STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0086

State of Minnesota,
Respondent,

vs.

Curtis Michael Gould,
Appellant.

Filed November 20, 2017
Affirmed in part, reversed in part, and remanded
Connolly, Judge

Redwood County District Court
File No. 64-CR-14-104

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

Jenna Peterson, Redwood County Attorney, Redwood Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of conspiracy to commit first-degree controlled-substance crime, arguing that the state failed to prove beyond a reasonable doubt

that he intended to sell drugs and because he abandoned any criminal purpose and made reasonable efforts to prevent the commission of the crime. Appellant also challenges his sentence, arguing that he is entitled to be resentenced in accord with the provisions of the 2016 Drug Sentencing Reform Act (2016 Minn. Laws ch. 160) (DSRA). Because the evidence supports the district court's conclusion that appellant was guilty of conspiring to commit first-degree controlled-substance crime, we affirm the conviction, but because the supreme court has determined that the amelioration doctrine applies to defendants whose cases were not yet final when the DSRA took effect, we reverse appellant's sentence and remand for resentencing.

FACTS

On February 12, 2014, H. and M., both off-duty undercover agents of the Brown-Lyon-Redwood-Renville Drug Task Force (BLR-DTF), encountered appellant Curtis Gould and a woman, A., first at one bar, then at another. At the second bar, appellant and A. sat down at a table with H. and M.

They talked about various topics. A. told them she had defrauded the welfare system. From her use of certain terms, M. inferred that she was or had been engaged in using and selling drugs. A. also indicated that she could obtain cocaine.

At that point, H. and M. transitioned to on-duty undercover agents. They asked A. if she could get narcotics. A. said she could, and appellant offered to facilitate the transaction. The four went to appellant's apartment, where appellant talked about the cost, who would pick up the cocaine, and who would contact whom. At some point in the

evening, appellant exchanged phone numbers with H.; he later provided H. with A.'s phone number.

During the next week, H. exchanged 55 text messages with appellant and 39 with A. After some vacillation, H. ultimately purchased cocaine that weighed 12.538 grams for $1,000 from A. in A.'s car. A. was arrested; appellant was arrested later. M. interviewed appellant in jail.

On February 21, 2014, appellant was charged with one count of conspiracy to commit first-degree controlled-substance crime. He entered an *Alford* guilty plea and was sentenced to a stay of adjudication and placed on probation. Because of probation violations, the stay was vacated, and appellant was sentenced to a presumptive sentence of 86 months in prison, stayed, with five years of probation. Following another violation, his probation was revoked, and his sentence was executed.

In 2016, appellant petitioned for postconviction relief. The petition was granted, and he withdrew his guilty plea. Following a court trial in August 2016, appellant was found guilty. He was sentenced to 74 months in prison, which is the presumptive guidelines sentence for a first-degree controlled-substance offense by a person with a criminal-history score (CHS) of zero.

Appellant filed a direct appeal in January 2017. He challenges his conviction on the ground that the evidence was insufficient and his sentence on the ground that he is entitled to be resentenced under *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017).

D E C I S I O N

1. Sufficiency of the Evidence

This court applies the same standard to bench trials as to jury trials when reviewing the sufficiency of the evidence. *In re Welfare of M.E.M.*, 674 N.W.2d 208, 215 (Minn. App. 2004). That standard, here, is whether the district court, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably have concluded that appellant was proved guilty of conspiring to commit first-degree controlled-substance crime. *See Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant's own testimony provided a basis for the conclusion that he was guilty of conspiracy to commit first-degree controlled-substance crime. He testified on direct examination that: (1) he and H. exchanged phone numbers at the first bar; (2) A., H., and M. came to his apartment after leaving the second bar and talked about drug dealing; (3) he continued to text H.; and (4) he volunteered to pick up A.'s children from school while she was getting the cocaine. On cross-examination, appellant admitted: (1) exchanging a series of text messages with H. on February 14-19; (2) exchanging voicemail messages with H.; (3) calling a welfare fraud investigator (WFI) but never calling law enforcement concerning A.'s drug dealing; (4) talking to H. "about dollar amounts, $2,200.00 for an ounce of cocaine"; (5) knowing A. "was going to Minneapolis to get these drugs"; (6) telling H. when A. left to go to Minneapolis, when she was going to be back, and when she was on her way back with drugs and ready to sell them; (7) passing A.'s information to H. of his own free will; (8) not being threatened by A.; (9) never calling law enforcement

about A. selling illegal drugs or wanting to sell illegal drugs; (10) relaying A.'s statements to H.; and (11) not being threatened or forced by A. to contact H., to leave voicemail messages on H.'s phone, or to participate in the communication that led to A.'s sale of drugs to H.

Documentary evidence supports appellant's testimony. On February 14, appellant received a text from H. saying, "I'll deal with . . . just u . . . But I got cash and orders to fill! Hit me when ur side is good and we will do business," to which appellant replied, "Ok, got it." On February 16, H. texted appellant, "I need a price from her [A.]"; and appellant replied, "I know you need p" and later, "2200 per zipper [ounce] . . . ." Appellant later texted H. that he should send a moneygram to the Walmart in New Ulm; H. replied, "I ain't fronting nothing. . ."; appellant said "[A.] states put x [$] up or no deal."

