STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2206

State of Minnesota,
Respondent,

vs.

Jeffrey Burckhardt,
Appellant.

Filed April 29, 2008
Affirmed
Klaphake, Judge

Murray County District Court
File No. K7-05-183

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

Paul Malone, Malone & Mailander, 2605 Broadway Avenue, P.O. Box 256, Slayton, MN 56172 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Melissa V. Sheridan, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Schellhas, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

KLAPHAKE, Judge

Appellant Jeffrey Burckhardt challenges his conviction for fifth-degree controlled substance offense (possession or cultivation of a controlled substance while in possession of a firearm) in violation of Minn. Stat. §§ 152.025, subds. 1(2), 2(1) (2006), 609.11, subd. 5(a) (2006). He claims that (1) the prosecutor acted vindictively by adding the firearm enhancement charges after the district court granted appellant's motion to dismiss more serious charges; (2) the evidence was insufficient to prove that he possessed firearms while growing marijuana; and (3) the district court abused its discretion by denying his motion to bifurcate the trial because evidence of firearms in his home was prejudicial when he admitted to growing marijuana but claimed that he did so to treat his glaucoma. We affirm because we conclude that the record does not support appellant's claim that the firearm enhancement charges were added through prosecutorial vindictiveness; the evidence was sufficient to prove that appellant possessed a firearm while committing the underlying controlled substance offenses; and the district court did not abuse its discretion in refusing to bifurcate the trial.

D E C I S I O N

I.

Appellant claims that the prosecutor's motion to amend the criminal complaint to include the enhanced charges was a vindictive response to his motion to dismiss the most serious controlled substance charges for lack of evidentiary support. The timeline of pretrial motions shows that on March 7, 2006, appellant moved to dismiss the three most

serious of six controlled substance charges filed against him after a Bureau of Criminal Apprehension (BCA) report revealed that the weights of the marijuana plants taken from him were inadequate to support those charges. On the same day, the state filed a written response opposing the motion and moving to amend the complaint to add two firearm enhancement charges. At his omnibus hearing, appellant objected to the motion to amend, arguing prosecutorial vindictiveness, but the district court found no evidence of vindictiveness, relying on the prosecutor's statement that he reviewed the evidence after the dismissal motion and decided to add the enhanced charges "to clarify the facts that existed."

A complaint may be freely amended before trial to charge different or additional offenses, if the amendment is not motivated by prosecutorial vindictiveness. *State v. Alexander*, 290 N.W.2d 745, 748-49 (Minn. 1980); Minn. R. Crim. P. 3.04, subd. 2 (allowing an amended complaint to be filed during pretrial proceedings); *see State v. Bluhm,* 460 N.W.2d 22, 24 (Minn. 1990) (noting that in the pretrial period, "the trial court is relatively free to permit amendments to charge additional offenses . . ., provided the trial court allows continuances where needed"). A presumption of vindictiveness may arise when a defendant's exercise of a procedural right mandates "a complete retrial after he ha[s] been once tried and convicted." *United States v. Goodwin,* 457 U.S. 368, 376, 102 S. Ct. 2485, 2490 (1982). For pretrial decisions involving prosecutorial discretion, however, no presumption of vindictiveness applies. *Id.* at 381, 102 S. Ct. at 2492-93. In *Goodwin*, the Supreme Court enumerated several pretrial procedural rights that a defendant may assert that do not realistically provoke a vindictive response, and

one of those is the assertion of a challenge to the sufficiency of the indictment. *Id.* at 381, 102 S. Ct. at 2493. The Minnesota Supreme Court adopted the reasoning of *Goodwin* to find no prosecutorial vindictiveness in the state's decision to charge a defendant with an offense that was greater in degree than the charge in the original, dismissed indictment. *State v. Pettee*, 538 N.W.2d 126, 133 (Minn. 1995).

The rationales of *Goodwin* and *Pettee* apply here. While the state's motion to amend the complaint coincided in time with appellant's successful motion to dismiss three charges against him, the state's decision to add the enhanced charges had an independent basis in fact and was made four months before trial. Further, the state's proffered reason for the amendment, "to clarify the facts that existed[,]" finds independent support in the chronology of pretrial events that included receiving testing results from the BCA just prior to the state's motion to amend. In the exercise of prosecutorial discretion, the state may increase a charge upon realizing "that information possessed by the State has broader significance." *Goodwin*, 457 U.S. at 381, 102 S. Ct. at 2492; *Pettee*, 538 N.W.2d at 133. This discretion is allowed to reflect "the extent of the societal interest in prosecution" and in response to the notion that prosecutors are not infallible, and they are subject to limited resources. *Goodwin*, 457 U.S. at 382 and n.14, 102 S. Ct. at 2493 and n.14. On these facts, the amendment was based on the state's interest in prosecuting the case, or its broader realization of the import of appellant's possession of the firearms and not vindictiveness on the part of the prosecutor.

II.

Appellant next challenges the sufficiency of the evidence to prove that his possession of firearms increased the risk of violence, as required by Minn. Stat. § 609.11 (2006). Minn. Stat. § 609.11, subd. 5(a), provides that a person who commits a felony-level controlled substance offense under chapter 152 while the person "had in possession or used, whether by brandishing, displaying, threatening with, or otherwise employing a firearm, shall be committed to the commissioner of corrections for not less than three years[.]" The statute does not define "possession," but in *State v. Royster*, 590 N.W.2d 82, 85 (Minn. 1999), the supreme court held that constructive possession is sufficient to trigger section 609.11, because

> the obvious reality [is] that possession of a firearm while committing a predicate felony offense substantially increases the risk of violence, whether or not the offender actually uses the firearm. The firearm in possession . . . [is] an insurance policy . . . to be used to further the crime if need be and clearly raises the stakes of severe injury or death as a result of the commission of the predicate offenses.

