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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1982

State of Minnesota,
Respondent,

vs.

Nicholas Neil Nikiforakis,
Appellant.

Filed January 9, 2012
Affirmed
Johnson, Chief Judge

Dakota County District Court
File No. 19HA-CR-10-197

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

James C. Backstrom, Dakota County Attorney, Maureen F. Caturia, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Schellhas, Judge; and Collins, Judge.[*]

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[*]Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

JOHNSON, Chief Judge

A Dakota County jury found Nicholas Neil Nikiforakis guilty of two drug-related offenses based on evidence that he facilitated a sale of cocaine to an undercover police officer. On appeal, Nikiforakis argues that the evidence is insufficient to support his conviction of aiding-and-abetting the sale of cocaine. Nikiforakis also argues that the district court erred by refusing to instruct the jury that his “mere presence” at places and times relevant to the cocaine transaction does not, by itself, prove that he aided and abetted others in the commission of the crime. We conclude that the evidence is sufficient to support the aiding-and-abetting conviction and that the district court did not err in its jury instructions and, therefore, affirm.

FACTS

Nikiforakis’s convictions arise from his involvement in a drug transaction that also involved two of his friends or acquaintances, Ryan Merchant and Christopher Vega, and an undercover police officer. Merchant first contacted the undercover officer to ascertain his interest in purchasing cocaine, and Vega delivered the cocaine to the undercover officer. Nikiforakis’s role in the transaction bears on both of the issues he raises on appeal.

Nikiforakis and Merchant have been friends since 2005. The record is unclear about the nature and duration of Nikiforakis’s relationship with Vega. Nikiforakis introduced Merchant and Vega to each other at Nikiforakis’s Burnsville apartment during a social gathering in the winter of 2009-2010. At a later date, again while at

Nikiforakis's apartment, Vega asked Merchant for help in finding a buyer for an ounce of cocaine. Vega promised to give Merchant an eighth of an ounce of cocaine as a finder's fee. Merchant soon found an interested person, who, unbeknownst to Merchant or Vega or Nikiforakis, was Jeremiah Simonson, an undercover police officer working with the Dakota County Drug Task Force.

Officer Simonson and Merchant proceeded to negotiate an agreement for the sale of an ounce of cocaine. Initially, Officer Simonson and Merchant made arrangements for the sale to occur on January 14, 2010, at Nikiforakis's apartment. Merchant told Nikiforakis of the arrangement, and Merchant, Vega, and Nikiforakis made plans to meet at Nikiforakis's apartment prior to the sale. But Officer Simonson later refused to meet at Nikiforakis's apartment. In a telephone conversation with Merchant, Officer Simonson suggested that they instead meet in the parking lot of a strip mall near Nikiforakis's apartment. While Officer Simonson waited on the telephone, Merchant discussed the proposed change of location with Vega and Nikiforakis. Nikiforakis said to Merchant that it would be alright with him if the sale were moved to Officer Simonson's preferred location.

Just before the sale, Vega gave Merchant a gram of cocaine (which is approximately 1/28th of an ounce). Vega, Merchant, and Nikiforakis promptly consumed half of that amount. Nikiforakis placed the remaining half-gram of cocaine in his pocket.

Vega, Merchant, and Nikiforakis then went to the strip mall, with Vega driving. After parking, Vega exited the vehicle, entered Officer Simonson's parked vehicle, and traded the ounce of cocaine for $1,100 in cash. As soon as Vega returned to the vehicle

he had been driving, several waiting police officers arrested the three men. During a search incident to arrest, officers found the half-gram of cocaine in Nikiforakis's pocket. The substance that Vega delivered to Officer Simonson later was determined to be 27.53 grams of cocaine.

The state charged Nikiforakis with three offenses: (1) aiding and abetting a first-degree sale of a controlled substance, a violation of Minn. Stat. §§ 152.021, subd. 1(1), 609.05 (2008); (2) conspiracy to commit a first-degree sale of a controlled substance, a violation of Minn. Stat. §§ 152.021, subd. 1(1), .096 (2008); and (3) fifth-degree possession of a controlled substance, a violation of Minn. Stat. § 152.025, subd. 2(a)(1) (Supp. 2009). The case was tried to a jury for two days in June 2010. The state presented the testimony of four witnesses: Officer Simonson, a supervising officer who initially arranged the drug transaction, Merchant, and a technician from the police department's laboratory. Vega refused to testify, and the district court held him in contempt of court. The defense presented no evidence.

