IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD JOSEPH SHOEMAKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80375-COA

FILED

OCT 21 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Richard Joseph Shoemaker appeals from a judgment of conviction, pursuant to a jury verdict, of three counts of possession of a firearm by a prohibited person. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

A confidential informant told Las Vegas Metropolitan Police Department (LVMPD) detectives that Shoemaker regularly sold heroin and methamphetamine out of his home in Las Vegas. The informant worked with officers on prior cases and was involved in several other active investigations. Specifically, the informant told officers that he had known Shoemaker for about a year, and that Shoemaker was known to have illegal drugs and firearms at his home. To confirm the informant's allegations, officers conducted two controlled buys at Shoemaker's residence, where the officers surveilled the informant as he purchased methamphetamine from Shoemaker. During these controlled buys, the informant did not see any firearms in Shoemaker's home. Using the informant's information, officers obtained a search warrant to search Shoemaker's home and seize controlled substances and indicia of use and ownership of the home.[1]

[1]The search warrant application stated that it was imperative to prevent disclosure of the informant's identity to protect ongoing

LVMPD officers executed the warrant and recovered one firearm in Shoemaker's master bedroom and two in a trailer on his property, along with heroin and small amounts of methamphetamine. Shoemaker was not home during the search. Shoemaker's house sitter, Amanda Stone, was present. Stone did not claim ownership of the firearms when seized by police. Approximately one month later, Shoemaker was located and arrested.

The State charged Shoemaker with three counts of ownership or possession of a firearm by prohibited person (i.e. felon in possession of a firearm); two counts of possession of a controlled substance, methamphetamine; and one count of possession of a controlled substance with intent to sell, heroin. Shoemaker moved to compel disclosure of the confidential informant's identity, claiming that the informant's identity was necessary for his trial defense, was necessary to attack the informant's credibility, and was necessary to ensure there was no conflict because Shoemaker's counsel regularly receives court-appointed clients and might have represented the confidential informant on a prior case. In response, the State invoked the confidential-informant privilege under NRS 49.365.

The district court denied Shoemaker's motion and ordered an in camera inspection of the informant's file kept with LVMPD to determine if the information regarding the informant was material. Neither party provided a record of the district court's in camera review, and it is unclear if it ever occurred. The minute order indicates that Shoemaker volunteered to serve LVMPD with the order for the in camera inspection. The written order states that LVMPD shall deliver the written confidential informant

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investigations and to keep the informant safe. The issuing court sealed the affidavit.

records to the district court, and that the court will then determine if "all, some or none of the" records will be disclosed. The order also stated that if any records were disclosed, it would be under seal. There is nothing in the record to establish that the confidential informant records were delivered to the district court nor any indication that the court inspected or disclosed any information related to the confidential informant.

Shoemaker moved to dismiss his charges under NRS 49.365, claiming again that the State invoking the confidential-informant privilege required the court to dismiss the case because the confidential informant's identity was necessary for his defense at trial. The district court denied this motion, apparently without issuing a written order, and neither party includes a transcript of the proceedings on appeal, except a minute order that states, "COURT stated its findings and ORDERED, Motion to Dismiss DENIED . . . ." Nevertheless, nine months after the first hearing to compel disclosure of the informant's identity, and three months after denial of the motion to dismiss, the State voluntarily dismissed the drug-related charges and proceeded only on the firearms charges.[2]

At trial, the State presented testimony from a SWAT officer describing the seizure of the weapons but the references to the illegal drugs were omitted. Shoemaker called Stone as his only witness. Stone testified that she was housesitting for Shoemaker on the day of the search, and that she was the owner of the firearms that police found in Shoemaker's home. She testified that Shoemaker left his residence and was not present for approximately two to three days before the search. She stated that she slept on the couch inside the residence during her stay.

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[2]The State acknowledged that the informant was relevant to the drug-related charges, and decided to dismiss these counts.

