STATE OF MINNESOTA

IN SUPREME COURT

A19-2007

Court of Appeals Thissen, J.

State of Minnesota,

Respondent,

vs.

Filed: December 1, 2021
Office of Appellate Courts

Anthoney Micheal Fugalli,

Appellant.

Keith M. Ellison, Attorney General, Saint Paul, Minnesota; and

John L. Fossum, Rice County Attorney, Terence Swihart, Assistant County Attorney, Fairbault, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Sean Michael McGuire, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

Individuals "sell" a prohibited amount of a mixture containing a controlled substance when they offer to sell that amount of a controlled substance, even if less than the amount offered is delivered to the buyer.

Affirmed.

O P I N I O N

THISSEN, Justice.

This case requires us to determine whether, under Minn. Stat. § 152.021, subd. 1(3) (2020), individuals "sell" 10 or more grams of heroin when they offer to sell 10 or more grams of the substance, but less than 10 grams are delivered to the buyer.[1] Appellant Anthoney Fugalli pleaded guilty to first-degree sale of a controlled substance under Minn. Stat. § 152.021, subd. 1(3). During his plea hearing, Fugalli admitted that he offered to sell 13 grams of heroin, but he admitted that only 8.906 grams of heroin were delivered to the buyer. The district court denied Fugalli's presentence motion to withdraw his guilty plea and sentenced him to 78 months' incarceration. On appeal, Fugalli argued that the factual basis for his guilty plea was inaccurate because he never admitted that 10 or more grams of heroin were delivered to the buyer. The court of appeals affirmed.

We conclude that under the plain language of section 152.021, subdivision 1(3), individuals "sell" 10 or more grams of heroin when they offer to sell 10 or more grams of heroin, even if the individual delivers, or has the capacity to only deliver, less than 10 grams of heroin to the buyer. We therefore affirm.

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[1] Minnesota Statutes §§ 152.021–.025 (2020) define first-degree through fifth-degree controlled substance sale crimes. Here, Fugalli was charged with, and convicted of, first-degree sale of a controlled substance under section 152.021, subdivision 1(3). We use the facts before us—an offer to sell more than 10 grams of heroin—to illustrate our discussion of the issue. But our holding—that a person sells a controlled substance when they *offer* to sell a controlled substance—is not limited to the first-degree controlled substance sale crime. It applies to first-degree through fifth-degree controlled substance sale crimes under sections 152.021–.025.

FACTS

On November 15, 2018, Fugalli pleaded guilty to first-degree sale of one or more mixtures of a total weight of 10 grams or more containing heroin on one or more occasions within a 90-day period in violation of section 152.021, subdivision 1(3).[2] During his plea hearing, he admitted selling heroin to an informant on four occasions between May 31 and June 19, 2018. On May 31, Fugalli offered to sell three grams of heroin in exchange for $650.00. He used a runner to complete the sale. The Bureau of Criminal Apprehension (BCA) later tested the package and determined that it contained 2.161 grams of heroin. On June 7, Fugalli offered to sell three grams of heroin for $510.00. He used the same runner to complete the sale. The BCA later tested the package and determined that it contained two grams of heroin. On June 12, Fugalli offered to sell three grams of heroin for $510.00, this time completing the sale himself. The BCA tested the package and determined that it contained 2.074 grams of heroin. Finally, on June 19, Fugalli offered to sell four grams of heroin for $750.00, again completing the sale himself. Later BCA testing showed that the package contained 2.671 grams of heroin. In summary, Fugalli admitted at the plea hearing that on four occasions within a 90-day time period, he offered to sell the informant an aggregate amount of 13 grams of heroin and delivered 8.906 grams of heroin.

Before accepting Fugalli's guilty plea, the district court noted that "the definition of sale includes offer to sell," but asked the parties whether any case law addressed the issue

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[2] The statute provides that a person commits a first-degree controlled substance sale crime when the person sells "mixtures of a total weight of ten grams or more containing heroin." For ease of reading, we will refer in this opinion to "mixtures . . . containing heroin" as "heroin."

of the disparity between the offered weight and the actual weight of the heroin delivered. When neither party pointed to existing precedent, the district court accepted Fugalli's admissions as a sufficient factual basis for his guilty plea, stating that, "if all Mr. Fugalli had done was offer to sell the 13 grams he would still be convicted of selling the 13 grams . . . though the actual amounts delivered were less."

