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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1153**

State of Minnesota,
Respondent,

vs.

Gregorio Zuniga-Vallejo,
Appellant.

**Filed May 28, 2019
Affirmed in part, reversed in part, and remanded
Reilly, Judge**

Le Sueur County District Court
File No. 40-CR-15-1087

Keith Ellison, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Brent Christian, Le Sueur County Attorney, Le Center, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Rodenberg, Judge; and
Reilly, Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant argues that: (1) the district court erred in its admission of his non-*Mirandized* statements; (2) the district court erred in its admission of J.Z.'s statements and

interpretations; (3) the evidence was insufficient to prove possession of controlled substances; and (4) he is entitled to be re-sentenced in accordance with the Drug Sentencing Reform Act (DSRA). We affirm the district court's determination that appellant was not in custody and therefore not entitled to a *Miranda* warning. We conclude that the district court erred in its determination that J.Z.'s statements were admissible, however, we determine that the error was harmless beyond a reasonable doubt. The evidence is sufficient to support appellant's first-degree controlled substances conviction. Because appellant is entitled to re-sentencing in accordance with the DSRA, we reverse and remand for further proceedings in accordance with this opinion.

FACTS

On October 22, 2015, appellant called 911 numerous times from an area on Savidge Lake Road near Cleveland, Minnesota. Deputy Sheriff Todd Lau located appellant's truck parked in front of 300 Savidge Lake Road. Appellant jumped in front of Deputy Lau's squad car waving his arms, and stated that his wife was kidnapped with "a gun held to her head" inside the 300 Savidge Lake Road house. Deputy Sheriff Dan Tousley arrived on the scene, pat-searched appellant, and found roughly \$5,000 in cash in appellant's pocket. When questioned about the money, appellant stated it was "for the ransom" that needed to be paid to the Mexican drug cartel to ensure the safety of his family in Mexico. When Deputies Jeff Gilhousen and Matt Shouler arrived on the scene they observed appellant acting "nervous" and "erratic." After placing appellant in a squad car, the deputies checked the 300 Savidge Lake Road house to investigate appellant's kidnapping claims but no one was home.

Meanwhile, appellant's wife, J.Z., flagged down a police officer in a different part of town. An officer took her to her husband. When J.Z. arrived at 300 Savidge Lake Road, she was "in a complete panic," "irrational," and "paranoid." J.Z. explained that her daughter would be kidnapped and killed if she did not "pay them off," but J.Z. would not say who "they" were. Additionally, J.Z. mentioned that appellant's family in Mexico had already been kidnapped.

Officers confirmed that J.Z.'s brother, M.G., was caring for J.Z.'s daughter and she was safe. Investigator Vollmer interviewed appellant and J.Z. at the Le Sueur County Law Enforcement Center (LEC). Investigator Vollmer observed that appellant "appeared to be under the influence of controlled substances" and that he "was very deceptive in many answers he gave" during the interview. Investigator Vollmer also suspected that J.Z. was under the influence of a controlled substance. During her interview, J.Z. reiterated that the Mexican drug cartel was holding her daughter and appellant's family in Mexico hostage, and she noted that the kidnappings may be related to appellant's "drug debt." Investigator Vollmer ultimately concluded the kidnapping claims were "unfounded," and appellant and J.Z. were released from the LEC.

On October 28, 2015, the homeowner of 300 Savidge Lake Road found a suspicious package in his garden. The package was tightly sealed with saran wrap and other layers of plastic. The property owner cut it open and saw a white crystalline substance inside. The property owner reported the information to law enforcement. Deputy Shouler retrieved the package, conducted a field test of the substance, and determined it tested positive for methamphetamine. Deputy Shouler later determined that the package weighed 1.12

pounds (or 544 grams) with its packing material and submitted a roughly 30-gram sample of the suspected methamphetamine to the Minnesota Bureau of Criminal Apprehension (BCA) for testing.

