This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).

STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2303

State of Minnesota,
Respondent,

vs.

Rhiannon Brozek,
Appellant.

Filed December 2, 2013
Affirmed
Hooten, Judge

Pine County District Court
File No. 58-CR-10-358

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

John K. Carlson, Pine County Attorney, Pine City, MN (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Kirk Anderson, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Hooten, Judge.

U N P U B L I S H E D   O P I N I O N

HOOTEN, Judge

In contesting her conviction of fifth-degree possession of methamphetamine, appellant argues that (1) there was insufficient circumstantial evidence supporting the

conviction; (2) the district court erred by permitting the deputy sheriff to testify regarding his belief that the canister in which the methamphetamine was found belonged to appellant; and (3) the district court abused its discretion by instructing the jury that, when considering direct and circumstantial evidence, the law does not prefer one type of evidence over the other. We affirm.

FACTS

During the evening of June 29, 2010, Deputy Sheriff Benjamin Neel of the Pine County Sheriff's Office was called to assist a lawful arrest of appellant Rhiannon Brozek in Pine City. When he arrived on scene, Deputy Neel searched appellant "as best as possible," explaining that "it's difficult for a male [officer] to search [female suspects], so a lot of times you'll just ask them if they have any weapons or objects that are going to harm you or hurt me in any way." He added that he might "pat them down with the back of [his] hands and stuff like that," but that "the search is more thoroughly performed once they're in jail by a female officer." He placed appellant in handcuffs with her hands behind her back and put her in the back of his squad car.

As Deputy Neel assisted another officer search appellant's purse, he noticed that appellant "was moving around in the squad car a lot," "slouching down in the car and then coming back up." Deputy Neel then drove appellant to the Pine County jail. Upon opening the door to remove her from the squad car, he noticed that her jacket "was down around her shoulder down on her waist down by her wrist area" rather than "fully on her" as it had been when he first placed her in the squad car. He also noticed that appellant's shirt under her jacket "was pulled up from her waist line area."

Deputy Neel testified that when appellant exited his squad car, he observed a film canister "shoved down by the back seat" directly behind where appellant's hands had been. He clarified that the canister "wasn't shoved all the way underneath [the] seat" and that he "could see it as soon as [appellant] stepped out of the vehicle." The canister contained "two little baggies" of "a white crystal like . . . powdery substance."

Deputy Neel further testified that he had "thoroughly" searched the back seat of his squad car at the beginning of his shift, which was approximately three hours prior to appellant's arrest, and did not find anything. He explained that the back seats "pop right out" and are "really easy to move out and in." He looked underneath the seats by moving them "all the way forward so you can see the whole bottom part" and found no contraband. There was no space to hide anything on the sides of the back seats, and nothing could be hidden in the top parts of the seats because they are bolted and cannot be removed.

After arriving on the scene, but prior to placing appellant in the back of his squad car, Deputy Neel again searched the back seat "as best as possible." He "made a quick glance to make sure there was nothing on the seat or on the floor" and was certain that there were no items in his back seat prior to transferring appellant to the jail. He submitted the canister for testing, but did not test it for fingerprints "[b]ecause [he] knew it was [appellant's]" and explained that "there was no other way it could have gotten in my car" except for appellant bringing it in. Deputy Neel acknowledged that he never saw appellant in actual possession of the canister, the contents of which later tested positive for methamphetamine.

Appellant was charged with one count of fifth-degree possession of methamphetamine in violation of Minn. Stat. § 152.025, subd. 2(b)(1) (Supp. 2009), and was later found guilty by a jury. This appeal follows.

D E C I S I O N

I.

Appellant argues that there is insufficient evidence to sustain her conviction. In assessing a claim that a conviction is not supported by sufficient 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).

Standard of Review

Appellant was convicted under Minn. Stat. § 152.025, subd. 2(b)(1), which makes it a crime to "unlawfully possess one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV, except a small amount of marijuana." "[I]n order to convict a defendant of unlawful possession of a controlled substance, the state must prove that [the] defendant consciously possessed, either physically or constructively, the substance . . . ." *State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975). Appellant's conviction is based upon circumstantial evidence that she physically possessed the canister containing methamphetamine at the time of her arrest. "Circumstantial evidence is defined as evidence based on inference and not on personal knowledge or observation and all evidence that is not given by eyewitness testimony."

