STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1045

State of Minnesota,
Respondent,

vs.

Araya Woldeselassie,
Appellant

Filed June 2, 2014
Affirmed
Rodenberg, Judge

Hennepin County District Court
File No. 27-CR-12-8797

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

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

RODENBERG, Judge

Appellant Araya Woldeselassie appeals from his convictions of two counts of third-degree sale of a controlled substance in violation of Minn. Stat. § 152.023, subd. 1(1) (2010), after a bench trial, arguing that the evidence is insufficient to sustain the convictions. We affirm.

FACTS

On the night of September 3, 2011, Minneapolis Police Sergeant Sara Metcalf and Officer Phillip Sosnowski were working undercover investigating drug sales at a bus stop near the intersection of Blaisdell Avenue and Lake Street in Minneapolis. Sergeant Metcalf testified that the area was "fairly well lit." A man, later identified as appellant, approached the undercover officers and stated that he was "hustling," which the officers understood to mean that he was interested in selling narcotics. Officer Sosnowksi asked for a "twenty," meaning $20 worth of crack cocaine. Appellant agreed and walked away, eventually leaving the officers' sight. Appellant returned a few minutes later and accepted a prerecorded $20 bill from Officer Sosnowski, in exchange for what Sergeant Metcalf testified was a "rock of crack cocaine." Appellant produced a pipe and suggested that the three smoke the substance, but the officers declined.

Sergeant Metcalf and Officer Sosnowski returned to their office, where Officer Sosnowski field-tested the substance. It tested positive for cocaine. Sergeant Metcalf and Officer Sosnowski then returned to the intersection where they had purchased the substance and conducted additional surveillance of appellant from an unmarked car.

They radioed uniformed officers to stop and identify appellant. Sergeant Metcalf testified that she and Officer Sosnowski watched the uniformed officers "stop the right person, and they identified him, and I pulled up some booking photos of [appellant] and was able to positively identify that it was [appellant] who sold us the crack cocaine." Sergeant Metcalf explained that appellant was not immediately arrested because "when we buy drugs undercover from someone and we arrest them and they know they had just sold narcotics to an undercover officer, that word gets out on the street within hours, and we're not able to do our job for a long time."

The substance purchased on September 3 was delivered to the Bureau of Criminal Apprehension (BCA) for laboratory testing, and a forensic scientist confirmed that the substance was cocaine.

On the night of October 14, 2011, Sergeant Metcalf and Officer Sosnowski were again working undercover near the corner of Lake Street and Blaisdell Avenue. Appellant approached the two officers and asked what he could get for them. Sergeant Metcalf and Officer Sosnowski "recognized [appellant] immediately" as the same individual who had sold them crack cocaine on the night of September 3. Officer Sosnowski initially indicated that they were waiting for another dealer to return. Appellant lectured the two officers, telling them to only buy drugs from him, as he "would not rip [them] off." When the other dealer Officer Sosnowski referenced failed to show up, he asked appellant for a "twenty." Appellant walked out of sight of the two undercover officers and returned a few minutes later with a white powder, which he gave to Officer Sosnowski in exchange for a prerecorded $20 bill.

The officers returned to their office where Officer Sosnowski field-tested the white powder, which tested positive for cocaine. Sergeant Metcalf agreed in her testimony that field testing of a substance "is not determinative," but she explained that "it gives you a pretty good idea if it is narcotics or not." For reasons not revealed by the record, the substance purchased on October 14 was never sent to the BCA for confirmatory testing. The prerecorded $20 bills used in the two sales were never recovered.

Appellant was charged with two counts of third-degree sale of a controlled substance. Appellant waived his right to a jury trial and the case was tried to the district court. At trial, Sergeant Metcalf and Officer Sosnowski both identified appellant as the person who sold them narcotics on September 3 and October 14, referring to him as the person in court wearing "orange." There was no objection to these in-court identifications. Appellant argued in summation that the identification provided by the uniformed officers on the night of September 3 was unreliable because it was hearsay, but the state countered in its summation that appellant failed to object to the identification evidence. The district court found appellant guilty of both counts. This appeal followed.

