STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2028

State of Minnesota,
Respondent,

vs.

Dung Anh Nguyen,
Appellant.

Filed December 29, 2009
Affirmed
Peterson, Judge

Dakota County District Court
File No. 19-K3-07-002037

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, Assistant County Attorney, 1560 West Highway 55, Hastings, MN 55033 (for respondent)

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

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Harten, 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

PETERSON, Judge

In this appeal from a conviction of attempted first-degree controlled-substance crime (manufacture), appellant argues that (1) the circumstantial evidence was insufficient to support his conviction; and (2) the aggravating factors found by the jury cannot support the sentencing departure, and the district court did not specify the substantial and compelling circumstances that support the departure. We affirm.

FACTS

On June 15, 2007, a Dakota County Electric crew responded to a report of a blown transformer that supplied power to four homes in Apple Valley. A transformer at that location had failed and was replaced in December 2006. Of the four homes connected to the transformer, the home at 8760 Hunters Way was registering abnormally high electricity use. The crew discovered that the underground wiring to that home had been altered to bypass the meter. The crew notified the police. When an officer arrived, he and the electric-company employees noticed an odor of marijuana coming from the house. The police determined that the house belonged to appellant Dung Anh Nguyen.

On June 16, 2007, the police executed a search warrant at 8760 Hunters Way. The police forcibly entered the house because no one was inside. Upon entering the house, the officers noticed a strong odor of marijuana. The main level of the house was mostly empty and had only some furniture and very little food in the refrigerator. In one of the upstairs bedrooms, police found some small marijuana "starter plants." The basement level was exclusively used for growing marijuana plants and was so full of

plants that the officers had to walk on plants to get across the room. Police found plastic containers with liquid fertilizer and tools used for watering the plants. Hooded lights and fans connected to 44 electrical transformers were placed among the plants to facilitate growth, and a modified ducting system had been installed throughout the home to direct vapors out through the chimney. Additional modifications included "silvery stuff" on the walls to contain light and heat and sheetrock and black plastic over the windows to prevent the glow of lights from being visible outside. The officers also found a scale and a food sealer, two items that a narcotics officer identified as typical of a drug-manufacturing operation.

No marijuana plants were found on the main floor. Police removed from the house 1,264 marijuana plants that would yield approximately 11 kilograms of usable product. Testing of the product confirmed that the plants were marijuana. The police obtained four usable fingerprints from the electrical transformers, and none of them matched appellant's fingerprints. The police also found expired prescription pill bottles with either appellant's or his ex-wife's name on them, a bank document with appellant's name on it, miscellaneous men's clothing ranging in size from small to extra large, a photo album filled with pictures of appellant, and a small bag of marijuana in the refrigerator. All of these items, except the clothing, were found in the kitchen.

Later in the day, after the warrant was executed, appellant briefly entered the house and left. When he was about a block away, the police arrested him. Appellant was charged by complaint with one count of attempted first-degree controlled-substance

crime, one count of third-degree controlled-substance crime, and one count of fifth-degree controlled-substance crime.

At appellant's jury trial, Captain John Grant, the agent in charge of the Dakota County Drug Task Force, testified that he has participated in hundreds of hours of narcotics- and drug-related training provided by the DEA, the FBI, and other facilities and departments. Based on his training and experience, Grant testified that it takes approximately eight to ten weeks for a marijuana seedling to mature to a full-size marijuana plant ready for harvest and that a plant produces one-half to one pound of usable product. He estimated that 1,200 plants would produce 600 to 1,200 pounds of usable marijuana per harvest or "[a]bout 300 [kilograms] approximately." Grant testified that the level of sophistication of the growing operation at appellant's house was "off the charts."

Appellant testified that following his divorce, he bought the house at 8760 Hunters Way in September 2006 for approximately $391,000 with the hope that he and his ex-wife would reconcile and move into the house together. However, after closing on the house, he learned that his ex-wife was involved with someone else. Because he could not afford the house payments on his own, he needed a roommate, and in late 2006, he was at a coffee shop where he saw a Vietnamese man whom he had worked with at Century and Hitchcock Industries and knew only as "Ricky." He asked Ricky if he would like to move into the house as a roommate, and Ricky replied that he would like to rent the entire house for $5,000 a month. Without entering into a written lease, Ricky paid appellant $15,000 up-front and moved into the house in January 2007. Appellant moved

out of the house and in with a friend in Bloomington; appellant's Bloomington friend corroborated this. Despite not residing at 8760 Hunters Way, appellant continued to pay the utilities and received his mail there. Appellant testified that he would go to the house to gather his mail and to collect the rent, but the only rooms he entered were the kitchen and the living room, and he was not aware of the marijuana-growing operation in the house. Appellant testified that, since his arrest, he has searched for Ricky and has offered to assist the police in searching for Ricky, but no one has been able to find him. Appellant's trial testimony was consistent with his statement to police following his arrest.

