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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-493

State of Minnesota,
Respondent,

vs.

Robert Stephen Huber,
Appellant.

Filed March 29, 2011
Affirmed in part, reversed in part, and remanded
Hudson, Judge

Anoka County District Court
File No. 02-CR-08-13059

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

Anthony C. Palumbo, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

HUDSON, Judge

Appellant alleges that the evidence is insufficient to support his conviction of second-degree controlled-substance crime, that he was denied his right to a fair trial

based on the admission of expert testimony relating to the ultimate issue in the case, and that the district court erred by convicting appellant of a lesser-included offense arising from the same behavioral incident. We conclude that the evidence is sufficient to sustain appellant's conviction of second-degree controlled-substance crime and that he was provided a fair trial. But because the district court erred by convicting appellant of the lesser-included offense, we reverse that conviction.

FACTS

The state charged appellant with second-degree controlled-substance crime, possession with intent to sell, in violation of Minn. Stat. § 152.022, subd. 1(1) (2006); and third-degree controlled-substance crime in violation of Minn. Stat. § 152.023, subd. 2(1) (2006), based on the presence of material containing methamphetamine discovered during a search of a car appellant had been driving.

At appellant's jury trial, a Centennial Lakes police officer testified that, while on routine patrol, he ran a random license-plate check on a vehicle driving on Centerville Road. Ten to fifteen minutes later, the officer saw the same vehicle in a parking lot and observed that the numbers and letters on the rear license plate were different from those he had recently observed on the front plate. He followed the car as it left the lot and activated emergency lights to conduct a stop. He observed the car go through a stop sign and park in another parking lot. The officer then saw the driver, whom he later identified as appellant, exit the vehicle and begin running through a residential neighborhood. The officer yelled at appellant to stop, but appellant failed to do so.

After the officer lost sight of appellant, the officer radioed for assistance and turned his attention to the passenger, whom he arrested. He searched the vehicle pursuant to the arrest and in the front-seat console he discovered a plastic baggie. The plastic baggie contained several other smaller plastic baggies, seven of which contained a white powder, which weighed a total of over three grams and tested positive for methamphetamine. The seven smaller baggies included four baggies whose contents weighed .4 grams, one whose contents weighed 1 gram, one whose contents weighed .5 grams, and one whose contents weighed .2 grams.

Another officer located appellant in a cornfield, chased him, and ultimately caught up to him as he was trying to climb a fence adjacent to Highway 35E. Police arrested appellant and conducted a search, which revealed a cell phone and a wallet containing $1,000 in one-hundred-dollar bills and a ten-dollar bill.

A detective assigned to the Anoka Hennepin Drug Task Force testified at trial that common weights for methamphetamine sales were .5 gram, 1.75 grams, and 3.5 grams and that possession of multiple bags containing similar weights was consistent with drug sales because a person who is engaged in selling methamphetamine would typically have drugs weighed out for customers. He testified that the presence of small individual baggies was also consistent with the sale of drugs. He testified that drug transactions were typically handled by cash and that the presence of $1,000 and illegal drugs would tend to support a determination that a person had been selling drugs.

The following colloquy occurred between the prosecutor and the detective:

Q.: In this particular case, you are the detective that submitted the case to the County Attorney's Office for charging?

A.: That is correct.

Q.: You asked that he be charged with possession with intent to sell?

A.: Correct.

Q.: Why is that?

A.: Because of how the narcotics were found, their amounts, the seven baggies, seven individual bags with weights that are consistent with the common way narcotics are sold, amounts.

Q.: So, is it your opinion that the way the drugs were packaged indicate it is for sale?

A.: Correct.

On recross examination, the detective clarified that the county attorney made the final charging decision. The detective admitted that he had no personal knowledge of whether appellant sold, or made arrangements to sell, drugs that night or whether appellant knew that the drugs were present in the car. On redirect, the county attorney asked, "[W]hy did you ask that he be charged then?" The detective replied, "[B]ecause of where the narcotics were found in the vehicle and with the behavior prior to him actually being physically taken [into] custody, fleeing on foot, running away from, quote, unquote, the narcotics."

The jury convicted appellant of both counts. The district court sentenced appellant to 67 months on the second-degree controlled-substance-crime conviction and 51 months on the third-degree controlled-substance-crime conviction. This appeal follows.

D E C I S I O N

I

In a challenge to the sufficiency of the evidence, a reviewing court examines the record to determine whether a fact-finder, on considering the facts and any legitimate inferences drawn from the facts, could reasonably find the defendant guilty. *State v. Robinson*, 604 N.W.2d 355, 365–66 (Minn. 2000). This court reviews the evidence in the light most favorable to the conviction. *Id.* at 366. This court independently considers the reasonableness of any inferences that could be drawn. *State v. Al-Naseer*, 788 N.W.2d 469, 473–74 (Minn. 2010). If the jury could reasonably have found the defendant guilty, giving due regard to the presumption of innocence and the state's burden of proof beyond a reasonable doubt, the verdict will not be reversed. *State v. Pierson*, 530 N.W.2d 784, 787 (Minn. 1995).

The jury convicted appellant of second-degree controlled-substance crime, possession with intent to sell methamphetamine in violation of Minn. Stat. § 152.022, subd. 1(1) (2006). Because the state presented no evidence to show that appellant actually sold drugs, the state was required to prove beyond a reasonable doubt that appellant "possess[ed] with intent to" "sell, give away, barter, deliver, exchange, distribute or dispose of" the drugs found in the console of the car. *See* Minn. Stat. § 152.01, subd. 15a(3) (2006) (providing alternate definition of "sell").

