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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1014

In the Matter of the Welfare of T.J.W., Child.

Filed January 29, 2008
Affirmed as modified
Shumaker, Judge

Hennepin County District Court
File No. 27-JV-070121

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Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

On appeal from an extended juvenile jurisdiction (EJJ) adjudication on charges of aiding an offender and crime committed for the benefit of a gang, appellant contends that his convictions are not supported by sufficient evidence, that the district court erred in admitting gang expert testimony, and that the district court erred in assigning a severity level of VIII to the offense of aiding an offender, by imposing the sentence for crime

committed for the benefit of a gang, and by imposing more than one sentence. We affirm as modified.

FACTS

Following his March 2007 bench trial, appellant T.J.W., a minor, was convicted of aiding an offender and crime committed for the benefit of a gang, in connection with the murder of 17-year-old T.R.M.

T.J.W. and T.R.M. attended the same high school in Minneapolis. T.J.W. and his friend, R.C.N., age 17, have been friends since childhood, having grown up in the same Minneapolis neighborhood. T.J.W. also socializes with R.C.N.'s 26-year-old brother George Neiss (Neiss) and Michael Cranton (Cranton), a 22-year-old man living in T.J.W.'s neighborhood. T.J.W., R.C.N., and Neiss are affiliated with the criminal street gang known as the Gangster Disciples (GD). Although Neiss, R.C.N., and T.J.W. associated with T.R.M., they disliked him and hoped to confront and attack him.

On the afternoon of October 25, 2006, T.R.M.'s mother was home alone when two young men came to her house, rang the doorbell, and pounded on the door in an aggressive manner. She did not open the door, but called T.R.M. and told him what had happened and described the two men.

When T.R.M. arrived home from school that day, he and his friend, 16-year-old C.J.S, went up to his room, where T.R.M. retrieved a loaded revolver, wrapped it in a shirt, and placed it in a backpack. The two boys left the house and walked to a park, where they met T.R.M.'s friends, 26-year-old Andrew Stinar and 28-year-old Daniel Larson. The group went to a nearby liquor store to purchase beer and rum and then

walked to a remote campsite near the edge of the Mississippi River, where they built a fire and began drinking.

Earlier in the day, T.R.M. had invited Neiss and others to join him and his friends at the party by the river. Neiss, R.C.N., T.J.W., and Cranton, along with two 15-year-old girls, S.P. and S.M., boarded a bus heading towards the river. T.R.M. and C.J.S. met them at the bus stop and led the way to the riverbank, where Stinar and Larson had remained.

The ten people—Stinar, Larson, T.R.M., C.J.S., T.J.W., Neiss, R.C.N., Cranton, S.P., and S.M.—drank alcohol and smoked marijuana. R.C.N., who had brought a digital camera with him, took photos of the party. Shortly after T.J.W., Neiss, R.C.N, Cranton, and the two girls arrived, Stinar and Larson left; they did not return to the riverbank that night.

T.J.W. and R.C.N. left the site briefly with the two girls, S.P. and S.M., because S.P. was feeling ill and wanted to use a nearby restroom. All four of them returned to the riverbank, but the two girls soon left.

Around this time, T.R.M. retrieved the revolver from the backpack, which he had hidden behind a bush upon his arrival at the riverbank. He showed the revolver to Neiss, who unloaded it and returned both the revolver and cartridges to T.R.M.; T.R.M. put them in his sweatshirt pocket.

Sometime after seeing the gun, C.J.S. left, because he had received a text message from his mother ordering him to return home.

Neiss, R.C.N., T.J.W., Cranton, and T.R.M. were the last five people remaining at the riverbank. Neiss began speaking privately with T.R.M.; suddenly, Neiss punched T.R.M. in the head, causing him to fall to the ground. R.C.N. and T.J.W. joined in the attack and began kicking and yelling at T.R.M. T.J.W. was yelling at T.R.M., asking who he thought he was dealing with. T.R.M. attempted to defend himself by denying his attackers' accusations and protecting his face and head with his arms. As the assault intensified, he tried to crawl away, losing a shoe in the process. The three attackers pursued T.R.M., continuing to kick and yell at him. Cranton did not participate in the beating and pleaded with T.R.M. to stop talking so that his attackers might also stop.

R.C.N. grabbed the .357 revolver from T.R.M.'s sweatshirt and hit him in the head with it several times. T.R.M. curled up into the fetal position, as the beating continued, and pleaded for his life. T.J.W. removed T.R.M.'s other shoe and socks; he threw both shoes and socks towards the fire. R.C.N. put a cartridge in the revolver's cylinder, uttered something about Russian roulette, put the barrel to T.R.M.'s temple, and pulled the trigger, instantly killing him.

