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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1856**

State of Minnesota,
Respondent,

vs.

Semaj Maurice Dow, Jr.,
Appellant.

**Filed September 23, 2019
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Mower County District Court
File No. 50-CR-18-131

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Connolly, Judge; and Peterson, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

JOHNSON, Judge

A Mower County jury found Semaj Maurice Dow, Jr., guilty of five offenses based on evidence that he unlawfully possessed a firearm, ammunition, and a controlled substance. We conclude that the evidence is sufficient to prove that Dow intentionally possessed the firearm and the ammunition. We also conclude that Dow was lawfully convicted of multiple offenses. But we conclude that Dow was unlawfully sentenced on multiple convictions because two of his convictions are based on the same behavioral incident. Therefore, we affirm in part, reverse in part, and remand for resentencing.

FACTS

In January 2018, Dow was living in a motel while on supervised release for a 2017 drug conviction. The terms of his supervised release required him to submit to random searches and prohibited him from having any visitors in his motel room. But Dow's probation officer learned from motel personnel "that people were in and out of [Dow's] room." In addition, Dow tested positive for marijuana and methamphetamine in random drug tests.

On January 17, 2018, probation officers and law-enforcement officers visited Dow's motel room, unannounced, to conduct a random search. Upon their arrival, they found two persons in the room: Dow and N.H., another felon on supervised release. N.H. had a purse, but officers did not find any other property belonging to her in the room.

As officers searched the motel room, Dow was seated in a chair. Officer Roiger found a "cinch sack" on top of a dresser. As Officer Roiger picked up the cinch sack, Dow

immediately said, without prompting, “That wasn’t mine. I was just holding it for my cousin. I was supposed to bring it somewhere.” Inside the cinch sack, Officer Roiger found a disassembled semi-automatic handgun wrapped in a towel belonging to the motel. As Officer Roiger examined the handgun, Lieutenant Wollenburg referred to it as a “MAC-10.” Other officers opened the drawers of the dresser and found two nine-millimeter cartridges. Officer Roiger opened a drawer in a nightstand and found one nine-millimeter cartridge, Dow’s Minnesota identification card, and several motel-room key cards. In addition, Agent VanPelt found several methamphetamine pipes in the bathroom.

The officers arrested Dow and placed him in the back seat of Lieutenant Wollenburg’s squad car. While en route to jail, Dow referred to the handgun as a “Tec-G” or “Tec-9” while conversing with Lieutenant Wollenburg. A video camera in the squad car recorded Dow as he pulled something from his pocket and dropped it on the floor of the squad car. Officers later found a baggie there, which contained 0.134 grams of methamphetamine.

The handgun was determined to be a Tec-9, which uses nine-millimeter ammunition, such as the three cartridges found in Dow’s motel room. The handgun’s serial number was “scratched off.” DNA testing revealed that one cartridge had genetic material with a “[m]ajor male DNA profile [that] matches” Dow but does not match N.H. DNA testing was inconclusive with respect to the handgun and the other two cartridges.

The state charged Dow with six offenses: (1) possession of a firearm by an ineligible person, in violation of Minn. Stat. § 609.165, subd. 1b(a) (2016); (2) possession of ammunition by an ineligible person, in violation of Minn. Stat. § 609.165, subd. 1b(a);

(3) possession of a firearm with an altered or removed serial number, in violation of Minn. Stat. § 609.667(2) (2016); (4) fifth-degree possession of a controlled substance (methamphetamine), in violation of Minn. Stat. § 152.025, subd. 2(1) (2016); (5) possession of a firearm by an unlawful user of a controlled substance, in violation of Minn. Stat. § 624.713, subd. 1(10)(iii) (2016); and (6) possession of drug paraphernalia, in violation of Minn. Stat. § 152.092(b) (2016).

