STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0552

State of Minnesota,
Respondent,

vs.

Daniel Patrick McShane,
Appellant.

Filed April 10, 2017
Affirmed
Johnson, Judge

Anoka County District Court
File No. 02-CR-15-2562

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

Tony Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Amanda Johnson (certified student attorney), Anoka, Minnesota (for respondent)

Bradford Colbert, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

An Anoka County jury found Daniel Patrick McShane guilty of a fifth-degree controlled substance crime based on evidence that he possessed a spoon to which heroin

residue was attached. McShane argues that the evidence is insufficient to prove that he knowingly possessed heroin and that the district court erred by not giving the jury a lesser-included-offense instruction. We affirm.

FACTS

On May 19, 2014, McShane visited a storage facility where he leased a storage unit. The manager of the facility walked toward McShane's storage unit to speak with him. When the manager arrived at McShane's unit, he saw that the door was open but that McShane was not inside. But the manager saw McShane nearby, sitting in his vehicle. When the manager approached the vehicle, he saw that McShane had a needle in his arm. The manager asked, "What are you doing?" McShane initially said that he was a diabetic but then admitted that he is an opiate user. The manager called 911. McShane quickly gathered some of his possessions from the storage unit and abruptly drove away.

Ten minutes later, a police officer arrived and observed several items in or near McShane's storage unit that could be used in the manufacture of narcotics. The police officer contacted the Anoka Hennepin Drug Task Force, which conducted a canine sniff of the storage unit, which indicated that narcotics were present in the storage unit. The officers obtained a warrant for a search of the storage unit.

In the search, officers found, among other things, a backpack. The backpack contained an envelope bearing McShane's name and address. The backpack also contained multiple clear plastic bags, which held several syringes and five spoons, each of which had

a light brown substance stuck to it or encrusted on it. The officers sent one of the spoons to a laboratory for testing, which revealed that the substance on that spoon is heroin.

In April 2015, the state charged McShane with fifth-degree controlled substance crime, in violation of Minn. Stat. § 152.025, subd. 2(b)(1) (2014), based on his possession of a spoon with a controlled substance attached to it. The case was tried to a jury in November 2015. A forensic scientist testified that the substance on the tested spoon is heroin. A law-enforcement officer testified that a spoon may be used in the process of ingesting narcotics.

At the instructions conference, McShane requested a jury instruction on the offense of possession of drug paraphernalia, which he asserted is a lesser-included offense. The district court did not give the requested instruction, reasoning that the evidence does not allow a rational basis for acquitting McShane of possessing heroin residue but convicting him of possessing drug paraphernalia.

The jury found McShane guilty. The district court sentenced him to 15 months of imprisonment but stayed execution of the sentence for 10 years. McShane appeals.

D E C I S I O N

I. Sufficiency of the Evidence

McShane argues that the evidence is insufficient to prove beyond a reasonable doubt that he knowingly possessed the heroin that was attached to the spoon that was submitted to the laboratory for testing.

When reviewing whether there is sufficient evidence to support a conviction, this court undertakes a "painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient" to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). We will "not disturb the 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 that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

"A person is guilty of controlled substance crime in the fifth degree . . . if . . . the person unlawfully possesses one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV . . . ." Minn. Stat. § 152.025, subd. 2(a)(1) (2014). Heroin is a Schedule I controlled substance. Minn. Stat. § 152.02, subd. 2(c)(11) (2014). To establish a defendant's guilt on this offense, "the state must prove that defendant consciously possessed . . . the substance and that defendant had actual knowledge of the nature of the substance." *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975); *see also State v. Ali*, 775 N.W.2d 914, 918 (Minn. App. 2009), *review denied* (Minn. Feb. 16, 2010); *State v. Denison*, 607 N.W.2d 796, 799 (Minn. App. 2000), *review denied* (Minn. June 13, 2000).

In this case, McShane's challenge to the sufficiency of the evidence focuses on whether the state proved that he knew that there was heroin on the spoon in the backpack. He does not challenge the evidence that he possessed the backpack or the spoon or that the substance on the spoon is heroin. Rather, he argues that, given the fact that the substance on the spoon was merely residue, and given the small amount of heroin residue on the spoon, the evidence is insufficient to prove that he knew that he possessed heroin.

