STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1026

State of Minnesota,
Respondent,

vs.

Glenn Leo Mangen,
Appellant.

Filed August 26, 2008
Affirmed
Peterson, Judge

Brown County District Court
File No. CR-06-805

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James R. Olson, Brown County Attorney, 519 Center Street, P.O. Box 428, New Ulm, MN 56073 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Kalitowski, Judge; and Collins, Judge.*

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

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this direct appeal from his conviction of first-degree controlled-substance crime, appellant argues that he is entitled to a new trial because the district court erred in denying his motion to preclude any reference to firearms found in his home during the execution of a search warrant. We affirm.

FACTS

On October 2, 2006, investigators with the Brown/Lyon/Redwood County Drug Task Force executed a search warrant for appellant Glenn Leo Mangen's farm home. In the kitchen, an investigator found baggies, straws, an ashtray containing a white powder, and "various paraphernalia that's used for ingesting cocaine and cutting up cocaine and measuring cocaine," including a spoon, a knife, a razor blade, and a mirror with a white powder on it. In a box in a kitchen cabinet, the investigator found a baggie of cocaine and carbon copies of checks bearing appellant's name. There were also three bindles of cocaine on the kitchen table, which combined for a total weight of 2.6 grams. A wallet and some money were also seized from the kitchen. In a china cabinet in the computer room, an investigator found a large amount of cash and a plastic bag of cocaine. The combined weight of the cocaine found in the computer room and in the baggie in the kitchen cabinet was 162 grams. An experienced narcotics investigator testified that the cocaine had a wholesale value of $7,000 to $8,000 and a retail value of $16,000. In the computer room, investigators also discovered a gun case and several guns, including "a number of rifles," "some pistols," and a loaded handgun. Photos of the firearms were

introduced at trial. Officers also seized a triple-beam scale with a white powdered substance on it.

While the search was being conducted, a BCA agent interviewed appellant, who said that there was cocaine on the kitchen table, but that he did not know of any other cocaine in the residence. When confronted with information that investigators had located cocaine in other areas of the house, appellant told the agent that somebody must have left it there.

Appellant was charged with first-degree controlled-substance crime for possessing "one or more mixtures of a total weight of twenty-five grams or more containing cocaine." Appellant requested that the jury also be instructed on the lesser included offense of third-degree controlled-substance crime for participating in the sale or attempted sale of cocaine. The jury was also instructed on fifth-degree controlled-substance crime for possession of any amount of cocaine.

Appellant made a motion to preclude any reference to weapons, guns, firearms, and ammunition seized or photographed during the search of his home as irrelevant and unduly prejudicial. The state argued that "there is a connection, a nexus, with a loaded firearm, and that is protection, knowledge of drugs. This was a significant amount of drugs."[1] The district court concluded that the evidence was relevant because "it would

[1] Although a mandatory minimum sentence applies when firearms are located in the vicinity of narcotics, the presumptive sentence for appellant on the two most-serious charges exceeded the mandatory minimum, and the state elected not to ask that the minimum be applied to the fifth-degree charge. *See* Minn. Stat. § 609.11, subds. 5(a), 9 (2006) (mandatory minimum sentences).

tend, to some extent, to show state of mind with respect to the existence of the cocaine," and that the risk of unfair prejudice was slight. The court reasoned:

> [I]t's somewhat relevant and it's not very prejudicial, and I don't think that the prejudicial effect of the weapons, if any there is, even outweighs the probative value, much less outweighs it substantially as the rule would require in order to preclude it from being admitted into evidence.

The district court denied appellant's motion, but offered to give a cautionary instruction, informing the jury that the firearms "weren't illegal and it wasn't illegal to have them," and that their only evidentiary value was in considering appellant's state of mind. Appellant declined the cautionary instruction.

Appellant called Ann Hillsheim to testify on his behalf. She purchases groceries for appellant once or twice a week and testified that appellant's home is not very secure, because the door is generally open and his friends come and go. She also testified that appellant had reconditioning done on his home and that at times there were 15 to 20 people present, some of whom she had seen in the kitchen and the computer room.

Appellant testified that he used the triple-beam scale in reconstructing motorcycle engines and that his daughter used it for science projects. He admitted that he had used it to weigh cocaine "[s]ome years ago." Appellant testified that he was shown two bags of cocaine, but he had not been aware that they were in his house. He was aware of the bindles on the kitchen table and testified that somebody had called and asked if she could leave a package for a girlfriend to pick up, and he said she could leave it on the table. Appellant admitted to possessing some of the paraphernalia found in his house, including straws, the ashtray, and the spoon, knife, and razor blade found in the ashtray.

Appellant was found guilty on all three charges, convicted of first-degree controlled-substance crime, and sentenced to 86 months. This appeal followed.

D E C I S I O N

I.

As a general rule, all relevant evidence is admissible, but evidence which is not relevant is not admissible. Minn. R. Evid. 402. "'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." Minn. R. Evid. 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. "Unfair prejudice under rule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). "A weapon is admissible in a criminal case if it has some relevance to the issues in the case, but is not admissible if its only purpose is to create suspicion in the minds of the jurors that because a defendant owns a gun he is likely to commit crimes." *State v. Daniels*, 361 N.W.2d 819, 827 (Minn. 1985).

