STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1697

State of Minnesota,
Respondent,

vs.

Ronald Dean Heard,
Appellant.

Filed September 12, 2011
Affirmed
Larkin, Judge

Steele County District Court
File No. 74-CR-08-2298

Lori A. Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Daniel A. McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Larkin, Judge; and Muehlberg, Judge.[*]

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

LARKIN, Judge

Appellant challenges his conviction of third-degree murder, arguing that the district court erred in denying his motions to suppress, denying his motion for a mistrial, instructing the jury, and denying his request for a downward-durational departure. We affirm.

FACTS

This case stems from the death of B.K., who died after ingesting a lethal combination of methamphetamines and Fentanyl. On July 26, 2008, S.N. drove B.K. to appellant Ronald Dean Heard's home so B.K. could buy drugs from Heard. B.K. had purchased patches of Fentanyl, a potent opiate, from Heard in the past. B.K. entered Heard's home and went into a bedroom with Heard. D.B. was present and later reported that B.K. was only in the bedroom for a short time and did not appear as though he was there to socialize.

S.N. later found B.K. unconscious on the porch of his mother's home and called Heard. Heard told S.N. that B.K. had ingested a Fentanyl patch. D.B., Heard, and Heard's live-in girlfriend, M.M., went to assist S.N. M.M., who used to be a nurse, reported that B.K. was making noises as if something was stuck in his throat. B.K. was unresponsive, blood was coming out of his nose, and there was saliva on his shirt. S.N. drove B.K. to the hospital, but he was dead upon arrival. An autopsy report shows that B.K. had a blood methamphetamine level of .85 mg/L, within the fatal range of 0.09-18mg/L, and a blood Fentanyl level of 14 mcg/L, within the fatal range of 3-28 mcg/L.

The autopsy report lists his cause of death as a mixed drug toxicity of methamphetamine and Fentanyl.

After leaving S.N. and B.K, M.M. and Heard went back to their home and attempted to remove all indicia of drug use from the home. They next drove D.B. to his home, where they disposed of garbage that they had removed from their home.

Detective Bob Vogelsberg was dispatched to the hospital to investigate B.K.'s death. Vogelsberg interviewed S.N. S.N. told Vogelsberg she dropped B.K. off at Heard's home the previous night so he could buy drugs from Heard. Vogelsberg relayed this information to Deputy Scott Hanson, who had previous information from confidential informants that Heard sold drugs at his residence.

While officers were securing Heard and M.M.'s home in anticipation of a search warrant, Heard and M.M. arrived at the home. Vogelsberg transported them to the Steele County Law Enforcement Center (LEC) to provide statements. They were transported in the backseat of an unmarked vehicle, which did not have bars separating the front and back seats. Neither was handcuffed.

Heard and M.M. waited with Detective Brandon Gliem in the LEC garage for an interview room to become available. Gliem told Heard and M.M. that he would not be questioning them while they waited for the room. Heard nonetheless stated that B.K. was a friend of theirs and that they would provide any information that could help the officers. Heard also volunteered that he had been at B.K.'s mother's house the previous night. Heard told Gliem that he noticed a Fentanyl patch near B.K.'s body, recognized it as his

own, and brought it home. Gliem reminded Heard several times that he did not have to talk to him.

After approximately ten minutes, Heard and M.M. were brought to an interview room where they had access to a landline telephone. A video recording shows M.M. making a cell-phone call in which she informed the recipient that she and Heard were not under arrest, but that Heard wanted M.M. to have a lawyer. Gliem and Vogelsberg interviewed M.M. and Heard separately. The detectives read M.M. her *Miranda* rights, which she waived, even though she told the detectives that Heard wanted her to have an attorney present. M.M. told the detectives that B.K. had been at her home and that he went into the bedroom to speak to Heard privately.

The detectives also provided Heard with a *Miranda* warning. He waived his rights and provided a statement without an attorney. Heard admitted that B.K. had been at his home, but Heard denied selling B.K. Fentanyl. At the conclusion of the interviews, the detectives told Heard and M.M. that they were free to leave.

