STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0659

State of Minnesota,
Respondent,

vs.

Brenda Kay Olson,
Appellant.

Filed July 1, 2008
Affirmed
Kalitowski, Judge

Clay County District Court
File No. K0-05-21

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Brian Melton, Clay County Attorney, Heidi M.F. Davies, Chief Assistant County Attorney, Clay County Courthouse, 807 11th Street North, Moorhead, MN 56561 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

KALITOWSKI, Judge

On appeal following her conviction of conspiracy to commit fourth-degree controlled-substance offense, appellant Brenda Kay Olson argues that: (1) the district court abused its discretion by admitting character evidence and hearsay evidence; (2) the prosecutor committed misconduct; and (3) there is insufficient evidence to support the jury's verdict. We affirm.

I.

Appellant argues that the district court erred by admitting certain evidence at trial. Specifically, appellant challenges the admission of evidence of other drug use and drug sales, evidence that she was a bad mother, testimony that appellant's driver's license was restricted, and testimony from "concerned citizens" that led to the search of appellant's residence. We conclude that appellant has failed to establish reversible error.

We "largely defer to the [district] court's exercise of discretion in evidentiary matters and will not lightly overturn a [district] court's evidentiary ruling." *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989). "Absent a clear abuse of discretion, the ruling will stand." *Id.* And even if error is shown, reversal will not be warranted if the error was harmless. *Id.* "If the verdict actually rendered was surely unattributable to the error, the error is harmless beyond a reasonable doubt." *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996.)

Prior Bad Acts and "Bad Mother" Evidence

Appellant argues that the district court erred in allowing testimony that appellant had used and sold drugs before and after the period during which the state alleged she conspired to sell methamphetamine. Appellant also challenges the district court's admission of testimony that appellant's daughter was not surprised by the presence of law enforcement officers at her house.

"The state may prove all relevant facts and circumstances which tend to establish any of the elements of the offense with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes." *State v. Drews*, 274 Minn. 426, 430, 144 N.W.2d 251, 254-55 (1966). But evidence of other crimes, wrongs, or bad acts (*Spreigl* evidence) may not be introduced if its probative value is substantially outweighed by its tendency to unfairly prejudice the fact-finder. Minn. R. Evid. 403. The state must give notice of its intent to introduce *Spreigl* evidence. *State v. Ross*, 732 N.W.2d 274, 282 (Minn. 2007). Evidence that is a necessary part of the substantive proof of the crime is not *Spreigl* evidence. *State v. Roy*, 408 N.W.2d 168, 171 (Minn. App. 1987), *review denied* (Minn. July 22, 1987).

Appellant contends that S.L.'s testimony regarding appellant's drug use and drug sales was impermissible character evidence. That testimony included S.L.'s statements that appellant provided him methamphetamine before and after the period during which the state alleged that appellant conspired to sell drugs. The district court overruled appellant's objection to S.L.'s testimony, reasoning that "[c]onspiracies are of an ongoing nature . . . [i]t's difficult often to point to the specific date on which a conspiracy begins

or ends." We agree. In this case, the challenged testimony involved the same substance and the same people that were connected with appellant's conspiracy offense. We conclude that because the evidence was relevant and not impermissible character evidence it was within the district court's discretion to allow the testimony.

And the "bad mother" testimony that appellant challenges was not *Spreigl* evidence. Appellant claims that the state "presented a large amount of evidence casting aspersions on [appellant's] fitness as a parent." But the only evidence appellant challenges is three officers' testimony that, when they executed the October 5, 2004 search warrant, appellant's ten-year-old daughter did not seem surprised at the presence of law enforcement in her home. Appellant objected to the first officer's account and was overruled. Although perhaps unfavorable to appellant and not highly relevant, the testimony was not evidence of other bad acts. And the district court has broad discretion in determining the relevancy of evidence. *See, e.g., State v. Schulz,* 691 N.W.2d 474, 477-78 (Minn. 2005). Accordingly, we conclude that the district court's admission of this testimony does not warrant reversal.

Restricted Driver's License Testimony

Appellant argues that the following exchange was improper:

> [Prosecutor:] On the back of this license there's a restriction. What is that?
> [Officer:] Any use of alcohol or drugs invalidates license.
> [Prosecutor:] How does that get on a license? Does everybody have that restriction?
> [Officer:] No.

