STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1792

State of Minnesota,
Respondent,

vs.

David P. Johnson,
Appellant.

Filed January 13, 2009
Affirmed
Halbrooks, Judge

Nicollet County District Court
File No. 52-CR-06-96

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael K. Riley, Sr., Nicollet County Attorney, Kenneth R. White, Assistant County Attorney, 326 South Minnesota Avenue, P.O. Box 360, St. Peter, MN 56082 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

HALBROOKS, Judge

In this appeal from his convictions of theft and receiving stolen property, appellant argues that the evidence was insufficient to support the verdict, the verdict is inconsistent with the charges filed against him, and the district court erred in denying him a mistrial. We affirm.

FACTS

In the fall of 2004, Werner Remmen bought a foreclosed house in St. Peter that had been owned by Tim Schleeve. When Remmen bought the house, there was debris throughout it.

Remmen met appellant David P. Johnson through a mutual friend, Ron Saatzer. Johnson offered to remodel the house for Remmen. As part of the remodeling process, Johnson removed the debris and put it in a trailer. Johnson was to take the debris to a local dump, where Remmen had paid for it to be disposed of. Johnson lived in the St. Peter house while performing this debris-clearing and remodeling work.

Remmen met Wayne Sandeen when Johnson took Remmen to Sandeen's farm to see some antique tractors or cars. Remmen and Sandeen testified as to different dates for this meeting. Remmen's recollection was that their meeting occurred in August or September 2005. Sandeen said that the visit occurred in November 2005, before Thanksgiving. During the visit, Sandeen showed Remmen and Johnson around the farm, including several storage buildings. Sandeen is Johnson's cousin once-removed, but Johnson grew up referring to Sandeen as his "uncle" and continues to do so.

Randy Saatzer, Ron's brother, testified that on Thanksgiving Day 2005, Johnson brought an ATV to Saatzer's house and offered to sell it to him or his brother. According to Saatzer, Johnson claimed to have gotten the ATV from his uncle. Saatzer and his brother were not interested in buying the ATV.

A few days later, on November 30, Johnson approached Clint Schmidt about purchasing the ATV. Johnson and Schmidt had worked together on construction projects in the past. Schmidt was not interested in buying the ATV but did agree to loan Johnson $2,000 with the ATV left in his possession as collateral. According to Schmidt, Johnson said that he had gotten the ATV from his uncle. Johnson never provided Schmidt with title to the ATV or repaid him.

Around or after Thanksgiving 2005, Sandeen noticed that some "junk" had been dumped in a grove of trees on his property, including some paneling, a dishwasher, and bags of garbage. On January 5, 2006, Sandeen noticed that his ATV was missing; he reported it as stolen to the Nicollet County Sheriff's Office the same day. Deputy Joel Polzin took the report and began an investigation. He learned from Sandeen that the ATV had been for sale and that several people had been by to look at it before Sandeen stored the ATV in an unlocked shed on the farm for the winter. Deputy Polzin testified that Sandeen stated that he believed that the ATV had probably been stolen sometime in the two weeks preceding the report. Five days later, on January 10, Sandeen called Deputy Polzin to report the debris on his property.

Sandeen went to Remmen's St. Peter house to find Johnson and confront him about the missing ATV and the dumped debris. Sandeen showed Remmen photographs of the debris, which Remmen said looked like debris from his St. Peter house.

The sheriff's deputy investigating the case later matched the serial number provided by Sandeen to the ATV at Schmidt's residence. The deputy also photographed a trailer located at the home of Schmidt's father. Schmidt identified the trailer as the one that Johnson used to transport the ATV to his home.

A complaint was filed against Johnson that was amended twice as trial approached. The final complaint charged Johnson with three counts of felony theft and three counts of receiving stolen property. The second amended complaint also included citations to statutory penalty provisions. The counts were differentiated based on the value or nature of the property: two counts for property worth more than $2,500; two counts for property worth between $500 and $2,500; and two counts for a motor vehicle.

At trial, Sandeen referred to a police photograph of Johnson that was found in the debris dumped on his property as a "mug shot." Defense counsel objected twice to Sandeen's characterization of the photo. The court sustained the objections and ordered the jury to disregard the comment. After Sandeen used the term a third time, the district court excused the jury, and defense counsel moved for a mistrial. The court denied the motion. Outside the jury's presence, the prosecutor instructed Sandeen to simply refer to the picture as a "photograph," and the district court offered to give the jury a curative instruction. Defense counsel declined the court's offer for a curative instruction, saying it would "just draw attention to" the use of the term.

After the state rested, the defense moved for an acquittal, arguing that the state had failed to prove the venue element of the receiving-stolen-property charges, that the receiving-stolen-property statute requires a motor vehicle to be worth less than $500, and that the evidence presented was only circumstantial and insufficient to prove guilt. The district court denied the motion.

