

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
Supreme Court No. 20170306

STATE OF NORTH DAKOTA,	)
	)
PLAINTIFF/APPELLEE	)
	)
VS.	)
	)
STEVEN DOYLE NEWMAN	)
	)
DEFENDANT/APPELLANT	)

APPEAL FROM THE JUDGMENT ENTERED JULY 13, 2017  
AS A RESULT OF A JURY VERDICT FROM THE  
RAMSEY COUNTY DISTRICT COURT  
NORTHEAST JUDICIAL DISTRICT  
THE HONORABLE DONOVAN FOUGHTY, PRESIDING  
BRIEF FOR DEFENDANT/APPELLANT

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North Dakota Century Code Section 62.1-02-01	[3, 7, 13, and 21]
North Dakota Rule of Criminal Procedure 29	[44]

## STATEMENT OF THE ISSUES

[1] I. Whether the evidence is sufficient to support a finding that Steven Newman is guilty of the charge of unlawful possession of a firearm in violation of North Dakota Century Code Section 62.1-02-01?

[2] II. Whether the trial court erred in denying Steven Newman's Motion for Judgment of Acquittal?

## STATEMENT OF THE CASE

[3] This is an appeal by Steven Newman of a jury verdict from a Ramsey County District Court of the Northeast Judicial District on the charge of unlawful possession of a firearm in violation of North Dakota Century Code Section 62.1-02-01.

[4] The State in this case alleged that Steven Newman, a convicted felon, had ownership, possession, or control of three firearms within five years of his felony conviction.

[5] A jury trial was held on July 12, 2017. The jury found Steven Newman guilty.

[6] Newman filed a Motion for New Trial and a Motion for Judgment of Acquittal both of which were denied. Steven Newman then submitted his Notice of Appeal on or about August 11, 2017.

## STATEMENT OF THE FACTS

[7] On February 24, 2017, the State of North Dakota through the Ramsey County State's Attorney filed a Complaint/Information charging Steven Newman with being a felon in possession of a firearm in violation of North Dakota Century Code Section 62.1-02-01. App. 1. This charge came about because on January

27, 2017, Probation Officer Aaron Hall performed a probation search of Steven Newman's residence at 408 King Street in Starkweather, ND. Tr. Page 13 lines 13-19. There was an additional search of a garage that was right behind the house. Tr. Page 14 lines 9-16. Steven Newman rents the house and garage from the Feldner family. Tr. Page 14 lines 2-12. Entry into the garage was obtained by boosting Officer Engen through an open unlocked window. Tr. Page 14 line 24 – Page 15 line 1. In the garage was (1) a car registered to Steven Newman, (2) a motorcycle, (3) a Century locked safe and on top of the safe was a backpack full of shotgun shells and 762 ammo, and (4) guns and ammo magazines that were thrown about the floor. Tr. Page 15 lines 4-10. The safe had a keypad lock and a key as well, but none of those were present. Tr. Page 21 lines 6-21. Steven Newman was (1) transported to the jail prior to Law Enforcement searching the garage and (2) responded that he did not know the combination when the Probation Officer called the jail and asked Mr. Newman for the combination to open the safe. Tr. Page 15 line 25 to Page 16 line 5. The safe was taken to the Devils Lake office of the Bureau of Criminal Investigation and opened with a halligan tool. Tr. Page 16 lines 17-18. Two shotguns and a MAK 90 Sporter were found in the safe once it was opened. Tr. Page 17 lines 12-14. Mr. Hall had no knowledge that Steven Newman knew what was in the garage. Tr. Page 20 lines 21-25. The only connection Mr. Hall testified to as to Steven Newman having with the garage was the fact that he had rented the garage and that a car registered to him was in the garage.

[8] Special Agent Travis Zahn from the Bureau of Criminal Investigation

testified that he assisted with the probation search on January 27, 2017 at the Newman residence. Tr. Page 26 lines 13-16. Travis Zahn also testified that the car in the garage was registered to Steven Newman, but the motorcycle was registered to somebody from Minot, and had not been registered since 2014. Tr. Page 31 lines 1-11. Travis Zahn also testified that Steven Newman was not in or near the garage at the times he was there. Tr. Page 30 Lines 13-24.

