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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0188**

State of Minnesota,
Respondent,

vs.

Bryan Alan Bemboom,
Appellant.

**Filed December 26, 2017
Reversed
Johnson, Judge**

Pine County District Court
File No. 58-CR-16-320

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Reese Frederickson, Pine County Attorney, Pine City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

JOHNSON, Judge

A Pine County jury found Bryan Alan Bemboom guilty of possession of methamphetamine. The jury's verdict is based primarily on evidence that a law-

enforcement officer found two small packages of methamphetamine in the underwear of a person who was in the front passenger seat of the car that Bemboom was driving when he was stopped by a state trooper. In closing arguments, the prosecutor asked the jury to infer either that, before the traffic stop, Bemboom actually possessed the methamphetamine that later was found in the passenger's underwear or that, after the traffic stop, Bemboom constructively possessed the methamphetamine while it was hidden in the passenger's underwear. We conclude that the state's circumstantial evidence is insufficient to support Bemboom's conviction because it allows for multiple reasonable inferences, including the reasonable inference that Bemboom's passenger solely possessed the methamphetamine that was found in her underwear. Therefore, we reverse Bemboom's conviction.

FACTS

On April 5, 2016, at approximately 11:00 a.m., State Trooper Westbrook checked the registration status of a car that he observed driving on state highway 48 in Pine County. After learning that the car's registration had expired, the trooper activated his emergency lights to initiate a traffic stop. The driver of the car did not immediately stop but eventually turned into the entrance of the Grand Casino and stopped in the parking lot of a nearby hotel.

As Trooper Westbrook approached the car, he saw a man in the driver's seat, who later was identified as Bemboom, and a woman in the front passenger seat, who later was identified as Allison Ripka. When Trooper Westbrook approached the driver's side of the car, he asked Bemboom to provide his identification, but Bemboom initially kept his hands in his pockets. Trooper Westbrook noticed that Bemboom was shaking and that his hands

were sweaty and clammy. Trooper Westbrook asked Bemboom to step out of the car so that he could perform a pat-down search. As the trooper performed a pat-down search of Bemboom, he perceived that Bemboom was attempting to block the trooper's view of the interior of the car. The trooper found two butane lighters in a front pocket of Bemboom's sweatshirt and a marijuana pipe in a front pocket of his jeans. The trooper detained Bemboom in the back seat of his squad car.

The trooper returned to the car and asked Ripka to get out of the car so that he could search it. While searching the car, the trooper found a digital scale with white powder residue on the driver's seat; one-half of a Viagra pill on the passenger seat; and an empty, unlabeled prescription pill bottle with the cap removed on the floor of the back of the car, near the center console. After searching the car, the trooper detained Ripka in the front seat of the squad car because she provided false identification. While the trooper searched the car a second time, Ripka opened the front passenger door of the squad car and fled on foot. The trooper apprehended her behind the casino approximately six minutes later.

While Bemboom and Ripka were detained in the squad car, Bemboom talked to himself, and he and Ripka talked to each other. Their statements and conversations were recorded by the squad car's dashboard video-camera. Nine excerpts were played for the jury. In the first excerpt, Bemboom said to himself, "I'm so f--ked." In the second excerpt, Bemboom asked Ripka, "Where's the stuff? Where's the sh-t?" Ripka responded, "In my crotch." Later Bemboom said to Ripka, "Get them out now, throw them." Later still, after Ripka fled and was apprehended, Bemboom said that he hoped she "got rid of it."

Trooper Westbrook eventually transported Bemboom and Ripka to the Pine County jail. Upon their arrival, Corrections Officer Dixon performed an intake search of Ripka. When Officer Dixon instructed Ripka to remove her underwear, Ripka refused and attempted to push something into her vagina. After Officer Dixon repeated the instruction to remove her underwear, Ripka complied, and two small packages of a crystalline substance fell to the floor. The contents of the packages later were tested and determined to be approximately 6.4 grams of methamphetamine. During an intake search of Bemboom, a law-enforcement officer found \$660 in cash in a front pocket of his jeans.

