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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0634**

State of Minnesota,
Respondent,

vs.

Courtney Victor Prude,
Appellant.

**Filed March 4, 2019
Affirmed
Hooten, Judge**

St. Louis County District Court
File No. 69DU-CR-17-336

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

Mark S. Rubin, St. Louis County Attorney, Christopher J. Pinkert, Assistant County
Attorney, Duluth, Minnesota (for respondent)

Charles F. Clippert, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Rodenberg, Judge; and
Cochran, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant challenges his conviction for aiding and abetting first-degree sale of a
controlled substance, arguing that: the evidence was insufficient to support his conviction,

the judge improperly communicated with the jury outside of his presence, the state failed to disclose exculpatory evidence, and the state elicited perjured testimony. We affirm.

FACTS

In late January of 2017, police surveilled a house in Duluth and observed evidence of drug dealing, including repeatedly witnessing Joanne Smith leaving the house and briefly meeting other individuals on the street within one block of the house. Sergeant Rodney Wilson observed this behavior and recognized it as indicative of drug dealing based on his experience. Police conducted this surveillance based on prior information that heroin was being dealt out of that house, and because police had successfully raided the same house three times in the preceding 18 months based on suspicion of heroin being sold there.

After they observed several suspected drug deals, police obtained and executed a no-knock search warrant for the house. Smith was leaving as police were coming in, and police took her into custody. When police entered the house, they immediately saw Antonio Johnson running away from the front door towards the bathroom of the residence. One officer took him into custody. Another officer forced open the bedroom door and discovered appellant Courtney Victor Prude inside with N.R., who was a heroin user visiting the house. After taking appellant into custody, police found in the room where he was arrested: a strap that is commonly used as a tourniquet by intravenous drug users, a digital scale that appeared to be covered in drug residue, a clear plastic bag, and pieces of similar plastic bags. Police also found a bag of heroin in the hallway of the apartment, as well as more suspected heroin throughout the house. In total, police seized 48.9 grams of

confirmed heroin, 24.685 grams of a confirmed mixture of heroin and fentanyl, and 98 grams total of suspected heroin. Police also discovered \$678 in cash in appellant's possession and \$3,129 in Johnson's possession.

Police charged appellant with one count of aiding and abetting first-degree sale of a controlled substance under Minn. Stat. § 152.021 (2016). At trial, Smith testified that: she drove appellant and Johnson up to Duluth so that they could sell heroin there; she took them to her friend's house so that both of them could sell heroin there; she personally conducted heroin deals on behalf of appellant and Johnson; when she got orders for heroin, appellant sometimes gave her the heroin and sometimes Johnson gave it to her; and in exchange for running the heroin to customers and bringing back the money to appellant and/or Johnson, they would give her money or heroin. She also testified that she received a lesser sentence in exchange for her testimony, but her plea agreement did not impact the substance of her testimony.

After closing arguments, the jury sent a message to the district court judge asking a question about "Investigator Shaw." The trial judge sent the note back through the bailiff "saying we need clarification on this because there was no Investigator Shaw in this case." The jury did not return the question or have any other communications with the judge about Investigator Shaw. Although the judge did not call in the parties to address the jury's question, the judge made a record of the exchange before calling the jury in to read the verdict.

The jury convicted appellant of the sole charge. The district court sentenced appellant to an executed guidelines sentence of 105 months. This appeal follows.

DECISION

I. The evidence is sufficient to support the jury’s verdict.

“In reviewing a claim of insufficiency of the evidence, we make a painstaking review of the record, to ascertain[] whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged.” *State v. Flowers*, 788 N.W.2d 120, 133 (Minn. 2010) (quotations omitted). “We will not disturb a verdict [i]f the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [the] defendant was proven guilty of the offense charged.” *Id.* (quotation omitted).

When reviewing a conviction based on circumstantial evidence, we apply a two-step analysis. *State v. Harris*, 895 N.W.2d 592, 598–601 (Minn. 2017). The first step is to identify the circumstances proved “by resolving all questions of fact in favor of the jury’s verdict,” in deference to the jury’s credibility determinations. *Id.* at 600. “In identifying the circumstances proved, we defer 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 State.” *State v. Sterling*, 834 N.W.2d 162, 175 (Minn. 2013) (internal quotations omitted). This includes “assuming 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). Second, we independently consider the “reasonable inferences that can be drawn from the circumstances proved.” *Harris*, 895 N.W.2d at 601. “To sustain the conviction, the circumstances proved, when viewed as a whole, must be consistent with a

reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Id.* Accomplice liability for a crime attaches when an individual “intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05 (2016).

We begin by noting that respondent appears to concede that the circumstantial-evidence standard of review should apply in this case. But “it is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be ‘diluted by counsel’s oversights, lack of research, failure to specify issues or to cite relevant authorities.’” *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). And here, because there is direct evidence that appellant committed the crime he was convicted of, we need not apply the circumstantial-evidence standard of review. *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016) (“[W]hen a disputed element is sufficiently proven by direct evidence alone, as it is here, it is the traditional standard, rather than the circumstantial-evidence standard, that governs.”).

Under this standard, the evidence is sufficient to uphold the jury’s verdict. Appellant argues that he was just present at the drug house, that he did not assist Johnson in selling the heroin, and that mere presence is insufficient to aid and abet the sale of controlled substances. He also argues that the evidence does not rule out the possibility that appellant could have been selling simulated controlled substances and not selling heroin.

