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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2004**

State of Minnesota,
Respondent,

vs.

James Lee Scholten,
Appellant.

**Filed October 29, 2012
Affirmed
Hooten, Judge**

Pine County District Court
File No. 58-CR-10-313

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John K. Carlson, Pine County Attorney, Michelle R. Skubitz, Assistant County Attorney, Pine City, Minnesota (for respondent)

David W. Merchant, Chief Appellant Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Chutich, Judge; and Hooten, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

On appeal from a conviction for third-degree sale of a controlled substance, appellant argues that the state's critical evidence, mostly circumstantial in nature, was not

sufficient to prove his guilt beyond a reasonable doubt. The state argues that the direct and circumstantial evidence, when viewed as a whole, directly leads to appellant's guilt so as to exclude beyond a reasonable doubt any reasonable inference that appellant did not engage in the sale of methamphetamine. We affirm.

FACTS

On June 4, 2010, appellant James Lee Scholten was charged by criminal complaint with the sale of a controlled substance in the fourth degree in violation of Minn. Stat. § 152.024, subd. 1 (2010). An amended complaint was filed on April 8, 2011, adding a count of sale of a controlled substance in the third degree in violation of Minn. Stat. § 152.023, subd. 1(1) (2010). Count one was dismissed at trial. A jury returned a guilty verdict on count two and this appeal followed.

On June 3, 2010, at approximately 5:00 a.m., Deputy Jason Miller from the Pine County Sheriff's Office was dispatched to the Grand Casino in Hinckley, Minnesota in order to view a video of individuals engaged in suspicious activities at a slot machine on the gaming floor. The video had been recorded by the surveillance department of the casino approximately 20 minutes earlier. Deputy Miller indicated that he observed the video footage in high definition and described the surveillance department's monitor as "pretty crystal clear" with the "benefit of when they zoom in that it remains crystal clear." According to Deputy Miller, the film depicted a female, identified as Jennifer Anderson, handing money to appellant. The video shows that appellant counted the money and held it in his left hand, and then placed the money in his jacket pocket. Anderson then opened her cigarette pack, pulled out a cigarette, and attempted to hand it

to appellant. Appellant waved it away and Anderson placed the cigarette back in the pack. Anderson then handed appellant the entire cigarette pack, which appellant placed between his legs. Appellant took a cigarette out of the package with his left hand and used his right hand to manipulate an object inside the pack. Appellant then returned the cigarette pack to Anderson and lit a cigarette. Deputy Miller, who observed the video in high resolution prior to the trial, testified that the video showed appellant place a white substance in cellophane plastic into the cigarette pack. Deputy Miller believed that he witnessed the sale of an illegal substance and described how plastic cellophane used to package cigarette packs is used to transport illegal substances like methamphetamine.

Casino security escorted Deputy Miller to Anderson's location on the gaming floor. As he approached, he observed Anderson standing with three other individuals, one of whom motioned for the group to leave through the casino's back door. Deputy Miller confronted Anderson in a hallway leading to a side door and asked to search her cigarette pack in order to investigate a possible drug transaction. Anderson proceeded to search inside her purse for the cigarette pack. Deputy Miller testified that her search took an extended period of time, during which he heard the sound of cellophane plastic being manipulated. Deputy Miller did not observe any cellophane containing drugs in the cigarette pack. Anderson then consented to a search of her purse after Deputy Miller asked about the sound of manipulated plastic. However, as she handed over the purse, Deputy Miller heard plastic inside her sleeve. After asking Anderson to roll up her sleeve on the same hand with which she used to reach inside her purse, he observed cellophane

containing a “white, crystalline substance.” The substance weighed two-tenths of a gram and tested positive for methamphetamine.

Anderson was placed under arrest.¹ Deputy Miller then located appellant and placed him under arrest for the sale of methamphetamine. A search of appellant’s person located a cigarette pack with the cellophane missing from the bottom, but no drugs. Deputy Miller observed that the cellophane missing from appellant’s cigarette pack was the same size as the cellophane containing the methamphetamine.

D E C I S I O N

On appeal, appellant does not dispute that Anderson gave him money and handed him a cigarette pack, or that he returned the pack after removing a cigarette. Appellant argues that the video showing these activities, as well as the other circumstantial evidence produced by the state, is insufficient to support the jury’s verdict.

In considering a claim of insufficiency of evidence, this court’s review is limited to a painstaking analysis of 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. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This court will not disturb a verdict “if the jury, acting with due regard for the presumption of innocence” and the requirement of proof beyond a reasonable doubt, could reasonably

¹ After arriving at the jail, a white substance in tin foil was located inside the purse. Deputy Miller agreed that Anderson had drugs on her person before meeting up with appellant.

conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004) (quotation omitted).