The case was tried on two days in July 2018. The state called six witnesses: Officer Roiger; Lieutenant Wollenburg; a police detective who swabbed the handgun and cartridges; and three analysts from the BCA who conducted forensic testing on the handgun, the three cartridges, and the methamphetamine. Dow testified that he allowed N.H. to stay in the motel room for one and one-half weeks, during which time he stayed at a friend's house. He testified further that he had returned to his motel room only 15 or 20 minutes before the officers arrived to conduct the random search. Dow admitted that he possessed the methamphetamine that was found on the floor of the squad car.

The jury found Dow guilty on counts 1 through 5. The jury did not return a verdict on count 6, and the state later voluntarily dismissed that count. The district court imposed concurrent sentences of 60, 60, 15, and 21 months of imprisonment, respectively, on counts 1, 2, 3, and 4. The district court imposed a sentence of 212 days in jail on count 5, with credit for time served. Dow appeals.

DECISION

I. Possession of Firearm and Ammunition

Dow first argues that the evidence is insufficient to support the jury's verdicts on counts 1, 2, 3, and 5. To prove unlawful possession of a firearm or ammunition by an ineligible person, the state must prove that the defendant knowingly possessed the contraband while prohibited by law from doing so. *See State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). Dow does not dispute that he was ineligible to possess a firearm and ammunition in January 2018. The question is whether Dow knowingly possessed the handgun and the ammunition that were found in his motel room.

In 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 must 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). We do “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.

Dow contends that this court should apply a stricter standard of review because his convictions rest on circumstantial evidence. The state agrees. In reviewing a conviction based on circumstantial evidence, this court applies a two-step analysis. *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).

Both parties discuss whether the circumstantial evidence is sufficient to prove that Dow constructively possessed the handgun. 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, 226 N.W.2d 609, 610-11 (Minn. 1975) (*per curiam*) (citing Charles H. Whitebread & Ronald 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 a 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 611. In this case, the state does not expressly state whether the first part, the second part, or both parts of the constructive-possession test apply, but its brief emphasizes the second part. Accordingly, we will proceed to determine whether “there is a strong probability . . . that [Dow] was . . . consciously exercising dominion and control over” the handgun and the cartridges. *See id.* at 611; *see also State v. Sam*, 859 N.W.2d 825, 833-34 (Minn. App. 2015).

At the first step of the circumstantial-evidence analysis, we must identify the circumstances proved that are relevant to the jury’s determination of guilt. *See Moore*, 846 N.W.2d at 88. The relevant circumstances are recited above in the statement of facts.

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 contends that, given the circumstances, it is reasonable to infer that Dow was consciously exercising dominion and control over the handgun and the cartridges at the time of the random search. We agree.

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.* (quotations omitted). With respect to the handgun, Dow contends that, given the circumstances, it is reasonable to infer that he did not know what was in the cinch sack.

His contention is inconsistent with the fact that, when Officer Roiger picked up the cinch sack, Dow immediately attempted to disassociate himself from the cinch sack by saying, “That wasn’t mine. I was just holding it for my cousin. I was supposed to bring it somewhere.” His contention also is inconsistent with the fact that the handgun was wrapped in a motel towel (which indicates that the handgun was placed in the cinch sack after it entered the motel), the fact that Dow was not permitted to have any guests in his motel room (which indicates that he, not another person, placed the cinch sack containing the handgun on his dresser), and the fact that he accurately described the handgun while in the squad car even though another officer earlier had incorrectly described it (which indicates that Dow was familiar with the handgun). For these reasons, the inference that Dow did not know what was in the cinch sack is not a reasonable inference. Dow contends in the alternative that, if he knew what was in the cinch sack, he was not exercising dominion and control over it. This contention is directly contrary to his statement to Officer Roiger that he was holding the cinch sack for his cousin. Thus, the only reasonable inference in light of the circumstances proved is that Dow was “consciously exercising dominion and control over” the handgun, *see Florine*, 226 N.W.2d at 611, which means that the circumstances are “inconsistent with any rational hypothesis except that of guilt,” *see Moore*, 846 N.W.2d at 88 (quotations omitted).

