STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1561

State of Minnesota,
Respondent,

vs.

Gerald Thomas Elling,
Appellant.

Filed July 22, 2013
Reversed and remanded
Connolly, Judge

Isanti County District Court
File No. 30-CR-11-439

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

Jeffrey Edblad, Isanti County Attorney, Stacy St. George, Timothy C. Nelson, Assistant County Attorneys, Cambridge, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Rodenberg, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

CONNOLLY, Judge

On appeal from his conviction of felony fifth-degree possession of methamphetamine and of gross-misdemeanor driving-after-cancellation inimical to public safety (DAC/IPS), appellant argues (1) his fifth-degree-possession conviction must be reversed because there was insufficient circumstantial evidence; (2) the district court committed reversible error by allowing the introduction of inadmissible hearsay evidence and other testimonial evidence from police officers; and (3) appellant's purported guilty plea on the charge of driving after cancellation must be vacated where he did not validly waive his jury trial rights. Because there was insufficient circumstantial evidence to support appellant's felony conviction, that conviction is reversed, and because his gross-misdemeanor guilty plea was invalid, we reverse and remand for further proceedings.

FACTS

On August 8, 2011, law enforcement arrived at a gas station for a controlled buy, targeting suspect D.K. Surveillance showed a vehicle arriving with two occupants. The car's driver was appellant Gerald Elling, and the passenger was D.K. Police had no prior information that appellant would be involved in the controlled buy or would be driving the car. When police officers approached the vehicle to arrest the occupants, appellant cooperated with the officers and had no drugs on him. But D.K. did not cooperate, and when he was removed from the vehicle, officers discovered a broken baggy with methamphetamine near where D.K. had been sitting and white powder spread over the passenger's seat.

When searching the car, police found a pair of jeans in the backseat, behind the driver's seat. The jeans were on top of a snowmobile jacket. In the coin pocket of the jeans was a baggy containing what was later determined to be methamphetamine.

Respondent, the state, charged appellant with conspiracy to commit fourth-degree possession with intent to sell (methamphetamine), fifth-degree possession (methamphetamine), and DAC/IPS. Appellant moved to dismiss the possession charges for lack of probable cause. The district court granted the motion with respect to the fourth-degree possession charge, finding that respondent failed to produce evidence of a conspiracy. But the district court denied the motion as to the fifth-degree possession charge. Appellant pleaded guilty to the DAC/IPS charge and proceeded to trial on the fifth-degree possession charge.

The fifth-degree possession charge was based on the methamphetamine found in the jeans in the backseat of the car; ownership of the jeans was the sole contested issue at appellant's trial. At trial, an investigator testified that the jeans found in the car were size 30/31. He also testified that the registered owner of the car was an individual named J.B. and that no paperwork or anything else found in the car was connected to appellant.

Although police did not locate J.B., J.B.'s driver's license indicated that he was six-foot-one and 250 pounds. The investigator testified that appellant was five-foot-eight and 180 pounds; that D.K. was five-foot-ten and 200 pounds; and that he himself was six-foot-two and 215 pounds and wore size 34/34 pants. He also testified that, as part of his investigation, he had spoken with an unidentified jail employee who indicated that, when appellant was brought to the jail, he had been wearing size 31/30 pants. Finally, he

testified that, based on his training and experience, he had formed an opinion that appellant owned the jeans containing the methamphetamines.

Another officer testified that he knew appellant from prior contacts and testified generally regarding appellant's weight. Specifically, he testified that on the day of his arrest, appellant was skinnier than usual and that appellant was heavier at trial than he had been at the time of his arrest. In addition, a video of the arrest, in which appellant can be seen, was shown to the jury.

The jury found appellant guilty of fifth-degree possession. The district court sentenced appellant to the presumptive sentence of 17 months in prison, execution stayed for five years, and 270 days in jail on the possession charge, and to an additional 270 days on the DAC/IPS charge, to which appellant pleaded guilty.[1]

D E C I S I O N

I. Sufficiency of the Evidence

First, appellant argues that there was insufficient evidence to support his conviction of fifth-degree possession. At trial, respondent attempted to prove by circumstantial evidence that appellant constructively possessed the methamphetamine discovered in the jeans by showing that the jeans belonged to appellant. Appellant asserts that the evidence presented to the jury supports a rational hypothesis that someone else owned the jeans.

