STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1281

State of Minnesota,
Respondent,

vs.

Troy Michael Wierson,
Appellant.

Filed September 16, 2019
Affirmed in part, reversed in part, remanded
Cochran, Judge

Dakota County District Court
File No. 19HA-CR-15-2478

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hasting, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Cochran, Judge; and Kirk, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

COCHRAN, Judge

Appellant Troy Michael Wierson challenges his convictions of first-degree possession of a controlled substance, endangering a child, conspiracy to sell a controlled substance in the first degree, and aiding and abetting the sale of a controlled substance in the first degree. Wierson argues that there was insufficient evidence to support the convictions and that the district court committed reversible error by answering the jury's questions during deliberations without providing notice to the parties and without the defendant being present. In a pro se supplemental brief, Wierson also argues that the district court erred by not dismissing a juror for cause. Because we conclude that the evidence was sufficient to support Wierson's conviction of first-degree possession of a controlled substance, that the judge's error in answering the jury's questions was harmless, and that Wierson's pro se argument is without merit, we affirm Wierson's conviction for first-degree possession of a controlled substance. Because we conclude that the evidence was insufficient to support Wierson's convictions for the other charges, we reverse Wierson's remaining convictions and remand for resentencing.

FACTS

We begin by reviewing the evidence presented during Wierson's trial. In late June of 2015, the Dakota County Drug Task Force (DCDTF) received an anonymous tip regarding Wierson and a residence in Hastings. As a result of that tip, an investigator collected the garbage that was outside the residence. The garbage contained two pieces of tubular glass and some baggies that, in the investigator's experience, were consistent with

methamphetamine use. A field test of one of the pieces of glass produced a positive result for methamphetamine.

Approximately one week later, investigators executed a search warrant at that residence. When officers entered the residence, they found Wierson's wife, N.W., coming out of a bedroom. Officers also found a seven-year-old boy in a different bedroom. An officer testified at trial that the boy was N.W.'s biological son or stepson, and that he had a different last name than both N.W. and Wierson. During the search of the residence, officers found more than 25 grams of methamphetamine in a tool chest in the garage. The tool chest also contained other items associated with drug use and/or sale, such as a digital scale and small baggies.

Attached to the front of the tool chest were photographs of Wierson with a small child. Officers also found a traffic citation, along with a man's watch, on the tool chest. The citation had been issued to Wierson on June 18, 2015 (roughly two weeks before the search) and listed the residence as Wierson's address. The tool chest also contained N.W.'s insurance card. In the living room of the residence, officers observed a photograph of Wierson, N.W., and two children hanging on the wall.

While officers were executing the search warrant, an officer obtained Wierson's phone number and called him. The officer informed Wierson that he was with the DCDTF, that he was executing a search warrant at Wierson's home, and asked Wierson to come to the residence to speak with him. Wierson responded "I'm not coming home."

Following the search of the residence, the state charged Wierson with possession of a controlled substance in the first degree. The state later amended the complaint to add

charges of child endangerment, conspiracy to sell a controlled substance in the first degree, and aiding and abetting the sale of a controlled substance in the first degree. The case proceeded to a jury trial.

During deliberations, the jury wrote out four questions for the district court regarding the evidence at the trial. The court records include a document containing the questions from the jury. The questions were:

> 1. Are we able to see the warrant?
>
> 2. Can we consider the fact that the wife was convicted?—Or do we stop at knowing she was arrested?
>
> 3. Can we get a 2015 calendar?
>
> 4. Can we see details of citation?

At the bottom of the document, the district court wrote, "All of the evidence in this case has been provided and no further information will be provided." The record does not contain any further information about how the district court's response was prepared or provided to the jury.

The jury found Wierson guilty on all counts. The district court sentenced Wierson to 128 months for conspiracy to sell a controlled substance in the first degree, and to 365 days for child endangerment. This appeal follows.

D E C I S I O N

Wierson argues that the evidence was insufficient to support his convictions and that the district court committed prejudicial error in answering the jury's questions without notifying the parties and without the defendant present. In a pro se supplemental brief,

Wierson further argues that the district court erred in deciding not to dismiss a juror for cause. We address each issue in turn.

I. There was sufficient evidence to support Wierson's conviction for first-degree possession of a controlled substance but insufficient evidence to support his other convictions.

In reviewing whether a conviction was supported by sufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient." *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). "[W]e 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.

