STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1124

Monty George Haaland, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 8, 2011
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

Clay County District Court
File No. 14-CR-07-530

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Brian J. Melton, Clay County Attorney, Heidi M. F. Davies, Chief Assistant County Attorney, Moorhead, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

In this appeal from denial of postconviction relief, appellant argues that the district court erred in not suppressing drug evidence and that the state improperly elicited expert

testimony as to intent to sell the drugs and inadmissible drug-profile testimony. We affirm the district court's decision with respect to the suppression issue and the expert testimony. But because the district court plainly erred in admitting drug-profile testimony and that error affected appellant's substantial rights, we reverse in part and remand.

FACTS

Appellant Monty Haaland was driving his friend J.F.'s Cadillac on July 6, 2007. Moorhead Police Officer Adam Torgerson ran a license-plate check, which revealed that J.F.'s driving privileges were suspended. Because Haaland matched the available description of J.F., Officer Torgerson initiated a traffic stop.

Haaland identified himself with a driver's license that had a clipped corner, explaining that he had misplaced his new license. While talking to Haaland, Officer Torgerson noticed several empty cans of energy drink in the vehicle and an air freshener. He also noticed that Haaland avoided eye contact, seemed unusually nervous, and gave evasive and nonresponsive answers to questions. After a license check confirmed that Haaland had a valid license, Officer Torgerson told Haaland that he was free to go. But because the circumstances of the stop led Officer Torgerson to believe that the vehicle contained drugs, he asked Haaland if he could "talk to him for a minute." Haaland did not respond orally but did not leave. Officer Torgerson asked Haaland if he could search the vehicle, and Haaland responded that it was not his car. Officer Torgerson asked multiple times, but Haaland did not provide a yes or no answer. Eventually, Haaland

consented to a search. Officer Torgerson advised Haaland that he could withdraw his consent at any time, but Haaland did not do so.

Officer Torgerson searched the vehicle with the assistance of Officer Shawn Carlson. During the search, they discovered several items: a small plastic bag of marijuana concealed behind the roof paneling; a large plastic bag of marijuana concealed under the carpeting in the trunk; and a plastic bag with several smaller bags inside containing a total of 288 ecstasy pills concealed in the engine compartment. Haaland was arrested, and a search of his person revealed more than $800 in cash.

Haaland was charged with first-degree controlled-substance crime (sale); second-degree controlled-substance crime (possession); and fifth-degree controlled-substance crime (sale). Haaland moved to suppress the drug evidence, arguing that the stop was unlawful. The district court denied the motion. The state dismissed the third count, and the case proceeded to trial. The jury found Haaland guilty of the first- and second-degree controlled-substance crimes. Haaland did not pursue a direct appeal.

Haaland filed a timely petition for postconviction relief. He argued that the district court erred in (1) admitting expert testimony from the police officers as to whether Haaland intended to sell the ecstasy pills found in the vehicle, (2) admitting drug-profile evidence, and (3) denying his pretrial suppression motion. The district court summarily denied relief and incorporated its pretrial order denying Haaland's suppression motion. This appeal follows.

D E C I S I O N

"A petition for postconviction relief is a collateral attack on a conviction that carries a presumption of regularity." *Shoen v. State*, 648 N.W.2d 228, 231 (Minn. 2002). We review a postconviction court's decision for an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). We review findings of fact to determine whether the evidence is sufficient to sustain the findings and review de novo legal issues. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003).

I. The district court properly denied Haaland's motion to suppress.

When reviewing a district court's pretrial order on a motion to suppress evidence, "we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009) (quotation omitted). Where, as here, the facts are not in dispute, we may "independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

Both the federal and state constitutions guarantee the right to be free from unreasonable searches and seizures. U.S. Const. amend IV; Minn. Const. art. I, § 10. The Minnesota Supreme Court, in interpreting article I, section 10 of the Minnesota Constitution, expressly adopted the principles of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1838 (1968), in the context of traffic stops. *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004). A *Terry* analysis asks (1) whether the stop was justified at its inception by reasonable, articulable suspicion or probable cause, and (2) if so, whether the actions of the police during the stop were "reasonably related to and justified by the circumstances

that gave rise to the stop in the first place." *Id.* at 364. "[T]he scope and duration of a traffic stop investigation must be limited to the justification for the stop." *State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003). "[E]ach incremental intrusion during a traffic stop [must] be tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry*." *Askerooth*, 681 N.W.2d at 365.

Haaland concedes that the initial stop was lawful but argues that Officer Torgerson impermissibly expanded the scope of the stop by detaining Haaland after it was apparent that his license was valid. We agree that further detention of Haaland based on suspicion of driving with a suspended license was unjustified after Officer Torgerson verified that Haaland had a valid driver's license. *See Fort*, 660 N.W.2d at 418. Officer Torgerson's continued detention of Haaland and request for consent to search, therefore, required separate justification. *See State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005) (requiring "reasonable articulable suspicion of other criminal activity" to expand a traffic stop by requesting to search a vehicle (quotation omitted)).

We conclude that separate justification was present. Officer Torgerson observed air fresheners, several cans of energy drink, and loose interior moldings. He also noted that Haaland was driving a vehicle that was not his own and was unusually nervous and evasive. Officer Torgerson knows, based on training and experience, that this set of factors tends to indicate the presence of drugs.

Haaland argues that several of these factors, such as the presence of an air freshener or Haaland's nervousness, are not enough in and of themselves to indicate the

presence of drugs. *See State v. Tomaino*, 627 N.W.2d 338, 341 (Minn. App. 2001) (stating that nervousness is not enough by itself to establish reasonable suspicion but "may contribute to an officer's reasonable suspicion"). We agree. But the relevant inquiry is whether the totality of the circumstances provides a reasonable, articulable suspicion of criminal activity. *Burbach*, 706 N.W.2d at 488. And police officers are permitted to rely upon "inferences and deductions that might elude an untrained person." *Tomaino*, 627 N.W.2d at 341; *see also State v. Martinson*, 581 N.W.2d 846, 851-52 (Minn. 1998) (permitting consideration of drug-courier profile in determining reasonable suspicion). Officer Torgerson's training and experience reasonably led him to believe that the combination of these factors made it likely that there were drugs in the vehicle. Accordingly, he had sufficient reasonable, articulable suspicion to further detain Haaland and request permission to search the vehicle.

Haaland also asserts that even if the request to search was justified, the search was still unlawful because he did not voluntarily consent to the search. Whether consent is voluntary is a question of fact to be determined by considering the totality of the circumstances. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). Consent is voluntary if a "reasonable person would have felt free to decline the officer's requests or otherwise terminate the encounter." *Id.* (quotation omitted).

Haaland argues that Officer Torgerson "coerced" him into consenting, pointing to Officer Torgerson's repeated requests and "show of authority." This argument is unavailing. The record demonstrates that Officer Torgerson's repeated requests were prompted by Haaland's failure to respond with a yes or no answer. And Haaland does

not argue that Officer Torgerson exerted any additional "show of authority" beyond that already present because of the initial stop. Officer Torgerson did not lean over Haaland, remove him from the vehicle, display weapons, or otherwise attempt to intimidate Haaland. *Cf. State v. George*, 557 N.W.2d 575, 581 (Minn. 1997) (considering officer's leaning over defendant as part of improper coercion to extract consent); *Dezso*, 512 N.W.2d at 881 (concluding that consent was involuntary when an officer placed the defendant in a squad car and engaged in a series of requests to examine his wallet while leaning over toward the defendant). Rather, Officer Torgerson offered to call J.F. about searching the vehicle, did so without success, and advised Haaland that he could withdraw his consent at any time. On this record, we conclude that the district court did not err in determining that Haaland's consent to the search was valid.

II. The district court's error in permitting expert testimony as to intent to sell was harmless.

Haaland asserts that the district court improperly permitted the officers to testify as to whether the ecstasy pills found in the vehicle were intended for sale, a required element of the first-degree controlled-substance offense. *See* Minn. Stat. § 152.01, subd. 15a (2006) (including possession with intent to sell in definition of "sell"). "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Minn. R. Evid. 702; *see also* Minn. R. Evid. 704 (providing that expert testimony is not objectionable merely because it "embraces an ultimate issue to be decided by the trier of fact"). However, opinion testimony as to a legal conclusion or mixed questions of law and fact does not assist the factfinder and should not be permitted. *State v. Collard*, 414 N.W.2d 733, 736 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988); *see also* Minn. R. Evid. 704 1977 comm. cmt. Intent is a mixed question of law and fact, and an "expert inference" on the issue of intent is impermissible. *State v. Chambers*, 507 N.W.2d 237, 239 (Minn. 1993) (citing *State v. Provost*, 490 N.W.2d 93, 101-02 (Minn. 1992)).

Haaland contends that the officers' testimony was not merely informative but "in the form of a legal conclusion that the drugs were in fact for resale." We agree. An expert in a controlled-substance case may offer context by testifying as to the quantities of a particular drug that one would possess for personal use or the relevance of the purity or packaging of drugs but may not opine as to the defendant's intent or draw conclusions for the jury. *See Collard*, 414 N.W.2d at 736 (stating that testimony as to personal-use quantity was permissible because it was "not expressed as a legal conclusion or in otherwise conclusive terms"). Officer Torgerson opined that the pills were "packaged for resale" and that he "would not believe that [the 288 pills were] a personal-use amount." Officer Carlson likewise testified that he believed that the pills were packaged for resale.