[1] From the record, it is not clear to us whether the DAC/IPS charge was sentenced concurrently or consecutively with the possession charge.

In assessing the sufficiency of the evidence, we "review the evidence to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted). "A conviction based on circumstantial evidence, however, warrants heightened scrutiny," which requires us "to consider whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt." *Id.* (quotation omitted).

To convict appellant of fifth-degree possession, respondent was required to prove beyond a reasonable doubt that appellant unlawfully possessed a controlled substance other than a small amount of marijuana. Minn. Stat. § 152.025, subd. 2(1) (2010). When a defendant does not physically possess the unlawful item, the state may prove constructive possession by showing: (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 found in a place to which others had access, there is a strong probability, inferable from the evidence, that appellant 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). We look at the totality of the circumstances in assessing whether or not constructive possession has been proved. *State v. Munoz*, 385 N.W.2d 373, 377 (Minn. App. 1986).

Appellant did not have exclusive control over the car he was driving because the car belonged to J.B. and D.K. was also riding in the car. Therefore, respondent was required to prove that there was a strong probability that, at the time of the arrest,

appellant was consciously exercising dominion and control over the drugs discovered in the jeans. Respondent attempted to prove this by demonstrating that the jeans belonged to appellant because the jeans were approximately the same size as the pants appellant was wearing when taken into custody.

We conduct a two-step analysis when we assess the sufficiency of circumstantial evidence. *Al-Naseer*, 788 N.W.2d at 473. First, we identify the circumstances proved, deferring "to the jury's acceptance of the proof of these circumstances and rejection of evidence . . . that conflict[s] with the circumstances proved by the State." *Id.* (quotation omitted). Here, the circumstances proved were: (1) appellant was driving a vehicle where methamphetamine was discovered in a pair of jeans behind the driver's seat; (2) the jeans containing the methamphetamine were a size 30/31; (3) appellant was wearing a size 31/30 pair of pants when he was taken into custody; (4) appellant did not own the vehicle he was driving; and (5) the vehicle's owner and the other passenger in the car were taller and heavier than appellant.

Next, we examine "the reasonableness of all inferences that might be drawn from the circumstances proved," giving no deference to the jury's choice between inferences. *Id.* at 473-74 (quotation omitted). The circumstances proved must form "a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *Id.* at 473.

While it was reasonable for the jury to infer that the jeans belonged to appellant and that he constructively possessed the drugs, the circumstances proved also support

other reasonable inferences. The car appellant was driving belonged to J.B. None of the other items in the car was shown to belong to appellant, including the snowmobile jacket that was found with the jeans.[2] It is equally reasonable to infer that, just as appellant drove J.B.'s car, other people had also driven J.B.'s car, and the jeans, and the drugs in them, belonged to someone else. Because the circumstances proved do not lead so directly to appellant's guilt as to exclude beyond a reasonable doubt an inference other than guilt, we reverse appellant's conviction for insufficiency of the evidence.

II. Hearsay Testimony

Further, although we reverse on sufficiency of the evidence, we note that the district court committed reversible error by allowing the investigator to testify to the substance of his conversation with an unidentified jail employee about appellant's pants size because that testimony was inadmissible hearsay evidence.

While appellant did not object to the admission of this testimony at trial, we may consider the issue if we find plain error. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Plain error is: (1) error; (2) that is plain; and (3) that affects substantial rights. *Id.* If these three prongs are met, we may correct the error only if it would "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 742 (quotation omitted).

[2] At oral argument, respondent urged the court to review the squad car video of appellant's arrest because that video also would have afforded the jurors an opportunity to make observations concerning appellant's waist size at the time the pants were discovered. The video of the arrest shows appellant for, at most, two seconds, walking in profile. It does not accurately show appellant's waist size by any stretch of the imagination, let alone beyond a reasonable doubt.

