

*This opinion is nonprecedential except as provided by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
A23-1550**

State of Minnesota,
Respondent,

vs.

John Arland Kirst,
Appellant.

**Filed August 19, 2024
Affirmed
Reilly, Judge***

Cottonwood County District Court
File No. 17-CR-21-268

Keith Ellison, Attorney General, Zuri Balmakund, Assistant Attorney General, St. Paul, Minnesota; and

Nick Anderson, Cottonwood County Attorney, Windom, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrew J. Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larson, Presiding Judge; Connolly, Judge; and Reilly, Judge.

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

NONPRECEDENTIAL OPINION

REILLY, Judge

A jury found appellant John Arland Kirst guilty of third-degree controlled substance crime after he fled police and a search of his person turned up “crystal shards” suspected to be methamphetamine. On appeal, Kirst argues that the evidence is insufficient to sustain his conviction of third-degree controlled substance crime because the state failed to prove he possessed ten grams or more of methamphetamine. We affirm.

FACTS

The facts below are taken from uncontested testimony and evidence admitted at trial.

On June 7, 2021, Cottonwood County Sheriff’s Office drug investigator J.S. noticed a Kawasaki motorcycle being driven and parked around town with “just a piece of cardboard with duct tape on it . . . in the place of where the license plate would normally be.” He looked up the driving status of the owner of the motorcycle, discovering that Kirst owned it and had a cancelled driver’s license. J.S. shared his observations with the Windom Police Department patrol officers and Cottonwood County Sheriff deputies.

Two days later, on June 9, 2021, Windom Assistant Chief of Police C.H. saw the Kawasaki motorcycle that he had been “informed to be on the lookout for” in the town of Windom. He advised J.A., a deputy with the Cottonwood County Sheriff’s Office, that he saw the motorcycle. J.A. then drove to find the motorcycle. After following the motorcycle for several blocks, J.A. initiated a traffic stop. The motorcycle did not stop, and J.A. continued to pursue it for “approximately six minutes” and “[a]bout three miles.” During

the pursuit, J.A. observed the motorcycle make “multiple dangerous traffic violations.” D.M., a deputy with the Cottonwood County Sheriff’s Office, was on a call nearby and joined J.A.’s pursuit. D.M. then took the lead on the pursuit. Kirst’s motorcycle eventually stopped, and Kirst ran off on foot. D.M. ran after Kirst for about 100 yards. After Kirst briefly resisted, the officers arrested Kirst.

C.H. searched Kirst and found butane lighters and two large baggies containing “[c]rystal-like, large shards” which were located “in his pocket and up his shorts.” C.H. testified that, based on his training and experience, he believed the substance to be methamphetamine. J.A. also testified that, based on his training and experience, he believed the “crystal-like substance” to be methamphetamine.

J.A. took the baggies back to the sheriff’s office, logged them into evidence, and weighed them. Respondent State of Minnesota introduced trial exhibits 5 and 6, two photos each showing a baggie containing crystal shards on a scale, with the scale reading 14.6 grams and 1.8 grams, respectively. Kirst did not object to the admission of exhibits 5 and 6. J.A. testified that the photos were a true and accurate representation of the suspected methamphetamine he weighed.

Officers sent the baggies to the Minnesota Bureau of Criminal Apprehension (the BCA) for testing. The BCA report concluded that the first bag weighed 14.329 grams and contained methamphetamine. The report noted that the second, smaller bag was “not analyzed.” The state charged Kirst with third-degree controlled substance crime in violation of Minn. Stat. § 152.023, subd. 2(a)(1) (2020).

At trial, a BCA forensic scientist testified. She received two pieces of evidence for this case—two “Ziploc bags of white crystalline material.” She tested only one of the bags because “from what [she] observed in [the other bag], [she] didn’t believe that that would increase the charge.” She testified this is standard practice at the BCA. She performed “two spot tests, or color tests,” a test in which she “add[ed] a certain chemical or a certain chemical structure” to see what color it turned, which indicated “that the sample could possibly contain methamphetamine.” She then performed a confirmatory test using a gas chromatograph mass spectrometer. She testified that, based on both the preliminary and confirmatory tests, she concluded that the substance was methamphetamine. She did not testify about the weight of any of the individual components that she tested.

