STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0469

State of Minnesota,
Respondent,

vs.

Karl Alfredo Rosillo,
Appellant.

Filed March 28, 2022
Affirmed
Reyes, Judge

Blue Earth County District Court
File No. 07-CR-19-3781

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Patrick McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

On direct appeal from his convictions of first-degree sale and third-degree possession of a controlled substance, appellant argues that (1) the state presented insufficient evidence to prove that appellant possessed the methamphetamine found in his

vehicle and (2) the district court plainly erred by admitting two officers' testimonies because their testimonies constituted inadmissible drug-dealer profile evidence. Appellant also asserts additional claims in a pro se supplemental brief. We affirm.

FACTS

On September 4, 2019, law-enforcement officers were attempting to find appellant Karl Alfredo Rosillo, who had an outstanding warrant. Officers stopped T.C., a known acquaintance of appellant, and, during that stop, an officer asked T.C. if they knew where to find appellant. T.C. told the officer about a vehicle appellant drove and a farmhouse appellant frequented. The officer went to the farmhouse and saw the vehicle T.C. described parked outside. Officers began monitoring the area.

Shortly thereafter, the vehicle left the farmhouse, with M.R. driving and appellant in the front passenger seat. Officers attempted to pull the vehicle over, but it sped away and did not stop until it eventually collided with an approaching police car. Officers ordered appellant and M.R. to get out of the vehicle. M.R. got out immediately. Appellant sat with his hands up in the passenger seat until an officer pulled him out from the driver's side. Appellant briefly struggled while an officer handcuffed him.

Officers searched the vehicle. On the floor of the driver's side, officers found a black bag containing a wallet holding $4,270 in cash. On the passenger side, they found seven "gem baggies" [1] containing a crystal substance, a glass pipe, a spoon, an empty but possibly used "gem baggie," and a black drawstring bag.

[1] Officers testified that "gem baggie" refers to a type of Ziploc bag.

Testing by the Minnesota Bureau of Criminal Apprehension (BCA) confirmed that the substance in the baggies was methamphetamine weighing 19.097 grams. The baggies were submitted for DNA testing, but the results were inconclusive.

Respondent State of Minnesota charged appellant with the kidnapping of M.R., fleeing a police officer, first-degree controlled-substance sale, and third-degree controlled-substance possession. At appellant's jury trial, officers testified about their arrest of appellant and the items they found in the vehicle. Two officers testified generally about their experience with drug sales.

Appellant presented defense witnesses T.A., M.F., and D.S. M.F. and D.S. testified that, around September 4, 2019, T.C. worked on appellant's vehicle and that they had seen T.C. with a black bag. T.A., M.F., and D.S. were all held in the same county jail building as appellant at some point after his arrest.

The district court entered a judgment of acquittal on the kidnapping and fleeing charges. The jury found appellant guilty of first-degree controlled-substance sale in violation of Minn. Stat. § 152.021, subd. 1(1) (2018), and third-degree controlled-substance possession in violation of Minn. Stat. § 152.023, subd. 2(a)(1) (2018). The district court sentenced appellant to 256 months' imprisonment for the first-degree controlled-substance-sale conviction. This appeal follows.

DECISION

I. The state presented sufficient evidence to prove that appellant possessed the methamphetamine found in the vehicle.

Appellant first argues that the state presented insufficient evidence to prove that he possessed the methamphetamine found in his vehicle. We disagree.

The parties agree that the state relied on circumstantial evidence to prove appellant's controlled-substance offenses. When a verdict is based on circumstantial evidence, we use a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, we identify the circumstances proved and assume that the jury believed the state's witnesses and disbelieved the defense's witnesses. *Id.* at 598-99. Second, we "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 599 (quotation omitted). We examine independently the "reasonableness of all inferences that might be drawn," giving no deference to the jury's choice between reasonable inferences. *Id.* (quotation omitted).

The jury found appellant guilty of first-degree controlled-substance sale.[2] To convict, the state had to prove that appellant knowingly possessed the methamphetamine found in the vehicle. The parties agree that the state had to prove that appellant

[2] A defendant is guilty of first-degree controlled-substance sale if "on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of 17 grams or more containing . . . methamphetamine." Minn. Stat. § 152.021, subd. 1(1). To "sell" means "(1) to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture" or "to possess with intent to perform an act listed in clause (1)." Minn. Stat. § 152.01, subd. 15a(1), (3) (2018). The state charged appellant with first-degree controlled-substance sale on the theory that appellant possessed with intent to sell the methamphetamine found in the vehicle.

constructively possessed the methamphetamine. The state proves constructive possession when (1) the item was found "in a place under defendant's exclusive control to which other people normally did not have access" or (2) if the item was found in a place to which others had access, "there is a strong probability (inferable from other evidence) that at the time the defendant was consciously or knowingly exercising dominion and control over it." *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). A defendant may possess an item jointly with another person. *Id.* But the defendant must have exercised dominion and control over the item itself and not merely the place where it was found. *State v. Hunter*, 857 N.W.2d 537, 542-43 (Minn. App. 2014). "Proximity is an important factor in establishing constructive possession." *State v. Porte*, 832 N.W.2d 303, 308 (Minn. App. 2013) (quotation omitted).

