STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1096

State of Minnesota,
Respondent,

vs.

Warren Patrick Banks, Jr.,
Appellant.

Filed June 16, 2014
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CR-11-37349

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Cleary, Chief Judge; Hudson, Judge; and Smith, Judge.

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

HUDSON, Judge

Appellant challenges his conviction of third-degree controlled substance crime, arguing that the circumstantial evidence is insufficient to prove his possession of a controlled substance. Because the evidence does not support a reasonable hypothesis

other than appellant's guilt, and because appellant's additional pro se arguments lack merit, we affirm.

FACTS

The state charged appellant Warren Banks with third-degree controlled substance crime, possession of more than three grams of cocaine, in violation of Minn. Stat. § 152.023, subd. 2(a)(1) (Supp. 2011), after police recovered crack cocaine in a parking lot where he had been standing. At appellant's first jury trial, the district court declared a mistrial after the jury was unable to reach a unanimous decision.

At appellant's second jury trial, a Minneapolis police officer testified that he was on routine patrol late one evening near 14th Avenue South and Lake Street in Minneapolis, when he observed a woman standing on the corner, looking toward the squad and then toward an open parking lot. The officer and his partner saw two people in the lot and drove a marked squad into the lot to investigate. The officer noticed that one of the people, later identified as appellant, did not look at the marked squad and faced away from it with elbows out, as if his hands were above his waistline. The officer testified that eventually, appellant looked over at the squad, looked back over his shoulder, and lowered his hands; the officer then saw an object fall between appellant's legs to the ground right beneath his feet. According to the officer, the other man in the parking lot, D.E., was sitting on a low wall and did not drop anything.[1] The officer testified that, after exiting the squad and detaining and pat-frisking both men, he walked

[1] D.E. died from unrelated causes before either of appellant's trials.

over to the "exact[]" location where he had seen the object drop, less than 25 feet away, and retrieved a package of what later tested as crack cocaine, lying on a plastic potato chip bag. He testified that, although the squad's headlights were not shining on that corner of the lot, he was "100 percent sure" that no other people were in the lot, in the adjoining alley, behind a tree, or behind a fence. No adjacent businesses were open at that hour. The officer testified that the lighting in the lot was adequate and that the area contained a lot of garbage, but that he "did not see anything else . . . that could have been what [appellant] dropped."

The second officer testified that as the squad passed the lot, she saw two people standing in its darkest corner, and she began to drive toward them and turned on the squad spotlight. She testified that from 15-20 feet away, she saw appellant, who had his back to her, first glance over his shoulder and then abruptly turn his head back around and drop his hands from around his chest, where he appeared to be manipulating something. She then observed a small object fall from his right hand onto the ground.

The officer and her partner called the men over and walked to the area where the object had dropped, where they identified a baggie of crack cocaine, whose appearance corresponded to that of the dropped object. The second officer testified that nothing else in the area matched that physical description and after she saw appellant drop the item, she did not see anyone else enter the area. She testified that although the parking lot was very dark, the scene was illuminated by the squad headlights and then its spotlight. She acknowledged that someone could have been standing out of her view in the deepest corner of the lot on the retaining wall and that, while she frisked appellant, the object was

out of her view. But she testified that there was no doubt in her mind that appellant had dropped the bag of cocaine.

The jury found appellant guilty and he was sentenced to 39 months, the presumptive sentence. This appeal follows.

D E C I S I O N

An appellate court reviews a claim of insufficiency of the evidence to ascertain whether "given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004) (quotation omitted). 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. Hayes*, 831 N.W.2d 546, 552 (Minn. 2013) (quotation omitted).

To convict appellant of third-degree controlled-substance crime, the state was required to prove beyond a reasonable doubt that he possessed three or more grams of cocaine. *See* Minn. Stat. § 152.023, subd. 2(a)(1). The state argues that it proved appellant's possession of the cocaine under the doctrine of constructive possession, which requires a showing either that the drugs were found in a place under a defendant's control to which no other person normally had access; or, if others had access to the location, that the defendant exercised dominion and control over the area at the time. *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). But although the jury received instructions on constructive possession in appellant's first trial, in his second trial, the

district court omitted that instruction by agreement of both parties and instructed the jury instead to determine simply whether appellant "unlawfully possessed" cocaine. Thus, because the jury could not have convicted appellant based on his constructive possession of the cocaine, we address whether the state proved beyond a reasonable doubt that appellant had actual physical possession of the cocaine and then dropped it on the ground. Actual possession involves "direct physical control." *State v. Simion*, 745 N.W.2d 830, 842 (Minn. 2008).

The officers testified that they did not see the object continuously from when it left appellant's hand until they later viewed a similar bag on the ground. Therefore, to find appellant guilty, the jury was required to infer that he was the person who dropped the bag containing the cocaine. Thus, appellant's actual possession of the cocaine was proved by circumstantial evidence. *See Bernhardt*, 684 N.W.2d at 477, n.11 (defining circumstantial evidence as "evidence based on inference and not on personal knowledge or observation and all evidence that is not given by eyewitness testimony") (quotation omitted). An appellate court applies 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." *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). This includes 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.*

Appellant argues that the circumstantial evidence does not lead so directly to the conclusion that he was the person who dropped the baggie of cocaine as to exclude other reasonable inferences inconsistent with his guilt. He argues that the officers could not identify the object that he dropped, and that, when they searched him, they found no drugs or paraphernalia or any sign that he had been using drugs. He also points out that the drugs were found in a high crime area and argues that they could have been left by another person, including D.E., who was not searched.

The state proved the following circumstances: that two men were present in the parking lot, with appellant standing and D.E. sitting on a wall; that appellant first held his hands near his waist, facing away from the squad, then looked back over his shoulder, lowered his hands, and dropped a small object onto the ground beneath his feet; and that a few minutes later, the officers retrieved a baggie of cocaine from a location near where appellant had been standing. Appellant argues that the evidence supports a reasonable inference that another person dropped the baggie. But the officers testified that nobody else was in the area besides the two men, that D.E. was not seen dropping anything, and that nothing other than the baggie corresponded to the description of the object appellant had dropped. In examining the record for reasonable inferences, this court will not overturn a conviction based on mere conjecture. *Hanson*, 800 N.W.2d at 622. "[P]ossibilities of innocence do not require reversal . . . so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Taylor*, 650 N.W.2d 190, 206

(Minn. 2002) (quotation omitted). Given the circumstances proved of appellant's action of dropping a small object to the ground and the officers' recovery of a small object from that location shortly afterwards, we reject as unreasonable his alternative hypothesis that some other person possessed, and then dropped, the drugs. Therefore, the circumstantial evidence supports appellant's conviction.

In a pro se supplemental brief, appellant also raises several arguments that were not raised in the district court. This court does not generally decide issues that were not raised before, and considered by, the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Nonetheless, we have carefully reviewed appellant's additional arguments and conclude that they lack merit.

Affirmed.