On cross-examination, the BCA forensic scientist explained that she weighed the substance in “[a] weigh boat” and that the BCA’s standard operating procedure was to remove the packaging to weigh a controlled substance, but that the procedures did not specify whether it must be weighed in a container or not. The district court admitted into evidence, without objection, the forensic scientist’s initial and amended BCA reports concluding that the shards tested contained methamphetamine.

The jury found Kirst guilty of third-degree controlled substance crime, fleeing a peace officer, and driving after cancellation as inimical to public safety. The district court sentenced Kirst to a 45-month prison term for the third-degree controlled substance conviction.

This appeal follows.

DECISION

On appeal, Kirst argues that the state failed to prove beyond a reasonable doubt the nature and weight of the substance is sufficient to sustain his conviction.

The state charged Kirst with third-degree controlled substance crime in violation of Minn. Stat. § 152.023, subd. 2(a)(1), under which “[a] person is guilty of controlled substance crime in the third degree if: . . . on one or more occasions within a 90-day period the person unlawfully possesses one or more mixtures of a total weight of ten grams or more containing a narcotic drug other than heroin or fentanyl.” The weight of the controlled substance is an essential element of the offense and must be proved beyond a reasonable doubt. *State v. Papadakis*, 643 N.W.2d 349, 354 (Minn. App. 2002); *see also State v. Robinson*, 517 N.W.2d 336, 339-40 (Minn. 1994) (reversing conviction because scientific evidence of weight—an element of the charged offense—was insufficient because of inadequate random sampling); *State v. Loveless*, 987 N.W.2d 224, 248 (Minn. 2023) (“If an alleged offense depends on proof of a numerical threshold, that threshold is ‘an essential element of the offense charged,’ which ‘must be proven by the state and proven beyond a reasonable doubt.’”). Kirst argues that the state did not prove the element of the weight through direct evidence. The state argues that direct evidence supports the conviction, and that circumstantial evidence also “corroborates the identification and weight of the methamphetamine.”

Appellate courts “have not prescribed minimum evidentiary requirements in identification cases, preferring to examine the sufficiency of the evidence on a case-by-case basis.” *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979). Scientific evidence is not

always required to identify controlled substances beyond a reasonable doubt. *State v. Gruber*, 864 N.W.2d 628, 638 (Minn. App. 2015). For example, the state may prove a substance's identity with nonscientific or circumstantial evidence when the substance is unavailable for testing because of the defendant's actions. *State v. Olhausen*, 681 N.W.2d 21, 27-29 (Minn. 2004). The state may also satisfy its burden of proof with a combination of scientific evidence, nonscientific evidence, and circumstantial evidence. *Vail*, 274 N.W.2d at 134 (considering both types of evidence but concluding that "additional factors' simply do not advance the state in satisfying its burden of proof, given the trial court's skepticism of the scientific evidence"); *see also Loveless*, 987 N.W.2d at 248.

To assess the sufficiency of the evidence, we "review the evidence to determine 'whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.'" *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quoting *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992)).

Kirst notes that the BCA forensic scientist extrapolated the results of testing three crystals in "distinct pieces" to conclude that all the crystals in the bag contained methamphetamine. But he argues that, because the forensic scientist did not testify which pieces she tested or how much they weighed, the state failed to prove that Kirst possessed ten grams of methamphetamine.

Kirst relies on *Robinson* to support his position. In *Robinson*, the defendant was convicted of first-degree controlled substances crime for selling "[ten] grams or more of a

cocaine mixture.” 517 N.W.2d at 337. Law enforcement had found a “bag contain[ing] 13 clear plastic packets, each containing a piece of a white substance” which weighed in total 16.7 grams. *Id.* at 338. The chemist at trial testified that she “emptied [six] or [seven] of the 13 packets into a container” and tested “samples of the mixture,” determining it was “87.6 percent cocaine base.” *Id.* The supreme court noted that, because the state tested “at most [seven]” packets, the state “tested less than [nine] grams of the substance.” *Id.* The state argued that the testing of the packets “along with the circumstantial evidence,” was sufficient to prove the weight of the substance was ten grams or more. *Id.* The supreme court disagreed because “extrapolation does not take into account the fact that, in the case of substances *not homogeneously packaged*, drug dealers are known to substitute placebos for the real thing.” *Id.* at 339 (emphasis added). It also stated that “there may be instances where . . . the individual items are so alike and the risk of benign substitutes so unlikely that random testing may legitimately permit an inference beyond a reasonable doubt that the requisite weight of the whole mixture is established.” *Id.* at 340. It ultimately concluded that “the degree of homogeneous packaging needed for random sampling is not present” because in that case the “individually wrapped plastic packets with some amount of some kind of white substance in each” have packaging which “gives no assurance that the same substance was wrapped in each packet.” *Id.*

