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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0644**

State of Minnesota,
Respondent,

vs.

Robert Lamar Mutcherson,
Appellant.

**Filed June 1, 2021
Affirmed
Smith, Tracy M., Judge**

Stearns County District Court
File No. 73-CR-19-2037

Keith Ellison, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Ross, Judge; and Connolly, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this direct appeal from the final judgments of conviction of first-degree controlled-substance crime, unlawful possession of a firearm, and threats of violence, appellant Robert Lamar Mutcherson argues that the district court committed reversible

error by denying his motion for a mistrial after a police officer impermissibly testified that he knew Mutcherson from another investigation. Mutcherson also raises several additional issues in his pro se supplemental brief. We affirm.

FACTS

The following facts were established at the jury trial in this case. A.M. lived in an apartment in St. Cloud with two other people. She first met Mutcherson in 2018, and the two became romantically involved. Around February 2019, Mutcherson, who at the time was homeless and unemployed, began staying with A.M. and keeping personal belongings at her apartment.

One morning in March 2019, Mutcherson and A.M. argued by text message after A.M. became suspicious that he was seeing another woman. Mutcherson swore at A.M., called her names, and threatened that his sister was going to beat her up. A.M. became scared. She told Mutcherson that she wanted him to get his belongings and get out of her apartment.

A.M. told her roommate that she was afraid of Mutcherson and asked the roommate to meet Mutcherson when he arrived at the apartment to get his belongings. When Mutcherson arrived that day, A.M. hid in another roommate's bedroom. Mutcherson did not return his key to A.M.'s roommate. Mutcherson went to A.M.'s bedroom, where he texted A.M. pictures of her wallet and passport and threatened to burn them. A.M. texted a friend, who was not in the apartment, about what was happening.

A.M. then went into her bedroom and confronted Mutcherson, who was lying down. A.M. told him that a friend was coming over to help her move out and that Mutcherson

needed to remove his belongings. Mutcherson pulled back the bedsheets to reveal a gun and told her, "If you keep pushing me, I will shoot you and the people that are coming." A.M. was afraid.

A.M. went into the living room and communicated with her friend by phone and text, telling her friend that Mutcherson had a gun. The friend called the police. Meanwhile, Mutcherson went to the living room where A.M. was. He had the gun in his waistband and was carrying a plastic Armor All wipes container, which he set on the coffee table in front of him.

The police arrived, and A.M. gave them permission to enter the apartment. As officers entered the apartment, Mutcherson removed the gun from his waistband and pushed it into the couch. Officers told Mutcherson to put his hands up. As he was standing up, the couch cushion lifted and the officers saw the gun slide to the back of the couch behind where Mutcherson was sitting. A.M. later testified that this was the same gun that Mutcherson threatened her with in her room. The Bureau of Criminal Apprehension (BCA) also confirmed that, while there was a mixture of DNA on the gun, there was a major male profile that matched Mutcherson's DNA on the gun.

Officers handcuffed Mutcherson. When the officers began searching him, Mutcherson pulled something out of his pants pocket and tried to conceal it in his waistband. When officers grabbed his hand to seize the object, Mutcherson began to struggle. Once able to subdue Mutcherson and force his hand open, officers discovered a clear plastic bag containing a white powder. Officers later confirmed the powder was 9.5 grams of cocaine. Mutcherson testified at trial that he possessed the cocaine for personal

use. Officers transported Mutcherson to the Stearns County jail, where it was noted that he had two cell phones—one smart phone and one flip phone.

After Mutcherson's arrest, A.M. and her roommates consented to a search of the apartment. A.M. brought officers over to the couch area, where the Armor All wipes container was. She told officers that she had seen Mutcherson with the container the day before and that he often stored things in it. She showed officers how to open it. Inside the container, officers found a plastic bag containing a larger amount of what turned out to be cocaine weighing 24.3 grams. A.M., her roommates, and a friend present denied using cocaine and denied that the cocaine or the container belonged to them.

A.M. also directed officers to the places in her bedroom where Mutcherson stored his belongings. There, officers discovered a clear plastic bag containing an unidentified white powder that tested negative for cocaine and a black bag containing \$7,680 in cash. Mutcherson later testified that the money was his, but he denied it was from drug sales.¹ Finally, A.M.'s roommate told officers that Mutcherson had visitors to the apartment but that they would only stay for ten minutes or less.

The state charged Mutcherson with first-degree possession of cocaine with intent to sell in violation of Minn. Stat. § 152.021, subd. 1(1) (2018), possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) (2018), and felony threats of violence in violation of Minn. Stat. § 609.713, subd. 1 (2018). The jury found

¹ Mutcherson's ex-girlfriend testified at trial that she gave him \$4,200 in cash shortly before the incident.

