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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0835**

State of Minnesota,
Respondent,

vs.

Misty Rose Ann Johnson,
Appellant.

**Filed May 7, 2018
Affirmed
Jesson, Judge**

Isanti County District Court
File No. 30-CR-16-248

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

Jeffrey Edblad, Isanti County Attorney, Cambridge, Minnesota; and

Scott A. Hersey, Special Assistant Isanti County Attorney, St. Paul, Minnesota (for
respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Schellhas, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

JESSON, Judge

On a spring evening in Braham, sheriff's deputies descended on a home where they believed two men with felony arrest warrants were residing. Appellant Misty Rose Ann Johnson was inside the home when the deputies arrived. The deputies knocked but failed to get a response from inside the house, then broke down the door and found Johnson lying on a couch, face-down, and covering a purse. After ordering Johnson to get up, deputies discovered drugs in the purse and arrested her for fifth-degree possession of a controlled substance.

A jury found Johnson guilty, and she raises two arguments on appeal. First, she argues that testimony from an officer at her trial contained improper comments constituting reversible prosecutorial misconduct. Second, she argues that the evidence against her was not sufficient to sustain the jury's verdict. We affirm.

FACTS

In April 2016, Isanti County deputies arrived at a house in Braham, which they believed housed two men with felony arrest warrants. As the deputies closed in on the home, they saw one of the men step outside. The man glanced up, saw the approaching squad car, then darted back inside the home. Appellant Misty Johnson also stepped out of the house around this time but quickly retreated back inside after catching sight of law enforcement.

The deputies secured the perimeter of the home and then began loudly knocking on the front door. They yelled directly to Johnson, saying that they were only there for the

two men with warrants, not for her. Still, the door remained shut. After about ten minutes of loudly knocking on the door and leaving messages on one of the resident's telephone, there was still no response. One of the deputies left to obtain a search warrant while others remained on the scene.

It took an hour to obtain a warrant to enter the home, but once it was in hand, the deputies broke open the door after giving the occupants one last chance to let them inside, but failing to get a response. They poured into the home with weapons drawn and split their numbers between the upstairs and downstairs levels. Deputies entered the living room and saw Johnson alone in the room, lying face-down on a couch with her eyes closed. They noticed that Johnson's hands were completely underneath her body and they yelled for her to get up and show her hands. Johnson opened her eyes and slowly got up from the couch. As she rose, deputies could see that her body had completely covered a purse, cell phone, and a pair of scissors lying on the couch. Deputies observed that Johnson would have been able to access the purse while she was lying on the couch because of the way her hands were placed.

After attending to Johnson, deputies peered into the open purse and saw a baggie with white residue. They believed the residue was methamphetamine because the deputies knew that all three people inside the home—including Johnson—were methamphetamine users. A field test showed the presence of methamphetamine which was later confirmed by lab testing. There was no identifying information inside the purse.

Johnson was charged with one count of fifth-degree possession of a controlled substance. At trial, one of the men inside the home testified that the purse belonged to

Johnson and he had seen her carrying it. Johnson called her own witness who testified that earlier on the day of the incident, he was helping Johnson move out and they loaded Johnson's purse, different from the one found on the couch, into a car well before the deputies arrived.

The jury found Johnson guilty and the district court sentenced her to a year and a day, but stayed execution of that sentence for five years. Johnson appeals.

D E C I S I O N

Johnson makes two arguments on appeal. First, that the trial prosecutor committed misconduct by eliciting two improper statements from an officer-witness. Second, that the evidence against her was insufficient to sustain her conviction. We address each issue in turn.

I. The state did not commit reversible misconduct.

Johnson argues that the state committed prosecutorial misconduct by eliciting two statements that tainted the jury against her. The first statement occurred during the prosecution's direct examination of an officer who was at the scene. The prosecutor asked the officer what the deputies did after seeing Johnson and Mr. Collins go back into the home and the officer responded:

At that time we got to the house myself, Investigator Carlson, Lieutenant Olson and several other deputies arrived at the home. We knew that Mr. Enger who also rented this house had a warrant for his arrest. We knew Mr. Collins had a warrant for his arrest and that Misty Johnson all had been there. *We're all familiar with these three parties from previous cases.*

The second statement came later during the same direct examination. The prosecutor showed the officer one of the baggies that contained the drugs and asked if the officer could identify it. The officer replied,

Yes, sir. This is the smaller of the three baggies that was in the purse. It had a slight white residue in it. *At that time, I believed it to be methamphetamine because I knew the history of these three. They were methamphetamine users.* So I tested it for meth and it tested positive as indicated in the blue test kit.

