STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1746
A07-1747

State of Minnesota,
Respondent (A07-1746),
Appellant (A07-1747),

vs.

Raymond Custer,
Appellant (A07-1746),
Respondent (A07-1747).

Filed December 23, 2008
Affirmed
Halbrooks, Judge

Scott County District Court
File No. 70-CR-06-18531

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

Patrick J. Ciliberto, Scott County Attorney, Michael J. Groh, Assistant County Attorney, 200 Fourth Avenue West, Shakopee, MN 55379 (for respondent State of Minnesota)

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Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Harten, Judge.*

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

HALBROOKS, Judge

In this consolidated appeal of two convictions of and a sentence for first-degree controlled-substance crime, appellant Raymond Custer argues that (1) the circumstantial evidence was insufficient to eliminate all rational hypotheses other than that of his guilt; (2) the district court committed plain error when it allowed the state's witnesses to express opinions regarding whether he and another were working together to manufacture methamphetamine; and (3) the district court abused its discretion by admitting a statement by a co-conspirator made after any conspiracy had been thwarted. The state argues that the district court abused its discretion by imposing a downward durational sentencing departure. We affirm.

FACTS

On August 4, 2006, police arrived at Erik Michael Karlsen's farm to arrest him on an outstanding felony warrant. One officer heard voices coming from within a detached garage and could see that a light was on inside the garage. He looked through a hole in the north wall of the garage and saw Thomas Paul Mussehl and Custer inside the structure. The officer testified that Mussehl was sitting in a chair and that Custer was standing next to him. One of the men was holding a beaker containing a dark chemical

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while the other man held a propane torch. The beaker was connected to a 55-gallon drum by a tube.

Three other officers later took turns looking through the hole in the wall. These officers saw Mussehl holding the beaker in one hand and a butane torch in the other. The flame was on, and Mussehl was holding the torch underneath the beaker while the contents of the beaker bubbled. The officers testified that Custer was standing near Mussehl, was not moving around the garage, and held some kind of white material in his hand.

After Karlsen was taken into custody, police ordered Custer and Mussehl to leave the garage. Custer came out of the garage upon their request. Mussehl did not come out of the garage, so the officers entered the building. Mussehl was seated, stirring the beaker, which had smoke coming out of it. Mussehl said that if he put the beaker down, it would explode. With the officers' permission, Mussehl poured water into the beaker and set it down. The beaker was later found to contain 10 milliliters (11.7 grams) of liquid methamphetamine. An officer testified that paper towels had been used as a primitive seal to keep vapors in the 55-gallon drum. The police also found cans of engine degreaser in the garage.

A jury convicted Custer of one count of first-degree controlled-substance crime, manufacturing methamphetamine, in violation of Minn. Stat. §§ 152.021, subd. 2a(a), 609.05 (2006). The jury also convicted Custer of one count of possession of methamphetamine precursors, in violation of Minn. Stat. §§ 152.0262, subd. 1, 609.05 (2006). The district court sentenced Custer to 43 months in prison, a downward

durational departure from the presumptive sentence of 86 months. In this consolidated appeal, Custer challenges his convictions, and the state appeals his sentence.

D E C I S I O N

I.

Custer argues that the evidence does not support the theory that he actively participated in the manufacture of methamphetamine. He also argues that there is insufficient evidence to support his conviction of possession of methamphetamine precursors. 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 the 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 that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

"[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 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. *Jones*, 516 N.W.2d at 549. 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. Manufacture of methamphetamine

A person is guilty of aiding or abetting the manufacture of methamphetamine if he "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. §§ 152.021, subd. 2a(a), 609.05, subd. 1. Although "inaction, knowledge, or passive acquiescence" is not enough to establish the requisite criminal intent, "active participation in the overt act which constitutes the substantive offense is not required, and a person's presence, companionship, and conduct before and after an offense are relevant circumstances from which a person's criminal intent may be inferred." *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995).

Here, an officer saw Custer holding either the beaker or the torch while Mussehl held the other object. Minutes later, other officers saw Mussehl holding both the torch and the beaker. Assuming the jurors believed the officers' testimony, it was reasonable for the jury to infer that Custer handed whatever object he was holding to Mussehl. It was also reasonable for the jury to infer that Custer, by standing very close to Mussehl while the latter heated the beaker with the torch, knew that Mussehl was manufacturing methamphetamine.[1] Custer's handing of the torch or beaker to Mussehl therefore rose to the level of active participation in the manufacture of methamphetamine. Because the

[1] Custer does not dispute that methamphetamine was manufactured in the garage.

jury reasonably could have concluded that Custer assisted Mussehl in manufacturing methamphetamine, we will not disturb its verdict. The evidence is sufficient to support Custer's conviction.