Before the case was submitted to the jury, the district court proposed to instruct the jury on the elements of aiding and abetting a first-degree sale of a controlled substance in a manner similar to Criminal Jury Instruction Guide 4.01. *See* 10 Minn. Dist. Judges Ass'n, *Minnesota Practice—Jury Instruction Guides, Criminal* § 4.01, at 67 (5th ed. 2006). Nikiforakis requested that the district court also give the following instruction related to aiding and abetting: "Mere presence at the scene of the crime does not alone prove that a person aided or abetted, because inaction, knowledge, or passive

acquiescence does not rise to the level of criminal culpability." The district court refused to give Nikiforakis's requested instruction, reasoning:

> I don't see this really as a mere presence type of case. If the testimony was simply that Mr. Nikiforakis happened to be at the scene at the time of the sale, I probably would be ruling differently. But, with the testimony I have, which includes the testimony that Mr. Nikiforakis may have received some cocaine as compensation for this deal, that it was originally set up for his apartment, testimony that it was changed and he was at least contacted or communicated with when they changed the location of the sale, that testimony changes things. So, for that reason, as well as the fact that we have a conspiracy count and I think that giving this instruction may confuse the jury because really this instruction, as I see it, relates to the Aiding and Abetting count but not the conspiracy and it may confuse the jury as to the elements on conspiracy.

The district court's instructions on aiding and abetting differed from Criminal Jury Instruction Guide 4.01 only in that the verbs "conspired" and "conspiring" were omitted. *See Criminal Jury Instruction Guides* § 4.01, at 67.

The jury found Nikiforakis guilty on the first count (aiding and abetting a first-degree sale of a controlled substance) and the third count (fifth-degree possession of a controlled substance). The jury found Nikiforakis not guilty on the second count (first-degree conspiracy to commit a sale of a controlled substance). The district court sentenced Nikiforakis to 114 months of imprisonment. Nikiforakis appeals.

D E C I S I O N

I. Sufficiency of the Evidence on Count One

Nikiforakis argues that the evidence introduced at trial is insufficient to prove beyond a reasonable doubt his guilt of aiding and abetting a first-degree sale of a controlled substance.

When considering a claim of insufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the jurors to reach the verdict that they did. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). We must assume that "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 disturb the verdict if the jury, acting with due regard for the presumption of innocence" and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the crime charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

A person is guilty of a first-degree sale of a controlled substance if he "unlawfully sells one or more mixtures of a total weight of ten grams or more containing cocaine, heroin, or methamphetamine." Minn. Stat. § 152.021, subd. 1(1). In addition, a person may be held criminally liable for a crime committed by another if he "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1. Accomplice liability attaches when a defendant "plays some knowing role in the commission of the crime and takes no steps to thwart its

completion." *State v. Swanson*, 707 N.W.2d 645, 658-59 (Minn. 2006) (quoting *State v. Pierson*, 530 N.W.2d 784, 788 (Minn. 1995)). A conviction of aiding and abetting another person may be based on factors such as "defendant's presence at the scene of the crime, defendant's close association with the principal before and after the crime, defendant's lack of objection or surprise under the circumstances, and defendant's flight from the scene of the crime with the principal." *Id.* at 659 (quoting *Pierson*, 530 N.W.2d at 788). "[A]ctive participation in the overt act which constitutes the substantive offense is not required, and a person's presence, companionship, and conduct before and after an offense are relevant circumstances from which a person's criminal intent may be inferred." *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995).

