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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1655**

State of Minnesota,
Respondent,

vs.

Gina Elizabeth Menard,
Appellant.

**Filed August 24, 2020
Affirmed
Bratvold, Judge**

Hennepin County District Court
File No. 27-CR-18-14815

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Bratvold, Judge; and Frisch, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this direct appeal from final judgments of conviction, appellant argues that we must reverse her convictions for aiding and abetting first-degree sale of methamphetamine

and being a felon in possession of a firearm because the warrant authorizing the search of her hotel room was not supported by probable cause. Alternatively, appellant argues that she is entitled to a new trial because the district court erroneously admitted “drug dealer profile evidence” during trial. We conclude that the issuing judge had a substantial basis to find probable cause for the search warrant. We also conclude that the district court erred by admitting drug-dealer-profile evidence, but that appellant is not entitled to a new trial because there is no reasonable possibility that the wrongfully-admitted evidence significantly affected the jury’s verdict. Therefore, we affirm.

FACTS

On April 27, 2018, officers obtained a warrant to search a hotel room occupied by appellant Gina Elizabeth Menard and Jason Yort. Officers executed the warrant and found 22 grams of methamphetamine, a vacuum sealer, a digital scale, drug-sale-related notes, plastic baggies, packaging for a pistol holster, glass pipes, and a cell phone set up to record the hotel room’s door. Officers then obtained a warrant to search Menard’s car, which was parked in the hotel’s parking lot, and found a loaded pistol and another 22 grams of methamphetamine in the trunk.

The state charged Menard with first-degree sale of methamphetamine under Minn. Stat. § 152.021, subd. 1(1) (2016) (count one), second-degree possession of methamphetamine under Minn. Stat. § 152.022, subd. 2(a)(1) (2016) (count two), and two counts of third-degree possession of methamphetamine under Minn. Stat. § 152.023, subd. 2(a)(1) (2016) (counts three and four). Menard moved to suppress the evidence obtained from the search of the hotel room and her car, arguing that the warrant for the

hotel room lacked probable cause and failed to establish a nexus between drug-related activity and the hotel room. In a written order, the district court denied Menard's motion to suppress.

Before trial, the state amended the complaint to add a charge for felon in possession of a firearm under Minn. Stat. § 624.713, subd. 1(2) (2016) (count five). The state also amended count one to charge aiding and abetting first-degree sale of methamphetamine.

The district court held a five-day jury trial in June 2019. Before beginning testimony, the district court heard the state's motion to "introduce expert testimony regarding possession of narcotics with intent to sell." The district court granted the state's motion in part.

The state presented testimony from ten witnesses at trial, including several police officers, a detective, and forensic laboratory technicians. Menard testified in her defense. She admitted that she used methamphetamine daily in April 2018. She also testified that she and Yort had restarted a romantic relationship in November 2017 and they had lived in hotels since that time. Menard testified that Yort told her the hotel-room cell phone was set up to watch her movements, he kept the keys to her car, he would not let her work, and he was physically abusive. She denied knowing about the methamphetamine and pistol found in her car's trunk and also denied that she helped Yort sell drugs.

The jury returned verdicts finding Menard guilty of all counts. The district court adjudicated Menard guilty of counts one (aiding and abetting first-degree drug sale) and five (felon in possession of a firearm). The district court sentenced Menard to 75 months in prison for count one. Menard appeals.

DECISION

I. The warrant application provided a substantial basis for the issuing judge to find probable cause that methamphetamine would be found in the hotel room.

Menard argues that the district court erred by denying her pretrial motion to suppress because the warrant application to search the hotel room lacked probable cause. She focuses her challenge on the “nexus” requirement, arguing that the warrant application failed to establish that evidence of drug dealing would be found in the hotel room. The state argues that the district court correctly found a sufficient nexus because Yort is a “drug wholesaler.”

The United States and Minnesota Constitutions provide that search warrants must be supported by probable cause. *See* U.S. Const. amend. IV; Minn. Const. art. I, § 10. “Probable cause exists if the judge issuing a warrant determines that ‘there is a fair probability that contraband or evidence of a crime will be found.’” *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). The probable-cause determination is a “practical, common-sense decision” based on the totality of the circumstances. *Id.* at 622-23.

When reviewing a pretrial order on a motion to suppress, we review the district court’s factual findings for clear error and the district court’s legal determinations de novo. *State v. Milton*, 821 N.W.2d 789, 798 (Minn. 2012). And when we review a district court’s decision to issue a search warrant, we determine whether there was a “substantial basis for concluding that probable cause existed.” *State v. Fawcett*, 884 N.W.2d 380, 384 (Minn. 2016) (quotation omitted). We give “great deference” to the issuing judge’s determination.