A human-resources director at Hitchcock Industries testified that appellant had worked for Hitchcock for two stints of more than a year each between 2003 and 2006. She acknowledged that many people of Asian descent worked for Hitchcock. M.S., who went by "Rick," testified that he worked at Hitchcock Industries during the time that appellant had been employed there, but he did not rent appellant's house. Two Hitchcock Industries supervisors and a 35-year veteran of the company testified that none of them knew of a "Ricky" who worked for the company, but they also acknowledged that they did not know the names of everyone who had worked for the company.

The state called three witnesses who lived near 8760 Hunters Way. Next-door neighbors K.H. and L.H. testified that they had seen appellant and a woman they presumed to be his wife entering and leaving the house on multiple occasions. K.H. stated that he saw appellant no more than four or five times from January 1, 2007, until June 16, 2007. L.H. testified that she saw appellant four times during that period. L.H.

saw a white van at the house, which she said appellant had told her was there for remodeling. Both K.H. and L.H. testified that they saw appellant come and leave without staying very long. D.S., the neighbor across the street from 8760 Hunters Way, testified that he saw appellant two to three times a week, sometimes in the morning or evening, throughout the spring of 2007. Once, when it was cold outside, D.S. saw appellant in appellant's garage in shorts and a t-shirt, sweating. D.S. also saw U-Hauls and paneled vans coming to the house, and in the spring, a "crew" accompanied a panel truck.

Appellant's ex-wife testified that she was not aware of appellant's house purchase, and she had never been at 8760 Hunters Way.

The jury found appellant guilty of all three charges. The state moved for an upward durational departure, and the district court submitted a special-verdict form to the jury with two questions: (1) "Did the offense of Attempted Controlled Substance Crime in the First Degree involve an attempted sale or manufacture of marijuana in quantities substantially larger than 50 kilograms?" and (2) "Did the offense of Attempted Controlled Substance Crime in the First Degree involve a high degree of sophistication or planning?" Appellant objected to the special-verdict form, arguing that (1) the amount of controlled substance manufactured is an element of the offense, and therefore is not proper grounds for an aggravating factor; and (2) by its very nature, the offense of manufacturing 50 kilograms requires a high degree of sophistication or planning, and therefore it is part and parcel of the charge. The district court overruled appellant's objection.

The jury answered both special-verdict questions in the affirmative. The district court sentenced appellant to 86 months in prison for the first-degree offense, which is a double durational departure from the presumptive sentence. This appeal followed.

D E C I S I O N

I.

A person is guilty of first-degree controlled-substance crime if, "on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of 50 kilograms or more containing marijuana or Tetrahydrocannabinols." Minn. Stat. § 152.021, subd. 1(4) (2006). When used in Minn. Stat. § 152.021, subd. 1(4), "sell" also means "manufacture." Minn. Stat. § 152.01, subd. 15a(1) (2006). "Whoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit the crime. . . ." Minn. Stat. § 609.17, subd. 1 (2006).

Undisputed evidence showed that police discovered a marijuana-growing operation in appellant's house that was capable of manufacturing more than 50 kilograms of marijuana in 90 days. Appellant concedes that the marijuana-growing operation was in his house, but he maintains that he was not aware of and was not involved in the operation. Appellant argues that because the state relied solely on circumstantial evidence and the circumstantial evidence was consistent with appellant's assertion of innocence, the evidence was insufficient to support the guilty verdict.

"When we review whether the evidence is sufficient to sustain a conviction, we determine whether, under the facts in the record and any legitimate inferences that can be

drawn from them, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Tscheu*, 758 N.W.2d 849, 857 (Minn. 2008) (quotations omitted). "[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). 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 guilt. *Id*. The state is not required to exclude all inferences other than guilt. "The State's obligation is to exclude all *reasonable* inferences other than guilt." *Tscheu*, 758 N.W.2d at 857.

