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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0841**

State of Minnesota,
Respondent,

vs.

Robert James Yernatich,
Appellant.

**Filed May 4, 2020
Affirmed in part, reversed in part, and remanded
Bratvold, Judge**

St. Louis County District Court
File No. 69VI-CR-18-795

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Mark S. Rubin, St. Louis County Attorney, Karl G. Sundquist, Assistant County Attorney,
Virginia, Minnesota (for respondent)

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Considered and decided by Bratvold, Presiding Judge; Reyes, Judge; and Bryan,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant seeks review from final judgments of conviction for first-degree sale
of methamphetamine, first-degree possession of methamphetamine, being a felon in

possession of ammunition, and being a felon in possession of an electronic incapacitation device, in this case, a “stun gun.” He raises three issues: (1) the record evidence is insufficient to sustain his convictions for possession and sale of methamphetamine and possession of a stun gun, (2) the prosecutor engaged in prejudicial misconduct during closing arguments, and (3) the district court incorrectly sentenced appellant for two offenses that arose from the same behavioral incident. We conclude that the evidence of appellant’s possession of methamphetamine and the stun gun is insufficient to sustain these convictions because there is a reasonable hypothesis inconsistent with guilt based on the circumstances proved. We also conclude that any prosecutorial misconduct during closing arguments does not warrant reversal of the remaining conviction for being a felon in possession of ammunition. Because our resolution of the first issue disposes of the two convictions challenged in the third issue, we do not reach the third issue. We therefore affirm in part, reverse in part, and remand for resentencing.

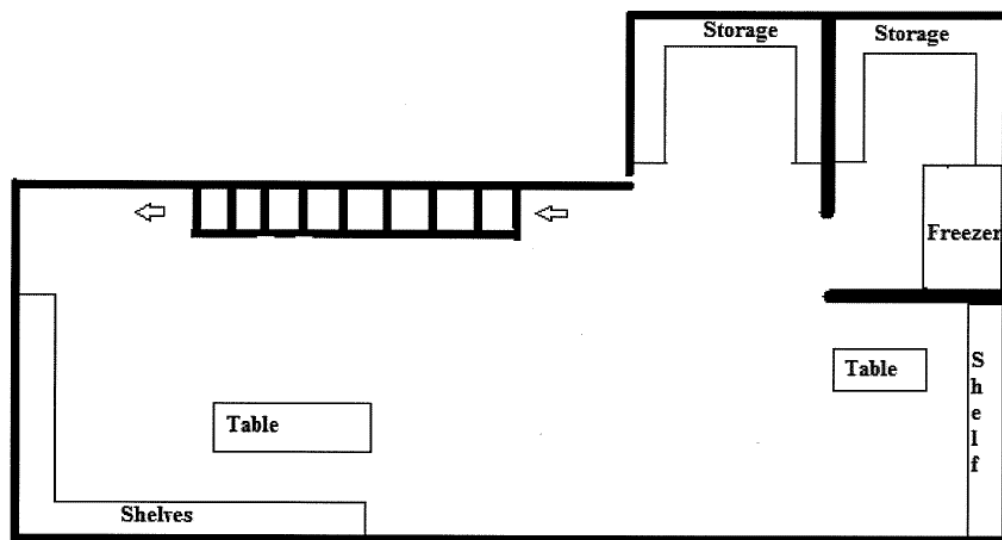
FACTS

On July 10, 2018, officers with the Lake Superior Drug and Violent Crimes Task Force (task force) and other law-enforcement agencies obtained a warrant to search appellant Robert Yernatich, his home, and a restaurant called the Black Bear Café (café), in Tower. Yernatich’s brother owned the café at the time of the search, and Yernatich ran the café’s day-to-day operations. Yernatich’s home was a separate building about 200 feet behind the café.

Before the task force executed the search warrant, investigator Scott Williams and three plainclothes officers entered the café to conduct surveillance. They identified

Yernatich and noticed two employees who were working at the café. After about an hour, the officers identified themselves and placed Yernatich in handcuffs for safety purposes while they conducted the searches. Williams searched Yernatich's person and found \$1,150 in his pocket, but no drugs. Yernatich told Williams that he had no drugs at the café.

Other officers began to videotape the café and its basement as part of the search. The recording shows a basement crowded with many items. It had shelves in the southwestern corner, shelves along the southeastern wall, and two storage areas in the northeastern corner. The parties stipulated to the admission of a diagram of the basement as a trial exhibit. The diagram has no dimensions and is not to scale. The exhibit is oriented with north at the top.



