STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2021

State of Minnesota,
Respondent,

vs.

William Thomas Chevre,
Appellant.

Filed December 29, 2009
Reversed
Larkin, Judge

Morrison County District Court
File No. 49-CR-07-536

Lori Swanson, Attorney General, Paul R. Kempainen, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Brian Middendorf, Morrison County Attorney, Morrison County Government Center, 213 Southeast First Avenue, Little Falls, MN 56345 (for respondent)

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

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges his conviction of conspiracy to commit second-degree controlled-substance possession arguing that (1) the evidence was insufficient to sustain his conviction, (2) the district court committed plain error by failing to provide a jury instruction regarding accomplice testimony, and (3) the district court erred by denying his motion to suppress evidence seized after an unlawful entry into his hotel room. Because the evidence is insufficient to sustain appellant's conspiracy conviction, we reverse.

FACTS

On the evening of March 4, 2007, Keisha Markie and Jeffrey Mudgett asked appellant William Chevre to give them a ride from St. Paul to Little Falls. Chevre agreed to do so in exchange for either $150 or $300. Although Mudgett testified that he planned to meet up with his cousin, Aaron Jendro, and to sell methamphetamine, Mudgett also testified that he did not reveal his intentions to Chevre. Chevre, Markie, and Mudgett left St. Paul on the evening of March 4 and arrived in Little Falls sometime between 2:00 and 4:00 a.m. on March 5. Markie drove Chevre's vehicle. Chevre was aware that Mudgett and Markie were in possession of controlled substances. Mudgett testified that he used methamphetamine in the car during the drive to Little Falls, and Chevre admitted to smoking marijuana.

Upon arrival in Little Falls, Chevre, Markie, and Mudgett went to Jendro's house, where Jendro bought approximately one gram of methamphetamine from Markie. Jendro testified that Chevre was sleeping on a couch in his home during this transaction. Later,

all four individuals went to the Super 8 hotel in Little Falls and checked into room 245 under Markie's name. In his post-arrest statement, which was played for the jury, Chevre admitted that he used methamphetamine at the hotel.

Mudgett and Jendro began making arrangements to sell methamphetamine. Jendro left the hotel in Chevre's vehicle, sold drugs, and returned to the hotel with the money. Jendro testified that he bought additional methamphetamine from Markie in the hotel room and that Chevre was sleeping when this transaction occurred. Similarly, Mudgett testified that Chevre was asleep when he left the hotel room to sell drugs.

Sometime before 10:00 a.m. on March 5, Jendro contacted Jason Pierzinski, also of Little Falls, and asked him to come to the hotel. Jendro wanted Pierzinski to help him sell methamphetamine. Pierzinski agreed to meet Jendro and drove to the hotel. Morrison County Deputy Sheriff Douglas Rekstad observed Pierzinski driving. Rekstad knew that Pierzinski's driver's license was revoked. Rekstad was also aware, through his involvement with the Central Minnesota Drug and Gang Task Force, that Pierzinski was allegedly involved in illegal drug activity. Rekstad followed Pierzinski and saw him drive into the hotel parking lot and pull up next to Chevre's automobile. He then saw Jendro exit Chevre's vehicle and enter Pierzinski's vehicle.

Rekstad observed Pierzinski and Jendro drive through northeast Little Falls in Pierzinski's vehicle and then return to the hotel parking lot, where Jendro exited Pierzinski's vehicle and entered Chevre's vehicle. Mudgett was in the driver's seat of Chevre's vehicle. At this point, Task Force Investigator Michael Wochnick and Sergeant Charles Strack of the Little Falls Police Department joined the surveillance. The two

suspect vehicles were driven to an apartment complex nearby and stopped in the parking lot. Strack observed Jendro exit Chevre's vehicle and re-enter Pierzinski's vehicle. The two vehicles then left the apartment complex parking lot together.

Pierzinski's vehicle was next driven to a gas station located one block southeast of the Super 8 hotel and parked near the gas pumps. Pierzinski exited the vehicle and walked toward the station. Strack approached Pierzinski and told him that he was under arrest for driving after revocation. Jendro exited Pierzinski's vehicle and began to walk away but was stopped by Rekstad. Pierzinski promptly informed Strack that Jendro possessed methamphetamine in a metal tube attached to his belt. Strack approached Jendro and saw the metal tube on his belt. The tube contained a white residue, which later field-tested positive for methamphetamine. Pierzinski also told the officers that he had information about additional controlled substances at the Super 8.

