STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1495

State of Minnesota,
Respondent,

vs.

Andrew James Frederick,
Appellant.

Filed September 5, 2017
Affirmed
Klaphake, Judge[*]

Stearns County District Court
File No. 73-CR-13-8849

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

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

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

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

KLAPHAKE, Judge

Appellant challenges his second-degree controlled-substance convictions, arguing that they are not supported by sufficient evidence because the state relied on extrapolation from limited chemical testing of prescription narcotic drugs. Because the chemical testing and other evidence was sufficient to allow the jurors to reach the verdict that they did, we affirm.

D E C I S I O N

Appellant Andrew James Frederick was convicted by a jury of two counts of second-degree possession of a controlled substance, with intent to sell, after a large quantity of prescription narcotic drugs were seized from his business.[1] Appellant challenges his convictions, alleging that the state failed to prove beyond a reasonable doubt that he possessed the requisite amounts of controlled substances under Minn. Stat. § 152.022, subds. 1(2) and 1(3) (2012). Appellant argues that because the Bureau of Criminal Apprehension (BCA) failed to test 10 or more grams of the pills that were that were visually identified as containing acetaminophen with either hydrocodone or oxycodone, and at least 50 of the pills visually identified as containing amphetamine, to verify that they contained controlled substances. Appellant asks this court to vacate his second-degree controlled-substance convictions.

[1] Appellant was also convicted of one count of fifth-degree possession of a controlled substance, but does not appeal that conviction.

For the jury to convict appellant of count one, the state was required to prove beyond a reasonable doubt that appellant possessed ten or more grams of acetaminophen with hydrocodone or acetaminophen with oxycodone. Minn. Stat. § 152.022, subd. 1(2). Of the 52 pills visually identified as containing those substances, the BCA tested four and confirmed the presence of acetaminophen with either hydrocodone or oxycodone.[2] For the jury to convict appellant of count two, the state was required to prove beyond a reasonable doubt that appellant possessed 50 or more dosage units of a mixture containing amphetamine. Minn. Stat. § 152.022, subd. 1(3). Of the 61 pills visually identified as containing amphetamine, the BCA tested three and confirmed the presence of amphetamine.

In considering a claim of insufficient evidence, this court's review is limited to a thorough review of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was 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 assumes 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 he defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77

[2] The 52 pills had a total weight of 31.721 ± 0.005 grams. The weight of the four pills tested by the BCA and chemically confirmed to contain a mixture of acetaminophen with either hydrocodone or oxycodone was 2.74731398 ± 0.005 grams.

(Minn. 2004). Further, this court will uphold a "jury's chemical-identity fact findings unless the findings are clearly erroneous." *State v. Gruber*, 864 N.W.2d 628, 639 (Minn. App. 2015).

To establish possession of a controlled substance under Minn. Stat. § 152.022, subds. 1(2) and 1(3), the state must prove the nature and weight of the substance beyond a reasonable doubt. *See State v. Papadakis*, 643 N.W.2d 349, 354 (Minn. App. 2002). Failure to adequately test contraband within the state's possession may result in failure to establish the nature and weight of the substance. *State v. Robinson*, 517 N.W.2d 336, 339 (Minn. 1994).

During the investigation, an officer with the St. Cloud Police Department and the Drug Task Force examined the seized pills, removed them from their bottles, and identified those that appeared to be controlled substances by looking at their markings and verifying the markings through drugs.com. The pills were then sent to the BCA for chemical testing. The parties stipulated to admission of the resultant BCA lab report. The pills were also admitted into evidence. When the BCA tested the pills, the forensic scientist "visually identified [them] as a pharmaceutical product containing [a controlled substance]," then randomly selected one of each type of tablet or capsule for chemical testing to confirm its contents. No additional evidence was presented regarding the identification process.

Appellant relies on the *Robinson* decision to support his argument that the chemical testing was insufficient because the state failed to test a sufficient number of the suspect capsules. Appellant notes that in *Robinson* the state recovered 13 packets of an unknown substance that appeared to be cocaine, and only tested the contents of seven of them to

confirm that they contained cocaine. *Robinson*, 517 N.W.2d at 338. This random sampling was deemed insufficient to establish the contents of the untested packets despite the uniformity of the packets, particularly because drug dealers are known to "substitute placebos for the real thing." *Id.* at 339. He also relies on *State v. Carpenter*, asserting that his convictions must be vacated because the state "failed to offer any good reason why it failed to test the amount corresponding to the statutory charge." 893 N.W.2d 380, 388 (Minn. App. 2017).

But the conclusion in *Robinson* does not apply to the testing of identifiable pharmaceuticals in the way it applies to the testing of wholly unknown substances. The uniformity of pharmaceuticals, from the size and shape of pills, to the numbers, colors, and other markings on the pills, creates a much stronger circumstantial inference that the substances within each pill are identical than any inference that can be drawn from two unlabeled packets of similar appearance. *Gruber*, 864 N.W.2d at 640. The *Robinson* court made this distinction when it noted that, "[t]here may be instances where the seized material consists of pills or tablets where the individual items are so alike and the risk of benign substitutes so unlikely that random testing may legitimately permit an inference beyond a reasonable doubt that the requisite weight of the whole mixture is established." 517 N.W.2d at 240; s*ee also State v. Traxler*, 583 N.W.2d 556, 561 (Minn. 1998) (noting that "*Robinson* does not . . . preclude the state from establishing the weight of a mixture through extrapolation from random samples"). The distinction was also made in *Carpenter*, a case where the state only tested 19 of 64 unlabeled packets for the presence of heroine. 893 N.W.2d at 387. This court concluded that, like in *Robinson*, extrapolation

of weight from the random sampling was insufficient because heroine was "not the kind of substance whose risk of substitutes [was] so benign that extrapolation [was] permissible." *Id*.

Appellant also argues that the state's admission of the BCA lab report without accompanying expert testimony about the forensic scientist's visual identification process precludes the extrapolation that the similar pills contained the same substances. But in this case the parties stipulated to admission of the BCA lab report, so although the forensic scientist should have been more thorough in describing the identification process, the report was not objected to and this argument goes to the weight of evidence, not its admissibility. We must assume that the jury believed the state's evidence. *See Moore*, 438 N.W.2d at 108.

Although this court agrees that the state's presentation of evidence should have included more detailed information regarding the officer's and the BCA forensic scientist's visual identification processes, the state presented minimally sufficient evidence to support appellant's convictions in this case. *See Gruber*, 864 N.W.2d at 640 (finding that the pharmaceutical markings on the pills, along with the other evidence identifying the pills as controlled substances, was sufficient to establish beyond a reasonable doubt that the pills were narcotic drugs even absent chemical testing). The *Robinson*, *Gruber*, and *Carpenter* cases do not prevent the state from relying on extrapolation in a case involving pharmaceuticals, or on the other evidence that the jury heard and saw, including statements by appellant that the pills he possessed contained controlled substances, and the text messages appellant sent regarding the sale and purchase of controlled substances. Based

on the evidence presented, we cannot conclude that the jury's chemical-identity factual findings were clearly erroneous. *Gruber*, 864 N.W.2d at 639.

A thorough review of the record, while viewing the evidence in the light most favorable to the conviction, reveals that there was sufficient evidence for the jurors to reach the verdict that they did. *Webb*, 440 N.W.2d at 430. Appellant's convictions should not be disturbed because a jury could have reasonably concluded that he possessed the requisite amounts of controlled substances. *Bernhardt*, 684 N.W.2d at 476-77.

Affirmed.