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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0918**

State of Minnesota,
Respondent,

vs.

Tony G. Aguirre,
Appellant.

**Filed September 9, 2008
Affirmed
Johnson, Judge**

Crow Wing County District Court
File No. K9-06-1729

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

Donald F. Ryan, Crow Wing County Attorney, Kristine R. DeMay, Assistant County Attorney, Crow Wing County Judicial Center, 213 Laurel Street, Suite 31, Brainerd, MN 56401 (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Toussaint, Chief Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

A Crow Wing County jury found Tony G. Aguirre guilty of second-degree sale of a controlled substance, methamphetamine, in a school zone. The state's evidence consisted primarily of the testimony of two police officers who observed a controlled purchase of drugs from Aguirre as well as electronic text messages that were exchanged by Aguirre and the informant who made the controlled purchase. On appeal, Aguirre challenges the sufficiency of the evidence. We conclude that the evidence was sufficient to support the conviction and, therefore, affirm.

FACTS

On July 2, 2006, a Brainerd police officer arrested Michael Payne after finding drugs in his possession during a traffic stop. Payne told the arresting officer that he had information that would be of interest to drug enforcement officers. That night he met with Officer Ann Marie Hunnicutt of the Baxter Police Department and told her that he and Aguirre were the “main suppliers” of methamphetamine in the Crow Wing County area. In the hopes of receiving favorable treatment, Payne told Officer Hunnicutt that he was willing to help arrange a controlled buy from Aguirre. The police released Payne, pending charges in connection with his arrest, with instructions to contact the police as soon as he had contacted Aguirre.

The next day, having made contact with Aguirre, Payne returned to the law-enforcement center and met with Officer Hunnicutt and Investigator Joseph Meyer of the Crow Wing County Sheriff's Office, who leads the Lakes Area Drug Investigative

Division. In Investigator Meyer's presence, Payne used his cellular telephone to exchange text messages with Aguirre. Payne arranged to meet Aguirre at Aguirre's house and to buy \$200 worth of methamphetamine. Investigator Meyer made photocopies of the text messages from Payne's telephone. He also searched Payne for drugs, gave him \$200 in bills that had been photocopied, and fitted Payne with an audio recording device.

At approximately 1:20 p.m., after the officers and Payne had left the law-enforcement center, Aguirre sent Payne a message indicating that he had gone to a Holiday gas station on South Sixth Street in Brainerd. Investigator Meyer dropped off Payne nearby and instructed Officer Hunnicutt to position herself somewhere near the Holiday station to observe the transaction while Investigator Meyer observed from a location west of the station. Officer Hunnicutt testified that, shortly after she arrived at the station, she saw Payne meet Aguirre as Aguirre walked out of the store, and she saw Aguirre enter a white Cadillac on the passenger's side and speak with Payne through the window. Investigator Meyer testified that he saw Payne pass something to Aguirre through the window. Payne testified that he gave Aguirre the \$200 in bills and that Aguirre told him that the methamphetamine was at his house, outside of his garage.

At approximately 1:35 p.m., Payne walked north in the direction of Aguirre's residence, which is on Eighth Street, across the street from St. Francis School. Investigator Meyer followed Payne and observed him walk up the driveway toward Aguirre's garage. Payne entered the garage and remained inside for less than a minute before exiting. Payne then went around to the side of the garage where he bent down and

picked up something. Payne then returned to Investigator Meyer's car and gave him a cigarette package containing a white substance. Investigator Meyer took a statement from Payne at approximately 2:15 p.m. and transported him back to the law-enforcement center for debriefing.

The white substance in the cigarette package tested positive as methamphetamine but weighed only 0.3 grams, considerably less than the one gram that Payne had arranged to buy and, accordingly, worth less than \$200. According to Investigator Meyer, Payne admitted to him that he used some of the money supplied by law enforcement to pay off a debt to Aguirre. But at trial, Payne testified that there was supposed to be one gram of methamphetamine in the cigarette box and that he paid the \$200 for that quantity. Payne also admitted that he owed Aguirre money from an earlier incident in which Aguirre had wired \$800 to Payne for the purchase of methamphetamine before another drug dealer absconded with the money.

