STATE OF MINNESOTA
IN COURT OF APPEALS
A08-101

State of Minnesota,
Respondent,

vs.

Kenneth Belgarde,
Appellant.

Filed March 3, 2009
Affirmed
Ross, Judge

Clay County District Court
File No. K2-07-428

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134, and

Brian J. Melton, Clay County Attorney, 807 North Eleventh Street, P.O. Box 280, Moorhead, MN 56560 (for respondent)

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

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

ROSS, Judge

This appeal requires us to decide the validity of a warrant that authorized police to search Kenneth Belgarde's home, and consequently to decide the admissibility of a large quantity of methamphetamine and other evidence tending to indicate that Belgarde is a drug dealer. Belgarde appeals from his convictions of a first-degree controlled-substance crime (sale) and possession of prohibited drug paraphernalia. He argues that the district court erred by denying his motion to suppress the evidence because the warrant was not supported by probable cause. He also challenges several aspects of his trial, including the district court's evidentiary rulings, the jury instructions, and the prosecutor's allegedly prejudicial misconduct. Because probable cause supports the warrant, and because none of the alleged trial errors were plain or prejudicial, we affirm.

FACTS

The circumstances that prompted officers to seek a warrant to search Kenneth Belgarde's home in February 2007 began in December 2006. On December 12, Officers Brad Berg and Toby Krone of the DEA Task Force in the Fargo-Moorhead area interviewed a cooperating criminal defendant in a federal drug-trafficking case. This identified federal witness told the officers that she sold four-ounce quantities of methamphetamine to "Ken and Lori" several times from December 2005 through March 2006. She said that the last time she sold to Ken and Lori was in July 2006. She also told the officers that Ken and Lori lived in a housing complex in North Moorhead.

The officers identified "Ken and Lori" as Kenneth Belgarde and Lorraine Otero and learned that they lived together in unit 1618–A of the complex that the federal witness described. The officers went to the unit on December 14, 2007, to speak with Belgarde and Otero. A "nervous female" answered the door and informed the officers that neither Belgarde nor Otero was home. The officers left.

Two weeks later, an anonymous informant contacted Officer Krone. The informant told him that on the day that he and Officer Berg went to Belgarde and Otero's apartment, a large amount of methamphetamine was flushed down the toilet. The informant claimed to have seen Otero with a bag full of methamphetamine in Otero's car. The informant also reported seeing a woman leave Belgarde and Otero's residence with a large amount of methamphetamine. The informant told the officers that Otero and Belgarde recently moved from unit 1618–A, but the informant did not know their new address.

Officer Krone told Detective Brad Stuvland what he heard from the identified federal witness and from the anonymous informant. Detective Stuvland discovered that the utility accounts for unit 1618–A were in Otero's name and were deactivated on December 18, 2006, the same day that utilities in Otero's name were activated at 3546 Village Green Lane.

On February 14, 2007, Detectives Shawn Carlson and Stuvland searched the garbage discarded from 3546 Village Green Lane. The search yielded a "food saver/heat sealing bag," which Detective Stuvland believed to be a bag commonly used to package large quantities of drugs. They found no visible drug residue in the bag. The next day,

Detective Stuvland contacted Officer John Lien, who handles "Hickok," a police dog trained to detect narcotics. Detective Stuvland placed the food saver bag in a hidden area of a room without disclosing the location of the bag to Officer Lien. Officer Lien brought Hickok into the room to conduct a narcotics search. Hickok alerted to the scent of narcotics. Officer Lien pointed out to Detective Stuvland the area where Hickok alerted and Detective Stuvland confirmed that the food saver bag was hidden from view in that area.

