STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0208

State of Minnesota,
Respondent,

vs.

Michael Daniel Keller,
Appellant.

Filed January 13, 2025
Affirmed in part, reversed in part, and remanded
Wheelock, Judge

Hennepin County District Court
File No. 27-CR-23-1105

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Matthew D. Hough, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Bjorkman, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges his convictions for possession of pornographic works involving minors and unlawful possession of a firearm, arguing that the circumstantial evidence was insufficient to support his convictions. Because the circumstances proved

are consistent with the inference that appellant possessed two firearms and pornographic works involving minors and inconsistent with any other rational hypothesis, we affirm appellant's convictions. However, because the district court sentenced appellant for two unlawful-firearm-possession offenses committed during a single behavioral incident, we reverse and remand with instructions for the district court to vacate one of his sentences for those convictions.

FACTS

Respondent State of Minnesota charged appellant Michael Daniel Keller with two counts of possession of a pornographic work involving a minor by a registered predatory offender in violation of Minn. Stat. § 617.247, subd. 4(b)(2) (2022) (counts 1 and 2), and two counts of possession of a firearm after being adjudicated for a crime of violence in violation of Minn. Stat. § 624.713, subd. 1(2) (2022) (counts 3 and 4).[1] The following facts are derived from the evidence presented at—and the district court's findings from—Keller's court trial for the charges in this case.

After his arrest on charges of possession of pornographic works involving minors in two other cases, Keller asked E.F., his former girlfriend, to pick up his cell phone from jail, and during a recorded jail phone call, he asked her to delete his social-media conversations with "the females" from his phone. Keller had been engaging in online conversations at least two minor girls who had disclosed their ages to Keller as 11 and 16.

[1] Keller does not challenge that he has a previous conviction for third-degree criminal sexual conduct, which is a crime of violence, Minn. Stat. § 624.712, subd. 5 (2022), and that he is required to register as a predatory offender.

In both conversations, Keller said he was taking a bath. In one conversation, after mentioning that he was having a hot bath, Keller said that he "no longer [has] balls . . . they burned off" and asked, "You've already seen what I look like?" At another point, Keller said to one of the minors that if she "ever want[s] to meet up [she] can have [his old cell phone]." But E.F. did not delete the conversations, and after finding content that appeared to be pornographic works involving minors, she gave Keller's phone to law enforcement.

Law enforcement identified 11 files on Keller's phone as pornographic works involving minors. The state submitted two of the files to prove the charges on counts one and two. Forensic analysis of the phone showed that these pornographic works involving minors were created, accessed, and modified on January 24 and March 10, 2022. Keller's phone also contained screenshots of a text-message conversation that graphically described a nine-year-old child being sexually assaulted by her father, as well as content that involved bestiality. The internet history on Keller's phone contained searches for websites that used the terms "darknet," "child," "porn," "can i put a recording device in my childs clothes," and "schoolgirl is on her back with her skirt lifted up" and evidence of visits to the internet sites that resulted from those searches. It also included a search for "can i purchase a full automatic rifle."

Keller claimed that the pornographic works involving minors were on his phone because he had let a person named "Marcus" live at his apartment for a time, and while there, "Marcus" downloaded them onto Keller's phone. While in jail, Keller sent both his father and A.P. (a former friend) texts about "Marcus" that were consistent with this

narrative.[2] Law enforcement interviewed A.P., who explained that he housesat for Keller during the time Keller claimed that "Marcus" lived at Keller's apartment and that he did not see any other people or any indication of guests at the house during that time. A.P. told law enforcement that he knew "this guy named Marcus is not real" and informed them that Keller had asked A.P. to "lie in court" about "Marcus" on Keller's behalf. During a jail call, Keller alluded to another person, this time named "Sapphire" or "Saphyre," as being responsible for "bad juju" on his electronics.[3]

Law enforcement also interviewed E.F., who explained that Keller had been building a relationship with her and her two young children and living in her home about five days a week since January 2022 and that she and Keller had been planning to get married until they discovered that E.F.'s divorce from her ex-husband was not yet finalized. E.F. also told law enforcement that Keller kept some of his possessions in her detached garage.

