STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2283

State of Minnesota,
Respondent,

vs.

Richard Reuel Womack,
Appellant.

Filed April 22, 2008
Reversed
Worke, Judge

Clay County District Court
File No. K5-06-784

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

Brian J. Melton, Clay County Attorney, Clay County Courthouse, 807 North 11th Street, Moorhead, MN 56561 (for respondent)

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

Considered and decided by Toussaint, Chief Judge; Hudson, Judge; and Worke, Judge.

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

WORKE, Judge

On appeal from convictions of first-degree controlled-substance crime, conspiracy to commit controlled-substance crime, and child endangerment, appellant argues that (1)

the state failed to corroborate accomplice testimony, (2) the district court committed prejudicial error by admitting evidence of appellant's various prior bad acts, and (3) the district court committed prejudicial error in instructing the jury. We reverse.

FACTS

On April 5, 2006, officers received a tip that Rick Guderjahn was going to purchase methamphetamine and followed him to a residence. After Guderjahn left the residence, officers stopped him for driving with a suspended license. Guderjahn agreed to return to the residence to conduct a controlled buy. Following the controlled buy, officers executed a search warrant at the residence. Jennifer Drewes was home with her children when officers arrived. Among other things, officers found methamphetamine packaged for sale, marijuana, and the controlled-buy money. Drewes was arrested, but told officers that the drugs belonged to her boyfriend, appellant Richard Reuel Womack, who lived in California. Drewes agreed to testify against appellant for a reduced sentence.

During trial, appellant moved to prohibit the state from eliciting testimony from Drewes regarding drug sales prior to April 5. The court ruled that it would be

> impossible for the State to be able to prove its case without being allowed the opportunity to establish the history of the relationship between [] Drewes and [appellant], including . . . the method or modus operandi of [prior] drug transactions. If the State were . . . limited to the sole sale in issue, the jury . . . could not logically convict [appellant].

The district court instructed the jury:

> [Appellant] is on trial here for alleged drug offenses that occurred on April 5, 2006 . . . . During the testimony of

> [Drewes] you will hear evidence which alleges . . . that [appellant] and perhaps [Drewes], were involved in other drug transactions before April 5, 2006. It is important for you to be aware that [appellant] is not charged with drug crimes . . . for any time frame or any transaction other than April 5, 2006. And I'm allowing this testimony into evidence solely for the purpose of establishing the relationship between [Drewes] and [appellant] and the alleged method of operation or custom of [appellant] in his alleged distribution and sale of drugs so that you can better understand the allegations of the State relative to the charges on April 5, 2006.

Drewes testified that she sold marijuana and methamphetamine for appellant. According to Drewes, appellant would send her drugs from California, which she would sell and then send him the money. Appellant visited Drewes in March 2006, during which time she sold drugs for him. Drewes testified that appellant called her on April 5, 2006, and told her that Guderjahn would stop by to buy methamphetamine. Drewes testified that following the sale, Guderjahn returned and asked for two eightballs for $500. Drewes called appellant for permission to conduct that sale. When the officers arrived, Drewes told them to call appellant because she believed that appellant would admit that the drugs belonged to him. When the officers called, appellant did not acknowledge ownership of the drugs.

Believing that he had been set up by the individual he knew as "Poon," Guderjahn agreed to testify and in exchange, he was not charged with driving after suspension. Guderjahn testified that prior to April 5, he purchased drugs from Drewes and a person he called "Poon," although he did not know Poon's real name. On April 5, Guderjahn called the number he had for Poon to arrange a sale. Guderjahn drove to Drewes's residence and she told him to come back in 15 minutes. After Guderjahn left, police pulled him

over. After being fitted with a microphone, Guderjahn returned to the residence and asked Drewes for two eightballs for $500. Drewes called someone and the conversation was recorded through Guderjahn's microphone. An *unidentified* male on the phone with Drewes stated "two for five?" "Yep." Guderjahn picked two baggies and paid Drewes. Guderjahn identified appellant as Poon, but admitted that all he remembered about Poon was that he was a "black" guy. Guderjahn testified that he was not positive about his identification and might have identified appellant because he was the only African-American male in the courtroom.

