STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1142

State of Minnesota,
Respondent,

vs.

Lee David Riutzel,
Appellant.

Filed June 30, 2014
Affirmed
Schellhas, Judge

St. Louis County District Court
File No. 69VI-CR-08-2408

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

Mark S. Rubin, St. Louis County Attorney, Gordon P. Coldagelli, Assistant County Attorney, Virginia, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Stephanie A. Karri, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

SCHELLHAS, Judge

Appellant challenges his convictions of fifth-degree controlled-substance crime (sale) and possession of a firearm by a prohibited person. We affirm.

FACTS

The Boundary Waters Drug Task Force executed a search warrant at appellant Lee David Riutzel's residence early in the morning on October 23, 2008. After task-force members seized evidence of marijuana cultivation and a semiautomatic rifle, they arrested Riutzel. In an approximately 35-minute post-*Miranda* interview, Riutzel repeatedly asserted that he had been growing marijuana for his own use, not sale; he acknowledged occasionally exchanging "weed" among his friends "to get a different flavor." Riutzel claimed that the rifle did not belong to him but acknowledged storing it in a case by his bed, purchasing shells, and firing it within the past two weeks. Respondent State of Minnesota charged Riutzel with fifth-degree controlled substance crime (sale), in violation of Minn. Stat. § 152.025, subd. 1(1) (2008),[1] and possession of a firearm by a prohibited person, in violation of Minn. Stat. § 624.713, subd. 1(b) (2008).[2] Before trial, Riutzel left Minnesota. Minnesota extradited Riutzel from Washington in time for an October 2012 hearing.

At the trial in February 2013, the jury heard testimony from task force members, Deputy Anthony DelGreco and Detective Nicole Mattson, and a recording of Riutzel's post-*Miranda* interview. The jury also viewed photographs of Riutzel's residence, including marijuana plants; a photograph of the semiautomatic rifle; and a lab report from the Bureau of Criminal Apprehension (BCA), stating that the substance seized contained

[1] Under Minnesota law, "sell" means, among other things, "to manufacture," and "manufacture" includes the "cultivation" of drugs. Minn. Stat. § 152.01, subds. 7, 15a (2008).

[2] Riutzel does not dispute that he was prohibited from possessing a firearm.

marijuana and weighed 450 grams. The jury found Riutzel guilty as charged, and the district court sentenced him concurrently to 17 months' imprisonment for his conviction of fifth-degree controlled-substance crime (sale) and 60 months' imprisonment for his conviction of possession of a firearm by a prohibited person.

This appeal followed.

D E C I S I O N

I.

Riutzel argues that the district court committed reversible error by allowing Deputy DelGreco to offer "expert opinion testimony" about Riutzel's "'marijuana growing operation'" when Deputy DelGreco was not qualified as an expert and the testimony went to the ultimate issue for the jury—whether Riutzel was cultivating marijuana.[3] This court will reverse a district court's evidentiary rulings only for a clear abuse of discretion. *Bernhardt v. State*, 684 N.W.2d 465, 474 (Minn. 2004). Because Riutzel did not object to the district court's admission of the challenged testimony, this court reviews the district court's decision for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Riutzel therefore "must show that the district court's failure to sua sponte exclude the testimony at issue constituted (1) an error; (2) that was plain; and (3) that affected [Riutzel's] substantial rights." *State v. Medal–Mendoza*, 718 N.W.2d 910, 919 (Minn. 2006). If these three plain-error requirements are established, appellate courts "will order a new trial only if the error seriously affected the fairness, integrity, or

[3] Riutzel does not address how the challenged testimony allegedly impacted his conviction of possession of a firearm by a prohibited person.

public reputation of judicial proceedings." *State v. Bahtuoh*, 840 N.W.2d 804, 811 (Minn. 2013).

Riutzel challenges admission of the following testimony:

> We located an active marijuana growing operation with approximately 18 marijuana plants in different stages of growth, along with growing lights, fertilizers, books containing information in regards to growing marijuana, transformers which would be used to power a marijuana grow operation, water pump, air pump, also items to assist with a marijuana operation.