On November 16, 2015, Investigator Todd Waldron and BCA Senior Special Agent Robert Nance went to appellant's apartment to interview appellant and J.Z. The officers advised appellant that he was not under arrest, that he did not have to answer their questions, and that he could ask the officers to leave at any point during the conversation. During the recorded interview, appellant spoke English intermittently and J.Z. assisted in some interpretation. J.Z. also answered some questions on her own behalf. Appellant made several admissions during the interview, including that he used methamphetamine on October 22 and that he left the "little package" of methamphetamine at a residence on Savidge Lake Road because he knew that the police were coming. Appellant also signed a photograph of the package of methamphetamine found by the property owner in order to indicate it was the same package he hid.

The state charged appellant with a first-degree controlled-substance crime in violation of Minn. Stat. § 152.021, subd. 2(a)(1) (2014), based upon his possession of 25 grams or more of methamphetamine on October 22, 2015. The matter proceeded to a three-day jury trial. At trial, the state called six witnesses to describe the October 22 incident and the October 28 discovery of the methamphetamine. In addition, the court received into evidence a photograph depicting the close proximity of appellant's truck to the property owner's residence on October 22, the 1.12-pound package of methamphetamine that the property owner found on October 28, BCA lab results indicating that the package contained

methamphetamine, and the recording of the November 16 interview. At the conclusion of trial, the jury found appellant guilty.

This appeal follows.

D E C I S I O N

I. Appellant Was Not In Custody.

Appellant argues that the district court erred in its pretrial decision to admit his November 16 non-*Mirandized* statements because a reasonable person would have believed he was in police custody. *Miranda v. Arizona* provides procedural safeguards to protect an individual's Fifth Amendment privilege against self-incrimination. 384 U.S. 436, 478-79, 86 S. Ct. 1602, 1630 (1966). Statements made by a suspect during a custodial interrogation are admissible only if the statements were preceded by a *Miranda* warning. *State v. Thompson*, 788 N.W.2d 485, 491 (Minn. 2010). In other words, a *Miranda* warning is required if two factors are present: custody and interrogation. *Id.* Because the state does not dispute that appellant was subject to an interrogation, the question in this appeal is whether appellant was in custody.

“[A]n interrogation is custodial if, based on all the surrounding circumstances, a reasonable person would believe he or she was in police custody to the degree associated with formal arrest.” *State v. Scruggs*, 822 N.W.2d 631, 637 (Minn. 2012). The test is not merely “whether a reasonable person would believe he or she was not free to leave.” *State v. Champion*, 533 N.W.2d 40, 43 (Minn. 1995). The determination is an “objective inquiry,” and the suspect's subjective beliefs about whether he was in custody are therefore

irrelevant. See *State v. Miller*, 573 N.W.2d 661, 670 (Minn. 1998) (noting that the standard refers to “a reasonable person in the suspect’s situation”).

Factors suggesting that a person is in custody include:

- (1) the police interviewing the suspect at the police station;
- (2) the suspect being told he or she is a prime suspect in a crime;
- (3) the police restraining the suspect’s freedom of movement;
- (4) the suspect making a significantly incriminating statement;
- (5) the presence of multiple officers;
- and (6) a gun pointing at the suspect.

Scruggs, 822 N.W.2d at 637.

Factors suggesting that a person is not in custody include:

- (1) questioning the suspect in his or her home;
- (2) law enforcement expressly informing the suspect that he or she is not under arrest;
- (3) the suspect’s leaving the police station without hindrance;
- (4) the brevity of questioning;
- (5) the suspect’s ability to leave at any time;
- (6) the existence of a nonthreatening environment; and
- (7) the suspect’s ability to make phone calls.

Id. A determination of whether a suspect was in custody involves a mixed question of law and fact. *State v. Horst*, 880 N.W.2d 24, 31 (Minn. 2016). This court reviews the district court’s underlying factual findings for clear error.¹ *Id.* But, whether those facts support a

¹ Appellant specifically challenges five of the district court’s factual findings: (1) that appellant confirmed that the package was methamphetamine; (2) that he was using methamphetamine when he was on Savidge Lake Road; (3) that he hid the package of methamphetamine when he knew that officers were coming to his location; (4) that he did not sell the methamphetamine because he no longer had it in his possession; and (5) that he was fronted the methamphetamine. A factual finding is clearly erroneous only when there is no reasonable evidence to support the finding or when the appellate court is left with the definite and firm conviction that a mistake occurred. *State v. Roberts*, 876 N.W.2d 863, 868 (Minn. 2016). After careful review of the record, we determine that the challenged findings are properly supported by the record and, moreover, the contested

determination that the suspect was in custody is a legal conclusion which this court reviews independently. *Id.* “If the district court applies the correct legal standard, we grant considerable, but not unlimited, deference to the district court’s fact-specific resolution of whether the interrogation was custodial.” *Id.* (quotation omitted).

