

*This opinion is nonprecedential except as provided by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
A20-0861**

State of Minnesota,
Respondent,

vs.

Jayson John Rogahn,
Appellant.

**Filed April 26, 2021
Reversed and remanded
Reilly, Judge**

Otter Tail County District Court
File No. 56-CR-18-1040

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

Michelle M. Eldien, Otter Tail County Attorney, Jacob J. Thomason, Assistant County Attorney, Fergus Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Reilly, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant challenges his first-degree controlled-substance conviction because (1) the evidence was insufficient to establish beyond a reasonable doubt that he constructively possessed a controlled substance, (2) the district court erred by allowing the

state to introduce the substance of the confidential informant's statements into evidence, (3) the prosecutor committed misconduct during closing argument, and (4) his sentence is erroneous. While the evidence was marginally sufficient to support the guilty verdict, the erroneously admitted evidence prejudiced appellant. We therefore reverse and remand.

FACTS

In April 2018, Officer Steven Branby, a narcotics officer with the Otter Tail County Sheriff's Office and a special agent with the West Central Minnesota Drug and Violent Crimes Task Force, seized a large amount of methamphetamine from an individual during a traffic stop. That individual (the CI) offered to act as a confidential informant. The CI stated that he had previously dropped off a large amount of methamphetamine in Fergus Falls and agreed to participate in controlled phone calls, which the officer would record. The CI placed three calls to J.F., asking him to collect the methamphetamine and setting a time to meet the next day. J.F. stated on the call that he might not be alone, and could be bringing another person with him.

Based on these calls, the officers suspected that J.F. was storing half a pound of methamphetamine at an apartment in Fergus Falls. Fergus Falls Police Officer Nathan Frieler placed the apartment under surveillance. Frieler saw a vehicle pull up to the curb in front of the apartment building and recognized J.F. as the driver. J.F. stayed at the building for about ten minutes. Later that evening, Frieler saw J.F.'s vehicle return to the apartment building. J.F. and another man entered the building. After leaving the building, J.F. and his passenger took an "indirect route" down residential streets. Frieler contacted State Trooper and K-9 Officer Aaron Myren and notified him that the vehicle was likely

traveling eastbound on the interstate, carrying what officers suspected was a large amount of methamphetamine.

Myren saw the vehicle on I-94 and noticed that the vehicle's registration was expired and it was traveling over the posted speed limit. Myren initiated a traffic stop and identified J.F. as the driver and appellant Jayson Rogahn as the passenger. Myren suspected that J.F. was under the influence of a controlled substance. Myren's police dog conducted a sniff and search of the vehicle and alerted on the passenger-side glove box and a lockbox in the backseat. In the glove box, Myren found a cigarette carton containing three large plastic bags holding about half a pound of a substance that field-tested positive for methamphetamine. In the lockbox, Myren found a bag containing 1.5 ounces of a material that field-tested positive for methamphetamine, a used pipe, a large amount of empty plastic baggies, rubber bands, and cash.

The Minnesota Bureau of Criminal Apprehension (the BCA) tested the contents of two of the four bags. The BCA determined that the first bag contained 91.036 grams of methamphetamine, and the second bag contained 86.688 grams of methamphetamine. The BCA did not analyze the third or fourth bags.

Respondent State of Minnesota charged appellant with first-degree sale and first-degree possession of methamphetamine. Following a two-day jury trial, the jury found appellant guilty of the possession charge and not guilty of the sale charge.¹ The district court sentenced appellant to the presumptive sentence, and this appeal follows.

¹ Appellant did not testify at trial.

DECISION

I. Sufficiency of the Evidence

Appellant challenges the sufficiency of the evidence underlying his conviction. He argues that respondent did not meet its burden to prove that he possessed the methamphetamine found in the car. In evaluating the sufficiency of the evidence, we “carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the factfinder to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). We review the evidence “in the light most favorable to the conviction” and “assume the jury believed the State’s witnesses and disbelieved any evidence to the contrary.” *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We “will 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.” *Id.*

We analyze the sufficiency of the evidence first because that determination dictates the relief granted. The Double Jeopardy Clause of the United States Constitution precludes retrial if a conviction is set aside because the evidence supporting it is legally insufficient. *State v. Cox*, 779 N.W.2d 844, 853 (Minn. 2010). “Legally insufficient” means that “the government’s case was so lacking that it should not have even been submitted to the jury.” *Id.* (quotations omitted). We review all of the evidence admitted by the district court—even if erroneously admitted—to decide whether the defendant is entitled to retrial under

the Double Jeopardy Clause. *Id.* Retrial is not barred if a conviction is reversed based on trial error. *State v. Harris*, 533 N.W.2d 35, 36 (Minn. 1995).

