STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2224

State of Minnesota,
Respondent,

vs.

Ricky Antwon Osborne,
Appellant.

Filed January 3, 2012
Affirmed
Hudson, Judge

Olmsted County District Court
File No. 55-CR-09-7490

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

HUDSON, Judge

Appellant challenges his conviction of aiding and abetting second-degree controlled-substance crime, arguing that the state failed to prove beyond a reasonable

doubt the element of the weight of the controlled substance involved in the transaction. He also argues that he is entitled to a new trial because the district court committed plain error by failing to give an accomplice instruction and by admitting irrelevant and prejudicial character evidence. Finally, he contests the district court's rejection of his *Batson* challenge to the removal of the only African-American juror on the jury panel. We affirm.

FACTS

The state charged appellant Ricky Antwon Osborne with aiding and abetting second-degree controlled-substance crime, in violation of Minn. Stat. § 152.022, subd. 1(1) (2008) and Minn. Stat. § 609.05 (2008). At appellant's jury trial, several officers from the Rochester Police Department and a confidential reliable informant (CRI) testified about a controlled buy of narcotics in Rochester. In that transaction, a narcotics officer furnished the CRI with $300 in identified cash to purchase an "eight ball" of crack cocaine, or about 3.5 grams, from B.G. The officers set up surveillance, following the CRI in vehicles and using a recording device to monitor the transaction. The CRI testified that she arrived at B.G.'s girlfriend's apartment and spoke to him on a cell phone. The CRI then moved her vehicle to a location near the Salvation Army. She spoke to B.G., who requested the money for the transaction, but she said she wanted the drugs first. B.G. made some calls on his cell phone, and an officer heard by surveillance that B.G.'s supplier would pull up in a vehicle and perform the transaction in that vehicle.

The officers observed B.G. go over to the CRI's vehicle. A brown Chevy Yukon pulled into a nearby parking spot. Then B.G. exited the CRI's vehicle and entered the

Yukon. The CRI advised the officers that she had given B.G. $160 of the money, but she would not give him all the money until he came back with drugs. After a few minutes, the officers saw B.G. leave the Yukon, reenter the CRI's vehicle, and then leave it again. The CRI told the officers that B.G. had given her four small packages containing what appeared to be crack cocaine, and he was taking the rest of the money to get additional drugs. The officers observed B.G. enter the Yukon again for a very short time, and then return to the CRI's vehicle. The CRI testified that B.G. then gave her what appeared to be not quite an eight-ball of powdered cocaine. The CRI gave B.G. a ride back to his home, dropped him off, and gave the drugs to the officers.

Immediately after observing the controlled buy, the officers followed the Yukon and made a traffic stop. They observed that a female, V.M., was driving, with appellant in the front passenger seat. When they arrested and searched appellant, they recovered $316 in cash from his pants pocket, but found no illegal substances. The officers also found on the right front floorboard a pink purse with $280 of the controlled-buy money lying on it. They also recovered a cell phone from the passenger seat where appellant had been sitting, two other cell phones from the purse, and one other cell phone from the front console.

V.M., who was then dating appellant, identified the purse and the cell phone in the console as hers. In searching the Yukon, officers also found in the purse a bill of sale for the Yukon dated a few days earlier, and in the glove box, a recent pay stub from a day-labor service in appellant's name for $15 and Western Union Moneygram receipts containing appellant's name.

Additional officers followed the CRI's vehicle back to B.G.'s home and arrested him. In searching his person incident to arrest, they recovered cell phones, a tablet of what appeared to be Ecstasy, a small amount of a powder and crack cocaine that tested positive for cocaine, a crack pipe, a glass tube, and $20 of the controlled-buy money.

The state introduced records for the cell phones used by the CRI, B.G.'s cell phone, the cell phone found in the center console, and the cell phone found on the seat where appellant had been sitting. The records indicate that, close to the time of the controlled buy, a call was made from the phone on appellant's seat to B.G., and several calls were made from B.G. to that phone. The state also introduced evidence of jail calls made from appellant to V.M. In one call, appellant told V.M., "You do what the f___ I tell you to do." In another call, appellant's sister stated that B.G. was just "paying them back" for covering his rent. Appellant replied, "Bottom line, sounds good to me."

