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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0320**

State of Minnesota,
Respondent,

vs.

Antonio Cortez Lewis,
Appellant.

**Filed March 15, 2021
Reversed
Jesson, Judge**

Hennepin County District Court
File No. 27-CR-19-11555

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Reyes, Judge; and
Jesson, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

Moments after a drive-by shooting, police saw appellant Antonio Cortez Lewis riding in the front passenger seat of a vehicle speeding away from the scene. After police made an unsuccessful attempt to stop the car, Lewis, the driver, and an unidentified

backseat passenger eventually abandoned the vehicle and fled from police on foot. Police found a .45-caliber Springfield handgun in the car's rear passenger area. Lewis was apprehended on a later date and admitted that he was present when the shots were fired but denied participating in the shooting.

The state charged Lewis with aiding and abetting the drive-by shooting¹ and unlawful possession of a firearm or ammunition.² The state introduced cellphone videos showing Lewis in possession of a purported 9mm handgun in the days leading up to the shooting and argued to the jury that Lewis possessed and fired a 9mm handgun—that police never found—on the night of the shooting. The jury acquitted Lewis of aiding and abetting the drive-by shooting, but guilty of unlawful possession of a firearm or ammunition. Lewis challenges the sufficiency of the evidence supporting the jury's guilty verdict. Because we conclude that the evidence is not sufficient to prove, beyond a reasonable doubt, that Lewis possessed a firearm or ammunition, we reverse.

FACTS

At trial, the state's theory of the case was that Lewis and Jamar McLane participated in a drive-by shooting near a Minneapolis residence, and that Lewis fired a 9mm handgun during the shooting. The jury ultimately acquitted Lewis of aiding and abetting, but

¹ Minn. Stat. § 609.66, subd. 1e(b) (2018).

² Minn. Stat. § 624.713, subd. 1(2) (2018).

convicted him of unlawful possession of a firearm. With the exception of several details, the parties generally agree as to the facts proved at trial:

On March 24, 2019, a group of people were visiting J.J.'s residence while J.J. was away. At about 1:00 a.m., J.J. returned home and asked the guests to leave. Suddenly, gunfire broke out outside. Bullets entered the residence through the windows and hit walls. J.J. and a guest were both shot.

Nearby, two police officers heard the gunfire and drove towards the sound of the shots. They saw a white Kia driving with its lights off at a high speed away from where they heard the shots. The officers stopped the Kia by pulling their squad car in front of it. Squad car and body camera videos depicting the interaction were played at trial, and police officers involved in the stop testified to their recollection of it. There were three men in the Kia—the driver (later identified as McLane), a front-seat passenger (later identified as Lewis), and a back-seat passenger (who was never identified). When the officers got out of their squad car and instructed the men to raise their hands, the men did not initially comply. Lewis made movements that one officer testified looked like he “was probably hiding something underneath the seats.”³ The officers had their guns drawn and pointed at the men in the Kia.

³ We observe that, although the officer testified that Lewis's movements made it look like he was hiding something underneath the seats, the video evidence of the stop clearly demonstrate that Lewis moved towards the front of the Kia, not toward the rear passenger area where the gun at issue in this case was ultimately discovered.

Two more police officers arrived in a second squad car, pulled behind the Kia, and exited their vehicle. In order to avoid a crossfire, an officer standing in front of the Kia moved to its side. When she did, the Kia sped off.

All of the officers pursued the Kia in their squad cars. After a short chase, the Kia stopped and its occupants fled from the police on foot. Police apprehended McLane not long afterwards. McLane told police that “the gun” was in the Kia. When asked whether it was just one gun, McLane responded that he did not know.

A K9 officer, attempting to locate the other occupants of the car, led police to a shack in a nearby residential back yard where the dog alerted. There was no person in the shack, but police found a black jacket that appeared to be similar to one that the front-seat passenger in the Kia had been wearing.

