STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0032

State of Minnesota,
Respondent,

vs.

Timothy Sorgine,
Appellant.

Filed February 26, 2008
Affirmed
Peterson, Judge

Mower County District Court
File No. 50-K5-05-001095

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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

John M. Stuart, State Public Defender, Benjamin J. Butler, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and Poritsky, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

PETERSON, Judge

In this appeal from convictions of fifth-degree possession of marijuana and fifth-degree sale of marijuana, appellant argues that (1) the district court violated his right to testify and explain his conduct; and (2) because his convictions arose from a single behavioral incident, the court erred in sentencing him for both offenses. We affirm.

FACTS

During the execution of a search warrant at appellant Timothy Sorgine's residence, law-enforcement officers discovered more than 55 marijuana plants in various growth stages, 154 grams of marijuana in a Tupperware container on the kitchen table, individually packaged baggies of marijuana, and grow lights and other items associated with growing and using marijuana. Appellant was charged with one count each of selling marijuana in violation of Minn. Stat. § 152.025, subd. 1(1) (2004),[1] and possessing marijuana in violation of Minn. Stat. § 152.025, subd. 2(1) (2004).

At trial, appellant sought to introduce evidence that he uses marijuana to alleviate symptoms resulting from Still's Disease. The district court ruled:

> He can't express medical opinions given to him by anyone else. He can't express his understanding of his medications

[1] When used in Minn. Stat. § 152.025, subd. 1(1), "sell" means "to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture." Minn. Stat. § 152.01, subd. 15a (2004). When used in Minn. Stat. § 152.01, subd. 15a, the meaning of "manufacture" includes the production and cultivation of drugs. Minn. Stat. § 152.01, subd. 7 (2004). Consequently, offenses referred to in Minn. Stat. § 152.025, subd. 1(1), as sale crimes include the cultivation of marijuana.

> or what components or contents of those medications may or may not be THC or similar to THC in chemical structure. . . .
>
> . . . [H]e can testify that he needs, because of his personal well-being, the use of marijuana, but he just can't testify to any medical opinions, whether they're his opinions or someone else's opinions and whether it's a qualified expert giving that opinion or not a qualified expert giving that opinion to him.
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> . . . .
>
> . . . He can testify that he has been diagnosed with Still's Disease. He can tell us what he believes the symptomatolgy of that disease is. He's not going to be allowed to quote or say that he was told this by a doctor or anyone else. That's hearsay on hearsay or hearsay, at least.

Appellant testified that he has had Still's Disease, a type of rheumatoid arthritis, for almost 14 years. Defense counsel then asked:

> Q: Okay. Well, what's the main symptom of Still's disease?
> A: The inability to move. It dries all the fluid out in every joint in your body.

The district court sustained the state's objection to the question and ordered the question and response stricken. In a bench conference, the court explained that appellant could testify about the symptoms he had that were relieved by marijuana but could not relate those symptoms to a specific illness or diagnosis because that would be a medical opinion.

Appellant then testified:

> Q: . . . [Y]ou used this marijuana extract in order to help with some of the symptoms of your condition, is that correct?
> A: Yes.
> Q: What specifically does the marijuana do for you?

A: Well, I have multiple joint replacements that I – allows me to be mobile, but they can't replace all the joints, and so as you move, there's friction which is painful. So it allows me to do what I otherwise couldn't do, and that after trying everything else that's known. So it allows me to not lay in my electric hospital bed or have to rely on an electric chair to get up. It allows me to have . . . a life with my kids. You know, to endure the other medicines that I'm prescribed. It helps with the symptoms and the side effects that not only the disease causes, but the other medicines that are prescribed to try to deal with it.

. . . .

Q: . . . [Y]ou are of the opinion that Western medicine has not provided you with what you need, is that correct?

A: By "Western medicine", do you mean in Minnesota?

Q: . . . I'm talking about Western medicine that you would get at the Mayo Clinic here in Minnesota.

A: At the Mayo Clinic here in Minnesota they do all that they can do for me.

Q: And in your opinion, is that enough?

A: No.

Q: And in your opinion, does marijuana use provide a life worth living that Western Medicine does not?

A: . . . It helps so much that I can't imagine.

Q: And is that why you go through all the trouble in procuring marijuana for your own use?

A: After living with it for as long as I've lived with it and knowing what it's like without it and with it, it's like mobility is too much of a temptation.

