STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0856

State of Minnesota,
Respondent,

vs.

Mario Lamar Jones,
Appellant.

Filed May 12, 2009
Affirmed
Hudson, Judge

Olmsted County District Court
File No. 55-CR-06-8012

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

Mark A. Ostrem, Olmsted County Attorney, Olmsted County Courthouse, 151 Fourth Street Southeast, Rochester, Minnesota 55904 (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and Randall, 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

On appeal from his conviction of a third-degree controlled substance crime for the sale of crack cocaine, appellant argues that his waiver of his right to a jury trial was insufficient, and he raises numerous pro se claims. Because we conclude that appellant validly waived his right to a jury trial and that appellant's pro se claims lack merit, we affirm.

FACTS

During the early morning hours of September 7, 2006, Rochester Police Sergeant John Sherwin witnessed what he believed to be a hand-to-hand drug sale between appellant Mario Lamar Jones and Samuel Schafer. Sergeant Sherwin was conducting surveillance on a gas station when he saw Schafer approach another man, later identified as appellant. The two men conversed. According to Sergeant Sherwin, Schafer then reached into his pocket and handed appellant some money; in exchange, appellant gave Schafer a plastic bag. Soon thereafter, Sergeant Sherwin stopped Schafer and found him with crack cocaine. Schafer told Sergeant Sherwin that he purchased the crack cocaine from "G.," and then he identified appellant as "G."

Appellant was charged with third-degree controlled substance crime for the sale of crack cocaine, in violation of Minn. Stat. § 152.023 (2006). He waived his right to a jury trial. Following a court trial, the district court found appellant guilty as charged and imposed the presumptive sentence of 57 months. This appeal follows.

D E C I S I O N

I

Appellant claims that his waiver of his right to a jury trial was insufficient, and he therefore asks this court to reverse his conviction and remand for a jury trial or another court trial after an adequate waiver.

The United States Constitution and the Minnesota Constitution provide a criminal defendant with the right to a jury trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. A defendant may waive the right to a jury trial, but the waiver must be voluntary, knowing, and intelligent. *State v. Ross*, 472 N.W.2d 651, 653 (Minn. 1991). In accepting a waiver, the district court "should be satisfied that defendant was informed of his rights and that the waiver was voluntary." *State v. Pietraszewski*, 283 N.W.2d 887, 890 (Minn. 1979). A searching inquiry as to why a defendant is waiving his right is not required. *In re Welfare of M.E.M.*, 674 N.W.2d 208, 213 (Minn. App. 2004). Although "[t]he nature and extent of the inquiry may vary with the circumstances of a particular case," the district court "must be satisfied that the defendant was informed of his rights and that the waiver was voluntary." *Ross*, 472 N.W.2d at 653–54 (quotation omitted).

Rule 26.01 of the Minnesota Rules of Criminal Procedure sets forth a "relatively painless and simple procedure to protect" a defendant's constitutional right to a jury trial. *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. June 18, 2002). The rule is strictly construed. *Id.* It provides that a defendant may waive this right with the approval of the court if "the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the

right to trial by jury and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd. 1(2)(a).

At a pretrial hearing, appellant's attorney told the district court that appellant "would like to waive the jury." The court asked appellant if he had discussed waiving his right to a jury trial with his attorney, and appellant stated that he had. The court then asked appellant if he understood his rights:

> COURT: Do you understand that the Constitution guarantees you a right to a jury trial, is that correct?
>
> APPELLANT: Yes.
>
> COURT: And you understand that a jury would then be the decider of fact and if you waive that right to a jury trial, the Court would be applying the law and deciding the facts, do you understand that?
>
> APPELLANT: Yes.
>
> COURT: Are you willing to waive your right to a jury and have this matter heard by myself?
>
> APPELLANT: Yes.

Appellant asserts that his waiver was deficient because the district court did not ensure that he understood the basic elements of a jury trial (including the right to a unanimous verdict), as required by *United States v. Delgado*, 635 F.2d 889 (7th Cir. 1981). In *Delgado*, the court held that a defendant should be informed that a jury is composed of 12 members of the community, that the defendant may participate in the selection of jurors, that the verdict of the jury is unanimous, and that if a jury is waived a judge will decide guilt or innocence. *Id.* at 890. But while *Delgado* provides "helpful

guidelines" in ensuring that a defendant's waiver is voluntary and intelligent, Minnesota courts have expressly declined to make the *Delgado* inquiry mandatory. *See, e.g.*, *Ross*, 472 N.W.2d at 654; *State v. Johnson*, 354 N.W.2d 541, 543 (Minn. App. 1984).