While Heard and M.M. were questioned by the detectives, Hanson obtained a search warrant for their home based, in part, on the statements that Heard made in the LEC garage. When the warrant was executed, Hanson noticed that the inside of the home was very clean and that all of the garbage cans had new trash bags inside of them. M.M. and Heard arrived home during the search. Hanson informed Heard and M.M. that they did not need to talk to him. Hanson informed Heard that officers had located a locked safe in his bedroom and that they could legally destroy the safe. Heard then opened the safe for the officers. The safe contained a digital scale that tested positive for

methamphetamine, a glass pipe that tested positive for methamphetamine, a glass pipe with marijuana residue, several small baggies, and other drug paraphernalia. When asked, Heard confirmed that he was the only person who had access to the safe. Heard also showed the officers a black bag in his closet that contained Fentanyl. The officers arrested Heard for fifth-degree possession of a controlled substance. After M.M. told officers that the methamphetamine pipe was hers, she was also arrested for fifth-degree possession.

On July 31, officers interviewed D.B., who told them that Heard was a drug dealer. D.B. also said that Heard admitted to him that on the night of B.K.'s death, he sold B.K. two Fentanyl patches for $35 each. Based on this information, officers applied for another search warrant for Heard's residence. During execution of that warrant, officers recovered cell phones and medical equipment from Heard's bedroom.

Heard was charged with one count of fifth-degree-controlled-substance crime under Minn. Stat. § 152.025, subds. 2(1) and 3(b) (2006), and one count of third-degree murder under Minn. Stat. § 609.195(b) (2006). Heard moved to suppress the statements that he made at the LEC and at his residence, as well as items seized during the search of his residence. An omnibus hearing was held on June 22, 2009. Heard, Vogelsberg and Gliem testified.

Heard testified that he requested a lawyer while he, M.M., and Gliem waited in the LEC garage for an interview room. He further testified that he asked for an attorney four times prior to being read his *Miranda* rights. He explained that he did not request an

attorney after he was read his rights because he relied on Gliem's alleged statement that he did not need one. The district court denied Heard's motion to suppress in its entirety.

Prior to trial, Heard filed a motion in limine to exclude "[a]ny and all references to [Heard] being a drug dealer on the grounds that the evidence is of no relevance…, the evidence is highly prejudicial and constitutes proof of other crimes, wrongs or acts that are inadmissible." The district court granted the motion, ordering that "there isn't to be any testimony with regard to . . . Mr. Heard's use of drugs, Mr. Heard's [] prior sales of drugs, [and] manufacture of drugs."

The case was tried to a jury. S.N., M.M., and D.B. testified for the state. The state also called D.V., who had been incarcerated at the Steele County jail with Heard. D.V. testified that Heard told him that he had traded B.K. Fentanyl patches for money and methamphetamine. D.V. also testified that Heard told him that B.K. overdosed, but that he was able to get one of his patches back.

During S.N.'s testimony, Heard requested a mistrial three times based on alleged violations of the district court's order prohibiting reference to Heard's prior drug activity. Heard objected to the following statements: S.N.'s testimony that "sometimes we'd do drugs" at Heard's trailer; S.N.'s testimony that she "used" with Heard and M.M.; and S.N.'s testimony that she "didn't know how anybody in their right mind could say something like that" when the prosecutor asked her how she felt about Heard's suggestion that he inject drugs into B.K.'s heart to "wake him up." The district court denied the requests but provided a curative instruction in response to two of the requests.

Heard was convicted as charged. At sentencing, he argued for a downward-durational departure, but the district court imposed the presumptive sentence of 146 months in prison. *See* Minn. Sent. Guidelines IV (2006) (providing for a sentencing range of 141-198 months for an offender with one criminal-history-score point). This appeal follows.

D E C I S I O N

Heard makes five claims on appeal: (1) the district court erred in refusing to suppress his statements, (2) the district court erred in refusing to suppress evidence seized from his home, (3) the district court abused its discretion by denying his requests for a mistrial, (4) the district court abused its discretion by denying his request for specific witness credibility jury instructions and by failing to provide, sua sponte, an accomplice-testimony instruction, and (5) the district court erred in denying his request for a downward-durational departure. In arguing these claims, Heard suggests other assignments of error that are not fully developed or supported by legal authority. We decline to address any assignment of error that is not supported by legal argument or authority. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (explaining that an assignment of error based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

I.

