STATE OF MINNESOTA
IN COURT OF APPEALS
A08-101

State of Minnesota,
Respondent,

vs.

Kenneth Belgarde,
Appellant.

Filed September 22, 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)

Marie L. Wolf, Interim Chief Appellant Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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 case involves Kenneth Belgarde's conviction of a first-degree controlled-substance crime (sale). After we affirmed his conviction, he petitioned the supreme court for further review and the supreme court remanded his case for reconsideration in light of *State v. Litzau*, 650 N.W.2d 177 (Minn. 2002). Without further guidance from the supreme court, we interpret the remand as instructing us to decide whether Belgarde is entitled to a new trial because of certain unobjected-to "drug-trafficker profile" testimony that was admitted at his trial. Because we conclude that the unobjected-to testimony is not the type of drug profile testimony *Litzau* condemned, and because Belgarde was not prejudiced by the testimony, we affirm his conviction.

FACTS

We described the relevant facts underlying Belgarde's appeal in our original opinion, *State v. Belgarde*, 2009 WL 511140 (Minn. App. Mar. 3, 2009). We summarize briefly. Moorhead police obtained a "no-knock" warrant to search Belgarde's home after receiving tips from an identified informant and an anonymous informant that linked Belgarde and his girlfriend, Lorraine Otero, to possible methamphetamine trafficking. The warrant to search Belgarde's home was also supported by a drug-detecting police dog's positive alert to a bag seized from Belgarde's garbage.

The search of Belgarde's residence yielded three containers of methamphetamine. Police found one bag 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 discovered 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 quantity of drugs, the informants' tips, and the other items discovered in the search led the police to believe that Belgarde was not just a drug user but also a drug seller. The state charged Belgarde with first-degree possession of a controlled substance with intent to sell and with possession of drug paraphernalia.

Belgarde moved to suppress all the evidence seized, contending that the warrant lacked probable cause. The district court denied his motion and, after a trial, a jury found Belgarde guilty of first-degree possession with intent to sell. Belgarde appealed to this court raising six issues, resting on five constitutional provisions, and referring to 62 cases and 17 other sources of authority. He argued that the search warrant was invalid and that multiple errors entitled him to a new trial. This court affirmed his conviction without specifically citing *Litzau*. He sought further review, and the supreme court granted his petition and remanded "for reconsideration in light of *State v. Litzau*, 650 N.W.2d 177 (Minn. 2002)." This opinion follows.

D E C I S I O N

Belgarde claims that he is entitled to a new trial because the prosecutor elicited and the district court admitted inadmissible drug-trafficker profile evidence. The testimony that Belgarde highlights relates to the items seized from his house and the officers' testimony about how those items were relevant to the charges against him. The officers explained how potentially innocent items such as FoodSaver or Ziplock bags, a GPS unit, cell phones, outdoor surveillance cameras, large sums of cash, night vision

scopes, and radio frequency detectors could be used in drug-trafficking enterprises. Belgarde contends that all of the testimony was inadmissible drug-trafficker profile evidence. The state argues that none of the testimony was profile evidence.

Because Belgarde did not object to the introduction of any of this evidence, this court must review the admission of the evidence under the plain-error test, which asks whether there was error, whether the error was plain, whether the error affected the substantial rights of the defendant, and whether the error must be addressed to ensure the fairness and integrity of the judicial proceedings. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

We addressed this issue in our initial opinion as follows:

> 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, 2009 WL 511140, at *8. This remains our holding on remand after reconsideration in light of *Litzau*.

Litzau depends on *State v. Williams*, 525 N.W.2d 538 (Minn. 1994). In *Williams*, the supreme court addressed for the first time the admissibility of "drug courier profile

evidence at trial as evidence of the defendant's guilt." *Id.* at 548. The *Williams* court cautioned that cases from other jurisdictions did "[not] hold that all testimony by police officers as to techniques employed by other drug dealers or couriers is always inadmissible at trial." *Id.* (citations omitted). But the court held "clearly and plainly inadmissible" police testimony

> that in their experience most drug couriers behave a certain way—e.g., buy their tickets with cash, typically come from a so-called "source" city such as Detroit, typically use the club car on the train, etc.