Trooper Westbrook later performed an inventory search of the car that Bemboom had been driving. In that search, the trooper found a zippered shaving kit that contained, among other things, multiple empty baggies, another digital scale, a methamphetamine pipe, and multiple prescription pill bottles with Bemboom's name on the labels. In the trunk of the car, the officer found a large marijuana bong and a prosthetic device that a man could use to provide a falsified urine sample.

The state charged Bemboom with four offenses: (1) felony third-degree controlled-substance crime, in violation of Minn. Stat. § 152.023, subd. 2(a)(1) (2014); (2) felony fifth-degree controlled-substance crime, in violation of Minn. Stat. § 152.025, subd. 2(b)(1) (2014); (3) gross-misdemeanor driving after cancellation of a driver's license as inimical to public safety, in violation of Minn. Stat. § 171.24, subd. 5 (2014); and (4) felony second-degree controlled-substance crime, in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2014). Each of the three controlled-substance charges is based solely on the

allegation that Bemboom possessed the methamphetamine that was found in Ripka's underwear at the jail.

Bemboom pleaded guilty to the charge of driving after cancellation of his driver's license. The three controlled-substance charges were tried to a jury on two days in June 2016. The state called three witnesses: Trooper Westbrook, Officer Dixon, and an employee of the bureau of criminal apprehension. The state introduced 15 exhibits, including excerpts from the video- and audio-recording of Bemboom and Ripka in Trooper Westbrook's squad car. Bemboom did not present any evidence.

In closing arguments, the prosecutor urged the jury to find Bemboom guilty on the ground that he possessed the two small packages of methamphetamine that were found in Ripka's underwear. The prosecutor acknowledged the possibility "that Ms. Ripka is the sole possessor of these drugs" but argued that she did not act independently and that she was helping Bemboom by hiding his methamphetamine. The jury found Bemboom guilty of all three controlled-substance charges. The district court imposed a sentence of 44 months of imprisonment on count 4, which is a downward durational departure from the presumptive guidelines sentencing range, and a concurrent sentence of 180 days on count 3. Bemboom appeals.

D E C I S I O N

Bemboom makes three arguments on appeal. First, he argues that the state's evidence is insufficient to support his controlled-substance conviction. Second, he argues that the district court erred by admitting certain evidence. Third, he argues that he is

entitled to a reduction in the severity level of his offense and entitled to be resentenced in light of the Drug Sentencing Reform Act of 2016.

We begin by considering Bemboom’s challenge to the sufficiency of the evidence. When reviewing whether there is sufficient evidence to support a conviction, this court undertakes a “painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient” to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). “[W]e will not disturb the verdict 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 the defendant was guilty of the charged offense.” *Ortega*, 813 N.W.2d at 100.

Bemboom underscores that the state did not introduce any direct evidence that he actually possessed the methamphetamine that was found in Ripka’s underwear, such as DNA or fingerprint evidence. The parties agree that Bemboom’s conviction rests on circumstantial evidence and that this court should apply the standard of review that is appropriate for circumstantial evidence. When reviewing a conviction based on circumstantial evidence, this court applies a two-step analysis to determine the sufficiency of the evidence. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we “identify the circumstances proved.” *Id.* (citing *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). “In identifying the circumstances proved, we assume that the jury resolved any factual

disputes in a manner that is consistent with the jury's verdict." *Id.* (citing *Andersen*, 784 N.W.2d at 329). Second, we "examine independently the reasonableness of the inferences that might be drawn from the circumstances proved" and "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotations omitted). We must consider the evidence as a whole and not examine each piece of evidence in isolation. *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). "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." *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017) (internal quotation omitted).

