STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1711

State of Minnesota,
Respondent,

vs.

Ricky J. Carufel,
Appellant.

Filed December 30, 2008
Affirmed in part, reversed in part,
and remanded
Hudson, Judge

Winona County District Court
File Nos. K8-05-664; KX-05-665; K1-05-666

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

Charles MacLean, Winona County Attorney, Nancy L. Bostrack, Assistant County Attorney, Winona County Courthouse, 171 West Third Street, Winona, Minnesota 55987 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

HUDSON, Judge

Appellant challenges his convictions of second-degree controlled substance offenses for selling cocaine in a park zone and the improper joinder of unrelated counts from three separate complaints. Appellant also raises numerous pro se claims. We affirm in part, reverse in part, and remand.

FACTS

During three controlled buys in December 2004 and January 2005, appellant Ricky J. Carufel sold cocaine to police informants L.J. and C.J. The informants worked with Tony Gagnon, an investigator with the Winona police department, to arrange the controlled buys. All of the buys took place at appellant's residence, which was located at 307 Adams Street in Winona. The informants used an audio recording device to record each of the controlled buys.

The three controlled buys occurred on different dates and at different times during the day. The first buy involved only L.J., but both informants were involved in the second and third buys. The three controlled buys were similar in that the informant, or informants, would travel to appellant's home at 307 Adams Street. Police would follow in a separate vehicle. The informants then went to appellant's door and knocked. During each of the buys, the informants gave appellant $100 in exchange for a baggie of cocaine. After each of the buys, the informants and police met at another location, where the informants turned over to police an audio recording device and the baggie of cocaine.

As a result of the three drug transactions, appellant was charged in three separate complaints filed April 28, 2005. Each complaint charged appellant with one count of controlled substance crime in the third degree, in violation of Minn. Stat. § 152.023, subd. 1(1) (2004), and one count of controlled substance crime in the second degree for selling a controlled substance in a park zone, in violation of Minn. Stat. § 152.022, subd. 1(6)(i) (2004). Minnesota law designates a "park zone" to include "an area within 300 feet or one city block, whichever distance is greater, of the park boundary." Minn. Stat. § 152.01, subd. 12a (2004).

Before trial, the prosecution moved to join the six offenses for trial. The district court, over defense objection, joined the counts.

A two-day jury trial began on April 18, 2007. During the trial, the jury heard from several witnesses, including the informants, Investigator Gagnon, and Officer Anne Scharmach, who was also involved in the controlled buys. In addition, the prosecution presented testimony from Bruce Fuller, the superintendent of parks and forestry in Winona. The audio recordings of the buys were played for the jury.

Several witnesses, including Fuller and Gagnon, testified about the area surrounding appellant's residence at 307 Adams Street. Fuller told the jury that one of the parks near appellant's home is Gabrych Park, explaining that the park "lies between Sixth and Seventh Streets off of Buchanan on the east side, which is one block away from Adams Street." He said that the distance from appellant's home to Gabrych Park is 330 feet. On direct examination, Fuller testified that Gabrych Park was within a block of 307

Adams Street. But on cross-examination, Fuller was asked how one would get from Gabrych Park to 307 Adams Street.

> DEFENSE COUNSEL: To get from Gabrych Park to 307, you would go one block and turn right and go two houses; correct?
> FULLER: Correct.
> DEFENSE COUNSEL: Or you could go up the alley and you go one block and turn left and go three houses?
> FULLER: Correct.

Investigator Gagnon also testified about the area where the controlled buys occurred and drew a diagram of the area, which was admitted as an exhibit for illustrative purposes without defense objection. Gagnon testified that 307 Adams Street was "within one block east of" the park. Likewise, Officer Scharmach testified that the park is "within a block" of 307 Adams Street.

After the state rested, appellant moved for dismissal of the second-degree controlled substance offenses, arguing that the state had failed to prove that the controlled buys occurred within a park zone. The district court denied that motion. Appellant did not testify and did not present any witnesses.

The jury found appellant guilty of all six offenses. The district court imposed concurrent sentences of 48 months, 54 months, and 54 months, respectively, for each of the second-degree controlled substance crime convictions.

This appeal follows.

D E C I S I O N

I

Appellant argues that the sales of cocaine did not take place within 300 feet or within one city block of a park, as required by the statute, and that therefore, his convictions for second-degree controlled substance crime must be reversed. We agree.