On January 7, 2019, Fugalli moved to withdraw his guilty. Fugalli argued that section 152.021, subdivision 1(3), requires proof that 10 or more grams of heroin were actually delivered. Because Fugalli's admissions at the plea hearing established that he delivered less than 10 grams of heroin, he asserted that the plea hearing record did not establish that he committed a first-degree controlled substance sale crime under section 152.021, subd. 1(3), and, therefore, he must be allowed to withdraw his plea.

Following an evidentiary hearing on June 14, 2019, the district court denied Fugalli's motion to withdraw his guilty plea. The court noted that the factual basis of Fugalli's guilty plea was his admission that he offered to sell 13 grams of heroin. The district court concluded that his admission was sufficient and accurate for the first-degree controlled substance sale crime. On September 17, 2019, Fugalli was sentenced to 78 months in prison.

On appeal, Fugalli challenged the district court's legal conclusion that his offer to sell more than 10 grams of heroin while delivering less than 10 grams was sufficient for a conviction under Minn. Stat. § 152.021, subd. 1(3). *State v. Fugalli*, No. A19-2007, 2020 WL 7330586, at *2 (Minn. App. Dec. 14, 2020). Fugalli argued that his guilty plea was

inaccurate, and thus invalid, because the amount of heroin he actually delivered was less than the statutory threshold for a first-degree controlled substance sale crime. *Id.*

The court of appeals rejected Fugalli's argument and affirmed his conviction. It held that his admission to offering to sell 13 grams of heroin "meets the straightforward statutory definition of the crime to which he pleaded guilty." *Id*. at *2. The court stated, "[T]o conclude that . . . section 152.021, subdivision 1(3), authorizes a first-degree controlled substance conviction only if a defendant actually delivers, rather than merely offers to sell or deliver" would require "ignoring the defining statutory language." *Id*.

We granted Fugalli's petition for review.

ANALYSIS

This case comes to us from an order denying Fugalli's motion to withdraw his guilty plea to a first-degree controlled substance sale crime in violation of section 152.021, subdivision 1(3). Fugalli moved to withdraw his guilty plea under Minn. R. Crim. P. 15.05, subd. 1, which provides: "At any time the court must allow a defendant to withdraw a guilty plea upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." A manifest injustice exists when a guilty plea is not valid. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent. *Id*.

The manifest injustice claimed here is that the guilty plea was inaccurate. Fugalli asserts that section 152.021, subdivision 1(3), requires proof not only that the accused offered to sell 10 or more grams of heroin, but also that the accused delivered (or at least had access to) 10 or more grams of heroin. In contrast, the State argues that

section 152.021, subdivision 1(3), provides that a person commits a first-degree controlled substance sale crime the moment the person offers to sell 10 or more grams of heroin.

To resolve this dispute, we must determine the meaning of section 152.021, subdivision 1(3). That is a question of statutory interpretation which we review de novo. *State v. Townsend*, 941 N.W.2d 108, 110 (Minn. 2020). When interpreting statutes, our objective is to "effectuate the intent of the legislature." *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019) (citation omitted) (internal quotation marks omitted). The first step in statutory interpretation is to determine whether the statute's language is ambiguous. *Id.* The language of a statute is unambiguous when there is only one reasonable way to read the text. *State v. Khalil*, 956 N.W.2d 627, 634 (Minn. 2021).

The statutory language at issue here provides: "A person is guilty of controlled substance crime in the first degree if: . . . (3) on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of ten grams or more containing heroin . . . ." Minn. Stat. § 152.021, subd. 1(3). The Legislature defines "sell" as: "(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 (2020) (emphasis added).

