STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2060

State of Minnesota,
Respondent,

vs.

Hussein Yusuf,
Appellant.

Filed April 8, 2008
Reversed and remanded
Peterson, Judge

Olmsted County District Court
File No. K1-05-3731

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mark A. Ostrem, Olmsted County Attorney, Olmsted County Courthouse, 151 Fourth Street Southeast, Rochester, MN 55904-3712 (for respondent)

John M. Stuart, State Public Defender, Jodie L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and Wright, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from a conviction of second-degree controlled-substance crime, appellant argues that (1) the evidence is insufficient to prove that he constructively possessed cocaine that was found in a public space, and (2) his confrontation rights were violated when the state failed to call a witness to testify regarding the identity and weight of the substance. We reverse and remand.

FACTS

At about 3:00 a.m. on September 17, 2005, several Rochester police officers responded to a report of a possible car prowler at an apartment complex. On foot, Officer Hwat Lou approached the complex from the south. Sergeant Thomas Pingel and two or three other officers approached on foot from the north. As Lou and Pingel approached, they saw four people standing in the parking lot and a fifth person, later identified as appellant Hussein Ali Yusuf, standing behind a tree about ten to 15 feet away from the other four individuals.

A plastic bag containing a number of broken-off pieces of a white, wafer-like substance was found on the ground very near where appellant was standing. The substance appeared to Lou to be crack cocaine. Lou handcuffed appellant and put him in a squad car and then told Pingel that he had found suspected crack cocaine. Pingel took possession of the plastic bag and put it in his squad car.

Lou testified that if appellant had simply removed the bag from his pocket and dropped it on the ground, it could have landed where it was found. Lou did not see

appellant make any movements with his hands, but, due to lighting conditions and the fact that appellant saw the other officers approaching before Lou walked up to appellant, appellant could have removed the plastic bag from a pocket without Lou seeing him do so. According to Lou, given the location of the tree, it would have been impossible for the bag to have landed where it was found if it had been thrown by one of the individuals in the parking lot.

Pingel testified that after appellant was placed in a squad car, he yelled at Pingel to get his attention. Appellant told Pingel that he was innocent and that the crack cocaine belonged to the man in the black cap who owned the white car in the parking lot. Appellant testified that he did not recall talking to Pingel at the scene. Appellant denied knowing anything about the bag containing cocaine and denied telling Pingel that the cocaine belonged to the man in the black cap who owned the white car.

After returning to the police station, Pingel performed a preliminary test to identify the substance in the plastic bag, and it tested positive for cocaine. Also, based on the appearance of the substance and the way it was packaged, it appeared to Pingel to be crack cocaine. Pingel weighed the baggy and the substance, and together they weighed 12 grams. Pingel estimated that the bag contained at least 50 rocks of crack cocaine and testified that a rock of cocaine weighs .2 grams.

The substance was sent to the Bureau of Criminal Apprehension (BCA) for analysis. A forensic scientist for the BCA prepared a report identifying the substance as a mixture weighing 8.9 grams and containing cocaine.

A jury found appellant guilty of second-degree controlled-substance crime in violation of Minn. Stat. § 152.022, subd. 2(1) (2004) (possession of six grams or more of cocaine). The district court sentenced appellant to an executed term of 41 months in prison. This appeal followed.

D E C I S I O N

I.

Appellant argues that his conviction must be reversed because the circumstantial evidence that he constructively possessed the cocaine, which was found in a public space, is legally insufficient. 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).

Circumstantial evidence is entitled to as much weight as direct evidence. *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992). For a defendant to be convicted based on circumstantial evidence alone, however, the circumstances proved must be "consistent with the hypothesis that the [defendant] is guilty and inconsistent with any rational

hypothesis [other than] guilt." *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). Even with this strict standard, the jury is in the best position to weigh the credibility of evidence and, thus, determines which witnesses to believe and how much weight to give to their testimony. *State v. Daniels*, 361 N.W.2d 819, 826 (Minn. 1985). "[P]ossibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995).

A person commits second-degree controlled-substance crime if "the person unlawfully possesses one or more mixtures of a total weight of six grams or more containing cocaine, heroin, or methamphetamine." Minn. Stat. § 152.022, subd. 2(1) (2004). "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). An individual may constructively possess a controlled substance alone or with others. *Id.* 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 at the totality of the circumstances in determining whether constructive possession has been proved. *Denison*, 607 N.W.2d at 800.

The evidence was sufficient to permit the jury to reasonably conclude that there is a strong probability that appellant was consciously exercising dominion and control over the bag containing the cocaine. The bag was in close proximity to appellant, lying on the ground about a foot away from him. Lou testified that the bag could have landed where it was found if appellant had simply removed the bag from his pocket and dropped it on the ground. Appellant argues that Lou did not see him make any movements with his hands. But Lou testified that due to lighting conditions and the fact that appellant saw the other officers approaching before Lou walked up to appellant, appellant could have removed the plastic bag from a pocket without Lou seeing him do so. Officers saw two of the individuals in the parking lot appear to throw something in a direction away from appellant but did not see anyone throw anything in appellant's direction. Also, if someone in the parking lot had thrown the bag, it could not have landed where it was found due to the location of the tree. Lou also testified that appellant appeared nervous and defensive as Lou approached him. Although appellant claimed that he was nervous because the officers had their guns drawn, appellant's testimony that the officers' guns were drawn was contradicted by the officers' testimony. Finally, the statement that appellant volunteered to Pingel at the scene shows that appellant knew that the bag contained cocaine. Under the totality of these circumstances, it is not a rational hypothesis that appellant was not consciously exercising dominion and control over the bag of cocaine.

