STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1527

State of Minnesota,
Respondent,

vs.

Montreial Lavell Monroe,
Appellant.

Filed August 6, 2018
Affirmed in part, reversed in part, and remanded
Jesson, Judge

St. Louis County District Court
File No. 69DU-CR-16-4036

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

Mark Rubin, St. Louis County Attorney, Christopher J. Pinkert, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Cleary, Chief Judge; and Jesson, Judge.

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

JESSON, Judge

While surveilling appellant Montreial Lavell Monroe, law enforcement witnessed him pull up behind a black minivan, which was parked near a city park. Monroe got out

of his car, and into the minivan, only to reemerge just moments later. Believing they had just witnessed a drug deal, officers arrested Monroe. A search of Monroe's clothing revealed a substance that tested positive for heroin, and Monroe was convicted of and sentenced for second-degree possession of a controlled substance with intent to sell in a park zone. He now challenges that conviction, arguing there was insufficient evidence to prove that he had intent to sell the heroin. He was also convicted of third- and fifth-degree offenses for the same incident, and challenges those convictions, arguing they are lesser-included offenses. We affirm in part, reverse in part, and remand.

FACTS

On October 13, 2016, members of the Lake Superior Drug and Violent Crimes Task Force were conducting surveillance of appellant Montreial Lavell Monroe, whom they suspected of dealing heroin. Officers followed Monroe as he left a residence and drove throughout the city of Duluth for approximately 30 minutes, before pulling over and parking behind a black minivan within feet of a city park. Monroe approached the minivan and got in, only to reemerge moments later.

Officers believed they had just witnessed a drug deal and descended upon Monroe and the occupants of the minivan. There were three people in the minivan—L.C., her brother N.C., and L.C.'s three-year old son. Officers placed Monroe under arrest and questioned the adult occupants of the minivan. L.C. at first told police that she met with Monroe only to repay $30 that she owed him. But then L.C. admitted that she purchased approximately a "point" of heroin from Monroe for the $30, and she swallowed the heroin when law enforcement approached. Officers took L.C. to the hospital, but after she was

informed that she too was under arrest, L.C. left the hospital before any tests could be completed.

Officers brought Monroe to the Duluth Public Safety Building, where they conducted a strip search. This included the removal and inspection of each item of Monroe's clothing.[1] An officer searched the jeans Monroe was wearing and felt a rock-like object along the zipper. Further investigation revealed a slit in the jeans, creating a small pocket behind the zipper. The pocket was too small to allow the officer to remove the object with his fingers, so the jeans were cut open to reveal two individually wrapped plastic bags. Those objects were sent to the BCA, and tests determined the larger of the two contained heroin.[2] Officers also found cash in Monroe's jean's pockets separated into two amounts, $88, and $30.

Monroe was charged with second-degree sale of a controlled substance in a park zone,[3] and third-degree sale of a controlled substance.[4] He pleaded not guilty, and the case proceeded to a two-day jury trial. At the beginning of the trial, the state amended the complaint to include counts of second-degree possession of a controlled substance with

[1] While Monroe was also searched at the scene, this was not a comprehensive search. The officer was mainly searching for any weapons.
[2] The BCA only tested the larger of the two objects because the weight of the drug did not matter to the charges in this case.
[3] In violation of Minnesota Statutes section 152.022, subdivision 1(7) (2016).
[4] In violation of Minnesota Statutes section 152.023, subdivision 1(1) (2016).

intent to sell in a park zone,[5] third-degree possession of a controlled substance with intent to sell,[6] and fifth-degree possession of a controlled substance.[7]

At trial, L.C. testified that she purchased heroin from Monroe on the day of his arrest, that she knew Monroe, and that she had purchased heroin from him in the past. L.C. explained that her testimony was required as a part of her plea agreement for a charge against her for child endangerment for having her three-year-old son in the car that day. L.C. also testified that she has felony convictions on her record, including theft, fraud, and criminal damage to property.

The other witnesses on behalf of the state were Duluth law enforcement officers who conducted the surveillance,[8] made the arrests, and booked and searched Monroe at the Public Safety Building; BCA forensic specialists; and a property service manager for the city who verified that the incident took place within 14 feet of a city park. The defense did not present any witnesses.

The jury acquitted Monroe of second- and third-degree sale of a controlled substance, but found him guilty of second-degree possession of a controlled substance with intent to sell in a park zone, third-degree possession of a controlled substance with intent to sell, and fifth-degree possession of a controlled substance.

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[5] In violation of Minnesota Statutes section 152.022, subdivision 1(7).
[6] In violation of Minnesota Statutes section 152.023, subdivision 1(1).
[7] In violation of Minnesota Statutes section 152.025, subdivision 2(1).
[8] While the jury was informed that Monroe was under surveillance because law enforcement suspected he was selling drugs, this information was provided only as context as to why police were watching him. The jury was specifically instructed to not use this fact in its determinations of whether Monroe was guilty of the charged offenses.

The district court sentenced Monroe only for second-degree possession of a controlled substance with intent to sell in a park zone, to 68 months in prison. And while the district court never articulated, in the record, whether convictions should be entered on the other two counts for which the jury found him guilty, convictions for third-degree possession of a controlled substance with intent to sell, and fifth-degree possession of a controlled substance, were entered and listed on Monroe's warrant of commitment.

Monroe appeals all three convictions.

D E C I S I O N

I. There was sufficient evidence to prove Monroe's intent to sell the heroin he possessed.

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).

Intent to sell a controlled substance is typically proved by circumstantial evidence, "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted); *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). In order for circumstantial evidence to be sufficient to support a conviction, the evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). To evaluate sufficiency of circumstantial evidence, the

reviewing court must apply a two-step analysis—first it must identify the circumstances proved and then determine whether the circumstances proved are consistent with guilt, as well as inconsistent with any rational hypothesis other than guilt. *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013).

The circumstances proved here are: Monroe met with L.C., a known heroin user; law enforcement officers witnessed this meeting; the meeting took place within 14 feet of a city park; L.C. bought heroin from Monroe for $30; when arrested, Monroe had heroin in his possession; the heroin was in a hard-to-reach slit-pocket in Monroe's jeans; the heroin weighed less than a gram; the heroin was packaged in baggies; and Monroe also had $113, split up with $30 in one stack and the remaining amount in the other.

These circumstances—specifically that Monroe had just engaged in a sale of heroin; he had the exact money paid for the heroin in one stack; and the heroin he possessed was individually wrapped—support Monroe's intent to sell the heroin in his possession, and are consistent with guilt. *See Porte*, 832 N.W.2d at 310 (stating that the facts that the defendant distributed a controlled substance in the recent past and that the drugs were individually packaged can infer an intent to sell). They are also inconsistent with any rational hypothesis other than guilt. Monroe asserts that a reasonable hypothesis is that he possessed the heroin for personal use. But that is simply inconsistent with the fact that he had just engaged in a sale, had the money from that sale, and had individually wrapped portions of heroin. Based on the circumstances proved, the jury determined that Monroe intended to sell the heroin. And a jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430.

Monroe argues that this court should not consider the testimony of L.C. in determining the circumstances proved, because the jury acquitted Monroe of second- and third-degree sale of a controlled substance. Monroe asserts that this indicates the jury did not find L.C.'s testimony credible. He attempts to differentiate his case from *State v. Montermini*, 819 N.W.2d 447, 461 (Minn. App. 2012), where this court determined the opposite. We are unpersuaded. In *Montermini*, the jury found the defendant guilty of third-degree murder, among other charges, but acquitted him of kidnapping charges. *Id.* at 460-61. This court rejected the defendant's argument on appeal that the circumstances proved may not include any circumstances underlying the kidnapping charges because the acquittals rendered these circumstances unproven. *Id*. at 461. Instead, this court stated that "[t]he acquittals here shed no light on which circumstances the jury believed or disbelieved; the acquittals only demonstrate that the jury believed the state failed to establish the elements of kidnapping" and that the elements of the kidnapping offense were irrelevant to the murder. *Id*. Monroe argues that his case is different from *Montermini* because the offenses at hand are related, and thus the acquittal sheds light on what the jury believed.

However, there is binding precedent from the Minnesota Supreme Court that has squarely considered and rejected Monroe's argument under highly analogous facts. In *State v. Holbrook*, 305 Minn. 554, 556-57, 233 N.W.2d 892, 894 (1975), Holbrook was acquitted by a jury of the sale of heroin but was convicted for intent to sell. *Id.* This was after the jury heard from a witness who testified that she had purchased drugs from Holbrook. *Id*. at 556, 233 N.W.2d at 893. The defense's argument on appeal was that there was insufficient evidence to find him guilty of intent to sell when the jury acquitted

him of actual sale, because the jury must have rejected the witness's testimony. *Id.* at 556-57, 233 N.W.2d at 894. The supreme court disagreed, stating: "[t]here are several possible explanations, logical and otherwise, for the jury's finding defendant guilty only of the charge of possession with intent to sell. The jury in the exercise of its power of lenity could have believed all of [the witness's] testimony and yet have convicted defendant of only the possession charge." *Id.*; *see also Montermini*, 819 N.W.2d at 461 (acquittals may "simply be an expression of the jury's power of lenity"). Because of these possibilities, the court refused to presume that the jury rejected the witness's testimony and declined to consider whether there was sufficient evidence to convict the defendant without it. *Id.* at 557, 233 N.W.2d at 895.

The analysis in *Holbrook* squarely applies here because there are multiple explanations for the jury's ultimate decision to find Monroe guilty of possession with intent to sell, and not guilty of actual sale. First, because there were inconsistencies in L.C.'s story—she initially told police she was only meeting with Monroe to repay a debt and not to purchase heroin—this could have given the jury pause and led it to acquit on actual sale. The jury could have believed, for instance, that L.C. was not sufficiently credible to testify about the sale that day, but credible in that she was a heroin user, she knew Monroe and she had purchased heroin from him in the past. And even if the jury found all of L.C.'s testimony credible, it could have used its power of lenity to acquit him of actual sale. Because of the several possible explanations for the jury's decision in this case we, like the court in *Halbrook*, refuse to presume that the jury rejected L.C.'s testimony. L.C.'s

testimony thus remains a part of the circumstances proved and supports Monroe's intent to sell the heroin he possessed. The evidence presented is sufficient to support his conviction.

II. Monroe was improperly convicted of lesser-included offenses.

A court can convict an individual of "either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2016). An included offense includes lesser degrees of the same crime, or "crime[s] necessarily proved if the crime charged were proved." *Id*. Monroe argues his two other convictions—third-degree possession of a controlled substance with intent to sell and fifth-degree possession of a controlled substance are included offenses under his second-degree possession of a controlled substance with intent to sell in a park zone conviction.[9] We agree.

The second- and third-degree sale elements are entirely the same, with the exception of the park zone requirement for the second-degree offense.[10] *See* 10A *Minnesota Practice*, CRIMJIG 20.12; 20.16 (2015). Because of this, the third-degree offense is necessarily proved by the second-degree offense. And the fifth-degree offense only requires possession, also contained in the second-degree offense requiring possession *and* the intent to sell. 10A *Minnesota Practice*, CRIMJIG 20.36 (2015). It too is necessarily proved by the second-degree offense.

[9] The state acknowledges that "[t]here is no doubt the charges of 3rd Degree Sale and 5th Degree Possession for which Appellant was convicted at trial are lesser included offenses."

[10] The elements of second-degree possession of a controlled substance with intent to sell in a park zone are: the defendant possessed and intended to sell the controlled substance; the defendant knew or believed it was a controlled substance; the intended sale would take place in a park zone; the sale would be unlawful; and it took place at a certain time in a certain county. 10A *Minnesota Practice*, CRIMJIG 20.12 (2015).

We conclude that Monroe was improperly convicted for third-degree possession of a controlled substance with intent to sell, and fifth-degree possession of a controlled substance, because those are lesser-included offenses of his second-degree possession of a controlled substance with intent to sell in a park zone conviction.[11] Therefore, we reverse in part and remand with instructions to vacate the third- and fifth-degree convictions.

Affirmed in part, reversed in part, and remanded.

[11] We acknowledge that the record does not clearly indicate that the district court intended to enter convictions for the third- and fifth-degree offenses. The district court, at sentencing, made clear that it was only sentencing Monroe on the second-degree possession of a controlled substance with intent to sell in a park zone offense. And while the jury returned guilty verdicts for the other two offenses, the district court at no point entered those convictions—either at the time of the verdicts, or at sentencing. Nonetheless, the convictions are listed on the warrant of commitment and thus, must be addressed.