The parties agree that the conviction rests on circumstantial evidence and that we should apply the standard of review that is appropriate for circumstantial evidence. Indeed, "[k]nowledge is customarily determined from circumstantial evidence." *Ali*, 775 N.W.2d at 919. When reviewing a conviction based on circumstantial evidence, this court applies a two-step test to determine the sufficiency of the evidence. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we "identify the circumstances proved." *Id.* (citing *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). "In identifying the circumstances proved, we assume that the jury resolved any factual disputes in a manner that is consistent with the jury's verdict." *Id.* (citing *Andersen*, 784 N.W.2d at 329). Second, we "examine independently the reasonableness of the inferences that might be drawn from the circumstances proved" and determine whether "the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotations omitted). We must consider the evidence as a whole and not examine each piece in isolation. *Andersen*, 784 N.W.2d at 332.

At the first step of the analysis, we must identify the circumstances the state proved that might be relevant to whether McShane knew that he possessed heroin. The following circumstances are relevant: Heroin may be ingested with a syringe and needle after being heated and liquefied on a spoon. McShane was observed with a needle in his arm near his storage unit. McShane admitted to the storage-facility manager that he is an opiate user. McShane quickly fled when the storage-facility manager called law enforcement. McShane's storage unit contained several other items that may be used in the manufacture and use of controlled substances. A backpack in McShane's storage unit contained plastic bags holding five spoons and several syringes. The backpack also contained an envelope with his name and address. The tested spoon was submitted into evidence and was described by witnesses as bearing a brown stain. Photographic exhibits and testimony establish that each of the five spoons has a visible brown substance attached. The laboratory employee who tested the substance on the spoon concluded that it is heroin.

At the second step of the analysis, we "examine independently the reasonableness of the inferences that might be drawn from the circumstances proved" and determine whether "the circumstances proved are consistent with guilt." *Moore*, 846 N.W.2d at 88 (quotations omitted). The state contends that the circumstances proved support an inference that McShane knew that there was a substance on the spoon and that it was heroin. We agree. It is reasonable to infer from the circumstances proved that McShane was familiar with the use of spoons in ingesting controlled substances, that he had used the spoons in his backpack to ingest one or more controlled substances, that he saw a visible

brown substance on the spoons, and that he knew that the brown substance remained there when he put it in the plastic bag that was inside his backpack. Given those inferences, it is reasonable to infer that McShane knew that he possessed heroin.

We must also determine whether the circumstances proved are "inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted). McShane contends that the circumstances proved are consistent with the inference that he did not know that the brown substance that remained on the spoons is heroin or contains heroin. McShane cites no caselaw for the proposition that the state must prove not only that he knew that the spoon previously held heroin but also that the substance remaining on the spoon is heroin, as opposed to some other substance that is not heroin but merely a by-product of heroin. We are unaware of any such caselaw. In the absence of a specific rule of law, we defer to the jury's ability to infer that a person who knew that a spoon was used in the ingestion of heroin also knows that a substance that remains on the spoon is either heroin or a mixture containing heroin. *See* Minn. Stat. § 152.01, subd. 9a (2014) (defining "mixture").

McShane also contends that the circumstances proved are consistent with the inference that he did not know that there was any heroin on the spoon because he intended to ingest all the heroin on the spoon and the remaining amount was too small to be noticed. In support of this contention, he cites several opinions from other states, with an emphasis on *People v. Aguilar*, 223 Cal. App. 2d 119, 35 Cal. Rptr. 516 (1963), which also concerned heroin residue on a spoon. *Id.* at 119, 35 Cal. Rptr. at 517. The *Aguilar* opinion is, of course, not precedential in Minnesota. Furthermore, the facts of *Aguilar* appear to be

distinguishable from the facts of this case. The *Aguilar* court noted that the substance in that case "was imperceptible to the human eye and its presence . . . could be detected only with the aid of a forensic chemist and laboratory." *Id.* at 123, 35 Cal. Rptr. at 519. The court stated, however, that if there is a "small quantity of narcotics . . . in a recognizable state," and if there is "other evidence showing that the particular defendant was a user of narcotics or was otherwise familiar with the nature of the substance," the evidence in such a case would be sufficient to establish the defendant's knowledge that a controlled substance exists. *Id.* at 122, 35 Cal. Rptr. at 518. In this case, the substance on the spoon was visible to the naked eye and, thus, apparent to McShane, and there is abundant evidence that McShane is familiar with how a spoon may be used to ingest controlled substances. Furthermore, the Minnesota Supreme Court has held that a defendant's knowledge of his possession of a controlled substance may be inferred from even a small amount of the controlled substance. *State v. Siirila*, 292 Minn. 1, 3, 193 N.W.2d 467, 469 (1971).