"When reviewing a district court's ruling on a pretrial motion to suppress evidence, we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Buckingham*, 772

N.W.2d 64, 70 (Minn. 2009) (quotation omitted). Heard argues that three of his statements should have been suppressed. We address each statement in turn.

A.

Heard argues that the statements he made while waiting for the interview room should have been suppressed because he was not provided with a *Miranda* warning. The Fifth Amendment to the United States Constitution and Article I, Section 7 of the Minnesota Constitution protect individuals from compelled self-incrimination. In order to protect this right, if a suspect is both "in custody" and subject to "interrogation," the suspect must be read his or her *Miranda* rights. *State v. Heden*, 719 N.W.2d 689, 694-95 (Minn. 2006). The United States Supreme Court has defined interrogation as "express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689 (1980). "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301, 100 S. Ct. at 1689-90 (footnotes omitted). "'Subtle compulsion' or the mere possibility that a question will elicit an incriminating response is insufficient to trigger the *Miranda* doctrine." *State v. Tibiatowski*, 590 N.W.2d 305, 310 (Minn. 1999). "A volunteered statement made by a suspect, not in response to interrogation, is not barred by the Fifth Amendment and is admissible with or without the giving of *Miranda* warnings." *State v. Williams*, 535 N.W.2d 277, 289 (Minn. 1995).

The district court concluded that Heard's pre-*Miranda* statements were not made in response to interrogation. We agree. Gliem specifically told Heard and M.M. that he would not be questioning them while they waited for the interview room. Even though Gliem told Heard several times that Heard did not need to talk to him, Heard volunteered information. Because no interrogation occurred, the district court did not err by refusing to suppress these statements, even if Heard was in custody for the purposes of *Miranda*.

B.

Heard next argues that the statement he provided in the interview room should have been suppressed because it was obtained in violation of his Sixth Amendment right to counsel. The U.S. Supreme Court has promulgated a bright-line rule that "an accused, … having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1184-85 (1981). "The bright-line rule of *Edwards* establishes a duty on the part of police to cease interrogation after a suspect invokes his right to counsel unless the [suspect] himself initiates further communication, exchanges, or conversations with the police." *State v. Munson*, 594 N.W.2d 128, 140 (Minn. 1999) (quotation omitted).

At the suppression hearing, Heard testified that he asked three to four times for an attorney while waiting in the LEC garage. Heard testified that by the last time he made this request, he said it very loudly. But the district court did not find Heard's testimony credible. The district court provided a detailed explanation of why it did not believe that

Heard requested counsel, reasoning that although Heard claimed that he asked for an attorney four times, he had the opportunity to call an attorney prior to the interview but did not do so. Heard made no effort to contact an attorney even as M.M. made a phone call indicating that Heard wanted her to have counsel. And after Heard was read his rights, he told the detectives that he was willing to talk to them. We defer to the district court's determination that Heard's testimony that he requested an attorney was not credible. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (explaining that appellate courts give "great deference" to the district court's factual determinations). And because Heard did not request an attorney, the district court did not err in refusing to suppress his statement for a purported violation of his constitutional right to counsel.

C.

Finally, Heard argues the statements that he made at his home during the execution of the first search warrant should have been suppressed because he was subject to custodial questioning without a *Miranda* warning. Appellate courts apply an objective test to decide whether a person is in custody: "[W]hether the circumstances of the interrogation would make a reasonable person believe that he was under formal arrest or physical restraint akin to formal arrest." *In re Welfare of D.S.M.*, 710 N.W.2d 795, 797-98 (Minn. App. 2006).

In denying Heard's motion to suppress, the district court determined that Heard was not in custody when he made the statements. We agree. After Heard's interview at the LEC was over, the detectives told him that he was free to leave and that he needed to arrange his own transportation. The detectives never directed Heard to return to his

home. Once he arrived at his home, the police did not tell him that he had to remain there. And Heard was not formally arrested until after officers found drugs in his safe. As the district court concluded, "[a] reasonable person in [Heard's] situation would not understand themselves to be in custody" based on these facts and circumstances. Because Heard was not in custody, no *Miranda* warning was required, and the district court did not err in refusing to suppress Heard's statements made during the execution of the search warrant.