When the Legislature has defined a term, that meaning prevails. *See U.S. Jaycees v. McClure*, 305 N.W.2d 764, 766 (Minn. 1981). "The legislature defines a term only because it intends in some measure to depart from the ordinary sense of that term. Thus, there is a presumption that we are not to substitute the literal, ordinary meaning . . . for the

definition the legislature has provided." *Id*. Under a plain reading of the statutory definition, to sell includes offering or agreeing to sell.

Returning to the first-degree controlled substance sale provision under section 152.021, subdivision 1(3), we insert the Legislature's definition of "sell" into the statutory definition of the crime. *Cf. State v. Traxler*, 583 N.W.2d 556, 560 (Minn. 1998) (concluding that substituting the phrase "possess with the intent to manufacture" for "sell" in jury instructions "did not materially misstate the law"). After replacing "sell" with the statutory definition relevant here, Minn. Stat. § 152.01, subd. 15a(2), section 152.021, subdivision 1(3), reads: "A person is guilty of controlled substance crime in the first degree if: . . . on one or more occasions within a 90-day period the person unlawfully *offers or agrees to sell* one or more mixtures of a total weight of ten grams or more containing heroin."

The language self-evidently and unambiguously tells us that individuals "sell" 10 or more grams of heroin when they offer to sell 10 or more grams of heroin. The statutory language does not require anything more. No additional grammatical parsing or lexicographic analysis is necessary to understand what the language plainly says when we apply the Legislature's definition. Accordingly, because Fugalli admitted to offering to sell more than 10 grams of heroin, his guilty plea to first-degree sale of heroin, under Minn. Stat. § 152.021, subd. 1(3), is accurate and valid.

Fugalli insists, however, that section 152.021, subdivision 1(3), requires the State to prove that the person making the sale actually delivered more than 10 grams of heroin, or at the very least, had both access and capacity to deliver 10 or more grams of heroin. To

support this reading and avoid the plain and common-sense meaning of the statutory language, Fugalli makes two interrelated arguments.

First, he points to prior decisions where we have held that the State must establish four distinct elements to prove the commission of a first-degree controlled substance sale crime: (1) a sale, (2) the unlawfulness of the sale, (3) the weight of the controlled substance sold, and (4) the identity of the controlled substance sold.[3] Second, Fugalli observes that the object of the word "offer" in the statutory definition of "sell" is the *act* of selling. *See* Minn. Stat. § 152.01, subd. 15a(2) (sale includes "to offer or agree *to perform an act*" (emphasis added)). According to Fugalli, these textual clues mean that the definition of "sell" in section 152.01, subdivision 15a, which includes the concept of offering to sell, is relevant only to establish that a sale occurred (the first element), leaving the weight and identity elements to be independently proven by the State as they would be in any other controlled substance sale case.

We disagree with Fugalli's analysis. To begin with, Fugalli's argument works too hard and unduly strains the ordinary meaning of the language adopted by the Legislature. Fugalli essentially asks us to read section 152.021, subdivision 1(3), as follows: "A person is guilty of a controlled substance crime in the first degree if on one or more occasions

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[3] Fugalli relies on three primary cases identifying these elements: *State v. Vail*, 274 N.W.2d 127 (Minn. 1979) (identity); *State v. Robinson*, 517 N.W.2d 336 (Minn. 1994) (weight); *State v. Olhausen*, 681 N.W.2d 21 (Minn. 2004) (identity and weight). These cases, however, do not address the legal question presented in this case—whether, standing alone, an offer to sell drugs completes the crime of selling drugs. *See Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 628–29 (Minn. 2021) (noting that descriptive factual similarities between the case before us and past cases are not analytically relevant to questions of law that are not addressed in the prior cases).

within a 90-day period the person unlawfully offers to sell one or more mixtures of a total weight of 10 grams or more containing heroin *and delivers or transfers, or has the capacity to deliver or transfer*, one or more mixtures of a total weight of 10 grams or more containing heroin." Fugalli's interpretation runs afoul of the interpretive principle that courts cannot add words that the Legislature did not include. *See State v. Schwartz*, 957 N.W.2d 414, 419 (Minn. 2021).

