STATE OF MINNESOTA
IN COURT OF APPEALS
A11-651

State of Minnesota,
Respondent,

vs.

Prince Antonio Jones,
Appellant.

Filed June 25, 2012
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CR-10-38369

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, Jodie Carlson, Elizabeth A. Larsen, Laurie M. Glapa, Assistant Public Defenders, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Willis, 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

CONNOLLY, Judge

Appellant challenges his conviction of being a prohibited person in possession of a firearm, arguing that the admission of evidence of his extended-jurisdiction-juvenile conviction was plain error because that evidence was inadmissible due to his prior stipulation, that the prosecutor committed misconduct by eliciting the evidence, that his counsel provided ineffective assistance by failing to object to the evidence, and that the other evidence was circumstantial and insufficient to support his conviction. Because we see no error in the admission of evidence to which appellant opened the door, no prosecutorial misconduct, and no ineffectiveness in appellant's counsel's failure to object to the evidence, and because sufficient evidence supports appellant's conviction, we affirm.

FACTS

In 2006, when appellant Prince Antonio Jones was 17, he was convicted as an extended-jurisdiction juvenile (EJJ) for felony possession of a short-barreled shotgun under Minn. Stat. § 609.67, subd. 2 (2006). He was therefore a person prohibited from possessing a firearm under Minn. Stat. § 624.713, subd. 1(2) (2010). In 2010, when appellant was 20, and while he was on probation for the EJJ conviction, two police officers saw him remove a gun from his waistband and throw it up to the roof of a garage.

Appellant was charged with violation of Minn. Stat. § 624.713, subds. 1(2), 2(b) (2010) (prohibiting possession of a firearm by "a person who has been . . . adjudicated delinquent or convicted as an extended jurisdiction juvenile for committing, in this state

or elsewhere, a crime of violence"). Before his trial, he stipulated to the fact that he was prohibited from possessing a firearm.

At trial, the state's witnesses included three police officers. The first officer testified that he was riding in a squad car when he saw a man, later identified as appellant, walk away from a group of men when the squad car approached. The man had a bulge in his waistband that the officer believed could be a gun. He testified further that, when he opened the squad car door, he saw the man begin to run, then take a gun from his waistband and throw it up to a garage roof using an "underhand" or "almost backhand" motion. Finally, the officer testified that no one else was near the garage at that time.

The second officer testified that he was the driver of the squad car and drove it in appellant's direction when appellant walked away. He testified that, after he saw the first officer chase appellant down an alley, he drove into the alley. He also testified that, from a distance of about 100 feet, he saw appellant throw an item that landed on a garage roof and was later found to be a gun.

The third officer testified that he responded to a call for assistance from the other officers and arrived at the scene in about 30 seconds. He testified that he climbed to the roof of the garage, photographed the gun lying there, and he put on rubber gloves before removing the gun.

Appellant's witnesses included an acquaintance who was an eyewitness to the incident and who testified that, at the time of the incident, appellant was on probation and "was about to get off." She also testified that she was in the vicinity because she was

attending a barbecue at the residence of her aunt, who lived in the neighborhood; although she thought someone else had thrown the gun, she did not tell appellant or the police this; and (3) appellant called her numerous times from the jail and once asked her to lie and say she was his mother to get some of his money out of the police property room. An investigator who testified for appellant said he had been unsuccessful in verifying that the eyewitness was visiting an aunt because she said that the aunt had moved and she had neither an address nor a phone number for her and that the eyewitness was not on good terms with her mother, who was the aunt's sister, and who would not provide information.

Appellant also testified on his own behalf. When his counsel asked him about his conversation with the eyewitness, he said, "I was telling her that I was going to be off probation and all of that. And then when I called her from jail, she said she was mad . . . that I was in jail, 'cause I was doing good and I was being off probation . . . ." On cross-examination, when appellant was asked what he was on probation for, he answered, "Possession of a firearm." He answered "Yes" when asked, "Possession of a short-barreled shotgun, correct?" and added "And that happened when I was 16." Appellant's counsel did not object to this testimony, and neither party referred to it during closing argument.

Appellant challenges his conviction on the basis of this evidence, arguing that its admission was plain error, that the prosecutor committed misconduct in eliciting it, and that appellant was deprived of the effective assistance of counsel because his counsel did

not object to its admission. He also argues that the other evidence was circumstantial and was not sufficient to support his conviction.

D E C I S I O N

I. Plain Error

No objection was made to the admission of evidence of appellant's 2006 EJJ conviction for a crime of violence, namely the possession of a short-barreled shotgun in violation of Minn. Stat. § 609.67, subd. 2, (the EJJ evidence). When no objection is made to the admission of evidence, this court reviews the admission under a plain-error standard, which requires an error that was plain and that affect[ed] substantial rights; moreover, the error may be corrected only if it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (quotation omitted).