II.

The United States and Minnesota Constitutions provide that no warrant shall issue without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, a search is lawful only if it is executed pursuant to a valid search warrant issued by a neutral and detached magistrate after a finding of probable cause. *See* Minn. Stat. § 626.08 (2010); *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999). "When determining whether a search warrant is supported by probable cause, we do not engage in a de novo review." *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). Instead, "great deference must be given to the issuing [magistrate's] determination of probable cause." *State v. Valento*, 405 N.W.2d 914, 918 (Minn. App. 1987). This court limits its "review to ensuring that the issuing [magistrate] had a substantial basis for concluding that probable cause existed." *McGrath*, 706 N.W.2d at 539.

To determine whether the issuing magistrate had a substantial basis for finding probable cause, we look to the "totality of the circumstances."

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. Wiley, 366 N.W.2d 265, 268 (Minn. 1985) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). In reviewing the sufficiency of a search-warrant affidavit under the totality-of-the-circumstances test, "courts must be careful not to review each component of the affidavit in isolation." *Id.* "[A] collection of pieces of information that would not be substantial alone can combine to create sufficient probable cause." *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004). Furthermore, "the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded warrants." *Wiley*, 366 N.W.2d at 268 (quotation omitted).

Heard argues that the search warrant for his home lacked probable cause. Specifically, Heard argues that the probable cause finding was inappropriately based on his illegally obtained statements. "It is established that evidence discovered by exploiting previous illegal conduct is inadmissible." *State v. Olson*, 634 N.W.2d 224, 229 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). But, as discussed in section I, Heard's statements were not illegally obtained. And while Heard challenges other information in the search warrant, probable cause is assessed based on the totality of the circumstances, not based on a line-by-line dissection of the search warrant, as Heard advocates. Heard's admissions that a Fentanyl wrapper was found next to B.K. during his overdose, that the wrapper belonged to him, and that he removed the wrapper from B.K.'s mother's porch

and brought it back to his home provided probable cause to believe that there was a fair probability that contraband or evidence of a crime would be found at Heard's home. Thus the district court did not err by refusing to suppress the evidence obtained at Heard's home during execution of the search warrant.

III.

"[A] mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different" if the event that prompted the motion had not occurred. *State v. Spann*, 574 N.W.2d 47, 53 (Minn. 1998). "[T]he district court is in the best position to evaluate whether prejudice, if any, warrants a mistrial." *State v. Marchbanks*, 632 N.W.2d 725, 729 (Minn. App. 2001). The denial of a motion for a mistrial is reviewed for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). The district court does not abuse its discretion by denying a motion for a mistrial when the parties and the district court took steps to minimize any prejudicial effect of a witness's remark. *State v. Miller*, 573 N.W.2d 661, 675-76 (Minn. 1998).

Heard argues S.N.'s testimony that "sometimes we'd do drugs" at Heard's trailer and that she "used" with Heard and M.M. violated the district court's ruling on his motion in limine and was so prejudicial as to require a mistrial. Heard also argues S.N. impermissibly referenced his character when she testified that she "didn't know how anybody in their right mind could say something like that" when the prosecutor asked her how she felt about Heard's suggestion that he inject drugs into B.K.'s heart to "wake him up." The district court provided a curative instruction after the second and third statements.

As to the first statement, the district court reasoned that its pretrial order on Heard's motion in limine had not been violated because S.N. did not testify that Heard used drugs with her. We agree that the testimony did not violate the district court's order. And we conclude that the district court did not abuse its discretion in determining that the statement was not so prejudicial as to warrant a mistrial.

S.N.'s second statement, that she used drugs with Heard, violated the court's pretrial order. But the district court gave the following curative instruction to alleviate any prejudice: "You are instructed to disregard the witness's statement, quote, I just used with them, end quote. You are not to consider this statement as inferring any use of illegal substances by Mr. Heard." *See State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (providing that prejudice may be mitigated by instructions that the jury disregard a comment, as long as the instructions are not such that they draw attention to the witness's statements). Heard presents no argument as to why the curative instruction was insufficient to alleviate any prejudice that resulted from violation of the district court's order. *See Ture v. State*, 353 N.W.2d 518, 524 (Minn. 1984) (concluding that the witness's reference to other criminal conduct by the defendant justified a curative instruction but not a mistrial). We presume that a jury follows the district court's instructions. *Miller*, 573 N.W.2d at 675. The district court did not abuse its discretion by giving a curative instruction instead of granting a mistrial.