D E C I S I O N

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 fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We will not disturb the verdict when the fact-finder, 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). We review "the facts in evidence and the legitimate inferences which could be drawn from those facts" in reviewing the sufficiency of the evidence. *State v. Robinson*, 604 N.W.2d 355, 365-66 (Minn. 2000). When a conviction is based on circumstantial evidence, however, we apply "heightened scrutiny." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). "This heightened scrutiny requires us to consider whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt." *Id.* (quotation omitted). We must assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). When reviewing the sufficiency of the evidence, we apply the same standard to bench and jury trials. *In re Welfare of M.E.M.*, 674 N.W.2d 208, 215 (Minn. App. 2004).

"A person is guilty of controlled substance crime in the third degree if . . . the person unlawfully sells one or more mixtures containing a narcotic drug." Minn. Stat. § 152.023, subd. 1(1). Cocaine is statutorily defined as a narcotic drug. Minn. Stat. § 152.01, subds. 3a, 10 (2010).

Appellant argues that the state's evidence failed to prove beyond a reasonable doubt that appellant was the individual who sold to the undercover officers on September 3 and October 14, 2011. Appellant also argues that the evidence presented regarding the October 14 sale was not sufficient to prove that the substance sold was cocaine. Because the evidence of identification of appellant as the seller was based on direct evidence, we

review the evidence supporting the verdict for sufficiency in the light most favorable to the verdict. But because the evidence of the composition of the substance sold on October 14 was circumstantial, it warrants heightened-scrutiny review.[1] *See Al-Naseer*, 788 N.W.2d at 473.

Evidence identifying appellant

Appellant makes several arguments concerning the identification of appellant as the seller on September 3 and October 14. The state tersely argues that appellant is making "credibility arguments" that were decided by the fact-finder when it found appellant guilty and that such determinations should be afforded deference on appeal. We address each of appellant's arguments in turn.

"Identification is a question of fact for the [fact-finder] to determine." *State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998). "An identification need not be positive and certain to support a conviction—it is sufficient if a witness testifies that in his belief, opinion, and judgment the defendant is the one he saw commit the crime." *State v. Landa*, 642 N.W.2d 720, 725 (Minn. 2002). "[A] conviction may rest on the testimony of a single credible witness." *Miles*, 585 N.W.2d at 373. "The trustworthiness of an identification must necessarily be judged by the opportunity the witness has had for a deliberate and accurate observation of the accused while in his presence." *State v. Gluff*, 285 Minn. 148, 151, 172 N.W.2d 63, 65 (1969).

[1] Appellant makes no challenge to the sufficiency of the evidence regarding the composition of the substance sold on September 3. Our sufficiency-of-the-evidence review on this issue is therefore limited to the October 14 sale.

Appellant first argues that Sergeant Metcalf and Officer Sosnowski directed uniformed officers who had not witnessed the September 3 transaction to stop appellant and that there was "an opportunity for error" in that the uniformed officers could have stopped the wrong individual. Appellant did not object at trial to the hearsay testimony regarding the uniformed officers' identification of appellant on the night of September 3. Sergeant Metcalf and Officer Sosnowski identified the person stopped by the uniformed officers as the drug seller. They confirmed the seller's identity by consulting computer records. Sergeant Metcalf testified that she watched the uniformed officers "stop the right person" as she and Officer Sosnowski were conducting additional surveillance of appellant from nearby in an unmarked squad car. Her testimony was based on personal observation. Because the weight to give that identification testimony is for the fact-finder to determine, appellant is not entitled to relief on this ground.