According to Stone, one or two nights prior to the search, Stone's now-deceased father came to Shoemaker's residence and gave Stone three firearms for her to sell for money to support her then-unborn child. Stone said she placed the three guns in Shoemaker's trailer. The morning after Stone's father delivered the guns, a friend of Stone's cousin, whose identity was never disclosed, came to Shoemaker's residence to potentially purchase one of the guns. Stone testified that she let the friend select and remove one of the firearms from the trailer to view and take apart. Stone admitted that she was not knowledgeable with firearms and did not handle the firearm. The friend did not purchase the firearm and left it in Shoemaker's bedroom. The master bedroom had a sliding glass door providing close access to the trailer.

The State cross-examined Stone, who admitted that she was a daily heroin user, and that she was under the influence while testifying at trial, and also during the days she housesat Shoemaker's home. Stone testified that the video footage would corroborate her testimony. However, Detective Pazos later testified about the video footage recovered from Shoemaker's home, which apparently only depicted Shoemaker and not Stone's father, nor the potential buyer nor anyone bringing firearms inside the residence. Time-stamped screenshots from this video footage were admitted and showed Shoemaker inside the residence on the evening prior to the search. This was around the same time that Stone's father allegedly delivered the guns. No video footage was admitted showing Stone's father at the premises or the potential buyer. The admitted screenshots only depicted Shoemaker, and Detective Pazos's testimony about the video did not reveal the presence of any visitors.

The district court also admitted, over Shoemaker's objection, numerous photos depicting the inside of Shoemaker's home. The State offered this evidence to show Shoemaker's dominion and control of the property. The photos depicted the home in a messy state, with clothes strewn all about the living space. Other photos showed Shoemaker's tax forms and prescription drugs.

Shoemaker proposed what he characterizes as a "knowledge" jury instruction for felon in possession of a firearm. The district court refused to provide this instruction to the jury, holding that it was an inaccurate statement of law. The district court approved a "possession" instruction, a "knowingly" instruction, and an instruction that the jury must find beyond a reasonable doubt that Shoemaker willfully possessed the firearms to convict him.

The jury returned a guilty verdict for all three felon-in-possession counts. The district court sentenced Shoemaker to probation, but he absconded and had his underlying sentence imposed after his capture. Shoemaker appeals.

On appeal, Shoemaker argues that (1) the district court erred in denying his motion to dismiss under NRS 49.365; (2) the district court erred in refusing to give a jury instruction that the State must prove that Shoemaker had knowledge that the firearms were in his home; (3) it was "plain error" for the jury to convict Shoemaker; (4) the district court erred in admitting photographs of Shoemaker's home depicting his taxes,

prescription drugs, and messy living areas; and (5) cumulative error requires reversal of Shoemaker's conviction.[3] We disagree.

The district court did not err in denying Shoemaker's motion to dismiss

Shoemaker contends that the district court's denial of his motion to dismiss under NRS 49.365 was erroneous because the confidential informant was a material witness. Shoemaker additionally claims that without the informant's identity, he was denied his Sixth Amendment right to compulsory process; that the identity of the informant was exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963); and that NRS 49.335 and NRS 49.365 are facially unconstitutional under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[4]

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[3]As we discuss throughout this order, there was no error below, so we need not address Shoemaker's cumulative error claim. *See Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) (concluding that "insignificant or nonexistent" errors do not warrant cumulative error review).

[4]Shoemaker did not raise these additional claims to the district court, thus they are waived on appeal. *See Blankenship v. State*, 132 Nev. 500, 505 n.2, 375 P.3d 407, 411 n.2 (2016) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." (quoting *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)).