In cases such as this one, where the conviction is based on circumstantial evidence, this court conducts a two-step analysis. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). First, we identify the circumstances proved at trial, disregarding evidence that is not consistent with the jury's verdict. *Id.* Second, we "consider the reasonable inferences that can be drawn from the circumstances proved when viewed as a whole." *Id.* "We give no deference to the jury's choice between reasonable inferences at this second step." *Id.* The evidence was sufficient if the circumstances proved, viewed as a whole, are "consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.* We do not look at the circumstances proved

as isolated facts but instead as a whole to determine whether they form a "complete chain that . . . 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) (quotation omitted). If the reasonable inferences are consistent with guilt, a defendant must point to evidence in the record that is consistent with a rational hypothesis other than guilt. *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

A. Possession of a Controlled Substance in the First Degree

To support Wierson's conviction of possession of a controlled substance in the first degree, the state was required to prove that Wierson unlawfully possessed "one or more mixtures of a total weight of 25 grams or more containing . . . methamphetamine." Minn. Stat. § 152.021 (2014). To prove that a defendant possessed a controlled substance, "the state must prove that [the] defendant consciously possessed . . . the substance and that [the] defendant had actual knowledge of the nature of the substance." *State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975). Knowing possession is typically proved through circumstantial evidence. *State v. Ali*, 775 N.W.2d 914, 919 (Minn. App. 2009), *review denied* (Minn. Feb. 16, 2010).

Possession can take two forms—actual or constructive. *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015). Actual possession involves "direct physical control." *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quotation omitted). Constructive possession of a controlled substance is established where the state demonstrates (1) "that the police found the substance in a place under [the] defendant's exclusive control to which other people did not normally have access," or (2) "that, if police found it in a place to

which others had access, there is a strong probability (inferable from other evidence) that [the] defendant was at the time consciously exercising dominion and control over it." *Florine*, 226 N.W.2d at 611; *see also Salyers*, 858 N.W.2d at 159 (noting that Minnesota courts "have consistently applied *Florine's* analysis as the test for constructive possession"). The constructive-possession doctrine allows a conviction where the state cannot prove actual possession, but "the inference is strong that the defendant physically possessed the item at one time and did not abandon his possessory interest in it." *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). Possession of a controlled substance may be joint or exclusive. *See State v. Ortega*, 770 N.W.2d 145, 150 (Minn. 2009) ("A person may constructively possess contraband jointly with another person."). Applying the circumstantial-evidence standard, we conclude that the evidence was sufficient to support Wierson's conviction under a constructive-possession theory.

The relevant circumstances proved at trial regarding the possession charge were: DCDTF received an anonymous tip regarding Wierson and the residence of the search; a search of the trash revealed tubular glass that tested positive for methamphetamine; more than 25 grams of methamphetamine were found in a tool chest in the residence; the tool chest also contained other items associated with drug use and/or the sale of drugs; a citation issued to Wierson two weeks prior to the search, which listed the residence as his address, and a man's watch were on the tool chest; pictures of Wierson with a child were attached to the tool chest; the tool chest contained N.W.'s insurance card; N.W. was arrested at the residence; and when police contacted Wierson during the search

and asked him to come to the residence to speak with them, he responded, "I'm not coming home."[1]

We next consider whether the circumstances proved are consistent with Wierson's guilt. Generally, evidence that contraband was discovered in a shared residence in close proximity to a defendant's personal belongings is sufficient to establish constructive possession. *See, e.g.*, *State v. Colsch*, 284 N.W.2d 839, 841 (Minn. 1979) (concluding there was sufficient evidence of constructive possession when papers identifying the defendant and the defendant's checkbook were found near the drugs); *see also State v. Mollberg*, 246 N.W.2d 463, 472 (Minn. 1976) (concluding there was sufficient evidence of constructive possession of marijuana where marijuana, along with letters addressed to defendant and the front end of defendant's motorcycle, were found in a bedroom at a residence where defendant frequently stayed). In this case, the presence of a man's watch, a citation that was recently issued to Wierson, and photographs of Wierson with a child on

[1] Wierson urges this court to also consider as "circumstances proved" a number of facts regarding the police investigation, including that police did not observe Wierson at the residence, that police did not conduct fingerprint or DNA testing on any of the evidence, and that police did not have direct knowledge of whether Wierson knew that the methamphetamine was in the garage. Although these facts are undisputed, we believe that the proper way to view them is as illustrating the absence of circumstances proved. *See State v. German*, 929 N.W.2d 466, 473-74 (Minn. App. 2019) (holding that "the absence of evidence in the record regarding a certain circumstance does not constitute a circumstance proved"). Furthermore, we note that for purposes of deciding what inferences are reasonable based on the circumstances proved, we do not discern any difference based on the framing of the circumstances proved. For example, whether we view the circumstances proved as including that police did not observe Wierson at the residence or we view the circumstances proved as not including that same fact, both framings give rise to the same reasonable inferences with regard to whether Wierson constructively possessed the methamphetamine.

the tool chest support a reasonable inference that Wierson constructively possessed the methamphetamine inside the tool chest.