(Quotation omitted.) The *Royster* court stated that sufficient evidence of constructive possession may be proved by "the nature, type and condition of the firearm, its ownership, whether it was loaded, its ease of accessibility, its proximity to the drugs, why the firearm was present and whether the nature of the predicate offense is frequently or typically accompanied by use of a firearm[.]" *Id.*

Here, the record is sufficient to prove beyond a reasonable doubt that appellant constructively possessed firearms within the meaning of Minn. Stat. § 609.11, subd. 5(a). He admittedly owned all of the firearms found in his home, which included rifles, among

them an SKS assault rifle; the rifles, while they were not loaded, were in the vicinity of ammunition; although the rifles were found in the living room, that room was where appellant slept; the marijuana was grown in bedrooms that were near the living room; and the predicate offenses, cultivating and possessing marijuana, were the types of offenses that could typically increase the risk of violence. Viewing this evidence in the light most favorable to the verdict, as we must, the evidence is sufficient to show that appellant was in constructive possession of the firearms and that they posed a risk of violence within the meaning of Minn. Stat. § 609.11. *See State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989) (stating that appellate review of sufficiency of evidence claim consists of whether the evidence, viewed in the light most favorable to the conviction, was sufficient to support a finding of guilt).

Appellant urges that this court adopt his testimony that he grew the marijuana for medicinal purposes and that the firearms were never used in connection with the marijuana found at his house. The jury is the ultimate judge of the credibility of conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The jury here could have been persuaded by the complexity of appellant's growing operation, the number of firearms found at his home, and appellant's question to arresting officers about "who ratted me out[.]" Based on our review of the record, the evidence is sufficient to sustain the jury's verdict.

III.

Finally, appellant asserts that the district court abused its discretion in denying his motion to bifurcate his trial to decide guilt in the predicate drug offenses separately from

the sentencing enhancement issue, which was based on his possession of firearms.[1] Minn. Stat. § 244.10, subd. 5 (2006), provides that a sentencing enhancement case involving "the state's request for a mandatory minimum under section 609.11" must be tried by a jury. The statute became effective on June 2, 2006. 2006 Minn. Laws ch. 260, art. 1, § 1. Under this statute,

> [t]he district court shall bifurcate the proceedings, or impanel a resentencing jury, to allow for the production of evidence, argument, and deliberations on the existence of factors in support of an aggravated departure after the return of a guilty verdict when the evidence in support of an aggravated departure:
>
> (1) includes evidence that is otherwise inadmissible at a trial on the elements of the offense; and
>
> (2) would result in unfair prejudice to the defendant.

Minn. Stat. § 244.10, subd. 5(c)(1), (2) (2006).

[1] In his pro se brief, appellant argues that based on *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 2537 (2004), the use of his possession of a firearm to increase his penalty beyond the prescribed sentence for the predicate controlled substance offenses necessarily had to be decided by a sentencing jury, and as the district court lacked statutory authority to convene a sentencing jury, the court had no authority to sentence him to an enhanced sentence under Minn. Stat. § 609.11 (2006). Appellant relies on *State v. Barker*, 705 N.W.2d 768, 773 (Minn. 2005), for the proposition that a district court has no inherent authority to convene a sentencing jury. *Barker* was decided before statutory amendments to Minn. Stat. § 244.10 (Supp. 2005) authorizing a district court to bifurcate a trial to have a jury separately determine sentence-enhancing factors, however. On June 3, 2005, legislation became effective to authorize the use of sentencing juries. 2005 Minn. Laws ch. 136, art. 16, §§ 3-6 (codified at Minn. Stat. § 244.10, subds. 4-7 (Supp. 2005). Because appellant was charged on July 27, 2005, he was subject to the amended version of Minn. Stat. § 244.10. Thus, appellant's claim that the district court lacked authority to order bifurcation of his trial is without merit. *See also State v. Chauvin*, 723 N.W.2d 20, 26 (Minn. 2006) (recognizing inherent power of the district court to impanel a sentencing jury).

The parties disagree about whether the evidence regarding the presence of firearms in his home would be admissible to prove the elements of the controlled substance offenses and whether the admission of this evidence would result in unfair prejudice to him. As to the admissibility of the firearms, appellant admitted growing marijuana but argued that it was solely for his personal, medical use. But considered together with the evidence of appellant's elaborate growing operation, including the presence of 142 plants in his home, plants in various growing stages, and a room dedicated solely to marijuana production, the firearms were relevant to prove that appellant was growing marijuana for more than personal use. *See State v. Love*, 321 Minn. 484, 484-85, 221 N.W.2d 131, 132 (1974) (allowing presence of firearms to be admitted to prove controlled substances were more than for personal use).

We also conclude that because the firearms were relevant to prove "manufacture" that was not solely for personal use, reference to them in a unified trial would not cause appellant unfair prejudice. The evidence supporting appellant's convictions for the predicate offenses was based on his admissions and on strong evidence of a marijuana growing operation. Under these circumstances, the district court did not abuse its discretion in declining to order a bifurcated trial. *See State v. Laine*, 715 N.W.2d 425, 433 (Minn. 2006) (setting forth rule that district court's bifurcation decision is subject to abuse of discretion standard of review).

Affirmed.