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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2218**

State of Minnesota,
Respondent,

vs.

Dennis Jerome Holloway,
Appellant.

**Filed January 21, 2014
Affirmed in part, reversed in part, and remanded
Hudson, Judge**

Hennepin County District Court
File No. 27-CR-12-13363

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

Michael O. Freeman, Hennepin County Attorney, Leah Erickson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Hooten, Presiding Judge; Stoneburner, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant challenges the sufficiency of the evidence to support his convictions of controlled-substance crime and ineligible firearm possession and argues that the district

court erred by adjudicating and imposing a sentence on a lesser-included offense. He also argues in a pro se supplemental brief that the district court abused its discretion by denying his request for a continuance to obtain a witness. We affirm in part but reverse in part for vacation of appellant's conviction and sentence on second-degree controlled-substance crime and remand for resentencing.

FACTS

After police arranged two controlled drug buys and executed a search warrant at a North Minneapolis residence, the state charged appellant Dennis Jerome Holloway with two counts of aiding and abetting first-degree controlled-substance crime, sale; one count of first-degree controlled-substance crime, possession with intent to sell; one count of second-degree controlled-substance crime, possession; and one count of prohibited person in possession of a firearm.

At appellant's jury trial, a Minneapolis police officer testified that he had received information from a cooperating defendant, W.L., that a person named "Dennis" was trafficking in large quantities of powdered and crack cocaine, using an identified cell-phone number and two vehicles, a white Cadillac Escalade and a black Chevy Avalanche. The officer set up surveillance to track the cell phone assigned to the identified number using a locator tool, which sent a "pinging" signal to the phone every 15 minutes, forcing it to enter the network and provide information on its location within a certain radius. During this monitoring over an approximate two-week period, police noted that the phone emitted a cluster of signals from a three-block area near Logan Avenue North and Broadway Avenue, during the hours of about 2:00 to 7:00 a.m. They then located the

identified vehicles parked in front of a residence on Logan Avenue North, placed tracking devices on them, and conducted physical surveillance of the residence. An officer testified that he observed appellant come and go from the residence using a key and drive the vehicles.

During the phone-surveillance period, police arranged two controlled buys of cocaine in which W.L. called the identified phone number to order drugs; the calls were recorded, and the person who answered the calls agreed to supply drugs. An officer testified that he recognized the voice speaking from the identified number as appellant's, based on prior contact and a police interview after appellant's arrest. The recorded phone calls and the police interview were played for the jury.

In both of the controlled buys, H.C. left the residence on Logan Avenue, drove to an arranged location, and delivered cocaine to W.L. During the first controlled buy, H.C. was driving the Avalanche. Appellant was not present when the drugs were exchanged, and police did not observe him transporting drugs. W.L. testified that he was intoxicated and under the influence of drugs during the buys, and he did not recall whether appellant was the person he called to arrange for the drug purchases.

About a week after the second controlled buy, when the locator system placed the identified cell phone at the Logan Avenue address, police executed a warrant to search that residence. Just before the warrant was executed, appellant left that address, driving the Escalade. When police executed the warrant, they found a loaded, semi-automatic handgun under a pillow in an upstairs bedroom. In a dresser drawer in that room, they found a stack of cash inside a hat and some pieces of mail addressed to appellant. In a

downstairs bedroom, they found a pair of pants with a traffic citation in H.C.'s name in the pocket.

In a drawer in the kitchen, police recovered 13.1 grams of crack cocaine, bullets for a handgun, and a digital scale. In another kitchen drawer, they found mail addressed to appellant at his mother's address in Brooklyn Park. Underneath the kitchen sink, they found a Barbie doll box containing a box of small plastic baggies, a Pyrex glass with a white residue, baking soda, and knives. A BCA forensic scientist testified that two latent fingerprints, one on each box, matched characteristics of appellant's fingerprints.

Police stopped appellant's vehicle a short distance from the residence and took him into custody. He had in his possession the cell phone with the identified number, which he later told police was his phone number. But he told police that he lived at the Brooklyn Park address, and his mother corroborated that claim.