There were two tables in the basement, one near the southwestern shelves and one near the southeastern shelves. Yernatich stored tools and other personal items on the southwestern table and in the surrounding area. The café stored its inventory and supplies in an area with a freezer in the northeastern corner of the basement.

As the search continued, Yernatich told Williams that there was a “user amount” of methamphetamine in the café’s basement and showed Williams a small bindle of methamphetamine on the southwestern table. Sheriff’s Deputy Chad Larson and other officers searched the basement while Sheriff’s Deputy Josh Berndt recorded, photographed, and collected evidence. Larson found a large plastic bag containing a scale and 122.568 grams of suspected methamphetamine behind a card table on the southeastern shelves. Other officers found suspected methamphetamine pipes and a plate with suspected methamphetamine residue on the southwestern shelving, a second small bindle of suspected methamphetamine on the southwestern table, and a stun gun on the southwestern table. Later testing confirmed that the large plastic bag and two small bindles contained methamphetamine.

Officers searched Yernatich’s home the same day and found cash totaling \$4,000 in one bedroom on the home’s main floor. In another bedroom on the main floor, officers found Yernatich’s state identification card and a gun cabinet that contained a magazine loaded with one .22-caliber cartridge. Officers also found ammunition in a plastic tub near the home’s front entryway.

The state charged Yernatich with first-degree sale of methamphetamine under Minn. Stat. § 152.021, subd. 1(1) (2016); first-degree possession of methamphetamine under Minn. Stat. § 152.021, subd. 2(a)(1) (2016); being a felon in possession of ammunition under Minn. Stat. § 624.713, subd. 1(2) (2016); and being a felon in possession of an electronic incapacitation device under Minn. Stat. § 624.731, subd. 3(b) (2016).

The district court held a two-day jury trial in January 2019. Yernatich stipulated that the large plastic bag contained 122.568 grams of methamphetamine and that he was an ineligible person to possess ammunition and a stun gun. Yernatich did not dispute that the stun gun qualifies as an electronic incapacitation device. The state called five witnesses who testified to the facts summarized above.

Berndt testified that “all of the stuff for the bar and the restaurant were located in a different area” from where police found the drugs and stun gun in the southwestern corner. Berndt also testified that he knew from training and experience that methamphetamine dealers tend to keep their drugs at a location they have control over, often keep a large stash near a personal-use stash, and “keep it in a place like this where they can make the argument that somebody else had access to it or in a shed where they think that we won’t look.”

Officer Katherine Kral testified that the task force supplies confidential informants with prerecorded money to use in controlled purchases of drugs. Kral received and analyzed the money discovered during the searches of Yernatich and his home. She found that \$500 of the \$1,150 on Yernatich’s person and \$450 of the \$4,000 in Yernatich’s home matched the task force’s prerecorded money. Kral testified that the task force put the prerecorded money into circulation the same day that the task force executed the search warrant. Kral agreed on cross-examination that investigators did not know how the prerecorded money came into Yernatich’s possession.

The state called Yernatich’s brother, who is the café’s sole owner. The brother testified that he did “more of the books” for the café and that Yernatich handled the café’s day-to-day operations. The brother also testified that employees went into the basement’s

northeastern storage area “[s]everal times a day” to get items for the café but that it was “[h]ighly unlikely” that employees would go into the other areas of the basement. He testified that the café did not have a credit-card machine at the time of the search, so customers paid with cash or check. Yernatich did not testify.

The jury found Yernatich guilty on all counts. The district court convicted Yernatich and imposed concurrent sentences of imprisonment of 126 months for first-degree drug sale, 60 months for being a felon in possession of ammunition, and 23 months for being a felon in possession of an electronic incapacitation device, with credit for time served. Yernatich appeals.

D E C I S I O N

I. The evidence is insufficient to sustain Yernatich’s convictions for first-degree drug sale, first-degree drug possession, and being a felon in possession of an electronic incapacitation device.

Yernatich challenges the sufficiency of the evidence supporting his convictions for first-degree sale of methamphetamine, first-degree possession of methamphetamine, and being a felon in possession of an electronic incapacitation device. He does not challenge the sufficiency of the evidence supporting his conviction for being a felon in possession of ammunition.

The elements of first-degree sale and first-degree possession require the state to prove beyond a reasonable doubt that Yernatich possessed the methamphetamine in the basement; Yernatich stipulated that the large plastic bag contained 122.568 grams of methamphetamine. *See* Minn. Stat. § 152.021, subds. 1(1), 2(a)(1). Similarly, the elements of being a felon in possession of an electronic incapacitation device require the state to

prove beyond a reasonable doubt that Yernatich possessed the stun gun; Yernatich stipulated that he was ineligible to possess one. *See* Minn. Stat. § 624.731, subd. 3(b). In other words, Yernatich disputes only the possession element of all three convictions.

