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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1178**

State of Minnesota,
Respondent,

vs.

David Earl Riley,
Appellant.

**Filed July 29, 2008
Affirmed
Shumaker, Judge**

Ramsey County District Court
File No. K9-06-4450

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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

UNPUBLISHED OPINION

SHUMAKER, Judge

On appeal from his conviction of possession of a firearm by an ineligible person, appellant argues that the district court abused its discretion by declining to instruct the jury on “fleeting control.” Because Minnesota has not adopted the notion of “fleeting control” as an exception to the rule of “possession,” we affirm.

FACTS

Around midnight on November 20, 2006, St. Paul police officer George Nelson received a call from a confidential reliable informant indicating that Cory Hobbs was in possession of a firearm at a bar in St. Paul’s Frogtown neighborhood. The informant gave Nelson the license plate number of a red, four-door car that Hobbs drove to the bar and said Hobbs was with two other men named Dave and Twon.

Officer Nelson, who was wearing plain clothes and driving an unmarked squad car, went to the bar. Once there, he located the red car, which was parked where the informant said it would be, and verified the car’s description and license plate number. Nelson also ran a driver’s license check on Hobbs and learned that he had a suspended license and was ineligible to possess a firearm.

Nelson began watching the car. When the bar closed around 2 a.m., Nelson saw three men leave the bar and walk toward the red car; he immediately recognized them as Cory Hobbs, Antwon Baymon, and appellant David Riley. The three men got in the car; Hobbs got into the driver’s seat, Baymon was in the back seat, and Riley sat in the front passenger seat.

As the red car left the bar, Nelson followed it and alerted other squad cars in the area to help stop the vehicle on probable cause that Hobbs had a suspended driver's license.

Officers Brady Harrison and Michael McAlpine were driving marked squad cars in the vicinity when Nelson requested assistance. They, along with other officers, stopped the red car.

Once Hobbs pulled over the car, Officers Harrison and McAlpine conducted a felony stop with their guns drawn because of the possibility that Hobbs was carrying a gun. The officers did not notice any movement in the car between Hobbs and Riley. They ordered Hobbs to get out of the car, but he ignored their command.

Riley, however, did get out of the car and attempted to flee. Officer Harrison yelled at Riley to stop, but he did not. Harrison then sent his K-9 partner, Sully, after Riley.

When the officers caught up with Riley, he was against a fence with Sully biting his leg. Riley began hitting Sully so that Sully would release his bite. Once free from Sully's grip, Riley again attempted to flee. Sully charged at Riley a second time, biting his leg and allowing Harrison to apprehend him.

After arresting Riley, officers recovered a .40-caliber semiautomatic pistol on the ground near the fence where Riley was apprehended. No identifiable fingerprints were found on the gun or ammunition clip.

Riley was charged with one count of possession of a firearm by an ineligible person, in violation of Minn. Stat. § 624.713 (2006). During his two-day jury trial, Riley

presented his theory of the case to the jury, arguing that he did not actually possess the firearm, that the gun belonged to Hobbs, and that Hobbs had set him up. He stipulated that he was ineligible to possess a firearm because of a prior felony conviction.

Riley testified in his own defense, explaining that he, Hobbs, and Baymon arrived at the bar between 12:00 a.m. and 12:30 a.m. and that he did not recall seeing Hobbs with a gun at the bar. He further admitted that he drank tequila, used ecstasy, and smoked marijuana that night. Riley told the jury that when police pulled the car over, Hobbs threw the gun onto Riley's lap. Riley then tossed the gun back to Hobbs, but Hobbs threw it back at him and pointed out that Riley's fingerprints were on the gun because Hobbs was wearing gloves. Riley claimed that he panicked when he heard police order them out of the car. He admitted that he heard the officer tell him to stand still, but said he did not hear the officer say he would release the dog. He told the jury that he ran because he had a gun that did not belong to him, his "so-called friend" had set him up, and he did not want to go to jail for a gun he "never had." He said that as he was running towards the fence he threw the gun away. And after being apprehended, he told police that the gun belonged to Hobbs and that Hobbs had set him up.

During cross-examination, Officer Nelson admitted that the information from the informant indicated that Hobbs possessed the firearm, and Officer Harrison admitted that, after his arrest, Riley insisted that Hobbs had set him up.

