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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0696**

State of Minnesota,
Respondent,

vs.

Larry Roy Kiefat, Jr.,
Appellant.

**Filed April 15, 2019
Affirmed
Reyes, Judge**

Dakota County District Court
File No. 19HA-CR-17-248

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

James C. Backstrom, Dakota County Attorney, Charles C. Cremens, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

REYES, Judge

In this direct appeal, appellant argues that his final judgment of conviction and sentence for first-degree controlled-substance crimes (sale and possession) must be

reversed because the state produced insufficient evidence to prove that he constructively possessed methamphetamine, and the circumstances proved support a reasonable inference inconsistent with guilt. Alternatively, appellant argues that he did not enter a knowing and intelligent waiver of counsel because the district court failed to enter a written waiver into the record and conduct the required comprehensive inquiry. We affirm.

FACTS

On January 20, 2017, Officer Audra Rawlings placed appellant Larry Roy Kiefat, Jr., under arrest for driving without a valid driver's license. While talking with the passenger, J.K., who remained in the vehicle, Officer Rawlings observed a small glass jar in the center console of the vehicle containing what appeared to be marijuana. Based on this observation, Officer Rawlings decided to conduct a search of the vehicle.

A search of the cab of the vehicle yielded a large plastic zip-top bag of marijuana, two bags containing empty plastic bags, and several pieces of mail bearing appellant's name. Officer Rawlings then searched under the hood of the truck and found a plastic compartment that contained a black fabric zip-top bag. The bag contained various paraphernalia and several individually packed bags containing a white crystallized substance. Officer Rawlings suspected the substance to be methamphetamine. Subsequent field and forensic tests confirmed her suspicion. Officer Rawlings questioned J.K., who said the drugs belonged to appellant. The state charged appellant with one count of first-degree controlled-substance sale, in violation of Minn. Stat. § 152.021, subd. 1(1) (2016), and one count of first-degree controlled-substance possession, in violation of Minn. Stat. §152.021, subd. 2(a)(1) (2016).

On the first day of his jury trial, appellant declared his intent to represent himself. The district court questioned appellant about his desire to proceed pro se and asked him several times during the discussion whether he was certain that he wanted to discharge his attorney.¹ The district court advised appellant that it planned to honor his “speedy demand on this case” by proceeding with the trial and discharged appellant’s counsel after appellant stated that he wanted to proceed pro se. The district court did not enter a written waiver into the record.

During trial, Officer Rawlings testified that B.P., the registered owner of the vehicle appellant had been driving, told her that he did not use drugs because he had a heart condition. J.K. testified that she did not lie during Officer Rawlings’ out-of-court questioning. Following the trial, the jury found appellant guilty of both counts, and the district court sentenced him to a term of imprisonment of 138 months on count one. This appeal follows.

D E C I S I O N

I. The state produced sufficient circumstantial evidence to prove that appellant constructively possessed the methamphetamine.

Appellant argues that the state failed to prove, beyond a reasonable doubt, that he constructively possessed the methamphetamine. Appellant further argues that the circumstances proved support a reasonable hypothesis inconsistent with guilt, namely that

¹ Each time the district court asked appellant whether or not he was going to discharge his attorney, appellant redirected the discussion to expressing his frustrations regarding a prior contested omnibus hearing and the conditions of his release.

the “methamphetamine could have already been there when he borrowed the truck.” We are not persuaded.

“We review the sufficiency of the state’s circumstantial evidence de novo.” *State v. Sam*, 859 N.W.2d 825, 830 (Minn. App. 2015). In analyzing the record, we must determine whether sufficient evidence, when viewed in the light most favorable to the conviction, supports the jury’s verdict. *State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004).

The state may prove constructive possession either (1) by demonstrating that appellant had exclusive control over the location in which the methamphetamine was found or (2) by proving that there is a strong probability, inferable from other evidence, that appellant consciously or knowingly exercised dominion and control over the methamphetamine up to the time of the arrest. *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975). Constructive possession may be proved through circumstantial evidence. *See State v. Arnold*, 794 N.W.2d 397, 401 (Minn. App. 2011). This court applies a two-step test to review the sufficiency of circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, we determine the circumstances proved by considering only those circumstances that are consistent with the verdict. *State v. Hawes*, 801 N.W.2d 659, 668 (Minn. 2011). Second, we examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences inconsistent with guilt. *State v. Al-Naseer*, 788 N.W.2d 469, 473-74 (Minn. 2010).

A. The circumstances proved that are consistent with the jury's guilty verdict.

The circumstances proved that are consistent with the verdict include: (1) Officer Rawlings stopped a vehicle driven by appellant, who did not have a valid driver's license; (2) appellant had borrowed the vehicle from B.P. and had been driving it for 27 days; (3) pursuant to a search of appellant incident to his arrest, Officer Rawlings found a large amount of cash and multiple cell phones on appellant's person; (4) Officer Rawlings found marijuana in the cab of the vehicle; (5) Officer Rawlings searched under the hood of the vehicle and discovered a black fabric zip-top bag containing a digital scale, glass pipes, pills, and ten individually packed bags of suspected methamphetamine; (6) the contents of the ten bags field-tested positive for methamphetamine, and a subsequent forensic test confirmed this result; (7) the discovered methamphetamine carried a street value of approximately \$3,000; (8) J.K. informed Officer Rawlings that the drugs belonged to appellant; (9) B.P. testified that he did not put the drugs under the hood of the vehicle and did not know they were there; and (10) several law-enforcement officers testified that the substantial amount of methamphetamine recovered from the vehicle, the large amount of cash, multiple cell phones, empty plastic bags, and the digital scale were all indicators of drug sales, rather than personal use.