A. The District Court Applied the Correct Legal Standard.

The Minnesota Supreme Court has consistently applied a deferential standard when reviewing a district court’s custody determination for *Miranda* purposes. *See, e.g., State v. Sterling*, 834 N.W.2d 162, 167-68 (Minn. 2013) (stating that even though an appellate court “makes an independent review of the [district] court[’s] determination regarding custody and the need for a *Miranda* warning,” it grants “considerable, but not unlimited, deference to a [district] court’s fact-specific resolution of such an issue when the proper legal standard is applied” (quotations omitted)).

Appellant argues that the district court did not apply the correct standard in this case. In its pretrial order, the district court stated that the court must analyze whether the person being questioned is in custody or deprived of his freedom of action in any significant way, not whether the interrogation has coercive aspects to it or whether the investigation has focused on the person being questioned. *See Oregon v. Mathiason*, 429 U.S. 492, 494, 97 S. Ct. 711, 713 (1977). Though the district court did not outline the appropriate factors to consider when making a custody determination, it nevertheless considered relevant factors

findings are not particularly relevant to the determination of whether appellant was in custody. The district court did not clearly err in its factual findings regarding appellant’s statements to officers.

as provided in *Scruggs*. 822 N.W.2d at 637 (detailing that factors a court could consider include location of the interview, restraint of defendant’s freedom, information provided to defendant, use of weapons, and extent of questioning). Here, the district court noted that the interview took place at appellant’s home, appellant freely invited the officers inside, and the officers told appellant that he did not need to speak with them and that he was not under arrest. We therefore determine that the district court applied the correct standard in this case.

B. The District Court Did Not Err When It Determined Appellant Was Not In Custody.

Appellant argues that the district court erred in its determination of custody status. This court independently reviews whether the facts support a determination that the suspect was in custody. *Horst*, 880 N.W.2d at 31. A determination regarding whether a suspect was in custody is “based on all the surrounding circumstances” and “no factor alone is determinative.” *Thompson*, 788 N.W.2d at 491.

First, appellant argues that there was a change in circumstance during the interview that would lead a reasonable person to believe he was in custody. Appellant contends that the discussion shifted when the officers made an accusation that appellant left methamphetamine in the property owner’s garden, told appellant that they could present the case to a county attorney, and discussed appellant signing the photograph to “put[] it into evidence for you, you know.” However, the Supreme Court has unequivocally declared that an interrogation may be noncustodial even if it occurs in a “coercive

environment” where “the questioned person is one whom the police suspect.” *Mathiason*, 429 U.S. at 495, 97 S. Ct. at 714.

Second, appellant argues that the mere fact that the questioning occurred inside his home does not mean that it was noncustodial and the district court should have considered other factors when making its custody determination. Appellant is correct that, “the mere fact that questioning occurred in a suspect’s home does not by itself mean that the questioning was not custodial in nature.” *State v. Wiernasz*, 584 N.W.2d 1, 3 (Minn. 1998). Though this factor is not dispositive, it remains a legitimate factor under the totality-of-the-circumstances custody test. *Horst*, 880 N.W.2d at 32. Appellant also argues that the district court did not consider certain factors which support a determination that he was in custody (i.e. appellant was the prime suspect, appellant’s home was a part of the investigation, and appellant made a significantly incriminating statement). However, “a district court is not required to discuss every fact that is relevant to a determination of custody so long as it considers the totality of the circumstances and makes sufficient findings to support its decision.” *Id.* Without indicia of formal arrest or restraint of the suspect’s freedom of movement, a coercive environment does not render the questioning custodial. *Id.*