By his own reference to being on probation, appellant "opened the door" to the prosecutor's questions as to why he was on probation. *See State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006) (quoting 8 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice—Criminal Law and Procedure* § 32.54 (3d ed. 2001) for the proposition that opening the door to another party's testimony occurs when one party introduces material that creates in the other party the right to respond with other material to prevent the factfinder from receiving a "misleading or distorted representation of

reality").[1] Thus, the admission of appellant's testimony as to why he was on probation was not error.

Appellant raises four arguments to support his view that admitting this evidence was not only error but plain error. First, he argues that it violated Minn. R. Evid. 609(d) (providing that evidence of juvenile adjudications is not admissible unless permitted by statute or required by a constitution). This argument assumes that an EJJ conviction is a "juvenile adjudication." The only support appellant offers for this assumption is negative: he relies on Minn. Stat. § 260B.245, subd. 1(a) (2010) (providing that "An extended jurisdiction juvenile conviction shall be treated in the same manner as an adult felony criminal conviction for purposes of the Sentencing Guidelines") and argues that, because the statute provides no other similarity between EJJ convictions and adult convictions, EJJ convictions are equivalent to juvenile adjudications.

But the statute, taken in its entirety, refutes rather than supports appellant's argument because it makes juvenile adjudication and EJJ conviction not equivalent but mutually exclusive. *See, e.g.*, Minn. Stat. § 260B.245, subd. 1(a) ("No adjudication upon the status of any child in the jurisdiction of the juvenile court shall operate to impose any of the civil disabilities imposed by conviction . . . nor shall this adjudication be deemed a conviction of crime"); *see also* Minn. Stat. § 260B.255, subd. 1 (2010) (providing that a violation of a state law by a child under 18 "is not a crime unless the juvenile court: . . . (3) convicts the child as an extended jurisdiction juvenile . . . ."). Appellant's assumption

[1] Appellant cites a number of cases from other jurisdictions, arguing that the door was not opened. These cases are neither binding on this court nor persuasive.

that an EJJ conviction is the equivalent of a juvenile adjudication is without support, and the admission of testimony about an EJJ conviction is not excluded under Minn. R. Evid. 609(d).

Second, appellant argues that the evidence was inadmissible as irrelevant because he stipulated that he was prohibited from possessing firearms. *See* Minn. R. Evid. 401 (defining relevant evidence as evidence that tends to make the existence of any fact "of consequence to the determination" more or less probable than it would be without the evidence); Minn. R. Evid. 402 (providing that relevant evidence is admissible and irrelevant evidence is inadmissible). Whether appellant was prohibited from possessing firearms was not at issue because of the stipulation, but appellant did not testify that he was prohibited from possessing a firearm, and his testimony was relevant to the subject of his probation, which he raised. *See State v. Davidson*, 351 N.W.2d 8, 11 (Minn. 1984) (holding that a defendant prosecuted for being a prohibited person in possession of a firearm "should be permitted to remove the issue of whether he is a convicted felon by stipulating to that fact" but "the door should be left open so that in appropriate cases where the probative value of the evidence outweighs its potential for unfair prejudice, the evidence may be admitted").

Third, appellant argues that his testimony was inadmissible because its prejudicial effect outweighed its probative value. Factors to consider in determining admissibility of evidence of a prior conviction are: (1) impeachment value of the prior crime, (2) date of prior conviction and history since that time, (3) similarity of past crime to charged crime, (4) importance of defendant's testimony, and (5) centrality of credibility. *State v. Jones*,

271 N.W.2d 534, 538 (Minn. 1978). Appellant concedes that factor (2) favors admission because his EJJ conviction was within the time limit provided by Minn. R. Evid. 609.

Factor (1), the impeachment value of the prior crime, is determined by whether the evidence will enable the jury to see the defendant as a whole person and better judge the truth of his testimony. *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). Evidence of appellant's prior crime would have been valuable for this purpose, so this factor favors admission. Factor (3) argues against admission because appellant's two crimes—possession of a short-barreled shotgun and possession of a firearm by a prohibited person—are similar.

