STATE OF MINNESOTA
IN COURT OF APPEALS
A09-956

State of Minnesota,
Respondent,

vs.

Brian Lee Nelson,
Appellant.

Filed June 22, 2010
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-CR-08-27223

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Wright, Judge.

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

WRIGHT, Judge

In this appeal from his conviction of possession of a firearm by a prohibited person, appellant argues that the district court erred by (1) accepting appellant's stipulation to being a prohibited person without an express waiver of his right to a jury trial on every element of the offense and without adequate evidentiary support; (2) improperly instructing the jury as to the definition of constructive possession; and (3) directing a verdict on an element of the offense by instructing the jury that a BB gun is considered a firearm under the statute. Appellant advances additional arguments in his pro se supplemental brief. We affirm.

FACTS

In May 2008, the Minneapolis SWAT Team and members of the Sherburne County Sheriff's Office executed a search warrant at the residence of appellant Brian Nelson. Nelson and his girlfriend, D.S., were in an upstairs bedroom when officers entered. Officers found a silver replica handgun in a duffle bag in the living room, a .38 caliber handgun in a shoebox in the upstairs bedroom, and an air rifle capable of shooting BBs and pellets in the hallway outside of the bedroom.

Nelson, who had a prior felony conviction, was charged with possession of a firearm by a prohibited person, a violation of Minn. Stat. § 624.713, subds. 1(b), 2(b) (2006). The case proceeded to trial, during which Nelson stipulated to an essential element of the offense, namely, that he was prohibited from possessing a firearm. After

the jury found Nelson guilty, the district court imposed an executed sentence of 60 months' imprisonment. This appeal followed.

D E C I S I O N

I.

Nelson contends that the district court erred by accepting his stipulation without advising him of the right to a jury determination of whether he was a prohibited person. The United States and Minnesota constitutions guarantee the right to a jury trial in a criminal case. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see also* Minn. R. Crim. P. 26.01, subd. 1(1). A defendant's right to a jury trial includes the right to be tried on every element of the charged offense. *State v. Bluhm*, 457 N.W.2d 256, 260 (Minn. App. 1990), *aff'd in part, rev'd in part on other grounds*, 460 N.W.2d 22 (Minn. 1990). When stipulating to an element of the offense, a defendant effectively waives the right to a jury trial on that element and removes evidence regarding that element from the jury's consideration. *State v. Berkelman*, 355 N.W.2d 394, 397 (Minn. 1984). Consequently, a defendant must personally waive a jury trial on the element in writing or on the record in open court before stipulating at trial to one of several elements of an offense. *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010); *see* Minn. R. Crim. P. 26.01, subd. 1(2)(a). When the prior conviction is uncontroverted, a stipulation to the prior-conviction element generally is perceived as beneficial to the defendant because it effectively removes potentially prejudicial evidence from the jury's consideration. *Berkelman*, 355 N.W.2d at 397.

Neither Nelson's attorney nor the district court advised Nelson that he had a right to a jury trial on the question of whether he was a person prohibited from possessing a firearm. And Nelson did not expressly waive this right. Consequently, even though the parties were gathered to commence jury selection for the jury trial that followed, it was error for the district court to accept Nelson's stipulation to this essential element of the offense without advising him of the right to have the jury decide the issue.

When a defendant stipulates to an element of the offense without a valid waiver of the right to a jury trial, we apply the harmless-error test to determine whether it was prejudicial to the defendant. *Fluker*, 781 N.W.2d at 399; *State v. Hinton*, 702 N.W.2d 278, 281-82 (Minn. App. 2005) (applying harmless-error analysis when defendant stipulated to element of offense without personally waiving right to jury trial), *review denied* (Minn. Oct. 26, 2005); *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004) (same), *review denied* (Minn. June 29, 2004). *But cf. State v. Kuhlmann*, 780 N.W.2d 401, 404-05 (Minn. App. 2010) (applying plain-error analysis when insufficient stipulation to element resulted in erroneous jury instructions), *review granted* (Minn. June 15, 2010). The state bears the burden of establishing beyond a reasonable doubt that the error was harmless and that a new trial, therefore, is unwarranted. *Wright*, 679 N.W.2d at 191. An error is harmless beyond a reasonable doubt when the verdict was "surely unattributable to the error." *Id*. (quotation omitted).

