STATE OF MINNESOTA
IN COURT OF APPEALS
A11-479

State of Minnesota,
Respondent,

vs.

Harun Ali Noor,
Appellant.

Filed March 19, 2012
Affirmed
Schellhas, Judge

Olmsted County District Court
File No. 55-CR-09-874

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

Mark A. Ostrem, Olmsted County Attorney, Karen A. Arthurs, Assistant County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction of aiding and abetting third-degree controlled-substance crime, arguing that (1) the district court committed plain error in its jury

instructions; (2) the district court committed plain error when it sent a computer and DVD into the jury room during deliberations; and (3) the evidence was insufficient to convict appellant. We affirm.

FACTS

The Rochester Police Department set up a controlled buy between a confidential informant (CI) and a known drug dealer named "Fifty" at a Kwik Trip on July 8, 2008. When the CI telephoned Fifty, another known drug dealer named Bruno answered and said that he would arrive in 15 to 20 minutes. Approximately 40 minutes later, a Mercedes arrived at the Kwik Trip and parked next to an unmarked police vehicle from which an undercover officer planned to record the controlled buy. Three people were in the Mercedes—two in the front and one in the back. The driver was later identified as appellant Harun Noor and the back-seat passenger as Bruno. After the front-seat passenger exited the vehicle, the CI entered the back seat and exchanged money for crack cocaine with Bruno. The transaction lasted approximately one minute, during which the undercover officer observed Noor's face and saw him look around and watch what was going on in the back seat. According to the undercover officer, Noor did not appear surprised, upset, or angry in response to what he watched. The officer testified that Noor "was smiling." After the CI and Bruno completed the controlled buy, the CI left the Mercedes, Bruno moved to the front passenger seat, and the Mercedes departed with Noor driving.

Respondent State of Minnesota charged Noor with aiding and abetting third-degree controlled-substance crime in violation of Minn. Stat. §§ 152.023, subd. 1(1),

609.05, subd. 1 (2006). Before trial, the state informed the district court that it intended to play a DVD of a surveillance video of the controlled buy during its case-in-chief. The state disclosed that the DVD also contained an unrelated surveillance video of a controlled buy involving Fifty, and that the state had been unable to delete that video or copy the DVD. Noor did not object. The court informed the parties that if the jury later asked to see the DVD again, it would have to do so in the courtroom with the parties present. The state played the relevant portion of the DVD during its case-in-chief, and the district court received the DVD into evidence without objection by Noor. During deliberations, the jury asked to review the surveillance video of the July 8 controlled buy. The parties agreed that the court would give the jury an instruction regarding the content of the DVD, and, afterward, the court sent the DVD and a computer to the jury room. Noor did not object.

The jury found Noor guilty of aiding and abetting third-degree controlled-substance crime. This appeal follows.

D E C I S I O N

Jury Instructions

If a defendant does not object to jury instructions at trial, this court reviews the defendant's challenges to instructions on appeal using the plain-error test. *State v. Larson*, 787 N.W.2d 592, 600 (Minn. 2010). "The plain-error test requires: (1) an error; (2) that is plain; and (3) the error must affect the defendant's substantial rights. If those three prongs are met, we determine whether we need to correct the error to ensure fairness and the integrity of the judicial proceedings." *Id.* (citation omitted). We review

jury instructions "in their entirety to determine whether they fairly and adequately explain the law of the case." *State v. Peterson*, 673 N.W.2d 482, 486 (Minn. 2004).

Before trial, Noor asked the district court to supplement the model jury instruction on aiding and abetting—10 *Minnesota Practice*, CRIMJIG 4.01 (2006)—with an additional paragraph explaining aiding and abetting. The court granted Noor's request. Before the court instructed the jury, defense counsel stated that "we have no objection" to the jury instructions "as revised." When the court instructed the jury, it recited the first paragraph of CRIMJIG 4.01 and Noor's requested supplemental instruction, as follows:

> Liability for crimes of another. The defendant is guilty of a crime committed by another person when the defendant has intentionally aided the other person in committing it or has intentionally advised, hired, counseled, conspired with or otherwise procured the other person to commit it.[1]
>
> To convict the defendant of aiding and abetting, the State need not prove that the defendant actively participated in the overt act that constitutes the primary offense. But more than passive acquiescence or inaction is required. A jury may infer the requisite criminal intent when the defendant plays some knowing role in the commission of the crime and takes no steps to thwart the completion. The defendant's presence at the crime scene is not enough by itself to convict him of aiding and abetting. But the jury [may][2] consider the defendant's presence along with the defendant's role in the crime, the defendant's lack of objection or surprise, the defendant's flight from the scene with the principal, and the defendant's companionship or association with the principal before and after the crime.