Appellant next argues that Sergeant Metcalf's and Officer Sosnowski's identifications of appellant at trial were "questionable" because the officers would have known that the person wearing orange at a criminal trial was the accused. Again, appellant did not object to the in-court identifications. We therefore review the admission of the in-court identifications for plain error. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Sergeant Metcalf and Officer Sosnowski dealt with appellant at arm's length on two separate occasions at an intersection that was "fairly well lit." Sergeant Metcalf testified that she and Officer Sosnowski "recognized [appellant] immediately" on October 14 as the person who had sold them drugs on September 3. They observed appellant under circumstances enabling them to recognize him, rather than

merely relying on the fact that he was wearing orange in the courtroom during a criminal trial. *See Gluff*, 285 Minn. at 151, 172 N.W.2d at 65 (noting that we must consider the extent of the witnesses' opportunity to observe the accused while in his presence).

Appellant also argues that the officers purchased the substances with prerecorded bills that were not recovered from appellant and that the officers did not make electronic audio or visual recordings of the transactions. But appellant cites no authority, and we are aware of none, that supports the proposition that prerecorded buy money must be recovered or that audio or visual recording evidence is required to prove the identity of a seller of a controlled substance. There was sufficient evidence of identification to sustain appellant's convictions.

We must construe the evidence in the light most favorable to the verdict, and here the evidence is sufficient to sustain a finding beyond a reasonable doubt that appellant was the individual who sold to Sergeant Metcalf and Officer Sosnowski on September 3 and October 14, 2011. *See Webb*, 440 N.W.2d at 430.

Drug-identification evidence

"We have not prescribed minimum evidentiary requirements in [drug] identification cases, preferring to examine the sufficiency of the evidence on a case-by-case basis." *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979). "Minnesota law requires proof of the actual identity of the substance, the defendant's belief is not sufficient." *Id.* Representations made and the price charged by a defendant are mere assertions of his belief. *Id.*

Appellant relies on *State v. Knoch*, 781 N.W.2d 170, 173-74 (Minn. App. 2010), *review denied* (Minn. June 29, 2010), for the proposition that "only a confirmatory test performed in a laboratory can positively identify a controlled substance." But *Knoch* held that laboratory testing is *not* required to support probable cause. 781 N.W.2d at 179-80. And *State v. Olhausen* held that the identity of a controlled substance can be proven by circumstantial evidence without confirmatory testing. 681 N.W.2d 21, 26 (Minn. 2004). *Olhausen* indicates that we must review the evidence for sufficiency on a case-by-case basis. *Id.* at 29. We are aware of no authority supporting appellant's contention that laboratory testing is *always* required to prove the identity of a substance beyond a reasonable doubt and that no other method(s) of proving this element can suffice.

Because the identity of the October 14 substance was proved using circumstantial evidence, we apply "heightened scrutiny" in reviewing the sufficiency of it. *See Al-Naseer*, 788 N.W.2d at 473. We first identify the circumstances proved in support of the conviction, giving deference to "the [district court's] acceptance of the proof of these circumstances as well as to [its] rejection of evidence in the record that conflicted with the circumstances proved." *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). "The second step is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013) (quotation omitted). In making this determination, "we do not review each circumstance proved in isolation" but instead consider the circumstances on the whole. *State v. Andersen*, 784 N.W.2d 320, 332 (Minn. 2010). "The [s]tate does not have the burden of removing all doubt, but of removing all

reasonable doubt." *Al-Naseer*, 788 N.W.2d at 473. We independently examine the reasonableness of the possible inferences and "give no deference to the fact finder's choice between reasonable inferences." *Id.* at 473-74 (quotation omitted).

Appellant relies on *Vail* to argue that the evidence of drug identification is insufficient. In *Vail*, the district court heard testimony undermining the state's evidence that the substance sold by the defendant was 225 pounds of marijuana. 274 N.W.2d at 129, 133. The district court made a finding that, by itself, the scientific evidence was not sufficient to establish the identity of the controlled substance. *Id.* at 130. But the district court relied on the inferences that could be drawn from evidence of the defendant's representations regarding the weight and the price of the substance to conclude, beyond a reasonable doubt, that the substance was marijuana. *Id.* at 130, 133-34. Our supreme court disagreed, noting that "[t]he price charged and representations made by the defendant are, at best, only assertions of his belief." *Id.* at 134. Therefore, relying on inferences from these facts, when the scientific evidence was found to be insufficient to establish the identity of the substance, was improper. *Id.* Here, the evidence, and inferences from the evidence, relied upon by the fact-finder were not solely representations made by appellant regarding the nature of the substance.

