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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-702**

State of Minnesota,
Respondent,

vs.

Damion Eugene Devine,
Appellant.

**Filed May 7, 2012
Affirmed
Worke, Judge**

Dakota County District Court
File No. 19HA-CR-09-2087

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Phillip Prokopowicz, Assistant County Attorney, Hastings, Minnesota (for respondent)

Melissa Sheridan, Assistant State Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Harten,
Judge.*

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his controlled-substance, assault, firearm-possession, and fleeing-a-police-officer convictions, arguing that the evidence was insufficient to support any of the convictions. He also raises numerous issues in a pro se brief. We affirm.

DECISION

Appellant Damion Eugene Devine argues that the evidence was insufficient to support his convictions for one count of ineligible person in possession of a firearm, Minn. Stat. § 624.713, subd. 1(2) (2008), two counts of first-degree controlled-substance crime, Minn. Stat. § 152.021, subds. 1(1), 2(1) (2008), two counts of second-degree assault, Minn. Stat. § 609.222, subd. 1 (2008), and one count of fleeing a peace officer in a motor vehicle, Minn. Stat. § 609.487, subd. 3 (2008). “When assessing whether the evidence is sufficient to support a conviction, we conduct a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict.” *State v. Nissalke*, 801 N.W.2d 82, 108 (Minn. 2011) (quotation omitted). “We construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the State’s witnesses and disbelieved the defense witnesses.” *Id.* (quotation omitted).

In reviewing a conviction that depends on circumstantial evidence, we apply “heightened scrutiny” that includes a two-part test to evaluate the sufficiency of the evidence. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010); *State v. Andersen*, 784

N.W.2d 320, 329-30 (Minn. 2010). First, we identify the circumstances proved, relying on the jury's duty to weigh credibility. *Andersen*, 784 N.W.2d at 329. Next, we “examine independently the reasonableness of all inferences that might be drawn from the circumstances proved”; the circumstantial evidence must be “consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 329-30.

Appellant was found guilty of three offenses for items police found in a townhouse during execution of a valid search warrant. Police found a loaded handgun in the top dresser drawer in the master bedroom and 3.7 grams of cocaine in a shot glass on top of the dresser. Police also found 50.5 grams of cocaine in two baggies in a drawer safe in the kitchen.

Possession of handgun

As to the firearm-possession offense, appellant claims that the state failed to prove that he was in constructive possession of the handgun. *See* Minn. Stat. § 624.713, subd. 1 (including in offense definition, that certain persons “shall not be entitled to possess a . . . firearm”); *State v. Porter*, 674 N.W.2d 424, 427 (Minn. App. 2004) (requiring state to satisfy burden of proof by showing “actual or constructive possession of a firearm”). The state may prove constructive possession by showing that

(1) the police found the item in a place under the defendant's exclusive control to which other people did not normally have access, or (2) if the police found it in a place to which others had access, that there is a strong probability, inferable from the evidence, that the defendant was, at the time, consciously exercising dominion and control over it.

State v. Lee, 683 N.W.2d 309, 317 n. 7 (Minn. 2004).

The state provided sufficient evidence that appellant constructively possessed the handgun at the time of the offense. Although the handgun was found in a townhouse owned by the mother of appellant's child, the mother had been out of town for several weeks at the time of the offense, and appellant was partially responsible for the child's care and had access to the townhouse. In addition, other evidence suggested that appellant was living at the townhouse, at least temporarily, and was using the townhouse as a base for a drug-selling operation. Based on a tip, police set up several controlled buys of cocaine involving appellant, and appellant drove to the buys from the townhouse and returned to it afterward. During the search, appellant's personal items were found strewn throughout the residence, including his clothing, mail addressed to him, and his wallet, which was found in close proximity to the handgun in the dresser drawer. *See State v. Denison*, 607 N.W.2d 796, 800 (Minn. App. 2000) (upholding a finding of constructive possession of marijuana when although defendant lived in a house with her spouse, marijuana was found in close proximity to her personal items), *review denied* (Minn. June 13, 2000). Although the mother testified that she lived with only her son in the townhouse and that a former boyfriend may have left items in the townhouse, the jury was free to reject this testimony in light of its implausibility. *See State v. Johnson*, 568 N.W.2d 426, 436 (Minn. 1997) (permitting a jury to believe part and reject part of a witness's testimony); *State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995) (permitting a jury to reject a defendant's claim of innocence when the evidence taken as a whole makes theory "unreasonable"). Giving the jury deference for making credibility determinations,

the evidence and its proper inferences were consistent only with the conclusion that appellant constructively possessed the handgun.