[1] This paragraph is CRIMJIG 4.01, the model jury instruction for liability for crimes of another.

[2] In the transcript, the word "may" is missing. But, on appeal, both parties seem to acknowledge that the district court's instructions to the jury included the word.

Invited-Error Doctrine

The state argues that because Noor proposed the now-challenged supplemental jury instructions, we should decline to review the jury instructions under the invited-error doctrine. "The invited error doctrine prevents a party from asserting an error on appeal that he invited or could have prevented in the court below." *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007). "The invited error doctrine does not apply, however, if an error meets all four parts of the plain error test." *State v. Everson*, 749 N.W.2d 340, 349 (Minn. 2008). We therefore must determine whether Noor satisfies all four parts of the plain-error test.

Plain-Error Test

The three-prong test for plain error requires that there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* If Noor's claimed error meets all of these four parts of the plain-error test, the invited-error doctrine does not apply. *Everson*, 749 N.W.2d at 349.

Noor argues that the district court's aiding-and-abetting jury instructions, including the supplemental instruction which he requested, constituted plain error because it (1) created a permissive inference of criminal intent, (2) erroneously stated that a person must take steps to thwart the completion of a crime to avoid liability for crimes of another, and (3) failed to instruct the jury that it must find that the state proved Noor's intent beyond a reasonable doubt.

Permissive Inference

The district court instructed the jury that "[a] jury may infer the requisite criminal intent when the defendant plays some knowing role in the commission of the crime and takes no steps to thwart the completion." Noor's argument that this instruction erroneously created a permissive inference of criminal intent is unpersuasive. Permissive inferences are not per se erroneous. *State v. Hollins*, 765 N.W.2d 125, 130 (Minn. App. 2009).

> An instruction containing a permissive inference will pass constitutional muster if it instructs the jury that (1) the jury may—as opposed to must—draw the inference; (2) the defendant is presumed innocent and it is the prosecution's burden to prove the defendant guilty beyond a reasonable doubt; and (3) the jury must examine all the evidence in the case.

Id. Additionally, the "permissive-inference instruction must be balanced." *Id.*

Here, the district court instructed the jury that it may infer criminal intent, that Noor was presumed innocent, that the state had the burden to prove his guilt beyond a reasonable doubt, and that the jury must examine all the evidence in the case. Noor argues that the instruction is not balanced. An instruction is not balanced if it "singles out and emphasizes one piece of circumstantial evidence bearing on a disputed issue." *Id.* (citing *State v. Olson*, 482 N.W.2d 212, 216 (Minn. 1992)). In *Hollins*, this court concluded that the record did not suggest that the following permissive-inference instruction on aiding and abetting was unbalanced:

> If you find that the State has shown that the defendant played some knowing role in commission of the controlled substance crime in the third degree and took no steps to thwart it, the

> defendant is guilty of aiding and abetting controlled substance crime in the third degree. "Knowing role" here is defined or can include aiding, advising, hiring, counseling, conspiring with, or procuring another to commit a crime. However, something more than mere presence, knowledge, inaction, or passive acquiescence is required. A person's presence, companionship, and conduct after an offense are relevant circumstances from which a person's criminal intent *may* be inferred.

Id.

In this case, similar to the instruction in *Hollins*, the district court informed the jury that it may infer criminal intent when the defendant did not take steps to thwart the crime; that mere presence was insufficient to convict the defendant of aiding and abetting; and that the jury may consider several factors, such as the defendant's presence, role in the crime, lack of objection, flight, and companionship with the principal before and after the crime. Noor cites *State v. Litzau* and *State v. Olson* to support his claim that the permissive inference in the jury instruction was improper, but they are distinguishable. In *Litzau*, the jury instruction focused on two facts and suggested that the jury could convict the defendant without considering all the evidence. 650 N.W.2d 177, 187 (Minn. 2002). In *Olson*, the jury instruction focused on only one factor. 482 N.W.2d at 216. Here, the court instructed the jury that it could consider six factors. *See Hollins*, 765 N.W.2d at 131 (distinguishing jury instruction from those in *Litzau* and *Olson* because the instruction in *Hollins* articulated three factors the jury could consider). Noor also argues in a footnote that the final sentence in the jury instruction, which listed five factors the jury could consider, unfairly emphasized certain factors. But Noor's argument is foreclosed by *Hollins*, where this court upheld a jury instruction that listed three factors

that are very similar to the six factors listed here. *See id*. (upholding an instruction that listed three permissive factors).