Riutzel first argues that this testimony is unqualified expert testimony. *See* Minn. R. Evid. 702 ("a witness qualified as an expert" may testify to "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue"). The state disagrees, asserting that the challenged testimony is lay opinion testimony. *See* Minn. R. Evid. 701 (a lay witness may offer "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue"); *cf. State v. Ards*, 816 N.W.2d 679, 683 (Minn. App. 2012) (stating that "[s]imply because [the officer] has specialized training and experience did not convert her impairment testimony to expert testimony, thereby preventing her from offering her opinion about whether [appellant] was impaired").

Even if Riutzel establishes an error that was plain, we will only consider granting relief if he also establishes that admission of the challenged testimony affected his substantial rights. *See Medal–Mendoza*, 718 N.W.2d at 919. Here, in addition to Deputy DelGreco's description of Riutzel's '"marijuana growing operation,'" the jury saw

photographs of Riutzel's marijuana plants and listened to the 35-minute recording in which Riutzel described in detail his marijuana operation, from pollination to preparation. And, notably, defense counsel did not argue during closing argument that Riutzel was not growing marijuana; counsel merely argued that Riutzel was not *selling* marijuana. Because the record contains substantial evidence of Riutzel's marijuana cultivation, Riutzel fails to meet his "heavy burden" of persuasion on the third plain-error element. *See State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). Riutzel therefore is not entitled to relief on this ground and we decline to determine whether the challenged testimony is lay or expert testimony, or whether Deputy DelGreco was qualified as an expert.

Riutzel next argues that the challenged testimony amounted to a legal conclusion that usurped the role of the jury. But this argument is contrary to the text of the rules of evidence: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704; *see also State v. Hodges*, 384 N.W.2d 175, 185 (Minn. App. 1986) (Minn. R. Evid. 704 "applies to lay as well as expert witnesses"), *aff'd as modified*, 386 N.W.2d 709 (Minn. 1986). Because Riutzel fails to establish any error, we end our plain-error analysis of this claimed error here.

II.

In a pro se supplemental brief, Riutzel raises two additional arguments.

Riutzel first alleges that his trial counsel was ineffective because he failed to pursue a certain defense and, during trial, did not ask Riutzel's desired questions. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that

(1) counsel's performance "fell below an objective standard of reasonableness" and (2) there is a reasonable probability that, but for counsel's errors, the outcome would have been different. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). The burden of proof on this claim rests with the defendant, who must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). When the defendant fails to prove either counsel's deficient performance or resulting prejudice, the defendant's claim of ineffective assistance of counsel fails. *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005).

Strategic decisions do not provide a basis for a claim of ineffective assistance of counsel. *See State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) ("What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence."); *State v. Doppler*, 590 N.W.2d 627, 635 (Minn. 1999) (stating that supreme court does not "review for competence matters of trial strategy"). Because Riutzel's allegations revolve around matters of trial strategy, his claim of ineffective assistance of counsel fails.

Riutzel next challenges the composition of the jury, arguing that because no juror was a convicted felon or had a farm background, the jury did not constitute "a jury of [his] peers." But Riutzel mischaracterizes his right, which is "to be tried by a jury made up of members selected by nondiscriminatory criteria." *See State v. Pendleton*, 725 N.W.2d 717, 723 (Minn. 2007); *see also* Minn. R. Crim. P. 26.02, subd. 1 ("The jury list

must be composed of persons randomly selected from a fair cross-section of qualified county residents. The jury must be drawn from the jury list."). Additionally, "[a]n assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection." *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (quotation omitted), *aff'd on other grounds*, 728 N.W.2d 243 (Minn. 2007). Because Riutzel merely asserts error without providing any legal argument or authority, and prejudicial error is not obvious on inspection, we deem this argument waived.

Affirmed.