STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1833

State of Minnesota,
Respondent,

vs.

Erick Fontain Thomas,
Appellant.

Filed November 10, 2009
Affirmed
Halbrooks, Judge

Mower County District Court
File No. 50-CR-07-3785

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Kristen Nelsen, Mower County Attorney, Mower County Courthouse, 201 First Street Northeast, Austin, MN 55912 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

HALBROOKS, Judge

Appellant Erick Fontain Thomas challenges his convictions of first-degree sale of cocaine, second-degree possession of cocaine, and second-degree sale of cocaine on the grounds that the district court abused its discretion by admitting *Spreigl* evidence and that the evidence was insufficient to corroborate accomplice testimony and sustain his convictions. We affirm.

FACTS

Appellant's convictions arose out of a series of drug transactions coordinated by the Austin Police Department. In October 2007, Detective David McKichan was approached by a confidential informant (CI) about engaging in a controlled purchase of cocaine. Detective McKichan had previously worked with the CI on controlled purchases of narcotics and found the information that she provided to be reliable.

The CI contacted Darrell Leaks, who knew several sources of cocaine in the Austin area. On October 3, 2007, the CI, who was wired with a radio transmitter, picked up Leaks in her vehicle. Leaks had no drugs with him but called someone to set up a buy. Detective McKichan could hear Leaks on the phone. Leaks directed the CI to two adjacent apartment buildings behind the Midtown Car Wash. One of the buildings was white; the other was gray. Appellant lived in the lower unit of the white building.

Detective McKichan, who had followed the CI, saw Leaks dealing with someone in the white building. The detective also heard the conversation between the CI and Leaks when he returned to the CI's car. Leaks told the CI that his supplier obtained the

drugs while in Chicago. Leaks asked the CI for a piece of the drugs that he had obtained for her and also asked her to smoke some of the crack cocaine with him. The CI declined, saying she had to meet with her parole officer the next day.

After the CI dropped Leaks off near his residence, she met Detective McKichan at an agreed-upon location for de-briefing. Detective McKichan wanted to continue the investigation in order to identify Leaks's supplier and to increase the amount of cocaine purchases so that increased charges could be brought.

On October 8, 2007, Detective McKichan arranged a second transaction between the CI and Leaks, this time with the support of additional surveillance officers. Although the police did not know where the drug buy would take place, Detective Mark Haider waited in his vehicle about one and one-half blocks from the white building, anticipating that Leaks would bring the CI to the same location. The CI picked up Leaks at a library, and during the drive, Leaks borrowed the CI's cellular phone to call one of appellant's telephone numbers and inform him that he was coming to purchase crack cocaine.

During the transaction, Detective Haider observed activity between the white building and the adjacent gray building. Using binoculars, Detective Haider observed a black male in a blue shirt stand outside and then enter the back of the white building. About a minute later, the detective observed a thinner black male, wearing an "A-Style" t-shirt, with a cornrow hairstyle, leave the white building and walk toward the gray building. That man remained in the gray building for about one minute before returning to the white building. Detective Haider later identified the second man as appellant. At that same time, the CI arrived and Leaks entered the white building, purchasing cocaine

from inside. After Leaks purchased approximately one gram of cocaine, he again requested a piece from the CI. Following the transaction, the CI again met with Detective McKichan. The detective decided to proceed with another controlled transaction to determine the relationship between the white and gray buildings and build more evidence regarding Leaks's suppliers.

On October 12, 2007, the CI arranged a third controlled buy with Leaks. The CI picked up Leaks at his home. During the drive, Leaks told the CI that his supplier just returned from Chicago that same morning and that the crack cocaine was still cooking. Leaks then dialed appellant's telephone number, had a brief conversation, and informed the CI that it would be about five more minutes. The two arrived at the white building, and Leaks entered. He returned, asking the CI whether powdered cocaine would be acceptable, and the CI agreed to the substitution. The CI then asked Leaks why his supplier was walking out of the white building. Leaks replied that his supplier kept a stash in the gray building.

