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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A16-2039**

State of Minnesota,
Respondent,

vs.

Amanda Kay Schrupp,
Appellant.

**Filed December 11, 2017**
**Affirmed**
**Rodenberg, Judge**

Benton County District Court
File No. 05-CR-15-2188

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Philip K. Miller, Benton County Attorney, Foley, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and Stan Keillor, Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Rodenberg, Judge.

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

**RODENBERG**, Judge

Appellant Amanda Kay Schrupp appeals from her convictions of aiding and abetting first-degree aggravated robbery and aiding and abetting first-degree burglary and her 144-

month sentence, arguing that (1) the district court plainly erred in instructing the jury on aiding and abetting, (2) the district court plainly erred when it did not bifurcate closing arguments, (3) the evidence was insufficient to prove that three or more persons actively participated in the robbery, and (4) the district court abused its discretion in imposing an upward sentencing departure. We affirm.

## FACTS

On November 13, 2015, at about 1:30 a.m., D.S. received a phone call from Chyvonne Lewis asking if she could come over to his St. Cloud apartment. D.S. had used crack cocaine with Lewis in the past and was planning to purchase crack cocaine to again smoke crack with Lewis on that date. D.S. did not have any money with him and told Lewis that he would need to go to an automated teller machine (ATM) but that it was too cold to walk there. Lewis said that she had a friend who could take them to an ATM. Lewis arrived at D.S.'s apartment alone. Around 2:54 a.m.,[1] appellant Amanda Kay Schrupp, whom D.S. had never met before, arrived to give D.S. and Lewis a ride to the ATM. The three of them talked for a little while, then appellant drove them to a bank. At 3:07 a.m., D.S. withdrew $540 from the ATM, intending to buy $50 worth of crack cocaine and to use the rest of the money to pay his rent. Then, D.S., Lewis, and appellant went to

[1] D.S.'s apartment building had a number of security cameras that captured, in a time-stamped recording, events occurring outside the front door, in between the front door and the security entrance, in the lobby, and in the elevator lobbies of each floor. The ATM recorded the exact time of the cash withdrawal. Investigators also obtained the cell phone records of the individuals involved by way of search warrants. This combined evidence allows uncommon precision concerning the facts of this case.

a gas station, where D.S. bought some cigarettes and a few sodas, before going back to D.S.'s apartment.

When the threesome arrived by car outside of D.S.'s apartment building, D.S. gave appellant $50 and appellant gave Lewis a bag of crack cocaine. D.S. and Lewis then returned to D.S.'s apartment at 3:19 a.m. Appellant was not with them. In the apartment, D.S. and Lewis smoked the crack cocaine and D.S. played poker on his computer while Lewis used her cell phone. At 4:01 a.m., Lewis left D.S.'s apartment building, returning about five minutes later in a dark-colored vehicle; she got out of the passenger side of the vehicle, and went up to D.S.'s apartment. At 5:21 a.m., Lewis, with a bag in her hand, again left D.S.'s apartment and walked to the elevator. Her hood was up around her face. While in the elevator, Lewis was pacing and fidgeting; she then walked out of the apartment building at 5:23 a.m.

Appellant's cell phone records indicate that she was in frequent contact with Orlando Johnson while Lewis was in D.S.'s apartment. At 5:01 a.m., Johnson placed a phone call to appellant, lasting about two and a half minutes, and appellant called Johnson at 5:12 a.m. and talked for just under one minute. Appellant also placed a call to Johnson at 5:25 a.m. that lasted about five minutes.

Lewis returned to the apartment building with appellant around 5:27 a.m. The two women were passing a cell phone back and forth as they waited at the security entrance. According to appellant's cell phone records, her 5:25 a.m. phone call to Johnson was still ongoing at this time. At 5:30 a.m., appellant and Lewis entered the ordinarily secured entrance as "an unidentified" man left the building. They took the elevator to the third

floor, where D.S.'s apartment was, while appellant continued to talk on the cell phone. At 5:31 a.m., appellant sent a text message to Johnson. She then called Johnson at 5:33 a.m., and they talked for about one minute. D.S. testified that appellant provided more crack cocaine when she came back to his apartment, but that he did not pay for it and assumed that Lewis had fronted the money for it. D.S. admitted that he smoked a little bit of methamphetamine with appellant during this time.