The state proved the following circumstances at trial:

- Officers received information from T.C. that appellant may be at a particular farmhouse with a particular vehicle.
- Officers located the described vehicle at the farmhouse.
- The vehicle belonged to appellant.
- During the officers' observation, pursuit, and stop of the vehicle, M.R. drove and appellant sat in the front passenger seat.
- The vehicle did not stop when officers attempted to pull it over.
- Pursuing officers saw appellant slouching low in his seat, looking around frantically, removing his seatbelt, and reaching for the steering wheel.

- The vehicle sped away from the officers, moved erratically, and did not stop until it crashed into an oncoming police car.

- M.R. immediately got out of the car and surrendered, but the officers had to remove appellant from the vehicle, and appellant briefly resisted an officer's attempt to handcuff him.

- Officers searched the vehicle and found seven baggies containing a crystal substance. The officers found five baggies protruding from underneath the passenger-side glovebox area, one baggie between the front passenger seat and the passenger door, and one baggie on or near the front passenger seat.

- Officers found a wallet with $4,270 under the driver's seat.

- Five of the baggies contained a total of 19.097 grams of methamphetamine.

- No usable DNA was found on the baggies.

First, the circumstances proved are consistent with appellant's guilt. The vehicle belonged to appellant. Appellant sat closest to the methamphetamine, which officers found on the passenger side within appellant's reach. Appellant's flight from the officers, his furtive movements during pursuit, and his resistance to arrest further support an inference of guilt. *See State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (noting that flight is evidence of consciousness of guilt); *State v. McDaniel*, 777 N.W.2d 739, 746 (Minn. 2010) (noting that resisting arrest is admissible as evidence of consciousness of guilt).

Appellant argues that the circumstances proved are consistent with the rational hypothesis that someone else, such as T.C. or M.R., possessed the methamphetamine. This

alternative hypothesis that T.C. possessed the drugs and hid them in appellant's vehicle rests entirely on the testimony of defense witnesses T.A., M.F., and D.S. On appeal, we defer to the jury's rejection of those witnesses. *See Silvernail*, 831 N.W.2d at 598-99. Appellant's alternative hypothesis that M.R. alone possessed the methamphetamine is also not a rational inference from the circumstances proved. Although M.R. drove the vehicle, the vehicle belonged to appellant, officers found the methamphetamine on the passenger side where he sat, appellant resisted arrest, and none of the other circumstances proved suggest that M.R. alone possessed the methamphetamine. At most, the circumstances proved are consistent with the hypothesis that M.R. and appellant jointly possessed the methamphetamine. *See Harris*, 895 N.W.2d at 601 ("A defendant may possess an item jointly with another person.").

Appellant argues that his case is like *State v. Sam*, 859 N.W.2d 825 (Minn. App. 2015), and *State v. Harris*, 895 N.W.2d 592 (Minn. 2017). The facts in *Sam* are distinguishable. The appellant-driver in *Sam* had borrowed the vehicle from another person, officers found the methamphetamine in the glove compartment in front of a passenger who had methamphetamine in his wallet, and no drugs or paraphernalia were found on the appellant's person. 859 N.W.2d at 834-36. This court accordingly concluded that a reasonable inference existed that either the owner of the car or the passenger possessed the methamphetamine and put it in the glove compartment. *Id.* at 835.

Harris is similarly distinguishable. In *Harris*, the appellant drove a car he did not own, a firearm not immediately visible to the searching officer in the dark was stuck between the headliner and the roof of the car, and two other occupants of the vehicle could

not be excluded as contributors to DNA found on the firearm. *Harris*, 895 N.W.2d at 602-03. Based on those circumstances, the supreme court concluded that a reasonable inference existed that the defendant did not know the firearm was in the car. *Id.* at 603. As noted above, the circumstances here are different. Because the circumstances proved here are consistent with guilt and inconsistent with any other rational hypothesis, we conclude that the state presented sufficient evidence to support appellant's convictions.

II. The district court did not plainly err by admitting two officers' testimonies.

Appellant next argues that the district court plainly erred by admitting two officers' testimonies because they constituted improper drug-dealer profile evidence. We are not persuaded.