At the same time, Detective Glen Farnum was conducting surveillance of the two buildings. He observed a black male, smaller than Leaks, walking between the white and gray buildings. Detective McKichan, also surveying the area, witnessed this movement. From his vantage point, Detective McKichan could not rule out the possibility that the individual was appellant.

Leaks finally returned to the CI with an eight-ball of cocaine. After the transaction was complete, the CI met with Detective McKichan. The CI told the

detective that Leaks's supplier had left the white building and entered the gray building while they waited for the drugs.

Detective McKichan subsequently executed a search warrant on both apartment buildings. In the basement of the gray building, officers discovered a black bag containing a scale and 9.2 grams of cocaine that was underneath a lawnmower. No fingerprints were recovered from these items. In appellant's apartment, officers found drug paraphernalia, a small amount of marijuana, and a cellular phone plugged into the wall. The phone's number was the same one used by Leaks on October 8th, and the contact list included Leaks's telephone number. Appellant was charged with first-degree controlled-substance sale, in violation of Minn. Stat. § 152.021, subd. 1(1) (2006); second-degree controlled-substance possession, in violation of Minn. Stat. § 152.022, subd. 2(1) (2006); and second-degree controlled-substance sale, in violation of Minn. Stat. § 152.022, subd. 1(1) (2006). A charge of third-degree controlled-substance sale, in violation of Minn. Stat. § 152.023, subd. 1(1) (2006), was later added.

In a recorded police interview introduced at appellant's trial, Leaks admitted to purchasing cocaine from appellant 10-15 times. Leaks also stated that appellant usually left for a short period during the transactions, but he was unsure where appellant went during the brief time that he was gone. Leaks testified at trial and restated that he purchased cocaine from appellant at the white building. He further testified that he saw appellant enter the gray building a couple of times.

Anthony White, a resident of the gray building, testified for the state. White testified that he lived in the upstairs unit of the gray building and was the building's

caretaker in October 2007. According to White, the basement functioned as a tornado shelter for both the gray and white buildings, and for that reason, the basement was kept unlocked at all times. White testified that he did not know that cocaine was kept in the basement or that drugs were being sold out of the white building. Tiffany Poppa, White's fiancée and roommate, also testified that she was unaware of any cocaine deals occurring out of either building.

Appellant called two alibi witnesses. The jury first heard from Calvin Williams, appellant's Illinois parole agent. Williams testified that the automated system[1] for the Illinois Department of Corrections received a call from a Chicago telephone number on the evening of October 8, 2007. The caller identified himself as appellant. The system also received a call on October 9, 2007, from another Chicago telephone number. That caller also identified himself as appellant. Williams further testified that he met with appellant in person on the evening of October 9. Williams stated on cross-examination that the automated system does not have voice identification or a method of detecting three-way calls. Williams also conceded that he did not speak directly to appellant on October 8 and was unable to confirm whether appellant was in Chicago at that time. Tennie Bryant, appellant's grandmother, also testified. According to Bryant, appellant was with her in Chicago on October 12.

[1] According to Williams's testimony, the automated system records the phone number used to call the system and an operator asks the caller to recite the phone number. The caller is also asked to provide other identifying information such as the caller's name, Department of Corrections ID number, address, etc.

The district court permitted respondent State of Minnesota to introduce three of appellant's prior convictions as *Spreigl* evidence: possession of cocaine in Dane County, Wisconsin in 2001; manufacture or delivery of cannabis in Cook County, Illinois in 2002; and third-degree possession of cocaine in Mower County in 2004. In its ruling on the *Spreigl* evidence, the district court determined that the state had provided proper notice, that the evidence was clear and convincing, that the prior convictions were relevant to proving identity and rebutting appellant's alibi defense, and that the probative value of the prior convictions outweighed any prejudice. The state read the *Spreigl* convictions to the jury but was not permitted to introduce details of the convictions. The district court instructed the jury on the proper use of the evidence. Following its deliberations, the jury returned a guilty verdict on all counts. This appeal follows.

