STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0661

State of Minnesota,
Respondent,

vs.

Marsha Colleen Sam,
Appellant.

Filed March 17, 2014
Affirmed
Hooten, Judge

Mille Lacs County District Court
File No. 48-CR-12-1033

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janice S. Jude, Mille Lacs County Attorney, Heather R. Van Zee, Assistant County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Stephen L. Smith, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

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

HOOTEN, Judge

Appellant challenges her conviction of fourth-degree driving while intoxicated (DWI), arguing that the evidence is insufficient to support the jury's verdict. We affirm.

FACTS

Appellant Marsha Sam was charged by amended complaint with two counts of fourth-degree DWI in violation of Minn. Stat. § 169A.20, subds. 1(2) and (7) (2010); failure to produce proof of insurance in violation of Minn. Stat. § 169.791, subd. 2 (2010); and driving after revocation of her license in violation of Minn. Stat. § 171.24, subd. 2 (2010). Appellant pleaded guilty to failure to produce proof of insurance and driving after revocation. But, appellant notified the state of her intention to defend both DWI charges, claiming that, as a defense to the DWI charge under Minn. Stat. § 169A.20, subd. 1(7) (presence of a controlled substance), she had a prescription for Vicodin, which is a controlled substance. *See* Minn. Stat. § 169A.46, subd. 2 (2010) (providing a defense to DWI under subdivision 1(7) if the accused used the controlled substance according to the terms of a prescription).

At trial, the jury was presented with the following facts. Trooper Mike Hill of the Minnesota State Patrol testified that at around 4:10 p.m. on October 1, 2011, he heard a Mille Lacs County dispatcher report that a vehicle had been driven off of Highway 169. When he arrived on the scene, he saw a black Nissan Maxima in a ditch and was told that appellant had been the driver. Appellant was not at the scene when he arrived, having been transported to the hospital.

Trooper Hill met appellant at the hospital. Appellant described the accident to him in two different ways. First, appellant stated that she braked and the car pulled to the left. Later, appellant stated that she braked and the car pulled to the right. As she was speaking, Trooper Hill noticed that appellant's "voice was very slurred" and that "[h]er

eyes were very watery." When he asked whether she had consumed any drugs or alcohol, she responded that she had taken two prescribed Vicodin pills at 1 p.m.

Trooper Hill asked appellant to perform the horizontal gaze nystagmus test. He held out a pen and moved it across her field of vision. Trooper Hill stated that, normally, an unimpaired person's eyes track the pen smoothly. An impaired person's eyes "jerk[]" as they follow the pen. He described appellant's eyes as "goin' all over the place" and "they definitely weren't tracking smoothly." He concluded that she "was highly impaired" based on her level of difficulty in performing the field sobriety test. Trooper Hill arrested appellant for DWI, read her the implied-consent advisory, and obtained a blood sample.

Joseph Yoch, a forensic scientist with the Bureau of Criminal Apprehension Forensic Science Laboratory, analyzed appellant's blood sample. The results of the test, which were submitted as evidence, indicated the presence of 0.02 milligrams per liter each of oxycodone—a controlled substance found in Percocet or Percodan—and oxymorphone—the primary active metabolite of oxycodone. He testified that oxycodone and oxymorphone are Schedule II controlled substances. The state inquired, "[I]f [V]icodin was in the defendant's system, would that ever show up as oxycodone or oxymorphone?" Yoch responded, "It would not" and added that Vicodin presents as hydrocodone and hydromorphone. Yoch acknowledged that appellant's blood contained a therapeutic range of oxycodone and speculated that it was possible that oxycodone was in her system that morning or earlier in the day.

Appellant testified that she lives with about 11 other residents at an assisted-living facility. She explained that she is prescribed Vicodin to alleviate the pain caused by arthritis and multiple sclerosis (MS) and that she takes two pills at 6 a.m., two pills at 6 p.m., and one pill at 10 p.m. under the observation of assisted-living-facility staff.

On October 1, 2011, she received her Vicodin pills at 6 a.m., but did not take them. Instead, she took her car to a mechanic to fix a tire leak and to check her brakes. She took the pills at 1 p.m. before leaving the mechanic's shop. Appellant claimed that while she was driving back to the assisted-living facility, the vehicle in front of her was driving erratically. She slammed on her brakes and drove into a ditch to avoid hitting the vehicle because she did not have insurance. Appellant testified that she was not under the influence: "I was able to drive. It was my decision to go in the swamp. I just didn't wanna hit a car . . . ." She did not feel lightheaded and pointed out that her Vicodin prescription does not prevent her from driving.

Appellant had no explanation for the presence of oxycodone and oxymorphone in her body: "I don't understand. I don't even know what the stuff is." She claimed that she has never taken Percocet. She explained that "there's been like a conflict at [the assisted-living facility] that pills are missing." When her attorney asked whether she thought that she had been given the wrong medication by mistake, she answered, "That coulda happened" and "Probably did."

Appellant entered into evidence a letter from a physician's assistant, stating that appellant "has chronic low back pain and paresthesia related to Multiple Sclerosis. She

has been on a Controlled Medication Agreement with our Health System and has been using Vicodin . . . for many years. Her current dosage is 7.5mg/500mg four times daily."