We conclude that Noor's requested supplemental permissive-inference instruction was balanced and that the jury instruction was not erroneous on this basis.

Steps to Thwart Completion of Crime

Noor argues that the district court misstated the law when it "instructed [the jury] that a person present when a crime is committed *must* take steps to thwart it or be an accomplice." (Emphasis added.) But the court did not so instruct the jury. Rather, at Noor's request, the court instructed the jury that it "*may* infer the requisite criminal intent when the defendant plays some knowing role in the commission of the crime and takes no steps to thwart the completion." (Emphasis added.) The court did not instruct the jury that a person present when a crime is committed *must* take steps to thwart it to avoid being an accomplice. And Noor is incorrect that the court's instruction was erroneous. In *State v. Souvannarath*, the supreme court stated, "[W]here the accused plays at least some knowing role in the commission of the crime and takes no steps to thwart its completion, the jury may properly infer the requisite mens rea for a conviction of aiding and abetting." 545 N.W.2d 30, 34 (Minn. 1996).

Noor also argues, relying on *State v. Moore*, 699 N.W.2d 733 (Minn. 2005), that the district court erroneously removed from the jury's consideration "the factual question of whether the facts of this case constituted proof of knowledge of the crime and intentional assistance in the completion of the crime, violating the requirement that criminal convictions must rest upon a jury determination that the defendant is guilty of

every element of the crime with which he is charged, beyond a reasonable doubt." (quotations omitted). But *Moore* does not support Noor's argument. In *Moore*, the district court erred by instructing the jury that the loss of a tooth is a permanent loss of the function of a bodily member. 699 N.W.2d at 735–36. The supreme court concluded that the instruction in *Moore* was improper because it "instructed the jury that the definition of 'great bodily harm' was established" and removed that element of the crime from the jury's consideration. *Id*. at 737. Here, unlike in *Moore*, the district court's instruction was permissive and did not remove an element of a crime from the jury's consideration. The court merely informed the jury that it *may*—not *must*—infer intent if a defendant took no steps to thwart the completion of a crime.

We conclude that the court's instruction on thwarting the crime was not erroneous.

Intent

Relying on *State v. Mahkuk*, 736 N.W.2d 675 (Minn. 2007), Noor argues that the final sentence in the jury instruction diminished the state's burden of proof on the essential element of intent. His reliance on *Mahkuk* is misplaced. In *Mahkuk*, the district court listed factors the jury could consider in determining whether the defendant aided and abetted first-degree murder. 736 N.W.2d at 680–81. The supreme court reasoned that although the district court's list of factors was not improper because it was balanced, the district court erred when it listed defendant's knowledge and intent as factors the jury *could* consider. *Id.* at 682. The supreme court stated that knowledge and intent were not factors that the jury could merely consider, but they were "facts the jury had to find beyond a reasonable doubt." *Id.* Unlike *Mahkuk*, the district court here did not list as

permissive factors the defendant's knowledge or intent. Moreover, when the court recited CRIMJIG 4.01, it informed the jury of the required facts that it had to find. Noor's argument is without merit.

Noor also argues that the district court never informed the jury "that the state must prove beyond a reasonable doubt that Noor had the requisite criminal intent." Noor is mistaken. We review jury instructions in their entirety. *Peterson*, 673 N.W.2d at 486. At the beginning of its jury instructions, the court informed the jury that the state had to prove Noor guilty beyond a reasonable doubt. And at the end of the instructions, the court instructed the jury, "If you find that each of these elements has been proven beyond a reasonable doubt, the defendant is guilty. If you find that any element has not been proven beyond a reasonable doubt, the defendant is not guilty."

In a footnote, Noor also argues that CRIMJIG 4.01 does not constitute a proper instruction for liability for the crimes of another. "A jury instruction is in error if it materially misstates the law. Jury instructions must be viewed in their entirety to determine whether they fairly and adequately explain the law of the case." *State v. White*, 684 N.W.2d 500, 509 (Minn. 2004) (citation omitted). CRIMJIG 4.01 very closely paraphrases the statute on liability for crimes of another. *Compare* CRIMJIG 4.01 *with* Minn. Stat. § 609.05, subd. 1. CRIMJIG 4.01 therefore fairly and adequately explains the law.

Because the district court did not err in instructing the jury, we need not continue the plain-error analysis. *See State v. Pearson*, 775 N.W.2d 155, 161 (Minn. 2009) (noting that because defendant "needs to prove all parts of the plain error test, we need not

analyze each separate part individually"). Because Noor has not satisfied the plain-error test, the invited-error doctrine applies. *See Goelz*, 743 N.W.2d at 258. We therefore conclude that Noor is precluded from challenging the jury instructions on appeal.