During a recorded jail call, Keller asked E.F. to remove some of his property from her garage:

> Keller: Um, [his] gift is in the garage. It's in the black bag. Like, so when you walk in the garage, the garage door, and you turn to the right and—

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[2] Keller sent A.P. a text that said, "Well bud. Looks like you can say you were right 5 times now lol. You said i was an idiot for letting marcus stay there . . . n look at that you were right." The record shows that A.P. did not reply to this text. Keller sent his father a text that said, "[L]uckily [A.P.'s] testimony [about Marcus] will set everything straight. If it even gets [that] far."

[3] On several jail calls with E.F., Keller instructed E.F. to destroy various possessions with which he thought "Sapphire" had come into contact, including asking E.F. to swipe a "large magnet" over a hard drive that "Sapphire" had potentially used.

E.F.: Yep.
Keller: —you walk forward. You know, the, the big red, um, shelving that I've got?
E.F.: Yeah.
Keller: His—his congratulation gift is actually in the black—like in the black bag up there. And he can have the boxes.
E.F.: What is it?
Keller: He can have the boxes too with it. Um—
E.F.: What is it?
Keller: It's something for, for him. Um—
E.F.: Not for the baby?
Keller: Correct. Yeah. I mean, when, when—
E.F.: Okay.
Keller: —[he] gets older type, type thing. Unless if I decide otherwise. Like later on. But—
E.F.: Wait. It's in a black—oh.
Keller: Yeah. Yep. So—
E.F.: Gotcha.
Keller: —and then the, the boxes and stuff can go with him too and, you know. Just—'cause it's kind—
E.F.: Okay.
Keller: —of like, you know, it's a group, group gift. You know what I mean?

Sometime after that call, Keller also texted E.F., "The wood one my grandfather gave me it holds a lot of value to me personally. I want to keep it in the family . . . i was hoping to gift the one item to my son one day since my grandpa gave it to me." He also asked E.F. whether his acquaintance got "the black bag from the garage."

E.F. reported to law enforcement that she found an AR-15 and a .22-caliber rifle in her garage among Keller's belongings. E.F. told law enforcement that she did not own firearms and that she had not known that Keller owned firearms. After speaking with E.F., law enforcement obtained and executed a search warrant for E.F.'s detached garage. During that search, they found an AR-15, a .22-caliber rifle with a wooden stock, and boxes of ammunition on Keller's red shelving near his other belongings in the garage—including

construction equipment with his name on it and two vehicles licensed to him. Law enforcement investigated the firearms, ultimately tracing the AR-15's chain of ownership to B.C. When law enforcement interviewed B.C., he explained that he had sold Keller the AR-15 for $750 cash in the summer of 2020 or 2021. B.C. also discussed possessing screenshots of a text conversation between himself and Keller in which Keller sent B.C. a photo of the AR-15 and stated that he had already gotten 100 rounds through it. Law enforcement traced the .22-caliber rifle's ownership to Keller's father, who had purchased it in 1997.

After a stipulated-evidence trial, the district court convicted and sentenced Keller on counts 1 and 2, possession of a pornographic work involving a minor, and counts 3 and 4, unlawful possession of a firearm. The district court sentenced Keller to prison for sixty-eight months on count 1; eighty-three months on count 2; and sixty months on counts 3 and 4, with all sentences to be served concurrently.

Keller appeals.

DECISION

Keller raises three issues on appeal. First, he argues that the circumstantial evidence was not sufficient to prove that he knowingly possessed pornographic works involving minors. Second, he argues that the circumstantial evidence was not sufficient to prove that he unlawfully possessed firearms. Third, he argues that one of his two sentences for unlawful possession of a firearm should be vacated because both convictions are based on a single behavioral incident. We address each argument in turn.

I. Sufficient circumstantial evidence supports Keller's convictions for possession of pornographic works involving minors.

Keller argues that we should reverse his convictions for possession of pornographic works involving minors because there is a rational alternative theory that another person—E.F. or Sapphire—could have downloaded the pornographic works involving minors on his phone. Thus, he challenges the sufficiency of the evidence supporting the element that he possessed the pornographic works involving minors "knowing or with reason to know [their] content and character." Minn. Stat. § 617.247, subd. 4(b)(2).

