

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1324**

State of Minnesota,
Respondent,

vs.

Israel Frederick Elder,
Appellant.

**Filed November 14, 2022
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-20-12549

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa A. Haley, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Gaïtas, Presiding Judge; Worke, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges his conviction for ineligibly possessing a firearm, arguing that the evidence was insufficient, the district court improperly instructed the jury, and the prosecutor committed misconduct during closing argument. We affirm.

FACTS

On the evening of May 25, 2020, a 911 caller reported that he heard a gunshot and saw a group on the street outside his house that included a person holding a firearm. The caller provided a physical description of the male holding the firearm.

Two responding police officers searched on foot for the person with the firearm. One of the officers saw appellant Israel Frederick Elder—who generally matched the description from the 911 caller—emerge from nearby bushes onto the sidewalk. The officer pointed his flashlight at Elder. Elder then walked away from the officer. The officer pointed his firearm and flashlight at Elder and yelled at him twice to drop what was in his hands. Elder continued walking away and briefly disappeared behind a tree before emerging with a cellphone in his right hand and surrendering. The officer looked behind the tree where Elder was concealed and found a pistol with a chrome slide under a car parked next to the tree.

The state charged Elder with possession of a firearm by an ineligible person under Minn. Stat. § 624.713, subd. 1(2) (2018). At Elder’s jury trial, the 911 caller and police officers testified for the state. Of note, the officer who found the firearm testified that he was “a hundred percent sure” he saw a firearm with a chrome slide in Elder’s right hand. Elder stipulated that he was ineligible to possess a firearm and presented no evidence on his own behalf.

The prosecutor began closing argument by telling the jury not to apply “a higher burden . . . than the law requires.” He compared the proper standard to a “doctor provid[ing]” a patient “with information,” stating that a doctor “is never going to say, [y]es,

with 100 percent certainty, we are going to cure this ailment. What they will do is give you the tools to make the best decision possible for you.” The prosecutor then argued that the state proved that Elder actually possessed the firearm.

In Elder’s closing argument, his counsel told the jury to compare the required level of proof to that required in “the most important affairs of your life,” such as buying a house or getting married. The defense also noted that when the officer who interviewed Elder after his arrest testified, the state did not present the interview recording, so the jury did not “know what all the questions were.” Additionally, the defense pointed out that the state presented no evidence of fingerprints or gunshot residue.

On rebuttal, the prosecutor characterized the defense’s argument as “[i]t’s everybody else’s fault.” As for the burden of proof, the prosecutor commented that “[i]t’s the same standard we’ve used since the beginning of this country.” He also argued that marriage and buying a house are inapt comparisons to the burden of proof because they involve emotion and finances. He told the jury that the standard was “[b]eyond a reasonable doubt, not all doubt. Is it reasonable?” The prosecutor then asked the jury,

what’s more reasonable? The defense is claiming this is a high crime area so that gun just happened to be there Or is it more reasonable that [the 911 caller] gave a very detailed description of [Elder], told police he had a firearm? [The officer] finds him about a minute to two minutes later with a firearm, retrieving it from a bush, holding it, and then he comes out from behind the tree and the gun is right next to him. What is more reasonable? And I think you know the answer to that.

Regarding the lack of fingerprints or gunshot residue, the prosecutor told the jury to “[r]emember . . . the CSI effect . . . This is real life, not TV.”

As to the recording of Elder’s postarrest interview, the prosecutor stated that both parties “have the same access to the evidence. If they want to play [the recording] for some reason, they can play it.” Elder objected that this statement shifted the burden of proof. The district court did not rule but stated outside the jury’s presence that the prosecutor prevented any further issue by moving on.

At the end of his rebuttal, the prosecutor stated that,

[t]o find this defendant not guilty would mean that you did have to contemplate the testimony of [the 911 caller] and that what [the 911 caller] said was not true, that [the officer] did not see that firearm in the defendant’s hand.

The jury found Elder guilty. This appeal followed.

DECISION

Sufficiency of the evidence

Elder argues that the evidence was insufficient to prove he possessed the firearm.¹ Our review of the sufficiency of the evidence depends on whether the “disputed element is sufficiently proven by direct evidence alone.” *See State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). “[D]irect evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation and alteration omitted). In contrast, “circumstantial evidence always requires an inferential step to prove a fact that is not required with direct evidence.” *Id.*

¹ Unlawful possession of a firearm must also be knowing. *See State v. Salyers*, 858 N.W.2d 156, 161 (Minn. 2015). Mens rea is not at issue here, so we decline to address it. *See id.*

When reviewing the sufficiency of direct evidence, we “carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the factfinder to reasonably conclude that the defendant was guilty” of the charged offense beyond a reasonable doubt. *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation and alteration omitted). Under this standard, we must “adopt the view of the evidence most favorable to the state” and assume that “the jury believed the state’s witnesses and disbelieved any contradictory evidence.” *State v. Webster*, 894 N.W.2d 782, 785 (Minn. 2017) (quotation omitted).

