

*This opinion is nonprecedential except as provided by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
A24-1224**

State of Minnesota,
Respondent,

vs.

Fernando Andre Scott, Jr.,
Appellant.

**Filed July 7, 2025
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-22-5866

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

Michael J. Colich, Brooklyn Park City Attorney, Raghen J. Lucy, Amanda J. Grossmann,
Assistant City Attorneys, Colich & Associates, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Smith,
Tracy M., Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges the sufficiency of the evidence supporting his conviction for
third-degree driving while impaired (DWI). We affirm.

FACTS

On March 18, 2022, at 2:50 a.m., a state trooper received a dispatch about a single-car accident. He observed a vehicle off the road and in the ditch or “pond area.” The trooper observed appellant Fernando Andre Scott Jr. standing in the ditch next to the vehicle speaking into a cell phone. The vehicle was running and the keys were in the ignition.

Scott approached the trooper. Unsolicited, Scott stated: “I was driving and someone cut me off.” The trooper asked Scott to explain what happened, and Scott reiterated that he was driving and his car went off the road when another driver cut him off. Scott said that he was alone and unhurt.

The trooper observed that Scott had bloodshot and watery eyes and that his speech was slurred. The trooper “could smell the odor of alcohol from [Scott’s] mouth as he spoke.” Scott declined to perform field sobriety tests, and the trooper arrested him for DWI based on his “smell, his speech, his balance, [and] the mechanism of the crash.”

Scott submitted to a breath test which, at 4:23 a.m., revealed an alcohol concentration (AC) of 0.17. Respondent State of Minnesota charged Scott with third-degree DWI, in violation of Minn. Stat. § 169A.20, subd. 1(1) (Supp. 2021), and third-degree DWI—AC of 0.08 or greater as measured within two hours of the offense, in violation of Minn. Stat. § 169A.20, subd. 1(5). Both counts were enhanced based on the aggravating factor of Scott’s 0.17 AC. *See* Minn. Stat. §§ 169A.26, subd. 1(a), .03, subd. 3(2) (2020).

At trial, the trooper testified consistent with the facts above. The state also presented the video recordings from the officer's body camera. Scott testified in his own defense and asserted for the first time that he was not driving the car the night he was arrested. He testified that his friend was driving and that after the accident the friend immediately fled the scene.

The jury found Scott guilty as charged. The district court sentenced Scott to 364 days in jail and stayed execution of the sentence for two years. This appeal followed.

DECISION

Scott argues that the evidence is insufficient to sustain his conviction because the state failed to prove that he drove or had physical control of the vehicle within two hours of having an AC of 0.16 or more.

To convict Scott of third-degree DWI, the state needed to prove that he was (1) driving, operating, or in physical control of a motor vehicle, (2) while he was under the influence of alcohol, and (3) that his AC was 0.16 or more within two hours of the offense. Minn. Stat. §§ 169A.20, subd. 1(1), .26, subd. 1(a), .03, subd. 3(2).

When a defendant challenges the sufficiency of the evidence supporting a conviction, our standard of review depends on whether the state relied on direct or circumstantial evidence to support the conviction. *State v. Petersen*, 910 N.W.2d 1, 6 (Minn. 2018). Direct evidence is “[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). In contrast, circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute

existed or did not exist.” *Id.* “[C]ircumstantial evidence always requires an inferential step to prove a fact that is not required with direct evidence.” *State v. Jones*, 4 N.W.3d 495, 501 (Minn. 2024) (quotation omitted).

Scott argues that we must apply the heightened circumstantial-evidence standard because the state provided “no direct evidence about when Scott drove . . . or was in physical control of the motor vehicle.” The state contends that it presented direct evidence of physical control and circumstantial evidence of driving. We agree that the state’s evidence, including the trooper’s eyewitness testimony, the footage from the trooper’s body camera, Scott’s admissions, and Scott’s breath-test result, is direct evidence of physical control. *See State v. Brazil*, 906 N.W.2d 274, 278 (Minn. App. 2017) (“Testimony provided by a witness, concerning what the witness saw or heard, is considered direct evidence.”), *rev. denied* (Minn. Mar. 20, 2018); *State v. Blevins*, 10 N.W.3d 29, 40 (Minn. 2024) (concluding that video is direct evidence of what it shows); *State v. Weber*, 137 N.W.2d 527, 535 (Minn. 1965) (noting that defendant’s incriminating statements are direct evidence of guilt); *Brazil*, 906 N.W.2d at 279 (“A [breath-test] result is direct evidence of a person’s [AC].”). We nevertheless apply the heightened circumstantial-evidence standard because Scott’s claims fail under either standard. *See State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013) (declining to resolve dispute over whether direct- or circumstantial-evidence standard applied because “even under the more favorable [circumstantial-evidence] standard . . . the record contains sufficient evidence to support the jury’s verdict”).