"Construction of a criminal statute is a question of law subject to de novo review." *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002). "The rules of statutory construction require that a statute's words and phrases are to be given their plain and ordinary meaning." *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003). If a statute is ambiguous, the intent of the legislature controls. *Id.* When reviewing a statute, the court assumes that the legislature did not intend any unreasonable or absurd results. Minn. Stat. § 645.17 (2004). "[W]hen construing criminal statutes, a rule of strict construction applies and all reasonable doubt concerning legislative intent should be resolved in favor of the defendant." *State v. Estrella*, 700 N.W.2d 496, 501 (Minn. App. 2005) (citing *State v. Olson*, 325 N.W.2d 13, 19 (Minn. 1982)), *review denied* (Minn. Nov. 15, 2005).

A person is guilty of controlled substance crime in the second degree if the person unlawfully sells any amount of a schedule I or II narcotic drug in a school zone, a park zone, a public housing zone, or a drug treatment facility. Minn. Stat. § 152.022, subd. 1(6)(i). Thus, where a controlled substance crime occurs in a "park zone," the commission of the crime within the zone operates as an aggravating element that heightens the degree of the offense. *Estrella*, 700 N.W.2d at 500.

At issue in this case is whether the controlled buys took place in a "park zone," under the definition provided by Minn. Stat. § 152.01, subd. 12a. Subdivision 12a states:

> "Park zone" means an area designated as a public park by the federal government, the state, a local unit of government, a park district board, or a park and recreation board in a city of the first class. "Park zone" includes the area within 300 feet or one city block, whichever distance is greater, of the park boundary.

Here, it is undisputed that 307 Adams Street, where the controlled buys occurred, is more than 300 feet from Gabrych Park. Thus, to fit within the ambit of the statute, the drug transactions must have occurred "within . . . one city block" of the park.

We examined Minn. Stat. § 152.01, subd. 12a, in *Estrella*, "conclud[ing] that the statute is ambiguous in its definition of how far from the actual park boundary a 'park zone' extends." *Estrella*, 700 N.W.2d at 500. Looking at the statute's language, we noted that it did not define the phrase "one city block" and that the phrase's "definition is not apparent based on the plain language of the statute." *Id.* We recognized, however, that "the inclusion of a distance of 300 feet implies that a distance of 'one city block' should be in the neighborhood of 300 feet." *Id.* After examining the statute, we held that the criterion of "one city block" does not apply in cases where an actual grid system is not present. *Id.* at 501. In such instances, a drug transaction must take place within 300 feet of the park's boundary to fit within the statute. *Id.* at 501.

In so holding, we declined to broadly construe the term "park zone." *Id.* at 500–01. The state had argued that the word "block" meant "a part of a city or town that is surrounded by streets or avenues on at least three sides" or that "park zone" included "the

park and all of the surrounding land bounded by city streets." *Id.* at 501. But we rejected these interpretations and "refuse[d] to endorse the state's proposed unlimited definition of the term 'city block.'" *Id.*

Appellant asserts that the prosecution did not establish that the controlled buys occurred within one city block because testimony from Fuller revealed that 307 Adams Street is more than one city block from the park.

The term "one city block" is ambiguous. *Id.* at 500. When a statute is ambiguous, courts look to legislative intent to construe the statute. *Id.* The legislative intent for enhancing drug crimes that take place within the vicinity of a park is to protect children from discarded drugs, drug paraphernalia, and drug dealers. *State v. Benniefield*, 678 N.W.2d 42, 47 (Minn. 2004).

In light of Fuller's testimony, we conclude that the controlled buys did not occur within one city block of the park. Fuller's testimony shows that one must travel more than a city block to get from the park to 307 Adams Street. It is unreasonable to construe the term "one city block" to mean one city block plus a right turn and two houses or one city block plus a left turn and three houses. Furthermore, appellant's residence apparently is not even on the same square block as the park. Gagnon's diagram clearly establishes an intervening street between the park and the square block on which appellant's residence is located. Fuller's testimony likewise indicates that the park and appellant's residence are not on the same square block. He testified that the park was "between 6th and 7th Streets off of Buchanan on the east side, which is one block away from Adams Street."

Finally, we note that our interpretation of the statute is in accord with the rule of lenity, which requires courts to resolve ambiguity in a criminal statute in favor of lenity toward the defendant. *State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007) ("[W]hen the language of a criminal law is ambiguous, we construe it narrowly according to the rule of lenity."); *State v. Stevenson*, 637 N.W.2d 857, 862 (Minn. App. 2002) (explaining rule of lenity), *aff'd on other grounds*, 656 N.W.2d 235 (Minn. Feb. 6, 2002).

Because the location of the controlled buys was not within one city block of the park, we reverse appellant's convictions for second-degree controlled substance offenses, and we remand for adjudication of conviction on the third-degree controlled substance offenses and resentencing.