Cranton, T.J.W., Neiss, and R.C.N, who was still holding the revolver, ran away from the riverbank and up to the street. Neiss called for a ride, and when it arrived, the four piled into the vehicle and eventually discussed what had happened. T.J.W. announced that T.R.M. got what he deserved. The driver of the car dropped off Neiss and R.C.N. and then dropped off Cranton and T.J.W. T.R.M.'s body was discovered the next afternoon.

On November 8, 2006, police officers interviewed T.J.W. at his school. The district court found that during this interview, T.J.W.

> intentionally misrepresented to [officers] among other things, the chronology of the events of October 25, 2006, who was present at the party at the riverbank, and his direct and personal knowledge of the events leading up to and after T.R.M.'s assault and murder. More particularly, in accordance with the plan made with G. Neiss and R.C.N., [T.J.W.] intentionally omitted Cranton's, S.P.'s and S.M.'s names from his recitation of the people who were present at the riverbank on the night of the assault and murder. While he admitted that two girls attended the party, he vehemently, albeit falsely, asserted that he did not know who they were. [T.J.W.] made no allusion to Cranton's presence whatsoever. [T.J.W.] told [officers] that he, G. Neiss and R.C.N. left the campsite before the unknown girls, and left T.R.M. alive with a couple of other, unknown males. He insisted that no fighting had taken place before he, G. Neiss and R.C.N. left and that they were not present when T.R.M. was shot.

T.J.W. was adjudicated delinquent as an EJJ for the offenses of crime committed for the benefit of a gang and aiding an offender. In its disposition order, the court ranked the aiding-an-offender charge at a severity level of VIII. Given T.J.W.'s criminal-history score of 0 and the severity level of VIII, the court imposed an adult sentence of the presumptive sentence of 48 months for aiding an offender. The district court also imposed a concurrent sentence of 72 months for the offense of crime committed for the benefit of a gang. The adult sentence was stayed, however, on the conditions that T.J.W. successfully complete a juvenile disposition at the Rite of Passage Program in Nevada, successfully complete EJJ probation until the age of 21, adhere to the No Contact Order regarding his co-respondent or co-defendant, remain law-abiding, and abstain from nonprescribed mood-altering substances.

This appeal followed.

D E C I S I O N

I. Sufficiency of Evidence to Support Conviction of Aiding an Offender

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the state, in a criminal case, to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged." *State v. Otterstad*, 734 N.W.2d 642, 645 (Minn. 2007) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970)). In considering a claim of insufficient evidence, this court's "review on appeal is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to allow the [fact-finder] to reach the verdict which [it] did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

T.J.W. was convicted of aiding an offender under Minn. Stat. § 609.495, subd. 3, which provides:

> Whoever intentionally aids another person whom the actor knows or has reason to know has committed a criminal act, by destroying or concealing evidence of that crime, providing false or misleading information about that crime, receiving the proceeds of that crime, or otherwise obstructing the investigation or prosecution of that crime is an accomplice after the fact . . . .

Minn. Stat. § 609.495, subd. 3 (2006). The parties agree that the offense requires the state to prove beyond a reasonable doubt the following elements: (1) a felony offense was

committed; (2) the defendant knew that the crime was committed; (3) the defendant destroyed or concealed evidence of a crime, provided false or misleading information about the crime, received the proceeds of the crime, or obstructed the investigation or prosecution of the crime; and (4) the defendant acted with the intent to aid the person who committed the felony offense. 10A *Minnesota Practice*, CRIMJIG 24.13 (2006).

Accomplice Testimony

T.J.W. contends that the evidence is not sufficient to support his conviction of aiding an offender, because the proof consists largely of testimony from Michael Cranton, who, he argues, was his accomplice.

"[A] conviction may rest on the testimony of a single credible witness." *State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998). But an accomplice's testimony cannot be the basis of a conviction, unless that testimony is corroborated.

> A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

Minn. Stat. § 634.04 (2006). The purpose behind the corroboration requirement "is to provide a check upon the credibility of testimony of a person who, having been admittedly involved in criminal conduct, might be disposed to shift or diffuse responsibility in order to curry the favor of law enforcement officials." *State v. Azzone*, 271 Minn. 166, 170, 135 N.W.2d 488, 493 (1965); *see also State v. Nelson*, 632 N.W.2d 193, 202 (Minn. 2001) ("[A]ccomplice testimony may be untrustworthy because of the

risk that the accomplice may testify against another in the hope of or upon a promise of immunity or clemency or to satisfy other self-serving or malicious motives." (quotation omitted)).