A car dealer testified that, a few days before the controlled buy, appellant and V.M. had purchased the Yukon for $3,200 in cash, using small bills from appellant's pocket. The bill of sale was placed in V.M's name.

V.M. testified that she was present in the Yukon with appellant because she usually dropped him off at the Civic Inn at that time of day. She testified that they were parked listening to music when B.G. approached the Yukon and spoke to appellant for a short time, but she did not hear what they discussed. She testified that B.G. went to another vehicle and returned, but she did not see B.G. exchange anything with appellant. She testified that she purchased the Yukon with her own money and that the money found on the purse did not belong to her and she did not know its origin.

A forensic scientist from the Bureau of Criminal Apprehension (BCA) testified that the gross weight of the suspected crack cocaine in the plastic bag recovered from the CRI, including packaging, was 1.8 grams. The analyst performed instrument testing on one of the four knot-tied bindles present in the packaging; the bindle weighed .2 gram and tested positive for cocaine. She testified that all of the bindles appeared to be the same, but she did not analyze the other three. She testified that she also weighed and tested the powder obtained by the CRI, which weighed 2.4 grams and tested positive for cocaine. In addition, she weighed and tested the material recovered from B.G., which included one sample weighing .2 gram and one sample weighing .6 gram; both tested positive for cocaine.

Before trial, the district court rejected appellant's challenge to the peremptory strike of the only African American on the jury panel under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). When instructing the jury, the district court did not provide the jury with an accomplice testimony instruction. The jury found appellant guilty of the charged offense and sentenced appellant to 108 months. This appeal follows.

D E C I S I O N

I

Appellant argues that the evidence is insufficient to support his conviction. When considering a challenge to the sufficiency of the evidence, this court performs "a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in the light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Pendleton*, 706 N.W.2d 500, 511

(Minn. 2005). Circumstantial evidence merits the same weight as direct evidence, but we apply a stricter degree of scrutiny to review of convictions that depend on circumstantial evidence. *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). To sustain a conviction in a circumstantial-evidence case, the "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). On elements proved by circumstantial evidence, there must be "no other . . . rational inferences that are inconsistent with guilt." *State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010) (quotation omitted).

A conviction for aiding and abetting second-degree controlled substance crime, sale of cocaine, requires that a defendant intentionally sells a mixture with "a total weight of three grams or more containing cocaine." Minn. Stat. § 152.022, subd. 1(1); Minn. Stat. § 609.05; *see State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995) (stating that aiding and abetting requires state to show that defendant played some knowing role in the commission of the crime).

In a drug-related conviction, "[t]he 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." *State v. Robinson*, 517 N.W.2d 336, 339 (Minn. 1994). In *Robinson*, the Minnesota Supreme Court concluded that the evidence was insufficient to sustain a conviction of selling ten or more grams of cocaine when the state sampled only seven of thirteen packets suspected of containing cocaine, and the total amount of the mixture tested amounted to less than nine grams. *Id.* at 338–39. The

supreme court noted that drug dealers sometimes substitute placebos for drugs and that, unless the drugs are pills or tablets, random testing may not legitimately permit an inference that the required weight of the mixture is established beyond a reasonable doubt. *Id*. at 339–40.

The state offered evidence that the BCA tested one of four bindles contained in separate, tied-off corners of a plastic bag recovered from the CRI. The bag, which contained four bindles, weighed 1.8 grams, including packaging. The single bindle that was weighed, which contained crack cocaine, weighed .2 gram. The BCA also tested the powder contained in a plastic bag recovered from the CRI; that powder weighed 2.4 grams and tested positive for cocaine. Therefore, the total drug material recovered from the CRI that tested positive for cocaine weighed 2.6 grams, which is less than the 3 grams required for a conviction of second-degree controlled-substance crime. *See* Minn. Stat. § 152.022, subd. 1(1).

Appellant argues, based on *Robinson*, that scientific testing of only one of the bindles in the plastic bag was insufficient to establish by circumstantial evidence that the other bindles also contained illegal drugs, so that the state failed to prove beyond a reasonable doubt the requisite weight of drugs for his conviction. *See Robinson*, 517 N.W.2d at 340. But even if a substance is not scientifically tested, "circumstantial evidence and officer testimony may be presented to the jury to attempt to prove the identity of the substance." *State v. Olhausen*, 681 N.W.2d 21, 28–29 (Minn. 2004). Circumstantial evidence has in some cases been held sufficient to prove a defendant's possession and aiding and abetting sale of controlled substances beyond a reasonable

doubt. *See id.* (concluding that evidence was sufficient to sustain drug-related conviction when circumstantial evidence surrounding attempted sale and possession of controlled substance was "compelling," including statements of defendant and coconspirator about weight and contents of package, and police officer testimony as to authenticity, size, weight, and dollar amount for cost of substance).

