STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1944

State of Minnesota,
Respondent,

vs.

Charles Ginyard, Jr.,
Appellant.

Filed November 24, 2009
Affirmed
Johnson, Judge

Stearns County District Court
File No. 73-K7-06-001149

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

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Marie L. Wolf, Interim Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

JOHNSON, Judge

A Stearns County judge found Charles Ginyard, Jr., guilty of aiding and abetting a third-degree controlled-substance crime based on evidence that he facilitated the sale of 0.4 grams of crack cocaine. On appeal, Ginyard challenges the sufficiency of the evidence and the district court's denial of his motion for a downward departure at sentencing. We conclude that the evidence is sufficient to support the conviction and that the district court did not abuse its discretion by declining to depart downward when imposing sentence. Therefore, we affirm.

FACTS

Ginyard's conviction arises from an incident in which he helped a person purchase crack cocaine. The person who made the purchase was a confidential informant (CI) who was cooperating with the St. Cloud Police Department.

On July 19, 2005, Officer Daniel Greenwald prepared the CI to make a controlled buy. Officer Greenwald attached audio-surveillance equipment to the CI and provided him with $100 of pre-recorded currency. Officer Greenwald followed the CI to the corner of Eighth Avenue and West St. Germain Street. Officer Greenwald saw Ginyard and an individual known by the street name "Hot Sauce" approach the CI. After some discussion, the CI and Ginyard agreed that the CI would buy $100 worth of crack cocaine in a nearby bar.

The CI and Ginyard entered the bar together, where they found Hot Sauce, who had entered earlier. The CI gave $100 to Hot Sauce. Whether the CI handed the money

directly to Hot Sauce or indirectly by handing it to Ginyard is in dispute. In any event, after Hot Sauce received the money, Ginyard handed the CI a package containing 0.4 grams of crack cocaine. The CI and Ginyard then argued because the CI believed that 0.4 grams of crack cocaine was not worth $100. Outside the bar, after the CI received a $40 refund, Ginyard asked the CI for a "dub" (which is slang for a small amount of drugs worth $20) for his efforts in arranging the sale. The CI refused Ginyard's request and left the scene. The CI met Officer Greenwald at a prearranged location, where he gave the officer the crack cocaine and the remaining cash. During the controlled buy, law-enforcement officers conducted both audio and visual surveillance of the CI at all times, except when the CI was inside the bar, when only audio surveillance was possible.

Following a bench trial, the district court found Ginyard guilty of aiding and abetting a controlled-substance crime in the third degree, in violation of Minn. Stat. §§ 152.023, subd. 1(1); 609.05 (2004). Before sentencing, Ginyard moved for a downward durational departure from the presumptive guidelines sentence of 60 months of imprisonment. Ginyard requested a sentence of 24 months on the ground that his role in the drug transaction was minimal. The district court denied the motion and imposed a sentence of 60 months. Ginyard appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Ginyard first argues that the evidence is insufficient to sustain the conviction. When determining the sufficiency of the 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, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The analysis is the same for bench trials as for jury trials. *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998). In either type of case, "[t]he credibility of witnesses and the weight to be given their testimony are determinations to be made by the factfinder." *DeMars v. State*, 352 N.W.2d 13, 16 (Minn. 1984). We will not reverse the verdict so long as the factfinder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could "reasonably conclude that [a] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (alteration in original) (quotation omitted).

A defendant is guilty of a controlled-substance crime in the third degree if he or she "unlawfully sells one or more mixtures containing a narcotic drug." Minn. Stat. § 152.023, subd. 1(1). A defendant may be held liable for aiding and abetting if he or she "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1. To impose aiding-and-abetting liability, the state must prove that the defendant played a "knowing role" in the crime. *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995). "However, active participation in the overt act that constitutes the substantive offense is not required, and a defendant's presence, companionship, and conduct before and after an offense is committed are relevant circumstances from which the jury may infer criminal intent." *State v. Gates*, 615 N.W.2d 331, 337 (Minn. 2000), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

In this case, the district court found that

> the State has proven beyond a reasonable doubt that the defendant intentionally aided, intentionally advised, hired, counseled, conspired with, or otherwise procured another to commit an unlawful sale of one or more mixtures containing 0.4 grams of cocaine, a narcotic; the defendant knew or believed that the substance sold was crack cocaine; the defendant negotiated the sale, participated in the sale, and argued about how he would be compensated for his role in the sale; and the defendant's acts took place on July 19, 2005 in Stearns County.

Ginyard's challenge to the sufficiency of the evidence focuses on the testimony of the CI. Specifically, Ginyard contends that the CI's memory was "blurred by a stroke and the ravages of time," that he "is a convicted felon, who was paid for his cooperation in buying drugs," that he "admitted to drinking alcohol at lunch prior to testifying," that he "once used information culled from his work as an informant to plan a burglary," and that his "version . . . changed and was impeached with prior statements he gave to prosecutors."

The district court expressly considered the issues concerning the CI's credibility that are raised by Ginyard's appellate arguments. In its findings, the district court wrote:

> The CI's testimony was coherent and understandable. Any alcohol he drank with lunch on the day of his testimony did not particularly affect his recall / memory of the events. Although the CI admitted he had a stroke and this may have caused some memory problems, he did recall this transaction which forms the basis for the charge against Defendant. It would be expected given the instant controlled buy occurred in July of 2005 and the CI's testimony was not until the spring of 2008, coupled with the fact that the CI also took part in other controlled buys with law enforcement on July 19, 2005, that the CI would not recall every specific detail of the instant controlled buy.