Based on our careful review of the record, the state has met its burden. Nelson does not challenge the existence of the prior conviction; and the underlying facts of the stipulation are not in dispute. Further, Nelson benefitted from the stipulation because it

kept from the jury potentially prejudicial evidence regarding his prior felony drug conviction. *See Berkelman*, 355 N.W.2d at 397 (stipulation to uncontroverted prior-conviction element generally is beneficial to defendant because it removes potentially prejudicial evidence from jury's consideration). Thus, although the district court erred by accepting Nelson's stipulation to an element without Nelson's express, personal, informed waiver of his jury-trial rights regarding that element of the offense, under the circumstances presented here, the error does not require a new trial.

Nelson also argues that his stipulation to being a person prohibited from possessing a firearm was inadequate because the stipulation did not include any evidence detailing the prior conviction on which the stipulation was based. A person who has been convicted of a crime of violence and possesses a firearm is guilty of possession of a firearm by a prohibited person. Minn. Stat. § 624.713, subd. 1(b). Before trial, the following colloquy occurred regarding Nelson's prior conviction that resulted in his prohibition from possessing a firearm:

> DISTRICT COURT: I think one of the first things is whether we should put a stipulation on the record as to the element of the defendant's prior record that makes him a prohibited person. If your client wants to stipulate to that, why don't you put that on the record, defense counsel.
> DEFENSE COUNSEL: . . . Mr. Nelson, you have the right to have the State prove beyond a reasonable doubt that you have a prior felony conviction that falls within the purview of certain persons being ineligible. The prosecutor has shown me a certified record of your drug conviction. I have suggested to you and talked to you that we don't, in my estimation, need for him to prove that up, that there is no benefit to you to have him prove that up. And so with that understanding, I have asked you to waive your right to have

> the prosecutor prove that up, and we'll stipulate to that. Do you understand?
> NELSON: Yes, I do.
> DEFENSE COUNSEL: Are you willing to do that?
> NELSON: Yes.
> DEFENSE COUNSEL: Okay.
> DISTRICT COURT: All right, I'll accept the waiver and then instruct the prosecutor and also the witnesses for the prosecution not to mention anything about the defendant's prior criminal history without further permission from the [district court].

No additional evidence of Nelson's prior conviction was offered.

The Minnesota Rules of Criminal Procedure address the procedural requirements for waiver of a jury determination of one of several elements required for the determination of the issue of guilt. Minn. R. Crim. P. 26.01, subd. 1(2)(a); *see also Fluker*, 781 N.W.2d at 400 (holding that waiver of jury trial on an element must be in accordance with rule 26.01). The rules do not directly address what evidence may be required to support a defendant's stipulation to an element. However, looking to rule 26.01 for guidance, we observe that subdivision 3, which details the requirements for a trial on stipulated facts, addresses circumstances that are most akin to those in which a defendant stipulates to an element of the offense. Subdivision 3 provides that a defendant and prosecutor may agree that the defendant's guilt will be determined by the court based on stipulated facts. But the rule does not require documentary evidence to support those stipulated facts. Given that documentary evidence is not required in a trial on stipulated facts, and Nelson directs us to no legal authority for such a requirement here, we conclude that documentary evidence, such as a certified copy of conviction, is not required when a defendant stipulates to an element of the offense.