Defense counsel objected and was sustained, and the line of questioning ceased. Defense counsel did not move to strike the testimony.

Since appellant's objection was sustained, appellant now claims that recitation of the restriction's existence alone "improperly suggests that [appellant] had prior trouble with drugs, alcohol, and driving." But the objected-to exchange occurred after appellant testified that she did not use drugs and was therefore admissible for impeachment purposes. *See* Minn. R. Evid. 608(b) (explaining that specific instances of prior misconduct may be admissible during cross-examination for the purpose of impeaching a witness's credibility). And even if the testimony should have been stricken, we conclude that such a passing reference to the restriction was harmless error. *See Jones*, 556 N.W.2d at 910.

Concerned Citizens' Testimony

Appellant argues that the district court erred in admitting, over objection, the testimony of a police detective about reports he received from "concerned citizens" that prompted the investigation of appellant's residence. Appellant maintains that because these comments were inadmissible hearsay, appellant is entitled to a new trial. We disagree.

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). "In criminal cases, evidence that an arresting or investigating officer received a tip for purposes of explaining why the police conducted surveillance is not hearsay." *State v. Litzau*, 650 N.W.2d 177, 182 (Minn. 2002). Nevertheless, testimony about the substance of the tip may be inadmissible because the

testimony has little non-hearsay value. *See id.* at 183; *State v. Williams*, 525 N.W.2d 538, 544-45 (Minn. 1994) (holding that testimony about the contents of tip was hearsay). And "a police officer testifying in a criminal case may not, under the guise of explaining how [the] investigation focused on defendant, relate hearsay statements of others." *Id*. at 544.

Appellant challenges the following testimony, given by a police detective:

> The information that came from the concerned citizens, which were the neighbors of that neighborhood, indicated that there were unusual activities going on in [appellant's] residence. They described frequent visits to [appellant's] residence, but they were very short-term visits. They indicated that they would observe vehicles pull up, one person get out, other people remain in the vehicle. They observed the garbage being disposed of in manners not necessarily the common way. They would stack up garbage in vehicles and take them away. There was comings and goings all hours of the night. They observed the occupants acting in an unusual manner. They indicated that there was a bondsman in the neighborhood looking for an individual by the name of [appellant's boyfriend] that had skipped bond and elaborated on activities which were indicative of drug trafficking activity.

In her rebuttal argument, the prosecutor stated: "That's why law enforcement went to [appellant's] house in the first place, because people saw it. The neighbors saw it. They saw the come-and-go traffic, and they were suspicious about what was going on."

Based on *Litzau*, we agree that this detailed testimony was hearsay and thus, improperly admitted. But we conclude that, unlike the hearsay evidence at issue in *Litzau*, the admission of hearsay here was harmless. In *Litzau*, the Minnesota Supreme Court held that "[t]here was no reason for the [detective's] testimony about the substance of the informant's conversation which pointed directly to appellant's guilt of the crime

for which he was on trial." 650 N.W.2d at 183. Here, the challenged testimony did not connect appellant to the charged offense; rather, it was evidence that, like other evidence properly admitted during trial, showed that drug dealing went on at the residence. Moreover, the hearsay testimony suggests that appellant's boyfriend was involved in drug dealing, but says nothing about appellant's involvement. Because the jury received overwhelming properly admitted evidence of drug dealing at the house, and because appellant's boyfriend, who resided with appellant, testified that he used and sold drugs, the detective's testimony added nothing to the evidence linking appellant to the charged offense. We are satisfied that the verdict was surely unattributable to the detective's testimony, and thus conclude that the district court's error in admitting the evidence was harmless.

II.

Appellant argues that the prosecutor committed misconduct by asking a "were they lying" question on cross-examination. The overarching concern on issues of prosecutorial misconduct is that it may deny the defendant's right to a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). "[W]e reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). If the defendant objected to the prosecutorial misconduct, a new trial will not be granted when the misconduct was harmless beyond a reasonable doubt. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). Prosecutorial misconduct is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error. *Id.*

Generally, were-they-lying questions are improper because they are perceived as unfairly giving the jury the impression that in order to acquit, it must determine that the witness whose testimony contradicts the defendant's testimony is lying. *State v. Pilot*, 595 N.W.2d 511, 516 (Minn. 1999). But a prosecutor may ask were-they-lying questions if "the defendant holds the issue of the credibility of the state's witnesses in central focus." *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005) (quotation omitted). This type of question may be permissible in clarifying testimony when the jury must evaluate "the credibility of a witness claiming that everyone but the witness lied, or [when the witness] flatly denies the occurrence of events." *Pilot*, 595 N.W.2d at 518.

