STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0874

State of Minnesota,
Respondent,

vs.

Desean Maurice Carter,
Appellant.

Filed April 21, 2014
Reversed
Cleary, Chief Judge

Stearns County District Court
File No. 73-CR-12-3476

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

Janelle P. Kendall, Stearns County Attorney, Carl Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Stephanie A. Karri, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Cleary, Chief Judge; and Rodenberg, Judge.

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

CLEARY, Chief Judge

Appellant Desean Maurice Carter was found guilty of conspiring to commit the crime of fifth-degree sale of marijuana for remuneration, in violation of Minn. Stat. § 152.025, subd. 1(a)(1) (2010), with reference to Minn. Stat. § 152.096, subd. 1 (2010). Appellant challenges his conviction, arguing there was insufficient evidence to support the guilty verdict and that the district court committed plain error when it improperly instructed the jury. Because the evidence is insufficient to support a conspiracy conviction, we reverse.

FACTS

On April 6, 2012, appellant was charged with conspiring to sell marijuana in the fifth degree with Reginald Freeman in Stearns County, Minnesota. This charge stemmed from a monitored drug sale arranged by the St. Cloud police on June 30, 2011. On June 30, 2011, a confidential informant (CI) advised Investigator Adam Meierding that he had arranged to buy one half ounce of marijuana for $180 from Freeman at his residence. Before the buy, the CI called Freeman to arrange the buy. This phone call from the CI to Freeman was taped:

> [FREEMAN]: Hello?
> [CI]: Hey. Are-are you ready yet?
> [FREEMAN]: Yeah. You can-you can (indiscernible) yeah, you can (indiscernible) come to right now 'cause I'm still waiting on the (indiscernible). Come to right now though
> [CI]: All right. I'll be-be there in a few minutes.
> [FREEMAN]: All right.
> [CI]: All right.

The CI testified that when he spoke to Freeman on the phone, Freeman was waiting on the marijuana to be delivered because he did not have the marijuana in his possession at the time. An audio transmitting device was also placed on the CI's person to record the transaction. The CI then drove to Freeman's residence and was invited inside. The CI testified that Freeman told him that he did not have the drugs at the time, and he was "just waiting on his dude to show up." Once inside, the CI stated that after waiting for approximately twenty minutes, Freeman received a phone call, told the CI that he would "be right back," and then stepped out of his residence.

The CI further testified that Freeman did not retrieve the marijuana from inside his residence. The CI stated that immediately after Freeman came back inside, Freeman exchanged a plastic bag of marijuana for $180. Freeman then separated the $180 he received from the CI into two piles and stepped outside again.

Investigator Derek Peters surveyed the outside of the residence and photographed the controlled buy. Investigator Peters testified that he observed the CI arrive at Freeman's residence and make contact with Freeman. Investigator Peters then witnessed a white vehicle pull up to Freeman's residence. A man, identified as appellant, was the driver. Freeman and the CI were inside the residence when appellant's vehicle arrived. Investigator Peters then saw Freeman approach the car. Investigator Peters testified:

> After they talked for a short time I then observed Mr. Freeman then lean down towards that door. From my vantage point the door was actually blocking so I could see Mr. Freeman here. I could see [appellant] sitting in the seat here, but the actual where their hands were was blocked by the door, but I observed Mr. Freeman bend down towards

> [appellant] and it appeared that there was some sort of transaction that was occurring.

After Freeman left, appellant did not leave. Instead, he exited his vehicle and walked around a parking lot. Freeman again exited his residence, met up with appellant, and both individuals walked to appellant's vehicle. Investigator Peters opined that another transaction appeared to take place that lasted "a matter of minutes." Afterwards, appellant drove away and Freeman again walked back into his residence. The CI exited the residence and drove away in his vehicle. The entire controlled buy took approximately thirty minutes.

A forensic scientist testified at trial and identified the substance that the CI bought from Freeman as 12.3 grams of marijuana. The lab report detailing these findings was submitted to the jury. And the plastic bag of marijuana that the CI procured from the controlled buy was submitted to the jury as an exhibit. Neither appellant nor Freeman testified. The jury found appellant guilty of conspiracy to commit controlled substance crime in the fifth degree. This appeal followed.

D E C I S I O N

Appellant argues that the evidence is insufficient to prove beyond a reasonable doubt that appellant conspired with Freeman to sell marijuana to the CI for remuneration because the state offered no direct evidence that appellant sold Freeman marijuana or that appellant knew Freeman was going to sell the marijuana to the CI.

In considering an insufficient-evidence claim, we determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jury

to reach a verdict of guilty. *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). We defer to the jury's acceptance of the circumstances proved by the state and rejection of evidence that conflicted with those circumstances. *Id.*

A conviction based on circumstantial evidence, as is the case here, receives stricter scrutiny than a conviction based on direct evidence. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). "While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). In addition to the analysis we apply in direct evidence cases, we consider whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt. *Silvernail*, 831 N.W.2d at 599.

