

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0442**

State of Minnesota,
Respondent,

vs.

David Garrett Tynes,
Appellant.

**Filed March 18, 2019
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Hennepin County District Court
File No. 27-CR-17-9240

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Deborah Ellis, Ellis Law Office, St. Paul, Minnesota (for appellant)

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

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

JOHNSON, Judge

After a court trial, the Hennepin County District Court found David Garrett Tynes
guilty of two criminal offenses based on evidence that he exchanged text messages with a
person with the intent to hire a 15-year-old prostitute. On appeal, Tynes challenges the

sufficiency of the evidence and the imposition of multiple sentences. We conclude that the evidence is sufficient to prove that Tynes reasonably believed that the fictitious girl with whom he exchanged text messages was under the age of 16. We also conclude that the district court erred by imposing two sentences for a single behavioral incident. Therefore, we affirm in part, reverse in part, and remand for resentencing.

FACTS

On April 12, 2017, Tynes called a telephone number in an online advertisement on backpage.com for “Princess Kylie.” The advertisement included three photographs depicting a young female and described her as 18 years old and a “very mature, sexy, sensual, and passionate woman who loves to have FUN.” The advertisement also stated that “2 girls” were “available to generous men.” The advertisement had been placed by the Minnetonka Police Department as part of a prostitution “sting” targeting men intending to engage in sexual conduct with prostitutes under the age of 16.

Police officers did not answer Tynes’s telephone call. Instead, Detective O’Keefe sent a text message to Tynes while pretending to be Princess Kylie. Detective O’Keefe texted, “hi baby.” Tynes responded by texting, “Hi – may I come and see you,” and, after a few more exchanges, “I would love to see u for an hour.” Detective O’Keefe texted, “180h,” which was intended to indicate an hourly rate of \$180, and Tynes responded, “Ok.” When Detective O’Keefe asked Tynes, “what u like?,” he responded, “FS,” which Detective Wenmark later testified is shorthand for “full service,” *i.e.*, sexual intercourse. Detective O’Keefe asked Tynes whether he liked “GFE,” and Tynes responded, “Yes.” Detective Wenmark later testified that GFE means “girlfriend experience,” *i.e.*, a

“relationship type experience” that simulates the “kinds of interactions that would be normal for a normal relationship.” Detective O’Keefe then provided Tynes with an address, saying, “text me when u get there for more.”

Detective O’Keefe next sent Tynes a text message saying, “im a little youngr than in my ad, but im professional.” After eight minutes without a response from Tynes, Detective O’Keefe texted, “baby?” After Tynes acknowledged the text, Detective O’Keefe continued the conversation by texting, “im almost 16 but I know what im doing and I want to learn more.” Tynes responded by texting, “No thanks pls don’t txt me.” Detective O’Keefe replied, “whatever.”

Approximately seven minutes later, Tynes resumed the correspondence by texting, “Here.” Detective O’Keefe wrote, “are you just f---in with me?” Tynes responded, “No.” Tynes texted again to say that he was at the address that had been given to him, which was the location of a gas station. Detective O’Keefe wrote, “ok, u hard for me? i want u ready.” Tynes responded, “Will be.” Detective O’Keefe then directed Tynes to a nearby apartment by giving him an address, an apartment number, and an access code. Tynes arrived at the apartment a few minutes later. Police officers were waiting and arrested Tynes when he knocked on the apartment door. When the officers searched him incident to his arrest, they found \$211 in cash on his person.

The state charged Tynes with two offenses: (1) hiring, offering, or agreeing to hire an individual whom he reasonably believed to be between the ages of 13 and 15 to engage in sexual penetration or sexual contact, in violation of Minn. Stat. § 609.324, subd. 1(b)(3) (2016); and (2) using an electronic-communication system to solicit a person younger than

16 years old or a person he reasonably believed to be younger than 16 years old to engage in sexual conduct, in violation of Minn. Stat. § 609.352, subd. 2a(1) (2016).

Tynes waived his right to a jury trial. A court trial was held in September 2017. The state called three witnesses, each of whom was a police officer involved in the sting operation. Tynes testified about his extensive experience hiring prostitutes, saying that he had done so approximately 75 to 100 times in the four-year period before his arrest. He testified further that he did not believe that the fictitious girl with whom he was texting was under 16 years old and also that he understood the advertisement to say that he would have a choice of two prostitutes upon his arrival.