Here, the two officers went to appellant’s apartment building in plain clothes. After the officers were buzzed into the apartment building, appellant greeted them at the door of his apartment unit. The investigators followed appellant back to the entryway while he retrieved his mail. After appellant brought them back to his apartment, the officers advised appellant that he was not under arrest, that he did not have to answer their questions, and

that he could ask the officers to leave at any point during the conversation. The officers acknowledged that they presented appellant and J.Z. with false fingerprint evidence during the interview as a “tactic,” both to gauge whether they were being truthful and to encourage an honest confession. Appellant never denied that the package could contain his fingerprints. During the interview appellant signed a photograph of the package containing methamphetamine to identify that it was the package referenced during the interview. At trial, the officers testified that they did not attempt to intimidate appellant into a false confession, but rather, that their goal was to get to “the truth,” they treated him with respect throughout the conversation, and they assured him that he was not under arrest. Based upon the totality of the circumstances, we affirm the district court’s determination that appellant was not in custody and therefore was not entitled to a *Miranda* warning.

II. J.Z.’s Statements to Police Were Not Admissible.

Before trial, appellant filed a motion to suppress all statements “stated by or attributed to” his wife during the interview, and to preclude her prospective trial testimony based on marital privilege. The district court denied the motion to suppress the statements because they were neither confidential nor testimonial, but granted appellant’s objection to his wife testifying at trial based on marital privilege. Appellant argues that the district court deprived him of his Sixth Amendment right to confront a witness against him when it allowed his wife’s statements into evidence when his wife was not available for cross-examination due to spousal privilege. Generally, appellate courts review a district court’s evidentiary ruling for an abuse of discretion. *Miles v. State*, 840 N.W.2d 195, 204 (Minn. 2013). But, whether admission of evidence violates a criminal defendant’s rights under

the Confrontation Clause is a question of law that appellate courts review de novo. *Hawes v. State*, 826 N.W.2d 775, 786 (Minn. 2013).

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions “the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Sixth Amendment is applicable to the states via the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068 (1965). The Confrontation Clause bars the admission of testimonial out-of-court statements unless (1) the declarant is unavailable and (2) the defendant had a prior opportunity to cross-examine the declarant. *Andersen v. State*, 830 N.W.2d 1, 9 (Minn. 2013) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004)). “Testimony” means a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364.

A. J.Z.’s Statements Were Testimonial.

Appellant argues that the J.Z.’s statements during the interview were testimonial and therefore his Confrontation Clause rights were violated when J.Z.’s statements were admitted into evidence without J.Z. being available for cross-examination. The district court determined that J.Z. could not testify based upon spousal privilege. The district court considered the two distinct marital-privileges: “(1) the privilege to prevent a spouse from testifying against the other during the marriage; and (2) the privilege to prevent a spouse from testifying at any time concerning confidential interspousal communications made during the marriage.” *State v. Palubicki*, 700 N.W.2d 476, 483 (Minn. 2005). However, the district court determined that J.Z.’s statements were not confidential because they were

made in the presence of two officers and were therefore admissible. *See State v. Leecy*, 294 N.W.2d 280, 283 (Minn. 1980) (explaining that communications made when others are present are not confidential and therefore are not privileged).

However, the state concedes that the district court erred when it determined that J.Z.’s statements were admissible evidence because J.Z.’s statements were “testimonial” for *Crawford* purposes.² The facts of this case are analogous to those presented in *State v. Swaney*, 787 N.W.2d 541 (Minn. 2010). In *Swaney*, the supreme court held that statements by the defendant’s wife to a BCA agent during a recorded interview were testimonial because they were “knowingly given in response to structured police questioning” and the agent’s objective was to establish “past events potentially relevant to later criminal prosecution.” *Id.* at 552. We conclude that the district court erred in its admission of J.Z.’s statements because they violated appellant’s confrontation rights.

B. The Admission of J.Z.’s Statements Was Harmless Error.

We must then determine if the error was harmless beyond a reasonable doubt. *Id.* at 555 (providing that confrontation-clause violations are subject to harmless-error analysis). When making this determination, we examine the record as a whole, considering

² We note that the definition of interrogation for *Miranda* purposes is distinct from the definition of interrogation in a *Crawford* analysis. The United States Supreme Court has determined that the definition of interrogation for Fifth and Sixth Amendment purposes is not interchangeable. *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4, 100 S. Ct. 1682, 1689 n.4 (1980). In the *Crawford* context, the term “interrogation” is to be used in its colloquial sense and a recorded statement given in response to police questioning qualifies. *Swaney*, 787 N.W.2d at 552. The recorded interview was not a custodial interrogation for *Miranda* purposes, but the statements were “testimonial” and given during an “interrogation” under *Crawford*.

the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant. *State v. Courtney*, 696 N.W.2d 73, 79-80 (Minn. 2005). We also consider the strength of the evidence of guilt. *State v. Hall*, 764 N.W.2d 837, 842 (Minn. 2009).