> Stated another way, circumstantial evidence is sufficient to sustain a conviction when "all the *circumstances proved* [are] consistent with the hypothesis that the accused is guilty and inconsistent with any *rational* hypothesis except that of his guilt." The phrase "circumstances proved" does not mean "every circumstance as to which there may be some testimony in the case"; rather, it refers only to those "circumstances as the jury finds proved by the evidence." There may well be "testimony on behalf of the defendant as to inconsistent facts and circumstances, not conclusively proved, and which the jury may have a right to and do reject as not proved."

Id. at 857-58 (alteration in original) (quoting *State v. Johnson*, 173 Minn. 543, 545, 217 N.W. 683, 684 (1928)).

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 426, 430 (Minn. 1989). Questions of which witnesses or conflicting evidence to believe are for the jury even in cases built entirely on circumstantial evidence, and possible scenarios of innocence do not require

reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable. *See State v. Ostrem*, 535 N.W.2d 916, 923-24 (Minn. 1995) (holding that circumstantial evidence was sufficient to convict even though the record contained evidence of two different factual scenarios because the jury was free to disbelieve defendant's alibi defense). The reviewing 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).

To succeed in his challenge to the verdict, appellant may not rely on mere conjecture. *Tscheu*, 758 N.W.2d at 858. He must instead point to evidence in the record that is consistent with a rational theory other than guilt. *Ostrem*, 535 N.W.2d at 923. Appellant points to his testimony that, beginning in January 2007, he rented the house to a man named Ricky and visited the house only to collect rent and mail and was never on the second floor or in the basement where the marijuana plants were growing. But to find credible appellant's alternative theory of events, the jury needed to believe appellant's explanation that he rented his house to a former co-worker whose last name he did not know even after he rented the house to him. Also, appellant's testimony was contradicted by the neighbors' testimony that, during the six months after appellant moved out of the house, he was in the garage during cold weather wearing shorts and a t-shirt and sweating and that appellant told a neighbor that a white van at the house was there for remodeling. This evidence supports inferences that appellant did more at the house than collect rent or mail and that appellant was aware that at least some remodeling was being done in the house.

Because the jury was free to believe the state's evidence and reject appellant's contradictory evidence, the circumstantial evidence was sufficient for the jury to find that appellant purchased a house that he could not afford; appellant did not rent the house to a man named "Ricky"; a marijuana-growing operation that was capable of producing more than 50 kilograms of marijuana in 90 days was operated in the house for at least several weeks; the operation included several significant modifications to the electrical and ventilation systems in the house and modifications to cover the windows; the growing marijuana produced an odor that was detected by electric-crew members and an investigating police officer from outside the house and that was very strong inside the house; appellant was inside the house on several occasions, including on the day that he was arrested, when the marijuana odor was very strong; appellant's activities at the house went beyond collecting rent and mail; and appellant was aware that some remodeling was going on inside the house.

Based on this evidence, the jury could reasonably conclude that appellant is guilty of attempting to manufacture more than 50 kilograms of marijuana in 90 days because the circumstances proved were consistent with the hypothesis that appellant was participating in the marijuana-growing operation, and any hypothesis that appellant was not participating in the operation was not reasonable.

II.

Appellant challenges his sentence as an improper upward departure from the presumptive sentence. This court reviews a sentencing court's departure from the presumptive sentence for abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516

(Minn. 2003). A district court must impose the presumptive sentence provided by the sentencing guidelines unless there are substantial and compelling circumstances to warrant a departure. Minn. Sent. Guidelines II.D (2006). Substantial and compelling circumstances are present when "the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002).

Appellant challenges the sentencing departure on four grounds: (1) the departure grounds duplicate an element of the offense and are therefore improper; (2) the evidence was insufficient to support the jury's findings; (3) the jury did not find appellant's offense to be a "major controlled-substance offense"; and (4) the district court did not specify the substantial and compelling circumstances that warrant the departure.

1. Whether the departure grounds duplicate an element of appellant's offense.

Under the Minnesota Sentencing Guidelines, the nonexclusive list of aggravating factors that may be used as reasons for departure includes that "[t]he offense was a major controlled substance offense, identified as an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense." Minn. Sent. Guidelines II.D.2.b.(5). That subsection provides further that

> [t]he presence of two or more of the circumstances listed below are aggravating factors with respect to the offense: . . .
>
> (b) the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; or
>
> (c) the offense involved the manufacture of controlled substances for use by other parties; or . . .
>
> (f) the offense involved a high degree of sophistication or planning or occurred over a lengthy period

> of time or involved a broad geographic area of disbursement[.]