"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." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). A jury, however, 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). Thus, appellant must demonstrate more than mere conjecture to overturn a conviction based on circumstantial evidence. *State v. Porte*, 832 N.W.2d 303, 310 (Minn. App. 2013).

To support a conviction for the crime of conspiracy, the state must prove beyond a reasonable doubt (1) an agreement between two or more people to commit a crime and (2) an overt act in furtherance of the conspiracy. *See* Minn. Stat. §§ 152.096, subd. 1 (2010) (prohibiting conspiracy to commit controlled-substance crimes), 609.175, subd. 2

(2010) (identifying elements of conspiracy crime); *see also State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) (discussing essential elements of controlled-substance conspiracy crime).

Minnesota applies a two-step evaluation to determine the sufficiency of the circumstantial evidence supporting a defendant's conviction. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). First, the court must identify the circumstances proved. *State v. Stein*, 776 N.W.2d 709, 718 (Minn. 2010). In identifying the circumstances proved, "we defer, consistent with our standard of review, to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id.*

When viewed in the light most favorable to the conviction, the evidence presented at trial proves the following circumstances. The CI called Freeman to buy marijuana and was told to come to Freeman's residence. The CI had to wait to purchase marijuana from Freeman because Freeman was "waiting on delivery" and "waiting on his dude to show up." The CI waited inside Freeman's residence for approximately twenty minutes before the drug transaction took place. After the CI arrived at Freeman's residence, appellant arrived at the residence approximately twenty minutes later. Once appellant arrived, Freeman went outside to speak with appellant. Appellant was sitting in the driver's seat with the door open. Freeman leaned in to talk to him. After Freeman returned inside, he gave a bag of marijuana to the CI in exchange for nine twenty-dollar bills. Freeman then separated the twenty-dollar bills into two piles and went back outside. Once outside, Freeman spoke with appellant and they walked back to appellant's vehicle. Appellant sat

down in his vehicle and Freeman again leaned in towards appellant. Appellant then drove away and the CI left Freeman's residence. In total, the controlled buy took approximately thirty minutes to complete.

Next, we "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, this includes inferences consistent with a hypothesis other than guilt." *Andersen*, 784 N.W.2d at 329 (quotation omitted). In making this determination, "we do not review each circumstance proved in isolation" but instead consider the circumstances as a whole. *Id.* at 332.

Appellant argues that the evidence is insufficient to prove that he delivered or sold marijuana to Freeman. In support of his theory, appellant points out that the surveying police officer did not see an actual drug exchange, and that the evidence adduced at trial is equally consistent with the hypothesis that he was only conversing with Freeman. Investigator Peters testified that he did not see the actual exchange occur because his view was blocked by the vehicle's door, but that two transactions appeared to occur. Moreover, Freeman repeatedly told the CI that he would have to wait to purchase the marijuana as he did not have the marijuana because he was "waiting on his dude to show up." And Freeman did not sell the CI marijuana until after he exited the residence and came back inside even though the CI had already been at the residence for approximately twenty minutes.

These circumstances proved do not reasonably allow an inference that appellant and Freeman were just conversing. Considering the proved circumstances as a whole, there is no reasonable inference other than that appellant sold or delivered marijuana to

Freeman. *See State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) ("[P]ossibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable.") (quotation omitted).

Appellant also contends that, even if the evidence supports the inference that appellant delivered or sold marijuana to Freeman, the state did not prove beyond a reasonable doubt that appellant and Freeman had an agreement to sell the marijuana to the CI. Proof of a formal agreement to commit a crime is not required for a conspiracy conviction. *State v. Burns*, 215 Minn. 182, 189, 9 N.W.2d 518, 521 (1943). And "the agreement required for a conspiracy need not be proved through evidence of a subjective meeting of the minds, but must be shown by evidence that objectively indicates an agreement." *State v. Hatfield*, 639 N.W.2d 372, 376 (Minn. 2002).

The state asserts that, because the CI observed Freeman separate the drug money into two bundles and because Investigator Peters observed appellant and Freeman conduct a second exchange, the only rational hypothesis supported by the evidence is that appellant and Freeman engaged in concerted action to sell marijuana to the CI. Respondent's argument, however, fails to account for the fact that appellant never saw Freeman separate the cash into two bundles and never saw the CI. By all accounts, Freeman sorted the cash into two piles while still inside the residence and appellant never entered the residence. Thus, the only evidence in the record that objectively indicates an agreement to sell marijuana to the CI are the two separate transactions that occurred between appellant and Freeman. Those transactions confirm that appellant sold Freeman marijuana; they do not provide any evidence that appellant was aware of, much less a part

of, an agreement to sell that same marijuana to a third party. For the purposes of assessing the sufficiency of this evidence, the two separate transactions do not "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." *Id.* at 377 (quotation omitted).

Based on these circumstances proved, there are other reasonable, rational inferences inconsistent with guilt of conspiracy to commit a controlled substance crime in the fifth degree. We hold that a jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could not reasonably conclude that an agreement to sell marijuana to a third party for remuneration existed between appellant and Freeman. Because we reverse on this issue, we need not reach the issue of the alleged erroneous jury instruction.

Reversed.