The jury found appellant guilty of all counts. The district court sentenced appellant to the following concurrent sentences: 146 months on count 1, aiding and abetting first-degree controlled-substance crime (for the first sale); 161 months on count 2, aiding and abetting first-degree controlled-substance crime (for the second sale); 161 months on count 3, first-degree controlled-substance crime, possession with intent to sell; 111 months on count 4, first-degree controlled-substance crime, possession; and 70 months on count 5, possession of a firearm by an ineligible person. This appeal follows.

DECISION

I

An appellate court reviews the sufficiency of the evidence to support a conviction by determining whether legitimate inferences drawn from the evidence would allow a jury to conclude that the defendant was guilty beyond a reasonable doubt. *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). In this review, we must 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). We will not overturn a guilty verdict “if, giving due regard to the presumption of innocence and the prosecution’s burden of proving guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty of the charged offense.” *State v. Leake*, 699 N.W.2d 312, 319 (Minn. 2005).

Appellant argues that his convictions were based solely on circumstantial evidence. *See State v. Al-Naseer*, 788 N.W.2d 469, 474–75 (Minn. 2010) (articulating standard of heightened scrutiny for circumstantial evidence). But “[c]ircumstantial evidence is defined as evidence based on inference and not on personal knowledge or observation and all evidence that is not given by eyewitness testimony.” *Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004) (quotation omitted). The officer who arranged the controlled buys testified that he recognized the voice of the person who answered the phone and agreed to supply drugs as appellant’s, based on prior contact and appellant’s later statement to police. This testimony is direct, not circumstantial, evidence. *See id.* (“Direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.”).

Therefore, appellant's sale convictions were supported in part by direct evidence, not just circumstantial evidence.

Appellant points out that W.L. was unable to identify appellant as the person from whom he arranged to buy drugs over the phone. This is true, but the officer identified appellant as the seller. And "weighing the credibility of witnesses is a function exclusively for the jury." *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002). The jury weighed the officer's credibility and could also compare for themselves the voice on the controlled-buy recordings with appellant's voice on his recorded police statement. Legitimate inferences drawn from the evidence would allow the jury to identify appellant as a person aiding and abetting the sale of illegal drugs. *See Pratt*, 813 N.W.2d at 874.

But we agree with appellant that the only evidence supporting the possession convictions was circumstantial. Because the record contains no evidence that he actually possessed the drugs and firearm, in order to prove the possession crimes beyond a reasonable doubt, the state was required to rely on circumstantial evidence of constructive possession. *See State v. Florine*, 303 Minn. 103, 104–05, 226 N.W.2d 609, 610 (1975) (applying constructive-possession doctrine in narcotics case); *State v. Smith*, 619 N.W.2d 766, 770 (Minn. App. 2000) (applying constructive-possession doctrine in case involving unlawful possession of firearm), *review denied* (Minn. Jan. 16, 2001). We apply heightened scrutiny to a disputed element of a conviction proved by circumstantial evidence, first examining the circumstances proved and deferring to the jury's acceptance of proof of those circumstances. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). We then "independently examine the reasonableness of the inferences to be drawn from

the circumstances proved,” *Pratt*, 813 N.W.2d at 874, including inferences of innocence as well as guilt. *Hanson*, 800 N.W.2d at 622. In this examination, all of the circumstances proved must be consistent with guilt and inconsistent with any reasonable, rational hypothesis negating guilt. *Id.* But a rational hypothesis that negates guilt must be based on more than mere conjecture. *Id.*

The purpose of the constructive-possession doctrine is to include . . . those cases where the state cannot prove actual or physical possession at the time of arrest, but where the inference is strong that the defendant at one time physically possessed the [item] and did not abandon his possessory interest in the [item] but rather continued to exercise dominion and control over it up to the time of the arrest.

Florine, 303 Minn. at 104–05, 226 N.W.2d at 610. The state may prove constructive possession by showing either that (1) the police found the property in a place under appellant’s exclusive control, to which other people did not normally have access or (2) if the property is found in a place to which others had access, a strong probability exists, inferable from the evidence, that appellant was at the time consciously exercising dominion and control over it. *Id.* at 105, 226 N.W.2d at 611. We examine the totality of the circumstances in assessing whether or not constructive possession has been proved. *State v. Denison*, 607 N.W.2d 796, 800 (Minn. App. 2000), *review denied* (Minn. June 13, 2000).

