

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0050**

State of Minnesota,
Respondent,

vs.

Dzenan Jay Kamencic,
Appellant.

**Filed April 19, 2021
Affirmed
Peterson, Judge***

Olmsted County District Court
File No. 55-CR-17-3882

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Dzenan Kamencic, Rochester, Minnesota (pro se appellant)

Considered and decided by Cochran, Presiding Judge; Gaïtas, Judge; and Peterson,
Judge.

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

NONPRECEDENTIAL OPINION

PETERSON, Judge

In this pro se appeal from his convictions for possessing child pornography, appellant argues that the evidence is insufficient to support the convictions and that the district court erred by denying his motion for a mistrial after an investigator offered testimony at trial based upon an undisclosed report. We affirm.

FACTS

In March 2017, police executed a search warrant at appellant Dzenan Jay Kamencic's home. Officers recovered a computer hard drive and a cellphone. Both devices contained suspected child pornography. The state charged appellant by amended complaint with six counts of child-pornography possession. The charges concerned twelve images of suspected child pornography and six alleged victims.

At appellant's jury trial, an officer testified that the hard drive was from a computer found in a kitchen cabinet and that the cellphone was found in a box in the basement. An investigator testified about the forensic examination of the recovered devices. When he turned on the cellphone, an email address consistent with appellant's name appeared on the cellphone, and pictures of appellant were recovered from the cellphone.

During cross-examination, defense counsel asked the investigator about "hash values," which are "line[s] of code" that are as "distinct to an image as fingerprints are to a human" and can be used to determine whether an image is of a "known person." Defense counsel then asked the investigator if any of the images from the cellphone or the hard drive contained a known hash value, and the following exchange occurred:

DEFENSE: You would agree with me that the images that you looked at in preparation for trial today, none of those images have known hash values; do they?

INVESTIGATOR: One did.

DEFENSE: Are you certain about that or are you just guessing?

INVESTIGATOR: The images that . . . [another] [i]nvestigator . . . selected to send through the National Center for Missing and Exploited Children law enforcement portal, we sent them through and months later we got a report back with one image being identified by I believe [a] police department—I think it was [the] Charlotte-Mecklenburg [police department].

DEFENSE: Do you have personal information about this or are you relying on something you read or saw from [the other investigator's] work?

INVESTIGATOR: I'm relying upon the report that came back to me that I shared with [the other investigator].

DEFENSE: So you received a report back?

INVESTIGATOR: After the images—I sent the images in and they emailed me back that that report is ready.

DEFENSE: Did you provide a copy of that report to counsel?

INVESTIGATOR: Did I? No.

During a bench conference after this testimony, it was determined that one of the pictures introduced at trial (exhibit 2) contained an identified person, which was noted in a report, and neither the prosecution nor the defense had been made aware of the report. The victim identification in the report was not conclusive, as the report stated “the following does not constitute verification of identity of the child,” and “[i]t is the responsibility of the investigator or prosecutor to contact the listed law enforcement agency for verification of image and age verification of the child.”

The prosecutor acknowledged an error, stating, “I should’ve asked if we had reports in this regard.” Defense counsel requested a mistrial because of the purported discovery violation, and the district court denied the request. Defense counsel then requested an

opportunity to cross-examine the investigator about his misstatement that a victim was identified by hash value. Defense counsel also requested that the state be prohibited from eliciting testimony that a victim had been identified in a report. The district court agreed to proceed in that manner.

When the trial resumed, the following exchange took place:

DEFENSE: Investigator, this morning I had asked you to confirm for me that none of the people in the photographs had been identified and you indicated that you believed one had; do you recall that?

INVESTIGATOR: I recall that.

DEFENSE: You were basing your testimony on a report you received from [the National Center for Missing and Exploited Children]; is that correct?

INVESTIGATOR: Correct.

DEFENSE: That's a center that looks at the photos and tries to identify people; right?

INVESTIGATOR: Correct.

DEFENSE: And now you've had a chance since this morning to look at the report that you got; is that correct?

INVESTIGATOR: Correct.

DEFENSE: You would agree with me that on page 3 of the report there's a disclaimer that says: "The following does not constitute verification of identity." Do you acknowledge that?

INVESTIGATOR: I acknowledge that, yes.

DEFENSE: Understanding that there's that disclaimer on this report that it does not constitute verification of identity, would you agree with me now that actually none of the persons in those photos have been identified?

