STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0750

State of Minnesota,
Respondent,

vs.

Misty Marie Littlewolf,
Appellant.

Filed May 12, 2014
Affirmed
Hudson, Judge

Clearwater County District Court
File No. 15-CR-12-276

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Richard C. Mollin, Clearwater County Attorney, Bagley, Minnesota (for respondent)

Stephanie A. Karri, Attorney at Law, St. Paul, Minnesota (for appellant)

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

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

HUDSON, Judge

On appeal from her convictions of three controlled-substance crimes, appellant argues that (1) the district court abused its discretion by trying her jointly with a co-defendant; (2) she could not be convicted of aiding and abetting the manufacture of

methamphetamine where no usable methamphetamine was found; (3) there was insufficient evidence to support each of her convictions; (4) the district court abused its discretion by denying her motion for a downward durational departure to her sentence; and (5) her conviction for aiding and abetting the possession of methamphetamine precursors must be vacated because it is a lesser-included crime of aiding and abetting the manufacture of methamphetamine. We affirm.

FACTS

A concerned individual called the White Earth Police Department to report a domestic disturbance between appellant Misty Marie Littlewolf and her boyfriend Joseph Malmo at appellant's mother's home. The caller reported that he was worried about the welfare of children in the home. The sergeant who took the call notified the officer on night patrol to be on the lookout for a white van with orange lights on the top, which appellant, Malmo, and two children were thought to be traveling in, and advised the officer to stop the vehicle for a welfare check on the children. The officer located the white van with orange lights on top in a wooded area near a lake. He observed an infant on the ground in a car seat near the van, and Malmo in the driver's seat of the van wearing rubber gloves and holding a propane torch and a knife. The officer also detected a strong chemical odor on Malmo consistent with the odor of a methamphetamine lab. In front of the van there was a small pile of wood burning and a second fire to the east. No one else was at the campsite besides Malmo, appellant, and the children.

Near the fire to the east, the officer found a cigarette butt consistent with the brand Malmo was smoking as well as various items known to be used for manufacturing

methamphetamine. Malmo was arrested and placed in the squad car; around that time appellant came up from the nearby lakeside with a female toddler and a fishing pole. Appellant told the officer that she had gotten into a fight with her parents earlier in the day so she and Malmo had left with the two children. She also told him that she owned the van. Appellant was also arrested.

Narcotics investigators were called to the scene. At trial, one investigator testified regarding the process and supplies necessary for the "one-pot method" for manufacturing methamphetamine and stated that all of the items used for the method were found at the campsite. The investigator testified that the final stage of the manufacturing process had not yet reached completion, but that a liquid found at the scene was analyzed by the BCA and tested positive for methamphetamine. Investigators also learned that, in the months before her arrest, appellant had purchased medication containing pseudoephedrine or ephedrine, essential ingredients in the methamphetamine-manufacturing process, ten separate times at six different pharmacies.

The Clearwater County Attorney charged appellant with seven controlled-substance crimes. Appellant and Malmo had a joint jury trial. Four of the counts against appellant were dismissed at the conclusion of the state's case on a motion for judgment of acquittal. The jury found appellant guilty of the remaining three charges: (1) aiding and abetting first-degree controlled substance crime — manufacturing methamphetamine under Minn. Stat. § 152.021, subd. 2a (2010); (2) aiding and abetting methamphetamine-related precursors under Minn. Stat. § 152.0262, subd. 1(a) (2010); and (3) aiding and abetting methamphetamine-related crime involving children under Minn. Stat. § 152.137,

subd. 2(b) (2010). Appellant was sentenced to 81 months for aiding and abetting the manufacture of methamphetamine and 12 months for aiding and abetting methamphetamine crimes involving children. No sentence was imposed for the count of aiding and abetting possession of methamphetamine precursors. The district court denied appellant's motion for a downward durational departure. This appeal follows.