Appellant argues that a defendant's confession is the most probative and damaging evidence that can be admitted against him and therefore the admission is not harmless error.³ However, the question is not whether the entirety of the November 16 recording impacted the verdict, but whether the portions admitted in error—J.Z.'s own statements and interpretations—impacted the verdict. Based on our review of the entire record, we determine that the district court's error was harmless beyond a reasonable doubt for three reasons: (1) the majority of J.Z.'s statements are unrelated to the charged offense; (2) many of J.Z.'s statements were also admitted by appellant himself; and (3) the state presented overwhelming evidence of appellant's guilt.

During the interview, J.Z. independently provided statements and answered questions in response to police questions. However, the statements made by J.Z. during the recorded interview were not particularly persuasive to prove appellant's guilt. For example, J.Z. provided background information; she described her family, her health concerns, and the couple's employment. Upon review,⁴ very little information of

³ We have already determined that appellant's statements to investigators on November 16, 2015 were noncustodial and, therefore, admissible.

⁴ During our review of the record, we redacted all statements and interpretations made by J.Z. from the interview transcript in order to determine the evidentiary value of J.Z.'s statements in comparison to appellant's statements.

evidentiary value was contained in J.Z.'s statements. Instead, appellant made the incriminating statements.

We also note that during the trial, the prosecutor did not heavily rely on J.Z.'s statements and did not extensively refer to them in closing argument. The prosecutor referenced statements made by J.Z. approximately three times,⁵ whereas, the prosecutor referenced the much more damaging statements provided by appellant throughout his closing argument. During the recorded interview, appellant stated that he used methamphetamine on October 22, that he had previously sold methamphetamine, that he knew the drug's street value, and that he was "fronted" the methamphetamine in question and still owed his supplier. Additionally, appellant admitted that he hid the methamphetamine in the garden because he called the police and they were coming.

Finally, even if the interview was excluded, the state presented strong evidence at trial. Testimony describing appellant's proximity to 300 Savidge Lake Road on October 22, coupled with his and J.Z.'s behavior and their discussion of "drug debts" and ransom,

⁵ First, on page 388-89 of the trial transcript, the prosecutor stated that J.Z. and appellant "both admitted to using meth" on October 22. While J.Z.'s admission to using methamphetamine on October 22 was inadmissible, there was other strong evidence supporting drug use by both J.Z. and appellant. Second, on page 390, J.Z.'s statement that appellant and she lived in the apartment since 2013 was mentioned during closing arguments. That statement is not persuasive to prove appellant's guilt. Third, on page 393, the prosecutor stated that J.Z. indicated that packages are not coming to the home. However, as the prosecutor noted, the appellant thereafter provided a statement that he meets people in the cities to pick up the drugs which undercuts the evidentiary value of J.Z.'s statement.

is strong circumstantial evidence. We determine that the admission of J.Z.’s statements was harmless beyond a reasonable doubt.⁶

III. The Evidence Was Sufficient to Convict Appellant.

Appellant argues that the evidence is insufficient to support his conviction for possession of a controlled substance. When reviewing the sufficiency of the evidence, 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). This court must assume that the fact-finder “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). This court does “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. If the state’s evidence on one or more elements of a charged offense

⁶ Appellant argues that J.Z.’s interpretations of appellant’s statements should not have been admitted because J.Z. was the declarant of those statements, they were testimonial, she was unavailable due to spousal privilege, and there was no opportunity for cross-examination. For the same reasons that the admission of J.Z.’s statements was harmless beyond a reasonable doubt, we conclude that the admission of J.Z.’s interpretations was harmless beyond a reasonable doubt. Appellant provided many incriminating statements without any interpreting assistance. Appellant independently answered, in English, numerous questions posed by the officers. Additionally, appellant often answered the officer’s English questions in Spanish without any interpretations by J.Z. We need not reach the merits of the argument because we determine that the admission of the interpreted statements was harmless beyond a reasonable doubt. See *State v. Sanders*, 775 N.W.2d 883, 889 n.5 (Minn. 2009) (“When an alleged evidentiary error is harmless, an appellate court need not address the merits of the claimed error.”).

consists solely of circumstantial evidence,⁷ this court applies a heightened standard of review. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013); *see also Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004).

