STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1042

State of Minnesota,
Respondent,

vs.

Susana Serrato,
Appellant.

Filed August 19, 2008
Affirmed
Peterson, Judge

Brown County District Court
File No. CR-06-943

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

James R. Olson, Brown County Attorney, John L.R. Yost, Assistant County Attorney, 519 Center Street, P.O. Box 428, New Ulm, MN 56073-0428 (for respondent)

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

Considered and decided by Peterson, Presiding Judge; Kalitowski, Judge; and Halbrooks, Judge.

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

PETERSON, Judge

In this appeal from a conviction of first-degree controlled-substance crime, appellant argues that (1) the district court abused its discretion in denying her request for a continuance and (2) the evidence was insufficient to prove that she aided and abetted the two controlled buys required to constitute the first-degree offense. We affirm.

FACTS

In November 2006, New Ulm narcotics investigator Jeffrey Hohensee was given a telephone number for Brad Hoecke and told that Hoecke was a source of methamphetamine in the area. On November 14, 2006, Hohensee contacted Hoecke to set up a methamphetamine buy. Hohensee and Hoecke spoke on the telephone many times that day, trying to set up a meeting place and agree on the amount and price of the methamphetamine. Hoecke said that he was waiting for his partner, who had traveled to Willmar to buy methamphetamine from a supplier. When Hoecke's partner had still not returned at 10:00 or 11:00 p.m., Hoecke told Hohensee to call him in the morning.

In the morning on November 15, 2006, Hoecke agreed to bring one-half ounce of methamphetamine to a parking lot in New Ulm. When Hoecke came to the parking lot, there was a woman, later identified as appellant Susana Serrato, sitting in the front passenger seat of his vehicle, with her head down in her arms, as if trying to hide her identity. After Hohensee introduced himself to Hoecke, he and Hoecke had a short conversation, which was interrupted by a whispered conversation between Hoecke and appellant. Hoecke told Hohensee that there had been a misunderstanding, that he did not

have any methamphetamine that day, and that they would have to go to Willmar. Hoecke and Hohensee then discussed how much methamphetamine could be gotten in Willmar, how long it would take, and whether Hoecke needed money up front. When Hohensee refused to give Hoecke money without any collateral, Hoecke said that they did have methamphetamine in the vehicle that they were willing to sell to him, and appellant removed four or five plastic baggies containing methamphetamine from inside her blue jeans. Hohensee weighed the methamphetamine and negotiated a price with appellant. Hohensee gave the money to Hoecke, who gave it to appellant. There was talk about another sale later that day, but the sale, which was contingent on Hoecke and appellant getting more methamphetamine in Willmar, did not take place.

In the morning on November 20, 2006, Hohensee called Hoecke's telephone number, and appellant answered. Hohensee engaged appellant in a conversation about methamphetamine and future purchases and arranged to buy five grams of methamphetamine for $400. Appellant told Hohensee that she had the methamphetamine, but because she was going to Willmar, Hoecke would meet Hohensee with the methamphetamine.

That afternoon, Hohensee met Hoecke in the parking lot of an old filling station and bought five grams of methamphetamine for $400. Hoecke told Hohensee that appellant was traveling to her source in Willmar to buy additional methamphetamine. Hoecke referred to appellant as his business partner and said that she supplied the methamphetamine that he sold.

The substance that Hohensee bought on November 15 weighed 6.4 grams and contained methamphetamine. The substance that Hohensee bought on November 20 weighed 4.9 grams and contained methamphetamine.

Appellant was charged by complaint with one count each of first-degree controlled-substance crime in violation of Minn. Stat. § 152.021, subd. 1(1) (2006) (sale, on one or more occasions within 90 days, of one or more mixtures of a total weight of ten grams or more containing methamphetamine) and second-degree controlled-substance crime in violation of Minn. Stat. § 152.022, subd. 1(1) (2006) (sale, on one or more occasions within 90 days, of one or more mixtures of a total weight of three grams or more containing methamphetamine). When appellant appeared for trial, she moved for a continuance, claiming that defense counsel had been unable to contact her until two days before trial. The district court denied appellant's motion, and the case was tried to a jury.

Appellant testified at trial that she was a methamphetamine addict and that Hoecke was her supplier. Appellant testified that she was coming down from a methamphetamine high on November 15 and had been sleeping when the methamphetamine buy occurred. She recalled Hoecke trying to wake her and asking her for something. She testified that as she lay her head down on the console to go back to sleep, she saw a bag between the seat and the console and threw it to Hoecke. Appellant denied knowing what was in the bag and also denied discussing the methamphetamine sale or having any methamphetamine to sell. Appellant admitted answering Hoecke's phone on November 20 but denied knowing who was calling or that the call was about a drug sale.

The jury found appellant guilty as charged, and the district court sentenced her to an executed term of 84 months in prison. This direct appeal challenging the convictions followed.

D E C I S I O N

I.

A district court's ruling on a defendant's request for a continuance is reviewed for abuse of discretion. *State v. Courtney*, 696 N.W.2d 73, 81 (Minn. 2005). In determining whether the district court acted within its discretion in denying a continuance, we look "to whether the defendant was so prejudiced in preparing or presenting his defense as to materially affect the outcome of the trial." *State v. Vance*, 254 N.W.2d 353, 358-59 (Minn. 1977); *see Courtney*, 696 N.W.2d at 81 ("A defendant must show that he was prejudiced to justify reversal.").