B. Possession of precursors

"A person is guilty of a crime if the person possesses any chemical reagents or precursors with the intent to manufacture methamphetamine." Minn. Stat. § 152.0262, subd. 1 (including "organic solvents" in list of chemical reagents and precursors).

Custer admits to purchasing two cans of engine degreaser and bringing them into the garage. Custer argues that the evidence supports his claim that he purchased the degreaser to trade it to Karlsen, but Detective Nicholas Adler testified that Custer had previously told him that the degreaser was purchased for Custer's own use. Assuming that the jury believed the testimony of the state's witnesses, Custer assisted Mussehl in the manufacturing of methamphetamine after purchasing engine degreaser. Officer Terry Stier, a clandestine laboratory technician, testified that the methamphetamine-production process in the garage lab was in the reaction phase when Custer and Mussehl were discovered. Officer Stier further testified that the next step in the process would involve the addition of an organic solvent, such as engine degreaser. Assuming that the jury believed Det. Adler and Officer Stier and disbelieved Custer, the jury could have reasonably concluded that Custer purchased the degreaser and brought it into the garage with the intent to use it to manufacture methamphetamine. Because the jury could have reasonably concluded that Custer was guilty of possession of methamphetamine

precursors, we will not disturb its verdict. The evidence was sufficient to support Custer's conviction.

II.

At trial, the officers who had observed Custer and Mussehl in the garage opined that Custer and Mussehl were manufacturing methamphetamine. Custer argues that the question of whether he and Mussehl were manufacturing methamphetamine together was exclusively the province of the jury and that admission of the testimony constitutes plain error and requires a new trial. The district court did not rule on this issue, because Custer did not object to the admission of the testimony at trial.

Where a defendant fails to object to the admission of evidence, this court's review is under the plain-error standard. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To meet this standard, the defendant must show: "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). If those three requirements are met, we "may correct the error only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)).

Here, Custer argues that the district court improperly allowed the officers to give opinions as to the ultimate issue in the case, i.e., whether Custer and Mussehl were manufacturing methamphetamine together in the garage. But opinion testimony is not objectionable merely because it embraces an ultimate issue to be decided by the jury. Minn. R. Evid. 704; *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982). The

admission "of opinion evidence on ultimate issues rests largely in the discretion of the [district] court." *State v. McCarthy*, 259 Minn. 24, 31, 104 N.W.2d 673, 678 (1960). Regardless of whether it embraces an ultimate issue, opinion testimony must be helpful to the jury to be admitted. *See* Minn. R. Evid. 701 (stating that lay opinions must be "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue"); Minn. R. Evid. 702 (stating that expert opinions must "assist the trier of fact to understand the evidence or to determine a fact in issue"); *see also State v. DeShay*, 669 N.W.2d 878, 884 (Minn. 2003) (stating that the "ultimate question of admissibility" of expert testimony is whether the testimony will "help the trier of fact in evaluating evidence or resolving factual issues") (quotation omitted).[2]

Opinion evidence is helpful when it enhances "the jury's ability to reach conclusions about matters that are not within its experience." *DeShay*, 669 N.W.2d at 888 (addressing expert opinion evidence). Helpful opinion evidence is admissible even if it embraces the ultimate issue. *See State v. Bradford*, 618 N.W.2d 782, 793 (Minn. 2000) (holding that medical examiner's testimony that victim's death was a homicide "was helpful to the jury because a lay juror may not be able to differentiate between a self-inflicted intraoral gunshot wound and one inflicted by another"); *State v. Salazar*, 289 N.W.2d 755 (Minn. 1980) (citing rules 701 and 704 in holding that district court did not err in allowing prosecutor to ask whether defendant was defending himself when he

[2] Whether the officers' opinions were expert or lay is irrelevant because Minn. R. Evid. 704 applies to both expert and lay opinions. *See* Minn. R. Evid. 704 1977 comm. cmt. ("If the witness is qualified and the opinion would be helpful to or assist the jury as provided in rules 701–703, the opinion testimony should be permitted.").

stabbed the victim because "the purpose of the prosecutor's question was not to elicit a legal opinion on the issue of self defense—which would not have been helpful to the jury—but simply to elicit testimony as to whether the witness saw the victim do anything which prompted defendant to stab him").

On the other hand, ultimate-conclusion testimony that embraces legal conclusions or terms of art is not helpful to the jury. *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990); *see also* Minn. R. Evid. 704 1977 comm. cmt. ("In determining whether or not an opinion would be helpful or of assistance under these rules a distinction should be made between opinions as to factual matters, and opinions involving a legal analysis or mixed questions of law and fact."). Expert testimony is also not helpful "[i]f the jury is in as good a position to reach a decision as the expert." *Saldana*, 324 N.W.2d at 229; *see also State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980) (stating that expert testimony is not helpful if "the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions about that subject which is within their experience"). Nor is opinion testimony helpful when it "merely [tells] the jury what result to reach." *State v. Lopez-Rios*, 669 N.W.2d 603, 613 (Minn. 2003); *see also State v. Moore*, 699 N.W.2d 733, 736, 740 (Minn. 2005) (holding inadmissible the expert opinion of emergency-room doctor that victim's injury met the legal definition of "great bodily harm").

