STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1102

State of Minnesota,
Respondent,

vs.

Bounkieng Sinthavong,
Appellant.

Filed July 18, 2022
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Stearns County District Court
File No. 73-CR-20-8525

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his conviction for unlawful possession of a firearm, arguing that the district court abused its discretion by admitting evidence regarding ammunition that the police found in a van appellant had been driving. He argues that the ammunition

was inadmissible evidence of a prior bad act. He also challenges the district court's imposition of a mandatory minimum sentence. In a pro se supplemental brief, appellant contends that the evidence was insufficient to support his conviction. Because the ammunition was admissible as intrinsic evidence and immediate-episode evidence, and because the evidence was sufficient to support appellant's conviction, we affirm his conviction. But because the district court erroneously concluded that it had to impose the mandatory minimum sentence, we reverse appellant's sentence and remand.

FACTS

The State of Minnesota charged appellant Bounkieng Sinthavong with unlawful possession of a firearm. The case was tried to a jury. Before trial, Sinthavong stipulated that he was ineligible to possess a firearm because he had multiple convictions for crimes of violence.

The evidence at trial established the following circumstances. The alleged offense occurred on a 160-acre wooded property surrounded by a barbed wire fence. A dead-end gravel road led to a gate at the edge of the property. A "No Trespassing" sign was posted next to the gate. On December 26, 2020, the property owner's adult son saw a van parked outside the gate. The son approached the van. It had snowed recently, and the son observed one set of footprints leading from the van to the property. He saw no other footprints in the snow, and the only tire tracks were from the van. The son heard two gunshots. Based on his hunting experience, he believed the shots were from a .22 caliber rifle, which is often used for squirrel hunting. The son then called his brother, who contacted the police.

The brother met the police at the gate to the property. The police looked through the window of the van and saw a rifle case inside. They looked up the registration for the van and determined that it was registered to someone with the last name of Sinthavong.

The brother and the police observed one set of footprints in the snow leading from the van onto the property. The police followed the tracks into the woods. The trail was easy to follow because the snow was fresh, the footprints were clearly visible, and there were no other footprints present. Moreover, the footprints had a distinctive tread, with a zigzag pattern near the heel. The police eventually saw a person in camouflage overalls walking in the distance. They approached the person, whom they later identified as Sinthavong.

Sinthavong told the police that he was "out for a walk." He denied having a firearm but said that he had heard a gunshot. The police walked back to the van with Sinthavong. They observed that the imprints of the tennis shoes that Sinthavong was wearing matched the footprints that they had followed. Sinthavong asked to retrieve his cell phone from the van, and he unlocked the van using keys from his pocket.

Some of the officers looked for a firearm by backtracking Sinthavong's footprints from the point on the property at which they had encountered him. They saw blood droplets in the snow next to the footprints in several places, which caused them to believe that someone had been hunting on the property. The footprints ultimately led to a pile of recently shot squirrels. The officers discovered a .22 caliber rifle buried underneath the squirrels. There were two bullets inside the rifle. The bullets had a C marking on them. The rifle was not rusty or waterlogged, so the officers believed that it had not been there

for a long period of time. The brother did not recognize the rifle, and he indicated that the property owners did not leave weapons unattended on the property.

The police arrested Sinthavong. They transported the van to a storage facility and obtained a search warrant. They searched the van and found four unfired .22 caliber cartridges. Three cartridges were in a closed ashtray between the driver's and passenger's seats, and one cartridge was in a cosmetic bag in the back seat. At least one of the cartridges in the ashtray was corroded, and the cartridge in the cosmetic bag was damaged and unusable. The cartridges contained an F marking on them.

After jury selection and before opening statements, Sinthavong moved the district court to exclude the ammunition from the van, arguing that it was inadmissible evidence of a prior bad act under Minn. R. Evid. 404(b). The state opposed the motion, arguing that the ammunition was relevant to connect the rifle in the snow to the van that Sinthavong had driven to the crime scene. The district court denied the motion the following day. In doing so, it treated the ammunition evidence as a prior bad act and analyzed it under the requirements of Minn. R. Evid. 404(b).