Appellant challenges the prosecutor's question to appellant: "Is it your position that everybody here is lying?" But the record indicates that what preceded the prosecutor's question made the question permissible. During direct examination, much of appellant's testimony contradicted the testimony of two of the state's principal witnesses, S.L. and K.K. When cross-examined, appellant stated that K.K. and S.L. lied when they testified about seeing her use drugs. Then appellant stated that S.L. lied when he said he received drugs from her, and that K.K. was partially lying. And appellant further suggested that a police detective coerced those witnesses to lie against her. Because appellant held "the issue of the credibility of the state's witnesses in central focus," we conclude that the prosecutor's question was permissible and that the district court was within its discretion to allow it. *See Morton*, 701 N.W.2d at 233.

III.

Appellant argues that the evidence was insufficient to support the jury's conclusion that she was guilty of conspiring to sell a controlled substance. In considering a claim challenging the sufficiency of the evidence, "our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends largely on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

Our review includes an analysis of both the facts presented and the inferences that the jury could reasonably draw from those facts. *State v. Robinson*, 604 N.W.2d 355, 365-66 (Minn. 2000). Because "weighing the credibility of witnesses is the exclusive function of the jury," *Pieschke*, 295 N.W.2d at 584, we assume that the jury believed the state's witnesses and disbelieved contrary evidence. *Moore*, 438 N.W.2d at 108. We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could have reasonably concluded that the defendant was guilty of the charged offense. *State v. Olhausen*, 681 N.W.2d 21, 25-26 (Minn. 2004).

"[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence." *State v. Jones*, 516 N.W.2d 545, 549

(Minn. 1994). "While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the defendant's guilt as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *Jones*, 516 N.W.2d at 549. A jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to deference. *Webb*, 440 N.W.2d at 430.

An individual who conspires with another to sell a controlled substance is guilty of fourth-degree controlled-substance-conspiracy crime. Minn. Stat. § 152.024, subd. 1(1) (2004). A criminal conspiracy is "(1) an agreement between two or more people to commit a crime and (2) an overt act in furtherance of the conspiracy." *State v. Stewart*, 643 N.W.2d 281, 297 (Minn. 2002). There must be evidence that "objectively indicates an agreement," but the state need not prove the existence of a formal agreement to commit a crime. *State v. Hatfield*, 639 N.W.2d 372, 376 (Minn. 2002). A conspiracy may be inferred from the circumstances. *State v. Burns*, 215 Minn. 182, 189, 9 N.W.2d 518, 521 (1943).

Here, we conclude that the evidence presented at trial supported an inference that appellant conspired with her boyfriend to sell methamphetamine. By its verdict, the jury rejected the testimony of appellant that she had never used methamphetamine and had no knowledge of drugs or drug paraphernalia in her home. And the jury also rejected the testimony of appellant's boyfriend that he had placed drugs in appellant's purse prior to the first search by the police and that he never used or sold methamphetamine with

appellant. Further, the jury had to reconcile appellant's testimony that she installed surveillance equipment to monitor the vehicles on the property for her automobile-detailing business with her boyfriend's testimony that the equipment was there because he was paranoid about getting caught with drugs. And based on its verdict, we must assume that the jury rejected appellant's testimony.

Although appellant testified that she did not use drugs or allow them in the house, there was also direct and circumstantial evidence to the contrary. Drugs and drug paraphernalia were found in appellant's bedroom and in her purse. In addition, drug agents found a police scanner and video-surveillance equipment hooked up to a television in the living room so that residents could "see people coming and going . . . on the street." Moreover, a woman living with appellant and her boyfriend testified that both were drug users. And another individual who lived with the couple at the time of the second search testified that he observed appellant using methamphetamine on several occasions and that he had seen her packaging methamphetamine with a scale and placing it in baggies. He also testified that appellant had provided him with methamphetamine several times and that her source was a man named "Gabe." Thus, the jury could have reasonably concluded that appellant conspired with "Gabe" or with her boyfriend to sell methamphetamine. We conclude that there was sufficient evidence for the jury to find that appellant conspired to sell a controlled substance.

Affirmed.