In October 2017, the district court filed its findings of fact and verdict. The district court found Tynes guilty on both counts. With respect to Tynes's belief of the age of the fictitious prostitute, the district court made specific findings, as follows:

Defendant believed he was communicating with a person just under 16 years of age on the afternoon of April 12, 2017. There is little doubt the business of prostitution is done in code with an overlay of deception to entice the interests of potential patrons and avoid detection by authorities. But the subsequent text messages, indicating the prostitute was "almost (but not yet) 16," dispensed any reasonable ambiguity. Defendant's suggestion that he relied on prior experience as a basis for thinking the prostitute might be lying about being underage is not credible.

Defendant's claim is also undermined by his behavior. Having declined the transaction before reinitiating contact seven minutes later supports only one reasonable inference: Defendant hesitated upon initially learning that he was dealing with an underage prostitute, but decided to take the risk anyway. As such, this element is proven beyond a reasonable doubt.

At a sentencing hearing in December 2017, the district court imposed a sentence of 18 months of imprisonment but stayed execution of the sentence for three years and ordered Tynes to serve 120 days in the Hennepin County workhouse. The district court did not specify the offense for which the sentence was imposed. The warrant of commitment states that the same sentence is imposed for each offense and that the sentences are concurrent. Tynes appeals.

D E C I S I O N

I. Sufficiency of Evidence

Tynes first argues that the evidence is insufficient to support his conviction of either offense. He contends that the state did not prove beyond a reasonable doubt that he reasonably believed that the fictitious person whom he solicited and agreed to hire for sex was younger than 16 years old. Specifically, he contends that the age of the fictitious girl was ambiguous because he received “mixed messages” and that he believed that another, older prostitute would be available upon his arrival.

When reviewing the sufficiency of the evidence, we ordinarily undertake “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 will view the evidence in the light most favorable to the verdict and assume that the factfinder disbelieved any testimony conflicting with that verdict.” *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) (quotation omitted). A verdict will not be overturned if the factfinder, “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.

The above-stated standard of review applies so long as a conviction is based on direct evidence. *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016). Direct evidence is evidence that is “based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Circumstantial evidence, on the other hand, is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Id.* (quotation omitted). A conviction depends on circumstantial evidence if proof of the offense, or a single element of the offense, is based solely on circumstantial evidence. *See State v. Fairbanks*, 842 N.W.2d 297, 307 (Minn. 2014). If a conviction necessarily depends on circumstantial evidence, this court uses a heightened standard of review. *See State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010); *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). In such a case, we apply a two-step test 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 [factfinder] resolved any factual disputes in a manner that is consistent with the [factfinder’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 then “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotations omitted). We consider the

evidence as a whole rather than examine each piece in isolation. *Andersen*, 784 N.W.2d at 332.

The parties disagree as to whether Tynes's convictions are based solely on direct evidence or are based in part on circumstantial evidence. The district court's findings and conclusions do not characterize the evidence as being either direct or circumstantial. Tynes contends that, although the text messages are direct evidence of the communications themselves, his belief concerning whether Princess Kylie was younger than 16 years old depends on circumstantial evidence. In response, the state contends that the text messages between Tynes and Detective O'Keefe constitute direct evidence that Tynes reasonably believed that Princess Kylie was younger than 16 years old. The state cites two opinions in support of its contention that the reasonable-belief element is supported by direct evidence, but both opinions are concerned with a defendant's intent to commit a crime, not a defendant's belief concerning an external, verifiable fact. *See State v. Charlton*, 338 N.W.2d 26, 29-30 (Minn. 1983); *State v. Gundy*, 915 N.W.2d 757, 764-65 (Minn. App. 2018), *review denied* (Minn. Aug. 7, 2018). Because none of Tynes's text messages expressly and specifically state his belief concerning the age of the fictitious girl, we believe that the district court's verdicts necessarily rest on circumstantial evidence. Thus, we will analyze the sufficiency of the evidence under the heightened circumstantial-evidence standard of review.

At the first step of the circumstantial-evidence analysis, we must identify the circumstances proved that are potentially relevant to the question whether Tynes reasonably believed that the fictitious girl with whom he was exchanging text messages

was under the age of 16. *See Moore*, 846 N.W.2d at 88. Our identification of the circumstances proved is informed by the fact that Tynes testified at trial and by the district court’s specific findings of fact, which expressly rejected Tynes’s testimony that he did not believe that the fictitious girl was under the age of 16. This is so because an appellate court’s application of the circumstantial-evidence standard of review may not usurp the factfinder’s exclusive role in evaluating the credibility of witnesses:

As the fact finder, the jury is in a unique position to determine the credibility of the witnesses and weigh the evidence before it. *State v. Gatson*, 801 N.W.2d 134, 144 (Minn. 2011). It “is free to accept part and reject part of a witness’s testimony.” *State v. Landa*, 642 N.W.2d 720, 725 (Minn. 2002). To be clear, *the first step of our circumstantial-evidence test protects these principles—it requires an appellate court to winnow down the evidence presented at trial by resolving all questions of fact in favor of the jury’s verdict, resulting in a subset of facts that constitute “the circumstances proved.”* *See State v. Hawes*, 801 N.W.2d 659, 670 (Minn. 2011) (disregarding evidence inconsistent with the verdict).