The corroboration requirement, however, applies only if the witness is an accomplice, and an accomplice is a person who could have been indicted and convicted of the crime with which the accused is charged. *State v. Henderson*, 620 N.W.2d 688, 701 (Minn. 2001). T.J.W. contends that Cranton was an accomplice because he had provided alcohol to minors, was present during the assault, fled the murder scene, told T.J.W. not to talk to the police, agreed not to speak to the police as Neiss instructed, and then left the state.

Because we are not persuaded that Cranton could have been charged with and convicted of the same crime as T.J.W., aiding an offender, we conclude that he was not an accomplice for the purposes of the corroboration requirement. Cranton's provision of alcohol to minors constitutes a separate crime, and thus does not make him an accomplice to T.J.W.'s crime. The fact that Cranton was present when the murder occurred and then fled the scene is also insufficient to impose accomplice liability. *See State v. Crow*, 730 N.W.2d 272, 280 (Minn. 2007) ("Mere presence at the crime scene does not alone prove that a person aided or abetted, because inaction, knowledge, or passive acquiescence do not rise to the level of criminal culpability."); *State v. Flournoy*, 535 N.W.2d 354, 358-60 (Minn. 1995) (concluding that a witness was not an accomplice even though he had been present during a murder and ran away from the scene with the defendant).

As T.J.W. points out, Cranton testified that after being dropped off, he told T.J.W. not to tell anyone about what had happened that night.

> PROSECUTOR: Where did you and [T.J.W.] go after being dropped off?
> CRANTON: To my front porch.
> PROSECUTOR: What did the two of you do on your front porch?
> CRANTON: Smoked a joint and I told him not to tell anyone.
> PROSECUTOR: Why did you tell [T.J.W.] not to tell anyone?
> CRANTON: I just at that time I didn't know what to do, so I figured don't tell anyone.
> PROSECUTOR: And what did [T.J.W.] say in response?
> CRANTON: Okay.

This is the only evidence suggesting Cranton solicited T.J.W.'s silence. And there is no indication that Cranton told anyone else to keep quiet or formulated any kind of plan to silence witnesses. T.J.W. suggests that Cranton agreed not to speak to the police after conversing with Neiss the day after the murder, but Cranton's testimony establishes only that Neiss told him not to talk to the police.

> PROSECUTOR: Now, on Thursday, October 26, did you have any contact with [Neiss]?
> CRANTON: Yes.
> PROSECUTOR: And what kind of contact?
> CRANTON: He called me on my cell phone and said he needed to talk to me. So then he picked me up a couple blocks away from my house because I told him I was going for a walk.
> . . . .
> PROSECUTOR: And where did they end up taking you?
> CRANTON: We drove around to somebody's house. [Neiss] ran in real quick somewhere off of Hiawatha or something like that. And then we drove to some hotel somewhere. That's when [Neiss] was telling me not to worry, my name's not going come up in anything.

> PROSECUTOR: It was [Neiss] who told you this?
> CRANTON: Yeah.
> . . . .
> PROSECUTOR: What did you understand [Neiss] to mean by that?
> CRANTON: That he told me that I was probably going to have to talk to the cops eventually but just say that I wasn't there.

Contrary to T.J.W.'s assertions, this testimony does not show that Cranton formulated any kind of plan with Neiss or even that he agreed to remain quiet. Moreover, there is no indication in the record that Cranton destroyed or concealed evidence, provided false or misleading information to police, received any proceeds of the crime, or otherwise obstructed the investigation or prosecution of the crime, as required by Minn. Stat. § 609.495, subd. 3. Cranton could not have been charged with *and* convicted of the crime of aiding an offender; therefore he is not an accomplice, and the corroboration requirement does not apply here.

Cranton's testimony confirms the testimony of other witnesses on several key points, including T.J.W.'s proximity to the crime scene, his association with R.C.N and Neiss, their affiliation with the GD, and the motive for the attack. Cranton testified that he understood T.J.W. to be a member of the GD, and Captain Martin explained that T.J.W. met certain gang-identification criteria, based on his self-admission, tattoo, association with known members of the GD, his arrests with other members of the GD, and possession of GD-related graffiti and literature. Indeed, T.J.W. admitted in a statement to police that he was a member of the GD, and his former girlfriend, S.P., testified that she understood T.J.W. to be a gang member.

Cranton and Captain Martin both testified that the motive for the attack was gang-related. Cranton testified that, during the attack, Neiss accused T.R.M. of lying about who he was and about having an uncle in jail, who was a member of the GD, and said to T.R.M., "You can't f--k with GD." During his testimony, Captain Martin explained that if someone falsely claims that they are a member of the GD, members of the GD may retaliate by "assault[ing] or threaten[ing] or intimidat[ing] that person" or possibly even murdering them. C.J.S.'s testimony is also corroborative on this point. C.J.S. testified that before he left, Neiss pulled him aside to ask about T.R.M. and T.R.M.'s claimed gang membership.