State v. Rochefort, 631 N.W.2d 802, 804 (Minn. 2001). Our review is limited to the information contained in the warrant application and its supporting affidavit. *Fawcett*, 884 N.W.2d at 384-85.

Probable cause requires a nexus; that is, “a fair probability that the evidence will be found at the specific site to be searched.” *Yarbrough*, 841 N.W.2d at 622. A nexus may be inferred from the totality of the circumstances, including “the type of crime, the nature of the items sought, the extent of the defendant’s opportunity for concealment, and the normal inferences as to where the defendant would usually keep the items.” *Id.* at 622-23. “It may be reasonable to infer that drug wholesalers keep drugs at their residences.” *Id.* at 623; *see also Novak v. State*, 349 N.W.2d 830, 832-33 (Minn. 1984) (stating there may be an “increased . . . likelihood” that drugs will be found at the residence of someone who deals drugs in “large quantities”).

For example, in *Yarbrough*, the supreme court upheld a search warrant for defendant’s home based on evidence in the warrant application that he was a drug wholesaler. 841 N.W.2d at 623-24. Specifically, the supreme court relied on defendant’s previous arrest for possession of a controlled substance with intent to distribute, information from a confidential informant that the defendant dealt crack cocaine, and the defendant’s statement that someone had stolen “a large amount of crack cocaine from him.” *Id.* The supreme court determined that defendant’s status as a drug wholesaler provided a sufficient nexus between his drug-related activity and his apartment, overturning the district court’s decision to suppress evidence obtained by the warrant. *Id.*

We begin our analysis by considering the warrant application, which contained the following facts. On April 26, 2018, a Robbinsdale police officer initiated a traffic stop. The officer later identified the driver as Yort. Yort did not stop and evaded the officer. Officer Neitzel of the Maple Grove Police Department overheard radio chatter concerning the attempted stop. Neitzel is assigned to the “Safe Streets Unit” and “regularly deals with illegal narcotics and associated crimes.” Neitzel ran a records search for the license-plate number of the fleeing car. The records search showed that the fleeing car had recently been parked next to a car registered to Menard at a Maple Grove hotel parking lot. Neitzel continued his records search and found that law enforcement had “scanned” both cars in Maple Grove a few days earlier. Neitzel “knew that Menard and Yort both had illegal narcotics history.” Neitzel found that the state had charged Yort with first-degree sale of methamphetamine earlier that month, Yort had an active arrest warrant for that charge, Yort had “at least four other felony drug cases” in his criminal history, and Menard had two felony drug cases in her criminal history.

Neitzel contacted the Robbinsdale officer to discuss his investigation. After viewing a photo of Yort, the Robbinsdale officer confirmed that Yort was driving the car that he had tried to stop. Neitzel then waited in the parking lot at the hotel where law enforcement had recently observed the fleeing car and Menard’s car.

Shortly after 11:00 p.m., an unidentified person dropped off Yort at the hotel. Neitzel arrested Yort, searched Yort, and found \$9,098 in cash and keys for a hotel room. Neitzel spoke with hotel staff and learned that Yort and Menard had occupied the hotel room for the last four days. He also learned that the room was registered in the name of a

woman, who listed her residence from another state. While Neitzel began drafting a warrant application, Menard exited the hotel and approached Neitzel's unmarked squad car. Neitzel spoke to Menard, who confirmed that she was staying in the hotel room with Yort.

In the order denying Menard's motion to suppress, the district court determined that the warrant application provided a substantial basis for finding probable cause because of "Mr. Yort and [Menard]'s drug history, Mr. Yort's attempt to flee from officers, and the large amount of cash found on Mr. Yort's person." The district court found that Yort's active arrest warrant for a charge of first-degree methamphetamine sale was relevant because it was closely related to the activity suspected in the hotel room. The district court found that Yort's earlier evasion of the Robbinsdale police officer was "suspect for a law-abiding person" and "indicative of unlawful activity." The district court found that the large amount of cash on Yort's person "was likely acquired through drug trafficking" because it was "highly improbable that a law-abiding citizen" would carry that much cash on his or her person. The district court then concluded that these facts, plus Yort's possession of keys to the hotel room, "suggest[ed] Mr. Yort [was] a wholesale drug dealer," which in turn provided a nexus connecting drug-dealing activities to the hotel room.

