STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0594

State of Minnesota,
Respondent,

vs.

LaSamuel Richardson III,
Appellant.

Filed July 21, 2009
Affirmed
Minge, Judge

Clay County District Court
File No. 14-CR-07-1460

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Brian J. Melton, Clay County Attorney, Clay County Courthouse, 807 North 11th Street, P.O. Box 280, Moorhead, MN 56560 (for respondent)

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

Considered and decided by Minge, Presiding Judge; Worke, 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

MINGE, Judge

Appellant challenges his firearm-possession convictions under Minn. Stat. § 624.713, subd. 1(b) (2006) and Minn. Stat. § 624.714, subd. 1a (2006), arguing (1) there was insufficient evidence that he possessed a gun; (2) the jury was shown a video which contained improper gang evidence; and (3) a witness improperly testified that he knew appellant because he had been "locked up" with him. We affirm.

FACTS

On September 2, 2007, appellant LaSamuel Richardson III borrowed his neighbor's car, purportedly to run a quick errand. Rather than returning the car, appellant went out with three friends for the evening to cruise around and "drink and party." At 10:30 p.m., a Moorhead police officer saw appellant driving with his headlights off, and the officer stopped appellant. As the officer walked toward the car, appellant told his passengers that they were going to take off, and he accelerated quickly. Appellant pulled into a nearby parking lot, jumped out of the moving car, and ran. The passengers stayed in the car. One passenger apparently tried to step on the brake but instead depressed the accelerator pedal, and the car crashed into a hardware store. Police found a baggie of marijuana and a pistol with one round in the chamber in the car's glove compartment. Appellant, who was soon apprehended, had $282 in cash.

At trial, appellant's passengers testified differently with regard to the marijuana and gun. One passenger testified that, while driving around, she saw the marijuana and gun and asked appellant where the gun came from, and that appellant said that he did not

know and directed her to return it to the glove compartment. Another passenger testified that, just before the police stopped the car, appellant threw the marijuana at him and asked if he knew of anyone who wanted to buy any, but the passenger declined and threw it back. The third passenger claimed that she did not learn about the gun or marijuana until after the traffic stop.

Police traced the gun to John Cukurt, an acquaintance of appellant and a former roommate of one of the passengers. One passenger identified the gun as Cukurt's gun and testified that, before their joyride began, appellant picked up items that Cukurt had left at the passenger's home.

Appellant was convicted of several charges, including the two related to the gun. This appeal follows.

D E C I S I O N

I.

The first issue is whether there is sufficient evidence that appellant possessed the gun. In claims of insufficient evidence, our review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, [is] sufficient to allow the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that the jury believed the evidence supporting the conviction and disbelieved any contrary evidence, especially when the resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). "We 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 that [a] defendant was guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted). We examine the "facts in the record and the legitimate inferences that can be drawn from those facts" to determine if a jury could have reasonably found the defendant guilty. *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). Generally, a jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to deference. *State v. Morris*, 606 N.W.2d 430, 437 (Minn. 2000).

Appellant's two gun-related convictions required the state to prove that he possessed the gun. *See* Minn. Stat. § 624.713, subd. 1(b) (prohibiting possession of a pistol by persons convicted of a crime of violence); Minn. Stat. § 624.714, subd. 1a (prohibiting carrying, holding, or possessing a pistol in a vehicle or on one's person without a permit).[1] The state may establish either actual or constructive possession. *State v. Porter*, 674 N.W.2d 424, 427 (Minn. 2004). Because there was no evidence that appellant had actual possession of the firearm, the state's burden was to prove constructive possession.

> To prove constructive possession, the state must prove that: (1) the police found the item 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. (citing *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975)).

[1] The state had a lesser evidentiary burden under section 624.714; thus, if its burden under section 624.713 is met, the burden for both convictions was met.

The state presented evidence that appellant (1) loaned and had control over the car; (2) knew the gun was in the car and continued to drive around; (3) knew Cukurt, the gun's owner, and had arranged to pick up his belongings; and (4) fled from police by himself and in an exceptionally dangerous way, implying consciousness of guilt. Neither party presented evidence demonstrating a link between Cukurt and the neighbor who owned the car. Additionally, the three passengers and the car owner disclaimed ownership of the gun and were available for cross-examination. Appellant's basic argument on appeal is that the gun could have belonged to the neighbor who owned the car. But the jury was presented with and, we must presume, rejected this alternative. Viewing the evidence in a light most favorable to the conviction, we hold that the evidence was sufficient to allow the jury to conclude appellant constructively possessed the firearm.

II.