The admission of the investigator's testimony about his conversation with the jail employee was error. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay ordinarily is not admissible as evidence in a criminal trial. Minn. R. Evid. 802; *State v. Ashby*, 567 N.W.2d 21, 26 (Minn. 1997) ("Unless it falls into an exception, hearsay is not admissible."). The investigator testified about a statement made to him by a jail employee, and that statement was offered to prove the truth of the matter asserted—that appellant's pants size matched the size of the jeans containing the methamphetamine. Therefore, the admission of this hearsay testimony was error.

"An error is plain if it is clear or obvious. . . . [A]n error is plain if the error contravenes case law, a rule, or a standard or conduct." *State v. Vance*, 734 N.W.2d 650, 658 (Minn. 2007) (quotations and citations omitted), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303, 311 (Minn. 2012). Because the error in this case contravenes a rule of evidence, the error was plain.

Finally, the erroneous admission of the testimony affected appellant's substantial rights. When addressing this third prong of the plain error analysis, "we ask whether the error was prejudicial and affected the outcome of the case." *Id.* at 659. An error is prejudicial if it likely had a significant effect on the verdict. *Griller*, 583 N.W.2d at 741. Appellant's pants size at the time of his arrest was the only evidence offered to prove his constructive possession of the drugs found in the jeans. Therefore, the error was prejudicial and affected the outcome of the case because the testimony went to the sole contested issue at trial and seriously affected the fairness and integrity of the proceedings. *See State v.*

Litzau, 650 N.W.2d 177, 184 (Minn. 2002) (finding that erroneous admission of hearsay was not harmless where the evidence "went to the critical issue at trial"). Because we reverse on the issue of sufficiency of the evidence and note that the district court committed plain, reversible error by allowing the admission of hearsay evidence as to appellant's pants size, we do not reach appellant's other challenges to inadmissible testimony or to the jury instructions.

III. Guilty Plea

Finally, appellant argues that his guilty plea on the DAC/IPS charge was invalid because the plea did not conform with the requirements of the Minnesota Rules of Criminal Procedure. Specifically, appellant argues that the district court failed to inquire as to whether he was intoxicated or mentally disabled, pursuant to Minn. R. Crim. P. 15.01, subd. 1(5), and failed to ensure that he had waived his individual trial rights and was informed of his possible sentence, pursuant to Minn. R. Crim. P. 15.01, subd. 1(6). Although appellant first challenges the validity of his guilty plea on direct appeal, we address the challenge because the record provides a sufficient basis for meaningful appellate review. *See State v. Anyanwu*, 681 N.W.2d 411, 413 & n.1 (Minn. App. 2004) (holding that defendant could challenge his guilty plea for the first time on appeal when based solely on matters in the record and no material-fact dispute existed).

A defendant is allowed to withdraw his guilty plea after sentencing if "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists where a guilty plea is invalid. *State v. Theis*, 742 N.W.2d 643, 646

(Minn. 2007). To be valid, a guilty plea must be accurate, voluntary, and intelligent. *Id.* "If a plea fails to meet any of these requirements, it is invalid." *Id.*

First, appellant argues that his plea is invalid because the district court did not ask him whether he was under the influence of intoxicating substances or suffering from a mental disability, as required by Minn. R. Crim. P. 15.01, subd. 1(5). But Minn. R. Crim. P. 15.01 applies to guilty pleas in felony matters and is inapplicable here, where the plea was to a gross misdemeanor.

Next, appellant also argues that his guilty plea was invalid because he did not waive his trial rights individually and was not informed of his sentence. Although it appears from the transcript that appellant validly waived his right to a jury trial, appellant was not informed of his sentence as required by Minn. R. 15.02, subd. 1(2). "A guilty plea is valid if a defendant is aware of the direct consequences of pleading guilty." *State v. Crump*, 826 N.W.2d 838, 841-42 (Minn. App. 2013) (quotation omitted). But, if a defendant has not been informed of the direct consequences of his guilty plea, including the maximum sentence to be imposed, his plea may not be accurate, voluntary, and intelligent. *Id.* at 842. Because there was no discussion in the record of the maximum sentence for appellant's guilty plea on the DAC/IPS charge, we conclude that his plea was invalid. Therefore, we reverse the DAC/IPS conviction and remand to the district court for further proceedings.

Reversed and remanded.