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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0148**

State of Minnesota,
Respondent,

vs.

Jeriod David Knerr,
Appellant.

**Filed January 22, 2018
Reversed
Bratvold, Judge**

Isanti County District Court
File No. 30-CR-15-80

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

Jeffrey R. Edblad, Isanti County Attorney, Robert C. Bieniek, Assistant County Attorney,
Cambridge, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant challenges his conviction of second-degree possession of
methamphetamine by raising two issues: (1) the circumstantial evidence of appellant's guilt

is insufficient to eliminate reasonable hypotheses inconsistent with his guilt and (2) the prosecutor engaged in prejudicial misconduct. Because we conclude that the evidence is insufficient to eliminate a reasonable hypothesis inconsistent with guilt but consistent with the circumstances proven, we reverse appellant's conviction.

FACTS

Around 1:30 a.m. on May 6, 2014, Sheriff's Deputy Jonathan Vandervegt was traveling eastbound in a marked squad car on 275th Avenue in Isanti County.¹ According to Vandervegt, he was patrolling a known "drug area" and he had made "multiple drug arrests in [the] area" before that evening. On May 6, he patrolled for several hours, but saw no other vehicles until he passed a Dodge Dakota pickup truck traveling in the opposite direction. Because Vandervegt noticed one of the pickup's taillights was out, he decided to follow the pickup. As he turned his car around, the pickup accelerated. Vandervegt continued to follow the pickup as it turned left onto Flora Street, where it slowed down to a normal speed. Vandervegt also turned onto Flora Street and activated his emergency lights. The pickup stopped on the shoulder.

As Vandervegt walked over to the pickup, he noticed the driver's side window was already open, which struck him as "a little peculiar" since it was about 46 degrees. Appellant Jeriod David Knerr was in the driver's seat, and a woman was in the passenger seat. Vandervegt saw that Knerr's "hand and leg were shaking violently and [there was] heavy perspiration on his forehead." Knerr told Vandervegt that he accelerated when he

¹ The evidence at trial included a map depicting the area and location of key events. It is attached to this opinion.

did because he thought that the deputy's vehicle was actually a car that was "harassing . . . or stalking" Knerr and his companion in an earlier "road rage" incident. Vandervegt rejected this answer because Knerr and his companion "should have been able to clearly observe [the deputy's] fully marked squad car." As he spoke with Knerr, Vandervegt saw a "high powered butane lighter" that was "commonly used for smoking controlled substances" inside the pickup.

Vandervegt asked Knerr and the passenger to exit the pickup, then retrieved a K-9 dog from the squad car to do a narcotics sniff. According to Vandervegt, the K-9 "came into the odor of a controlled substance on the driver's side and indicated near the rear of the cab area and then as I detailed him further forward . . . he actually stuck his head in the open driver's window and again indicated to the presence of an odor of a controlled substance." As a result, Vandervegt searched the pickup interior, but did not find any contraband. Vandervegt did not think that Knerr was under the influence of any intoxicants and released him with an equipment violation warning.

Nonetheless, Vandervegt's observations of Knerr and the passenger made him suspect that he had somehow missed drugs that had been in the vehicle. Although Vandervegt had not seen any drugs tossed from pickup as he followed it before the stop, he decided to search Knerr's driving route to look for drugs. About 150 feet behind where the pickup had pulled over on Flora Street, Vandervegt "found a scale which is commonly used for weighing controlled substance[s]." According to Vandervegt, the scale appeared to be "freshly deposited there" because it was "clean" and he "didn't see any dirt or grime or anything indicating" that the scale had been there long. Meanwhile, a second deputy,

Noah Heiller, searched 275th Avenue and found two small baggies of “glass crystal-like shards” lying in the eastbound lane, between Flora Street and the point on 275th Avenue where Vandervegt had passed the pickup. The Minnesota Bureau of Criminal Apprehension (BCA) later determined that the two baggies together contained over six grams of methamphetamine.

The state charged Knerr with possessing a controlled substance in the second-degree under Minn. Stat. § 152.022, subd. 2(a)(1) (2014). The state called three witnesses at trial: Vandervegt, Heiller, and an investigator for the sheriff’s office, who testified regarding forensic testing. The investigator testified that the BCA declined to test for DNA on the baggies and the scale. The investigator also testified that analysis of a fingerprint on the scale was inconclusive.

