STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1977

State of Minnesota,
Respondent,

vs.

Monte Ray McClellon,
Appellant.

Filed September 15, 2009
Affirmed
Lansing, Judge

Stearns County District Court
File No. 73-K5-06-004437

Lori Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Janelle Kendall, Stearns County Attorney, Administration Center Room 448, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

LANSING, Judge

On appeal from a conviction for aiding and abetting a third-degree controlled-substance crime, Monte McClellon challenges the admission of *Spreigl* evidence and argues that the circumstantial evidence was insufficient to support the conviction. Because admitting evidence of a prior act was not an abuse of discretion and the evidence does not allow for a reasonable hypothesis other than guilt, we affirm.

F A C T S

The state charged Monte McClellon with aiding and abetting a third-degree controlled-substance crime. The charge was based primarily on evidence that on July 11, 2006, he was driving a car in which his brother sold cocaine to a confidential informant (CI). A nearly identical sale had occurred the previous day, July 10, at the same location with the same CI. McClellon was also driving the car on July 10.

At trial, the CI did not testify and McClellon's brother testified only that he had pleaded guilty to the July 11 drug sale. Three officers provided testimony describing their observations of the events of July 11 and, although none of them saw the hand-to-hand transaction in the car, two officers watched McClellon as he drove to and away from the transaction. The state also offered the July 10 sale as *Spreigl* evidence. McClellon argued that his presence on July 10 was not sufficiently probative of whether he played a knowing role in either transaction. Based on the similarity of the two incidents and the circumstantial nature of the state's case, the district court allowed

evidence of the July 10 sale to show that McClellon had the requisite knowledge of the July 11 sale.

The jury found McClellon guilty. He now appeals, arguing that the evidence is insufficient to sustain his conviction.

D E C I S I O N

I

A person is guilty of a third-degree controlled-substance crime when he "unlawfully sells one or more mixtures containing a narcotic drug." Minn. Stat. § 152.023, subd. 1(1) (2004). A person may also be held criminally liable for a crime committed by another 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 (2004). To act "intentionally," "the actor must have knowledge of those facts which are necessary to make the actor's conduct criminal and which are set forth after the word 'intentionally.'" Minn. Stat. § 609.02, subd. 9(3) (2004). Jurors may infer the necessary intent from factors, which include the defendant's presence when the crime occurs, close association with the principal before and after the crime, lack of objection or surprise under the circumstances, and flight from the scene of the crime with the principal. *State v. Swanson*, 707 N.W.2d 645, 659 (Minn. 2006).

At trial, the state acknowledged that its case relied only on circumstantial evidence. Circumstantial evidence is evidence "based on inference and not on personal knowledge or observation." *Black's Law Dictionary* 636 (9th ed. 2009). When a conviction is based entirely on circumstantial evidence, the evidence viewed as a whole

"must form a complete chain that . . . leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002); *see also State v. Bernhardt*, 684 N.W.2d 465, 477 (Minn. 2004) (stating that circumstantial case "must do more than give rise to suspicion of guilt; it must point unerringly to the accused's guilt" (quotation omitted)).

To challenge a conviction based entirely on circumstantial evidence, an appellant must show that the evidence and reasonable inferences that can be drawn from it are consistent with a rational hypothesis other than guilt. *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003). A possibility of innocence does not require reversal of a jury verdict if the evidence taken as a whole makes the possibility seem unreasonable. *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008). "Mere conjecture" about innocence is insufficient, and the appellant must "point to evidence in the record that is consistent with a rational theory other than guilt." *Id.*

The state provided evidence establishing that, on July 11, the CI made a call to McClellon's brother; that she was searched and given marked buy-money; that she was watched at the store as she approached the vehicle and when she got out of the vehicle; and that she was searched afterwards and found to possess cocaine. The evidence also established that McClellon and his brother were at McClellon's residence when the CI called; that they got in their car almost immediately after the call and drove to the store; that McClellon was driving the car; that the transaction with the CI lasted about ten to fifteen seconds; that the car pulled away afterwards, with McClellon still driving; and that the car returned to McClellon's apartment. The *Spreigl* evidence established that, at the

same location the day before, the CI had purchased cocaine from McClellon's brother "who was at that time in a vehicle driven by the [d]efendant, Monte McClellon."

These facts, which are undisputed in the record, are fully consistent with the hypothesis that McClellon aided and abetted the third-degree controlled-substance sale. *Bernhardt*, 684 N.W.2d at 477 (discussing standard required for proof based on circumstantial evidence). All signs of McClellon's knowing role in the sale are present to some degree. McClellon conceded he was present during the illegal sale. The jury could infer that McClellon did not object to the illegal sale, because he drove to the store after his brother got the call and was present when it happened. And even if his driving home afterwards does not conclusively reflect flight, McClellon stopped the vehicle at the store for only a short time and drove away as soon as the transaction was complete. This series of actions supports an inference that McClellon knew that an illegal transaction was occurring.

