STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1646

State of Minnesota,
Respondent,

vs.

William McKinley Whitehorn,
Appellant.

Filed December 23, 2008
Affirmed in part and reversed in part
Peterson, Judge

Olmsted County District Court
File No. K6-05-4695

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James P. Spencer, Olmsted County Attorney, 151 Fourth Street Southeast, Rochester, MN 55904 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

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

PETERSON, Judge

In this appeal from convictions of second- and fifth-degree controlled-substance crimes, appellant argues that (1) the evidence was insufficient to establish that he committed a controlled-substance offense; (2) the district court erred in refusing to allow defense counsel to ask if the informant continued to use drugs while working for law enforcement and to ask during closing argument what happened to surveillance tapes; and (3) the district court erred in entering a conviction for both second- and fifth-degree controlled-substance crimes, when the court found a single behavioral incident under Minn. Stat. § 609.04 (2004). We affirm the second-degree controlled-substance conviction and vacate the fifth-degree controlled-substance conviction.

FACTS

On November 16, 2005, T.Y. assisted Rochester police officers in making a controlled-substance purchase from a person known to T.Y. as "B," who was later identified as appellant William McKinley Whitehorn. T.Y., who had been arrested for controlled-substance crime, had agreed to cooperate with the police in exchange for being allowed to plead to fifth-degree controlled-substance crime, which would allow him to avoid a prison sentence.

Rochester Narcotics Investigator Daryl Seidel picked up T.Y. and brought him to the police station, where Seidel strip-searched T.Y. to verify that T.Y. did not possess any money or illegal drugs. Seidel then equipped T.Y. with a transmitter, gave him seven $100 bills that had been photocopied, and brought him to a shopping mall. By telephone,

T.Y. arranged to meet appellant at the mall in about 20 minutes and buy one ounce of cocaine from him for $700. When appellant had not shown up after 30 minutes, T.Y. made a second call and spoke to appellant, who said he would be on his way shortly. Another 30 minutes went by, and appellant still had not shown up. During this first hour, T.Y. was always in Seidel's sight. Seidel saw T.Y. speak to one person and borrow a cell phone from another. Using the camera system in the mall security office, Rochester Narcotics Investigator Jeffrey S. Sobczak also monitored T.Y.

Seidel went outside to assist surveillance officers watching for appellant's arrival. After about another 30 minutes went by, T.Y. phoned Seidel, saying that appellant was in the mall and had instructed T.Y. to meet him by a restaurant in the mall. Seidel drove over to the restaurant and went inside the mall.

Sobczak testified that as T.Y. walked toward the restaurant, appellant approached him, and they shook hands and walked together toward the food court. They stopped near a kiosk, and Sobczak saw T.Y. count out money and hand some money to appellant. A woman approached appellant and T.Y. and had a conversation with appellant. Appellant then reached into his jacket pocket and handed T.Y. what appeared to Sobczak to be a plastic baggie. T.Y. put the baggie in his pocket and began walking away. Within 20 seconds, T.Y., looking upset, returned to appellant, and appellant reached into his pocket and gave another item to T.Y. Sobczak was unable to identify the second item. Seidel also saw two exchanges occur between T.Y. and appellant but could not identify the items being exchanged.

Seidel arrested appellant. On appellant's person, Seidel found a $100 bill from the buy money, two cell phones, and a set of car keys that appeared to belong to a rental car. Using a remote-control device on the key ring, Seidel found the car to which the keys belonged parked in the mall parking lot. In the car's glove compartment, officers found a straight-edge razor blade with a substance that appeared to be crack cocaine, four pills, and four small baggies of what appeared to be marijuana. Also in the glove compartment were a traffic citation and a rental agreement for the car, both of which were in appellant's name. A set of barber tools with a replacement blade for a straight-edge razor was in the car.

Rochester Narcotics Investigator Tracy Nepper picked up T.Y., and he gave her $600 of the buy money and three small plastic baggies that contained what appeared to Nepper to be crack cocaine. T.Y. told Nepper that "he had the $600 left because [appellant] sold him one gram for $100." Seidel watched T.Y. from the time that he and appellant separated until Nepper said that she had contact with T.Y. During that time, T.Y. did not meet with anyone, stop anywhere, or attempt to retrieve anything from a hidden location.

At the law-enforcement center, T.Y. told Seidel that in the initial exchange, he gave appellant the entire $700 of buy money, and appellant gave him crack cocaine. After walking a few steps away, T.Y. realized that the amount was much less than an ounce, so he returned to appellant, and appellant gave $600 back to T.Y. T.Y. told Seidel that appellant indicated that he "had additional cocaine in the vicinity." After talking to T.Y., Seidel interviewed appellant. Appellant denied any knowledge of drugs, claimed

that he had been dropped off at the mall but was unable to identify the person who had dropped him off, and said that he was attending school in Chicago to become a barber.