D E C I S I O N

I

Minn. R. Crim. P. 17.03 gives the district court discretion to allow a joint trial when two or more defendants are charged with the same offense. Minn. R. Crim. P. 17.03, subd. 2. "[T]he court must consider: (1) the nature of the offense charged; (2) the impact on the victim; (3) the potential prejudice to the defendant; and (4) the interests of justice." *Id.* The rule "neither favors nor disfavors joinder." *State v. Martin*, 773 N.W.2d 89, 99 (Minn. 2009).[1] On review, this court must make "an independent inquiry into [whether] any substantial prejudice to defendants may have resulted from the joinder." *Id.* (quotation omitted). The district court found that three of the four elements weighed in favor of joinder, and that the "impact on the victim" factor neither weighed for nor against joinder because the only victims, the defendant's children, would not be testifying.

[1] Appellant argues that there is a long-standing state policy against joinder, but the presumption in favor of separate trials was removed in 1987. *Santiago v. State*, 644 N.W.2d 425, 440 (Minn. 2002).

Nature of the Offense Charged

Appellant argues that this factor weighs against joinder because, although the charges arose from the same event, appellant and Malmo's actions, location, and circumstances were different when police discovered the suspected methamphetamine lab. Appellant argues that there was nothing to support the district court's finding that there was "substantial evidence that the [d]efendants worked in close concert with one another." The nature of the offense charged favors joinder when there is substantial evidence that codefendants worked in close concert with each other and the overwhelming majority of evidence is admissible against both defendants. *State v. Johnson*, 811 N.W.2d 136, 142 (Minn. App. 2012), *review denied* (Minn. Mar. 28, 2012).

Here, the only evidence that was admissible against Malmo but not appellant were brief statements he made to officers when they arrived at the campsite. Before Malmo's statements were introduced, the judge cautioned the jury that they could not be used against appellant. Another similar instruction was given in the final jury instructions. All of the other physical evidence found at the site was admissible against both defendants. The district court found that "[v]irtually all of the incriminating evidence against the [d]efendants was gathered on a single occasion, from the same, remote campsite, where the [d]efendants, along with their children, were the only people present." Thus, the "overwhelming majority" of evidence was admissible against both. Further, Malmo and appellant were the only adults present at the scene and Malmo described appellant as his fiancée, providing a basis for the district court to conclude that the two were working together. Thus, we conclude that this factor weighs in favor of joinder.

Impact on the Victim

Here, the only individual victims of the crime, the children, would not be testifying. We agree with the district court that this factor weighs neither for nor against joinder.

Prejudice to the Defendant

Appellant argues that she was prejudiced by the joint trial because Malmo's statements would not have been admitted as evidence if she had a separate trial. She also argues that the district court erred by finding that the defendants had "complimentary defenses."

Substantial prejudice exists when parties present antagonistic or inconsistent defenses. *Johnson*, 811 N.W.2d at 143. At a pre-trial hearing, defense counsel for Malmo claimed that, while the defenses were currently "not guilty," he anticipated that there could be finger-pointing at trial. Appellant's counsel agreed and further argued that she would be prejudiced by Malmo's post-arrest statements that could be introduced against her in violation of *Crawford* and by the introduction of Malmo's prior convictions.

Because neither defendant testified, Malmo's prior convictions and post-arrest statements were never introduced at trial. The only statements made by Malmo introduced at trial were those to an officer at the scene. The officer testified that Malmo originally told him that he had seen the methamphetamine-related items near the campfires, but after continued questioning Malmo told the officer he had never been around the materials at all. Appellant claims this was prejudicial toward her because the

fact that Malmo changed his story tends to establish his guilt. But it was a minor discrepancy, and Malmo never admitted any ownership or control of the methamphetamine-related items. Thus, there is not a basis to conclude that appellant was prejudiced by the statements.