The state identifies several circumstances from which it is reasonable to infer that the substance sold on October 14 was cocaine: (1) appellant had previously sold these same officers a substance positively identified by laboratory testing as cocaine, (2) the field test on October 14 showed that the substance was cocaine, (3) there was no evidence that appellant intended to, or ever has, sold placebo, (4) appellant was at the same

location in both instances, a pattern which he likely would not repeat for long if he were selling a bogus or adulterated product, (5) appellant was trying to groom the officers as steady customers, bragging that his product was good and that he "would not rip [them] off," and (6) appellant did not carry the substance on his person but retrieved it from elsewhere, a precaution suggestive of the retrieved substance being illegal. Additionally, we note that Sergeant Metcalf and Officer Sosnowski are narcotics officers who deal with controlled substances frequently. The fact that they each believed from viewing it and from considering the circumstances of the October 14 sale as indicating that they were buying cocaine is also circumstantial evidence that the substance was cocaine. The foregoing circumstances are not merely appellant's representations of the substance's identity. *See id.* And considering the circumstances on the whole, we see no reasonable inference inconsistent with the district court's finding that the substance sold on October 14 was cocaine. *See Silvernail*, 831 N.W.2d at 599.

Appellant also cites *State v. Robinson*, 517 N.W.2d 336 (Minn. 1994), to argue that there was insufficient evidence of the identity of the October 14 substance. In *Robinson*, the defendant was charged "[u]nder Minn. Stat. § 152.021, subd. 1(1) (Supp. 1991), [which stated that] a person is guilty of sale of a controlled substance in the first degree if on one or more occasions within a 90-day period the person unlawfully sells one or more mixtures of a total weight of ten grams or more containing cocaine base." 517 N.W.2d at 337 n.1 (quotation marks omitted). The state tested less than nine grams of the substance seized from the defendant. *Id.* at 338. The state argued that the testing, "when considered along with the circumstantial evidence, [was] sufficient to prove

beyond a reasonable doubt that the weight of the cocaine mixture . . . equaled or exceeded 10 grams." *Id.* The supreme court rejected that argument, stating that

> random sampling in a case such as this one is insufficient to establish the total weight required of the mixture containing a controlled substance. The weight of the mixture is an essential element of the offense charged; like every other essential element, it must be proven by the state and proven beyond a reasonable doubt. . . . [T]here seems to be no good reason why a sufficient quantity of the mixture should not be scientifically tested so as to establish beyond a reasonable doubt an essential element of the crime charged.

Id. at 339 (citation omitted). The supreme court based its decision, in part, on a policy rationale, explaining that "the fact that the sentences for drug offenses have greatly increased in recent years persuades us that the state should be required, in cases such as this, to test enough of the substance mixture to prove scientifically the requisite weight." *Id.* *Robinson* is distinguishable. Here, the statute under which appellant was convicted does not have a drug-weight requirement. *See* Minn. Stat. § 152.023, subd. 1(1). Appellant was charged with selling cocaine *in any amount*.[2]

The evidence is sufficient to prove that appellant was the seller on both September 3 and October 14, 2011. And the circumstantial evidence used to prove the identity of the substance sold on October 14 admits of no reasonable inference inconsistent with the district court's finding that the substance was cocaine. We therefore affirm both

[2] Our opinion should not be read to condone the approach taken by the state in this case. Laboratory testing is the preferred method of identifying a controlled substance. In the absence of laboratory testing, the state risks that the fact-finder may conclude that the identity of the substance has not been proven beyond a reasonable doubt. Here, the district court heard and saw the evidence and concluded that the state had carried its heavy burden. And our review of the evidence reveals no reversible error.

convictions of third-degree sale of a controlled substance in violation of Minn. Stat. § 152.023, subd. 1(1).

Affirmed.