STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1400

State of Minnesota,
Respondent,

vs.

David Busch,
Appellant.

Filed July 10, 2023
Reversed
Larson, Judge
Dissenting, Johnson, Judge

Pipestone County District Court
File No. 59-CR-22-122

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

Damain Sandy, Pipestone County Attorney, Pipestone, Minnesota (for respondent)

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

Considered and decided by Gaïtas, Presiding Judge; Johnson, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

Appellant David Busch appeals from his conviction for first-degree possession of methamphetamine. We reverse.

FACTS

Around noon on March 31, 2022, law enforcement[1] began surveilling a house in Pipestone, Minnesota. Law enforcement asked dispatch to run the license plates on a car parked in front of the house, and dispatch informed law enforcement that the car was stolen. A second vehicle pulled up to the house later that day. Law enforcement ran its license plates and discovered the license plates belonged to a different vehicle. Law enforcement followed this vehicle when it departed the house, pulled the vehicle over, located narcotics in the vehicle, and arrested the driver. Based on these events, law enforcement acquired a search warrant for the house.

Just after 7:00 p.m. that day, law enforcement executed the search warrant. Law enforcement surrounded the house and called via loudspeaker for the occupants to exit the front door with their hands in the air. D.T. and her minor child exited the front door. Appellant, S.B., and C.T. exited the back door. Law enforcement arrested appellant, D.T., S.B., and C.T. and took them to the Pipestone County Sheriff's Office for intake before jail. Appellant declined to provide a urinalysis sample during the intake process.

Law enforcement entered the house after the arrests. At trial, law enforcement described the house's condition as "extremely filthy" and filled with "piles of clothing, boxes, garbage, all throughout the house." On the upper level, law enforcement found, in relevant part, a sharps container for used hypodermic needles, a mirror with a white powder

[1] Law enforcement involved in this case included the Pipestone County's Sheriff's Office, the Buffalo Ridge Drug Task Force, the Minnesota Bureau of Criminal Apprehension, and a high-risk entry and arrest (HEAT) team. For simplicity, we use the term "law enforcement."

on it that field-tested positive for methamphetamine, several hypodermic needles loaded with clear liquid, two vials containing an unknown white substance, a "cut straw" used to snort controlled substances like methamphetamine, and several other articles of drug paraphernalia.

When law enforcement entered the basement, they observed a sink, washer, dryer, two couches, and a center table fashioned from an upright bookshelf. Law enforcement described the basement as a "party room." Law enforcement found the following controlled substances and paraphernalia in the basement: on the dryer, a mirror with two lines of white powder that field tested positive for methamphetamine; on a shelf within the center table, a round bong with liquid in it that field-tested positive for methamphetamine (small bong) and a sunglass case with two baggies containing a white, crystalline substance that field-tested positive for methamphetamine; on top of the center table, a loaded hypodermic needle; on the floor near the center table, a round bong with liquid in it (large bong); underneath a couch, two pipes that field-tested positive for methamphetamine; and in a purse, several hypodermic needles and a woman's driver's license.

Law enforcement sent the liquid from the large bong to the Bureau of Criminal Apprehension (BCA) for testing, which revealed that the liquid contained methamphetamine and weighed just over 143 grams. Law enforcement dusted the large bong for fingerprints but found none. At trial, the state submitted the large bong into evidence, as well as the liquid containing the methamphetamine. The large bong was fashioned from a spherical liquor bottle with a hole drilled near the bottle's neck. Law

enforcement found the large bong with a hose equipped with a rubber grommet near its end.

Law enforcement did not send the liquid from the small bong to BCA for testing.[2] And the state did not submit the small bong into evidence, instead only admitting a photo of the small bong among the other content within the center table. The photo depicts a round, clear bong, with the top portion obscured in shadow.

On April 1, 2022, the state charged appellant with first-degree possession of methamphetamine, Minn. Stat. § 152.021, subd. 2(a)(1) (2020) (count one), and storing a controlled substance in the presence of a child or vulnerable adult, Minn. Stat. § 152.137, subd. 2(a)(2) (2020) (count two).[3] The complaint relied solely on the methamphetamine mixture found in the large bong to support the first-degree possession charge. Appellant requested an interview with law enforcement, which occurred on April 12, 2022. In this interview, appellant told a Pipestone County Sheriff's Office lieutenant (Lieutenant Dengler), "I smoke a little bit, I smoke weed, I smoke the sh-t sometimes." The state later elicited testimony from Lieutenant Dengler that "the sh-t" is slang for methamphetamine. The case proceeded to trial.