Police searched the Kia. They discovered a Springfield .45-caliber handgun in the rear passenger area, partially underneath the front seat. Fully loaded, the Springfield would hold 14 rounds (one round in the chamber, 13 rounds in the magazine). There were no rounds in either the magazine or the chamber. Police also found a box of .45-caliber ammunition in the vehicle. The box was missing exactly 14 rounds. There were no discharged cartridge casings in the car. But the officers found two cell phones and an alcohol bottle in the Kia.

A team of forensic scientists was dispatched to the residence to process the crime scene. They found discharged cartridge casings along the exterior of the house, as well as

discharged cartridge casings across the street on the sidewalk.⁴ There were two distinct groupings of these casings across the street from the residence. There was one group of 9mm discharged cartridge casings and one group of .45-caliber discharged cartridge casings. In the .45-caliber group, there were 13 casings and one live round, totaling 14 rounds—the same amount of rounds that the Springfield could hold and the amount missing from the ammunition box. Forensic testing could not determine whether the .45-caliber discharged cartridge casings had been fired from the Springfield.

Other forensic scientists compared fingerprints and DNA found in and on the Kia to known samples of Lewis and McLane. Lewis's fingerprints and palm prints were found in several areas—on multiple locations on the exterior of the Kia and on the alcohol bottle. A DNA mixture of four or more individuals was discovered on the Springfield. The major DNA profile of that mixture matched McLane's DNA sample. The scientist conducting the DNA analysis could not determine whose DNA might have been a minor profile in the mixture. But Lewis's DNA sample matched (or was very likely a contributor to) DNA mixtures on the black jacket found in the shed and the alcohol bottle.

Turning to the cellphones in the Kia, police found two short videos on one that depicted Lewis holding a 9mm handgun. The videos were “created” on March 21 and 23,

⁴ In total, the scientists found 13 .40-caliber discharged cartridge casings, 13 .45-caliber discharged cartridge casings, 26 9mm discharged cartridge casings, and one live .45-caliber round. A firearms specialist testified that the 26 9mm discharged cartridge casings that were found at the scene were fired by four distinct 9mm guns.

2019, meaning that they were either filmed, downloaded to the phone, or edited on those dates.⁵

A police sergeant eventually interviewed Lewis about the incident. Lewis initially denied being present or involved in the shooting and subsequent chase. But when the sergeant gave the address of the shooting, Lewis appeared nervous. He denied knowing McLane, but when shown a picture of him, he identified McLane by his nickname. Even after the sergeant confronted Lewis with evidence that he was present—his fingerprints, DNA, and the videos on the cellphone—Lewis maintained that he was not there. But ultimately, after further questioning, Lewis admitted that he was present. He claimed that McLane had set him up. He admitted that he saw McLane with a gun in the car. He admitted that “shots were fired.” When asked what he had done with “his gun,” Lewis said that “there was a gun” but refused to admit where it was.

In its closing arguments, the state attempted to persuade the jury that Lewis participated in drive-by shooting by possessing and firing a 9mm handgun—likely the 9mm handgun shown in the cellphone videos. The state did not argue to the jury that Lewis possessed the Springfield—instead, the state argued that it was likely that McLane fired the Springfield because it had McLane’s DNA “all over it.”

The jury found Lewis not guilty of drive-by shooting, but guilty of unlawful possession of a firearm or ammunition. The district court sentenced Lewis to 60 months in prison. This appeal follows.

⁵ The state also introduced generic photographs of a Taurus 9mm Slim handgun, which appeared to be the model of the gun in the videos.