Because appellant failed to object to the officers' testimonies on these grounds at trial, we may review the admission for plain error.[3] *See State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002). Plain error exists when there is (1) error, (2) that is plain, and (3) that affects the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If those three prongs are met, we assess whether the error should be addressed to ensure the fairness and integrity of judicial proceedings. *Id.* An error is "plain" if it is clear or obvious by contravening caselaw, a rule, or a standard of conduct. *Id.*

Testimony regarding quantities of drugs typically possessed for sale compared to personal use or explaining how certain items indicate drug sales is generally admissible when it is relevant to show that a defendant intended to sell drugs. *See State v. Barajas*,

[3] Appellant objected to the officers' testimonies at trial but on the grounds that the officers' testimonies amounted to improper expert-opinion testimony by a lay witness.

817 N.W.2d 204, 222-23 (Minn. App. 2012), *rev. denied* (Minn. Oct. 16, 2012). In contrast, testimony that goes "well beyond" those subjects and instead suggests that a defendant is a drug dealer because he shares traits of other drug dealers amounts to drug-dealer profile evidence and is plainly inadmissible. *See Litzau*, 650 N.W.2d at 185. This may include officer testimony about the typical behavior of drug couriers, including that they typically bought tickets with cash, came from a "source" city like Detroit, and usually used the club car on the train. *State v. Williams*, 525 N.W.2d 538, 548 (Minn. 1994). The supreme court likened this type of testimony to inadmissible character evidence. *Id.* Inadmissible drug-dealer profile testimony may also include that drug dealers often buy vehicles without transferring title to their own names, sometimes use an older vehicle to transport drugs to avoid forfeiture of newer vehicles, and often hide drugs in obscure places, such as the air cleaner. *Litzau,* 650 N.W.2d at 185.

Here, as in *Litzau*, the district court determined that the state's witnesses could testify about quantities of drugs and items commonly found in a suspect's possession that indicate drug sales. At trial, one officer stated that, in his experience, someone involved in methamphetamine sale has more than a small amount or has the methamphetamine divided into several bags and that sellers will have a scale, clean bags, and U.S. currency. He explained that sellers are typically found with U.S. currency because the cash is either profits from sale or used to buy more drugs to sell, since "drug sales is a cash business"; that people in drug sales have clean baggies so they can bag smaller amounts for sale; that people who sell drugs often have drugs divided into baggies to facilitate a quicker sale; and that a drug seller may have a scale on hand to weigh particular amounts for buyers. He

also explained that possession of those items differs from someone engaged in personal use because "Typically, someone would not have several bags. They'd have one bag of their own drugs that they use and not have a scale with them, in my experience."

Another officer testified that, in his experience, someone looking to buy for personal use would buy small amounts of "a gram or two" while a seller would buy enough "to also sell to make money" and "usually 7 grams is what they'll purchase." He also testified that if someone is selling, "sometimes people will have individual bags already set up so it's easier for them to sell in the specific weights" or "sometimes they'll just have one lump sum and they'll scoop it out of whatever they have and weigh it out."

Appellant compares this testimony to that in *Haaland v. State*, No. A10-1124, 2011 WL 781229 (Minn. App. Mar. 8, 2011). First, *Haaland* is a nonprecedential and nonbinding opinion. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) (stating that nonprecedential opinions are not binding authority but may be cited as persuasive authority). Second, it is unpersuasive. In *Haaland*, an officer testified that he suspected the defendant was a drug trafficker because the defendant drove a vehicle not registered to him, there were air fresheners and energy drinks in the vehicle, and the vehicle's body panels appeared to have been previously removed. *Haaland*, 2011 WL 781229, at *4. This court concluded that was inadmissible drug-trafficker profile evidence because the testimony went beyond the officers' observations to their conclusion that, consistent with typical drug dealers, the appellant was using the vehicle to transport drugs. *Id.*

Here, the officers' testimonies informed the jurors about how the quantity of drugs, their packaging, and the items found nearby potentially related to appellant's intent to sell

methamphetamine. This is permissible testimony regarding quantities of drugs and items indicating drug sales which did not go "well beyond" those subjects. As a result, the district court did not plainly err by admitting it.

We also note that, in his closing argument at trial, appellant specifically *highlighted* parts of the officers' testimonies he now claims were plainly inadmissible. Appellant reminded the jury that the officers had testified that drug dealers have clean baggies and scales, noted that officers found no clean baggies or scales in appellant's vehicle, and argued that the lack of such items weighed against appellant's guilt. Appellant also pointed out the lack of scales and baggies while cross-examining the officers. Appellant cannot now claim on appeal that these testimonies are inadmissible after failing to object and relying on them. *See State v. Helenbolt*, 334 N.W.2d 400, 407 (Minn. 1983) (stating that appellant could not complain about inadmissible evidence on appeal when appellant failed to object to state eliciting challenged evidence and, as part of trial strategy, re-elicited the same evidence and used it in his final argument).