Id. The court explained that this testimony "impliedly urged [the jury] to infer that since defendant's conduct fit the profile, she must have known that her luggage contained crack cocaine." *Id.* And the court compared this profile evidence to evidence of typical characteristics of child sex abusers. *Id.* The court's reasoning followed its approval of a treatise describing this type of evidence as "akin to character evidence." *Id.* at 547 (citation omitted). *Williams* involved evidence of publicly observable behavior, innocent in itself, that had served as the basis for law-enforcement officers to stop passengers in airports and on other public transportation. *See id.* at 546–47.

In *Litzau*, the supreme court referenced *Williams* and held that the expert witness's testimony in that case constituted "drug profile evidence, akin to character evidence, [that was] 'plainly inadmissible' under [the] decision in *Williams*." 650 N.W.2d at 185. Based on the brief discussion in *Litzau* related to drug-trafficker profile evidence, it is clear that *Litzau* held that the testimony was inadmissible for two reasons: (1) because the expert witness testified about matters "well beyond that which was allowed by the trial court's

ruling" and (2) because the testimony itself was "akin to character evidence." *Id.* Neither one of these bases exists in Belgarde's case. There is no pretrial restriction and, more important, the evidence was not introduced as mere profile character evidence; the witnesses specifically explained how the evidence was relevant to the issue of drug selling by describing how Belgarde may have used the items in trafficking drugs.

The district court's pretrial ruling in *Litzau* restricted the expert's testimony to information "within his personal knowledge" and it expressly allowed the expert to testify "regarding the quantities of controlled substances and items commonly found in a suspect's possession which are indicative of the sale of drugs compared to personal use." *Id.* The supreme court did *not* deem inherently inadmissible or plainly erroneous testimony regarding quantities of drugs typically for sale compared to personal use, or how potentially innocent items found in a suspect's possession are relevant or indicative of drug selling. This is practical, considering that an average juror would be assisted by an expert's opinion regarding how a quantity of drugs relates to an individual's intent to sell rather than to use the drugs.

But in *Litzau*, the expert's testimony extended to some typical practices of drug dealers, including "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." *Id.* The expert also "suggested that it was not uncommon for drug dealers to consent to a search of their vehicle." *Id.* The supreme court condemned this testimony as "well beyond" what the district court had allowed in a pretrial ruling. *Id.*

Here, the district court never issued a pretrial ruling limiting the expert's testimony because Belgarde never objected before trial or at any time during the trial. And the drug experts' testimony was helpful to the jury because it explained how the large quantity of drugs and certain items found in the search of Belgarde's home could be relevant to his intent to sell—evidence that the jury might not otherwise understand as relevant. This usage testimony is obviously distinct from quasi-character evidence that tends to inculpate a person simply because he possesses the things a drug dealer might possess. Several police officers testified without objection regarding various items found in the residence that Belgarde shared with Lorraine Otero and about the utility of these items in drug dealing. These items included (1) sealable "FoodSaver" bags; (2) a radio frequency detector; (3) a GPS unit; (4) a cell phone; (5) outdoor surveillance cameras; (6) a Western Union receipt; (7) a night vision scope; and (8) the packaging of the largest quantity of methamphetamine. Detective McCarthy testified that people "often . . . use FoodSaver bags to distribute larger amounts of narcotics." Agent Oksendahl testified similarly of FoodSaver bags, that "[o]ften times that's how narcotics are packaged."

Lieutenant Monroe testified that "people that traffic in narcotics typically use [a radio frequency] detector" during a drug sale to see whether the buyer is wearing a transmitter installed by police. Detective Stuvland also testified that "individuals that sell drugs . . . possess RF detectors to try and [detect] transmitters that [police] place on individuals to buy drugs from them." Stuvland also testified that it was significant to find a GPS unit in Belgarde's house because "[i]t's common for individuals involved in the distribution of drugs to have to travel to meet with their suppliers . . . [or buyers] . . . and

oftentimes they have . . . actual maps or coordinates in GPS units to get to those locations." Stuvland also explained why it was significant that the police found a cell phone because "[i]n today's world drug transactions are typically conducted by cell phone." Stuvland described how drug dealers were "keeping their actual drug debts listed or [sic] inside their phone in code to try and avoid detection by law enforcement."

