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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1588

State of Minnesota,
Respondent,

vs.

Lee Vang,
Appellant.

Filed August 12, 2019
Affirmed in part, reversed in part, and remanded
Reyes, Judge
Dissenting, Rodenberg, Judge

Hennepin County District Court
File No. 27-CR-17-5085

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

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

REYES, Judge

In this direct appeal from convictions of and sentences for second-degree possession of methamphetamine and aiding and abetting second-degree possession of

methamphetamine, appellant argues that (1) the state failed to present sufficient evidence to prove that she constructively possessed the drugs found in her vehicle; (2) the state failed to present sufficient evidence to prove that she aided and abetted possession of the drugs; and (3) the district court erred by imposing separate convictions because the charges involved the same act of possession. We affirm in part, reverse in part, and remand.

FACTS

In the early morning of September 22, 2016, U.S. Fugitive Apprehension Agent Stewart Peters patrolled an area of Minneapolis looking for Jason Stone, who had a warrant out for his arrest. Acting as a bail investigator, Agent Peters had received information that Stone would be in a Chevrolet Malibu with his girlfriend, appellant Lee Vang. He found the empty Malibu in an alley, called for backup, and proceeded to surveil it. At around 2:00 a.m., the agents observed Stone and appellant enter the Malibu and prepare to exit the alleyway. Agent Peters and his partners boxed in the Malibu with their vehicles and instructed Stone, the driver, to turn off and exit the Malibu. The agents also asked appellant, sitting in the passenger seat, to exit the Malibu.

After the agents searched and secured Stone, Agent Peters asked appellant if there were any weapons in the Malibu that he should know about. She replied that there was methamphetamine in the car, and pointed to a black bag in the backseat. When Agent Peters asked how much methamphetamine was in the bag, she stated that it weighed "not a little." Agent Peters took the bag from the backseat and placed it on the hood of his vehicle. He looked inside and noticed a baggie containing what he believed to be methamphetamine. He immediately called the Minneapolis Police Department.

Upon arriving at the scene, Minneapolis police officers searched the bag and found drug paraphernalia, suspected marijuana, suspected methamphetamine, counterfeit U.S. currency, and Stone's cell phone. Appellant asked the police officers if she could keep the cell phone but they refused and took it into custody along with the other items. The suspected methamphetamine field-tested positive and weighed a total of 32 grams.

In February 2017, respondent State of Minnesota charged appellant with second-degree possession of a controlled substance, in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2016). Appellant moved to dismiss, arguing that the complaint lacked probable cause to show that she possessed the methamphetamine. The district court denied her motion, finding that probable cause existed to support the charges, and that "the factual determination as to whether [appellant] was in possession of the methamphetamine should be determined by a factfinder."

In February 2018, the state amended the complaint to add a charge of aiding and abetting possession pursuant to Minn. Stat. § 609.05, subd. 1 (2016). The district court held a jury trial from April 9-12, 2018. At trial, the parties stipulated to the following facts: that the Malibu belonged to appellant's father, that appellant used the vehicle frequently, and that she possessed the vehicle on the day of the incident. The jury found appellant guilty of both counts. The district court entered convictions on both counts and sentenced appellant to 75 months on count II. This appeal follows.

D E C I S I O N

I. Sufficient evidence supports appellant's conviction of count I, possession of a controlled substance.

Appellant first argues that the state failed to present sufficient evidence to prove that she constructively possessed the methamphetamine because it only established her proximity to and knowledge of the drugs, not her dominion and control over them. We disagree.

In reviewing a claim of insufficient evidence, we painstakingly review the record to determine whether the evidence and reasonable inferences drawn therefrom, when viewed in the light most favorable to the conviction, are sufficient to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). 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.