Mutcherson guilty of all counts,² and the judge sentenced Mutcherson to 126 months in prison for the drug conviction and concurrent prison sentences on the other counts.

Mutcherson appeals.

DECISION

I. The district court did not abuse its discretion by denying Mutcherson’s motion for a mistrial.

Mutcherson’s motion for a mistrial arose after the state’s expert witness made an impermissible comment during cross-examination. The district court sustained defense counsel’s objection and instructed the jury to disregard the remark. It denied the defense request for a mistrial.

To decide whether to grant a mistrial, a district court must determine whether there is a reasonable probability that the trial’s outcome would be different if the event prompting the motion had not occurred. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). A “district court is in the best position to evaluate the prejudicial impact, if any, of an event occurring during the trial.” *State v. Bahtuoh*, 840 N.W.2d 804, 819 (Minn. 2013). We therefore review the denial of a motion for a mistrial for an abuse of discretion. *See State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016). A district court abuses its discretion if its “decision is based on an erroneous view of the law or against logic and facts in the record.” *Andersen v. State*, 940 N.W.2d 172, 177 (Minn. 2020) (quotation omitted).

² The jury also found Mutcherson guilty of fifth-degree possession of a controlled substance, in violation of Minn. Stat. § 152.05, subd. 2(1) (2018). Because it was a lesser included controlled-substance offense, the district court did not enter a conviction for this offense.

A. The Mistrial Motion and the District Court's Ruling

Before trial in this case, the state proffered expert testimony from an investigator with the Central Minnesota Violent Offender Task Force regarding drug trafficking. The state sought to introduce the investigator's testimony concerning "the quantity of drugs typically found in sales as opposed to personal use" in order to prove that Mutcherson intended to sell the cocaine in his possession. The district court ruled that the investigator could testify as an expert on the quantities and characteristics of controlled substances that are indicative of sales rather than possession but could not vouch for other witnesses or testify about the ultimate issue of Mutcherson's intent.

On the morning of trial, Mutcherson's counsel informed the district court that the investigator and the task force were involved in another matter involving Mutcherson, "which potentially raises issues of bias." The prosecutor acknowledged that in August 2019 the Violent Offender Task Force had conducted surveillance of Mutcherson during a controlled buy, which resulted in a charge against him. But the prosecutor explained that the investigator would not be "testifying to anything that happened then." The district court reaffirmed that the investigator could testify as an expert witness regarding drug trafficking and observed that defense counsel could cross-examine the investigator concerning any potential bias.

At trial, the investigator on direct examination provided his expert testimony regarding the typical amount a personal user of cocaine would purchase and other background information about cocaine sales. On cross-examination, Mutcherson's counsel began by asking the investigator, "So you don't know mister—if Mr. Mutcherson is a user,

do you?” The investigator responded, “I don’t personally know Mr. Mutcherson, but our task force has investigated Mr. Mutcherson.” Mutcherson’s counsel immediately objected to the answer. The district court sustained the objection, telling the jury to “disregard the last part of that answer.” After a bench conference, defense counsel asked just two more questions of the investigator—regarding the street value of cocaine—and the prosecution conducted no redirect examination.

Once the district court excused the jury for the day, Mutcherson moved for a mistrial, arguing that the investigator’s testimony was “highly prejudicial.” The district court denied the motion, stating, in part:

I will state that [defense counsel] is correct in the sense that the witness’s answer probably was more than the direct question asked by [defense counsel]. But I also say that it was beyond the scope of direct. . . .

. . . .

. . . I do agree, [the investigator’s statement] is, one, beyond the scope; but, two, inappropriate in this particular case. As a passing reference, I’m certainly willing to give a cautionary instruction. I do not interpret that to be intentional. I understand that [defense counsel] may feel differently, but I did not interpret that evidence, that statement, to be malicious, willful, intent of the officer to purposely disregard any instructions given to him and then intentionally tried to bring in otherwise inadmissible evidence. So I am not going to grant the mistrial.

I will certainly be happy to give a cautionary instruction, and I’ll leave it to [defense counsel] to come up with any instructions you would like me to give about that, if you want me to highlight the issue. I think it was very short in passing and I immediately told the jury to disregard it. But if you want me to give additional instructions to the jury, I’ll be happy to consider whatever language you would like.

