STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1381

State of Minnesota,
Respondent,

vs.

Jason Alexander Palko,
Appellant.

Filed August 10, 2010
Affirmed
Minge, Judge

Meeker County District Court
File No. 47-CR-08-211

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Stephanie Beckman, Meeker County Attorney, Litchfield, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, St. Paul, Minnesota; and

Glenna L. Gilbert, Special Assistant Public Defender, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Minge, Judge; and Muehlberg, Judge.*

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

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

MINGE, Judge

Appellant challenges his conviction of possession of methamphetamine paraphernalia in the residence of a child and two counts of fifth-degree possession of a controlled substance. Appellant claims that the circumstantial evidence was not sufficient to support the convictions and that the district court improperly excluded testimony regarding misleading conduct by a drug dealer that was the basis for a search warrant. Because we conclude that the evidence was sufficient and the basis for the search warrant was extraneous, we affirm.

FACTS

In February 2008, police executed a search warrant for a house rented by appellant Jason Palko in Litchfield. Palko had been living in the home with his girlfriend and their two children since September 2006. The basis for the warrant was an informant's report that his drug supplier brought him to Palko's house during a marijuana sale.

During the search, police found 152 grams of marijuana, a light bulb packaged with trace amounts of methamphetamine, drug paraphernalia, and a large metric scale in the living-room closet. Police testified that most of these items were plainly visible on a chest-high shelf and that an officer immediately smelled marijuana when he opened the closet door. In addition, the closet contained linens and other household items. Police also found drug paraphernalia and trace amounts of marijuana in the living room and a bedroom. When Palko arrived home during the search, police arrested him and found a marijuana pipe and 1.5 grams of marijuana in his coat pocket.

Palko was charged with possession of methamphetamine paraphernalia in residence of a child, Minn. Stat. § 152.137, subd. 2(a)(4) (2006), two counts of fifth-degree controlled substance possession, Minn. Stat. § 152.025, subd. 2(1) (2006), and one count of possession of drug paraphernalia, Minn. Stat. § 152.092 (2006). The paraphernalia and drugs found in the living-room closet were the primary basis for proving the charges.

At trial, Palko testified that the prior occupants of the house had left many of their possessions behind, that the living-room closet was full of their belongings, and that he blocked the closet door with a space heater and chair. He added that he had not used the living-room closet since he moved into the house. He testified that although he had peeked inside the closet, he had not seen or smelled drugs, and that he immediately closed the door and never used it because it was already full. The landlord, Timothy Cook, testified for the defense that the previous tenants had abruptly moved out and left their possessions scattered throughout the house, including the closet. Cook added that after the previous tenants moved out but before the search, he inspected the closet and saw the prior tenants' things piled up inside. During cross-examination, Cook stated that when he checked the closet he did not see drugs, the scale, or paraphernalia and that he did not smell marijuana.

Palko attempted to call as a witness the drug seller that led the informant to Palko's home. The seller was expected to testify that he only went to Palko's home to conceal from the informant where he kept his drugs. The district court excluded the

testimony on the ground that the veracity of the statements in the search warrant were not relevant to the trial issues.

The jury convicted Palko on all counts. Palko appeals.

D E C I S I O N

I.

The first issue raised by Palko is whether the evidence is sufficient for the jury to find that he possessed the contraband found at his home. An appellate court's sufficiency-of-the evidence review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). A conviction based on circumstantial evidence, though more strictly scrutinized, is entitled to the same weight as one based on direct evidence. *State v. Olhausen*, 681 N.W.2d 21, 26 (Minn. 2004); *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). Construing conflicting testimony most favorably to the verdict, this court affirms if the circumstances proved form a complete chain that leads so directly to the defendant's guilt as to exclude all other inferences beyond a reasonable doubt. *State v. Tscheu*, 758 N.W.2d 849, 857-58 (Minn. 2008); *Jones*, 516 N.W.2d at 549.

The crimes for which Palko was convicted require possession. Minn. Stat. § 152.092; Minn. Stat. § 152.025, subd. 2(1); Minn. Stat. § 152.137, subd. 2(a)(4). Other than the small amount of marijuana found on his person, no direct evidence shows Palko

actually possessed the drugs and paraphernalia for which he was convicted. *Jacobson v. Aetna Cas. & Sur. Co.*, 233 Minn. 383, 388, 46 N.W.2d 868, 871 (1951) (defining actual possession as "direct physical control"). So the state must prove he constructively possessed the contraband. *See State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975); *State v. Denison*, 607 N.W.2d 796, 799 (Minn. App. 2000), *review denied* (Minn. June 13, 2000). To prove constructive possession, the state must show that either (a) the police found the items in a place under Palko's exclusive control; or, (b) if police found the item in a place to which others had access, there is a strong probability (inferable from other evidence) that Palko was, at the time, consciously exercising dominion and control over it. *Florine*, 303 Minn. at 105, 226 N.W.2d at 611. This court reviews the totality of the circumstances to decide whether constructive possession was proved. *State v. Munoz*, 385 N.W.2d 373, 377 (Minn. App. 1986).