Possession of cocaine

Appellant also challenges the sufficiency of the evidence of his constructive possession of cocaine found in the townhouse. The evidence showed that appellant had come from and returned to the townhouse to conduct controlled buys in the period before his arrest, was the only adult who had access to the townhouse just before his arrest, and had numerous personal items in the townhouse. In addition, police found cocaine in two rooms of the townhouse, drug paraphernalia that included a digital scale and small plastic baggies used for packaging drugs, and \$1,650 in cash in a men's coat. While a woman who was with appellant immediately prior to his arrest testified that they had spent the prior one to two hours in the vehicle in the townhouse garage, the jury was free to reject this testimony. *See State v. Memis*, 708 N.W.2d 526, 531 (Minn. 2006) ("Assessing the credibility of a witness and the weight to be given a witness's testimony is exclusively the province of the jury."). We conclude that the evidence was sufficient to prove that appellant was in constructive possession of the cocaine found in the townhouse.

Weight of cocaine from vehicle

Appellant separately challenges the accuracy of the weight of 30.59 grams of cocaine found in the vehicle he was driving at the time of his arrest, claiming that the cocaine weight was inaccurate because of debris added to it during law-enforcement's collection process. *See State v. Robinson*, 517 N.W.2d 336, 339 (Minn. 1994) ("The weight of the mixture is an essential element of the offense charged; like every other

essential element, it must be proven . . . beyond a reasonable doubt.”). Appellant was charged and convicted of two counts of first-degree controlled-substance crime under Minn. Stat. § 152.021, subd. 1(1) (sale of ten grams or more of cocaine within 90 days), and Minn. Stat. § 152.021, subd. 2(1) (possession of 25 grams or more of cocaine). Because we have upheld the sufficiency of the evidence of appellant’s possession of the 50.5 grams of cocaine found in the townhouse, we decline to reach this issue, as the quantities of cocaine found in the townhouse support a conviction for either sale or possession of cocaine.

Assault convictions

Appellant was convicted of two second-degree-assault offenses because he nearly struck two police officers during his apprehension. Minn. Stat. § 609.222, subd. 1 (2008), defines second-degree assault as “assault[ing] another with a dangerous weapon.” “Assault” is defined as either “an act done with intent to cause fear in another of immediate bodily harm or death” or “the intentional infliction of or attempt to inflict bodily harm upon another.” Minn. Stat. § 609.02, subd. 10 (2008). In *State v. Fleck*, 810 N.W.2d 303, ___ (Minn. 2012), the supreme court ruled that an assault offense premised on causing fear of bodily harm to the victim is a specific intent crime, and an assault offense premised on causing bodily harm to the victim is a general intent crime.

Appellant claims that the evidence established only that he intended to flee the scene, not assault any of the arresting officers. Appellant’s claim lacks merit. Appellant struck a police vehicle parked directly behind him with enough force to cause a large dent in the driver’s side; the collision occurred just as an officer was opening the door on the

driver's side to exit the vehicle. The size and location of the dent provide circumstantial evidence that appellant intended to cause bodily harm to that officer. Another police officer was located in front of appellant's vehicle as it started to move forward, and he shot at appellant because he "was in fear for [his] life." This evidence is sufficient to prove that appellant possessed the requisite intent to assault both officers. *See id.* at ____ (noting that "regardless of whether an offense is described as a specific-or general-intent crime, a defendant must voluntarily do an act or voluntarily fail to perform an act").

Pro se arguments

Appellant makes several arguments that depend on facts that are contrary to the jury verdict or are outside of the record on appeal. He also cites no legal support for any of his arguments. Under these circumstances, we decline to consider appellant's pro se claims. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (refusing to consider pro se claims unsupported by the record); *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (stating that appellate court considers waived an issue raised in a brief that "contains no argument or citation to legal authority in support of [its] allegations"); *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007).

Affirmed.