

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1893**

State of Minnesota,
Respondent,

vs.

Kelly Lynn Wise,
Appellant.

**Filed December 4, 2017
Affirmed
Florey, Judge**

Meeker County District Court
File No. 47-CR-15-541

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota; and

Brandi Schiefelbein, Meeker County Attorney, Litchfield, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Jesson, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

FLOREY, Judge

On appeal from her convictions of fifth-degree possession of a controlled substance
and possession of drug paraphernalia, appellant argues that the circumstantial evidence was

insufficient to prove that she constructively possessed a pipe with traces of methamphetamine found in a locked safe. Because the evidence was sufficient, we affirm.

FACTS

Appellant Kelly Lynn Wise lived in a house with her significant other, M.H., and her son, C.W. Appellant and M.H. shared a bedroom. M.H.'s son, N.H., also occasionally stayed at the home. On the morning of June 10, 2015, law enforcement executed a search warrant at the home; agents had previously arranged controlled buys of methamphetamine from N.H. and believed that he was residing at that location.

After entering, officers found appellant and M.H. in their bedroom. No one else was home. The bedroom contained a security-camera monitor, providing a view of the home's front entrance. In the bedroom, a plastic bin contained appellant's mail; two large shards of a substance that field-tested positive for methamphetamine; a pipe that field-tested positive for methamphetamine; a scale; drug paraphernalia; and over \$1,000 in cash, including money that had been used in the aforementioned controlled buys to purchase methamphetamine from N.H. On a shelf, behind a child's picture in a frame with "mommy" written across the top, was a water bong that field-tested positive for methamphetamine.

A locked safe was also discovered on a shelf in the bedroom, and after breaking it open, officers found two car titles, one belonging to appellant and one belonging to M.H., as well as two pipes in an eyeglasses case. One of those pipes found in the safe was tested by the Bureau of Criminal Apprehension (BCA) and contained trace amounts of methamphetamine.

Officers searched two upstairs bedrooms, one belonging to C.W. and one belonging to N.H., and discovered methamphetamine paraphernalia in both bedrooms and methamphetamine in N.H.'s room. A further search of the house turned up additional drugs and paraphernalia. In the kitchen, officers found marijuana, baggies, and a "snort straw." In the basement, officers found baggies and paraphernalia.

Appellant was arrested and gave a short recorded statement. She stated that she could not recall the last time she used methamphetamine, but it had "been a while." When asked if she would test positive for methamphetamine, she responded that she did not know. A statement was also taken from M.H., who admitted to being a regular methamphetamine user.

On June 24, 2016, an amended complaint was filed charging appellant with third-degree possession of methamphetamine, fifth-degree possession of methamphetamine, and possession of drug paraphernalia.

A two-day jury trial was held. At the start of trial, the district court dismissed the third-degree possession charge.¹ N.H. testified for the defense that the day before the search, he was using his scale to weigh methamphetamine in appellant and M.H.'s bedroom. Appellant and M.H. returned home, so he put his methamphetamine and other paraphernalia into the plastic bin in their room. He testified that the safe was sometimes open and sometimes closed, but he did not put anything into the safe when they returned home. He also testified that he did not know the combination to the safe.

¹ The charge was dismissed because the large shards of methamphetamine had not been weighed and tested by the BCA.

Appellant was convicted of fifth-degree possession of methamphetamine for the trace amounts of methamphetamine found on the pipe in the safe. She was also found guilty of a petty-misdemeanor count of possession of drug paraphernalia for possessing that same pipe.² This appeal followed.

DECISION

Appellant argues that there was insufficient evidence to convict her of possessing the methamphetamine pipe found in the safe. In considering her claim of insufficient evidence, we conduct “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). We assume that “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). The verdict will not be disturbed if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that appellant is guilty of the charged offenses. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant was convicted of fifth-degree possession of a controlled substance, a violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2014), which prohibits persons from unlawfully possessing “one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV, except a small amount of marijuana.” Methamphetamine is a

² The parties agree that appellant’s convictions are based upon the methamphetamine pipe found in the safe.

Schedule II controlled substance. Minn. Stat. § 152.02, subd. 3(d)(2) (2014). Appellant was also found guilty of the petty-misdemeanor offense of possessing drug paraphernalia, a violation of Minn. Stat. § 152.092 (2014). The term “drug paraphernalia” generally includes all equipment that is intentionally used to manufacture, introduce into the body, test, or enhance an illicit controlled substance. *See* Minn. Stat. § 152.01, subd. 18 (2014).

