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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2154
A07-0227**

State of Minnesota,
Appellant (A06-2154),
Respondent (A07-0227),

vs.

William Gomez,
Respondent (A06-2154),
Appellant (A07-0227).

**Filed February 26, 2008
Affirmed
Peterson, Judge**

Renville County District Court
File No. 675-CR-05-206

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appellant)

Considered and decided by Willis, Presiding Judge; Peterson, Judge; and
Toussaint, Chief Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a conviction of first-degree controlled-substance crime, appellant William Gomez argues that (1) the denial of his posttrial motion for judgment of acquittal should be reversed because there was insufficient circumstantial evidence that he constructively possessed the drugs found in another person's home and because the district court failed to consider evidence developed in a federal investigation, which was not presented to the jury but was known to the court; (2) the district court abused its discretion in refusing to instruct the jury on the doctrine of constructive possession; (3) the district court violated his constitutional right to compel the testimony of a witness by ruling that the person at whose residence the drugs were found, who had pleaded guilty in federal court and was awaiting sentencing for that offense, had a Fifth Amendment privilege excusing her from testifying; and (4) he is entitled to a judgment of acquittal or new trial based on the prosecutor's misrepresentation regarding the anticipated testimony of the homeowner, juror misconduct, and newly discovered evidence. The state appeals from the stay of imposition granted Gomez, arguing that the district court erred in finding that Gomez played a "minor or passive role" in the offense and that he was amenable to treatment. We affirm.

FACTS

On April 23, 2005, members of the CEE-VI Drug Task Force executed a search warrant at the house located at 201 East DePue Avenue in Olivia. The house belonged to Ericka Cantu, who lived there with her two children and appellant William Gomez. One

son testified that Gomez had lived in the house since November 2003 and that Gomez and Cantu shared the master bedroom.

Officers discovered a number of items in the master bedroom. In a filing cabinet in the bedroom's only closet, there was paperwork that belonged to Gomez, including an insurance card, a department-of-employment card, an insurance contract, and tax documents. The insurance card listed Gomez's address as 201 East DePue Avenue, but other paperwork listed only a post office box. The closet contained both men's and women's clothing. A dresser in the bedroom contained men's and women's clothing in separate drawers.

One officer found a black bag on a shelf in the closet. The bag contained a plastic bag that contained what appeared to the officer to be methamphetamine. A second plastic bag inside the black bag also appeared to the officer to contain a controlled substance. The second plastic bag was larger and had two plastic bags inside it. Analysis showed that the smaller bag contained 26.1 grams of methamphetamine and the larger bag contained 111 grams of methamphetamine and 20.4 grams of cocaine. In one of the dresser drawers, another officer found a bag inside a sock. The bag contained what appeared to be methamphetamine. Although the sock appeared to be a man's sock, the other clothes in the drawer were women's undergarments. Analysis showed that the bag contained 18.7 grams of methamphetamine.

In a kitchen cupboard, an officer found a vacuum sealer and vacuum-sealer bags, which were similar to the bags that contained methamphetamine and cocaine. A small digital scale of a type used to weigh controlled substances was hidden on top of a

cupboard. The officer also found a bottle of Inosital powder, a substance used to cut cocaine and methamphetamine, in a kitchen cupboard.

Gomez was charged with one count of first-degree controlled-substance crime in violation of Minn. Stat. § 152.021, subd. 2(1) (2004) (possession of one or more mixtures of a total weight of 25 grams or more containing cocaine, heroin, or methamphetamine). A jury found Gomez guilty as charged. The district court stayed imposition of Gomez's sentence under Minn. Stat. § 152.152 (2004) and placed him on supervised probation for up to ten years. The state appealed from the sentence, and Gomez appealed from the conviction. This court ordered the two appeals consolidated.

D E C I S I O N

The state asserts that this court should affirm the denial of Gomez's new-trial motion because it was made more than 15 days after trial and, therefore, was untimely under Minn. R. Crim. P. 26.04, subd. 1(3). On March 3, 2006, within the 15-day period, Gomez filed a posttrial motion listing several grounds for relief, including the rules governing motions for a judgment of acquittal and a new trial. But he did not file a memorandum specifically explaining the grounds on which he sought relief until May 11, 2006. We need not determine whether the memorandum was timely because, except for a claim of newly discovered evidence, the issues raised by Gomez are issues that can be raised on direct appeal even without a motion for a new trial, and Gomez filed a timely appeal from the judgment of conviction. *See* Minn. R. Crim. P. 28.02, subd. 11 ("On appeal from a judgment, the court may review any pretrial or trial order or ruling, whether or not a motion for new trial has been made, and may review the denial of a

motion for new trial or to vacate judgment or for judgment of acquittal, whether ruled upon before or after judgment.”); Minn. R. Crim. P. 28.02, subds. 2(1), 4(3) (stating that judgment of conviction becomes final upon imposition of sentence and that appeal must be taken within 90 days of final judgment). The claim of newly discovered evidence was addressed in the May 11 motion papers and considered by the district court and, therefore, may be considered by this court. *See* Minn. R. Crim. P. 28.02, subd. 11 (stating that court of appeals “may review any other matter as the interests of justice may require.”).

