STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1667

State of Minnesota,
Respondent,

vs.

Avis Koko Wright,
Appellant.

Filed December 23, 2008
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 06048786

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Shumaker, Judge.

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

PETERSON, Judge

In this appeal from a conviction of being an ineligible person in possession of a firearm, appellant argues that the district court erred by (1) materially misstating the law when it instructed the jury on constructive possession and (2) informing the jury that appellant had been convicted of a crime of violence despite appellant's stipulation to that element. We affirm.

FACTS

Based on suspicious driving behavior in an area where there had recently been several shootings, Ramsey County Sheriff's Deputy William Bukoskey and Golden Valley Police Officer Robert Zarrett stopped a car and identified the driver as appellant Avis Koko Wright. Appellant was alone in the front seat, and two passengers, Joweley Koon and J.H., were in the back seat. Because appellant had an instructional permit, which requires that a licensed driver be in the front seat, Zarrett asked appellant to exit the car for questioning.

After having the passengers get out of the car, Bukoskey used a flashlight to visually inspect the car for weapons. On the floor in the back seat, sticking out from underneath the driver's seat, Bukoskey saw what appeared to be the wooden handle and barrel of a handgun. By moving the gun slightly, Bukoskey was able to identify it as a .22-caliber semiautomatic handgun. The gun had a round of ammunition in the chamber and a magazine with bullets in it.

Appellant, Koon, and J.H. were arrested and brought to the Brooklyn Park Police Department for questioning. Brooklyn Park Police Officer Sara Villa responded to a call for backup and drove appellant and Koon in her squad car. In the squad car, "[Appellant] said ma'am, ma'am, I want to tell you that it was my gun, and I am glad that you found me because I was going to commit a murder."

Zarrett and another officer interviewed appellant following his arrest. Appellant told the officers that the gun belonged to him and that when the officers stopped the car, he removed the gun from the driver's door and handed it to Koon. While making this statement, appellant moved his arms in a manner consistent with removing the gun from the driver's door and passing it to the back seat. Appellant said that he had borrowed the gun from a friend for protection because someone had recently been shooting at him. He described the gun as a long-range .22 with a wood handle, a bullet in the chamber, and a loaded magazine.

Appellant was charged with possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(b) (2006), and the case was tried to a jury. At trial, the parties stipulated that appellant was prohibited by law from possessing a firearm and that no fingerprints were found on the gun.

Appellant testified on his own behalf at trial as follows: The car belonged to his cousin, but his cousin's girlfriend was using it and had been driving it until shortly before the stop, when she got out of the car and let appellant drive. The suspicious driving behavior occurred because someone had frightened appellant while he and the other occupants were waiting for the girlfriend to return. Appellant did not know that there

was a gun in the car. When appellant and the two passengers were detained at the curb while the car was being searched, Koon admitted that the gun belonged to him. Appellant agreed to say that the gun belonged to him because Koon was his friend and appellant wanted to keep Koon out of trouble. Koon told appellant what the gun looked like and what to tell the officers.

Appellant also testified that he had previously been convicted of a felony, specifically second-degree assault. He testified that he did not know that he would be charged with a crime for possessing a gun but rather assumed that his probation would be revoked and he would serve the remainder of his sentence for the assault conviction.

The jury found appellant guilty as charged, and the district court sentenced appellant to an executed term of 60 months in prison. This appeal followed.

D E C I S I O N

Appellant did not object at trial to the jury instructions that he challenges on appeal. An appellate court has discretion to review a jury instruction despite the failure to object at trial if the instruction is plain error that affects substantial rights. *State v. Goodloe*, 718 N.W.2d 413, 420 (Minn. 2006). Demonstrating plain error involves a three-part test: (1) there must be error; (2) that is plain; and (3) the error must affect the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If those three prongs are met, an appellate court may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002).

I.

Appellant argues that the district court erred by instructing the jury that possession could be established by showing that appellant exercised dominion or control over the gun.

Proof of constructive possession of a firearm will support a conviction under Minn. Stat. § 624.713, subd. 1(b). *State v. Porter*, 674 N.W.2d 424, 429 (Minn. App. 2004). To prove constructive possession of a firearm, the state must prove that

> (1) the police found it in a place under the defendant's exclusive control to which other people did not normally have access; or (2) if the police found it in a place to which others had access, that there is a strong probability, inferable from the evidence, that the defendant was, at the time, consciously exercising dominion *and* control over it.

Id. (emphasis added) (citing *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975)). A jury instruction that "materially misstates the law" is erroneous. *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

The gun was found in a place to which others had access, so the state was required to show a strong probability that appellant was "consciously exercising dominion and control over it." In closing instructions, the district court stated that an element of possession of a firearm is that appellant "knowingly possessed a firearm, or consciously exercised dominion *or* control over it." (Emphasis added.) Citing *Porter*, appellant argues that the district court's use of the disjunctive "or" was a material misstatement of the law.