DVD in Jury Room

Noor argues that the district court erred by sending a DVD and a computer into the jury room. He claims that his substantial rights were prejudiced and that the integrity of the trial was affected because the DVD contained evidence that had not been admitted at trial and because the court failed to instruct the jury to not look at the evidence not admitted. District courts have discretion to grant or deny a jury's request to review specific evidence during deliberations. *See* Minn. R. Crim. P. 26.03, subd. 20(2)(a) (2010) ("If the jury requests review of specific evidence during deliberations, the court may permit review of that evidence after notice to the parties.");[3] *Everson*, 749 N.W.2d at 345 (noting district court has discretion to grant jury's request to review evidence).

Noor's claims that the DVD contained evidence that had not been admitted and that the district court failed to instruct the jury to not look at the evidence of the unrelated surveillance video are not supported by the record. At trial, the state introduced the DVD through the testimony of the undercover police officer who made the July 8 surveillance video. Although the DVD contained the unrelated surveillance video, as disclosed by the state, the state offered the DVD into evidence without restriction and without objection

[3] This rule has been amended. District courts still "may allow the jury to review specific evidence," but "[a]ny jury review of depositions, or audio or video material, must occur in open court." Minn. R. Crim. P. 26.03, subd. 20(2)(b) (Supp. 2011).

by Noor.[4] During deliberations, when the jury asked to review the surveillance video of the July 8 controlled buy, the court gave the jury the instruction agreed to by the parties—that only the first portion of the DVD was relevant and that the second portion "was not submitted as evidence and is not part of this case." We presume that the jury followed the district court's instruction. *See State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005) (noting that this court "presume[s] that the jury follows the court's instruction"). After giving the jury the agreed-upon instruction, the court sent the DVD and a computer to the jury room without objection by Noor.

In a footnote, Noor suggests that this court should remand his case for a *Schwartz* hearing to determine what happened with the DVD and whether the jury's exposure to inadmissible evidence caused harm. *See Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960) (permitting a district court to question a juror when questions about juror misconduct arise). But Noor did not request a *Schwartz* hearing in the district court. And we conclude that he "has not made the required showing of evidence which, if unchallenged, would warrant a conclusion of jury misconduct." *See Everson*, 749 N.W.2d at 349 (noting that "to obtain a *Schwartz* hearing, the defense has the burden of adducing sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct" (quotations omitted)).

We conclude that the district court did not plainly err in its instruction or decision to send the DVD into the jury room with a computer. *See* Minn. R. Crim. P. 26.03, subd.

[4] We note that the video of the unrelated surveillance video of a controlled buy involving Fifty is seven seconds long, shows no one involved in the July 8 controlled buy, and consists only of the back of a male facing the front of a truck.

20(1) (2010) ("The court must permit received exhibits or copies, except depositions, into the jury room."); *see State v. Kuhlmann*, 806 N.W. 2d 844, 852 (Minn. 2011) (stating that when a defendant does not object to an error, we review that error under a plain-error analysis). Because we conclude that the district court did not err, we need not continue the plain-error analysis. *See Pearson*, 775 N.W.2d at 161 (noting that because defendant "needs to prove all parts of the plain error test, we need not analyze each separate part individually").

Sufficiency of the Evidence

Noor argues that the evidence was insufficient to sustain his conviction because reasonable inferences other than those consistent with guilt can be drawn. A person is liable for aiding and abetting if the person "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1. "To be guilty of aiding and abetting a crime, the defendant does not need to have participated actively in the actual commission of the crime." *State v. Hawes*, 801 N.W.2d 659, 668 (Minn. 2011). "But the State must prove that the defendant had knowledge of the crime and intended his presence or actions to further the commission of that crime." *Id.* (quotation omitted). "Jurors can infer the necessary intent from factors including: defendant's presence at the scene of the crime, defendant's close association with the principal before and after the crime, defendant's lack of objection or surprise under the circumstances, and defendant's flight from the scene of the crime with the principal." *Id.* (quotation omitted).

