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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-14**

State of Minnesota,
Respondent,

vs.

Steven Francis Martinez,
Appellant.

**Filed November 10, 2009
Affirmed
Lansing, Judge**

Ramsey County District Court
File No. 62-K1-08-000378

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

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Considered and decided by Hudson, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

UNPUBLISHED OPINION

LANSING, Judge

A jury found Steven Martinez guilty of possession of a firearm by an ineligible person. On appeal, Martinez challenges the sufficiency of the evidence. And in his pro se, supplemental brief, Martinez contends that his conviction should be reversed because of testimonial references to his “weapons history,” improper authentication of a recorded telephone conversation, and prosecutorial misconduct in decisions on charges and plea negotiations. Because the evidence is sufficient to prove Martinez’s possession of the gun, and Martinez’s remaining claims do not present a basis for reversal, we affirm.

FACTS

Steven Martinez was one of four occupants of a car pulled over by St. Paul Police. Martinez was seated behind the driver, and his codefendant, who is known by the name Bennie, was seated behind the front-seat passenger. The officers ordered the occupants out of the car and inspected the car’s interior. On the floor of the back-seat area, to the right of the transmission hump, the officers found a loaded Beretta firearm. The officers arrested Martinez and he was later charged with possession of a firearm by an ineligible person.

While in jail, Martinez made a call that was recorded and presented as evidence at trial. In the call, Martinez said, “Hey, listen, man, they[’re] trying to give me, let me tell you what happened . . . Bennie, you know, [asks] for the heat, I give him the heat, he drops it when the police come[], he’s talkin[g] . . . like I’m the one that dropped it. He[’s] [the] one that had it. That’s what happened.” Individuals held at the jail are

advised at the beginning of every telephone call that their calls are subject to monitoring and recording. At trial, the officer who interviewed Martinez after his arrest and who was in charge of the investigation identified Martinez's voice in the recording.

Martinez testified on his own behalf. The district court allowed the state to use, for impeachment purposes, Martinez's convictions for felony theft, drug possession, and providing false information to the police. In the course of his testimony, Martinez confirmed that it was his voice in the recorded telephone call but explained that he used the term "heat" to refer to drugs, not guns. On cross-examination he acknowledged that he has heard guns referred to as "heat." Martinez stipulated that he was ineligible to possess a firearm. The jury found him guilty of possession of a firearm by an ineligible person.

At his sentencing hearing, Martinez argued that he was treated unfairly by the prosecution when it charged him with a more serious crime than his codefendant and when it did not offer Martinez a plea agreement with the same terms as offered to his codefendant. In his appeal, Martinez renews these arguments, raises additional evidentiary arguments in his pro se, supplemental brief, and challenges the sufficiency of the evidence.

DECISION

I

Evidence is sufficient to support a conviction if, given the facts in the record and the legitimate inferences drawn from those facts, a jury could reasonably conclude the defendant committed the crime charged. *State v. Laine*, 715 N.W.2d 425, 430 (Minn.

2006). In reviewing a challenge to the sufficiency of the evidence, we thoroughly analyze the record to determine whether the evidence, when viewed in a light most favorable to the conviction sufficiently supports the jury's verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that the jury believed the evidence supporting the verdict and disbelieved evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Martinez was convicted of violating Minn. Stat. § 624.713, subd. 1(b) (2006), which prohibits persons convicted of crimes of violence from possessing firearms. The state must establish either actual or constructive possession of the firearm. *State v. Loyd*, 321 N.W.2d 901, 902 (Minn. 1982). Actual possession requires “direct physical control.” *State v. Simion*, 745 N.W.2d 830, 842 (Minn. 2008). The purpose of the constructive-possession doctrine is to include those cases in which “the inference is strong that the defendant at one time physically possessed [an item] and did not abandon his possessory interest in the [item] but rather continued to exercise dominion and control over it.” *State v. Florine*, 303 Minn. 103, 104-05, 226 N.W.2d 609, 610 (1975). Constructive possession can be established by showing that the firearm was found in a place under the defendant's exclusive control or, if others have access to the place, by showing the strong probability that the defendant was at the time consciously exercising dominion and control over the firearm. *Id.* at 105, 226 N.W.2d at 611.

The record contains sufficient evidence to permit the jury to find that Martinez both actually and constructively possessed the firearm. Witness testimony connected Martinez to the owner of the gun and showed how Martinez could have obtained the gun.

A jury could reasonably find that Martinez, in the recorded phone call, referred to the gun as “heat” and was stating that he had possessed the Beretta firearm while in the car and passed it to his codefendant, who then dropped it on the floor where police discovered it. Martinez testified that he was talking about drugs as “heat,” and not the gun, and explained that he had passed his codefendant drugs in a cell phone, which was on the floor of the car next to the gun. But the jury was free to evaluate Martinez’s credibility and to reject his attempt to provide a different meaning to his telephone conversation. The jury could also make a common-sense assessment that the subject of the phone call was logically the gun rather than drugs because the cell phone that Martinez says contained drugs was not seized by the police and was not part of the criminal charge he was discussing on the call. *See Moore*, 438 N.W.2d at 108 (stating that weight and credibility of witness testimony is for jury to decide).

The witness testimony, recorded statement, and location of the gun support the jury’s verdict and are sufficient to establish that Martinez actually possessed the gun before the car was stopped by police. Inferences drawn from the same evidence also support a conclusion that Martinez constructively possessed the gun at the time of the arrest by exercising dominion and control over the gun on the floor of the back-seat area. *See Florine*, 303 Minn. at 105, 226 N.W.2d at 601 (discussing standard for inferring constructive possession).