The parties presented conflicting evidence on whether appellant lived in the "party room" at the time law enforcement executed the search warrant. The state presented the

[2] The mixture in the small bong would not support appellant's first-degree offense. The record indicates the small bong contained only 1.75 fluid ounces. Under Minn. Stat. § 152.021, subd. 2(b) (2020), "the weight of fluid used in a water pipe may not be considered in measuring the weight of a mixture except in cases where the mixture contains four or more fluid ounces of fluid."

[3] The district court granted appellant's motion for a directed verdict on count two.

following evidence. D.T., the daughter of the house's owner, testified that appellant lived in the basement from March 2022 until the search warrant's execution. D.T. explained that appellant did not pay rent, but paid for bills and groceries. D.T. noted that appellant brought clothes to the house and received mail there after the search warrant's execution. A BCA Special Investigations Unit agent, who contacted appellant multiple times before the search warrant, testified.[4] The agent explained that on March 21, 2022, appellant: told the agent he lived "downstairs" with a female "landlord roommate"; explained that he was fixing a washing machine; and offered to let the agent stay on a couch in the basement. Lieutenant Dengler also testified regarding items found when law enforcement searched the "party room." He noted that law enforcement found a blanket near the couches, indicating people slept there. He also testified that he located a bag with men's clothes next to one couch and a notebook with appellant's emails and passwords.

Appellant presented the following evidence regarding his living arrangements at the time law enforcement executed the search warrant. Appellant's friend, T.S., who lived across the street in an apartment, testified that appellant lived in the apartment from January 2022 until the search warrant's execution. T.S. explained that appellant slept at the apartment every night. T.S. also testified that he previously received appellant's mail but was not receiving any mail "currently."

The state also presented evidence regarding appellant's drug use on the day law enforcement executed the search warrant. S.B. testified that he was at the house when law

[4] The record does not clarify in what capacity the agent contacted appellant prior to the search warrant, but gives the impression that the agent may have been undercover.

enforcement executed the search warrant to help appellant fix the washer.[5] The state asked S.B. if he had a conversation with Lieutenant Dengler on April 1, 2022, to which S.B. answered in the affirmative. The state then asked if, during that conversation, S.B. told Lieutenant Dengler that he saw appellant and C.T. smoking methamphetamine out of a bong on the basement couches. S.B. answered, "We were all sitting on the couch but I never seen anybody smoking meth." The state asked if S.B. recalled making a statement to Lieutenant Dengler that he saw appellant and C.T. "smoking from the bong[,]" to which S.B. answered, "I might of but I – I never – I don't recall."

The state recalled Lieutenant Dengler. After confirming that Lieutenant Dengler conducted an interview with S.B. on April 1, 2022, the state asked Lieutenant Dengler what S.B. told him during that interview. Appellant objected on hearsay grounds, to which the district court responded "[n]oted and overruled." The state did not respond to appellant's hearsay objection. Lieutenant Dengler then testified that S.B. told him "[S.B.] observed [appellant] and [C.T.] smoking [methamphetamine] out of a water bong. And [Lieutenant Dengler] asked him to describe what that water bong looked like. [S.B.] said it was a round homemade bong." Lieutenant Dengler also testified that S.B. told him he saw two women do a "hot rail" in the basement, which Lieutenant Dengler testified was shorthand for a way to smoke methamphetamine.

The jury returned a guilty verdict, and the district court sentenced appellant to 85 months in prison.

[5] The state granted S.B. immunity in the form of guaranteeing it would not use S.B.'s testimony against him in S.B.'s own criminal trial.

Appellant appeals.

DECISION

Appellant challenges his first-degree possession-of-methamphetamine conviction. In doing so, appellant raises two arguments: (1) that the state failed to prove beyond a reasonable doubt that he possessed the large bong containing the methamphetamine mixture and (2) that the district court abused its discretion when it admitted Lieutenant Dengler's testimony regarding S.B.'s statement over appellant's hearsay objection.[6] Because we conclude the state failed to prove beyond a reasonable doubt that appellant possessed the large bong, we reverse. We separately conclude that even if the state had presented sufficient evidence, the district court erred when it admitted S.B.'s hearsay statement.