The jury found Sinthavong guilty as charged. At sentencing, Sinthavong moved for a downward durational departure, arguing that his offense was less serious than typical. The state opposed the motion and contended that the district court did not have discretion to impose a downward departure. The state argued that a mandatory minimum sentence of 60 months' imprisonment was statutorily required because Sinthavong had a prior conviction for a third-degree controlled-substance crime in which he possessed a firearm. The district court agreed with the state and denied Sinthavong's motion for a downward

durational departure. It entered a judgment of conviction and imposed the mandatory minimum sentence of 60 months in prison. Sinthavong appeals.

DECISION

I.

Sinthavong contends that the district court abused its discretion by denying his motion to exclude the ammunition discovered in the van. We review a district court's evidentiary rulings for an abuse of discretion. *State v. Riddley*, 776 N.W.2d 419, 424 (Minn. 2009). The defendant must demonstrate both that the admission of the evidence was erroneous and that it prejudiced him. *Id.*

Evidence of a defendant's other crime, wrong, or act "is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1). "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Such evidence is referred to as *Spreigl* evidence. *State v. Scruggs*, 822 N.W.2d 631, 643 (Minn. 2012); *see State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

The principal concern with the admission of *Spreigl* evidence is that "it might be used for an improper purpose, such as suggesting that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). Accordingly, the state must meet certain requirements for evidence of prior bad acts to be admitted in a criminal prosecution. *See* Minn. R. Evid. 404(b)(2) (listing requirements).

Sinthavong argues that the ammunition in the van was inadmissible *Spreigl* evidence. He complains that the state did not comply with the requirements for admission of such evidence under rule 404(b) and that the ammunition was relevant only for the improper purpose of showing that he had the propensity to possess firearms and ammunition. The state counters that the evidence was not *Spreigl* evidence and that it was admissible as intrinsic evidence or immediate-episode evidence. Sinthavong responds that this court should not consider that argument because it was not raised in district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that an appellate court generally will not decide issues that were not raised in the district court).

Sinthavong's position is untenable for three reasons. First, "[a] respondent can raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted." *State v. Grunig*, 660 N.W.2d 134, 134 (Minn. 2003). That statement of law was based on a previous version of Minnesota Rule of Criminal Procedure 29.04, subdivision 6, which allowed a "respondent, without filing a cross-appeal, to defend a decision or judgment on any ground that the law and record permit that would not expand the relief that has been granted to the respondent." *Id.* at 136 (quotation omitted). In *Grunig*, the Minnesota Supreme Court held that this court "erred because it failed to apply Rule 29.04 and consider" an argument by the state that fit within rule 29.04, subdivision 6. *Id.* at 137. *Grunig* supports consideration of the state's argument that the ammunition

evidence was admissible as intrinsic evidence or immediate-episode evidence because that argument is consistent with the allowance in rule 29.04, subdivision. 6.[1]

Second, although the prosecutor did not reference "intrinsic evidence" or "immediate-episode evidence" in the district court, he argued that the possession of ammunition was not a prior bad act. As explained later in this opinion, the state's argument concerning "intrinsic evidence" and "immediate-episode evidence" is a refinement of the argument that it made in district court, which is permissible. *See Jacobson v. $55,900 in*