The district court also instructed the jury to disregard S.N.'s statement regarding Heard's suggestion that he could revive B.K. by injecting drugs into his heart. Heard cites no authority to support his argument that this testimony is impermissible character

evidence. *See* Minn. R. Evid. 404 (stating that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith"). Although the testimony arguably portrays Heard in a negative light by suggesting that he had access to drugs and was prepared to act in the event of an overdose, it also suggests his desire to help B.K. But even if we were to assume that the testimony was impermissible character evidence, we would not conclude that it was so prejudicial as to require a mistrial. In sum, the district court did not abuse its discretion by denying Heard's requests for a mistrial.

IV.

District courts are allowed "considerable latitude" in the selection of language for jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). This court reviews the district court's jury instructions for an abuse of discretion. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). "Refusal to give a proposed jury instruction lies within the discretion of the [district] court and there is no error absent an abuse of discretion." *State v. O'Hagan*, 474 N.W.2d 613, 620 (Minn. App. 1991), *review denied* (Minn. Sept. 25, 1991).

Heard argues that the district court erred in denying his request for specific witness-credibility jury instructions and in failing to provide, sua sponte, an instruction regarding accomplice testimony. We address each argument in turn.

A.

Heard requested specific witness-credibility instructions regarding witnesses who are granted immunity, witnesses who are drug- or alcohol-abusers, witnesses who provide inconsistent statements, and witnesses who have felony convictions. The district court denied Heard's request and instead provided the model jury instruction regarding witness credibility. *See* 10 *Minnesota Practice*, CRIMJIG 3.12, 3.15 (2010) (providing instructions on the believability of a witness and impeachment, including the witness' criminal record and reputation for truthfulness).

With regard to inconsistent statements and prior convictions, the district court instructed the jury that, "[i]n deciding the believability and weight to be given the testimony of a witness, you may consider evidence that the witness has been convicted of a crime. . . . Evidence of any prior inconsistent statement or conduct should be considered only to test the believability and weight of the witness's testimony." The district court's instructions also addressed the issue of drug and alcohol abuse stating, "[i]n determining believability and weight of evidence, you may take into consideration the witness's . . . ability and opportunity to know, remember and relate facts." The district court also instructed the jury that it could consider a witness's "relationship to the parties," "convict[ion] of a crime," and "any other factors that bear on believability and weight."

The substance of Heard's requested instructions is contained in the model witness-credibility instruction used by the district court. We therefore conclude that the district court did not abuse its discretion by denying Heard's request. *See State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009) (stating that, because the "substance of the requested

instruction was already contained in the existing jury instructions" the district court did not err by denying defendant's request for additional language).

B.

A defendant may not be convicted based solely on the uncorroborated testimony of an accomplice. *See* Minn. Stat. § 634.04 (2010). The general rule regarding accomplice testimony requires courts to caution jurors about the nature of accomplice testimony because it is not uncommon for an accomplice to testify against a defendant for self-serving purposes. *See State v. Shoop*, 441 N.W.2d 475, 479 (1989). An accomplice instruction need not be given in every criminal case, but "it must be given in any criminal case in which any witness against the defendant might reasonably be considered an accomplice to the crime." *Id*. If it is unclear whether a witness is an accomplice, the jury should make that determination. *See State v. Flournoy*, 535 N.W.2d 354, 359 (Minn. 1995).

The test for whether a witness is an accomplice for purposes of section 634.04 is whether the witness could have been indicted and convicted for the crime with which the accused is charged. *See State v. Swyningan*, 304 Minn. 552, 555, 229 N.W.2d 29, 32 (1975). However,

> where the acts of several participants are declared by statute to constitute separate and distinct crimes, the participants guilty of one crime are not accomplices of those who are guilty of a separate and distinct crime. Thus, . . . an accessory after the fact is not an accomplice of the principal.

Id. at 555-56, 229 N.W.2d at 32 (citations omitted).