But Smith testified that she received heroin from appellant and gave him the money she received following a sale; this is direct evidence that appellant was selling heroin and

was not selling simulated controlled substances. Smith also testified that in the few days before the raid she facilitated the sale of over 20 grams of heroin for appellant and Johnson. Smith's testimony is corroborated by the drug paraphernalia in the room where Prude was arrested, the significant amount of heroin found in the apartment, the multiple heroin users in the apartment at the time of the arrest, and the large amount of cash Prude had when he was arrested. We hold that this direct evidence is sufficient for the jury to have reasonably concluded that appellant was guilty of the charged crime.¹

II. There is no need to reconstruct a record of the district court's communication with the jury.

Appellant argues that the district court erred when it answered the jury's question about "Investigator Shaw" outside his presence and that we should remand appellant's case so that the district court can reconstruct a record of the exchange.

"A defendant's constitutional right to be present is grounded in the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment." *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005) (citing *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 1484 (1985)). "Our court has recognized that Minn. R. Crim. P. 26.03, subd. 1(1), requiring defendant's presence 'at every stage of the

¹ But even if the circumstantial-evidence standard of review applied, appellant's sufficiency argument would still fail. Under the first step, because we presume that the jury believed the state's witnesses, the circumstances proved include: appellant, through Smith, sold more than 20 grams of heroin, he was selling actual heroin and not a simulated controlled-substance, he had a large amount of cash on his person, and he was found in a bedroom with multiple items of drug paraphernalia. These circumstances proved are sufficient to rule out both of appellant's alternate hypotheses, as well as any other reasonable hypothesis other than guilt. *See Moore*, 438 N.W.2d at 108.

trial,’ provides a broader right to be present than the right guaranteed by the United States Constitution.” *Id.* Pursuant to Minn. R. Crim. P. 26.03 subd. 1(1), “[t]he defendant must be present at arraignment, plea, and for every stage of the trial,” which includes: “(f) any jury questions dealing with evidence or law.” When there has been communication between the judge and the jury outside the presence of the defendant, “the reviewing court must look to the substance of the communication to see if the defendant was prejudiced.” *State v. Petrich*, 494 N.W.2d 298, 299 (Minn. App. 1992), *review denied* (Minn. Feb. 23, 1993). “Reversal is appropriate if it appears that the error affected the outcome of the case.” *Id.* at 300.

A reconstructed record is neither necessary nor appropriate in this case. Courts will sometimes reconstruct records when there is no record of an exchange between the jury and another person or persons. *See, e.g., State v. Martin*, 723 N.W.2d 613, 623 (Minn. 2006). But that is not necessary when, as here, a district court makes a contemporaneous record of any communications with the jury. *Id.* at 625–26 (“The better practice, and the practice we expect, is for the court to convene counsel and the defendant in the courtroom and make a contemporaneous record of all communications with the jury, both those that are housekeeping and those that are not, so that the record for appeal is clear.”).

The district court should have called the parties and the jury in the courtroom before responding to the jury’s question. *See Petrich*, 494 N.W.2d at 299 (“During jury deliberations, the judge and jury should not communicate except in open court and, where practicable, in the presence of counsel . . . and in criminal cases in the presence of the defendant.”) (quotation omitted). But given the contemporaneous record the district court

created, the innocuous nature of the exchange, and the fact that appellant does not even argue that he was prejudiced by the exchange, it is unclear what a remand for the purpose of reconstructing a record could possibly accomplish. We therefore affirm because appellant has failed to meet his burden of establishing an error in the district court's creation of a contemporaneous record.

III. The state did not violate its *Brady* obligations.

In his one-page pro se supplemental brief, appellant appears to argue that the state improperly withheld the existence of a plea agreement with a “state witness,” denying him the right to a fair trial. *See generally, Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963). We conclude that he must be referring to a plea agreement with either Smith or N.R. because they were the only non-police witnesses called by the state at trial.

If appellant is referring to the state's plea agreement with Smith, the state disclosed the agreement before trial and the attorneys for both parties mentioned the agreement multiple times at trial. Therefore, the state's plea agreement with Smith was surely not withheld under *Brady*. If appellant is referring to a plea agreement with N.R., no plea agreement was mentioned at trial because there is nothing in the record to suggest that N.R. had a plea agreement with the state, and the state represents that it had no deal with her.² Even liberally construing appellant's claim, we hold that it is without merit.

² Even if appellant had actual evidence of a deal between the state and N.R., which he does not argue he has, we would still be unable to grant appellant relief because we do not make new findings of fact or consider evidence that was not admitted by a district court. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 374–75 (Minn. 1990) (holding that the role of the court of appeals is to correct errors, not to find facts).

IV. Alleged perjured testimony.

Appellant also makes a cursory argument that N.R.'s testimony was perjured because she made a few statements at trial that were inconsistent with her earlier statements to Sergeant Wilson about why she went to the house where appellant was arrested. The most generous interpretation of appellant's claim is that he is alleging that the prosecutor committed misconduct by knowingly eliciting false testimony. *See Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177 (1959) (requiring reversal of a conviction knowingly obtained with the state's use of false evidence). But appellant provides no proof of misconduct, and does not even allege that such testimony had a reasonable likelihood of affecting the judgment of the jury, such that we could possibly reverse his conviction. *See id.* at 271, 79 S. Ct. at 1178. And "[a]rguments are forfeited if they are presented in a summary and conclusory form, do not cite to applicable law, and fail to analyze the law when claiming that errors of law occurred." *State v. Bursch*, 905 N.W.2d 884, 889 (Minn. App. 2017).

We therefore reject appellant's argument on the ground that it is presented in a summary and conclusive form without applicable citations or legal analysis.

Affirmed.