We apply a heightened standard of review when considering circumstantial evidence. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). But because the direct evidence here is sufficient, we need not apply the circumstantial-evidence standard. *See Horst*, 880 N.W.2d at 40; *Salyers*, 858 N.W.2d at 161.

To prove that Elder possessed the firearm, the state must show that he “physically had the handgun on his person.” *See State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *rev. denied* (Minn. Jan. 16, 2001). At trial, one of the officers testified that he was “a hundred percent sure” he saw a firearm with a chrome slide in Elder’s right hand. Assuming that the jury found the officer credible, this testimony is direct evidence sufficient to sustain the verdict. *See State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998) (“The jury determines the weight and credibility of individual witnesses . . . and a conviction may rest on the testimony of a single credible witness.”).

Elder focuses on the fact that the officer’s body-camera footage does not clearly show what, if anything, Elder was holding before surrendering. But Elder’s hands are

obscured in the grainy and shaky footage preceding his arrest. Thus, the evidence here is analogous to that discussed in a recent nonprecedential but persuasive opinion of this court. *See State v. Finley*, No. A18-1597, 2020 WL 132168, at *3-4 (Minn. App. Jan. 13, 2020), *rev. denied* (Minn. March 25, 2020).² In *Finley*, we concluded that the evidence of Finley inflicting bodily harm was sufficient despite unclear video recordings because “the recordings d[id] not refute [the victim’s] testimony that Finley struck him in the face.” *Id.* Likewise, the officer’s body-camera footage does not refute the arresting officer’s testimony that he saw the firearm in Elder’s hand. The direct evidence is therefore sufficient to sustain the verdict.

Jury instructions

Elder next argues that the district court improperly instructed the jury on the element of possession. Elder did not object to this jury instruction; therefore, we review it for plain error. *See State v. Reek*, 942 N.W.2d 148, 158 (Minn. 2020). Plain error exists when there was (1) an error (2) that is plain (3) and that affected the appellant’s substantial rights. *See id.* at 158-59. “[A]n error is plain if it was clear or obvious.” *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotations omitted). Generally, an error is clear or obvious if it “contravenes caselaw, a rule, or a standard of conduct.” *Id.* (quotation omitted). An error affects the appellant’s substantial rights if “there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict.” *Id.* (quotation omitted). If the appellant shows plain error, we “may correct the error only if it seriously

² This court is not bound by its nonprecedential opinions but may consider them as persuasive authority. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Reek*, 942 N.W.2d at 159 (quotation omitted).

The district court instructed the jury on possession as follows:

The defendant possesses a firearm or ammunition if it is on the defendant’s person. The defendant also possess[es] a firearm or ammunition if it was in a place under the defendant’s exclusive control to which other people did not normally have access or, if found in a place to which others have access, the defendant knowingly exercised dominion and control over it.

This instruction incorporated the concepts of both actual and constructive possession. *See Smith*, 619 N.W.2d at 770. A defendant actually possesses an item if it is “on his person.” *Id.* A defendant constructively possesses an item if the item is “in a place under the defendant’s exclusive control to which other people did not normally have access,” or if the item is “in a place to which others had access, [] there is a strong probability . . . that the defendant was . . . consciously exercising dominion and control over [the item].” *State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004); *see State v. Hunter*, 857 N.W.2d 537, 542-43 (Minn. App. 2014) (holding that dominion and control is required over the item, not the place where the item is found).

Elder frames the issue as whether the instruction on possession materially misstated the law of possession. But he agrees that this instruction correctly defined actual and construction possession in accordance with 10A *Minnesota Practice*, CRIMJIG 32.21 (2015), which sets forth the elements of possession of a firearm by an ineligible person under Minn. Stat. § 624.713, subd. 1(2). Rather, Elder claims that failing to explicitly use the terms “actual possession” and “constructive possession” in this instruction was plainly

erroneous by “forc[ing] the jury to create [its] own framework to determine” the possession issue, making “it [] unclear how the jury determined that the [s]tate met its burden of proof.” In other words, Elder argues that the district court’s instructions needed to lead the jury to agree on a single legal theory of possession.

