STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0157

State of Minnesota,
Respondent,

vs.

Kenneth James Harrison, Jr.,
Appellant.

Filed December 26, 2017
Affirmed
Rodenberg, Judge

Beltrami County District Court
File No. 04-CR-16-891

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

David P. Frank, Interim Beltrami County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jodi Lynn Proulx, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

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

RODENBERG, Judge

Appellant Kenneth James Harrison, Jr., appeals from his convictions for possession of a short-barreled shotgun, felon in possession of a firearm, and fifth-degree possession of methamphetamine, arguing that the evidence is insufficient to prove that he possessed

either the methamphetamine or the shotgun. Appellant also appeals his 120-month sentence, arguing that the district court erred by accepting the state's tardy *Blakely* notice and that the sentence unfairly exaggerates his criminality. We affirm.

FACTS

On March 18, 2016, around 3:00 a.m., Leech Lake Tribal Police Officers received a report of multiple gunshots being fired. Sergeant Vincent Brown and Officer Anthony Hanson, among others, responded to the call. Upon arriving to the general area where the gunshots were reported, the officers dispersed to investigate. Eventually, Officer Hanson radioed the other officers to report that a car had quickly reversed course away from him as he approached it. Officer Hanson followed the car, but lost sight of it when it pulled into a driveway.

Sergeant Brown joined Officer Hanson about a minute later and the two officers saw appellant walking down the driveway. The officers ordered appellant to show his hands and to walk toward the squad cars. Appellant showed his hands, but did not walk toward the squad cars, so Sergeant Brown and Officer Hanson approached him. Appellant appeared intoxicated based on his speech, balance, and breath. The officers pat-searched appellant's clothing and did not find any weapons. They then detained appellant in Officer Hanson's squad car.

After appellant was detained, Sergeant Brown followed appellant's footprints through the "fresh layer of snow on the ground that had just fallen." Sergeant Brown testified that he was sure that the footprints were appellant's because he had seen appellant walking on the driveway and there was only one set of footprints in the fresh snow.

Sergeant Brown followed the footprints directly to the front passenger's side door of a black GMC Yukon, parked in front of a trailer house. Sergeant Brown shined his flashlight into the front passenger's side window and saw a shotgun with a sawed-off barrel on the left side of the front passenger seat, leaning against the center console.

Sergeant Brown walked around to the driver's side of the Yukon and noticed a second distinct set of footprints leading from the driver's door. Sergeant Brown followed these footprints through the woods to a house. He there found a man he recognized as Randall Stangler. Stangler also appeared intoxicated. Slurring his words, Stangler asked Sergeant Brown what he wanted. Sergeant Brown detained Stangler, matched Stangler's shoes to the shoe prints that led to the house from the driver's side door of the Yukon. Stangler was detained in a squad car near the Yukon. It was later discovered that the license plates on the Yukon were registered to a different vehicle titled in Stangler's name.

Sergeant Brown returned to the Yukon and photographed the car's interior, its exterior, and the shotgun near the front passenger's seat. Sergeant Brown also saw some cash, several shotgun rounds, a .38-caliber round, a lighter, and a wallet, all on the front passenger's seat. Sergeant Brown testified that the wallet was located directly next to the shotgun; it contained a debit card and a Leech Lake tribal identification card, both identifying appellant. Upon closer inspection of the shotgun, Sergeant Brown saw that there was a spent 12-guage shell in the chamber and one live round in the magazine.

Sergeant Brown also noticed a grey object near the passenger-side doorjamb, which looked to him like a makeup case. Inside the grey case, Sergeant Brown found a bag containing a crystal-like substance. The substance field tested positive as

methamphetamine, and was later confirmed as such by the Bureau of Criminal Apprehension (BCA). In the glove compartment of the vehicle, Sergeant Brown located a snort tube which he said is used to ingest drugs or to scoop drugs into smaller bags. Sergeant Brown also found a bag of marijuana in the driver's side door pocket.

From this evidence, police concluded that Stangler had been the driver of the Yukon, with appellant sitting in the front passenger's seat. Police did not see appellant holding the shotgun or sitting in the passenger's seat of the car.

Sergeant Brown requested DNA testing on the shotgun and got a search warrant to take buccal swabs from appellant and Stangler for comparison. The BCA found that the DNA profile from the shotgun grips belonged to two or more individuals, but that the partial major DNA profile matched appellant and not Stangler. Similarly, the DNA profile found on the shotgun's pump action was a mixture of three or more persons' DNA, and the partial major DNA profile matched appellant and not Stangler. The BCA's expert noted at trial that it is not uncommon to find DNA mixtures on inanimate objects because such objects are touched by multiple people when they are moved. She also noted that it is possible for a secondary transfer of DNA to occur when one person touches an object after touching another person.