The crux of Johnson's argument is that both of these statements implied she was a drug user, which was improper and prejudiced the jury against her. She argues that this misconduct was severe enough to require reversal.

Johnson failed to object to these comments at trial, which means we analyze her claim through the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). Under this standard, we may reverse if three things occur: there is error, the error is plain, and the error affected the defendant's substantial rights. *Id.* In a prosecutorial misconduct case such as this, the burden is on Johnson to prove the first two elements—that is, there was error and that error was plain. *Id.* at 299-300. If Johnson succeeds, then the burden shifts to the state to disprove the third element—that the plain error did not affect Johnson's substantial rights. *Id.*

In its brief, the state appears to concede that these two statements were plain error.¹ To counter Johnson's claim of prosecutorial misconduct, the state centers its argument on

¹ In its brief, the state largely avoids analyzing the first two plain-error elements and instead moves into an analysis of the third factor concerning substantial rights. The state also explicitly writes that one of the comments was certainly improper.

showing that the misconduct did not affect Johnson's substantial rights. To analyze whether the comments affected substantial rights, we remove the misconduct from the case and ask ourselves, is there a reasonable chance the jury would have come to a different result? *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011) (stating that a defendant's substantial rights are not violated if there is "no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury" (internal quotation omitted)). To assess this, we consider three factors:

- The strength of the evidence against Johnson,
- The pervasiveness of the improper conduct, and
- Whether Johnson had an opportunity to rebut the prosecutor's improper suggestions.

Id. at 654-55. If we decide that Johnson's substantial rights were affected, we then discuss whether the error should be addressed in order to ensure the fairness and integrity of the judicial proceedings. *Ramey*, 721 N.W.2d at 302. We address each factor below.

The evidence against Johnson was strong

The record shows that deputies entered the home and found Johnson in the living room, lying face-down on a couch, and with her hands completely underneath her. As Johnson rose from the couch deputies were able to see a purse previously hidden underneath her and accessible only to her. Finally, one of the other occupants of the house testified that the purse belonged to Johnson and that he had previously seen her carrying it.

Johnson argues that the only evidence linking her to the purse is proximity. She argues that it makes little sense for her to leap face-first onto the couch to cover a purse she

knows contains methamphetamine and then lie there for an hour while deputies knock on the front door, yelling to be let in. But Johnson's argument must be framed against the strength of the evidence, and after reviewing the record, we believe the evidence against Johnson was strong. Johnson was the only person in the room, her body was completely covering the purse, her hands were positioned such that she had access to drugs inside the purse, and one of the other members of the house testified that he previously saw Johnson with the purse. All of these facts support Johnson's possession of the purse when the deputies entered.

And while Johnson's disbelief that she would have leapt onto the purse is understandable, our task is not to interpret the situation through the lens of skepticism. Instead, we examine the overall evidentiary picture as it is painted in the record and ask, is that evidence strong? We believe it is, and this factor weighs in favor of the state.

The misconduct was not pervasive

We next turn to the pervasiveness of the misconduct. There is no bright-line rule for determining pervasiveness; it is analyzed on a case-by-case basis. For example, in *State v. Davis*, a prosecutor's improper questions on cross-examination were not pervasive where any implication was not repeated during closing arguments and the improper subject only occupied less than one page of 64 transcript pages. 735 N.W.2d 674, 682 (Minn. 2007). Likewise in *State v. Valentine*, this court found that less than seven improper questions and answers at trial were not pervasive enough to affect the defendant's substantial rights. 787 N.W.2d 630, 642 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). By contrast, a prosecutor's improper questions were pervasive in *State v. Mayhorn* where at least 20

transcript pages of the state's 80-page cross-examination covered improper matters. 720 N.W.2d 776, 791 (Minn. 2006).

