

*This opinion is nonprecedential except as provided by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
A23-1135**

State of Minnesota,
Respondent,

vs.

Jerry Ray Apel,
Appellant.

**Filed July 15, 2024
Affirmed
Ede, Judge**

St. Louis County District Court
File No. 69HI-CR-22-709

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

Kimberly J. Maki, St. Louis County Attorney, Tyler Kenefick, Assistant County Attorney,
Hibbing, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Wheelock, Judge; and Ede,
Judge.

NONPRECEDENTIAL OPINION

EDE, Judge

In this direct appeal from final judgments of conviction for unlawful possession of
a firearm and receiving stolen property, appellant asserts that the trial evidence was
insufficient to support his convictions. Appellant argues that the record does not

sufficiently establish that he constructively possessed a firearm. Appellant also maintains that, even if the evidence was sufficient to show that he possessed a firearm, the evidence was insufficient to prove that he knew or had reason to know that the firearm was stolen. Because we conclude that there was sufficient circumstantial evidence to prove actual possession of a firearm and to prove that appellant knew or had reason to know that the firearm was stolen, we affirm.

FACTS

Respondent State of Minnesota charged appellant Jerry Ray Apel by amended complaint with one count of receiving stolen property in violation of Minnesota Statutes section 609.53, subdivision 1 (2022), and one count of unlawful possession of a firearm in violation of Minnesota Statutes section 624.713, subdivision 1(2) (2022). The matter proceeded to a jury trial in March 2023.

The following recitation of facts is based on evidence adduced at trial and described in the light most favorable to the jury's verdict. On October 12, 2022, M.K. left his home between 3:00 p.m. and 4:00 p.m. When he returned home, M.K. found that his front doors were open. M.K. discovered that his firearm was missing because he had left it on his floor, intending to clean it, but when he "looked down, it was gone." The missing firearm was a 9mm Taurus handgun in a holster.

At the time, M.K. lived with his grandson, N.D. Close to the time that M.K. came home and found that his firearm was missing, N.D. also returned home. Upon arriving, N.D. saw K.K., a childhood friend who had previously lived in the home with M.K. and N.D. but had been kicked out for stealing from them. N.D. observed K.K. "standing outside

the window watching [M.K.] sleep.” When N.D. saw her, K.K. “bolted straight for the back of [the] house.” M.K. told N.D. that K.K. had stolen a firearm. N.D. reported the missing firearm to a 911 dispatcher around 9:00 p.m. that night.

In response to N.D.’s 911 call, Officer A.M. went to the home. Officer A.M. was aware of information that law enforcement had received advising that a suspect had left the home in a “colored vehicle.” At the scene, M.K. informed Officer A.M. that a 9mm Taurus firearm was missing and provided the officer with the firearm’s serial number.

Officer J.B., who worked with a canine partner, also responded to N.D.’s 911 call. At M.K.’s home, Officer J.B. confirmed that the firearm was missing and instructed his canine partner to track the female suspect who had “fled on foot from the residence.” Shortly after the canine began tracking, Officer J.B. received information that “[t]he suspect vehicle was located across town.” Based on a radio description of “movement in the wood line,” Officer J.B. and his canine partner returned to their squad car and headed to the location of the suspect vehicle.

On his way, Officer J.B. was advised that the female suspect was detained, and he simultaneously observed someone run across the road a couple of blocks ahead of him. Officer J.B. believed that this was suspicious because the person was running away from the area where officers had just detained the female suspect. Officer J.B. exited his squad car with his canine partner, and they began to track the fleeing individual.

Officer J.B. and his canine partner searched a yard and came to some shrubs. After clearing a corner behind the brush, Officer J.B. saw “an individual laying there.” Upon questioning, the individual identified himself as Apel. Officer J.B. began placing Apel in

handcuffs. Apel did not immediately raise his hands in response to Officer J.B.'s commands. In particular, Apel was slow to raise his right hand. Beneath that hand, Officer J.B. found "a firearm and a case."

Deputy J.O. responded to Officer J.B. and Apel's location and observed another deputy pick up the firearm—"a 9mm handgun that was in a holster"—from the area where Officer J.B. had discovered Apel. Deputy J.O. recorded the firearm's serial number, which matched that provided earlier by M.K.

Apel testified in his own defense. According to Apel, he had been with K.K. "almost the whole day" on October 12. K.K. picked him up around noon, and they spent time at the home where K.K. had been staying. While at this home, K.K. attempted to break into the garage. At that point, Apel walked through the yard and saw the police. Apel ran about two blocks away and hid from law enforcement.

The jury found Apel guilty of both charged counts. The district court sentenced Apel to 60 months in prison for unlawful possession of a firearm and to a concurrent custodial term of one year and one day for receiving stolen property.

This appeal follows.