The trial record contains the following evidence tending to show Palko's constructive possession of the marijuana, methamphetamine, and drug paraphernalia:

- The house was rented to, occupied by, and under the control of Palko.
- The contraband was in plain view on an eye-level shelf of the living-room closet.
- Palko had exclusive control over and access to the closet for the previous nine months.
- Other marijuana and drug paraphernalia was found in Palko's living room and bedroom.
- Marijuana was found in Palko's jacket pocket during the arrest.
- Landlord Cook checked the closet after the previous tenants had moved out and did not see or smell drugs or see drug paraphernalia.

Palko argues that it is reasonable to conclude that the closet contraband belonged to the prior tenants because (1) there was nothing in the closet that identified the contraband as his; (2) the uncontested evidence was that the prior tenants left things in the closet; (3) he and his girlfriend did not use the closet; and (4) he denied that the closet drugs and paraphernalia were his. To support his argument, Palko points to prior cases where appeals courts affirmed constructive-possession convictions based largely on the fact that the contraband was discovered near items identified as belonging to the defendants, which did not occur here. *See State v. Colsch*, 284 N.W.2d 839, 841 (Minn. 1979) (noting that the defendant's checkbook was atop a dresser holding drug paraphernalia); *Denison*, 607 N.W.2d at 800 (noting that drugs were found in closet with the defendant's clothes). But constructive-possession and circumstantial-evidence cases are fact intensive, and we uphold a conviction so long as the circumstances proved, in one way or another, meet the standards set forth above.

In this case, the key circumstance that discredits Palko's version of events is Cook's testimony. Cook looked inside the closet *after* the prior tenants had moved out and did not see the drugs, scale, or paraphernalia that were so immediately noticeable to the police when they opened the closet door. Cook, who stated he was familiar with the smell of marijuana, did not smell any; the police could smell marijuana after opening the closet door. For purposes of appellate review, we assume the jury believed this testimony, which, when combined with the officer's, indicates that the contraband was placed in the closet after the departure of the prior tenants and undermines Palko's claim that the prior tenants left the drugs and paraphernalia in the closet. Palko's admitted drug

use, the presence of drugs in other rooms and on Palko's person, and the inference that people ordinarily know the contents of and use their living-room closets reinforces the conclusion that Palko consciously exercised dominion and control over the contraband at issue. Based on the totality of the circumstances, we conclude that the jury could reasonably determine that the circumstances proved lead so directly to Palko's guilt as to exclude other inferences beyond a reasonable doubt.

II.

The second issue raised by Palko is whether the district court erred by excluding the search-warrant-related testimony of the drug seller. Evidentiary rulings rest within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

A defendant has a constitutional right to offer testimony of witnesses so that he can present his version of facts to the jury; but that right is limited by evidentiary rules, which authorize the district court to exclude evidence that is of only marginal relevance. *State v. Quick*, 659 N.W.2d 701, 713 (Minn. 2003). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401.

Palko argues that the jury would assume that because the police had obtained a search warrant for his home, there was other evidence not presented at trial that he possessed drugs and that the drug seller's explanation for the informant's misguided tip would dispel that damaging assumption.

In excluding the testimony, the district court noted that the state had been "careful . . . not to present any of the evidence of any occurrences or information that it had prior to the search," that the "[search warrant] information doesn't go to [the possession] issue," and that the jury instructions would make clear that the jury should begin by presuming Palko's innocence.[1] We note that the state never presented any evidence of or referred to the informant's tip. We further note that testimony regarding disputes over the basis of this search warrant would have taken trial time and distracted the jury from the real issue of whether Palko's possession of the drugs and paraphernalia was established. The district court acted within its discretion by excluding the evidence.

Even if offered testimony is relevant, its exclusion must be prejudicial to require a new trial. *W.G.O. ex rel. Guardian of A.W.O. v. Crandall*, 640 N.W.2d 344, 349 (Minn. 2002). An error is prejudicial if it could "reasonably have influenced the jury and changed the result of the trial." *Id*. Here, the claim of an implicit link between the search warrant and other evidence against Palko is attenuated. No evidence of the basis, nature, or contents of the warrant was presented to the jury. The jury was told not to make assumptions of guilt by the fact of the criminal proceedings and was informed that the police were not familiar with Palko prior to execution of the search warrant. The basis of the warrant does not pertain to the circumstantial evidence used to convict. The claim

[1] The jury instructions included the statement, "Defendant is presumed innocent of the charge made, and that presumption abides with the Defendant unless and until he has been proved guilty beyond a reasonable doubt. That the defendant is on trial, has been arrested, and has been brought before the Court by the ordinary processes of the law should not be considered by you as in any way suggesting guilt. The burden of proving guilt is on the State."

that the jury would infer guilt based on undisclosed material in the warrant is not persuasive. Exclusion of the evidence was not prejudicial. In fact, excluding the evidence might have helped Palko's case because the testimony would have described a previous drug sale occurring at Palko's home, suggesting that he was a drug dealer and creating doubts about his credibility.

In sum, we conclude that the district court did not abuse its discretion in excluding the offered testimony.

Affirmed.

Dated: