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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-999**

State of Minnesota,
Respondent,

vs.

Quonn Nikole Koger,
Appellant.

**Filed July 13, 2010
Affirmed
Bjorkman, Judge**

Ramsey County District Court
File No. 62-K1-07-003979

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County
Attorney, St. Paul, 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 Larkin, Presiding Judge; Shumaker, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant Quonn Nikole Koger challenges his conviction of ineligible possession of a firearm, asserting that (1) the evidence was not sufficient to sustain his conviction, (2) the district court erred in instructing the jury on the elements of the offense, and (3) the district court abused its discretion in denying a new trial based on the allegation that a juror made a racist comment during deliberations. Because we conclude that the evidence was sufficient, that the erroneous jury instruction did not prejudice appellant's substantial rights, and that the district court did not abuse its discretion in handling the jury issue, we affirm.

FACTS

On September 5, 2006, the St. Paul Police Gang Strike Task Force executed a search warrant at appellant's home. During the search, the police located an unloaded shotgun under appellant's mattress, two shotgun shells and a .45 caliber pistol magazine¹ in a glass jar on a dresser, and an additional shotgun shell on a shelf in the bedroom closet.

Appellant was ineligible to possess a firearm under Minn. Stat. § 624.713, subd. 1(b) (2006), based on a 1997 third-degree burglary conviction.

Both appellant and his wife, S.K., testified at trial about the shotgun. S.K. stated that she purchased the shotgun from a friend in 2005, during the time appellant was

¹ The police did not locate a .45 caliber pistol. Appellant is not prohibited from possessing either the magazine or the ammunition.

incarcerated for a check-forgery conviction, because she was concerned for her family's safety. She also purchased two shotgun shells. S.K. acknowledged that she had never fired a weapon, only handled the shotgun once, and made no effort to learn how to fire the shotgun. She testified that she placed the shotgun between the mattress and box spring of her bed and put the shells in a small glass jar on her nightstand.

Appellant testified that he did not find out about the shotgun until two months after he was released from the workhouse. Appellant told S.K. to get rid of the weapon, but testified that he subsequently forgot about the shotgun. He also testified that the jar containing the ammunition was located on his dresser.

Before trial, appellant stipulated that he was ineligible to possess a firearm. After the prosecution concluded its case in chief, the district court informed the jury that “[t]he parties have stipulated and agreed, and it becomes evidence in this case, that the defendant . . . is ineligible to possess a firearm and that he has been ineligible since September 11, 1997.” But when defining the elements of the charged offense at the conclusion of the trial, the district court instructed the jury that appellant had been “convicted of a crime of violence.”

The jury deliberated for less than a day. During their deliberations, the jury asked the district court to define the terms “exercising,” “dominion,” and “control.” All of these terms were included in the possession instruction. The district court substituted the term “authority” for dominion, so that the instruction defined possession as “knowingly exercis[ing] authority and control over [the firearm].” The jury found appellant guilty.

Three days after the verdict, juror S.O. contacted the district court's chambers. S.O. indicated that one of the jurors made a racist remark during deliberations. S.O. also expressed regret about the verdict, stating that he was the last juror to support a guilty verdict, that he felt bullied, and that he "caved" because of the financial hardship created by extended deliberations.

Based on S.O.'s disclosures, the district court subpoenaed S.O. to testify at a preliminary hearing. During the hearing, S.O. stated that while the jury was deliberating whether appellant had control of the shotgun, juror J.S. said, "I know how those people operate." S.O. believed that the phrase "those people" referred to African-Americans. S.O. testified that he believed that all the jurors heard the remark, and specifically identified another juror, R.P., as having heard the comment. S.O. stated that he talked with R.P. at her place of employment after he received the subpoena. But S.O. denied discussing the alleged racist statement with R.P.