At approximately 5:39 a.m., Lewis left D.S.'s apartment after saying that she needed to deliver a bag of crack cocaine to another apartment in the building and that she would be back. D.S. locked the apartment door behind her. After leaving D.S.'s apartment, Lewis got onto the elevator and rode it down to the lobby. Also around 5:39 a.m., the apartment security cameras recorded Johnson walking into the apartment building with his hood up and the bottom half of his face covered. Johnson called appellant at 5:40 a.m., then Lewis left the apartment building through the security door, which allowed Johnson to enter the building. The two did not appear to interact. Johnson took the elevator up to D.S.'s floor, looking at his phone the entire time, and got off the elevator at 5:41 a.m. Johnson remained near the elevator for a few minutes, exchanging phone calls and text messages with appellant; his face was still covered. At 5:44 a.m., Johnson walked down the hall to D.S.'s apartment.

During all of this, appellant and D.S. remained in D.S.'s apartment. Appellant then unlocked the apartment door and looked down the hallway. D.S. asked appellant what she was doing, and she responded that she thought she heard Lewis coming back. D.S. testified

that he attempted to shut the door and lock it, but as he was grabbing the handle, Johnson entered the apartment.

D.S. had met Johnson in the summer of 2015 when Johnson was introduced to him as Lewis's cousin. Johnson had sold D.S. some crack cocaine, for which D.S. still owed Johnson $150 as of November 13. D.S. had given his laptop to Johnson as security for the debt. He later sent Johnson a text message telling him to keep the laptop as payment for the debt. Later that summer, Johnson approached D.S. outside of a bar, grabbed D.S.'s shirt, demanded the money, and tried to hit D.S. D.S. ran across the street and Johnson drove off. D.S. remained afraid of Johnson after that incident. D.S. testified that he had no knowledge that Johnson would be coming to his apartment on November 13, 2015, and that he would not have let Johnson enter his apartment. But appellant unlocked the apartment door, which allowed Johnson to enter.

Johnson punched D.S. in the left side of the face with a closed fist. D.S. backed away from Johnson into his bedroom as Johnson came at him with an arm extended. D.S. continued to back away until he was in the bathroom, backed against the sink and the mirror. Johnson forced D.S.'s head against the mirror, scratched D.S.'s face with an object, and stuck the object into D.S.'s mouth. D.S. testified that, while he did not get a good look at the object, he thought it was a gun. It had a rounded end and he could feel metal against his teeth. According to D.S., he was shoved up against the mirror for about three to five minutes and the object was shoved under his tongue, cutting off his air flow. He felt like was going to throw up and thought he was going to die.

While forcing D.S. against the mirror, Johnson said something about the payment of debts, which D.S. believed was in reference to the money he owed Johnson. D.S. testified that, during this altercation, appellant was standing immediately outside of the bathroom. He further testified that appellant told Johnson that D.S.'s wallet was in D.S.'s front right pocket and made a comment about how D.S. never pays his debts. Appellant did not tell Johnson to stop what he was doing and did not otherwise question or interfere with what was happening. D.S. testified that appellant did not seem to be surprised by what was taking place. Johnson reached into D.S.'s pocket, took D.S.'s wallet, and removed the object from D.S.'s mouth. While D.S. was trying to catch his breath, Johnson went into the kitchen, broke D.S.'s cell phone, and took D.S.'s tablet, a pack of cigarettes, and some medication.

D.S. testified that appellant left his apartment first, followed closely by Johnson with the wallet and other things. This was confirmed by appellant's cell phone records and the apartment security video. At 5:47 a.m., Lewis sent appellant a text saying "come." At 5:48 a.m., video surveillance recorded appellant walking briskly towards the elevator. However, when the elevator opened, appellant did not enter it but continued to look down the hallway towards D.S.'s apartment. Johnson left D.S.'s apartment, his face covered with a scarf, and walked to meet appellant at the elevator where they both got on, rode it down, and left the apartment building. Lewis never returned to the apartment. D.S. called the police about five minutes after appellant and Johnson left.