Appellant was charged with one count of possession of a short-barreled shotgun under Minn. Stat. § 609.67, subd. 2 (2014); one count of felon in possession of a firearm under Minn. Stat. § 609.165, subd. 1b(a) (Supp. 2015); and one count of fifth-degree possession of methamphetamine under Minn. Stat. § 152.025, subd. 2(a)(1) (2014). A contested omnibus hearing was held on April 12, 2016, and, on April 21, 2016, the state

filed a *Blakely* notice, indicating its intent to seek an aggravated sentence. Appellant challenged the timeliness of the state's filing. The district court allowed the late *Blakely* notice because there was still at least a month until trial, appellant had not yet entered a plea, and there was no prejudice to appellant. At a hearing on May 20, 2016, the district court re-articulated that there was no prejudice in allowing the state to seek an aggravated sentence because it was based on appellant's criminal history, which was already known to appellant and would involve no special preparation.

Appellant testified at trial that he had consumed tequila and malt liquor with his brother and Stangler before going to a bar. The three men drank and played pool at the bar, and smoked marijuana as they left the bar around midnight. According to appellant, they left in a Yukon Denali and he was in the back of the car, with Stangler driving. The next thing appellant remembered was Stangler shaking him awake in the back seat yelling that the cops were there. Appellant testified that he got out of the back seat of the car. He testified that he had no warrants and no reason to run. He also testified that he did not know a gun was in the vehicle and had not seen a gun in it that night. He maintained that he did not see the shotgun in the car that night, touch the shotgun, or know that it was a sawed-off shotgun. He also testified that he did not know there was methamphetamine in the vehicle. Appellant stated that the only drugs in the car of which he was aware was the marijuana. Appellant also testified that he does not know how his wallet ended up in the front passenger seat. He said that he did not put it there.

A jury found appellant guilty of all three charged offenses. In the *Blakely* phase of the trial, the jury found appellant to be a danger to public safety. The district court

sentenced appellant to 120 months in prison on the felon-in-possession conviction,[1] a double upward departure from the presumptive sentence of 60 months.

This appeal followed.

D E C I S I O N

I. The record evidence is sufficient to prove beyond a reasonable doubt that appellant knowingly possessed both the methamphetamine and the shotgun.

In considering a claim of insufficient evidence, we thoroughly review the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict that they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the factfinder, "acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that" the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

A fact may be proven by direct or circumstantial evidence. "Direct evidence is [e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Bernhardt*, 684 N.W.2d at 477 n.11 (quotation omitted). Such evidence can be provided in the form of testimony by a person who perceived the fact through his senses or physical evidence of the fact itself. *State v.*

[1] Appellant was also sentenced for possessing a short-barreled shotgun (23 months) and fifth-degree controlled substance crime (21 months) concurrent with this sentence.

Williams, 337 N.W.2d 387, 389 (Minn. 1983). In contrast, circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). "[C]ircumstantial evidence always requires an inferential step to prove a fact that is not required with direct evidence." *Id.*

"Possession may either be actual or constructive." *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016). An item may be possessed jointly with another person. *Harris*, 895 N.W.2d at 601 (citing *State v. Lee*, 683 N.W.2d 309, 317 n.7 (Minn. 2004)). Actual possession involves direct physical control. *Barker*, 888 N.W.2d at 353. "The mere fact that an item is not in a defendant's physical possession at the time of apprehension does not preclude prosecution for actual possession of contraband." *Id.* at 354. In contrast, constructive possession involves an item being "in a place under appellant's exclusive control to which other people do not normally have access, or that there is a strong probability that appellant was, at the time of discovery, consciously exercising dominion and control over" that item. *State v. Sam*, 859 N.W.2d 825, 833 (Minn. App. 2015).

A. The record evidence sufficiently shows that appellant constructively possessed the methamphetamine.

The state agrees that it cannot prove appellant to have actually possessed the methamphetamine. The record contains no direct evidence of actual possession. As such, we review whether there is sufficient circumstantial evidence to prove that appellant constructively possessed the methamphetamine.

"[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). However, "[w]hile it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1990). When the verdict is the result of circumstantial evidence, it "will be upheld if the reasonable inferences from such evidence are consistent only with the defendant's guilt and inconsistent with any rational hypothesis except that of his guilt." *Webb*, 440 N.W.2d at 430. In other words, the "[c]ircumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quoting *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002)).

