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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-0330**

State of Minnesota,
Respondent,

vs.

Josue Gonzalez Reyes,
Appellant.

**Filed May 19, 2009**
**Affirmed**
**Stauber, Judge**

Dakota County District Court
File No. K4071978

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

James C. Backstrom, Dakota County Attorney, Phillip D. Prokopowicz, Chief Deputy County Attorney, Dakota County Judicial Center, 1560 West Highway 55, Hastings, MN 55033 (for respondent)

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

Considered and decided by Stauber, Presiding Judge; Minge, Judge; and Connolly, Judge.

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

**STAUBER**, Judge

On appeal from his conviction of aiding and abetting a first-degree controlled substance crime, appellant argues that the evidence was insufficient to support his conviction when he was merely present at the scene and the state relied upon an informant who was not reliable or credible. Because the evidence was sufficient to support a conviction, we affirm.

## FACTS

On June 14, 2007, officers with the Dakota County Drug Task Force searched the home of F.S. and found a half-ounce of crystal methamphetamine (meth). F.S. was told that he would not be charged if he cooperated with the task force. He agreed to serve as a confidential informant and immediately called a person he claimed could deliver meth. Task Force Agent James Gabriel did not see the number F.S. called, but F.S. told him the number he dialed. Once F.S. got off the phone, he told officers that someone he knew as "Chuy" would be arriving in about 30 minutes with four ounces of meth. The call was not recorded, and Agent Gabriel testified that he could not understand it because it was all in Spanish.

Shortly after the phone call, a sport utility vehicle (SUV) arrived at the residence. There were two people inside. A passenger, later identified as Gustavo Villano Alvares, exited the SUV, entered the residence and was immediately arrested by task force members. Officers found a gardening glove in his pant leg; inside the glove were four baggies, each containing about 27 grams of meth. While officers were arresting Alvares,

the driver of the vehicle started walking toward the residence. He was arrested and identified as appellant Josue Gonzalez Reyes. F.S. identified Reyes as "Chuy." Reyes was charged with aiding and abetting a controlled substance crime in the first degree under Minn. Stat. §§ 152.021, subd. 1(2), 609.05 (2006).[1] Following a jury trial, appellant was found guilty and sentenced to 74 months in prison. This appeal followed.

**D E C I S I O N**

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). This court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *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). This court examines corroborating "evidence in the light most favorable to the verdict and do[es] not require it to establish a prima facie case of the defendant's guilt." *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007) (alteration in original) (quotation omitted). 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

[1] The complaint was orally amended at trial to change the charge to section 152.021, subd. 1(1).

defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

In Minnesota, a defendant is liable for a controlled substance crime in the first degree 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 cocaine, heroin, or methamphetamine." Minn. Stat. § 152.021, subd. 1(1) (2006).

A person may be held liable for the crimes of a principal if he "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2006). To establish aiding-and-abetting liability, the state must prove that a defendant played a "knowing role" in the crime and took no steps to thwart its commission. *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995). But active participation in the overt act that constitutes the substantive offense is not required. *Id*. The jury may infer the necessary intent from considering factors such as the person's presence at the scene of the crime, the person's close association with the principal before and after the crime, the person's lack of objection or surprise under the circumstances, and the person's flight from the scene of the crime with the principal. *State v. Swanson*, 707 N.W.2d 645, 659 (Minn. 2006).

Evidence of a person's knowledge, inaction, or passive acquiescence is not sufficient to establish aiding-and-abetting liability. *Ostrem*, 535 N.W.2d at 924. Thus, evidence of the person's mere presence at the scene of the crime, without more, is not sufficient. *Id*. To sustain a conviction of aiding and abetting the sale of a controlled

substance, the state must establish that a defendant took "affirmative action" in support of the underlying offense. *State v. Kessler*, 470 N.W.2d 536, 542 (Minn. App. 1991).

Relying on *State v. Kessler*, appellant argues that he did not take affirmative action regarding the meth sale. Kessler was charged with aiding and abetting the sale of a controlled substance. *Id*. at 538. When police searched his home, they found an abundance of evidence relating to the growing and selling of marijuana. *Id*. Kessler admitted that he knew of all of the paraphernalia and marijuana plants, but claimed "it was not his, that it was his wife's." *Id*. This court determined that while knowledge and acquiescence are pertinent to show possession, it is clear that active participation is required to aid and abet an "active" crime. *Id*. at 542. This court reversed the district court's determination that there was probable cause to believe that Kessler actively aided and abetted in sale of a controlled substance. *Id*.