Testimony from various witnesses establishes T.J.W.'s presence at the riverbank that night, the circumstances preceding the attack, and the manner of T.R.M.'s death. Cranton and C.J.S. both testified that they saw T.R.M. obtain the revolver from an area behind a bush and hand it to Neiss, saw Neiss examine the gun and empty the bullets, and saw him return the gun and bullets to T.R.M., who then placed them in his sweatshirt pocket.

T.J.W. admits that the medical examiner's testimony regarding the cause of death and the manner of shooting is consistent with Cranton's testimony, but maintains that evidence is insufficient, because there is no other evidence establishing T.J.W.'s presence at the shooting. In support of this argument, T.J.W. points out that another witness testified that T.R.M. had called him on the night of the murder and told him that he was by the river alone and was leaving soon. Admittedly, Cranton was the only witness who testified about the attack and shooting, and was the only witness who placed T.J.W. at the

riverbank when T.R.M. was shot. There is, however, uncontroverted evidence indicating T.J.W. was present at the riverbank on the night of the murder. And the district court, acting as fact-finder, is charged with weighing the evidence and judging credibility. *See Moore*, 438 N.W.2d at 108 (indicating that when examining a claim of insufficient evidence, the reviewing court assumes the fact-finder believed the state's evidence and did not believe contrary evidence).

Intent to Aid the Offender

T.J.W. contends that the evidence is insufficient to show that he intended to aid the offender, R.C.N. The district court concluded "beyond a reasonable doubt that on or about November 8, 2006, in Hennepin County, Minnesota, T.J.W. provided false and misleading information about the assault and murder of T.R.M. and did so with the express and purposeful intention of aiding R.C.N." T.J.W. argues, however, that in coming to this conclusion, the court mistakenly relied on findings that were not supported by the evidence, specifically its finding that T.J.W. "made diligent efforts to locate [the camera]" and that "T.J.W., R.C.N., and G. Neiss made efforts to clean up the riverbank and to destroy or hide evidence of their presence." In support of this argument, T.J.W. correctly points out that Cranton only testified that Neiss returned to the murder scene to destroy evidence. But S.M. testified that T.J.W. told her and S.P. that he "tried burning [T.R.M.] with a log" and that he called her in an effort to locate the digital camera.

T.J.W. also contends that the district court erroneously relied on its finding that he burned T.R.M.'s shoes and socks, claiming that these actions cannot be the basis of a conviction of aiding an offender since the record established they occurred before the

murder. T.J.W. cites no caselaw to suggest that the court absolutely may not consider, as context, the events leading up to and during a crime, when determining whether the state has met its burden in establishing the elements of the offense of aiding an offender.

Even if we were to agree with both of these arguments, there is ample other evidence to support the district court's determination. In particular, we note that the court's judgment is supported by the express findings that (1) T.J.W. aided R.C.N. and Neiss during the initial interview with police by "intentionally misrepresent[ing] to [officers], among other things, the chronology of the events of October 25, 2006, who was present at the party at the riverbank, and his direct and personal knowledge of the events leading up to and after T.R.M.'s assault and murder"; (2) T.J.W. intentionally omitted the names of those present at the riverbank in accordance with the plan made with Neiss and R.C.N.; (3) T.J.W. vehemently and falsely asserted that he did not know the two girls at the party; (4) T.J.W. lied in telling police that he, Neiss, and R.C.N. had left the riverbank before the unknown girls, that the victim was alive when he left, and that there were a couple of other unknown males present at the riverbank; and (5) T.J.W. misled police by insisting that no fighting took place when he, Neiss, and R.C.N. left and that they were not present when the victim was shot. Similarly, there is evidence that T.J.W. told the two girls, S.P. and S.M., not to discuss the events. S.P. testified that T.J.W. "just said, um, if I don't say nothing really then he won't put my name in either," and S.M. testified, "He said, 'Don't say anything. You don't know nothing. You weren't down there.'"

The district court as fact-finder is entitled to draw reasonable inferences from the facts. *In re the Welfare of S.M.J.*, 556 N.W.2d 5, 6 (Minn. App. 1996). Here, the district court reasonably inferred that T.J.W.'s omission of key eyewitnesses, assertion that he did not know the two girls who were present, and lies to the police about the events and chronology of events on October 25 were intended to protect a fellow gang member, R.C.N., from murder charges. As the state points out, T.J.W. lied to police about when he, R.C.N., and Neiss left the riverbank, and thereby provided R.C.N. with an alibi—an action that the court could legitimately infer was intended to mislead police and keep the police from identifying R.C.N. as the murderer.