I.

Gomez argues that the evidence was insufficient to prove constructive possession and, therefore, the district court should have granted his motion for judgment of acquittal.

In considering a claim of insufficient evidence, this court’s review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the jury believed the state’s witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court 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. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).¹

“[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence.” *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). But circumstantial evidence “is entitled to as much weight as other kinds of evidence.” *Webb*, 440 N.W.2d at 430. “The circumstantial evidence must form a complete chain which, in light 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.” *Id.* (quotation omitted).

“A person is guilty of possession of a controlled substance if [he or] she knew the nature of the substance and either physically or constructively possessed it.” *State v. Denison*, 607 N.W.2d 796, 799 (Minn. App. 2000), *review denied* (Minn. June 13, 2000). When the controlled substance is not in a place under defendant’s exclusive control to which other people did not normally have access, constructive possession requires a showing that “there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.” *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). This court looks to the totality of the

¹ This court reviews the denial of a motion for acquittal as it would review a claim of insufficient evidence. *See* Minn. R. Crim. P. 26.03, subd. 17(1) (providing that district court shall order judgment of acquittal upon motion if evidence is insufficient to sustain conviction); *State v. Anderson*, 414 N.W.2d 747, 750-51 (Minn. App. 1987) (reviewing denial of motion for acquittal by deciding whether evidence was sufficient to sustain convictions).

circumstances in determining whether constructive possession has been proved. *Denison*, 607 N.W.2d at 800.

When the search warrant was executed, Gomez had been living in Cantu's home for almost a year and a half. Evidence in the record showed that he and Cantu shared the master bedroom, and, specifically, the closet and dresser where the controlled substances were found. That evidence included the testimony of Cantu's son, documents that belonged to Gomez found in the file cabinet in the bedroom closet, and men's clothing found in the closet and dresser and on a chair.

Gomez argues that because the controlled substances were found in a woman's purse and in a dresser drawer with women's clothing, the only reasonable inference is that the controlled substances belonged to Cantu. Although the controlled substances in the closet were found in a black bag of a type typically used as a woman's purse, nothing about the bag indicated that it was in fact being used as a woman's purse. Rather, it was being used to store controlled substances. Although the methamphetamine in the dresser was in a drawer that contained only women's clothing, at least one other drawer in the dresser contained men's clothing, which indicated that Cantu and Gomez shared the dresser, and the methamphetamine was in a sock similar to other men's socks in the bedroom. Also, in addition to the controlled substances found in the bedroom, items associated with weighing and packaging controlled substances were found in the kitchen, which is a common area of the house.

The state was not required to prove that Gomez exclusively possessed the controlled substances. "[C]onstructive possession need not be exclusive but may be

shared.” *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000) (citing *State v. LaBarre*, 292 Minn. 228, 237, 195 N.W.2d 435, 441 (1972)), *review denied* (Minn. Jan. 16, 2001).

Citing *State v. Mollberg*, 310 Minn. 376, 390, 246 N.W.2d 463, 472 (1976), Gomez argues that his passive presence in the house was insufficient to establish constructive possession. But *Mollberg* did not recognize a different standard for constructive possession based on passive presence, and in *Mollberg*, the court simply determined that the evidence established a strong probability that the defendant was consciously exercising dominion and control over marijuana found in a bedroom closet. *See id.* (holding that jury could have reasonably concluded that the defendant was in constructive possession of marijuana found in bedroom closet based on evidence that defendant frequently stayed at the residence and the presence of his personal possessions in the bedroom).

Viewing the evidence in the light most favorable to the state, we conclude that the evidence excludes beyond a reasonable doubt any reasonable inference other than that Gomez constructively possessed the controlled substances. *See State v. Wiley*, 295 Minn. 411, 412 n.2, 422, 205 N.W.2d 667, 670 n.2, 675-76 (1973) (affirming finding of constructive possession in house shared with girlfriend who pleaded guilty to possession of controlled substance); *Denison*, 607 N.W.2d at 799-800 (affirming finding of constructive possession of a controlled substance found in close proximity to appellant’s personal effects and in areas of residence over which she likely exercised at least joint dominion and control); *State v. Lozar*, 458 N.W.2d 434, 441 (Minn. App. 1990) (holding

that evidence was sufficient to support finding that appellant constructively possessed marijuana where large quantities of it were found in common areas of home that appellant jointly possessed with her husband), *review denied* (Minn. Sept. 28, 1990).