I.

Appellant challenges the sufficiency of evidence to support his first-degree possession-of-methamphetamine conviction. "When evaluating 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 jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). "The

[6] We must first address appellant's sufficiency argument before reaching the hearsay issue. *See State v. Clark*, 755 N.W.2d 241, 256 (Minn. 2008) ("[W]e must also address [appellant's] sufficiency argument to determine whether the appropriate remedy is to remand for a new trial or a judgment of acquittal." (citing *Burks v. United States*, 437 U.S. 1, 11 (1978))).

evidence must be viewed in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict." *Id.* "The verdict will not be overturned if the fact-finder, upon application of the presumption of innocence and the State's burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense." *Id.*

To establish appellant's guilt for first-degree possession of a controlled substance, the state had to prove that appellant knowingly and unlawfully "possesse[d] one or more mixtures of a total weight of 50 grams or more containing . . . methamphetamine." Minn. Stat. § 152.021, subd. 2(a)(1); *State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975). The parties dispute whether the state proved appellant possessed the large bong. The state can prove appellant's guilt by establishing appellant's "actual or constructive possession." *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015). The state can prove both actual or constructive possession through direct or circumstantial evidence. *See State v. German*, 929 N.W.2d 466, 472 (Minn. App. 2019).

"Direct evidence is evidence based on personal knowledge or observation that, if true, proves a fact without inference." *State v. Olson*, 887 N.W.2d 692, 700 (Minn. App. 2016) (citing *Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004)). When the state supports an element with direct evidence, we painstakingly review "the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted).

Circumstantial evidence is "evidence from which the factfinder 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). We apply a heightened two-step standard when reviewing the sufficiency of circumstantial evidence. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). First, we identify the circumstances proved. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). In this step, we defer to "the jury's acceptance of the proof of these circumstances" and "assume that the jury believed the State's witnesses and disbelieved the defense witnesses." *Id.* at 598-99 (quotations omitted). Second, we determine if the circumstances, when viewed "as a whole" are "consistent with guilt and inconsistent with any rational hypothesis except that of guilt, not simply whether the inferences that point to guilt are reasonable." *Id.* at 599 (quotation omitted). During this step of the analysis, we do not defer to the factfinder's choice between reasonable inferences. *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010). The circumstantial evidence presented by the state "must form a complete chain that, in view of the evidence as a whole, 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). We will sustain a conviction based on circumstantial evidence only if the circumstances proved are "consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Harris*, 895 N.W.2d at 601.

Appellant argues the state failed to prove that he actually or constructively possessed the methamphetamine mixture in the large bong. We address appellant's arguments in turn.

A. Actual Possession

Appellant argues the state failed to prove his actual possession of the methamphetamine mixture in the large bong. We agree.

Initially, we must identify the applicable standard of review. Both appellant and the state seem to agree that the circumstantial-evidence test applies because the evidence that appellant actually possessed the large bong was purely circumstantial.[7]

Applying the circumstantial-evidence test, we next consider the circumstances proved. Here, the state proved the following at trial: (1) appellant lived at D.T.'s house and slept in the basement; (2) the area where appellant slept was a "party room" used by many people; (3) appellant was in the basement the day law enforcement executed the search warrant with at least four other people; (3) appellant admitted he "smoke[d] a little bit, [he] smoke[d] weed, [he] smoke[d] the sh-t sometimes"; (4) S.B. witnessed appellant smoking methamphetamine from a bong on the day law enforcement executed the search

[7] Circumstantial evidence inherently "requires an inferential step to prove a fact that is not required with direct evidence." *Harris*, 895 N.W.2d at 599 (citing *Silvernail*, 831 N.W.2d at 604 (Stras, J., concurring)). Lieutenant Dengler's testimony that S.B. told him that he "observed [appellant] and [C.T.] smoking methamphetamine out of a water bong" and that the bong was "round" and "homemade" was direct evidence that appellant smoked from *a* bong. However, to conclude from this evidence that appellant knowingly possessed the water in the large bong, the jury was required to infer that appellant smoked from the large bong. Additionally, the jury was required to infer that the weight of the water in the large bong remained unchanged.

warrant; (5) the bong was "round" and "homemade"; (6) law enforcement found contraband and drug paraphernalia in the party room, including the large bong and small bong; (7) both the large bong and small bong could fit S.B.'s description; (8) the liquid in the large bong contained methamphetamine and weighed just over 143 grams.