Additionally, to assert the Sixth Amendment compulsory process and *Brady* claims, the informant must be a material witness. As explained below, because Shoemaker failed to supply a record of why the district court held that the informant was not a material witness, this court need not address these issues on appeal. Even if the witness was material, these claims fail. First, the Sixth Amendment right to compulsory process does not extend to witnesses protected by privilege. *Taylor v. Illinois*, 484 U.S. 400, 410 (1988) (concluding that under the Sixth Amendment, "[t]he

We review conclusions of law and questions of statutory interpretation de novo. *Mendoza-Lobos v. State*, 125 Nev. 634, 642, 218 P.3d 501, 506 (2009); *Cf. Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (holding that a district court's decision to grant or deny a motion to dismiss an indictment is reviewed for abuse of discretion). We review a district court's factual findings for clear error. *Casteel v. State*, 122 Nev. 356, 361, 131 P.3d 1, 4 (2006).

Under NRS 49.335-49.375, if the State invokes the confidential-informant privilege for a material witness, the district court must dismiss the case. *Sheriff of Washoe Cty. v. Vasile*, 96 Nev. 5, 8, 604 P.2d 809, 810-11 (1980). However, invoking the privilege for a nonmaterial informant does not mandate dismissal. *Id.* at 8, 604 P.2d at 810; *see also* NRS 49.365.

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accused does not have an unfettered right to offer testimony that is . . . privileged . . . under standard rules of evidence").

Second, the Nevada Supreme Court concluded in *Wade v. State* that a confidential informant's identity is not per se *Brady* material; the defendant must prove that the informant has exculpatory information. 115 Nev. 290, 296, 986 P.2d 438, 441 (1999) ("Although defense counsels' presentation of the theory of defense in this case may have been enhanced by more complete access to the requested information, we discern no basis for concluding that there is a reasonable possibility that the outcome of appellant's trial would have been affected if appellant had received . . ." the complete confidential informant file). Shoemaker baldly claims that the informant's identity and testimony could have been exculpatory, without any support to back this assertion.

Lastly, Shoemaker's facial due process claims are predicated on his compulsory process and *Brady* claims. Shoemaker has not explained how these claims implicate due process. Thus, this facial challenge is duplicative and not cogent. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Thus, these additional claims lack merit.

An informant is a material witness when circumstances show a reasonable probability that the informant can testify to a defendant's culpability. *Vasile*, 96 Nev. at 8, 604 P.2d at 810. For example, a witness is "material" when she or he does more than merely introduce officers to the accused, and in some way either participates with law enforcement in apprehending the accused or witnesses the alleged crime. *See id.* at 8, 604 P.2d at 810-11. Whether an informant's identity must be disclosed depends on the circumstances of each case. *Miller v. State*, 86 Nev. 503, 506, 471 P.2d 213, 215 (1970).

NRAP 30(b)(3) requires an appellant to include in his appendix any portion of the record that is necessary for this court's determination of the issues raised on appeal. This court presumes that matters not contained in the record on appeal support the district court's ruling. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007); *Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991), *rev'd on other grounds*, 504 U.S. 127 (1992); *see also Fields v. State*, 125 Nev. 785, 790, 220 P.3d 709, 712 (2009); *Lee v. Sheriff of Clark Cty.*, 85 Nev. 379, 380, 455 P.2d 623, 624 (1969).

Here, Shoemaker fails to demonstrate that the district court erred in denying his motion to dismiss. Specifically, he fails to produce any record of the district court's findings and rationale for its denial even though a minute order says the court stated its findings for denial of the motion. NRS 49.375(3) requires that if the district court reviews an informant's identity in camera, then a sealed copy of the informant's identity must be preserved for appellate review. Shoemaker's appellate record does not indicate if the district court ever made an in camera inspection. When an in camera inspection is made, a sealed record must be created and kept with

the district court. *See* NRS 49.375. NRAP 30(b)(3) requires Shoemaker to produce that sealed record on appeal. Because he did not include these records, we presume that the missing record supports the district court's denial of Shoemaker's motion to dismiss and conclude that the confidential informant was not a material witness.[5]