In terms of numbers, Johnson complains about two statements made during her trial. The first is a statement from one of the arresting officers who said that he was "familiar with these three parties from previous cases." But this statement was embedded in the middle of a longer, narrative response. The second statement occurred later during the same direct-examination where the prosecutor asked if the officer recognized the baggie that contained the methamphetamine.

Focusing on the numbers, the misconduct is three sentences that, in their surrounding context, runs about half a page of transcript. The entire trial was approximately 123 pages of transcript from opening statements to deliberation, meaning that Johnson's claim focuses on three allegedly improper sentences of transcript buried within longer responses in a transcript totaling over one hundred pages.

Of course, the law does not require a statistical auditing of the improper conduct inside a trial transcript in order to find a violation of substantial rights. A small but prejudicial comment spoken in the middle of a lengthy trial has the potential to undermine the entire proceeding. Johnson argues that this very situation occurred in *State v. Strommen* and is similar to her case. 648 N.W.2d 681 (Minn. 2002). In *Strommen*, the supreme court reversed a defendant's conviction because of two improper statements made during trial. *Id.* at 687-88. The first was an accomplice's remark that the defendant had "killed somebody" in the past. *Id.* at 684. The second was an officer's testimony that he recognized the defendant "[f]rom . . . prior contacts and incidents." *Id.* at 685.

In this case, neither statement Johnson complains of was as prejudicial and suggestive as the accomplice's remark in *Strommen*. In particular, a comment that the defendant killed someone in the past is substantially more prejudicial than informing the jury that the defendant is a drug user. Here, the two improper comments were fleeting and buried in longer narratives. And while we do not mean to diminish the fact that these remarks were improper, we believe that in the context of the entire length of trial, they were not especially pervasive. For these reasons we conclude that this factor also weighs slightly in favor of the state.

Johnson had an opportunity to rebut the improper suggestions

Finally, we examine whether Johnson had an opportunity to rebut the improper comments. Johnson did not object to these comments at the time, but at the end of cross-examination the parties held a private bench conference that resulted in the court giving an instruction cautioning the jury that it should not convict Johnson for anything other than the underlying offense. This suggests that not only did Johnson have an opportunity to rebut the improper statements, her counsel recognized this and made a strategic decision to request a cautionary instruction. This allowed the court to address the impropriety and remind the jurors of their duties, but kept the focus away from these statements. We generally presume that jurors follow a court's cautionary instructions. *State v. Clark*, 755 N.W.2d 241, 261 (Minn. 2008). Although a cautionary instruction is not a panacea, its presence in this case and the circumstances in how it was used tilt our analysis more favorably towards the state. Because Johnson had the opportunity to rebut the suggestions, we believe this factor falls in the state's favor.

Overall, we conclude that the evidence against Johnson was strong, the improper statements were not pervasive throughout the trial, and Johnson had an opportunity to rebut their impact. Viewed against the background of the case and the evidence, we do not believe these comments affected Johnson’s substantial rights and therefore, the comments do not rise to the level of reversible misconduct.

II. The evidence against Johnson was sufficient to sustain her conviction.

Johnson also argues that the evidence against her was insufficient for the jury to find her guilty. Her argument rests on two critical presumptions. First, Johnson presumes that the case against her was for constructive—rather than actual—possession. Second, she presumes that the evidence against her was only circumstantial, which implicates a higher standard of review on appeal. Before addressing whether the evidence against Johnson was sufficient, we will first address both presumptions.

Johnson’s case involves actual possession

Johnson’s first presumption for her sufficiency-of-the-evidence argument is that the case against her was only proved by constructive possession, not actual possession. Actual possession (sometimes referred to as physical possession) means that the person had “direct physical control” over contraband. *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016) (quoting *Jacobson v. Aetna Cas. & Sur. Co.*, 233 Minn. 383, 388, 46 N.W.2d 868, 871 (1951)). On the other hand, constructive possession can be established either (1) by proof that the item was in a place under the defendant’s “exclusive control to which other people did not normally have access” or (2) by proof of a strong probability that the “defendant was at the time consciously exercising dominion and control over it,” even if

the item was in a place to which others had access. *Id.* at 353-54 (quoting *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975)).