State v. Clark, 739 N.W.2d 412, 421 n.4 (Minn. 2007) (alterations and quotations omitted). When reviewing the sufficiency of a conviction based on circumstantial evidence, we apply a heightened scrutiny circumstantial-evidence standard of review. *State v. Porte*, 832 N.W.2d 303, 309–10 (Minn. App. 2013).

"[W]e first identify the circumstances proved." *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). We defer to the jury's acceptance of the proof of these circumstances as well as to the jury's rejection of evidence in the record in conflict with the circumstances proved by the state. *Id.* Juries are generally in the best position to weigh the credibility of evidence and determine which witnesses to believe and how much weight to give to their testimony. *Id.*

The "second step 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." *Id.* (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." *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted). "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." *State v. Stein*, 776 N.W.2d 709, 716 (Minn. 2010).

Circumstances Proved and Alternative Theories

The circumstances proved at trial that appellant physically possessed the canister at the time of arrest include: (1) Deputy Neel thoroughly inspected the squad car three hours prior to appellant's arrest and found no contraband; (2) Deputy Neel saw no contraband in the back seat of his squad car before placing appellant there; (3) Deputy Neel saw the canister in the back seat immediately after appellant exited the squad car; (4) the canister was found right behind where appellant's hands had been in the back seat of the squad car; (5) appellant's jacket was on her shoulders when Deputy Neel placed her in the squad car; (6) appellant, while handcuffed, squirmed around in the back seat of the squad car; and (7) appellant's jacket was at her waist near her wrists and her shirt was pulled up from her waistline when she exited his squad car. In Deputy Neel's experience, individuals that he has arrested leave or attempt to leave contraband in his squad car, which made him suspicious of appellant's movements.

Based on these circumstances, the only rational inference is that appellant possessed the canister containing methamphetamine prior to being placed in the squad car. No rational hypothesis other than guilt exists in light of Deputy Neel's testimony that he thoroughly searched the car prior to his shift, did not see the canister immediately prior to placing appellant in his squad car, found the canister only after appellant exited the squad car, and observed appellant's suspicious movements while assisting another officer.

Appellant argues that she did not place the canister in the squad car. 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." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). 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.*

In support of her theory, appellant points to Deputy Neel's testimony that his search of appellant's person did not produce the canister and that he did not thoroughly search the back seat immediately before placing her in the squad car. But Deputy Neel testified that when he arrests female suspects, he might pat them down with the back of his hands, and that he transports them to the jail to be searched more thoroughly by a female officer. And taking Deputy Neel's testimony as a whole makes appellant's theory unreasonable. Deputy Neel's testimony relative to the contraband, along with his testimony regarding her suspicious movements and her disheveled clothing, are consistent with appellant's guilt and are inconsistent, on the whole, with appellant's theory of innocence.

Appellant argues that the back seat of the squad car "is accessible to far too many people" for the state to prove that she exercised dominion and control over the canister. This argument is based on the constructive-possession doctrine which is utilized when the state cannot prove that the defendant possessed the contraband at the time of arrest. *Florine*, 303 Minn. at 104, 226 N.W.2d at 610. Instead, the state introduces evidence that

provides a strong inference that the defendant physically possessed the contraband at one time, but did not abandon a possessory interest in the contraband and continued to exercise dominion and control over it up to the time of the arrest. *Id.* at 105, 226 N.W.2d at 610.

But here the state used circumstantial evidence to prove that appellant physically possessed the canister at the time of her arrest. Moreover, appellant's theory of innocence is based on conjecture, as she points to no evidence in the record supporting the possibility that another person under arrest abandoned the canister, and her theory is directly contradicted by Officer Neel, who checked the backseat immediately before she was placed in the squad car and found nothing. In sum, appellant's theory that she did not possess the methamphetamine is not plausible or supported by the evidence as a whole.

II.

Within her sufficiency-of-the-evidence argument, appellant also asserts that she was prejudiced because Deputy Neel testified at trial that he did not check the canister for fingerprints because he knew that it belonged to her and that she placed the canister in his squad car. Appellant argues that this testimony was speculative and highly prejudicial, and that the answer invaded the province of the jury. She further argues that "[k]nowing who the canister belonged to is not personal knowledge as this is the sole issue being tried by the jury."