Appellant's version of the events leading up to her return to D.S.'s apartment after Lewis called her for more crack cocaine was mostly consistent with D.S.'s. Appellant

testified that, as she was heading back to D.S.'s apartment, she called Johnson and asked him to bring more drugs to that apartment. She did not tell D.S. who was coming; instead, she told him that her drug dealer would be coming. When appellant told Johnson where she was, Johnson told her that D.S. owed her money. Appellant also testified that, when Lewis left D.S.'s apartment to deliver a bag of crack cocaine elsewhere in the building, Lewis was also planning to let Johnson into the secured entrance to the building.

Appellant testified she was standing by D.S.'s apartment door waiting for Lewis to come back with Johnson, as planned. During this time, appellant testified that she was on the phone with Johnson and that Johnson was angry because Lewis enabled D.S. to spend his money on drugs instead of paying his old debt to Johnson. Appellant testified that, when Johnson arrived at the apartment, he asked D.S. if D.S. had something for him. D.S. said no. She testified that she then left because she saw that Johnson was mad, knew he has a temper, and the situation was none of her business. She testified that she did not know what was going to happen. Appellant testified that she started going back to D.S.'s apartment to get Johnson, but by that time Johnson was already coming down the hallway. She did not think anything bad had happened because Johnson told her that D.S. gave him the money. Appellant testified that she had her hood up because it was cold, not because she was trying to conceal herself.

On cross-examination, appellant admitted to having a lot of phone contact with Johnson before the incident at D.S.'s apartment. Appellant testified that she waited for Johnson before leaving the apartment building because she needed more drugs from him.

But she agreed with the prosecutor that she would not have needed to wait for Johnson before leaving because they drove separately.

Appellant's cell phone records reveal that, from about 9:21 a.m. that morning until 8:50 p.m., appellant had 28 contacts with Johnson and ten contacts with a person listed as "Shavon." Everything on the phone from before 9:21 a.m. had been deleted. The explanation for all of these phone calls and text messages was that a lot of communication is needed to complete drug deals. Appellant was arrested around 8:50 p.m. on November 13, 2015. As she was being arrested, appellant received a phone call from "O. Johnson."

A jury found appellant guilty of two counts of aiding and abetting first-degree aggravated robbery and one count of aiding and abetting first-degree burglary. The jury also answered a special interrogatory that, as an aggravating factor for sentencing, the robbery had been committed by three or more active participants. On the day of her sentencing hearing, appellant pleaded guilty to a controlled-substance crime arising from the same incident. Based on the jury finding of an aggravating factor, the attorneys agreed to recommend a 12-month upward departure and, as part of the agreement, the state agreed not to seek a greater upward departure. The district court sentenced appellant to 144 months in prison for her convictions of aiding and abetting first-degree aggravated robbery and aiding and abetting first-degree burglary.

This appeal followed.

## D E C I S I O N

### I. The district court did not err in its aiding-and-abetting instruction to the jury.

Appellant first contends that the district court plainly erred by instructing the jury that appellant could be guilty of aiding and abetting if she "knew her alleged accomplices were going to or were committing a crime." Specifically, appellant argues that foreknowledge is required to prove the knowledge element of aiding and abetting, so the language "or were committing" in the instruction misstated the law.

Because appellant did not object to the aiding-and-abetting instruction at trial, we review the instruction for plain error. *See State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) ("[W]e review the unobjected-to jury instructions for plain error."). "Under the plain-error doctrine, the appellant must show that there was (1) an error; (2) that is plain; and (3) the error affected substantial rights." *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). An error is plain when it is "clear or obvious," and an error is clear or obvious when it "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). If appellant meets the burden of showing the three elements of plain error, "we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Huber*, 877 N.W.2d at 522 (quotation omitted).

This issue is resolved by our recent decision in *State v. Smith*, 901 N.W.2d 657 (Minn. App. 2017), *review denied* (Minn. Nov. 14, 2017). The jury instruction given in *Smith* was nearly identical to the instruction at issue here: "The jury was instructed that a defendant's presence constitutes aiding if the defendant knew her alleged accomplices were

going to or were committing a crime and intended that her presence and actions aid the commission of the crime." *Id.* at 660 (quotation marks omitted). We held that a defendant need not have knowledge of an accomplice's criminal intent before the crime commences; rather, criminal liability for aiding and abetting "require[s] a defendant to possess knowledge of the crime *before the defendant intentionally aids in its commission*." *Id.* at 662. "A defendant who acquires the requisite knowledge while the accomplice is in the process of committing the offense, and makes the choice to aid in its commission either through her presence or her actions, is guilty as an accomplice under the plain language of Minn. Stat. § 609.05." *Id.*

*Smith* clarifies that the required "foreknowledge" of a crime for accomplice-liability purposes need only exist *before the defendant intentionally provides aid*. Accordingly, the district court did not err by instructing the jury that appellant could be found guilty if she "knew her alleged accomplices were going to or were committing a crime" and that she "intended that her actions aid the commission of the crime."