Under Minn. Stat. § 152.022, subd. 2(a)(1), the state had to prove that appellant unlawfully possessed 25 grams or more of methamphetamine. "A person is guilty of possession of a controlled substance if she knew the nature of the substance and either physically or constructively possessed it." *State v. Denison*, 607 N.W.2d 796, 799 (Minn. App. 2000). "A person may constructively possess a controlled substance alone or with others." *Id.* "Constructive possession may be proved by showing either that (1) the

controlled substance was found in an area under the defendant's control and to which others normally had no access; or (2) if others had access to the location of the controlled substance, the evidence indicates a strong probability that the defendant exercised dominion and control over the area." *Id*. at 800.

Constructive possession can be proved through circumstantial evidence. *State v. Sam*, 859 N.W.2d 2d 825, 832 (Minn. App. 2015). Convictions based on circumstantial evidence require "heightened scrutiny." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). In *State v. Harris*, the supreme court reaffirmed the two-step analysis to apply when a conviction is based on circumstantial evidence. 895 N.W.2d 592, 600 (Minn. 2017). First, we "winnow down the evidence presented at trial by resolving all questions of fact in favor of the jury's verdict, resulting in a subset of facts that constitute the circumstances proved." *Id*. (quotation omitted). In doing this, we reject evidence that conflicts with the circumstances proved. *State v. Anderson*, 789 N.W. 2d 227, 241-42 (Minn. 2010) (quotation omitted).

Second, we consider "whether a reasonable inference of guilt can be drawn from the circumstances proved, viewed as a whole, and whether a reasonable inference inconsistent with guilt can be drawn from the circumstances proved, again viewed as a whole." *Harris*, 895 N.W.2d at 600. A reasonable inference cannot be based on "mere conjecture." *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). And mere "possibilities of innocence do not require reversal of a . . . verdict so long as the evidence taken as a whole makes such theories seem reasonable." *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010) (quotation omitted). Both steps focus on the circumstances proved. Because the

state proved constructive possession through circumstantial evidence, we apply the two-step standard above.

Here, the state proved the following circumstances: (1) Agent Peters looked for Stone in Minneapolis because of an outstanding warrant for his arrest; (2) Agent Peters knew Stone would be with his girlfriend, appellant, in a Chevy Malibu; (3) the agents located the Chevy Malibu and observed two people get into it at around 2:00 a.m.; (4) Agent Peters' partners identified the driver of the vehicle as Stone; (5) Agent Peters recognized appellant sitting in the passenger seat; (6) appellant told Agent Peters about the bag with methamphetamine and its exact location; (7) appellant sat in close proximity to the bag; (8) appellant stated that the amount of drugs was "not a little;" (9) appellant asked if she could have Stone's phone located in the bag; (10) BCA testing later confirmed that the drugs tested positive for 31.984 grams of methamphetamine; and (11) appellant's father owned the Chevy Malibu and appellant possessed it on that day.

Appellant argues that the circumstances do not eliminate a rational hypothesis "of innocence that appellant did not constructively possess the methamphetamine." It is true that proximity to the drugs alone is not enough to convict appellant. *See Harris*, 895 N.W.2d at 601 (stating that "the [s]tate must prove more than the defendant's mere proximity to the firearm"). And her ease of access to the drugs is only "one factor relevant to establishing constructive possession." *State v. Salyers*, 858 N.W.2d 145, 159 (Minn. 2015). But appellant's proposed reasonable alternative hypothesis—that she is innocent—turns on circumstances that were not proved. She points to the lack of evidence of appellant carrying the bag to the car and of appellant's DNA or fingerprints on the

methamphetamine's packaging. She also points to the fact that "she did not try to run or engage in furtive behavior when confronted." This argument is inconsistent with our task of focusing on the "subset of facts that constitute the circumstances proved." *Harris*, 895 N.W.2d at 600 (quotation omitted). In other words, we do not consider facts *not* proved at trial.

Here, appellant sat in very close proximity to the bag and could easily access it. She knew that the bag contained methamphetamine and that it was "not a little." She also knew that the bag contained Stone's cell phone, and even asked to keep it. Appellant possessed the Chevy Malibu, in which the methamphetamine was located, and accompanied her boyfriend, Stone, to her car at 2:00 in the morning. The key circumstances here are the specific details that appellant knew about the bag. Unlike the defendant driver in *Harris*, who stated he had no knowledge of the gun concealed in the roof of the vehicle, appellant clearly knew about the drugs located in a bag sitting in the backseat. Combined with the other circumstances proved, and viewed as a whole, these facts are "consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.* at 601. The record therefore supports the district court's determination that appellant knowingly exercised dominion and control over the bag sufficient to support her conviction of second-degree possession of a controlled substance.

