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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1945**

State of Minnesota,
Respondent,

vs.

Richard Vang,
Appellant.

**Filed December 14, 2020
Affirmed
Reilly, Judge**

Hennepin County District Court
File No. 27-CR-17-20407

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

REILLY, Judge

A jury found appellant guilty of first-degree controlled-substance possession after hearing evidence that police officers conducted a controlled delivery of a package

containing methamphetamine, observed appellant and a woman drive by and pick up the package, and watched appellant discard the package behind a house a few blocks away. On appeal, appellant challenges the sufficiency of the evidence to support his conviction. Because the direct evidence was sufficient to prove that appellant unlawfully possessed methamphetamine, we affirm.

FACTS

Respondent State of Minnesota charged appellant Richard Vang with first-degree possession and first-degree sale of a controlled substance for actions arising out of police officers' controlled delivery of a package containing methamphetamine. The case proceeded to a jury trial, at which various witnesses testified to these facts.

Police officers' testimony

Airport police intercepted a package at the airport FedEx facility and became suspicious because the package bore several characteristics common among packages containing drugs. The package had shipped from California and was addressed to a "Julie Xiong" at a specific address in Brooklyn Center (Address A). Police determined through their databases that there was no Julie Xiong associated with that address. Believing that the package may contain drugs, police conducted a dog sniff, and the dog alerted to the presence of narcotics. Police obtained a search warrant to open the package and discovered more than five pounds of methamphetamine inside.

After replacing most of the drugs in the package with rock salt, the airport police worked with the Northwest Metro Drug Task Force to conduct a controlled delivery to the package's intended location so that police could identify the individuals trying to acquire

the methamphetamine. Detective Jeff Trevino testified that people who buy drugs often put a fictitious name on the package and that they commonly have the package delivered to a neighbor's house, so that the package cannot be easily traced to them. Searches of law-enforcement databases revealed that there were no Asian names associated with Address A, so police expanded their search to neighboring addresses and discovered that a family with an Asian last name lived across the street (Address B). Police retrieved a photo from Minnesota Driver and Vehicle Services of a woman associated with Address B named Panhia Lo.

Detective Trevino posed as a FedEx deliveryman, drove a van bearing FedEx markings, and went to the area with the plan of leaving the package on the front porch of Address A. As Detective Trevino walked up the driveway to the residence, a woman left the house and was getting in her car when she told the detective, "If that's for Julie, it's for across the street," pointing to Address B. After the woman drove away, Detective Trevino continued to the front door of Address A, where an older man answered the door, told him that Julie Xiong did not live there, and said that he should try the house across the street at Address B. Detective Trevino then walked across the street to Address B, where an elderly Asian woman answered the door and told him that there was no Julie Xiong at that residence. Detective Trevino returned to the van with the package and drove away briefly, before returning and parking in the same spot to wait and see if anyone showed up.

At one point Detective Trevino saw a vehicle drive up the street towards the van at a high rate of speed before quickly decelerating. As the vehicle passed the van, he saw that the driver was an Asian male—later identified as Vang—and that the passenger was an

Asian female whom Detective Trevino recognized from the Minnesota Driver and Vehicle Services photograph as Panhia Lo. Lo was pointing at the FedEx van and talking with the driver as they drove past. The vehicle parked in front of Address A for a few minutes and then drove off, before reappearing a few minutes later and stopping a ways behind the FedEx van. To find out if the people in the vehicle were waiting to pick up the package, Detective Trevino went up to Address A, placed the package on the front porch, and drove away.

Other officers surveilling the area witnessed Vang pull into the driveway of Address A. Lo stepped out of the vehicle, picked up the package from the front porch, and returned to the car, at which point Vang backed the vehicle into Address B's driveway. Both Lo and Vang got out of the car and looked around for five to ten minutes. A surveilling officer testified that he believed that they were checking for police presence in the area. Lo and Vang got back in the vehicle and drove away, and police followed them. They drove for a few blocks and then pulled into a driveway (Address C). Officers watched as Vang and Lo got out of the car and moved quickly towards the side and back of the house. Vang was carrying the package. He and Lo then returned to the car without the package and drove away. The officers conducted a traffic stop and arrested both of them. Officers recovered the package from just behind the fence in the backyard of Address C, where it appeared to have been hastily discarded.

Vang's testimony

Vang testified in his own defense, providing a different version of events. Vang said that Lo was the girlfriend of a friend of his, Jackie Xiong. Vang knew Xiong because

they used to use methamphetamine together. Vang testified that Xiong called him and asked for a ride because Lo's parents were kicking him and Lo out of their house. Vang drove to Lo's parents' house, which was at Address B.¹ When he arrived, Xiong and Lo came out of the house, and Lo's parents were yelling at them. Xiong told Vang to drop Lo off at Xiong's house before leaving in a separate vehicle.

When Vang stopped at a gas station, Lo told him that she wanted to go back to her parents' house so that she could retrieve her belongings. Vang drove back to the house, and Lo told him to slow down. He drove past the house to see if Lo's parents had left and then turned around and stopped the car. Lo got out of the car, ran to a neighbor's house, and grabbed a package. Vang testified that he did not know why Lo took the package and was concerned that Lo had just stolen something from her neighbors. Lo returned to the car and threw the package in the back seat. Vang backed into the driveway of her parents' house, and they sat there for several minutes. Vang got out of the car briefly, but Lo's parents came out of the house and told them to get off their property. Vang and Lo drove away.