On February 16, 2007, Stuvland applied for, obtained, and executed a "no-knock" search warrant for Belgarde and Otero's residence, their persons, and their two cars. The warrant was based on the anonymous and identified informants' tips linking Belgarde and Otero to possible methamphetamine trafficking, and on the bag seized from their garbage. Shortly after entering the residence, the officers located Belgarde and Otero in a basement bedroom. They found three containers of methamphetamine, one in Otero's purse and two larger bags in a black case in the bedroom. The largest bag contained 27.7 grams of methamphetamine and was wrapped in black tape. Police also seized numerous items of drug paraphernalia, a radio frequency detector, cell phones, a video surveillance system, a computer, over $2,000 in cash, and income tax records.

The state charged Belgarde with first-degree possession of a controlled substance with intent to sell and with possession of drug paraphernalia. Minn. Stat. §§ 152.021, subd. 1(1), .01, subd. 15a (2006). Belgarde moved to suppress all the evidence seized, contending that the warrant lacked probable cause. The district court denied his motion. The evidence was admitted at Belgarde's trial and a jury found him guilty of first-degree

possession with intent to sell. In this appeal, Belgarde challenges the validity of the search warrant, and he also contends that several prejudicial errors entitle him to a new trial.

D E C I S I O N

I

Belgarde contends that the issuing court lacked a probable-cause basis to authorize the search warrant. The state and federal constitutions protect against unreasonable searches and seizures and require warrants to be supported by probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. This court gives deference to a district court's probable cause determination and we limit our review to ensure that the court "had a substantial basis for concluding that probable cause existed." *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). A substantial basis for probable cause exists if the evidence described in the affidavit establishes a "fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quotation omitted). We look to the "totality of the circumstances" and not to each isolated component of the affidavit attached to the warrant application. *State v. Kahn*, 555 N.W.2d 15, 18 (Minn. App. 1996). The totality-of-the-circumstances approach permits a finding of probable cause based on several factors that, standing alone, may not substantially support a search warrant. *State v. Carter*, 697 N.W.2d 199, 205 (Minn. 2005). Probable cause must exist from the information presented in the warrant

application rather than the information actually possessed by the police. *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998).

A finding of probable cause requires "a direct connection, or nexus, between the alleged crime and the particular place to be searched, particularly in cases involving the search of a residence for evidence of drug activity." *Souto*, 578 N.W.2d at 747–48. To determine whether this connection exists, "[i]nformation linking the crime to the place to be searched and the freshness of the information" are relevant factors. *Id*. at 747. The issuing judge may "draw common-sense and reasonable inferences from the facts and circumstances" to determine whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Brennan*, 674 N.W.2d 200, 204 (Minn. App. 2004) (quotation omitted).

Detective Stuvland's affidavit purports to establish that Belgarde was involved in drug trafficking and that contraband or evidence of a crime would result from a search of his residence. That evidence can be summarized as follows: (1) a cooperating defendant in a federal case told police that she delivered methamphetamine to Belgarde and Otero in December 2005, March 2006, and July 2006; (2) an anonymous informant saw Otero in December 2006 with a sandwich-sized bag of methamphetamine in Otero's car and also witnessed a female leaving Otero's home with a large amount of methamphetamine; (3) the anonymous informant reported that a large amount of methamphetamine had been flushed down the toilet at Belgarde's former residence in December 2006 when police knocked; (4) the anonymous informant told police that Belgarde and Otero moved to a new home in December 2006; (5) police found in Belgarde and Otero's garbage a "food

saver bag," which, in Officer Stuvland's experience, drug dealers use to store or transport larger quantities of drugs; and (6) a police dog indicated that a controlled substance had been in or near the food saver bag.

The state contends that the totality of these circumstances supports a finding of probable cause that drugs or drug-related items would be found in a search of Belgarde's house. Belgarde's challenge does not regard the totality of the circumstances, and he instead maintains that individual components of the warrant application do not establish probable cause to search his home. First, he contends that the information provided by the informants was stale. Second, he contends that the alleged activities at his former residence cannot establish a direct connection between the criminal activity and his new residence. Third, he argues that the application's description of the police dog's positive alert on the bag was "too vague and uncertain" to support a finding of probable cause. The arguments fail.