The officers' testimony did not simply describe the amount and packaging of the ecstasy but told the jury that Haaland possessed the ecstasy with the intent to sell. Because this testimony did not assist the jury but made the ultimate determination the jury was to reach, we conclude that the district court abused its discretion in admitting the testimony.

This conclusion does not end our analysis. We next consider whether the error was harmless. *See Amos*, 658 N.W.2d at 203 (requiring appellant to demonstrate prejudice from erroneous evidentiary ruling). Our careful review of the record reveals that the opinion testimony was not the only probative evidence of Haaland's intent to sell. The jury heard undisputed testimony about the quantity of ecstasy seized and how it was packaged. *See State v. White*, 332 N.W.2d 910, 912 (Minn. 1983) (holding that "the large quantity of drugs possessed" was evidence tending to show intent to sell). Although the record is devoid of evidence as to the typical quantity possessed for personal use, it is unlikely that the jury would have concluded, even without the officers' opinion testimony, that 288 ecstasy pills packaged in multiple small bags were intended for personal use. Moreover, Haaland had more than $800 in cash when he was arrested, which is consistent with drug sales. *See Collard*, 414 N.W.2d at 736 (stating that possession of a "large sum of money" could demonstrate "a selling operation"). On this record, we conclude that the error in permitting the officers' conclusory opinions regarding Haaland's intention to sell the ecstasy was harmless and does not warrant postconviction relief.

III. The district court plainly erred in admitting drug-profile testimony, which affected Haaland's substantial rights.

Haaland also argues that the district court erred in admitting the officers' testimony as to the characteristics of drug traffickers and how Haaland displayed these characteristics. He concedes that he did not object to this testimony at trial, so we consider whether "(1) there is error; (2) the error is plain; and (3) the error affects the defendant's substantial rights." *See State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). An error is plain if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006), and it affects the defendant's substantial rights if it is "prejudicial and affect[s] the outcome of the case," *Griller*, 583 N.W.2d at 741. If plain error affecting substantial rights is established, then we assess "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Ramey*, 721 N.W.2d at 302.

The supreme court has directly addressed the issue of drug-profile evidence twice, each time holding such evidence is not admissible. In *State v. Williams*, the supreme court held that testimony from police officers that "in their experience most drug couriers behave a certain way" was "clearly and plainly . . . inadmissible." 525 N.W.2d 538, 548 (Minn. 1994). The *Williams* court noted that drug-profile evidence is "akin to character evidence" because it "impliedly urge[s]" the jury to infer that since the defendant's conduct fits the profile, the defendant must be a drug courier. *Id.* at 547-48. Again, in *State v. Litzau*, the supreme court held that an expert witness's testimony that "drug

dealers often purchase vehicles without transferring title to their own names, sometimes use a second older vehicle to transport drugs to avoid forfeiture of a newer vehicle, and often hide drugs in obscure places such as in the air cleaner" constituted drug-profile evidence that was "plainly inadmissible" under *Williams*. 650 N.W.2d 177, 185 (Minn. 2002).

Analysis of the challenged testimony demonstrates that the concerns the supreme court articulated in *Williams* and *Litzau* are present here. Officer Torgerson testified first, describing the profile of a drug trafficker and explaining why Haaland (or the vehicle he was driving) met the profile. Officer Torgerson testified that he received training on the trafficking of controlled substances and knew what to look for to identify possible suspects. He explained that one of the most common ways of transporting controlled substances is through vehicles and that most of the time "the driver is driving a vehicle not registered to him, or it's not his vehicle," so that he can claim ignorance of the drugs. Officer Torgerson then testified about the significance of the air freshener and energy drinks he observed inside the vehicle Haaland was driving, explaining:

> As you learn in the drug trafficking education that we receive, air fresheners are commonly present in vehicles transporting illegal narcotics. Energy cans also present. Many times vehicles transporting illegal narcotics, the reason energy drinks are usually present is they don't want to sleep or stop at hotel, they want to get to Point A from Point B, energy drinks let you do that by staying awake, staying alert.

Officer Torgerson also testified that the inside of the vehicle was messy and that there "appeared to be a lot of loose parts," like the vehicle "had been tampered with." He

testified that the combination of these facts led him to believe that the vehicle "may be involved in some type of drug trafficking."

Officer Carlson similarly testified about the training he received regarding the trafficking of controlled substances. He testified that, during the search of the vehicle, he observed air fresheners and energy drinks and that "it appeared that the body panels inside the car had been removed before." He explained that

> [p]eople transport drugs often in vehicles, and they hide them in the voids inside of the door panels, inside of the—basically empty areas of the car behind plastic molding. . . . There are a lot of voids commonly used for transporting drugs. . . . So the drug dealers know about these voids.