T.J.W. contends that the court cannot rely on his statements to the police to conclude that he intended to aid the offender, because he lied to police to avoid incriminating himself. The law, of course, protects T.J.W.'s right against self-incrimination. U.S. Const., amend V; Minn. Const. art. 1, § 7. But the right against self-incrimination does not equate with a right to lie to or intentionally mislead police. *See United States v. Rodriguez-Rios*, 14 F.3d 1040, 1049 (5th Cir. 1994) ("Although the Fifth Amendment protects a person's right to remain silent in response to an incriminating question, an outright lie is not protected."); *see also Bryson v. United States*, 396 U.S. 64, 72, 90 S. Ct. 355, 360 (1969) (observing that "[a] citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood"). Similarly, that T.J.W.'s lies were also motivated by concern for himself is irrelevant. The statute requires only that T.J.W. intend to aid the offender, R.C.N.; it does not require that the intent to aid the offender be the sole motivating factor.

Had T.J.W. intended that his lies protect only himself, he might have told police that he left the party early, but, instead, he told police that R.C.N. and Neiss had also left. The evidence was sufficient to support a finding beyond a reasonable doubt that T.J.W. intended to aid the offender.

Knowledge

The state was required to prove beyond a reasonable doubt that T.J.W. knew or had reason to know that R.C.N. had committed a criminal act. Minn. Stat. § 609.495, subd. 3. Here, the evidence proves beyond a reasonable doubt that T.J.W. was aware of the murder. Cranton's testimony establishes T.J.W.'s presence, and for the reasons explained above, the district court did not err in relying on Cranton's testimony. In addition, S.P. testified that T.J.W. told her "they beat [T.R.M.] up" and said "something about burning him or something about trying to throw him in the river." Likewise, S.M. testified that she was present when T.J.W. told S.P. "[t]hat he tried burning [T.R.M.] with a log." Therefore, the evidence was sufficient to prove beyond a reasonable doubt that T.J.W. knew of, or had reason to know of, R.C.N.'s criminal act.

II. Sufficiency of Evidence to Support Conviction of Crime Committed for the Benefit of a Gang

In Minnesota, "[a] person who commits a crime for the benefit of, at the direction of, in association with, or motivated by involvement with a criminal gang, with the intent to promote, further, or assist in criminal conduct by gang members is guilty of a crime . . . ." Minn. Stat. § 609.229, subd. 2 (2006).

T.J.W. contends that the state did not prove the underlying crime of aiding an offender, and therefore the conviction of committing a crime for the benefit of a gang must be reversed. But as explained above, the evidence is sufficient to support T.J.W.'s conviction of aiding an offender.

T.J.W. further contends that the evidence is not sufficient to support his conviction of crime committed for the benefit of a gang because his conduct was motivated by friendship and the district court mistakenly relied on the removal of shoes and the motive for the attack, when that conduct occurred before the killing.

Although the evidence in the record demonstrated that T.J.W. and R.C.N. were childhood friends, it also demonstrated that they were fellow gang members. The district court clearly considered whether T.J.W. was motivated solely by friendship, but instead determined he was motivated both by friendship and by gang membership, concluding that T.J.W. "intended to aid and assist his lifelong friend, and fellow GD, R.C.N., who had committed Felony Murder in the Second Degree."

Testimony presented at trial illustrated that the assault and murder were motivated by a false claim of affiliation with the GD, a fact that could reasonably lead a fact-finder to infer that the subsequent coverup was also related to the GD. Similarly, the district court concluded that other circumstances surrounding the assault and murder, such as the removal and burning of T.R.M.'s shoes or his bare feet, had symbolic or special meaning in the gang context. Given the strong nexus between the criminal activity and the GD, we conclude that the evidence is sufficient to prove beyond a reasonable doubt that

T.J.W. committed the crime of aiding an offender for the benefit of, at the direction of, in association with, or motivated by his involvement with the GD.

III. Gang Expert Testimony

At trial, the state offered the testimony of Captain Michael Martin, who provided background information on the GD and explained whether Neiss, R.C.N., and T.J.W. met certain gang-membership criteria. T.J.W. did not object to Martin's testimony at trial and, in fact, cross-examined Martin. Now, on appeal, T.J.W. contends that the admission of Martin's testimony was improper because Martin recounted the general criminal activities of the GD, offered his opinion that T.J.W. was a member of the GD, provided an opinion on an ultimate issue, based his opinion regarding T.J.W.'s membership on the ten-point gang-identification criteria, and testified that the GD handled "posers" by murdering them.