The state must prove every element of an offense beyond a reasonable doubt. *State v. Culver*, 941 N.W.2d 134, 142 (Minn. 2020). Appellate courts apply the same standard of review to evaluate the sufficiency of the evidence in bench trials as in jury trials. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011). They assess the sufficiency of the evidence by "carefully examin[ing] the record to determine whether the facts and the legitimate inferences drawn from them would permit the [fact-finder] to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). In doing so, appellate courts view the evidence and the reasonable inferences drawn from it in the light most favorable to the verdict. *State v. Ferguson*, 742 N.W.2d 651, 658 (Minn. 2007). When, as here, the state relies on circumstantial evidenceto prove an element of an offense, we apply a heightened standard of review. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010).

Under the heightened circumstantial-evidence standard, we conduct a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, we identify the

circumstances proved by the state. *Id.* Reviewing courts consider only "circumstances that are consistent with the verdict . . . because even in cases based on circumstantial evidence, the [fact-finder] is in the best position to evaluate the credibility of the evidence." *State v. Hawes*, 801 N.W.2d 659, 670 (Minn. 2011) (citations omitted). Second, we "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Silvernail*, 831 N.W.2d at 599. We review the circumstances proved as a whole and independently examine the reasonableness of all inferences without deferring to the fact-finder's choice between reasonable inferences. *Id.* In addition, "inconsistencies in the state's case or possibilities of innocence" do not require reversal of a conviction if the evidence ultimately "makes such theories seem unreasonable." *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008).

Here, the state proved the following circumstances:

- Keller's personal cell phone contained files of pornographic works involving minors.
- The files were downloaded, modified, and accessed on January 24 and March 10, 2022.
- Keller's phone contained screenshots of a text-message conversation graphically describing a nine-year-old child being sexually assaulted by her father and content involving bestiality.
- Keller chatted online with girls who told him that they were 11 and 16 years old, talking about taking hot baths and his genitals, stating that he "no longer [has] balls . . . they burned off," and asking, "You've already seen what I look like?"
- Keller offered to one of the girls that if she "ever want[s] to meet up [she] can have [his old cell phone]."
- Keller asked E.F. to delete the conversations with the minor girls from his phone.
- The internet history on Keller's phone showed searches for, and visits to, internet sites that included the following terms:

> "darknet"; "child"; "porn"; "can i put a recording device in my childs clothes"; and "schoolgirl is on her back with her skirt lifted up."

Having identified the circumstances proved, we consider whether the circumstances proved, when viewed as a whole, are consistent with Keller's guilt of possession of pornographic works involving minors and inconsistent with any rational hypothesis other than his guilt. We conclude that they are and turn to Keller's arguments to the contrary.

Keller argues that the circumstances proved were not inconsistent with the notion that another person—either E.F. or someone named "Sapphire"—downloaded the pornographic works involving minors onto his phone. However, "to succeed in a challenge to a verdict based on circumstantial evidence, a convicted person must point to evidence in the record that is consistent with a rational theory other than guilt." *State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995). Here, there is no evidence in the record that another person accessed Keller's cell phone in January or March 2022.

Furthermore, after considering the evidence as a whole, we conclude that the notion that E.F. downloaded pornographic works involving minors onto Keller's personal cell phone without his knowledge when they first met is not a rational hypothesis. The district court credited E.F.'s interview statements that she had hoped to marry Keller and raise her children with him; the district court also observed that E.F. was surprised and emotional when she learned the nature of the charges for which Keller was arrested. The district court found that the evidence as a whole demonstrated that E.F. was invested in her relationship with Keller. Considering this lack of evidence of motive, we cannot conclude that Keller's

hypothesis that E.F. downloaded pornographic works involving minors onto Keller's phone without his knowledge in January and March 2022 is rational.

Keller also argues that a person named "Sapphire" could have downloaded the illegal content, but he has not identified any evidence in the record to support this assertion. *See id.* It is unclear whether Sapphire is a real person. We cannot reverse a conviction based on "mere conjecture or the possibility of innocence when the evidence shows such possibility is unreasonable." *Tscheu*, 758 N.W.2d at 861. Viewing the facts in a light most favorable to the verdict, we reject this alternative hypothesis as unreasonable, too.

Keller next argues that his case is like *State v. Myrland*, 681 N.W.2d 415 (Minn. App. 2004), *rev. denied* (Minn. Aug. 25, 2004), asserting that the facts here are similar to the facts in that case because his phone was available to others, there was only a "small fraction" of pornographic work involving minors on his phone, and the investigators could not say whether the images on his phone had been viewed. We are not persuaded.