We must next evaluate whether this evidence, when viewed "as a whole," is "inconsistent with any rational hypothesis except that of guilt." *Silvernail*, 831 N.W.2d at 599 (quotation omitted). Appellant argues the evidence is consistent with a rational hypothesis other than guilt because "there were two bongs found in the basement," and S.B. "did not identify which bong [appellant] smoked from." We agree. The state's failure to provide any evidence tying S.B.'s statement to the large bong permits a rational alternative inference that S.B. observed appellant smoking from the small, untested bong.[8] Thus, the evidence is consistent with a rational alternative inference that appellant smoked from the small, untested bong.

We, therefore, conclude the state failed to prove beyond a reasonable doubt that appellant actually possessed the methamphetamine mixture found in the large bong.

B. Constructive Possession

Appellant also argues the state failed to prove he constructively possessed the methamphetamine mixture in the large bong. Again, we agree.

[8] Further, we are not aware of any case concluding a person who simply smokes something out of a bong—without additional evidence—knowingly possesses whatever controlled substance happens to be in the bong water.

When the state cannot prove "actual or physical possession at the time of arrest," constructive possession allows the state to prove possession where either (1) the prohibited item was found "in a place under [the] defendant's exclusive control to which other people did not normally have access," or (2) if police found the prohibited substance "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 610-11 (emphasis added); *see also Salyers*, 858 N.W.2d at 159-60 (referring to these as *Florine*'s first and second prong, respectively). The parties dispute whether the evidence established appellant's constructive possession of the methamphetamine mixture from the large bong under *Florine*'s second prong.[9]

Courts consider several factors when determining whether there is sufficient evidence to establish constructive possession. "Proximity is an important consideration in assessing constructive possession." *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *rev. denied* (Minn. Jan. 16, 2001). "Ease of access is . . . [another] factor relevant to establishing constructive possession, [though] it is not the sole factor or necessarily even the most important factor." *Salyers*, 858 N.W.2d at 159; *Harris*, 895 N.W.2d 600-01.

Here, the parties agree that we must assess whether the state proved appellant constructively possessed the methamphetamine mixture in the large bong using the circumstantial-evidence test. The circumstances proved are the same as those articulated above for actual possession. We are, therefore, left with examining whether the

[9] The state does not argue, and the record does not support, that any methamphetamine was found in a place under appellant's exclusive control.

circumstances proved support a reasonable inference that appellant was not consciously exercising dominion and control over the methamphetamine mixture in the large bong.

Appellant asserts that the state's proximity evidence was insufficient to show appellant exercised dominion and control over the large bong. Minnesota caselaw establishes that physical proximity to contraband, without more, is insufficient to sustain a conviction based on circumstantial evidence of constructive possession. In *Sam*, the appellant drove a passenger in another person's vehicle with expired license plates. 859 N.W.2d at 834. When law enforcement pulled over the vehicle, they located many different kinds of contraband, including methamphetamine in the glove compartment. *Id.* We reversed appellant's conviction for methamphetamine possession, concluding that "at least two reasonable inferences concerning the methamphetamine in the glove compartment [were] inconsistent with appellant's guilt." *Id.* at 835. The first, that the car's owner placed the methamphetamine in the glove compartment, and the second, that the passenger placed the methamphetamine in the glove compartment. *Id.* We reasoned that the state failed to present any evidence to negate these inferences other than guilt. *Id.*; *see also State v. Yernatich*, No. A19-0841, 2020 WL 2116549, at *5 (Minn. App. May 4, 2020) (citing *Sam* for this principle and reversing appellant's conviction for first-degree possession of methamphetamine).[10]

[10] *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) ("Nonprecedential opinions . . . are not binding authority except as law of the case, res judicata or collateral estoppel, but nonprecedential opinions may be cited as persuasive authority.").