INVESTIGATOR: I would agree with that.

DEFENSE: And so your testimony this morning about one of them being an identified person due to a [hash value] was mistaken?

INVESTIGATOR: Yes.

A second investigator testified that exhibits 1, 2, 3, and 5 were recovered from the hard drive, and exhibits 4 and 6 through 12 were recovered from the cellphone. These

exhibits were admitted into evidence. According to the second investigator, appellant stated that he lived with his mother at the home that was searched, his daughter occasionally visited, and appellant's bedroom was in the basement of the home.

Appellant did not testify, and the defense did not present evidence. The defense moved for judgment of acquittal, arguing that the state failed to prove that the victims were underage. The district court denied the motion. The jury found appellant not guilty on counts one (exhibits 6-12), three (exhibit 2), and five (exhibit 3), and guilty on counts two (exhibit 4), four (exhibit 5), and six (exhibit 1). The district court stayed imposition of sentence and placed appellant on probation for five years. This appeal followed.

DECISION

I. *Sufficiency of the evidence*

In considering a challenge to the sufficiency of the evidence to sustain a conviction, we carefully analyze the record to determine whether the evidence, viewed in a light most favorable to the conviction, was sufficient to permit the jury to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We “assume that the jury believed the state’s witnesses and disbelieved contrary evidence.” *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). We will not disturb a guilty verdict if the jury, acting with due regard for the presumption of innocence and requirement of proof beyond a reasonable doubt, could reasonably have concluded that the state proved the defendant’s guilt. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant was convicted of violating Minn. Stat. § 617.247, subd. 4(a) (2016), which makes it a crime for a person to possess a “pornographic work” if the person knows

or has reason to know “its content and character.” A “pornographic work” is defined to include a picture that uses a minor to depict “sexual conduct.” Minn. Stat. § 617.246, subd. 1(f) (2016).

The state relied on circumstantial evidence¹ to prove that appellant constructively possessed the images. In order to prove constructive possession, the state needed to show: (1) that the police found the contraband “in a place under defendant’s exclusive control to which other people did not normally have access,” or (2) “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.” *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975); *see also State v. Myrland*, 681 N.W.2d 415, 420 (Minn. App. 2004) (stating that because appellant was not seen viewing images or using computers to do so, the state was required to prove appellant had constructive possession of computers by showing that he exercised dominion and control over them), *review denied* (Minn. Aug. 25, 2004).

When the state relies on circumstantial evidence to prove an element of an offense, we apply a heightened standard of review. *See Harris*, 895 N.W.2d at 601-03. Under the heightened circumstantial-evidence standard, we use a two-step process. *Id.* at 601. First, we identify the circumstances proved, “disregard[ing] evidence that is inconsistent with

¹ Circumstantial evidence is “evidence from which the fact[-]finder 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). “In contrast, 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).

the jury's verdict." *Id.* Next, we "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt." *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (quotation omitted). We do not defer to the fact-finder's choice between reasonable inferences. *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). We will reverse a conviction based on circumstantial evidence only if there is a reasonable inference other than guilt. *Loving*, 891 N.W.2d at 643.

The cellphone and hard drive were recovered from appellant's home, and both devices contained images of young girls that the jury determined were child pornography. The cellphone also contained a photo of a utility bill addressed to appellant and photos of appellant, which one investigator described as "selfies." And, when an investigator turned on the cellphone, an email address consistent with appellant's name appeared. The cellphone was recovered from the basement, and appellant told an investigator that he resided in the basement. Under these circumstances, there was a strong probability that appellant exercised dominion and control over the cellphone.

Although the circumstantial evidence that linked appellant to the hard drive is not as strong, the hard drive was found in a place where appellant had access to it, and appellant has not posited an alternative hypothesis that is inconsistent with his guilt. Because appellant's mother also lived in the house, and his daughter occasionally visited, it is possible that the computer hard drive belonged to one of them. But the record contains no evidence that supports this hypothesis. Speculation or conjecture cannot be the basis for a posited alternative hypothesis. *State v. Al-Naseer*, 788 N.W.2d 469, 480 (Minn. 2010).

The circumstantial evidence was sufficient to establish that appellant was in constructive possession of the computer hard drive.

