STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0848

State Minnesota,
Respondent,

vs.

Jason Jerome McDonough,
Appellant.

Filed November 27, 2017
Affirmed
Smith, Tracy M., Judge

Dakota County District Court
File No. 19HA-CR-15-2760

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

James C. Backstrom, Dakota County Attorney, Chip Granger, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

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

SMITH, TRACY M., Judge

Appellant Jason Jerome McDonough challenges the sufficiency of the evidence to support his conviction of third-degree controlled-substance crime for possession of a

mixture containing methamphetamine.[1] Specifically, McDonough argues that the state failed to prove beyond a reasonable doubt that the weight of the mixture containing methamphetamine that he possessed met the statutory threshold. Because sufficient evidence supports a finding that McDonough possessed at least three grams of a mixture containing methamphetamine, we affirm.

FACTS

On August 18, 2015, McDonough was a passenger in a car with impounded plates. Based on the plates, West Saint Paul Police Officer Kurtis Syvertsen pulled the car over and, after determining that neither the driver nor McDonough had a driver's license, allowed them to leave the traffic stop on foot while Syvertsen began preparing to tow the car.

As part of his preparations for towing, Syvertsen conducted an inventory search of the car. During this search, Syvertsen discovered a crystal-like substance between the front-passenger seat and the front-passenger door. After calling for backup, Syvertsen began to approach the driver and McDonough, who were approximately 25 yards from the car and continuing to walk away. As Syvertsen approached, he saw a similar substance on the sidewalk in a trail leading from the car to McDonough and noticed that McDonough had begun digging around in his pants pockets with his hands. Syvertsen then arrested McDonough and handcuffed him behind his back. As Syvertsen walked McDonough back

[1] Initially, McDonough also appealed his sentence, arguing for a reduced offense level under the Drug Sentencing Reform Act. However, McDonough withdrew this ground for appeal at oral argument on the basis that *State v. Otto*, 899 N.W.2d 501 (Minn. 2017), disposed of it.

to his police car, McDonough continued to dig in his pants pockets until Syvertsen pulled McDonough's hands up higher to prevent him from doing so.

By the time they reached the police car, West Saint Paul Police Officers Elyse Wood and Timothy Sewald had arrived. As Wood and Sewald approached, they observed more crystal-like substance falling from McDonough's pants onto the ground. Syvertsen and Wood searched McDonough and found a small bag containing more of the substance in McDonough's left pants pocket. This bag was placed in evidence bag #1. In McDonough's right pants pocket, Syvertsen found more of the substance, this time unbagged. It was placed in evidence bag #2. McDonough was then transported to the police station by Sewald, where additional crystal-like substance was collected from McDonough's right pants pocket and added to bag #2.

While Sewald transported McDonough to the police station, Syvertsen continued his search of the car, bagging the crystal-like substance from the floor of the car into evidence bag #7. Additional crystal-like substance was collected from two other sources: (1) at the station Syvertsen collected a single crystal from McDonough's right shoe, which was placed in either evidence bag #2 or #7; and (2) before taking McDonough from the scene, Sewald gathered as much of the trail of substance off the sidewalk as possible and placed it in either evidence bag #2 or #7.

The Bureau of Criminal Apprehension (BCA) tested the contents of evidence bags #1, #2, and #7. Prior to testing evidence bag #7, the BCA scientist noted that the bag contained some debris and removed it. The debris was not part of the weight or analysis. All three evidence bags were found to contain methamphetamine, although the purity of

the contents of each bag was not determined. Bag #1 contained 1.703 ± 0.005 grams; bag #2 contained 1.138 ± 0.005 grams; bag #7 contained 1.495 ± 0.005 grams.

The district court held a bench trial. The state offered the BCA test results to prove the identity and weight of the crystal-like substance. McDonough objected, arguing that, because bag #2 or #7 contained roadside debris, there were issues as to whether (1) the substance could be authenticated and (2) the state had established appropriate chain of custody. The district court overruled his objection and admitted the results. During closing argument, McDonough argued that the state had failed to show that he possessed over three grams of a mixture containing methamphetamine because, in the process of gathering loose crystals from McDonough's pants pockets, the vehicle, and the roadside, the police may have added debris to the bags, causing the measured weight to exceed the amount McDonough possessed. The district court found McDonough guilty of third-degree controlled-substance crime.

