STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1606

State of Minnesota,
Respondent,

vs.

Shawn Wardell Embry,
Appellant.

Filed June 30, 2014
Affirmed
Connolly, Judge

St. Louis County District Court
File No. 69DU-CR-13-519

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

Mark S. Rubin, St. Louis County Attorney, Gary W. Bjorklund, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Schellhas, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of second-degree controlled substance sale in a public-housing zone, arguing that the evidence of the sale was insufficient. Because there was sufficient evidence to allow the district court to reach its verdict, we affirm.

FACTS

Appellant Shawn Embry was convicted for selling a second-degree controlled substance in a public-housing zone on the basis of testimony provided by L.B., a confidential informant who had begun working for the Lake Superior Drug Task Force (LSDTF) to avoid being charged with possession of a controlled substance. L.B. testified that: (1) he knew appellant, whom he identified in the courtroom and referred to by the nickname "D," because he had previously purchased crack cocaine from him; (2) in January 2013, L.B. offered to make a purchase from appellant; (3) L.B. knew appellant's sales were taking place at Room 409 of the King Manor, a public-housing unit in St. Louis County, where a third party, J.H., lived; (4) L.B. requested and appellant provided a phone number that was answered sometimes by appellant, sometimes by J.H., and sometimes by a person known as "Fam," any of whom could arrange purchases of crack cocaine; (6) on January 15, L.B. met with two LSDTF investigators who gave him $100 to buy crack and attached a recording wire to him; (7) after a few attempts, L.B. got an answer when he called the phone number appellant had given him; (8) in the recorded phone conversation that followed, L.B. told the person who answered that he wanted to purchase $100 worth of crack, and their phone call was recorded; (9) when L.B. entered

King Manor and went to the fourth-floor bathroom across from J.H.'s apartment, he did not know who would be conducting the sale; (10) appellant was in the bathroom; (11) appellant asked L.B. if he had a wire and patted him down, but did not find the wire; (12) L.B. gave appellant the $100 given to him by the investigators, and appellant let L.B. choose one of the packs of crack cocaine appellant had with him; and (13) appellant then went into J.H.'s apartment, and L.B. returned to the investigators.

Appellant was arrested on February 8, 2013, and charged with one count of second-degree controlled substance sale in a public-housing zone in St. Louis County on January 15, 2013. On April 9, 2013, a week before his trial, appellant filed notice that he would present an alibi defense. At the bench trial, appellant presented two witnesses who testified that appellant was with them at their home in Apple Valley on January 15, 2013.

The district court found appellant guilty as charged and denied appellant's motion for a downward dispositional or durational departure, sentencing him to 90 months in prison.

Appellant challenges his conviction, arguing that the evidence was insufficient.

D E C I S I O N

A district court's verdict is reviewed by the same standard as a jury's verdict. *State v. Davis*, 595 N.W.2d 520, 525 (Minn. 1999). A verdict will not be disturbed if a jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could have concluded that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-770 (Minn. 2004). This court's review is limited to a painstaking analysis of the record to determine whether the

evidence, viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach their verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

Appellant's counsel forcefully argues that the evidence was not sufficient to show that appellant sold the crack cocaine because L.B. was not a credible witness due to "inconsistencies and uncertainties" in his testimony. But none of the inconsistencies or uncertainties appellant mentions pertained to the testimony essential to convict appellant: appellant concedes that "[L.B.] testified that when he reached the fourth floor bathroom, [appellant] was either already there or showed up to make the sale" and "When [L.B.] met with the officers following the buy, he told them that he had purchased the drugs from [a]ppellant." Thus, there was no inconsistency or uncertainty in L.B.'s testimony as to the identity of the person from whom he bought the crack cocaine; L.B. provided consistent, certain testimony that appellant sold him crack cocaine on January 15, 2013, in a public-housing zone.

The state did not need to prove that L.B. entered King Manor by a particular door or spoke to appellant on the phone prior to the sale, and L.B. explained that any inconsistency or uncertainty on these or other points in his testimony resulted from his confusing the various similar buys he had made for LSDTF and the passage of three months between the date of the buy and the date of trial. L.B.'s testimony, viewed in the light most favorable to the verdict, was sufficient to allow the district court to reach its verdict. *See id.*

Appellant also argues that two "upstanding alibi witnesses" testified that he was at their home in Apple Valley on January 15, 2013. But the two witnesses' testimony was

inconsistent: for example, one testified that appellant came to their home "every three months or so" and for special occasions, and the other testified that "[p]robably two weeks out of the month, he'll – he'd probably be at our house." One of the witnesses, who had told appellant's attorney a week earlier that appellant arrived at his home on Saturday or Sunday, January 12 or 13, testified that appellant arrived on the night of January 14. One witness testified that they had received a couple of phone calls to their residence from appellant; the other witness testified that there had been several phone calls from appellant; appellant testified that he had not called the residence at all. Both witnesses testified that they had signed a letter to appellant's attorney dated January 16, 2013, saying that they planned to be witnesses for appellant on charges arising out of an earlier drug sale in May 2009.

The testimony of appellant and his witnesses that he was at their Apple Valley home on January 15 conflicts with L.B.'s testimony that appellant was in Duluth selling crack cocaine on January 15. This court must assume that the factfinder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989) (quotations omitted). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

Consequently, we defer to the district court and see no basis to reverse the conviction.

Affirmed.