Gomez argues that the district court should have considered all of the information in the district court record, not just the evidence that was presented to the jury, in deciding his motion for a judgment of acquittal. This argument is contrary to the language of Minn. R. Crim. P. 26.03, subd. 17(1), and to cases applying the rule. *See, e.g., State v. Anderson*, 414 N.W.2d 747, 750-51 (Minn. App. 1987) (reviewing denial of motion for acquittal by deciding whether evidence was sufficient to sustain convictions). Gomez argues that posttrial motions “are made on the files, exhibits and minutes of the court.” Equivalent language does appear in Minn. R. Crim. P. 26.04, subd. 1(2), but that rule specifically applies only to new-trial motions. The district court did not err in denying Gomez’s motion for judgment of acquittal.

II.

Gomez identifies as an issue whether “the [district] court erred by denying [Gomez’s] request for a jury instruction regarding circumstantial evidence as it pertained to the constructive possession element required to prove possession of a controlled substance.” But Gomez’s argument only addresses the instruction on constructive possession. The district court gave the recommended jury instruction on constructive possession. *See 10A Minnesota Practice*, CRIMJIG 20.20 (2000). Gomez does not identify any error in the instruction on constructive possession.

Regarding circumstantial evidence, Gomez requested that the district court instruct the jury, “All circumstances must be consistent with that conclusion and inconsistent with any other rational conclusion in order for jury to reach conclusion beyond a reasonable doubt.” The refusal to give a requested jury instruction is generally a matter within the district court’s discretion and will not be overturned absent an abuse of discretion. *State v. Blasus*, 445 N.W.2d 535, 542 (Minn. 1989). The instruction requested in this case is not mandatory, and refusal to give it is not reversible error. *State v. Gates*, 615 N.W.2d 331, 339 (Minn. 2000). The district court did not abuse its discretion in denying Gomez’s request. *See id.* (noting that instructing the jury on the legal standard for the sufficiency of circumstantial evidence would risk confusing the jury).

III.

Gomez argues that the district court erred in allowing Cantu to invoke her Fifth Amendment privilege against self-incrimination.

[A] valid claim of the privilege against self-incrimination under the Fifth Amendment takes precedence over the Sixth Amendment right to compulsory process. It is for the trial court to decide whether the witness’ claim of the privilege is valid, and in making this decision the court has broad discretion. The court should not require the witness to prove the hazard of incrimination in the sense in which a claim is usually required to be established in court, otherwise the witness would be compelled to surrender the very protection which the privilege is designed to guarantee. In appraising the claim of privilege, the trial judge must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.

State v. Moose, 266 N.W.2d 521, 525 (Minn. 1978) (quotation and citations omitted).²

Cantu pleaded guilty to controlled-substance crimes in federal court. The plea agreement apparently contemplated a downward sentencing departure in exchange for Cantu's truthful testimony at Gomez's trial. Gomez asserts that the agreement operated as a waiver of Cantu's Fifth Amendment rights in the proceeding against Gomez, but he provides neither evidentiary nor legal support for this assertion. An argument in a brief must be supported by legal analysis and citation to relevant authority. *See* Minn. R. Civ. App. P. 128.02, subd. 1(d) (providing that appellant's argument in a formal brief must be accompanied by citations to relevant authority); *State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address issue not adequately briefed); *Whalen ex rel. Whalen v. Whalen*, 594 N.W.2d 277, 282 (Minn. App. 1999) (declining to address issue unsupported by legal analysis or citation to relevant law).

At Gomez's trial, Cantu expressed a concern that the prosecutor believed that Cantu would testify untruthfully, which could affect her sentence. The district court properly determined that this was a legitimate concern and that Cantu would not have to answer any questions likely to lead to the possibility of her being denied leniency in sentencing. *See Mitchell v. United States*, 526 U.S. 314, 326-27, 119 S. Ct. 1307, 1314

² Gomez refers to the plain-error test in his statement of the issue. But Gomez sought to call Cantu as a witness and argued that he was prejudiced by the district court's decision allowing Cantu to claim the Fifth Amendment privilege against self-incrimination. The plain-error test, therefore, does not apply. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (stating plain-error test applies to unobjected-to error).

(1999) (rejecting claim that privilege did not exist in context of sentencing and stating that it only ends when there can be “no further incrimination” or “[i]f no adverse consequences can be visited upon the convicted person by reason of further testimony”).