Officers preserved numerous text messages that were stored on Payne's cellular telephone, which were introduced into evidence. Payne testified at trial that the following messages were ones that he sent to Aguirre: "I'll walk, but are u holding, dude has deep pockets, I come now for a g." "Started. We can do this he just wants sample then large amounts." Payne also testified at trial that the following messages were ones he received from Aguirre: "I can't get what he doesn't have. I can bring 200 if it can be there to get this." "Many options DO NOT Drive 2 my house! walk or bike in please." "Holiday." "Left corner, by garbage." In addition, the state introduced into evidence the following messages without any indication as to whether Aguirre sent or received them:

“Is that still cool if I stop by? Don’t want to walk for no reason.” “I’ve let now. Did wait bout long as I could.” “Whereru? quice&6th.”

Shortly after debriefing Payne at the law-enforcement center, Hunnicutt arrested Aguirre while he was sitting in the passenger seat of the white Cadillac at a nearby restaurant. Aguirre had in his possession a large sum of cash, including the \$200 given to Payne for the controlled buy, and a cellular telephone. Aguirre admitted to having received \$200 from Payne but stated that it was repayment of a debt. Several text messages were found on Aguirre’s cellular telephone, including seven that he had sent to or received from Payne that day: (1) At 12:42 p.m., Aguirre had received a message from Payne, stating, “By self, on foot.” (2) At 12:43 p.m., Aguirre had sent a message to Payne, stating, “K.” (3) At 1:14 p.m., Aguirre had sent a message to Payne, stating, “I’ve left now. Did wait bout’ long as i could.” (4) At 1:17 p.m., Aguirre had sent a message to Payne, stating, “Whereru? quice& 6th.” (5) At 1:21 p.m., Aguirre had sent a message to Payne, stating, “Holiday.” (6) At 1:40 p.m., Aguirre had sent a message to Payne, stating, “Left corner, by garbage.” (7) At 1:40 p.m., Aguirre had received a message from Payne, stating, “K.”

The case was tried for three days in January and February 2007. The jury found Aguirre guilty of second-degree sale of a controlled substance, methamphetamine, in a school zone. See Minn. Stat. § 152.022, subd. 1(6)(i). The district court sentenced Aguirre to 78 months of imprisonment. Aguirre appeals.

DECISION

Aguirre challenges the sufficiency of the evidence to sustain his conviction. To assess the sufficiency of the evidence, a reviewing court makes “a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict.” *State v. Brown*, 732 N.W.2d 625, 628 (Minn. 2007). A reviewing court assumes that the jury believed the evidence favorable to the state and disbelieved any evidence to the contrary. *See State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004); *State v. Steinbuch*, 514 N.W.2d 793, 799 (Minn. 1994). A reviewing court 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 [a] defendant was proven guilty of the offense charged.” *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted, alteration in original).

We begin by noting that the jury could reasonably interpret the text messages exchanged by Payne and Aguirre to have referred to a drug transaction. Payne testified that the messages, “dude has deep pockets, I come now for a g,” and “he just wants sample then large amounts,” was intended to be a request for Aguirre to sell him a gram of methamphetamine that he would sell to another buyer. The jury could reasonably conclude that the messages sent from Aguirre’s telephone to Payne were responsive to those inquiries.

Furthermore, the events that transpired after and contemporaneous with the text messages corroborate Payne’s testimony that Aguirre intended to sell, and did sell,

methamphetamine to him. One or both of the law-enforcement officers witnessed the entire transaction except for the short period when Payne was inside Aguirre's garage. Aguirre's cellular telephone contained a message that Aguirre sent to Payne stating, "Left corner, by garbage." Investigator Meyer observed Payne pick up something from the ground near the corner of Aguirre's garage shortly before Payne gave Investigator Meyer the cigarette box containing methamphetamine. Payne had been searched before the controlled buy to confirm that he did not have any drugs in his possession. Furthermore, when Aguirre was arrested, he was in possession of the \$200 in bills that Investigator Meyer had given to Payne.