Appellant was charged with one count each of second-, third-, and fifth-degree controlled-substance crime in violation of Minn. Stat. §§ 152.022, subd. 1(1) (2004) (sale of three or more grams of mixture containing cocaine), .023, subd. 1(1) (2004) (sale of mixture containing narcotic drug), .025, subd. 2(1) (2004) (controlled-substance possession). The case was tried to a jury.

T.Y. testified at trial that he initially gave appellant $100 and told appellant that he did not feel comfortable doing the transaction there, but appellant "said it was okay to do it here." T.Y. testified that appellant "started putting the dope into my pocket," so T.Y. gave appellant the rest of the money. As T.Y. walked away, he realized that appellant had given him only about a gram of cocaine when the deal had been for an ounce, which is 28 grams. T.Y. returned to appellant and said the amount was short. Appellant gave T.Y. a little more cocaine and promised to return in 15 minutes with even more. T.Y. asked to go with appellant, but appellant told T.Y. to stay where he was. T.Y. walked back toward the food court, where he was picked up by a female officer. T.Y. denied getting any of the buy money back from appellant.

Testing showed that the baggies that T.Y. received from appellant contained .8 grams of a substance containing cocaine and that the substance found in the car's glove compartment weighed 5.1 grams and contained cocaine. The four pills were determined to be a controlled substance commonly known as ecstasy.

The jury found appellant guilty as charged. The district court sentenced appellant to the presumptive sentence on the second-degree offense, an executed term of 67 months. A judgment of conviction was entered on the fifth-degree offense, but no sentence was imposed. This appeal followed.

D E C I S I O N

I.

Appellant argues that the evidence was insufficient to support his conviction for second-degree controlled-substance crime.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). "While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). A jury, however, is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430. The reviewing court 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). The reviewing court 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 that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A person is guilty of second-degree controlled-substance crime if "on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of three grams or more containing cocaine." Minn. Stat. § 152.022, subd. 1(1) (2004). "'Sell' means: (1) to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture; or (2) to offer or agree to perform an act listed in clause (1); or (3) to possess with intent to perform an act listed in clause (1)." Minn. Stat. § 152.01, subd. 15a (2004).

Based on the failure of police to perform a cavity search, appellant argues that T.Y. could have possessed the cocaine he turned over to police before meeting appellant at the mall. Appellant argues, alternatively, that the officers' surveillance of T.Y. was insufficient, so he could have gotten the cocaine from someone else that he had contact with at the mall.

But T.Y. testified that he got the cocaine from appellant, and appellant had $100 of the buy money on his person when he was arrested. Also, T.Y.'s testimony that two exchanges occurred was corroborated by Seidel's and Sobczak's observations. Both Seidel and Sobczak saw two exchanges occur between T.Y. and appellant, and during the first exchange, Sobczak saw T.Y. give appellant money and appellant give T.Y. what looked like a plastic baggie.

Officers maintained constant surveillance of T.Y. while he was at the mall. Seidel observed T.Y. during the entire first hour T.Y. spent at the mall. During that time, Seidel saw T.Y. borrow a cell phone from someone, and Seidel testified that T.Y. did not exchange anything else with anyone. Sobczak monitored appellant from the time he

arrived at the mall until the transaction with appellant was completed. After the transaction, Seidel kept T.Y. in sight until Nepper made contact with T.Y. The testimony of Sobczak, Nepper, and Seidel shows that at least one officer had T.Y. in sight at all times. Appellant's claim that no one saw T.Y. get a cell phone is contrary to Seidel's testimony.

T.Y. argues that Sobczak's testimony lacks credibility because he did not see T.Y. return the cell phone to his acquaintance and did not recall T.Y. meeting with anyone other than appellant or shaking anyone's hand. T.Y. testified that while waiting for appellant, he spoke to three different people at three different times. T.Y. also testified that he shook hands with appellant when they met. Inconsistencies in testimony and conflicts in evidence do not require reversal, but rather they are factors for the jury to consider when making credibility determinations. *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004); *see also State v. Pippitt*, 645 N.W.2d 87, 92-94 (Minn. 2002) (stating that it is jury's role to resolve conflicts in evidence and weigh witness credibility).

