

*This opinion is nonprecedential except as provided by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
A22-0464**

State of Minnesota,
Respondent

vs.

Raytavien Rashad Richardson,
Appellant.

**Filed April 24, 2023
Reversed and remanded
Reyes, Judge**

Hennepin County District Court
File No. 27-CR-19-22308

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

Mary F. Moriarty, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney,
Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Reyes, Judge; and Larson,
Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this direct appeal from his conviction of unlawful firearm possession, appellant argues that the prosecutor committed misconduct by repeatedly misstating the law of constructive possession to the jury. We reverse and remand for a new trial.

FACTS

During the late evening of September 6, 2019, and into the early morning hours of September 7, 2019, Minneapolis police officers assigned to a team focused on gang and group violence within the city received information about appellant Raytavien Rashad Richardson being involved in suspicious activity at the Gold Room bar. During their surveillance of appellant, officers viewed a Facebook livestream video from inside the Gold Room showing appellant flashing gang signs.

At approximately 2:00 a.m., officers conducted surveillance outside the Gold Room. They observed appellant leave the bar and get into a dark SUV in the front passenger seat. They also observed the driver of the SUV, J.M.M., violate two traffic laws by failing to signal upon entering the lane of traffic and crossing over a double line and into the oncoming lane of traffic.

An officer initiated a traffic stop by activating his lights and siren. At first, J.M.M. pulled to the side as if planning to stop, but then he “abruptly sped up and continued to drive for at least half a block.” J.M.M. eventually stopped at the intersection of Marquette and Fifth Street. Because of his erratic driving conduct, the officers conducted a high-risk stop. During this high-risk stop, officers had two squad cars line up behind the vehicle with at least four officers behind that vehicle for coverage. The officers did not approach the vehicle and instead called the occupants to step out of the vehicle, one by one.

There were six occupants in the SUV. The officers first called the driver J.M.M. to step out, and he complied. The officers then called the front-passenger appellant to step out numerous times, but he did not comply. They decided to move on instead to the rear

passengers, who exited the vehicle when called to do so. Eventually, appellant got out, and officers detained him. After all the occupants were removed from the vehicle, the officers performed an “inventory search or weapons frisk of the car looking for any evidence.” They found two firearms, a Walther and Glock, under the front passenger seat.

Because appellant was prohibited from possessing a firearm due to multiple previous convictions of prohibited person in possession of a firearm, respondent State of Minnesota charged appellant with one count of possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) (2018). The district court held a jury trial between August 25 and September 1, 2021. At trial, the prosecutor made the following statements on constructive possession during his opening and closing arguments:

1. “Constructive possession can be as simple as having *control of an area* where an item is found and the common sense to prove that the individual knew, in this particular case, that [appellant] knew that the guns that were found at his feet were in fact there.
2. “[The guns] were found under [appellant’s] seat, he exercised dominion and *control of that area*, [and] he knew they were there.”
3. “[Appellant] had *control of the area*, he had sufficient control of the firearms”
4. “Let’s go back to that . . . definition . . . constructive possession. In that someone basically does not have the firearm on them at the time but has dominion and *control over that area*.”
5. “Also, any firearm. *The State is not required to prove it was the Walther or the Glock that he possessed*. Both of them were there, *both of them were* in the constructive possession *within his sphere of control*.”

(Emphasis added.) The jury found appellant guilty of being an ineligible person in possession of a firearm. The district court sentenced appellant to 60 months in prison. This appeal follows.

DECISION

I. Standard of review

Appellant argues that the prosecutor committed misconduct by misstating the law during trial and that the state cannot prove that the plain error did not affect his substantial rights, requiring reversal.

Because appellant did not object to the prosecutor's statements at trial, we review them under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 296 (Minn. 2006). The appellant must first show an error that is plain. *Id.* at 302. An error is plain if it "contravenes [caselaw], a rule, or a standard of conduct." *Id.* Once the appellant shows plain error, the burden shifts to the state to show that "the error did not affect the defendant's substantial rights." *Id.* at 296. "A plain error affects a defendant's substantial rights if it was prejudicial and affected the outcome of the case." *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017) (quotation omitted). If all three prongs of the plain-error test are satisfied, we assess "whether the error should be addressed to ensure fairness and the integrity of judicial proceedings." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

II. The prosecutor's statements were plain error that affected appellant's substantial rights which requires reversal to ensure the fairness and integrity of judicial proceedings.

