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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2318**

State of Minnesota,
Respondent,

vs.

Lester Rockett,
Appellant.

**Filed April 7, 2009
Affirmed
Ross, Judge**

Ramsey County District Court
File No. K8-06-1796

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

Susan E. Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102-1657 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Randall, Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

Lester Rockett appeals from his conviction of and sentence for possession of a firearm as a felon. Rockett was the sole back-seat passenger in a car from which police seized a 25-caliber handgun from an area of the trunk within reach of a passway from the back seat. Rockett argues that the evidence was insufficient to prove that he possessed the gun. He also argues that we should remand this case for resentencing because the district court erroneously failed to depart downward from the 60-month mandatory-minimum prison sentence. Because the evidence supports the district court's guilty verdict, and because the district court did not abuse its discretion by declining to depart downward when sentencing Rockett, we affirm.

FACTS

Officers Timothy Bohn and Joshua Moore were driving north on Lexington Avenue in St. Paul in a marked squad car in 2006 when they noticed a gold sedan in the lane beside them. Officer Bohn thought that the three males in the car seemed nervous about the squad car; they sat rigid in their seats and appeared to look at the squad car peripherally. When the squad car slowed, the gold car also slowed. It stayed deliberately behind the squad car, despite being in the open lane beside it. The gold car suddenly turned right onto Minnehaha Avenue, but it failed to signal appropriately. The officers decided to stop the car for this traffic violation, so Officer Moore activated the squad car's emergency lights and followed it onto Minnehaha Avenue.

After the lights and siren were activated, Officer Bohn observed the rear-seat passenger—later identified as Lester Rockett—turn his body and look out the rear window at the officers. Rockett sat directly behind the driver, and he leaned to the right in a manner that caused his shoulder and head to disappear from Officer Bohn’s view. Officer Bohn testified later that Rockett appeared to lean forward, causing his whole body to disappear from view, and then he appeared upright again. Officer Moore also testified that he saw Rockett move toward the car’s passenger side. The car slowed and pulled to the side of the road, but it continued without stopping for about one block. Rockett’s movements and the length of time it took the car to stop aroused Officer Bohn’s suspicion because, in his experience, those circumstances indicate an attempt to hide contraband.

Once the car stopped, the officers approached on foot and observed that Rockett “appeared to be shoving something between the seat and the seat back in the back seat.” Officer Bohn told Rockett to place his hands on the back of the front seat where Bohn could see them. Rockett initially complied, but then moved his hands again. Officer Bohn drew his gun and ordered Rockett to keep his hands on the seat. Officer Moore determined that the driver did not have a driver’s license and noticed that he was wearing a bulletproof vest. Officer Moore directed the driver out of the car and into the back seat of the squad car.

Officer Bohn then radioed for additional officers to assist because “the presence of the [bulletproof] vest, the movement[s], [and] the noncompliance of the other passengers all made [him] extremely nervous.” Officer Bohn explained that in his nine-year police

career, he had “only encountered a couple of people . . . in possession of a bulletproof vest, and every time [he] encountered it, there’s always been a gun along with the vest.” After other officers arrived, Rockett and the other passenger were searched for weapons and placed in the back of separate squad cars. The search of Rockett yielded a pair of latex gloves.

Police arrested Rockett and the front-seat passenger. Each was subject of an outstanding arrest warrant. Police learned that the car was a rental vehicle that had been rented by someone else, and they decided to tow it. Officer Bohn conducted an inventory search. Among other things, the search yielded a 25-caliber handgun found on the floor of the trunk. Officer Bohn found the gun directly behind the back seat’s fold-down armrest that allows passway access to the trunk. The passway was immediately to the right of where Rockett had been sitting when he turned and twice positioned himself out of sight. Rockett is ineligible to possess a firearm because of prior felony convictions.

The state charged Rockett with possession of a firearm by an ineligible person. Rockett waived his right to a jury trial and the district court held a bench trial. The district court found Rockett guilty and sentenced him to the presumptive sentence of 60 months in prison. This appeal follows.

DECISION

Minnesota Statutes section 624.713 (2006) prohibits certain persons from possessing firearms. Rockett concedes that he is one of them because of his prior felonies, but he challenges his conviction by contending that the evidence presented to

the district court was insufficient to prove that he actually or constructively possessed the gun found in the trunk. He also challenges the validity of his sentence.

I

Rockett specifically contends that the district court could not have reasonably concluded that he possessed the firearm because it erroneously “relied solely on [his] proximity to the firearm in finding him guilty.” He also argues that the district court’s findings ignore the relevant caselaw because “appellate courts have consistently found that the driver or owner of a car [rather than a passenger] has actual or constructive possession of contraband that is found in the car’s trunk.” He argues finally that no physical evidence shows that he possessed the gun and that the circumstantial evidence does not form a complete chain linking him to it. None of Rockett’s arguments supports reversal.

This court reviews a claim of insufficient evidence to determine whether a factfinder could reasonably conclude that the defendant is guilty of the charged offense beyond a reasonable doubt based on the facts in the record and all legitimate inferences that can be drawn in favor of the conviction. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999); *see also State v. Cox*, 278 N.W.2d 62, 65 (Minn. 1979) (providing that same standard of review applies regardless of whether factfinder is judge or jury). The reviewing court also assumes that the factfinder believed the state’s witnesses and rejected any contrary evidence. *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007).