In cases like this, proved through circumstantial evidence, we begin by considering whether the circumstantial evidence supports the conviction. We apply a heightened standard of review when the state’s evidence on one or more elements of a charged offense consists solely of circumstantial evidence, as it does here. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). 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). We apply a two-step test to evaluate the sufficiency of this evidence. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). At the first step, we identify the circumstances proved. *Id.* We then independently examine 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).

The jury found appellant guilty of first-degree possession of methamphetamine under Minn. Stat. § 152.021, subd. 2(a)(1) (2018) (prohibiting unlawful possession of “one or more mixtures of a total weight of 50 grams or more containing . . . methamphetamine”). Possession may be actual or constructive. *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015). Constructive possession may be established either by (1) 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) proof of a strong probability that the “defendant was at the time consciously exercising dominion and control over it,” even if the item were in a place to

which others had access. *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975). Two people may have joint constructive possession of an item. *Harris*, 895 N.W.2d at 601.

We begin by identifying the circumstances proved. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). The CI made a series of controlled phone calls to J.F. to arrange for J.F. to pick up methamphetamine stored at an apartment in Fergus Falls. The CI asked J.F. if he would be alone, and J.F. responded that he may not be alone. The police believed that a large amount of methamphetamine was being stored at an apartment in Fergus Falls and placed the apartment under surveillance. Frieler saw J.F. enter the apartment with another man. Myren later stopped J.F.'s vehicle for a traffic violation and on the suspicion that the driver may have been transporting methamphetamine. Appellant was a passenger in this vehicle and seated in front of the glove box. Myren noticed that J.F. displayed signs of impairment. Myren testified that appellant showed similar signs, such as fumbling with his fingers and fidgeting, and had dilated pupils. Myren asked for the vehicle registration and insurance information. J.F. and appellant looked at the glove box, but would not open it. When Myren searched the vehicle, he uncovered a large amount of methamphetamine in the passenger-side glove box and in a lockbox in the backseat. 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." *Moore*, 846 N.W.2d at 88. While we recognize that the record is thin, this is not a case in which the evidence is so lacking that the district

court should not have submitted the case to the jury.² *See Cox*, 779 N.W.2d at 853. J.F. told the CI he may not be alone. Appellant was in the car with J.F. to deliver the methamphetamine to the CI. Appellant was seated in front of the glove box and would not open it when the officer suggested the registration might be in the glove box. A large amount of methamphetamine was then found in the glove box.

We next evaluate “independently the reasonableness of all inferences that might be drawn from the circumstances proved,” including inferences consistent with a hypothesis other than guilt. *Hanson*, 800 N.W.2d at 622 (quotation omitted). Sufficient evidence supports the jury’s determination that appellant jointly possessed the methamphetamine with J.F. because he was “consciously exercising dominion and control over it.” *Florine*, 226 N.W.2d at 611. But appellant argues that there is a reasonable hypothesis that he did not constructively possess the methamphetamine and was merely a passenger in J.F.’s vehicle. The record shows that J.F. told the CI he may have someone with him during the drug exchange. J.F. then visited the apartment in Fergus Falls with another individual to pick up methamphetamine. Soon after, an officer stopped J.F.’s car and identified appellant as the only passenger. Both J.F. and appellant displayed indicia of being under the influence, and nervously looked at and would not open the glove box. The officer found drugs in the glove box directly in front of appellant. We consider this evidence of appellant’s guilt to be marginal. Yet, viewing the evidence in the light most favorable to

² We note that at trial appellant did not move for a judgment of acquittal under Minn. R. Crim. P. 26.03, subd. 18(1)(a), arguing that the evidence was insufficient to sustain a conviction.

the jury's verdict, as we must, we determine it is narrowly sufficient. *See id.* at 600 (noting that fact-finder "is in a unique position to determine the credibility of the witnesses and weigh the evidence before it"). In viewing all of the evidence presented by respondent, including any erroneously admitted evidence, we conclude that the evidence was marginal enough to support the jury's verdict.

II. Erroneous Introduction of Evidence

Appellant next asserts that the district court committed reversible error by allowing the respondent to introduce and use the substance of the CI's statements to law enforcement and the content of the CI's recorded calls to J.F. because they were hearsay statements. We agree.

When a case "is sufficiently marginal" based on the evidence presented, we conduct a "careful examination of the proceedings with respect to the claims of error occurring at the time of the trial." *State v. Olson*, 156 N.W.2d 89, 90 (Minn. 1968); *see also State v. Flowers*, 261 N.W.2d 88, 89 (Minn. 1977) (noting that "the state's evidence, consisting solely of the uncorroborated testimony of the complaining witness, is sufficiently marginal to require a careful examination of defendant's claims of error at trial"); *cf. State v. Budreau*, 641 N.W.2d 919, 928 (Minn. 2002) (determining that *Olson* did not apply when state presented "overwhelming" evidence of defendant's guilt). We review evidentiary rulings for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Even if the district court abuses its discretion, an appellant is not entitled to a new trial if the error was harmless. *State v. Robinson*, 718 N.W.2d 400, 407 (Minn. 2006).