Vandervegt testified that the baggies’ location on the road showed that “it would have had to have come from the driver’s window or the left side” of a vehicle traveling westbound down 275th Avenue. He also testified that the crystals of methamphetamine in the baggies were unbroken and that the baggies themselves “appeared to be in pristine condition,” as though they had not “been hit by any vehicles or disturbed” and “had just fallen on the roadway.” But Vandervegt also testified that the drugs “possibly” could have been there before Knerr drove by because he had “no idea” how long they were in the road.

The jury found Knerr guilty and the district court committed Knerr to the commissioner of corrections to serve a sentence of 108 months. Knerr appeals.

DECISION

Knerr argues that the evidence was insufficient to convict him because there are reasonable inferences from the circumstances proved that are inconsistent with his guilt. Generally, when a defendant challenges the sufficiency of the evidence, we “conduct[] ‘a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction,’ is sufficient to allow the jurors to reach a verdict of guilty.” *State v. Porte*, 832 N.W.2d 303, 307 (Minn. App. 2013) (quoting *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012)).

The parties agree the state offered only circumstantial evidence that Knerr possessed methamphetamine. We review a conviction based on circumstantial evidence under heightened scrutiny. *State v. Nelson*, 812 N.W.2d 184, 188 (Minn. App. 2012). Minnesota courts use a two-part test to evaluate sufficiency of circumstantial evidence. *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017). First, the court “identif[ies] the circumstances proved and independently consider[s] the reasonable inferences that can be drawn from those circumstances, when viewed as a whole.” *Id.* When determining the circumstances proved, the court defers, according to the standard of review, to the jury’s acceptance of evidence or rejection of evidence that conflicts with the circumstances the state proved. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010).

Second, the court must determine that “the reasonable inferences that can be drawn from the circumstances proved as a whole [are] consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *State v. Fox*, 868 N.W.2d 206, 223 (Minn. 2015). We undertake this second step under a de novo

standard of review because the inferences the jury drew receive no deference. *Al-Naseer*, 788 N.W.2d at 474. Mere speculation or conjecture cannot serve as the basis for any rational hypothesis inconsistent with the guilty verdict. *Id.* at 480.

The elements of second-degree possession of a controlled substance require the state to prove that Knerr (1) knowingly possessed the substance; (2) knew or believed the substance was a controlled substance; (3) had no lawful authority to possess the controlled substance; and (4) had possession on May 6, 2014, in Isanti County. *See* Minn. Stat. § 152.022, subd. 2(a); *State v. Papadakis*, 643 N.W.2d 349, 354 (Minn. App. 2002) (outlining the elements of possession crimes). The state may prove that the defendant actually or constructively possessed the drugs. *State v. Porte*, 832 N.W.2d 303, 308 (Minn. App. 2013).

The state's theory was that Knerr constructively possessed the drugs.² Proving constructive possession requires that the state show either

(1) that the prohibited item was found “in a place under defendant’s exclusive control to which other people did not normally have access,” or (2) if the prohibited item was found “in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.”

² We have previously stated that actual possession may be proven even when a defendant does not physically possess the contraband at the moment of arrest. *State v. Barker*, 888 N.W.2d 348, 354 (Minn. App. 2016) (reversing district court’s order dismissing charges for lack of probable cause). For example, the state may prove actual possession by evidence that the defendant at one time physically possessed the contraband. *Id.* Here, the state and Knerr address only constructive possession; therefore, we analyze the case only under the tenets of constructive possession, even though actual possession may be the more applicable standard. *See id.* at 354.

State v. Salyers, 858 N.W.2d 156, 159 (Minn. 2015) (quoting *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975)). The deputies found the drugs on a public highway, which is not “in a place under defendant’s exclusive control to which other people did not normally have access.” *Florine*, 226 N.W.2d at 611. Accordingly, in order to prove Knerr possessed the drugs, the state needed to show that there was a strong probability that Knerr was consciously exercising dominion and control over the drugs.