II. We need not decide the issue of whether sufficient evidence supported appellant's conviction for aiding and abetting possession of a controlled substance.

Appellant also argues that the state failed to support her conviction on count II of aiding and abetting possession of a controlled substance with sufficient evidence. We decline to decide this issue.

The district court entered judgments of conviction on both counts, but only imposed a sentence on count II. Because we conclude that sufficient evidence supports her conviction on count I, we do not need to address the sufficiency of the evidence on count II. *See State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) ("We need not decide whether the evidence also was sufficient to support convictions on the other two counts . . . because defendant was not sentenced . . . [and] defendant was never formally adjudicated guilty of these two counts."); *see also State v. Byers*, 570 N.W.2d 487, 489 (Minn. 1997) (affirming on other grounds when the reviewing court agrees with the result reached but not the analysis). Furthermore, even if we did reach this issue, the state provides no caselaw supporting the charge or conviction of aiding and abetting possession of a controlled substance.

III. The district court erred in entering convictions on both counts.

Appellant finally argues that the district court erred in entering judgments of conviction on count I and count II because both charges arose from the same criminal act of possession. We agree.

Minn. Stat. § 609.04 (2016) states that a defendant "may be convicted of either the crime charged or an included offense, but not both." "[T]he proper procedure to be followed by the trial court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only.

The remaining conviction(s) should not be formally adjudicated at this time." *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). Here, the jury found appellant guilty on both charges. The proper procedure therefore was for the district court to adjudicate and sentence on only one charge because both charges were based on the same criminal act of methamphetamine possession. Because sufficient evidence supports her conviction on count I, we reverse and remand for the district court to vacate her conviction of count II and resentence.

Affirmed in part, reversed in part, and remanded.

RODENBERG, Judge (dissenting in part)

I agree with the court's analysis in parts II and III, but I must respectfully dissent from part I of the court's opinion. Appellant probably jointly possessed the methamphetamine. Her joint constructive possession of it is certainly consistent with the circumstances proved. But I cannot say on this record that the *only* reasonable inference from the circumstances proved is that appellant constructively possessed the methamphetamine.

The Minnesota Supreme Court reaffirmed the two-step analysis concerning the sufficiency of circumstantial evidence supporting a conviction in *State v. Harris*, 895 N.W.2d 592, 600-01 (Minn. 2017). That two-step analysis requires that we first identify the circumstances proved, deferring to the jury's acceptance of the proof of these circumstances and its rejection of the evidence in the record that conflicted with the circumstances proved by the state. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). We then independently examine the reasonableness of all inferences that might be consistent with a rational hypothesis other than guilt. *Id.* at 473-74. In this second step, "[w]e give no deference to the fact finder's choice between reasonable inferences." *Id.* at 474 (quotation omitted). If any reasonable inference is inconsistent with guilt, then the circumstantial evidence is insufficient. *See id.*

We have here another example of the problem with appellate review of a jury's verdict after the jury has been instructed concerning direct and circumstantial evidence to the effect that "[t]he law does not prefer one form of evidence over the other." 10 *Minnesota Practice*, CRIMJIG 3.05 (Supp. 2018); *see Harris*, 895 N.W.2d at 603-11

(Lillehaug, J., dissenting) (explaining that, despite this admonition to juries, "on appellate review, we do not follow that admonition"); *see also State v. McCormick*, 835 N.W.2d 498, 505 n.2 (Minn. App. 2013) (discussing the benefits that would flow from a complete and robust explanation to juries of the proper framework for analyzing the sufficiency of circumstantial evidence), *review denied* (Minn. Oct. 15, 2013). Nevertheless, *Harris* reaffirms Minnesota's two-step appellate review of convictions that rest solely on circumstantial evidence, 895 N.W.2d at 600, and we are bound by the law as established by the Minnesota Supreme Court, *see State v. Curtis*, 921 N.W.2d 342, 343 (Minn. 2018) ("The court of appeals is bound by supreme court precedent."). That being so, I cannot agree that the circumstances here are inconsistent with any reasonable inference other than that appellant constructively possessed the methamphetamine.