This excerpt from the district court's order reveals that the district court fully considered Ginyard's arguments concerning the CI's credibility. "Because the weight and believability of witness testimony is an issue for the district court, we defer to that court's credibility determinations." *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003). This is true even if a witness's credibility is seriously called into question. *State v. Pendleton*, 706 N.W.2d 500, 512 (Minn. 2005).

Ginyard also contends that the CI's testimony is not credible because his trial testimony conflicted with pre-trial statements concerning whether he handed $100 to Hot Sauce directly or indirectly through Ginyard. The district court acknowledged that the CI's trial testimony may have been inconsistent with his prior statement to police. But the district court reasoned that any such inconsistency

> is not fatal to the State's case . . . because even if the CI gave the money to someone other than the defendant, the defendant is being charged with Aiding and Abetting Controlled Substance Crime in the Third Degree which does not necessitate that the money was actually given to Defendant. The CI never waivered in this testimony and was certain that the defendant gave him (the CI) the crack cocaine and that the defendant was arguing with him (the CI) about getting some drugs or money as compensation for "hooking him (the CI) up," i.e. setting up the drug transaction.

This part of the district court's analysis is not erroneous. Regardless whether the CI gave the money to Hot Sauce directly or indirectly through Ginyard, the evidence shows that Ginyard played a role in arranging and facilitating the transaction. And the CI consistently stated that it was Ginyard who handed him the package of crack cocaine.

That evidence is sufficient to establish that Ginyard played a "knowing role" in the crime. *Ostrem*, 535 N.W.2d at 924.

In addition to the CI's testimony, the state presented the testimony of law enforcement officers who observed and listened to the controlled buy as it occurred. Officer Greenwald testified that he performed surveillance during the controlled buy and met the CI afterward to pick up the package of crack cocaine and the unused currency. Stearns County Deputy Sheriff Kellan Hemmesch testified concerning his surveillance of the CI's interactions with Ginyard while they were standing on a public sidewalk and a series of photographs of the men, taken both before and after they were in the bar. The district court relied on the officers' testimony in its order finding Ginyard guilty.

Ginyard also contends that, "even where the evidence is legally sufficient to sustain the conviction, a reviewing court may reverse in the interests of justice where it has grave doubts about the defendant's guilt." Ginyard cites *State v. Boyce*, 284 Minn. 242, 170 N.W.2d 104 (1969), and *State v. Johnson*, 277 Minn. 368, 152 N.W.2d 529 (1967). We need not analyze whether these cases have continuing vitality because we have reviewed the trial transcript and the trial exhibits, and we do not have grave doubts as to whether Ginyard is guilty of the offense of which he was convicted.

Thus, the evidence is sufficient to support the conviction.

II. Motion for Downward Departure

Ginyard also argues that the district court erred by denying his motion for a downward departure from the presumptive guidelines sentence. A district court has broad discretion in determining an appropriate sentence, and reviewing courts will not

reverse a district court's denial of a request for a downward departure unless the district court has abused its discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "Departures from the presumptive sentence are justified *only* when substantial and compelling circumstances are present in the record." *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008) (citing *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002); Minn. Sent. Guidelines II.D.). Even if there are reasons for departing, this court will not disturb the district court's sentence if the district court had reasons for refusing to depart. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006); *Kindem*, 313 N.W.2d at 7-8. Reversing a denial of a request for a departure is appropriate only in "rare" circumstances, *Kindem*, 313 N.W.2d at 7, such as when the district court incorrectly believed that it was constrained from exercising its discretion or otherwise failed to exercise its discretion, *see, e.g.*, *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002).

In this case, Ginyard argues that his role in the crime was minimal. The district court stated that "the evidence did support that you did play an active role, even though that may not be your claim in this case." Accordingly, the district court found "no substantial and compelling reasons to depart based on that." The record reflects that the district court exercised its discretion by considering but rejecting Ginyard's arguments for a downward durational departure. In doing so, the district court did not abuse its discretion.

Ginyard also contends that the district court erred by failing to "examine [his] sentence in light of [sentences imposed on other] persons with similar criminal histories

convicted of the same acts." Ginyard relies on *State v. Vazquez*, 330 N.W.2d 110 (Minn. 1983). Ginyard's argument fails for at least two reasons. First, *Vazquez* is a case in which the appellant challenged a double upward departure from the presumptive sentence. *Id.* at 111-13. The supreme court reasoned, in part, that "[t]he primary means . . . for accomplishing equity in sentencing is the sentencing matrix, which establishes the presumptive sentence based on offense severity and the defendant's criminal history score." *Id.* at 112. Here, Ginyard received the presumptive guidelines sentence, which was based on an offense level of six and a criminal history score of eight due to his nine prior criminal offenses. The guidelines sentence that Ginyard received is not inconsistent with *Vazquez*. *See State v. Williams*, 337 N.W.2d 387, 391 (Minn. 1983) (affirming imposition of presumptive sentence and discussing *Vazquez*). Second, Ginyard has not identified any other persons or sentences that would allow this court to make the comparison that he contends should be made.

Thus, the district court did not abuse its discretion by denying Ginyard's motion for a downward durational departure from the presumptive guidelines sentence.

Affirmed.