"A person is guilty of controlled substance crime in the second degree if . . . the person unlawfully possesses one or more mixtures of a total weight of six grams or more containing cocaine, heroin, or methamphetamine" Minn. Stat. § 152.022, subd. 2(a)(1). Bemboom contends that the state's circumstantial evidence is insufficient to prove beyond a reasonable doubt that he possessed the methamphetamine that was found in Ripka's underwear. In response, the state contends that Bemboom possessed the methamphetamine that was found in Ripka's underwear in two alternative ways. First, the state contends that Bemboom *actually* possessed the methamphetamine that was found in Ripka's underwear while he was driving the car, before the traffic stop. Second, the state contends that Bemboom *constructively* possessed the methamphetamine that was found in Ripka's underwear while it was hidden in her underwear. The state's contentions align

with the applicable caselaw, which states that “[p]ossession may be proved through evidence of actual or constructive possession.” *See Harris*, 895 N.W.2d at 601 (reviewing conviction for unlawful possession of firearm). We will consider the state’s two theories in series.

A. Actual-Possession Theory

We first consider whether the state’s circumstantial evidence is sufficient to prove that Bemboom actually possessed the methamphetamine that was found in Ripka’s underwear. The state contends that Bemboom actually possessed the methamphetamine that was found in Ripka’s underwear “at an earlier time, while [Bemboom] was still in the vehicle.”

At the first step of the circumstantial-evidence analysis, we must identify the circumstances proved that are potentially relevant to the question whether, before the traffic stop, Bemboom actually possessed the methamphetamine that was found in Ripka’s underwear. *See Moore*, 846 N.W.2d at 88. The relevant circumstances are the circumstances stated above in our recitation of the facts of the case.

At the second step of the analysis, we must “examine independently the reasonableness of the inferences that might be drawn from the circumstances proved” and “determine whether the circumstances proved are consistent with guilt.” *Moore*, 846 N.W.2d at 88 (quotations omitted). The state’s theory is “that the two baggies of methamphetamine were originally contained in the prescription bottle inside [Bemboom’s] pocket,” that Bemboom “ditched the bottle onto the driver’s seat when he exited the vehicle, and that Ripka then grabbed the bottle, quickly opened it, and hid the

methamphetamine in her underwear while Trooper Westbrook was preoccupied with” Bemboom. For purposes of this opinion, we assume without deciding that one reasonable inference from the circumstances proved is that, before the traffic stop, Bemboom actually possessed the methamphetamine that later was found in Ripka’s underwear.

At the second step of the analysis, we also must determine whether the circumstances proved are “inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotation omitted). Bemboom contends that the circumstances proved are consistent with the hypothesis that he did not possess the methamphetamine that was found in Ripka’s underwear and that she alone possessed it. The state responds by reiterating the inferences that are consistent with guilt. But the state does not explain why Bemboom’s suggested inferences are not reasonable or why those inferences are inconsistent with guilt.

We see several reasons why the state’s suggested inferences are not the only reasonable inferences that may be drawn from the circumstantial evidence. Bemboom may have delayed in stopping the car for another reason. *See Harris*, 895 N.W.2d at 603 (reasoning that appellant’s “failure to immediately stop the car [does not] preclude a reasonable inference that Harris did not know the firearm was in the car”). Bemboom may have kept his right hand in his pocket for another reason, such as concealing the digital scale that was found in the car or the pipe that was found in a pocket of his jeans. Bemboom may have tried to block the trooper’s view of the interior of the car out of concern that the trooper would find the scale or the pipe. Similarly, Bemboom’s recorded statements while in the squad car indicate that he was concerned about the trooper’s investigation, but he never said that the methamphetamine was his, so his statements are not inconsistent with

the inference that the methamphetamine belonged only to Ripka. Moreover, the evidence suggesting that Bemboom is a methamphetamine user or a methamphetamine dealer does not shed light on whether, before the traffic stop, he possessed the methamphetamine that was found in Ripka's underwear. Accordingly, reasonable inferences may be drawn that are inconsistent with guilt.