Here, the substances tested were distinct shards all contained in one baggie. The photos of the substances admitted as exhibits show that the substances look similar in color, texture, and quality, despite differing in size and shape. Further, both C.H. and J.A. testified the substance appeared to be methamphetamine. Because the individual shards are alike

and were packaged homogeneously, *Robinson* does not compel us to overturn Kirst's conviction. *See id.* at 340 ("There may be instances where the seized material consists of pills or tablets where the individual items are so alike and the risk of benign substitutes so unlikely that random testing may legitimately permit an inference beyond a reasonable doubt that the requisite weight of the whole mixture is established."). We therefore turn to consider the circumstantial evidence supporting Kirst's conviction.

In *Olhausen*, the supreme court concluded that the circumstantial evidence was sufficient to establish the nature and weight of the methamphetamine and sustain his convictions for first-degree controlled substance crime even though Olhausen threw the drugs out the window and law enforcement never found them. 681 N.W.2d at 26 (concluding that the factors supporting his conviction included "(1) respondent's agreement to sell [one] pound of methamphetamine, (2) respondent's phone calls to arrange the sale, (3) respondent's representation of a small sample to [an undercover agent], a sample that [the agent] believed to be authentic methamphetamine, (4) respondent's various statements, including an offer to sell 'ten for one,' or [one] pound of methamphetamine for \$10,000, (5) respondent's various indications that the package he obtained from [a friend] was [one] pound of methamphetamine, (6) [the friend's] representations to the police that he furnished respondent with [one] pound of methamphetamine, and (7) respondent's dramatic flight from the scene of the incident").

We analyze the other evidence, both scientific and nonscientific, in Kirst's case and conclude it is sufficient to establish the nature and weight of the methamphetamine. *See Vail*, 274 N.W.2d at 134. First, Kirst's behavior in fleeing from police for approximately

six minutes on his motorcycle, attempting to flee police on foot, and then attempting to hide from police supports that the substance was methamphetamine. *See Olhausen*, 681 N.W.2d at 26 (noting that Olhausen’s “dramatic flight from the scene” was one factor supporting a conclusion that he possessed methamphetamine). At trial, the jury watched D.M.’s dash cam video capturing his pursuit of Kirst. Next, C.H. testified that he found two baggies on Kirst that contained crystal-like shards. C.H. and J.A.’s testimony that they visually identified the substances as methamphetamine also supports that the substance was methamphetamine. J.A. then testified that he weighed the baggies, and that the photographs submitted as exhibits showing the weight as 14.6 and 1.8 grams, with packaging, accurately depict what he observed.

At trial, the BCA forensic scientist explained that the BCA lab is nationally accredited, follows standard operating procedures, and is regularly evaluated. Thus, their results are reliable and correct. She testified that she followed standard operating procedures when she tested the substances here. She weighed the substance without packaging and the larger baggie weighed 14.329 grams, sufficient to meet the statutory threshold of ten grams or more. She performed two preliminary tests and one confirmatory test to inform her conclusion that the substance was methamphetamine. Her results were then reviewed and substantiated by another BCA scientist. The district court received the BCA reports documenting this as evidence.

In sum, the uncontested evidence¹ is that the bigger bag of shards weighed over ten grams, all the shards looked alike, the experienced and trained officers identified the substances as methamphetamine, and the BCA forensic scientist concluded the samples of substances tested was methamphetamine after following established procedures. We therefore conclude that these circumstances proved are consistent with the conclusion that Kirst possessed more than ten grams of methamphetamine and are inconsistent with any alternative hypothesis that Kirst possessed less than ten grams of methamphetamine.

Affirmed.

¹ On appeal, Kirst argues that some of the substance he possessed may have been placebos. *Robinson* noted that “in the case of substances not homogeneously packaged, drug dealers are known to substitute placebos for the real thing.” 517 N.W.2d at 339. Although Kirst appeared to raise the issue of placebos during his closing argument, there is no record evidence, such as testimony or exhibits, discussing the possibility that any of the crystal shards could have been placebos to support his argument.