"Failure to object to the admission of evidence generally constitutes a waiver of a right to appeal on that basis; however, this court has discretion to consider an error not objected to at trial if it is plain error that affects substantial rights." *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007). To establish plain error, the defendant must prove (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the three prongs are met, the appellate court may reverse if necessary "to ensure fairness and the integrity of the judicial proceedings." *Id.*

The Minnesota Supreme Court has previously considered the admissibility of gang expert testimony in several cases, including *Martinez*, 725 N.W.2d 733; *State v. Jackson*, 714 N.W.2d 681 (Minn. 2006); *State v. Blanche*, 696 N.W.2d 351 (Minn. 2005); *State v.*

Deshay, 669 N.W.2d 878 (Minn. 2003); and *State v. Lopez-Rios*, 669 N.W.2d 603 (Minn. 2003). Although the Minnesota Supreme Court has identified concerns with the admission of gang expert testimony, its admission is not prohibited. *Jackson*, 714 N.W.2d at 691. Instead, the court has "recommended that firsthand knowledge testimony be used to prove the 'for the benefit of a gang' element when feasible." *Id.* Gang expert testimony should be admitted if it is helpful to the fact-finder in making specific factual determinations. *Blanche*, 696 N.W.2d at 373; *see also* Minn. R. Evid. 702 (regarding admissibility of expert testimony). Expert testimony on gangs is frequently helpful, because the makeup and dynamics of a criminal gang—or more specifically a particular criminal gang, like the GDs—are frequently beyond the experience of the fact-finder. *State v. Carillo*, 623 N.W.2d 922, 928 (Minn. App. 2001) (explaining that an officer with knowledge and experience concerning a particular gang's activities "is able to offer a factual perspective that is both helpful and not otherwise available to a lay juror"), *review denied* (Minn. June 19, 2001).

In prior cases, the Minnesota Supreme Court has concluded that cases involving gang expert testimony included ample independent evidence establishing the defendants' links to gangs and supporting the conclusion of guilt as to the crimes charged, that the expert testimony corroborated other witnesses' testimony, and that the expert testimony was likely no more influential than the other evidence. *See Martinez*, 725 N.W.2d at 739 (examining the line of gang-expert-testimony cases). Accordingly, the supreme court concluded that reversal was unwarranted in those cases, since the error did not affect substantial rights. *Id.*

Here, we need not determine whether the admission of Captain Martin's expert testimony was error, or whether, if error, the error was plain, because its admission did not affect T.J.W.'s substantial rights. *See Griller*, 583 N.W.2d at 741 (explaining that the error affects a substantial right "if the error was prejudicial and affected the outcome of the case").

Captain Martin's testimony consisted mostly of background information, including information on gang membership, gang identification, impact on victims, gang activities, and the GD. With regard to T.J.W., Captain Martin testified that he met certain gang-membership criteria.

> PROSECUTOR: Beginning with the defendant, [T.J.W.], what did you learn?
> MARTIN: I reviewed the Minneapolis police department reports and I also looked at information that was maintained within this particular case, and I'm trying to think if I also spoke with some of the investigators that were involved with the case. And I was able to determine that he met several criteria that I believe indicate that he's a member of the Gangster Disciples.
> PROSECUTOR: Specifically what criteria did you identify with [T.J.W.]?
> MARTIN: Self admission was one of them. He admitted in a taped statement with sergeants that he's a member of the Gangster Disciples. He also admitted to a school liaison officer prior to that, Officer Chris Gaiters, that he was a member of the Gangster Disciples. My understanding is that he has a tattoo on his web of his right hand of a six-pointed star, which would be an indicator that he's a member of the Gangster Disciples. I was not able to locate a picture of that, but I was told that he has it. I was able to determine that he consistently associates with other members of the Gangster Disciples and that he's been arrested in the company of Gangster Disciples, and as well as when the search warrant was conducted on his room he was in possession of Gangster Disciple graffiti and literature.

As in prior cases, here, there was ample independent evidence establishing that T.J.W. was a member of the GD. The transcript from his police interview indicates T.J.W. identified himself as a member of the GD. Cranton and T.J.W.'s former girlfriend, S.P., likewise testified that T.J.W. was a GD member. For instance, S.P. explained that she believed T.J.W. to be a member of the GD because he had a tattoo of six-pointed star on his hand, she saw him "throw" six-pointed stars and greet others with a gang handshake, and he carried a bandana, the color of which he told her was the gang's color.