Our analysis of the circumstantial evidence in this case is informed in part by a comparison of the facts of this case with the facts of prior cases concerning actual possession of controlled substances. In cases in which the supreme court and this court have affirmed convictions based on actual possession of controlled substances, the state introduced the testimony of a law-enforcement officer who found controlled substances on the defendant's person or other evidence that the defendant physically possessed controlled substances. See *State v. Olhausen*, 681 N.W.2d 21, 23-25 (Minn. 2004) (affirming conviction based on undercover agent's testimony that defendant agreed to sell him methamphetamine and later produced package of methamphetamine); *State v. Arnold*, 794 N.W.2d 397, 400-01 (Minn. App. 2011) (affirming conviction based on defendant's admission to handling and hiding methamphetamine); see also *State v. Davidson*, 351 N.W.2d 8, 9-10 (Minn. 1984) (affirming conviction of unlawful possession of firearm based on officers' testimony that defendant inserted something in pants and hid near van where firearm later was found); *State v. Loyd*, 321 N.W.2d 901, 902 (Minn. 1982) (affirming conviction of unlawful possession of firearm based on evidence that defendant threatened victim with firearm). We are unaware of any case in which a Minnesota appellate court has affirmed a conviction based on an actual-possession theory without

evidence that contraband was found on a defendant's person or other evidence that the defendant physically possessed the contraband.

The state responds to Bemboom's contentions in part by relying on *State v. Barker*, 888 N.W.2d 348 (Minn. App. 2016). In *Barker*, law-enforcement officers found methamphetamine and cocaine in a ditch near the place where the defendant had crashed his car after a high-speed chase and fled on foot. *Id.* at 351-52. The district court granted the defendant's motion to dismiss the drug-possession charge for lack of probable cause. *Id.* at 352. This court reversed on the ground that the circumstantial evidence provided probable cause to believe "that Barker actually possessed the drugs, before they were discarded out of his passenger-side window" into the ditch while fleeing from police. *Id.* at 355-56. *Barker* is distinguishable in at least two ways. First, the state obtained a statement of a confidential informant who said that the defendant had purchased drugs, and the informant's description of the type and packaging of the drugs matched the drugs that were found in the ditch. *Id.* at 351, 356. In contrast, there is no such evidence from a witness in this case. Second, the procedural posture of *Barker* was different. This court's opinion in *Barker* arose from a pre-trial appeal in which the disputed issue was probable cause. *Id.* at 351. In contrast, this appeal arises after a trial, and the disputed issue is whether the state's circumstantial evidence is sufficient to prove Bemboom's guilt beyond a reasonable doubt. The *Barker* opinion recognizes as much: "Unlike proof beyond a reasonable doubt . . . , probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* at 353 (quoting *State v. Harris*, 589 N.W.2d 782, 790-91 (Minn. 1999)).

Thus, we conclude that the circumstantial evidence allows a reasonable inference that, before the traffic stop, Bemboom did not possess the methamphetamine that was found in Ripka's underwear. Therefore, the circumstantial evidence is insufficient to prove beyond a reasonable doubt that Bemboom actually possessed methamphetamine.

B. Constructive-Possession Theory

We next consider whether the state's circumstantial evidence is sufficient to prove that Bemboom constructively possessed the methamphetamine that was found in Ripka's underwear. The supreme court has explained the constructive-possession doctrine as follows:

The purpose of the constructive-possession doctrine is 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 possessory interest in the substance but rather continued to exercise dominion and control over it up to the time of the arrest.

State v. Florine, 303 Minn. 103, 104-05, 226 N.W.2d 609, 610 (1975) (*per curiam*) (citing *Whitebread & Stevens, Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 Va. L. Rev. 751, 755 (1972)). To the extent that the state seeks to justify Bemboom's conviction on the ground of constructive possession, the state's evidence must be sufficient to prove either:

(a) that the police found the substance in a place under defendant's exclusive control to which other people did not normally have access, or (b) that, if police found it 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.