The inference that Wierson constructively possessed the methamphetamine is further supported by Wierson telling the police officer, "I'm not coming home." The jury could reasonably infer that he told police that he would not come home because he knew what police officers would find in the tool chest. *Cf. State v. Bias*, 419 N.W.2d 480, 485 (Minn. 1988) ("[E]vidence of flight suggests consciousness of guilt."). Together, all of these circumstances allowed the jury to reasonably infer that Wierson exercised dominion and control over the substance in the tool chest sufficient to establish constructive possession of the methamphetamine.

Wierson acknowledges that the evidence gives rise to an inference that he constructively possessed the methamphetamine because the evidence connected Wierson to the residence and the tool chest. But he argues that the circumstances proved do not rule out an alternative rational inference of innocence—that N.W. solely possessed the methamphetamine and that Wierson had no dominion or control over the methamphetamine at the time that it was found. Wierson argues, among other things, that there was no fingerprint or DNA evidence tying him to the methamphetamine, that the state did not prove when he was last at the residence, and N.W. was at the residence when the drugs were found.

Although we agree with Wierson that the evidence gives rise to a reasonable inference that N.W. constructively possessed the methamphetamine *jointly* with Wierson, we do not agree that the evidence supports a reasonable inference that N.W. *exclusively*

possessed the methamphetamine. The circumstances proved show that N.W. lived at the residence and that her insurance card was in the tool chest. But there is no evidence in the record to support that N.W. exclusively possessed the methamphetamine without Wierson. The methamphetamine was not placed in an area to which Wierson had limited access or would be unlikely to go. Rather, the methamphetamine was placed in a tool chest that Wierson had access to, and the evidence, particularly the recent driving citation, suggests that Wierson had recently accessed the tool chest. While the state did not prove specifically when Wierson was last in the residence, the presence of the recent driving citation negates any inference that he had not been at the residence for an extended period. Further, Wierson told police that he was "not coming home" when asked to do so during the search, suggesting that he was aware of the contraband and, at a minimum, jointly possessed it with N.W.

Although this is a close case, we conclude that the circumstances proved, viewed as a whole, are inconsistent with a reasonable inference that Wierson had no dominion or control over the methamphetamine found in the tool chest. In considering the totality of the circumstances, we conclude that they form a complete chain leading directly to the conclusion that Wierson possessed the methamphetamine, either exclusively or jointly with N.W., and excluding any reasonable inference that Wierson did not possess the methamphetamine. *See Al-Naseer*, 788 N.W.2d at 473. Accordingly, we conclude that the evidence was sufficient to support Wierson's conviction for first-degree possession of a controlled substance.

B. Child Endangerment

The state charged Wierson with child endangerment under Minn. Stat. § 609.378, subd. 1(b)(2) (2014), which provides:

> A parent, legal guardian, or caretaker who endangers the child's person or health by:
>
> . . . .
>
> (2) knowingly causing or permitting the child to be present where any person is selling, manufacturing, possessing immediate precursors or chemical substances with the intent to manufacture, or possessing a controlled substance . . . is guilty of child endangerment . . . .

The statute defines "caretaker" as "an individual who has responsibility for the care of a child as a result of a family relationship or who has assumed responsibility for all or a portion of the care of a child." Minn. Stat. § 609.376, subd. 3 (2014). Wierson argues that the circumstantial evidence was insufficient to prove that he was the child's parent, legal guardian, or caretaker within the meaning of the statute. We agree.

The relevant circumstances proved regarding the child are that DCDTF found a seven-year-old child coming out of a bedroom in the residence during the search, the child has a different last name than Wierson and N.W., the child was either N.W.'s biological son or stepson, and there was a child's bicycle in the garage. The state also asserts that additional circumstances proved relevant to the child endangerment charge include: (1) the family picture in the living room and (2) the pictures attached to the tool chest showing Wierson with a child. But there is no evidence in the record to demonstrate that the child found by police at the residence was depicted in any of the pictures.