Moreover, the premise of Fugalli's argument is incorrect. The State here *did* prove all four elements: (1) Fugalli made a "sale"—here, the offer to sell; (2) Fugalli concedes that it was unlawful for him to sell heroin; (3) Fugalli offered to sell 10 or more grams of a substance, meeting the weight element; and (4) Fugalli offered to sell "heroin," meeting the identity element.

Fugalli also argues that the legislative history of the definition of "sell" in section 152.01, subdivision 15a, compels a decision different from the one we reach today. He points to a short and indecisive discussion between a single legislator and a single witness. We do not need to resort to legislative history when a statute is unambiguous. *See State v. Kirby*, 899 N.W.2d 485, 492 (Minn. 2017) ("[L]egislative history is relevant only if the statute is ambiguous."). Because the statutory meaning of "sell" is plain and unambiguous for the reasons stated above, we decline to use legislative history to create ambiguity in an otherwise unambiguous statute.

Fugalli further asserts that the language of section 152.021, subdivision 1(3), must be construed to require an actual delivery because the First Amendment prohibits the

criminalization of mere words.[4] We do not apply constitutional avoidance statutory interpretation principles when, as here, we have found a statute to be unambiguous. *See State v. Irby*, 848 N.W.2d 515, 521–22 (Minn. 2014).

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[4] In a series of cases, the court of appeals has discussed the distinct question of whether, when a charge is based on an offer to sell, the State must provide some corroborating evidence that the accused had the intent to follow through on the words of the offer. The court of appeals has reached different answers on that legal question. *Compare State v. Lorsung*, 658 N.W.2d 215, 219 (Minn. App. 2003) (ruling that evidence of intent to fulfill an offer to sell drugs is not required), *rev. denied* (Minn. June 17, 2003), *and State v. Hebrink*, No. C6-02-1288, 2003 WL 21384828, at *3 (Minn. App. June 17, 2003) (ruling that Minn. Stat. § 152.021, subd. 1, is unambiguous and "contains no specific intent requirement"), *with State v. Bautista*, No. C5-97-1668, 1998 WL 422221, at *3 (Minn. App. July 28, 1998) (ruling that proof of intent to follow through on an offer to sell drugs is required because to "make any sense," the statute has to be read to include "at least some minimum mens rea, some specific intent requirement"), *rev. denied* (Minn. Sept. 22, 1998). *See also State v. Rosillo*, No. C2-00-1610, 2001 WL 881279, at *2 (Minn. App. July 31, 2001) (ruling that no intent to perform is required, only "some conduct consistent with fulfilling [the] offer" (citation omitted) (internal quotation marks omitted)), *aff'd*, 651 N.W.2d 499 (Minn. 2002) (order).

In each of those cases, resolution of the question was unnecessary because the State had evidence of corroborating acts. *See Lorsung*, 658 N.W.2d at 217 (affirming a second-degree conviction for offering to sell methamphetamine when over the phone the defendant agreed to sell two eight balls of methamphetamine for $500 and agreed on a meeting location, but never followed through); *Hebrink*, 2003 WL 21384828, at *3 (affirming first-degree and second-degree convictions for offering to sell cocaine when the defendant exchanged cocaine for $250 in one sale, then accepted $600 for a second sale and never returned or delivered on that sale); *Rosillo*, 2001 WL 881279, at *2 (affirming first-degree conviction for offering to sell cocaine when the defendant accepted $1,200 and arranged to meet at a later time to deliver cocaine but never showed up or delivered any drugs); *Bautista*, 1998 WL 422221, at *1 (affirming first-degree conviction for sale of cocaine when defendant made phone calls to arrange a deal for six ounces of cocaine and accepted $3,600 in payment but never delivered any cocaine).

We neither reach nor express an opinion on the issue of intent discussed in the cases cited in this footnote because Fugalli did not raise this issue on appeal. Moreover, during the plea hearing, he admitted evidence of corroborating acts: he in fact delivered heroin to the confidential informant.