Id. at 105, 226 N.W.2d at 611. The state concedes that the first prong of the constructive-possession test does not apply in this case. Accordingly, the question is whether the state’s circumstantial evidence is sufficient under the second prong of the constructive-possession test.

Before analyzing the circumstantial evidence, we must consider Bemboom’s argument that, as a matter of law, the state cannot satisfy the second prong of the constructive-possession test because the state cannot prove that Bemboom had access to the space inside Ripka’s underwear. Bemboom contends that “[a]ccess must be proven first” and that “[w]ithout any facts establishing access to the place the drugs were found, the state cannot show dominion and control over the drugs inside.” The second prong of the constructive-possession test, as stated by *Florine*, does not necessarily require that the defendant have access to the place where contraband is found. *See id.* Rather, the second prong requires only that the state prove that the defendant “consciously exercis[ed] dominion and control over” the contraband. *See id.*; *see also State v. Hunter*, 857 N.W.2d 537, 542-43 (Minn. App. 2014). The constructive-possession analysis required by *Florine* is “necessarily fact driven.” *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015) (quotations omitted). We are unaware of any caselaw stating that, under the second prong of the constructive-possession test, a person must have access to the place where contraband is found as a pre-condition to exercising dominion and control over the contraband. Accordingly, Bemboom is incorrect in his contention that the second prong

of the constructive-possession test cannot apply, as a matter of law, to the methamphetamine that was inside Ripka's underwear.

At the first step of the circumstantial-evidence analysis, we must identify the circumstances proved that are relevant to whether Bemboom constructively possessed the methamphetamine in Ripka's underwear while it was hidden there. *See Moore*, 846 N.W.2d at 88. The relevant circumstances are the circumstances stated above in our recitation of the facts of the case.

At the second step of the analysis, we must "examine independently the reasonableness of the inferences that might be drawn from the circumstances proved" and "determine whether the circumstances proved are consistent with guilt." *Id.* (quotations omitted). The state's theory is that Bemboom "made incriminating statements in the squad car that permitted the jury to infer that the methamphetamine belonged to him, that he knew Ripka had concealed the methamphetamine in her 'crotch,' and that he was directing Ripka to get rid of it." We agree that one reasonable inference from the circumstantial evidence identified by the state is that Bemboom constructively possessed the methamphetamine that was found in Ripka's underwear.

At the second step of the analysis, we also must determine whether the circumstances proved are "inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted). Bemboom contends that "[i]t would be wrong to find a person constructively possessed drugs found in a very private place on another person." The state responds by contending that the circumstantial evidence that is consistent with an inference

of guilt is “inconsistent with a reasonable inference that appellant was *not* consciously exercising joint dominion and control over the methamphetamine.”

The video-recording allows a reasonable inference that Bemboom did not know that methamphetamine was in Ripka’s underwear until she so informed him as they were sitting in the squad car. The video-recording also allows a reasonable inference that Bemboom’s subsequent statements that Ripka should dispose of the methamphetamine were a suggestion that Ripka should take certain actions with respect to her own methamphetamine for her own benefit. These reasonable inferences are consistent with the hypothesis that Bemboom did not exercise dominion and control over the methamphetamine before *or* after Ripka told him that it was in her underwear. Furthermore, Ripka did not in fact dispose of the methamphetamine, even after fleeing on foot and being at liberty for six minutes. Under the second prong of the constructive-possession test, “the State must prove that the defendant had *an ability* and intent to exercise dominion and control over” the contraband. *Harris*, 895 N.W.2d at 602 (emphasis added). Because Bemboom did not actually cause Ripka to dispose of the methamphetamine before it was discovered by a law-enforcement officer at the jail, the circumstantial evidence allows an inference that Bemboom did *not* have an ability to exercise dominion and control over the methamphetamine that was in Ripka’s underwear.