The district court did not err in denying Shoemaker's proposed jury instruction

Shoemaker argues that the district court's refusal to provide a "knowledge" instruction for the felon-in-possession-of-a-firearm charges was erroneous. We review the district court's refusal to give a jury instruction for abuse of discretion. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Whether an instruction correctly states the law, however, presents a legal question that we review de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). NRS 202.360(1) makes it a felony for a convicted felon to "own or have in his or her possession . . . any firearm." To possess a firearm, a person must "knowingly" do so. *Palmer v. State*, 112 Nev. 763, 768, 920 P.2d 112, 115 (1996) (internal quotation marks omitted). There are two types of possession: actual and constructive. *Id.* Actual possession means the person is knowingly in direct physical control over the item, whereas constructive possession is knowingly exercising dominion or control over contraband, "either directly or through another." *Id.* (internal quotation marks omitted); *Batin v. State*, 118 Nev. 61, 65-66, 38 P.3d 880, 883-84 (2002).

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[5]We note that the State dismissed the drug charges to avoid disclosure of the informant. Shoemaker has not shown why the testimony of the informant was material to raise a doubt as to his guilt for possessing firearms as a felon.

Here, the district court did not err in refusing to provide the requested jury instruction. Despite Shoemaker's contention on appeal that the district court refused to provide a knowledge instruction, the district court provided an instruction on "constructive possession" along with a separate instruction defining "knowingly." The district court also instructed the jury that it must find beyond a reasonable doubt that Shoemaker "willfully" possessed the firearms as a felon. We thus conclude that the district court did not incorrectly state the law, and, in any event, the jury received a "knowingly" instruction, thereby repelling Shoemaker's contention that he was erroneously denied a "knowledge" instruction.[6]

There was sufficient evidence for the jury to convict Shoemaker of felon in possession of a firearm

Shoemaker argues that the jury's verdict was "plain error." We address this claim as a sufficiency-of-the-evidence challenge for his three convictions. Shoemaker specifically claims that NRS 202.360(1) requires that the firearms be in Shoemaker's immediate and exclusive control, and because the State failed to prove that Shoemaker was at his home when the firearms were present, the jury should not have convicted him.

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[6]Shoemaker's proposed jury instruction provided, "[s]hould you find the State to not prove beyond a reasonable doubt that a firearm was in his home, you must find him not guilty of ownership." We do not see how this instruction addresses any knowledge requirement under the felon-in-possession-of-a-firearm statute. This instruction only addresses whether the firearms were actually found in Shoemaker's home, which was not something that Shoemaker contended at trial, nor does he challenge this on appeal. Plus, other instructions addressed the knowingly requirement for felon in possession of a firearm. *See Rose v. State*, 123 Nev. 194, 205, 163 P.3d 408, 415 (2007) ("It is not error for a court to refuse an instruction when the law in that instruction is adequately covered by another instruction given to the jury." (internal quotation marks omitted)).

We review the sufficiency of the evidence "in the light most favorable to the prosecution," to see if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). We do not "determine the credibility of witnesses." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Constructive possession is universal across all possession crimes in Nevada, including felon in possession of a firearm. *Accord Palmer*, 112 Nev. at 768-69, 920 P.2d at 115 (defining "constructive possession" of a stolen vehicle as knowingly exercising dominion or control over a stolen vehicle (internal quotation marks omitted)); *Lathrop v. State*, 110 Nev. 1135, 1136, 881 P.2d 666, 667 (1994) (defining "constructive possession" of a cheating device as "dominion and control over, or a right to control, the cheating device"); *Woodall v. State*, 97 Nev. 235, 236, 627 P.2d 402, 403 (1981) (defining "constructive possession" under NRS 202.360 as exercising dominion or control over a firearm); *Konold v. Sheriff, Clark Cty.*, 94 Nev. 289, 290, 579 P.2d 768, 769 (1978) (defining "constructive possession" of illegal drugs as exercising "dominion and control over the contraband"). The State may prove the elements of felon in possession of a firearm by direct or "circumstantial evidence and reasonably drawn inferences." *Sheriff, Washoe Cty. v. Shade*, 109 Nev. 826, 830, 858 P.2d 840, 842 (1993) (internal quotation marks omitted). However, "mere presence in the area where contraband is discovered or mere association with the person who does control the contraband is insufficient to support a finding of possession." *Lathrop*, 110 Nev. at 1136, 881 P.2d at 667. For example, in *Woodall*, 97 Nev. at 236-37, 627 P.2d at 403, the Nevada Supreme Court concluded that