"[T]o review whether the evidence was sufficient in this circumstantial evidence case, we follow a two-step process." *Id*. "The first step in this analysis is to identify the circumstances proved." *Id.* "In identifying the circumstances proved, we 'defer, consistent with our standard of review, to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.'" *Id.* (quoting *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). "The second step in this analysis is to determine whether the circumstances proved are 'consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt.'" *Id.* at 669 (quoting *Andersen*, 784 N.W.2d at 329). "[W]e consider whether the circumstances proved are consistent with guilt and inconsistent, *on the whole*, with any reasonable hypothesis of innocence." *Id.* (alteration in original) (quotation omitted).[5]

For the first step in the analysis—determining which circumstances are proved—Noor concedes that the state proved eight facts: (1) the police set up a controlled buy between the CI and Bruno; (2) the CI and Bruno agreed to meet at a Kwik Trip; (3) Bruno arrived in a car driven by Noor, and the car also contained another male

[5] The state argues that for sufficiency-of-the-evidence cases involving circumstantial evidence, we should follow the supreme court's approach in *State v. Gates*, 615 N.W.2d 331, 337–38 (Minn. 2000), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), *as recognized by State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). But the state's argument is misplaced. The supreme court identified the proper approach for analyzing these types of cases in *Andersen*. 784 N.W.2d at 329–30. The supreme court quoted *Andersen* extensively and applied *Andersen*'s approach in *Hawes*, which we rely on here, and in *Al-Naseer*, which Noor relies on in his brief. *See Hawes*, 801 N.W.2d at 668–69 (quoting from *Andersen* and applying *Andersen*'s circumstantial-evidence approach); *State v. Al-Naseer*, 788 N.W.2d 469, 473–74 (Minn. 2010) (same).

passenger; (4) the car stopped, the front-seat passenger left the car, and the CI got in the back seat with Bruno; (5) the CI and Bruno exchanged drugs and money; (6) Noor looked into the back seat and smiled while the CI and Bruno were seated there; (7) the CI exited the car, and Bruno counted the money and moved to the front seat; and (8) the car with Noor and Bruno drove away. In addition to the facts that Noor concedes, the circumstances proved also include the following: the Kwik Trip was not on a direct route between two locations Noor claimed he was traveling between; other gas stations were closer to the direct route; Noor did not object when the CI got into his car; Noor did not object to what was occurring in his car; after Noor looked in the back seat at the CI and Bruno, he smiled and laughed; and after Noor laughed, he looked down and then started looking around at surrounding cars.

The second step of the analysis requires this court to decide whether the circumstances proved are consistent with the guilty verdict and, viewing the proved circumstances in their entirety, inconsistent with any reasonable hypothesis of innocence. *Id.* at 669. Noor argues that other reasonable inferences may be drawn from his conduct. One is that "he did not know what was going on in the back seat until he looked around and based on what he saw he was surprised and smiled, or he was nervous and smiled." But Noor's suggested inference is not reasonable after looking at the circumstances proved as a whole. Noor drove Bruno to the Kwik Trip; did not object when the CI got into his car; looked into the back seat while Bruno and the CI exchanged drugs and money; smiled, laughed, and started looking at the surrounding cars; did not object to what he saw in the back seat; and drove Bruno away from the Kwik Trip after the

exchange was completed. *See id.* at 668 ("Jurors can infer the necessary intent from factors including: defendant's presence at the scene of the crime, defendant's close association with the principal before and after the crime, defendant's lack of objection or surprise under the circumstances, and defendant's flight from the scene of the crime with the principal." (quotation omitted)); *see also State v. Hanson*, 800 N.W.2d 618, 623–24 (Minn. 2011) (affirming defendant's conviction of possessing methamphetamine with the intent to sell although some of the "circumstances proved include circumstances from which, when viewed in isolation, it can be reasonably inferred that [defendant] possessed the methamphetamine solely for personal use," because the only reasonable inference to be drawn from other circumstances proved "is that the methamphetamine was possessed for purposes of sale").

Noor argues that he "testified that he asked about the money and was told it was the repayment of a loan Bruno had earlier made to the [C.I.]." But Noor's argument rests on his testimony, which is not part of the circumstances proved. *See Hawes*, 801 N.W.2d at 672 (noting that the appellant's argument "rests entirely on her own testimony, which . . . is not part of the circumstances proved"). Noor also argues that the "minor detail" of the Kwik Trip not being on a direct route between the two locations "does not disprove Noor's claim that he was giving the men a ride home." "But we examine the circumstances proved in their entirety, not certain facts in isolation." *Id.* Looking at the circumstances as a whole, we conclude that the evidence was sufficient to convict Noor.

Noor also argues that "the state did not present evidence of any connection between Noor and Bruno . . . or other evidence to explain why Noor would knowingly

participate or help in a drug deal." But the state did present evidence of a connection between Noor and Bruno when it showed a surveillance video where Noor and Bruno arrived in the same car and remained in the car together during the controlled buy. Nonetheless, the state is not required to prove why Noor would commit a crime. *See Andersen*, 784 N.W.2d at 331 ("The State, however, is not required to prove motive.").

Affirmed.