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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1828**

State of Minnesota,  
Respondent,

vs.

John Davis Burks,  
Appellant.

**Filed September 7, 2010  
Reversed  
Ross, Judge**

Hennepin County District Court  
File No. 27-CR-08-31947

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodi L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Kalitowski, Judge; and Wright, Judge.

**UNPUBLISHED OPINION**

**ROSS, Judge**

When police arrived at the scene of reported gunfire, they found one gun and five people. The district court convicted two of them of possession of the gun based on the

testimony of one of the two. John Burks appeals his conviction. Burks accurately maintains that the accomplice testimony that formed the basis of his conviction was not corroborated by evidence to show that he possessed the pistol. We therefore reverse his conviction.

## **FACTS**

A Minneapolis resident near Minnehaha Park called police at approximately 3:25 a.m. and reported that she heard gunshots and that people were walking in the park. Police found five people and commanded them to stop. The four males in the group stopped, but the lone female, Laura Rainey, continued walking for about 30 feet, dropped her purse, and walked back. Police found a handgun in the open purse. Rainey told police that the gun belonged to the appellant, John Burks.

Police found no shell casings on the ground or fingerprints on the gun. They also did not interview the three other males walking with Burks and Rainey. The state charged Burks with reckless discharge of a firearm, and it charged both Burks and Rainey with possession of a handgun without a permit.

One of the males accompanying Burks and Rainey, G.M., testified at Burks's bench trial. G.M. acknowledged that police stopped the group and found a handgun in Rainey's purse. But he denied that anyone in the group fired the gun or that Burks had ever possessed it.

Rainey testified that the group had been in the park drinking and that Burks had a gun and fired it. She said that Burks had put the gun into her purse as they were leaving the park. Rainey acknowledged that she was awaiting sentencing after pleading guilty to

possession of a pistol without a permit but that her testimony was not part of a plea agreement with the state.

Burks did not testify or present any witnesses at his bench trial. His counsel argued that he could not be convicted solely on the testimony of Rainey. The district court disagreed, finding Rainey's testimony to be credible and corroborated "by the shots fired that the neighbor heard and by the other circumstances of the case." The district court acquitted Burks of reckless discharge of a firearm because there was insufficient evidence to show recklessness, but it convicted him of possession of a handgun without a permit. This appeal follows.

## DECISION

Burks argues that the evidence is insufficient to sustain his conviction. When considering a claim of insufficient evidence, we examine the record to determine whether the evidence, when considered in the light most favorable to the conviction, could reasonably support the verdict. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004). Evidence is sufficient to support a conviction if the district court could reasonably conclude that the defendant was guilty of the charged offense. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999). We assume that the factfinder "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 when resolution of the matter depends on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

Burks argues that the evidence is insufficient because the district court found him guilty based on uncorroborated accomplice testimony. A defendant may not be convicted

based “upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense.” Minn. Stat. § 634.04 (2006). The rationale for this rule is that accomplice testimony is “inherently untrustworthy,” *State v. Evans*, 756 N.W.2d 854, 877 (Minn. 2008), because accomplices “may testify against another in the hope of or upon a promise of immunity or clemency or to satisfy other self-serving or malicious motives,” *State v. Shoop*, 441 N.W.2d 475, 479 (Minn. 1989).

If it is unclear whether a witness is an accomplice, the question should be determined by the jury. *State v. Henderson*, 620 N.W.2d 688, 700 (Minn. 2001). But in a bench trial, the district court makes the determination. *In re Welfare of S.H.H.*, 741 N.W.2d 917, 919 (Minn. App. 2007). Although the district court here did not make a finding of fact specifically establishing Rainey as an accomplice, the evidence bearing on whether Rainey is an accomplice under the statute is undisputed and we therefore consider Rainey’s status de novo. *See O’Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (stating that the application of a statute to undisputed facts is a question of law).

### ***Was Rainey an Accomplice?***

A person is guilty of possession of a pistol without a permit if he carried, held, or possessed “a pistol in a motor vehicle, snowmobile, or boat, or on or about the person’s clothes or the person, or otherwise in possession or control in a public place” without a permit. Minn. Stat. § 624.714, subd. 1a (2006). A witness is an accomplice under Minnesota Statutes section 634.04 if “the witness could have been indicted and convicted