Staleness

Belgarde correctly asserts that a warrant generally cannot depend on old information. "Because a stale factual basis may invalidate a search warrant, the affidavit must also supply proof of facts so closely related in time to the issuance of the search warrant as to justify a finding of probable cause at the time." *McGrath*, 706 N.W.2d at 539 (citations omitted). Courts consider a number of factors to determine whether information supporting a search warrant is stale, including "whether there is any indication of ongoing criminal activity, whether the items sought are innocuous or incriminating, and whether the property sought is easily disposable or transferable." *Id.*

at 544 (quotation omitted). But "[w]hen an activity is of an ongoing, protracted nature, the passage of time is less significant." *Souto*, 578 N.W.2d at 750.

The supreme court's conclusion in *Souto* is informative. The court evaluated a warrant application and determined that its support was stale because six months had passed since the defendant's known drug involvement and approximately 10 months had passed since a drug dealer unsuccessfully mailed drugs to the defendant. *Id*. In part because of the staleness of the information, the *Souto* court determined that the warrant application did not establish the necessary nexus between criminal activity and the defendant's home. The connection here is not so attenuated. The identified informant told police that she supplied drugs to Belgarde from December 2005 through July 2006, and the anonymous informant reported that Belgarde continued in drug activity in December 2006. The otherwise potentially stale claim of ongoing drug activity in December 2005 to summer 2006 was refreshed by the information supplied by the anonymous informant, who indicated the continuing and recent nature of Belgarde's drug activities. Only six weeks had passed between Belgarde's last reported incident of drug activity and the warrant application. Most contemporary, the police dog alerted to a bag that police had taken from Belgarde's garbage just two days before they applied for the search warrant. Because the cumulative information showed ongoing and current drug activity, we conclude that the information in the application was not stale.

Connection Between Criminal Activity and Belgarde's Home

Belgarde's chief argument questions the relationship between the relied-upon information and his home. When police seek a warrant to search a home, "there must be

specific facts to establish a direct connection between the alleged criminal activity and the site to be searched." *Souto*, 578 N.W.2d at 747–48, 749. But "the required nexus . . . need not rest on direct observation; instead, the nexus may be inferred from the totality of the circumstances." *State v. Ruoho*, 685 N.W.2d 451, 456 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004). Relevant circumstances include, "the type of crime involved, the nature of the items sought, the extent of an opportunity for concealment, and reasonable assumptions about where a suspect would likely keep that evidence." *Id*.

This case resembles *Ruoho*. In *Ruoho*, we determined that information in a warrant application that alleged drug trafficking in the defendants' former residence supported probable cause to search the residence to which they had moved four days before the warrant was executed. We reached this holding even though the affidavit contained no specific indication of drug activity at the new residence. *Id*. at 456–58. We reasoned that because of the nature of drug trafficking, it is reasonable to assume that persons who buy and sell drugs would maintain evidence of their crime in their residence. *Id*. at 458. We considered that "[o]bservations of a suspect's drug trafficking that occurs at a place other than the suspect's current residence can support probable cause [to issue] a search warrant for the suspect's residence." *Id*. at 458.

The affidavit here contained information indicating drug trafficking at Belgarde's former residence. The anonymous informant alleged that a large quantity of drugs was flushed down the toilet at that residence when police arrived and that a person had purchased a large quantity of drugs at the residence. Because of the ongoing nature of drug trafficking, the reasonable inference that drug sellers keep drugs in their residence,

and the observations of drug trafficking at Belgarde's former residence just six weeks before the search of his new residence, the warrant application established a sufficient nexus between drug activity and Belgarde's new residence. This is so even without considering the direct link established by the police dog's alert to a bag discarded from the new residence just before the search.