**II. The district court did not plainly err by not bifurcating closing arguments.**

Appellant next argues that the district court erroneously failed to order, or give appellant a chance to request, bifurcated arguments on the aggravating factor that three or more persons actively participated in the robbery and burglary. Appellant concedes that her failure to challenge the procedure at the district court requires us to apply a plain-error standard of review.

"Under the plain-error doctrine, the appellant must show that there was (1) an error; (2) that is plain; and (3) the error affected substantial rights." *Huber*, 877 N.W.2d at 522.

"Plain error affects a defendant's substantial rights if 'there is a reasonable likelihood that the error[] had a significant effect on the jury's verdict.'" *State v. Bustos*, 861 N.W.2d 655, 663 (Minn. 2015) (quoting *State v. Vang*, 847 N.W.2d 248, 261 (Minn. 2014)). Put differently, plain error affects a defendant's substantial rights when the jury would have had to conclude that the state had not proved the fact in question—here, the aggravating factor—beyond a reasonable doubt. *State v. Kelley*, 832 N.W.2d 447, 457 (Minn. App. 2013). Plain error does not affect a defendant's substantial rights when, "[g]iven the totality of the evidence, it seems unlikely that the jury would have reached a different verdict." *State v. Gomez*, 721 N.W.2d 871, 881 (Minn. 2006).

We need not address whether the district court erred or whether any error was plain, because it is evident from the record that appellant's substantial rights were not affected by the order of trial in any event. The evidence overwhelmingly established that three people were actively involved in this crime. The jury concluded that appellant was guilty of aiding the burglary and robbery. And Lewis was, if anything, *more* involved in the crime than was appellant. Lewis had frequent phone contact with Johnson, had knowledge of D.S.'s debt to Johnson, was related to Johnson, and she opened the security entrance for Johnson at the precise time that Johnson arrived to commit the armed robbery. Having concluded beyond a reasonable doubt that appellant was an accomplice to Johnson's crime, the jury would certainly have concluded that Lewis was also a participant, regardless of how the arguments were ordered and made. Bifurcating the arguments on the aggravating factor would not have changed anything. Appellant's substantial rights were unaffected.

## III. There is sufficient evidence in the record to support the jury's finding that three or more persons actively participated in the offenses.

Appellant next argues that the record contains insufficient evidence to prove beyond a reasonable doubt that three or more persons actively participated in the burglary and robbery. Specifically, appellant argues that the state presented no direct evidence that Lewis actively participated in the crimes.

In considering a claim of insufficient evidence, our review is limited to a thorough analysis of the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict that they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court 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). The appellate court will not disturb the verdict if the factfinder, "acting with due regard for the presumption of innocence and for the necessity of overcoming it by 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).

Direct evidence "proves a fact without inference or presumption." *Bernhardt*, 684 N.W.2d at 477 n.11. In contrast, "circumstantial evidence always requires an inferential step to prove a fact that is not required with direct evidence." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017). The conclusion that Lewis participated in Johnson's crimes depends on circumstantial evidence, because the jury was required to infer whether Lewis intended to aid Johnson from the evidence presented. "[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). However, "[w]hile 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). When the verdict is the result of circumstantial evidence, it "will be upheld if the reasonable inferences from such evidence are consistent only with the defendant's guilt and inconsistent with any rational hypothesis except that of his guilt." *Webb*, 440 N.W.2d at 430. In other words, 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 that of guilt." *Jones*, 516 N.W.2d at 549 (quotation omitted).