Gomez fails to identify any basis, other than the claimed waiver of privilege, for concluding that the district court abused its broad discretion in allowing Cantu to assert the privilege against self-incrimination. Accordingly, we affirm the district court’s ruling. *See State v. Manley*, 664 N.W.2d 275, 285-86 (Minn. 2003) (rejecting argument that district court should have examined witness to determine if privilege claim was valid, noting that district court is in best position to appraise privilege claim, and affirming ruling allowing assertion of privilege when record did not establish abuse of discretion).

IV.

Gomez argues that he is entitled to a new trial based on prosecutorial misconduct, juror misconduct, and newly discovered evidence.

Prosecutorial misconduct

This court reviews claims of prosecutorial misconduct only to determine whether “the misconduct, when considered in light of the whole trial, impaired the defendant’s right to a fair trial.” *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

Gomez argues that the prosecutor acted vindictively in representing that Cantu would be called to testify against Gomez and then declining to call her as a witness. The record contains evidence that Cantu changed her mind about cooperating with the state and intended to testify in favor of Gomez. Gomez cites no authority to support his claim that the prosecutor acted improperly in declining to call Gomez as a witness under these

circumstances, and the record does not support Gomez's claim that the prosecutor improperly attempted to influence Cantu to not testify for Gomez.

Juror misconduct

Gomez argues that the jury was improperly influenced by Jose Cantu. We review the denial of a *Schwartz* hearing under an abuse-of-discretion standard. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). An allegation of juror misconduct may provide a basis for the trial court to order an investigatory hearing with the jurors in the presence of all interested parties. Minn. R. Crim. P. 26.03, subd. 9; *Opsahl*, 677 N.W.2d at 421-22 (citing *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960)). District courts should liberally grant requests for *Schwartz* hearings, but the requesting party must first produce "sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *State v. Church*, 577 N.W.2d 715, 720 (Minn. 1998) (quotation omitted).

The district court denied a *Schwartz* hearing because appellant failed to present evidence substantiating his claim that Jose Cantu had contact with members of the jury. On appeal, Gomez does not identify any contact between Jose Cantu and the jury. He states only that Jose Cantu was present during trial. The district court did not abuse its discretion in denying a *Schwartz* hearing.

Newly discovered evidence

Gomez argues that he is entitled to a new trial based on newly discovered evidence that proves that evidence that he was insuring vehicles owned by Cantu was false. In the memorandum filed May 11, 2006, Gomez stated that he had "obtained proof that he was

not insuring automobiles owned by [Cantu] at the time of his arrest.” To receive a new trial based on newly discovered evidence, a defendant must prove that (1) the evidence was not known to the defendant or counsel at the time of trial; (2) the evidence could not have been discovered through due diligence before trial; (3) the evidence is not cumulative, impeaching, or doubtful; and (4) the evidence probably would produce an acquittal or a more favorable result. *Wilson v. State*, 726 N.W.2d 103, 106 (Minn. 2007). Gomez has not satisfied this burden.

V.

The state argues that the district court erred in granting Gomez a stay of imposition of sentence.

The decision to depart from the sentencing guidelines is within the district court’s discretion and will not be reversed absent a clear abuse of discretion. *State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996). The district court may depart from the presumptive sentence provided in the sentencing guidelines if the case involves “substantial and compelling circumstances” to warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). A defendant’s particular amenability to individualized treatment in a probationary setting may be a substantial and compelling circumstance that justifies imposing probation in lieu of an executed sentence. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982); *State v. Gebeck*, 635 N.W.2d 385, 389 (Minn. App. 2001). For a violation of Minn. Stat. § 152.021, the district court’s sentencing discretion is also limited by Minn. Stat. § 152.152 (2004), which states that a “sentence may be stayed based on amenability to probation only if the offender presents adequate evidence to the court that

the offender has been accepted by, and can respond to, a treatment program that has been approved by the commissioner of human services.”

Gomez presented evidence that he had been accepted into and would be entering into a treatment program on October 30, 2006. The state argues that additional evidence of amenability to probation should also have been required. But there was additional evidence of amenability to probation, including Gomez’s lack of any prior felonies and his passive role in the crime. The district court considered these factors, which are proper factors to consider in determining amenability to probation. *See State v. Heywood*, 338 N.W.2d 243, 243-44 (Minn. 1983) (concluding a defendant’s prior record and passive role are relevant in determining amenability to probation).

The state argues that the finding of a passive role in the crime was based solely on this being a constructive-possession case. Whether a defendant’s role has been minor or passive is generally a factual issue best decided by the trial court. *State v. Carson*, 320 N.W.2d 432, 438 (Minn. 1982). In concluding that Gomez had a passive role in Cantu’s criminal conduct, the district court noted that Cantu was the one who had been selling drugs and that there was no evidence that Gomez actually handled the drugs. The district court declined to credit testimony to the contrary that was based on unsworn proffered statements. The district court did not abuse its discretion in staying imposition of Gomez’s sentence.

Affirmed.