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

The primary issue at trial was whether appellant possessed the 162 grams of cocaine found in the china cabinet in the computer room and the kitchen cabinet. For the first-degree charge, the state only needed to prove that appellant possessed 25 grams or more of cocaine. *See* Minn. Stat. § 152.021, subd. 2(1) (2006) (defining first-degree controlled-substance crime as the unlawful possession of "one or more mixtures of a total weight of 25 grams or more containing cocaine"). It was not necessary to prove that appellant intended to sell or otherwise distribute the cocaine. *See id.*, subds. 1-2 (2006) (defining sale and possession crimes). However, the jury could have inferred from the quantity and value of the cocaine found that the person or persons to whom it belonged intended to distribute it. *See United States v. Schubel*, 912 F.2d 952, 956 (8th Cir. 1990) ("Intent to distribute may be inferred solely from the possession of large quantities of narcotics."). Because the jury could have inferred that the cocaine was intended for distribution, any evidence that appellant was involved in the distribution of cocaine is relevant to the question of whether appellant possessed the cocaine found in his home. For the third-degree charge, the state needed to prove that appellant sold or aided and abetted in the sale of cocaine.[2] *See* Minn. Stat. §§ 152.023, subd. 1(1) (defining third-degree controlled-substance crime to include the sale of any amount of narcotics), 609.05, subd. 1 (2006) (aiding-and-abetting liability). Appellant's admitted ownership and possession of firearms found in his home in the same room as a large quantity of

[2] The trial transcript states that appellant "requested a lesser-included third-degree charge under 152.023, subd. 13." Minn. Stat. § 152.023 (2006) does not contain a subdivision 13. Based on appellant's argument regarding the 2.6 grams of cocaine found on his kitchen table, we understand his request to be for an instruction under Minn. Stat. § 152.023, subd. 1(1).

cocaine and cash makes it more probable that he was involved in the distribution or sale of cocaine. *See State v. Love*, 301 Minn. 484, 485, 221 N.W.2d 131, 132 (1974) ("[I]t may reasonably be inferred that an armed possessor of drugs has something more in mind than mere personal use." (quotation omitted)); *see also United States v. Hammer*, 3 F.3d 266, 270 (8th Cir. 1993) ("Guns are typical tools of the drug trade, used to protect merchandise and money."); *Schubel*, 912 F.2d at 956 ("The presence of firearms, generally considered a tool of the trade for drug dealers, is also evidence of intent to distribute.") Because the evidence of the firearms found in the same room as a large quantity of cocaine and cash makes it more probable that appellant knowingly possessed all of the cocaine found in his home and participated in the sale of the cocaine, the district court did not abuse its discretion in concluding that the evidence was relevant.

Appellant also argues that any probative value of the evidence was substantially outweighed by the potential for prejudice and the danger that the jury would misuse the evidence. As we have already stated, the evidence had at least some probative value regarding appellant's possession of the cocaine. Appellant testified that he did not know that the cocaine was in his house and that someone else must have put it there. There was also testimony from appellant and a defense witness that would support an inference that someone could have placed the cocaine in appellant's home without appellant's knowledge.

The district court concluded that the firearm evidence had little potential for unfair prejudice. In reference to the firearms found in the house, the state argued:

> And then we have the guns. Now, the hunting rifles and things like that, typical for a farm, typical. But it's the loaded semiautomatic pistol, something that can be concealed, . . . used inside, not generally used on a farm. You don't shoot animals with a pistol; you shoot at animals with a rifle, and it's located right here in the room with the drugs.

The state did not argue that appellant's possession of firearms made it more likely that he committed crimes, but only argued that the presence of the loaded pistol is evidence that appellant knowingly possessed the cocaine. Appellant declined to have the district court give a limiting instruction to the jury and argued in his closing statement that there was no evidence that the firearms were illegally possessed or used, that he was forthright with the officers about the presence and location of the firearms and the fact that the pistol was loaded, and that "those guns are not relevant to this case. There's no reason that they have any evidentiary value whatsoever." Appellant has not shown that the district court abused its discretion in determining that the evidence had little to no potential for unfair prejudice or that any danger of unfair prejudice did not substantially outweigh the probative value.

II.

In his pro se supplemental brief, appellant expresses concern that "a good record" be made so that he can participate in the "1/2 time drug law provision" and cites Minn. Stat. § 244.055 (2006). Appellant appears concerned that the department of corrections could determine that he is ineligible for this program because he illegally possessed firearms or the firearms were an integral part of the offense for which he was convicted. Appellant appended to his brief a notice of filing of order and two pages from an order

for district court file CV-06-955, which appears to be a civil-forfeiture case related to some of the property seized from appellant's home, and a letter from the district court regarding his conviction. None of these documents are part of the record on appeal. *See* Minn. R. Crim. P. 28.02, subd. 8 ("The record on appeal shall consist of the papers filed in the [district] court, the offered exhibits, and the transcript of the proceedings, if any.") Furthermore, appellant does not allege that the district court erred or provide any authority that a new trial would be the proper remedy for such an error. Appellant has failed to raise even a colorable argument that he is entitled to relief on this basis.

Affirmed.