The state argues that the circumstances proved were sufficient to give rise to an inference that the child lived at the residence and that Wierson was guilty of child endangerment by allowing the child to have access to an area where Wierson possessed methamphetamine. Even assuming the circumstances proved support the state's argument, the circumstances proved are also consistent with an alternative rational inference of innocence—namely, that the child does not live full-time at the residence, that Wierson did not have responsibility to provide care for the child, and that Wierson is not the child's parent, legal guardian, or caretaker.

Importantly, the state did not present any evidence regarding Wierson's legal relationship to the child, if any. Nor did the state present any evidence regarding whether Wierson had assumed responsibility for any portion of the child's care. Similarly, there is no evidence regarding N.W.'s custody arrangement for the child. Given the lack of evidence regarding Wierson's relationship to the child and the lack of evidence that Wierson had any responsibility to care for the child, the circumstances proved are consistent with a reasonable alternative inference that Wierson is not a parent, legal guardian, or caretaker of the child. *See* Minn. Stat. § 609.376, subd. 3. Because the statute only criminalizes the conduct of parents, legal guardians, and caretakers, the evidence was insufficient to support Wierson's conviction for child endangerment. Therefore, we reverse Wierson's conviction of child endangerment.

C. Other Charges

Wierson also argues that there was insufficient evidence to support his conviction of conspiracy to sell a controlled substance in the first degree or his conviction for aiding

and abetting the sale of a controlled substance in the first degree. He argues that the record does not contain evidence of any sale or agreement to sell a controlled substance. The state concedes that the evidence was insufficient to support these convictions. Based on our independent review of the record, we agree.

The circumstances proved do not include any agreement to sell a controlled substance or any sale of a controlled substance. The circumstances proved are consistent with a rational hypothesis that Wierson possessed the methamphetamine for personal use. Because the circumstances proved are consistent with a rational hypothesis of Wierson's innocence, the evidence was insufficient to support Wierson's convictions for conspiracy to sell a controlled substance in the first degree and aiding and abetting the sale of a controlled substance in the first degree. Therefore, we reverse Wierson's convictions on these charges.

II. The district court's error in communicating with the jury was harmless error.

Wierson argues that the district court erred by responding to the jury's deliberation questions without notifying the parties and without the defendant being present. The state agrees that the district court erred but argues that the error was harmless.

The United States Constitution gives a defendant the right to be present "at all critical stages of the trial." *Rushen v. Spain*, 464 U.S. 114, 117-18, 104 S. Ct. 453, 455 (1983). The Minnesota Rules of Criminal Procedure also specifically provide that a defendant must be present "for every stage of the trial including . . . any jury questions dealing with evidence or law." Minn. R. Crim. P. 26.03, subd. 1(1). The district court "should have no communication with the jury after deliberations begin unless that

communication is in open court and in the defendant's presence." *State v. Sessions*, 621 N.W.2d 751, 755-56 (Minn. 2001).

In reviewing "the denial of a defendant's right to be present for all communications with the jury," appellate courts apply a harmless-error analysis. *Brown v. State*, 682 N.W.2d 162, 167 (Minn. 2004); *see also Sessions*, 621 N.W.2d at 756 ("Even if a defendant is wrongfully denied the right to be present at every stage of trial, a new trial is warranted only if the error was not harmless."). This analysis applies even where the district court fails "to make a complete record of those communications." *Brown*, 682 N.W.2d at 167. "If the verdict was surely unattributable to the error, the error is harmless beyond a reasonable doubt." *Sessions*, 621 N.W.2d at 756. When considering whether the erroneous exclusion of a defendant from judge-jury communications constitutes harmless error, we consider (1) the strength of the evidence and (2) the substance of the judge's response. *Id.*

Here, the jury asked four written questions that dealt with the evidence in the case. The district court answered the questions in writing, rather than communicating with the jury in open court and in the defendant's presence as required. The district court clearly erred by responding to the jury's questions in this manner. *Id.* at 755-56. Thus, we must determine whether the error was harmless.