Moreover, to be convicted of the offense of a crime committed for the benefit of a gang, the prosecution does not necessarily have to establish beyond a reasonable doubt that a defendant was a member of a criminal gang. The law allows for a conviction if the crime was committed for the "benefit of, at the direction of, in association with, motivated by involvement with a criminal gang, with the intent to promote, further, or assist in criminal conduct by gang members." Minn. Stat. § 609.229, subd. 2. Here, there is enough evidence from which to infer that T.J.W. committed the crime of aiding an offender for a multitude of reasons, all of which are related to the GD. For instance, there is ample evidence, independent of Captain Martin's testimony, suggesting that the assault and murder were gang-related. Because the assault and murder were gang-related, a fact-finder could reasonably infer that the subsequent attempts to cover up the murder and mislead the police were also gang-related crimes. Thus, although the district court considered the expert testimony of Captain Martin, there were enough indicia, beyond the gang expert testimony, that the gang expert testimony was not dispositive. Because the

admission of the gang expert testimony did not affect T.J.W.'s substantial rights, we do not consider whether its admission constituted plain error.

IV. Severity Level

In sentencing a felony in Minnesota, the district court is required to impose the presumptive sentence for the particular crime under the Minnesota Sentencing Guidelines, unless there are identifiable, substantial, and compelling reasons justifying a departure. Minn. Sent. Guidelines II.D. The presumptive sentence is calculated by considering the offender's criminal-history score and the severity level of the crime. Minn. Sent. Guidelines II.C. But, in this case, T.J.W. was convicted of aiding an offender, a crime that does not have an assigned severity level. Therefore, it is up to the district court to assign the appropriate severity level, and we review that decision for an abuse of discretion. Minn. Sent. Guidelines cmt. II.A.05; *State v. Kenard*, 606 N.W.2d 440, 442-43 (Minn. 2000) (applying an abuse-of-discretion standard to the district court's assignment of a severity level to an unranked offense).

"Beyond indicating that the sentencing court is to exercise its discretion in assigning an offense severity level to unranked offenses, the sentencing guidelines do not give any direct guidance as to what considerations should go into the exercise of that discretion." *Kenard*, 606 N.W.2d at 442. Accordingly, the Minnesota Supreme Court has directed courts to consider several factors:

> the gravity of the specific conduct underlying the unranked offense; the severity level assigned to any ranked offense whose elements are similar to those of the unranked offense; the conduct of and severity level assigned to other offenders

> for the same unranked offense; and the severity level assigned to other offenders who engaged in similar conduct.

Id. at 443 (footnote omitted). This list of factors is not meant to be exhaustive, nor is any particular factor controlling. *Id.* "The failure of the district court to state the factors and considerations supporting its decision on the record can be a reason to find the district court abused its discretion." *State v. Bertsch*, 707 N.W.2d 660, 666-67 (Minn. 2006) (citing *Kenard*, 606 N.W.2d at 442-43).

Ultimately, the district court concluded that the appropriate severity ranking for T.J.W.'s offense of aiding an offender was level VIII, based on its consideration of the four *Kenard* factors and the reasoning of two court of appeals cases: *State v. Skipintheday*, 704 N.W.2d 177 (Minn. App. 2005), *aff'd* 717 N.W.2d 423 (Minn. 2006), and *In re the Welfare of C.H.*, No. C0-02-900, 2003 WL 457233 (Minn. App. Feb. 23, 2005). The ranking was also based on the district court's findings of fact, including its findings that T.J.W was present when the murder occurred and participated in the attack preceding the murder, readily participated in covering up the underlying offense, and actively misled investigating officers.

T.J.W. contends that the district court abused its discretion in assigning the severity level because it relied on clearly erroneous findings of fact in analyzing the *Kenard* factors and assigning the severity level. Specifically, T.J.W. contends that there is no evidence he did anything to clean up the murder scene because Cranton had testified that Neiss went to the scene to locate the camera, picked up the beer bottles, and kicked the leaves around, and that the court erred in considering the removal and burning of

T.R.M.'s shoes and socks because this conduct occurred before the murder and therefore cannot be considered an act of concealment.

The gravity of the specific conduct underlying T.J.W.'s offense supports the district court's ranking of level VIII. T.J.W. solicited the silence of witnesses, like S.P. and S.M., instructing them not to speak to anyone about what had happened. He misled officers in numerous ways by intentionally misrepresenting the chronology of events on the night of the murder, who was present at the riverbank, his direct and personal knowledge of the events leading to the assault and murder, and by omitting the names of Cranton, S.P., and S.M. when talking to the police.