With respect to the three cartridges, Dow contends that it is reasonable to infer that he did not know that the cartridges were in his dresser and in his nightstand. His contention is inconsistent with the fact that his DNA was found on one of the cartridges. In addition, one cartridge was found in the same drawer as his Minnesota identification card and motel-

room key cards (which indicates that he had access to and used the drawers), and the cartridges are the type of ammunition needed for a Tec-9 handgun. Dow also contends that the forensic scientist who testified about the DNA tests “could not say how appellant’s DNA came to be placed on the ammunition, which leaves open the possibility that the DNA was transferred from a personal item of appellant’s, such as the [identification card] found in the drawer.” There is no evidence in the record concerning the likelihood that Dow’s DNA was transferred to the cartridge from another item. In any event, Dow’s contention does not overcome the reasonable inference that he used the dresser and nightstand drawers in which cartridges were found. Thus, the only reasonable inference in light of the circumstances is that Dow was “consciously exercising dominion and control over” the ammunition, *see Florine*, 226 N.W.2d at 611, which means that the circumstances are “inconsistent with any rational hypothesis except that of guilt,” *see Moore*, 846 N.W.2d at 88 (quotations omitted).

Thus, the state’s circumstantial evidence is sufficient to prove that Dow knowingly possessed the handgun and the ammunition that was found in the random search of his motel room.

II. Multiple Convictions and Sentences

Dow also argues that the district court erred by entering multiple convictions and by imposing multiple sentences. He asks this court to reverse and remand with instructions to vacate the convictions on count 3 and count 5 or, in the alternative, to vacate two of the sentences on counts 3, 4, and 5.

A.

Dow argues that the district court erred by entering multiple convictions on counts 3 and 5.

A defendant “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2016). An offense is an included offense if it is:

- (1) a lesser degree of the same crime; or
- (2) an attempt to commit the crime charged; or
- (3) an attempt to commit a lesser degree of the same crime; or
- (4) a crime necessarily proved if the crime charged were proved; or
- (5) a petty misdemeanor necessarily proved if the misdemeanor charge were proved.

Id. In determining whether an offense is an “included offense” under section 609.04, courts examine “the elements of the offense instead of the facts of the particular case.” *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). This court applies a *de novo* standard of review to the application of section 609.04. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013).

Neither the offense in count 3 nor the offense in count 5 is a lesser-included offense of the other offense. Neither crime is a lesser degree of the other crime. *See* Minn. Stat. § 609.04, subd. 1(1). Neither crime is an attempt to commit the other crime. *See id.*, subd. 1(2). Neither crime is an attempt to commit a lesser degree of the other crime. *See id.*,

subd. 1(3). Neither crime is “a crime necessarily proved if the crime charged were proved.” *See id.*, subd. 1(4). That is so because an obliterated serial number is required for count 3 but not required for count 5, and because the unlawful use of a controlled substance is required for count 5 but not required for count 3. *See* Minn. Stat. §§ 609.667(2), 624.713, subd. 1(10)(iii). Lastly, neither crime is a petty misdemeanor necessarily proved by proof of a misdemeanor. *See id.*, subd. 1(5). Furthermore, count 3 and count 5 are based on statutes that are located in different chapters of the Minnesota Statutes. *See State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985); *State v. Nyagwoka*, 894 N.W.2d 174, 176-77 (Minn. App. 2017).

Thus, the district court did not err by entering convictions on counts 3 and 5 as well as counts 1, 2, and 4.

B.

Dow also argues that the district court erred by imposing multiple sentences on counts 3, 4, and 5.

