STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1533

State of Minnesota,
Respondent,

vs.

Deangelas Demoyne Cook,
Appellant.

Filed August 5, 2019
Affirmed
Worke, Judge

Blue Earth County District Court
File No. 07-CR-16-192

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Patrick R. McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jodi Proulx, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Cochran, Judge.

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

WORKE, Judge

Appellant challenges his controlled-substance convictions arguing that: (1) the district court judge should have been disqualified; (2) the district court erred by allowing a witness to testify about matters for which he lacked personal knowledge; (3) the district court denied him his right to testify and present a complete defense; (4) he is entitled to a new *Blakely* proceeding because the district court permitted improper expert testimony; and (5) he should be resentenced under the Drug Sentencing Reform Act (DSRA). We affirm.

FACTS

In January 2016, Agent Smith of the Minnesota River Valley Drug Task Force arranged for a confidential informant (CI) to purchase methamphetamine from appellant Deangelas Demoyne Cook. The CI arranged to meet Cook at a gas station to purchase 14 grams of methamphetamine for $900.

Officers gave the CI $900 in cash and searched both the CI and her vehicle. Cook arrived at the gas station, the CI gave him the $900, and Cook placed a red plastic baggie containing methamphetamine in the center column of the CI's vehicle. Cook then left the gas station. Agent Smith approached the CI's vehicle and retrieved the red plastic baggie.

Cook was arrested and charged with first- and second-degree sale of methamphetamine, Minn. Stat. §§ 152.021, subd.1(1), .022, subd. 1(1) (2014). The state later amended the complaint to add a second-degree drug-possession charge, Minn. Stat. § 152.022, subd. 2(a)(1) (2014).

Cook was tried and convicted of first- and second-degree controlled-substance sale, and found not guilty of the possession charge. Following the conclusion of trial, a *Blakely*[1] proceeding was held, wherein the jury found that Cook was a danger to public safety, pursuant to Minn. Stat. § 609.1095, subd. 2(2) (2014). Based on the jury's finding, the district court sentenced Cook to an upward departure of 250 months in prison.

Cook appealed, and this court reversed and remanded due to prosecutorial misconduct that occurred during closing argument. *State v. Cook*, No. A16-1275, 2017 WL 3013217, at *3 (Minn. App. July 17, 2017). This court also held that the district court erred in admitting prejudicial material during the *Blakely* proceeding. *Id*. at *4.

On remand, Cook moved to disqualify the district court judge, asserting that the judge was not impartial because in 2007, Cook's cousin was convicted of attempting to hire someone to kill the judge. The chief judge of the district court denied the motion, concluding that a reasonable person with full knowledge of the facts would not question the district court judge's impartiality.

In April 2018, a jury found Cook guilty of first- and second-degree controlled substance sale and second-degree possession. In the *Blakely* proceeding, the jury found that Cook is a danger to public safety, and the district court sentenced him to an upward departure of 250 months in prison. This appeal followed.

[1] "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004) (quotation omitted).

D E C I S I O N

Motion to disqualify

Cook argues he is entitled to a new trial because the district court judge should have been disqualified. "A judicial officer's authority to conduct a trial is a legal question that we review de novo." *State v. Irby*, 848 N.W.2d 515, 5178-18 (Minn. 2014).

"A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." Minn. Code Jud. Conduct Rule 2.11(A). "A judge is disqualified for a lack of impartiality under Rule 2.11(A) if a reasonable examiner, from the perspective of an objective layperson with full knowledge of the facts and circumstances, would question the judge's impartiality." *Troxel v. State*, 875 N.W.2d 302, 314 (Minn. 2016) (quotations omitted).

Cook argues that the threats made by his cousin against the district court judge warrant disqualification. Cook relies on *In re Nettles*, 394 F.3d 1001 (7th Cir. 2005), and *U.S. v. Greenspan*, 26 F.3d 1001 (10th Cir. 1994), for the proposition that genuine threats against a judge are sufficient to warrant disqualification, but both cases are distinguishable.

In *Nettles*, the petitioner was charged with attempting to destroy the courthouse in which he was to be tried. 394 F.3d at 1002. Nettles moved, at the outset of his proceedings, to recuse the assigned judge and all the other judges of the district court on the ground that the plot involved a threat to their safety. *Id*. The Seventh Circuit held that because the threat was genuine and not motivated by a desire to recuse, recusal was required. *Id.*

The same was true in *Greenspan*. In that matter, the district court judge was aware that the F.B.I. was investigating claims that Greenspan had conspired to kill the judge or

his family members, and expedited the sentencing hearing and denied Greenspan's motion for a continuance in order to get him into the federal penitentiary immediately. *Greenspan*, 26 F.3d at 1005. The Tenth Circuit held that "where there is no inference that the threat was some kind of ploy, the judge should have recused himself . . . . Had there been any reason to believe that threats were made only in an attempt to obtain a different judge . . . recusal would not have been warranted." *Id*. at 1006.