McClellon's alternative hypothesis—that he did not know what was happening between his brother and the CI—is not reasonable on this evidence. A transaction between the CI and the brother took place in McClellon's presence on July 10. The next day, the brothers left in the car after getting a call, drove to the same store, and met the same CI. They were at the store for no purpose other than a hurried transaction that took place in the confines of the car. Legal transactions do not reasonably occur under these circumstances, and McClellon has not pointed to any evidence in the record to support a theory that his brother tricked him into thinking the July 10 and 11 transactions were innocuous. Absent any evidence in the record, it is mere conjecture that McClellon did

not know that his brother was selling drugs in the car that McClellon was driving on July 11. *See Tscheu*, 758 N.W.2d at 858 (holding that "mere conjecture" is not sufficient to support a rational hypothesis of innocence).

II

The second issue that McClellon raises in this appeal is the introduction of evidence relating to the July 10 sale under the *Spreigl* rule. Evidence of prior bad acts, known in Minnesota as *Spreigl* evidence, is inadmissible as proof of a person's character or to show that the person acted in conformity with that character. Minn. R. Evid. 404(b); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). *Spreigl* evidence may be admissible as proof of other matters, including motive, intent, common scheme or plan, or absence of mistake or accident. *Kennedy*, 585 N.W.2d at 389. Five requirements must be met for the admission of *Spreigl* evidence: (1) the state must provide notice, (2) the state must clearly indicate what the evidence will be offered to prove, (3) the state must provide clear and convincing proof that the defendant participated in the prior act, (4) the offered evidence must be relevant and material to the state's case, and (5) the probative value of the evidence must outweigh its potential for unfair prejudice. Minn. R. Evid. 404(b); *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006).

We review admission of *Spreigl* evidence for abuse of discretion. *Ness*, 707 N.W.2d at 685. To warrant a new trial, a defendant must show both abuse of discretion and prejudice. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

The notice and content of the notice are not at issue. The district court found that the July 10 incident was proved by clear and convincing evidence at the omnibus hearing.

One of the investigating officers testified that he saw McClellon in the driver's seat of the car when the CI purchased the drugs. The district court also concluded that the similarity and one-day-apart timing of the two events would allow a jury to infer that McClellon knew what his brother was doing during the repeated, short trips to the store. The district court recognized that evidence of the July 10 sale was also prejudicial, but concluded that its probative value outweighed any unfair prejudice. In arriving at this conclusion, the district court cited the similarity of the transactions and the state's need for evidence of McClellon's knowledge at the time of the July 11 sale.

The officer's testimony was sufficient to establish clear and convincing proof of McClellon's presence in the car during the July 10 drug sale. His presence on July 10 was also relevant to an element of the July 11 charge: because the July 10 sale took place in his presence, McClellon reasonably might know what was happening and might recognize that it was happening again the next day. The July 10 sale therefore tended to imply his knowledge of the drug sale on July 11. *See* Minn. R. Evid. 401 (stating that evidence is relevant when it has "any tendency to make the existence of [the] fact . . . more probable or less probable than it would be without the evidence").

The record also supports the district court's determination that the evidence was more probative than prejudicial. The closer a *Spreigl* incident is to the charged crime "in terms of time, place, or modus operandi, the greater the relevance and probative value of the other-acts evidence and the lesser the likelihood that the evidence will be used for an improper purpose." *Ness*, 707 N.W.2d at 688. Because *Spreigl* evidence is necessarily prejudicial, the question when balancing its overall effect is whether it is *unfairly*

prejudicial, meaning that it "persuades by illegitimate means." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). The need for the evidence is also "considered in deciding whether the danger of unfair prejudice outweighs the probative value of other-acts evidence." *See Ness*, 707 N.W.2d at 691 (recognizing that need for evidence to strengthen otherwise weak case or element weighs in favor of its probative value).

The close connection between the July 10 sale and the charged conduct in time, place, and modus operandi, and the state's demonstrated need for the evidence establish that its admission was not unfairly prejudicial. The district court also safeguarded against misuse of the evidence through careful procedures. The district court heard live testimony to determine whether the state had clear and convincing proof, reserved judgment on necessity until after the state's other evidence was presented, admitted the evidence only by way of a brief stipulation that included minimal details of the July 10 sale, and provided a proper *Spreigl* instruction to guide the jury's use of the evidence.

On this record, the district court did not abuse its discretion in admitting evidence of the July 10 drug sale.

Affirmed.