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. Minn. R. Evid. 801(c). While hearsay is generally inadmissible, an out-of-court statement offered for some other purpose, such as to prove knowledge, is not considered hearsay. Minn. R. Evid. 801 1989 comm. cmt.; see *State v. Litzau*, 650 N.W.2d 177, 183 n.4 (Minn. 2002) (permitting testifying officer to reconstruct steps in a criminal investigation and testify that officer spoke to informant).

Before trial, appellant moved to exclude the CI's statements to Branby and the substance of the CI's recorded phone calls with J.F. as inadmissible hearsay.³ Respondent argued that the evidence was not hearsay because it would not go to the truth of the matter asserted and would "give the jury some context on why surveillance is being set up." The district court permitted respondent to introduce the evidence:

And if the [controlled phone calls to J.F.] were to be introduced as characterized by the defense, to show knowledge and a sale and knowing possession, there would be hearsay that would be subject to the hearsay rule and not admissible.

The State argues that its intent is to introduce the audio recordings to show the impact on the law enforcement officer, here Officer Branby, and so, I'm allowing the recordings in. However, I want the questions relating to the calls from the State to be narrowly crafted so that we only have the calls for the purpose that the State argues they should come in for, and that is to set the context of the further police action and investigation.

³ The CI did not testify at trial.

But the record establishes that respondent went far beyond what it represented to the district court, and thus far beyond the district court's ruling at trial. The prosecutor stated during opening argument that appellant "was an active participant in moving a very large amount of methamphetamine out of Fergus Falls." At trial, the prosecutor elicited the substance of the CI's statements from Branby and Frieler. The prosecutor also played two of the CI's recorded phone calls to J.F. for the jury and highlighted the substance of the statements in those calls. The prosecutor again emphasized the CI's statements and phone calls during his closing argument and rebuttal. The prosecutor argued that J.F.'s statement in one of the recorded calls that "he will not be alone" was "highly, highly important" evidence. It may have been "highly important" evidence, but it was erroneously admitted hearsay evidence.

The use of the controlled phone calls as substantive evidence was erroneous. *Litzau* guides us. 650 N.W.2d at 177. In that case, a police officer testified that he received a tip from a confidential informant that the defendant possessed a controlled substance. *Id.* at 181. Testimony that law enforcement received a tip, to explain their actions, is not inadmissible hearsay. *Id.* at 182. As the supreme court explained, "[a] police officer may reconstruct the steps taken in a criminal investigation, may testify about his contact with an informant, and may describe the events leading up to a defendant's arrest." *Id.* at 183 n.4 (quotation and citations omitted). But the supreme court cautioned that "the officer's testimony must be limited to the fact that he spoke to an informant without disclosing the substance of that conversation." *Id.* Thus, a law enforcement officer "testifying in a

criminal case may not, under the guise of explaining how the investigation focused on defendant, relate hearsay statements of others.” *Id.* at 182 (quotation omitted).

But that is what happened here. Respondent used the content of the CI’s controlled phone calls as substantive evidence. This went far beyond “giv[ing] the jury some context” of the police action, and the statements should have been excluded. The failure to exclude them constitutes plain error.⁴ *See State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008) (noting that an error is plain if it “is clear or obvious”); *State v. Ray*, 659 N.W.2d 736, 744 (Minn. 2003) (stating that it is plain error for a prosecutor to intentionally elicit inadmissible testimony).

We also determine that this error was prejudicial. An error in admitting evidence does not automatically lead to reversal of a conviction and a new trial. *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997). If the verdict “actually rendered was surely unattributable to the error, the error is harmless beyond a reasonable doubt” and the verdict may stand. *Litzau*, 650 N.W.2d at 184 (quotation omitted). But “[w]here the evidence was aimed at having an impact on the verdict, we cannot say that the verdict was surely unattributable to the error.” *Id.* As discussed above, the circumstantial evidence against appellant was marginal at best. The erroneously admitted calls, coupled with the scant evidence of appellant’s guilt, compels us to conclude that appellant was prejudiced. We therefore

⁴ The state argues in the alternative that the CI’s phone calls were admissible under the residual exception to the hearsay rule. *See* Minn. R. Evid. 807 (discussing residual exception). The state did not present this argument to the district court and we decline to address it. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (declining to consider arguments raised for the first time on appeal).

reverse and remand.⁵ *See Harris*, 533 N.W.2d at 36 (noting that retrial is not barred if conviction is reversed based on trial error).

Reversed and remanded.

⁵ Appellant also argues that the prosecutor committed prosecutorial misconduct during closing argument and that his sentence is erroneous. We need not reach these arguments.