In *Myrland*, elementary-school students found pornographic images in the tray of a school printer. 681 N.W.2d at 417. After an investigation, school administrators discovered that Myrland had been using school computers to access and print off pornographic images for use at his home. *Id.* at 418. The websites Myrland visited using the school computers referenced terms associated with child pornography, and some had pornographic works with pictorial representations of minors on them. *Id.* Some computers that Myrland used were in a common area of the school, and "potentially hundreds of people" could have used the computers to view the images. *Id.* at 418, 420. Although thousands of pornographic images were accessed on the school computers, only a tiny

fraction of the content found on the computers Myrland used was pornographic works involving minors. *Id.* at 418.

Evidence in *Myrland* included testimony that, because all the teachers had the same internet access code, someone other than Myrland could have used the school computers to view the pornographic works involving minors. *Id.* at 420. The evidence in *Myrland* also supported the rational alternative hypothesis that the pornographic works involving minors could have been on the school computers from someone accessing pornographic works involving adults because a person "could view legal adult pornographic materials at the top of a web page, and any illegal child pornographic material at the bottom of the page would be stored to the computer's hard drive, even if the user never 'scrolled down' or viewed the material and was unaware of its presence." *Id.* Here, however, law enforcement found pornographic works on Keller's personal cell phone and the state was not required to prove that Keller viewed or downloaded the images—it only had to prove that he possessed the images and knew or had reason to know they were pornographic images involving minors. *See State v. Kamencic*, No. A20-0050, 2021 WL 1525172, at *4 (Minn. App. Apr. 19, 2021) (concluding that the state need not "prove when or how the [child pornography] images were downloaded; it needed to prove only that appellant possessed the images and knew or had reason to know of their character"), *rev. denied* (Minn. Aug. 24, 2021).[4] We conclude that *Myrland* is distinguishable from the circumstances of Keller's case.

[4] "Nonprecedential opinions . . . may be cited as persuasive authority." Minn. R. Civ. App. P. 136.01, subd. 1(c).

Viewing the evidence in the light most favorable to the verdict, we conclude that the circumstances proved, when viewed as a whole, are consistent with Keller's guilt of possession of pornographic works involving minors and inconsistent with any rational hypothesis other than his guilt. Therefore, Keller's convictions for possessing pornographic works involving minors are supported by sufficient evidence.

II. Sufficient circumstantial evidence supports Keller's convictions for unlawful possession of firearms.

Keller argues that the state did not present sufficient evidence to prove that he constructively possessed firearms.

Minnesota law prohibits people who have been convicted of a crime of violence from possessing firearms. Minn. Stat. § 624.713, subd. 1(2). "Possession of a firearm may be proved through actual or constructive possession." *State v. Salyers*, 858 N.W.2d 156, 159 (Minn. 2015). To establish constructive possession, the state must show either that the prohibited item was found (a) in an area under defendant's exclusive control or (b) in an area to which "others had access, [but] there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it." *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975). A defendant may possess a firearm jointly with another person. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017).

Because the state proved Keller's constructive possession of the firearms through circumstantial evidence, we apply the circumstantial-evidence standard set forth above. Here, the circumstances proved include the following:

- E.F. does not own firearms and did not know that Keller owned firearms prior to Keller's arrest.

- The internet browser history of Keller's phone included a search for "can i purchase a full automatic rifle."
- B.C. sold Keller an AR-15 for $750 cash in the summer of either 2020 or 2021.
- B.C. explained that Keller texted him that Keller had gotten 100 rounds through the AR-15 and that Keller sent him a photo of an AR-15 in a black soft-sided case.
- Keller kept his personal property in E.F.'s garage.
- During a recorded jail call, Keller asked E.F. to move items stored "in the black bag" on "the big red, um, shelving" in E.F.'s garage, stated that "the boxes [go] with it," and indicated that an item in the bag was intended as a gift for a male recipient when that person gets older.
- Keller sent E.F. a text saying, "The wood one . . . holds a lot of value to me personally. I want to keep it in the family . . . i was hoping to gift the one item to my son one day since my grandpa gave it to me." In a text message from jail, Keller asked E.F. whether an acquaintance got "the black bag from the garage."
- Law enforcement found an AR-15, a .22-caliber rifle, and boxes of ammunition on Keller's red shelving in E.F.'s garage.
- Law enforcement found the firearms among Keller's other belongings in the garage, including construction equipment with Keller's name on it and vehicles registered to him.