As for the more esoteric electronic equipment, Detective Larson testified that finding a night vision scope was significant because many "drug traffickers will operate at night. A night vision scope is a helpful tool for those purposes." Larson added that a night vision scope could be helpful to detect the presence of police. Officer Carlson testified that there was a surveillance camera in the back of the house that was connected to the TV in the house. Carlson testified that such a surveillance system was uncommon in residences but useful in drug dealing for "trying to keep an eye out for police" to "give them enough time to possibly destroy evidence" if police arrived with a search warrant. Detective Stuvland also testified about the surveillance system, noting they are "not uncommon for individuals that are involved in distribution of large amounts of drugs . . . so they can be aware if law enforcement is either approaching for a search warrant and/or doing surveillance."

Regarding the more mundane items, Stuvland testified that it was "common for individuals to wire money" in drug deals using Western Union. Detective Larson, who testified that he was trained in the "business methods of drug traffickers," testified that it was "common for people that are trafficking methamphetamine" to have separate sums of cash in the home, some personal and some "business" cash. Detective Stuvland testified

that it was "very common" for drug dealers, especially those dealing in large quantities, to have "large amounts of U.S. currency on hand" in different denominations, and that it was "not uncommon to keep various amounts separate," for different reasons. As to the methamphetamine in a baggie wrapped in black electrician's tape, Detective Larson testified that "[m]any times traffickers when moving their narcotics will package it" for hiding inside the vehicle.

We conclude that the police testimony about the esoteric electronics gear, common household items, or money itself is not "plainly inadmissible" under *Litzau* or *Williams* because it is not "akin to character evidence." The supreme court in *Williams* quoted with approval the objection to drug-courier profile evidence stated by Professor Graham in his treatise on federal evidence:

> Normally, proof of character involves witnesses who generalize on the basis of past acts of the defendant and this generalization is used to support an inference as to the conduct in issue. The drug courier profile involves a generalization based on the past acts of third persons. *The jury is asked to infer from the fact that the defendant shares some of the characteristics of these third persons that he shares their guilt of drug smuggling.*

Williams, 525 N.W.2d at 547–48 (citing 22 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure–Evidence*, § 5233 n.53.2 (Supp. 1994) (emphasis added)). But the testimony offered in Belgarde's case about the connection between items in Belgarde's home and drug dealing is different. Unlike drug-courier profile evidence, the testimony does not suggest that because Belgarde possesses similar items or acted similarly to third persons who deal drugs, then he must be a drug dealer. Rather,

the testimony explained to the jury how items that may have legitimate uses could also have potentially illegitimate uses, thereby demonstrating how the evidence is relevant to show that Belgarde intended to deal drugs.

The officers' testimony did not invite the jurors to infer Belgarde's guilt by relating possessions or actions of third parties to Belgarde's possessions. That kind of inductive reasoning constitutes improper character inferences—i.e., drug dealers commonly use Western Union, defendant used Western Union, therefore defendant is a drug dealer—and is the core danger identified in *Williams* and applied in *Litzau*. Here, it was not improper for the police to inform the jurors how the quantity of drugs and some of the items found in Belgarde's residence related to the issue of his intent to sell the drugs. *See Williams*, 525 N.W.2d at 548 (disapproving of testimony that drug couriers "behave a certain way").

Neither *Williams* nor *Litzau* prohibits the state from introducing circumstantial evidence to demonstrate intent; they regard only the manner of its introduction and use at trial. Neither case prevents the state from explaining why police investigators deem certain items, including common household items, relevant to their investigation. Once the defendant's potential use of these items is explained through the insight of a drug-investigation expert, the jurors are sufficiently informed to accept or reject the circumstantial inference. This distinguishes inadmissible character evidence from admissible circumstantial evidence.

