STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1856

State of Minnesota,
Respondent,

vs.

Jay Carl Krampitz,
Appellant.

Filed February 19, 2008
Affirmed
Connolly, Judge

Olmsted County District Court
File No. K4-05-1360

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101-2134; and

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John M. Stuart, State Public Defender, Roy G. Spurbeck, Assistant Public Defender, Erin Eldridge (Certified Student Attorney), 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

On appeal from his conviction of a third-degree controlled-substance crime (sale of cocaine) under Minn. Stat. § 152.023, subd. 1(1) (2004), appellant Jay Carl Krampitz argues that (1) the district court erred when it ruled that if appellant decided to impeach a prosecution witness with evidence of her past crime of dishonesty, the state would be allowed to impeach appellant with his past drug convictions; (2) the evidence was insufficient to prove that appellant sold cocaine; (3) by sentencing appellant under the more severe of two overlapping statutes, the district court violated his right to equal protection under the Minnesota Constitution; and (4) the district court abused its discretion when it denied appellant's motion for a downward durational departure.

Because (1) the district court's error in conditioning appellant's ability to impeach a prosecution witness with her past crime of dishonesty was harmless; (2) the evidence was sufficient to prove that appellant sold cocaine; (3) in *State v. Richmond*, 730 N.W.2d 62 (Minn. App. 2007), *review denied* (Minn. June 19, 2007), this court rejected sentencing arguments identical to the ones now raised by appellant; and (4) the district court did not abuse its discretion by sentencing appellant to the presumptive sentence under the guidelines, we affirm.

FACTS

On April 8, 2005, the Rochester Police Department was working with a confidential informant, H.M., to set up controlled buys of illegal drugs. H.M. was

cooperating with police because she had been promised a "contact visit" with her incarcerated boyfriend.

H.M. received a phone call from a friend, T.H., who offered to sell her cocaine. H.M. contacted the police, who met with her to make sure that her wire was still functioning, conduct a search of her person, give her $200 in "buy money," and go over the details of the buy. The police then sent H.M. home to wait for a follow-up call from T.H.

Within ten minutes, H.M. received her call and agreed to meet T.H. at a nearby Kwik Trip. H.M. walked to the store and waited; after several minutes, a red/maroon Buick LeSabre pulled into the parking lot. H.M. got into the backseat next to T.H.; appellant was in the front passenger seat, and another man was driving.

T.H. claimed that the cocaine was not yet ready and asked H.M. to leave the $200 with him, but she refused. According to H.M., appellant indicated that he had a smaller amount of crack cocaine that she could buy. H.M. testified that she then purchased two "50-cent pieces" for fifty dollars each and handed the money across the front seat to appellant. H.M. gave T.H. a hug and got out of the vehicle, signaling to the police that a transaction had occurred.

Throughout the transaction, H.M. was under audio and video surveillance by the police. The video did not clearly capture the exchange of the drugs or the money, but the officers conducting the surveillance were able to ascertain that they heard a voice other than T.H.'s offering to sell a smaller amount of drugs to H.M.

As the LeSabre pulled out of the parking lot, the police could not see clearly what was taking place inside the vehicle. The vehicle was pulled over, and its occupants were arrested. The two fifty-dollar bills that had been given to H.M. for the controlled buy were found in appellant's right back pocket.

Meanwhile, H.M. met with the police to turn over the drugs that she had received and the remaining buy money. She was searched to make sure that she had nothing else on her person. The Bureau of Criminal Apprehension (BCA) later confirmed that the packages that H.M. turned over to the police contained a substance that weighed .5 grams and contained cocaine.

Prior to trial, defense counsel moved to exclude impeachment evidence of appellant's 1999 and March 2006 convictions for second-degree and fifth-degree controlled-substance crimes, but to allow him to impeach H.M. with a 1997 felony conviction for financial transaction card fraud. The parties discussed the *Jones* factors[1] and their preferences for allowing or disallowing this evidence, and the district court ruled that if appellant chose to impeach H.M. with her prior conviction, the state would then be allowed to impeach appellant with his prior convictions. Appellant chose to not impeach H.M.

