

*This opinion is nonprecedential except as provided by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
A23-1095**

State of Minnesota,
Respondent,

vs.

Kelly Ann Tysdale,
Appellant.

**Filed July 8, 2024
Affirmed
Schmidt, Judge**

Rice County District Court
File No. 66-CR-20-1430

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

Brian M. Mortenson, Rice County Attorney, Sean R. McCarthy, Assistant County Attorney, Faribault, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Schmidt, Judge; and Harris, Judge.

NONPRECEDENTIAL OPINION

SCHMIDT, Judge

Appellant Kelly Ann Tysdale challenges her conviction of great bodily harm caused by the sale of a Schedule I or II controlled substance and the verdict of third-degree sale of heroin or fentanyl, arguing that the evidence was insufficient as a matter of law to prove

that Tysdale (1) sold a Schedule I or II controlled substance, or (2) sold heroin or fentanyl.¹ Because the evidence supports the conviction for great bodily harm caused by the sale of a Schedule I or II controlled substance, we affirm.

FACTS

In June 2020, respondent State of Minnesota charged Tysdale with great bodily harm caused by distribution of a Schedule I or II controlled substance and third-degree sale of heroin or fentanyl. The following facts are derived from the evidence presented at trial.

J.H., the victim, testified that she had suffered from addiction in the past and that her drug of choice was “heroin/fentanyl.” When asked about her overdose in June of 2020, J.H. testified that she overdosed on fentanyl or a mixture of heroin and fentanyl, but could not recall the specific date. J.H. testified that she could not remember “anything from that night besides waking up in the parking lot,” getting Narcan, and being transported to jail. She recalled, however, that she used the drug intravenously with a needle.

L.W., J.H.’s friend, testified that she was present when J.H. overdosed. L.W. recounted that she and her boyfriend met with J.H. to obtain Suboxone for L.W.’s boyfriend. The three then drove together to a hotel to meet Tysdale and her boyfriend.

Shortly after they parked at the hotel, Tysdale arrived with her boyfriend. L.W. and J.H. stayed in the car as L.W.’s boyfriend entered Tysdale’s car. L.W.’s boyfriend returned to the car and asked for methamphetamine. L.W. gave her boyfriend methamphetamine, and he walked back to Tysdale’s car. When L.W.’s boyfriend returned to the car a second

¹ Prior to oral argument, appellant’s counsel filed a letter withdrawing a third issue raised in the brief related to Tysdale’s criminal-history score.

time, he and J.H. began “splitting up heroin” on the car dashboard. L.W. became upset because she did not want her boyfriend to use heroin. L.W. and her boyfriend argued while J.H. “shot up” the drugs they had received from Tysdale. When L.W. next looked at J.H., J.H. was “facedown in her lap,” “blue” in the face, and “making a horrible sound gasping for air.” L.W. called 911.

Dispatch informed officers that the caller said a female was overdosing from heroin. Officer M.S. responded to the scene first and administered Narcan to J.H. Officer M.S. testified that Narcan is a drug used to reverse the effects of an opioid overdose. After the first dose, officers found a weak pulse. Officer J.B. administered a second dose of Narcan to J.H., and she eventually regained consciousness. Officer J.B. testified that, based on his observations of J.H., and from his training and experience, J.H. likely overdosed from either heroin or fentanyl. Both Officers M.S. and J.B. testified that using Narcan on somebody who is not suffering from an opioid overdose will have no effect on that person.

The jury heard a recording of one of Tysdale’s jail calls. In the recording, Tysdale described how police took her phone and contemplated how she could delete its contents. Tysdale also said “if she died, yeah, I might have a little remorse, but . . . she chose to do that, you know? . . . And I told him it was really good too.”

After the three-day trial, a jury found Tysdale guilty of both charged offenses. The district court sentenced Tysdale to 84 months in prison on count one (great bodily harm caused by the sale of a Schedule I or II controlled substance) and did not adjudicate count two (third-degree sale of heroin or fentanyl).

Tysdale appeals.

DECISION

Tysdale argues that the evidence was insufficient to prove beyond a reasonable doubt that J.H. overdosed on a controlled substance and that she was guilty of third-degree controlled-substance sale. We address each argument in turn.

I. The third-degree drug-sale verdict is not ripe for review.

Tysdale argues the guilty verdict of third-degree drug sale must be reversed due to insufficient evidence. Although a jury found Tysdale guilty of third-degree controlled-substance sale, the district court did not adjudicate her guilt for that offense or impose a sentence. Thus, the third-degree drug-sale conviction is not ripe for sufficiency review because there is no judgment of conviction. *See State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) (declining to consider an insufficiency-of-the-evidence claim on a conviction for which the district court did not adjudicate the defendant's guilt or impose a sentence).

II. Sufficient evidence supports Tysdale's conviction of great bodily harm caused by distribution of a Schedule I or II controlled substance.

Tysdale argues her conviction of great bodily harm caused by the sale of a Schedule I or II controlled substance must be reversed because the state did not chemically test the substance. Tysdale contends that, without such testing, there exists a reasonable inference that J.H. overdosed on a Schedule III or IV opioid rather than a Schedule I or II drug.