We conclude that the totality of the circumstances supports the district court's determination that Yort was a drug wholesaler. Yort had an active arrest warrant after being charged earlier that month with first-degree sale of methamphetamine—an offense requiring the sale of at least 17 grams of methamphetamine within a 90-day period. *See* Minn. Stat. § 152.021, subd. 1(1). Yort had over \$9,000 in cash on his person when he was arrested. The warrant application included an affidavit by Neitzel, an officer trained in

criminal drug investigation, who averred that “parties involved in the trafficking of illegal controlled substances often conduct their transactions in cash to avoid a paper trail” and that it is “highly unusual for a law abiding citizen to carry such a large sum of cash on their person.” Neitzel’s affidavit also stated that he believed it was “probable that the money located on Yort came from illegal drug sales.” The district court therefore reasonably found that the cash was “probable drug contraband.”

Regarding the link to the hotel room, Neitzel attested that Yort and Menard had been at the hotel for four days and that “parties involved in illegal narcotics trafficking often use hotel rooms to conduct their business.” Neitzel’s affidavit stated that Yort and Menard registered the room under the name of a person from a different state, which is a common tactic among “parties involved in illegal narcotics activity at hotels.” And finally, Neitzel averred that “parties who conduct illegal narcotics activity at hotels often use their room as their hub of activity and generally house their controlled substances, packaging, cash, records of transactions[,] and other illegal narcotics activity related items in their room.”

These averments include inferences based on Neitzel’s training and experience and, therefore, carry considerable weight. *See State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (stating that appellate courts give “due weight” to reasonable inferences because, “based on their training and experience, . . . police officers may interpret circumstances differently than untrained persons” (quotation omitted)). Thus we conclude that the warrant is supported by the reasonable inference that evidence of Yort’s drug-dealing activities would be found in his known temporary residence—the hotel room—because he is a drug

wholesaler. *See Yarbrough*, 841 N.W.2d at 623 (“It may be reasonable to infer that drug wholesalers keep drugs at their residences . . .”).

Still, Menard argues that “[t]his case is markedly different than *Yarbrough* because only one of the[] three factual allegations [present in *Yarbrough*] was included in the warrant affidavit.” She correctly contends that *Yarbrough* found probable cause for the search warrant based on three facts: defendant’s previous arrest for possession of a controlled substance with intent to distribute, a statement from a reliable confidential informant that defendant was a drug dealer, and defendant’s statement that someone had stolen a large amount of drugs from him. *Yarbrough*, 841 N.W.2d at 623-24.

We are not persuaded by Menard’s view of *Yarbrough*. We recognize that warrants to search the residences of drug wholesalers are oftentimes supported by a defendant’s participation in a controlled buy of drugs or by drugs found on the defendant’s person. *See, e.g., id.; Novak*, 349 N.W.2d at 832-33. And we agree with Menard that these circumstances are not present here. But Menard identifies no legal authority holding that a court may infer a person is a drug wholesaler *only* under those circumstances. To the contrary, *Yarbrough* instructs us to review the district court’s finding that Yort was a drug wholesaler for clear error and its determination that there was a fair probability that evidence of drugs would be found in Yort’s hotel room under the totality of the circumstances. *See Yarbrough*, 841 N.W.2d at 622. The district court’s finding that Yort was a drug wholesaler is not clearly erroneous and supports the determination that the warrant was issued upon probable cause based on a totality of the circumstances.

Similarly, Menard argues that our opinion in *State v. Kahn*, 555N.W.2d 15 (Minn. App. 1996), requires reversal because Yort had no drugs on his person when he was arrested. We disagree. In *Kahn*, we determined that a warrant to search the defendant's home lacked a sufficient nexus because there was nothing "to link [the defendant's] possession of one ounce of cocaine in Minneapolis to possible evidence or contraband at his residence 75 to 85 miles away in Elgin." *Id.* at 18. *Kahn* therefore turned on the significant physical distance between the defendant's location at the time he was found in possession of drugs and his residence. Here, by contrast, police arrested Yort as he walked into the hotel that he treated as his temporary residence. Yort also had an active arrest warrant for a first-degree sale of methamphetamine charge and he had over \$9,000 in cash when police arrested him outside the hotel. The district court found that the cash was "probable drug contraband." Thus, unlike the defendant in *Kahn*, Yort was found with "probable drug contraband on his person" while he was a short walk away from the hotel room. We conclude that this provided a sufficient nexus between Yort's drug-dealing activity and the hotel room.