Appellant argues that phones and computer hard drives often change hands, and the state failed to prove “when the images were downloaded, from what location[,] . . . and by whom.” But section 617.247, subdivision 4(a), criminalizes possession, not downloading. The state was not required to prove when or how the images were downloaded; it needed to prove only that appellant possessed the images and knew or had reason to know of their character.

Citing a definition of “identifiable minor” that is contained in 18 U.S.C. § 2256 (2018), appellant argues that the persons in the images “were not identified minors,” and the prosecutor “incorrectly advised the jury that victims do not have to be identified.” But the federal statute that appellant cites does not apply to the charges brought here under a state statute. *See* 18 U.S.C. § 2256 (stating that the definitions are “[f]or the purposes of this chapter”).

Appellant also cites Minn. Stat. § 617.246, subd. 1(f)(2), which defines a pornographic work to include a visual depiction that “has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct,” and argues that the evidence was not sufficient to prove the identity of the people in the photos. But appellant misinterprets that statute. It does not require that a child’s actual identity be proved. Section 617.246, subdivision 1(f), alternatively defines a pornographic work to include pictures that use “a minor to depict actual or simulated sexual conduct,” and another provision defines “minor” as “*any person under the age of 18.*” Minn. Stat.

§ 617.246, subd. 1(b) (2016) (emphasis added). The statutory language that appellant cites merely requires that a child depicted in a “created, adapted, or modified” image be real, not virtual or fabricated. *See State v. Fingal*, 666 N.W.2d 420, 425 (Minn. App. 2003) (“The visual depiction must be of an identifiable minor, not a virtual child.”), *review denied* (Minn. Oct. 21, 2003); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239, 256, 122 S. Ct. 1389, 1396, 1405 (2002) (concluding that federal act that extended prohibition against child pornography to sexually explicit images “that appear to depict minors but were produced without using any real children” was unconstitutional).

II. *Denial of motion for mistrial*

We review a district court’s denial of a motion for a mistrial for an abuse of discretion. *State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016). “A mistrial should be granted only if there is a reasonable probability, in light of the entirety of the trial including the mitigating effects of a curative instruction, that the outcome of the trial would have been different had the incident resulting in the motion not occurred.” *Id.* The district court is in the best position to determine whether a mistrial is warranted, or if an alternate remedy is appropriate. *Id.*

Appellant argues that a mistrial was warranted because an undisclosed report was the basis for an investigator’s testimony that one of the victims was identified by hash value, and the failure to disclose the report was a discovery violation. A reviewing court will not disturb a district court’s remedy for discovery violations absent a clear abuse of discretion. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). When exercising this discretion, the district court should consider: (1) the reason why disclosure was not made;

(2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors. *State v. Spann*, 574 N.W.2d 47, 53 (Minn. 1998). “Generally, without a showing of prejudice to the defendant, the state’s violation of a discovery rule will not result in a new trial.” *State v. Scanlon*, 719 N.W.2d 674, 685 (Minn. 2006) (quotation omitted).

Even if we assume that a discovery violation occurred, the district court’s remedy was not a clear abuse of its discretion.² In denying a mistrial, the district court determined that the failure to disclose the report was inadvertent, a “miscommunication,” and that any prejudice could be rectified. Defense counsel requested the opportunity to cross-examine the investigator about his victim-identification testimony, rather than have the court give a curative instruction. Defense counsel also requested that the state be prohibited from eliciting further testimony regarding the undisclosed report. The district court granted these requests. Upon further cross-examination, the investigator testified that none of the persons in the photos had been identified and that his testimony that one was identified by hash value “was mistaken.” Given these curative measures, the investigator’s limited testimony about the identification of a victim surely had no effect on the verdict. In fact, the jury returned a not-guilty verdict on the charge involving the image that the investigator incorrectly testified was the image of an “identified” minor.

² Appellant also suggests that the district court erred by “refusing to acquit.” However, he fails to cite any authority or make any argument to support this bare assertion. We decline to consider this argument. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (declining to consider allegations made in a supplemental brief with “no argument or citation to legal authority”).

Citing Minn. R. Civ. P. 26.01(a)(3), appellant also argues that the state failed to disclose evidence in a timely manner. But the rules of civil procedure do not apply in this case. *See* Minn. R. Crim. P. 1.01 (“These rules [of criminal procedure] govern the procedure in prosecutions for felonies, gross misdemeanors, misdemeanors, and petty misdemeanors in the district courts in the State of Minnesota.”).

Affirmed.