Id.

In its answers to the special-verdict questions, the jury found that appellant's offense involved (1) an attempted sale or manufacture of marijuana in quantities substantially larger than 50 kilograms and (2) a high degree of sophistication or planning. Appellant contends that both of these aggravating factors duplicate the quantity element of Minn. Stat. § 152.021, subd. 1(4), and, therefore, cannot be relied upon to support an upward durational departure.

Appellant correctly argues that the supreme court has cautioned courts "against using quantity to support a departure under the major controlled substance offense departure criteria when to do so duplicates an element of the offense." *State v. McIntosh*, 641 N.W.2d 3, 12 (Minn. 2002). But we disagree with appellant that the district court's use of quantity to support appellant's sentencing departure duplicated the quantity element of appellant's offense.

To violate Minn. Stat. § 152.021, subd. 1(4), it was only necessary for appellant to attempt to manufacture 50 kilograms of marijuana. The first special-verdict question asked whether appellant's offense involved "quantities substantially larger than 50 kilograms." This question was directed at determining whether the circumstances of appellant's offense were more onerous than the usual offense because the quantity of marijuana that appellant was attempting to produce was substantially larger than the 50

kilograms required to commit the offense. Attempting to manufacture substantially more than 50 kilograms of marijuana is not an element of appellant's offense.

Appellant speculates that the first special-verdict question was drawn from Minn. Sent. Guidelines II.D.2.b.(5)(b), which refers to "quantities substantially larger than for personal use." Because 50 kilograms of marijuana is a quantity substantially larger than for personal use, any violation of Minn. Stat. § 152.021, subd. 1(4), necessarily involves a quantity substantially larger than for personal use. Therefore, imposing an upward departure because an offense involved a quantity of marijuana substantially larger than for personal use would duplicate an element of Minn. Stat. § 152.021, subd. 1(4). But the special-verdict question asked about quantities substantially larger than 50 kilograms, not quantities substantially larger than for personal use.

It appears that, rather than being drawn from Minn. Sent. Guidelines II.D.2.b.(5)(b), the first special-verdict question was intended to address Minn. Sent. Guidelines II.D.2.b.(5)(c). Because 50 kilograms of marijuana is a quantity substantially larger than for personal use, any violation of Minn. Stat. § 152.021, subd. 1(4), necessarily involves "the manufacture of controlled substances for use by other parties," which is the aggravating factor recognized under Minn. Sent. Guidelines II.D.2.b.(5)(c). Consequently, the mere fact that appellant's offense involved the manufacture of controlled substances for use by other parties could not be used to support a sentencing departure because doing so would duplicate an element of the offense. But, as we have already stated, attempting to manufacture substantially more than 50 kilograms of marijuana is not an element of appellant's offense. Therefore, the district court could

base a departure on Minn. Sent. Guidelines II.D.2.b.(5)(c) if appellant attempted to manufacture substantially more than 50 kilograms of marijuana. The jury's answer to the first special-verdict question indicates that he did, and the record supports the jury's answer.

The record contains evidence that the amount of marijuana appellant attempted to manufacture was both significantly larger than for personal use and significantly larger than 50 kilograms. The record does not establish how many harvests there had been within 90 days before the search or how many harvests there could have been within 90 days after the search. But Grant testified that if the 1,200 plants that were found in appellant's house had been left to grow to maturity (which would have taken less than ten weeks) they would have provided approximately 300 kilograms of usable product, six times the amount prohibited by the statute.

Appellant also argues that the language of the second special-verdict question regarding "a high degree of sophistication or planning" duplicates the quantity element of the crime. Appellant contends that any operation manufacturing 50 kilograms of marijuana would have to be large-scale and would necessarily involve a high degree of sophistication and planning. But a kilogram is approximately 2.2 pounds. *The American Heritage Dictionary of the English Language* 991 (3d ed. 1992). This means that fifty kilograms is approximately 110 pounds. Grant testified that a full-size marijuana plant ready for harvest produces one-half to one pound of usable product, which means that approximately 100 to 200 plants would be needed to produce 50 kilograms. We are not persuaded that growing 200 or fewer plants outdoors would necessarily involve a high

degree of sophistication and planning. Consequently, we conclude that the aggravating factors identified by the special-verdict questions do not duplicate the quantity element of Minn. Stat. § 152.021, subd. 1(4).