Appellant testified that the marijuana found at his residence was for his own use. He explained that he processes marijuana plants into a derivative because the derivative is the only thing that alleviates his suffering. He testified that only a small amount of derivative can be extracted from each plant and that the derivative from two dozen plants would fill less than one small pill bottle.

The jury found appellant guilty as charged. The district court sentenced him on both the possession and sale convictions. This appeal followed.

D E C I S I O N

I.

"[E]very criminal defendant has the right to be treated with fundamental fairness and afforded a meaningful opportunity to present a complete defense." *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1993) (quotation omitted). "[I]t cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock v. Arkansas*, 483 U.S. 44, 49, 107 S. Ct. 2704, 2708 (1987). But "the accused must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Richards*, 495 N.W.2d at 195 (quotation omitted). Thus, even when a party alleges a violation of his constitutional rights, evidentiary questions are reviewed for abuse of discretion. *State v. Gustafson*, 379 N.W.2d 81, 84 (Minn. 1985). If an evidentiary ruling led to the violation of a party's constitutional right and if the error was not harmless beyond a reasonable doubt, then the conviction should be reversed. *In re Welfare of M.P.Y.*, 630 N.W.2d 411, 415 (Minn. 2001). But reversal is not appropriate when a reasonable jury would have reached the same verdict even if the evidence had been admitted and its potential fully realized. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994).

A defendant's constitutional right to provide testimony regarding intent and motivation is very broad. *State v. Buchanan*, 431 N.W.2d 542, 550 (Minn. 1988). While the district court may impose reasonable limits on the testimony of a defendant, courts must be mindful of the need to scrutinize with the greatest care any restrictions placed on a defendant's testimony offered as to his intent and the motivation underlying that intent

so as not to jeopardize the defendant's federal and state constitutional right to a fair trial. *State v. Rein*, 477 N.W.2d 716, 719-20 (Minn. App. 1991), *review denied* (Minn. Jan. 30, 1992) . "[C]riminal defendants have a due process right to explain their conduct to the jury, whether or not their motives constitute a valid defense." *Id.* at 719 (citing *State v. Brechon*, 352 N.W.2d 745, 751 (Minn. 1984)). But a defendant's right to testify as to intent or motive is not without limitation, and such testimony must be balanced against interests served by applying evidentiary rules to the defendant's testimony. *Rock*, 483 U.S. at 55-56, 107 S. Ct. at 2711.

Appellant argues that he was qualified to testify as a lay person about the symptoms of Still's Disease because he has suffered from the disease for almost 14 years. The district court allowed appellant to testify about his symptoms. Appellant's testimony described his own perceptions of his symptoms. But the district court did not allow appellant to testify that the symptoms that he perceived were the symptoms of a particular disease. To relate his symptoms to a particular disease, appellant would either have to repeat what he had been told by someone who diagnosed his disease or he would have to have medical expertise that would provide a basis for expressing his own medical opinion. Repeating what he had been told by someone else would be hearsay. *See* Minn. R. Evid. 801(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). And appellant does not contend that he was qualified as an expert to state a medical opinion at trial. *See* Minn. R. Evid. 702 (witness qualified as an expert may testify in form of an opinion). The court's ruling that appellant could not relate his

symptoms to a specific illness or diagnosis was not an abuse of discretion. *See Marose v. Hennameyer*, 347 N.W.2d 509, 511 (Minn. App. 1984) (concluding that lay person was not qualified to give opinion on her need for medical care).

Appellant argues that the district court erred in prohibiting him from testifying that a doctor had written him a prescription for marijuana. But although the district court used testimony about a prescription as an example of evidence that would be prohibited, the transcript pages cited by appellant do not show that appellant sought to testify that a doctor had written him a prescription for marijuana. Also, appellant has not explained why the district court erred by treating a prescription written by a doctor as a statement of the doctor's medical opinion that appellant needs the prescribed medication.

Appellant argues that the prescription for marijuana and statements made to appellant by medical doctors regarding marijuana use were admissible as statements "made for the purpose of medical diagnosis or treatment" under Minn. R. Evid. 803(4). But that rule applies to a patient's statement to medical personnel. *See* Minn. R. Evid. 803(4) cmt. ("Statements to treating physicians traditionally have been admissible as an exception to the hearsay rule if reasonably pertinent to diagnosis and treatment.").