Officers found 130 grams of methamphetamine in the café, of which 122.568 grams were in the large plastic bag discovered on the basement's southeastern shelves. If the state failed to prove that Yernatich possessed the methamphetamine in the large plastic bag, the approximately seven grams of methamphetamine found elsewhere would be insufficient to uphold his convictions for first-degree sale and first-degree possession. *See* Minn. Stat. § 152.021, subd. 1(1) (requiring state to prove defendant sold at least 17 grams of methamphetamine); Minn. Stat. § 152.021, subd. 2(a)(1) (requiring state to prove defendant possessed at least 50 grams of methamphetamine). We therefore focus our analysis on whether the evidence is sufficient to prove that Yernatich possessed the large plastic bag on the southeastern shelves and the stun gun on the table in the southwestern corner.

The state may meet its burden of proof by establishing either actual or constructive possession. *State v. Porte*, 832 N.W.2d 303, 308 (Minn. App. 2013). The parties agree that the state's theory at trial was that Yernatich constructively possessed the methamphetamine and stun gun. Constructive possession requires the state to show either:

(1) that the prohibited item was found “in a place under defendant's exclusive control to which other people did not normally have access,” or (2) if the prohibited item was found “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” the prohibited item.

State v. Salyers, 858 N.W.2d 156, 159 (Minn. 2015) (quoting *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975)). Only the second test applies to the drugs and stun gun under the fact of this case. Yernatich’s brother testified that café employees went into the basement “[s]everal times a day” to get items for the café, meaning that the drugs and stun gun were not found “in a place under defendant’s exclusive control to which other people did not normally have access.” See *Florine*, 226 N.W.2d at 611. Accordingly, to prove that Yernatich possessed the drugs and stun gun, the state needed to show that there was a strong probability that Yernatich consciously exercised dominion and control over the drugs and stun gun.

Either type of constructive possession may be proved by circumstantial evidence. *State v. Sam*, 859 N.W.2d 825, 832 (Minn. App. 2015). Generally, when a defendant challenges the sufficiency of the evidence, we conduct “a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach a verdict of guilty.” *Porte*, 832 N.W.2d at 307 (quotation omitted). Because the state offered only circumstantial evidence of a possession element challenged by Yernatich, we review the conviction under heightened scrutiny using a two-part test. See *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017). First, we “identify the circumstances proved and independently consider the reasonable inferences that can be drawn from those circumstances, when viewed as a whole.” *Id.* During this step, we defer to the jury’s acceptance or rejection of evidence that conflicts with the circumstances proved. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010).

In the second step, we “independently consider the reasonable inferences that can be drawn from the circumstances proved, when viewed as a whole.” *Harris*, 895 N.W.2d at 601. We do not defer to the jury’s choice between reasonable inferences at this stage. *Id.* The circumstantial evidence proved by the state “must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted). We will sustain a conviction based on circumstantial evidence only if the circumstances proved are “consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Harris*, 895 N.W.2d at 601.

We begin our analysis of the first step by identifying the circumstances proved:

- (1) Yernatich’s brother owned the café and Yernatich ran the café’s day-to-day operations.
- (2) Yernatich initially denied having drugs and then later disclosed that he had a “user amount” of methamphetamine in the café’s basement.
- (3) Yernatich showed officers a “small bundle” of methamphetamine on the basement’s southwestern table, in an area surrounded by Yernatich’s tools.
- (4) Officers found a stun gun on the same table as the small bundle that Yernatich showed to police.
- (5) Officers discovered a scale and approximately 122 grams of methamphetamine in a plastic bag behind a card table on the southeastern shelves.
- (6) Officers found \$1,150 on Yernatich’s person, of which \$500 matched cash prerecorded by the task force and given to a confidential informant to buy drugs in a controlled purchase.
- (7) Officers found \$4,000 in a bedroom in Yernatich’s home, of which \$450 matched cash prerecorded by the task force.
- (8) The café was

check- or cash-only and did not accept card payment at the time of the search. (9) Yernatich's brother testified that he stored items in the basement but that the drugs and stun gun were not his. (10) The café stored food and supplies in an area in the basement's northeastern corner. (11) The café had at least six employees who had access to the café's storage area in the basement and would retrieve supplies "[s]everal times a day." (12) It would be "[h]ighly unlikely" that the café's employees would go into areas of the basement other than the café's storage area in the northeastern corner. (13) Officers testified that drug dealers often keep a personal drug stash near their larger stash, often will not keep the larger stash at home, and often will disclose their personal stash to police in the hope that police will stop searching. (14) Officers testified that drug dealers seldom leave a large stash of drugs at their place of employment.