[1] Sinthavong notes that rule 29.04, subdivision 6, has been amended since *Grunig* was decided and now reads, "The court may permit a *party*, without filing a *cross-petition*, to defend a decision or judgment on any ground that the law and record permit that would not expand the relief that has been granted to the party." Minn. R. Crim. P. 29.04, subd. 6 (emphasis added). Sinthavong also notes that this court has observed, in a footnote in a nonprecedential opinion, that "[t]he substitution of the word 'petition' for the word 'appeal' arguably indicates that the rule now is limited to proceedings in the supreme court." *State v. Schlichting*, No. A13-1249, 2014 WL 2807650, at *3 n.1 (Minn. App. June 23, 2014). Sinthavong fails to note that the next line in that footnote states: "But we will not consider the issue because Schlichting has not challenged the state's invocation of *Grunig*." *Id.* As to that issue, although a few words in the rule have changed, the rule was and remains one governing appeals from this court to the supreme court. Nonetheless, in *Grunig*, the supreme court held that this court erred by failing to apply the rule in an appeal to this court from the district court. Presumably, if the supreme court intended to reverse its holding in *Grunig* and thereby limit application of rule 29.04, subdivision 6, to appeals from this court to the supreme court, the comments to the rules would reflect that purpose. There is no such comment. Instead, the rule change was recommended as part of "a project to complete a full review and stylistic revision of the Rules." Minn. Sup. Ct. Advisory Comm. on Rules of Crim. Proc., *Report and Proposed Amendments to the Minnesota Rules of Criminal Procedure for a Complete Stylistic Revision of the Rules* 1 (Apr. 22, 2009), https://mncourts.gov/mncourtsgov/media/AdministrativeFileArchive/Criminal%20Procedure%20Rules%20ADM10-8049%20formerly%20C1-84-2137/2009-04-22-Crim-Proc-Rpt-Proposed-Amendments.pdf. The advisory committee's goal was to "stylistically" revise and streamline "the Rules without making substantive changes." *Id.* We therefore conclude that the change was stylistic, and not substantive. And we continue to follow *Grunig*, which requires application of rule 29.04, subdivision 6, in appeals to this court when appropriate.

U.S. Currency, 728 N.W.2d 510, 523 (Minn. 2007) (concluding that a claim was properly before the court on appeal because although the appellant had "refined the argument he made to the district court," he had not raised a new argument on appeal).

Third, Sinthavong did not comply with the rules of procedure governing motions to exclude evidence. "Defenses, objections, issues, or requests that can be determined without trial on the merits must be made before trial by a motion to dismiss or to grant appropriate relief." Minn. R. Crim. P. 10.01, subd. 2. "In felony . . . cases, motions must be made in writing and served upon opposing counsel no later than 3 days before the Omnibus Hearing unless the court for good cause permits the motion to be made and served later." Minn. R. Crim. P. 10.03, subd. 1. The rules provide for an omnibus hearing at which the court must hear all motions relating to "[e]videntiary issues" and the "[a]dmissibility of other crimes, wrongs or bad acts under Minnesota Rule of Evidence 404(b)." Minn. R. Crim. P. 11.02. "The court must make findings and determinations on the omnibus issue(s) in writing or on the record within 30 days of the issue(s) being taken under advisement." Minn. R. Crim. P. 11.07.

Despite those motion-practice rules, defense counsel in this case first challenged the admissibility of the ammunition evidence after completion of voir dire and before opening statements. In fact, defense counsel stated that he did not file the motion earlier "so as to not tip the State off" that it could charge Sinthavong with a separate offense for unlawful possession of ammunition. Defense counsel's strategic decision not to raise the issue until after the jury had been selected and opening statements were about to begin no doubt compromised the state's ability to fully develop its argument in response to the motion to

exclude evidence. We therefore do not fault the state for refining its argument on appeal, and we will consider those refinements.

Intrinsic Evidence

Evidence of another crime that is "intrinsic to the charged crime" is admissible without regard to Minn. R. Evid. 404. *State v. Hollins*, 765 N.W.2d 125, 132 (Minn. App. 2009). Evidence is intrinsic if (1) "the other crime arose out of the same transaction or series of transactions as the charged crime," and (2) either "the other crime is relevant to an element of the charged crime," or "excluding evidence of the other crime would present an incoherent or incomplete story of the charged crime." *Id.*

Here, any crime based on the ammunition in the van arose out of the same transaction as Sinthavong's illegal possession of the firearm. And the ammunition was relevant to an element of the charged unlawful-possession offense because it was circumstantial evidence that Sinthavong brought the .22 caliber rifle onto the property. *See* Minn. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). The presence of ammunition for a .22 caliber rifle in the van that Sinthavong drove to the property was relevant to show that Sinthavong, and not some other unidentified person, buried the rifle in the snow. In sum, the evidence was admissible as intrinsic evidence.