there was insufficient evidence to support the jury's verdict that defendant had dominion and control over a firearm discovered in a truck occupied by both defendant and his companion where the companion claimed ownership.

Here, Shoemaker claims that the State failed to prove that Shoemaker was present and in immediate and exclusive control of the firearms at his home, so the jury should not have convicted him. However, presence is not required for constructive possession, only dominion and control. The evidence was undisputed at trial that this was Shoemaker's home and one of the firearms was found in his bedroom in plain view. The other two were found in his trailer.

The State also provided video evidence to prove that Shoemaker was present on the day prior to the search warrant's execution—either around the same approximate time that Stone's father allegedly brought the guns to Shoemaker's house, or shortly after he delivered them. This video evidence contradicts Stone's testimony that Shoemaker was not home the night before the search. Moreover, the footage did not show anyone entering the property with guns or any of Stone's family. Stone's testimony could be found to be not credible, and as a result, we conclude that the jury could reasonably infer that Shoemaker exercised dominion and control over the firearms recovered from his residence.

The district court did not abuse its discretion in admitting photos of Shoemaker's tax forms, prescription drugs, and messy home

Shoemaker argues that admission of the photos of his tax forms, prescription drugs, and messy home was unduly prejudicial and an error of law because Shoemaker stipulated to ownership of the residence. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109

(2008). "[T]he admission of photographs lies within the sound discretion of the district court. Absent an abuse of discretion, we will not reverse that admission." *Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997). Only relevant evidence is admissible at trial. NRS 48.025(1). Evidence is relevant if it has "any tendency to make the existence of any fact" at issue "more or less probable than it would be without" it. NRS 48.015. Relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." NRS 48.035(1). Relevance is substantially outweighed by unfair prejudice when "it encourages the jury to convict the defendant on an improper basis." *Holmes v. State*, 129 Nev. 567, 575, 306 P.3d 415, 420 (2013) (internal quotation marks omitted).

Here, the State bore the burden of demonstrating that Shoemaker had dominion and control over the firearms seized by police. To do so, the State had to prove, among other things, that Shoemaker lived in the home while the firearms were present. Shoemaker argues that admission of these photos was erroneous because Shoemaker stipulated to ownership of the residence. However, ownership is not equivalent to occupying and living in a residence. For that reason, we conclude that the district court did not abuse its discretion in finding that this evidence was relevant and probative of Shoemaker's use and control of the home as his residence at the time of the search.

Although these photographs are somewhat embarrassing, Shoemaker fails to explain how exactly the personal nature of these items would "encourage[ ] the jury to convict" him "on an improper basis." *Id.* Shoemaker makes the bare assertion that the jury is classist and would discriminate against his socioeconomic status. He further claims that a lawful prescription for oxycodone would lead the jury to conclude that he is

a mentally ill drug addict, and for whatever reason convict him on that basis. These arguments lack substance because a jury could easily look at these items for what they were offered to prove: Shoemaker lived in the house and controlled the items within it. Even if these photos were prejudicial, they did not rise to the level of being so unfairly prejudicial as to substantially outweigh their probative value. We therefore conclude that the district court did not abuse its discretion in admitting these photos. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Ronald J. Israel, District Judge
Cohen Johnson Parker Edwards
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk