

*This opinion is nonprecedential except as provided by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
A20-0324**

State of Minnesota,
Respondent,

vs.

Maung Soe Myint,
Appellant.

**Filed March 29, 2021
Reversed
Gaïtas, Judge**

Waseca County District Court
File No. 81-CR-18-880

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

Rachel V. Cornelius, Waseca County Attorney, Waseca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Gaïtas, Judge; and Cleary,
Judge.*

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

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Maung Soe Myint appeals from his conviction for fourth-degree driving while impaired, arguing that the evidence was insufficient to support the district court's guilty verdict. Because the evidence failed to establish beyond a reasonable doubt that Myint drove, operated, or was in physical control of a motor vehicle while under the influence of a controlled substance, we reverse.

FACTS

On the evening of October 26, 2018, Janesville Police received a report of a “suspicious person” at a local hardware store. An employee of the hardware store pointed out the suspicious person—later identified as Myint—to the responding officer, and the officer asked Myint to speak with him outside. The officer asked Myint why he was in Janesville, and Myint stated that he had gotten lost driving from Mankato to Austin and that his vehicle had run out of gas. The officer requested Myint's identification. Myint responded that his identification was in his vehicle. The officer instructed Myint to retrieve his identification, and Myint did.

The officer testified that Myint acted “very confused” during their conversation, would not make eye contact, and could not answer simple questions regarding “where he was, what he was doing or where he was going.” The officer also testified that Myint was making “twitching” motions and frequently moved his hands in and out of his pockets despite being repeatedly instructed not to do so. Based on Myint's failure to refrain from putting his hands in his pockets, the officer decided to pat-search him to check for weapons

or other contraband. During the search, a pink plastic bag fell from Myint's pocket, which the officer suspected contained a controlled substance. The officer placed Myint under arrest and located a "green glass pipe," a second pipe, and two lighters concealed in his clothing. Myint told the officer that the bag contained "medicine" that he used to stay awake, and admitted that he used the green glass pipe to smoke it.

On the basis of his observations and discoveries, the officer suspected that Myint had been driving under the influence of a controlled substance and obtained a search warrant for a sample of Myint's blood. Subsequent testing by the Minnesota Bureau of Criminal Apprehension (BCA) confirmed the presence of methamphetamine and amphetamine in Myint's blood, and confirmed that the bag discovered during the search contained 1.16 grams of methamphetamine.

The state charged Myint with fourth-degree driving while impaired (DWI), Minn. Stat. § 169A.20, subd. 1(2) (2018), as well as with additional offenses unrelated to this appeal. The district court found appellant guilty after a bench trial.

This appeal follows.

DECISION

"Due process requires that every element of the offense charged must be proven beyond a reasonable doubt by the prosecution." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). "To determine whether sufficient evidence exists to support a jury verdict, [appellate courts] view the evidence in a light most favorable to the verdict and assume the fact-finder disbelieved any testimony conflicting with that verdict." *State v. Balandin*, 944 N.W.2d 204, 213 (Minn. 2020) (quotation omitted). A verdict will not be overturned "if,

giving due regard to the presumption of innocence and to the prosecution's burden of proving guilt beyond a reasonable doubt, the [fact-finder] could reasonably have found the defendant guilty of the charged offense." *Id.* (quotation omitted). We apply the same standard of review when evaluating the sufficiency of the evidence after a court trial as we do after a jury trial. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011).

The district court found Myint guilty of DWI under a statute that prohibits driving, operating, or being in physical control of a motor vehicle when "under the influence of a controlled substance." Minn. Stat. § 169A.20, subd. 1(2). Myint argues that the state's evidence was insufficient to prove beyond a reasonable doubt that he was under the influence of a controlled substance at any point while driving, operating, or in physical control of a motor vehicle.

The elements of an offense may be proven by either direct or circumstantial evidence. "Direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004) (quotation omitted). 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). The parties here agree, and the record confirms, that Myint's conviction relies on circumstantial evidence that he drove, operated, or was in physical control of a motor vehicle while under the influence of a controlled substance.

When an element of an offense is supported by circumstantial evidence alone, the appellate court reviews the sufficiency of the evidence underlying that element with greater

scrutiny. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010.) The first step in evaluating the sufficiency of circumstantial evidence is to identify the circumstances proved by the state. To do so, we “winnow down” the presented evidence by “resolving all questions of fact in favor of the [fact-finder’s] verdict” and disregarding any evidence inconsistent with the verdict. *Harris*, 895 N.W.2d at 600. Having identified the circumstances proved, the second step is to determine whether these circumstances are consistent with the inference of guilt and inconsistent with any reasonable inference of innocence. *Al-Naseer*, 788 N.W.2d at 473-74. At this step of the analysis, unlike the first step, we do not defer to the fact-finder’s choice among reasonable inferences. *Id.* at 474. If the circumstances proved are consistent with a reasonable inference other than guilt, the evidence is insufficient and any resulting conviction must be reversed. *See Harris*, 895 N.W.2d at 603.

Viewing the evidence in the light most favorable to the state, the relevant circumstances proved are as follows. A police officer responded to a suspicious-person call and encountered Myint inside a hardware store. After stepping outside, the officer asked Myint for his identification, which he retrieved from a vehicle. Myint told the officer he had gotten lost driving from Mankato to Austin and had run out of gas. The officer observed that Myint was “twitching” during their conversation and that he seemed anxious and confused, largely because he was having trouble answering basic questions and was not making eye-contact. Because Myint kept putting his hands in his pockets despite being instructed not to do so, the officer pat-searched him and found a set of car keys and a plastic bag containing methamphetamine, which Myint told the officer was his “medicine” that he

uses to stay awake. While placing Myint under arrest, the officer also found two glass pipes and two lighters. Subsequent testing of a blood sample confirmed the presence of methamphetamine and amphetamine in Myint's system.¹

Having determined the circumstances proved, we now evaluate the reasonable inferences that may be drawn from them. Certainly, these circumstances are consistent with Myint's guilt. Myint indeed concedes that the evidence supports the conclusions that he was under the influence of a controlled substance at the time of his interaction with police and that he had driven a vehicle to the hardware store that day. Myint argues, however, that these circumstances are insufficient to exclude as unreasonable the alternative hypothesis that he was not under the influence of a controlled substance at any time in which he drove, operated, or was in physical control of a motor vehicle. We agree.

A person "drives" a motor vehicle by "exercis[ing] physical control over the speed and direction" of the vehicle "while it is in motion." 10A *Minnesota Practice*, CRIMJIG 29.04 (2020). To "operate"—a slightly broader term—means to "manipulate[] or activate[] any of the controls . . . necessary to put the vehicle into motion." *Id.* Here, the state's evidence cannot exclude the reasonable, alternative hypothesis that Myint came under the

¹ The district court's order includes a factual finding that the arresting officer was advised by another deputy of "a driving complaint from a citizen that called into dispatch." The court also found that the vehicle described by the complainant matched Myint's vehicle. In Myint's brief to this court, he argues that the district court's finding "is wholly unsupported by the record" and cannot serve as a circumstance proved on appeal. We agree. At trial, the arresting officer began to give a description of information he had received from another deputy, but was interrupted by a sustained hearsay objection from defense counsel. We therefore disregard the district court's finding of fact regarding the alleged driving complaint.

influence of a controlled substance only after driving or operating a vehicle. Although Myint admitted to having driven to the hardware store from Mankato, the state presented no evidence regarding when Myint became intoxicated and the arresting officer admitted that Myint could have used drugs only after driving to the hardware store. Accordingly, the circumstances proved cannot exclude the possibility that Myint never drove or otherwise manipulated or activated the car's controls while under the influence of a controlled substance.

More comprehensive than either “driving” or “operating,” the most inclusive theory for DWI liability is “physical control”—a broad term intended to address a situation in which an impaired person is found “under circumstances where the car, without too much difficulty, might again be started and become a source of danger to the operator, to others, or to property.” *State v. Starfield*, 481 N.W.2d 834, 837 (Minn. 1992). “[A] person is in physical control of a vehicle if he has the means to initiate any movement of that vehicle, and he is in close proximity to the operating controls of the vehicle.” *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010).

Cases that have determined a person to be in “physical control” of a vehicle while not inside of the vehicle have generally involved circumstances where the person is in immediate proximity to the vehicle, usually attending to a mechanical issue or damage from a collision. *See, e.g., Jante v. Comm’r of Pub. Safety*, A20-0344, 2020 WL 6703532, at *4 (Minn. App. Nov. 16, 2020) (standing outside truck on roadside, door open, keys found by appellant’s feet); *Hedstrom v. Comm’r of Pub. Safety*, 410 N.W.2d 47, 48 (Minn. App. 1987) (standing outside crashed vehicle in a field, keys in ignition); *State v.*

Woodward, 408 N.W.2d 927, 928 (Minn. App. 1987) (standing outside truck on roadside, keys in ignition, hazard lights flashing, flat tire). Here, by comparison, Myint was inside of a business at the time he was located by police and the state did not present specific evidence as to where the vehicle was located in relation to the hardware store.

Because Myint was not located inside the vehicle and there is no evidence demonstrating that he was at the time “in close proximity to the operating controls,” it is reasonable to infer that he was not in “physical control” of the car as that phrase has been interpreted by the Minnesota Supreme Court and applied by this court. *Fleck*, 777 N.W.2d at 236; *see also Starfield*, 481 N.W.2d at 837. Accordingly, the circumstances proved cannot exclude the reasonable possibility that Myint was not in physical control of a motor vehicle while under the influence of a controlled substance.

Because the state’s circumstantial evidence was insufficient to prove beyond a reasonable doubt that Myint drove, operated, or was in physical control of a motor vehicle while under the influence of a controlled substance, his conviction for fourth-degree DWI must be reversed.

Reversed.