Appellant and H. also communicated by voicemail on February 16. Appellant told H. that A. wanted his "complete shopping list" and that she wanted half the money; later appellant told H. that

> you can hang onto it [the money] til she comes home and then we'll meet in a public place with no cameras . . . and then you guys can do your stuff ah but I need to hear from you if you wanna do this cuz she's not putting up her money cuz there's no way to trust you, can't check anything out, I've got my private investigator buddy [i.e., WFI] checking your phone number so ah ya know that hasn't come back yet but ya know life is life and things change and things take a while so ah ya know if you want this to work I believe it can happen but you gotta, you gotta do something, just show an effort, she's got the product and I know it. And the reason I know it is I know where she got it from so call me back—voice to voice.

Appellant's references to "we," to having his "private investigator" check on H., and to knowing where A. got the drugs all indicate that appellant knew there was an agreement to commit a crime and had the intent to commit the crime, both elements of a conspiracy offense. *See State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) ("[B]oth knowledge of an agreement and evidence of intent to commit the crime or act that is the object of the conspiracy" are required for a conspiracy offense.).

On February 18, H. sent appellant a photograph of a pile of money. Appellant replied, "[N]ext time. L go to msp/st. Paul u will play ball." On February 19, appellant said, "[A.] just left . . . [She] mite be a litl late," and "Have her kids. As sitter. She will notify me o u." From appellant's testimony and his text and voicemail correspondence with H., the district court could reasonably have concluded that appellant was proven guilty beyond a reasonable doubt.

Appellant argues that, "[e]ven if there is sufficient evidence that [he] conspired with [A., he] is nonetheless not liable as a co-conspirator because he abandoned any criminal purpose and made reasonable efforts to prevent the crime by his actions with [WFI]." WFI's testimony defeats this argument.

WFI testified that: (1) appellant had contacted him by phone about A.'s efforts to use appellant's identification to get money from money grams her family sent her because appellant "was concerned that if that would come out that it may look like he was committing fraud"; (2) appellant contacted him about A. committing "other crimes potentially um, substance crimes . . . . I believe [appellant] was referring to drugs"; (3) appellant "said that [A.] was um, dealing drugs and could get anything she wanted from

the . . . Twin City area"; (4) appellant "had met with um, somebody by the name of Rob, [i.e., H., who] was continuing to contact [appellant] regarding a drug deal"; (5) when WFI offered to put appellant in contact with someone in law enforcement who had knowledge of drug offenses, appellant said WFI could contact law enforcement but appellant "wanted to remain anonymous"; (6) appellant never indicated that he had called law enforcement about his concerns with the drug dealing; and (7) appellant did not explain why he wanted to remain anonymous.

The records of appellant's communication with H. and A. show that he was simultaneously telling WFI that he was concerned about the drug dealing and facilitating communication between A. and H. so the sale could occur. There is no evidence that appellant abandoned the conspiracy or intended it to fail: he did not contact law enforcement, he continued to act as a go-between for A. and H., he watched A.'s children so she could get the drugs, he kept H. informed of A.'s progress, and he refrained from telling WFI or anyone else about the drug sale he knew would occur.

Nothing in the record supports appellant's assertion that he withdrew from the conspiracy and tried to prevent the crime. There was sufficient evidence to conclude that appellant was guilty of conspiracy to commit first-degree controlled-substance crime.

2. Effect of the DSRA on Appellant's Conviction and Sentence

Appellant argues that he is entitled to be resentenced under the DSRA. A defendant is required to be resentenced under the DSRA-amended sentencing grid "only if: (1) the Legislature made no statement that clearly establishes the Legislature's intent to abrogate the amelioration doctrine; (2) the amendment mitigated punishment; and (3) final judgment

had not been entered as of the date the amendment took effect." *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017).

As to the first requirement, *Kirby* concluded that, in the DSRA, "the Legislature did *not* intend to abrogate the amelioration doctrine." *Id*. at 491. Thus, the first requirement is met.

As to the second requirement, the issue is "whether the Legislature reduced the presumptive sentences from those in the sentencing grid under which [the defendant] was sentenced." *Id.* at 495. In 2014, when appellant committed his crime, the sentencing range for first-degree controlled substance crime committed by a person with a CHS of zero was 74-103 months, with a presumptive sentence of 86 months. Minn. Sent. Guidelines 4.A (2014). Section 18 of the DSRA, which became effective on May 23, 2016, reduced that sentencing range to 56-78 months, with a presumptive sentence of 65 months. Thus, the DSRA did reduce appellant's presumptive sentence, and the second requirement is also met. *See Kirby*, 899 N.W.2d at 495-96 ("The [DSRA] plainly mitigates punishment" where it reduced the offender's presumptive sentencing range "from 138 to 192 months to 110 to 153 months.").

As to the third requirement, here, as in *Kirby*, appellant's conviction was not yet final on May 23, 2016, so that requirement is also satisfied. *See id*. at 490. Under *Kirby*, appellant is entitled to have his sentence reversed and to be resentenced under the DSRA.

Affirmed in part, reversed in part, and remanded.