In his closing argument, appellant's counsel stated that appellant "thought she took a hydrocodone pill or a [V]icodin and somehow it was a [P]ercocet instead." He explained:

> At a place like [an assisted-living facility] where there's folks dealing with pain and other disabilities, they probably have a lotta [Percocet] pills around. And when you're filling these prescriptions for folks, doin' it fast, it's pill time, it's busy, everyone wants their pills, it is not at all beyond the realm of possibility that there was a screw-up. We're not blaming anyone. . . . We're just establishing the fact that the evidence suggests that's the case. . . . [T]he fact that [the presence of oxycodone and oxymorphone] was in a therapeutic range indicates it was used by a prescription or at least a prescription that [appellant] thought she had.

The jury acquitted appellant of fourth-degree DWI under Minn. Stat. § 169A.20, subd. 1(2) (under the influence of a controlled substance), but found her guilty of fourth-degree DWI under Minn. Stat. § 169A.20, subd. 1(7) (presence of a controlled substance). The district court imposed a stayed sentence of 30 days in jail and placed appellant on probation for 2 years. This appeal follows.

D E C I S I O N

Appellant contends that the evidence presented at her jury trial was insufficient to sustain her conviction of fourth-degree DWI (presence of a controlled substance). In considering a claim of insufficient evidence, we analyze the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that 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 that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

A person is guilty of fourth-degree DWI (presence of a controlled substance) if that person drives, operates, or is in physical control of a motor vehicle when the person's body contains any amount of a Schedule I or II controlled substance or its metabolite. Minn. Stat. § 169A.20, subd. 1(7). In this case, the state must prove beyond a reasonable doubt that (1) appellant drove, operated, or was in physical control of a motor vehicle; (2) at the time that appellant drove, operated, or was in physical control of the motor vehicle, her body contained any amount of a Schedule I or II drug; and (3) appellant's act took place on or about October 1, 2011, in Mille Lacs County. *See id.*; 10A *Minnesota Practice*, CRIMJIG 29.06 (2006) (listing elements of fourth-degree DWI (presence of a controlled substance)).

The evidence is sufficient to support the conviction. Trooper Hill and appellant testified that appellant drove her vehicle on October 1, 2011, in Mille Lacs County. Yoch testified that appellant's blood test, which was submitted at trial, indicated that appellant's body contained oxycodone and its metabolite oxymorphone and that they were in her body earlier that day or morning. Oxycodone and oxymorphone are Schedule II controlled substances. Minn. Stat. § 152.02, subd. 3(1)(a) (2010).

Appellant claims that the evidence "fails to prove beyond a reasonable doubt that appellant *intentionally* drove her car *knowing* she had consumed a non-prescribed,

Schedule II controlled substance." (Emphases added.) Appellant fails to cite to legal authority that the state must prove intent or state of mind. Neither the statute nor the jury instructions require proof of intent or state of mind. In the context of determining whether a DWI arises out of the same behavioral incident as other offenses, the supreme court has stated that DWI is a "nonintentional" crime. *State v. Clement*, 277 N.W.2d 411, 413 (Minn. 1979); *State v. Sailor*, 257 N.W.2d 349, 352 (Minn. 1977); *see also State v. Johnson*, 273 Minn. 394, 404, 141 N.W.2d 517, 525 (1966) (noting that intent is not an essential element of traffic offenses); *State v. Bauer*, 776 N.W.2d 462, 478 (Minn. App. 2009) (noting that nonintentional crimes generally include traffic violations), *aff'd*, 792 N.W.2d 825 (Minn. 2011). Similarly, we have held that "[a]n unlawful intention or state of mind is not an element of a D.W.I. charge." *State v. Duemke*, 352 N.W.2d 427, 430 (Minn. App. 1984) (rejecting appellant's argument that the evidence was insufficient to show that he drove, operated, or was in physical control of a vehicle because he was asleep at the wheel and therefore could not have consciously violated the DWI statutes).

Moreover, this argument essentially rests on credibility. The jury heard appellant testify and appellant's counsel argue that appellant did not knowingly ingest oxycodone or oxymorphone. The jury rejected this theory, as evidenced by the guilty verdict. When reviewing sufficiency of the evidence claims, "it is for the jury, not this court, to determine the credibility and weight to be given to the testimony of witnesses." *State v. Pendleton*, 706 N.W.2d 500, 512 (Minn. 2005). "We assume that the jury believed the witnesses whose testimony supports the verdict[,] that the jury did not believe evidence to the contrary[,] [and that the] jury properly decides which evidence is credible." *Id.*

(citations omitted). In sum, "[w]e accord great deference" to the fact-finder's credibility determinations. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 36, 113 S. Ct. 2130 (1993).

Appellant correctly asserts that "a prescription for a Schedule II controlled substance is an affirmative defense to a DWI charge based on the presence of that controlled substance." Minnesota Statute section 169A.46, subdivision 2 provides:

> If proven by a preponderance of the evidence, it is an affirmative defense to a violation of section 169A.20 subdivision 1, clause (7) (presence of Schedule I or II controlled substance), that the defendant used the controlled substance according to the terms of a prescription issued for the defendant in accordance with sections 152.11 and 152.12.

But the controlled substances detected in appellant's blood were not prescribed to her. Appellant's blood contained levels of oxycodone and oxymorphone, controlled substances found in Percocet and Percodan. Appellant had a prescription for Vicodin, which presents as hydrocodone and hydromorphone.

We have considered appellant's arguments in her pro se supplemental brief. Because they are without citation to legal authority and without merit, we need not address them here. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (concluding that arguments in a pro se supplemental brief are waived because "[t]he brief contains no argument or citation to legal authority in support of the allegations"). For all of these reasons, we conclude that the evidence is sufficient to support the jury's guilty verdict and appellant's conviction for fourth-degree DWI (presence of a controlled substance).

Affirmed.