In sum, the warrant application provided the issuing judge a substantial basis for finding probable cause that drugs would be found in the hotel room because Yort was a drug wholesaler. Consequently, officers lawfully obtained the evidence discovered in the hotel room. Because Menard only challenges the search of her car as fruit of the poisonous tree resulting from the search of the hotel room, and we conclude that officers lawfully searched the hotel room, the search of Menard's car was also lawful. The district court did not err by denying Menard's motion to suppress.

II. The district court erred by admitting drug-dealer-profile evidence, but Menard is not entitled to a new trial because there is no reasonable possibility that the wrongfully admitted evidence significantly affected the jury verdict.

Menard next argues that the district court reversibly erred by allowing the state to present drug-dealer-profile evidence at trial. She argues that the district court's evidentiary ruling was contrary to caselaw, the state presented profile evidence that urged the jury to find her guilty based on unfair inferences, and that there is a reasonable chance that the wrongfully-admitted evidence substantially influenced the jury's verdict. The state responds that the district court's evidentiary ruling was appropriate, the state's expert testified consistently with the district court's ruling, and Menard is not entitled to a new trial even if the evidence was wrongly admitted.

"The admission of expert opinion testimony is within the broad discretion of the [district] court." *State v. Litzau*, 650 N.W.2d 177, 185 (Minn. 2002). We review a district court's evidentiary ruling for abuse of discretion. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999). "[A]n appellant who alleges an error in the admission of evidence that does not implicate a constitutional right must prove that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016) (quotation omitted).

We begin by reviewing controlling caselaw on the admissibility of drug-profile evidence, which is similar to character evidence. In *State v. Williams*, the state charged defendant with first-degree controlled-substance possession following a search of her luggage and her arrest at a train station. 525 N.W.2d 538, 540 (Minn. 1994). At trial, the state presented officer testimony about behavior typical of a drug courier. *Id.* at 541. For

example, the officers testified that drug couriers “buy their tickets with cash, typically come from a so-called ‘source’ city such as Detroit, [and] typically use the club car on the train.” *Id.* at 548. In other words, “the officers testified . . . that in their experience most drug couriers behave a certain way.” *Id.* The supreme court held this profile evidence was “plainly inadmissible” because it “impliedly urged” the jury to infer that the defendant knew her luggage contained drugs because her behavior fit the drug-courier profile. *Id.* Still, the court acknowledged that testimony about “techniques employed by other drug dealers or couriers” could be relevant profile evidence and was not per se inadmissible. *Id.* The supreme court reversed defendant’s conviction and remanded for a new trial. *Id.* at 549.

The supreme court revisited drug-profile evidence in *Litzau*, which concerned a district court’s pretrial ruling that the state could present expert testimony about common drug-dealer behavior. 650 N.W.2d at 185. The district court limited the expert’s testimony to information like “the quantities of controlled substances and items commonly found in [a dealer’s] possession which are indicative of the sale of drugs compared to personal use.” *Id.* At trial, the expert *also* testified about *other* behaviors common among drug dealers: that they often buy cars without transferring title to their own names, they sometimes use cars they did not buy to transport drugs, and they hide drugs in obscure places. *Id.* The supreme court reversed the conviction and remanded for a new trial after determining that the expert’s testimony went “well beyond” the pretrial ruling and constituted the type of drug-dealer-profile evidence that is “plainly inadmissible” under *Williams*. *Id.*

More recently, this court considered the admissibility of drug-dealer-profile evidence in *State v. Barajas*, 817 N.W.2d 204 (Minn. App. 2012), *review denied* (Minn. Oct. 16, 2012). In *Barajas*, the state’s expert testified about “the characteristics of drug traffickers” and “how seemingly innocent items . . . can be used in the sale of drugs.” *Id.* at 222. We upheld defendant’s conviction after determining that the “testimony established the relevance and significance of items in [the defendant’s] possession by explaining the connection between those items and the sale of drugs.” *Id.* at 223. Further, we reasoned that the testimony did not suggest that the defendant “must be a drug dealer” because he “possessed similar items or acted similarly to drug dealers.” *Id.*

Viewed together, these cases show that there is a fine line between admissible testimony about items used in dealing drugs and inadmissible profile testimony. If the testimony explains “how seemingly innocent items . . . can be used in the sale of drugs,” it is admissible. *Barajas*, 817 N.W.2d at 222. If the testimony suggests that drug dealers “behave a certain way” and infers that the defendant is guilty because she behaved similarly, the testimony is not admissible. *Williams*, 525 N.W.2d at 548.