As to the first prong of the harmless-error analysis, we conclude that the state's evidence was strong, but not overwhelmingly strong. It is undisputed that police found 25 grams of methamphetamine in the tool chest at the residence. There was testimony that, on the tool chest, police found a citation issued to Wierson roughly two weeks prior and

that the citation listed Wierson's address as that of the residence where the methamphetamine was found. In addition to the citation, the police found a man's watch on the tool chest, and photos of Wierson and a child attached to the tool chest. And when an officer on the drug task force called Wierson and told him that police were executing a search warrant at the residence, Wierson told the officer: "I am not coming home." Based on our review of the evidence, we conclude that the evidence that Wierson constructively possessed the drugs was strong.

As to the second prong, we conclude that the district court's response was not prejudicial to Wierson. In *Sessions*, the district court responded to a question about the evidence by stating that the jurors were to decide the case based upon their own collective recollection of the evidence. *Id.* at 757. The supreme court held that the instruction was not prejudicial because the instructions did not favor the prosecution or defense. *Id.* at 756-57.

Similarly, in this case, the district court instructed the jury to make its decision based only on the evidence that it already had. In the jury's first, third, and fourth questions, they asked whether they could view additional evidence that was not provided during the trial. The district court's response correctly informed the jury that they could not receive the additional evidence they requested.

Wierson argues that the jury's second question—whether it could consider that N.W. was convicted—demonstrated that the jury misunderstood the law or the evidence because no evidence was presented at trial that N.W. was convicted of a crime. But Wierson's defense attorney asserted in his opening statement that the evidence would show

that someone other than Wierson was found in the residence and convicted of drug possession. Thus, the jury's question appears to reflect uncertainty as to whether it could consider defense counsel's opening statement, despite the absence of evidence supporting that statement.

During the district court's final instructions to the jury, it told the jury that "the arguments or other remarks of an attorney are not evidence." "We assume that the jury follows a court's instructions." *State v. Ferguson*, 581 N.W.2d 824, 833 (Minn. 1998). To the extent that the jury's question indicates that it may not have followed the district court's instruction, and improperly considered defense counsel's statement as evidence, this error was not prejudicial to Wierson. Such an error would have actually supported Wierson's argument that N.W. possessed the methamphetamine. Any instruction from the district court clarifying that defense counsel's statements were not evidence would only have helped the state's case. Accordingly, we conclude that the district court's response did not prejudice Wierson.

In weighing these two factors, we conclude that "the verdict was surely unattributable to the error." *Sessions*, 621 N.W.2d at 756. The evidence against Wierson was strong, and we discern no prejudice to the defendant from the district court's error. If anything, it appears that the district court's error prejudiced the state's case. In light of the lack of prejudice in the district court's response to the jury's questions, we conclude that the jury's verdict was surely unattributable to the district court's error and that the error was harmless beyond a reasonable doubt.

III. The district court did not err in declining to strike a juror for cause.

In his pro se supplemental brief, Wierson argues that the district court erred by declining to strike for cause a juror who Wierson contends demonstrated actual bias. "The United States Constitution and the Minnesota Constitution guarantee a criminal defendant the right to an impartial jury." *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015). "The bias of a single juror violates the defendant's right to a fair trial," because the "impartiality of the adjudicator goes to the very integrity of the legal system." *State v. Brown*, 732 N.W.2d 625, 630 (Minn. 2007). "To prove actual bias, the challenging party must show that the juror exhibited strong and deep impressions that would prevent her from laying aside her impression or opinion and rendering a verdict based on the evidence presented in court." *Fraga*, 864 N.W.2d at 623.

Wierson argues that a juror expressed actual bias when the juror stated that his "concentration isn't all that great at a trial right now" and that "a lot of talk about this kind of stuff, it is kind of over my head." Wierson also notes that the juror stated that it was difficult for him to sit for a long period of time. None of the juror's comments show that the juror exhibited "strong and deep impressions" that would prevent him from "laying aside [his] impression or opinion." *See id.* In fact, none of the comments demonstrate any impression or opinion of any kind, much less an opinion that would have prevented the juror from "rendering a verdict based on the evidence presented in court." *See id.* Accordingly, these comments do not suggest actual bias on the part of the juror, and

Wierson's pro se argument that the district court should have dismissed the juror for cause due to the juror's bias is without merit.[2]

Affirmed in part, reversed in part, and remanded.

[2] Furthermore, we note that during voir dire counsel for the state inquired as to whether the regular breaks the district court had previously mentioned would help with the juror's concentration issues. Although the juror continued to express a lack of confidence in his abilities, he stated that he would be willing to "learn and listen" during the trial. The juror's comments alleviate any concern that he was not willing to sit and pay attention throughout the trial.