Meanwhile, Wochnick was observing Chevre's vehicle, which was parked at the Super 8. Wochnick observed that the vehicle's front license plate was partially obstructed and unreadable in violation of law. A call to dispatch revealed that the vehicle was registered to Chevre and that the vehicle's color was different from the color noted in state records. Wochnick approached the vehicle and encountered Mudgett in the driver's seat. Wochnick asked Mudgett for proof of insurance. Wochnick also asked Mudgett who owned the car and why he had been following Pierzinski's vehicle. Mudgett provided vague or nonresponsive answers. During this time, the driver's door of the vehicle was open, and Wochnick observed an electronic gram scale which, in his

experience, is the kind typically used by narcotics traffickers. Chevre later claimed that the scale belonged to a friend.

Rekstad and Strack contacted Wochnick and informed him that Pierzinski had reported that there was methamphetamine in room 245 of the Super 8. Wochnick again asked Mudgett who owned the vehicle. Mudgett said that he could not remember the owner's name, but that the owner was inside the hotel and his name was in Mudgett's cell phone. Mudgett took out his cell phone and began to scroll through the names that were stored in his phone. As he scrolled through the names, Wochnick observed Mudgett hit the phone's "SEND" button. Wochnick ordered Mudgett to end the call and when he did not comply, Wochnick seized the phone and ended the call. Wochnick did not know who Mudgett had called or if the call had been completed, but Wochnick suspected that Mudgett had attempted to call the vehicle's owner.

Wochnick then asked Mudgett if he would voluntarily empty his pockets; Mudgett complied. The contents of Mudgett's pockets included a cigarette case containing suspected methamphetamine and a room key for the Super 8. Mudgett told Wochnick that the key was for room 245 and that the owner of the vehicle was in the room with a female. The officers discussed the circumstances and concluded that the occupants of the hotel room were involved in controlled-substance trafficking and that evidence of a controlled-substance crime was inside the room. They were worried that Mudgett's attempted phone call may have alerted the occupants of room 245 to the police activity and that there was a risk that the occupants would destroy any controlled substances or contraband in the room. Wochnick contacted the county attorney's office about securing

the room until a search warrant could be obtained. The officers contacted the owner of the Super 8 and obtained a master key. Next, the officers went to room 245 and twice knocked on the door. After receiving no response, they used the master key to enter the room. Inside the room, they observed Markie and Chevre sleeping on a bed with cash and drug paraphernalia lying near them. The officers found 0.6 grams of methamphetamine on the bed and 6.2 grams of methamphetamine in Markie's bra. The officers did not find any drugs on Chevre.

The state charged Chevre with conspiracy to commit first-degree controlled-substance sale in violation of Minn. Stat. § 152.021, subd. 1(1) (2006) and Minn. Stat. § 152.096 (2006), and conspiracy to commit second-degree controlled-substance possession in violation of Minn. Stat. § 152.022, subd. 2(1) (2006) and Minn. Stat. § 152.096. Chevre moved the district court to suppress the evidence obtained from the hotel room and to dismiss the complaint against him, arguing that the warrantless entry of the hotel room was illegal. The district court denied Chevre's motions, concluding that the officers had probable cause to believe that evidence of a controlled-substance crime would be found in the room and that exigent circumstances supported the warrantless entry.

A jury trial was held on June 10-11, 2008. Jendro and Mudgett testified. Jendro testified that in his opinion, Chevre was innocent and was basically asleep during the drug transactions. Mudgett testified that Chevre was not involved in the sale of methamphetamine in any way and that he never told Chevre the real purpose of the trip to Little Falls. Markie did not testify, but portions of her statements to the police were

received into evidence, including her admission that she was the one selling methamphetamine through Mudgett. Although all three had been charged with controlled-substance offenses in connection with this case, the district court did not give an accomplice-testimony instruction.

At the close of the state's case, Chevre moved for dismissal. In the alternative, Chevre moved the district court to instruct the jury on the lesser included offense of fifth-degree controlled-substance possession. The district court denied the motion for dismissal, concluding that there was sufficient evidence to sustain a conviction. But the district court granted Chevre's motion for a lesser-included instruction, concluding that there was a rational basis for the jury to find Chevre guilty of fifth-degree possession based on the methamphetamine found near him on the bed and a rational basis for the jury to acquit on the conspiracy charges. The district court stated that for the purpose of clarity, the fifth-degree possession charge would be identified as count three in the jury instructions.