During its case, the defense presented the testimony of James Sikkila, who was then imprisoned for drug possession. Sikkila testified that, in August 2005, Schleeve tried to buy drugs from him and offered an ATV as payment. Sikkila said that he never saw the ATV that Schleeve wanted to trade for drugs. In order to establish a value for the ATV, the defense called an employee of an ATV dealer. Using the "NADA book" and his own experience, the employee estimated the value of the ATV to be $2,100. Sandeen estimated its value to be around $3,000 based on his conversations with unidentified people.

The jury found Johnson guilty of felony theft, receiving stolen property and felony theft of a motor vehicle. The jury valued the stolen ATV in the range of $500–$2,500. The district court sentenced Johnson to 39 months. This appeal follows.

D E C I S I O N

I.

Johnson raises two sufficiency-based challenges. First, he argues that the state's case was based entirely on circumstantial evidence that was insufficient to establish that he was the person responsible for taking the ATV. Second, he argues that the state presented insufficient evidence that he received the stolen ATV in Nicollet County.

In considering a claim of insufficient evidence, our review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a 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 must assume that "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). 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) (quotation 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). "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). The circumstantial evidence must "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 guilt." *Jones*, 516 N.W.2d at 549 (quotation omitted). But a jury "is in the best position to evaluate circumstantial evidence, and [its] verdict is entitled to due deference." *Webb*, 440 N.W.2d at 430.

A. Theft charges

Johnson was charged with and convicted of theft under Minn. Stat. § 609.52, subd. 2 (2004), which provides:

> Whoever does any of the following commits theft and may be sentenced as provided in subdivision 3:
>
> (1) intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property; or
>
> . . . .
>
> (17) takes or drives a motor vehicle without the consent of the owner or an authorized agent of the owner, knowing or having reason to know that the owner or an authorized agent of the owner did not give consent.

Minn. Stat. § 609.52, subd. 2(1), (17).

Here, the jury had sufficient evidence to convict Johnson of theft of Sandeen's ATV. Johnson had been to Sandeen's farm in the weeks leading up to Thanksgiving, where he would have seen the ATV. On Thanksgiving, Johnson was trying to sell an ATV that he claimed he got from his "uncle"—the term he used to describe Sandeen. A few days later, Johnson successfully obtained money in exchange for the ATV, although the transaction was characterized as a secured loan from Schmidt rather than a sale. Once again, in dealing with Schmidt, Johnson stated that he obtained the ATV from his uncle. The ATV was later identified as belonging to Sandeen. Further, the debris found at Sandeen's farm was taken from the house Johnson was remodeling.

The defense sought to inject reasonable doubt into the case by pointing to another possible thief: Schleeve. However, there was no evidence that Schleeve knew Sandeen, had been to his farm, or had seen the ATV. While one defense witness testified that Schleeve tried to barter an ATV for drugs, the witness had not seen the ATV and could not identify the ATV Schleeve was offering as the ATV stolen from Sandeen. And as a

chronological matter, Schleeve's alleged attempt to exchange an ATV for drugs predated by several months the theft of Sandeen's ATV.

A careful review of the circumstantial evidence, coupled with appropriate deference to the jury verdict, leads us to the conclusion that Johnson's conviction is supported by sufficient evidence.

B. Venue for the receipt charges

Johnson argues that the state failed to meet its burden of proof on the venue element of the receiving-stolen-property charges. Because venue is an element of the offense of receiving stolen property, it must be proved beyond a reasonable doubt by the state. *State v. Larsen*, 442 N.W.2d 840, 842 (Minn. App. 1989); *see also* 10 *Minnesota Practice*, CRIMJIG 16.48 (2006) (setting forth the elements of receiving stolen property). Like other elements of crimes, venue can be proved by circumstantial or direct evidence. *State v. Bahri*, 514 N.W.2d 580, 582 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). "Venue is determined by all the reasonable inferences arising from the totality of the surrounding circumstances." *State v. Carignan*, 272 N.W.2d 748, 749 (Minn. 1978).

The statutory definition for the crime covers more than simply receiving an item; rather, it reaches "any person who receives, possesses, transfers, buys or conceals" the item. Minn. Stat. § 609.53, subd. 1 (2004). Thus, the state needed to prove that Johnson engaged in any of these five acts with the ATV in Nicollet County.

Having determined that Johnson stole the ATV from Sandeen's farm in Nicollet County, the jury's conclusion that Johnson possessed the ATV in the county naturally follows. Additionally, several days passed between the two incidents of Johnson trying

to sell the ATV. While the failed sale to Saatzer took place in Le Sueur County and the successful secured-loan transaction with Schmidt took place in Sibley County, a reasonable jury could account for the intervening days with Johnson possessing, and possibly concealing, the ATV at his Nicollet County residence. We therefore conclude that the jury had sufficient evidence to conclude that Johnson "received" the stolen ATV in Nicollet County.