D E C I S I O N

I.

Appellant contends that the district court abused its discretion by admitting *Spreigl* evidence of his prior drug-related convictions. Under Minn. R. Evid. 404(b), *Spreigl* evidence is admissible only for such limited purposes as "motive, intent, knowledge, identity, absence of mistake or accident, or a common scheme or plan." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). A district court must find that the following five elements have been satisfied before admitting *Spreigl* evidence:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the

> state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

Id. at 686. We will not reverse a district court's admission of *Spreigl* evidence unless an abuse of discretion is clearly shown. *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988). To prevail, an appellant must show error and the prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Appellant argues that the state failed to show a relationship between the prior acts and the current charge sufficient to demonstrate the relevance of the *Spreigl* evidence.[2] "In determining the relevance and materiality of *Spreigl* evidence, the [district] court should consider the issues in the case, the reasons and need for the evidence, and whether there is a sufficiently close relationship between the charged offenses and the *Spreigl* offense in time, place or modus operandi." *State v. Kennedy*, 585 N.W.2d 385, 390 (Minn. 1998) (quotation omitted). Under the identity exception, only some relation between the other crimes and the charged offense in terms of the time, place, or modus operandi must be found by the district court. *See State v. Cogshell*, 538 N.W.2d 120, 123 (Minn. 1995). This test is applied in a flexible manner on appeal; admission is upheld "notwithstanding a lack of closeness in time or place if the relevance of the evidence was otherwise clear." *State v. Lynch*, 590 N.W.2d 75, 80-81 (Minn. 1999) (quotation omitted).

[2] Both parties argue the applicability of the "common scheme or plan" exception to the facts of this case. But our review of the record demonstrates that the district court admitted the evidence solely for the purpose of proving appellant's identity and rebutting his alibi defense. In closing argument, the state argued the Chicago-Austin connection to the jury, consistent with the identity exception. Because the district court did not conclude that the common-scheme exception applied, we do not address that issue.

The record reflects that the district court appropriately considered the relevance of the *Spreigl* offenses to appellant's charge. After reciting the test outlined in the *Ness* decision, the district court ruled that the evidence was relevant to establish identity and to rebut appellant's alibi defense. Specifically, the "geography . . . the location . . . [and] the involvement with cocaine on [two] prior occasion[s]" demonstrated the relevance of the three *Spreigl* incidents. The record supports the district court's conclusion that a sufficiently close relationship existed between the *Spreigl* offenses and appellant's current case. The district court clarified that the *Spreigl* evidence was relevant to identity because of the geography and connection between the offenses.

The state's evidence demonstrated that Leaks's supplier made frequent trips to and from Chicago. Dane County, Wisconsin is located between Chicago and Austin. During two of the three controlled buys, Leaks mentioned his supplier's recent return from Chicago. In fact, Leaks told the CI that some of the cocaine originated in Chicago and that his supplier brought it back to Minnesota. Appellant's defense consisted of alibi witnesses, who testified that he was in Chicago during the time the drug buys occurred, and an argument that the drugs found in the gray building did not belong to him.

The geographic connection between the *Spreigl* offenses and appellant's current charge rebutted these alibi defenses. The evidence showed that Leaks's supplier traveled between Chicago and Austin, frequently with cocaine. The *Spreigl* evidence showed that appellant had drug connections between these two locations and points in between. While the offenses are not geographically close as usually understood, the district court was charged with the task of considering the evidence in light of the issues in the case

and the need for the evidence. *See State v. Blom*, 682 N.W.2d 578, 612 (Minn. 2004). Here, the district court concluded that the locations of the *Spreigl* offenses were relevant to proving appellant's identity because of the geographic connection and the state's evidence. Finally, while these crimes do not have a markedly similar modus operandi, the district court did not abuse its discretion in admitting the evidence to prove identity. *See Cogshell*, 538 N.W.2d at 123 ("We have not *required* that the other crimes be signature crimes, but we have repeatedly said that generally there must be some relation between the other crimes and the charged offense in terms of time, place or modus operandi." (quotations and citation omitted)).