Here, unlike in *Nettles* and *Greenspan*, there was no genuine threat made by Cook that would warrant disqualification. Rather, Cook relied on the ten-year-old threat made by his cousin only for the purpose of effecting disqualification. Furthermore, Cook waited until the matter had been tried, sentenced, appealed, and remanded for a new trial before attempting to disqualify the district court judge. "The law is well settled that one must raise the disqualification of the judge at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." *U.S. v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976).[2] Cook's disqualification motion was not based on a genuine threat to the district court judge's safety, which could call into question the judge's impartiality in an objective layperson's mind, but rather upon a ten-year-old threat made by another with the sole purpose to effect removal. Therefore, the district court did not err in denying Cook's disqualification motion.

[2] Because Cook relies exclusively on federal caselaw, the federal standard is supplied.

Admission of evidence

Cook argues that the district court erred in admitting portions of Agent Smith's testimony. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017).

Cook argues that Agent Smith lacked personal knowledge regarding: the search of the CI and her vehicle prior to the controlled buy; Cook's arrest and the recovery of the buy money from his person; and the packaging of the methamphetamine recovered from the CI's vehicle prior to its delivery to the Bureau of Criminal Apprehension (BCA) for analysis. Because Agent Smith lacked personal knowledge regarding these events, Cook asserts that the district court abused its discretion by admitting Agent Smith's testimony and supporting exhibits.

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Minn. R. Evid. 602. The state concedes, and the record shows, that Agent Smith lacked personal knowledge regarding the recovery of the buy money and the search of the CI's person prior to the controlled buy, and thus the district court abused its discretion in admitting this evidence.

The district court sustained two of Cook's objections regarding the search of the CI's vehicle, and then Agent Smith testified that "we as agents will go out and conduct a

search of the vehicle to ensure that there is nothing that [is] either illegal contraband or money that could contaminate the investigation." This is a general description of the department's procedures and does not affirmatively indicate whether contraband was found, only that the agents acted in accordance with the procedure. Because the admitted statement refers only to Agent Smith's own knowledge, its admission was not an abuse of discretion.

Regarding the seizure and preparation of the methamphetamine for BCA analysis, Agent Smith testified that he personally removed the package of methamphetamine left by Cook from the center console of the CI's vehicle. Agent Smith then testified that he removed the methamphetamine from its original red packaging and weighed it. Regarding the intermediary step between his weighing of the methamphetamine and its delivery to the BCA for analysis, Agent Smith testified as follows:

> Q: Do you know who put this item into evidence?
> A: Generally we initial -- it is quite common that when we process evidence we will do it as -- a team -- as a unit -- so it will be numerous agents within the drug task force. This particular seal[] has [the initials] CR which I would believe that to be Agent Ruch who packaged this, but it would have been under my direction and my control at that time.
> Q: And you don't have any reason to believe that anything was done improperly?
> A: No, not [at] all.
> Q: In fact you sent this up to the BCA and you later received a report back [from] the BCA indicating that they had tested the substance here?
> A: Yes.

Cook argues that because Agent Ruch did not testify at trial, Agent Smith's testimony was insufficient to establish a chain of custody, and thus the district court abused its discretion in admitting the methamphetamine into evidence.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). "Admissibility should not depend on the prosecution negativing all possibility of tampering or substitution, but rather only that it is reasonably probable that tampering or substitution did not occur." *State v. Bailey*, 677 N.W.2d 380, 394 (Minn. 2004) (quotation omitted).

Here, the CI testified that she gave Cook $900 and he placed a red plastic bag of methamphetamine in the center column of her car. Agent Smith testified that he removed the red plastic bag from the CI's center console and weighed its contents, which were then sealed in an evidence bag bearing the initials C.R. Finally, the BCA lab analyst testified that the methamphetamine arrived in a sealed bag that did not appear to have been tampered with. While Agent Ruch did not testify, "the fact that everyone who handled the evidence did not testify is not fatal to establishment of a chain of custody." *State v. Bellikka*, 490 N.W.2d 660, 664 (Minn. App. 1992), *review denied* (Minn. Nov. 25, 1992). Because Cook did not introduce any evidence indicating that the methamphetamine had been tampered with or substituted, the district court did not abuse its discretion by admitting the methamphetamine into evidence.

Because the district court abused its discretion by admitting Agent Smith's testimony regarding the recovery of the buy money from Cook upon his arrest and regarding the search of the CI's person prior to the controlled buy, Cook maintains that he is entitled to a new trial. "[T]he appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *Amos*, 658 N.W.2d at 203. "[I]f there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted, then the error in admitting the evidence was prejudicial error." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994).