The jury acquitted Chevre of conspiracy to commit first-degree controlled-substance sale, but found him guilty of conspiracy to commit second-degree controlled-substance possession and fifth-degree possession. At the sentencing hearing, the district court asked how the prosecutor wanted to proceed with regard to the fifth-degree possession count stating, "I think at one point you said something about dismissing that count or in the alternative the conviction would be entered without a sentence." The prosecutor responded that the most "just resolution" would be to dismiss the fifth-degree possession count. The state then moved for dismissal, and the district court granted the

motion. The district court sentenced Chevre to serve 88 months in prison for his conspiracy conviction. This appeal follows.

D E C I S I O N

Chevre argues that the evidence is insufficient to support his conviction of conspiracy to commit second-degree controlled-substance possession. When 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 sustain the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court "must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude the defendant was guilty of the offense charged." *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). We 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). We 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

"Convictions based on circumstantial evidence alone may be upheld . . . [but] convictions based on circumstantial evidence warrant particular scrutiny." *State v. Ferguson*, 581 N.W.2d 824, 836 (Minn. 1998) (quotation omitted). "[O]n appeal, a conviction based on circumstantial evidence may stand only where the facts and circumstances disclosed by the circumstantial evidence form a complete chain which, in

light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994) (quotation omitted). A successful challenge to a conspiracy conviction based on circumstantial evidence "must establish that the evidence in the record and the reasonable inferences that could be drawn therefrom are consistent with a rational hypothesis other than just the defendant's guilt." *State v. Hatfield*, 639 N.W.2d 372, 376 (Minn. 2002) (citing *State v. Steinbuch*, 514 N.W.2d 793, 798-99 (Minn. 1994)); *see also State v. Walen*, 563 N.W.2d 742, 750 (Minn. 1997) (stating that circumstantial evidence is "entitled to the same weight as any evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt" (quotation omitted)).

"[A] conspiracy to commit a crime is a separate, substantive offense from the crime which is the object of the conspiracy. . . ." *State v. Burns*, 215 Minn. 182, 186, 9 N.W.2d 518, 520 (1943). A conspiracy requires a "common object" to commit the crime that is the object of the conspiracy, "which each member of the [alleged conspiracy] intends shall be accomplished by the concerted action of all." *Id.* A person cannot be found guilty of conspiracy unless it is shown that he or she and the alleged co-conspirators had a "common purpose" to commit the crime which is the object of the conspiracy and that "each of them understood that the others had such purpose." *Id.* at 189, 9 N.W.2d at 521.

> Of course, a conspiracy need not be established by direct evidence. It may be inferred from the circumstances. Nor is it necessary to show a formal agreement to commit the crime charged. Where the evidence permits an inference of concert of action to accomplish a given unlawful result, as where several persons commit separate acts which form parts of a connected whole, an inference of conspiracy—that there was concert in both planning and execution—is permissible.

Id. at 189, 9 N.W.2d at 521-22.

Ultimately, the state must prove beyond a reasonable doubt that an agreement existed between two or more people to commit a crime and that a party to the conspiracy committed an overt act in furtherance of the conspiracy. Minn. Stat. § 609.175, subd. 2 (2006); *State v. Brown*, 732 N.W.2d 625, 628 (Minn. 2007) (citing *State v. Stewart*, 643 N.W.2d 281, 297 (Minn. 2002)). The agreement need not be proved through evidence of a "subjective meeting of the minds, but must be shown by evidence that objectively indicates an agreement." *Hatfield*, 639 N.W.2d at 376.

In this case, the state was required to prove the existence of an agreement to commit the crime of second-degree controlled-substance possession: to "unlawfully possess[] one or more mixtures of a total weight of six grams or more containing cocaine, heroin, or methamphetamine[.]" Minn. Stat. § 152.022, subd. 2(1). In the absence of direct evidence of the necessary agreement or common purpose, the state argues that Chevre's conviction is supported by the following circumstantial evidence: (1) Chevre's knowledge that Mudgett and Markie possessed methamphetamine; (2) Chevre's agreement to "give them and their drugs a ride to Little Falls"; (3) Chevre's use of methamphetamine with Mudgett and Markie; (4) Chevre's close proximity to the

methamphetamine found near him on the bed in the hotel room; (5) Chevre's presence during methamphetamine sales; and (6) Chevre's admission that he owned the electronic gram scale found in his vehicle.[1]