DECISION

Lewis argues that the evidence is not sufficient to support his conviction because it fails to prove an essential element of unlawful possession of a firearm or ammunition—that he *possessed* a firearm or ammunition.⁶

This case is somewhat unique in that the state argued to the jury that Lewis was guilty of unlawfully possessing a 9mm handgun, but now argues on appeal that the evidence is sufficient to prove that Lewis possessed the Springfield. In fact, the state concedes that by acquitting Lewis of aiding and abetting the drive-by shooting, the jury rejected the theory that Lewis possessed a 9mm gun that was fired during the shooting. We agree that the jury clearly rejected the theory that Lewis possessed a 9mm handgun on the night of the shooting. As a result, we restrict our analysis to whether the evidence is sufficient to establish, beyond a reasonable doubt, that Lewis possessed the Springfield.⁷

When reviewing the sufficiency of the evidence, we conduct “a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable

⁶ Lewis also argues that (1) the district court plainly erred by failing to instruct the jury as to what act of possession he was guilty of, and (2) the district court erred by allowing the state to introduce inadmissible evidence. Because we ultimately conclude that the evidence is not sufficient to support the jury’s guilty verdict, we address only that issue.

⁷ We acknowledge that the state charged Lewis with possession of a firearm *or ammunition*, and that the state introduced evidence that ammunition was also discovered in the Kia. But it is clear, based on the evidence introduced at trial concerning the ammunition, that Lewis could not be convicted of possessing the ammunition if the jury did not also conclude that Lewis was guilty of possessing the Springfield. And there is no evidence of where in the Kia the ammunition was discovered, making it even less connected to Lewis than the gun. Thus, because we conclude that the evidence is not sufficient to prove that Lewis possessed the Springfield, we also conclude that the evidence is not sufficient to prove that Lewis possessed the ammunition discovered somewhere in the Kia.

to the conviction, was sufficient.” *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). “[W]e 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.” *Ortega*, 813 N.W.2d at 100.

Lewis’s conviction is based on circumstantial evidence. When the conviction is based on circumstantial evidence, we conduct a two-step analysis. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). First, we identify the circumstances proved at trial, disregarding evidence that is not consistent with the jury’s verdict. *Id.* Second, we consider the inferences that can be drawn from the circumstances proved. *Id.* We give no deference to the jury’s choice among reasonable inferences at this second step. *Id.* The evidence is sufficient if the circumstances proved, viewed as a whole, are “consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Id.*

Before beginning this two-step analysis, we review the law governing possession. Possession can be either actual or constructive. *State v. Florine*, 226 N.W.2d 609, 610-11 (Minn. 1975). A person is in *actual* possession of an item if he has direct physical control over it—for example, if the person is holding it. *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016). A person is in *constructive* possession of an item if the item is found in a place under his exclusive control to which other people do not normally have access,

or if it is found in a place to which other people do have access, there is a strong probability inferable from other evidence that the person was consciously exercising dominion and control over it. *Florine*, 226 N.W.2d at 611. Here, Lewis was not in actual possession of the Springfield. And the Springfield was found in a place to which other people had access. Thus, the state could only prove Lewis's guilt by proving that Lewis consciously exercised dominion and control over the Springfield.

Possession may also be exclusive or joint. *Ortega*, 770 N.W.2d at 150. But, generally, the defendant's mere presence in an area, occupied by multiple people, where an item is found is not sufficient to demonstrate that the defendant possessed that item. *State v. Lorenz*, 368 N.W.2d 284, 288 (Minn. 1985); *see also Harris*, 895 N.W.2d at 602-03 (concluding that evidence was insufficient to prove that driver possessed handgun lodged into headlining near sunroof when there were two other passengers in the car).