Here, three police officers observed Custer and Mussehl through the hole in the garage wall. After describing their observations to the jury, they all opined that the two men had been manufacturing methamphetamine. No officer offered a legal analysis or

conclusion—opining, for example, that Custer and Mussehl were guilty or that the conduct they witnessed met the legal standard for a crime. The officers' testimony may have come close to telling the jury what result to reach, but because the process of manufacturing methamphetamine is a matter of factual determination and is unfamiliar to most people, we conclude that the officers' opinions were helpful to the jury. The opinions assisted the jurors in making their decision whether or not what the officers observed through the hole was consistent with methamphetamine production. We therefore conclude that the district court did not abuse its discretion by admitting the officers' opinions.

III.

Custer also argues that the district court improperly admitted Karlsen's statement made on Deputy Grosland's cell phone, warranting a new trial. Deputy Grosland testified that while the officers waited for the fire department to arrive, Karlsen asked him if he could borrow the deputy's cell phone to call a friend to come and watch Karlsen's dog. The deputy testified that while Karlsen was talking on the cell phone, Karlsen said that "Ray [Custer] and Tom [Mussehl] got caught cooking" in the garage. At trial, the district court overruled Custer's objection and admitted the statement under Minn. R. Evid. 801(d)(2)(E).

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Rule 801(d)(2)(E) provides that a statement is not hearsay when it is offered against a party and is a statement made by a co-conspirator of the party.

> In order to have a coconspirator's declaration admitted, there must be a showing, by a preponderance of the evidence, (i) that there was a conspiracy involving both the declarant and the party against whom the statement is offered, and (ii) that the statement was made in the course of and in furtherance of the conspiracy.

Minn. R. Evid. 801(d)(2)(E). Here, Custer does not argue that the evidence does not show the existence of a conspiracy. Instead, he argues that the statement was not made in the course of and in furtherance of the conspiracy because the conspiracy ended when the police broke up the methamphetamine lab.[3] The state concedes that the conspiracy had just ended when Karlsen made his statement.

Although statements made by a co-conspirator after the conspiracy terminates are generally inadmissible, statements made "during the concealment phase of a conspiracy may be admissible under the co-conspirator exemption." *State v. Willis*, 559 N.W.2d 693, 699 (Minn. 1997). But "a conspiracy to conceal the commission of the charged crime may not be automatically implied to permit the use of hearsay statements made by co-conspirators." *State v. Buschkopf*, 373 N.W.2d 756, 764 (Minn. 1985), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 150, 110 S. Ct. 2301, 2315 (1990); *see also State v. Durante*, 406 N.W.2d 80, 84 (Minn. App. 1987) (refusing to apply co-conspirator exception where state made no showing of defendants' conspiracy to conceal

[3] The district court found that the state had shown by a preponderance of the evidence that a conspiracy existed but did not address whether the statement was made in the course or in furtherance of the conspiracy.

their involvement in a fire; conspiracy could not be extended to include statements made after the fire). "The proper approach is to analyze the facts of the case to determine if . . . there was an agreement to conceal, to determine the closeness in time of the concealment to the commission of the principal crime, and to determine the reliability of these statements." *State v. Davis*, 301 N.W.2d 556, 559 (Minn. 1981); *see also State v. Flores*, 595 N.W.2d 860, 866 (Minn. 1999) (stating that a reviewing court analyzes the admissibility of a co-conspirator's statement in the manner described in *Davis*).

Here, the district court did not determine that there was any conspiracy to conceal the manufacture of methamphetamine. Because there is no evidence that Karlsen's statement was made in the course of a conspiracy to conceal, the district court abused its discretion by admitting the statement.[4]

If the district court errs in admitting evidence, this court determines whether there is a reasonable possibility that the wrongfully admitted evidence significantly altered the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Id.* In completing such an analysis, the inquiry is not whether the jury could have convicted the defendant without the error but what effect the error had on the jury's verdict, "and more specifically, whether the jury's verdict is 'surely unattributable' to [the error]." *State v. King*, 622 N.W.2d 800, 811 (Minn. 2001) (quoting *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997)).

[4] Because we find that the statement was not made in the course of the conspiracy, we do not address whether the statement was made in furtherance of the conspiracy.