Nor does it appear that appellant was substantially prejudiced by the possibility of the defendants presenting antagonistic defenses. At trial, Malmo's defense was that the methamphetamine-related items at the campsite did not belong to him and that he was just camping. Appellant's defense was that she did not know what was going on at the campsite and that her life was not so intertwined with Malmo's that she would have always known what he was doing. The only prejudice appellant identifies is that her defense theory had "less impact" because if she had her own trial she would not have been presented as Malmo's partner, and his incriminating statements would not have been introduced. But it is unlikely that there would have been no mention of Malmo in appellant's trial had they been held separately, and, as discussed above, the statements Malmo made were very brief and not damaging. In addition, the district court noted that the parties filed the same motions at the same time and made nearly identical arguments regarding the same issues. *See State v. Jackson*, 773 N.W.2d 111, 119 (Minn. 2009) (concluding that defendants were not prejudiced by a joint trial in part because they "regularly adopted the motions and objections of the other") (quotation omitted). We conclude that this factor weighs in favor of joinder.

Interests of Justice

Appellant argues that the district court's determination that this prong weighed in favor of joinder was unfounded because a witness the district court was worried would disappear between trials never testified. But the district court also concluded that joinder would clear congestion on the court calendar and prevent one defendant from potentially having to stay in custody for additional time while the first trial was held. The district court also noted that the separate trials would involve the same witnesses, and a joint trial would prevent witnesses from being able to "polish their testimony" before the second trial. We agree and conclude that it was not error to try appellant and Malmo jointly.

II

For appellant to be found guilty of aiding and abetting the manufacture of methamphetamine, the state must prove beyond a reasonable doubt that she intentionally aided another in manufacturing "any amount of methamphetamine." Minn. Stat. § 152.021, subd. 2a, 609.05, subd. 1 (2010). "'Manufacture,' in places other than a pharmacy, means and includes the production, cultivation, quality control, and standardization by mechanical, physical, chemical, or pharmaceutical means, packing, repacking, tableting, encapsulating, labeling, relabeling, filling, or by other process, of drugs." Minn. Stat. § 152.01, subd. 7 (2010). Appellant argues that she could not be guilty of this crime because no completed, usable methamphetamine was actually found at the campsite; therefore at most she was guilty of aiding and abetting an attempt to manufacture methamphetamine. Appellant does not dispute that liquid methamphetamine, which is generally not consumable, was found at the scene.

Appellant claims that the word "and" between "production, cultivation, quality control" and "standardization" in the definition of manufacture equates to a requirement that evidence of a process as well as evidence of a completed final product must exist to support a conviction for manufacturing. In other words, a person could not be convicted of manufacturing a drug until it reaches its final, usable form. We disagree. Appellant's position is not supported by other phrases within the definition of "manufacture." *See State v. Larivee*, 656 N.W.2d 226, 229 (Minn. 2003) (quotation omitted) (stating that statutes should be construed as a whole so that no word, phrase, or sentence is superfluous, void, or insignificant). The inclusion of the phrases "means and includes" and "or by other process" indicates that the definition is not exhaustive and that a person may be found guilty of manufacturing a controlled substance by any of the methods listed or even methods that are not specifically named. Minn. Stat. § 152.01, subd. 7; *see LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14, 19 (Minn. 2012) (stating that "[t]he word 'includes' is not exhaustive or exclusive"); *State v. Kessler*, 470 N.W.2d 536, 541 (Minn. App. 1991) (stating that the definition of manufacture includes production and cultivation "among other things").

In addition, the actual crime of manufacturing methamphetamine simply states that an individual is guilty if they manufacture "any amount" of the drug; it does not distinguish between usable and unusable forms. Minn. Stat. § 152.021, subd. 2a. Methamphetamine is defined in the schedule of controlled substances as "*any* material, compound, mixture, or preparation which contains *any* quantity" of methamphetamine. Minn. Stat. § 152.02, subd. 3(3)(b) (2010) (emphasis added). Appellant conceded that

the liquid found at the campsite was a solvent containing methamphetamine. Based on the plain language of the relevant statutes, the liquid found at the scene supports a manufacturing charge because it is a "material, compound, mixture, or preparation" that contains methamphetamine. *See State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009) (concluding that bong water containing traces of methamphetamine qualified as a controlled substance).

