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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1745**

State of Minnesota,
Respondent,

vs.

Robert Alan Thunder,
Appellant.

**Filed August 13, 2018
Reversed
Bjorkman, Judge**

Pennington County District Court
File No. 57-CR-17-181

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Seamus Duffy, Pennington County Attorney, Kristin Hanson, Assistant County Attorney,
Thief River Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his convictions of six controlled-substance offenses. Because the record evidence is insufficient to prove that appellant possessed the controlled substances, we reverse.

FACTS

On March 1, 2017, around 1:30 a.m., a state trooper patrolling in Pennington County turned to follow a vehicle and observed it speed up, take multiple turns, and eventually fail to stop at a stop sign. The trooper executed a traffic stop and spoke with the two occupants—the driver and the front-seat passenger, appellant Robert Thunder. They told the trooper that the vehicle did not belong to either of them, and Thunder asked to walk home. The trooper detained both men while he confirmed their identities and subsequently arrested the driver upon learning that his driver’s license had been canceled as inimical to public safety and that he had an active warrant for his arrest.

The trooper conducted an inventory search of the vehicle. He recovered a backpack in the back seat behind the driver’s seat, which contained a “large quantity” of apparent drugs; a toolbox on the floor behind the passenger seat, which contained drug paraphernalia; and a glass pipe of the type used for smoking methamphetamine in the center console.

The trooper arrested Thunder and searched him, recovering \$920 in cash that was bound in a yellow bank band. Thunder told the trooper that the driver had picked him up and was bringing him home, that he had not previously known the driver, and that when

the trooper began following them, the driver “got nervous and started speeding up and basically was trying to avoid [the trooper].”

Subsequent testing of the contents of the backpack revealed more than 218 grams of marijuana, more than 27 grams of methamphetamine, and smaller quantities of several other controlled substances.

Thunder was charged with second-degree possession of a controlled substance, five counts of fifth-degree possession of a controlled substance, and possession of drug paraphernalia. At trial, over Thunder’s objection, the district court admitted evidence that in 2010, Thunder was discovered in possession of several baggies of methamphetamine and drug paraphernalia in a vehicle he was driving and was convicted of fifth-degree controlled-substance possession. The jury found Thunder guilty on the controlled-substance possession charges but acquitted him on the paraphernalia charge. The district court convicted Thunder of all six controlled-substance offenses and imposed a 95-month prison sentence for the second-degree offense, with shorter concurrent sentences for each of the fifth-degree offenses. Thunder appeals.

D E C I S I O N

In reviewing a claim of insufficient evidence, we

view the evidence in a light most favorable to the verdict to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.

State v. Hanson, 800 N.W.2d 618, 621 (Minn. 2011) (quotations omitted). When reviewing a conviction based on circumstantial evidence, we apply a two-step analysis. *State v. Harris*, 895 N.W.2d 592, 598-601 (Minn. 2017). First, we identify the circumstances proved “by resolving all questions of fact in favor of the jury’s verdict,” in deference to the jury’s credibility determinations. *Id.* at 600. Second, we independently consider the “reasonable inferences that can be drawn from the circumstances proved.” *Id.* at 601. “To sustain the conviction, the circumstances proved, when viewed as a whole, must be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Id.*

To convict Thunder of the controlled-substance offenses at issue here, the state was required to prove, in relevant part, that Thunder possessed the controlled substances. *See* Minn. Stat. §§ 152.022, subd. 2(a)(1), .025, subd. 2(1) (2016). A person may possess an item “jointly with another person,” and possession “may be proved through evidence of actual or constructive possession.” *Harris*, 895 N.W.2d at 601. When the item is found in a place to which the defendant and others had access, the state must show that “there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.” *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). This standard requires more than “mere proximity” or easy access to the item. *Harris*, 895 N.W.2d at 601-02. It requires proof “that the defendant had an ability and intent to exercise dominion and control over the [item].” *Id.* at 602.

At trial, the state argued that Thunder constructively possessed the controlled substances jointly with the driver. The jury's guilty verdicts show the state proved the following circumstances: (1) On March 1, 2017, Thunder was a front-seat passenger in a vehicle that a state trooper stopped for a traffic violation; (2) the trooper arrested the driver and conducted an inventory search of the vehicle, which revealed a backpack containing multiple controlled substances; (3) the person who loaned the vehicle to the driver was not familiar with the backpack and had never seen the driver with it; and (4) Thunder had \$920 in cash on his person, which the trooper believed, based on his training and experience, could indicate Thunder was going to buy or had sold the controlled substances.

The state asserts that two additional circumstances support the jury's determination of guilt. We disagree. First, the state contends that it proved that the vehicle "was traveling in the complete opposite direction from [Thunder's] residence" at the time of the stop, contradicting Thunder's claim that he was merely getting a ride home. But the state does not identify any record evidence concerning where the vehicle was stopped relative to Thunder's residence, and our careful review of the record reveals none. Second, the state points to Thunder's prior conviction of possessing methamphetamine in a motor vehicle. That circumstance, while proved, is not evidence that can factor into the determination whether Thunder possessed the controlled substances. Rather, the evidence was admitted only on the limited issue of knowledge—that if Thunder did possess the substances, he

likely knew what they were.¹ Accordingly, we limit our consideration of the circumstances proved to the four listed above.

Given Thunder's proximity and ease of access to the controlled substances and possession of an unusually large quantity of cash, we conclude the proved circumstances support a reasonable inference that Thunder possessed the backpack and the controlled substances it contained, either individually or jointly with the driver of the vehicle. But that does not end our analysis. To sustain Thunder's convictions, the circumstances proved must also be "inconsistent with any rational hypothesis except that of guilt." *Harris*, 895 N.W.2d at 601. That is not the case here.

Thunder was neither the driver nor the owner of the vehicle. No drugs or paraphernalia were visible in the vehicle—the backpack behind the driver's seat was "mostly closed" and the toolbox and center console were closed. And neither the backpack nor the toolbox contained any identifying information linking them to Thunder. These facts likely led the jury to acquit Thunder of the paraphernalia charge. Because the evidence tying Thunder to the toolbox is indistinguishable from that tying him to the backpack, it is reasonable to infer that he exercised an equal lack of dominion and control

¹ Thunder also challenges the admission of this evidence. Because we reverse based on insufficient evidence, we do not substantively address this issue. But we note that the evidence of Thunder's prior methamphetamine-related conviction was admitted to show Thunder's knowledge of methamphetamine, a fact that was not in dispute. *See State v. Rossberg*, 851 N.W.2d 609, 615 (Minn. 2014) (addressing requirements for admission of other-bad-acts evidence, including that it must address a specific fact that is actually disputed). Moreover, because the jury was not instructed to limit its consideration of the prior conviction to that issue, the potential for unfair prejudice was not only great but likely led to the unsupported convictions we now reverse.

over the contraband contained within each. Indeed, the state acknowledges that one of “three rational inferences [that] can be drawn from the circumstances proved” is that the driver alone “consciously exercised dominion and control over the controlled substances.” We agree. The reasonableness of this innocent inference means that the state presented insufficient evidence to support Thunder’s controlled-substance convictions.

Reversed.