The cases cited in the court's disposition order also support the assigned ranking of level VIII for the offense of aiding an offender. For example, in *Skipintheday*, we said that "the district court did not abuse its discretion in concluding that the appropriate severity level for accomplice after the fact to first-degree murder is level VIII." 704 N.W.2d at 183. And in *C.H.*, an unpublished decision, that was relied upon by the district court, we affirmed a decision classifying "aiding an offender in the predicate offense of second-degree murder as a severity-level VIII offense." 2003 WL 457233, at *3. *But see* Minn. Stat. § 480A.08, subd. 3 (2006) (providing that unpublished opinions are not precedential); *Vlahos v. R & I Constr., Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (stating that district courts should not rely on unpublished opinions as binding precedent and noting the danger of miscitation of unpublished opinions since they rarely contain a full recitation of the facts).

T.J.W. contends that these two cases are distinguishable because the defendants in *Skipintheday* and *C.H.* participated more than he did in concealing the crime. But the facts of *Skipintheday* and *C.H.* are sufficiently similar to the facts in the case at hand; thus, *Skipintheday* and *C.H.* support the district court's decision to assign the offense of aiding an offender as level VIII.

The *Skipintheday* defendant pleaded guilty to being an accomplice after the fact to three crimes, and the evidence indicates that, after witnessing three gang-related shootings, he fled in a car driven by another person, commanded the vehicle's driver to drive away from the crime scene, told her that she did not see anything, hid the gun and its ammunition, denied involvement in the shootings and any gang connections, and then misidentified one of the shooters in order to protect him from an outstanding arrest warrant. 704 N.W.2d at 179-80. The *Skipintheday* defendant did not participate in the argument preceding the shooting or in the shooting itself. *Id.* at 179.

Meanwhile, the defendant from *C.H.* chased a victim with his fellow gang members, was present when the victim was shot, and accepted and hid the murder weapon. 2003 WL 457233 at *3.

In the facts presented here, T.J.W. was involved in the assault leading up to the murder and was present at the time of the murder. He solicited S.P.'s and S.M.'s silence, tried to locate the camera, and lied to investigating officers. Although T.J.W. did not dispose of the murder weapon in this case, his conduct still demonstrates an effort to obtain evidence (presumably in order to destroy or hide it), silence witnesses, and mislead investigating officers.

Given the gravity of the conduct underlying T.J.W.'s offense and the similarities between T.J.W.'s actions and the actions of the defendants in *Skipintheday* and *Matter of C.H.*, the district court did not abuse its discretion in ranking T.J.W.'s offense at level VIII.

V. Additional 24-Month Sentence

Sentencing challenges based on legal issues are reviewed de novo. *State v. DeRosier*, 719 N.W.2d 900, 903 (Minn. 2006). A district court generally has broad discretion in sentencing, and its decision will not be reversed absent a clear abuse of discretion. *See State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) ("[W]e generally will not interfere with the exercise of that [broad] discretion."). The court abuses its discretion if it misinterprets or misapplies the law. *State v. Babcock*, 685 N.W.2d 36, 40 (Minn. App. 2004), *review denied* (Minn. Oct. 20, 2004).

The presumptive sentence for a person who is convicted of committing a felony offense for the benefit of a gang is the mandatory sentence of a year and a day plus the sentence for the underlying offense. Minn. Stat. § 609.229, subd. 4(a) (2006). If the victim of the underlying offense is under 18, then the sentencing guidelines provide for an additional 24 months to be added to the sentence for the underlying offense. Minn. Sent. Guidelines II.G.

Here, the district court added an additional 24 months because, the victim, T.R.M., was under the age of 18. On appeal, T.J.W. and the state agree that the district court erred in adding an additional 24 months. Minnesota courts have previously concluded that the "the crime of being an accomplice after-the-fact is a crime against the

administration of justice, not a crime against personal victims." *State v. Skipintheday*, 717 N.W.2d 423, 424 (Minn. 2006). Thus, the appropriate additional sentence for T.J.W.'s offense of crime committed for the benefit of a gang is a year and a day. Minn. Stat. § 609.229, subd. 4(a).

VI. Sentencing on More than One Count

T.J.W. argues, and the state agrees, that the district court erred in imposing separate sentences for aiding an offender and crime committed for the benefit of a gang. They are correct. The Minnesota Supreme Court has explained that when a defendant is convicted on more than one charge for the same act, the district court should adjudicate formally and impose sentence on only one count. *Martinez*, 725 N.W.2d at 739. "In a crime committed for the benefit of a gang, the underlying crime is an included crime." *Lopez-Rios*, 669 N.W.2d at 615.

Here, T.J.W. was found guilty on two counts, and the district court imposed sentences for both of these counts. But only one sentence should have been imposed. Therefore, we vacate T.J.W.'s sentence for the offense of aiding an offender, and we reduce the sentence for the offense of crime committed for the benefit of a gang to 60 months.

Affirmed as modified.