STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0741

State of Minnesota,
Respondent,

vs.

Kenneth Myron Remund,
Appellant.

Filed May 18, 2020
Affirmed in part, reversed in part, and remanded
Slieter, Judge

Chippewa County District Court
File No. 12-CR-17-765

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Matthew Haugen, Chippewa County Attorney, Montevideo, Minnesota (for respondent)

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

Considered and decided by Slieter, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

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

SLIETER, Judge

In this direct appeal from final judgment, appellant Kenneth Myron Remund argues that (1) his conviction for fifth-degree controlled-substance crime (sale) must be reversed

because the state did not prove that he possessed or intended to sell marijuana in Chippewa County, and (2) the district court incorrectly calculated his criminal-history score. Because the state proved that Remund possessed marijuana with the intent to sell it in Chippewa County, we affirm the conviction.[1] We reverse and remand for the district court to hold further proceedings to determine Remund's correct criminal-history score.

FACTS

The state charged Remund with: fifth-degree controlled-substance crime (possession), in violation of Minn. Stat. § 152.025, subd. 2(1) (2016); fifth-degree controlled-substance crime (sale), in violation of Minn. Stat. § 152.025, subd. 1(1) (2016); and possession of drug paraphernalia, in violation of Minn. Stat. § 152.092(a) (2016). The matter proceeded to a jury trial. These facts are based on the testimony from trial.

Law enforcement with the city of Montevideo created an undercover Facebook page as part of its criminal investigatory tools. Law enforcement posted on the undercover Facebook page material described by law enforcement as "pro-drug," such as pictures depicting people using drugs and joke images related to marijuana use.

On November 29, 2017, the undercover Facebook page received a message from an account linked to Remund. The message included a picture of Remund, which law enforcement described as showing Remund holding a large bag of what appeared to be

[1] Remund also argues on appeal that he did not possess marijuana such that the finding of guilt for fifth-degree controlled-substance crime (possession) must be reversed. As we address here, the state presented sufficient evidence to sustain the intent-to-sell conviction, which includes an element that Remund possessed marijuana. Therefore, we do not address this issue separately.

marijuana. Law enforcement responded to Remund's message stating, "Bring it." Remund responded "where" and law enforcement responded with "Monte." A conversation about purchasing marijuana from Remund followed, and Remund agreed to sell a quarter pound of marijuana for $700.

The Montevideo police coordinated with the CEE-VI Drug Task Force to rent a motel room in Chippewa County for Remund to meet for the sale. Law enforcement conveyed the location to Remund.

On November 30, 2017, Remund arrived at the motel, carried a black duffle bag with him to the room, knocked on the door, and law enforcement arrested him. Pursuant to a search warrant, law enforcement searched the bag and found green plant-like material in glass mason jars that they suspected to be marijuana. Law enforcement also found rolling paper in the duffle bag. Law enforcement searched Remund's person and found a glass pipe, which law enforcement identified as a marijuana pipe. During an interview by law enforcement, Remund denied an intent to sell or give away marijuana.

Law enforcement consolidated the green plant-like material into one sample and sent it to the Minnesota Bureau of Criminal Apprehension (BCA) for testing. A BCA analyst in the drug-chemistry section testified about his assessment of the substance sent by law enforcement. The BCA analyst explained that he performed a three-part test to confirm the substance as marijuana, which involved: macroscopic, microscopic, and color testing, a test process accepted in the scientific community as an accurate method to determine whether a substance is marijuana. The BCA analyst concluded that the substance provided by law enforcement from Remund was marijuana and the substance

weighed 64.59 grams. The BCA analyst issued a report explaining the results of the examination.

Remund, during his testimony, asserted that his intent in coming to the motel was to meet a woman "to make a physical connection and an emotional, sensual connection." Remund denied intending to sell or give away marijuana during this encounter. Remund also denied carrying a duffle bag into the room. Remund, in an apparent conflicting defense, asserted also that he felt coerced by the Facebook messages to sell drugs. The state presented evidence that Remund had a prior conviction for possession of drug paraphernalia and possession of a small amount of marijuana.