This issue presents a close question. But we will not substitute our discretion for that of the district court simply because another district court might have reached a contrary conclusion. *See id.* at 124 (affirming the district court, but noting that other district courts might have exercised discretion differently). Therefore, we conclude that the district court did not abuse its discretion in finding that the *Spreigl* offenses were relevant to prove identity.

Appellant also argues that the probative value of the evidence was outweighed by its potential for unfair prejudice. *Spreigl* evidence is prejudicial by nature. The question is whether the evidence is unfairly prejudicial, meaning that it "persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). The prosecution's need for other-acts evidence should be addressed in the balancing test, not as an independent requirement. *Ness*, 707 N.W.2d at 690. The district court correctly balanced these factors. It considered the closeness of time, the fact that

both incidents involved the possession of controlled substances, and "the fact that we have a fairly strong case . . . of alibi being proffered . . . or the possibility if it's not the alibi then it [isn't] the defendant who possessed the cocaine," before concluding that the evidence was admissible. The district court properly balanced the probative value of appellant's prior convictions against the possibility of unfair prejudice before admitting the *Spreigl* evidence.

In order to lessen any prejudicial effect, the district court did not permit the state to introduce the complaints or other documents containing the details of appellant's prior convictions. In addition, the jury did not take any evidence referencing the *Spreigl* incidents into its deliberations. The jury received two curative instructions regarding the appropriate use of the evidence. *See Lynch*, 590 N.W.2d at 81 (stating that cautionary instructions to the jury when *Spreigl* evidence was received and again at end of trial "assured that the jury did not give improper weight to the evidence"). Because the district court analyzed the five factors in light of the particular issues in this case, we conclude that it was not an abuse of discretion to admit the *Spreigl* evidence.

We further note that even if the district court's decision did constitute error, such error was harmless. If the district court errs in admitting evidence, a reviewing court determines whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). "When determining whether a jury verdict was surely unattributable to an erroneous admission of evidence, the reviewing court considers the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing

argument, and whether it was effectively countered by the defendant." *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005). While overwhelming evidence of guilt is an important factor to consider in a harmless-error analysis, it is not the only element this court considers. *Id.*

First, the strength of evidence against appellant is substantial. The state presented testimony from Leaks that appellant sold him the crack cocaine, evidence that Leaks dialed appellant's telephone number to set up the transactions, evidence that appellant walked from the white building into the gray building during a transaction, a conversation between Leaks and the CI regarding appellant's stash of drugs in the gray building, and evidence that appellant had family in Chicago and a parole officer in Illinois for an undisclosed offense. Second, the method of introducing the *Spreigl* evidence significantly limited any harmful effect. The state read each of appellant's convictions to the jury but was not permitted to go into detail beyond a recitation of the convictions. The jury was not permitted to view the criminal complaints and did not take any exhibits or other evidence referencing appellant's *Spreigl* convictions into its deliberations. Third, in closing argument, the state referred to appellant's *Spreigl* convictions on two brief occasions over what appears to be a lengthy closing argument. Finally, even without the introduction of the *Spreigl* convictions, appellant called his parole officer as a witness, which informed the jury that appellant had a criminal history. Based on all of these factors, we conclude that there is no reasonable possibility that the *Spreigl* evidence

significantly affected the verdict. We therefore conclude that any error from admission of the *Spreigl* evidence was harmless.[3]

II.

We next address appellant's argument that the evidence was insufficient to corroborate Leaks's accomplice testimony. A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense. Minn. Stat. § 634.04 (2008); *see State v. Harris*, 405 N.W.2d 224, 227 (Minn. 1987). Evidence to corroborate accomplice testimony "is sufficient when it is weighty enough to restore confidence in the truth of the accomplice's testimony. . . . [I]t must affirm the truth of the accomplice's testimony and point to the guilt of the defendant in some substantial degree." *Harris*, 405 N.W.2d at 227-28. Corroborating evidence may be direct or circumstantial. *State v. Johnson*, 616 N.W.2d 720, 727 (Minn. 2000). "Where evidence of corroboration appears its weight and credibility is for the jury." *Harris*, 405 N.W.2d at 229 (quotation omitted). The sufficiency of the circumstantial evidence to corroborate an accomplice's testimony that the defendant participated in the crime charged is reviewed in the light most favorable to the verdict. *State v. Bowles*, 530 N.W.2d 521, 532 (Minn. 1995).

