STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2115

State of Minnesota,
Respondent,

vs.

Michael Shelby Lee,
Appellant.

Filed February 9, 2010
Affirmed
Peterson, Judge

Winona County District Court
File No. 85-CR-07-509

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

Charles MacLean, Winona County Attorney, Justin A. Wesley, Assistant County Attorney, Winona, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Suzanne M. Senecal-Hill, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Peterson, Judge; and Ross, 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 multiple counts of controlled-substance crime, appellant argues that the state failed to prove that he sold cocaine when the only

eyewitness to the actual drug sales was the informant, who was a drug user with a history of lying to persons of authority for her own benefit, and when the state's other evidence did not sufficiently corroborate the informant's version of events. We affirm.

FACTS

Winona Police Investigator Tony Gagnon learned from informant D.B. that a male known to D.B. as "Black" was selling cocaine. D.B. assisted officers in making five controlled buys from "Black," who was later identified as appellant Michael Shelby Lee.

During the previous three years, D.B. had assisted Gagnon with 28 controlled buys that resulted in 11 convictions. Gagnon knew that D.B. had a criminal history and was using drugs at the time that she assisted in making the controlled buys from appellant. D.B. was paid $100 for each controlled buy, and Gagnon believed that she was using the money to buy cocaine for herself. Gagnon was present during four of the five controlled buys from appellant. Before the buys, Gagnon searched D.B. by having her empty her pockets and turn them inside out. He then provided her with an audio recorder and money that had been photocopied. He also conducted surveillance of D.B. during the buys.

On February 1, 2007, Gagnon and Investigator Arthur Petroff went to D.B.'s apartment. D.B. called appellant, and he said that he would call her back in a few minutes. Appellant called D.B. back and said that he would come to her apartment. D.B. told Gagnon the general area where she thought appellant was staying. Gagnon drove to that area and saw a man, later identified as appellant, leave a house at 218 Charles Street and drive away in a car. Gagnon followed the car, which parked about one and a half

blocks from D.B.'s apartment. Appellant left the car, walked to D.B.'s apartment building, entered the doorway leading to D.B.'s apartment, and exited the building about 30 seconds later. Gagnon went into D.B.'s apartment, and she gave him a plastic bag that contained a substance that looked like, and field-tested positive for, cocaine.

A few hours later, D.B. called Gagnon and said that she could make another controlled buy from appellant. D.B. called appellant to arrange the buy, and appellant said that he would be at D.B.'s apartment in a few minutes. This time, Gagnon waited inside D.B.'s apartment. When appellant came to the building, D.B. walked downstairs to the front door. Through a window in the door at the top of the stairs, Gagnon watched D.B. meet with appellant for a few seconds. Gagnon stepped away to avoid being seen by appellant. About 30 seconds later, D.B. returned to the apartment and gave Gagnon a plastic baggie that contained a substance that looked like, and field-tested positive for, cocaine.

On February 2, 2007, D.B. called Gagnon and said that she wanted to attempt another buy from appellant. Gagnon and Officer Doug Cichosz went to D.B.'s apartment. D.B. called appellant, who said that he would be at her apartment in about 15 minutes. Gagnon went outside, and Cichosz stayed in the apartment with D.B.. Petroff, who was conducting surveillance at 218 Charles Street, reported to Gagnon that he saw a person that he believed was appellant preparing to leave in a minivan. The minivan went in the direction of D.B.'s apartment. Gagnon watched as a minivan parked near D.B.'s apartment, a man got out and went inside the apartment building for a few seconds, and then the man left, returned to the minivan, and drove away. Petroff followed the minivan

as it drove around for awhile and then went back to 218 Charles Street. D.B. gave Cichosz two plastic baggies that contained a white powdery substance that field-tested positive for cocaine.

On February 5, 2007, Petroff met D.B. at her apartment, and she called appellant. But he did not answer. Appellant called D.B. and told her to meet him at a bar. Petroff went to conduct surveillance at the bar, and Cichosz stayed with D.B. at her apartment. Petroff saw a van stop near D.B.'s apartment, and appellant got out of the van and started walking toward D.B.'s apartment. Petroff contacted Cichosz and advised him of the apparent change in plans. While Cichosz hid in the bathroom, D.B. walked out of her apartment and down the stairs to the front of the building. D.B. returned about 30 seconds later and gave Cichosz a plastic baggie that contained a white powdery substance that looked like, and field-tested positive for, cocaine.

On February 8, 2007, D.B. called Gagnon and said that she wanted to try another controlled buy with appellant. Gagnon went to D.B.'s apartment, and D.B. called appellant, who said he would bring $100 worth of cocaine to her apartment in about 15 minutes. When appellant called to say he was outside the apartment building, Gagnon saw appellant approaching and walked with D.B. to the top of the stairwell. On the audio recording of the buy, Gagnon heard D.B. comment to appellant that the cocaine was soft and appellant reply that he thought D.B. would like it better. D.B. returned a few seconds later and gave Gagnon a plastic baggie that contained a white powdery substance that looked like, and field-tested positive for, cocaine.

