STATE OF MINNESOTA
IN COURT OF APPEALS
A10-373

State of Minnesota,
Respondent,

vs.

Domingo Zambrano Ramirez,
Appellant.

Filed January 18, 2011
Affirmed in part and reversed in part
Klaphake, Judge

Dodge County District Court
File No. 20-CR-09-482

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Paul Kiltinen, Dodge County Attorney, Mantorville, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Connolly, Judge.

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

KLAPHAKE, Judge

Domingo Z. Ramirez appeals from his convictions of conspiracy to manufacture methamphetamine, possession of substances with intent to manufacture

methamphetamine, unauthorized anhydrous ammonia containment, and fleeing a police officer in a vehicle and on foot. Appellant argues that the evidence is insufficient to support his convictions because the convictions are based solely on uncorroborated accomplice testimony. Because we conclude that the evidence is sufficient to support appellant's conviction of fleeing a police officer on foot, we affirm in part. But because the state did not introduce evidence to sufficiently corroborate the accomplice testimony, we reverse appellant's other convictions.

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, was sufficient to allow the jurors to reach the verdict they did." *State v. Webb*, 440 N.W.2d 426, 430 (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).

Appellant argues that the evidence is insufficient to support his convictions because it is uncorroborated accomplice testimony. A criminal conviction may not be based solely on accomplice testimony; the state must present evidence to corroborate the accomplice's testimony that the defendant participated in the charged offense. Minn. Stat. § 634.04 (2008). "Corroborating evidence is sufficient if it restores confidence in the accomplice's testimony, confirming its truth and pointing to the defendant's guilt in

some substantial degree." *State v. Ford*, 539 N.W.2d 214, 225 (Minn. 1995) (quotation omitted). While circumstantial evidence may be sufficient to corroborate an accomplice's testimony, "the circumstantial evidence must clearly support the defendant's implication in the crime." *State v. Wallert*, 402 N.W.2d 570, 573 (Minn. App. 1987), *review denied* (Minn. May 18, 1987). We review the sufficiency of corroborating evidence in a light most favorable to the verdict. *State v. Bowles*, 530 N.W.2d 521, 532 (Minn. 1995).

Conspiracy to Manufacture Methamphetamine

Appellant was convicted of conspiracy to manufacture methamphetamine, which requires proof of (1) an agreement between two or more people to commit the crime of methamphetamine manufacture, and (2) an overt act in furtherance of the conspiracy. *State v. Tracy*, 667 N.W.2d 141, 146 (Minn. App. 2003); *see* Minn. Stat. §§ 152.021, subd. 2a, .096, subd. 1 (2008).

Brian Rathbun, appellant's accomplice, was the state's primary witness. According to his testimony, Rathbun dropped off a tank of anhydrous ammonia in a secluded location. The following day, he met appellant by chance at an acquaintance's home and the two decided to manufacture methamphetamine, allegedly to settle a debt that Rathbun owed to appellant. Rathbun testified that he drove appellant to Wal-Mart so that appellant could purchase Coleman fuel and a one-gallon jug. The two then retrieved the hidden tank of anhydrous ammonia; Rathbun testified that appellant knew what the tank contained. As Rathbun drove away, police attempted to stop his truck, but he sped up, ultimately crashing into a tree. After a brief chase on foot, the two were apprehended.

Rathbun also testified that appellant had purchased the lithium batteries found in Rathbun's pocket and briefcase, and that appellant had ephedrine pills on his person.

Rathbun was impeached with a statement he made to police following his arrest. In contrast to his trial testimony, Rathbun told police that appellant drove with him to Wal-Mart, but made no purchases. The receipts found with the Coleman fuel and one-gallon jug indicated that they had been purchased with cash, so the purchaser was not identified.

Appellant's police statement was also introduced at trial. Appellant stated that he had asked Rathbun for a ride and Rathbun picked him up at an acquaintance's house. Appellant said that Rathbun had purchased the Coleman fuel and the one-gallon jug. Appellant thought that Rathbun left the truck to urinate; he said he did not know that Rathbun was retrieving the tank of anhydrous ammonia.

Further, no receipt was recovered for the lithium batteries, although police found the receipt for purchase of the Coleman fuel and the one-gallon jug. Finally, police did not find any ephedrine or other methamphetamine-related items on appellant's person after he was apprehended.

In essence, the evidence introduced to support appellant's convictions was limited to Rathbun's accomplice testimony. The only evidence submitted by the state to corroborate Rathbun's testimony consisted of appellant's presence in the vehicle, appellant's trip to Wal-Mart with Rathbun, and the fact that appellant began to run from police after Rathbun crashed his truck into a tree. There was no evidence to link appellant to the anhydrous ammonia, no evidence that appellant was ever in possession of

any of the other items necessary to manufacture methamphetamine, and no evidence to substantiate Rathbun's testimony that the two agreed to manufacture methamphetamine in order to settle a debt. Instead, the corroborating evidence supplied by the police officers and the surrounding circumstances proves only that a crime occurred, and does not clearly support appellant's participation in that crime. *See Wallert*, 402 N.W.2d at 573 (reversing a conviction when the corroborating testimony did not "clearly support [the defendant]'s implication in the [crime]"). Appellant's trip to Wal-Mart with Rathbun to purchase the Coleman fuel and one-gallon jug, along with appellant's presence in the vehicle at the time the anhydrous ammonia was retrieved, is insufficient to corroborate Rathbun's testimony that the two had an agreement to manufacture methamphetamine. Because the state failed to produce sufficient evidence to prove an essential element of the charge, we conclude that appellant's conviction for conspiracy to manufacture methamphetamine must be reversed.