In light of the evidence in the record and the applicable law, we conclude that the circumstances proved are not consistent with a rational hypothesis that McShane is not guilty on the ground that he did not know that heroin was attached to the spoon. Thus, the evidence is sufficient to support McShane's conviction of fifth-degree controlled substance crime.

II. Jury Instruction on Lesser-Included Offense

McShane also argues that the district court erred by not granting his request for a jury instruction on the offense of possession of drug paraphernalia, which he contends is a lesser-included offense.

A jury instruction on a lesser-included offense is warranted if "1) the lesser offense is included in the offense charged; 2) the evidence provides a rational basis for acquitting the defendant of the charged offense; and 3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *State v. Dahlin*, 695 N.W.2d 588, 595 (Minn. 2005). This court applies an abuse-of-discretion standard of review to a district court's ruling on a request for a lesser-included-offense instruction, but if "the evidence warrants a lesser-included offense instruction, the trial court *must* give it." *Id.* at 597; *see also State v. Nystrom*, 596 N.W.2d 256, 261 (Minn. 1999). In determining whether the evidence provides a rational basis for an acquittal on the charged offense and a conviction on the lesser offense, a district court must "view the evidence in the light most favorable to the party requesting the instruction." *Dahlin*, 695 N.W.2d at 597.

The district court resolved the issue based on the second and third requirements of the lesser-included-offense test. The district court reasoned that there is no rational basis on which the jury could both acquit McShane of possession of the heroin residue and convict him of possession of drug paraphernalia for possessing the spoon. In the view of the district court, if the spoon contained heroin, McShane should be found guilty of both

crimes, and if the spoon did not contain heroin, McShane should not be found guilty of either crime because a spoon is not drug paraphernalia without any drugs.

McShane does not directly address the district court's reasoning but contends that "there is a substantial question as to whether [he] knowingly possessed the controlled substance" and that "[t]he spoons that were found in [his] storage unit could clearly be considered drug paraphernalia." We agree with the district court that if the jury had acquitted McShane of drug possession, it would not have had a rational basis for finding him guilty of possession of drug paraphernalia. An object is drug paraphernalia only if it is used to produce, test, or take into the body a controlled substance. Minn. Stat. § 152.01, subd. 18 (2014). Accordingly, McShane cannot satisfy both the second and the third requirements.

In addition, McShane cannot satisfy the first requirement, that the offense of possessing drug paraphernalia necessarily is included within the offense of possessing a controlled substance. An offense is a lesser-included offense if, given the elements of each offense, it is impossible to commit the greater offense without also committing the lesser offense. *Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986); *State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986). If a person can commit the greater offense without committing the lesser offense, the lesser offense is not a lesser-included offense. *State v. Kinsky*, 348 N.W.2d 319, 326 (Minn. 1984). The statute prohibiting possession of a controlled substance provides that a person is guilty if "the person unlawfully possesses one or more mixtures containing a controlled substance," such as heroin. Minn. Stat.

§ 152.025, subd. 2(a)(1). The statute prohibiting possession of drug paraphernalia provides that a person may not "knowingly or intentionally . . . use or . . . possess drug paraphernalia." Minn. Stat. § 152.092(a) (2014). In light of these elements, it is not impossible to commit the offense of unlawful possession of a controlled substance without also committing the offense of possession of drug paraphernalia. *See Bellcourt*, 390 N.W.2d at 273; *Roden*, 384 N.W.2d at 457. It may be true, in some situations, that a person cannot *consume* a controlled substance without drug paraphernalia, but mere *possession* of a controlled substance is sufficient for the offense of which McShane was convicted. Accordingly, the first requirement of the lesser-included test is not satisfied.

Thus, the district court did not err by not instructing the jury on the offense of possession of drug paraphernalia.

Affirmed.