Appellant was afforded a broad opportunity to explain to the jury the motivation for his conduct. Appellant testified that he has had multiple joint replacements and suffers from painful friction; his mobility is restricted, which requires him to stay in bed or use an electric chair to get up; the Mayo Clinic had provided all the treatment it had to offer, and it was not enough; and marijuana relieves his pain and the symptoms of Still's Disease and the side effects of medication and affords him mobility.

Furthermore, an offer of proof is necessary to evaluate prejudice. *In re Estate of Olsen*, 357 N.W.2d 407, 413 (Minn. App. 1984), *review denied* (Minn. Feb. 27, 1985). Except for the answer about the main symptom of Still's Disease that was stricken, appellant did not make an offer of proof as to what additional evidence he wanted to introduce regarding his symptoms and treatment. A party who fails to make an offer of proof showing the nature of excluded evidence fails to preserve the evidentiary issue for appeal. *M.P.Y.*, 630 N.W.2d at 415. An offer of proof is adequate only "if it is sufficiently specific and there is nothing in the record to indicate a want of good faith or inability to produce the proof." *Santiago v. State*, 644 N.W.2d 425, 442 (Minn. 2002) (quotation omitted); *see In re Welfare of W.J.R.*, 264 N.W.2d 391, 394 (Minn. 1978) (requiring some specifics in offer of proof beyond conclusory characterization of evidence offered). Appellant has not shown that the district court abused its discretion when it did not permit appellant to testify about medical opinions that were given to him by someone else.

II.

Minn. Stat. § 609.035, subd. 1 (2004), states that "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." This means that a court may impose only one sentence when multiple offenses are part of a single behavioral incident. *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000). To determine whether multiple offenses are part of a single behavioral incident, the court considers factors of time and place, and whether the offenses were motivated by a single criminal objective. *Id.* The court considers whether

the offenses "(1) arose from a continuous and uninterrupted course of conduct; (2) occurred at substantially the same time and place; and (3) manifested an indivisible state of mind." *State v. Heath*, 685 N.W.2d 48, 61 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004), *cert. denied*, 546 U.S. 882 (2005). The district court's determination of whether multiple offenses constitute a single behavioral incident is a factual determination that we will not reverse on appeal unless clearly erroneous. *Id.* The state has the burden of proving that the offenses were not part of a single course of conduct. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

In *State v. Carr*, 692 N.W.2d 98 (Minn. App. 2005), this court considered whether possessing methamphetamine and manufacturing methamphetamine were separate offenses, rather than parts of a single behavioral incident. In *Carr*, the possession charge was based on possession of partly manufactured methamphetamine, which was still in its liquid form; this court concluded that the only reason the defendant possessed the partly manufactured methamphetamine was to complete the manufacturing process, which made the possession and manufacturing parts of the same behavioral incident. *Id.* at 102. In contrast, in *Heath*, this court concluded that conspiracy to manufacture methamphetamine and aiding and abetting possession with intent to sell were two separate behavioral incidents because the conspiracy was complete when the participants agreed to manufacture and took the first overt act in furtherance of manufacture, but the second offense occurred later, after the methamphetamine had been manufactured and the conspirators had divided it among themselves in order to sell it. *Heath*, 685 N.W.2d at 61.

The *Carr* court listed the following reasons for concluding that the two charges were part of a single behavioral incident: the liquid methamphetamine needed further processing "before the manufacturing process was complete"; because the methamphetamine was not yet in a usable form, the only reason to possess it would be to complete the manufacturing process; the methamphetamine in *Carr* was not in a usable form, whereas in *Heath* it was; and "[a]lthough a conspiracy to manufacture methamphetamine will typically be completed by the time the conspirators are in possession of the drug, manufacture and possession can occur at the same time." 692 N.W.2d at 102.

The state concedes that the factors of time and place were the same in this case but argues that the manufacturing and possession convictions were not motivated by a single criminal objective. The possession charge was based on the marijuana in the Tupperware container, and the sale charge was based on the plants in various growth stages. The marijuana in the Tupperware container was ready to be used, but the marijuana plants were still under cultivation and had to be processed before the marijuana would be ready for use.

Heath and *Carr* indicate that the district court's finding that appellant's two convictions did not arise from a single behavioral incident is not clearly erroneous. During cultivation and processing, appellant needed to possess the marijuana in the plants, and that possession was an inextricable part of the manufacturing process. But the

marijuana in the Tupperware container was the product of an earlier manufacturing process, and possessing it was not part of the current course of manufacturing conduct.

Affirmed.