Appellant also argues that there is a significant discrepancy between T.Y.'s trial testimony that he gave appellant all of the buy money and did not receive any back and Nepper's and Seidel's testimony about T.Y.'s statements to them right after the controlled buy. T.Y.'s statements to Nepper and Seidel were corroborated by T.Y. returning $600 of the buy money to Nepper. While T.Y.'s statement to Seidel (that he initially gave appellant the entire $700 and then got $600 back when he realized he had received much less cocaine than the agreed-upon amount) is more detailed than T.Y.'s

statement to Nepper (that he paid $100 for a gram of cocaine), the two statements are consistent. The discrepancy between T.Y.'s trial testimony and his earlier statements to Nepper and Seidel was an issue for the jury to resolve in making its credibility determinations.

Appellant notes the prosecution's failure to introduce any video or audio recordings into evidence. We find no authority imposing such a requirement when the evidence is otherwise sufficient to support a conviction.

Viewing the evidence in the light most favorable to the verdict, as we must, the evidence was sufficient to prove beyond a reasonable doubt that appellant sold cocaine to T.Y. The sale of cocaine to T.Y., together with appellant's possession of the keys to a locked car with a rental agreement and traffic citation bearing his name in the glove compartment, were sufficient to establish possession of the controlled substances found in the car. *See State v. Florine*, 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975) (discussing evidence required to prove constructive possession); *State v. Munoz*, 385 N.W.2d 373, 377 (Minn. App. 1986) (affirming finding of constructive possession based on totality of circumstances). An inference of intent to sell is supported by the officers' observations, T.Y.'s statements to police, T.Y.'s trial testimony, and the razor blade found in the car. *See State v. Lozar*, 458 N.W.2d 434, 436 (Minn. App. 1990) (discussing circumstantial evidence that will support a finding of intent to sell), *review denied* (Minn. Sept. 28, 1990). The evidence was sufficient to support appellant's conviction of second-degree controlled-substance crime.

II.

Evidentiary ruling

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). If the district court has erred in excluding defense evidence, the error is harmless only if this court is "satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (*i.e.*, a reasonable jury) would have reached the same verdict." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994) (footnote omitted).

Appellant argues that the district court erred by not allowing defense counsel to ask T.Y. if he continued to use drugs while working as an informant for police. On cross-examination, T.Y. testified that after serving time in jail for a drug offense, he was introduced to appellant, who lived upstairs from T.Y., by a "drug friend" of appellant's. T.Y. and appellant had been neighbors for a month or two before the controlled buy. After T.Y. testified about how he met appellant, defense counsel asked, "During this period of time you were conducting these controlled buys for law enforcement, were you still using drugs?" The district court sustained an objection to the question. But appellant had already answered "no," and the district court did not direct the jury to disregard the question and answer.

Appellant argues that T.Y.'s testimony that he met appellant through a "drug friend" of appellant's provided a basis for defense counsel's question. But the evidence in the record does not suggest that T.Y. was associating with the person who introduced him to appellant due to T.Y. continuing to use drugs, rather than for a legitimate purpose. In any event, any potential error was harmless because T.Y. answered "no" to the question, and the jury was informed that T.Y. was working as an informant in order to avoid going to prison for a controlled-substance offense.

Closing argument

In closing argument, "defense counsel, like the prosecutor, may argue all reasonable inferences from the evidence in the record, but cannot intentionally misstate the evidence or mislead the jury as to the inferences it may draw." *State v. Davidson*, 351 N.W.2d 8, 12 (Minn. 1984).

Appellant argues that the district court erred by sustaining an objection to the following argument: "Let's talk a little bit about what's not here. What's not here is the videotape of anything." Because there was no evidence as to why the videotapes were not submitted into evidence, the district court properly sustained the objection. *See id.* at 13 (noting that state's failure to produce evidence about whether gun was dusted for fingerprints did not necessarily support inference that defendant wanted jury to draw (that state failed to do all it could to meet its burden of proof) and that comment about failure to produce evidence could have potentially confused the jury); *see also State v. Swain*, 269 N.W.2d 707, 716-17 (Minn. 1978) (concluding that district court did not abuse its

discretion in ordering defense counsel not to comment on prosecutor's failure to call witness who was equally available to both sides).

III.

The state concedes that appellant's fifth-degree controlled-substance-crime conviction should be vacated under Minn. Stat. § 609.04 (2004). *See* Minn. Stat. § 609.04 (stating that a defendant "may be convicted of either the crime charged or an included offense, but not both" and defining an "included offense" to include a "lesser degree of the same crime"); *see also State v. Earl*, 702 N.W.2d 711, 723-24 (Minn. 2005) (applying Minn. Stat. § 609.04 (2004)). Accordingly, we vacate appellant's conviction for fifth-degree controlled-substance crime, but we note that the jury verdict on that count remains in force. *See id.*; (citing *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn.1999) (holding that the underlying guilty verdict of a lesser-included crime remains intact and the district court may later convict and sentence on that crime if a separate adjudicated conviction is later vacated)).

Affirmed in part and reversed in part.