[9] Kenneth Feldner testified that he did not do the rental agreement with Steve Newman for the house or the garage. Tr. Page 37 lines 1-3 and that he did not assist Steven Newman in putting the safe in the garage nor did he know whether Mr. Newman knew that the safe was in the garage. Tr. Page 37 lines 17-24.

[10] Jeanette Feldner testified that she assisted Mr. Newman with the rental property in Starkweather on November 1, 2016. Tr. Page 39 lines 13-24. Mrs. Feldner also testified that she did not see Steven Newman put the safe in the garage and that she did not know whether Steven Newman knew that the safe was in the garage Tr. Page 41 lines 1-8. She also testified that she did not know how anything that was in the garage got in the garage. Tr. Page 42 lines 1-8.

[11] After the State rested its case Tr. Page 42 lines 12-13, the defense moved for a Judgment of Acquittal contending the State has not proved beyond a reasonable doubt the essentials elements of the offense of felon in possession of a firearm – unlawful possession of a firearm by a felon. Tr. Page 43 lines 3-22. The State resisted the motion Tr. Page 43 line 16. The trial court denied the motion. Tr. Page 44 line 17.

[12] The defense made its opening statement and rested and the jury retired and returned with a verdict of guilty. Steven Newman then filed a Motion for a New Trial (App. 2) and a Motion for Judgment of Acquittal (App. 3) and both of them were denied. App.4. Steven Newman then appealed to this Court. App. 5.

#### LAW AND ARGUMENT

[13] I. Whether the evidence is sufficient to support a finding that Steven Newman is guilty of the charge of unlawful possession of a firearm in violation of N.D.C.C. Section N.D.C.C. SECTION 62.1-02-01?

[14] Newman contends that his conviction should be overturned because of the evidence is not sufficient as a matter of law to support a verdict of guilty.

[15] It is well-settled in North Dakota law the role of the North Dakota Supreme Court when reviewing a challenge to the sufficiency of the evidence to support a verdict of guilty as is evidenced by the cases outlined below.

[16] A criminal conviction will be reversed only when this Court has reviewed the evidence and all reasonable evidentiary inferences in the light most favorable to the verdict and concludes that no rational factfinder could have found the Defendant guilty beyond a reasonable doubt. State v. Wacht 2013 ND 126 Paragraph 26, 833 N.W.2d 438.

[17] When a jury verdict is challenged on appeal based on the sufficiency of the evidence, this Court's review is highly deferential to the jury's verdict. State v. Curtis 2008 ND 108 Paragraph 28, 750 N.W.2d 438.

[18] Appellate review of the sufficiency of the evidence for a jury verdict is very limited as this Court will look only to the evidence most favorable to the guilty

verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction. State v. Alvarado 2008 ND 203 Paragraph 20, 757 N.W.2d 570.

[19] On a challenge to the sufficiency of the evidence to support a guilty verdict, this Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. The defendant bears the burden of showing that the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. When considering the sufficiency of the evidence, this Court will not reweigh conflicting evidence or judge the credibility of the witnesses understanding that a jury may find a defendant guilty even though evidence exists which if believed could lead to a verdict of not guilty. State v. Christian 2011 ND 56 Paragraph 8, 795 N.W.2d 702.

[20] As a result, Steven Newman recognizes that he has an uphill climb to overturn the jury verdict of guilty that was rendered in the trial court. Nevertheless, Steven Newman argues here that even when viewing the testimony that was presented at trial and the reasonable inferences to be drawn there from, in a light that is most favorable to the jury's verdict, it is clear that the evidence presented by the State is not sufficient to support the jury's verdict.

[21] Defendant was charged with unlawful possession of a firearm in violation of North Dakota Century Code Section 62.1-02-01. Specifically, Defendant is alleged to have violated subsection (b) of Section 62.1-02-01. That subsection provides in pertinent part that a person who has been convicted of a felony is



prohibited from possessing a firearm or having one under his control from the date of conviction and continuing for a period of five years after the date of conviction or the date of release from incarceration, parole or probation whichever is latest.