Having identified the circumstances proved, we consider whether the circumstances proved, when viewed as a whole, are consistent with Keller's guilt of unlawful possession of firearms and inconsistent with any rational hypothesis other than his guilt. We first note that these circumstances are consistent with the hypothesis that Keller constructively possessed both of the firearms, and we next conclude that they are inconsistent with any rational hypothesis except that of Keller's guilt.

Although Keller did not have exclusive control over E.F.'s garage, he had access to it and stored many personal belongings there. While on the phone with E.F., he spoke about the location of specific items in the garage in a cryptic manner that avoided naming

what the items were: "[his] gift is in the garage. It's in the black bag"; "his congratulation gift is actually in the black—like in the black bag up there. And he can have the boxes"; "the boxes and stuff can go with him too and, you know. Just—'cause it's kind of like, you know, it's a group, group gift." Keller also sent a message about "the wood one" and said that "it holds a lot of value to me personally. I want to keep it in the family . . . i was hoping to gift the one item to my son one day." These statements support an inference that Keller was talking about the wooden-stocked .22-caliber rifle. Based on all of Keller's statements, the only reasonable inference is that, before and during the call, Keller knew the precise location of the two firearms and ammunition and was directing the disposition of them when he asked E.F. to find the "black bag" and "boxes and stuff" to give to his acquaintance. Additionally, the circumstances proved include that law enforcement traced the AR-15's ownership to the person who sold it to Keller and the .22-caliber rifle's ownership to Keller's father. E.F. did not own any of the firearms, and she did not know that Keller owned firearms prior to his arrest.[5] These circumstances proved also support the inference that Keller possessed the firearms and ammunition found in E.F.'s garage.

Keller's text messages, statements during his jail calls, and the results of law enforcement's investigation of the firearms demonstrate a "strong probability" that Keller consciously exercised dominion and control over the firearms, *see Florine*, 226 N.W.2d at 611, and are inconsistent with any rational hypothesis other than guilt. We therefore

[5] Because contraband can be possessed jointly with another person, *Harris*, 895 N.W.2d at 601, we would reach the same conclusion that Keller possessed the firearms even if E.F. also possessed them.

conclude that the evidence was sufficient to support Keller's convictions for unlawful possession of firearms.

III. The district court erred by sentencing Keller on both convictions for unlawful possession of a firearm because the offenses arose out of a single behavioral incident.

Keller argues that we must vacate one of his two sentences for unlawful possession of a firearm because sentencing him for both convictions violates Minn. Stat. § 609.035, subd. 1 (2022). The state agrees. We consider this issue on the merits because "it is the responsibility of appellate courts to decide cases in accordance with law." *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

When facts are not in dispute, whether a given offense is subject to multiple sentences under Minn. Stat. § 609.035 (2022) is a legal question that we review de novo. *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012). "An appellant does not waive claims of multiple convictions or sentences by failing to raise the issue at the time of sentencing." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007). Minnesota Statutes section 609.035 generally prohibits multiple sentences for conduct that is part of a singular behavioral incident. Minn. Stat. § 609.035; *see also State v. Papadakis*, 643 N.W.2d 349, 357 (Minn. App. 2002) ("Minn. Stat. § 609.035 allows multiple convictions for different incidents (counts) arising out of a 'single behavioral incident,' but prohibits multiple sentences for conduct that is part of a single behavioral incident."). To determine whether two offenses arose from a single behavioral incident, we consider whether the offenses (1) occurred in the same time and place and (2) were motivated by a single criminal objective. *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011).

Here, Keller possessed the firearms at the same time and in the same place because law enforcement discovered them in the same vicinity when they searched E.F.'s garage. Keller's possession of the two firearms was motivated by the same criminal objective—possessing firearms despite being ineligible to possess them due to a prior felony conviction. Therefore, Keller's possession of the two firearms constituted a single behavioral incident and the district court erred by sentencing Keller for both unlawful-firearm-possession convictions.

In sum, we affirm Keller's convictions for possessing pornographic works involving minors and unlawful possession of firearms because the state presented sufficient evidence to support the convictions; however, because the convictions for unlawful possession of a firearm arose out of the same behavioral incident and Keller received a sentence for each conviction, we reverse and remand for the district court to vacate one of the sentences for either count 3 or count 4.

Affirmed in part, reversed in part, and remanded.