Sinthavong questions the applicability of the intrinsic-evidence exception. He notes that although this court adopted the intrinsic-evidence exception in *Hollins*, it has never been adopted by the Minnesota Supreme Court and that *Hollins* relied exclusively on

federal caselaw when it created the exception. *See Hollins*, 765 N.W.2d at 131-32. Sinthavong's argument regarding the validity of intrinsic-evidence exception is immaterial because, as explained below, the evidence also was admissible as immediate-episode evidence.

Immediate-Episode Evidence

Immediate-episode evidence is an exception to the rules governing admission of prior-bad-act evidence. *Riddley*, 776 N.W.2d at 425. Under that exception, the state "'may prove all relevant facts and circumstances which tend to establish any of the elements of the offense with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.'" *Id.* (quoting *State v. Wofford*, 114 N.W.2d 267, 271 (Minn. 1962)). As such, "immediate episode evidence is admissible 'where two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the res gestae.'" *Id.* (quoting *Wofford*, 114 N.W.2d at 271). Res gestae is "the events at issue, or other events contemporaneous with them." *Id.* at 425 n.2 (quotation omitted).

Evidence of a prior bad act is generally admissible as immediate-episode evidence if there is "a close causal and temporal connection between the prior bad act and the charged crime." *Id.* at 425. Here, the ammunition in the van and the rifle in the snow have a close temporal connection: the ammunition was in the van outside the gate to the property at the same time that the rifle was buried in the snow on the property. There is also a close causal connection because the ammunition in the van was the same caliber as the rifle in

the snow. *See State v. Darveaux*, 318 N.W.2d 44, 48 (Minn. 1982) (concluding that drug evidence was properly admitted "as proof of the immediate episode for which defendant was being tried" where drugs found on defendant's person, in his companion's purse, and in his residence two days after a drug-store robbery were the same type of drugs stolen from the drug store); *see also Riddley*, 776 N.W.2d at 426 (describing the circumstances in *Darveaux* as an illustration of "the type of close causal and temporal connection required to satisfy the narrow immediate-episode exception"). Because there was a close causal and temporal connection between the ammunition and the rifle, the ammunition was admissible as immediate-episode evidence.

In sum, the ammunition in the van was properly admitted both as intrinsic evidence and as immediate-episode evidence. It was therefore unnecessary for the district court to analyze the issue under the requirements of rule 404(b).[2]

II.

Sinthavong contends that the district court erroneously concluded that it was statutorily required to impose a mandatory minimum presumptive sentence.

Sinthavong was convicted of unlawful possession of a firearm under Minn. Stat. § 624.713, subd. 1(2) (2020). He therefore was subject to a mandatory minimum sentence

[2] Again, the district court was asked to rule on Sinthavong's motion to exclude the ammunition without receiving the notice required under the rules of criminal procedure. The district court nonetheless produced a ten-page order and memorandum explaining its analysis and decision under rule 404(b). We commend the court for giving the issue significant time and attention after the trial had begun. We have no reason to doubt that if the state had raised the intrinsic-evidence and immediate-episode-evidence doctrines, the district court would have correctly applied them.

of 60 months in prison. Minn. Stat. § 609.11, subd. 5(b) (2020). The district court generally has discretion to depart from the mandatory minimum sentence if it finds substantial and compelling reasons to do so. *Id.*, subd. 8(a) (2020). But the district court may not depart if "the defendant previously has been convicted of an offense listed in subdivision 9 in which the defendant used or possessed a firearm or other dangerous weapon." *Id.*, subd. 8(b) (2020). Whether the defendant has been convicted of another offense in which he possessed or used a firearm is a question for the fact-finder at the time of the verdict. *Id.*, subd. 7 (2020).