II.

Johnson argues that his conviction should be overturned because the sentencing provisions listed on the complaint are inconsistent with the jury's verdict. "[T]he inadequacy of a complaint is subject to a harmless error analysis." *State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006); *see also* Minn. R. Crim. P. 17.02, subd. 3 (stating that citation error or omission in a complaint "shall not be ground" for reversing a conviction if the error or omission did not prejudice the defendant). An error is harmless if "the verdict was surely unattributable to the error." *Townsend v. State*, 646 N.W.2d 218, 223 (Minn. 2002).

A complaint must include a "citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated." Minn. R. Crim. P. 17.02, subd. 3. Additionally, a complaint must state the essential facts comprising the charged offense. *State v. Oman*, 265 Minn. 277, 281, 121 N.W.2d 616, 620 (1963). This requirement is designed, in part, to ensure the defendant an opportunity to properly prepare a defense. *State v. Wurdemann*, 265 Minn. 92, 94, 120 N.W.2d 317, 318 (1963).

In *Chauvin*, the supreme court upheld a conviction even though the complaint lacked a citation to the sentencing statute. *Chauvin*, 723 N.W.2d at 30–31. The supreme court determined that the defendant had sufficient advance notice of the charges against him and the state's intent to seek sentence enhancements. *Id.* at 31.

Here, Johnson asks us to reverse his convictions of theft of a motor vehicle and receiving stolen property (in the form of a motor vehicle) because of erroneous penalty citations in the complaint. As previously noted, the theft convictions all rely on two clauses in subdivision 2 of section 609.52. Clause (1) deals with movable property, while clause (17) addresses motor vehicles. Both clauses are cited in the fifth count of the second amended complaint. The receiving-stolen-property statute, section 609.53, does not differentiate between property and motor vehicles; it simply talks about "any stolen property." Minn. Stat. § 609.53, subd. 1. However, both sections 609.52 and 609.53 use the sentencing provisions of section 609.52.

The sentencing provisions, found in Minn. Stat. § 609.52, subd. 3 (2004), are based on the nature and value of the property. Subdivision 3(3)(a), cited in one of the receiving-stolen-property counts of the complaint, applies if "the value of the property or services stolen is more than $500 but not more than $2,500." Minn. Stat. § 609.52, subd. 3(3)(a). Subdivision 3(3)(d)(v), cited in the felony-theft-of-a-motor-vehicle count, applies if "the value of the property or services stolen is not more than $500, and . . . the property stolen is a motor vehicle." *Id.*, subd. 3(3)(d)(v). In both instances, the penalty is the same, "imprisonment for not more than five years or . . . payment of a fine of not more than $10,000, or both." *Id.*, subd. 3(3).

Johnson certainly had notice of the theft statute he was alleged to have violated and of the central facts underlying the state's complaint. The complaint also directed him, as the charging statutes would have, to the sentencing statute. He has not argued or shown that he was at all prejudiced in putting on his defense by any error in the sentencing citations included in the complaint. Therefore, the error, if any, was harmless.

III.

Johnson's final assignment of error is the district court's denial of his motion for a mistrial based on Sandeen's use of the term "mug shot" three times to refer to a photograph found in the garbage bags dumped on his property. A district court's denial of a motion for a mistrial is reviewed for an abuse of discretion. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). But a district court should not grant a mistrial "unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred." *Id.* (quotation omitted).

The supreme court has acknowledged that references to a defendant's prior incarceration can be unfairly prejudicial. *Id.* But a district court can mitigate any prejudice by resort to means short of a mistrial. *See, e.g.*, *Ture v. State*, 353 N.W.2d 518, 524 (Minn. 1984) (holding that police officer's reference to questioning defendant in another incident justified a curative instruction but not a mistrial); *cf. Long v. Humphrey*, 184 F.3d 758, 761 (8th Cir. 1999) (listing "less drastic" alternatives to a mistrial), *cited in Manthey*, 711 N.W.2d at 506.

Here, the district court sustained both of defense counsel's objections to the use of the term "mug shot" to describe the photograph, struck the references, and instructed the

jury to disregard them. The district court also offered to give a curative instruction, which defense counsel declined. Thus, the district court fairly sought to mitigate any prejudice that might have resulted from the use of the term "mug shot." And it cannot be said that the outcome of the trial would have been different if the photograph had simply been referred to as a photograph or by its exhibit number all along. Finally, as respondent notes, the photograph itself was admitted into evidence, without objection, and shown to the jurors; they could have concluded for themselves that it appeared to be a "mug shot," even if no one uttered the phrase.

The district court did not abuse its discretion in denying the motion for a mistrial.

Affirmed.