STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2363

State of Minnesota,
Respondent,

vs.

Jason J. Isaacson,
Appellant.

Filed April 21, 2009
Affirmed
Stoneburner, Judge

Polk County District Court
File No. 60CR071155

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Suite 125, 816 Marin Avenue, Crookston, MN 56716 (for respondent)

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

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Collins, 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

STONEBURNER , Judge

Appellant challenges his convictions of second- and third-degree controlled substance crime for sale of cocaine, arguing that (1) the circumstantial evidence was insufficient to prove that he was the seller in a controlled buy and (2) his confession is insufficient to support a finding that he sold sufficient cocaine in the 90 days preceding the controlled buy to support the conviction of second-degree controlled substance crime. We affirm.

FACTS

On December 21, 2006, a Polk County deputy observed police informant J.B. dialing a telephone number to arrange a controlled buy of cocaine. The deputy drove J.B. to the location of the buy and observed him get into a late 1980's or early 1990's blue four-door sedan with a sloped hood and a missing front hub cap (blue sedan). J.B. was in the car for less than a minute. He returned to the deputy's vehicle and turned over what later testing revealed to be 2.8 grams of a mixture containing cocaine. The deputy then observed J.B.'s post-buy call to the same number and overheard J.B. discuss the recent transaction with whomever answered. The initial telephone call, the buy, and the post-buy telephone call were recorded.

In January 2007, the deputy saw the blue sedan being driven by appellant Jason J. Isaacson. The deputy spoke to Isaacson. The blue sedan was registered to one of Isaacson's parents.

Isaacson was arrested in March 2007 on other charges. The deputy questioned Isaacson and told him that he "had" Isaacson in a drug buy with an informant. The deputy did not give the name of the informant. Isaacson confirmed that the number used by the informant was Isaacson's cell-phone number. Isaacson admitted that he had sold cocaine to J.B. and another person from late fall until mid-December 2006. Isaacson said that he had sold more than one "8 ball" (3.5 grams) of cocaine to J.B. and "Rocky," but Isaacson never admitted that he was involved in the controlled buy on December 21, 2006.

Isaacson was charged with third-degree controlled substance crime (sale of 2.8 grams of cocaine) for the December 21, 2006 controlled buy. And, based primarily on his confession that he had sold additional cocaine to J.B. in the late fall, he was also charged with second-degree controlled substance crime (sale of 3 grams of cocaine within 90 days).

At trial, the recordings made during the controlled buy were played to the jury. The deputy and a corrections officer who knew Isaacson identified Isaacson's voice on the recordings. The corrections officer testified that the telephone number J.B. dialed was the number Isaacson gave to the corrections officer as Isaacson's cell-phone number. The jury found Isaacson guilty as charged. Isaacson was sentenced for second-degree controlled substance crime, and this appeal followed.

D E C I S I O N

I. Sufficiency of the evidence

a. Standard of review

Isaacson argues that because no one identified him as the seller of 2.8 grams of cocaine in the controlled buy, the evidence is insufficient to support his conviction of third-degree controlled substance crime. And even if the circumstantial evidence is sufficient to support his conviction for the controlled buy, Isaacson argues that the evidence is insufficient to support the conviction of second-degree controlled substance crime because that charge is based solely on his confession.

The state argues that Issacson's failure to challenge the sufficiency of the evidence at trial limits review on appeal to a plain-error analysis. *See* Minn. R. Crim. P. 31.02 (providing that a plain error may be considered on appeal if it affects a defendant's substantial rights, even where the error or defect was not brought to the attention of the trial court). Here the record is clear that Isaacson's entire defense at trial was premised on the insufficiency of the evidence to support the charges, and Issacson held the state to its burden of proof beyond a reasonable doubt. A conviction based on anything less than proof beyond a reasonable doubt violates the Due Process Clause of the Fifth Amendment, *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970), and amounts to plain error affecting a defendant's substantial rights. *State v. Clow*, 600 N.W.2d 724, 726 (Minn. App. 1999), *review denied* (Minn. Oct. 21, 1999). The issue has been fully briefed on appeal, and we conclude that the interests of justice are served by reviewing Issacson's convictions to ensure that they are supported by sufficient evidence in the

record. *Id.* (concluding that the interests of justice required review of claim of insufficient evidence where defendant put the state to its burden of proof at trial and the state had opportunity to brief the issue).

In considering a claim of insufficient evidence, we make a painstaking review 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); *see Clow*, 600 N.W.2d at 726–27 (reviewing claim of insufficient evidence under the *Webb* standard despite defendant's failure to raise the issue at trial). The reviewing court must assume that "the jury believed the state's witnesses and disbelieved any of the evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

b. Controlled buy

The deputy who arranged and observed the controlled buy did not see who was driving the blue sedan at the time of the controlled buy or if there were any passengers in the car. J.B. did not testify at trial. The state relied on circumstantial evidence to prove that Isaacson is the person who sold cocaine to J.B. in the controlled buy.

Circumstantial evidence is entitled to the same weight as direct evidence. *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). But the circumstantial evidence must form a

complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilty. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). A jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *State v. Webb*, 440 N.W.2d at 430.