At the sentencing hearing, the state submitted evidence that Sinthavong pleaded guilty to a third-degree controlled-substance crime in 2011. The complaint for the third-degree controlled-substance crime indicated that Sinthavong possessed a firearm when he was arrested at the time of that crime. Because felony controlled-substance crimes are listed in Minn. Stat. § 609.11, subd. 9 (2020), that prior conviction would have prevented the district court from departing from the mandatory minimum sentence if it were proved that a firearm was involved in the commission of that offense. However, the fact-finder in this case—i.e., the jury—did not find that Sinthavong possessed or used a firearm during the controlled-substance offense. Nor did Sinthavong stipulate that his prior conviction involved the possession or use of a firearm. Because the jury did not make the necessary finding, the district court erred by concluding that it had no discretion to depart from the presumptive 60-month sentence.

Sinthavong asks this court to reverse his sentence and remand for consideration of his motion for a downward durational departure. Although the state agrees that the district

court erred by determining that it had no discretion to depart from the presumptive sentence, the state disagrees that Sinthavong is entitled to relief. The state argues that the district court's error was harmless because any reasonable sentencing jury would have found that Sinthavong's previous controlled-substance crime involved a firearm, thereby prohibiting the district court from departing.

The failure to submit a sentencing question to the jury can be harmless error. *State v. Essex*, 838 N.W.2d 805, 813 (Minn. App. 2013), *rev. denied* (Minn. Jan. 21, 2014). In *Essex*, this court determined that it was harmless error for the district court to fail to submit a special interrogatory to the jury regarding possession or use of a firearm during an assault. *Id.* at 812-13. The evidence at trial, including the defendant's testimony, demonstrated that the defendant was wearing a holster with a firearm during the assault. *Id.* at 813. Moreover, the jury found the defendant guilty of attempted assault with a dangerous weapon and carrying a pistol in a public place while under the influence of alcohol. *Id.* Based on that evidence and the guilty verdict, this court could say with certainty that the jury would have found the aggravating factor to be present if that factor had properly been submitted to the jury. *Id.*

We cannot reach the same conclusion here because the state did not present any evidence regarding Sinthavong's third-degree controlled-substance crime to the jury. Instead, it submitted the relevant documents to the district court after the guilty verdict and before sentencing. And unlike *Essex*, this is not a case in which the necessary finding was encompassed within the elements of the charged offenses. Moreover, a holding based on the state's theoretical ability to prove that Sinthavong possessed or used a firearm during

his prior third-degree controlled-substance crime would render meaningless the statutory requirement that a fact-finder must make the necessary finding "at the time of a verdict or finding of guilt at trial." *See* Minn. Stat. § 609.11, subd. 7.

In sum, the district court erroneously concluded that it had no discretion to depart from the presumptive sentence, and that error was not harmless. We therefore reverse Sinthavong's sentence and remand for consideration of his previously filed departure motion.[3]

III.

In a pro se supplemental brief, Sinthavong contends that the evidence was insufficient to prove that he possessed the rifle. When evaluating the sufficiency of the evidence, we "review the evidence to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted). We will uphold the jury's verdict if the jury reasonably could have found the defendant guilty, consistent with the presumption of innocence and the state's burden of proof beyond a reasonable doubt. *Id.*

[3] The parties dispute whether the district court may impanel a resentencing jury on remand and allow the state to present evidence that Sinthavong possessed a firearm during his prior controlled-substance offense. If the state elects to do so, the district court must decide the issue in the first instance. *See State v. Martinez-Mendoza*, 804 N.W.2d 1, 9 (Minn. 2011) (stating that appellate courts avoid advisory opinions and therefore concluding that it would not address whether the state could recharge the defendant when it had not yet attempted to do so).