While the evidence cited by the state establishes that Chevre actually possessed the controlled substances that he consumed and constructively possessed the methamphetamine found near him on the bed, it does not establish that Chevre and his companions agreed or shared a "common purpose" to possess six or more grams of methamphetamine. *See Burns*, 215 Minn. at 189, 9 N.W.2d at 521 ("A defendant cannot be found guilty of conspiracy . . . unless it be shown that he and the other alleged conspirators had a common purpose. . . ."). To constitute a conspiracy, there must not only be a combination of actions by the alleged conspirators, but also a common object, "which each member of the combination intends shall be accomplished by the concerted action of all." *Id.* at 186, 9 N.W.2d at 520. Here, evidence of an agreement or common purpose—possession of six or more grams of methamphetamine—is lacking. There is no evidence that Chevre and his companions engaged in concerted action to obtain six or more grams of methamphetamine. There is no evidence that Chevre intended or desired to possess six or more grams of methamphetamine. And there is no evidence that Chevre's companions allowed him to exercise dominion or control over the methamphetamine that was in their physical possession. Finally, there is no evidence that Chevre used six or more grams of methamphetamine.

[1] The state cites to the record in support of its contention that Chevre admitted ownership of the gram scale. These references do not support the assertion.

The state argues that there was more than sufficient evidence to prove "intentionally concerted action" between Chevre, Mudgett, and Markie to at least "possess, among themselves, 6 grams or more of methamphetamine" relying, in part, on Chevre's admission that he knew that Mudgett and Markie possessed methamphetamine during the trip to Little Falls. But the Minnesota Supreme Court has held that knowledge of criminal activity is not necessarily indicative of an agreement to commit a crime. *Hatfield*, 639 N.W.2d at 377. The focus must be on whether there was objective evidence that Chevre agreed to possess six or more grams of methamphetamine. *See id.*

The state argues that the necessary agreement may be inferred from Chevre's willingness to transport Mudgett and Markie to Little Falls knowing that they possessed methamphetamine. But the fact that Chevre agreed to provide Mudgett and Markie with transportation does not establish that Chevre agreed to possess the drugs in their physical possession. Nor does it indicate that Mudgett and Markie agreed that Chevre could possess their drugs. Similarly, Chevre's use of methamphetamine with Mudgett and Markie does not give rise to an inference that Chevre, Mudgett, and/or Markie agreed that Chevre would have possession of Mudgett and/or Markie's methamphetamine. To the contrary, Mudgett testified that he did not share his drugs with Chevre or Markie.

The state also argues that a conspiratorial agreement may be inferred from Chevre's "close proximity to some of the methamphetamine possessed by the conspirators in this case, when the officers found it at his feet on the bed in Super 8 room 245." While close proximity supports a finding that Chevre constructively possessed the 0.6 grams of methamphetamine on the bed, *see State v. Denison*, 607 N.W.2d 796, 799-

800 (Minn. App. 2000) (affirming finding of constructive possession of controlled substance found in close proximity to appellant's personal effects and in areas of residence over which she likely exercised at least joint dominion and control), *review denied* (Minn. June 13, 2000), it does not establish Chevre's agreement to possess the six-plus grams of methamphetamine in Markie's bra.

The state next argues that the requisite agreement may be inferred from Chevre's presence during his companions' drug transactions. The state argues that "[a]lthough the jury acquitted [Chevre] of any involvement in the 'sales' transactions, this evidence helped corroborate [his] agreement to the crime of 'possession.'" However, "mere association with a person engaged in illegal activity does not make a person a conspirator." *State v. Pinkerton*, 628 N.W.2d 159, 164 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). And the state's own witness testified that Chevre was sleeping during the transactions. Finally, even if Chevre had admitted to owning the gram scale that was found in his vehicle, this does not indicate that Chevre agreed to possess six or more grams of the methamphetamine in his companions' physical possession. S*ee Hatfield*, 639 N.W.2d at 377 (holding that a person's possession of drug paraphernalia and methamphetamine "goes to [the individual's] knowledge and perhaps an overt act, but says nothing about an agreement with another").