Having preserved the jury’s credibility findings, the appellate court considers at the next step whether a reasonable inference of guilt can be drawn from the circumstances proved, viewed as a whole, and whether a reasonable inference inconsistent with guilt can be drawn from the circumstances proved, again viewed as a whole. *State v. Al-Naseer*, 788 N.W.2d 469, 474-75, 478-79 (Minn. 2010). This second step does not encroach on the jury’s credibility determinations because the act of inferring involves the drawing of permissible deductions, not actual fact finding by the jury. *See State v. Jones*, 266 Minn. 526, 124 N.W.2d 729, 731 (1963). The second part of the second step—determining whether a reasonable inference inconsistent with guilt can be drawn—also ensures that there is no reasonable doubt as to the defendant’s guilt.

Harris, 895 N.W.2d at 600-01 (emphasis added).

Accordingly, the relevant circumstances proved are as follows: Tynes exchanged text messages with Detective O’Keefe, who pretended to be Princess Kylie. In one text message, Detective O’Keefe wrote, “im almost 16.” Tynes promptly responded by texting, “No thanks pls don’t txt me.” But Tynes later resumed the exchange of text messages without further prompting by Detective O’Keefe. Thereafter, no additional information was provided to Tynes concerning Princess Kylie’s age. Tynes testified that he did not believe that Princess Kylie was younger than 16, but that part of his testimony is not credible.

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, based on Detective O’Keefe’s text message saying, “im almost 16,” Tynes reasonably believed that Princess Kylie was under the age of 16. We agree that the state’s inference is a reasonable inference in light of the circumstances proved.

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). Tynes contends that the circumstantial evidence is consistent with a rational hypothesis that he was not expecting an underage person at the apartment and believed that he would be able to choose an older prostitute upon his arrival. But that hypothesis is inconsistent with the circumstances proved, which reflect the district court’s specific finding that Tynes’s testimony on the central issue is not credible. In other words,

the inference that Tynes is not guilty is not a reasonable inference in light of the fact that the district court, having heard and considered his testimony, decided that the belief to which he testified is simply not true. Thus, the only rational hypothesis is that Tynes, having received information that Princess Kylie was “almost 16,” reasonably believed that she was only 15 years old.

Before concluding, we note that Tynes appears to contend that his conviction on count 2 should be reversed as a matter of law in light of *State v. Moser*, 884 N.W.2d 890 (Minn. App. 2016), in which the defendant was convicted of electronically soliciting a 14-year-old girl who claimed to be 16 years old. *Id.* at 894. This court reversed the defendant’s conviction on the ground that the statute setting forth the offense was unconstitutional as applied to the defendant, who had solicited the girl over the internet without having met her in person, because the statute precluded him from asserting a mistake-of-age defense. *Id.* at 905-06. Tynes appears to contend that his text messages with Detective O’Keefe raise a similar constitutional issue. But this court rejected such an argument in *State v. Olson*, 884 N.W.2d 906 (Minn. App. 2016), *review denied* (Minn. Nov. 15, 2016), in which we reasoned that the due-process concerns implicated in *Moser* are not present if the state is required to prove that a defendant reasonably believed that the person being solicited was under the age of 16. *Id.* at 912. Furthermore, the girl in *Moser* specifically stated that she was 16, whereas Detective O’Keefe specifically informed Tynes that Princess Kylie was “almost 16,” which caused him to reasonably believe that she was only 15 years old. Thus, *Moser* is not a basis for concluding that the statute at issue in this case is unconstitutional or that the evidence in this case is insufficient.

In sum, the evidence is sufficient to support Tynes's convictions.

II. Multiple Sentences

Tynes also argues that the district court erred by imposing two sentences, one for each offense, on the ground that the two offenses arise from a single behavioral incident. *See* Minn. Stat. § 609.035, subd. 1 (2016); *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016); *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012). The state concedes that the two offenses arise from a single behavioral incident and that this court should reverse and remand the case to the district court for vacatur of one of the two formal adjudications and its corresponding sentence. We agree. On remand, the district court shall resentence Tynes by formally adjudicating and imposing a sentence on only one count.

Affirmed in part, reversed in part, and remanded.