B. The district court did not apply the wrong legal standard.

Mutcherson first argues that the district court abused its discretion in denying a mistrial because it failed to apply the proper legal standard. He contends that the district court's failure to explicitly state whether there was a reasonable probability that the challenged testimony would change the outcome of the trial shows that the district court applied an incorrect legal standard.

In evaluating whether a reasonable probability exists, courts have considered whether challenged testimony was of a passing nature, whether an objection was sustained, and whether the jury received a curative instruction. *See, e.g., State v. Mahkuk*, 736 N.W.2d 675, 689 (Minn. 2007); *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978). The district court here discussed the brevity of the testimony, the direction to the jury to disregard it, and the availability of an additional curative instruction. Given its discussion of these factors, we cannot conclude that the district court failed to apply the proper legal standard.

Mutcherson argues, however, that the district court's "focus on whether or not [the investigator] *intended* to prejudice Mutcherson" demonstrates its legal error. We disagree. In moving for a mistrial, defense counsel argued that the investigator's testimony "was an intentional attempt to prejudice the jury." The district court responded to that assertion, rejecting it. The fact that the district court responded to defense counsel's complaint does not mean that the district did not understand or apply the proper legal standard for a mistrial.

We observe that, “even if a district court applies the wrong legal standard, if the ruling was warranted under the proper standard and no prejudice results, reversal is not required.” *State v. Jaros*, 932 N.W.2d 466, 474 n.5 (Minn. 2019). We turn to the question of whether the ruling was an abuse of discretion under the applicable legal standard.

C. The denial of a mistrial was not an abuse of discretion.

When reviewing a district court’s denial of a mistrial, we analyze whether the appellant has satisfied the burden “to establish a reasonable probability that the jury would have reached a different verdict” absent the wrongful testimony. *Id.* at 472. For several reasons, we conclude that Mutcherson has not satisfied his burden.

First, the challenged testimony was isolated and brief. *See Bahtuoh*, 840 N.W.2d at 819 (affirming the denial of a mistrial when “the disputed reference was isolated and brief”). The investigator’s statement was, as the district court described it, “a passing reference” to the other investigation, and the district court immediately directed the jury to disregard the statement. The improper statement was one sentence of testimony in a three-day trial, and there was no other reference to it in the trial. *See Jaros*, 932 N.W.2d at 475 (considering that erroneously admitted testimony was not relied on by the state or referenced in closing argument).

Mutcherson argues that the passing reference alone is enough to warrant a mistrial because “Minnesota courts have long recognized that a mistrial is a necessary remedy where a police officer testifies to inadmissible material prejudicing the defendant.” He relies on *State v. Gegen*, where the supreme court reversed the denial of a mistrial based on improper police testimony. 147 N.W.2d 925, 925 (Minn. 1967). In *Gegen*, though, the

supreme court focused on the fact that the prosecutor deliberately elicited the improper testimony regarding the defendant's prior conviction, stating that "[i]f prosecutors and police officers persist in trying to inject into a trial indirectly matters which they know they cannot introduce directly the only solution is to let them try the case over." *Id.* at 926. Here, it was defense counsel's question that led to the improper testimony, and the district court found that the investigator had no "malicious, willful intent . . . to purposely disregard any instructions given to him." Mutcherson contends that the state was still at fault for failing to prepare the witness. But, given the nature of the question posed to the investigator and the content and brevity of his response, we are not persuaded that the investigator's statement demonstrates a failure of the state not to prepare the witness.

Second, the evidence against Mutcherson was strong. For the possession-with-intent-to-sell charge, A.M. testified that Mutcherson possessed the Armor All container holding cocaine and that the container was within Mutcherson's reach when officers entered the apartment. The container held a bag of a "white-ish substance that . . . appear[ed] to be the same color and consistency and packaging" as the cocaine that Mutcherson admitted was his. All the other occupants of the apartment denied possessing the container. The total amount of cocaine recovered from the apartment was valued at around \$3,300 and was enough for 132 doses. Officers also discovered \$7,680 in cash and a suspected cutting agent among Mutcherson's belongings in A.M.'s bedroom. Mutcherson did not dispute that he owned these items, even though he was unemployed at the time of his arrest. Mutcherson also often had visitors at the apartment who stayed for no more than a few minutes at a time. Finally, officers found two cell phones belonging to Mutcherson—

a flip phone and a smart phone. Thus, the state presented a strong case against Mutcherson for the possession-with-intent-to-sell charge.

