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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1061**

State of Minnesota,
Respondent,

vs.

Timothy Merrill Newlun,
Appellant.

**Filed May 6, 2019
Affirmed
Rodenberg, Judge**

Chisago County District Court
File No. 13-CR-17-1107

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Janet Reiter, Chisago County Attorney, David Hemming, Assistant County Attorney,
Center City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Rodenberg, Judge; and
Reilly, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this direct appeal from his conviction of second-degree possession of 25 grams
or more of methamphetamine, appellant Timothy Merrill Newlun argues that the district
court abused its discretion when it allowed the state to admit several bags of

methamphetamine as evidence after he stipulated that the substance found in a shaving kit in the trunk of the car he had been driving weighed more than 25 grams and was methamphetamine. He also argues that the district court abused its sentencing discretion by failing to consider a downward dispositional departure. We affirm.

FACTS

In December 2017, appellant drove a car that belonged to R.B. The car was parked at a gas station, and Wyoming Police Officer Anthony Zerwas decided to check the car's license plate. This check resulted in a response of "impound for alcohol." Because a car with such plates cannot be legally driven, Officer Zerwas followed the car and initiated a traffic stop. Officer Zerwas made contact with the driver, who identified himself as appellant. Officer Zerwas could "smell the odor of an alcoholic beverage emanating from the vehicle" and returned to his squad car to check appellant's driving information. Officer Zerwas's search revealed that appellant's license was cancelled as inimical to public safety.

Another officer, Chisago County Sheriff Sergeant Robert Berg, was "right behind Officer Zerwas when he completed the stop." Because Officer Zerwas had smelled an alcohol odor coming from the car, Sergeant Berg began investigating appellant for possible driving while impaired. Appellant did not indicate any signs of impairment, but admitted that he did not have a valid driver's license. Sergeant Berg told appellant that he was going to be arrested and transported to jail "due to the initial stuff that we had, the driving after cancellation inimical to public safety, [and] operating the vehicle with impounded plates." Given the snowy road conditions and the car's proximity to an Interstate-35 on-ramp, the officers decided to tow the car.

Before towing the car, the officers conducted an inventory search. During their search, Officer Zerwas opened the center console and found “meth baubles” used for smoking methamphetamine. Also in the center console was a tax form with appellant’s name on it. Officer Zerwas continued searching the car, opened the trunk, and saw men’s clothing and a black shaving kit.¹ Inside the shaving kit were four plastic bags filled with a rock-like crystal substance. The substance field-tested positive as methamphetamine. The officers weighed each of the bags. One of the bags contained 6.5 grams of methamphetamine, and another contained approximately 28 grams of methamphetamine. Also inside the shaving kit were three prescription pill bottles with appellant’s name on them.

The state charged appellant with one count of second-degree controlled-substance crime for possession of 25 or more grams of methamphetamine under Minn. Stat. § 152.022, subd. 2(a)(1) (2016).²

The case proceeded to a jury trial. Before trial, appellant agreed to stipulate that the total weight of the methamphetamine was over 25 grams and that the drug mixture was in fact methamphetamine. The state explained that the purpose of the stipulation was to eliminate the need for witnesses to testify concerning the analysis and chemical composition of the methamphetamine or to testify about the methamphetamine’s chain of custody. Consequently, the principal issue at trial was whether appellant knowingly

¹ During trial testimony, the officers used other terms to describe the bag in which they found the methamphetamine. We refer to this bag as a shaving kit here.

² Because the offense occurred in 2017, we cite to the 2016 version of the statute.

possessed the methamphetamine. Appellant contended that he had been borrowing R.B.'s car and did not know that the methamphetamine had been inside it.

Before opening statements, the state indicated an intention to introduce the four bags of methamphetamine, arguing that "all of those bags are admissible to prove the case." Appellant's trial counsel objected, asserting that the bags were not needed to prove the element of the offense requiring proof of 25 grams or more of methamphetamine, and argued that it would be "overkill" to admit the bags since appellant had stipulated to the methamphetamine's weight. The district court rejected appellant's argument. It reasoned that, despite the stipulation, the bags themselves were relevant evidence and not unfairly prejudicial.