The trial record contains sufficient evidence to allow the jury to find, beyond a reasonable doubt, that Nikiforakis is guilty of aiding and abetting Merchant and Vega in a first-degree sale of a controlled substance. First, Nikiforakis had a knowing role in determining the location of the sale of cocaine. Merchant testified that Nikiforakis offered his apartment as a venue for the sale of cocaine. Merchant and Officer Simonson testified that Merchant later consulted Nikiforakis about moving the drug transaction from Nikiforakis's apartment to the parking lot, and Nikiforakis agreed to the change of venue. Second, the state introduced evidence tending to prove that Nikiforakis effectively received compensation from Vega in the form of cocaine for facilitating the sale. Officer Simonson testified that Merchant made a pretrial statement that Vega had promised Nikiforakis an eighth of an ounce of cocaine for assisting with the sale, and Merchant testified that Vega gave a gram (approximately 1/28th of an ounce) of cocaine

to Merchant just before the sale and that Nikiforakis pocketed half of that amount, which was found when he was searched upon his arrest. Third, it is undisputed that Nikiforakis drove to the scene of the sale with Vega and Merchant and that Nikiforakis was present at the place and time of the sale, where he was arrested. All of this evidence is sufficient to allow the jury to conclude that Nikiforakis "play[ed] some knowing role in the commission of the crime" of a first-degree controlled substance sale "and [took] no steps to thwart its completion." *Swanson*, 707 N.W.2d at 658-59 (quoting *Pierson*, 530 N.W.2d at 788).

Nikiforakis contends that the conviction is based on circumstantial evidence, to which we must give "heightened scrutiny." *See State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). We disagree. The evidence described above was established with direct evidence. By definition, direct evidence "is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007) (quotation and alterations omitted). Circumstantial evidence, on the other hand, is "evidence based on inference and not on personal knowledge or observation and all evidence that is not given by eyewitness testimony." *Id.* (quotation and alterations omitted). The direct evidence in the record is sufficient to support the verdict; the jury could have concluded that Nikiforakis aided and abetted the sale of cocaine without relying on circumstantial evidence. Thus, we need not review this case under the heightened standard for circumstantial evidence.

Therefore, we conclude that the evidence introduced by the state is sufficient to prove that Nikiforakis is guilty of aiding and abetting a first-degree sale of a controlled substance.

II. Jury Instructions

Nikiforakis also argues that the district court erred by refusing to instruct the jury that his "mere presence," by itself, is insufficient to establish accomplice liability.

A district court must instruct the jury in a way that "fairly and adequately explain[s] the law of the case" and does not "materially misstate[] the applicable law." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). A district court has "considerable latitude" in the selection of language for jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). Accordingly, we apply an abuse-of-discretion standard of review to a district court's jury instructions. *Koppi*, 798 N.W.2d at 361.

In this case, Nikiforakis did not object to the district court's decision to instruct the jury by using the language in Criminal Jury Instruction Guide 4.01, with slight modifications. But Nikiforakis requested that the district court augment that instruction with another instruction stating that "mere presence" is insufficient to prove aiding and abetting. The district court refused to give the requested instruction on the ground that Nikiforakis's role in the drug transaction went beyond "mere presence." *See State v. Daniels*, 361 N.W.2d 819, 832 (Minn. 1985) (holding that district court did not err by not giving "mere presence" instruction because evidence did not support requested instruction).

The district court's refusal to instruct the jury on "mere presence" was not erroneous because the instructions given are consistent with the statute and the caselaw concerning aiding and abetting. Nikiforakis's proposed "mere presence" jury instruction is essentially a negative definition of aiding and abetting. In other words, merely being present when a crime is committed is simply one way in which a defendant may be said to not intentionally aid, advise, hire, counsel, or otherwise procure the principal to commit the crime. *See* Minn. Stat. § 609.05, subd. 1. In *State v. Boyd*, 410 N.W.2d 445 (Minn. App. 1987), this court held that an instruction on "mere presence" was "unnecessary" because an instruction based on Criminal Jury Instruction Guide 4.01 was "sufficient to exclude mere presence or passive approval." *Id.* at 447. We also noted that Boyd's trial counsel was allowed to argue the "mere presence" theory to the jury. *Id.* Likewise, in this case, Nikiforakis's trial counsel was able to pursue a "mere presence" theory in his opening statement and his closing argument. Nikiforakis has offered no reasons why this case is different from *Boyd*. Thus, we conclude that the district court's instructions "fairly and adequately explain[ed] the law of the case." *Koppi*, 798 N.W.2d at 362.

Therefore, the district court did not err by refusing to instruct the jury that Nikiforakis's "mere presence" is insufficient to prove that he aided and abetted the commission of the crime.

Affirmed.