STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1601

State of Minnesota,
Respondent,

vs.

Tegre Matlock,
Appellant.

Filed October 14, 2008
Affirmed
Connolly, Judge

Winona County District Court
File No. 85-CR-07-175; 85-CR-07-176

Lori Swanson, Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101; and

Charles E. MacLean, Winona County Attorney, Nancy L. Bostrack, Assistant County Attorney, Winona County Courthouse, 171 West Third Street, Winona, MN 55987 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Minge, Judge.

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

CONNOLLY, Judge

After a jury trial, appellant was convicted of two separate counts of felony third-degree controlled-substance sale of cocaine. Appellant argues that the district court abused its discretion by not allowing him to impeach a confidential informant (C.I.) at trial with her prior felony conviction. He further contends that it was clear error for the district court to sentence him on each crime. Because it was harmless error for the district court to refuse to allow appellant to impeach the C.I. with the prior felony conviction and because the district court did not clearly err by concluding that each crime consisted of separate behavioral incidents for sentencing purposes, we affirm.

FACTS

In 2005, a woman was stopped outside of a residence by Officer Tony Gagnon and found to have a crack pipe on her person. In exchange for not filing charges against her, she agreed to become a C.I. for the Winona Police Department. At the time of the trial in this case, the C.I. had participated in approximately 26 controlled drug buys. She was paid between $50 and $100 for each buy.

On January 4, 2007, the C.I. contacted Officer Gagnon because she had witnessed her friend purchase cocaine from a black male, and she had access to his phone number. The C.I. believed that if she contacted the man, he would recognize her and sell cocaine to her. She did not know the seller's name nor had she ever bought drugs from him.

Officer Gagnon and Investigator Arthur Petroff arrived at the C.I.'s apartment at 6:35 p.m. At 6:43 p.m., the C.I. placed a phone call to the seller's cell phone. A female

answered the phone, and the C.I. explained that she wanted to buy $50 worth of cocaine. The C.I. was told to meet the seller at a liquor store approximately five blocks away. Investigator Petroff drove to the liquor store to set up surveillance. Officer Gagnon gave the C.I. an audio recorder and did an initial search of her person. He then gave her the buy money, searched her car, and followed her to the liquor store in an unmarked car. Officer Gagnon parked in such a manner that the liquor store blocked his view of the parking lot.

At 6:50 p.m., Investigator Petroff saw the C.I.'s vehicle pull into the liquor store parking lot. Approximately ten minutes later, a purple Buick Riviera pulled up on the left side of the C.I.'s truck. The C.I. exited her truck and entered the Buick Riviera. The C.I. testified that while she was in the other vehicle, she gave the seller the buy money and he gave her the cocaine. At trial, the C.I. identified appellant as the seller.

After the buy, the C.I. drove back to her apartment to meet with Officer Gagnon. The digital audio recorder documented that she arrived back at her apartment at 7:02 p.m. The C.I. gave Officer Gagnon the baggie of suspected cocaine, which was later tested by the Bureau of Criminal Apprehension (BCA) and was confirmed to contain .1 grams of cocaine. Officer Gagnon paid the C.I. $100.[1]

Meanwhile, Investigator Petroff was able to identify the driver of the Buick Riviera as a black male. After the buy, he watched the Buick Riviera park just down the street. An individual came out of an apartment and got into the Buick Riviera. The Buick Riviera then drove away, and Investigator Petroff followed it. The vehicle went

[1] The C.I. testified that she was actually paid $50 for participating in this controlled buy.

approximately one-half of a block, and then the passenger exited the vehicle. Investigator Petroff continued to follow the Buick Riviera until it was parked at a residence and the driver went inside. Investigator Petroff testified at trial that appellant was the driver of the Buick Riviera.

Because he was unable to identify the driver that night, Officer Gagnon asked the C.I. to make a second controlled buy. Officer Gagnon hoped to make the second buy and then conduct a traffic stop in an effort to identify the suspect. Officer Gagnon met the C.I. again that same evening at approximately 9:00 p.m. The C.I. used Officer Gagnon's cell phone to call the same phone number that was used previously and set up another meeting to buy cocaine. Appellant agreed to sell the C.I. $50 worth of cocaine at the same liquor store where they had met earlier in the evening.