[22] The State meets its burden of proof if through testimony or documentary evidence that was produced during the course of the trial there was a showing that would cause a reasonable person to conclude beyond a reasonable doubt that:

1. On or about January 27, 2017 in Ramsey County, ND the Defendant did own, possess, or control a firearm.
2. Defendant had been convicted of a felony.
3. Defendant's release from parole or incarceration, whichever occurred latest, was within five years of his ownership, possession, or control of the firearm.

[23] When looking at the elements of the offense of unlawful possession of a firearm, Defendant contends that the evidence is insufficient to support a finding that:

1. On or about January 27, 2017 in Ramsey County North Dakota the Defendant did own, possess, or control either (1) a MAK 90 Sporter Rifle; a Stoeger Arms Shotgun; or a Winchester 1300 Defender Shotgun.

[24] Defendant had previously stipulated that the second and third prong of the State's burden of proof were met and that the only issue was whether the

Defendant was in ownership, possession, or control of the three firearms.

[25] First of all, it is very clear from the record that there was neither evidence nor documentary proof presented by the State during the trial that showed beyond a reasonable doubt that Steven Newman owned either (1) a MAK 90 Sporter Rifle, (2) a Stoeger Arms Shotgun, or (3) a Winchester 1300 Defender Shotgun. As a matter of fact no evidence was produced by the State that Steven Newman owned the three firearms. When looking at the four people who testified, there was neither testimony nor documentary evidence produced as to the ownership of the firearms.

[26] With the absence of any evidence whatsoever as to the ownership of the firearms, no jury certainly could conclude from either the evidence presented or from any reasonable inference that could be drawn therefrom, beyond a reasonable doubt, that Steven Newman owned the three firearms.

[27] Defendant submits to the Court that the State has the burden of proof in criminal proceedings. The State must prove each and every element of the criminal offense beyond a reasonable doubt.

[28] While the State did not show that Steven Newman owned the three firearms in question, Defendant acknowledges that the State meets its burden of proof if it produces testimony or some type of documentary evidence that Steven Newman was in possession of the three firearms in question.

[29] Defendant contends that there was no showing that he had possession of the firearms in question.

[30] Possession may be actual or constructive, exclusive or joint, and may be

shown entirely by circumstantial evidence. State v. Demaris 2009 ND 143 Paragraph 8, 770 N.W.2d 246.

[31] When looking at the testimony of the four people who testified, neither of them testified that Steven Newman had the firearms in question on his person which would show actual possession of the firearms. As a result, there was no showing either by direct testimony or any reasonable inference that could be drawn from such testimony, that the Defendant was in actual possession of the firearms.

[32] Consequently, we are left to see if the evidence produced at the trial showed that the Defendant had constructive possession of the three firearms. Constructive possession is proven when the evidence establishes that the defendant had the power and the capability to exercise dominion and control over the item. Some of the additional circumstances which may support an inference of constructive possession are (1) the accused's presence in the place where the contraband is found, (2) the accused's proximity to the place where the contraband is found, and (3) the fact that the contraband is in plain view. State v. Morris 331 N.W. 2d 48, 53 (N.D. 1983).

[33] As to constructive possession, the question becomes whether there was any showing that the Defendant had the power and the capability to exercise dominion and control over the three firearms.

[34] A review of the testimony reveals that the testimony was that Defendant lived in a house in Starkweather that he rented along with a garage. The three firearms were located in a gun safe that was in the rented garage. Both the

garage and the gun safe were locked. The safe had a keypad lock which the Defendant did not know the combination and also a lock that required a key to open. The gun safe had to be pried open with a halligan tool. Inside the gun safe in addition to the firearms were sports memorabilia, baseball cards, some knives, a couple BB guns, collectibles, and possibly a machete. There was a motorcycle in the garage that was registered to someone other than the Defendant. Additionally, there was a car in the garage that was registered to Mr. Newman.

[35] Defendant contends that none of these things show that Defendant had constructive possession over these firearms. There is nothing that shows that the Defendant had the power and the capability to exercise dominion and control over the guns.