DECISION

Apel raises two challenges on appeal. First, he argues that the state presented insufficient circumstantial evidence to prove that he constructively possessed the firearm for purposes of his unlawful-possession-of-a-firearm conviction. Second, as to his receiving-stolen-property conviction, Apel maintains that there was insufficient circumstantial evidence to prove that he knew or had reason to know that the firearm was

stolen. Assuming without deciding that the circumstantial-evidence standard of review applies here, we conclude that the trial record was sufficient to prove both that Apel had actual possession of the firearm and that he knew or had reason to know that it was stolen.

Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). “A conviction based on circumstantial evidence . . . warrants heightened scrutiny.” *State v. Al-Nasser*, 788 N.W.2d 469, 473 (Minn. 2010). This heightened standard requires appellate courts “to consider whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt.” *Id.* (quotation omitted). But appellate courts “will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.” *Id.* (quotation omitted).

When reviewing the sufficiency of circumstantial evidence, appellate courts “apply a two-step process.” *State v. Gilleylen*, 993 N.W.2d 266, 275 (Minn. 2023). “Step one involves identifying the circumstances proved.” *Id.* (quotation omitted). At this step, appellate courts “winnow down the evidence presented at trial to a subset of facts that is consistent with the jury’s verdict and disregard evidence that is inconsistent with the jury’s verdict.” *Id.* (quotations omitted). “The jury is the sole judge of credibility and is free to accept part and reject part of the testimony of a particular witness.” *Id.* (quotations omitted). Step two requires appellate courts to “analyze whether the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis other than guilt.” *Id.* (quotations omitted).

I. There was sufficient circumstantial evidence to prove actual possession of the firearm.

Apel contends that, because the firearm was found under—and not on—his person, the state was required to prove constructive possession instead of actual possession. We are not persuaded.

To obtain an unlawful-possession-of-a-firearm conviction under Minnesota Statutes section 624.713, “the state must establish either actual or constructive possession of a firearm.” *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *rev. denied* (Minn. Jan. 16, 2001). “Actual possession, also referred to as physical possession, involves direct physical control.” *State v. Stone*, 982 N.W.2d 500, 510 (Minn. App. 2022) (quoting *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016)), *aff’d*, 995 N.W.2d 617 (Minn. 2023).

In support of his argument, Apel cites our decision in *Smith*. There, we stated that “[t]he state did not argue to the jury that appellant had actual possession of the handgun” in a prosecution for unlawful possession of a firearm, a scenario that we posited “would have required proof that appellant physically had the handgun on his person.” *Smith*, 619 N.W.2d at 770. But “[b]ecause we affirm[ed] on grounds of constructive possession, and because actual possession of the handgun was not clearly argued by the parties in the district court proceeding, we [did] not need to decide whether the facts of [that] case might [have] also support[ed] an argument for actual possession of the firearm.” *Id.* at 770 n.1. In other words, the portion of *Smith* upon which Apel relies was not binding precedent. *See State v. Bey*, 975 N.W.2d 511, 520 (Minn. 2022) (explaining that statements in a precedential decision are nonbinding dicta when the case “was resolved on other grounds”).

Moreover, we expressly acknowledged that “[a] very persuasive argument could [have] be[en] advanced that appellant concealed the handgun underneath his leg and that such concealment is equivalent to or demonstrative of physical possession”—reasoning that directly contradicts Apel’s position in this appeal. *Smith*, 619 N.W.2d at 770 n.1. Indeed, where the state *has* argued that circumstantial evidence supports a determination of actual possession, we have more recently concluded that “[t]he mere fact that an item is not in a defendant’s physical possession at the time of apprehension does not preclude prosecution for actual possession of contraband.” *Barker*, 888 N.W.2d at 354. Apel’s reliance on *Smith* is therefore unavailing.

We next analyze whether there was sufficient circumstantial evidence to prove that Apel actually possessed the firearm. At the first step of the circumstantial-evidence process, we identify the following circumstances proved:

- K.K. picked Apel up around noon and they were together “almost the whole day.”
- Before leaving home between 3:00 p.m. and 4:00 p.m., M.K. set out his firearm on the floor next to his couch so that he could clean it.
- When he returned home, M.K. found that his front doors were open and his firearm was missing.
- Upon N.D.’s arrival at the home, he saw K.K.—who had previously been kicked out of their shared residence for stealing from N.D. and M.K.—standing outside watching M.K. sleep.
- K.K. “bolted” for the back of the home.
- M.K. told N.D. that K.K. had stolen a firearm.
- N.D. called 911 around 9:00 p.m. to report the missing firearm.