The state proved the following circumstances. (1) Knerr was driving a pickup westbound on 275th Avenue around 1:30 a.m. on May 6, 2014, and had a passenger with him. (2) The deputy, while traveling eastbound, passed the pickup, saw one of its taillights was out, and then turned around to follow the pickup. (3) Knerr accelerated his speed on 275th Avenue as the deputy began to follow him. (4) Knerr turned left onto Flora Street, slowed down to a normal speed, and then pulled over after Vandervegt activated his emergency lights. (5) The deputy did not see anything thrown from the pickup while he was following it. (6) When the deputy approached the pickup, the driver’s side window was already down, which the deputy thought was “peculiar” given that the temperature was approximately 46 degrees. (7) Knerr was sweating, and his hand and leg were shaking. (8) Knerr admitted that he accelerated after seeing the deputy’s car turn around and explained that he thought he was being followed by a vehicle from an earlier “road rage” incident. (9) A torch “commonly used” for ingesting controlled substances was in the pickup. (10) The K-9 dog performed a narcotics sniff of the pickup and “indicated” the presence of an odor of a controlled substance on the driver’s side, the rear of the cab, and the driver’s open window. (11) The deputy searched but did not find any controlled

substances in the pickup. (12) Knerr did not appear to be under the influence of any intoxicants. (13) The deputies searched the area on Flora Street and 275th Avenue, following the path that Knerr traveled after passing the deputy. (14) During their search, the deputies found a scale along Flora Street, about 150 feet away from where the deputy had pulled Knerr over. (15) The scale was “clean,” had no “dirt or grime” and appeared to have been “freshly deposited” there. (16) The deputies also found two unmarked baggies with a crystal-like substance lying in the eastbound lane of 275th Avenue. (17) The location of the baggies in the roadway suggested they may have been discarded out of the driver’s side of a vehicle heading westbound down 275th Avenue. (18) The substance in the baggies had “large shards” that “had not been broken down” and the baggies were in “pristine condition” and did not appear to have “been hit by any vehicles or disturbed.” (19) The deputy had seen “zero traffic” in the area before he saw Knerr and was patrolling a known “drug area.” (20) Investigators found a partial fingerprint on the scale, but could not conclusively match it to Knerr. (21) Investigators did not test either the scale or the baggies for DNA. (22) Testing of the baggie contents confirmed six grams of methamphetamine.

We acknowledge that the jury could have reasonably inferred Knerr possessed the methamphetamine from the circumstances proved. Under the applicable standard of review, however, the circumstances proved must support no reasonable hypothesis inconsistent with guilt. Knerr argues that there are two reasonable hypotheses from the circumstances proved that are inconsistent with his guilt: (1) the passenger possessed the drugs without Knerr’s knowledge or (2) someone besides Knerr or his passenger abandoned the drugs before or after Knerr drove by. Because we determine that Knerr’s

first hypothesis is reasonable and inconsistent with his guilt, we do not address his second hypothesis.

The state argues that Knerr's first hypothesis is not reasonable for three reasons. First, the state contends that the drug's placement in the eastbound lane is inconsistent with someone throwing the drugs from the passenger side of a pickup travelling in the westbound lane. Second, the state points out that the K-9 dog "indicated" on the driver's side of the pickup. Lastly, the state argues that the jury reasonably could have concluded that Knerr jointly possessed the drugs with his passenger.

The state presents valid inferences as to why Knerr's first hypothesis is unlikely, but not unreasonable; therefore we do not accept the state's inferences under the applicable standard of review. The record contains no evidence that the drugs could not have landed in the eastbound lane if the passenger threw them out of a vehicle travelling in the westbound lane. Instead, the deputy testified that the location of the baggies was "consistent" with being thrown out of the open driver's window of a westbound vehicle. Moreover, the state offered no evidence showing that the passenger did not reach across Knerr to throw the drugs out of the driver's side of the pickup. Lastly, the state's argument that the jury "may have also considered the possibility that the methamphetamine was possessed jointly" is unavailing because joint possession is only one of the rational inferences from these facts, and the inferences of the jury do not receive any deference.³ *Al-Naseer*, 788 N.W.2d at 474.

³ Under Minnesota law, if a defendant is charged with violating, among other enumerated statutes, section 152.022, "[t]he presence of a controlled substance in a passenger

Further, this court has stated that typically Minnesota courts have “upheld convictions based on circumstantial evidence” only when there is “evidence tying a defendant directly to the illegal items.” *Sam*, 859 N.W.2d at 835. For example, courts have upheld convictions based on circumstantial evidence where “the items were found in the defendant’s home, effects identifying the defendant were found near or on the items, the defendant admitted possession of the items, or there was testimony at trial accusing the defendant of possessing the items.” *Id.* (citations omitted). There is no evidence in this case directly tying Knerr to the drugs, apart from the reasonable inference that the drugs were in his pickup before they landed on the road. Because the evidence also supports the reasonable inference that the passenger exclusively possessed the drugs, we reject the state’s theory. *See id.* at 834 (stating that proximity may be considered in establishing possession, but holding that mere proximity to drugs in vehicle was insufficient to establish possession when another passenger was in vehicle).