Officer Gagnon searched the C.I.'s person and vehicle again to make sure she did not have any other drugs or money. He then gave her the audio recorder and buy money and followed her to the liquor store. The C.I. parked in the parking lot, and Officer Gagnon parked across the street so that he could view the buy this time. Investigator Petroff set up surveillance in the parking lot.

According to Investigator Petroff, the same vehicle involved in the earlier controlled buy, driven by the same person, parked near the C.I.'s truck. The C.I. testified that she entered the Buick Riviera and exchanged $50 for cocaine. She further testified that the individual who sold her the cocaine was appellant. The C.I. met Officer Gagnon at 9:31 p.m. to give him the cocaine and the audio recorder. The substance was later

tested by the BCA and found to contain .1 grams of cocaine. Office Gagnon again paid the C.I. $100 for the controlled buy.[2]

Meanwhile, Investigator Petroff followed the Buick Riviera. Shortly after leaving the liquor store, the Buick Riviera stopped and picked up a passenger. Soon thereafter, the passenger exited the car, and the Buick Riviera drove away. Investigator Petroff radioed the Buick Riviera's license plate number to Officer Wooden who then initiated a traffic stop of the vehicle. Officer Gagnon drove by the traffic stop and recognized the vehicle as the one involved in both controlled buys. He did not, however, recognize the driver. Investigator Petroff drove by the traffic stop and recognized the driver as the same individual involved in the first controlled buy. Officer Wooden identified the driver of the Buick Riviera as appellant Tegre Matlock. Investigator Petroff testified that the individual involved in both controlled buys was appellant.

Appellant was arrested the next day and subsequently charged with two counts of felony third-degree controlled-substance sale of cocaine under Minn. Stat. § 152.023, subds. 1(1), 3(a) (2006). At the conclusion of the trial, the jury convicted appellant on both counts. Appellant was sentenced to a 60-month prison term on one count and a 63-month prison term on the other count to run concurrently. This appeal follows.

[2] The C.I. testified that she was only paid $50 for the second controlled buy.

D E C I S I O N

I. Any error the district court committed by refusing to permit appellant to cross-examine the confidential informant about her prior felony controlled-substance conviction was harmless.

Appellant argues that the district court abridged his right to present a complete defense when it prevented him from cross-examining the C.I. about her prior felony conviction. Respondent asserts that this decision was not an abuse of the district court's discretion, and therefore appellant's right to present a complete defense was not abridged.

The C.I. pleaded guilty to felony fifth-degree controlled-substance crime in 1999, received a stay of imposition and was placed on probation. She was discharged from probation, and the conviction is now listed on her record as a misdemeanor. The district court refused to allow the C.I. to be impeached with this prior controlled-substance conviction but did allow the admission of a prior felony theft conviction.[3]

A district court's ruling on the impeachment of a witness by prior conviction is reviewed, as are other evidentiary rulings, under a clear-abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). Evidence of a prior conviction may be admitted to attack the credibility of a witness if the underlying crime was punishable by imprisonment in excess of one year, the conviction or release is no more than ten years old, and the court determines that the probative value of the evidence outweighs its prejudicial effect. [4] Minn. R. Evid. 609(a)(1), (b). Whether the probative value of the

[3] The C.I. was convicted in Winona County for felony theft of workers' compensation benefits.

[4] Minn. R. Evid. 609(a)(2) provides that a conviction occurring less than ten years ago that involved dishonesty or a false statement is admissible, regardless of the punishment.

prior convictions outweighs their prejudicial effect is a matter within the discretion of the district court. *State v. Graham*, 371 N.W.2d 204, 208 (Minn. 1985).

First, for purposes of rule 609, this conviction was not time barred, as it occurred less than ten years ago. Second, although the conviction was ultimately deemed a misdemeanor, it was still admissible as a felony for impeachment purposes. *See State v. Hoffman*, 549 N.W.2d 372, 376 n.2 (Minn. App. 1996), ("A crime that is punishable by imprisonment for over one year (as was this one) is within the scope of this rule even if the conviction is reduced to a misdemeanor under Minn. Stat. § 609.13"), *review denied* (Minn. Aug. 6, 1996).

It is unclear from the record whether the district court fully considered the prejudicial effect versus probative value of the conviction. Rather, the district court focused primarily on the fact that this conviction had been reduced to a misdemeanor and was not a crime of dishonesty. Thus, failing to consider this essential element was arguably an abuse of discretion. Nonetheless, any error in refusing to allow the prior conviction into evidence for impeachment purposes was harmless.