Here, the large bong's connection to appellant is even more attenuated because the methamphetamine mixture was not found in proximity to appellant's person. Instead, law enforcement located the large bong in a party room where appellant slept and kept a bag with personal items. Similar to *Sam*, the evidence presented at trial proved many people used the party room on the date law enforcement executed the search warrant, including D.T., S.B., and C.T., any of whom could have brought the large bong into the room. Further, unlike cases where law enforcement found controlled substances in a bedroom with a defendant's personal items, *see State v. Colsch*, 284 N.W.2d 839, 841 (Minn. 1979), or defendant's identifying information on the controlled substance, *see State v. Wiley*, 366 N.W.2d 265, 270 (Minn. 1985), the only evidence tying the large bong to appellant's personal possessions is that both items were found in a common room. Thus, the evidence the state presented does not negate a rational inference that someone other than appellant brought the large bong into the party room and that appellant did not exercise dominion and control over it.

The state asserts that, despite this rational inference, it did present evidence that appellant exercised dominion and control over the large bong under a theory of joint-constructive possession. Under a joint-constructive-possession theory, "[a] person may constructively possess a controlled substance . . . with others." *State v. Denison*, 607 N.W.2d 796, 799 (Minn. App. 2000), *rev. denied* (Minn. June 13, 2000).[11] The state points

[11] Appellant correctly observes that the state did not request a jury instruction on joint-constructive possession. But "[a] sufficiency challenge should be assessed against the elements of the charged crime, not against the elements set forth in an erroneous jury instruction." *Musacchio v. United States*, 577 U.S. 237, 237 (2016) (syllabus). Thus,

to the following evidence to support its view that it proved joint-constructive possession: appellant slept in the party room; appellant had a bag with his belongings in the party room; drug paraphernalia was found in the party room, including the large bong; and appellant, D.T., S.B., and C.T. smoked from a bong on the day law enforcement executed the search warrant. But reviewing this case under a joint-constructive-possession theory, the state still failed to negate a rational inference other than guilt.

First, in order to prove constructive possession, the state must establish a person's control over contraband itself; proof of control over the place in which contraband is found when others have access to that place does not establish constructive possession. *State v. Hunter*, 857 N.W.2d 537, 542-43 (Minn. App. 2014). Thus, evidence showing appellant slept in the party room and had personal items in the party room is not sufficient to show appellant constructively possessed the large bong.

Second, the evidence showing multiple people smoked from *a* bong on the day law enforcement executed the search warrant does not negate a rational inference that appellant never smoked from the large bong. In this case, the record wholly fails to disambiguate *which* bong S.B. saw appellant use because Lieutenant Dengler testified that S.B. saw appellant use "*a* water bong . . . *a* round homemade bong." And the evidence of both the large bong and small bong in the record meet this very general description. Thus, at most, the state proved appellant exercised joint dominion and control over *a* bong, but not

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despite the state's failure to request a joint-constructive-possession jury instruction, it is appropriate for us to analyze the sufficiency of the evidence under this theory.

necessarily the large bong that contained the methamphetamine mixture which supported appellant's conviction.

For these reasons, the state's evidence failed to exclude the reasonable inference that appellant did not exercise dominion and control over the methamphetamine mixture in the large bong. Because the state failed to prove beyond a reasonable double that appellant possessed the large bong, either actually or constructively, we reverse.

II.

Appellant also argues the district court abused its discretion when it admitted S.B.'s statement over appellant's hearsay objection. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). A hearsay statement "is not admissible" unless it fits into an exception to the hearsay rule. Minn. R. Evid. 802. There are many enumerated exceptions to the rule against hearsay. *See, e.g.*, Minn. R. Evid. 801(d), 803-804. And, if a statement is not covered under a specific hearsay exception, it still may be admitted under the "residual exception" found in Minn. R. Evid. 807.

"We review a district court's evidentiary ruling on hearsay for an abuse of discretion." *State v. Vangrevenhof*, 941 N.W.2d 730, 736 (Minn. 2020). "A defendant claiming error in the district court's reception of evidence has the burden of showing both the error and the prejudice resulting from the error." *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009) (quotation omitted). Any error in the admission of a hearsay statement is harmless if the statement would have been substantively admissible at trial on other grounds. *See State v. Robinson*, 718 N.W.2d 400, 407-10 (Minn. 2006).

Here, the parties agree that Lieutenant Dengler's testimony regarding S.B.'s statement was hearsay and that appellant made a timely hearsay objection. The parties also agree the state did not respond to appellant's hearsay objection because the district court overruled the objection without argument. Thus, the only issue in dispute is whether the admission of the hearsay statement was harmless because it would have been substantively admissible under a hearsay exception.