It is not apparent how explicitly delineating actual and constructive possession would lead the jury to agree on one legal theory of possession. And even if jurors finding guilt on different legal theories were an issue, the state only advanced an actual-possession theory. Notwithstanding these observations, caselaw shows that the instruction on possession here was not plainly erroneous. In *State v. Ilhe*, the supreme court held that instructing the jury on “alternative means” of committing an element of the offense did not violate Ilhe’s right to a unanimous verdict because the different means were “not inherently different types of conduct grouped under a single offense.” 640 N.W.2d 910, 919 (Minn. 2002). The charged conduct was also “part of a single behavioral incident.” *Id.* In *State v. Stempf*, we noted that “[u]nderlying facts about which the jury would not necessarily have to agree would be whether the defendant had actual or constructive possession.” 627 N.W.2d 352, 357 (Minn. App. 2001).

Here, actual and constructive possession are not inherently different types of conduct but are “alternative means” of committing “the act of possession,” which is one “element of the crime” of ineligibly possessing a firearm. *See Ilhe*, 640 N.W.2d at 919; *Stempf*, 627 N.W.2d at 357. And the state offered evidence of only one incident of possession. Thus, even if explicitly delineating actual and constructive possession could have prevented the jurors from finding guilt on different legal theories, and even if the state

advanced multiple theories of possession, Elder has not shown that the jury was required to agree on one legal theory of possession. The district court did not plainly err in its jury instructions.

Prosecutorial misconduct

Elder also claims that the prosecutor committed misconduct during closing argument by misstating or shifting the burden of proof. Misstating or shifting the burden of proof is “highly improper and constitutes prosecutorial misconduct.” *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010) (quotation omitted). “Prosecutors improperly shift the burden of proof when they imply that a defendant has the burden of proving his innocence.” *Id.* (quotation omitted). To determine whether the prosecutor misstated or shifted the burden of proof in closing argument, we look at the argument “as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence.” *State v. Carridine*, 812 N.W.2d 130, 148 (Minn. 2012) (quotation omitted).

Elder claims that the prosecutor misstated or shifted the burden multiple times. But Elder objected to only one instance. We review the objected-to instance for harmless error. *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016). We review the unobjected-to instances under a modified-plain-error standard. *See State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010). If Elder shows plain error, the burden shifts to the state to show that the error did not affect Elder’s substantial rights. *See id.* If the state fails to meet its burden, we “may correct the error only if it seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014) (quotation omitted) (alteration in original).

Objected-to instance

Elder argues that the prosecutor shifted the burden of proof by noting that the state and the defense had the same access to evidence and that the defense could play the postarrest interview recording for the jury if it wanted. But Elder does not dispute that the prosecutor's statement was correct. And Elder invited the prosecutor's comment by focusing on the absent interview recording. This comment likens to a "comment on the lack of evidence supporting a defense theory," which is not a burden-shifting statement. *See McDaniel*, 777 N.W.2d at 750. In fact, the prosecutor's comment amounts to less than a comment on the lack of defense evidence. The prosecutor remarked only that if the postarrest interview recording was exculpatory, the defense could have played it for the jury, but it is not the state's burden to present such evidence. The comment about access to evidence did not shift the burden of proof.

Unobjected-to instances

Elder first claims that the prosecutor plainly erred by telling the jury not to hold him to a higher standard than the law requires and comparing proof beyond a reasonable doubt to a doctor being unable to tell a patient with one hundred percent certainty that they would cure an ailment. But Elder does not dispute that "beyond a reasonable doubt" is not "one-hundred percent certainty." He also does not explain how the prosecutor's analogy about medical decision-making misstated the burden of proof. The prosecutor—like the defense later did in closing argument about marriage and buying a house—"attempt[ed] to explain abstract legal phrases in terms that an average juror could understand and apply." *See State v. Nowels*, 941 N.W.2d 430, 438 (Minn. App. 2020) (noting that the "prosecutor's

statements characterizing reasonable doubt were a direct response to the defense's statements on the same topic"), *rev. denied* (Minn. June 16, 2020). Elder has not shown plain error in the prosecutor's initial closing statements.

Second, Elder claims that the prosecutor plainly erred by characterizing the defense's argument as "it's everybody else's fault." Regardless of any issues with this characterization, "it is difficult . . . to discern how this remark bears on the burden of proof at all." *See State v. Coleman*, 373 N.W.2d 777, 783 (Minn. 1985). The remark did not misstate or shift the burden of proof.