At trial, appellant denied selling crack cocaine to H.M. He testified that he came to Rochester to retrieve a leather jacket that T.H. had borrowed. Appellant further claimed that T.H. had left the jacket at H.M.'s and that he went to the Kwik Trip to get

[1] *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978).

his jacket. Appellant claimed that T.H. sold the cocaine to H.M. and that T.H. gave him the $100 as they left the parking lot as payment for the still missing leather jacket.

The jury found appellant guilty of the charged offense. Prior to sentencing, the district court rejected appellant's assertion that because the crimes of third- and fourth-degree controlled-substance offenses overlap, he should be sentenced to the less severe, fourth-degree crime. *See* Minn. Stat. §§ 152.023, subd. 1(1), .024, subd. 1(1) (2004). The district court also rejected appellant's request for a downward durational departure. Appellant was sentenced to a 39-month prison term.

D E C I S I O N

I.

A district court is vested with great discretion when ruling on evidentiary issues, including whether to admit prior-crimes evidence to impeach a defendant or a witness. *See, e.g., State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998); *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). This court reviews a district court's ruling on these issues "under a clear abuse of discretion standard." *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006).

Evidence that a witness has been convicted of a crime involving dishonesty or false statement is admissible for impeachment purposes. Minn. R. Evid. 609(a). But evidence that a witness has been convicted of a felony not involving dishonesty or false statement is admissible for impeachment only if the district court "determines that the probative value of admitting this evidence outweighs its prejudicial effect." Minn. R.

Evid. 609(a)(1). To determine whether the probative value of admitting a prior criminal conviction outweighs its prejudicial effect, a district court examines the following factors:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978).

Appellant argues that the district court erred by conditioning his right to impeach the state's confidential informant with evidence of her past crime of dishonesty on allowing the state to impeach appellant with his past drug convictions, which the district court acknowledged were substantially more prejudicial than probative. He asserts that the district court had no discretion to exclude H.M.'s 1997 felony conviction for financial transaction card fraud, which qualifies as a conviction involving dishonesty or false statement, and is clearly admissible as impeachment evidence under Minn. R. Evid. 609(a). He further asserts that his right to confront the state's only eyewitness to the drug sale was violated.[2]

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[2] The right to a fair trial includes the right to confront witnesses by effective cross-examination, which is the principal means to assess the believability of a witness and the truth of his or her testimony. *See State v. Ferguson*, 742 N.W.2d 651, 658 (Minn. 2007) (holding that limitation on cross-examination of cooperating prosecution witness as to penalty for first-degree murder, if error, was harmless). The right to confrontation is not violated by limitations on cross-examination so long as the jury is presented with "sufficient information from which to appropriately draw inferences as to the witness's reliability." *Id.* at 657. The jury here was presented with sufficient information from which it could judge H.M.'s reliability, because it knew that she was cooperating with police because she wanted to have a "contact visit" with her incarcerated boyfriend, that

Appellant is at least partially correct: the district court's ruling violated Minn. R. Evid. 609(a)(2), because there is no question that H.M.'s prior conviction involved dishonesty or false statement and should have been admitted. *See State v. Greer*, 635 N.W.2d 82, 90 (Minn. 2001) (holding that while district court has no discretion to exclude evidence of witness's prior conviction involving dishonesty or false statement, court's error in excluding evidence subject to harmless-error analysis). Therefore, this ruling was an abuse of discretion. Nevertheless, even if appellant had decided to impeach H.M. with her prior conviction, the result of his trial would have been the same.