[3] The district court also indicated that the *Spreigl* evidence showed that appellant "apparently has knowledge of the culture involving marijuana . . . and cocaine." The state argued that the *Spreigl* evidence showed appellant's "knowledge" of drug culture and was relevant to explaining why appellant would keep cocaine in an adjacent apartment building. We are not convinced that "knowledge of drug culture" is a permissible basis for admitting *Spreigl* evidence. But we conclude that the *Spreigl* evidence was admissible for other reasons.

Appellant contends that, apart from Leaks's testimony, the only evidence that identified him as a participant in the transactions consisted of Detective Haider's testimony. But the record demonstrates that the state presented sufficient additional evidence to corroborate Leaks's testimony. Evidence that Leaks called appellant's telephone number before two of the transactions corroborates his testimony that appellant was selling crack cocaine. The fact that appellant's contacts included Leaks's telephone number also corroborates this point. Detective Haider's observation of appellant walking between the apartment building corroborates Leaks's testimony that appellant went into the gray building on some occasions.

Appellant points to some inconsistencies in Leaks's testimony and attacks his reliability as a witness. In addition, appellant argues that his alibi witnesses were more credible. These arguments are not persuasive. The jury is in the best position to evaluate the credibility of the testimony corroborating or discrediting Leaks's testimony, and the jury apparently gave more weight to the evidence corroborating the testimony. *See Harris*, 405 N.W.2d at 229. Furthermore, appellant's alibi witnesses did nothing to detract from the evidence supporting Leaks's testimony. Appellant's parole officer, the only disinterested witness appellant called, conceded that he had no way to confirm appellant's location on the dates of the telephone contact. A reasonable jury could reject this testimony in favor of the evidence presented by the state. We therefore conclude that the evidence was sufficient to corroborate Leaks's accomplice testimony.

III.

Finally, we address appellant's contention that the evidence was insufficient to show that he was in possession of the cocaine found in the adjacent building. 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 a 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). The reviewing court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court 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. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Appellant argues that the evidence of his possession is only circumstantial. He contends that the drugs could have belonged to someone else and that the proof is insufficient to establish the element of possession necessary to uphold his convictions. A conviction based on circumstantial evidence merits strict scrutiny, but "circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The circumstantial 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). But 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.

A person is guilty of first-degree controlled-substance crime if he unlawfully sells one or more mixtures of a total weight of 10 grams or more containing cocaine. Minn. Stat. § 152.021, subd. 1(1). Under Minnesota law, to "sell" means: "(1) to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture; (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 (2006). If an item is found "in a place to which others had access," possession may still be established if "there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it." *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). A fact-finder may also determine that the defendant possessed the item "where the inference is strong that [he] at one time physically possessed [it] and did not abandon his possessory interest." *Id.* at 105, 226 N.W.2d at 610.

The evidence presented at trial formed a complete chain leading directly to the conclusion that appellant was in possession of the cocaine. Detective Haider observed appellant walking from the white building to the gray building during the second transaction; Detective Farnum and Detective McKichan observed a man walking between the buildings during the third transaction and Detective McKichan could not rule out the possibility that the individual was appellant; Leaks told the CI that appellant kept a stash of drugs in the other building; and no residents of the gray building knew that cocaine

was in the basement. A reasonable juror could have concluded that appellant was in possession of the cocaine and rejected appellant's alternate theory as unreasonable. Looking at the evidence in a light most favorable to the verdict, we conclude that the evidence was sufficient to prove the element of possession and sustain the jury's verdict.

Affirmed.