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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0184**

State of Minnesota,
Respondent,

vs.

Rick Alan Larson,
Appellant.

**Filed February 3, 2020
Affirmed in part, reversed in part, and remanded
Slieter, Judge**

Anoka County District Court
File No. 02-CR-17-1321

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Larkin, Judge; and Slieter,
Judge.

UNPUBLISHED OPINION

SLIETER, Judge

Appellant Rick Alan Larson challenges his controlled-substance convictions based
upon insufficient evidence and argues that the district court erred by imposing two

sentences.¹ Because direct evidence supports Larson’s convictions, we affirm his convictions. However, the district court erred by sentencing Larson on two counts of second-degree controlled-substance crime (sale) because the conduct was part of the same behavioral incident. We therefore reverse and remand with instructions for the district court to vacate the sentence for count three.

FACTS

Larson proceeded to a bench trial on five controlled-substance offenses occurring within a park zone. The state dismissed two of the counts at the end of trial.

The district court found that on February 24, 2017, members of the Blaine Police Department and members of the Anoka-Hennepin Drug Task Force executed a search warrant at a residence in Blaine. The district court also found that Larson rented a room in the basement of the residence. During the search of the basement, law enforcement seized baggies containing a white crystalline substance from a waste basket next to Larson’s bed. The white crystalline substance tested positive for methamphetamine and weighed

¹ Larson filed a *pro se* supplemental brief raising a number of issues, which include challenging: (1) probable cause for the search warrant; (2) proof of his residence; (3) proof of the sale; (4) proof of the possession of controlled substances; (5) proof of the park zone; (6) testimony of witnesses; and (7) lack of DNA evidence. Larson’s claims are either not preserved because he failed to raise those issues through pretrial motion or he failed to cite authority or the record to make a legal argument. Initially, Larson did not challenge the search warrant through pretrial motions and therefore the probable-cause claim was forfeited and is not properly before us on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that a party cannot raise a new issue on appeal). The remaining issues raised by Larson failed to cite legal authority or the record and we therefore do not address those issues. *See State, Dep’t of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (recognizing that appellate courts decline to address matters inadequately briefed).

7.6 grams. The district court found that the baggies were “in the waste basket underneath other waste material,” which it determined was “consistent with an attempt to hide the controlled substances at the time law enforcement announced their presence when executing the search warrant.”

The district court also received testimony from two individuals, S.S. and L.L., who were stopped by law enforcement leaving the residence before the search warrant was executed. S.S. and L.L. admitted that they purchased methamphetamine from Larson in the basement of the residence immediately before leaving the residence. The district court found that S.S. and L.L. went to Larson’s room to purchase what they believed was four grams of methamphetamine in exchange for \$200. The district court credited the testimony from these two witnesses about the sale “that it was [Larson] who sold them the methamphetamine that was found in [L.L.’s] purse.”

Based on testimony from the Anoka County Surveyor, the district court found that:

The land survey confirms that [the park], an established city park platted at the time of [the] subdivision, is located less than 300 feet from any part of the residence including the basement area of the home. From this, the Court can conclude that [Larson’s] living quarters were within a “park zone” as defined by Minnesota Statutes section 152.01, subd. 12a.

The district court found Larson guilty of two separate counts of second-degree controlled-substance crime (sale), in violation of Minn. Stat. § 152.022, subds. 1(7)(ii), 3(b) (2016); and one count of third-degree controlled-substance crime (possession), in violation of Minn. Stat. § 152.023, subds. 2(a)(6), 3(a) (2016). At the sentencing hearing, the district court noted that the two counts of second-degree controlled-substance crime

(sale) would “merge”² and the judge thereafter imposed a single sentence of 92 months’ imprisonment. The district court entered a conviction but did not pronounce a sentence for third-degree controlled-substance crime (possession).

This appeal follows.

D E C I S I O N

I. The state presented sufficient evidence that Larson’s criminal conduct occurred within a park zone.

When appellate courts evaluate the sufficiency of the evidence, they “‘carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he [or she] was convicted.’” *See State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quoting *State v. Boldman*, 813 N.W.2d 102, 106 (Minn. 2012)). “The evidence must be viewed in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict.” *Id.* “The verdict will not be overturned if the fact-finder, upon application of the presumption of innocence and the State’s burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense.” *Id.* “[Appellate courts] use the same standard of review in bench trials and in jury trials in evaluating the sufficiency of the evidence.” *See State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011).

² “Counts, convictions, or sentences cannot ‘merge’ or ‘combine,’ and the district court should avoid using such unclear language during sentencing.” *State v. Walker*, 913 N.W.2d 463, 469 (Minn. App. 2018).

Larson’s sole argument challenging the sufficiency of the evidence of all three counts is whether the state proved that the controlled-substance offenses occurred in a park zone. *See* Minn. Stat. §§ 152.022, subd. 1(7)(ii), 152.023, subd. 2(a)(6). The parties agree that the park near the residence where Larson was living qualifies as a park subject to Minn. Stat. § 152.01, subd. 12a (2016).