When reviewing a conviction based on circumstantial evidence, this court applies a two-step test to determine the sufficiency of the evidence. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, this court “identif[ies] the circumstances proved.” *Id.* (citing *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). “In identifying the circumstances proved, [this court] assume[s] 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, this court independently examines the “reasonableness of the inferences that might be drawn from the circumstances proved,” and then “determine[s] whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotations omitted). This court must consider the evidence as a whole and not examine each piece in isolation. *Andersen*, 784 N.W.2d at 332.

A. Standard of Review

The parties dispute the appropriate standard of review. The state asserts that the heightened standard of review does not apply in this case because appellant’s possession of the methamphetamine was proven by a combination of direct and circumstantial

⁷ Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Direct evidence is “evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* (quotation omitted).

evidence. Appellant cites to *State v. Silvernail*, 831 N.W.2d 594 (Minn. 2013) to support the use of the heightened standard of review for a conviction based on both circumstantial and direct evidence. But in *Silvernail* the court determined that it “need not resolve the parties’ dispute regarding the standard of review” because there was sufficient evidence under either standard. *Id.* at 598. In this case, appellant’s possession of the methamphetamine is supported by both direct and circumstantial evidence.

Appellant’s incriminating statements are direct evidence of guilt.⁸ See *State v. Weber*, 137 N.W.2d 527, 535 (Minn. 1965) (“The ‘admissions’ of the defendant constituted direct and not circumstantial evidence.”); see also *Horst*, 880 N.W.2d at 40 (determining that defendant’s statement—“I want him dead”—was direct evidence of her mens rea for first-degree premeditated murder). Accordingly, we may apply our traditional standard of review. However, we note—just as the *Silvernail* court did—that even under the heightened standard of review, appellant’s argument is not persuasive.

B. Possession

To convict appellant of first-degree possession of a controlled substance, the state was required to prove that he unlawfully possessed a total weight of 25 grams or more of methamphetamine. Minn. Stat. § 152.021, subd. 2(a)(1);⁹ see also 10 *Minnesota Practice*,

⁸ Appellant argues that the state’s direct evidence—appellant’s statement—was admitted in error. We analyzed appellant’s argument regarding his statements above and affirmed the district court’s decision.

⁹ Minnesota Statutes section 152.021, subdivision 2(a)(1) was amended in 2016. The amendment changed the requirement for first-degree possession of methamphetamine from 25 grams to 50 grams. The amendment went into effect on August 1, 2016 and applied to crimes committed on or after that date.

CRIMJIGS 20.03 (2016). Appellant argues that the evidence was insufficient to prove that he possessed the methamphetamine found in the garden beyond a reasonable doubt.

Possession may be either actual or constructive. *Harris*, 895 N.W.2d at 601. Actual possession is defined as “direct physical control.” *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quotation omitted). Constructive possession may be established either (1) by proof that the item was in a place under the defendant’s “exclusive control to which other people did not normally have access” or (2) by proof of a strong probability that “the defendant was at the time consciously exercising dominion and control over it,” even if the item was in a place to which others had access. *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975). Though the parties contend that this case centers only on constructive possession, we determine that there is sufficient evidence to support appellant’s prior actual possession of the controlled substance. *Barker*, 888 N.W.2d at 354 (“The mere fact that an item is not in a defendant’s physical possession at the time of apprehension does not preclude prosecution for actual possession of contraband.”); *see also State v. Olhausen*, 681 N.W.2d 21, 23, 26 (Minn. 2004) (affirming first-degree controlled substance offenses, including possession, where there was a wealth of circumstantial evidence that the defendant had possessed methamphetamine but did not possess the substance when arrested).