In addition to Drewes and Guderjahn, several officers testified. One officer testified that he knew several things about Poon, including: he was African American, he was from California, and he dated Drewes. During the search of Drewes's home officers found a resume for Richard "Big Poon" Womack. Officers also discovered that Drewes called "Daddy" on her cell phone during the controlled buy; officers called the number and appellant answered and spoke with an officer about Drewes's arrest. Two officers also testified that appellant was at Drewes's home in March 2006.

At the conclusion of trial, appellant requested that the district court instruct the jury on "the overt act" in the conspiracy charge. The district court instructed:

> The overt acts alleged in this case are either the packaging, distribution, transportation or sale . . . . An overt act is any action taken by one of the conspirators with the intention of furthering the accomplishment of any object of the conspiracy. The act . . . does not itself have to be a criminal act, but it must be done with the purpose of furthering the conspiracy.

The jury found appellant guilty, and this appeal follows.

D E C I S I O N

Sufficiency of the Evidence

In considering a claim challenging the sufficiency of the evidence, our role "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Our review includes an analysis of the facts presented and the inferences the jury could reasonably draw from those facts. *State v. Robinson*, 604 N.W.2d 355, 366 (Minn. 2000). "[B]ecause weighing the credibility of witnesses is the exclusive function of the jury[,]" *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980), we assume that "the jury believed the state's witnesses and disbelieved [contrary evidence]." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Therefore, we 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, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Olhausen*, 681 N.W.2d 21, 25-26 (Minn. 2004).

Appellant argues that the evidence is insufficient to support his convictions because the proof consists largely of Drewes's accomplice testimony that the state failed to corroborate.

> 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, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

Minn. Stat. § 634.04 (2004). Accomplice testimony must be corroborated because it "may be untrustworthy because of the risk that the accomplice may testify against another in the hope of or upon a promise of immunity or clemency or to satisfy other self-serving or malicious motives." *State v. Nelson*, 632 N.W.2d 193, 202 (Minn. 2001) (quotation omitted). "Corroborating evidence, which may be direct or circumstantial, is viewed in a light most favorable to the verdict and, while it need not establish a prima facie case of the defendant's guilt, it must point to defendant's guilt in some substantial way." *State v. Johnson*, 616 N.W.2d 720, 727 (Minn. 2000). "Corroborating evidence is sufficient if it restores confidence in the accomplice's testimony, confirming its truth and pointing to the defendant's guilt in some substantial degree." *State v. Ford*, 539 N.W.2d 214, 225 (Minn. 1995) (quotation omitted).

Appellant was convicted of first-degree controlled-substance crime. A person is guilty of this offense if: "on one or more occasions within a 90-day period the person unlawfully sells . . . a total weight of ten grams or more containing . . . methamphetamine." Minn. Stat. § 152.021, subd. 1(1) (2004). The offense requires that the state prove beyond a reasonable doubt that: (1) appellant, on one or more occasions, within a 90-day period, unlawfully sold a total weight of ten grams or more containing methamphetamine, (2) appellant knew or believed that the substance contained methamphetamine, and (3) the sale took place on or about April 5, 2006. 10A *Minnesota Practice*, CRIMJIG 20.02 (2006). The district court instructed the jury that "to sell" means "to sell, give away, barter, deliver, exchange, distribute, or dispose of to another, or to offer to agree to do the same or possess with intent to do the same or to

manufacture." The court instructed that appellant possessed methamphetamine if "it was in a place under [appellant's] exclusive control to which other people did not normally have access or if [appellant] knowingly exercised dominion and control over it."

