STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1605

State of Minnesota,
Respondent,

vs.

Eric Jerome Pratt,
Appellant.

Filed August 26, 2019
Affirmed in part, reversed in part, and remanded
Klaphake, Judge[*]

St. Louis County District Court
File No. 69DU-CR-16-3922

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

Mark S. Rubin, St. Louis County Attorney, Gary W. Bjorklund, Assistant County Attorney, Duluth, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Hooten, 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 Eric Jerome Pratt challenges his conviction of first-degree sale of a controlled substance, arguing that (1) the district court erred by denying his motion to suppress evidence of drugs found on his person and (2) insufficient evidence supports the conviction. We affirm the denial of Pratt's suppression motion, but because the evidence is sufficient to prove only second-degree possession of a controlled substance, not first-degree sale, we reverse Pratt's conviction and remand for entry of a conviction on the lesser-included offense and resentencing.

D E C I S I O N

Pratt was charged with first-degree sale of a controlled substance (heroin) and third-degree sale of a controlled substance (cocaine) after police recovered multiple baggies of heroin and cocaine from inside Pratt's clothing. After the district court denied Pratt's motion to suppress the drug evidence, Pratt agreed to a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3, and the district court found him guilty of first-degree sale of a controlled substance.

I.

When reviewing a pretrial order on a motion to suppress evidence, we independently review the facts and determine whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence. *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). We review the district court's factual findings for clear error and its legal determinations de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

The United States and Minnesota Constitutions protect against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. A seizure occurs when police, "by means of physical force or show of authority, . . . in some way restrain[] the liberty of a citizen." *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (quotation omitted). A "seizure" generally requires a warrant. *See State v. Stavish*, 868 N.W.2d 670, 675 (Minn. 2015) (stating that a warrantless seizure "is presumptively unreasonable"). But a limited investigatory stop is permissible if police reasonably suspect, based on the totality of the circumstances, that the person is engaged in criminal activity. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011). And if the person shares a vehicle with someone being arrested, police need no additional justification to temporarily secure the person outside of the vehicle while they complete the arrest and search the vehicle. *See State v. Ortega*, 770 N.W.2d 145, 152 (Minn. 2009); *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000); *see also State v. Munson*, 594 N.W.2d 128, 137 (Minn. 1993) (stating that brief handcuffing does not necessarily constitute an arrest).

Pratt argues that the district court erred by not suppressing the drug evidence because the officers arrested him without probable cause. The record indicates otherwise. Pratt was in the back seat of a minivan that Z.O. was entering when officers approached to arrest Z.O. for selling controlled substances. They also had cause to suspect Pratt's involvement because the officers had received information from a confidential reliable informant that Z.O. was in the area with his "source," implicating Pratt. And Pratt, instead of complying with the officers' directive to put his hands up, arched his back against the seat and reached his hands toward his groin area, apparently hiding something in his pants.

These circumstances amply justified detaining Pratt outside the vehicle. When police searched the vehicle and recovered from the floor next to where Pratt's left foot had been, a baggie of a substance that field-tested positive for heroin, they had probable cause to arrest him. *See State v. Dickey*, 827 N.W.2d 792, 796 (Minn. App. 2013) (stating that probable cause to arrest exists when "a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed"). Accordingly, the district court did not err by denying Pratt's motion to suppress.

II.

In reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the verdict "to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Hanson*, 800 N.W.2d 618, 621 (Minn. 2011) (quotations omitted). When the challenged conviction is based on circumstantial evidence, we first identify the circumstances proved "by resolving all questions of fact in favor of the jury's verdict," then independently consider the "reasonable inferences that can be drawn from the circumstances proved." *State v. Harris*, 895 N.W.2d 592, 600-01 (Minn. 2017). The circumstances proved must, when viewed as a whole, "be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.* at 601.

To convict Pratt of first-degree sale of a controlled substance, the state was required to prove that he sold 10 grams or more of heroin. Minn. Stat. § 152.021, subd. 1(3) (2016).