Here, Custer admitted to purchasing engine degreaser, admitted that he was in the garage while Mussehl was cooking the methamphetamine, gave statements to Det. Adler that conflicted with his trial testimony, and could not explain where the 55-gallon barrel came from if it was not in the garage when he arrived that evening. Given Custer's own testimony, the fact that Custer does not dispute that methamphetamine was being produced, the testimony of the four police officers who saw him standing close to Mussehl at various points in time, and the testimony of the officer who saw him holding either the torch or the beaker, the jury's verdict is surely unattributable to the admission of Karlsen's statement. We therefore conclude that although the district court abused its discretion by admitting the statement, such error does not require reversal.

IV.

The state makes several arguments that the district court abused its discretion in imposing a downward durational departure, including that Custer did not play a minor or passive role in the offense of manufacturing methamphetamine. We review a district court's departure from the sentencing guidelines for abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). In doing so, we must "examine the record to determine whether it supports the [district] court's stated reasons for a departure." *State v. Sebasky*, 547 N.W.2d 93, 100 (Minn. App. 1996), *review denied* (Minn. June 19, 1996).

Here, the district court imposed a 43-month sentence, a downward durational departure from the presumptive sentence of 86 months. In its departure report, the district court indicated that the reason for the downward departure was that Custer played

a minor or passive role in the offense. At sentencing, the district court stated that Custer "knew what was going on," and purchased items that could be used to manufacture methamphetamine. The district court found that Custer played a "minor and passive role" in the offense of manufacturing methamphetamine:

> [T]he police officers, essentially, did not see [Custer] doing anything. They saw him sitting next to the table, appearing to have been talking to the person who was cooking the meth. There's further evidence that [Custer] was able to come out of that garage or storage area immediately upon the police request. The other person who was actually cooking could not and there's no indication that he would have not cooperated but for his having a substance in his hand that would possibly explode[.] . . . There's no evidence of any fingerprints of . . . Custer around that area. And that is further evidence that the State was unable to prove that he was actively involved in the manufacturing of that methamphetamine.

A district court has broad discretion to depart from the presumptive sentence under the sentencing guidelines. *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993). But the district court must order the presumptive sentence provided in the sentencing guidelines unless the case involves "substantial and compelling circumstances" to warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *see also State v. Anderson*, 463 N.W.2d 551, 555 (Minn. App. 1990) (applying abuse-of-discretion standard in evaluating downward departure), *review denied* (Minn. Jan. 14, 1991). "[I]n exercising the discretion to depart from a presumptive sentence, the judge must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence." Minn. Sent. Guidelines II.D; *see also* Minn. Sent. Guidelines II.D.03 cmt. ("The aggravating or

mitigating factors and the written reasons supporting the departure must be substantial and compelling to overcome the presumption in favor of the guideline sentence."). Here, the district court found that Custer played a minor and passive role in the offense and disclosed this reason in writing and on the record. This is an acceptable reason for a downward departure. Minn. Sent. Guidelines II.D.2.a.(2).

Whether a defendant's role was relatively passive is within the province of the district court. *See State v. Wittman*, 461 N.W.2d 247, 249 (Minn. App. 1990). The state argues that the district court's conclusion is not supported by the evidence because Custer was seen holding either the beaker or the torch, Custer was seen holding white material in his hand, Custer purchased engine degreaser, and police officers testified that both Custer and Mussehl were manufacturing methamphetamine. The state also contests the district court's description of Custer 'sitting next to the table' because no witness testified that Custer was seated. We conclude that the district court's finding that "[t]he police officers, essentially, did not see [Custer] doing anything," is sound. The police saw Custer standing next to Mussehl while Mussehl heated the beaker with the torch. One officer saw Custer with a white material in his hand; another saw Custer holding the beaker or the torch. No witness saw Custer sealing the 55-gallon drum with paper towels, no witness saw Custer heating the beaker with the torch, and no witness saw Custer hand anything to Mussehl. The district court's statement that Mussehl was "actually cooking" the methamphetamine has support in the record: Mussehl was the only person seen heating the beaker with the torch, and he did not exit the garage immediately upon police request because he was holding a beaker that might explode.

The district court gave a valid reason for imposing the downward durational departure, and explained its reasoning. *See* Minn. Sent. Guidelines II.D.2.a.(2). The record supports the district court's conclusion. We therefore conclude that the district court did not abuse its discretion in determining that Custer played a minor or passive role in the offense of manufacturing methamphetamine.

Because the district court expressly found an appropriate reason for the downward departure, we decline to address the other reasons for the departure mentioned by the district court at sentencing. *See Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985) ("As long as the district court expressly finds, or the record contains, appropriate reasons for a departure, a district court's reliance on other improper reasons does not make the ultimate sentencing departure an abuse of discretion.").

Affirmed.