In *Ross*, the trial court's colloquy with the defendant did not address all of the *Delgado* points. 472 N.W.2d at 653. Nonetheless, the supreme court concluded that the waiver was valid, explaining:

> We are satisfied that defendant Ross made a valid waiver of his right to a jury trial. He is not unfamiliar with the judicial system, having been convicted once of robbery and twice for first degree burglary (although whether by plea or trial is not clear). He was advised by the court of the essential characteristics of a jury trial. While he was not told that the jury's decision had to be unanimous, we do not find that omission to be critical here. Finally, defendant had ample opportunity to consult with his attorneys who presumably also told him about the pros and cons of a jury trial.

Id. at 654.

In *Pietraszewski*, the defendant was asked only if he wished to waive his right to a jury trial, to which the defendant replied, "That's true, Your Honor." 283 N.W.2d at 890. The Minnesota Supreme Court held that, although a more thorough inquiry should have been made, reversal was not required. *Id.* The court then noted that the defendant's contacts with the district court provided sufficient evidence for the district court to determine the validity of the waiver. *Id.*

Here, the district court's questioning on appellant's jury-trial waiver was not as thorough as it might have been. But appellant's waiver of his right to a jury trial was nonetheless valid. Appellant clearly stated "orally upon the record in open court" that he

was willing to waive his right to a jury trial. Minn. R. Crim. P. 26.01, subd. 1(2)(a). Appellant advised the court that he and his attorney had discussed the waiver. The district court ensured that appellant understood that "the Constitution guarantees [appellant] a right to a jury trial," that a jury would decide the facts, and that, if appellant waived his right to a jury trial, the court would decide the facts and apply the law. Thus, the court ensured that appellant understood the "essential characteristics of a jury trial." *Ross*, 472 N.W.2d at 654. Appellant then affirmed that he willingly waived his right to a jury. Appellant made the waiver after he was advised by the district court of the right and after he had an opportunity to consult with counsel. Minn. R. Crim. P. 26.01, subd. 1(2)(a). Furthermore, appellant's prior experience with the judicial system weighs in favor of the validity of his jury-trial waiver. *See Ross*, 472 N.W.2d at 654 (considering the defendant's familiarity with the criminal justice system while assessing the validity of the jury-trial waiver). Appellant has several prior convictions; he is, therefore, familiar with the criminal-justice system. Under these circumstances, we conclude that appellant's waiver was knowing, voluntary, and intelligent and satisfies the requirements of rule 26.01, subd. 1(2)(a).

II

Appellant raises numerous other claims in his pro se supplemental brief. Appellant appears to argue that (a) Sergeant Sherwin "fabricated" evidence; (b) the district court judge was biased against him; (c) there is insufficient evidence to support his conviction because the money allegedly exchanged for the cocaine was not introduced at trial; (d) the district court's findings of fact are clearly erroneous; (e) three exhibits

were erroneously admitted; and (f) he was deprived of effective assistance of counsel when his attorney did not object to the admission of the three exhibits. We conclude that appellant's claims lack merit.

Fabrication of evidence, district court bias, and no evidence of money

Appellant's first three arguments—that Sergeant Sherwin fabricated evidence, that the district court was biased, and that the actual cash allegedly exchanged for the cocaine should have been introduced before the court could find him guilty—appear to be, in essence, claims challenging the sufficiency of the evidence.

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, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). "We review criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions." *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999) (quotation omitted). The choice between conflicting stories and the determination of credibility of any witnesses lies with the fact-finder. *State v. Lloyd*, 345 N.W.2d 240, 245 (Minn. 1984). But the reviewing court must assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the fact-finder, 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).