“Direct evidence is [e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007) (quotation omitted and alteration in original). “A fact is proven by circumstantial evidence when its existence can be reasonably inferred from other facts proven in the case.” 10 *Minnesota Practice*, CRIMJIG 3.05 (2006). Circumstantial evidence is entitled to the same weight as direct evidence. *Bernhardt*, 684 N.W.2d at 477. However, “[a] conviction based on circumstantial evidence receives stricter scrutiny than a conviction based on direct evidence.” *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010). This heightened scrutiny applies to any disputed element of the conviction that is based on circumstantial evidence. *See State v. Al-Naseer*, 788 N.W.2d 469, 474–75 (Minn. 2010).

“When reviewing the sufficiency of circumstantial evidence, we first identify the circumstances proved.” *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). Deference is given “to the jury’s acceptance of the proof of these circumstances as well as to the jury’s rejection of evidence in the record that conflicted with the circumstances proved by the state.” *Id.* “[J]uries are generally in the best position to weigh the credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony.” *Id.* (quotation omitted). A jury is in the best position to evaluate circumstantial evidence and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430.

The reviewing court “is to examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt.” *Hanson*, 800 N.W.2d at 622 (quotation omitted). No deference is given to the fact-finder’s choice between reasonable inferences. *Id.* “Circumstantial evidence 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.” *Stein*, 776 N.W.2d at 714 (quoting *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002)). “In assessing the inferences drawn from the circumstances proved, the inquiry is not simply whether the inferences leading to guilt are reasonable. Although that must be true in order to convict, it must also be true that there are no other reasonable, rational inferences that are inconsistent with guilt.” *Id.* at 716.

“An alternative theory does not justify a new trial if that theory is not plausible or supported by the evidence,” and “a conviction based on circumstantial evidence” will not be overturned “on the basis of mere conjecture.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). “To successfully challenge a conviction based upon circumstantial evidence, a defendant must point to evidence in the record that is consistent with a rational theory other than guilt.” *Taylor*, 650 N.W.2d at 206. “However, possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable.” *Id.* (quotation omitted).

The surveillance footage establishes that appellant and Anderson engaged in a transaction or exchange wherein appellant received cash from Anderson, who then

retrieves her cigarette pack in her purse and attempts to hand him a cigarette. Appellant waives the cigarette away and motions toward the cigarette pack itself, which Anderson hands over. Appellant takes the pack and abruptly holds it between his legs. He fidgets with the pack for a few seconds before removing a cigarette. However, after removing the cigarette, appellant can clearly be seen again fidgeting or manipulating the pack for two or three seconds while holding it further down between his legs and out of view from the camera. Appellant lifts his cigarette up and hands the cigarette pack back to Anderson. He lights his cigarette and hands a lighter to Anderson, who walks away.

The evidence also links appellant's handling of Anderson's cigarette pack to the drugs found in Anderson's sleeve. Deputy Miller testified that he observed, while viewing the footage close-up in high definition on a 42-inch monitor, appellant hold in his hand a small white substance in cellophane plastic during his exchange of the cigarette pack with Anderson. Deputy Miller also testified that his search of appellant's person located a cigarette pack with cellophane missing from the bottom, which he opined was the cellophane used to enclose the methamphetamine eventually discovered in Anderson's sleeve. He described how cellophane from cigarette packs is used to transport illegal substances and that he heard cellophane in Anderson's sleeve after she spent an unusually long period of time searching through her purse.

Contrary to appellant's argument, most of the state's evidence in this case consisted of direct evidence, i.e., the surveillance video which captured the suspicious exchange between appellant and Anderson, Deputy Miller's observations of the video in high definition on a large screen, and Deputy Miller's discovery of a similar-looking

cellophane wrapping containing methamphetamine in Anderson's sleeve. The primary circumstantial evidence is the inference that the white substance in cellophane observed by Deputy Miller on high definition video during the exchange was the methamphetamine found in Anderson's sleeve.

Under these circumstances, when viewing the direct and circumstantial evidence as a whole, it was reasonable for the jury to believe Deputy Miller's testimony that he actually saw appellant hold a small white substance in cellophane during his exchange with Anderson, and that the methamphetamine in cellophane wrapping found in Anderson's sleeve was the same white substance in a plastic wrapping as seen on the surveillance video. Even if the heightened standard of review for circumstantial evidence were applied, appellant's claim that the video merely showed an innocent exchange of cash and cigarettes on the gaming floor of a casino is not reasonable or rational. There is no other plausible alternative theory inconsistent with guilt that would explain appellant's clear efforts to fidget with or manipulate the cigarette pack while abruptly hiding it between his legs, or explain why a similar looking cellophane wrapping containing a white substance, as seen on the video by Deputy Miller, was found in Anderson's sleeve shortly after the exchange. Since the jury was in the best position to weigh and give credit to the evidence, we affirm appellant's conviction.

Affirmed.