Appellant argues that the evidence is insufficient because it consists solely of Drewes's accomplice testimony that the drugs belonged to appellant and Guderjahn's testimony that he called someone he knew as Poon to arrange a sale. The state contends that there was sufficient corroborative evidence: Drewes's cell phone, which showed a call to "Daddy" during the controlled buy; the phone conversation, during which someone was heard saying "yep"; a text message from appellant asking Drewes to send him money; and the testimony of officers who placed appellant at Drewes's home in March. Following a review of the entire record, we conclude that there is insufficient evidence to corroborate Drewes's testimony. The state relies on the cell-phone records, which show that someone answered appellant's phone and said "yep." But the state did not show that it was appellant who actually answered the phone and did not establish what "yep" meant. The text message shows that appellant asked Drewes for money, but it did not show that the drugs belonged to him on April 5. And appellant's mere presence at Drewes's home in March does not show that the drugs belonged to him. Finally, Guderjahn's testimony was particularly weak—he never met appellant, and he was unable to identify him in the courtroom.

Appellant was also convicted of second-degree conspiracy to commit a controlled-substance crime. A person is guilty of this offense if: "on one or more occasions within a 90-day period the person unlawfully [conspires to sell] . . . a total

weight of three grams or more containing . . . methamphetamine." Minn. Stat. §§ 152.022, subd. 1(1), .096, subd. 1 (2004). A conspiracy requires an agreement to commit a crime and an overt act in furtherance of the conspiracy by one of the parties to the agreement. *State v. Pinkerton*, 628 N.W.2d 159, 162-63 (Minn. App. 2001), *review denied* (Minn. July 24, 2001).

Appellant argues that the evidence is insufficient because the conviction rests on the single word "yep," supposedly in response to the two-for-five question. The state contends that Guderjahn's testimony and the tape-recorded conversation are sufficient to support the conviction. But again, Guderjahn called someone named Poon from whom he had purchased methamphetamine in the past, but he was not sure whom he actually talked to on April 5. Additionally, Guderjahn was unable to identify appellant as Poon. Finally, the taped conversation between Drewes and, allegedly, appellant does not provide sufficient corroboration. The only word allegedly spoken by appellant that is legible is "yep." This is not enough to support a conviction of conspiracy to sell methamphetamine.

Finally, appellant was convicted of child endangerment. A person is guilty of endangerment if he "knowingly caus[es] or permit[s] the child to be present where any person is selling, manufacturing, possessing immediate precursors or chemical substances with intent to manufacture, or possessing a controlled substance." Minn. Stat. § 609.378, subd. 1(b)(2) (2004). The elements of child endangerment are: (1) appellant knowingly caused or permitted a child to be present where a person was illegally selling, manufacturing, possessing immediate precursors or chemical substances with intent to

manufacture or possessing a controlled substance, (2) appellant was a parent, (3) the child was under eighteen years old, and (4) the act took place on or about April 5, 2006. 10 *Minnesota Practice*, CRIMJIG 13.94 (2006).

Appellant argues that the evidence is insufficient to show that he "knowingly caused or permitted" the children to be present where Drewes sold drugs. The determination of whether appellant knowingly caused or permitted the children to be present where drugs were sold is necessarily tied to our earlier conclusion that the evidence is insufficient to show that appellant was guilty of first-degree controlled-substance crime and second-degree conspiracy to commit a controlled-substance crime. Therefore, we conclude that the evidence is also insufficient to show that appellant knowingly caused or permitted the children to be present where Drewes sold drugs. Because the state failed to sufficiently corroborate Drewes's testimony and her testimony was the main evidence connecting appellant to the charges, the evidence was insufficient to support the convictions. Although we could reverse on this basis alone, we will address the additional alleged errors.

Evidence of Prior Bad Acts

Appellant next argues that the district court abused its discretion by admitting evidence of prior bad acts. Generally, evidence of other crimes or bad acts, commonly known as *Spreigl* evidence, is inadmissible to prove that a defendant acted in conformity with his character. Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). But *Spreigl* evidence may be admissible to prove other things, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

mistake or accident. Minn. R. Evid. 404(b); *Spreigl*, 272 Minn. at 491, 139 N.W.2d at 169.