[36] When Law Enforcement arrived, the Defendant was not in the garage (the place where the firearms were found) nor was the Defendant in close proximity to the garage when Law Enforcement arrived. As well, these firearms were not in plain view as they were in a locked gun safe.

[37] Outside of the fact that the Defendant rented the house and garage and that there was a car in the garage that was registered to the Defendant, there is nothing that links the Defendant to the firearms in the safe.

[38] Defendant submits that there is nothing in the evidence presented, nor can any reasonable inference be drawn from the evidence that shows that the Defendant had possession of the three firearms in question.

[39] Defendant also understands that the State meets its burden of proof if it

shows beyond a reasonable doubt that the Defendant had control over the three firearms.

[40] As to control Defendant contends that it implies an ability to exercise command and direction over an object and that there is nothing in the evidenced that was adduced that shows he had command and direction over the firearms.

[41] There is no evidence to show that the Defendant knew the gun safe was in the garage as well as he knew what the contents of the gun safe was. Indeed there is nothing to show that the Defendant knew that the gun safe was in the garage.

[42] When his probation officer asked him about the safe, there was no indication that the Defendant knew where the safe was located. The Defendant responded that he had neither key nor combination to open the safe. The ability to open the safe is a key issue when it comes to answering the question as to Defendant's control over the firearms as he would need to access the safe in order to get to the firearms contained inside. Additionally, there was nothing in the safe that connected the Defendant to the contents thereof to show that Defendant had control over the contents of the safe which would include the firearms.

[43] II. Whether the trial court erred in denying Steven Newman's Motion for Judgment of Acquittal?

[44] At the end of the State's presentation of its case and outside the presence of the jury, the Defendant moved for a judgment of acquittal pursuant to Rule 29 of the North Dakota Rules of Criminal Procedure. The trial court denied the

Defendant's motion. The Defendant then made his opening statement. After making his opening statement, the Defendant rested.

[45] The jury retired to make its deliberations and returned from its deliberations with a verdict of guilty and the Defendant was sentenced.

[46] After trial, the Defendant again moved for judgment of acquittal which was also denied by the trial court.

[47] In deciding a motion for judgment of acquittal, the district court, upon reviewing the evidence most favorable to the prosecution, "must deny the motion if there is substantial evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." When ruling on a motion for judgment of acquittal, the district court must assume the truth of the evidence supporting the State's case and then decide whether a reasonable person would be justified in concluding from this evidence that all the elements of the crime have been established beyond a reasonable doubt. To grant a judgment of acquittal, the district court must find the evidence insufficient to sustain a conviction of the offense charged. State v. Gonzalez 2000 ND 32 Paragraphs 14 and 15, 606 N.W.2d 873.

[48] Applying the law to the facts that were brought at during the trial of this matter we see that on or about January 27, 2017 a probation search was conducted at the residence of the Defendant as well as at a locked garage that was also rented by the Defendant. When the Probation Officer arrived, the Defendant was neither in, nor in close proximity to the garage.

[49] In the garage there was a locked gun safe that had among other things

three firearms. Also in the locked garage was a motorcycle that was registered to some person other than the Defendant and a car that was registered to the Defendant.

[50] There was no evidence presented as to who owned the three firearms or the other contents of the gun safe. There was no evidence presented that the Defendant had access to and actually used the garage. There was no evidence presented that the Defendant was the only person who had access to the garage. There was no evidence presented that the Defendant even knew that the gun safe was in the garage.

[51] Defendant contends that all the evidence showed was that there were three firearms in a locked gun safe in a garage that had been rented by the Defendant that also had a vehicle in it that had been registered to the Defendant.

[52] The only issue was whether the Defendant owned, possessed or controlled these firearms. When looking at the evidence it does not show who owned the evidence. Possession also was not shown as the firearms were not found on the Defendant nor in any area that was in close proximity to the Defendant.

[53] As to control, the fact that the guns were in a garage rented by the Defendant does not in any way show control. Nothing was presented that showed that the Defendant used the garage or had access to the garage. What is even clearer is the fact that no evidence was presented that the Defendant even knew that the gun safe was in the garage.

[54] Defendant contends that the State did not prove beyond a reasonable







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[3] Dated this 11th day of December, 2017.

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