At trial, the two officers testified that they found a shaving kit in the trunk of the car. The shaving kit contained prescription pill bottles with appellant's name on them and the methamphetamine. Appellant called one witness, R.B., who testified that he was the registered owner of the car appellant had been driving and that he had allowed appellant to use the car to search for a job. R.B. also testified that other individuals had used the car during the time that appellant had been borrowing it. On cross-examination, R.B. testified that he knew the officers found drugs inside the car, but that those drugs were not his.

At the close of trial, the district court instructed the jury that appellant had stipulated that the "drugs found in the vehicle he was driving . . . [were] methamphetamine and weighed 25 grams or more" and that the jury should treat that fact as having been proved. The district court did not allow the bags into the jury-deliberation room. But during

deliberations, the jury asked to view the bags. The district court allowed the jury to view the bags in the courtroom. The jury later found appellant guilty of the charged offense.

At sentencing, appellant's trial counsel explained that the state had agreed to request a 60-month sentence, a downward durational departure, based on its assessment that appellant's offense was less serious than a typical second-degree-possession offense. Appellant had also moved the district court for a downward dispositional departure to probation, but withdrew that request at sentencing. The district court then adopted the state's previously-stated reasons for departing and sentenced appellant to a 60-month prison term.

This appeal followed.

DECISION

- I. The bags of methamphetamine admitted at trial were relevant as to whether appellant knowingly possessed the methamphetamine in the car he was driving, and the district court acted within its discretion in admitting the bags into evidence.**

Appellant argues that his stipulations eliminated the state's need for admitting the bags into evidence at trial, and that the district court abused its discretion by allowing the bags into evidence because they were irrelevant and unfairly prejudicial.

We review the district court's evidentiary rulings for abuse of discretion. *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016); *see also State v. Zornes*, 831 N.W.2d 609, 624 (Minn. 2013) (stating that admission of physical evidence will be upheld unless it constitutes an abuse of discretion). Appellant bears the burden of demonstrating both that the district court abused its discretion in admitting the evidence at issue and that he was prejudiced by its admission. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

A defendant's offer to stipulate in a criminal case does not take away the state's right to offer evidence. *State v. Davidson*, 351 N.W.2d 8, 10 (Minn. 1984) (citing *State v. Wiley*, 205 N.W.2d 667, 675 (Minn. 1973)). "A defendant may not be allowed to unilaterally control the need for relevant evidence by offering to stipulate, especially where the evidence bears upon other issues not covered by the stipulation." *State v. Matelski*, 622 N.W.2d 826, 832 (Minn. App. 2001), *review denied* (Minn. May 15, 2001).

Under Minn. R. Evid. 401 and 402, evidence relevant to prove the offense remains admissible, regardless of the defendant's offer to stipulate. See *State v. Durfee*, 322 N.W.2d 778, 785-86 (Minn. 1982) (despite appellant's admission that child's injuries constituted great bodily harm, photos remained admissible because the real issue was whether defendant intentionally caused that harm); *State v. Barsness*, 473 N.W.2d 325, 328 (Minn. App. 1991) (despite appellant's offer to stipulate, district court did not abuse its discretion in admitting photo and videotape evidence because they were relevant), *review denied* (Minn. Aug. 29, 1991). Generally, with regard to physical evidence, objects that are connected to the crime scene or the investigation are admissible. *Zornes*, 831 N.W.2d at 624.

Under Minn. R. Evid. 403, even highly damaging evidence is nonetheless admissible when it is relevant and highly probative of a material issue of fact. *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). But when the potential for unfair prejudice substantially outweighs the probative value of the evidence and the stipulation supplies all of the relevant information on the subject, the evidence should be excluded. *Davidson*, 351 N.W.2d at 11; see *State v. Yang*, 774 N.W.2d 539, 555 (Minn. 2009) (explaining that,

under Minn. R. Evid. 403, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). Unfair prejudice is not merely damaging evidence, even severely damaging evidence; instead it is evidence that persuades by illegitimate means, giving one party an unfair advantage. *Schulz*, 691 N.W.2d at 478.