II.

Appellant argues that the district court violated his confrontation rights by admitting the BCA report without the testimony of the analyst who prepared the report.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. Whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law, which this court reviews de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

In *Crawford v. Washington*, the Supreme Court held that when testimonial evidence is at issue, an out-of-court statement is inadmissible unless the declarant is not available to testify at trial and the defendant has had an opportunity to cross-examine the declarant. 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004). In *Caulfield*, the supreme court held that a BCA lab report identifying a substance as cocaine is testimonial evidence under *Crawford*. 722 N.W.2d at 310.

The *Caulfield* court also addressed the constitutionality of Minn. Stat. § 634.15, subds. 1(a), 2(a) (2004), which permits the admission of "a report of the facts and results of any laboratory analysis or examination if it is prepared and attested by the person performing the analysis or examination in any laboratory operated by the Bureau of Criminal Apprehension" and allows a defendant who wants to cross-examine the analyst to "request, by notifying the prosecuting attorney at least ten days before the trial, that the [analyst] testify in person at the trial on behalf of the state." *Id.* at 310-313 (quoting Minn. Stat. § 634.15, subds. 1(a), 2(a) (2004)). The court concluded that the statute is

unconstitutional because it does not "provide adequate notice to the defendant of the contents of the report and the likely consequences of his failure to request the testimony of the preparer." *Id.* at 713.

Under *Caulfield*, the admission of the BCA report without the testimony of the analyst who prepared the report violated appellant's constitutional right to confront the witnesses against him.

Appellant did not object to the admission of the report at trial. Failure to object to the admission of evidence generally constitutes a waiver of the right to appeal on that basis. *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). However, this court has discretion to consider an error not objected to at trial if it is plain error affecting substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). We apply a three-prong test when making a plain-error determination: "there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *Id.* at 740. Each prong of the test has to be met or the claim fails. *Id.*

Because *Caulfield* was decided before this appeal was filed, appellant has satisfied the first two prongs of the plain-error test. *See Griller*, 583 N.W.2d at 741 (noting that error was plain when at the time of trial the district court correctly stated the law, but later that same law became incorrect based on a case decided during appeal); *see also State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002) (explaining that to satisfy the second prong of the plain-error test, the error must be clear or obvious at the time of the appeal).

The third prong of the plain-error test, requiring that an error affect a substantial right, is satisfied if "the error was prejudicial and affected the outcome of the case."

Griller, 583 N.W.2d at 741. Plain error is prejudicial if there is a "reasonable likelihood" that the error "had a significant effect" on the jury's verdict. *Id.* (quotation omitted).

Weight of a controlled substance is an element of the offense of which appellant was convicted. *See* Minn. Stat. § 152.022, subd. 2(1) (stating that a person commits second-degree controlled-substance crime if "the person unlawfully possesses one or more mixtures of a total weight of six grams or more containing cocaine, heroin, or methamphetamine"). As with other elements, when weight of a controlled substance is an element of an offense, the state has the burden of proving weight beyond a reasonable doubt. *State v. Robinson*, 517 N.W.2d 336, 339 (Minn. 1994).

In *Robinson*, the supreme court held that taking samples from only seven of 13 packets suspected of containing cocaine was insufficient to show that the total amount of the substance in all 13 packets weighed at least ten grams when the total weight of cocaine in the tested packets was estimated to be less than ten grams. *Id.* at 338. The court stated that in the case of substances not homogeneously packaged, extrapolation was insufficient to establish weight and that the state was required to test a sufficient quantity of the mixture to establish weight beyond a reasonable doubt. *Id.* at 340. The court expressed a concern that the untested packets might not have contained cocaine, based on evidence that drug traffickers sometimes substitute placebos for cocaine. *Id.* at 338-39. The court also noted, "Where a penalty as serious as 10 years' imprisonment may hinge on a gram, it seems not too much to require scientific testing to establish the requisite weight." *Id.* at 340.

The only evidence regarding weight other than the BCA report was Pingel's testimony. Pingel estimated that the plastic bag contained at least 50 rocks of crack cocaine and testified that a rock weighs .2 grams. Pingel also testified that he weighed the baggy and the substance, and together they weighed 12 grams. Pingel's testimony was insufficient to satisfy the scientific-reliability requirement described in *Robinson*. His estimate of the number of rocks in the bag does not establish the precise weight of the cocaine, and the weight of the baggy and the cocaine together does not establish the weight of the cocaine alone. Thus, without the BCA report, the evidence was insufficient to satisfy the state's burden of proving weight of the controlled substance beyond a reasonable doubt, and the third prong of the plain-error test is satisfied.

If the defendant meets the three prongs of the plain-error test, this court may correct the error "only if it seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (quotations omitted). The erroneous admission of the BCA report affected the fairness and integrity of appellant's trial by allowing him to be convicted based on the violation of his constitutional right to confront the witnesses against him. *See State v. Vance*, 734 N.W.2d 650, 662 (Minn. 2007) (addressing when an error affects the fairness and integrity of judicial proceedings). Accordingly, appellant is entitled to reversal of his conviction based on the erroneous admission of the BCA report.

Appellant raises several additional issues, including claims of juror bias, prosecutorial misconduct, and a sentencing error. Because we are reversing and

remanding based on the erroneous admission of the BCA report, we do not reach these issues.

Reversed and remanded.