Although the jury was not informed of H.M.'s prior conviction, H.M. was questioned on the issue of bias: H.M. admitted that T.H. was her friend, that she did not know appellant very well, and that she was cooperating with police so that she could have a "contact visit" with her incarcerated boyfriend. Thus, the jury was given information from which it could judge H.M.'s credibility, even without knowing about her 1997 conviction for financial transaction card fraud. Therefore, any error in limiting appellant's ability to use this evidence was harmless beyond a reasonable doubt. *See State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994) (explaining that harmless-error analysis requires reviewing court to conclude beyond a reasonable doubt that average jury would

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she considered T.H. to be her friend, and that she did not know appellant very well. Thus, the district court's exclusion of evidence of H.M.'s prior conviction does not rise to the level of a constitutional violation, particularly since that evidence would have merely called her credibility into question and it had nothing to do with the existence of any bias, prejudice, or ulterior motive for testifying against appellant in this particular case. *See State v. Greer*, 635 N.W.2d 82, 90 (Minn. 2001) (explaining that while a conviction for providing false information might call credibility into question, it is not likely to reveal bias, prejudice or ulterior motive for testifying).

have reached the same verdict if evidence had been admitted and damaging potential of evidence had been fully realized).

Appellant complains that the district court's ruling "forced defense counsel into a Hobson's choice: impeach the witness with clearly admissible evidence and subject appellant to impeachment by highly prejudicial evidence, or forego introducing important admissible evidence to avoid admission of appellant's otherwise inadmissible prior convictions." But appellant was given a significant tactical advantage because he was able to choose in the first instance and because he likely gained more from excluding evidence of his prior crimes than he would have gained from impeaching H.M. with her prior crime.

Appellant criticizes the district court's application of the principle that "sauce for the goose is sauce for the gander" and asserts that the district court ignored the fundamental differences between the admissibility of his prior convictions and H.M.'s prior conviction. Appellant distinguishes the two cases relied upon by the district court in making its ruling, as involving prior drug convictions of prosecution witnesses that did not relate directly to truth or falsity, unlike H.M.'s prior conviction. *See, e.g., State v. Owens*, 373 N.W.2d 313, 316-17 (Minn. 1985); *State v. Hochstein*, 623 N.W.2d 617, 624 (Minn. App. 2001). While the state acknowledges that the district court's reading of these two cases may have been "overly broad," it insists that the district court did not abuse its discretion in agreeing that "appellant should not be allowed to portray himself as a person who obeys the law, especially while claiming the state's witness was dishonest."

While appellant's argument is somewhat persuasive, we have already concluded that the district court abused its discretion in ruling that appellant could not impeach H.M. with her prior conviction, but that this was harmless error.

II.

Appellant next argues that the evidence was insufficient to prove beyond a reasonable doubt that he sold the cocaine to H.M. When considering a challenge to the sufficiency of the evidence, this court is limited to ascertaining whether, given the facts in the record and any legitimate inferences that can be drawn from those facts, the jury could reasonably find that the defendant was guilty. *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003). This court gives particular deference to the jury's credibility determinations. *State v. Laine*, 715 N.W.2d 425, 430 (Minn. 2006). And this court assumes that the jury believed the state's witnesses and rejected any contrary evidence. *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007). In all, "[a] defendant bears a heavy burden to overturn a jury verdict." *State v. Vick*, 632 N.W.2d 676, 690 (Minn. 2001).

Appellant argues that the only direct evidence that appellant sold the cocaine is the testimony of H.M., which is "fraught with difficulties," because (1) her testimony was ambiguous until further prodded by the prosecutor; (2) she testified that she and T.H. were good friends, which provided her with a clear incentive to implicate appellant, whom she did not know well, over her friend T.H.; and (3) she was given a "contact visit" with her incarcerated boyfriend, which provided her with an additional incentive to testify against someone she did not know well. Appellant further asserts that the other pieces of incriminating evidence, which included the buy money found in his pocket, the

unclear audio and video evidence gathered by police surveillance, and the testimony of the officers conducting that surveillance, were insufficient to prove that he sold the cocaine to H.M.