Again, our analysis of the circumstantial evidence in this case is informed in part by a comparison of the facts of this case with the facts of prior cases concerning constructive possession of controlled substances. In cases in which the supreme court and this court have affirmed convictions based on the constructive possession of controlled substances

under the second prong of the *Florine* test, the controlled substances typically were found in a location that was so near the defendant as to be within his reach or in a location that was closely associated with the defendant. See, e.g., *State v. Cusick*, 387 N.W.2d 179, 180-81 (Minn. 1986) (affirming conviction based on evidence that cocaine was found on ground near defendant's wallet after car accident); *State v. Lorenz*, 368 N.W.2d 284, 287-88 (Minn. 1985) (affirming conviction based on evidence that marijuana was found in kitchen closet and that cocaine was found in defendant's bedroom in apartment shared with another); *State v. Wiley*, 366 N.W.2d 265, 270-71 (Minn. 1985) (affirming conviction based on evidence that marijuana and defendant's possessions were found in bedroom of home shared with others); *State v. Maldonado*, 322 N.W.2d 349, 353 (Minn. 1982) (affirming conviction based on evidence that marijuana was found under driver's seat of car, where defendant had been sitting); *State v. Carr*, 311 Minn. 161, 163, 249 N.W.2d 443, 444-45 (1976) (affirming conviction based on evidence that heroin was found in kitchen cabinet of home defendant shared with another, that drug paraphernalia was found in box with papers bearing defendant's name, and that defendant had prick marks on his arm); *State v. Mollberg*, 310 Minn. 376, 390, 246 N.W.2d 463, 472 (1976) (affirming conviction based on evidence that marijuana was found in closet of bedroom where defendant had frequently stayed as house guest and had left his belongings); *State v. Porte*, 832 N.W.2d 303, 308-09 (Minn. App. 2013) (affirming conviction based on evidence that cocaine was found in center glove compartment of vehicle that defendant had been driving); *State v. Lozar*, 458 N.W.2d 434, 437, 441 (Minn. App. 1990) (affirming conviction based on evidence that marijuana was found in defendant's garage, basement, and refrigerator), *review denied*

(Minn. Sept. 28, 1990); *see also State v. Lee*, 683 N.W.2d 309, 316-17 & n.7 (Minn. 2004) (affirming conviction of unlawful possession of firearm based on evidence that stolen firearms and marijuana were stored in defendant's garage); *State v. Olson*, 326 N.W.2d 661, 662-63 (Minn. 1982) (affirming conviction of unlawful possession of firearm based on evidence that loaded firearm was found "within reach of where defendant had been seated" in car); *State v. Willis*, 320 N.W.2d 726, 727-29 (Minn. 1982) (affirming conviction of unlawful possession of firearm based on evidence that firearm was found under seat in car where defendant had been sitting); *State v. Smith*, 619 N.W.2d 766, 770-71 (Minn. App. 2000) (affirming conviction of unlawful possession of firearm based on evidence that firearm was found under defendant's leg while he slept in driver's seat of vehicle), *review denied* (Minn. Jan. 16, 2001). We are unaware of any case in which a Minnesota appellate court has affirmed a conviction on a constructive-possession theory under the second prong of the *Florine* test based on evidence that the contraband was found on the person of another.

Thus, we conclude that the circumstances proved are consistent with a reasonable inference that Bemboom did not exercise dominion and control over the methamphetamine that was found in Ripka's underwear while it was hidden there. Therefore, the circumstantial evidence is insufficient to prove beyond a reasonable doubt that Bemboom constructively possessed methamphetamine.

In light of our conclusion that the evidence is insufficient to support Bemboom's conviction of second-degree controlled-substance crime, and because the evidence also is

insufficient to support a conviction of third- and fifth-degree controlled-substance crimes, we need not consider or resolve Bemboom's other arguments.

Reversed.