As to the firearm-possession and threats-of-violence charges, A.M. testified that Mutcherson displayed his gun while they were arguing and threatened to shoot her and anyone else who came into the apartment. A.M. also saw Mutcherson bring the gun into the living room. Several police officers observed Mutcherson holding the gun while sitting on the couch, and police recovered the gun from a crease in the couch behind where Mutcherson was sitting. Finally, upon examination of the gun, a major male profile found on the gun matched Mutcherson's DNA. Thus, the state presented a strong case against Mutcherson on the firearm-possession and threats-of-violence charges.

Finally, the district court provided a curative instruction. *See Mahkuk*, 736 N.W.2d at 689 (affirming denial of mistrial based in part on curative instruction). Mutcherson argues that the district court's instruction to the jury was insufficient to mitigate any prejudice because the testimony came from a police officer. He relies on *State v. Huffstutler*, where the supreme court reversed a conviction, despite a curative instruction, because a police officer gave inadmissible testimony. 130 N.W.2d 347, 349 (Minn. 1964). But, since *Huffstutler*, the supreme court has taken into account a curative instruction in concluding that a police officer's inadmissible statement did not warrant a mistrial. *See Mahkuk*, 736 N.W.2d at 689. And this court has recognized that "doubts about instructions have not held sway in Minnesota courts, which in the years since *Huffstutler* have adopted a presumption that jurors follow instructions." *State v. McCurry*, 770 N.W.2d 553, 558-59 (Minn. App. 2007), *review denied* (Minn. Oct. 28, 2009).

The district court's denial of Mutcherson's motion for a mistrial was not an abuse of discretion. We turn to the issues raised in Mutcherson's pro se supplemental brief.

II. The arguments in Mutcherson's supplemental brief lack merit.

A. The evidence is sufficient to find Mutcherson guilty of all three counts.

Mutcherson argues that the evidence is insufficient to prove his guilt beyond a reasonable doubt on each of the three charges. We disagree.

1. First-Degree Possession of Cocaine with Intent to Sell

To convict Mutcherson of first-degree possession of cocaine with the intent to sell, the state had to prove that he unlawfully sold 17 grams or more of a mixture or mixtures containing cocaine within a 90-day period. *See* Minn. Stat. § 152.021, subd. 1(1). The statute defines “sell,” in part, as the possession of the controlled substance with the intent to sell. Minn. Stat. § 152.01, subd. 15a(3) (2018). Mutcherson admitted that he possessed the 9.5 grams of cocaine found on his person, but he claims that the evidence is insufficient to prove that he possessed the Armor All container containing the other 24.3 grams of cocaine. He also argues that the evidence is insufficient to prove that he sold or intended to sell the cocaine.

The state used direct evidence to prove Mutcherson's possession of the cocaine. We review a challenge to the sufficiency of direct evidence by determining whether the evidence—when viewed in the light most favorable to the conviction—allows the factfinder to reach a guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not disturb a verdict if the jury, acting with due regard for the presumption of innocence

and the requirement for proof beyond a reasonable doubt, could have reasonably concluded that the defendant was guilty. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

The state proves actual possession when it shows that the defendant has “direct physical control” of the contraband. *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quotation omitted). A.M. testified that she saw Mutcherson with the container both the day of his arrest and the day before. A responding officer testified that the container was within Mutcherson’s reach when they entered the apartment. That same officer testified that within the Armor All container found at the scene near Mutcherson there was a bag of a “white-ish substance that would appear to be the same color and consistency and packaging” as the cocaine found on Mutcherson’s person. Finally, A.M., her roommates, and her friend present at the apartment the day of the incident denied possessing the Armor All container or any of the cocaine within it. This is sufficient direct evidence to prove beyond a reasonable doubt that Mutcherson actually possessed the Armor All container containing the 24.3 grams of cocaine.

As to Mutcherson’s intent to sell, the state relied on circumstantial evidence to prove that element. When analyzing the sufficiency of circumstantial evidence, we apply a two-step analysis. *See State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, we identify the circumstances proved at trial, considering only those circumstances consistent with the jury’s verdict. *See id.* at 598-99. Second, we determine “whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt,” giving no deference to the jury’s choice between any reasonable inferences. *Id.* at 599 (quotations omitted). If there is any rational hypothesis pointing to innocence, then the

evidence is insufficient and the conviction must be overturned. *See State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010).

The circumstances proved at trial are: (1) the police seized 33 total grams of cocaine, when combining the amount of cocaine Mutcherson admits to possessing with the cocaine within the Armor All container; (2) this amount of cocaine is 132 doses, which is more than nine times the amount that a recreational user would purchase at a time; (3) Mutcherson owned a gun and two cell phones—one a smartphone and the other a flip phone; (4) Mutcherson possessed a bag with \$7,680 even though he testified he was unemployed; (5) the police found a bag of a white powder consistent with a cutting agent near Mutcherson's belongings in the bedroom; and (6) Mutcherson had visitors over to the apartment who never stayed more than a few minutes.