Description of the Dog-Sniff Search

The warrant application also contained information directly relating to Belgarde's new residence. The food-saver bag that was taken from Belgarde's garbage is the target of Belgarde's next challenge. "Contraband seized from a garbage search can provide an independent and substantial basis for a probable cause determination." *McGrath*, 706 N.W.2d at 543. Belgarde contends that the food-saver bag seized from his garbage does not support a finding of probable cause because the warrant application's description of the sniff-search was "too vague and uncertain" to support the district court's determination that there was probable cause. We are not persuaded by the challenge.

The affidavit described the circumstances of the canine alert:

> [Detective Stuvland] took the larger portion of the food saver bag and placed it in a hidden area of a room. The location of the bag was not provided to Officer Lien. Officer Lien conducted a narcotics search with his dog in the room where [Stuvland] had hidden the food saver bag. Officer Lien advised [Stuvland] that he received a positive alert from his canine partner for the odor of a controlled substance. Officer Lien pointed out to [Stuvland] where the alert was made. The alert was made where the food saver bag was hidden from view. [Stuvland] believes that this indicates that an odor of a controlled substance was emitting from the food saver bag.

Belgarde argues that this description was deficient because the judge reviewing the warrant application could not independently assess the reliability of the dog-sniff evidence without information such as where the bag was hidden in the room; what other things were in that area of the room; whether the room was clear of drug odors before the dog sniff; and whether the dog actually alerted on the bag pulled from Belgarde's garbage rather than to something else in the area of the concealed bag.

Belgarde's argument overlooks the common circumstances and accepted principles regarding search warrants. Warrant applications and supporting affidavits "are normally drafted by nonlawyers in the midst and haste of criminal investigation [and] [t]echnical requirements of elaborate specificity . . . have no proper place in this area." *State v. Anderson*, 439 N.W.2d 422, 425 (Minn. App. 1989) (citing *Illinois v. Gates*, 462 U.S. 213, 235, 103 S. Ct. 2317, 2230 (1983)), *review denied* (Minn. June 21, 1989). After an issuing judge has found probable cause to issue a warrant, reviewing courts "should not invalidate the warrant by interpreting the affidavit in a hyper-technical rather than a commonsense manner." *Id.* (quoting *United States v. Ventresca*, 380 U.S. 102, 109, 85 S. Ct. 741, 746 (1965)). And, "[a]lthough in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases . . . should be largely determined by the preference to be accorded to warrants." *Id.* (quoting *Jones v. United States*, 362 U.S. 257, 270, 80 S. Ct. 725, 735 (1960)).

Considering the affidavit's description of the dog alert within this frame leads us to conclude that the description was sufficient to support a finding of probable cause.

When the application is read with reasonable assumptions about police investigations, it implies that Detective Stuvland—who was also a former canine handler—conducted a narcotics search without improperly influencing the police dog or its handler. Because the dog alerted in the area of the room where the bag was hidden from view, Detective Stuvland indicated in the application that he believed that the odor of a controlled substance was emanating from the bag. Implicitly and reasonably relying on Detective Stuvland's background, the issuing judge concluded that the dog alerted on the bag taken from Belgarde's garbage. Asking the investigator to include the precise location of the room and a more detailed explanation of the search and his reasoning may have been helpful; but requiring it would ignore the practical realities of warrant applications. The degree of specificity presented in the warrant application was sufficient to support probable cause.

The totality of the circumstances as presented in the warrant application establishes a sufficient probability that police would discover contraband in Belgarde's new residence. The warrant rested on probable cause and it was therefore proper for the district court to deny Belgarde's motion to suppress the evidence.