On appeal, the state only argues the district court's admission of S.B.'s statement was harmless because it was admissible under the residual exception. *See* Minn. R. Evid. 807. The residual exception provides for admissibility of the following:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id. Where "the facts relevant to trustworthiness are undisputed and the applicability of the residual exception arises in the context of a harmless error analysis," we analyze a statement's admissibility as a legal issue. *Robinson*, 718 N.W.2d at 409.

The decision to admit hearsay statements under the residual exception requires a two-step inquiry. The first step examines "the totality of the circumstances to determine whether the hearsay statement has circumstantial guarantees of trustworthiness." *State v. Hallmark*, 927 N.W.2d 281, 292 (Minn. 2019) (quotation omitted). The supreme court has articulated four factors that indicate trustworthiness:

> (1) [T]here is no Confrontation Clause issue because the declarant testifies, admits to making the prior statement, and is available for cross-examination by the defense counsel; (2) the statement is recorded, removing any real dispute about what the declarant said; (3) the statement is against the declarant's penal interest; and (4) the statement is consistent with the State's other evidence that "pointed strongly toward" the defendant's guilt.

Id. at 293 (citing *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985)); *see also Robinson*, 718 N.W.2d at 408 (clarifying that *Ortlepp*'s four factors are nonexclusive and merely an application of the totality-of-circumstances standard).

We conclude that S.B.'s hearsay statement fails at the first step of the residual exception's admissibility inquiry. First, although S.B. testified, he did not admit to making the prior statement. *See Ortlepp*, 363 N.W.2d at 44. Instead, S.B. testified that he did not remember what he told Lieutenant Dengler, limiting appellant's ability to cross-examine S.B. on the prior statement.[12] Second, contrary to the state's assertion, nothing in the record

[12] The state admits that S.B.'s testimony detracts from S.B.'s hearsay statement's trustworthiness. The state argues that S.B.'s hearsay statement nonetheless possesses "sufficient circumstantial guarantees of trustworthiness" under caselaw analyzing recantations. *See Hallmark*, 927 N.W.2d at 293. A recanted statement has circumstantial guarantees of trustworthiness where "(1) other uncontradicted evidence discredits the declarant's recantation; (2) the declarant possesses a motive to falsely recant; (3) the declarant's recantation is itself inconsistent; and (4) the prior hearsay statements are 'strongly corroborated' by evidence admitted at trial." *Id.* We do not agree with the state that S.B. recanted his prior statement. Instead, S.B. said that he did not remember precisely what he told Lieutenant Dengler three months earlier. Further, even if we look to the circumstantial guarantees of trustworthiness for recanted statements, it does not help the state's case. The record lacks any uncontradicted evidence that discredits S.B.'s statement that he did not remember what he told Lieutenant Dengler, the supposed recantation is not inconsistent with the prior statement, and the prior statement is not *strongly* corroborated by any other evidence admitted at trial. In fact, S.B.'s statement is the *only* evidence the state relied on to directly tie appellant to the large bong.

shows that law enforcement recorded S.B.'s statement. *See id.* Third, the state cites no authority, and we are aware of none, showing that a statement is against penal interest merely because it places the witness in proximity to another person's drug use. *See id.* Finally, while S.B.'s statement that he saw appellant smoking methamphetamine from a bong is consistent with evidence of drug use, we conclude this evidence does not "point[] strongly toward" appellant's guilt for the same reasons the state failed to prove appellant's actual or constructive possession. *See id.*

For these reasons, even if we did not reverse appellant's conviction for insufficient evidence, we would reverse and remand for a new trial consistent with this opinion. *See State v. Williams*, 525 N.W.2d. 538, 549 (Minn. 1994); *Clark*, 755 N.W.2d at 256.

Reversed.

JOHNSON, Judge (dissenting)

I agree with part II of the opinion of the court insofar as it concludes that the district court committed reversible error by admitting hearsay evidence. I also agree with part I.B., in which the court concludes that the state's evidence is insufficient to prove constructive possession. But I respectfully disagree with part I.A., in which the court concludes that the state's evidence is insufficient to prove actual possession. The state's evidence is sufficient to prove that Busch actually possessed a controlled substance, specifically, a mixture of methamphetamine and water in a bong from which he smoked. Therefore, I respectfully dissent.

