluded that the district court erred by admitting the prior statements because the “inconsistencies were not minor discrepancies.” *Id.*

Newson contends that N.J.’s statements to the CornerHouse interviewer are not consistent with his trial testimony because they contain additional allegations: that Newson licked N.J.’s “butt,” performed oral sex on him multiple times, made multiple videos of the sexual acts, took pictures while they were in the shower together, and asked N.J. to perform oral sex on him. He also takes issue with the statements elicited by the forensic interviewer’s background questions.

We are not persuaded that N.J.’s statements to the CornerHouse interviewer and his trial testimony diverged to such an extent that they were not reasonably consistent. To convict Newson of first-degree criminal sexual conduct, the state had to prove that he engaged in sexual penetration or sexual contact with a person who was under the age of 13 and more than 36 months younger than him. Minn. Stat. § 609.342, subd. 1(a) (2014). N.J. established those elements (except for Newson’s age) when he testified as to his own age and that Newson engaged in oral and anal sex with him. The additional details that N.J.

described in the CornerHouse video, if true, did not raise Newson's conduct to a higher level of criminality. For the same reason, the inclusion of the forensic interviewer's background questions was not error, as that information did not affect the elements of the criminal charges.

Because all the requirements of rule 801(d)(1)(B) were satisfied, the district court did not abuse its discretion in admitting the CornerHouse video as a prior consistent statement.

II. The district court did not plainly err in admitting A.F.'s out-of-court statements to Newson's cousin.

Newson challenges the admission of his cousin's testimony that A.F. told her that he saw a video of Newson sexually penetrating a boy. At trial, defense counsel objected to this statement as unfairly prejudicial under Minn. R. Evid. 403. He now contends, for the first time, that the statement is inadmissible hearsay.

Generally, "[a] defendant's objection to the admission of evidence preserves review only for the stated basis for the objection." *State v. Vasquez*, 912 N.W.2d 642, 649 (Minn. 2018). But we may review otherwise forfeited arguments for plain error. *Id.* at 650. To obtain relief based on plain error, a defendant must demonstrate that (1) there was an error, (2) the error was plain, and (3) the error affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the defendant establishes all three prongs of the plain-error test, we will order a new trial only if it is "necessary to ensure fairness and the integrity of judicial proceedings." *Id.* at 742. But if we conclude that the defendant has

failed to satisfy any one of the three prongs, we need not consider the other plain-error requirements. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

We note the inherent difficulty of establishing plain error when the challenge is based on hearsay. Our supreme court has stated that the “complexity and subtlety of the operation of the hearsay rule and its exceptions make it particularly important that a full discussion of admissibility be conducted at trial.” *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). Without an objection at trial, the state does not have the opportunity to establish the admissibility of the statements “under one of the numerous exceptions to the hearsay rule.” *Id.*

Here, we need not consider whether admission of A.F.’s statement was error that was plain because Newson cannot show that the claimed error affected his substantial rights. First, the evidence against Newson was strong. N.J. testified that Newson sexually penetrated him. The CornerHouse video and testimony from the forensic interviewer corroborated this finding. Second, the record does not convince us that the jury gave the challenged statement particular weight. Newson’s cousin also testified that A.F. told her he saw photos of K.W.’s and X.W.’s private parts, describing those out-of-court statements in more detail. And the prosecutor emphasized A.F.’s statements regarding the photos during his closing argument, and did not mention the statements regarding the video of N.J. But the jury acquitted Newson on the counts related to K.W. and X.W. Based on the record, the jury clearly based its guilty verdict for first-degree criminal sexual conduct on N.J.’s testimony, and not on Newson’s cousin’s cursory reference to A.F.’s out-of-court statement.

In sum, the record convinces us that there is no reasonable likelihood that Newson's cousin's brief reference to A.F.'s out-of-court statement had a significant impact on the verdict.² Newson is not entitled to relief on evidentiary grounds.

III. Sufficient evidence supports Newson's unlawful-possession conviction.

When evaluating a sufficiency-of-the-evidence challenge, we “carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Boldman*, 813 N.W.2d 102, 106 (Minn. 2012). We view the evidence in the light most favorable to the verdict and will not overturn the verdict if the jury could reasonably have found the defendant guilty of the charged offense, consistent with the presumption of innocence and the state's burden of proof beyond a reasonable doubt. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A conviction based on circumstantial evidence is subject to heightened scrutiny. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). The heightened standard applies when direct evidence of guilt on a particular element is not sufficient to support the verdict by itself. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017).