II

Appellant next argues that he is entitled to a new trial because the district court improperly joined the six offenses. On appeal, respondent admits that the offenses were improperly joined, but contends that appellant was not prejudiced by the improper joinder and therefore is not entitled to a new trial.

Generally, when reviewing a joinder or severance decision, the appellate court makes "an independent inquiry into any substantial prejudice" resulting from the decision. *State v. Powers*, 654 N.W.2d 667, 674 (Minn. 2003) (discussing joinder of defendants); *Santiago v. State*, 644 N.W.2d 425, 444 (Minn. 2002) (discussing severance). But even if offenses are improperly joined, remand is not required unless the error was prejudicial. *State v. Profit*, 591 N.W.2d 451, 460 (Minn. 1999); *State v. Jackson*, 615 N.W.2d 391, 394 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000).

Generally, if the joined offenses could have been presented as *Spreigl* evidence in separate trials of the offenses, the error is not prejudicial. *State v. Ross*, 732 N.W.2d 274, 281–82 (Minn. 2007).

Evidence of other crimes, wrongs, or bad acts, while not admissible to show the defendant's bad character, may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Minn. R. Evid. 404(b). *Spreigl* evidence is admissible if: (1) the state gives notice of its intent to admit the evidence; (2) the state clearly indicates the purpose for which the evidence is offered; (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 evidence's probative value is not outweighed by its potential prejudice to the defendant. *Ross*, 732 N.W.2d at 282. Appellate courts focus on the third, fourth, and fifth conditions to determine if the defendant was prejudiced by the improper joinder. *Id.*

Here, there was clear and convincing evidence that appellant participated in the controlled buys because there was direct testimony that appellant sold cocaine to the informants on all three occasions and there were audio recordings of the transactions. The evidence of each transaction was relevant and material to the prosecution's case. *See* Minn. R. Evid. 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). During his closing argument, appellant's trial counsel contended that it was not clear what was happening on the audio recordings. But the admission of the evidence from each

controlled buy helps to clarify what was happening. In addition, it helps to establish appellant's identity and intent. Here, the identity of the person involved in the buys was an issue, because, as Gagnon explained at trial, the informants knew the man involved in the controlled buys as Charles Richter, but the same man was later identified by law enforcement as Ricky Carufel.

Finally, it does not appear that the potential for unfair prejudice to appellant outweighs the probative value of the evidence of the other controlled buys. Appellant alleges that he was prejudiced by the improper joinder because the evidence of the multiple transactions makes each individual transaction seem more likely. *See State v. Washington*, 693 N.W.2d 195, 200–01 (Minn. 2005) (noting that propensity to commit crime is an improper purpose of *Spreigl* evidence). He also points out that, had the evidence been admitted as *Spreigl* evidence, the jury would have received a cautionary instruction. But here, the probative value of the evidence outweighs any potential for unfair prejudice because it helps to establish appellant's identity and intent. Moreover, the existence of the multiple transactions tends to corroborate the informant's version of the controlled buys. And as respondent points out, appellant's trial counsel questioned, in his closing argument, whether the informants could be trusted.

Lastly, appellant faults the district court for engaging in this *Spreigl* analysis while considering the joinder motion, pointing out that the Minnesota Supreme Court has previously warned against such a practice. *Profit*, 591 N.W.2d at 461 ("We therefore caution district courts not to rely on a *Spreigl* analysis to circumvent the traditional joinder analysis. . . ."); *see also Jackson*, 615 N.W.2d at 396 n.1 (noting that the district

court had employed the *Spreigl* analysis to justify its decision and advising against such a practice). Here, when considering the motion to consolidate, the district court asked if the other incidents were admissible as *Spreigl* evidence. The prosecution argued that the incidents should be admitted as *Spreigl* evidence to prove appellant's identity, explaining that, during the buys, appellant used the name Charles Richter.

Although the district court should not have analyzed the motion to consolidate in the manner in which it did, appellant is not entitled to a new trial absent a showing of prejudice. Because the evidence of the other controlled buys could have been admissible as *Spreigl* evidence if the offenses had been properly severed for trial, the improper joinder was not prejudicial error.

III

In his pro se supplemental brief, appellant raises an additional 13 issues. We have reviewed these claims and find them to be without merit. Furthermore, the claims are waived because appellant has failed to support them with legal authority or citation to the factual record. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (refusing to consider portions of pro se briefs that contain only argument and are not supported by the facts on the record); *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (stating that a pro se defendant's assertions are waived if they unsupported by argument or legal authority).

Affirmed in part, reversed in part, and remanded.