Sinthavong was convicted of unlawful possession of a firearm. It is a crime for a person who has been convicted of a crime of violence to possess a firearm. Minn. Stat. § 624.713, subd. 1(2). The only element at issue here is whether Sinthavong possessed the .22 caliber rifle that the police found buried in the snow. "Possession of a firearm may be proved through actual or constructive possession." *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015). Actual possession requires proof that the defendant physically had the firearm on his person. *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *rev. denied* (Minn. Jan. 16, 2001). Alternatively, the state may show constructive possession when it cannot prove actual possession but "the inference is strong that the defendant at one time physically possessed the item and did not abandon his possessory interest in the item but rather continued to exercise dominion and control over it up to the time of the arrest." *Salyers*, 858 N.W.2d at 159 (quotation omitted).

The state may show actual possession even if the item is not in the defendant's physical possession when he is apprehended. *State v. Barker*, 888 N.W.2d 348, 354 (Minn. App. 2016). Actual possession of the item at an earlier time can be established through circumstantial evidence. *Id.* Circumstantial evidence is "evidence from which the [fact-finder] 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). When a conviction is based on circumstantial evidence, we use a heightened standard of review to determine whether the evidence was sufficient. *Al-Naseer*, 788 N.W.2d at 473. First, we determine the circumstances proved, disregarding evidence that is inconsistent with the fact-finder's verdict. *Harris*, 895 N.W.2d at 601. Next, we "independently consider the reasonable

inferences that can be drawn from the circumstances proved," giving no deference to the fact-finder's choice between reasonable inferences. *Id.* "To sustain the conviction, the circumstances proved, when viewed as a whole, must be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.*

The circumstances proved are as follows. The police found Sinthavong on the wooded property. He was the only person visible on the property, and he was wearing camouflage clothing. He had keys in his pocket that opened a van parked outside the gate to the property. The van contained an empty rifle case. Footprints that matched the tread on Sinthavong's shoes led from the van to the pile of dead squirrels under which the .22 caliber rifle was buried. The footprints then continued to the place where the police encountered Sinthavong. There were no other footprints on the property, and there were spots of blood next to the trail of footprints. The squirrels and rifle appeared to have been present for a short period of time. The property owner's son heard gunshots believed to be from a .22 caliber rifle shortly before the police searched the property. Those circumstances are consistent with a reasonable inference of guilt: Sinthavong carried the rifle from the van onto the property, used it to shoot the squirrels, and then hid it underneath the squirrels when the police arrived.

Sinthavong contends that the circumstances proved are consistent with a reasonable hypothesis of innocence: some unidentified person brought the rifle onto the property and buried it in the snow. Such an inference is unreasonable because the circumstances proved show that Sinthavong's footprints were the only ones on the property, the squirrels and

rifle came to their resting place on the property recently, and the property owners did not leave firearms on the property. There is no evidence in the record suggesting the presence of another party that could have been responsible for the rifle, and an alternative hypothesis to guilt may not be based on "mere conjecture." *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008). In sum, there is no rational hypothesis except that of guilt, and the evidence was sufficient to support Sinthavong's conviction.

Sinthavong's other arguments that the evidence was insufficient are unpersuasive. He cites the constructive-possession doctrine, but a constructive-possession analysis is unnecessary here because the circumstances are sufficient to demonstrate recent actual possession. He also points to the police's failure to test him for gunshot residue, as well as the failure of the DNA tests to connect him to the rifle. But forensic evidence is not required to prove possession, and it is unnecessary in this case given the strong circumstantial evidence that Sinthavong possessed the rifle before the police arrived.

In conclusion, we affirm Sinthavong's conviction, but we reverse his sentence and remand. On remand, the district court shall consider Sinthavong's prior motion for a downward durational departure. Whether or not to grant a request for a sentencing jury shall be decided in the first instance by the district court.

Affirmed in part, reversed in part, and remanded.