The district court has broad discretion in determining the admissibility of *Spreigl* evidence. *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988). This court reviews the district court's admission of *Spreigl* evidence for an abuse of discretion. *Id.* To prevail on this challenge, appellant must establish that the district court erred when it admitted the evidence and show actual prejudice caused by that error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981). If the district court erred in admitting the evidence, we must determine "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). If there is a reasonable possibility that the verdict would have been favorable to appellant without the evidence, then the error is prejudicial. *Id.* Before admitting *Spreigl* evidence, the district court must first determine that (1) the state gave notice of its intent to admit the evidence; (2) the state clearly indicated what it would offer the evidence to prove; (3) there is clear and convincing evidence that the defendant participated in the prior act; (4) the evidence is relevant and material to the state's case; and (5) the probative value of the evidence outweighs its potential prejudice. *Angus v. State*, 695 N.W.2d 109, 119 (Minn. 2005).

Here, the district court determined that evidence of prior drug sales conducted by appellant and Drewes was not *Spreigl* evidence but, rather, was relationship evidence. The district court stated that the evidence would be used "to establish the history of the

relationship between [] Drewes and [appellant], . . . and the method or modus operandi of [prior] drug transactions."

Under Minn. Stat. § 634.20 (2004),

> [e]vidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The evidence here is not "relationship evidence" because Drewes is not a "victim of domestic abuse." The state argues that although relationship evidence is often discussed in the context of domestic-abuse cases, it is not limited to those cases. However, the state fails to provide any support for this argument.

If the evidence was admitted to show method or modus operandi, as the district court concluded and the state argues, then the court was required to do a *Spreigl* analysis. The district court determined that the evidence was relevant and material to the state's case and that its probative value outweighed the potential for prejudice. However, the state did not give *Spreigl* notice or clearly indicate what it would offer the evidence to prove. And the district court did not determine that there was clear and convincing evidence that appellant participated in the prior bad acts. The district court failed to conduct a *Spreigl* analysis when one was required. We note that the only evidence supporting the prior bad acts was the testimony of Drewes, which was not sufficiently corroborated. This evidence showed a pattern of behavior and connected appellant to more drug sales than the one that occurred on April 5, 2006. Accordingly, there is a

reasonable possibility that the verdict would have been favorable to appellant without the evidence. Therefore, appellant has shown that the district court erred and that he was prejudiced.

Jury Instructions

Finally, appellant challenges the district court's jury instructions. Generally, we review the adequacy of jury instructions for an abuse of discretion. *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998). The district court "has considerable latitude in the selection of the language of a jury charge . . . [but] a jury instruction must not materially misstate the law." *State v. Pendleton*, 567 N.W.2d 265, 268 (Minn. 1997). "[T]he court's charge to the jury must be read as a whole, and if, when so read, it correctly states the law in language that can be understood by the jury, there is no reversible error." *Peou*, 579 N.W.2d at 475.

Appellant argues that his conviction of conspiracy to commit a controlled-substance crime violated his right to a unanimous jury verdict because the instructions did not require the jury to agree on a particular overt act. The state relies on the general rule that when a crime can be committed in various ways, the jurors need not agree on the mode of commission. The state is correct that while jury unanimity is required as to each element of a charged crime, it is not required for alternative means of satisfying a particular element. *State v. Stempf*, 627 N.W.2d 352, 354 (Minn. App. 2001). But in *Stempf*, we held that when "jury instructions allow for possible significant disagreement among jurors as to what acts the defendant committed, the instructions violate the defendant's right to a unanimous verdict." *Id.* We reversed the conviction of possession

of a controlled substance when the jurors were presented with evidence that Stempf possessed methamphetamine in a truck and also at his work. *Id.* at 359. The court held that the jury instructions violated Stempf's right to a unanimous verdict because the jurors, in finding him guilty of possessing drugs, could have relied on separate instances of possession. *Id.*

Here, appellant was charged with conspiracy to sell methamphetamine. The court instructed that the overt act in the case was the packaging, distribution, transportation, or sale made by one of the conspirators. The instructions required the jurors to find that one of the two conspirators committed one of four acts. This instruction potentially allowed jurors to convict appellant while disagreeing as to which alleged overt act satisfied the element. As a result the district court erred in its instruction.

Reversed.