

188 Conn. App. 532

MARCH, 2019

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the defendant. While two officers conversed with the defendant and three others who were seated at a picnic table near a corner formed by the cement walls of a planter, a third officer, L, stepped onto the wall and immediately saw in plain view a gun lying in the corner by the bushes, about four to five feet away from the defendant. Subsequently, the police used swabs to collect DNA from the gun and the ammunition that L had removed from the gun. The swabs, as well as DNA samples provided by the defendant and the three others were delivered to the state forensics laboratory, where R, a forensic science examiner, conducted DNA analyses of the materials. The quantity of the touch DNA on the swabs was small, and the DNA was partially degraded, but R was able to compare the DNA from the swabs with the samples provided in a scientifically accurate way and to obtain scientifically viable and accurate results. R's analysis eliminated the three other individuals as possible contributors to the DNA profile she developed from the swabs, but the defendant could not be eliminated as a contributor. *Held:*

1. The defendant could not prevail on his claim that there was insufficient evidence to support his conviction of criminal possession of a pistol or revolver because there was insufficient evidence of his knowledge of the gun and no evidence to prove his dominion or control over it: even though the defendant was not in exclusive control of the courtyard where the gun was found, the circumstances established a nexus between the defendant and the gun and permitted the jury reasonably to infer that the defendant knew of the gun's presence, that he was in a position to exercise dominion or control over it, and that he intended to do so, as the gun, which was discovered using a flashlight, was found in plain view in the open, and was uncovered and appeared to have been placed near the bushes just before L discovered it, the jury reasonably could have inferred therefrom that the person who put the gun near the bushes did not abandon it and leave the courtyard but, instead, was one of the six individuals in the courtyard when the police officers arrived, L testified that individuals who have a gun in their possession try to discard or stash the gun in an area close to them when they become aware of a police presence so that they will not be detected with it and, thus, it was reasonable for the jury to infer that the defendant quickly put the gun on the wall near the bushes to avoid being found with the gun, which was found four to five feet from the defendant, who was the only person at the picnic table who could not be eliminated as a contributor to the DNA profile found on the gun and ammunition; moreover, contrary to the defendant's claim, the state did not rely on DNA evidence alone to prove that the defendant knew of the gun's presence on the wall near the bushes, and although the defendant claimed that the DNA evidence was insufficient due to the questionable reliability of testing a small sample, the size of the DNA sample went to the weight of the evidence, not its admissibility; furthermore, the defendant could

NOTE: These pages (188 Conn. App. 533 and 534) are in replacement of the same numbered pages that appear in the Connecticut Law Journal of 19 March 2019.

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not prevail on his claim that even if the state produced sufficient evidence that he knew of the gun's presence, it failed to adduce any evidence of his intent to exercise dominion or control of the gun, as there was evidence of the defendant's proximity to the gun, which provided a DNA profile from which, among those present, only the defendant could not be excluded, there was circumstantial evidence that the gun recently had been placed on the wall near the bushes, and the jury, therefore, reasonably could have inferred that he stashed the gun but remained in close proximity to it, so that he could exercise dominion or control over it, and that he intended to do so.

2. The defendant's unpreserved claim that he was deprived of his constitutional right to a fair trial as a result of certain instances of prosecutorial impropriety during closing argument was unavailing:
 - a. Even though the prosecutor provided the jury with an incomplete and incorrect statement of the law of constructive possession by leaving out the necessary element of intent when she incorrectly told the jury that it could convict the defendant if he knew where the gun was located and had access to it, that error did not deprive the defendant of his right to a fair trial; the trial court's jury instructions, which were nearly identical to our model jury instructions for criminal possession of a gun, corrected the prosecutor's incorrect statement of the law of possession by giving a full and complete instruction on possession, the defendant failed to demonstrate how the model jury instruction that was used in the present case was a source of constitutional error, and despite the fact that the prosecutor's inaccurate reference to the law of constructive possession had the potential to confuse the jury, any perceived impropriety did not deprive the defendant of a fair trial, as the prosecutor's argument was not central to the theory of defense that focused on the DNA evidence, the state's case was convincing, and the court's correct charge on constructive possession, coupled with the repeated admonitions that the jury must follow the law as given to it by the court, adequately cured the prosecutor's error.
 - b. The defendant could not prevail on his claim that the prosecutor mischaracterized the DNA evidence and R's testimony, and improperly suggested that there was no evidence to support the defense's theory that the defendant's DNA on the gun or ammunition came to be there in some incidental or accidental fashion; although R, who testified as to a number of ways in which the defendant's DNA could have been transferred to the gun and that she did not know how his DNA was deposited on it, described possibilities or hypotheticals, her testimony was not evidence of how, in fact, the defendant's DNA came to be on the gun or the ammunition, and the state, which proved that the defendant's DNA was contained in the DNA profile developed from the swab