STATE OF MINNESOTA
IN COURT OF APPEALS
A09-729

State of Minnesota,
Respondent,

vs.

Deandre Lamar Barnes,
Appellant.

Filed June 29, 2010
Affirmed
Stoneburner, Judge

St. Louis County District Court
File No. 69DUCR082275

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

Melanie S. Ford, St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Schellhas, Judge; and Connolly, Judge.

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

STONEBURNER, Judge

Appellant challenges his convictions of second-degree assault, terroristic threats, and possession of a firearm by a felon, arguing that the convictions are not supported by sufficient evidence. In the alternative, appellant challenges his felon-in-possession conviction, arguing that the district court committed plain error by misstating the law when instructing the jury on the elements of constructive possession. Because the evidence is sufficient to sustain the convictions and the district court did not err in instructing the jury, we affirm.

FACTS

D.J. was high on crack-cocaine on an evening in April 2008 when he encountered two men—later identified as appellant Deandre Barnes and his accomplice, Darryl Boykin—outside Kozy's Bar in Duluth. D.J. testified at trial that the two men claimed that he had "ripped off" their little brother.[1] According to D.J., Boykin grabbed and held him, and Barnes held a gun to his head and said "I'll kill you right now if you don't have the money." D.J. broke free and ran into Kozy's.

D.J. was not welcome in Kozy's,[2] so the bartender, L.H., asked him to leave. D.J. refused, telling L.H. that there were two men outside with a gun and that he was afraid the men would kill him. L.H. called the police.

[1] D.J. admitted at trial that he had stolen $20 worth of crack-cocaine earlier that day.
[2] According to D.J., he had been "kicked out of the bar from years ago."

Earlier, L.H. had noticed that Barnes and Boykin had been sitting together inside the bar, and that they temporarily left the bar without finishing their drinks. L.H. observed that the men were not inside the bar when D.J. entered.

While L.H. was telephoning the police, D.J., who was seated near the door to the bar, saw Barnes hand a gun to Boykin as the two entered the bar. L.H. saw Boykin place something behind a dartboard located in the area to which he had walked. D.J. left the bar and encountered responding police officers. D.J. pointed out Barnes and Boykin, who were in the bar, to the officers. As one officer entered the bar, he saw Boykin walk to the other side of the bar from where he and Barnes had been sitting. An officer retrieved the gun—a revolver loaded with six rounds—from behind the dartboard. D.J. identified the gun as similar to the gun used in the assault.

Officers then placed Barnes and Boykin in custody. D.J.—the only witness to the assault—positively identified them as the two men who had threatened him. No usable fingerprint or DNA attributable to Barnes was recovered from the gun.

At Barnes's trial on charges of second-degree assault, terroristic threats, and felon in possession of a firearm, D.J.'s former girlfriend, J.A., testified for Barnes.[3] J.A. testified that D.J. told her more than once that there was no gun involved in the incident and that he was simply paranoid at the time that somebody was going to kill him because, in addition to being drunk and high on crack-cocaine, he had stolen crack-cocaine from someone. D.J. denied that he ever told J.A. that there had not been a gun or that he was

[3] On cross-examination J.A. disclosed that she met Barnes in a vehicle when both were being transported from custody to court. Barnes described to J.A. why he was in custody and J.A. recognized the incident described as having involved D.J.

drunk and scared or paranoid, and J.A.'s testimony was impeached by evidence that she had felt "hurt" when D.J. turned her in to law enforcement on three outstanding warrants.

There was conflicting trial testimony about what L.H. told police at the time of the incident. Officer Greenwalt, one of the responding police officers, testified that L.H. told her that, when D.J. entered the bar, D.J. told L.H. that he was trying to break up a fight outside but offered no other information. But L.H. testified that D.J. told him that there were two men outside the bar with a gun and that D.J. was afraid the men would kill him. L.H. testified that he could not recall saying anything to the officers about D.J. breaking up a fight.

The jury found Barnes guilty of all three of the charged crimes. This appeal followed.

D E C I S I O N

I. The evidence sufficiently supports Barnes's convictions.

Barnes challenges the sufficiency of the evidence supporting his convictions. In considering a challenge to the sufficiency of the evidence, this court's 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, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "This is especially true where resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the jury." *State v. Pieschke*, 295

N.W.2d 580, 584 (Minn. 1980). The reviewing court 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

Barnes was convicted of second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2008), which provides that "[w]hoever assaults another with a dangerous weapon" is guilty of second-degree assault. Barnes was also convicted of terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2008), which states that "[w]hoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror" is guilty of terroristic threats. Barnes argues that the evidence was insufficient to sustain these two convictions because the state's case relied on D.J.'s uncorroborated testimony, which, Barnes asserts, was not credible.

But D.J.'s testimony did not require corroboration: "[i]t is well-settled that a conviction can rest on the uncorroborated testimony of a single credible witness." *State v. Hill*, 285 Minn. 518, 518, 172 N.W.2d 406, 407 (Minn. 1969). D.J. was an eyewitness who testified about his personal observations, and the jury found him credible, despite impeachment evidence from J.A. and Barnes's vigorous cross-examination of the state's witnesses. Because the weight and believability of witness testimony is an issue for the jury, we defer to the jury's credibility determinations. *Wedan v. State*, 409 N.W.2d 266, 268 (Minn. App. 1987), *review denied* (Minn. Sept. 23, 1987). Even when, as here, a

witness's credibility is challenged, the jury is entitled to believe him or her. *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002).