When taken in the light most favorable to the verdict, the evidence proves the following circumstances: (1) appellant called police on October 22; (2) appellant had a large package of methamphetamine with him on October 22; (3) appellant hid the package of methamphetamine at 300 Savidge Lake Road because police were coming; (4) appellant

was located by police at 300 Savidge Lake Road; (5) appellant was acting erratic and was under the influence of controlled substances; (6) appellant used methamphetamine on October 22; (7) six days after the incident with appellant, the property owner found a 1.12-pound (or 544 gram) package containing methamphetamine in his garden; (8) appellant had been fronted the methamphetamine by a supplier; (9) appellant would need to work off his debt for the drugs; and (10) the package found on October 28 was the same package left by appellant on October 22.

Under the heightened-review standard, we must then determine if “there are no other reasonable rational inferences that are inconsistent with guilt.” *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010). Here, the circumstances proved are consistent with the hypothesis that the package found by the property owner was placed there by appellant. There is no other reasonable rational inference inconsistent with appellant’s guilt. Accordingly, we determine that there is sufficient evidence to convict appellant for his possession of methamphetamine.

IV. The District Court Erred in Sentencing.

Appellant argues that he is entitled to be re-sentenced in accordance with section 18 of the DSRA and that he should be re-sentenced to a 56-month term, which is the bottom-of-the-box sentence under the Drug Offender Grid. The DSRA, in part, modified statutory provisions of the sentencing guidelines to make certain presumptive sentences less severe. See 2016 Minn. Laws ch. 160, §§ 1-22, at 576-92. In *State v. Kirby*, the supreme court

held that section 18 of the DSRA applies to crimes committed before May 23, 2016,¹⁰ so long as three requirements are satisfied: (1) there is no statement of legislative intent “to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered as of the date the amendment takes effect.” 899 N.W.2d 485, 488-90 (Minn. 2017).

The state agrees that these three factors are all met in this case, and that appellant is entitled to resentencing under the DSRA. Even with the state’s concession, this court must decide cases in accordance with the law. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). First, in *Kirby* the supreme court concluded that “the Legislature made no statement that clearly establishes its intent to abrogate the amelioration doctrine with respect to DSRA § 18 [(reducing sentencing range for those convicted of first-degree possession)].” 899 N.W.2d at 495. Second, at the time of appellant’s sentencing the presumptive range was 74 to 103 months. Minn. Sent. Guidelines 4.A (Supp. 2015). This changed under the DSRA-amended sentencing guidelines to a presumptive range of 56 to 78 months. Minn. Sent. Guidelines 4.C (2016). Third, the district court imposed appellant’s sentence on April 17, 2018, so his conviction was not final when the DSRA became effective. This Court must accordingly remand appellant’s case to the district court for re-sentencing. 899 N.W.2d at 496; *see also State v. Otto*, 899 N.W.2d 501, 504 (Minn. 2017) (holding that “for the reasons discussed in *Kirby*” the amelioration doctrine required

¹⁰ Section 18 of the DSRA provides that the section “is effective the day following final enactment.” 2016 Minn. Laws ch. 160, § 18, at 591. Because the governor signed the DSRA into law on May 22, 2016, section 18 became effective on May 23, 2016. *See* 2016 Minn. Laws ch. 160, at 592; *see also Kirby*, 899 N.W.2d at 488.

that Otto, convicted of first-degree possession of methamphetamine, be re-sentenced under the DSRA-amended sentencing grid).

Appellant also argues that he should be re-sentenced to a 56-month bottom-of-the-box term under the Drug Sentencing Grid because that sentence is consistent with the bottom-of-the-box term that appellant received at sentencing on April 17, 2018. Appellant argues that because both the prosecutor and presentence interview preparer recommended the lowest end of the presumptive range below, this court should simply apply that here. Because the district court is in the best position to weigh sentencing options, *Massey v. State*, 352 N.W.2d 487, 489 (Minn. App. 1984), we deny appellant's request to remand for imposition of a 56-month commitment. The district court has discretion to determine the appropriate sentence within the presumptive range of the DSRA-amended sentencing grid on remand. *See State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998) (noting that the district court "is in the best position to evaluate the offender's conduct and weigh sentencing options"). Therefore, we remand back to the district court for resentencing.

Affirmed in part, reversed in part, and remanded.