As requested by Remund, the district court instructed the jury on the theory of entrapment. The jury rejected Remund's entrapment defense and found him guilty of the three charges.

The district court convicted and sentenced Remund for fifth-degree controlled-substance crime (sale) and possessing drug paraphernalia. Based on the sentencing worksheet provided, the district court concluded that Remund had five criminal-history points which results in a presumptive stayed sentence of 19 months. The court stayed execution of the 19-month prison sentence and placed Remund on probation for five years.

This appeal follows.

D E C I S I O N

I. The state presented sufficient evidence to sustain Remund's conviction for fifth-degree controlled-substance crime (sale).

"When evaluating the sufficiency of the evidence, appellate courts 'carefully examine the record to determine whether the facts 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. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quoting *State v. Boldman*, 813 N.W.2d 102, 106 (Minn. 2012)). The appropriate method to apply in examining a sufficiency-of-the-evidence appeal depends on the particular elements at issue. *See State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016) ("[W]hen a disputed element is sufficiently proven by direct evidence alone, as it is here, it is the traditional standard, rather than the circumstantial-evidence standard, that governs."). "When the direct evidence of guilt on a particular element is not alone sufficient to sustain the verdict, however, [appellate courts] apply a heightened two-step standard, which [the supreme court has] called the circumstantial-evidence standard of review." *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017).

Remund contends that the state failed to present sufficient evidence that he possessed marijuana with the intent to sell it in order to support the conviction of fifth-degree controlled-substance crime (sale). Because intent to sell is typically proven by circumstantial evidence, *see State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013), we apply the circumstantial-evidence standard.

When the state relies on circumstantial evidence, appellate courts conduct a two-step inquiry that requires the reviewing court to determine: (1) "the circumstances proved," and then (2) "whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013) (quotation omitted). Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in support existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted).

A person is guilty of fifth-degree controlled-crime (sale) when "the person unlawfully sells one or more mixtures containing marijuana." Minn. Stat. § 152.025, subd. 1(1). The term "sell" includes the following: "(1) to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture; or (2) to offer or agree to perform an act listed in clause (1); or (3) to possess with intent to perform an act listed in clause (1)." Minn. Stat. § 152.01, subd. 15a (2016). The term "'[m]ixture means a preparation, compound, mixture, or substance containing a controlled substance, regardless of purity except as provided in subdivision 16," *id.*, subd. 9a (2016), which provides that a "'[s]mall amount' as applied to marijuana means 42.5 grams or less." *Id.*, subd. 16 (2016).

First, we must identify the circumstances proved at trial. *Silvernail*, 831 N.W.2d at 598-99. The state proved the following circumstances.

- Remund reached out to law enforcement through an undercover Facebook account.
- Remund offered to sell the undercover Facebook account user a quarter pound of marijuana for $700.
- The undercover Facebook account user provided a location for the sale to occur in Chippewa County.

- Remand agreed that he would come to the location identified to sell the marijuana.
- Remund arrived at the location after engaging in conversations with the undercover Facebook account user about his travel to the location.
- When Remund arrived he possessed a duffle bag.
- Remund approached the room at the motel where the sale was to take place.
- Law enforcement arrested Remund at the door to the motel room.
- Law enforcement found inside Remund's duffle bag jars containing substances that appeared to law enforcement to be marijuana.
- A BCA analyst confirmed the substance inside the jars that Remund possessed contained 64.59 grams of marijuana.
- The amount of marijuana Remund brought to the location was less than the amount agreed upon for the sale.

Second, we must assess "whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except for guilt." *See id.* at 99 (quotation omitted). The circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt. No reasonable inference supports Remund's claim that he did not possess and intend to sell marijuana at the motel. *See State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (recognizing that appellate courts "will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture"). The jury rejected Remund's alterative explanation that he went to the motel to have a "physical connection and an emotional, sensual connection." Remund also argues now that he may have possessed synthetic marijuana instead of marijuana. This assertion is not reasonable. The BCA analyst testified to the scientific analysis that he performed and determined the substance was marijuana. Nothing in the record shows the BCA analyst could not distinguish between marijuana and synthetic marijuana. Additionally, the jury was in the best position to determine the BCA analyst's credibility, and we will not undo that

determination on appeal. *See Silvernail*, 831 N.W.2d 599 ("[T]he jury is in the best position to evaluate the credibility of the evidence even in cases based on circumstantial evidence.").