Factors (4) and (5) argue in favor of admission in cases where a defendant's credibility is central to the case. *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). Credibility is central to this case: the jury had to choose between believing appellant's statement that he did not have a gun or the police officers' statements that he was seen to throw a gun up to the garage roof. Thus, four of the five *Jones* factors indicate that appellant's EJJ conviction was more probative than prejudicial and favor its admission.[2]

Fourth, appellant argues that Minn. R. Evid, 404 (b) (providing that evidence of another crime "is not admissible to prove the character of a person in order to show action in conformity therewith" but may be "admissible for other purposes") (generally known as *Spreigl* evidence) precludes the admission of the evidence. But his evidence

[2] Appellant also argues that the district court failed to make the required findings on the *Jones* factors. But an appellate court is free to apply the factors and determine whether the impeachment evidence was properly admitted. *Swanson*, 707 N.W.2d at 655.

was admissible for the purpose of following up on the probation issue, which he had introduced.

There was no error, much less plain error, in the admission of appellant's EJJ evidence, and in any event, his argument that the error affected his substantial rights is unconvincing. Appellant stipulated to one element of the crime: being prohibited from possessing a firearm. On the other element, one officer testified that he saw appellant throw a gun, which was later found on the garage roof, and another testified that he saw appellant throw an item onto the garage roof where the gun was later found. The jury would have had to disbelieve their testimony to find appellant not guilty. There is no reasonable likelihood that the absence of the alleged error would have had a significant effect on the jury's verdict. *See State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (providing that a plain error affects a defendant's substantial rights where there is a reasonable likelihood that the absence of evidence on appellant's EJJ conviction would have had a significant effect on the jury's verdict). Appellant does not show that there was an error that was plain and that affected his substantial rights.

Because there was no objection to the EJJ evidence at trial, if its admission was not plain error, appellant is not entitled to appellate review. But, even if the error had been objected to, the plain-error analysis demonstrates that its admission was not an abuse of discretion. *See State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) ("Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion.").

II. Prosecutorial Misconduct

Appellant claims on appeal that the prosecutor committed misconduct by asking appellant what he was on probation for and whether that instance of possession of a firearm involved a short-barreled shotgun. Appellant did not object to the prosecutor's alleged misconduct at trial. Therefore, this court reviews under a modified plain-error standard, in which appellant must show an error that is plain, i.e., contravened caselaw, a rule, or a standard of conduct, and the state must show that the error had no effect on appellant's substantial rights, i.e., that there is no reasonable likelihood here that the absence of evidence on appellant's EJJ conviction would have had a significant effect on the jury's verdict. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Appellant's inability to show plain error has been discussed. The only remaining question is whether the state could show that there is no reasonable likelihood that the alleged error would have had a significant effect on the jury's verdict. In light of appellant's stipulation that he was not permitted to possess a firearm and the body of credible testimony provided by the three officers that he was in possession of a firearm, the testimony on his EJJ violation would not have had a significant effect.

III. Ineffective Assistance of Counsel

A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

Appellant argues that the performance of his defense counsel "fell below an objective standard of reasonableness" because "the admission of evidence related to [his]

EJJ conviction was improper. . . ." Both the admissibility of that evidence and the fact that its admission did not significantly affect the jury's verdict are discussed in connection with appellant's other claims. Appellant does not show that his counsel's assistance was ineffective.

IV. Sufficiency of the Evidence

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 a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). A jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *Id.* The reviewing court 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). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). This court will not disturb a 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).

Appellant argues that the evidence was insufficient to show he possessed a firearm. But one officer testified that he saw a bulge that looked like a gun in appellant's waistband and that he saw appellant take the gun from his waistband and throw it on a garage roof, where it was found, and another officer testified that he saw appellant throw

an item, later found to be a gun, up to the garage roof. Appellant claims "[t]here was a significant amount of evidence refuting the officers' testimony," but this court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *Moore*, 438 N.W.2d at 108.

Even if appellant was correct in his view that the state could not prove his actual possession of the gun and had to prove his constructive possession, his insufficient-evidence argument would fail. Because the gun was found on the roof of someone else's garage, a place to which others had access, the state would have to prove that there was a strong probability that appellant had consciously exercised dominion and control over the gun. *See State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975) (concluding that, when a defendant does not have exclusive control over the place in which an illegal item is found, the state must show that the defendant exercised dominion and control over the illegal item). The officers' testimony that appellant had the gun on his person, that he threw it, and that no one else was seen in the vicinity of the garage roof between the time he threw the gun and the time the gun was recovered would meet that standard.

With either actual or constructive possession, the jury could have inferred from the totality of the circumstances that appellant was in possession of the gun. *See State v. Denison*, 607 N.W.2d 796, 800 (Minn. App. 2000) (finding defendant constructively possessed marijuana because, under a totality of the circumstances, she likely exercised at least joint dominion and control over it), *review denied* (Minn. June 13, 2000). The evidence is sufficient to support appellant's conviction.

Affirmed.