Third, Elder claims that the prosecutor plainly erred by stating that the reasonable-doubt standard is "the same standard we've used since the beginning of this country." This comment seems to imply that the reasonable-doubt standard is not an impossible one because people have been convicted under it since the country's founding. Our supreme court has permitted similar comments. For example, the supreme court in *McDaniel* determined that the prosecutor did not misstate the burden of proof by saying in closing argument that "many men and women have come into rooms just like this like [the defendant] has, who have left these rooms after having been found guilty by proof beyond a reasonable doubt." 777 N.W.2d at 750; *see also State v. Martin*, 773 N.W.2d, 89, 105 (Minn. 2009) (holding it permissible for the prosecutor to state that "even with the presumption of innocence" and the "stiff burden" of proof beyond a reasonable doubt, "many people are still convicted"). Elder has failed to show that the same-standard comment was plainly erroneous.

Fourth, Elder claims that the prosecutor plainly erred by stating that marriage and purchasing a home are unlike the reasonable-doubt standard because they involve emotion and finance. While we might not agree with this statement, Elder cites no law suggesting that the statement is improper, and a debatable claim is not obviously erroneous. *See Mosley*, 853 N.W.2d at 801. Distinguishing marriage and purchasing a home from proof beyond a reasonable doubt was not plainly erroneous.

Fifth, Elder claims that the prosecutor’s remark about the “CSI effect” was plainly erroneous. But again, it is not apparent how this statement goes to the burden of proof, and the statement responded to Elder’s arguments about the lack of fingerprints or gunshot residue recovered. Because “[t]he prosecutor has the right to fairly meet the arguments of the defendant,” the “CSI effect” comment was not plainly erroneous. *State v. Jackson*, 773 N.W.2d 111, 123 (Minn. 2009).

Finally, Elder claims that the prosecutor plainly erred by asking, “what’s more reasonable,” and asserting that the 911 caller’s testimony and that of the officer who found the firearm would need to be untrue to acquit Elder. Even if Elder showed plain error in these comments, we conclude that any error would not seriously affect the fairness, integrity, or public reputation of judicial proceedings.³

³ The state failed to argue that any unobjected-to misconduct did not affect Elder’s substantial rights. The state argued only that Elder failed to show plain error. Thus, the state failed to meet any burden of showing no substantial-rights violation. *See Matthews*, 779 N.W.2d at 550; *cf. State v. Porte*, 832 N.W.2d 303, 312-14 (Minn. App. 2013) (declining to review sua sponte whether erroneous jury instructions were harmless because the state argued only that no error occurred and thereby waived the argument that any error was harmless).

We first note that any unfairness from the “what’s more reasonable” comment might be speculative. This comment occurred in the context of the prosecutor’s broader argument about any doubt regarding Elder’s guilt needing to be reasonable. *See Carridine*, 812 N.W.2d at 148. It is therefore unlikely that the jury took this comment as an invitation to decide guilt based on whether the state’s or defense’s theory was more reasonable.

More fundamentally, Elder “was afforded a complete adversarial trial” in which he “presented his defense and theory of the case” that someone else left the firearm where police found it. *See State v. Kelley*, 832 N.W.2d 447, 457 (Minn. App. 2013). The jury considered and rejected Elder’s strained defense after the state presented overwhelming evidence. *See id.* Specifically, the 911 call recording established that a man largely fitting Elder’s description was holding a firearm near the 911 caller’s house on the same street and block where police arrested Elder. The 911 caller testified that he saw only one person on the street fitting that description. Body-camera footage showed Elder emerging from the bushes and walking away from police with his hands toward his front pockets, even as an officer pointed his flashlight and firearm at Elder and yelled at him multiple times to drop what was in his hands.⁴ The footage showed that seconds later, the officer found a pistol with a chrome slide next to where Elder had momentarily disappeared behind a tree. The officer testified that he was “a hundred percent sure” that he saw such a firearm in Elder’s hand moments earlier. The body cameras recorded the officer’s corroborative statement that he had just seen the firearm in Elder’s hand in immediate response to Elder’s

⁴ The other arresting officer corroboratively testified that Elder kept his hands toward his front pockets in response to commands to drop what was in his hands.

claims that the firearm was not his and that he was “getting [his] phone.” And the body cameras showed no one in the close vicinity of the officers and Elder throughout the encounter except a single pedestrian who passed the other way on the sidewalk soon before.

“Based on the specific facts of this case,” we conclude that any prosecutorial misconduct was not “particularly egregious” enough to seriously affect the fairness, integrity, and public reputation of judicial proceedings. *See State v. Huber*, 877 N.W.2d 519, 528 (Minn. 2016) (quotation omitted); *cf. State v. Little*, 851 N.W.2d 878, 886 (Minn. 2014) (quoting *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)) (noting that the fairness-and-integrity prong is not met when a new trial would be futile and waste judicial resources); *Kelley*, 832 N.W.2d at 457.

Affirmed.