II

Belgarde argues that the taped interviews that Officer Krone conducted while other officers searched Belgarde's house were inadmissible because they served only to portray Belgarde as a chronic drug user with bad character. Belgarde's taped comments regarded his prior drug use. His trial attorney objected to this evidence as irrelevant and prejudicial. The district court overruled the objection and allowed the statements. A

reviewing court will not reverse a district court's admission of other crimes or bad acts unless an abuse of discretion is clearly shown. *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988). To prevail, an appellant must show error and the prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Evidence must be relevant to be admissible. Minn. R. Evid. 402. Relevant evidence is evidence that tends to make the existence of a fact that is of consequence more probable or less probable than it would be without that evidence. Minn. R. Evid. 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice, confusion of the issues or misleading the jury. Minn. R. Evid. 403. Generally, evidence regarding a defendant's character is inadmissible unless the defendant puts his character at issue. Minn. R. Evid. 404(a)(1). Although evidence of prior bad acts or crimes is not admissible to prove that the accused acted consistent with that conduct, it may be admitted for other purposes. Minn. R. Evid. 404(b).

Belgarde's taped statements were relevant. Evidence of his prior drug activity tended to show that he had used and purchased drugs. It may also tend to prove that he had the requisite intent to possess and perhaps to sell drugs. Belgarde's claim that this evidence was unfairly prejudicial is without merit because Belgarde specifically testified that he was a "heavy user," in an apparent attempt to discourage the connection between the large quantity of drugs and the inference that he deals drugs. The district court did not abuse its discretion by admitting this evidence.

III

For the first time, Belgarde claims on appeal that eight different errors occurred during his trial. Unobjected-to errors are generally waived, but even without an objection in the district court, this court can exercise its discretion to consider them using the plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). An error is "plain" when it is "clear" or "obvious." *Id*. at 688. An error affects substantial rights if it is prejudicial and it affects the outcome of the case. *Griller*, 583 N.W.2d at 741. It is always the defendant's burden "to demonstrate both that error occurred and that the error was plain." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Even if the defendant meets that three prong test, this court will correct the error only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Strommen*, 648 N.W.2d at 686 (quotation omitted).

Belgarde alleges the following errors: (1) admission of his taped interviews with police that include his *Miranda* warnings and references to his involvement in an ongoing federal drug investigation; (2) admission of police testimony that Belgarde claims to be drug-trafficking-profile evidence; (3) admission of police testimony on the "ultimate issue" of whether the drugs found with Belgarde were packaged for resale; (4) prosecutorial misconduct for eliciting inadmissible character evidence; (5) prosecutorial misconduct for referring to drugs found in Belgarde's residence that had not been scientifically confirmed to be drugs; (6) prosecutorial misconduct in closing argument for

mischaracterizing evidence; (7) improper jury instructions by failing to instruct the jury on constructive possession; and (8) the cumulative effect of all the errors. Because Belgarde has not shown that any of these alleged errors were plain, we do not disturb his guilty verdict.

Admission of Evidence

Belgarde claims that the district court erroneously admitted his taped interviews, police testimony on drug-trafficking-profile evidence, and police testimony on the "ultimate issue" of whether his drugs were meant for resale. The supreme court has explained that when an appellate court reviews an unobjected-to evidentiary error, "the question before [the court] is *not* whether the trial court erred in admitting the testimony[;] . . . the precise question . . . is whether the trial court's failure to sua sponte strike the testimony or to provide a cautionary instruction constituted plain error." *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001) (emphasis in original). For all of Belgarde's alleged evidentiary errors, the answer to that question is no.

Belgarde contends that it was plain error to admit the taped interviews because they include a full recitation of Belgarde's *Miranda* rights and the statement, "because you're wearing handcuffs" and are "not free to leave." Belgarde argues that he was prejudiced when the jury heard those statements. Allowing the jury to hear that Belgarde was in handcuffs and was read his *Miranda* rights before choosing to give his statement to police is not "clear" or "obvious" error. When a defendant gives a statement after a *Miranda* warning, the warning is admissible as foundation to show that the statement was voluntary. *State v. Jobe*, 486 N.W.2d 407, 414 (Minn. 1992). Belgarde claims that he

was prejudiced by the jury hearing that he was in handcuffs and not free to leave in the same way as when a jury sees a defendant wearing prison clothes at trial. This claim is without merit. The jury knew that the interview with police was conducted after the police executed the search warrant and found a large amount of contraband in Belgarde's home. Belgarde was not prejudiced by the jury knowing that the police handcuffed him after they found contraband in his home, especially since Belgarde admitted at trial that some of it was his.