With this legal backdrop in mind, we turn to the first step in evaluating the sufficiency of the evidence—to determine the relevant circumstances proved. The circumstances proved relevant to Lewis's possession of the Springfield are as follows:

- (1) Lewis, McLane, and a third person were present in the Kia outside the residence.
- (2) McLane was driving the Kia, Lewis was in the front passenger seat, and an unidentified person was in the rear passenger seat.
- (3) A shooting occurred at the residence.
- (4) Police found 13 .45-caliber discharged cartridge casings and one live .45-caliber round at the scene of the shooting, across the street from the residence.
- (5) Police also found a grouping of 9mm discharged cartridge casings across the street from the residence.
- (6) Lewis did not immediately put his hands up when police ordered him to do so and made movements

in his seat towards the front of the Kia. (7) Lewis fled from police on foot after a short car chase. (8) Police found a .45-caliber Springfield handgun in the rear passenger area of the Kia. (9) Police also found a box of .45-caliber ammunition that was missing 14 rounds, a bottle of alcohol, and two cellphones. (10) McLane's DNA matched the major DNA profile found on the Springfield. (11) Lewis's DNA was on the alcohol bottle and his fingerprints were found on the car. (12) Police found Lewis's black jacket in a nearby shed after Lewis fled from police on foot. (13) Lewis initially told police that he was not present for the shooting, but eventually admitted that he was. (14) Lewis knew that McLane had a gun in the Kia.

Our second step in evaluating the sufficiency of the evidence is to determine whether the circumstances proved are "consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Harris*, 895 N.W.2d at 601. The parties disagree over both prongs of this step.

The state argues that the circumstances proved are consistent with a reasonable inference that Lewis possessed the Springfield based on his presence in the vehicle, his movements in the front passenger seat, his proximity to the Springfield, his knowledge that the Springfield was in the Kia and was used in the drive-by shooting, and Lewis's decision to flee from police and initially be untruthful in his interview. Lewis argues that the circumstances proved do not support a reasonable inference that he exercised dominion and control over the Springfield.

We conclude that the circumstances proved support a reasonable—though not particularly strong—inference of guilt. There are many circumstances that may support an

inference that a defendant exercised dominion and control over an object. Proximity to the item is one consideration. *State v. Sam*, 859 N.W.2d 825, 834 (Minn. App. 2015). Evidence that the defendant handled the item is another. *State v. Arnold*, 794 N.W.2d 397, 401 (Minn. App. 2011). And evidence of the defendant's knowledge of the item should also be considered. *Harris*, 895 N.W.2d at 602-03. Here, the circumstances proved demonstrate that Lewis was in close proximity to the Springfield, knew that the Springfield was in the vehicle, and evaded police after the shooting by fleeing and not immediately being truthful in his police interview. These circumstances are sufficient to establish a weak, but reasonable, inference that Lewis exercised some level of dominion and control over the Springfield.

The circumstances proved, however, do not foreclose all reasonable inferences of innocence. To support a conviction, “[c]ircumstantial evidence must form a complete chain that, 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. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). Here, it is reasonable to infer from the circumstances proved that Lewis, although he was aware of McLane's Springfield and was present for the shooting, did not exercise dominion and control over it. In reaching this conclusion, we observe that, although it would be possible for the three occupants to jointly possess the Springfield, Lewis was the *most unlikely* to have exercised dominion and control over it. McLane's DNA was found on the gun. The unidentified backseat passenger was sitting behind where police ultimately found the gun. Although Lewis was present in the vehicle and aware of the Springfield, he did not participate in the drive-by shooting that occurred.

There is no DNA evidence linking Lewis to the Springfield, and therefore no evidence suggesting that Lewis handled it.⁸ Simply put, the evidence does not form a “complete chain” leading so directly to the conclusion that Lewis exercised dominion and control over the Springfield such that it is unreasonable to infer that he did not. *Id.*

The state’s argument to the contrary runs headlong into *Harris*, another case involving a firearm discovered in a vehicle occupied by multiple people. 895 N.W.2d 592. When police clearly attempted to stop the vehicle that Harris was driving, Harris continued driving for several blocks. *Id.* at 596. Police saw movement in the vehicle as Harris continued to drive. *Id.* When stopped, Harris complied with the officers’ command to raise his hands, but at some point, Harris lowered his hands below the window. *Id.* at 597. When instructed to raise his hands again, Harris complied. *Id.* Police ultimately searched the vehicle and discovered a handgun lodged into the headlining of the car, behind a sunroof. *Id.* The butt of the gun was protruding from the headlining. *Id.* On the gun, police found a DNA mixture of five or more persons’ DNA. *Id.* About 75% of the general population could be excluded from being a contributor to the DNA mixture, but Harris and the other two occupants could not be excluded. *Id.* The jury found Harris guilty of possessing the firearm. *Id.* at 596-97.