The state argues that the circumstantial evidence of B.G.'s possession of .8 gram of cocaine may be used to prove the weight of the drugs involved in the transaction. B.G.'s possession of cocaine and $20 of the controlled-buy money suggests that he received some drugs in the transaction. But the drug paraphernalia found on his person also suggests that he personally used drugs, and a rational hypothesis exists that, as a drug user, he may have been carrying some cocaine on his person before the transaction. Therefore, the addition of this circumstantial evidence is insufficient to prove beyond a reasonable doubt the weight of the controlled substance involved in the sale.

The record, however, also contains additional circumstantial evidence that proves beyond a reasonable doubt the weight of the drugs. The CRI testified that she expected to purchase an "eight-ball," which is about 3.5 grams of cocaine. The BCA analyst weighed the bag containing all four bindles at 1.8 grams and testified that all of the bindles looked the same. And an officer testified that, based on his training and experience, he believed that the bag contained four small wrapped pieces of a substance that he recognized as crack cocaine. He also tested the substance in one of the bindles, which tested positive for cocaine. Although these circumstances do not provide the "compelling" evidence present in *Olhausen*, *id.*, and it is possible that the officer field-

tested the same bag as the BCA analyst, we nonetheless conclude that significant circumstantial evidence provides proof beyond a reasonable doubt that the three bindles not tested by the BCA, taken together, contained at least .4 gram of cocaine. And taken in conjunction with the scientifically tested drug material, this evidence sufficiently establishes the requisite weight of cocaine to sustain appellant's conviction.

II

Appellant argues that he should be given a new trial because V.M. was an accomplice, and the district court failed to instruct the jury that, under Minn. Stat. § 634.04 (2008), a conviction could not be based on the uncorroborated testimony of an accomplice. An instruction on accomplice testimony must be given "in any criminal case in which it is reasonable to consider any witness against the defendant to be an accomplice." *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002). The purpose of the instruction is to ensure that a defendant is not convicted on the uncorroborated evidence of an accomplice who would have an incentive to shift the blame. *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004).

Because appellant did not object at trial to the district court's failure to give an accomplice instruction, we review the omission of the instruction under a plain-error standard, which involves determining whether error existed, whether it was plain, and whether it affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error has been deemed plain if it is "obvious" or "clear" or if it "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). The burden rests with the appellant to demonstrate that plain

error has occurred. *Id.* Plain error is considered "prejudicial if there is a reasonable likelihood that [it] . . . had a significant effect on the verdict of the jury." *Griller*, 583 N.W.2d at 741 (quotation omitted). If these three prongs are met, we address the error only if it seriously affects the fairness and integrity of judicial proceedings. *Id.* at 740.

The state argues that V.M. may not be considered an accomplice because she did not testify to appellant's illegal activity. The test for determining if a witness is an accomplice for purposes of Minn. Stat. § 634.04 is whether the witness could have been indicted for and convicted of the charged offense. *State v. Henderson*, 620 N.W.2d 688, 701 (Minn. 2001). A person may be held liable as an accomplice if that person plays a knowing role in the commission of the crime and does not take steps to thwart its completion. *State v. Barrientos-Quintana*, 787 N.W.2d 603, 611 (Minn. 2010). Accomplice liability has been found when "the defendant was present during the criminal activity" and "made no effort to stop it." *Id*. at 612 (quotations omitted).

V.M. admitted that she was present in the Yukon when B.G. spoke to appellant and that her purse, which was located in the Yukon, had cash lying on top of it. An officer testified that the cash was identified as relating to the controlled buy. Based on these circumstances, we conclude that V.M. could reasonably be considered an accomplice, and the district court erred by failing to give an accomplice instruction. And because the law clearly indicates that an accomplice instruction must be given when a witness may reasonably be considered an accomplice, the error was plain. *Id*.