Appellant argues that, because he stipulated that the drug mixture was methamphetamine weighing at least 25 grams, the bags should not have been admitted into evidence because they were irrelevant and highly prejudicial.

The issue here is similar to that in *Wiley*, where the defendant offered to admit that the quantity of seized marijuana was sufficient to support a conviction and to permit an inference of knowledge of the marijuana's presence. 205 N.W.2d at 675. The defendant argued that the state should be prohibited from introducing the marijuana into evidence because the very large amount might unduly prejudice the jury. *Id.* The district court admitted the marijuana into evidence. *Id.* On appeal, the defendant argued that the admission was prejudicial. *Id.* The supreme court rejected the argument, concluding that the marijuana was admissible because it "was relevant to the defense that defendant had been 'framed.'" *Id.*

Here, the issue principally in dispute at trial was not the weight of the methamphetamine or whether the drug mixture was methamphetamine. The disputed issue was whether appellant knew methamphetamine was in the car he had been driving. Appellant denied knowing about the drugs. His defense theory appears to have been that he was borrowing a friend's car and someone else put the methamphetamine in the car. Despite appellant's stipulations, the state still needed to prove that appellant knew the

methamphetamine was in the car. The state sought to admit the bags to prove that appellant knew the methamphetamine was in the car by showing the jury the size of the bags, the amount of methamphetamine in them, the size of the shaving kit, and the prescription pill bottles with appellant's name on them in close proximity to the bags. This was relevant visual evidence that went to the knowing element of the offense. *See 10A Minnesota Practice*, CRIMJIG 20.14 (Supp. 2018) (stating that the first element of controlled-substance possession is that the defendant "knowingly possessed one or more mixtures").

The admission of the bags was not unfairly prejudicial. The fact that it was damaging to the defense is what made the evidence relevant. And any prejudice was not unfair. Accordingly, the district court did not abuse its discretion by allowing the state to admit the bags into evidence.

II. The district court did not consider a downward dispositional departure because appellant withdrew his request for one.

Appellant argues that we must remand for resentencing because the district court did not consider a probationary sentence. Appellant asserts that the district court was under the impression that he was subject to a three-year minimum term under Minn. Stat. § 152.022, subd. 3(b) (2016), and that the district court improperly relied on that statute.

District courts are afforded great discretion in sentencing, and reviewing courts will reverse sentencing decisions only for an abuse of that discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). The district court must impose the presumptive sentence unless "substantial and compelling circumstances" exist warranting a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Unlike dispositional departures, which are based on a defendant's characteristics, durational departures may be justified by offense-

related reasons only. *State v. Rund*, 896 N.W.2d 527, 533 (Minn. 2017). We will not interfere with the district court’s exercise of discretion, “as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination.” *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation omitted).

Appellant’s argument mischaracterizes the record concerning why the district court did not consider a downward dispositional departure. At sentencing, appellant’s trial counsel explained that the state had agreed to request a downward durational departure to a 60-month term, instead of the presumptive guidelines term of 88 months, because appellant’s offense was less serious than the typical second-degree drug possession. Because the parties had agreed to a durational departure, the district court expressly asked appellant’s trial counsel, “So we’re clear, however, you’re withdrawing your dispositional departure request?” Appellant’s trial counsel responded, “Correct, Your Honor.”

As the sentencing transcript clearly indicates, the district court did not consider a dispositional departure because appellant withdrew that motion. Consequently, there was no request for the district court to consider.

The district court acted within its discretion in sentencing appellant to a downward durational departure and adopting the earlier-stated substantial and compelling reasons for departing from the guidelines as stated on the record.

Affirmed.