The circumstantial evidence in this case, assuming, as we must, that the jury believed the state's witnesses, is that J.B. called Isaacson's cell-phone number to arrange the controlled buy; J.B. got into a blue sedan that is registered to one of Isaacson's parents and was later seen to be driven by Isaacson; after a minute J.B. left the car with cocaine; J.B. called Isaacson's cell-phone number after the controlled buy and made reference to the buy; the deputy and a corrections officer identified Isaacson's voice on the recording of the telephone calls and the buy; and Isaacson, without having been told the name of the informant, admitted selling cocaine to J.B. on more than one occasion from late fall of 2006 to mid-December 2006.

This circumstantial evidence is sufficient to lead directly to Isaacson's guilt and to exclude beyond a reasonable doubt any reasonable inference other than guilty. We therefore affirm Isaacson's conviction of third-degree controlled substance crime.

c. Evidence of additional sale

Isaacson argues that even if the evidence is sufficient to prove that he sold 2.8 grams of cocaine on December 21, 2006, his confession alone is insufficient to prove that he sold any cocaine to anyone in the 90 days preceding the controlled buy, and therefore his conviction of second-degree controlled substance crime must be reversed. A

defendant's confession is not sufficient to warrant conviction of a crime without evidence that the offense charged has been committed. Minn. Stat. § 634.03 (2008); *In re C.M.A.*, 671 N.W.2d 597, 601 (Minn. App. 2003). The statute has a dual function: to discourage coercively acquired confessions and to make the admission reliable. *In re Welfare of M.D.S.*, 345 N.W.2d 723, 735 (Minn. 1984). "[T]he statute requires that the corroborating evidence show the harm or injury and that it was occasioned by criminal activity; it need not show that the defendant was the guilty party because the confession itself provides that link." *In re C.M.A.*, 671 N.W.2d at 601 (citing *McCormick on Evidence* § 146, at 525–26). "The requirement has also been read to require the state to produce 'enough evidence to identify [a] defendant and to bolster and substantiate [his or her] own admissions.'" *Id.* at 601–02 (citing *In re Welfare of M.D.S.*, 345 N.W.2d at 735).

Minn. Stat. § 634.03 codifies the requirement that the *corpus delicti* (body of the crime) be established by evidence independent of a confession. *Id.* at 601 (citing *State v. Lalli*, 338 N.W.2d 419, 420 (Minn. 1983)). But Minn. Stat. § 634.03 does not require that each element of a criminal offense be independently corroborated. *In re Welfare of M.D.S.*, 345 N.W.2d at 735.

The state relies on *State v. Olhausen*, 681 N.W.2d 21 (Minn. 2004), to argue that failure to produce the additional cocaine sold or any testing evidence to verify that what was sold was cocaine does not preclude Isaacson's conviction of second-degree controlled substance crime. In *Olhausen*, the supreme court affirmed a conviction of controlled substance crime despite the state's failure to produce the drug allegedly sold or

any evidence of testing or weighing the drug sold. *Id.* at 28–29. Olhausen confessed to the sale and said that he had thrown the package of drugs from the car as he escaped. *Id.* at 24–25. The package was never recovered. *Id*. In *Olhausen*, the state produced the following evidence independent of Olhausen's confession: (1) Olhausen agreed to sell methamphetamine to an informant; (2) Olhausen showed the informant a package of the appropriate weight that Olhausen said contained the methamphetamine; (3) Olhausen made incriminating statements during the transaction; (4) the informant testified that he believed that the package contained methamphetamine based on a sample Olhausen had shown him; (5) an accomplice stated that the accomplice had provided the methamphetamine to Olhausen; and (6) Olhausen fled as surveillance officers approached to arrest him during the transaction. *Id*. at 26. The facts of this case are very different, but we agree that the state's failure to produce tangible evidence of the sale of additional cocaine does not preclude conviction for sale of additional cocaine to J.B. if Isaacson's confession is sufficiently corroborated to make it reliable.

"[T]he United States Supreme Court . . . has held . . . that the prosecution's task is to bolster the confession by independent evidence of trustworthiness." *In re Welfare of M.D.S.*, 345 N.W.2d at 735 (citation omitted). Elements of the offense can be "sufficiently substantiated by independent evidence of attending facts or circumstances from which the jury may infer the trustworthiness of the confession." *Id.* (citation omitted).

The state argues that evidence of the controlled buy and Isaacson's spontaneous identification of J.B. as one of his customers, makes Isaacson's confession sufficiently

trustworthy to support his conviction of having sold additional cocaine to J.B. in the 90 days preceding the controlled buy. We agree. J.B. had Isaacson's cell phone number and dialed it to arrange the controlled buy in the time frame that Isaacson confessed he was selling cocaine to J.B.; the amount of cocaine involved in the controlled buy was similar to amounts of cocaine that Isaacson admitted selling to J.B.; and Isaacson identified J.B. as his customer not knowing that J.B. was the confidential informant. We conclude that the state produced sufficient indicia of the trustworthiness of Isaacson's confession to support his conviction of second-degree controlled substance crime.

Affirmed.