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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1241**

State of Minnesota,
Respondent,

vs.

Darvell Devontre Edwards,
Appellant.

**Filed June 25, 2012
Affirmed
Willis, Judge***

Ramsey County District Court
File No. 62-CR-10-5941

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter Reed Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Willis,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WILLIS, Judge

Appellant challenges his conviction of ineligible person in possession of a firearm, arguing that the district court erred by refusing to give a jury instruction on the impeachment of a witness by a prior inconsistent statement and by admitting evidence that the firearm was loaded and ready to fire. Appellant also asserts that the jury's verdict is not supported by the evidence. Because the trial evidence did not support appellant's requested instruction, appellant has not sustained his burden of showing that the erroneous introduction of evidence affected his substantial rights, and the evidence was sufficient to sustain the verdict, we affirm.

FACTS

On July 30, 2010, about 11:30 p.m., St. Paul police officers McNeill and Wilson were in a marked squad car patrolling the Frogtown neighborhood of St. Paul. The officers were driving north on St. Albans when they noticed two men also walking north about one block from their squad car. As they watched, one man turned west on Blair; the officers' attention was drawn to the other man, who continued north on St. Albans but looked over his shoulder several times at the squad car. As the man walked, he reached into a pocket or his waistband; he appeared to be carrying a white cloth and manipulating it back and forth in his hands. When the officers were about 20-40 feet away, both of them saw the man discard something dark just as he passed a large boulevard tree. The officers stopped their squad car and asked the man, later identified as appellant Darvell Devontre Edwards, to come to the squad car and talk to them; as McNeill interviewed

Edwards, Wilson returned to the tree and found a small handgun. No one else was in the area. The officers arrested Edwards.

At trial, Wilson testified that the gun was in the same condition as when he found it, except that the magazine had been removed; an expert testified that the gun was loaded and in firing position. The state mentioned this fact in both its opening and closing statement. No identifiable DNA or fingerprints were found on the gun. Edwards testified at trial that it was not his gun and that he was using the white rag to wipe away sweat.

At the suppression hearing, Wilson testified as described above. At trial, Edwards's counsel asked Wilson on cross-examination, "Isn't it possible that he could have just thrown a piece of paper?" Wilson replied that he knew it was not paper because he heard something hit the ground. Edwards's counsel, in an attempt to impeach Wilson, questioned him closely about why he mentioned this for the first time at trial and to what lengths he would go to get a conviction, but Wilson maintained that he had not fabricated the answer and was only "here to testify to what I saw and heard that night." McNeill did not hear anything.

Because of Wilson's testimony, Edwards asked the court to instruct the jury on the effect of a prior inconsistent statement on a witness's credibility. The district court refused to do so, but gave an instruction on evaluating witness credibility that included a reference to impeachment. Edwards's counsel attacked Wilson's credibility in his closing statement. The jury found Edwards guilty of the offense of ineligible person in possession of a firearm. This appeal follows.

DECISION

I. The district court did not abuse its discretion by refusing to instruct the jury on impeachment of a witness by a prior inconsistent statement.

Edwards contends that the district court abused its discretion by refusing his request for the standard jury instruction on impeachment of a witness by evidence of a prior inconsistent statement. Edwards argues that Officer Wilson’s failure to testify at the suppression hearing about hearing a noise is a statement inconsistent with his cross-examination testimony that he heard an object hit the boulevard. A prior inconsistent statement, while usually not admissible as substantive evidence, can be used to impeach the credibility of a witness. *State v. McDonough*, 631 N.W.2d 373, 389 (Minn. 2001); see 10 *Minnesota Practice* CRIMJIG 3.15 (2006) (stating that a witness may be impeached with “[e]vidence of a statement by the witness on some prior occasion that is inconsistent with present testimony”).

We review the district court’s refusal to give a requested jury instruction for an abuse of discretion. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). A defendant is entitled to a jury instruction if trial evidence supports it, but the district court need not give a requested instruction if its substance is contained in other instructions. *Id.*

To qualify for use as impeachment, a prior sworn statement must be inconsistent with a witness’s trial testimony. *State v. Amos*, 658 N.W.2d 201, 204 (Minn. 2003). The statements need not be “diametrically opposed or logically incompatible.” *Id.* (quotation omitted). A witness’s feigned claim of memory loss is sufficient to satisfy the inconsistency requirement. *Id.* at 206. But a witness must be given an opportunity to

“admit, deny or explain the inconsistency in order for the statement to be admissible to impeach the witness.” *State v. Graham*, 764 N.W.2d 340, 354 (Minn. 2009) (quotation omitted).

Here, the district court refused to give the impeachment instruction because it concluded that there was no trial evidence to support it and that the instruction would confuse the jury. We agree. First, to be used as impeachment, the prior inconsistent statement must be a “sworn statement.” *Amos*, 658 N.W.2d at 204 (stating that to “qualify as nonhearsay, a prior sworn statement must be inconsistent with the declarant’s trial testimony”). Wilson’s failure to volunteer information is not the same as making an affirmative inconsistent statement under oath. Second, the statement at trial was given in response to a narrow question: wasn’t it possible that Edwards discarded a piece of paper? Wilson had not been asked this question previously; he had been asked only what he saw. Third, although Wilson stated he could not remember whether or not he had mentioned the sound he heard in his prior testimony, there is no allegation that he was feigning memory loss. *See id.* at 206.

Finally, although the district court refused to give the prior-inconsistent-statement impeachment instruction, Edwards’s counsel thoroughly explored Wilson’s credibility, both in cross-examination and in closing argument. The substance of the impeachment instruction was given in the district court’s charge about witness credibility; in addition to the standard language, the district court noted that the jury could consider “any impeachment of the witness’s testimony [] and any other factors that bear upon questions of believability and weight.” *See Yang*, 774 N.W.2d at 559 (concluding that district court

did not abuse its discretion by denying requested instruction when the substance of the requested instruction was included in charge to the jury). The district court did not abuse its discretion by refusing to give Edwards's requested instruction.