To sell means not only to transfer to another (to "give away, barter, deliver, exchange, distribute or dispose of to another) but also "to offer or agree to perform" any such transfer or "to possess with intent to perform" any such transfer. Minn. Stat. § 152.01, subd. 15a (2016).

As the state concedes, the evidence before the district court—the parties' factual stipulation—does not indicate any form of sale. The stipulation establishes that Pratt was "seated in the rear" of the minivan when Z.O. was arrested "outside the van" on the basis of "previous controlled buys." Officers "observed what they believed to be heroin" on the floor next to Pratt. And they "arrested" him, obtained a warrant to search him, and recovered "three packets of a substance ultimately determined to be 41.42 grams of heroin on [Pratt's] person." These facts do not indicate that Pratt actually transferred heroin to another or offered or agreed to make such a transfer. Nor do they require a rational hypothesis that he possessed the heroin with intent to transfer it to another. *See State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013) (recognizing that intent to sell or distribute controlled substances typically is proved with circumstantial evidence). Evidence tending to show an intent to sell or distribute includes evidence that the quantity of drugs or the manner of packaging is consistent with sale and inconsistent with personal use, or other evidence of sale such as a scale or packaging materials. *Hanson*, 800 N.W.2d at 623. There is no such evidence here. Accordingly, we conclude that insufficient evidence supports Pratt's conviction of first-degree sale of a controlled substance, and we reverse.

When reversing a conviction for insufficient evidence, we may order "reduction of the conviction to a lesser included offense or to an offense of lesser degree, as the case may

require." Minn. R. Crim. P. 28.02, subd. 12; *see, e.g.*, *State v. Carpenter*, 893 N.W.2d 380, 388 (Minn. App. 2017) (reducing conviction of first-degree sale of a controlled substance to second-degree sale); *State v. Uber*, 604 N.W.2d 799, 803 (Minn. App. 1999) (reducing aggravated driving-while-impaired conviction to misdemeanor DWI). An included offense is "a lesser degree of the same crime" or "a crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1 (2018).

In determining whether an offense is a lesser-included offense, we look "at the elements of the offense, not the facts of the particular case." *State v. Schnagl*, 907 N.W.2d 188, 202 (Minn. App. 2017), *review denied* (Feb. 28, 2018), *cert. denied*, 139 S. Ct. 156 (2018). But for an offense like the sale of a controlled substance, which is defined broadly enough to encompass a range of conduct, the facts of the case define the elements of the particular offense with which the defendant is charged. *See State v. Traxler*, 583 N.W.2d 556, 560 (Minn. 1998) (stating that the district court must instruct the jury on "the particular offense" with which a defendant is charged, and approving instruction defining "sale" of controlled substance as possession of a particular amount of methamphetamine with intent to manufacture).

The sale charge against Pratt can only be construed as a charge of possession with intent to sell. The complaint contains no allegation of any type of transfer or agreement to transfer and refers to facts suggestive of intent to sell and inconsistent with possession for mere personal use. And in finding probable cause to support the charges, the district court stated: "The controlled substances located on Defendant's person support the charges in the Complaint." Because Pratt was charged with first-degree possession of a controlled

substance with intent to sell, and the factual stipulation amply establishes the elements of the lesser included offense of second-degree possession of a controlled substance under Minn. Stat. § 152.022, subd. 2(a)(3) (2016), we remand for reduction of Pratt's conviction to that lesser offense and direct the district court to resentence Pratt accordingly.

On remand, the district court should also correct the warrant of commitment with respect to the charge of third-degree sale of a controlled substance (cocaine). The factual stipulation before the district court did not encompass the third-degree charge, and the district court did not find Pratt guilty of that offense. Accordingly, the warrant of commitment should reflect the absence of an adjudication on the third-degree charge.

Affirmed in part, reversed in part, and remanded.