Pursuant to Minn. Stat. § 152.022, subd. 1(7) (2016), a person may be found guilty of second-degree controlled-substance crime (sale) if

the person unlawfully sells any of the following in a school zone, a park zone, a public housing zone, or a drug treatment facility:

. . . .
(ii) one or more mixtures containing methamphetamine or amphetamine

Similarly, a person may be found guilty of third-degree controlled-substance crime (possession) if a “person unlawfully possesses one or more mixtures containing methamphetamine or amphetamine in a school zone, a park zone, a public housing zone, or a drug treatment facility.” Minn. Stat. § 152.023, subd. 2(a)(6). A park zone for both of these statutes means

an area designated as a public park by the federal government, the state, a local unit of government, a park district board, or a park and recreation board in a city of the first class. “Park zone” includes the area within 300 feet or one city block, whichever distance is greater, of the park boundary.

Minn. Stat. § 152.01, subd. 12a.

Larson argues that the state offered no evidence “as to the design and dimensions of the basement or the foundation of the house relative to the footprint of the above-ground

part of the structure.” Larson contends that the district court’s findings related to the residence fail to “account for the lack of any evidence as to the design or dimensions of the house’s foundation and the basement itself, all of which could have extended outside the 300-foot radius.” This is a question that can be addressed by examining the direct evidence in the case. *See State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (applying an elements-based approach to a sufficiency-of-the-evidence claim in determining whether to apply direct or circumstantial evidence).

“[D]irect evidence is [e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (second alteration in original) (quotation omitted). The state presented direct evidence that the sale and possession of a controlled substance occurred in Larson’s bedroom in a residence located within a park zone.

First, the district court found credible the testimony of two individuals who purchased a controlled substance from Larson on the same day that the search warrant was executed. In the district court’s findings of fact, the district court made the following finding regarding their testimony.

Upon arrival at the home, [S.S.] and [L.L.] went downstairs to [Larson’s] living quarters. [The three] were all sitting on the couch. [Larson] handed an amount of methamphetamine believed by [the two women] to be 4 grams to [S.S.], who in turn handed the methamphetamine to [L.L.]. [L.L.] handed the purchase price of \$200 to [S.S.] who in turn handed the money to [Larson].

A detective with the Anoka-Hennepin Drug Task Force and a member of the team executing the search warrant, indicated that the couch they found in the basement was in the bedroom area of the basement.

Second, an Anoka County Surveyor testified that he determined the park zone extended such that it included the residence where Larson was living. The surveyor concluded that the exterior of the residence where Larson resided was 268 feet from the park. In furtherance of this testimony, the district court found “that [Larson’s] living quarters were within a ‘park zone.’”

The direct evidence in this case establishes that Larson’s bedroom was in the basement area of the residence and the residence was within 300 feet from the park zone. Further, the direct evidence shows the controlled-substance sale and possession occurred in Larson’s bedroom, which was in the basement of the house. We conclude that the state presented sufficient evidence beyond a reasonable doubt to support the conviction and therefore we affirm Larson’s convictions.

II. The district court erred by sentencing Larson on two counts of second-degree controlled-substance crime (sale) because the criminal conduct was part of the same behavioral incident.

“Whether the offenses were part of a single behavioral incident is a mixed question of law and fact, so [appellate courts] review the district court’s findings of fact for clear error and its application of the law to those facts de novo.” *See State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). “But where the facts are established, the determination is a question of law subject to de novo review.” *State v. Grampre*,

766 N.W.2d 347, 354 (Minn. App. 2009) (quotation omitted), *review denied* (Minn. Aug. 26, 2009).

“[I]f a person’s conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them.” Minn. Stat. § 609.035, subd. 1 (2016). “Thus, the law generally prohibits multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident.” *Bakken*, 883 N.W.2d at 270 (quotation omitted).

“The State bears the burden of proving, by a preponderance of the evidence, that a defendant’s offenses were not part of a single behavioral incident.” *Id.* Although the state concedes that both counts of second-degree controlled-substance crime (sale) are part of the same behavioral incident, we independently review this claim. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (recognizing that even when parties agree on appeal, appellate courts have the responsibility to “decide cases in accordance with the law, and that responsibility is not to be diluted by counsel’s oversights, lack of research, and failure to specify issues or to cite relevant authorities”) (quotation omitted)).

We determine that Larson’s sentence for one of the counts of second-degree controlled-substance crime (sale) should be vacated as part of a single-behavioral incident. *See State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (holding that whether two intent crimes constitute a single-behavioral incident requires consideration of time, place, and whether the conduct was motivated by an intent to obtain a single criminal objective). The district court found Larson guilty and entered judgment of conviction for two counts of

selling methamphetamine to S.S. and L.L. As explained by the district court, Larson handed the controlled substance to S.S. S.S. then handed the controlled substance to L.L. L.L. provided the money for the purchase. Further, the district court explained that the controlled substance was found in L.L.'s purse when law enforcement stopped the vehicle leaving the residence. Based upon the facts found by the district court, we conclude that the two counts of second-degree controlled-substance crime (sale) were part of a single-behavioral incident and accordingly reverse and remand for the district court to vacate the sentence and resentence.³

Affirmed in part, reversed in part, and remanded.

³ Although the parties did not raise an issue pursuant to Minn. Stat. § 609.04 (2016) and whether it was appropriate to enter two convictions for both counts of second-degree controlled-substance crime (sale), we note that the statute may have application in this case. The district court has discretion to consider arguments regarding this issue on remand.