The statute under which Tysdale was convicted provides that a person is guilty of great bodily harm caused by the distribution of drugs if she “proximately causes great bodily harm by, directly or indirectly, unlawfully selling, giving away, bartering,

delivering, exchanging, distributing, or administering a controlled substance classified in Schedule I or II[.]” Minn. Stat. § 609.228 (2020). The parties agree that the state relied on circumstantial evidence to prove Tysdale caused great bodily harm through the sale of a Schedule I or II controlled substance. In such a case, we apply a two-step analysis in reviewing a challenge to the sufficiency of the circumstantial evidence. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012).

The first step is to identify the circumstances proved. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). We must defer to “the jury’s acceptance of the proof of these circumstances” and “assume that the jury believed the State’s witnesses and disbelieved the defense witnesses.” *Id.* at 598-99 (quotations omitted). Accordingly, we construe conflicting evidence in the light most favorable to the verdict. *Id.* at 599.

The second step is to determine if the circumstances, when viewed “as a whole,” are “consistent with guilt and inconsistent with any rational hypothesis except that of guilt, not simply whether the inferences that point to guilt are reasonable.” *Id.* (quotation omitted). Appellate courts “examine independently the reasonableness of all inferences that might be drawn from the circumstances proved” and “give no deference to the fact finder’s choice between reasonable inferences.” *Id.* (quotations omitted). The circumstantial evidence presented 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.” *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted).

A. Circumstances Proved

J.H. testified that her drug of choice was “heroin/fentanyl.” She recalled overdosing but could not recall if she used fentanyl or a mixture of heroin and fentanyl. She did remember using the drug intravenously with a needle, waking up in a parking lot, having Narcan administered to her, and being transported to jail.

L.W. testified that she, her boyfriend, and J.H. drove together to meet Tysdale and her boyfriend. L.W.’s boyfriend gave methamphetamine to Tysdale and her boyfriend, and in return he received heroin or a heroin fentanyl mix. L.W. observed her boyfriend and J.H. “splitting up heroin.” As L.W. and her boyfriend argued about the boyfriend using heroin, J.H. injected the drug with a needle. L.W. then saw J.H. “facedown,” “blue” in the face, and “making a horrible sound gasping for air.” L.W. called 911.

Dispatch told the responding officers that a female was overdosing from heroin. Officer M.S. first responded to the scene and administered a dose of Narcan to J.H. After the first dose, officers found that J.H. had a weak pulse. Officer J.B. administered a second dose of Narcan, and J.H. regained consciousness. Officers M.S. and J.B. both testified that, in their training and experience, using Narcan on somebody who is not suffering from an opioid overdose will have no effect on that person. Based on his observations of J.H., Officer J.B. believed J.H. overdosed on heroin or fentanyl.

The jury also heard a jail call recording wherein Tysdale contemplated how she could erase the contents of her phone that was in police custody. In responding to the caller, Tysdale said “if she died, yeah, I might have a little remorse, but . . . she chose to do that, you know? . . . And I told him it was really good too.”

B. The circumstances proved are consistent with the guilty verdict.

The circumstances proved, viewed as a whole, supports the jury's finding that Tysdale gave J.H. heroin or a mixture of heroin and fentanyl. *See Silvernail*, 831 N.W.2d at 599. The evidence established that J.H.'s drug of choice was heroin/fentanyl; she went to a drug exchange to receive heroin; J.H. injected the drug with a needle; after injecting the drug, J.H. slumped over, turned blue, and gasped for air; officers administered two doses of Narcan; and officers believed, from firsthand observations and from training and experience, that J.H. had overdosed on heroin or fentanyl. These circumstances form a complete chain that supports the inference that Tysdale caused great bodily harm to J.H. by supplying her with heroin, or heroin and fentanyl, and excludes beyond a reasonable doubt any reasonable inference other than guilt. *See Al-Naseer*, 788 N.W.2d at 473.

Tysdale cites *State v. Vail* to argue the evidence is insufficient to uphold her conviction because "Minnesota law requires proof of the actual identity of the substance[.]" 274 N.W.2d 127, 134 (Minn. 1979). In other words, Tysdale argues that direct evidence is required to identify the controlled substance relevant to her charges. But the Minnesota Supreme Court has repeatedly refused to adopt a bright-line rule requiring chemical testing to establish that a substance is a controlled substance. *See State v. Olhausen*, 681 N.W.2d 21, 26 (Minn. 2004). When a "substance was not scientifically tested, circumstantial evidence and officer testimony may be presented to the jury to attempt to prove the identity of the substance" at trial. *Id.* at 28-29. Thus, Tysdale's conviction can be affirmed based upon circumstantial evidence.

Tysdale also contends that the lack of drug testing leaves room for the rational, alternative hypothesis that J.H. overdosed on a Schedule III or IV opioid. Tysdale cites a recent Minnesota Supreme Court case that determined that the state's failure to test a substance meant the circumstantial evidence was insufficient to prove the substance in question was one drug (marijuana) and not another (hemp) based on the delta-9 THC concentration level. *See State v. Loveless*, 987 N.W.2d 224, 248-49 (Minn. 2023). As such, the evidence did not exclude the rational inference that the substance in question was hemp, which did not violate the relevant statute. *Id.*

But *Loveless* is distinguishable from this case given the evidence of J.H. injecting the drug combined with the officers' testimony related to administering two doses of Narcan and testifying, from training and experience, that J.H. had overdosed on heroin or a fentanyl/heroin mixture. Unlike in *Loveless*, the evidence here forms a complete chain of guilt that excludes, beyond a reasonable doubt, any inference other than guilt. *Al-Naseer*, 788 N.W.2d at 473.

Affirmed.