In applying the circumstantial-evidence standard, we use a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013); *Al-Naseer*, 788 N.W.2d at 473-74. The first step is to "determine the circumstances proved, giving due deference to the fact-finder and construing the evidence in the light most favorable to the verdict." *Sam*, 859 N.W.2d at 833 (citing *Silvernail*, 831 N.W.2d at 599). Second, "we determine whether the circumstances proved are consistent with guilt and inconsistent with any other rational or reasonable hypothesis." *Id.* (quotation omitted). This part of the analysis gives "no deference to the fact finder's choice between reasonable inferences." *Silvernail*, 831 N.W.2d at 599.

Applying the first step of the circumstantial-evidence test, we determine the circumstances proved in the light most favorable to the verdict. The state proved that officers received a call for shots fired. Officer Hanson saw Stangler's car quickly reverse course away from him into a driveway. Sergeant Brown arrived on scene and saw appellant walking down the driveway toward the squad cars. Sergeant Brown followed appellant's footprints in the fresh snow directly back to the passenger's side door of the car. Through the car window, Sergeant Brown saw a short-barreled shotgun resting on the left side of the front passenger's seat. Sergeant Brown noticed a separate set of footprints leading away from the driver's door, followed them, and found the intoxicated Stangler. Sergeant Brown searched the car where, on the front passenger's seat, he found cash, miscellaneous shotgun rounds, a .38-caliber round, a lighter, and a wallet containing appellant's tribal identification card and debit card. A grey case containing methamphetamine was found on the passenger's side doorjamb. A DNA test of the shotgun later revealed DNA consistent with appellant's profile, but not consistent with Stangler's profile, on both the grip and pump action of the shotgun.

Next, we consider "whether the circumstances proved are consistent with guilt and inconsistent with any other rational or reasonable hypothesis." *Sam*, 859 N.W.2d at 833 (citing *Silvernail*, 831 N.W.2d at 599). Relying on *State v. Sam*, appellant contends that these circumstances are consistent with a reasonable inference that he did not know that the methamphetamine was in the car or that Stangler threw the case containing methamphetamine towards the passenger's door before fleeing from the car. But, this case is unlike *Sam*. There, the defendant was the driver of a borrowed car in which

methamphetamine was found inside the glove compartment on the passenger's side of the car. 859 N.W.2d at 828-29. In *Sam*, a passenger sitting directly in front of that glove compartment had other methamphetamine on his person. *Id.* at 834. Here, there is no corresponding evidence. The footprints and the other items left on the passenger's seat unequivocally indicate that appellant was the front-seat passenger in the vehicle. There is no evidence consistent with the jury's verdict of a third occupant of the vehicle. The methamphetamine was found on the doorjamb of the passenger's side door, right next to where appellant was seated.

In *Sam*, we expressly emphasized that there was no evidence tying the defendant directly to the methamphetamine, and contrasted the facts there with other cases where "effects identifying the defendant were found near or on the items." *Id*. at 835. This is a case of the latter sort. A wallet containing appellant's tribal identification card and a debit card with appellant's name on it was found on the passenger seat, near where the methamphetamine was found. While one can conjure up scenarios that might account for this confluence of circumstances that might be inconsistent with appellant's guilt, speculation is not a permissible basis on which to find reasonable doubt. *Al-Nasseer*, 788 N.W.2d at 473. And, in finding appellant guilty, the jury necessarily rejected appellant's testimony that he had been in the back seat of the Yukon and not where the drugs and gun were located by police. The facts and circumstances proved here, considered in light of the jury's verdict, lead directly to appellant's guilt and are inconsistent with any other reasonable hypothesis.

B. The record evidence is sufficient to prove beyond a reasonable doubt that appellant possessed the shotgun.

Appellant's conviction for possessing the shotgun rests primarily on circumstantial evidence. Even under the circumstantial-evidence standard, the record evidence supports the jury's finding that appellant possessed the shotgun. Appellant agrees that the circumstances proved are consistent with guilt, but argues that there is also a reasonable inference of innocence: that his DNA either got onto the shotgun through secondary transfer when Sergeant Brown detained him and patted him down before touching the shotgun, or the DNA had been on the weapon for a long period of time. Appellant claims that Stangler may have been the one to put the shotgun next to the passenger seat.

The circumstances proved render appellant's hypotheses unreasonable. First, Sergeant Brown testified that he was wearing leather gloves when he detained and patted appellant down, but wore latex gloves when searching the car to avoid transferring DNA. Viewing the evidence in the light most favorable to the verdict, we regard the jury as having accepted this testimony as true. Second, Sergeant Brown also touched Stangler to detain him before searching the car and handling the shotgun, but after detaining and patting appellant down. While DNA consistent with appellant's profile was on the grip and pump action of the shotgun, no DNA consistent with Stangler's profile was present. It is unreasonable to infer that appellant's DNA would appear on the shotgun through secondary transfer but Stangler's would not, especially since Sergeant Brown touched Stangler closer in time to handling the shotgun than he did appellant. Finally, while appellant claims that the DNA could have been on the shotgun for a long time, when he was asked on direct

examination if he had ever seen the shotgun before, he responded, "No." He then said that he may have seen it weeks before. On cross-examination, he said he "didn't touch it" when asked if he had ever touched the shotgun. These statements belie appellant's assertion that his DNA might have been on the gun from an earlier occasion before the night he was arrested.