When applying the circumstantial-evidence standard, we use a two-step process to assess the sufficiency of the evidence. *Id.* First, we identify the circumstances proved by “resolving all questions of fact in favor of the jury’s verdict.” *Harris*, 895 N.W.2d at 600. Second, 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). We undertake this analysis independently, giving no deference to the inferences drawn by the jury. *Id.* “To successfully challenge a conviction based upon circumstantial evidence, a defendant must point to evidence in the record that is consistent with a rational theory other than guilt.” *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

Viewing the evidence in the light most favorable to the verdict, the circumstances proved at trial are: (1) the trooper arrived on the scene at approximately 2:55 a.m.; (2) the trooper observed Scott standing next to his car in a ditch containing standing water; (3) the trooper did not observe anyone else in the vicinity of the accident; (4) the car’s engine was running; (5) the car key was in the ignition; (6) Scott repeatedly asserted that he was driving when the car left the road; (7) Scott stated that he was alone; (8) Scott was using his cell phone to call a tow truck to remove the car from the ditch; (9) Scott was not wearing a coat; (10) Scott exhibited signs of impairment; (11) Scott’s AC measured 0.17 at 4:23 a.m., less than two hours after the trooper arrived on the scene.

Physical control

The purpose of the physical-control provision in the DWI statute is to apprehend a “drunken driver . . . before he strikes.” *State v. Starfield*, 481 N.W.2d 834, 837 (Minn.

1992) (quotation omitted). Accordingly, the term “physical control” encompasses more than the terms “drive” and “operate,” and should be given “the broadest possible effect.” *Id.* at 836 (quotations omitted). “[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).

In assessing physical control, a person’s “[m]ere presence in or about the vehicle” is insufficient. *Starfield*, 481 N.W.2d at 838. Rather, this court considers “the overall situation.” *Id.* The overall situation includes “the person’s location in proximity to the vehicle; the location of the keys; whether the person was a passenger in the vehicle; who owned the vehicle; and the vehicle’s operability.” *Fleck*, 777 N.W.2d at 236.

Based on the overall situation, we conclude that the circumstances proved are consistent with Scott’s physical control of the vehicle and inconsistent with any rational hypothesis to the contrary. Indeed, the state proved that Scott was in close proximity to the controls of a running vehicle and its keys, that Scott was alone, that he was attempting to remove the vehicle from the ditch, and that less than two hours later Scott’s AC measured 0.17.

The extent of Scott’s argument against physical control, and that there exists an alternative, reasonable hypothesis inconsistent with guilt, is that “[he] was not inside the vehicle when [the trooper] arrived.” Scott’s argument is unpersuasive because a person need not be inside a vehicle to exercise physical control over it. *See State v. Woodward*, 408 N.W.2d 927, 927-28 (Minn. App. 1987) (driver standing at rear of vehicle while engine was running and keys were in ignition); *see also Jante v. Comm’r of Pub. Safety*,

No. A20-0344, 2020 WL 6703532, at *1 (Minn. App. Nov. 16, 2020) (driver standing outside vehicle with ready access to vehicle's ignition keys); *Maas v. Comm'r of Pub. Safety*, No. A22-1247, 2023 WL 2564628, at *1 (Minn. App. Mar. 20, 2023) (driver digging vehicle out of snow while engine was running and keys were in ignition).¹

Driving

Scott also argues that, because the state failed to prove when the accident occurred, the circumstances proved do not exclude the reasonable inference that he crashed prior to 2:23 a.m., and therefore did not drive within two hours of his AC sample. Though Scott's theory is not inconsistent with the circumstances proved, we conclude it is unreasonable to infer that Scott crashed his car and that, over half an hour later, with the car still running, he elected to stand next to it, in a ditch containing standing water, in the winter, without wearing a coat, while he placed a phone call.

Because the evidence was sufficient for the jury to conclude that Scott either drove or physically controlled his vehicle within two hours of providing an AC of 0.16 or more, we affirm.

Affirmed.

¹ We cite nonprecedential authority for its persuasive value. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).