Although this issue has never arisen in a manufacturing context, the Minnesota Supreme Court has affirmed a conviction for possession of methamphetamine despite the absence of any usable form of the drug. *See State v. Traxler*, 583 N.W.2d 556, 562 (Minn. 1998) (affirming possession charge where appellant had liquid methamphetamine and methamphetamine residue). And other jurisdictions have concluded that sufficient evidence can exist to support a manufacturing charge despite the absence of a usable controlled substance. Most significantly, the Kansas Supreme Court noted that the definitions of "manufacture" and "controlled substance" "in the Uniform Controlled Substances Act include but do not mandate the consummation of a final product." *State v. Martens*, 54 P.3d 960, 965 (Kan. 2002). Minnesota's controlled substance laws are also based on the Uniform Controlled Substances Act, which nearly every state has adopted. *See State v. King*, 257 N.W.2d 693, 695-96 (Minn. 1977); *State v. Ali*, 613 N.W.2d 796, 798 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000).

Because we conclude that the definition of manufacture does not require the presence of a usable controlled substance and because the liquid methamphetamine found

at the scene meets the definition of methamphetamine in the controlled-substances schedule, we conclude that the evidence is sufficient to support appellant's conviction.

III

Appellant argues that there is insufficient circumstantial evidence to support each of her convictions for aiding and abetting methamphetamine-related crimes because the evidence only shows that she "passively acquiesced" to Malmo's actions, not that she took any active role in the crimes.

A person may be guilty of aiding and abetting the crimes of a principal if he or she "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1. The state must prove the defendant "had knowledge of the crime and intended his presence or actions to further the commission of that crime." *State v. Hawes*, 801 N.W.2d 659, 668 (Minn. 2011) (quotation omitted). The jury may infer the necessary intent from the circumstances of the crime, including the "defendant's presence at the scene of the crime, defendant's close association with the principal before and after the crime, [and] defendant's lack of objection or surprise under the circumstances." *State v. Swanson*, 707 N.W.2d 645, 659 (Minn. 2006). The aiding-and-abetting statute requires more than inaction and "passive approval" to impose liability, *Hawes*, 801 N.W.2d at 673 (quotation omitted), but "active participation in the overt act which constitutes the substantive offense is not required." *State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995).

The sufficiency of circumstantial evidence should be closely scrutinized on review in a two-step process. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). The first

step is to identify the circumstances proved. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). We defer to the jury's acceptance of the proof of the circumstances and also to the jury's rejection of any evidence that conflicts with the circumstances proved by the state. *Id*. Juries are in the best position to "determine credibility and weigh the evidence." *Id*. Next, this court "examine[s] independently the reasonableness of all inferences that might be drawn from the circumstances proved," including those consistent with a hypothesis other than guilt. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (quotation omitted). The circumstantial evidence must form a complete chain that leads directly to the guilt of the defendant, such that "there are no other reasonable, rational inferences that are inconsistent with guilt." *Id*. at 330. If any of the circumstances proved are inconsistent with guilt, a reasonable doubt as to guilt arises. *Al-Naseer*, 788 N.W.2d at 474. But a conviction based on circumstantial evidence will not be overturned based merely on conjecture. *Andersen*, 784 N.W.2d at 330.

a. Aiding and Abetting the Manufacture of Methamphetamine

Appellant argues that, even if the manufacturing charge does not require usable methamphetamine to uphold her conviction, her presence at the campsite does not, by itself, prove that she aided and abetted the manufacturing process, particularly because when police arrived she was at the lake with her daughter and not with Malmo. But the state was not required to prove that appellant actively participated in the actual act of manufacturing methamphetamine; rather it is enough if she had knowledge of it and intended her actions or presence to further the crime. *Hawes*, 801 N.W.2d at 668. Here, more circumstances were proved beyond just appellant's presence at the scene.