“[I]f a person’s conduct constitutes more than one offense . . . , the person may be punished for only one of the offenses.” Minn. Stat. § 609.035, subd. 1 (2016). This statute “generally prohibits multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident.” *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012) (quotation omitted). If all offenses at issue are intentional crimes, “we determine whether the crimes were part of a single behavioral incident by considering (1) whether the offenses occurred at substantially the same time and place, and (2) whether the conduct was motivated by an effort to obtain a single

criminal objective.” *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016) (citations and quotations omitted). In making this determination, we consider the relationship of the offenses to each other. *See State v. Bauer*, 792 N.W.2d 825, 829 (Minn. 2011). This analysis is not a mechanical test but requires an examination of all relevant facts and circumstances. *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997); *State v. Carr*, 692 N.W.2d 98, 101 (Minn. App. 2005). The state bears the burden of proving by a preponderance of the evidence that the conduct underlying multiple offenses was not part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000). This court applies a clear-error standard of review to a district court’s findings of fact and a *de novo* standard of review to a district court’s ultimate decision concerning multiple sentences. *Bakken*, 883 N.W.2d at 270.

In this case, Dow contends that counts 3, 4, and 5 arise out of a single behavioral incident. He concedes that he was properly sentenced on both count 1 and count 2 due to a statute that provides that “a prosecution for or conviction of a violation of section 609.165 or 624.713, subdivision 1, clause (2), is not a bar to . . . punishment for any other crime committed by the defendant as part of the same conduct.” *See* Minn. Stat. § 609.035, subd. 3; *see also State v. Salyers*, 842 N.W.2d 28, 37 (Minn. App. 2014), *aff’d*, 858 N.W.2d 156 (Minn. 2015); *State v. Winbush*, 912 N.W.2d 678, 686 n.3 (Minn. App. 2018), *review denied* (Minn. May 29, 2018). But he contends that, because counts 3, 4, and 5 arise from the same behavioral incident, he may be sentenced on only one of those three convictions.

The state agrees with Dow that subdivision 3 of section 609.035 allows multiple sentences on counts 1 and 2 but does not extend to the other counts. For purposes of this

opinion, we assume without deciding that the parties have properly interpreted subdivision 3. The state also agrees with Dow that the convictions on counts 3 and 5 arise from the same behavioral incident. The state's concession on the latter point is consistent with this court's caselaw. In *Salyers*, the appellant was convicted of three offenses relating to a firearm: "felon in possession of a firearm, possessing a sawed-off shotgun, and possessing a firearm with an obliterated serial number." 842 N.W.2d at 37. We concluded that the offenses of possession of a firearm by an ineligible person and possession of a firearm with an obliterated serial number arose from the same behavioral incident and that the appellant was improperly sentenced on both convictions. *Id.* Accordingly, the district court in this case erred by imposing sentences on both count 3 and count 5.

In light of that conclusion, the next question is whether count 4, which concerns Dow's possession of methamphetamine, arises from the same behavioral incident as either count 3 or count 5, which concern his possession of the handgun. The caselaw is contrary to Dow's argument. In *Mercer v. State*, 290 N.W.2d 623 (Minn. 1980), the supreme court concluded that the appellant's convictions of possession of methamphetamine and unlawful possession of a handgun "were independent of each other, even though their commission was discovered by the police at the same time" because "nothing in the record reveals that either crime was in furtherance of the other or that defendant had a single criminal objective." *Id.* at 626. Similarly, this court concluded in *Winbush* that "[p]ossession of a firearm—any firearm—is not necessary to commit the crime of possessing methamphetamine and therefore is not part of the same behavioral incident."

912 N.W.2d at 685. Thus, Dow's conviction on count 4 does not arise from the same behavioral incident as his conviction on count 3 or his conviction on count 5.

The only remaining question is the appropriate remedy in light of our conclusion that the district court erred by imposing sentences on both count 3 and count 5. Dow urges us, in a general way, to remand for resentencing. The state urges us, in a more specific way, to affirm Dow's sentences on counts 1 through 4 and to remand with instructions to vacate count 5. We believe that it is appropriate to allow the district court to consider the appropriate options and to impose a lawful sentence in the first instance. Thus, we reverse and remand to the district court with instructions to resentence Dow in a manner that ensures that he does not receive sentences on both count 3 and count 5.

Affirmed in part, reversed in part, and remanded.