² Alternatively, Newson contends that A.F.'s statements were inadmissible under Minn. R. Evid. 403 because their probative value was substantially outweighed by the danger of unfair prejudice. Because we have already established that the out-of-court statements did not prejudice Newson, we need not consider this alternative ground for excluding the evidence.

We apply a two-step analysis when reviewing the sufficiency of circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). The first step is to identify the circumstances proved. *Al-Naseer*, 788 N.W.2d at 473. In doing so, we defer to the jury’s acceptance of the proof of those circumstances and rejection of conflicting evidence. *Id.* The second step is to examine the inferences that might be drawn from the circumstances proved. *Id.* at 473-74. Circumstantial evidence is sufficient if there are “no other reasonable, rational inferences that are inconsistent with guilt.” *Id.* at 474 (quotation omitted). We give no deference to the jury’s choice between reasonable inferences. *Id.*

A person may not possess a firearm if he has been convicted of a crime of violence. Minn. Stat. § 624.713, subd. 1(2) (2016).³ “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 requires proof that the defendant physically had the firearm on his person. *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). Constructive possession requires proof that either (1) the firearm was found “in a place under [the] defendant’s exclusive control to which other people did not normally have access,” or (2) if the firearm was found in a place to which other people 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.” *Salyers*, 858 N.W.2d at 159 (quoting *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975)). “Proximity is an important

³ Newson stipulated at trial that he had a prior conviction that made him ineligible to possess a firearm.

consideration in assessing constructive possession,” and such possession may be shared. *Smith*, 619 N.W.2d at 770.

The state proved the following circumstances at trial. K.W. and X.W. saw Newson holding a silver and black handgun in his apartment. X.W. saw Newson place the handgun in a bag and place the bag at the top of his closet. The police found a silver and black handgun in a bag near the top of Newson’s closet. The handgun matched the description the two boys gave to the police. The bag also contained pornography. DNA obtained from the handgun reveals a partial major male profile that matches Newson and approximately one in every 2.7 million people. A receipt shows T.D. purchased the handgun in 2013.

Newson does not dispute that the circumstances proved support the rational inference that he possessed the firearm. We agree. But he contends that the circumstances also support a rational inference that he did not exercise dominion and control over the firearm. This argument is unavailing.

We consider the totality of the circumstances in determining whether constructive possession has been proved. *State v. Denison*, 607 N.W.2d 796, 800 (Minn. App. 2000), *review denied* (Minn. June 13, 2000). Newson’s reliance on the handgun receipt to support his contention that the circumstances proved are consistent with rational inferences other than guilt ignores the totality of the circumstances. The firearm’s presence in a closet in Newson’s apartment is strong evidence that Newson constructively possessed it. The fact that K.W. and X.W. saw Newson holding the firearm in the apartment and X.W.’s testimony that he saw Newson put the firearm into a bag that he placed at the top of the closet—where police found it—further demonstrate Newson’s constructive possession.

Two people may have joint constructive possession of a handgun. Accordingly, the fact that T.D. originally purchased the handgun, when viewed in light of all the circumstances, does not support a reasonable inference that Newson did not possess the handgun.

Newson's arguments regarding the DNA evidence likewise do not persuade us that the circumstances proved support a reasonable inference other than guilt. Newson notes that the DNA profile from the handgun matched Newson and approximately one in 2.7 million people. He contends that more than 100 random people in the United States would match the DNA profile found on the firearm. But the firearm was located in a bag in Newson's apartment, not in public where anyone could have touched it. This case is not like *State v. Harris*, where the defendant's conviction was reversed because, among other things, approximately 25% of the general population could not be excluded as a source of the DNA on the firearm. 895 N.W.2d 592, 603 (Minn. 2017). In contrast, the DNA evidence here rules out all but 100 members of the total United States population as contributors. We are satisfied that the DNA evidence, when considered in context of all the circumstances proved, does not support a rational inference inconsistent with guilt.

When viewing the totality of the circumstances proved, the only reasonable inference is that Newson consciously exercised dominion and control over the firearm. The evidence is sufficient to support Newson's unlawful-possession conviction.

Affirmed.