At the omnibus hearing on December 19, 2006, appellant demanded a speedy trial. The same day, appellant posted bail and was released from jail. On December 21, 2006, a court notice that the trial had been scheduled for January 24, 2007, was mailed to the parties.

On the first day of trial, appellant requested a continuance because her lack of a telephone had prevented her from having contact with her attorney from the time she was released from jail until two days before trial. Defense counsel explained that he had two phone numbers to use to reach appellant, one for a land line and one for a cell phone, both of which belonged to appellant's friend. The land line was malfunctioning, so no one could hear the telephone ring, and, due to her work schedule, the friend only checked

messages on the cell phone at night. Defense counsel indicated that because appellant received his messages at night, she would attempt to contact him at night. As a result of this and because the friend was out of town and did not check her messages during the week before trial, defense counsel did not speak to appellant until two days before trial.

The district court denied a continuance and explained:

> the matter has been on the calendar for more than a month now, and, in fact, it was [appellant's] request initially for speedy trial.
>
> I don't know what [appellant] chose to do or not do, but she had ample notice of the . . . trial date.
>
> To the extent that the defense counsel is hamstrung by the situation, it appears to be the creation exclusively of [appellant] and her non-attendance to the details.

Citing *In re Welfare of T.D.F.*, 258 N.W.2d 774, 775 (Minn. 1977), appellant argues that the district court abused its discretion in denying a continuance. In *T.D.F.*, the supreme court reversed the denial of a continuance when a lack of diligence by defense counsel resulted in the defendant being unprepared for trial. *Id.* at 775-76. But unlike *T.D.F.*, here it was a lack of diligence by appellant, rather than her attorney, that resulted in appellant being unprepared for trial. Even if appellant could not afford a telephone, she does not identify any reason why she could not have made arrangements to use one during the day rather than attempting to call her attorney at night when it was unlikely that he would be in his office. A lack of diligence by a defendant justifies denial of a continuance. *Courtney*, 696 N.W.2d at 82; *see City of Minneapolis v. Price*, 280 Minn. 429, 434, 159 N.W.2d 776, 780 (1968) (stating that denial of continuance is

justified when defendant "fails to act diligently to replace counsel who withdraws well in advance of trial").

Appellant argues that she did not have sufficient time to prepare for trial because, until about a week before trial, she and her attorney were attempting to settle the case by having appellant cooperate with the police and because appellant had a simplistic view of what goes into trial preparation. But at the pretrial hearing, defense counsel indicated that even while pursuing a settlement, he had discussed with appellant the need to prepare for trial and "impressed upon her that . . . we need to sit down and talk."

Furthermore, appellant has not shown that the denial of a continuance prejudiced her in presenting her defense so as to materially affect the outcome of the case. While defense counsel claims a general unpreparedness for trial, appellant identifies no deficiencies in defense counsel's performance at trial.

II.

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 the 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 contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). Accordingly, 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, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A person is guilty of first-degree controlled-substance crime if "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 . . . methamphetamine." Minn. Stat. § 152.021, subd. 1(1) (2006). "'Sell' means: (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) . . . ." Minn. Stat. § 152.01, subd. 15a (2006). The state was required to prove that appellant was involved in both the November 15 and 20 sales to meet the ten-gram requirement to support a conviction under Minn. Stat. § 152.021, subd. 1(1).

Appellant argues that Hoecke's statements about them being business partners were not credible, noting that Hoecke's statement that appellant had gone to Willmar to buy methamphetamine was inconsistent with the fact that she had only $300 and no methamphetamine when police stopped her as she was returning from Willmar. Appellant also argues that Hohensee's testimony was not credible, citing an inconsistency between the audio recording of the November 20 sale, which indicated that Hohensee had agreed to buy seven grams of methamphetamine, and Hohensee's trial testimony that the purchase of five grams was "exactly" what had been arranged earlier. Inconsistencies in testimony and conflicts in evidence do not require reversal; they are merely factors to consider when making credibility determinations, which is the role of the fact-finder.

State v. Johnson, 679 N.W.2d 378, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004). Appellant also cites other factors, which she argues tend to cast doubt on the credibility of Hoecke's and Hohensee's testimony. But "judging the credibility of witnesses is the exclusive function of the jury." *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995).

Appellant argues that Hohensee's testimony about the November 20 sale was insufficient to corroborate Hoecke's 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 (2006). Appellant's argument goes to the credibility of Hohensee's testimony. But as we have already stated, judging credibility is the exclusive function of the jury. Appellant also argues that there was insufficient foundation for Hohensee's identification of appellant as the person who answered Hoecke's phone on November 20. Appellant did not object to this evidence at trial. Failure to object to the admission of evidence waives the issue on appeal. *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). Also, appellant admitted during her own testimony that she was the person who answered Hoecke's phone.

Appellant also argues that the evidence was insufficient to prove her involvement in the November 15 sale. But her argument again goes to the credibility of Hohensee's testimony.

The evidence was sufficient to support appellant's conviction of first-degree controlled-substance crime.

Affirmed.