Cook concedes, and the record shows, that the CI's testimony alone was sufficient to convict him. *See State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010) ("a conviction may be based on a single person's testimony"). However, Cook argues that the CI equivocated in her identification of him as the seller, making that testimony insufficient as an independent basis to support the conviction. Cook relies on the following exchange from the CI's testimony:

> Q: Do you have any doubt in your mind whatsoever that the person who sold you the methamphetamine was Mr. Cook?
> A: Um, I thought about this since last time I testified and it -- there isn't much doubt but there could be a doubt on the count that it was very dark in my vehicle . . . .
> . . . .
> Q: It was Mr. Cook wasn't it?
> A: Yes, I was just saying I did not see his face clearly when --

While this portion of the CI's testimony arguably casts doubt on her identification of Cook, the remainder of her testimony removes that doubt. On redirect examination, the CI testified:

Q: You didn't forget the fact that the defendant sold you methamphetamine?
A: No, I didn't.

Therefore, the district court's erroneous admission of portions of Agent Smith's testimony was not prejudicial, and Cook is not entitled to a new trial on this basis.

Right to complete defense

Cook argues that the district court denied him his right to present a complete defense. A criminal defendant is guaranteed a constitutional right to present a meaningful defense. U.S. Const. amend. VI; Minn. Const. art. I, § 6. "That right, however, is not unlimited. Evidence that is repetitive . . . only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues may be excluded." *State v. Greer*, 635 N.W.2d 82, 91 (Minn. 2001) (citation and quotations omitted). Appellate courts review this evidentiary issue for an abuse of discretion, and any abuse of that discretion is reviewed under a harmless-error analysis. *Id*.

Prior to Cook's testimony, the prosecutor stated: "I am concerned that [Cook] may try to get into irrelevant matters that are not associated with the present drug sale, and I would ask the [c]ourt to warn [Cook] that is irrelevant and that he should not go into that." The state also moved the district court to exclude any testimony regarding the prior trial and appeal. Cook did not make a formal offer of proof[3] regarding his testimony, but did indicate that he proposed to "present a defense of perceived bias against him by the task

[3] Cook attempted to make an offer of proof regarding his proposed testimony after both sides rested and the district court instructed the jury on the law. The district court declined to hear the offer of proof, because the evidentiary phase of the trial had concluded.

force and other[s] involved." The district court ruled: "I have previously warned Mr. Cook and I will warn him again, he will not talk . . . about anything other than this trial . . . there is no evidence of [bias] . . . his testimony will only . . . respond to questions asked by his counsel . . . if he does not [the state] can object." Cook then waived his right to testify.

Cook argues that the district court's ruling prevented him from testifying to bias, and therefore, prevented him from presenting a meaningful defense. Under the rules of evidence, "[f]or the purpose of attacking the credibility *of a witness*, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." Minn. R. Evid. 616 (emphasis added). Cook did not propose to testify to the bias of any of the state's witnesses, therefore rule 616 is inapplicable.

Because Cook did not provide an offer of proof until after the close of the evidentiary portion of the trial, which the district court denied, the record on appeal indicates that the state moved to exclude only "irrelevant" testimony unrelated to the drug sale at issue, which the district court appropriately granted. *See* Minn. R. Evid. 402 ("Evidence which is not relevant is not admissible."). The district court also appropriately limited Cook's responses to questions from his attorney. *See* Minn. R. Evid. 611(a) ("The [district] court shall exercise reasonable control over the mode and order of interrogating witnesses . . . ."). The district court's ruling specifically provided that individual objections to his testimony would be addressed as they arose. Accordingly, the district court did not abuse its discretion, and Cook was not prevented from presenting a meaningful defense.

Blakely

Cook argues that he is entitled to a new *Blakely* trial because the district court erred in allowing Agent Smith to testify as an unqualified, unnoticed expert witness. In the alternative, Cook argues that Agent Smith's testimony should have been excluded as irrelevant and therefore prejudicial. This court reviews rulings related to the admissibility of expert testimony for an abuse of discretion. *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016).

Cook argues that Agent Smith provided opinion testimony beyond the scope of his personal knowledge, and therefore, testified as an expert witness. *Compare* Minn. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."), *with* Minn. R. Evid. 702 (stating that if specialized knowledge will assist the trier of fact, "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise"). A lay witness may provide opinion testimony only when: "(a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Minn. R. Evid. 701.

The state initially asked Agent Smith to testify to "some of the dangers, based on [his] training and experience of illegal controlled substance[s] in the community[.]" Following Cook's objection that this called for unnoticed and unqualified expert testimony, the state rephrased its question, asking: "during your time when you enforced the drug laws

of the State of Minnesota, did you have an opportunity to observe how the [il]legal drug trade affected the community?"