III. None of appellant's claims in his pro se brief merit relief.

Appellant raises several additional claims in a supplemental pro se brief. Appellant argues that: (1) he received ineffective assistance of counsel; (2) the state improperly charged him; (3) the district court should not have allowed certain evidence and statements; (4) the jurors were biased; and (5) the district court ordered excessive restitution. We briefly address each argument below and conclude that none merit relief.

To establish that he is entitled to relief because he received ineffective assistance of counsel, appellant must demonstrate that (1) his counsel's representation fell below an

objective standard of reasonableness and (2) there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Anderson v. State*, 830 N.W.2d 1, 10 (Minn. 2013). Trial counsel is afforded wide latitude to determine trial strategy, and we generally will not review attacks on counsel's trial strategy. *See Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). We review de novo whether a defendant received ineffective assistance of counsel. *Dereje v. State*, 837 N.W.2d 714, 721 (Minn. 2013).

Appellant first makes general assertions that his trial counsel was unprepared and failed to investigate. These are conclusory assertions without adequate factual support. *See State v. Turnage*, 729 N.W.2d 593, 599 (Minn. 2007) (noting that appellant asserting ineffective-assistance-of-counsel claim must "do more than offer conclusory argumentative assertions, without factual support"). Appellant also argues that his trial counsel failed to object to the disclosure of M.R.'s name and age at trial and to the state playing video of the police pursuit of appellant's vehicle. But "[d]ecisions about objections at trial are matters of trial strategy, which [appellate courts] will not review." *State v. Mosley*, 895 N.W.2d 585, 592 (Minn. 2017) (quotation omitted).

Appellant also argues that his trial counsel provided ineffective assistance because his counsel failed to call L.B., a crucial witness to appellant's alternative-perpetrator theory regarding T.C., to testify. Which witnesses to call at trial is also a matter of trial strategy that we do not review. *See State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). Additionally, three other defense witnesses testified in support of appellant's alternative-

perpetrator theory. The jury rejected that theory, and appellant has not shown that L.B.'s additional testimony would have led to a different result.

Finally, appellant argues that his trial counsel provided ineffective assistance because he did not move for a judgment of acquittal. Appellant challenged the sufficiency of the evidence on appeal. A motion for judgment of acquittal would have tested the same evidence according to the same legal analysis as his sufficiency-of-the-evidence claim. *See State v. McCormick*, 835 N.W.2d 498, 506 (Minn. App. 2013), *rev. denied* (Minn. Oct. 15, 2013). Because we conclude that the state presented sufficient evidence to support appellant's controlled-substance conviction, he cannot establish that the trial result would have been different had his counsel sought a judgment of acquittal on that charge.

Appellant argues that the state improperly charged him because 50 grams of methamphetamine were required to convict him of first-degree possession of a controlled substance. Appellant appears to have mistaken the first-degree *possession* statute, which requires that a defendant unlawfully possess 50 or more grams of a mixture containing methamphetamine, *see* Minn. Stat. § 152.021, subd. 2(a)(1), with the first-degree *sale* statute. The state charged appellant with first-degree *sale* of a controlled substance in violation of Minn. Stat. § 152.021, subd.1(1), which only requires that a defendant possess with intent to sell one or more mixtures weighing 17 or more grams of a mixture containing methamphetamine. Appellant's claim fails.

Appellant argues that statements made at trial giving M.R.'s name and age were "*Crawford* violations." At the start of trial, appellant objected to any identification of M.R., including passing references to her name and age, arguing the information came from

testimonial hearsay statements, and, because M.R. did not testify, admission of such testimony violated appellant's confrontation rights under *Crawford v. Washington*, 541 U.S. 36 (2004). But even if we were to assume that references to M.R.'s name and age were inadmissible under *Crawford*, reversal is not required if the error was harmless beyond a reasonable doubt. *See State v. Swaney*, 787 N.W.2d 541, 555 (Minn. 2010). An error is harmless beyond a reasonable doubt if the guilty verdict is surely unattributable to the error. *Id.* Appellant does not explain how brief references to M.R.'s name and age affected the jury's controlled-substance verdict. Accordingly, even if the admission of such references was error, it was harmless error.

Appellant claims jury bias. Appellant's jury-bias claims are unsupported by citation to relevant legal authority and are therefore waived. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002). Further, the record reflects that the prospective jurors appellant claims were biased were not ultimately selected to sit on his jury.

Finally, appellant challenges the district court's restitution order. The district court ordered appellant to pay $16,072.25 in restitution requested by the state. A restitution order must be challenged within 30 days of receipt of written notice of the amount of restitution or within 30 days of sentencing. Minn. Stat. § 611A.045, subd. 3(b) (2020). Appellant did neither. Because appellant did not challenge restitution within the 30-day statutory timeframe, he cannot challenge it now. *See State v. Gaiovnik*, 794 N.W.2d 643, 647 (Minn. 2011) (concluding that statutory deadline applies to preclude review on appeal when offender disputes amount or type of restitution).

Affirmed.