Appellant claims that there was no evidence that she and Malmo were so intimately involved with each other that she knew everything he was doing. But Malmo described appellant as his fiancée and the couple have a child together. They also arrived at the remote campsite together in a van owned by appellant and were the only people there. Thus, the jury could reasonably conclude that the two were "closely associated." *See Swanson*, 707 N.W.2d at 659. Appellant's theory at trial was that she and Malmo had decided to take the children "for a day at the lake." Similarly, Malmo's theory of the case was that he was camping at the lakeside. Although appellant did have a fishing pole, an officer testified that there were no items found at the site consistent with camping, such as food preparation going on around the fires.

In addition, pharmacy records show that appellant purchased ephedrine and pseudoephedrine ten separate times at six different pharmacies in the 14 months before her arrest. Of those purchases, three occurred within about two weeks of her arrest, including one the day before. Appellant claims the purchases are consistent with an inference that she needed the medicine for legitimate purposes such as allergies or a cold. But the exhibits and testimony show that appellant made multiple purchases within short time frames, which is inconsistent with personal use. Most importantly, appellant purchased more than forty pills containing more than eight grams of pseudoephedrine or ephedrine within a short period before her arrest.[2] Appellant claims that the items she purchased at the pharmacies were never directly linked to the campsite, but the frequency

[2] Although appellant was not charged under Minn. Stat. § 152.02, subd. 6(f) (2010), this provision makes it a crime for an individual to purchase more than six grams of methamphetamine precursors in a thirty-day period.

and amount of purchases allow an inference that appellant intended for Malmo to use the ephedrine or pseudoephedrine to manufacture methamphetamine. It was reasonable for the jury to infer that appellant knew what Malmo was doing and provided him ingredients and transportation to aid in the manufacturing process. Based on all the circumstances proved, we are satisfied that there are no reasonable inferences inconsistent with guilt.

b. Aiding and Abetting the Possession of a Substance with Intent to Manufacture Methamphetamine

A person is guilty of aiding and abetting the possession of a substance with intent to manufacture methamphetamine if he or she intentionally aids another in possessing "any chemical reagents or precursors with the intent to manufacture methamphetamine." Minn. Stat. §§ 152.0262, subd. 1(a), 609.05, subd. 1. "Chemical reagents or precursors" include, among other things, ephedrine, pseudoephedrine, and lithium metal. Minn. Stat. § 152.0262, subd. 1(b) (2010).

A narcotics investigator testified that he found small metal balls inside a plastic bottle at the campsite, consistent with lithium, which are used to heat up and "cook" other ingredients into methamphetamine. The officer also testified that "everything that is used to create methamphetamine" was at the campsite. A forensic scientist with the BCA testified that a liquid substance found at the campsite was methamphetamine, "a compound that was ephedrine and or pseudoephedrine."

As discussed above, the evidence showed that appellant and Malmo had a close relationship and that she made several purchases of ephedrine or pseudoephedrine that were inconsistent with personal use. The couple arrived at the campsite together in one

vehicle, thus it is reasonable to infer that the lithium and ephedrine or pseudoephedrine were also transported in that vehicle. Liquid methamphetamine was produced from the supplies and ingredients found. Accordingly, the evidence was sufficient to support appellant's conviction under this section, and no reasonable hypotheses inconsistent with guilt exist.

c. Aiding and Abetting Methamphetamine-Related Crimes Involving Children

A person is guilty of aiding and abetting methamphetamine-related crimes involving children if he or she intentionally aids another to "knowingly cause or permit a child . . . to inhale, be exposed to, have contact with, or ingest methamphetamine, a chemical substance, or methamphetamine paraphernalia." Minn. Stat. §§ 152.137, subd. 2(b), 609.05, subd. 1. "Chemical substance" is defined as "a substance intended to be used as a precursor in the manufacture of methamphetamine or any other chemical intended to be used in the manufacture of methamphetamine." Minn. Stat. § 152.137, subd. 1(b) (2010). "Methamphetamine paraphernalia" is defined as "all equipment, products, and materials of any kind that are used, intended for use, or designed for use in manufacturing . . . methamphetamine." *Id.*, subd. 1(d). Expose means "[t]o subject or allow to be subject to an action, influence, or condition." *American Heritage Dictionary of the English Language* 625 (5th ed. 2011).