Aguirre contends that the evidence is insufficient because the state was unable to corroborate Payne's testimony with more direct evidence, such as Aguirre's fingerprints on the cigarette case or a recording of the conversation between Payne and Aguirre when they were at the Holiday station. The recording from the sound equipment that was hidden on Payne's body turned out to be inaudible, and no fingerprints were recovered from the box. But the state introduced other forms of physical evidence, such as the methamphetamine that Aguirre transferred to Payne and the money that Payne transferred to Aguirre. We will affirm the conviction if the evidence in the record was sufficient to allow the jury to "reasonably conclude that [Aguirre] was proven guilty of the offense charged." *Bernhardt*, 684 N.W.2d at 476-77 (quotation omitted); *see also Olhausen*, 681 N.W.2d at 25 (holding that evidence was sufficient to support conviction for possession of methamphetamine notwithstanding lack of physical evidence). Although the physical evidence Aguirre says is lacking would have made the state's case stronger, it was not

necessary in light of the physical evidence that was introduced, the testimony of Payne and the officers, and the text messages.

Aguirre also contends, both through appointed counsel and in his pro se supplemental brief, that the evidence was insufficient because Payne's testimony was not credible. But this court may not second-guess a jury's credibility determination because the "jury is in the best position to weigh the credibility of evidence and thus determine[] which witnesses to believe and how much weight to give to their testimony." *State v. Clark*, 739 N.W.2d 412, 418 (Minn. 2007) (quoting *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992)). We must assume for the purposes of appellate review that the jury rejected the evidence that is inconsistent with the verdict. *See Olhausen*, 681 N.W.2d at 25; *State v. Lloyd*, 345 N.W.2d 240, 245 (Minn. 1984). The jury heard defense counsel's cross-examination of Payne, in which he discussed his criminal history, his recent drug use, and his arrest on the day before the controlled buy. The jury was permitted to consider this testimony in assessing Payne's credibility but was not required to reject Payne's testimony. Aguirre's theory of the defense, reiterated in his pro se supplemental brief, appears to be that the text messages exchanged with Payne related solely to repayment of an \$800 debt and, furthermore, that the \$800 debt concerned the intended purchase of a car, not methamphetamine. This theory, however, is inconsistent with other evidence, including Payne's testimony that he communicated with Aguirre about the purchase of methamphetamine and completed the purchase. The jury apparently rejected Aguirre's theory, and there is ample evidence in the record that is consistent with the verdict.

Aguirre cites two cases from other jurisdictions for the proposition that a conviction should be reversed when the testimony of the state's key witness was not corroborated with more objective forms of evidence. Neither case, of course, is binding on us. In addition, each case is distinguishable. In *People v. Bazemore*, 182 N.E.2d 649, 651 (Ill. 1962), the testimony of the informant was "uncorroborated by any evidence, fact or circumstance in the record." *Id.* at 651. Here, Payne's testimony was corroborated by the testimony of two officers who observed almost the entire transaction, as well as the text messages between Aguirre and Payne. In *United States v. Wiseman*, 25 F.3d 862 (9th Cir. 1994), the prosecution lacked any evidence specifically linking the defendant to drugs or a conspiracy to possess drugs. *Id.* at 864-65. Here, Aguirre was connected to the methamphetamine by the text messages on his telephone, Aguirre's receipt of money from Payne, and the fact that Payne found the methamphetamine next to Aguirre's garage.

Aguirre further argues, in his pro se supplemental brief, that the verdict should be overturned because the timeline that could be constructed from the testimony of Officer Hunnicutt and Investigator Meyer would place Payne at Aguirre's garage at 2:00 p.m., twenty minutes after Payne had asked Aguirre where to find methamphetamine. Resolution of inconsistencies among eyewitnesses' testimony is the jury's exclusive function "because it has the opportunity to observe the demeanor of witnesses and weigh their credibility." *Lloyd*, 345 N.W.2d at 245; *see also State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006). The times stated by Officer Hunnicutt and Investigator Meyer were either estimates or ranges, and Aguirre's argument construes the evidence in the light

most favorable to his appeal. But when viewed in the light most favorable to the verdict, assuming that the jury disbelieved any evidence contrary to the verdict, the officers' testimony about the chronology of events is consistent with the jury's decision. See *Steinbuch*, 514 N.W.2d at 799.

In sum, the evidence against Aguirre was sufficient for the jury to reasonably conclude that the elements of the charge against him had been proven beyond a reasonable doubt. See *Moore*, 481 N.W.2d at 362.

Affirmed.