Although documentary evidence in support of the prior conviction was not submitted, Nelson does not dispute that he has a prior conviction, which makes him a person prohibited from possessing a firearm under Minn. Stat. § 624.713, subd. 1(b). He acknowledged this prior conviction and information regarding it in the stipulation colloquy. Nelson's attorney stated that the prosecutor showed him a certified record of Nelson's prior drug conviction and that he had discussed with Nelson that he did not feel it was necessary to require the prosecutor to "prove that up." Nelson confirmed that he understood his attorney's explanation and agreed that he was willing to waive his right to require the prosecutor to prove that element of the offense. Thus, Nelson had sufficient information to understand the nature of the conviction at issue and to make a reasoned decision regarding whether to stipulate to being a person prohibited from possessing a firearm because of his prior criminal conviction. Nelson's argument that his stipulation was inadequate, therefore, fails.

II.

For the first time on appeal, Nelson objects to the jury instructions given by the district court. A district court has "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). The district court is not required to use model jury instructions, *State v. Smith*, 674 N.W.2d 398, 401 (Minn. 2004), and it may tailor jury instructions to fit the facts, *State v. McCuiston*, 514 N.W.2d 802, 804 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). But a district court errs when jury instructions materially misstate the law. *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). When determining whether a jury instruction materially

misstates the law, we review the jury instructions in their entirety to determine whether they fairly and adequately explain the law. *Id.* at 555-56.

Because Nelson did not object to the jury instructions at trial, we apply a plain-error analysis on review. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). Plain error exists when the district court commits an obvious error that affects the criminal defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Plain error will be corrected on appeal "if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Meldrum*, 724 N.W.2d 15, 20 (Minn. App. 2006) (alteration in original) (quotations omitted), *review denied* (Minn. Jan. 24, 2007).

A.

Nelson contends that the district court materially misstated the law in its jury instruction on constructive possession. The district court twice instructed the jury regarding the possession element of the offense, once as the trial began and once before the jury began deliberations. On both occasions, the district court instructed as follows:

> [T]he law recognizes two kinds of possession—actual possession and constructive possession. . . . A person who is not in actual possession of a thing but who nevertheless *knowingly has both the power and the intention at a given time to exercise authority and control over it, either directly or through another person*, is then in constructive possession of it.

(Emphasis added.)

The district court's instruction differs from the model jury instruction defining "possession," which states that a person possesses an item "if it was in a place under [that

person's] 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). This model jury instruction is consistent with our holding in *State v. Porter* that, to prove constructive possession of an item found in a place to which others had access, there must be "a strong probability, inferable from the evidence, that the defendant was, *at the time, consciously exercising dominion and control* over it." 674 N.W.2d 424, 427 (Minn. App. 2004) (emphasis added) (citing *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975)).

Our analysis of the language employed by the district court in the challenged jury instruction establishes that it is functionally equivalent to the legal standard set forth in *Porter*. First, because "knowing" means, in part, to be "conscious," the district court's instruction that one must have knowing possession is equivalent to the legal standard's requirement that one must consciously exercise possession over the object at issue. *See Black's Law Dictionary* 950 (9th ed. 2009) (defining "knowing" as "[d]eliberate; conscious"). The district court's instruction that the possession must be "intentional" has a similar meaning. *Id*. at 28 (an "intentional act" is one that "result[ed] from the actor's will directed to that end"). The district court's use of the phrase "power . . . to exercise authority and control" is synonymous with the words "dominion" and "control." *See id.* at 1288 (defining "power" as having "[d]ominance, control, or influence"), 560 (defining "dominion" as "[c]ontrol; possession"), 378 (defining "control" as "[t]o exercise power or influence over"). Finally, the district court instructed that the possession must occur at a given time, which it identified as May 16, 2008, the date on which the officers seized

the firearms. This aspect of the district court's jury instruction is consistent with the legal requirement that the accused possess the firearm on the date of the charged offense.

Our review of the challenged jury instruction in its entirety establishes that the district court fairly and accurately explained the law regarding constructive possession. *See Porter*, 674 N.W.2d at 427. Because the district court did not materially misstate the law, it did not commit plain error.

B.