The second issue is whether the district court abused its discretion in refusing to redact a portion of a video. Relevant evidence is admissible, but it may be excluded if its probative value is substantially outweighed by its prejudicial effect. *See* Minn. R. Evid. 401-403. The district court has broad discretion to admit or exclude evidence and will not be reversed absent a clear abuse of discretion. *State v. Brown*, 739 N.W.2d 716, 720 (Minn. 2007). Appellant has the burden of proving that the district court abused its discretion by admitting the evidence and that he was thereby prejudiced. *State v. Chomnarith*, 654 N.W.2d 660, 665 (Minn. 2003).

A dashboard camera in the arresting officer's squad car recorded the police contact with appellant's passengers. During the encounter, the officer asked a passenger about a bandana in the passenger's pocket; the officer asked, "You're not affiliated with nothin', really?" The passenger replied, "No. Yeah, exactly, that's nothing." The district court admitted the video without redaction, denying that it suggested that the passenger was gang-affiliated.

The video was relevant because it depicts the outcome of the stop and the demeanor of the passengers after appellant fled. The officer merely inquired into the bandana's meaning and made no mention of gangs. The passenger denied "affiliation" of any sort, and the officer did not pursue the issue, reject the answer, or suggest disbelief. Further, the prosecutor did not refer to this verbal exchange. The district court had the discretion over the presentation of the video to the jury, and it could have redacted the challenged portion of the video. Nonetheless, we conclude that the comment did not have any material, prejudicial effect and that the district court did not abuse its discretion when it permitted the jury to see and hear the unredacted recording.

III.

The third issue is whether the district court abused its discretion in denying appellant's mistrial motion when a witness alluded to appellant's prior incarceration. We review the denial of a mistrial motion for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). "The trial judge is in the best position to determine whether an outburst creates sufficient prejudice to deny the defendant a fair trial such that a mistrial should be granted." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006).

"[A] mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *Id.* (quotations omitted).

The problematic moment at trial occurred when a passenger was asked, "How do you know [appellant]?" and he testified, "We were just, it was – it was – I don't know. I was kind of locked up with him earlier when we were younger." Immediately after this testimony, defense counsel stated that he had not understood the witness's response, and the district court jumped in and stated, "That's all right. Here's the deal. We're going to disregard that response. I'm going to have that stricken from the record. So ask another question." After several more questions, the district court excused the jury and instructed the witness that he may not refer to appellant's alleged crimes or incarceration. Defense counsel moved for a mistrial, which the district court denied by stating:

> I'm denying the motion and I'm going to make a record that there was a question asked, I believe it was something to the effect of how do you know [appellant] or where did you meet him, and he— the witness said something about them being locked up. It was hard to hear. He was asked to repeat it. I said we're not going to repeat it. I told them to strike it, and I think it's covered. I think I've covered it, so I'm denying your motion.

Generally, evidence from which a jury could infer that a defendant has a criminal record is inadmissible. *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974). But when a reference to a defendant's prior criminal record or incarceration "is of a 'passing nature,' or the evidence of guilt is 'overwhelming,' a new trial is not warranted because it is extremely unlikely 'that the evidence in question played a

significant role in persuading the jury to convict.'" *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (quoting *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978)).

In *Haglund*, a prosecution witness made a brief reference to the defendant's prior incarceration while reiterating a statement that the defendant made about not wanting to be incarcerated "again." 267 N.W.2d at 505. The district court denied a mistrial motion and did not provide the jury with a curative instruction. *Id.* On appeal, the supreme court noted that the reference to the prior incarceration was inadmissible but affirmed, concluding that the (1) comment was unintentionally elicited by the prosecutor; (2) the reference to the prior imprisonment was of a passing nature, the import of which might have been missed by the jury; and (3) the evidence of the defendant's guilt was overwhelming. *Id*. at 506.

In *Manthey*, a prosecution witness stated that the defendant had been in jail, and the defendant moved for a mistrial. 711 N.W.2d at 505. Instead of granting the motion, the district court read a curative instruction pertaining to the presumption of innocence without mentioning the reference to the jail stint. *Id.* at 505-06. On appeal, the supreme court stated that references to prior incarceration *can* be unfairly prejudicial but held that the witness's reference "was not so fundamental or egregious as to require a mistrial and was effectively mitigated by the court's instruction." *Id.* at 506. The court also noted that, if the district court gave a more specific instruction, it "could have had the effect of drawing attention to [the witness's] reference to [the defendant's] incarceration." *Id.*

Here, the district court found that the statement was hard to hear, which is supported by defense counsel's contemporaneous question about what had been said.

The district court was in the best position to evaluate prejudice. Given the passing and apparently poorly articulated nature of the allusion and that there were no further references to it, we hold that the testimony was not so egregious as to require a mistrial and that the district court exercised proper discretion in striking it without providing a potentially harmful curative instruction.

Because there was sufficient evidence to support the convictions and the district court did not abuse its discretion in admitting the unredacted video or denying the motion for mistrial, we affirm.

Affirmed.

Dated: