STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1097

State of Minnesota,
Respondent,

vs.

Antonio Dupree Wright,
Appellant.

Filed July 22, 2019
Affirmed in part, reversed in part, and remanded
Cochran, Judge

Hennepin County District Court
File No. 27-CR-17-19207

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Florey, Judge; and Cochran, Judge.

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

COCHRAN, Judge

Appellant Antonio Dupree Wright appeals from the judgment of conviction, arguing that (1) the evidence was insufficient to prove that he possessed cocaine with the intent to

sell, (2) that the district court erred by convicting him of possessing and selling the same contraband, and (3) that the district court erred in calculating his criminal-history score by failing to make a finding required by the Minnesota Sentencing Guidelines regarding his out-of-state convictions before factoring them into Wright's score. We affirm the drug-sale conviction because the evidence is sufficient to prove beyond a reasonable doubt that Wright possessed cocaine with the intent to sell. We reverse the district court's imposition of a conviction for drug possession and remand to the district court with instructions to vacate the possession conviction. We also remand to the district court for resentencing and to properly determine whether Wright's out-of-state convictions should be included in the adult section of his criminal-history-score calculation under the Minnesota Sentencing Guidelines.

FACTS

On July 26, 2017, Minneapolis police officers were surveilling a Chevrolet Equinox driven by appellant Antonio Dupree Wright. The car was parked and Wright was its sole occupant. Officer Lessard saw two different people separately get into the Equinox, stay only a minute or less, and then leave. Wright never got out of the Equinox during this time. Officer Lessard had worked hundreds of drug cases, and had purchased drugs dozens of times working as an undercover officer. Though Officer Lessard could not see into the vehicle, he believed that drug transactions were occurring in the Equinox. The short interactions between Wright and the two other individuals were consistent with his experience working drug cases and purchasing drugs while undercover.

After these two interactions, Wright drove out of the area and to a gas station. Officers followed Wright and continued to surveil him. A woman arrived at the gas station in her car, got out, and went into Wright's parked Equinox. She stayed inside for only a short time and then got back into her car and drove away. The woman never went into the gas station, and Wright did not get out of his vehicle while at the gas station. Officer Lessard believed that this interaction was also a drug transaction. A second officer parked at the gas station, Officer Yang, also observed the interaction there. Officer Yang, who also had purchased drugs while undercover, observed that the interaction between Wright and the woman was consistent with his experience making undercover purchases. To buy drugs while undercover, Officer Yang would often drive to a designated public place, get into the seller's car or have the seller get into his car for a short time, and make the transaction. After the transaction was complete, Officer Yang would leave the area.

After observing these interactions, police arrested Wright at the gas station. Officer Babekuhl, who was not involved in surveilling Wright but was asked to assist in the arrest, searched Wright. He found two baggies of narcotics in Wright's pocket. One of the bags contained several individual bindle packages of cocaine. Officer Yang weighed the separately packaged bindles at the scene. Six smaller bindles of cocaine each weighed close to 0.4 grams. One bindle weighed approximately 3.158 grams, and another bindle weighed 2.3 grams. According to Officer Yang, a bindle about the size of the six smaller bindles has a street value of approximately $40.

Police found several other notable items after they arrested Wright. Officer Babekuhl found $430 cash in Wright's pockets and a lighter. Police also found three cell phones in Wright's Equinox. There was also a half-smoked marijuana blunt in the vehicle.

The state charged Wright with third-degree drug sale in violation of Minn. Stat. § 152.023, subd. 1(1) (2016) and fifth-degree drug possession in violation of Minn. Stat. § 152.025, subd. 2(1) (2016) for the cocaine found in his pocket.

At trial, Officers Lessard and Yang testified that, based on their training and experience, Wright's conduct in the Equinox was consistent with drug trafficking. Officer Lessard conceded that he could not see into the Equinox. No officer could see whether the woman who was part of the third transaction was carrying anything before or after she was inside Wright's Equinox. Officer Babekuhl testified that cocaine packaged in bindles is packaged for sale. He agreed that drug users often buy more than one bindle, and that users often keep cocaine they purchase in bindles until they use it, but that "if there's multiple bindles, it's usually for sale." Officer Lessard testified that because a cocaine high lasts only a short time, users sometimes use a lot of it. Officer Lessard believed that the amount of cocaine that Wright possessed could last, depending on the individual user and the purity of the cocaine, two days to a week. Officer Yang testified that possession of multiple cell phones could be indicative of drug dealing because "[u]sually there's a personal phone. The other phone is what street terminology is a bin (phonetic) phone, which is a girlfriend phone, and the third could be a transaction phone for drugs."[1]

[1] Police never searched the data contained on the phones.

Wright did not testify, but his attorney conceded during closing arguments that Wright was guilty of possessing the cocaine. With regard to the sale charge, his attorney argued that the evidence was insufficient to prove beyond a reasonable doubt that Wright possessed the cocaine with the intent to sell it, and that he should therefore be acquitted of the sale charge. The jury found Wright guilty of both third-degree drug sale and fifth-degree drug possession. The district court imposed a conviction for both counts.

A probation agent drafted a felony sentencing report before the sentencing hearing. The report listed Wright's prior convictions and concluded that Wright's criminal-history score under the Minnesota Sentencing Guidelines was seven. The criminal-history score included three points for two Illinois armed robbery convictions that occurred in 1999. Each Illinois conviction was worth one-and-a-half points. The probation agent wrote a note next to each of these convictions that read: "Occurred when the [defendant] was 17 years old. Verified with Illinois DOC that this is an adult conviction." The Illinois court imposed an 11-year prison sentence on each conviction.

The district court relied on the report to conclude that Wright's criminal-history score was seven. Wright did not object to the district court's criminal-history-score calculation at sentencing. The district court sentenced Wright to 57 months' imprisonment, which was the presumptive sentence for third-degree drug sale for an offender with a criminal-history score of seven.

Wright appeals the convictions and his sentence.

D E C I S I O N

Wright argues that the evidence was insufficient to support his conviction for drug sale, that the district court erred in imposing convictions for both drug sale and drug possession, and that the district court abused its discretion by sentencing him based on a criminal-history score of seven without first finding that the Illinois convictions that occurred when he was 17 would have been certified to adult court had they occurred in Minnesota. We address each issue in turn.

I. The evidence is sufficient to support Wright's conviction for third-degree drug sale.

Wright concedes that he possessed the cocaine found in his pocket. He challenges the sufficiency of the evidence supporting his conviction for third-degree drug sale, arguing that the evidence was not sufficient to prove he intended to sell the cocaine he admittedly possessed.

In reviewing whether a conviction was supported by sufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). "[W]e 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 the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

The district court convicted Wright of third-degree drug sale under Minn. Stat. § 152.023, subd. 1(1), which provides that a person is guilty of that crime "if the person unlawfully sells one or more mixtures containing a narcotic drug." To "sell" means to "sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture." Minn. Stat. § 152.01, subd. 15a(1) (2016). Possession with the intent to do any of these acts also constitutes a sale. *Id.*, subd. 15a(3) (2016).

The state argued to the jury that Wright possessed the cocaine with the intent to sell it. Intent to sell is usually proved with circumstantial evidence. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). In this case, the only evidence of Wright's intent to sell cocaine is circumstantial evidence, namely evidence of Wright's interaction with others, the manner in which the cocaine was packaged, the amount of cocaine that he possessed, other items found on Wright and in his car, and the amount of money that Wright had when he was arrested.

When the conviction is based on circumstantial evidence, this court applies a two-step analysis. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). First, we identify the circumstances proved at trial, disregarding evidence that is not consistent with the jury's verdict. *Id.* Second, we "consider the reasonable inferences that can be drawn from the circumstances proved." *Id.* "We give no deference to the jury's choice between reasonable inferences at this second step." *Id.* The evidence is sufficient if the circumstances proved, viewed as a whole, are "consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.*

"We review the circumstantial evidence not as isolated facts, but as a whole." *State v. Sterling*, 834 N.W.2d 162, 175 (Minn. 2013).

We first identify the circumstances proved at trial: (1) Police saw two people, at different times, get into Wright's parked vehicle and get out shortly thereafter; (2) those people left the area after they got out of Wright's vehicle; (3) Wright then drove to a gas station; (4) a woman arrived at the gas station, got into Wright's vehicle, got out a short time later, and drove off in her own car shortly thereafter; (5) while he was under surveillance, Wright never got out of his vehicle; (6) the woman involved in the third interaction did not go into the gas station; (7) these three interactions were each consistent with police officers' experience buying drugs while undercover; (8) police arrested Wright and found two bags in his pocket that contained drugs; (9) one of the bags contained several individually packaged bindles of cocaine of various weights; (10) six bindles weighed approximately 0.4 grams and the largest bindles weighed 2.3 grams and 3.158 grams; (11) cocaine sellers usually package cocaine in bindles to sell it, and although drug users often buy multiple bindles of cocaine and keep them in bindles until they use them, possession of multiple bindles usually means that the bindles are for sale; (12) the amount of cocaine that Wright possessed in the bindles at the time of his arrest could last a user from two days to a week, depending on the user and the purity of the cocaine; (13) police also found $430 cash in Wright's pocket and a lighter; (14) there was a half-smoked marijuana blunt in Wright's car; (15) Wright had three phones; and (16) possession of three phones could be a sign that a person is having an affair and dealing drugs.

Next, we determine whether the circumstances proved, viewed as a whole, are "consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Harris*, 895 N.W.2d at 601. "Circumstantial evidence of an intent to sell controlled substances may include evidence as to the large quantity of the drugs possessed, evidence as to the manner of packaging, and other evidence." *Porte*, 832 N.W.2d at 309 (quotations omitted). Other evidence of a defendant's intent to sell may include possession of packaging materials or a scale. *State v. Hanson*, 800 N.W.2d 618, 623 (Minn. 2011). Moreover, evidence that the defendant had a significant amount of cash, that he had contact information of known drug dealers, or maintained records consistent with drug sales are evidence of an intent to sell. *State v. Collard*, 414 N.W.2d 733, 736 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988). Considering the evidence of the three individuals separately getting into Wright's vehicle and leaving after a short time on the same day, the amount of cocaine that Wright possessed, the manner in which it was packaged, the amount of cash that Wright had in his pocket, and the three phones that Wright had in his vehicle, we conclude that the circumstances proved are clearly consistent with a reasonable inference that Wright possessed the cocaine with the intent to sell it.

Wright argues that the circumstances proved, however, are also consistent with a rational hypothesis of innocence—that he possessed the cocaine merely for personal use or that he purchased the cocaine in the interactions that police observed. He contends that the amount of cocaine that he possessed and the manner in which it was packaged are also consistent with an inference that he purchased the cocaine for personal use and was keeping

it in the packaging as purchased. He asserts that the half-smoked marijuana blunt in the car shows that he is a drug user and that he might have intended to use the cocaine. He suggests that, because police could not see into the Equinox, it is reasonable to infer that he purchased drugs from those who got into his car. He also argues that because there is no evidence of how much money he had before the three interactions occurred, it is possible that he was using the money in his pocket to buy drugs. Finally, he asserts that he could have been using the multiple phones in his car to facilitate multiple romantic affairs.

We disagree that the circumstances proved are consistent with a rational hypothesis other than guilt. When viewed in totality, not as isolated facts, the circumstances proved are not consistent with the hypothesis that Wright possessed the cocaine for personal use or that he purchased the cocaine in the interactions that police observed. There were multiple circumstances proved that are consistent with an intent to sell and not personal use. Police observed Wright have *three* separate interactions with three *different* people on the same day, each consistent with a drug transaction, before being caught with drugs packaged in a way that is "usually" for sale, $430 cash, and three phones. It is unreasonable to infer that Wright possessed the drugs merely for personal use given the multiple interactions consistent with drug trafficking, the cash, and the multiple cell phones. The fact that Wright was involved in three consecutive, very short interactions with separate individuals at two different locations on the same day is inconsistent with an inference that he was purchasing drugs, especially considering the cash, phones, and amount of cocaine that Wright possessed. It is also unreasonable to infer, under these circumstances, that

Wright had three cell phones to facilitate multiple affairs or that he made three separate drug buys at two different locations within a short time span solely for personal use.

Because the circumstances proved are consistent with an inference that Wright intended to sell the cocaine that he possessed, and are inconsistent with any rational hypothesis other than that he intended to sell it, the evidence is sufficient to support Wright's conviction for third-degree drug sale under Minn. Stat. § 152.023, subd. 1(1).

II. The district court erred by imposing a conviction for both drug sale and drug possession.

Wright asserts that the district court erred in imposing a conviction for both drug sale and drug possession because both counts necessarily involve possession of the same cocaine. A district court may not impose a conviction for a lesser-included offense that is "necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1(4) (2016). The state agrees in this case that proof of the third-degree sale charge necessarily included proof of the lesser offense of the fifth-degree possession charge; Wright could not have possessed cocaine with the intent to sell it without possessing the cocaine. We agree with the parties that the district court erred by imposing a conviction for both third-degree drug sale and fifth-degree drug possession under these circumstances. *See State v. Bertsch*, 707 N.W.2d 660, 665-66 (Minn. 2006) (noting that Minn. Stat. § 609.04 applies when a defendant is charged with disseminating contraband and possessing the same contraband with the sole purpose of dissemination). We reverse the district court's imposition of a conviction on the possession charge and remand with instructions to vacate the fifth-degree drug-possession conviction, leaving the finding of guilt intact. *See State v. LaTourelle*,

343 N.W.2d 277, 284 (Minn. 1984) ("[T]he proper procedure to be followed by the trial court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only.").

III. The district court abused its discretion in sentencing Wright based on a criminal-history score of seven without first finding that his prior out-of-state convictions, which occurred when Wright was 17 years old, would have been certified to adult court if they occurred in Minnesota.

Wright maintains that the district court abused its discretion in sentencing him based on a criminal-history score of seven. We will not reverse a district court's determination of a defendant's criminal-history score "absent an abuse of discretion." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). But the interpretation of the sentencing guidelines presents a legal issue that this court reviews de novo. *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018).

"Minnesota's Sentencing Guidelines provide uniform standards for the inclusion and weighting of criminal history information that are intended to increase the fairness and equity in determining a defendant's criminal-history score." *Maley*, 714 N.W.2d at 711 (quotation omitted). Under the sentencing guidelines, an offender's criminal-history score is the sum of points from eligible prior adult felonies, prior juvenile adjudications, prior misdemeanors and gross misdemeanors, and the offender's custody status at the time of the offense. Minn. Sent. Guidelines 2.B.1-7 (2016). The guidelines detail the requirements for calculating the offender's criminal-history points in each of these areas. *Id.* If the offender has a foreign conviction, the guidelines instruct a sentencing court as to whether

the foreign conviction should be factored into the offender's juvenile section or adult section:

> Minnesota law governs the inclusion of a prior felony offense from jurisdictions other than Minnesota committed by an offender who was under 18 years old in the juvenile section or adult section of the criminal history score. The offense should be included in the juvenile history section only if it meets the requirements in section 2.B.4. *The prior can be included in the adult history section only if the factfinder determines that it is an offense for which the offender would have been certified to adult court if it had occurred in Minnesota.*

Minn. Sent. Guidelines 2.B.5.e (emphasis added).

The district court factored Wright's Illinois convictions, which occurred when he was 17 years old, into his adult-history section. But, the district court did not make an express finding that either offense would have been certified to adult court if it had occurred in Minnesota.

"[T]he district court may not use out-of-state convictions to calculate a defendant's criminal-history score unless the state lays foundation for the court to do so." *Maley*, 714 N.W.2d at 711. "The state must establish by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota." *Id.*; *see also Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018) (indicating that at sentencing the state bears the burden of proving that a prior conviction qualifies for inclusion within the criminal-history score).

When determining whether a prior out-of-state offense would have been certified to adult court in Minnesota, "the district court may look to the definition of the offense, the nature of the offense, and the sentence received." *State v. Edwards*, 900 N.W.2d 722, 729

(Minn. App. 2017) (quotation omitted), *aff'd mem.*, 909 N.W.2d 594 (Minn. 2018).[2] "In many cases . . . the district court's determination can be made by examination of the statutes in the two states and without looking at the defendant's underlying conduct." *Id.* (citing *Hill v. State*, 483 N.W.2d 57, 61 (Minn. 1992)). In *Edwards*, this court affirmed the district court's decision to include the appellant's prior out-of-state juvenile offenses because the district court compared the Minnesota and Wisconsin certification statutes and concluded that the appellant would have been certified to adult court if the crime occurred in Minnesota. *Id.* at 729-31.

Unlike in *Edwards*, the district court in this case did not find that Wright's out-of-state convictions would have been certified to adult court in Minnesota. Nevertheless, the district court included the convictions in the adult-history section of Wright's criminal-history score and assigned 1.5 points to each offense. Because the guidelines provide that inclusion of these offenses in the defendant's adult-history section is *only* appropriate if the court determines that the out-of-state offense would have been certified to adult court in Minnesota, the district court abused its discretion by including the Illinois offenses in the adult-history section without first determining that they would have been certified to adult court in Minnesota.

The state argues that the district court implicitly found that the Illinois convictions would have been certified to adult court in Minnesota given the court's ultimate determination that Wright's criminal-history score was seven. It argues that it introduced

[2] *Edwards* was affirmed by the supreme court "upon an evenly divided court." 909 N.W.2d at 594.

sufficient evidence to prove each out-of-state conviction by a preponderance of the evidence. But Wright does not challenge that the Illinois convictions exist, he argues that the district court failed to make a necessary finding under the guidelines before including the offenses in the adult-history section of Wright's criminal-history score. There was no discussion of Illinois convictions at the sentencing hearing. The limited information in the record about the convictions includes a note from the probation officer on the report, the titles of the Illinois offenses (both armed robbery), and the fact that the Illinois court sentenced Wright to 11 years in prison. While the district court may have been able to determine whether the Illinois offenses would have been certified to adult court in Minnesota using this information and with some additional legal research, we are not convinced on this record that the district court made such a determination. There is nothing in the record to suggest that the district court considered the Illinois or Minnesota certification statutes before calculating Wright's criminal-history score. Consequently, we conclude that the district court abused its discretion by sentencing Wright with a criminal-history score of seven without first finding that the Illinois convictions would have been certified to adult court in Minnesota. We remand to the district court for resentencing with a proper criminal-history-score calculation.

We recognize that Wright did not object to the criminal-history-score calculation at sentencing.[3] Under similar circumstances, when a defendant failed to object to the

[3] A defendant does not waive review of the district court's criminal-history-score calculation by failing to object to the score at sentencing. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007).

inclusion of foreign convictions in his criminal-history score and later challenged the score on appeal, we have indicated that it is appropriate for the district court to allow the state, on remand, to present additional evidence to support the inclusion of the offense in the calculation of the defendant's criminal-history score. *See State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008), *review denied* (Minn. July 15, 2008) (indicating that because "appellant did not object to the district court's determination that his out-of-state convictions were felonies," the state, on remand, was "permitted to further develop the sentencing record so that the district court [could] appropriately make its determination"). We leave the decision of whether to reopen the record to allow the state to produce additional evidence to the discretion of the district court.

Affirmed in part, reversed in part, and remanded.