Vang testified that Lo was acting nervous and "freaking out" as they drove. He asked Lo what was in the package, and she said, "It's some sh-t." Vang believed this to mean that the package contained drugs. Lo was suspicious that police were nearby, and Vang did not want to be around the package. Lo told him to go to Address C. Vang

¹ Vang testified that Lo's parents lived at Address A, but this appears to have been a mistake, based on Detective Trevino's testimony that Lo was linked to Address B, as well as Vang's later testimony that Lo picked up the package from a "neighbor's house."

testified that he had been to that house several weeks earlier because Xiong and another friend used to live there and he had used drugs with them previously. After pulling into the Address C driveway, Vang told Lo to take the package out of the car, but she refused. Vang took the package, went to the back of the house, and threw it over the fence to the backyard. Lo followed him to the backyard and back to the car. Vang then drove away intending to drop Lo off at Xiong's house, but they were stopped and arrested by police.

Verdict and Appeal

The jury found Vang guilty of first-degree controlled-substance possession but not guilty of first-degree sale. The district court granted Vang a downward durational departure and sentenced him to 42 months in prison. Vang appeals.

DECISION

Vang challenges the sufficiency of the evidence to convict him of first-degree controlled-substance possession. To evaluate the sufficiency of the evidence, appellate courts “carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the [factfinder] to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). Appellate courts review the evidence “in the light most favorable to the conviction” and “assume the jury believed the State’s witnesses and disbelieved any evidence to the contrary.” *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). Appellate courts “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.” *Id.*

To convict Vang of first-degree controlled-substance possession, the state had to prove that he unlawfully possessed a mixture weighing at least 25 grams containing cocaine, heroin, or methamphetamine. Minn. Stat. § 152.021, subd. 2(a)(1) (2014). The only element of the offense that Vang challenges is unlawful possession. To prove unlawful possession, the state must show that the defendant “consciously possessed, either physically or constructively, 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). The state argues that the evidence sufficiently proved Vang’s possession of the methamphetamine in the package based on three theories: actual possession, constructive possession, and aiding and abetting Lo’s possession. We conclude that the state presented sufficient evidence to prove that Vang possessed the methamphetamine.

Although the parties frame the issue using the circumstantial-evidence standard, *see Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (outlining the two-step standard of review that appellate courts apply when the state proves an element of the offense using circumstantial evidence), we need only look to the direct evidence presented at trial to show Vang’s actual possession of the package. Direct evidence is “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Vang’s own testimony established these facts through direct evidence: (1) after Lo picked up the package, Vang asked Lo what was in the package, and she said, “It’s some sh-t”;

(2) based on Lo's answer, Vang believed that the package contained drugs; and (3) Vang physically carried the package around to the back of Address C and threw it over the fence. A surveilling officer also testified that he observed Vang holding the package while walking to the back of Address C. These facts show, without inference or presumption, that Vang in fact possessed the methamphetamine when he carried the package while knowing it contained drugs.

Vang, though, argues that his actual possession of the drugs was not "unlawful," as the statute requires, based on the doctrine of "fleeting control." Some jurisdictions have recognized the fleeting-control doctrine as a defense to drug possession when the defendant's possession was merely a "momentary handling" of the drugs before abandoning them. *See People v. Mijares*, 491 P.2d 1115, 1120 (Cal. 1971). Minnesota has never recognized the fleeting-control doctrine. We have expressly rejected the defense in the context of firearm possession. *In re Welfare of S.J.J.*, 755 N.W.2d 316, 319 (Minn. App. 2008). We have also refused to recognize the defense in drug-possession cases, in unpublished opinions. *See Littlewolf v. State*, No. A17-0867, 2018 WL 1247460, at *2 (Minn. App. Mar. 12, 2018); *Freeman v. State*, No. A15-2035, 2016 WL 4421203, at *3 (Minn. App. Aug. 22, 2016), *review denied* (Minn. Nov. 15, 2016). We decline to adopt the fleeting-control doctrine here.

And we doubt the facts here would support a finding of fleeting control even if we were to recognize the doctrine. Vang testified that he had been to Address C recently, knew that Xiong and another friend had lived there, and had used drugs with them in the past. Vang did not passively hold the package for a few moments, nor did he dispose of

the package immediately in a random location as soon as he discovered it contained drugs. Rather, he deliberately left a package containing drugs at a residence he was familiar with and where he knew that drug use occurred. This differs from the type of momentary possession that other jurisdictions have found to support application of the fleeting-control doctrine. *See Mijares*, 491 P.2d at 1119 (applying the doctrine when defendant removed drugs from a friend's pocket and immediately threw them out the car window); *Moreau v. State*, 588 P.2d 275, 285-86 (Ala. 1978) (applying the doctrine when defendant merely picked up napkin containing heroin that codefendant had just spat out of his mouth); *Sanders v. State*, 563 So. 2d 781, 781, 783 (Fla. Dist. Ct. App. 1990) (holding that "momentary holding and looking at" cocaine was insufficient to prove possession).

Because the testimony presented at trial established that Vang actually possessed methamphetamine when he carried the package containing the drugs, the evidence is sufficient to sustain Vang's conviction of first-degree controlled-substance possession.

Affirmed.