Here, appellant argues that he did not actively participate in the meth sale because there was no reliable evidence that he aided and abetted the sale. Appellant argues there are five factors that indicate he did not actively participate in the sale.

First, appellant argues that there was inconsistent testimony about whether he was driving the vehicle. At trial, F.S. testified that he did not see who was driving the SUV, and he claimed he first saw Chuy when the second person from the SUV entered his house. But F.S. contradicted this testimony on cross examination, stating that he saw Chuy driving the truck when it pulled in front of his house. While F.S.'s testimony appears contradictory about whether he saw appellant driving the SUV, Agent Gabriel testified that he saw two Hispanic males exit the vehicle, and the passenger entered the

residence, leaving the driver outside. Agent Gabriel then stated that he went outside to speak with the driver, who was identified as appellant, establishing that appellant was the driver.

Second, appellant argues that there was an unreliable identification that he was "Chuy." However, testimony established that appellant was the man on the other end of the telephone conversation when F.S. called to arrange the sale, and that F.S. had previously called that phone number and arranged drug deals with that same voice. Furthermore, F.S. identified appellant in person as Chuy. F.S. had been taken into the kitchen while appellant and Alvares were being arrested. Agent Gabriel then brought appellant into the house, placed him next to Alvares, and asked F.S. which one was Chuy. F.S. indicated that appellant was the person he knew as Chuy.

Third, appellant argues that there was lack of proof that the cell phone he was holding when he was apprehended was his phone. Agent Gabriel testified that he found a cell phone on appellant when he detained appellant just outside the residence. When Agent Gabriel called the same number that F.S. called to set up the deal, the cell phone found on appellant rang. While the state did not present records regarding the phone's ownership, there is no question that appellant was in possession of the phone at the time of his arrest, or that the phone was the same as the one that F.S. called in setting up the sale. The jury could have reasonably inferred that the phone was appellant's.

Fourth, appellant argues it was clear that Alvares and F.S. were previously acquainted since Alvares entered the house without knocking, despite F.S. claiming that he did not know Alvares. Appellant seems to imply that because Alvares and F.S.

already knew each other, Alvares was Chuy. Regardless of whether Alvares and F.S. were prior acquaintances, it remains that appellant was still on the scene, was identified by F.S., and was found in possession of the cell phone that F.S. called. *See Ostrem*, 535 N.W.2d at 924 n.10 (concluding that there was sufficient evidence to support a guilty verdict for aiding and abetting second-degree burglary and theft where there was no "rational explanation for [the defendant's] presence other than participation in the crime").

Fifth, appellant argues that it was undisputed that police found no narcotics on him. This is undisputed, but not being in actual possession of drugs does not necessarily mean that appellant was not aiding and abetting the sale. *See Swanson*, 707 N.W.2d at 659 (stating that necessary intent can be inferred from the person's presence at the scene, the person's close association with the principal, and the person's lack of surprise under the circumstances).

Despite the fact that no drugs were found on appellant, these factors–that he spoke with F.S. on the phone in setting up the sale, he drove the SUV to F.S.'s house, he had the cell phone in his possession when he was arrested, and he was identified as Chuy by F.S.–indicate that he actively participated in the sale.

Additionally, appellant argues that the testimony presented at trial is from an unreliable confidential informant. But caselaw cited by appellant deals with requirements that confidential informants be reliable in order to provide probable cause in affidavits for searches. Here, appellant is not challenging probable cause, but rather the reliability of F.S.'s testimony at trial. While appellant maintains that the informant was not a credible

witness, credibility determinations are left to the jury, and even when a witness's credibility is seriously called into question, the jury is entitled to believe him or her. *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002).

Finally, appellant argues that because the circumstantial evidence presented by the state did not form a complete chain that excluded any reasonable inference other than guilt, his conviction must be reversed. Assuming that the jury believed the state's witnesses, the circumstantial evidence in this case is that F.S. called "Chuy's" cell-phone number to arrange a controlled buy, F.S. recognized Chuy's voice on the phone, appellant drove Alvares to F.S.'s house to complete the sale, F.S. identified appellant as Chuy, and appellant was in possession of the cell phone having what F.S. claimed was Chuy's number. The circumstantial evidence combined with the more direct evidence is sufficient to prove appellant's guilt, particularly because appellant has argued no other reason for being present on the scene with the cell phone in his possession. *See Swanson*, 707 N.W.2d at 659 (stating that necessary intent can be inferred from the person's presence at the scene, the person's close association with the principal, and the person's lack of surprise under the circumstances).

Appellant's pro se supplemental brief does not raise any issues that warrant separate consideration.

**Affirmed.**