Yernatich concedes that the circumstances proved allow for the reasonable inference that he constructively possessed the drugs and stun gun. He argues that the state's evidence fails on the second step because the circumstances proved are not inconsistent with the reasonable alternative hypothesis that one or more of the café's employees possessed the drugs and stun gun.

Minnesota caselaw guides our analysis. In two similar cases involving constructive possession, the appellate courts upheld convictions based on circumstantial evidence because the record included "evidence tying a defendant directly to the illegal items." *Sam*, 859 N.W.2d at 835. In *Harris*, for example, the defendant drove another person's car with two passengers when an officer initiated a traffic stop. 895 N.W.2d at 596-97. Officers searched the car and found a handgun hidden in the car's headlining near the sunroof,

slightly behind the driver's seat. *Id.* at 597. The handgun had a DNA mixture on it; forensic testing excluded 75% of the general population as contributors but could not exclude any of the car's three occupants as contributors. *Id.* Based on this evidence, the supreme court reversed defendant's conviction for being a felon in possession of a firearm because it was reasonable to infer that defendant did not know the firearm was in the car. *Id.* at 603. *See also Sam*, 859 N.W.2d at 835-36 (reversing conviction for insufficient evidence because no direct evidence tied defendant to the contraband and the state's evidence did not eliminate the reasonable alternative hypothesis that the car's owner or the passenger possessed the contraband).

Harris and *Sam* show that a person's physical proximity to contraband, without more, is insufficient to sustain a conviction based on circumstantial evidence of constructive possession. The state's proximity-based evidence in this case is even more attenuated than the record evidence in *Harris* and *Sam*. Rather than showing the contraband's proximity to Yernatich's *person*, the state showed the contraband's proximity to Yernatich's personal *items*. For example, the state proved that the stun gun was on the same table in the southwestern corner where Yernatich kept his personal bundle of drugs. But police documented many other items in the southwestern corner. And the state produced no evidence tying Yernatich to items in the *southeastern* corner, where police found the large plastic bag of drugs and the scale. In fact, the southeastern corner is significantly more proximate to the café's supplies that employees accessed "[s]everal times a day" than it is to the southwestern corner, where Yernatich's personal bundle was located.

With no evidence linking Yernatich directly to the large plastic bag, we conclude that the circumstances proved do not eliminate the reasonable alternative hypothesis that another café employee possessed the drugs and stun gun. *But cf. State v. Mollberg*, 246 N.W.2d 463, 472 (Minn. 1976) (affirming sufficiency of evidence supporting conviction for constructive possession of marijuana found in bedroom frequently occupied by defendant that contained letters addressed to defendant and parts of a motorcycle owned by defendant).

The state attempts to refute Yernatich's alternative hypothesis as unreasonable based on two pieces of evidence.¹ First, Yernatich's brother testified that it was "highly unlikely" that the café's employees would go anywhere in the basement except the café's storage area in the northeastern corner. This testimony is insufficient to rebut another employee's constructive possession of the prohibited items because it does not create a "strong probability" that Yernatich consciously exercised dominion and control over the drugs and stun gun.

Second, the state's evidence about the prerecorded cash in Yernatich's possession is too speculative. The café mainly operated in cash at the time of the search and police conceded that they did not know how the prerecorded cash came to be in Yernatich's possession. Yernatich's alternative hypothesis reasonably assumes that customers paid for food at the café with the prerecorded money. While the jury appropriately weighed this

¹ We observe that the officers' testimony that employees rarely store a dealer-sized stash of drugs at their place of employment cannot make the alternative hypothesis unreasonable because it is inconsistent with the conviction. Yernatich himself was an employee of the café; his brother was the café's owner and Yernatich was a supervisor.

evidence, and was well within its role to reject it, for example, because the amount of money seems high for a small-town café, we cannot do likewise because we do not defer to the jury's choice between reasonable inferences at this stage. *See Harris*, 895 N.W.2d at 601. The state has identified no record evidence to change our conclusion that Yernatich's alternative hypothesis is reasonable.

In sum, the circumstances proved at trial do not create a chain of evidence that leads so directly to Yernatich's guilt as to exclude the reasonable alternative hypothesis that someone other than Yernatich possessed the drugs and stun gun. *See Al-Naseer*, 788 N.W.2d at 473. As a result, we conclude that the circumstantial evidence against Yernatich was insufficient to sustain his convictions for first-degree sale of methamphetamine, first-degree possession of methamphetamine, and being a felon in possession of an electronic incapacitation device.