In *Porter*, this court reversed a conviction for possession of a firearm and remanded for a new trial when the district court instructed the jury that the defendant possessed the firearm if he exercised "authority, dominion or control" over it. *Porter*, 674 N.W.2d at 428-29 (emphasis omitted). In *Porter*, the defendant was charged with both possession of a controlled substance and possession of a firearm. *Id.* at 426. The same standard for constructive possession applied to both charges, but the court instructed the jury using the conjunctive "and" for the controlled-substance charge and the disjunctive "or" for the firearm charge. *Id.* at 429. The jury found him guilty of the firearm offense but not guilty of the controlled-substance offense. *Id.* at 426.

The *Porter* court concluded that the instruction on the firearm charge materially misstated the law. The court explained:

> By using the disjunctive "or" in the firearm-possession instruction, the court described a standard for finding constructive possession different from that required by *Florine* . . . Whether or not there is a substantive difference between "dominion" and "control," the instructions suggested to the jury that the standard for showing constructive possession of a firearm is lower than the standard for showing constructive possession of powder cocaine.

Id. at 429.

The concern in *Porter*, two different standards for constructive possession, is not present in this case. The dictionary defines dominion as "control or the exercise of control." *The American Heritage Dictionary of the English Language* 550 (3d ed.1992). Because dominion is synonymous with control, it is not apparent that the district court erred. *See State v. Olson*, 326 N.W.2d 661, 663 (Minn. 1982) (describing state's burden

of proof as showing that "defendant consciously exercised his dominion *or* control over [firearm]" (emphasis added)). Because no error is apparent, appellant has failed to meet his burden of showing plain error.[1]

II.

Appellant argues that the district court erred by instructing the jury that an element of the current offense is that appellant had previously been convicted of a crime of violence when appellant stipulated that he was a person "prohibited by law from possessing a firearm." The district court instructed the jury:

> The Statutes of Minnesota provide that whoever knowingly possesses a firearm and has been convicted of a crime of violence, or adjudicated delinquent as an Extended Jurisdiction Juvenile in this state, for committing a crime of violence, is guilty of a crime.
>
> The elements of possession of a firearm are . . . Second, [appellant] has been convicted for committing a crime of violence or adjudicated delinquent as an Extended Jurisdiction Juvenile in this state for committing a crime of violence. Assault in the Second Degree is a crime of violence. The parties agree that [appellant] was convicted for committing a crime of violence.

The state concedes that this instruction was error under *State v. Davidson*, 351 N.W.2d 8, 11-12 (Minn. 1984) (stating "that generally in a prosecution for being a felon

[1] Appellant's brief cites an unpublished opinion. "Unpublished opinions of the court of appeals are not precedential." Minn. Stat. § 480A.08, subd. 3(c) (2006); *see also Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) ("stress[ing] that unpublished opinions of the court of appeals are not precedential" and noting that "[t]he danger of miscitation [of unpublished opinions] is great because unpublished decisions rarely contain a full recitation of the facts"). Moreover, the unpublished opinion cited by appellant is distinguishable from this case.

in possession of a weapon the defendant should be permitted to remove the issue of whether he is a convicted felon by stipulating to that fact" and holding that the district court erred by denying defendant's motion to instruct the jury that he had stipulated that he was not entitled to possess a pistol under Minnesota law and that the jury should direct its attention to the element of possession). An obvious error is plain. *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002).

Thus, the issue is whether the error affected appellant's substantial rights. An "error affects substantial rights where there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotation omitted). In *Davidson*, the supreme court concluded that the error was not prejudicial even though the defendant had opted not to testify. 351 N.W.2d at 11-12. Here, appellant testified that he had been convicted of a felony, second-degree assault. Second-degree assault, by its nature, is a crime of violence. The district court's instruction, thus, did not provide the jury with any information that was not in evidence.

Also, the evidence against appellant was very strong. His initial admissions to police that the gun belonged to him were corroborated by other evidence. First, in his statement to police, appellant gave a detailed description of the gun that precisely matched the gun found in the car. Second, appellant told the police that he had obtained the gun for protection because he had recently been shot at several times. Earlier, appellant had reported the attempted shootings to his probation officer. Third, appellant

stated to police that he had the gun in the front seat and then handed it to Koon in the back seat. This statement was consistent with Koon's testimony.

Considering that the district court's instruction provided the jury with no information not already in evidence and that the evidence against appellant was very strong, we conclude that there is no reasonable likelihood that the instruction had a significant effect on the jury's verdict.

Appellant suggests that during closing argument, the prosecutor improperly referred to appellant's prior conviction for a crime of violence as substantive evidence. Except for one reference to the second element of illegal firearm possession, the references to the prior conviction addressed the credibility of appellant's theory that he was taking the blame for Koon. We find no authority showing that the argument was improper.

Affirmed.