But in a case like this one that involves conflicting testimony, the jury was entitled to decide which witnesses were credible. And the details of H.M.'s testimony were corroborated by the testimony of the officers conducting the surveillance, who stated that after T.H. told H.M. that he did not have any drugs, they heard a third person, later identified as appellant, agree to sell two packets of drugs. H.M.'s version of the events was further corroborated by the physical evidence found on her person (the two packets of crack cocaine and the $100 remaining from the buy money) and by the physical evidence found on appellant's person (the two fifty-dollar bills in buy money found in his pocket minutes later when he was arrested). Finally, appellant's claim that T.H. gave him the $100 as payment for his lost leather jacket was not corroborated by any other evidence: no one was heard discussing a jacket, and appellant admitted on cross-examination that he never asked H.M. about the jacket; that he did not hear T.H. discuss the jacket with H.M.; and that no one else in the vehicle discussed the jacket. On this record and under these facts, the evidence is more than sufficient to support appellant's conviction.

III.

Appellant next argues that his sentence for third-degree sale of cocaine, as a narcotic drug, should be replaced with a lesser sentence of fourth-degree sale of cocaine, as a schedule II substance, on the grounds that the statutes overlap and the more severe

sentence violates equal protection. *See* Minn. Stat. §§ 152.023, subd. 1(1), .024, subd. 1(1) (2004). Appellant asserts that the statutes proscribe the exact same criminal conduct, thus violating his right to equal protection. This court has rejected identical arguments in a case released after appellant prepared his brief for this appeal. *See State v. Richmond*, 730 N.W.2d 62 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).[3]

In *Richmond*, this court held that (1) the legislature intended that the sale of less than three grams of cocaine, as a narcotic drug, be punished as a third-degree and not a fourth-degree controlled-substance offense; (2) the statutes do not irreconcilably conflict and, even if they did, the more specific inclusion of cocaine as a narcotic prevails; and (3) the potential for unfettered prosecutorial discretion in deciding to charge under the statute with the more severe penalty does not violate equal protection under either the federal or the state constitution. *Id.* Following *Richmond*, we conclude that appellant's constitutional rights were not violated when the district court sentenced him under Minn. Stat. § 152.023, subd. 1(1).

IV.

Appellant finally argues that the district court abused its discretion in denying his request for a downward durational departure and in sentencing him to the presumptive 39-month term. Only in a "rare" case will a reviewing court reverse a district court's imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Even when "substantial and compelling circumstances are present," the district court has broad discretion to decide whether to depart from the presumptive sentence. *Id.*

[3] At oral argument, appellant's counsel conceded that *Richmond* is dispositive.

Appellant claims that the district court failed to consider his legitimate reasons for a downward departure. But the district court held three separate hearings and fully considered appellant's departure request before denying it and imposing what the district court and the parties believed to be the presumptive sentence.[4] Appellant further claims that the district court had the responsibility to consider the sentences meted out to other offenders convicted of similar crimes under similar circumstances, citing *State v. Vazquez*, 330 N.W.2d 110, 112 (Minn. 1983). But *Vazquez* does not support a reduction in appellant's sentence. To the contrary, the supreme court in *Vazquez* merely commented that while the accomplice's conduct was as bad or worse than the defendant's, the appropriate remedy would have been to increase the accomplice's sentence, not reduce the defendant's, and that reducing the defendant's sentence would merely compound the error. *Id.* at 113. Appellant has failed to provide this court with any basis to reverse the district court's exercise of its sound discretion and its decision to impose the presumptive sentence.

Affirmed.

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[4] The probation officer preparing the presentence investigation report (PSI) found "no substantial or compelling reason to recommend any type of sentencing departure," and calculated the presumptive sentence at 45 months. At sentencing, however, both parties assumed that appellant should not have been awarded a custody-status point in the determination of the guidelines sentence, and informed the district court that the presumptive range was 37 to 41 months. The district court concluded that no grounds for departure existed and imposed what it believed was the presumptive sentence of 39 months. On appeal, the state agreed to consider the 39-month sentence given by the district court as the presumptive sentence, but asserted that should this court remand the matter for resentencing, "it should direct the [district] court to reconsider and correct, if necessary, the criminal history score and [the] guidelines sentence."