Possession of contraband “may be proved through actual or constructive possession.” *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015). Actual possession involves direct physical control over something. *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016). There is no evidence of appellant’s actual possession of the methamphetamine pipe, so we must look to constructive possession. The constructive-possession doctrine is intended to “include within the possession statute those cases where the state cannot prove actual or physical possession at the time of arrest but where the inference is strong that the defendant at one time physically possessed the substance and did not abandon his [or her] possessory interest.” *State v. Florine*, 303 Minn. 103, 104-05, 226 N.W.2d 609, 610 (1975). Establishing constructive possession requires either “proof that the item was in a place under the defendant’s exclusive control to which other people did not normally have access” or “proof of a strong probability that the defendant was at the time consciously exercising dominion and control over it, even if the item was in a place to which others had access.” *Barker*, 888 N.W.2d at 353-54 (quotations omitted). Constructive possession need not be exclusive; possession of contraband may be shared. *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). However, appellant must have knowingly possessed the contraband. *See Florine*,

303 Minn. at 104, 226 N.W.2d at 610 (stating that there must be conscious possession of a controlled substance and actual knowledge of its nature); 10A *Minnesota Practice*, CRIMJIG 20.36 (2015) (requiring a jury to find the defendant knew or believed the substance was a controlled substance).

Appellant argues that we should review the sufficiency of the evidence under the heightened circumstantial-evidence standard, while the state asserts that a direct-evidence standard may apply. A direct-evidence standard may be applicable in cases of constructive possession when there is direct evidence that the area where the contraband was found was under the defendant's exclusive control, for example, where there is direct evidence that no one but the defendant occupied a particular room in a house where contraband was discovered. *Salyers*, 858 N.W.2d at 160-61; see *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016) (stating that when a disputed element is sufficiently proven by direct evidence, a direct-evidence standard of review applies). Here, however, a circumstantial-evidence standard applies because there was no evidence that appellant had exclusive control over the house, the bedroom, or the safe, and her exercise of dominion and control over the pipe was based on inference. We therefore apply a circumstantial-evidence standard of review to determine if there is sufficient "proof of a strong probability that [appellant] was at the time consciously exercising dominion and control over [the pipe]." *Barker*, 888 N.W.2d at 353-54 (quotation omitted).

Under the circumstantial-evidence standard, we review the evidence using a two-step analysis: we first identify the circumstances proved, deferring "to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted

with the circumstances proved by the [s]tate.” *State v. Robertson*, 884 N.W.2d 864, 871 (Minn. 2016) (quotations omitted). Second, we “independently examine the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt.” *Id.* (quotations omitted). “In order to sustain a conviction based on circumstantial evidence, the reasonable inferences that can be drawn from the circumstances proved as a whole must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotation omitted). We must view not only the circumstances proved as a whole, but also must consider the inferences drawn therefrom as a whole. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017).

Here, the circumstances proved are that appellant and M.H. shared a bedroom and both used methamphetamine. Methamphetamine, paraphernalia, a scale, a large amount of cash, and appellant’s mail were found in a plastic bin in their room. On a shelf in their room was a water bong that had been used to smoke methamphetamine. Inside a locked safe in their room was a pipe containing traces of methamphetamine. Both appellant’s and M.H.’s car titles were in that locked safe. The safe was sometimes left open, but N.H. did not know the combination.

The circumstances proved are consistent with the hypothesis that appellant and M.H. jointly possessed the methamphetamine pipe found in the safe. Appellant and M.H. both used methamphetamine. The locked safe was in their shared bedroom, the room where they were found when the search warrant was executed. No one else was home. “Proximity is an important consideration in assessing constructive possession,” and

“constructive possession need not be exclusive, but may be shared.” *Smith*, 619 N.W.2d at 770. Appellant’s and M.H.’s proximity to the locked safe indicates that its contents were under their joint control. Both appellant’s and M.H.’s car titles were in the safe, further suggesting that the contents of the safe were under their joint control. *See State v. Colsch*, 284 N.W.2d 839, 841 (Minn. 1979) (concluding there was sufficient evidence of constructive possession when papers identifying the defendant and the defendant’s checkbook were found near the drugs); *State v. Carr*, 311 Minn. 161, 163, 249 N.W.2d 443, 445 (1976) (concluding there was sufficient evidence of constructive possession when papers identifying the defendant were found in the same drawer as the drug paraphernalia).

Appellant argues that the circumstances allow for the reasonable inference that the pipe belonged solely to M.H., C.W., or N.H. We disagree. N.H. testified that he did not know the combination to the safe. Despite acknowledging possession of the large shards of methamphetamine and other paraphernalia found in the plastic bin, N.H. did not claim ownership of the pipe found in the safe. It is unreasonable to infer that the pipe belonged to N.H. Likewise, C.W. testified that he did not use methamphetamine, and even if he did, it is unreasonable to infer that C.W. kept his methamphetamine pipe in appellant and M.H.’s room. As to M.H., it is unreasonable to infer that the methamphetamine pipe was solely his. The safe was a space utilized by both appellant and M.H., and it was located in their shared bedroom. Both appellant and M.H. used methamphetamine, and the circumstances indicate that they used it openly. For example, a water bong that field-tested positive for methamphetamine was in their room, largely unconcealed. It is unreasonable

to infer that only M.H. exercised dominion and control over the methamphetamine pipe found in the safe.

The evidence in this case constitutes proof of a strong probability that appellant and M.H. were jointly and consciously exercising dominion and control over the methamphetamine pipe found in the safe. *Barker*, 888 N.W.2d at 353-54. Viewing the evidence in the light most favorable to the conviction, the jury could have reasonably concluded, beyond a reasonable doubt, that appellant was guilty of the charged offenses.

Affirmed.