The supreme court disagreed and reversed the conviction. The court noted that the theory that Harris fled to allow time to hide the firearm was not the only reasonable

⁸ To the extent that the state argues that Lewis’s movements in the Kia suggest that he handled the gun and attempted to hide the Springfield under the seat, we conclude that Lewis’s movements in the vehicle are not probative to his possession of the Springfield because Lewis leaned *away* from where the Springfield was eventually located.

hypothesis for why Harris fled; it was reasonable to infer that Harris fled because he was aware of a warrant for his passenger's arrest. *Id.* at 603. Nor did the circumstances foreclose an inference that Harris was unaware of the gun. *Id.* at 602. Other critical facts in the supreme court's analysis were that (1) Harris did not own the car; (2) the presence of others in the car; (3) there was no evidence that a lay person would have recognized the butt of the gun protruding from the headlining, which was behind the driver (Harris); (4) there was no evidence that Harris ever reached toward the sunroof; and (5) the DNA evidence was not particularly strong and did not exclude the other passengers in the car. *Id.* at 602-603.

We acknowledge the factual distinctions between this case and *Harris*. But these distinctions cut both ways and guide us to the conclusion that, as in *Harris*, the circumstances proved do not foreclose a rational inference that Lewis is innocent. Unlike in *Harris*, Lewis's knowledge of the Springfield in the Kia is a circumstance proved. But as in *Harris*, there are reasonable, alternative explanations for Lewis's elusive behavior after the incident—it is reasonable to infer that Lewis attempted to elude police because he was concerned they would erroneously believe, based on his presence in the car, that he was involved in the drive-by shooting.⁹

⁹ The state places particular emphasis on Lewis's flight. While Lewis was more successful in eluding police—Harris merely failed to stop for several blocks and failed to totally comply with police directives to raise his hands—his *motivation* for fleeing is the key factor in considering whether his flight is evidence of guilt. Because it is reasonable to infer that Lewis fled for reasons other than that he would be caught in possession of a firearm, the success of his flight is not particularly important to the sufficiency of the evidence supporting his conviction.

Moreover, the evidence that Lewis might have handled the Springfield is even weaker than that in *Harris*. Although a police officer testified that it looked like Lewis was hiding something underneath the seat, the video evidence demonstrates that Lewis did not reach toward the area that the Springfield was discovered—he reached towards the front of the Kia. Nor does the DNA evidence provide any link between Lewis and the Springfield. In *Harris*, the evidence indicated that 75% of the general population could be excluded as a contributor to the DNA mixture found on the gun, but Harris could not be excluded as a contributor. 895 N.W.2d at 597. Here, the DNA evidence says *nothing* of the probability that Lewis’s DNA contributed to the mixture on the Springfield. Instead, as the state argued to the jury, McLane’s DNA was “all over it.”

Accepting the jury’s verdict that Lewis did not aid or abet the drive-by shooting, and acknowledging that there are reasonable explanations for Lewis’s behavior after the shooting that are consistent with innocence, we are left only with the fact that Lewis was in a car which he knew contained a gun. But proximity and knowledge alone do not establish possession. Thus, we conclude that the evidence is consistent with a rational hypothesis of innocence—that Lewis was merely present in the Kia, and although he was aware of the Springfield, he did not exercise dominion and control over it.

Because the circumstances proved are consistent with a rational hypothesis of innocence, the evidence is not sufficient to support the jury’s guilty verdict. We therefore reverse Lewis’s conviction.

Reversed.