2. Whether there was sufficient evidence to support the jury's finding.

Appellant argues that the evidence is insufficient to support the jury's finding that the marijuana-growing operation involved a high degree of sophistication or planning. This court reviews sufficiency of the evidence claims to determine whether a jury could reasonably reach its conclusion based on the facts in the record and legitimate inferences. *Tscheu*, 758 N.W at 857. The evidence showed that the growing operation included ducting and ventilation modifications throughout appellant's house to dispose of vapors, electrical modifications to bypass the electricity meter and provide the lighting and ventilation for the operation, and extensive measures to conceal the modifications and prevent the operation from being detected from outside. It was reasonable for the jury to find that these modifications involved a high degree of sophistication and planning.

3. Whether the jury found appellant's offense to be a major controlled-substance offense.

Appellant argues that in order to support the departure, the jury was required to find either that his offense was a major controlled-substance offense or that the circumstances of his offense were more onerous than the usual offense. But the supreme court recently explained that the aggravating factors listed in Minn. Sent. Guidelines II.D are factors that may be used as reasons for a departure. *State v. Rourke*, 773 N.W.2d 913, 920 (Minn. 2009). The supreme court then explained that "the particular cruelty

aggravating factor[1] is a reason that explains why the additional facts found by the jury provide the district court a substantial and compelling basis for imposition of a sentence outside the range on the [sentencing guidelines] grid." *Id.* The supreme court then held

> that a district court must submit to a jury the question of whether the State has proven beyond a reasonable doubt the existence of additional facts, which were neither admitted by the defendant, nor necessary to prove elements of the offense, but which support reasons for departure. But the question of whether those additional facts provide the district court a reason to depart does not involve a factual determination and, therefore, need not be submitted to a jury.

Id. at 921. We conclude that, like particular cruelty in *Rourke*, whether appellant's offense was a major controlled substance offense that involved circumstances more onerous than the usual offense is a reason to depart that did not need to be submitted to the jury.

4. Whether the district court specified substantial and compelling circumstances for departure.

Appellant argues that the departure was improper and should be reversed because, during the sentencing hearing, the district court did not identify the substantial and compelling circumstances that justify the departure. If the jury finds facts that support a departure, the district court "may exercise the discretion to depart from the presumptive sentence." Minn. Sent. Guidelines II.D.; *accord State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). However, the district court must state particular reasons for the departure. *State v. Richardson*, 670 N.W.2d 267, 285 (Minn. 2003).

[1] The list of factors that may be used as reasons for departure includes: "The victim was treated with particular cruelty for which the individual offender should be held responsible." Minn. Sent. Guidelines II.D.2.b.(2).

At the sentencing hearing, the district court did not identify the aggravating factors under Minn. Sent. Guidelines II.D. that were its reason for the departure. But immediately before announcing the departure, the district court said to appellant, "I've never seen anything as sophisticated as this," and "you bought a $400,000 home you couldn't afford and turned it into a major grow operation." When these statements are read in light of the jury's answers to the special-verdict questions, it is apparent that the district court's reason for the departure is that appellant's offense is a major controlled-substance offense. The jury's findings support this reason for the departure, and the district court did not abuse its discretion in departing for this reason.

III.

Finally, appellant requests that this court modify his sentence in the interests of fairness and uniformity. Appellate courts have discretion to modify a sentence in the interests of fairness and uniformity. *State v. Vazquez,* 330 N.W.2d 110, 112 (Minn. 1983). Appellant argues that, although he was found guilty of attempted first-degree controlled-substance crime, the double-durational departure resulted in a sentence that punishes him as if he had been found guilty of the completed crime. *See* Minn. Stat. § 609.17, subd. 4(2) (2006) (whoever attempts to commit a crime may be sentenced "to not more than one-half of the maximum imprisonment or fine or both provided for the crime attempted").[2] But appellant does not argue that his sentence is not permitted under Minn. Stat. § 609.17, subd. 4(2). Because the sentence is permitted, appellant's argument

[2] The maximum imprisonment and fine for a first violation of Minn. Stat. § 152.021, subd. 1(4), are 30 years and $1,000,000. Minn. Stat. § 152.021, subd. 3 (a)-(b) (2006).

is simply another argument against the upward departure, which we have found to be within the district court's discretion.

Affirmed.