The record evidence forms "a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted). Here, "the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that" the appellant knowingly possessed both the methamphetamine and the shotgun. *Bernhardt*, 684 N.W.2d at 476.

II. The district court did not err by allowing the state to submit a notice of intent to seek an aggravated sentence after the omnibus hearing.

Minnesota Rule of Criminal Procedure 7.03 provides that the state "must give written notice at least seven days before the omnibus hearing of intent to seek an aggravated sentence," also referred to as a *Blakely* notice. Minn. R. Crim. P. 7.03, cmt. The rule allows notice to be given later "if permitted by the court on good cause and on conditions that will not unfairly prejudice the defendant." Minn. R. Crim. P. 7.03. "Because the construction of procedural rules is reviewed de novo, we review de novo whether the notice in this case fulfills that required in the rules." *State v. Robideau*, 817 N.W.2d 180, 188 (Minn. 2012).

It is undisputed that the state filed notice of its intent to seek an aggravating factor outside of the timeline set forth in Rule 7.03. Despite this, the district court stated that there was no prejudice to appellant because there would be a contested hearing before trial "to hear the issue on whether the aggravated sentencing will be allowed." This hearing was held on May 20, 2016. At the May 20 hearing, appellant raised the issue of whether there was good cause for the late notice, and the district court repeated that there was no prejudice because the notice was filed a month before the trial date, appellant and his attorney knew appellant's criminal history already, and it would not take much additional time for appellant's attorney to prepare to handle the aggravated-sentencing issue.

Appellant had the opportunity to contest the late notice. The district court allowed the late notice, implicitly finding good cause as allowed by rule 7.03, and explicitly stating that the late filing would not prejudice appellant. The district court did not err by accepting the *Blakely* notice after the omnibus hearing.

III. The district court acted within its discretion in imposing a 120-month sentence.

"We 'afford the [district] court great discretion in the imposition of sentences' and reverse sentencing decisions only for an abuse of that discretion." *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quoting *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999)). A sentencing court may depart from the guidelines only when an aggravating or mitigating circumstance is present and that circumstance provides a "substantial and compelling" reason for the departure. *Soto*, 855 N.W.2d at 308 (citation omitted). "A district court abuses its discretion when its reasons for departure are improper or inadequate." *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017).

The question of whether a stated reason for departure is a proper one is a question of law. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). "Once we determine as a matter of law that the district court has identified proper grounds justifying a challenged departure, we review its decision *whether* to depart for an abuse of discretion." *Id.* This review is "extremely deferential." *Id*. at 595-96. "If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed." *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015). "We have generally deferred entirely to the district court's judgment on the proper length of departures that result in sentences of up to double the presumptive term." *Dillon*, 781 N.W.2d at 596.

Generally, in order to depart from the presumptive guidelines range, the offense must involve "substantial and compelling circumstances." *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008). "Substantial and compelling circumstances are those demonstrating that 'the defendant's conduct in the offense of conviction was *significantly* more or less serious than that typically involved in the commission of the crime in question.'" *Id.* (quoting *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002)). However, under the dangerous-offender statute, the supreme court has stated that "[d]epartures under the statute are justified on the basis of the offender's criminal history, not on aggravating factors. In addition, the terms of the statute do not limit the length of departures." *Neal v. State*, 658 N.W.2d 536, 545 (Minn. 2003). The dangerous-offender statute "authorizes the court to impose a durational departure of any length, up to the statutory maximum, in all cases where the offender satisfies the statute's criteria." *Id.* The district court need not find

"severe aggravating factors" to justify a departure when the dangerous-offender statute's requirements have been met. *Id.* at 546.

Here, the jury found appellant a danger to public safety based on his lengthy criminal record. This jury finding authorized the district court to impose an upward departure from the sentencing guidelines. The felon-in-possession statute, Minn. Stat. § 609.165, subd. 1b(a), under which appellant was sentenced, has a maximum sentence of 15 years, or 180 months. Appellant was sentenced to 120 months. Appellant's sentence is below the 180-month maximum sentence authorized by Minn. Stat. § 609.165, subd. 1b(a), up to which the district court had the discretion to go under the dangerous-offender statute and *Neal*. And our review of the precise length of a sentence within a legally permissible range is "extremely deferential." *Dillon*, 781 N.W.2d at 595-96. The district court acted within its broad discretion in imposing a 120-month sentence.

Affirmed.