B. The circumstances proved support the jury's guilty verdict and are inconsistent with any other reasonable inference.

The circumstances proved support the jury's guilty verdict that appellant exercised conscious dominion and control over the methamphetamine up to the time of his arrest. Appellant argues that the circumstances proved fail to show constructive possession

beyond a reasonable doubt because the state failed to produce several specific forms of evidence. Appellant's argument is misguided, as our inquiry focuses only on the actual circumstances proved.

Appellant further argues that the circumstances proved support an alternative reasonable inference inconsistent with guilt. Appellant relies on the trial testimony of his friend, B.H., about an alleged theft of the loaned vehicle from a tire shop lot to show that it is possible that someone else had placed the drugs in the vehicle when it had been missing. B.H. testified that he reported the theft to the police. But these are not circumstances proved. The results of an investigation into the alleged theft conducted by Officer Windschitl, a police liaison who testified for the state, disproved B.H.'s testimony. Officer Windschitl discovered that the alleged theft of the vehicle was never reported to the police. When considering the sufficiency of the evidence, 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). Therefore, no other reasonable inference inconsistent with guilt exists. Because proof of either "exclusive control" or "dominion and control" is conclusive as to constructive possession, we need not analyze whether the evidence supported a finding of "exclusive control."

II. The district court did not err in determining that appellant entered a knowing and intelligent waiver of his right to counsel.

Appellant argues that his waiver of counsel is insufficient because the district court failed to commit it to writing and conduct a comprehensive examination of his decision. Appellant's argument is misguided.

When the facts are undisputed, the question of whether a defendant entered a constitutionally valid waiver of counsel is reviewed de novo. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012). A waiver of counsel must be voluntary, intelligent, and in writing, unless the defendant refuses to sign the waiver. Minn. R. Crim. P. 5.04, subd. 1(4). If the defendant refuses to sign a waiver, an on-the-record oral waiver is valid as long as it is knowing and intelligent. *State v. Nelson*, 523 N.W.2d 667, 670-71 (Minn. App. 1994). Before accepting the waiver, the district court must advise the defendant of the following:

- (a) the nature of the charges;
- (b) all offenses included within the charges;
- (c) the range of allowable punishments;
- (d) that there may be defenses;
- (e) mitigating circumstances that may exist; and
- (f) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

Minn. R. Crim. P. 5.04, subd. 1(4) (a)-(f).

The supreme court stated that, to ensure a knowing and intelligent waiver, district courts should conduct a “penetrating and comprehensive examination” of the above factors. *State v. Rubin*, 409 N.W.2d 504, 506 (Minn. 1987). However, if it can be inferred, from the facts and circumstances of a case, that a defendant provided a knowing and intelligent waiver, it may be upheld despite the district court’s failure to conduct an on-the-record inquiry of the defendant. *Rhoads*, 813 N.W.2d at 886.

In *State v. Worthy*, the supreme court held that, even though the district court failed to examine the rule 5.04 factors, the defendants had entered a valid waiver of counsel because (1) the defendants “were provided with competent legal representation for over a

month before trial and took full advantage of that representation up until the morning of their scheduled trial date;” (2) they knew they would be expected to conduct their own defense if they chose to fire their attorneys, who were prepared to proceed; (3) they knew that if they fired their attorneys, the district court would not grant a continuance of the trial for them to hire private counsel; and (4) the district court advised them “that if they chose to proceed pro se, they would be held to the same standard as the attorneys.” 583 N.W.2d 270, 276 (Minn. 1998). The supreme court also took into account the fact that both defendants “were familiar with the criminal justice system” as both defendants had multiple felony convictions and one defendant “admitted that he had ‘seen a lot of trials of late.’” *Id.*

The facts in *Worthy* are nearly identical to the facts in appellant’s case. Appellant had legal representation for 371 days before discharging his counsel;² the district court advised appellant that it would proceed with trial and that he would be held to the same standard as an attorney; the district court cautioned appellant that it would not appoint new counsel as a replacement; and the district court acknowledged appellant’s extensive experience with the legal system, given his lengthy criminal history, which included multiple felony convictions and 100 bench warrants. Unlike in *Worthy*, the district court advised appellant that it would provide him with extra time to hire private counsel if he chose to do so.

² “When a defendant has consulted with an attorney prior to waiver, a [district] court could reasonably presume that the benefits of legal assistance and the risks of proceeding without it had been described to defendant in detail by counsel.” *Worthy*, 583 N.W.2d at 276 (citation omitted).

Appellant argues that the district court erred by not appointing him standby counsel, but “[t]here is no state or federal constitutional right to standby counsel,” *State v. Jones*, 755 N.W.2d 341, 351 (Minn. App. 2008), and there is no such requirement in the Minnesota Rules of Criminal Procedure. The rules expressly leave it to the district court’s discretion whether to appoint standby counsel. Minn. R. Crim. P. 5.04, subd. 1(4). Under the facts and circumstances of appellant’s case, we conclude that the district court did not err in upholding appellant’s waiver of counsel as knowing and intelligent.

Affirmed.