In applying the circumstantial-evidence standard, a reviewing court uses a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, we "determine the circumstances proved, giving due deference to the fact-finder and construing the evidence in the light most favorable to the verdict." *State v. Sam*, 859 N.W.2d 825, 833 (Minn. App. 2015) (citing *Silvernail*, 831 N.W.2d at 599). Second, the reviewing court "determine[s] whether the circumstances proved are consistent with guilt and inconsistent with any other rational or reasonable hypothesis." *Id.* This part of the analysis gives "no deference to the fact finder's choice between reasonable inferences." *Silvernail*, 831 N.W.2d at 599.

Under the first step of the circumstantial-evidence test, we determine the circumstances proved, construing the evidence in the light most favorable to the verdict. Here, those circumstances include Lewis's drug use with D.S., her knowledge that D.S.

had cash with him, Lewis's knowledge of D.S.'s debt to Johnson, Lewis's frequent phone contacts with Johnson where she learned that Johnson was mad at her for not telling him that D.S. had money, and Lewis's plan to let Johnson into the apartment building. Lewis actually left through the security entrance at the very time that Johnson was arriving to allow him entry. This occurred after Lewis told D.S. that she was going to deliver drugs to another apartment.

Moving to the second step, we consider whether the circumstances are consistent only with guilt and inconsistent with any other rational or reasonable hypothesis. While appellant asserts that a reasonable hypothesis could be that Lewis was continuing to use and deal drugs, the overall circumstances proved are inconsistent with that conclusion. Although Lewis told D.S. that she was going to drop off some drugs elsewhere in the building, she left the building entirely and did not return. Lewis's misrepresentation to D.S. about where she was going, and her not having returned to use the drugs that appellant claims both she and Lewis believed Johnson was bringing, are inconsistent with a hypothesis that Lewis was merely engaged in drug using and dealing without any knowledge of Johnson's violent intentions. This is further evidenced by the fact that, instead of returning to D.S.'s apartment, Lewis texted appellant telling appellant to "come" while the assault was taking place. The circumstantial evidence here leads directly and surely to the conclusion that Lewis intended to actively participate in the robbery and burglary, and renders unreasonable any hypothesis that Lewis was merely continuing to use and deal drugs and was not involved in Johnson's crimes. The jury's finding that the

crime was committed by three or more active participants is adequately proved by the circumstantial evidence.

## IV. The district court acted within its discretion in imposing an upward durational departure.

Appellant also argues that the district court abused its discretion in imposing an upward durational departure during sentencing, which appellant alleges (1) was improperly based on a plea agreement in another case and (2) lacked explanation as to why the participation of three or more persons was a substantial and compelling reason to depart.

"We 'afford the [district] court great discretion in the imposition of sentences' and reverse sentencing decisions only for an abuse of that discretion." *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quoting *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999)). "A district court abuses its discretion when its reasons for departure are improper or inadequate." *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017).

The question of whether a stated reason for departure is proper is a legal issue. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). "Once we determine as a matter of law, that the district court has identified proper grounds justifying a challenged departure, we review its decision *whether* to depart for an abuse of discretion." *Id.* This review is "extremely deferential." *Id*. at 596. "If the reasons given for an upward departure are legally permissible and factually supported in the record, the departure will be affirmed." *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015).

Appellant's argument proceeds on the faulty premise that the district court departed from the guidelines based on the parties' agreement to a sentence outside the guidelines'

range. The record contains considerable discussion about the 144-month sentence as an agreement. But when taken fully in context, it is clear that the upward durational departure was *not* based on the plea agreement from appellant's other case. The state provided notice of intent to seek an aggravated sentence based on appellant having committed the crime as part of a group of three or more active participants. The jury then found this aggravating factor proved at trial. It was after this jury finding that the parties agreed to each argue for a 144-month sentence as the *appropriate departure*. Appellant's own counsel advocated for that sentence. Appellant, facing a possible sentence of up to 240 months in light of the jury's aggravating-factor finding, benefitted from the state's agreement to limit its sentencing request to 144 months.

When the district court imposed the sentence, it expressed that "[t]he sentence includes an upward durational departure which is based upon the fact that you committed the crime as part of a group of three or more offenders who all actively participated in the crime." The district court relied on an aggravating factor that was found by the jury and is listed in both Minn. Stat. § 244.10, subd. 5a(10) (2014), and Minn. Sent. Guidelines II.D.3b(10) (2015) as the basis for its upward durational departure. The district court had a proper basis for the upward durational departure and acted within its discretion in sentencing appellant as it did.

**Affirmed.**