Before trial, the district court heard the state’s motion to “introduce expert testimony regarding possession of narcotics with intent to sell.” The state proffered that its expert, Detective Rose, would testify about “the prices for methamphetamine at the street level, user amounts of methamphetamine, [and] how street-level dealing works.” The district court granted the state’s request in a broad yet specific ruling:

He may offer the following at trial: That he can talk about the general practices of the drug trade; that he can talk about practices of dealers in the drug trade; he can also testify as to

what a typical use amount is as it relates to methamphetamine. What is specifically articulated in the State's notice is that he is familiar with what a personal amount of methamphetamine is, the weight, the cost, how it's typically sold, what it means to be "points" in terms of—as it relates to the drug trade. He may testify as to these issues.

He may, however, not testify in the following regard: He may not testify as to the ultimate issue in this case; he may not testify that it was Ms. Menard's intent to possess or to have—either to possess or to sell narcotics as it relates to Counts 1, 2, 3, and 4. That is a factual determination for which the jury must determine.

The district court's pretrial ruling is troubling. Instead of simply granting the state's request to allow testimony on methamphetamine prices, user amounts, and street-level dealing, the district court went further and permitted Rose to testify about "the general practices of the drug trade" and "practices of dealers in the drug trade." In other words, the district court ruled Rose was allowed to testify about behaviors common among drug dealers. This runs against the prohibition of allowing testimony about how drug dealers "behave a certain way." *See Williams*, 525 N.W.2d at 548.

Consistent with the district court's ruling, Rose testified that drug dealers tend to live out of hotel rooms, do not have permanent addresses, and do not have lawful employment. This testimony addressed the behaviors of drug dealers and asked the jury to infer that Menard was involved in the sale of drugs because she and Yort shared those behaviors. Thus, we conclude that the district court abused its discretion by allowing this drug-dealer-profile testimony.

Having concluded that the district court erred, we next consider whether Menard is entitled to a new trial. A new trial is warranted where "there is a reasonable possibility that

the wrongfully admitted evidence significantly affected the verdict.” *Peltier*, 874 N.W.2d at 802 (quotation omitted). When determining whether wrongfully admitted evidence significantly affected a verdict, we consider factors including “(1) the manner in which the [s]tate presented the testimony; (2) whether the testimony was highly persuasive; (3) whether the [s]tate used the testimony in closing argument; and (4) and whether the defense effectively countered the testimony.” *Id.*

The state presented substantial evidence supporting Menard’s guilt apart from the inadmissible drug-dealer-profile evidence. The jury heard that officers found over 40 grams of methamphetamine in the hotel and Menard’s car, an amount that Rose testified is “very indicative of somebody involved with sales of controlled substances.” The jury also heard evidence that officers found a vacuum sealer, a digital scale, drug-related notes, baggies, glass pipes, and a cell phone set up to record the hotel room’s door. Like the evidence in *Barajas*, this evidence was admissible because it “assisted the jury in understanding how items that have legitimate uses also could have potentially unlawful uses or be evidence of unlawful conduct.” *See* 817 N.W.2d at 223; *see also Litgau*, 650 N.W.2d at 185 (noting admissibility of expert testimony about quantities of drugs that indicate sale rather than personal use).

Rose’s direct-examination encompassed 24 pages of trial transcript, whereas Menard’s cross-examination of Rose spanned 32 pages of trial transcript. Menard thus had the opportunity to respond to Rose’s testimony, and did so. The state referred to Rose’s testimony in closing arguments to suggest that the hotel room was “the stereotypical methamphetamine dealer den” and that “hopping from hotel to hotel every few days . . . [is]

pretty common among drug dealers.” But these were two comments in nearly 20 pages of closing arguments. In light of the substantial evidence supporting Menard’s guilt, we conclude that there is no reasonable possibility that the wrongfully admitted evidence substantially affected the jury’s verdict.

Additionally, Rose’s improper testimony did not affect the jury’s finding that Menard was guilty of being a felon in possession of a firearm—the only other offense for which the district court adjudicated Menard guilty. We also recognize the compelling evidence that Menard’s DNA was found on various parts of the pistol.

We therefore conclude that the district court erred by admitting drug-dealer-profile evidence but that there is no reasonable possibility that this evidence substantially affected the jury’s verdict. Thus, Menard is not entitled to a new trial.

Affirmed.