

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A06-2208**

State of Minnesota,  
Respondent,

vs.

Jarvis M. Thomas,  
Appellant.

**Filed February 12, 2008  
Affirmed  
Schellhas, Judge**

Ramsey County District Court  
File No. K1-06-151

Lori Swanson, Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101;  
and

Susan Gaertner, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney,  
50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

John Stuart, State Public Defender, Jessica Godes, Assistant Public Defender, State  
Public Defender's Office, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104  
(for appellant)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and  
Schellhas, Judge.

## **UNPUBLISHED OPINION**

**SCHELLHAS, Judge**

Appellant challenges his conviction and sentence for possession of a firearm by a felon, arguing that his possession was only fleeting, that the jury should have been instructed on the “fleeting possession” exception to the prohibition on felons possessing firearms, and that he was entitled to a downward durational departure. Because Minnesota has not recognized the “fleeting possession” exception and because the district court did not abuse its discretion in declining to depart from the guideline sentence, we affirm.

### **FACTS**

On January 5, 2005, appellant Jarvis Thomas was a front-seat passenger in a car approached by police officers. The officers told the driver to turn the car off and told both the driver and appellant to show their hands. Instead, the driver and appellant ducked down, and sped away in the car. Soon afterwards, when the car was involved in an accident, the driver and appellant left it and ran. Officers pursued and caught them.

One officer returned to the car, searched it, and found a handgun in the glove compartment. When questioned about the gun, appellant did not dispute his ineligibility to possess a firearm. He said that the driver handed the gun to him and told him to throw it out, but he decided to put it in the glove compartment. He was charged with possession of a firearm by an ineligible person, and a jury found him guilty. The district court imposed a sentence of 60 months, the presumptive mandatory minimum sentence.

Appellant challenges his conviction, arguing that the evidence was not sufficient to show that his possession of the gun was more than fleeting and that the jury should have been instructed on the fleeting-possession exception. He also challenges his sentence, arguing that his fleeting possession was a mitigating factor and that the district court erred in denying his motion for a downward durational departure.

## **D E C I S I O N**

### **1. Sufficiency of the Evidence**

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume 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). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

The jury found appellant guilty of possession of a firearm by an ineligible person. Appellant argues that the evidence was insufficient because it failed to show that his control of the gun was more than "fleeting." However, "a 'fleeting control' exception has not been recognized in Minnesota." *State v. Houston*, 654 N.W.2d 727, 734 (Minn. App. 2003) (acknowledging but declining to adopt suggestion that Minnesota adopt "fleeting control" exception), *review denied* (Minn. Mar. 26, 2003).

The jury heard appellant testify that the driver handed him the gun and told him to throw it out; that appellant made the decision to keep the gun in the car; and that he was the individual who put the gun in the glove compartment, where it remained in reach and accessible for use against the pursuing officers. Particularly when viewed in the light most favorable to the conviction, this evidence was sufficient to allow the jury to reach its verdict.

## **2. Jury Instruction**

The refusal to give a requested jury instruction is within the discretion of the district court and will not be reversed absent an abuse of that discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). The focus of the analysis is on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). An instruction is error if it materially misstates the law. *Id.* at 556.

The district court instructed the jury that the first element of possession of a firearm is “the defendant knowingly possessed a firearm or consciously exercised dominion and control over it” and that “it is not necessary that [the firearm has] been upon the defendant’s person . . . if it was in a place under his exclusive control to which other people did not normally have access.” Appellant proposed the following instruction to the district court:

You are instructed that if a person has possession of a weapon under certain circumstances which indicate that he did not have the intent to do the acts which constitute the offense of being an ineligible person in possession, that person would not be guilty of being in possession. Defendant would not be guilty of the offense charged if he lacked any criminal purpose in possessing the weapon and merely possessed the

weapon as the result of it being handed to him in a vehicle and had the weapon in his hand momentarily.

The district court declined to give this instruction and no other language was proposed by appellant. Appellant now acknowledges that the district court did not err in declining to give the specific instruction he requested but argues that the district court should have fashioned its own instruction on fleeting control.

The statute provides that those convicted of crimes of violence may not possess firearms; it does not permit or even mention “fleeting possession.” Minn. Stat. § 624.713, subd. 1(b) (2004). This court may not add to a statute “what the legislature purposely omits or inadvertently overlooks.” *Ullom v. Indep. Sch. Dist. No. 112*, 515 N.W.2d 615, 617 (Minn. App. 1994) (quotation omitted). The district court did not err in declining to give appellant’s instruction or in refusing to fashion its own instruction on fleeting control.

Moreover, the district court told appellant’s attorney he was free to argue the fleeting-possession concept in his closing statement. An analogous situation occurred in *Houston*, when an officer chasing a defendant saw the defendant “toss what appeared to be a gun over a fence and into the yard of a house.” 654 N.W.2d at 730. The defendant later testified that “his companion placed the gun in appellant’s jacket pocket as the officers were approaching” and that the defendant ran because he did not want police to find him with a gun. *Id.* at 731. The defendant “claimed at trial that because his possession of the gun was fleeting possession, he was entitled to a special jury instruction that he did not violate the law if he handled the gun for the sole purpose of disposal.” *Id.*

“The [district] court did not give a special instruction on fleeting control . . . .” *Id.* After noting that Minnesota has not recognized a “fleeting control” exception to the law prohibiting possession of guns by felons, *id.* at 734, this court “[did] not find the district court’s failure to give a specific ‘fleeting control’ instruction to be an abuse of discretion” because the defendant “had ample opportunity to argue to the jury that he did not knowingly possess the firearm.” *Id.* at 735. The district court here followed *Houston* by refusing to instruct on an exception that Minnesota has not recognized, but permitting appellant to argue that theory to the jury. There was no abuse of discretion.

### **3. Sentencing**

The district court denied appellant’s motion for a downward durational departure and imposed the presumptive sentence. Only in a “rare” case will a reviewing court reverse a district court’s imposition of the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

The minimum sentence for violation of the statute prohibiting convicted felons from possessing firearms is five years, the sentence received by appellant. Minn. Stat. § 609.11, subd. 5(b) (2004). Appellant argues that the fleeting nature of his possession reflects only a passive role by him and that his passive role was a substantial and compelling mitigating factor upon which the district court should have departed downward durationally. *See* Minn. Sent. Guidelines II.D.2.a.(2) (providing that playing only a passive role is a mitigating factor). However, appellant had complete, if brief, control of the gun; he chose to put it in the glove compartment rather than throw it out the

window. The district court did not err in imposing the mandatory minimum sentence; this is not the “rare” case in which a presumptive sentence should be reversed.

**Affirmed.**