Appellant admits that she and Malmo drove her van to the campsite with the two children. Appellant left her infant near the van and campfires, where Malmo was manufacturing methamphetamine, and took a second child to the nearby lakeside. The

testimony that all the materials needed to create methamphetamine were at the scene, coupled with testimony that an officer removed evidence wearing a Tyvek suit and an air tank so he would not be exposed to chemicals that can burn skin and lungs, proves there were chemical substances intended to make methamphetamine present. Accordingly, the state proved that appellant knowingly brought children to the campsite where they were exposed to "chemical substance[s]," "methamphetamine paraphernalia," and methamphetamine in liquid form. Based on those circumstances, there was sufficient evidence to support appellant's conviction and no rational hypotheses inconsistent with guilt exist.

IV

Appellant argues that the district court abused its discretion by denying her motion for a downward durational departure because she played a minor role in the crime and showed a willingness to attend counseling. She also argues that the district court erred by failing to compare reasons for and against departure before summarily denying the motion. The district court has discretion to depart from a presumptive sentence if substantial and compelling circumstances exist. Minn. Sent. Guidelines 2.D; *State v. Jackson*, 596 N.W.2d 262, 266 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999). Factors for and against departure should be deliberately considered. *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984). A reviewing court will rarely reverse the imposition of a presumptive sentence. *State v. Pagel*, 795 N.W.2d 251, 253 (Minn. App. 2011).

Here, following arguments by both the state and appellant's attorney, the district court stated that it had reviewed the pre-sentence investigation (PSI), as well as the information provided by appellant in her motion and that, based on all the information presented, there were not substantial or compelling reasons for a dispositional or durational departure. Contrary to appellant's assertion that the district court "abandoned" the issue of departure before exercising its discretion, the record shows that the district court reviewed all of the relevant materials and arguments to determine whether substantial and compelling reasons existed for a departure. "[A]n explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence." *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). Further, although playing a minor role in a crime and amenability to treatment may be mitigating factors, the district court is not required to depart simply because factors for departure exist. *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Mar. 31, 2009). Accordingly, the district court did not abuse its discretion in denying appellant's motion for a downward departure.

V

In her pro se supplemental brief, appellant argues that her conviction of aiding and abetting the possession of a substance with intent to manufacture methamphetamine is a lesser-included offense of aiding and abetting the manufacture of methamphetamine and, therefore, must be vacated.

Whether an offense is lesser-included is a legal issue reviewed de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012). A defendant cannot be convicted of "both the

crime charged and a crime necessarily proved if the crime charged were proved." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006) (quotation omitted); *see* Minn. Stat. § 609.04, subd. 1(4) (2010). In other words, "[a]n offense is necessarily included in a greater offense if it is impossible to commit the greater offense without committing the lesser offense." *Bertsch*, 707 N.W.2d at 664. In determining whether one offense is necessarily proved by the proof of another the court must look at the statutory definitions rather than the facts of the case. *Id*.

Based on the statutory language, the crime of possessing "chemical reagents or precursors" is not necessarily included in the crime of manufacturing. The crime of possessing precursors provides a specific list of substances that qualify as "chemical reagents or precursors" and notes that it includes any substances similar to those listed. Minn. Stat. § 152.0262, subd. 1(b). To prove manufacturing, the state does not have to prove that the defendant possessed any of the substances listed in section 152.0262, subdivision 1. As discussed above, the definition of manufacturing is broad and could include any number of variations of acts to support a conviction. Because the statutes prohibit different conduct and require proof of different elements, the crime of possession of substances with intent to manufacture methamphetamine is not a lesser-included crime of manufacturing methamphetamine.

Affirmed.