II. Yernatich has no right to a new trial on his remaining conviction because of prosecutorial misconduct.

Yernatich argues that he is entitled to a new trial because the prosecutor misstated the law governing constructive possession by stating that he possessed the drugs, stun gun, and ammunition by exercising dominion and control over the café's basement and the home at the time of his arrest. Because we reverse Yernatich's convictions for first-degree sale, first-degree possession, and being a felon in possession of an electronic incapacitation device, we consider only whether Yernatich is entitled to a new trial for being a felon in possession of ammunition.

Yernatich did not object to the state’s alleged misconduct in district court. We thus review under the modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The first step of this test requires the defendant to “prove the existence of an error that is plain.” *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). A prosecutor plainly errs by misstating the law. *See, e.g., State v. Strommen*, 648 N.W.2d 681, 689-90 (Minn. 2002) (concluding that prosecutor engaged in misconduct by misstating the law).

Caselaw establishes that the state may prove constructive possession in two distinct ways: first, by showing that the contraband was found in an area over which the defendant had exclusive control and others normally could not access; or second, if other persons did have access to the area, the evidence shows a strong probability that the defendant exercised dominion and control over the contraband itself rather than the area where the contraband was found. *Salyers*, 858 N.W.2d at 159; *see also State v. Hunter*, 857 N.W.2d 537, 542 (Minn. App. 2014).

During closing arguments, the prosecutor blended these distinct types of constructive possession as he argued that Yernatich possessed the ammunition in his home. For example, the prosecutor stated, “Who is the only person who lives [in] that residence other than on weekends when Mr. Yernatich’s daughter comes to visit? It’s Mr. Yernatich. He has dominion and control over that residence.” The prosecutor also stated, “This is Mr. Yernatich’s residence. This is where he lives. . . . He cannot have [ammunition] and it’s in the place he lives. He had dominion and control over it.” By conflating the two types of constructive possession, the prosecutor told the jury that Yernatich had dominion and control over the ammunition because he lived alone and others did not normally have

access to the home. This is confusing, at the very least, and not an accurate statement of the law governing constructive possession.

But even if we assume that Yernatich has established error that was plain, his claim of prosecutorial misconduct fails. The second step of the modified plain-error test requires the state to show that the plain error did not affect the defendant's substantial rights. *Parker*, 901 N.W.2d at 926. "A plain error affects a defendant's substantial rights if it was prejudicial and affected the outcome of the case. An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *Id.* (quotations omitted). While analyzing whether the error affected the defendant's substantial rights, we consider factors like the pervasiveness of the erroneous conduct, the strength of the evidence against the defendant, and whether the defendant had an opportunity to rebut the improper remarks. *State v. Peltier*, 874 N.W.2d 792, 805-06 (Minn. 2016).

We conclude that there is no "reasonable likelihood" that the prosecutor's misstatements of law affected Yernatich's substantial rights. The state presented strong evidence that Yernatich possessed the ammunition in the home because he exclusively controlled the home and others did not normally have access to it—the first type of constructive possession. Officers also found the magazine loaded with one cartridge in Yernatich's bedroom—a place within the home that others did not normally have access to—near his state identification card, and found the plastic tub of ammunition in the home's front entryway. The prosecutor's misstatements of law were not pervasive because they

occurred infrequently during closing argument. Yernatich had an opportunity to rebut the prosecutor's misstatements during his closing argument.

Importantly, the district court correctly instructed the jury on the law of constructive possession and instructed the jury to disregard the attorneys' statements of law that differed from those given by the district court. We presume that the jury followed the district court's instructions, which in turn reduced the harm caused by the prosecutor's infrequent misstatements of law. *See State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005) (finding prosecutor's misconduct harmless because "the court's ruling and instructions adequately addressed the misconduct").

In sum, even if we conclude that the prosecutor plainly erred by misstating the law in closing arguments, we determine that the error did not affect Yernatich's substantial rights. Yernatich is therefore not entitled to a new trial for his conviction of being a felon in possession of ammunition.

Because we reverse Yernatich's convictions for first-degree sale of methamphetamine, first-degree possession of methamphetamine, and being a felon in possession of an electronic incapacitation device, we do not consider Yernatich's argument that the district court erred while sentencing him for those offenses. We remand for resentencing for his remaining conviction.

Affirmed in part, reversed in part, and remanded.