That Rockett’s conviction rests on circumstantial evidence is relevant but not dispositive in our review. “[A] conviction based entirely on circumstantial evidence

merits stricter scrutiny than convictions based in part on direct evidence.” *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). But “circumstantial evidence is entitled to the same weight as direct evidence.” *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The factfinder is in the best position to balance circumstantial evidence, and its verdict is entitled to our deference. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

The appeal hinges on whether the circumstantial evidence establishes that Rockett possessed the gun. Possession can be actual or constructive. *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). Actual possession of a handgun would require proof that a defendant physically had the gun on his person. *Id.* Because the district court found only that Rockett constructively possessed the gun, we review his conviction only on a constructive-possession theory. The state can prove constructive possession in two ways, by showing “that the police found the [item] in a place under [the] defendant’s exclusive control to which other people did not normally have access,” or by showing that although police discovered it where others had access, a strong inferable probability exists “that [the] defendant was . . . consciously exercising dominion and control over [the item].” *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). Proximity is important when evaluating constructive possession. *State v. Cusick*, 387 N.W.2d 179, 181 (Minn. 1986). And constructive possession may be shared; it need not be exclusive. *Smith*, 619 N.W.2d at 770.

The evidence supports the district court’s finding that Rockett at least constructively possessed the gun, and we note that some evidence also implies actual possession. The officers testified that they observed Rockett lean to his right after they

initiated the traffic stop and as they followed the car. The driver seemed to intentionally delay contact with the officers by delaying his stop. Officer Bohn testified that he observed Rockett momentarily disappear from view during this time, and Rockett possessed a pair of latex gloves commonly known to prevent the transfer of fingerprints. Rockett sat in the back seat immediately beside the passway to the trunk. Officer Bohn discovered the gun on the trunk's floor, directly behind the passway and within reach of the back seat passenger. Rockett was the only person in the back seat within reach of the passway. A reasonable factfinder may infer from this evidence that Rockett either placed the gun in the trunk to be within his reach or that he had exclusive control over the area of the trunk where the gun rested when the police stopped the car. Although the district court chose not to go so far, this evidence also may have supported a finding that Rockett actually possessed the gun during the period that the driver delayed the stop.

Rockett contends that his testimony at trial disproves his possession. Rockett testified that he leaned to the right only once and that he did so to shove the gloves between the seats. He testified that if he had actually leaned to the right, he could not have opened the armrest and accessed the trunk. He maintained that he never knew about or possessed the gun. The district court was in the best position to weigh the conflicting testimony and had sufficient bases to determine that Rockett's testimony was incredible. Rockett testified that he and the car's other occupants had been drinking beer in the car and that there was a 24-pack of beer with a cooler full of ice in the trunk. He also said that they had been drinking gin and that there was a brown bag with an open gin bottle in the car. The inventory search did not reveal any alcohol or cooler.

Rockett insists that “cases in which the appellate courts have affirmed a passenger’s conviction for illegal possession of a firearm on the doctrine of constructive possession have a single common denominator” that is absent here. Specifically, he contends that in each of those cases, “the firearm is found under the seat where the passenger was sitting, creating a strong inference that the passenger physically possessed the firearm at one time and did not abandon his possessory interest in [it].” Constructive possession does not require that the gun be found under the defendant’s seat. And the same rationale that supports the finding of constructive possession under a passenger’s seat and within his reach supports the district court’s finding of constructive possession here. *See, e.g., State v. Olson*, 326 N.W.2d 661, 663 (Minn. 1982) (holding that defendant constructively possessed the gun based on conscious exercise of dominion and control of gun within reach of where he had been sitting); *State v. Willis*, 320 N.W.2d 726, 727–29 (Minn. 1982) (holding defendant constructively possessed firearm found in car in which he was one of two passengers because the evidence established that the defendant consciously exercised dominion and control over it). Because police found the gun immediately inside the trunk where only Rockett could reach and because Rockett had exclusive access to the trunk when police stopped the car, the district court reasonably concluded that Rockett constructively possessed the gun without needing to consider whether Rockett’s movements and other facts also prove his actual possession.

Given the district court’s reasonable factual determinations and Rockett’s admission to being a person ineligible to possess a firearm, we conclude that the evidence supports Rockett’s conviction.

II

Rockett next argues that his sentence must be vacated because the district court erred by failing to exercise its discretion to depart downward from the 60-month mandatory minimum prison sentence. Rockett did not argue for a downward departure to the district court. We generally will not consider an issue raised for the first time on appeal, but we may consider the issue if “the interests of justice require [its] consideration and addressing [it] would not work an unfair surprise on a party.” *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). We review a district court’s decision not to depart from a presumptive sentence for an abuse of discretion, and it is a “rare” case in which the district court’s refusal to depart will warrant reversal. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

The Minnesota Statutes provide a 60-month mandatory minimum sentence for a felon found guilty of possessing a firearm. Minn. Stat. § 609.11, subd. 5(b) (2006). The word “mandatory” is misleading because the statute also provides that “the court may sentence the defendant without regard to the mandatory minimum sentence[] . . . if the court finds substantial and compelling reasons to do so.” *Id.*, subd. 8(a) (2006). But a district court lacks discretion to depart from the mandatory minimum sentence “if the defendant previously has been convicted of an offense listed in subdivision 9” and “used or possessed a firearm or other dangerous weapon” in committing the prior subdivision-9 offense. *Id.*, subd. 8(b) (2006). Although Rockett has committed several of the offenses listed in subdivision 9, including simple robbery, attempted second-degree burglary, and possession of marijuana, he argues that the district court has discretion to depart from the

mandatory minimum sentence because there is no evidence that he committed those crimes with a firearm or other dangerous weapon.

The district court may depart from the 60-month sentence only if it finds “substantial and compelling reasons” to do so. *Id.*, subd. 8(a). That a district court may depart from the mandatory minimum sentence does not mean that it must. Rockett did not request a downward departure from the 60-month sentence, let alone provide the district court with any substantial and compelling reason to depart. Because Rockett failed to request a downward departure or to present any basis for one, the district court did not abuse its discretion by declining to depart downward from the 60-month prison sentence.

Affirmed.