Heard asserts that an accomplice-corroboration instruction was necessary because S.N., M.M., and D.B. were accomplices. But Heard did not request the instruction. Before this court will review an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three prongs are met, we should address the error to ensure fairness and the integrity of the judicial proceedings. *Id*. To determine whether there is plain error necessitating review, we must first determine whether the record supports a conclusion that S.N., M.M., or D.B. was an accomplice.

Heard argues that S.N. "testified under a grant of immunity which established that she had engaged in behavior that may very well have been criminal." But "[a]n accomplice is an associate or cooperator in the commission of acts constituting a crime." *State v. Currie*, 267 Minn. 294, 305, 126 N.W.2d 389, 397 (1964) (quotation omitted). There is no evidence that S.N. assisted Heard to furnish B.K. with drugs. And S.N.'s attempt to assist B.K. after he suffered the adverse effects of a drug overdose does not implicate her as a principal or accessory to the third-degree-murder charge.

Heard argues that an accomplice instruction was warranted with regard to M.M. because she was charged in connection with B.K.'s death. But Heard presents no information regarding the crime with which M.M. was charged.[1] The record indicates that M.M.'s involvement occurred after Heard had furnished B.K. with the drugs that led to his death. Even if M.M. aided Heard after the fact by helping him remove

[1] According to the state's brief, M.M. was charged with "Aiding An offender — Accomplice After the Fact."

incriminating evidence from their home, "an accessory after the fact is not an accomplice of the principal." *State v. Swyningan*, 304 Minn. 552, 555, 229 N.W.2d 29, 32 (1975).

With regard to D.B., Heard argues that D.B.'s "presence at [Heard's] house during the alleged sale of Fentanyl and his subsequent behavior driving with [S.N.] and [Heard] to check on B.K. should have, at least, prompted the court to instruct the jury that it should consider whether [D.B.] might be an accomplice." But D.B.'s mere presence, by itself, does not make him an accomplice. *See State v. Dominguez-Ramirez*, 563 N.W.2d 245, 257 (Minn. 1997) (explaining that presence at the scene is not enough to convict a defendant of aiding and abetting murder). Moreover, even though D.B. was present in Heard's home, none of the evidence suggests he was with Heard and B.K. when the alleged drug sale took place behind closed doors in the bedroom.

Heard's third-degree murder charge was based on his furnishing B.K. with drugs, which eventually led to B.K.'s death. No evidence establishes that S.N., M.M., or D.B. furnished drugs to B.K or cooperated, aided or assisted Heard to furnish drugs to B.K. Thus, the record does not support a finding that they are accomplices, an accomplice instruction was not necessary, and the district court did not err in failing to provide the instruction sua sponte.

V.

Heard argues that the district court erred by denying his request for a downward-durational departure. The district court must impose the presumptive guidelines sentence unless there are "substantial and compelling circumstances" that warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). The decision to depart from

the sentencing guidelines rests within the district court's sound discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Ordinarily, this court will not disturb the district court's imposition of the presumptive guidelines sentence, even where reasons for a downward departure exist. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). If the district court "considers reasons for departure but elects to impose the presumptive sentence," an explanation for its denial of the departure request is not necessary. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). And it is a "rare case" that warrants a reversal of a district court's refusal to depart from the presumptive sentence. *Kindem*, 313 N.W.2d at 7.

Heard argues that the district court abused its discretion by denying his request for a downward-durational departure, arguing that the district court should have considered that Heard was under the influence of his prescription medication (i.e. Fentanyl) at the time of the offense and that the district court "erred in failing to support its order denying a downward durational departure with offense-related factors." These arguments are not persuasive. Even if there were mitigating factors, the district court was not required to order a downward departure. *See State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984) ("The fact that a mitigating factor was clearly present did not obligate the court to place defendant on probation or impose a shorter term than the presumptive term."). Moreover, the district court was not required to provide reasons to support its refusal to depart from the presumptive sentence. *See Van Ruler*, 378 N.W.2d at 80. Finally, this is not the "rare

case" in which this court would overturn the district court's imposition of the presumptive sentence. *See Kindem*, 313 N.W.2d at 7.

Affirmed.

Dated:

Judge Michelle A. Larkin