STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0286

State of Minnesota,
Respondent,

vs.

Irvin Rockett,
Appellant.

Filed May 19, 2009
Affirmed in part and remanded
Toussaint, Chief Judge

Hennepin County District Court
File No. 27-CR-05047989

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

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, Megan Bell Gallagher, Certified Student Attorney, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Toussaint, Chief Judge; and Johnson, Judge.

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

TOUSSAINT, Chief Judge

Appellant Irvin Rockett challenges his first-degree controlled-substance convictions, claiming that: (1) the district court committed plain error by instructing the jury that his recorded in-custody statement was admissible for all purposes; (2) his convictions are not supported by sufficient circumstantial evidence; and (3) the district court improperly sentenced him on both counts arising out of a single behavioral incident. Because appellant's statement was not taken in violation of his right to counsel and because his convictions are supported by sufficient circumstantial evidence, we affirm. But because the record is unclear as to whether appellant was sentenced on both counts, we remand to the district court for clarification.

D E C I S I O N

Minneapolis Police Department officers executed a search warrant for the lower level of a duplex on August 1, 2005. Officers found seven individuals in the duplex's living room and appellant in the south bedroom. Officers searched the south bedroom and found drug paraphernalia, mail addressed to appellant, and appellant's wallet, containing his driver's license listing the address of the duplex, on a dresser. Plastic bags containing 38.45 grams of cocaine, a plastic bag containing 41.81 grams of heroin, and approximately $5,000 in cash were found in the closet. Appellant gave a recorded, in-custody statement in the bedroom. Appellant was charged with two counts of first-degree possession of controlled substances, cocaine and heroin, and was convicted following a jury trial.

I.

Appellant claims that it was plain error for the district court to instruct the jury to use his recorded statement as substantive evidence because the statement was taken in violation of his right to counsel.[1]

Appellant did not move for the suppression of his statement before trial, did not object to the admissibility of his statement based on a right-to-counsel violation at trial, and did not object to the district court's jury instruction that his statement was admissible for substantive purposes.[2] For an appellate court to review an unobjected-to error, an appellant must show (1) error, (2) that is plain, and (3) that affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Generally, plain error "is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "[A]n error affects substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007).

Appellant claims that the officer failed to cease questioning after he unequivocally invoked his right to counsel. The right to have counsel present during all custodial interrogations is undisputed and necessary to protect the suspect's right to remain silent.

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[1] The record does not include a transcript of the statement. Quotations from it and references to it are based on the tape itself.

[2] "Usually, we will not decide issues which are not first addressed by the trial court and are raised for the first time on appeal even if the issues involve constitutional questions regarding criminal procedure." *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989). "We may, however, at our discretion, decide to hear such issues when the interests of justice require their consideration and addressing them would not work an unfair surprise on a party. *Id.*

State v. Ray, 659 N.W.2d 736, 741 (Minn. 2003); *State v. Staats*, 658 N.W.2d 207, 213 (Minn. 2003). Custodial interrogation that persists after the defendant's invocation of his right to counsel "violates an accused's fifth amendment right, and any statement or confession ensuing as a result of that interrogation may not be introduced in evidence at the trial of the accused." *State v. Robinson*, 427 N.W.2d 217, 222 (Minn. 1988); *see State v. Scanlon*, 719 N.W.2d 674, 682 (stating that, if police initiate questioning in absence of counsel after suspect has requested counsel, suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial).

"A request for counsel is considered to be unequivocal if it is articulated sufficiently clearly that a reasonable police officer, in the circumstances, would understand the statement to be a request for an attorney." *Ray*, 659 N.W.2d at 742 (quotation omitted). Here, appellant unequivocally asked for a lawyer when he said, "May I have a lawyer around so they can make sure everything's legit? So I'll call the lawyer right now." *See Staats*, 658 N.W.2d at 213 (finding that defendant unequivocally requested attorney when he said that he "wanted to talk to a lawyer"); *Ray*, 659 N.W.2d at 742 (finding that defendant unequivocally requested attorney when he said "get me a public defender down here").

After appellant invoked his right to counsel, he asked the officer where he would be able to talk to a lawyer, and the officer explained that he could talk to a lawyer after being booked into jail because he was under arrest. The officer explained to appellant that it was not possible for him to speak to an attorney at the site of the arrest. The officer's clarifying questions indicate that he wanted to ensure that appellant understood

his right to counsel. *See State v. Risk*, 598 N.W.2d 642, 648-49 (Minn. 1999) (stating that, once accused has invoked right to counsel, police may resume interrogation "[o]nly if the narrow clarifying questions asked . . . confirm that the accused is not expressing a desire to deal with the police only through counsel").