Because the intent element of a crime involves a state of mind, it is generally proved by circumstantial evidence. *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). Circumstantial evidence merits the same weight as direct evidence. *State v. Bauer*, 598

N.W.2d 352, 370 (Minn. 1999). But when even a single element of the charged offense depends on circumstantial evidence, this court applies a stricter standard of review. *Al-Naseer*, 788 N.W.2d at 474. In such cases, 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 reasonable, rational inferences that are inconsistent with guilt." *State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010) (quotation omitted).

Appellant argues that the circumstantial evidence supports an alternative rational inference that he possessed the methamphetamine for personal use, rather than with an intent to sell it. He points out that in many drug cases, intent to sell is proved by circumstantial evidence of a large quantity of drugs, cash, and drug paraphernalia. *See, e.g., State v. Blahowski*, 499 N.W.2d 521, 524–25 (Minn. App. 1993) (upholding verdict when officers seized marijuana that was apparently packaged for sale, a large amount of cash, and a scale), *review denied* (Minn. June 22, 1993); *State v. Lozar*, 458 N.W.2d 434, 441 (Minn. App. 1990) (upholding verdict based on circumstantial evidence of large quantity of marijuana, packaging materials, over $5,000 in cash, and a scale), *review denied* (Minn. Sept. 28, 1990). Appellant argues that, in contrast, the state here presented no evidence of drug paraphernalia or other indicia of drug sales.

But the evidence included a large quantity of methamphetamine packaged in smaller amounts and in uniform quantities that were consistent with sale. There were also additional, empty plastic baggies in the same larger baggie that contained the smaller

baggies of drugs. The baggies were also found in a car console, rather than appellant's home. And when appellant was found, he was carrying over $1,000 in cash. The presence of the drugs packaged in small, uniform amounts, along with additional packaging material, and appellant's possession of over $1,000 in cash when he was arrested, reasonably support a determination that appellant intended to sell the drugs, rather than personally use them, and it does not support a reasonable inference inconsistent with appellant's guilt. *Andersen*, 784 N.W.2d at 330.

II

Appellant argues that the district court committed reversible error by admitting the detective's testimony relating to his recommendation that the offense be charged. Evidentiary rulings lie within the discretion of the district court, and this court will not reverse a district court's admission of evidence absent an abuse of that discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Because appellant did not object to this testimony at trial, we review its admission 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). 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.

Opinion testimony relating to an ultimate issue to be decided by the factfinder is generally admissible if it complies with Minn. R. Evid. 704 and does not "merely tell the jury what result to reach." *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005) (quotation omitted). Rule 704 permits opinion testimony on the ultimate issue if the testimony "is helpful to the factfinder." *Id.* (discussing rule 704 and stating that testimony is not "helpful" if it involves matters within experience and knowledge of lay jury, would not add depth and precision to jury's understanding, or states a legal conclusion). In *Moore*, the Minnesota Supreme Court concluded that expert opinion testimony that a victim had sustained "great bodily harm," an element of the charged offense, was improperly admitted. *Id.*

The detective's testimony that he recommended charging appellant with possession with intent to sell, in part, because of the packaging of the drugs, did relate to the ultimate issue of whether appellant had the intent to sell methamphetamine. Therefore, the admission of this evidence may have been error. But we conclude that appellant has not shown that its admission was plain error affecting his substantial rights. On cross examination, the detective admitted that he did not make the final charging decision and acknowledged that a person purchasing drugs for personal use may also buy them divided in individual packages. The detective additionally testified that his charging recommendation was also based on appellant's flight from police, which does not relate to the "intent-to-sell" element of the charged offense. Therefore, there is no

reasonable likelihood that the admission of the detective's questioned testimony had a significant effect on the jury's verdict. *Griller*, 583 N.W.2d at 741.

Finally, nothing indicates that admission of the evidence seriously affected the fairness and integrity of the judicial proceedings. *Id.* at 740. The defense vigorously cross-examined the detective, addressing a lack of additional evidence from which a jury might infer that appellant intended to sell the drugs, such as a weapon, cutting agents, or a scale. And the district court gave a curative instruction, telling the jury that "[t]he charges [brought by the state] are not evidence and create no inference of guilt." We may presume that the jury followed the district court's instructions. *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998). Therefore, we conclude that the admission of the detective's testimony did not amount to reversible error.

III

Appellant argues that the district court erred by convicting appellant of, and sentencing appellant on, both the second-degree and third-degree controlled-substance offenses. Under Minnesota law, an "actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2006). An included offense is a "lesser degree of the same crime," or a "crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1(1) & (4) (2006). Appellant's conviction of second-degree controlled-substance crime necessarily proved the additional charge of third-degree controlled-substance crime. *See* Minn. Stat. §§ 152.022, subd. 1(1) (second-degree controlled-substance crime); 152.023, subd. 2(1) (third-degree controlled-substance crime). Because third-degree controlled-substance crime is a lesser-

included offense of second-degree controlled-substance crime, appellant may not be convicted of both offenses. When a defendant is convicted of more than one charge for the same act, the district court must "adjudicate formally and impose [a] sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time." *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). We therefore reverse and remand to the district court with instructions to vacate the adjudicated conviction of third-degree controlled-substance crime. If the second-degree controlled-substance-crime conviction were to be vacated or reversed on independent grounds, the district court would be permitted to formally adjudicate and sentence appellant on the additional count. *State v. Grampre*, 766 N.W.2d 347, 354 (Minn. App. 2009); *review denied* (Minn. Aug. 26, 2009).

Affirmed in part, reversed in part, and remanded.