But the officers' testimony regarding "business methods" of drug dealers was less carefully presented. Detective Krone testified baldly that in drug dealing "it's common that a female will deal with a female and vice versa." And Detective Stuvland testified similarly that "[i]t's not uncommon for [drug dealers] to have the vehicle registered in somebody else's name or perhaps their girlfriend's name" to avoid police detection. The testimony about male dealers registering their vehicles in the names of others and of using female friends to deal with female suppliers is similar to the "business methods" testimony condemned in *Litzau*. *See* 650 N.W.2d at 185. It is a close question whether admitting this testimony was plain error under *Litzau* because there was no pretrial ruling in this case specifically limiting such testimony. But we need not reach that question because, even presuming it was plain error, Belgarde has not shown that the error was prejudicial.

An error is prejudicial if there is a reasonable likelihood that it substantially affected the verdict. *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). There are several factors weighing against a conclusion that *any* of the alleged drug-dealer profile evidence substantially affected the verdict. Although a significant portion of the state's presentation included police testimony explaining how the items found in Belgarde's house could be used by drug dealers, other evidence overwhelmingly supported the jury's conclusion that Belgarde intended to sell the drugs. First, even without the officers' testimony on how surveillance cameras, night vision scopes, and radio frequency detectors are used by drug dealers, the jury could readily infer that possession of this specialized equipment related to drug dealing. Jurors knew that police discovered a large

quantity of drugs in the house and that possessing the equipment is highly uncommon among the non-drug-dealing population.

Second, proving that Belgarde had the requisite intent to sell, the prosecutor focused more on Belgarde's "luxuriant lifestyle" and the large quantity of methamphetamine seized rather than on the alleged drug-dealer profile testimony. Most damning, the prosecutor introduced Belgarde's income tax records and compared Belgarde's extremely low legitimate income in the years preceding his arrest with the expensive items discovered in his home. The jurors learned that Belgarde had a total gross income in 2005 of only $8,771 but that he was able to purchase large quantities of methamphetamine and to furnish his home with extravagant accoutrements. This evidence was so compelling that it inspired the prosecutor to deliver his closing argument with this powerful first punch:

> May it please the court, counsel, and members of the jury. Are your screens on? How does a person have items like this in their home: flat-screen televisions, with surround sound systems, the newest game systems, PlayStation 3, Xbox 360, two Cadillacs, a Chevy Silverado, a Ski-doo snowmobile? How do you have that kind of lifestyle on their kind of money?
>
> You saw the pictures of everything that was in that house. And you'll also get to pass around their tax returns. The defendant talked about big money he was making once upon a time as a welder, but it turned out in reality he wasn't making much money at all. And he quit his job in 2006. Not very much money and an awful lot of goodies, fairly high rent, and a whole lot of cash sitting around the house. How do you pull those things off, when they seem to be financially inconsistent with each other?

> There's only one way to do that and that is through something like this. Exhibit 9 and Exhibit 13. This is an ounce and a half of methamphetamine. This is a lot of money. And selling this stuff makes a lot of money. And that's how this defendant and Lorraine Otero were sustaining their lifestyle.

The punch left Belgarde's defense stumbling; the only response Belgarde's counsel gave was that, well, maybe Belgarde just stole the stuff. This evidence and Belgarde's unusual response to it so strongly support the jury's determination that Belgarde's true income source was drug dealing, the alleged drug-dealer profile evidence could not have caused his conviction.

Third, it appears that the 27.7 grams of methamphetamine found in the large package is more than sufficient to indicate an intent to sell rather than to keep for personal use. *See State v. Heath*, 685 N.W.2d 48, 57 (Minn. App. 2004) (a combined weight of 13 grams from several packages of methamphetamine was found sufficient to infer an intent to sell), *review denied* (Minn. Nov. 16, 2004). The police testimony here was that a typical user amount was from a quarter gram up to 3.5 grams (an "eight ball").

Neither *Williams* nor *Litzau* supports Belgarde's argument that admission of the bulk of the drug experts' testimony was plain error, and Belgarde cannot demonstrate that the alleged error was prejudicial. Although some parts of the testimony might have been objectionable, the proper venue to make the objection was in the district court. A timely objection would have directed the testimony more clearly toward usage and further away from quasi-character evidence. On our limited review, we have identified no plain error, and even if some of the testimony was plainly erroneous, Belgarde has not shown that

there is a reasonable likelihood that the error substantially affected the verdict. We therefore affirm his conviction.

Affirmed.