If the district court erred in excluding defense evidence, the error is harmless only if this court is "satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (i.e., a reasonable jury) would have reached the same verdict." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994) (footnote omitted). But if there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, the error is prejudicial. *Id.*

We conclude that a reasonable jury would have convicted appellant even if the prior conviction had been admitted to impeach the C.I. First, a felony theft conviction demonstrating dishonesty was admitted at trial to show the C.I.'s lack of propensity for truthfulness. The jury evaluated her testimony with full knowledge of this prior theft conviction and nonetheless found her testimony credible enough to convict appellant. Furthermore, it was unnecessary for the jury to hear about the C.I.'s prior controlled-substance conviction because she admitted in her testimony that she had been in trouble with the law before and that she was a user of cocaine. The jury would not have been surprised by the prior conviction, and a reasonable jury would not have altered its verdict because of it. Therefore, even assuming that the district court abused its discretion by not allowing the defense to impeach the C.I. with her prior controlled-substance conviction, any such error was harmless.

II. The district court did not clearly err by sentencing appellant on each felony count.

Appellant was sentenced to concurrent prison terms of 60 and 63 months after being convicted of two counts of third-degree controlled-substance sale of cocaine under Minn. Stat. § 152.023, subds. 1(1), 3(a). Appellant argues that because the conduct involved arose from the same behavioral incident rendering multiple sentencing impermissible, the 63-month sentence must be vacated. Respondent disagrees, asserting that these were multiple crimes, not a single behavioral incident.

Subject to certain exceptions not applicable here, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only

one of the offenses." Minn. Stat. § 609.035, subd. 1 (Supp. 2007). "The state has the burden to establish by a preponderance of the evidence that the conduct underlying the offenses did not occur as part of a single behavioral incident." *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000). "Whether multiple offenses arose out of a single behavior incident depends on the facts and circumstances of the particular case." *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). "Among the factors to be considered in determining whether two offenses arose out of a single behavioral incident are the singleness of purpose of the defendant and the unity of time and of place of the behavior." *Id.* (quotation omitted). "The district court's decision of whether multiple offenses are part of a single behavioral incident is a fact determination and should not be reversed unless clearly erroneous." *State v. Carr*, 692 N.W.2d 98, 101 (Minn. App. 2005).

"Drug sales, even within a short period of time, may be considered separate behavioral incidents." *State v. Barnes*, 618 N.W.2d 805, 813 (Minn. App. 2000) (citing *State v. Gould*, 562 N.W.2d 518 (Minn. 1997) (holding that three sales of heroin on separate days within the same week did not amount to a single behavioral incident), *review denied* (Minn. Jan. 16, 2001); *see also State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997) (holding that multiple drug sales did not constitute a single behavioral incident). Although both illegal drug sales in this case occurred on the same night and in the same location, they did not occur at the same time. Two phone calls were made to appellant to notify him of the C.I.'s desire to buy drugs. The first buy occurred just before 7:00 p.m., while the second occurred just after 9:00 p.m. Between the buys, appellant picked up and

dropped off another individual, and then proceeded to enter a residence. Only after being contacted a second time by the C.I. did appellant arrive at the liquor store for the second buy. There is a lack of unity of time that demonstrates that these separate buys were not part of one behavioral incident.

Furthermore, although those "convicted of drug sales may be motivated by the single criminal objective of selling drugs to relieve financial hardship, this court has held that the criminal plan of obtaining as much money as possible is too broad an objective to constitute a single criminal goal within the meaning of section 609.035." *Gould*, 562 N.W.2d at 521. Respondent summarizes this analysis succinctly:

> Appellant committed the second offense with a state of mind and motivation divisible from the first offense. The first offense was not committed with the intent to facilitate the second offense. Appellant was not motivated by a desire to obtain a single criminal objective. Although appellant may have committed the offenses motivated by the single criminal objective to simply sell cocaine for financial gain, this objective is too broad to be constituted a single criminal goal in this case. Appellant's multiple crimes were not part of a single behavioral incident; thus, the state has met its burden.

There is a lack of unity of time between the two incidents. Furthermore, appellant's desire to obtain as much money as possible was too broad to be considered a single criminal purpose. Therefore, the district court's finding that these acts constituted separate behavioral incidents was not clearly erroneous.

Affirmed.