- The missing firearm was a 9mm Taurus handgun in a holster bearing a specific serial number.
- While Officer J.B. was on his way to the location of a suspected vehicle to investigate, he observed someone running from where law enforcement had just detained a female suspect, and he began tracking the fleeing individual with his canine partner.
- Apel was with K.K. when he spotted police, ran two blocks away, and hid.
- Officer J.B. found Apel lying down behind some brush.
- As Officer J.B. began placing Apel in handcuffs, Apel did not immediately raise his hands and was slow to raise his right hand in particular.
- Beneath Apel's right hand, Officer J.B. found "a firearm and a case."
- The serial number on the firearm found under Apel's right hand was the same as the serial number on M.K.'s missing 9mm Taurus handgun.

Having identified the circumstances proved, we turn to the second step: determining "whether the circumstances proved are consistent with the hypothesis that [Apel] is guilty and inconsistent with any rational hypothesis other than guilt." *Gilleylen*, 993 N.W.2d at 275 (quotations omitted). We conclude that the only rational hypothesis consistent with the foregoing circumstances is that Apel actually possessed the firearm. The reasonable inferences establish only that Apel knowingly came into physical possession of the firearm and had direct physical control over it sometime after it was stolen. More specifically, the circumstances proved compel the conclusion that Apel had actual possession of the firearm

when he ran away from police before he was apprehended by Officer J.B., who found the firearm immediately beneath Apel's right hand as he hid in the bushes.¹

We therefore conclude that there was sufficient circumstantial evidence to prove that Apel actually possessed the firearm.

II. There was sufficient circumstantial evidence to prove Apel knew or had reason to know the firearm was stolen.

Apel asserts that, even if the state proved that he possessed the firearm, we should reverse his receiving-stolen-property conviction because there are at least two reasonable alternative hypotheses consistent with innocence. The state counters that the evidence supports the jury's determination of guilt and that Apel's alternative hypotheses are unreasonable. We agree with the state.

A person is guilty of receiving stolen property when that person "receives, possesses, transfers, buys or conceals any stolen property or property obtained by robbery, knowing or having reason to know the property was stolen" Minn. Stat. § 609.53, subd. (1). Here, in the absence of direct evidence that Apel knew or had reason to know

¹ Even if we did not so conclude, we would nonetheless affirm because there was sufficient circumstantial evidence of constructive possession. The Minnesota Supreme Court has held that the state may prove constructive possession of an object like a firearm by establishing that "there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it." *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975). Mere proximity or ease of access to a firearm is insufficient; rather, "the State must prove that the defendant had an ability and intent to exercise dominion and control over the firearm." *Harris*, 895 N.W.2d at 602. The reasonable inferences arising from the circumstances proved here establish a strong probability that Apel consciously exercised dominion and control over the firearm and are inconsistent with any rational hypothesis other than guilt. See *Gilleylen*, 993 N.W.2d at 275.

that the firearm was stolen, the same circumstantial-evidence standard set forth above applies.

Again, our first step in reviewing the sufficiency of the circumstantial evidence is “identifying the circumstances proved.” *Gilleylen*, 993 N.W.2d at 275 (quotation omitted). The same circumstances outlined above apply here. The reasonable inferences arising from those circumstances establish only that Apel knew or had reason to know that the firearm was stolen and are “inconsistent with any rational hypothesis other than guilt.” *Id.* (quotations omitted). Apel was with K.K. almost the whole day, beginning from when K.K. picked Apel up around noon. Thus, Apel was with K.K. before and after the firearm was stolen, during the time that K.K. was suspected of stealing it, and when N.D. saw K.K. outside of M.K.’s home right after M.K. discovered that the firearm was missing. Moreover, Apel was with K.K. when he saw law enforcement, ran away, and hid behind some brush, where Officer J.B. found the firearm under Apel’s right hand. The only reasonable inference from these circumstances is that Apel knew or had reason to know that the firearm was stolen.

Apel contends that the circumstances proved support two hypotheses that are consistent with innocence. First, Apel proposes that K.K. “ditched the gun in the same hiding spot Apel would later use to hide from the police[.]” Second, Apel argues that the circumstances proved support the inference that K.K. gave him the firearm “without telling him it was stolen or without him finding out in any other way[.]” After independently examining Apel’s alternative hypotheses, we conclude that neither is rational. *See Gilleylen*, 993 N.W.2d at 275.

The circumstances proved do not support a rational hypothesis that Apel coincidentally hid in the same place that law enforcement found the firearm. As discussed above, the circumstances proved include that Apel spent nearly the whole day with K.K., including the time that the firearm went missing from M.K.'s home. It is therefore unreasonable to infer that Apel would not have known that K.K. had stolen the firearm, that she had possession of it, that she hid it, or the location where she hid it. Even more unreasonable is the inference that Apel happened to hide from police in the exact place that K.K. hid the firearm and was found with it beneath his right hand. The only reasonable inference from the circumstances proved is that Apel knew or had reason to know that the firearm was stolen.

Thus, after independently considering the reasonableness of Apel's alternative hypotheses, we conclude that the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. *See id.*

Affirmed.