As in *Williams* and *Litzau*, the testimony of Officer Torgerson and Officer Carlson is problematic because of the manner in which it presents the evidence. Police officers may testify to relevant aspects of drug trade, such as techniques to avoid detection, to explain a defendant's conduct or the significance of particular evidence. *See Williams*, 525 N.W.2d at 548 (collecting cases permitting testimony as to techniques drug dealers use to avoid detection to explain the defendant's conduct and testimony as to how coded language related to drugs); *Collard*, 414 N.W.2d at 736 (permitting testimony as to typical single dosage of cocaine, amount typically sold on the street, and the meaning of figures found in defendant's notes). But the two officers here did not simply explain how Haaland's conduct or evidence seized from him demonstrated that he was selling drugs. Rather, their testimony characterized Haaland as a drug trafficker because he matched the profile of a drug trafficker. For example, instead of testifying that an air freshener could mask the odor of drugs, the officers testified that drug traffickers use air fresheners to do

so. And instead of explaining that many vehicles have voids behind the interior moldings that could conceal items, the officers testified that drug traffickers use these voids to hide drugs. In sum, the officers' testimony went well beyond their observations to their conclusion that, consistent with typical drug traffickers, Haaland was using his friend's vehicle to transport and sell drugs. Because this is precisely the type of evidence *Williams* and *Litzau* prohibit, we conclude that the district court plainly erred by admitting the testimony.

We next consider whether the improper drug-profile testimony affected Haaland's substantial rights. Unlike the circumstances of the erroneous expert testimony regarding intent to sell, there are few factors that mitigate the impact of the improper drug-profile testimony. Haaland was unable to counter the drug-profile evidence because it negated a critical element of his defense—that he was driving his friend's car and was unaware of its contents. It is unlikely that the jury afforded much credence to this defense after hearing Officer Torgerson's testimony that this is precisely the behavior expected of a drug trafficker. And although the jury heard the state impeach Haaland with a suppressed statement he made to a police detective indicating that the ecstasy was "[n]ot from around here," this statement was not substantive evidence of Haaland's guilt and did not play a significant role in the trial. *See State v. Tomassoni*, 778 N.W.2d 327, 333 (Minn. 2010) (stating that suppressed statement may be used for impeachment but is not substantive evidence). Therefore, the only substantive evidence aside from characteristics of the car tending to incriminate Haaland is the more than $800 in cash on his person. Because this is a large sum of cash, it is strong evidence tending to link him to drug sales; but it also is

significantly less than that commonly relied upon as evidence of drug sales. *See, e.g.*, *State v. Lozar*, 458 N.W.2d 434, 441 (Minn. App. 1990) (over $5,000), *review denied* (Minn. Sept. 28, 1990); *Collard*, 414 N.W.2d at 736 (over $2,000); *State v. Marshall*, 411 N.W.2d 276, 281 (Minn. App. 1987) ($4,700), *review denied* (Minn. Oct. 26, 1987). And it is only one fact against extensive drug-profile evidence.

Our careful review of the record reveals that the drug-profile evidence played a significant role in the state's case against Haaland. Not only did the testimony of Officer Torgerson and Officer Carlson comprise a substantial portion of the state's case, but the prosecutor relied heavily on the drug-profile evidence in closing argument:

> [H]ow do we know that it was really this defendant's, whether it was his alone, or whether it was something that he possessed together with [J.F.], as part of a business venture that they were involved in.
>
> Consider everything that [the officers] saw at the traffic stop. . . . Officer Torgerson told you he stopped this vehicle because the registered owner had suspended driving privileges. And as he saw that vehicle pull over, he noticed the bumper was loose. And when we got up to the vehicle and spoke to the driver, he saw the air freshener and energy cans, and additional things within the vehicle.
>
> Now, to untrained observer, these things wouldn't mean anything. It would mean that this car needed repair work and somebody likes Red Bull.
>
> But to a trained officer, who has been trained specifically in drug interdiction, these are all red flags. The loose moldings where the car has been taken apart and drugs stored in the cavities or voids in the vehicle, put back together. The air fresheners to hide the odor of controlled substances, the energy drinks to allow a person to stay awake while driving long distances, and, of course, that third-party vehicle.

> Why is it so important to have somebody else's vehicle when you're driving around a load of drugs?
>
> Because the first thing you can say is, "I didn't know they were in there, it's not my car."
>
> You can immediately separate yourself from those drugs. And that way, all you lose is maybe your drugs, maybe your cash, but you might save yourself a charge. That's a very important tactic employed by people who are trafficking in controlled substances because you can say, "I just borrowed it. I didn't know."

Viewing the record as a whole, we conclude that the erroneous admission of the drug-profile evidence affected the outcome of the case and deprived Haaland of a fair trial. We therefore reverse Haaland's conviction and remand for a new trial.

Affirmed in part, reversed in part, and remanded.