Based on these circumstances, there is no other reasonable hypothesis than that Mutcherson intended to sell the cocaine in his possession. Considering that Mutcherson possessed more than nine times the amount of cocaine a regular user would purchase and a significant amount of money, there is no other reasonable hypothesis other than that Mutcherson had the requisite intent to support his conviction. *See State v. Collard*, 414 N.W.2d 733, 736 (Minn. App. 1987), *review denied* (Minn. Jan 15, 1988) (concluding the amount of cocaine and money seized, the address book, packaging of the cocaine, and expert testimony provided sufficient evidence to support a finding of intent to sell).³

³ Mutcherson presents many arguments against this conclusion. He contends that (1) the BCA contaminated or planted evidence pointing towards his guilt; (2) the state withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963); and (3) the state did not allow him to adequately testify in his defense. He

2. Possession of a Firearm as an Ineligible Person

Because Mutcherson stipulated to his ineligibility to possess a firearm, the state only had to prove beyond a reasonable doubt that Mutcherson knowingly possessed a gun to prove his illegal-possession-of-a-firearm charge. *See State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). A.M. and several police officers testified to seeing Mutcherson holding the gun before he dropped it onto the couch, where police recovered it. And, while the gun contained a mixture of DNA, the BCA determined that there was a major male profile that matched Mutcherson's DNA. This direct evidence is sufficient to prove beyond a reasonable doubt that Mutcherson knowingly possessed a gun.

3. Felony Threats of Violence

To convict Mutcherson of felony threats of violence, the state had to prove that he “threaten[ed], directly or indirectly, to commit any crime of violence with purpose to terrorize another” or did so “in a reckless disregard of the risk of causing such terror or inconvenience.” Minn. Stat. § 609.713, subd. 1. A.M. testified that Mutcherson showed her his gun and said, “If you keep pushing me, I will shoot you and the people that are coming.” A.M. later testified that she felt afraid when Mutcherson did this. This evidence is sufficient to prove Mutcherson directly threatened A.M. with his gun.

also makes several references to prosecutorial or judicial misconduct, perjury by several witnesses, coercion, bias, and entrapment. We reject these arguments because they either lack merit based on the record or are forfeited by Mutcherson's failure to raise them to the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that an issue not raised to the district court is forfeited on appeal).

B. Mutcherson did not receive ineffective assistance of trial counsel.

Mutcherson next argues that his trial counsel provided ineffective assistance. Claims of ineffective assistance of counsel are mixed questions of law and fact which are reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). Mutcherson claims his trial counsel was ineffective because trial counsel did not file a motion to suppress evidence based on the Fourth Amendment or request a competency evaluation under Minn. R. Crim. P. 20. Whether to move to suppress evidence is a question of strategy, which we will not review. *See Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015). As for not requesting a rule 20 evaluation, Mutcherson's argument is not supported by citations to legal authorities or to supporting evidence in the record and is instead based on conclusory statements. Therefore, we do not consider it. *See State v. Bartylla*, 755 N.W.2d 8, 22-23 (Minn. 2008) (declining to consider pro se arguments on appeal that are not supported by argument or citation to legal authority).

C. Mutcherson was not denied a jury of his peers.

Mutcherson also asserts in passing that he was denied his right to a jury of his peers. The United States and Minnesota Constitutions entitle a defendant to a jury pool reflective of a cross-section of the community. *Andersen*, 940 N.W.2d at 181. To prevail on his claim that this right was violated, Mutcherson must present a prima facie showing that the venire (1) excluded "a distinctive group in the community," (2) the group was not "fairly represented in the venire," and (3) that the underrepresentation stemmed from "systematic exclusion of the group in question" over a "significant period of time." *Id.* at 181-82

(quotations omitted). Because Mutcherson presented no factual basis to meet any of these three requirements, his claim fails.

D. Mutcherson’s remaining arguments fail.

Mutcherson makes several additional arguments, including concerning the search of the apartment, jury selection, his criminal-history score, alleged witness perjury, and various evidentiary matters. These arguments are forfeited either because Mutcherson had to but did not raise them in the district court, *see Roby*, 547 N.W.2d at 357, or because he has failed to provide adequate legal argument on appeal and no error is apparent based on our review, *see Bartylla*, 755 N.W.2d at 23 (concluding that issues are forfeited when they lack supportive arguments or legal authority and “no prejudicial error is obvious on mere inspection” (quotation omitted)).

Affirmed.