The case against Johnson was proved by actual possession. Although deputies never saw Johnson physically clasping the baggie of drugs in her hands, they did not need to. Actual possession can be proven even though the contraband was not in the defendant's physical possession at the time she was apprehended. *Barker*, 888 at 354; *see also State v. Molnau*, 904 N.W.2d 449, 453 (Minn. 2017) (upholding defendant's conviction for possession of a controlled substance where police searched defendant's unattended purse during the execution of a search warrant). Deputies saw Johnson lying on top of the purse containing the drugs and had her hands underneath her and in a position to access the purse. This was enough to illustrate that Johnson had "direct physical control" over the purse, meaning that she was in actual possession of the drugs. *Barker*, 888 N.W.2d at 353.

There was direct evidence against Johnson

Johnson's sufficiency-of-the-evidence argument also presumes that the deputies' eyewitness testimonies were circumstantial evidence instead of direct evidence. Circumstantial evidence is evidence "from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (citations omitted). Circumstantial evidence "always requires an inferential step to prove a fact that is not required with direct evidence." *Id.* In contrast, direct evidence is "based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Id.* (citation omitted).

Deputies testified that they observed Johnson lying face-down on a couch with her entire body concealing the purse containing the baggie of methamphetamine. They also testified that she was the only one in the room when they saw her, and a witness testified that the purse belonged to Johnson. Johnson believes this is circumstantial evidence because “there is dispute about the inferences that can be made from those circumstances.” But this confuses an inference of the facts proved by the evidence with an alternative explanation of what those facts could mean. All evidence contains some inference, and as this court recently stated, “even with eyewitness testimony, the factfinder must make some inferences in considering the testimony, such as whether the witness’s memory is accurate, whether the witness accurately perceived the subject of the testimony, and even whether the witness is telling the truth.” *State v. Brazil*, 906 N.W.2d 274, 279 (Minn. App. 2017). The fact that *some* inference is required in order for the jury to be able to interpret that evidence does not mean that the evidence is circumstantial. *Id.*

The officers in this case directly observed Johnson lying on the couch and on top of the purse containing drugs. There is no dispute about these facts, and therefore, no inference required to prove these facts. While Johnson speculates about the “why” and “how” she ended up in that situation, these are not disputes about the observed facts. For this reason, we conclude that the eyewitness observations were direct evidence that Johnson was in possession of the purse and, therefore, in possession of the drugs inside that purse.

The evidence against Johnson was sufficient

In considering whether the evidence against Johnson was sufficient to support her conviction, we ask if the evidence was sufficient to allow the jury to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We view the evidence with a favorable eye towards that verdict and assume the jury believed the state's witnesses and disbelieved any contradictory evidence. *Id.*; *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the jury could reasonably conclude that the defendant was guilty of the charged offense while taking seriously the presumption of innocence and the need for proof beyond a reasonable doubt. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

With an eye in favor of the verdict, and assuming that the jury believed the state's witnesses while disbelieving any contrary evidence, we conclude the jury's verdict was reasonable in light of the evidence. We have already detailed the evidence against Johnson in our previous discussion, but it bears repeating that Johnson was seen lying on top of the purse containing the drugs in a room by herself with her ownership of the purse vouched for by another occupant of the home. Even taking into account the presumption of innocence, the jury acted reasonably in reaching its verdict. For this reason, we conclude that the evidence against Johnson is sufficient to sustain her conviction.

Although the witness's statements that Johnson was a known methamphetamine user were clearly improper, we do not believe they seriously affected Johnson's rights or the overall integrity of her trial. They were momentary comments made in the midst of longer responses ingrained within a larger trial—and addressed by a curative instruction.

While we continue to caution prosecutors and witnesses against improper comments that run the risk of tainting a jury, we do not believe the conduct in this case was severe enough to require reversal. Additionally, we believe the evidence against Johnson was sufficient to sustain her conviction for actual possession of drugs with direct evidence. For all these reasons, we affirm.

Affirmed.