Courts may admit responses to further questioning of a suspect who has invoked his right to counsel only if the suspect initiated further discussions with police and knowingly and intelligently waived his right to counsel. *State v. Hannon*, 636 N.W.2d 796, 806 (Minn. 2001). After the officer explained the process to appellant, the record indicates that appellant waived his invoked right to counsel and evidenced a willingness for continued interrogation when he said, "I'll speak to you." *See State v. Bradford*, 618 N.W.2d 782, 796 (Minn. 2000) (finding that defendant waived previously invoked right to counsel and initiated further interrogation when he said, "Ok, well, I'm gonna tell you what happened"). Appellant's statement and tone of voice indicate a willingness and desire for a discussion about the investigation with a full understanding and knowing waiver of his right to counsel. It was not plain error for the district court to admit appellant's taped statement as substantive evidence.

Furthermore, even if appellant's right to counsel was violated, nothing in the record indicates that his substantial rights were affected by the admission of his statement. Appellant's statement was substantively not inculpatory because he denied ownership of the narcotics and paraphernalia. He admitted living at the duplex during his interrogation, but as discussed below, other circumstantial evidence supports the jury's finding of constructive possession.

Appellant also claims that the district court intended to admit his statement only for the limited purpose of attacking his credibility and not as substantive evidence but that it failed to give the jury such a limiting instruction. During trial, the district court ruled that the statement was admissible and stated that "playing the tape goes directly to the issue of credibility of [appellant's] testimony." The district court did not admit the statement for a limited purpose but explained the relevancy of the statement. The district court's jury instruction regarding appellant's recorded statement did not constitute plain error.

II.

Appellant challenges the sufficiency of the circumstantial evidence supporting his first-degree controlled-substance jury convictions. On a claim of insufficient evidence, this court reviews the record to determine whether the evidence, viewed in the light most favorable to the verdict, is sufficient to permit the jury to reach the verdict they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Circumstantial evidence is entitled to no less weight than direct evidence. *Id*. Juries are best situated to evaluate the case's circumstantial evidence and to determine the credibility and weight of witnesses' testimony. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). We 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 as charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). A conviction may be based purely on circumstantial evidence if the evidence as a whole leads directly to the guilt of the defendant and is inconsistent with any reasonable

inference other than guilt. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994).

Appellant was convicted of two counts of first-degree controlled-substance crime in violation of Minn. Stat. § 152.021, subd. 2(1) (2004) ("A person is guilty of a controlled substance crime in the first degree if . . . the person unlawfully possesses one or more mixtures of a total weight of 25 grams or more containing cocaine, heroin, or methamphetamine."). "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 found in a place to which others had access, the state must prove constructive possession by 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 circumstances in determining whether constructive possession has been proved. *Denison*, 607 N.W.2d at 800.

Appellant claims that the record supports reasonable inferences other than his constructive possession of the narcotics, such as ownership by one of the other seven individuals found in the duplex when police entered. But the jury could have inferred from the circumstantial evidence that appellant exercised dominion and control over the narcotics found in the bedroom closet: five officers saw appellant standing in the bedroom when they entered the residence, two officers saw appellant move towards the bedroom closet, mail addressed to appellant at the duplex's address was found on the

dresser, appellant's wallet containing his driver's license showing the duplex's address was found on the dresser, appellant moved out of his other apartment during the beginning of August and did not pay August rent, appellant gave the duplex's address as his current address and the duplex's phone number as his current phone number during his recorded statement, and appellant later claimed and picked up a dog taken from the duplex. We must defer to the jury's decision to discredit appellant's denials. *State v. Bias*, 419 N.W.2d at 484 (stating that jury is in best position to assess witness credibility).

Viewing the evidence in the light most favorable to the state, the evidence excludes any reasonable inference other than that appellant constructively possessed the controlled substances. *See State v. Mollberg*, 310 Minn. 376, 390, 246 N.W.2d 463, 472 (1976) (affirming finding of constructive possession of controlled substance found in room where appellant frequently stayed and where numerous letters addressed to appellant were found on floor of bedroom in close proximity to drugs); *Denison*, 607 N.W.2d at 799-800 (affirming finding of constructive possession of 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) (affirming finding of constructive possession of controlled substance found in common areas of home that appellant jointly possessed with husband), *review denied* (Minn. Sept. 28, 1990).

III.

Appellant argues that the district court sentenced him in error on both counts because his convictions arose from a single behavioral incident. Minnesota's statutory

double-jeopardy protection precludes multiple sentencing for conduct that is part of a single behavioral incident. Minn. Stat. § 609.035, subd. 1 (2004) ("[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them."). "Possession of two controlled substances at the same time and place, for personal use, is a single behavioral incident." *State v. Papadakis*, 643 N.W.2d 349, 357 (Minn. App. 2002).

Here, the record is unclear as to whether the district court sentenced appellant on both counts. We remand to the district court for clarification of appellant's sentence.

Affirmed in part and remanded.