Nelson next argues that the district court improperly infringed on his right to have a jury determine his guilt on every element of the offense by instructing the jury that "under Minnesota law, a [BB] or pellet gun is considered a firearm." A criminal conviction must "'rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *State v. Moore*, 699 N.W.2d 733, 735 (Minn. 2005) (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 2311 (1995)). In advancing his argument, Nelson relies on the Minnesota Supreme Court's decision in *Moore*, which reversed our conclusion, based on *State v. Bridgeforth*, 357 N.W.2d 393, 394 (Minn. App. 1984), that loss of a tooth constitutes great bodily harm as a matter of law. *Id.* at 737. The *Bridgeforth* court addressed challenges to the sufficiency of the evidence to support a guilty plea. 357 N.W.2d at 394. Observing the distinction between determining that evidence is sufficient to support a guilty plea and defining what constitutes an element as a matter of law, the *Moore* court concluded that an instruction that loss of a tooth constitutes great bodily harm as a matter of law violated the legal requirement that the jury determine that a

defendant is guilty beyond a reasonable doubt of every element of the charged offense. 699 N.W.2d at 737.

Here, unlike *Moore*, in which there had not been a prior holding that loss of a tooth constitutes great bodily harm as a matter of law, we have held that a "gas-cartridge BB gun falls within the definition of 'firearm,'" and that possession of such a gun is prohibited under Minn. Stat. § 624.713, subd. 1 (2006). *State v. Fleming*, 724 N.W.2d 537, 540 (Minn. App. 2006) (holding that supreme court concluded that a BB gun was a "firearm" for the purpose of Minn. Stat. § 609.02, subd. 6 (1974), and legislature presumptively adopted supreme court's "firearm" definition because it amended section 624.713 after supreme court's definition of the term). *Fleming* did not address the sufficiency of the evidence, but rather addressed whether a BB gun satisfied the definition of "firearm" in the same statute at issue here. *Id*. (citing Minn. Stat. § 624.713, subd. 1(b) (2004)). Our conclusion in *Fleming* was not merely that evidence of the defendant's possession of a BB gun was *sufficient* to satisfy the "firearm" element of the offense. Rather, we determined that, under Minn. Stat. § 624.713, a BB gun is a "firearm" as a matter of law.

Accordingly, the district court did not commit plain error by instructing the jury consistent with that holding. *See* Minn. R. Crim. P. 26.03, subd. 18(5) (stating that "the court shall state all matters of law which are necessary for the jury's information in rendering a verdict").

IV.

A.

Nelson raises several arguments in his pro se supplemental brief. He first argues that the prosecutor committed prejudicial misconduct during his closing argument. We will reverse a conviction because of prosecutorial misconduct "only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). For objected-to misconduct, a two-tiered harmless-error test has been employed. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). "For cases involving claims of unusually serious prosecutorial misconduct, there must be certainty beyond a reasonable doubt that misconduct was harmless." *Id*. But for cases involving claims of "less-serious prosecutorial misconduct," we determine whether the misconduct likely played a substantial part in influencing the jury to convict. *Id.* The Minnesota Supreme Court recently observed that it has not determined whether the two-tiered approach should continue to apply in cases involving objected-to prosecutorial misconduct. *State v. Jenkins*, ___ N.W.2d ___, ___, 2010 WL 1994651, at *14 (Minn. May 20, 2010) (noting past use of two-tiered approach but stating that it has not been determined whether two-tiered approach should continue to apply); *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (expressly declining to reach issue of whether two-tiered analysis of objected-to prosecutorial misconduct is still viable).

The prosecutor stated in closing argument that "[t]he only person in this room that has no doubt about what went on in that house[,] who had the guns, where they were, who had knowledge of any of this stuff is the defendant." The district court sustained

defense counsel's immediate objection, struck the improper statement from the record, and instructed the jury not to consider it when deliberating. After the jury began its deliberations, defense counsel moved for a mistrial because the prosecutor's statement commented on Nelson's failure to testify. The district court found the statement was a "serious breach," but it was not sufficient to grant a mistrial.