Possession of Substances with Intent to Manufacture Methamphetamine

Appellant was also charged with possession of substances with intent to manufacture methamphetamine. Minn. Stat. § 152.0262, subd. 1 (2008), makes it a crime for a person to possess "any chemical reagents or precursors with the intent to manufacture methamphetamine." Chemical reagents include anhydrous ammonia and lithium metals. *Id.*, subd. 1(5), (8). There was no evidence introduced at trial that appellant was ever in physical possession of the anhydrous ammonia discovered in the back of the vehicle or the lithium batteries found in Rathbun's pocket and briefcase. But

the state argues that the evidence is sufficient to demonstrate that appellant was in constructive possession of these items.

In order to prove constructive possession, the state must show that, "if police found [the items] in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over [them]." *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975). We look to the totality of the circumstances when determining whether the state adequately proved constructive possession. *State v. Munoz*, 385 N.W.2d 373, 377 (Minn. App. 1986).

The uncontradicted evidence submitted at trial was that Rathbun dropped off the anhydrous ammonia before meeting up with appellant. The two went to Wal-Mart to purchase some items and then Rathbun went back to the culvert to retrieve the anhydrous ammonia. But according to appellant's statement, he remained inside the truck while Rathbun picked up the container and he was unaware of Rathbun's actions. After Rathbun put the anhydrous ammonia in the back of the truck, the vehicle was on the road for a short amount of time before being stopped by police. There is no evidence linking appellant to the drop-off of the anhydrous ammonia, nor does the corroborating evidence demonstrate that appellant had any knowledge that the substance was even in the truck. *Cf. State v. Simon*, 275 N.W.2d 51, 52 (Minn. 1979) (holding that the evidence was sufficient to demonstrate constructive possession of drugs discovered in the defendant's bedroom). Furthermore, there was no evidence introduced to suggest that appellant was in constructive possession of the lithium batteries discovered in Rathbun's pocket or in

his briefcase. The only evidence the state offered in support of its theory was Rathbun's uncorroborated testimony that appellant was once in possession of the lithium batteries.

The brief period of time that appellant was in relatively close proximity to the anhydrous ammonia and lithium batteries is not sufficient to prove the inference that appellant was exercising dominion or control over the items, nor is it sufficient to corroborate Rathbun's testimony that appellant was ever in constructive possession of the items. *Cf. State v. Ortega*, 770 N.W.2d 145, 150 (Minn. 2009) (stating that "mere proximity to criminal activity does not establish particularized probable cause that a person is engaged in criminal activity"). We therefore conclude that appellant's conviction of possession of substances with the intent to manufacture methamphetamine must be reversed. Under the same reasoning, appellant's conviction for unauthorized anhydrous ammonia containment must also be reversed as the evidence is insufficient to demonstrate that appellant constructively possessed the anhydrous ammonia.

Fleeing a Police Officer in a Vehicle

Appellant was charged and convicted of fleeing a police officer in a motor vehicle, pursuant to Minn. Stat. § 609.487, subd. 3 (2008). Under this section, it is a felony for a person to flee or attempt to flee a police officer who is discharging his or her official duties. *Id.* "Flee" means "to increase speed, extinguish motor vehicle headlights or taillights, refuse to stop the vehicle, or use other means with intent to attempt to elude a peace officer following a signal given by any peace officer to the driver of a motor vehicle." *Id.*, subd. 1 (2008). This is a specific intent crime, meaning that the state must

prove beyond a reasonable doubt that the defendant intended to flee police. *State v. Johnson*, 374 N.W.2d 285, 288 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985).

The state relied solely on Rathbun's testimony to prove the element of appellant's intent. According to Rathbun, when the police began following his vehicle, appellant told Rathbun to let him out. But Rathbun also testified that appellant told him to speed up. In appellant's statement to police after his arrest, he told the officer that he asked Rathbun to stop the vehicle once the police chase began. This inconsistent testimony is the only evidence the state submitted in support of its theory that appellant intended to flee police by means of the motor vehicle Rathbun was driving. Rathbun's testimony that appellant told him to speed up the vehicle is not corroborated by any additional evidence. We therefore conclude that the evidence is insufficient to support appellant's conviction of fleeing a police officer in a motor vehicle.

Fleeing a Police Officer on Foot

Finally, appellant was charged and convicted of fleeing a police officer on foot. It is a misdemeanor offense to attempt to "evade or elude a peace officer . . . by means of running, hiding, or by any other means" for the purpose of avoiding arrest, detention, or investigation. Minn. Stat. § 609.487, subd. 6 (2008). The officers testified that after the truck crashed, Rathbun and appellant exited it and began running. It is true that one officer testified that he witnessed appellant running away from the truck, while another testified that appellant was apprehended approximately 50 yards from the crashed truck, although appellant had stopped running at that point. Nevertheless, we conclude that this

testimony is sufficient to support appellant's conviction of fleeing a police officer on foot, and we therefore affirm appellant's conviction.

Affirmed in part and reversed in part.