Because there was no objection to this testimony, we apply the plain error standard of review. "The plain error standard requires that the defendant show: (1) error; (2) that

was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "If those three prongs are met, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (alteration in original) (quotations omitted). "[T]he reception of opinion evidence on ultimate issues rests largely in the discretion of the trial court." *State v. McCarthy*, 259 Minn. 24, 31, 104 N.W.2d 673, 678 (1960).

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704.

> Expert and lay witnesses will not be precluded from giving an opinion merely because the opinion embraces an ultimate fact issue to be determined by the jury. If the witness is qualified and the opinion would be helpful to or assist the jury as provided in rules 701–703, the opinion testimony should be permitted. In determining whether or not an opinion would be helpful or of assistance under these rules a distinction should be made between opinions as to factual matters, and opinions involving a legal analysis or mixed questions of law and fact. Opinions of the latter nature are not deemed to be of any use to the trier of fact.

Minn. R. Evid. 704 1977 comm. cmt. "Under the helpfulness test, this court has not allowed ultimate conclusion testimony which embraces legal conclusions or terms of art." *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005) (quotation omitted).

We need not consider the merits of whether this testimony amounted to an unhelpful opinion because appellant fails to establish that this testimony affected her substantial rights. "Substantial rights are affected when a plain error was prejudicial and affected the outcome of the case." *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010).

“Plain error is prejudicial when there is a reasonable likelihood that the error had a significant effect on the jury’s verdict.” *Id.* “To determine whether the error had a significant effect on the jury’s verdict, we review the strength of the State’s case, the pervasiveness of the error, and whether the defendant had an opportunity to respond to the testimony.” *Id.* at 873. Appellant bears a “heavy burden” of persuasion on this prong. *Id.* at 872. “In addressing an alleged error under the plain-error rule, if a defendant fails to establish that the claimed error affected his substantial rights,” the remaining factors need not be considered. *Id.* at 873 (alteration and quotation omitted).

On this record, there is no reasonable likelihood that the disputed testimony had a significant effect on the verdict. The circumstances proved by the state provided strong circumstantial evidence that appellant possessed the canister of methamphetamine at the time of her arrest. Deputy Neel’s statements regarding his belief that the canister belonged to appellant were brief, merely provided an explanation for Deputy Neel’s decision not to test the canister for fingerprints, and were not mentioned or highlighted by the state during the remainder of his testimony or during closing arguments. Under these circumstances, appellant has failed to satisfy her burden of establishing that her substantial rights were affected by this testimony.

III.

Appellant also argues that the district court abused its discretion by instructing the jury according to 10 *Minnesota Practice*, CRIMJIG 3.05 (2006), which states that “[a] fact may be proven by either direct or circumstantial evidence, or by both. The law does not prefer one form of evidence over the other.” Appellant objected to the second section

of this instruction, arguing at trial and on appeal that the Minnesota Supreme Court case of *State v. Al-Naseer* stands for the proposition that the law prefers direct evidence over circumstantial evidence. We disagree.

"The decision to give a requested jury instruction lies in the discretion of the trial court and will not be reversed absent an abuse of that discretion." *State v. Palubicki*, 700 N.W.2d 476, 487 (Minn. 2005). We review jury instructions "in their entirety to determine whether they fairly and adequately explain the law." *State v. Cruz–Ramirez*, 771 N.W.2d 497, 507 (Minn. 2009). While circumstantial evidence must be reviewed with heightened certainty, "such evidence is entitled to as much weight as other kinds of evidence." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989); *see also State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999) ("While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence."). *Al-Naseer*, consistent with this prior case law, reiterates that convictions based on circumstantial evidence warrant heightened scrutiny upon review. 788 N.W.2d at 473. But nothing in *Al-Naseer* suggests that circumstantial evidence satisfying the heightened scrutiny standard is somehow less competent evidence in support of guilt than direct evidence.

Appellant cites no authority in support of her claim that the law prefers direct evidence over circumstantial evidence, and case law supports the instruction that the law does not prefer one form of evidence over the other. The district court did not abuse its discretion in instructing the jury with CRIMJIG 3.05, which remains an accurate statement of the law.

Affirmed.