The packages from all five sales were sent to the Bureau of Criminal Apprehension for testing. Testing confirmed that the packages from the first three sales contained cocaine. The packages from the last two sales did not contain cocaine but, instead, contained substances that are commonly known as Benadryl.

Police arrested appellant and executed a search warrant at his home. On a desk in a bedroom that appellant shared with his girlfriend, officers found plastic sandwich baggies that were consistent with the type used to package cocaine, two digital scales of a type used by dealers to package cocaine, a prescription bottle in appellant's girlfriend's name with trace amounts of a white powdery substance that tested positive for cocaine, and a tooth-and-crown saver with trace amounts of a substance that tested positive for cocaine. Officers also found several marijuana blunts, capsules that contained a white powder that was not cocaine but was not positively identified, and about $1,000 in cash that did not match the photocopied money used in the controlled buys.

Appellant was charged by separate complaints with five counts of third-degree controlled-substance crime in violation of Minn. Stat. § 152.023, subd. 1(1) (2006) (sale), and one count of fifth-degree controlled-substance crime in violation of Minn. Stat. § 152.025, subd. 2(1) (2006) (possession). Two of the third-degree charges were later amended to two counts of simulated controlled-substance crime in violation of Minn. Stat. § 152.097, subd. 1(a) (2006) (sale). All six complaints were joined for trial. Appellant waived his right to a jury trial, and the case was tried to the court. The district court found appellant guilty as charged and sentenced him according to the guidelines to an executed prison term. This appeal followed.

D E C I S I O N

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). The reviewing court must assume that the fact-finder believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the fact-finder, 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); *see also State v. Holliday*, 745 N.W.2d 556, 562 (Minn. 2008) (stating that when determining whether evidence is sufficient to sustain convictions, appellate court applies same standard of review to criminal bench trials as to jury trials).

Appellant argues that the evidence was insufficient to support his convictions because police did not employ sufficient safeguards to corroborate D.B.'s accounts of the controlled buys. Appellant contends that because officers searched only D.B.'s pockets and did not have her under constant surveillance during the controlled buys, D.B. could have hidden cocaine on her person or in her apartment before the buys and presented that cocaine to police falsely claiming that she obtained it from appellant. D.B. testified that during the controlled buys, she hid the audio recorder in her pants because she had been searched many times by both dealers and police and had never been searched there. This

testimony suggests that it would have been possible for D.B. to hide cocaine. But D.B.'s accounts of the controlled buys were corroborated by audio recordings of the phone conversations between D.B. and appellant before each of the controlled buys and of the controlled buy that occurred on February 8 and by video recordings of appellant coming to D.B.'s apartment on February 1, all of which were admitted into evidence at trial. D.B.'s accounts were also corroborated by the observations of officers who saw appellant arrive at D.B.'s apartment after D.B. called appellant to set up the buys.

Appellant also argues that because D.B.'s credibility was suspicious, it must cast doubt on the entire controlled-buy operation. Appellant cites evidence of an incident that occurred a few months after appellant was arrested during which D.B., purportedly assisting Gagnon in a controlled buy from another suspect, took the cocaine and gave Gagnon a plastic baggie that contained baking soda. The transaction took place inside the suspect's apartment, and D.B. was out of Gagnon's sight for a few minutes while she was inside the apartment. Gagnon was immediately suspicious because the baggie that D.B. gave him was not tied correctly and there appeared to be too much product in it. Gagnon conceded that appellant had hidden the baking soda on her person well enough to avoid detection during the search before the buy.

The district court specifically addressed this incident in its findings and determined that the evidence of D.B.'s unsuccessful attempt to keep the cocaine from the later buy showed that she was not good at duping the police. Based on this determination, the district court could reasonably reject appellant's argument that D.B.

might have been duping the police during the buys from appellant because these buys did not include similar unsophisticated deception efforts.

Appellant also cites items that were not found during the search of his home and vehicle (cocaine, Benadryl, any of the photocopied money) and D.B.'s history of lying to support his argument that the evidence was insufficient to support his convictions. But the fact that these items were not found and presented at trial as additional evidence does not demonstrate that, based on the evidence that was presented, the district court could not reasonably conclude that appellant was guilty of the charged offenses. *See Moore*, 438 N.W.2d at 108 (reviewing court must assume that jury believed state's witnesses and disbelieved any contrary evidence); *State v. Gardin*, 251 Minn. 157, 161, 86 N.W.2d 711, 715 (1957) (stating district court's findings entitled to same weight as jury verdict in criminal case); *see also State v. Triplett*, 435 N.W.2d 38, 44-45 (Minn. 1989) (concluding jury could believe witness's testimony despite evidence that she lied to police, used drugs, and forged checks).

Affirmed.