Fugalli finally argues that if a person sells more than 10 grams of heroin when they merely offer to sell more than 10 grams of heroin and nothing more is required, a different statute—the simulated controlled substances statute, Minn. Stat. § 152.097, subd. 1 (2020),[5]—is rendered irrelevant because the conduct criminalized by section 152.097, subdivision 1, is wholly subsumed by the controlled substance sale crime provisions in chapter 152. *See* Minn. Stat. §§ 152.021–.025 (defining first-degree through fifth-degree controlled substance sale crimes). Fugalli's argument asks us to apply the related-statutes canon (also known as *in pari materia*). That canon "allows two statutes with common purposes and subject matter to be construed together" to determine statutory meaning. *State v. Prigge*, 907 N.W.2d 635, 639 (Minn. 2018) (citation omitted) (internal quotation marks omitted). But the canon applies only "*after* a determination of ambiguity." *Id.* at 639–40. Because we conclude that the language of section 152.021, subdivision 1(3), is unambiguous, the related-statutes canon is inapplicable.

The pre-ambiguity whole statute canon likewise does not help Fugalli. That canon applies when two statutes were enacted at the same time and address the same subject. *See Prigge*, 907 N.W.2d at 640 (stating that the whole statute canon did not apply to two statutes enacted at different times and which do not address the same subject and apply to different circumstances); *Sheridan v. Comm'r of Revenue*, 963 N.W.2d 712, 718 (Minn. 2021) (stating that whole statute canon did not apply because the statutes being compared

[5] Minnesota Statutes § 152.097, subd. 1, provides: "It is unlawful for any person knowingly to manufacture, sell, transfer or deliver or attempt to sell, transfer or deliver a noncontrolled substance upon: (1) the express representation that the noncontrolled substance is a narcotic or nonnarcotic controlled substance . . . ."

were enacted at different times). In his brief, Fugalli acknowledges that the simulated controlled substances crime provision serves a different purpose than the controlled substance sale crime provisions. *See generally Barrow v. State*, 862 N.W.2d 686, 691 (Minn. 2015) (explaining that the statutory prohibition on sales (including offers) of controlled substances serves to disincentivize the drug trade); *State v. Olhausen*, 681 N.W.2d 21, 27–28 (Minn. 2004) (noting that the simulated controlled substances law addresses the common problem of substituting noncontrolled substances for controlled substances).

And the statutes were enacted at different times. It has been a crime to "sell, give away, barter, deliver, exchange or distribute" a controlled substance since at least 1971. Act of June 7, 1971, ch. 937, § 13, 1971 Minn. Laws 1923, 1931–32; *see* Minn. Stat. § 152.15 (1972). Prohibition on the sale of certain drugs dates back many decades longer. *See, e.g.*, Act of March 31, 1939, ch. 102, § 1, 1939 Minn. Laws 162, 162–63. In 1982, in a stand-alone bill, the Legislature enacted the simulated controlled substances provision, section 152.097. Act of March 22, 1982, ch. 599, 1982 Minn. Laws 1434. Later, in 1989, the Legislature reformatted the Controlled Substances Act, and established different degrees of controlled substance sale crimes. Act of May 30, 1989, ch. 290, art. 3, §§ 8, 37, 1989 Minn. Laws 1580, 1596–97 (adopting first-degree controlled substance sale crime), 1612 (repealing Minn. Stat. § 152.15 (1988)).[6] In the same bill, the Legislature added a

[6] In the 1989 law, the Legislature also added a penalty provision to the simulated controlled substances act, setting a 3-year maximum penalty, but it did not change the substance of the law. Act of May 30, 1989, ch. 290, art. 3, § 18, 1989 Minn. Laws 1580, 1603. That change does not affect our analysis of legislative intent or applicability of the

definition of "sell," which included "offer" to sell. *Id.* at 1596. Consequently, the pre-ambiguity whole statute canon is inapplicable.

In sum, Fugalli's efforts to avoid the plain meaning of the statutory language fail. His guilty plea was accurate because he admitted to offering to sell more than 10 grams of heroin, even though he delivered less than that amount.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

whole statute canon. Notably, Fugalli did not deliver a noncontrolled substance to the informant—he delivered heroin. Fugalli does not contend that he could have been charged or convicted under section 152.097.