After considering the circumstances proved and any rational hypothesis except for guilt, we conclude that the state submitted sufficient evidence to sustain Remund's intent-to-sell conviction. We therefore affirm the conviction.

II. Remund is entitled to reversal and remand for further proceedings to address his criminal-history score and to be resentenced.

"We review determinations of a defendant's criminal history score for abuse of discretion." *State v. Edwards*, 900 N.W.2d 722, 727 (Minn. App. 2017), *aff'd mem.*, 909 N.W.2d 594 (Minn. 2018). "The State bears the burden of proof at sentencing to show that a prior conviction qualifies for inclusion within the criminal-history score." *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018).

Remund contends that the sentencing worksheet used by the district court incorrectly calculated his felony points by assigning him five criminal-history points, which included three and one-half felony points from a 2004 sentencing. It is the point total from the 2004 sentencing that Remund believes is in error. Remund argues that, due to this error, we should remand with instructions for the district court to impose a presumptive 13-month stayed sentence based on two felony points. The state agrees the record is not clear as to the appropriate criminal-history points but that remand is appropriate to litigate this issue before the district court because it disagrees that the

appellate record clearly shows that he should have two felony points. We agree a remand is appropriate.

A defendant may move the district court to correct a sentence that is illegal at any time. *See* Minn. R. Crim. P. 27.03, subd. 9. Reviewing courts may direct a defendant's sentence to be corrected based on an incorrect criminal-history score on direct appeal even if a defendant failed to raise the issue at sentencing. *State v. Scovel*, 916 N.W.2d 550, 553 n.5 (Minn. 2018) ("A defendant cannot forfeit appellate review of his [or her] criminal history score."). We agree the record does not clearly identify Remund's criminal-history points.

The sentencing worksheet concluded Remund had a total of five criminal-history points, which included three and one-half criminal-history points from a 2004 sentencing which involved five separate felonies, including third-degree burglary, theft of a motor vehicle, and three separate counts of criminal damage to property. The district court accepted the information from the sentencing worksheet and imposed a presumptive guidelines sentence consistent with the worksheet.

A district court calculates a defendant's criminal-history score by adding the offender's eligible felonies, custody-status points, prior misdemeanor and gross misdemeanors, and prior juvenile adjudications. Minn. Sent. Guidelines 2.B (Supp. 2017). A district court assigns points "to . . . each felony conviction, provided that a felony sentence was stayed or imposed before the current sentencing or a stay of imposition of sentence was given before the current sentencing." Minn. Sent. Guidelines 2.B.1. But a district court is to weigh prior felonies differently "when multiple felony sentences were

imposed in a previous court appearance." Minn. Sent. Guidelines 2.B.1.d. In particular, if, as here in 2004, prior sentences involve a burglary along with other felonies potentially arising from the same behavioral incident, the weight should only be given to the highest severity level to be counted. Minn. Sent. Guidelines 2.B.1.d.(1). Also, a defendant is generally not to receive criminal-history points for more than one offense arising out of a single behavioral incident. Minn. Stat. § 609.035, subd. 1 (2016); Minn. Sent. Guidelines cmt. 2.B.107 ("In cases of multiple offenses occurring in a single course of conduct in which state law prohibits the offender from being sentenced on more than one offense, only the offense at the highest severity level should be considered.").

We are satisfied that the record before us presents a concern that Remund's criminal-history score may be inaccurate. However, because the record is underdeveloped, we conclude the proper remedy is to reverse and remand the case to the district court for the parties to develop a record involving the correct criminal-history score. *See State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008) (reversing and remanding for the district court to determine the number of out-of-state convictions that constituted prior felonies), *review denied* (Minn. July 15, 2008). On remand, if the district court determines that the criminal-history score is inaccurate, the district court may resentence Remund to impose a presumptive guidelines sentence in the appropriate range; absent an error in the criminal-history points, Remund's sentence may be re-imposed as previously ordered.

Affirmed in part, reversed in part, and remanded.