A. The prosecutor committed plain error.

Appellant argues that the prosecutor committed prosecutorial misconduct when he repeatedly misstated the law on constructive possession during opening, closing, and rebuttal arguments. His argument has merit.

“To convict [a defendant] of possession of a firearm by an ineligible person, the state [is] required to prove in relevant part that he knowingly possessed *the firearm*.” *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017) (emphasis added). “A defendant may possess an item jointly with another person.” *Id.* “Possession may be proved through evidence of actual or constructive possession.” *Id.*

“There are two methods by which the State may prove constructive possession. *Id.* The state may prove constructive possession by showing (1) “that the police found the item in a place under the defendant’s exclusive control to which other people normally did not have access”; or (2) “if police found the item in a place to which others had access, the State must show that there is a strong probability (inferable from other evidence) that at the time the defendant was consciously or knowingly exercising dominion and control over it.” *Id.* (citing *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975)).

As to the second method, “it” under *Florine* means the prohibited item. *See State v. Hunter*, 857 N.W.2d 537, 539 (Minn. App. 2014). Under § 624.713, subd. 1(2), the prohibited item is the firearm. As a result, the person needs to “knowingly exercise[] dominion and control over the [firearm]” and that “[i]t is not sufficient that the person

knowingly exercises dominion and control over the place in which the [firearm] [was] found when others had access to that place.” *Hunter*, 857 N.W.2d at 539. In addition, “knowledge of the prohibited item is required.” *State v. Salyers*, 858 N.W.2d 156, 161 (Minn. 2015).

“[T]he prosecutor is a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public.” *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (quotation omitted). Their role is “not simply to convict the guilty, they are also responsible for providing a procedurally fair trial.” *State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn. 2006). Misleading the jury about the law constitutes prosecutorial misconduct. *See State v. Strommen*, 648 N.W.2d 681, 689-90 (Minn. 2002).

Here, the officers found two firearms under the front passenger seat where appellant was sitting, a place to which others had access. Therefore, the state had to prove constructive possession through evidence showing that appellant consciously or knowingly exercised dominion and control over the firearm. However, the prosecutor misstated the law of constructive possession several times, stating that if appellant “had control of the area, he had sufficient control of the firearms.” We have held that a person needs to “knowingly exercise[] dominion and control over the [firearm]” and not just “over the place in which the [firearm] was found.” *Hunter*, 857 N.W.2d at 539. Under Minnesota caselaw, this is an error that is plain. Because appellant met his burden of showing that the prosecutor’s misstatements of the law were plain error, the burden now shifts to the state to show that the error did not affect appellant’s substantial rights.

B. The state failed to show that the error did not affect appellant's substantial rights.

“When considering whether an error based on improper suggestions by the [prosecutor] affected a defendant’s substantial rights . . . [appellate courts] consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions.” *State v. Mosley*, 853 N.W.2d 789, 803 (Minn. 2014) (quotation omitted).

1. The strength of the evidence against appellant is not overwhelming.

The state’s case relied on four facts: (1) appellant sat in the front seat with the two firearms underneath; (2) officer D.’s testimony that, following the stop, appellant was “bending down at the waist . . . with his hands down towards the floorboard of the vehicle”; (3) appellant’s initial reluctance to exit the vehicle; and (4) appellant’s DNA evidence on the Walther firearm.

First, appellant sitting in the front seat with the two firearms underneath is not indicative that he constructively possessed the firearms. *See Harris*, 895 N.W.2d 592, 601 (concluding that to prove that defendant knowingly exercised dominion and control over the firearm at the time in question, “the [s]tate must prove more than the defendant’s mere proximity to the firearm”). In other words, appellant’s “ease of access to [the] firearm[s] is but one factor relevant to establishing constructive possession,” [but] not the sole factor [or] necessarily even the most important factor.” *Id.* at 602 (quotation omitted). Also, appellant neither drove nor owned the vehicle. Appellant presented evidence that the

owner of the vehicle, J.M.M., instead could be the sole owner of both firearms. He testified that J.M.M. made a music video two months earlier and in it J.M.M. is seen displaying the Walther firearm. The music video was admitted into evidence. The state did not refute that the Walther firearm J.M.M. possessed in the music video is the same one the officers found in the vehicle. Appellant's niece S.W. accompanied him to the Gold Room that night and testified that appellant did not have a weapon on him because the Gold Room had staff "at the door with metal detectors" conducting personal searches to prevent people from bringing any weapons inside.