Prior to closing arguments, Riley asked the district court to instruct the jury on "fleeting control," which was part of Riley's defense. Relying on Minnesota caselaw, *State v. Houston*, 654 N.W.2d 727 (Minn. App. 2003), *review denied* (Minn. Mar. 26,

2003), the district court denied the request but told Riley that he was not precluded from making the fleeting-control argument to the jury. During his closing, Riley argued that Hobbs had set him up and that he was not guilty of possessing the firearm.

The jury returned a verdict of guilty as charged. This appeal followed.

D E C I S I O N

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). The refusal to give a requested jury instruction is within the discretion of the district court and will not be reversed absent an abuse of that discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). The focus of the analysis is on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). “An instruction is in error if it materially misstates the law.” *Id.* at 556.

At Riley’s jury trial, the district court instructed the jury on the elements of possession of a firearm by an ineligible person, including the requirement that “the defendant knowingly possessed a firearm.” The court explained to the jury:

In order for the defendant to have possessed a firearm, it is not necessary that it have been on the defendant’s person. Possession need not be by the defendant alone, but may be shared by others. Defendant possessed the firearm if it was in a place under defendant’s control to which other people did not normally have access, or if defendant knowingly exercised dominion and control over it.

But the district court denied Riley’s request for a jury instruction on fleeting control.

Minnesota has not adopted the proposition that fleeting control of a weapon does not qualify as possession of the weapon for purpose of criminal liability. *State v.*

Houston, 654 N.W.2d 727, 734 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003).

In *Houston*, we concluded that, even though an instruction on fleeting control may have been appropriate, the district court's failure to give a specific fleeting-control instruction was not an abuse of discretion because the defendant had the opportunity to argue to the jury that he did not knowingly possess the firearm; the jury was instructed that the prosecution had to show that he knowingly possessed the gun; and the jury considered whether the defendant had the required possession. *Id.* at 735.

Likewise, in this case the district court did not abuse its discretion. Rather, the district court followed *Houston* by refusing to instruct on a proposition that Minnesota has not recognized, but permitting Riley to argue his theory to the jury. Riley elicited testimony from the officers on cross-examination indicating that the informant had said that Hobbs possessed the gun and that Riley had consistently claimed he had been set up. He testified in his own defense, telling the jury that Hobbs had set him up. And during closing, defense counsel argued that Hobbs had set him up and that he was not guilty of possessing the firearm. Riley's version of events and his possession of the handgun were considered by the jury and ultimately resolved against him.

Riley attempts to distinguish his case from *Houston*, arguing that, unlike the situation presented by *Houston*, the fleeting-control instruction went to the heart of his defense theory, and that his version of events was corroborated by both the fact that the confidential informant told officers that Hobbs had the gun and by Riley's statement to police alleging that Hobbs had set him up. But our analysis in *Houston* does not indicate that these factors were relevant to the outcome. Rather, in *Houston*, we focused on the

defendant's opportunity to present his theory to the jury and the jury's opportunity to consider whether the defendant had the requisite possession. *Id.* (“The lack of a specific instruction regarding ‘fleeting control’ did not preclude appellant from arguing this to the jury, nor did it preclude the jury from considering the matter.”).

Riley next contends that the fleeting-control instruction was necessary because the state undercut his theory by arguing during closing that the judge's instructions did not say that there was a valid excuse for possessing the firearm and thus the jury could not have considered his version of events as a legitimate defense. In support of his argument, Riley directs this court to *State v. Pendleton*, in which the Minnesota Supreme Court concluded that a defendant charged with assault was entitled to a new trial because the jury instructions effectively eliminated his defense from the jury's consideration, even though there was evidence presented to support his defense. 567 N.W.2d 265, 270-71 (Minn. 1997). But in *Pendleton*, the supreme court concluded that the jury instructions “materially misstated the law, and were therefore in error” because the instructions required the defendant to show he feared great bodily harm or death to justify his use of deadly force and contradicted the plain language of the statute defining “defense of dwelling.” *Id.* Here, in contrast, the district court's instructions did not misstate the law in any respect; Minnesota has not adopted the fleeting-control proposition. *Houston*, 654 N.W.2d at 734.

Moreover, we note that the statute prohibiting persons convicted of crimes of violence from possessing firearms does not permit or mention fleeting control or fleeting possession. Minn. Stat. § 624.713, subd. 1 (2006). This court may not add to a statute

“what the legislature purposely omits or inadvertently overlooks.” *Ullom v. Indep. Sch. Dist. No. 112*, 515 N.W.2d 615, 617 (Minn. App. 1994) (quotation omitted).

Affirmed.