Busch's actual possession of a controlled substance is established by the testimony of Lieutenant Dengler that S.B. stated in a pre-trial interview that he saw Busch smoking from "a round homemade bong" while Busch was sitting on one of the couches in the so-called party room. Two bongs were found in the home. The question on appeal is: which of the two bongs did Busch use? The answer is: Busch used the bong that contained a methamphetamine-water mixture weighing 143 grams.

Exhibit 1 is a bong made of clear glass. It bears the letters "CHAMBORD," which indicates that its original purpose was to be a bottle containing a commercial brand of liqueur and that it later was repurposed. It is spherical in shape. It has a hole drilled near the top where a rubber tube apparently was connected. It is larger than a softball but smaller than a volleyball or a soccer ball. When testifying about the search of the home, Lieutenant Dengler described exhibit 1 as "a larger round bong" and testified that it was found in the basement on the floor of the so-called party room, near two couches and an item of furniture

that he described as "a center little table made out of a bookshelf with a top on it." Exhibit 1 contained a liquid that was tested, weighed, and determined to be a methamphetamine-water mixture weighing 143 grams.

The other bong is depicted in a photograph that is exhibit 10. The photograph shows a clear glass container on a shelf of the center bookshelf or table. Lieutenant Dengler described the item as "a small glass bong with clear liquid in it." The small glass bong appears to be wider at the bottom and narrower at the top. Even at its widest part, the small glass bong is narrower than a ruler-edged evidence marker, which is approximately eight centimeters (or approximately three inches) in width. The clear liquid inside the small glass bong was field-tested and weighed, but the state did not seek to hold Busch criminally liable for possession of the small glass bong.

As stated above, Lieutenant Dengler testified that S.B. stated in a pre-trial interview that he saw Busch smoking from "a round homemade bong" while Busch was sitting on one of the couches in the party room. For purposes of analyzing the sufficiency of the evidence, we assume that Lieutenant Dengler's testimony is admissible.

The evidence is sufficient to prove that exhibit 1 is the "round homemade bong" that S.B. identified as the bong that Busch used. First, exhibit 1 is the "round" bong because it is spherical. The small glass bong is rounded or curved but not spherical. Importantly, no witness described the small glass bong as "round." Second, exhibit 1 is the "homemade" bong because it originally was made for a different purpose and later was made into a bong by the drilling of a hole and the addition of rubber tubing. In contrast, the small glass bong depicted in exhibit 10 has no indications of being homemade, and no

witness described the small glass bong depicted in exhibit 10 as "homemade." Third, exhibit 1 is larger than the bong depicted in exhibit 10. The jurors' observations of exhibits 1 and 10 during trial, in conjunction with Lieutenant Dengler's testimony, would naturally lead jurors to conclude that the bong Busch used is the bong that is exhibit 1, *not* the bong that is depicted in exhibit 10.

This conclusion flows naturally from a direct-evidence analysis because the evidence concerning the nature and appearance of exhibit 1 is evidence that, "if true, proves a fact without inference or presumption." *See State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). The state's evidence—consisting of oral testimony and tangible items that were visible to the jury—would have been easily understood by the jury without the need to draw inferences. It is no surprise that neither party argues that a circumstantial-evidence analysis applies to the issue of actual possession. But even if a circumstantial-evidence analysis were applicable, the analysis would lead to the same conclusion. There are no reasonable inferences from the circumstances proved that Busch used the small glass bong that is depicted in exhibit 10 rather than the larger, round, homemade bong that is exhibit 1. *See State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). In addition, there is no reasonable inference from the circumstances proved that the methamphetamine-water mixture in the bong that is exhibit 1 weighed more when it was seized than when Busch possessed it only a few hours earlier (and Busch does not make such an argument). There is no evidence that anyone added water to the bong that is exhibit 1 during the afternoon of March 31, 2022, and we may not "overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *See State v. Al-Naseer*, 788 N.W.2d 469, 473

(Minn. 2010) (quotation omitted). Under either the direct-evidence approach or the circumstantial-evidence approach, the state's evidence is sufficient to prove that Busch actually possessed the methamphetamine-water mixture in the bong that is exhibit 1.

In sum, I would not reverse Busch's conviction on the ground that the state's evidence is insufficient. Rather, I would conclude that the state introduced evidence sufficient to prove that Busch actually possessed a controlled substance. Nonetheless, I would reverse and remand for a new trial for the first, second, and third reasons stated in part II of the opinion of the court.