II. The admission of evidence that the firearm was loaded and in firing position did not affect Edwards's substantial rights.

Edwards asserts that the district court plainly erred when it admitted evidence that the handgun recovered by police was loaded and in firing position. Edwards argues that this evidence was irrelevant and prejudicial.

When a defendant fails to object to the admission of evidence, we review for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Error is plain if it is "clear or obvious," *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007), or if it "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Even if plain error occurred, a defendant is not entitled to relief unless the error affected his or her substantial rights. *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007). The defendant has the burden of persuading this court that substantial rights were affected. *Ramey*, 721 N.W.2d at 302. If the defendant establishes plain error affecting the defendant's substantial rights, the reviewing court considers whether the error should be addressed "to ensure fairness and the integrity of the judicial proceedings." *Goelz*, 743 N.W.2d at 258 (quotation omitted).

The ineligible-persons statute does not require proof that a weapon is loaded or in firing position. Minn. Stat. § 624.713, subd. 1(2) (2008). The statute defines the types of firearms included within the prohibition; the prohibited weapons are generally defined as

“designed” to perform in a certain way. Minn. Stat. § 624.714 (2008). Both the supreme court and this court have ruled that the definition of “firearm” as it applies to various offenses includes inoperable weapons. *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982) (Minn. Stat. § 609.67, possession of a shotgun); *LaMere v. State*, 278 N.W.2d 552, 556-57 (Minn. 1979) (Minn. Stat. § 609.225, aggravated assault with a dangerous weapon); *State v. Knaeble*, 652 N.W.2d 551, 555 (Minn. App. 2002) (Minn. Stat. § 609.165, subd. 1b(a), felon in possession), *review denied* (Minn. Jan. 21, 2003).

Because the state is not required to prove that a firearm is operable to show that an ineligible person possessed the firearm, the fact that it is loaded is irrelevant. *See* Minn. R. Evid. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”). Irrelevant evidence is generally not admissible.¹ Minn. R. Evid. 402.

Admission of this irrelevant testimony was plain error. But Edwards has not sustained his burden of showing that his substantial rights were affected. The issue at trial was possession of the weapon, not whether the weapon was loaded or operable; that description has no bearing on the question of possession. The district court correctly instructed the jury on the elements of the charge, including the definition of

¹ Evidence that the weapon was loaded is marginally significant because it proves that the weapon is a pistol designed to fire or eject solid projectiles, an element of the offense, but that fact was not contested at trial.

“possession.”² Edwards has not sustained his burden of showing that his substantial rights were affected by the challenged evidence.

III. The evidence was sufficient to sustain Edwards’s conviction.

Edwards argues that the evidence is insufficient to sustain his conviction. A reviewing court conducts a “painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in the light most favorable to the verdict, were sufficient to allow the jury to reach its verdict.” *Staunton v. State*, 784 N.W.2d 289, 297 (Minn. 2010) (quotation omitted). We will not reverse the jury’s verdict, assuming it paid due regard to the presumption of innocence and the need to prove guilt beyond a reasonable doubt, if the jury could reasonably have concluded, based on the record evidence, that the defendant was proved guilty of the charged offense. *Id.*

Here, the police officers testified that they saw Edwards walking for several minutes; he seemed nervous and glanced back repeatedly at their marked squad car; he appeared to reach into a pocket or his waistband and to manipulate something in a white rag; both officers testified that he threw an object at the base of a tree, and one officer testified that he heard a thud like a heavy object hitting the dirt; Edwards was the only person on the street at that moment; the officers immediately stopped him and searched the area where Edwards tossed something; and the officers found the weapon there. The

² We note that Edwards’s trial counsel moved for acquittal based on the theory that the state had failed to prove that the weapon was operable; clearly, Edwards’s counsel did not consider the testimony describing the weapon as loaded to be objectionable.

absence of DNA on the weapon was consistent with the inference that Edwards had wiped the weapon with the white rag before discarding the weapon.

The evidence here is a mixture of direct and circumstantial evidence. “Direct evidence” is “[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Black’s Law Dictionary* 636 (9th ed. 2009). “Circumstantial evidence” is “[e]vidence based on inference and not on personal knowledge or observation.” *Id.* Despite the officers’ direct observations of Edwards’s actions, they did not see the weapon in his hand and could not identify the object that he tossed at the moment they saw his action; by finding the gun in the location where they saw Edwards toss something, the officers inferred that Edwards had possessed and discarded the gun. To base a conviction on circumstantial evidence, the state must “exclude all *reasonable* inferences other than that of guilt.” *State v. Tscheu*, 758 N.W.2d 849, 857 (Minn. 2008). The jury is free to accept and reject conflicting circumstantial evidence. *Id.* at 858. The reviewing court need not reject a jury’s verdict based on circumstantial evidence as long as the evidence taken as a whole makes alternative theories seem unreasonable. *Id.* The jury was free to reject Edwards’s alternative theory, that he did not possess a gun and that the police coincidentally found a gun in the location where he discarded a heavy object. *See id.*

Edwards denied that he had thrown anything and denied that the weapon recovered was his. The jury is the exclusive judge of credibility and is free to reject a witness’s testimony. *State v. Colbert*, 716 N.W.2d 647, 653 (Minn. 2006). A reviewing court may assume that the jury “believed the state’s witnesses and disbelieved any

evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We can assume here that the jury rejected Edwards’s version of events, leaving no reasonable alternative theory based on the circumstantial evidence.

The evidence here is sufficient to sustain Edwards’s conviction.

Affirmed.