Second, Officer D.'s assertion that he could observe appellant from approximately ten feet away "bending down at the waist . . . with his hands down towards the floorboard of the vehicle" is not overwhelming evidence. Officer D. was behind the right side of the vehicle and officer O. was behind the left side of the vehicle. Officer O. testified that he did not see appellant making any movements underneath his seat and that his view was obstructed by the left rear passenger. Moreover, officer D. acknowledged that he observed two occupants in the middle row and two occupants in the rear row. Officer D.'s bodycam footage shows how difficult it is to see movements in the darkness of the night and from behind the vehicle with occupants in the middle and rear rows.

Third, appellant explained that he did not exit immediately when ordered because "30 firearms [were] aimed at [him]." He therefore felt safer if the police officers got him out of the vehicle instead. After observing that two people exited the vehicle safely, he felt "less in danger" and stepped out.

Fourth, the DNA evidence is not conclusive. On cross-examination, Officer D. admitted that his hand touched the seat and, as he was trying to grab the gloves to secure the Walther firearm, he touched the fingers of the glove with his bare hands. A forensic scientist, serving as an expert witness on the case, defined secondary transfer as “the idea that if you personally never touched that stapler over there that possibly through a handshake, we could find your DNA profile on an object you did not directly touch.” Officer D. touching the fingers of the glove with his bare hands could have led to appellant’s DNA being secondarily transferred onto the Walther firearm due to Officer D.’s mishandling when securing the Walther firearm. Moreover, appellant’s DNA was not found on the Glock firearm that Officer S. properly secured. While the state presented some evidence, we conclude that it was not overwhelming. *See State v. Huber*, 877 N.W.2d 519, 527 (Minn. 2016) (holding that because the state did not present an overwhelming, considerable or ample quantum of evidence, the state did not overcome the prejudice).

2. The prosecutor’s misstatements of the law were pervasive.

The prosecutor misstated the law on constructive possession five times during his opening and closing statements. In *State v. Caldwell*, the supreme court held that the prosecutor’s three improper statements of law factored in its decision to grant appellant a new trial. 322 N.W.2d 574, 590-91 (Minn. 1982); *see also Strommen*, 648 N.W.2d at 689-90 (holding that the prosecutor’s misstatement on abandonment factored into its decision to grant the appellant a new trial). The prosecutor’s five misstatements of the law throughout the trial were pervasive.

3. Appellant's trial counsel did not rebut the misstatements of the law.

Appellant's trial counsel did not make any efforts to rebut the improper statements of the law. Instead, his counsel compounded the error by citing the same erroneous law. Before jury selection and during discussions on the introduction of evidence, appellant's trial counsel told the district court that "constructive possession requires knowledge . . . that the firearm is there or knowledge or somehow showing control of the area of which it is found." Then after the prosecutor misstated the law in his opening statement by stating that "[c]onstructive possession can be as simple as having *control of an area* where an item is found and the common sense to prove that the individual knew," appellant's trial counsel stated, the "[s]tate has already talked about constructive possession, but as he noted, a critical part of it is knowledge, and [appellant] did not know that those guns were under that seat." Appellant therefore did not rebut the erroneous statements of law.

Based on these factors, we conclude that the state has failed to show that the error did not affect appellant's substantial rights.

C. The error should be addressed to ensure fairness and the integrity of judicial proceeding.

The supreme court has "made it clear, that if prosecutors persist in making improper statements . . . we will not hesitate . . . to make the prosecutor try the case over again." *Salitros*, 499 N.W.2d at 816, 820 (holding that the prosecutor's improper remarks during closing argument warranted reversal in interests of justice even though defendant did not object to remarks and did not show prejudice). Here, the prosecutor's misstatements of the

law without objection by appellant deprived appellant of a fair trial. It is clear that “failing to correct the error would have an impact beyond the current case by causing the public to seriously question whether our court system has integrity and generally offers accused persons a fair trial.” *Pulczynski v. State*, 972 N.W.2d 347, 356 (Minn. 2022).

Because the plain error here affected appellant’s substantial rights and should be addressed to ensure that appellant has a fair trial, we reverse and remand for a new trial.

Reversed and remanded.