Appellant's arguments relating to fabrication of evidence and district court bias are challenges to the district court's credibility determinations. Although appellant asserts that Sergeant Sherwin fabricated evidence of the hand-to-hand drug deal, the claim boils down to a charge that Sergeant Sherwin lied when he testified that he saw Schafer hand money to appellant. Similarly, appellant's claim of bias seems to be based on the fact that the district court ruled against him. Appellant argues, for instance, that the district court could not reliably, reasonably, or fairly assess Schafer's credibility. We conclude that the district court, acting as fact-finder, appropriately weighed the evidence, made credibility determinations, and resolved conflicts in testimony.

Appellant also repeatedly claims that his conviction cannot stand because the actual money found on his person and ostensibly used by Schafer to purchase the cocaine was not admitted as evidence. But appellant cites no authority to support his position. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (providing that a pro se appellant's assertions are deemed waived if they contain no argument or citation to legal authority to support the allegations); *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) ("An assignment of error based on mere assertion and not supported by any argument or authorities . . . is waived . . . unless prejudicial error is obvious on mere inspection." (quotation omitted)). Here, Sergeant Sherwin's testimony clearly establishes that Schafer told him that he purchased the cocaine from "G.," that Schafer claimed to have given "G." five $20 bills, and that five $20 bills were found in appellant's possession.

When viewed in the light most favorable to the conviction, the evidence is sufficient to support the district court's guilty verdict.

Findings of fact

Appellant also alleges that various findings made by the district court are clearly erroneous.

In a bench trial, the district court must "specifically find the essential facts in writing on the record." Minn. R. Crim. P. 26.01, subd. 2. Findings of fact must be supported by the evidence. *State v. Colvin*, 645 N.W.2d 449, 453 (Minn. 2002). On appeal, we accept the district court's findings of fact unless those findings are clearly erroneous. *Id.*

Appellant asserts that the district court's findings of fact 18, 20, and 27 are erroneous. Those findings of facts were:

> 18. Schafer advised Sergeant Sherwin that he bought the cocaine from "G." He was taken back to the station and he identified [appellant] as "G." He further advised that he paid [appellant] $80 for an old drug bill and $20 for his purchase on this occasion.
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> . . . .
>
> 20. [Appellant] was arrested and when he was searched had $107 on his person. He had five twenties, one five and two one-dollar bills.
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> . . . .
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> 27. [Appellant] has been convicted of felony offenses in 2002 for the Sale of Cocaine Third Degree, in 2005 for the Sale of Cocaine Third Degree. He also has a Fifth Degree Controlled Substance felony conviction and a conviction for giving False Information to a Police Officer.

Finding 18 is supported by the record. Sergeant Sherwin testified that Schafer told him that he purchased the cocaine from "G.," that Schafer identified appellant as "G.," and that Schafer initially said that he paid $80 for a prior drug debt and $20 for "a small rock."

Finding 20 states that $107 was found on appellant's person. But Sergeant Sherwin testified that $106 was found on appellant: five $20 bills, one $5 bill, and one $1 bill. The error in this finding, namely the $1 discrepancy, is harmless and does not warrant reversal of the district court's decision. *See State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996) (citation omitted) ("If the verdict actually rendered was surely unattributable to the error, the error is harmless beyond a reasonable doubt.").

Finding 27 is supported by evidence in the record, namely appellant's own testimony. Appellant testified that he was convicted twice of controlled substance crime in the third degree and both times for the sale of cocaine. He also testified that he was convicted of fifth-degree controlled substance crime for possession of cocaine and convicted of giving false information to a police officer.

Three exhibits

Appellant claims that three exhibits—namely, a straw with traces of cocaine, a bag of cocaine found on Schafer, and the report from the Bureau of Criminal Apprehension,[1] which indicated that the substances from the straw and bag were cocaine—should not

[1] The lab analyst, a forensic scientist from the Bureau of Criminal Apprehension, testified at trial; accordingly, the admission of the report poses no confrontation-rights issue under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), or *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006).

have been admitted at trial. Appellant did not object to these exhibits at trial, and therefore appellant has forfeited this claim. This court may nonetheless review his claim for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Here, appellant has not demonstrated that the admission of these exhibits was error, much less plain error.

Furthermore, because appellant has not demonstrated that the admission of the exhibits was error, he has failed to establish that his counsel was ineffective for failing to object to their admission. *See Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064 (1984) (holding that to establish ineffective assistance of counsel, a claimant must show that his counsel's performance "fell below an objective standard of reasonableness").

Affirmed.