The state also argued at trial that Martinez was guilty of aiding and abetting his codefendant in illegal possession of the firearm because his codefendant had prior convictions for crimes of violence. Martinez argued on appeal that the evidence was

insufficient to support the verdict on this theory because Martinez did not know his codefendant was prohibited from possessing a firearm, so Martinez could not intentionally aid his codefendant to commit the crime charged. We agree with Martinez's characterization of this charge as dubious. Proof of the elements of aiding and abetting possession usually equates to either proof of joint possession or joint constructive possession, making the aiding-and-abetting theory unnecessary and confusing. Because the evidence is sufficient to support a conviction based both on Martinez's actual and constructive possession of the firearm, we need not decide whether the record provides sufficient evidence to show that Martinez knew his codefendant was also ineligible to possess a firearm and that he aided and abetted the codefendant's possession.

Having determined that the evidence was sufficient to support the jury's verdict, we turn to the arguments in Martinez's pro se, supplemental brief.

II

We review evidentiary rulings to determine whether the district court abused its discretion. *State v. McArthur*, 730 N.W.2d 44, 51 (Minn. 2007). Evidence is relevant if it has "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. Even if evidence is relevant, it may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 403. The appellant has the burden of establishing abuse of discretion and that he was prejudiced by the error. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Reversal is appropriate only if an evidentiary error likely had a substantial

influence on the jury's verdict. *State v. Ferguson*, 729 N.W.2d 604, 615 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).

In his pro se brief, Martinez argues that the district court erred when it admitted testimony from the interviewing officer mentioning “a weapons history involving Mr. Martinez” because it led the jury to believe that Martinez had a history of possessing firearms. The interviewing officer's statement came after Martinez's attorney, on cross-examination, elicited the facts that multiple patrol cars were involved in the traffic stop and that the officers shone bright lights into the vehicle and had their guns drawn when approaching the vehicle. On redirect examination the state asked the interviewing officer why these measures were taken, and the interviewing officer provided an explanation that, among other reasons, referred to Martinez's weapons history.

Reference to a defendant's prior crimes is generally inadmissible. *State v. Hall*, 764 N.W.2d 837, 842 (Minn. 2009). But defense counsel could likely anticipate this response when he asked the interviewing officer about the cautionary measures used when making the traffic stop. Consequently, the defense created the need for additional questions to elicit explanatory testimony, which inadvertently resulted in testimony about Martinez's weapon history. *See generally State v. Leutschaft*, 759 N.W.2d 414, 420 (Minn. App. 2009) (holding that, allowing prosecutor's follow-up questions was not plain evidentiary error or misconduct because defense counsel invited them). Additionally, reversal is not warranted when a reference to criminal history is unintentionally elicited by the prosecutor; the reference is passing, the import of which might have been missed by the jury; and the evidence of the defendant's guilt was overwhelming. *State v.*

Haglund, 267 N.W.2d 503, 506 (Minn. 1978). The reference to a “weapons history” was passing; the other evidence of Martinez’s guilt was strong; and evidence of past crimes was admitted to impeach Martinez later in the trial, making it unlikely that the interviewing officer’s comment substantially influenced the jury’s verdict.

Martinez also argues that the district court erred when it allowed the officer who interviewed him to authenticate his voice in the recorded call. Authentication of a recording is required for admissibility and the requirement is satisfied by submitting evidence showing that the recording is what the proponent claims. Minn. R. Evid. 901(a). Telephone conversations may be authenticated by a witness’s testimony that he recognized the caller’s voice. Minn. R. Evid. 901(b)(5); *see also City of St. Paul v. Caulfield*, 254 Minn. 142, 144, 94 N.W.2d 263, 265 (1959) (stating that call can be authenticated if witness can identify caller with reasonable certainty). The state established the interviewing officer’s familiarity with Martinez’s voice and the district court did not abuse its discretion when it allowed the officer to authenticate the recording. Martinez also authenticated the recording in his own testimony. Thus, even if the district court erred as Martinez argues, it is unlikely the error would have had a substantial influence on the jury’s verdict.

III

A prosecutor has broad discretion in the exercise of the charging function and ordinarily, under the separation-of-powers doctrine, a court should not interfere with the use of that discretion. *State v. Foss*, 556 N.W.2d 540, 540 (Minn. 1996). The state, in discharging its discretionary duty, can “charge a person with the offense which is best

supported by the available evidence and which carries a penalty commensurate with the culpable acts involved.” *State v. Lee*, 683 N.W.2d 309, 315 (Minn. 2004). A prosecutor’s duty when engaging in plea negotiations or reaching a plea agreement is not to act arbitrarily or with purposeful discrimination. *State v. Andrews*, 282 Minn. 386, 391-92, 165 N.W.2d 528, 532 (1969).

Martinez argued at his sentencing hearing and again on appeal that he should not have been charged with an offense that was different from his codefendant’s and that he should have been offered a plea agreement with the same terms as the one offered to his codefendant. At the sentencing hearing, the state explained that Martinez’s codefendant did not make the admissions that Martinez contended that the codefendant had made and that the state’s evidence was therefore weaker against the codefendant than against Martinez. The prosecution’s charging decisions and plea-agreement offers were well within its discretion and do not represent prosecutorial misconduct.

Affirmed.