The state relies heavily on this court's decision in *State v. Jenkins*, in which we found that the evidence was sufficient to support a conviction of conspiracy to possess marijuana with intent to sell. *State v. Jenkins*, 411 N.W.2d 504, 508 (Minn. App. 1987). In *Jenkins*, the offender drove his co-conspirator to a pre-arranged drug transaction,

followed him into a motel room where the transaction was to occur, inspected a 50-pound bale of marijuana, commented on the size and smell of the marijuana bale, asked the price of the marijuana, and told the seller (an undercover narcotics agent) that he was interested in purchasing 15 pounds of marijuana. *Id.* at 506. During this exchange, the offender also participated in discussions regarding a half ounce of cocaine that his co-conspirator had offered to sell. *Id.* And he answered a question regarding the quality of the cocaine and stated that he and his co-conspirator had initially tried to purchase methamphetamine but bought cocaine instead. *Id.* We held that the facts and the reasonable inferences flowing therefrom supported a finding of conspiracy to possess and sell marijuana. *Id.* at 508.

Jenkins is factually distinguishable. In *Jenkins*, the offender articulated his desire to purchase an amount of marijuana that was inconsistent with personal use; and the offender expressed this desire during a conversation in which the offender and his co-conspirator were attempting to sell cocaine to an undercover agent. *Id.* at 506. These facts warranted a conclusion that the offender and his co-conspirator were acting in concert to possess and sell controlled substances. *Id.* at 508. Unlike the circumstances in *Jenkins*, there is no evidence that Chevre acted in concert with Mudgett and Markie to obtain possession of six or more grams of methamphetamine. Equally important, there is no evidence that Mudgett and Markie intended Chevre to possess six or more grams of their methamphetamine.

We recognize that the alleged co-conspirators reported, in their post-arrest statements, that Chevre supplied their methamphetamine. Wochnick testified that Markie

admitted that she had been selling methamphetamine in Little Falls through Mudgett and that she at one point claimed that Chevre supplied the methamphetamine. But the jury also heard that Markie's statements regarding who supplied the methamphetamine were inconsistent. And because Markie did not testify at trial, her claim was not subject to cross-examination. Mudgett testified that he may have told the police that Chevre was the supplier but if he did, "it could have been a bunch of bullsh-t." Mudgett testified that he said some things that were not true when he was interviewed by the police because he was trying to talk his way out of trouble. In closing argument, the state acknowledged that it could not prove that Chevre "actually had his hands on [the drugs]." And the state does not cite Markie's out-of-court allegation or Mudgett's testimony in support of its argument that the evidence is sufficient to sustain Chevre's conviction.

Having reviewed Chevre's conviction with the "particular scrutiny" that is warranted when a conviction is based on circumstantial evidence, *Ferguson*, 581 N.W.2d at 836, we conclude that the evidence is insufficient to sustain the conviction. The record evidence and the reasonable inferences that could be drawn therefrom are consistent with a rational hypothesis other than guilt: Chevre provided transportation for, and used controlled substances with, two individuals who possessed six or more grams of methamphetamine, but there was no agreement that Chevre would possess six or more grams of their methamphetamine. This is simply not a case in which the circumstantial evidence forms "a complete chain which, in light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt." *Jones*, 516 N.W.2d at 549 (quotation

omitted). Because the evidence is insufficient to support Chevre's conviction of conspiracy to commit second-degree possession of a controlled substance, we reverse the conviction.

Because we reverse Chevre's conspiracy conviction based on insufficient evidence, we do not address his argument that the conviction should be reversed based on the district court's failure to provide, or his defense counsel's failure to request, a jury instruction regarding accomplice testimony. Nor do we address Chevre's claim that the district court erred by denying his motion to suppress evidence seized after the warrantless entry into the hotel room. While Chevre argues that the district erred by denying his motion to suppress and that his conviction for fifth-degree possession should be reversed on that ground, the record indicates that the district court dismissed the fifth-degree possession count at the sentencing hearing on the state's motion. The criminal judgment and warrant of commitment from which Chevre appeals indicates that he was convicted solely of conspiracy to commit controlled-substance crime in the second degree; an order accompanying the judgment states that the fifth-degree possession count was dismissed upon motion by the state. Because the district court dismissed the fifth-degree possession count without entering a judgment of conviction, there is no conviction to reverse. Given our holding, it is unnecessary to consider Chevre's pro se claim.

Reversed.

Dated:

_____
Judge Michelle A. Larkin