We next consider whether the error prejudiced appellant's substantial rights. In so doing, we examine whether a reasonable likelihood exists that the verdict would have

been significantly affected, had the jurors known that they could not convict appellant unless they found that V.M's testimony was corroborated by additional evidence. *Id.* The pertinent part of the accomplice jury instruction requires corroboration of the accomplice testimony that tends to convict the defendant. 10 *Minnesota Practice,* CRIMJIG 3.18 (2010). Because V.M. denied knowledge of a drug transaction between B.G. and appellant, as well as the origin of the identified money, the only portion of her testimony supporting appellant's conviction was the testimony that appellant was present in the Yukon, that B.G. approached the Yukon, and that B.G. spoke to appellant about an unknown subject. This testimony was amply corroborated by the CRI's testimony that B.G. entered the Yukon, as well as appellant's presence in the Yukon when it was stopped by police, and the police testimony based on the surveillance. Therefore, because appellant has not shown a reasonable likelihood that the accomplice-corroboration instruction would have had a significant effect on the verdict, the third prong of the plain-error test has not been established, and appellant is not entitled to a new trial.

III

Appellant challenges the district court's admission of evidence that he paid cash for the Yukon, as well as a pay stub from a day-labor service and Western Union money-gram receipts containing his name found in the glove box of the Yukon. Appellant argues that the evidence is irrelevant and unfairly prejudicial. Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence." Minn. R. Evid. 401. Under Minn. R. Evid. 403, evidence that is otherwise relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." In a criminal prosecution, the state may not attack the character of a defendant until the defendant has placed that character in issue. Minn. R. Evid. 404(a)(1). Appellant argues that the challenged evidence allowed the jury to impermissibly infer his bad character because it tended to show that he previously obtained cash by illegal means. *See, e.g.*, *Strommen*, 648 N.W.2d at 687–89 (Minn. 2002) (concluding that testimony regarding defendant's other bad acts, which included killing someone, required reversal when defendant had not placed his character in issue).

Because appellant did not object to the introduction of this evidence at trial, we consider it under the plain-error standard. *Griller*, 583 N.W.2d at 740. We agree that because the jury could have used the evidence of appellant's payment of cash for the Yukon and the contents of the glove box for an improper purpose, the district court erred by allowing its admission. But the challenged evidence also supports a legitimate inference that appellant had a prior connection to the Yukon, the location of the drug transaction. And appellant's purchase of the Yukon with V.M. illustrates his existing relationship with V.M., on whose purse the marked cash was found in the Yukon. Therefore, we conclude that appellant has not sustained his burden to show that plain error occurred. *See Ramey*, 721 N.W.2d at 302 (stating that burden rests with appellant to demonstrate plain error).

Further, we conclude that the admission of this evidence did not prejudice appellant's substantial rights because any improper inference relating to the purchase of the Yukon was mitigated by V.M.'s testimony that the Yukon was her vehicle, which she purchased with funds saved from her employment. Therefore, the admission of this evidence does not warrant a new trial.

IV

Appellant argues that he is entitled to a new trial because the state's proffered reason for exercising a peremptory challenge to remove the only African American person on the jury panel was pretextual. Peremptory challenges to the selection of jurors may not be used for racially discriminatory purposes. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). To analyze a claim of racial discrimination in the exercise of a peremptory strike, district courts apply a three-step inquiry. *State v. Dobbins*, 725 N.W.2d 492, 501 (Minn. 2006); *see also* Minn. R. Crim. P. 26.02, subd. 7(3) (describing three-step inquiry). First, the objector must make a prima facie showing that the circumstances raise an inference of exclusion based on race. *Dobbins*, 725 N.W.2d at 501. The party that exercised the strike must rebut this showing by providing a basis for the strike that is "facially valid and exhibits no discriminatory intent." *Id.* The objector then has an opportunity to establish that the offered reason is a pretext for purposeful discrimination. *Id.* This court "give[s] great deference to the district court's ruling on a *Batson* challenge, recognizing that the record may not reflect all of the relevant circumstances that the [district] court may consider," and we will not

reverse the district court's determination unless it is clearly erroneous. *State v. Pendleton*, 725 N.W.2d 717, 724 (Minn. 2007).