The district court then conducted a formal hearing pursuant to *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 104 N.W.2d 301 (1960). R.P. and J.S. testified pursuant to subpoenas. S.O. also appeared despite the fact that the court did not advise him of the hearing. The district court did not permit S.O. to remain in the courtroom. R.P. testified that J.S. made racist comments during deliberations by saying "well, you know how those people are" and "[t]hose black people, that's how they treat others." But R.P. contradicted some of S.O.'s earlier testimony. For example, R.P. testified that she was the only one who challenged J.S. R.P. also stated that she and S.O.

discussed the jury deliberations, including J.S.'s alleged statements, prior to the *Schwartz* hearing. J.S. emphatically denied that he made the alleged racist comments.

The district court denied appellant's motion for a new trial based on juror misconduct and sentenced appellant to 40 months' imprisonment, a downward departure from the guidelines sentence. The district court found that J.S.'s testimony at the *Schwartz* hearing was credible and that the complaining jurors were not credible. This appeal follows.

D E C I S I O N

I. The evidence was sufficient to sustain appellant's conviction.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume "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), and we do 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 the defendant was guilty of the charged offense, *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

Although circumstantial evidence is entitled to the same weight as direct evidence, *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999), "[a] conviction based on circumstantial evidence receives stricter scrutiny than a conviction based on direct evidence," *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010). The circumstantial

evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). The jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430. But “we examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with innocence.” *Stein*, 776 N.W.2d at 716.

Because the police did not find the shotgun on appellant’s person, the state had to establish constructive possession. *See State v. Loyd*, 321 N.W.2d 901, 902 (Minn. 1982). When the police find a weapon in a location to which others had access, constructive possession may be proven by showing that “there is a strong probability, inferable from the evidence, that the defendant was consciously exercising dominion and control over the item at the time.” *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). Proximity to the weapon is an important consideration in determining constructive possession. *Id.* Constructive possession need not be exclusive; it may be shared. *Id.* A reviewing court looks to the totality of the circumstances to determine whether constructive possession has been proven. *State v. Denison*, 607 N.W.2d 796, 800 (Minn. App. 2000), *review denied* (Minn. June 13, 2000).

It is undisputed that the shotgun was under the mattress of appellant’s bed for seven months. He knew it was there, he slept directly over it during that time, and the ammunition was located in a glass jar on appellant’s dresser. Appellant had access to the shells and their presence was a continual reminder to appellant of the shotgun’s proximity

to him. Appellant's testimony that only S.K. exercised control and dominion over the shotgun was contradicted by her testimony that she never handled the shotgun except when she purchased it, had never fired it or any other weapon, and did not know how to use it. Given appellant's close proximity to the shotgun on a daily basis for seven months, his admission that he knew the weapon was there, and S.K.'s testimony, we conclude that an inference other than that appellant had, at the very least, shared constructive possession of the shotgun, would not be reasonable. In light of the legitimate inferences that can be drawn from the evidence and considering the deference we give to a jury's credibility and factual determinations, we conclude that a reasonable jury could find that appellant had constructive possession of the shotgun.

II. The plain error in the final jury instruction did not affect appellant's substantial rights.

Appellant argues that the district court erred in instructing the jury that appellant stipulated that he had been convicted of a crime of violence. Because appellant did not object to the instruction, we review it for plain error, considering whether there is "(1) error; (2) that is plain; and (3) [that] affect[ed appellant's] substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *see also* Minn. R. Crim. P. 31.02. An "error affects substantial rights where there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotation omitted).

The district court instructed the jury that

[t]he statutes of Minnesota provide that whoever has been convicted of a crime of violence and who possesses a firearm

is guilty of a crime. Now, the elements of a felon in possession of a firearm are, first, [appellant] knowingly possessed a firearm. Second, [appellant] has been convicted of a crime of violence. The parties have stipulated that [appellant] has been convicted of such a crime.