Knerr’s hypothesis also finds support in recent Minnesota Supreme Court caselaw. In *Harris*, the supreme court reversed a conviction based on circumstantial evidence. 895 N.W.2d at 603. Harris was driving a car at night with two passengers, one of whom police were actively seeking based on an arrest warrant. *Id.* at 596. After an officer activated his

automobile permits the factfinder to infer knowing possession of the controlled substance by the driver or person in control of the automobile when the controlled substance was in the automobile.” Minn. Stat. § 152.028, subd. 2 (2014). Neither party addresses section 152.028 in this appeal. In *State v. Sam*, this court stated that section 152.028 merely “permits the inference that a driver has knowing possession of everything in the vehicle” and so “it does not negate other reasonable inferences” and thus has no effect on the circumstantial-sufficiency-of-the-evidence test. 859 N.W.2d 825, 832 n.4 (Minn. App. 2015).

lights and siren, Harris continued driving for another three blocks at a speed of 30 miles per hour, during which the officer saw movement inside the car. *Id.* at 596-97, 603. Harris stopped his car when the officer pulled alongside. *Id.* at 597. During a search of the vehicle, the officer noticed that the “headlining had been pulled down near the sunroof,” which created a small void. *Id.* at 602. The officer found a handgun in that void. *Id.* at 597. Investigators found a mixture of male and female DNA from five or more people on the firearm. *Id.* Testing revealed that the DNA could have belonged to Harris or another passenger in the car, but not 75.7% of the population. *Id.* Based on this evidence, the supreme court held that it was reasonable to infer that Harris did not know the firearm was in the car. *Id.* at 602-03. In doing so, the supreme court concluded that it was reasonable to infer that Harris failed to immediately stop the car because he knew one of his passengers was subject to an arrest warrant. *Id.* at 603.

Relying on *Harris*, Knerr argues that it is reasonable to infer that the passenger possessed the drugs. Like the evidence in *Harris*, the evidence against Knerr includes no forensic evidence linking him to the drugs and another passenger was in the car throughout the relevant time period. Additionally, Knerr sped up, then turned off the road after seeing a squad car follow him, which is similar to Harris’s failure to immediately stop.

The state attempts to distinguish *Harris* in three ways, all of which are unavailing. First, the state argues that the weapon in *Harris* was wedged in such a way that the driver might not have been able to see it, and that the car did not belong to Harris. But it is reasonable for a passenger in Knerr’s pickup to hide the drugs so that Knerr, like Harris, did not know of the contraband until the passenger threw it out the window. Second, the

state contends that there was no testimony indicating that Harris moved toward the firearm, while the state presented evidence from which it argued that Knerr threw the drugs out of the pickup. But all of the state's evidence suggesting that Knerr threw the drugs out of the window also supports the inference that the passenger discarded the drugs. Third, the state argues that Harris had a plausible reason for not stopping at the police officer's command, while Knerr did not. But even if we assume that the jury rejected Knerr's "road rage" explanation as implausible, Knerr's evasive driving does not mean he knowingly possessed the drugs. As a result, we conclude that the circumstantial evidence against Knerr was insufficient to convict him of second-degree possession of a controlled substance.

Because we reverse Knerr's conviction, we do not address his contentions of prosecutorial misconduct. We do note, however, that the prosecutor in this case clearly erred by stating "[w]e did—[w]e did try or make an attempt to, you know, establish the possession by the fingerprints, you know, again, it just didn't happen, so but if it had we probably wouldn't be having a trial in this matter." The Minnesota Supreme Court has "made it clear that the state will not be permitted to deprive a defendant of a fair trial by means of insinuations and innuendos which plant in the minds of a jury a prejudicial belief in the existence of evidence which is otherwise inadmissible." *State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994) (quotations omitted). Here, the state did not successfully gather forensic evidence and suggesting that such evidence would have shown Knerr's guilt was clear prosecutorial misconduct.

Reversed.

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