for the crime with which the accused is charged.” *Henderson*, 620 N.W.2d at 701. The reason accomplice testimony is presumed unreliable is that accomplices have substantial motive—avoiding their own criminal liability—to pin the blame on some other person. If, for argument’s sake, Rainey was concerned that she would be charged for bringing the gun into the park, firing it, and putting it back into her purse (a scenario having evidentiary support equal to that of the state’s theory, except for Rainey’s testimony), she could have implicated Burks to avoid the reckless-firing charge. This potential for a self-serving accusation is the concern that section 634.04 addresses. *See State v. Azzone*, 271 Minn. 166, 170, 135 N.W.2d 488, 493 (1965) (explaining that section 634.04’s purpose “is to provide a check upon the credibility of testimony of a person who, having been admittedly involved in criminal conduct, might be disposed to shift or diffuse responsibility”). Although the state charged Rainey and Burks under the theory that Burks possessed and fired the gun and that Rainey later possessed the gun after Burks put it in her purse, the evidence supports two other charging scenarios: that Rainey alone possessed and recklessly fired the gun or that both Rainey and Burks jointly possessed the gun after Burks fired it. Because Rainey could have been charged with possession under either of these other scenarios, Rainey qualifies as Burks’s accomplice.

It is not clear from the record whether the district court convicted Burks for his actual possession of the pistol at the time of the shooting or for constructive possession of the pistol with Rainey at the time the gun was discovered in Rainey’s purse. A person “has constructive possession of a firearm if he consciously exercises dominion and control over it.” *Salcido-Perez v. State*, 615 N.W.2d 846, 848 (Minn. App. 2000), *review*

*denied* (Minn. Sept. 13, 2000). Rainey’s testimony supported a finding of constructive possession. She testified that, without asking, Burks placed the gun in her purse and that she did not object. This establishes that Burks exercised dominion and control over both the pistol and the container in which it was placed. And constructive possession need not be exclusive; contraband can be possessed jointly. *See State v. Lee*, 683 N.W.2d 309, 316 n.7 (Minn. 2004).

The state argues that Rainey was not an accomplice for three reasons. First, the state points out that Rainey’s criminal complaint does not identify Rainey as Burks’s accomplice or codefendant. The state provides no authority for the proposition that accomplice or codefendant status depends on the state’s description of the crime. Second, the state emphasizes that Rainey and Burks were charged by separate entities—the City of Minneapolis and Hennepin County. The state does not explain the relevance of this distinction, and it is not apparent to us. Third, the state argues that Rainey did not aid, advise, counsel, or conspire with Burks to commit the crime—language found in the statute establishing the criminal liability of an accomplice. *See* Minn. Stat. § 609.05, subd. 1 (2006) (“A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.”). But our accomplice determination does not rest on whether Rainey aided or abetted Burks in his crime; it rests on the fact that Rainey could have been charged with the same crimes as Burks. The state’s contentions do not alter our holding that Rainey was Burks’s accomplice under section 634.04.

### ***Was the Accomplice Testimony Sufficiently Corroborated?***

We next consider whether Rainey's testimony was sufficiently corroborated. It was not. Corroborating evidence must do more than show that the offense was committed or the circumstances of its commission. Minn. Stat. § 634.04. It is sufficient only if it "restores confidence in the accomplice's testimony, confirming its truth and pointing to the defendant's guilt in some substantial degree." *State v. Ford*, 539 N.W.2d 214, 225 (Minn. 1995) (quotation omitted).

The district court found that Rainey's testimony was corroborated "by the shots fired that the neighbor heard and by the other circumstances of the case." That shots were fired does no more to implicate Burks than Rainey but merely shows that a crime occurred. We do not know the "other circumstances" the district court found persuasive, but the options are sparse. Other than Rainey's testimony, police testified that a resident nearby reported gunshots. Police testified that they encountered the group walking in the park; and G.M. identified those present in the group. This evidence tends to confirm the truth of some of Rainey's statements, but it does nothing to corroborate Rainey's claim that Burks was the one who possessed and fired the pistol rather than Rainey or anyone else in the group. "[W]hen evidence is as consistent with the defendant's innocence as with [his] guilt, the evidence is not sufficient to corroborate the testimony of accomplices." *State v. Her*, 668 N.W.2d 924, 927 (Minn. App. 2003) (alteration in original) (quotation omitted), *review denied* (Minn. Dec. 16, 2003). Rainey's testimony was not sufficiently corroborated.

And because Rainey's uncorroborated testimony was the only evidence that Burks possessed the firearm, the evidence is insufficient to sustain his conviction. Without Rainey's testimony, no reasonable factfinder could have found that Burks was guilty of possessing a handgun without a permit. There was no other testimony and no physical evidence linking Burks to the firearm. Because Burks's conviction cannot rest on the uncorroborated testimony of an accomplice and because the remaining evidence is insufficient as a matter of law to sustain his conviction, we reverse.

Burks also challenges the validity of his jury-trial waiver. But because the evidence is insufficient as a matter of law and double jeopardy precludes further prosecution, *see State v. Harris*, 533 N.W.2d 35, 36 n.1 (Minn. 1995), the jury-waiver issue is moot.

**Reversed.**