We conclude, and the state does not dispute, that the prosecutor's statement constitutes serious misconduct. But any potential prejudice created by the misconduct was cured because the defense counsel objected before the prosecutor could finish the statement, the district court sustained the objection, and the district court properly instructed the jury not to consider the comment. *See State v. Davis*, 685 N.W.2d 442, 446 (Minn. App. 2004) (holding that potential prejudice created by prosecutorial misconduct was cured by sustained objection, jury instruction to disregard, and comment being stricken from record), *review denied* (Minn. Oct. 27, 2004). The prejudicial effect of the comment also was minimal because it was a small part of the closing argument. *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (noting that erroneous statement was two sentences in lengthy closing argument). On this record, we conclude that the prosecutor's misconduct was harmless beyond a reasonable doubt, thereby satisfying the higher standard utilized in the two-tiered analysis. *See Yang*, 744 N.W.2d at 599.

B.

Nelson next argues that the prosecutor failed to disclose a police report and, as a result, portions of an officer's testimony should have been stricken. The imposition of sanctions for a discovery violation is a matter for the sound discretion of the district

court. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). In exercising this discretion, the district court should consider the reason that disclosure was not made, the extent of prejudice to the opposing party, the feasibility of rectifying the prejudice by a continuance, and any other relevant factors. *Id*. On review, we consider whether the district court's decision not to impose a sanction was a clear abuse of discretion. *State v. Daniels*, 332 N.W.2d 172, 179 (Minn. 1983).

In a felony case, the prosecutor must disclose "law enforcement officer reports" that relate to the case. Minn. R. Crim. P. 9.01, subd. 1(3). During the trial, the defense counsel moved for a mistrial because the prosecutor had not supplied a police report in discovery. The prosecutor explained that the report was in the file that had been made available to the defense and that someone from defense counsel's office copied the file prior to trial. The district court concluded that any failure to provide the report was unintentional and that the defense had not been prejudiced.

The district court's ruling is supported by defense counsel's opportunity to review and copy the case file in its entirety. Nelson does not identify any prejudicial evidence that resulted from the claimed discovery violation. The district court's decision not to impose a sanction was within its broad discretion.

C.

Nelson contends that he received ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance was deficient such that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment"; and (2) the defendant was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). An insufficient showing on one of these requirements defeats a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Gates*, 398 N.W.2d at 561.

Nelson first maintains that his counsel failed to argue that, because the .38 caliber handgun found at his residence does not have the capability of firing bullets, it did not have a serial number. But Nelson neither explains how information about the serial number was relevant to his case, nor presents evidence in support of his contention that the handgun could not fire bullets. Nelson's argument, therefore, does not demonstrate how his counsel's failure to raise this issue was both deficient representation and prejudicial.

Nelson next argues that his counsel waived the omnibus hearing and acknowledged that the gun at issue was not a replica. The evidence, however, established that Nelson possessed a "real gun," and Nelson has not demonstrated how his counsel's decision not to contest that the gun was "real" was prejudicial to Nelson.

Nelson also asserts that his counsel did not adequately challenge misrepresentations on the search warrant. To demonstrate ineffective assistance of counsel for failure to adequately challenge a search warrant, "[a] defendant must show that the search warrant so patently lacked probable cause that the failure to challenge it could only have been ineffectiveness of counsel and not trial tactics." *State v. McLane*, 346 N.W.2d 688, 690 (Minn. App. 1984). Nelson fails to provide evidence in support of

his claims or to describe how a successful challenge to the alleged misrepresentations would have affected the district court's finding of probable cause. Therefore, this claim also fails.

D.

Finally, for the first time on appeal, Nelson raises issues regarding his participation in the preliminary hearing, the admission of certain evidence and testimony, and jury selection. Generally, we will not consider matters that were not argued and considered in the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But we may review a matter "as the interests of justice may require." Minn. R. Crim. P. 28.02, subd. 11. Because our careful review of the record establishes that the interests of justice do not require consideration of Nelson's arguments raised for the first time on appeal, we decline to do so.

Affirmed.