The prosecutor exercised a peremptory challenge to strike O.W., the only African American on the jury panel. When the district court inquired about a race-neutral reason for the strike, the prosecutor stated that O.W.'s mother had been repeatedly charged and convicted of crimes in Olmsted County and that, in a jury trial in that county, O.W. had testified in her mother's defense. The prosecutor stated that O.W. may have a bias against the prosecution for that reason. The district court found that the prosecutor gave a race-neutral reason for the strike and rejected appellant's *Batson* challenge.

The parties agree that appellant made out a prima facie case of racial discrimination when the district court inquired as to a race-neutral reason for the strike. *See State v. Rivers*, 787 N.W.2d 206, 211 (Minn. App. 2010) (concluding that district court implicitly determined that defendant had established prima facie case of discrimination by asking prosecutor to articulate race-neutral reason for peremptory strike of only African American on jury panel), *review denied* (Minn. Oct. 19, 2010). But appellant argues that the district court clearly erred by determining that the proffered race-neutral reason for the strike was not a pretext for racial discrimination.

A family member's involvement in the criminal justice system is a valid race-neutral reason for a peremptory strike. *See State v. Scott*, 493 N.W.2d 546, 549 (Minn. 1992) (concluding that juror's recent family involvement with law enforcement was race-neutral reason for striking juror); *State v. Weatherspoon*, 514 N.W.2d 266, 269 (Minn. App. 1994) (concluding that juror's brother's experience of being accused of drug sales

was race-neutral explanation for striking juror), *review denied* (Minn. June 15, 1994). Appellant maintains that the prosecutor's articulated reason for striking O.W. was pretextual because he did not strike other jurors who also had experience with the criminal justice system. But "the fact that [other] jury members . . . had been involved in police investigations of crimes, yet were not removed, does not by itself demonstrate discriminatory intent." *Weatherspoon*, 514 N.W.2d at 270. The record shows that, although some other panel members also had previous involvement in the criminal-justice system, that involvement was less recent than that of O.W.'s mother, less direct, or occurred in different counties. In addition, O.W. had testified in Olmsted County in defense of her mother. Under these circumstances, the district court did not clearly err by determining that the state articulated a valid, race-neutral reason for the strike and that appellant had not established purposeful discrimination in the state's exercise of its peremptory challenge.

V

In a pro se brief, appellant argues that he was denied his Sixth Amendment right to confront witnesses against him and that he was provided prejudicially ineffective assistance of counsel. The primary purpose of the Sixth Amendment Confrontation Clause is to afford an accused the opportunity to cross-examine the witnesses who testify against him. U.S. Const. amend. VI; *State v. Byers*, 570 N.W.2d 487, 494 (Minn. 1997); *see Crawford v. Washington*, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 1374 (2004) (concluding that out-of-court, testimonial statements of non-testifying witnesses are barred under the Confrontation Clause unless the witness is "unavailable" and the

defendant had a prior opportunity to cross-examine the witness, regardless of whether the district court found such statements reliable). Appellant maintains that he had a right to confront B.G. based on appellant's belief that B.G.'s out-of-court statements provided the basis for the charges against him. But because the state did not call B.G. as a witness or offer any statements made by B.G. into evidence, appellant had no Sixth Amendment right to confront B.G. *See id*.

Appellant also asserts a claim of ineffective assistance of counsel, based on his counsel's failure to object to the car dealer's testimony relating to the purchase of the Yukon. A defendant who asserts an ineffective-assistance claim must prove both "that his counsel's performance fell below an objective standard of reasonableness and that a reasonable probability exists that, but for his counsel's unprofessional errors, the result of the proceedings would have been different." *Davis v. State*, 784 N.W.2d 387, 391 (Minn. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). "What evidence to present to the jury . . . and whether to object are part of an attorney's trial strategy which lie within the proper discretion of trial counsel and will generally not be reviewed later for competence." *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). Even if the district court erred by admitting the testimony regarding the purchase of the Yukon, defense counsel's failure to object to that testimony constitutes a matter of trial strategy, which does not provide grounds for an ineffective-assistance claim. *See id*. And because we have already concluded that appellant's rights were not substantially prejudiced by the admission of that evidence, we also conclude that no prejudice exists for the purpose of appellant's ineffective-assistance claim. *See Reed v.*

State, 793 N.W.2d 725, 735–36 (Minn. 2010) (concluding that, when no prejudice existed relating to plain-error review of accomplice-corroboration-instruction issue, no prejudice existed for purpose of ineffective-assistance claim based on same issue).

Affirmed.