Belgarde claims that the police testimony regarding items seized from his home was inadmissible profile evidence. We need not consider the legal basis for this type of challenge here. The testimony that Belgarde points to relates to the officers' testimony about how items seized from Belgarde's home may be used in drug-trafficking enterprises. The officers explained how potentially innocent items, such as food-saver or Ziplock bags, a GPS unit, cell phones, outdoor surveillance cameras, large sums of cash, and night vision scopes, are used in drug-trafficking enterprises. The officers' explanations about how the items can be used in the drug trade could assist the jury to know how the items were specifically relevant to the charge against Belgarde. Admission of this testimony was not "clearly" or "obviously" erroneous.

Belgarde also argues that it was plain error to admit Detective Stuvland's opinion that the large quantity of methamphetamine found with Belgarde "appeared to be a quantity that would be for distribution." Belgarde contends that this was testimony on the "ultimate issue" in the case because, in his view, the ultimate issue was whether the drugs were packaged for resale.

Although he was not described expressly as an expert witness, Detective Stuvland offered opinion testimony that depended on his background in narcotics investigations. Opinion testimony regarding the "ultimate issue" in a case is generally admissible provided that it complies with Minn. R. Evid. 704 and does not "merely tell the jury what result to reach." *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005); *State v. Collard*, 414 N.W.2d 733, 736 (Minn. App. 1987) ("An expert witness may give testimony on the ultimate issue which the factfinder must decide."), *review denied* (Minn. Jan. 15, 1988). Rule 704 permits opinion testimony on ultimate issues "if such testimony is helpful to the factfinder." *Moore*, 699 N.W.2d at 740 (discussing rule 704 and providing that testimony is not "helpful" when it involves matters within the knowledge and experience of the jury, does not add precision or depth to the jury's understanding, and states a legal conclusion). Because Belgarde was charged with possession of drugs with intent to sell, the ultimate issue was actually whether Belgarde had the requisite intent to sell the drugs. We hold that Stuvland did not testify regarding the ultimate issue in the case and, therefore, admission of his testimony was not plain error.

Prosecutorial Misconduct

Belgarde maintains that the prosecutor committed prejudicial misconduct because he elicited character evidence, argued facts not in evidence, and mischaracterized evidence. A prosecutor "is a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public," and to ensure that a defendant receives a fair trial. *Ramey*, 721 N.W.2d at 300 (quotation omitted). A prosecutor commits misconduct by intentionally eliciting inadmissible character evidence. *State v.*

Harris, 521 N.W.2d 348, 353–54 (Minn. 1994). And a prosecutor commits misconduct when he bases an argument on facts not in evidence or mischaracterizes the evidence. *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993). When prosecutorial misconduct constitutes plain error that affects the appellant's substantial rights, appellate courts should grant a new trial. *Ramey*, 721 N.W.2d at 303.

Belgarde contends that the prosecutor committed misconduct by repeatedly eliciting drug-trafficking-profile evidence, which is akin to character evidence. Profile evidence is generally inadmissible at trial to prove the defendant's guilt. *State v. Williams*, 525 N.W.2d 538, 548 (Minn. 1994). But not all testimony by police officers regarding techniques employed by other drug dealers is inadmissible. *Id.* In *Williams*, the profile evidence was "clearly and plainly inadmissible" because the officers testified that "in their experience most drug couriers behave a certain way . . . and the jury was impliedly urged to infer that since defendant's conduct fit the profile," she must have been a drug courier. *Id.* Profile evidence of this type is inadmissible to prove a defendant's guilt for the same reasons that evidence of a defendant's prior bad acts are generally inadmissible to prove that the defendant "acted in conformity therewith." *See* Minn. R. Evid. 404(a). Drug-trafficking-profile evidence takes the dangers posed by character evidence even further because the jury is essentially asked to infer that because the defendant shares some general characteristics with third persons who deal drugs, the defendant must also deal drugs.