Appellant actually stipulated that he was ineligible to possess a firearm. “[G]enerally in a prosecution for being a felon in possession of a weapon the defendant should be permitted to remove the issue of whether he is a convicted felon by stipulating to that fact.” *State v. Davidson*, 351 N.W.2d 8, 11 (Minn. 1984). Because the district court’s final instruction deprived appellant of the benefit of his stipulation, we conclude that the challenged instruction constitutes plain error.

The state argues that any error in the final jury instruction did not affect appellant’s substantial rights. We agree. There was strong evidence of appellant’s guilt including his proximity to the shotgun over an extended period of time. The erroneous use of the phrase “crime of violence” was only in the final jury instructions and the state did not highlight appellant’s prior conviction at trial. The district court had previously correctly instructed the jury that appellant had stipulated that he was ineligible to possess a firearm without referencing a “crime of violence.” Thus, the impact of the error was minimized.

Appellant contends that his rights were prejudiced because the jury was left to speculate about the seriousness of his prior “crime of violence.” We disagree. The questions the jury raised during deliberations—seeking definitions of the terms “exercised,” “dominion,” and “control,” and asking whether the statute prevents a felon from possessing ammunition—indicate that the jurors were not distracted or influenced

by appellant's predicate offense. Moreover, the instructions made it clear that the sole issue for the jury to decide was whether appellant had possession of the shotgun. We presume that juries follow instructions and will only base their verdicts on the legal standards as given in the instructions. *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998). And because the charged offense did not involve a crime of violence, only possession of a firearm, any potential for prejudice caused by the jury assuming appellant had a history of violent behavior was reduced. Accordingly, we conclude that the erroneous final jury instruction did not affect appellant's substantial rights.

III. The district court did not abuse its discretion in denying a new trial based on the alleged bias and conduct of one of the jurors.

Appellant asserts that the district court abused its discretion by not ordering a new trial or, in the alternative, obtaining the testimony of at least six jurors during the *Schwartz* hearing. We review a district court's decision to deny a new trial on the basis of juror misconduct for an abuse of discretion. *State v. Kyles*, 257 N.W.2d 378, 381 (Minn. 1977). A district court's factual findings as to the presence or absence of juror bias is "based upon determinations of demeanor and credibility" and therefore is entitled to deference. *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (quotation omitted). Actual bias is a question of fact that the district court is in the best position to evaluate. *Id.* We review the district court's findings of fact for clear error. *Id.*

The district court conducted two posttrial hearings involving three jurors. The first hearing established that there was sufficient evidence to hold a *Schwartz* hearing. At the subsequent hearing, the district court took testimony from the second complaining

juror as well as the juror who allegedly made racist comments. The district court found that the complaining jurors were not credible. We defer, as we must, to the district court's credibility determinations.

The district court determined that there was insufficient evidence of juror bias to warrant a new trial. After the jury returned its verdict, the district court polled the jurors collectively and individually. Each juror affirmed the verdict. Only two jurors, who met shortly after the conclusion of trial, reported the alleged racist statements. Their testimony was inconsistent, including on the topic of whether they discussed the deliberations prior to the *Schwartz* hearing. The district court noted that S.O. essentially admitted his own improper motive for reaching the verdict, stating that he "caved" because he did not want to be sequestered over a weekend. The juror who allegedly made the comment emphatically denied having made it, and the district court found that juror to be credible. Viewing the record as a whole, the district court's finding that there was no bias in the jury deliberations is supported by the record and is not clearly erroneous.

Appellant's argument that the district court erred by not including additional jurors in the *Schwartz* hearing also fails. The district court asked appellant's counsel if he wanted additional jurors to testify during the *Schwartz* hearing, and appellant declined. We conclude that appellant intentionally waived the right to examine additional jurors. *See State v. Blom*, 682 N.W.2d 578, 617 (Minn. 2004) (defining waiver as "an intentional relinquishment of a known right or privilege"). Based on our careful review of the

record, we discern no abuse of discretion in the manner in which the district court conducted the *Schwartz* hearing.

Affirmed.