McDonough appeals.

D E C I S I O N

McDonough argues that his conviction of third-degree controlled-substance crime must be reversed because the state's circumstantial evidence does not exclude the rational hypothesis that McDonough possessed less than three grams of a mixture containing methamphetamine. McDonough concedes that direct evidence established that he possessed the mixture containing methamphetamine in evidence bag #1 (which had a weight of 1.703 ± 0.005 grams). However, he challenges the finding that he possessed the remaining mixture necessary to meet the three-gram threshold. Specifically, McDonough

argues that at least some portion of the mixture in evidence bags #2 and #7 was proved to be in his constructive possession by circumstantial evidence and that the circumstantial evidence was insufficient to prove beyond a reasonable doubt that he possessed the mixture. We conclude that, even under the more exacting circumstantial-evidence standard, the evidence was sufficient to support McDonough's conviction.

When evaluating the sufficiency of circumstantial evidence, the reviewing court uses a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). "The first step is to identify the circumstances proved." *Id*. "In identifying the circumstances proved, we defer to the [fact-finder's] acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id*. at 598-99 (quotation omitted). The reviewing court "construe[s] conflicting evidence in the light most favorable to the verdict and assume[s] that the [fact-finder] believed the State's witnesses and disbelieved the defense witnesses." *Id*. at 599 (quotation omitted). "The second step is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id*. (quotation omitted). "We give no deference to the [fact-finder's] choice between reasonable inferences at this second step." *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017).

McDonough was convicted of third-degree controlled-substance crime. Under the laws in effect at the time McDonough possessed the methamphetamine,[2] a person is guilty

[2] In 2016, Minnesota passed the Drug Sentencing Reform Act, which changed the weight thresholds for certain drug crimes. However, the passage of that law does not impact

of third-degree controlled-substance crime if "on one or more occasions within a 90-day period the person unlawfully possesses one or more mixtures of a total weight of three grams or more containing . . . methamphetamine."[3] Minn. Stat. § 152.023, subd. 2(a)(1) (2014). At issue in this case is whether the state proved the total-weight requirement.

The circumstances proved support the district court's conclusion that McDonough possessed at least three grams of a mixture containing methamphetamine. Multiple officers testified that they saw crystals spilling out from McDonough's pants pockets onto the sidewalk from the time that McDonough exited the stopped car to the time he was placed in the police car. Although there was some debris gathered during the collection of these crystals, the BCA scientist attempted to remove as much debris as possible prior to testing evidence bag #7. Even after this debris was removed, the weight of the substance in evidence bag #7 was 1.495 ± 0.005 grams. Combined with the undisputed weight of the mixture found in McDonough's left pants pocket (evidence bag #1), McDonough possessed 3.198 ± 0.010 grams of a mixture containing methamphetamine. Further, even this amount disregards the additional 1.138 ± 0.005 grams of methamphetamine in evidence bag #2. Adding this bag further raises the weight to 4.336 ± 0.015 grams.

McDonough argues that these circumstances do not exclude the possibility that evidence bags #2 and #7 contained roadside debris, which he never physically possessed,

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McDonough's conviction. *See generally Otto*, 899 N.W.2d 501 (holding that changes in weight thresholds do not apply to crimes committed before the act's effective date).

[3] A mixture includes "a preparation, compound, mixture, or substance containing a controlled substance, regardless of purity." Minn. Stat. § 152.01, subd. 9a (2014).

in sufficient weight to inflate the total weight to over three grams. This argument is unconvincing. Taken together, the facts that (1) officers observed crystal-like substance falling from McDonough's pants onto the sidewalk as he was walking, (2) evidence bags #2 and #7 could be comprised of almost fifty percent debris and still (when combined with evidence bag #1) meet the three-gram weight threshold, (3) as much debris as possible was removed from bag #7 prior to weighing, and (4) the removed debris was not part of the weight or analysis, the circumstances proved make the hypothesis that he possessed less than the required 1.297 grams of the mixture in evidence bags #2 and #7 irrational. Therefore, we conclude that the record contained sufficient evidence to support the district court's conclusion that McDonough committed the offense of third-degree controlled-substance crime.

Affirmed.