But the officers' explanations of how the items seized from Belgarde's home may be used in the drug trade was not drug-trafficker profile evidence. The officers did not

testify that Belgarde matched a certain profile because of what he wore or how he acted, they explained how seemingly innocent items were relevant to the charge against Belgarde because of how the items are used by drug dealers. Likewise, it was not misconduct when the prosecutor asked the officers to identify the item and explain whether the item had any relationship to methamphetamine. No improper profile or character evidence was elicited.

Belgarde also argues that the prosecutor's reference to three bags of methamphetamine was an argument on facts that were not in evidence because only one bag found in Belgarde's home had been chemically analyzed and confirmed to possess methamphetamine. But all three bags were admitted into evidence and the officers as well as Belgarde himself testified that the bags either contained methamphetamine or a substance that resembled methamphetamine. Belgarde had every opportunity to contend that the bags contained something other than methamphetamine or that the contents were not sufficiently proven. But he did not. The prosecutor may argue based on reasonable inferences from the established facts. *State v. Roman Nose*, 667 N.W.2d 386, 402 (Minn. 2003). We reject Belgarde's assertion that a prosecutor may not refer to bags of alleged drugs that are admitted into evidence but not chemically confirmed to be drugs. It was not misconduct for the prosecutor to refer to the three bags of methamphetamine.

Belgarde next argues that the prosecutor mischaracterized the evidence in his closing argument by stating, "There was a lot of discussion [during trial] about the history of their drug trafficking and their drug purchasing." Belgarde argues that this is a mischaracterization because there was no evidence of Belgarde's history of drug

trafficking. "The state's closing argument . . . must be based on evidence produced at trial, or the reasonable inferences from that evidence." *State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006) (quotation omitted). The jury had already learned from Belgarde's recorded statement that both he and Otero had a drug habit. Officer Berg had asked him, "I understand you both have a habit? That you had to use a lot of [methamphetamine] and then you sold some . . . so that you could pay for the stuff you were using pretty much." Belgarde replied, "Right." Belgarde also told the officers that although Otero did most of the purchasing, a dealer named "Issy" would sell drugs to him also. There was a considerable amount of cash found in Belgarde's residence and Otero's and Belgarde's tax returns showed that their income had been very low in recent years. A prosecutor could fairly summarize and argue from this evidence that Belgarde was involved in drug trafficking.

Jury Instructions

Belgarde claims that it was plain error when the district court failed to instruct the jury on the definition of the terms "possess" and "constructive possession." The district court has considerable latitude in instructing the jury and will not be reversed absent an abuse of discretion. *State v. Oates*, 611 N.W.2d 580, 584 (Minn. App. 2000), *review denied* (Minn. Aug. 22, 2000). We consider jury instructions as a whole to determine whether they fairly and adequately explain the law. *Moore*, 699 N.W.2d at 736.

The jury instructions fairly and adequately explain the law here. The district court instructed the jury on each of the elements of the crime of first-degree controlled substance sale. Although it would have been appropriate to include a definition of the

term "possess" as well as "constructive possession," the instructions as a whole clearly and adequately guide the jury. We see no error.

Cumulative Effect

Belgarde's last argument is that "[t]he cumulative effect of the evidentiary errors, the jury instructions and the prosecutorial misconduct was so prejudicial that it impaired [his] right to a fair trial." The quantity of alleged errors are not a basis to reverse when there are no actual errors. Because none of Belgarde's challenges of error constitute plain error, this final claim lacks merit.

Affirmed.