To be sure, appellant knew about the methamphetamine, and knew that there was more than "a little" of it. And the record establishes that the car in which the methamphetamine was found was one regularly used by appellant, although on this occasion it was driven by Stone. Appellant asked the police if she could have Stone's phone, which she also knew was in the bag containing the methamphetamine. But how the methamphetamine got into the car, who put it in the car, and under what circumstances are unknown from this record.

I disagree with the notion that we cannot consider what was "*not* proved at trial." *Harris* discussed at length both what the evidence failed to show about what Harris knew and what the police officers did not see. 895 N.W.2d at 602-03. The enterprise contemplated by the supreme court's jurisprudence necessarily *requires* consideration of

reasonable hypotheses in light of the circumstances proved. In other words, an appellate court is required to consider the significance of what the state did not prove. And surely a defendant cannot constitutionally be required to prove any circumstances as a precondition to arguing that her guilt has not been proved beyond reasonable doubt. *See State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995) ("Due process requires that the state prove beyond a reasonable doubt the existence of every element of the crime charged.").

Constructive possession requires that the state prove either that the item in question was found in an area under the defendant's control and to which others normally have no access (which the state does not argue here) or that it was found where the evidence "indicates a strong probability that the defendant exercised dominion and control over the area." *State v. Denison*, 607 N.W.2d 796, 800 (Minn. App. 2000), *review denied* (Minn. June 13, 2000). Here, the methamphetamine was found in a bag with *Stone's* phone. The situation discovered by police when they arrested Stone could have come about in any number of ways, one of which is that Stone and appellant were jointly possessing the methamphetamine. But it is easy to formulate a hypothesis consistent with the circumstances proved at trial and yet inconsistent with appellant's guilt. There is no record evidence of appellant having so much as touched the methamphetamine. The circumstances proved here do not eliminate the reasonable inference that Stone possessed the methamphetamine, and appellant knew that Stone possessed the methamphetamine but did not herself possess or control it.[1]

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[1] Appellant did not testify at trial, and our situation is not one where the circumstances proved include the jury's rejection of the defendant's version of events. Although

An analogous circumstance would be a person lending a car to another and, when the borrower returns with the car, the borrower places a computer and phone into a backpack in the back seat without the owner ever having touched either of them; the owner knows that the bag and contents are there as the two drive away in the car, with the borrower at the wheel. That evidence, without more, proves neither that the owner of the car exercised "dominion and control" over the backpack and contents nor that she jointly possessed the contents.

It is far more likely than not that appellant did, in fact, constructively possess the methamphetamine. But the proof of that is entirely circumstantial. Being bound by *Harris* and similar cases to like effect, I cannot join in affirming the conviction here.

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unpublished opinions are not precedential, Minn. Stat. § 480A.08, subd. 3 (2018), they may be of persuasive value. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993). We have held in several cases, including a recent unpublished decision, that when considering on appeal the circumstances proved at trial, the circumstances do not include the testimony of a defendant who has been found guilty by the trier of fact. *Cf. State v. Bradley*, No. A17-1659, 2019 WL 3412314, at *6-7 (Minn. App. July 29, 2019). To the extent that we consider a convicted defendant's testimony at all, we would consider only the finder of fact having *rejected* the testimony that is inconsistent with guilt. In other words, the circumstances proved in such a case would include that the finder of fact concluded beyond all reasonable doubt that the defendant's testimony was untrue. *See id.*; *see also State v. Hawes*, 801 N.W.2d 659, 670-71 (Minn. 2011) (concluding that, because defendant's testimony conflicts with the state's evidence that supports the verdict, the supreme court would not consider testimony when identifying the circumstances proved).