“Proximity is an important factor in establishing constructive possession.” *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001). And an item may be constructively possessed by more than one person. *Smith*, 619 N.W.2d at 770. Here, the circumstances proved are that, in the common kitchen area, police found cocaine and drug-packaging

materials located near pieces of mail addressed to appellant, as well as fingerprints matching characteristics of appellant's fingerprints on boxes that contained materials used in the manufacture and packaging of illegal drugs. This evidence supports a reasonable inference that appellant constructively possessed the cocaine found in the kitchen drawer. *See, e.g., Denison*, 607 N.W.2d at 800 (upholding conviction of drug possession based on circumstantial evidence of constructive possession when marijuana was found in close proximity to defendant's personal effects and in common areas over which defendant likely exercised joint dominion and control). And recovery of the firearm in a bedroom containing mail addressed to appellant supports his constructive possession of the firearm. *See State v. Wiley*, 366 N.W.2d 265, 270 (Minn. 1985) (upholding conviction based on constructive possession of drugs found in bedroom containing mail addressed to the defendant). Appellant argues that the circumstances are consistent with an alternative rational hypothesis that he did not live at the residence, but only visited occasionally. But the tracking device on appellant's cell phone consistently placed appellant at the Logan Avenue address. In addition, most occasional visitors do not visit between 2:00 a.m. – 7:00 a.m. and do not have a key to the residence. Accordingly, we reject appellant's hypothesis as unreasonable and conclude that the circumstantial evidence is sufficient to prove appellant's constructive possession of both the drugs and the firearm.

II

Appellant argues, and the state concedes, that the district court erred by adjudicating and sentencing him on count four, second-degree controlled-substance

crime, possession of more than six grams of cocaine, because that offense is a lesser-included offense of count three, first-degree controlled-substance crime, possession of more than 10 grams of cocaine with intent to sell. *Compare* Minn. Stat. § 152.022, subd. 2(a)(1) (Supp. 2011) *with* Minn. Stat. § 152.021, subd. 1(1) (2010).

Minnesota law prohibits multiple convictions of the same offense, or of one offense and a lesser-included offense, on the basis of the same criminal act. *See* Minn. Stat. § 609.04 (2012) (providing that a defendant may be “convicted of either the crime charged or an included offense, but not both”). When a defendant is convicted of more than one charge for the same act, the district court “must adjudicate formally and impose sentence on one count only. The remaining convictions(s) should not be adjudicated at this time.” *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). Because the district court erred by adjudicating appellant guilty of both offenses and imposing separate, concurrent sentences on each, we remand for the district court to vacate appellant’s conviction and sentence on count four, second-degree controlled-substance crime, and to resentence appellant in conformity with this opinion.

III

Appellant argues in a pro se supplemental brief that the district court abused its discretion by denying his request for a continuance to secure H.C. as a witness. An appellate court reviews a district court’s denial of a continuance for abuse of discretion. *State v. Lloyd*, 345 N.W.2d 240, 247 (Minn. 1984). In this review, we determine “whether the defendant was so prejudiced in preparing or presenting his defense as to materially affect the outcome of the [matter].” *Id.* “Despite the Sixth Amendment’s

guaranty of compulsory process, it is not an abuse of discretion to refuse to grant a continuance to locate a witness when doing so would not likely result in actually securing the witness's presence at trial." *State v. Stone*, 767 N.W.2d 735, 744 (Minn. App. 2009), *aff'd*, 784 N.W.2d 367 (Minn. 2010).

During pretrial motions, the defense sought to continue the trial for one week because of the unavailability of H.C., a potential defense witness. H.C. had previously submitted an affidavit in support of an unsuccessful motion to suppress, in which he alleged that appellant did not reside at the Logan Avenue address. The district court denied the request for a continuance. We conclude that the district court did not abuse its discretion in doing so. The record does not suggest that the defense would have been able to secure H.C.'s presence at trial, even if additional time had been granted to locate him. *See Stone*, 767 N.W.2d at 744. H.C. would likely have testified, consistent with his previous affidavit, that appellant did not live at the address where the drugs and firearm were found, which would have been cumulative of appellant's mother's testimony that he lived with her in Brooklyn Park. The jury apparently rejected this theory of the case. The failure to obtain H.C.'s testimony did not materially prejudice appellant's case, and he is not entitled to relief based on this argument.

Affirmed in part, reversed in part, and remanded.