As rephrased, instead of asking Agent Smith about the generalized dangers of illegal drugs, the state asked Agent Smith to testify to his personal observations of the impact of illegal drugs upon the community. Similarly, the state asked him, based upon his own knowledge, if people have overdosed to the point of death in the community. Because Agent Smith was asked to testify only to matters of his own knowledge and observation, he did not provide expert testimony. *See State v. Ards*, 816 N.W.2d 679, 683 (Minn. App. 2012) (stating that the specialized training and experience of an officer does not convert their testimony based upon personal observations into expert testimony).

Cook also objected to Agent Smith's opinion testimony on redirect regarding Cook's status as a "major drug dealer." However, Cook raised the issue of his status as a "distributor" on Agent Smith's cross-examination. In questioning why the state chose to prosecute Cook instead of the CI, Cook's attorney asked Agent Smith: "because you made a judgment call that [the CI] was more of [a] user than a distributor, you chose to let her go?" Cook therefore opened the door to the issue of who constituted a larger threat to the community, the drug user or the drug dealer? "[D]istrict courts may permit inquiring into underlying facts when the defendant opens the door. Opening the door occurs when one party by introducing certain material . . . creates in the opponent a right to respond with material that would otherwise have been inadmissible." *State v. Guzman*, 892 N.W.2d 801, 814 (Minn. 2017) (quotations omitted). Therefore, the district court did not abuse its

discretion in overruling Cook's objection that Agent Smith provided unnoticed, unqualified expert witness testimony.

Cook also argues that Agent Smith's testimony at the *Blakely* hearing should have been excluded as irrelevant to the ultimate issue of whether he was a dangerous offender within the meaning of Minn. Stat. § 609.1095, subd. 2. Cook did not object to Agent Smith's testimony on the basis of relevance. "Failure to object to the admission of evidence generally constitutes waiver of the right to appeal on that basis . . . However, an appellate court may consider a waived issue if there is (1) error, (2) that is plain, and (3) the error affects the defendant's substantial rights." *State v. Vick*, 632 N.W.2d 676, 684-85 (Minn. 2001) (citation omitted).

The only issue in the *Blakely* proceeding was whether Cook constituted a "danger to public safety." The statute provides that "[t]he fact finder *may* base its determination that the offender is a danger to public safety on the following factors: (i) the offender's past criminal behavior . . . or (ii) the fact that the present offense of conviction involved an aggravating factor that would justify a durational departure . . . ." Minn. Stat. § 609.1095, subd. 2(2) (emphasis added).

Cook argues that because the state did not seek to prove the existence of an aggravating factor justifying a durational departure, the only relevant issue was Cook's criminal history. This argument, however, ignores the use of the permissive word "may" in the statute. *See* Minn. Stat. § 645.44, subd. 15 (2018) ("'May' is permissive."). Because the jury's consideration of whether Cook constituted a danger to public safety is not

statutorily constrained to the enumerated factors, as Cook argues, the district court did not plainly err in failing to exclude Agent Smith's testimony on the basis of relevance.

Sentence

Cook argues that the district court erred by sentencing him to 250 months in prison, because it is more than double the presumptive sentence under the DSRA. *See* 2016 Minn. Laws ch. 160. "[I]nterpretation of the sentencing guidelines [is] subject to de novo review . . . . We apply the rules of statutory construction to our interpretation of the sentencing guidelines." *State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012) (citation omitted).

The state concedes that Cook should have been sentenced in accordance with the DSRA guidelines, such that, with a criminal-history score of five, the presumptive sentence for first-degree controlled-substance crime is 115 months in prison, with a presumptive range of 98–138 months. Minn. Sent. Guidelines 4.C (2018). Relying on *State v. Evans*, Cook argues that he is entitled to have his sentence vacated and remanded for resentencing because his 250-month sentence is more than double the presumptive sentence under the DSRA. *See* 311 N.W.2d 481, 483 (Minn. 1981) ("[G]enerally in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive sentence length.").

Because the district court sentenced Cook in accordance with the dangerous-offender statute, Minn. Stat. § 609.1095, subd. 2, the sentencing limitation set forth in *Evans* does not apply. *See Neal v. State*, 658 N.W.2d 536, 545 (Minn. 2003) ("Departures under the [dangerous-offender] statute are justified on the basis of the offender's criminal history, not on aggravating factors . . . . The statute authorizes the court to impose a

durational departure of any length, up to the statutory maximum . . . ."). The district court sentenced Cook to 250 months in prison, which is less than the statutory maximum. *See* Minn. Stat. § 152.021, subd. 3 (2014). Therefore, Cook is not entitled to resentencing.

Pro se brief

In his pro se supplemental brief, Cook takes issue with alleged errors in the transcript from his first trial and with the standard formatting of the verdict forms. Cook does not cite to any authority or argument in support of his positions, and therefore these issues are forfeited. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." (quotation omitted)).

Affirmed.