Furthermore, contrary to Barnes's assertion, much of D.J.'s testimony was corroborated by L.H.'s observations of Barnes and Boykin, and the discovery of the loaded revolver after Boykin was observed placing something behind the dartboard.

Barnes challenges his conviction of felon-in-possession of a firearm, arguing that the state did not prove that he actually or constructively possessed the gun. *See* Minn. Stat. § 609.165, subd. 1b (2008) (providing that "[a]ny person who has been convicted of a crime of violence . . . and who . . . possesses . . . a firearm, commits a felony"). Barnes appears to argue, without citing any relevant authority, that the state could prove actual possession only if police found the firearm on his person. Actual possession involves direct physical control. *See State v. Florine*, 303 Minn. 103, 104–05, 226 N.W.2d 609, 610 (1975) (explaining that "[t]he purpose of the constructive possession doctrine is to include within the possession statute those cases where the state cannot prove actual or physical possession at the time of arrest but where the inference is strong that the defendant at one time physically possessed the substance and did not abandon his possessory interest in the substance but rather continued to exercise dominion and control over it up to the time of the arrest"). But no authority requires that law enforcement officers must witness direct physical control. D.J.'s testimony is direct evidence that Barnes physically controlled the gun: D.J. testified that Barnes held the gun to D.J.'s head

and that he saw Barnes give the gun to Boykin. D.J.'s testimony is sufficient to support Barnes's conviction.[4]

II. The district court did not err in instructing the jury.

In the alternative, Barnes argues that his felon-in-possession conviction must be reversed because a jury instruction materially and prejudicially misstated the law on constructive possession. Because the state proved actual possession, any error in instructing the jury on constructive possession would not have affected the verdict and would not entitle Barnes to relief on appeal. Nonetheless, we will address Barnes's argument to explain why it is without merit.

District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

For an appellate court to review an unobjected-to error, an appellant must show (1) error, (2) that is plain, and (3) that affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Generally, plain error "is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn.

[4] Barnes argues at length that the state's evidence did not prove constructive possession. We agree, but the evidence supports a finding of actual possession beyond a reasonable doubt.

2006). "[A]n error affects substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007).

Under *State v. Florine*, constructive possession can be found where

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

303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975) (emphasis added). Accordingly Minnesota's standard jury instruction on possession reads:

> A person possesses _____, if it is on (his) (her) person. A person also possesses _____ if it was in a place under (his) (her) exclusive control to which other people did not normally have access, or if the person knowingly exercised dominion *and* control over it.

10A *Minnesota Practice*, CRIMJIG 32.42 (2006) (emphasis added).

Barnes claims that the district court erred when it instructed the jury that "[a] person . . . possesses a firearm if it was in a place under his exclusive control to which other people did not normally have access, or if the person knowingly exercised dominion *or* control over it." But there is no legal authority for Barnes's claim that the use of "or" instead of "and" materially misstates the law.

Barnes relies on *State v. Porter*, 674 N.W.2d 424, 428–30 (Minn. App. 2004).[5] In *Porter*, the district court instructed the jury that Porter possessed a firearm if he exercised "authority, dominion *or* control." *Id*. at 428. This court held that the district court committed reversible error by so instructing the jury and remanded for a new trial. *Id*. at 429–30. But, a fair reading of *Porter* clearly reflects that the error there was in the district court's use of different constructive-possession instructions for the two possession crimes charged. *Id*. at 428.

The district court in *Porter* used the phrase "dominion *and* control" in instructing the jury on constructive possession of a controlled substance, but it used the phrase "authority, dominion *or* control" in instructing the jury on constructive possession of a firearm. *See id.* at 428. The jury then found that Porter possessed the firearm, but did not possess the controlled substance. *Id*. at 426. In *Porter*, we stated that "[*w*]*hether 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 (emphasis added). Therefore, *Porter* does not support Barnes's argument that the use of the phrase "dominion *or* control" in this case, instead of the use of the phrase "dominion *and* control" materially misstates the law, thereby constituting error.

[5] Barnes also relies on the unpublished opinion *State v. Martin*, A06-2127, 2008 WL 2020355 (Minn. App. May 13, 2008). But unpublished opinions of this court are not precedential. Minn. Stat. § 480A.08, subd. 3(b). And we conclude that the reasoning in the cited cases does not support Barnes's argument.

Furthermore, the supreme court has described constructive possession, interchangeably, as both the conscious exercise of "dominion *and* control," *State v. Willis*, 320 N.W.2d 726, 728–29 (Minn. 1982) (emphasis added), and the conscious exercise of "dominion *or* control," *State v. Olson*, 326 N.W.2d 661, 663 (Minn. 1982) (emphasis added). *Black's Law Dictionary* 560 (9th ed. 2009) defines "dominion" as "*[c]ontrol*; possession." (Emphasis added.) And *The American Heritage Dictionary of the English Language* 550 (3d ed. 1992) similarly defines "dominion" as "*[c]ontrol* or the exercise of *control*; sovereignty." (Emphasis added.) Therefore, the district court did not materially misstate the law when it instructed the jury that Barnes possessed the firearm if he consciously exercised "dominion *or* control," instead of "dominion *and* control," over the gun.

Affirmed.