STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1060

State of Minnesota,
Respondent,

vs.

Scott Dennis Armstrong,
Appellant.

Filed August 19, 2008
Affirmed
Minge, Judge

Douglas County District Court
File No. 21-K1-06-001341

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Christopher Karpan, Douglas County Attorney, Douglas County Courthouse, 305 Eighth Avenue West, Alexandria, MN 56308 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Theodora Gaitas, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Wright, Judge.

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

MINGE, Judge

Appellant challenges his drug-related convictions, arguing that he was deprived of a fair trial because of prosecutorial misconduct, that evidence of his prior contact with

law enforcement was improperly admitted, and that the evidence was insufficient to support his convictions. We affirm.

FACTS

On the evening of October 30, 2006, appellant Scott Armstrong was parked in a cul-de-sac. Because the car was running and the taillights were on for an unusual length of time, a local resident called the police. When the police arrived, they found Armstrong, who was the sole occupant of the vehicle, sleeping in the driver's seat. He was holding a glass pipe in his right hand and a cell phone in his left. The car was in drive, but he had fallen asleep with his foot on the brake pedal. Fearing Armstrong would be startled and hit the gas, the officers put the vehicle in park and took the keys out of the ignition before waking him.

The officers asked Armstrong to perform field sobriety tests. As a result of his performance in the tests, the officers determined that he was under the influence of a chemical substance and placed him under arrest. Pursuant to that arrest, an officer searched Armstrong for contraband and weapons. In addition to the glass pipe that Armstrong had been holding, the officer found a canister containing a substance that later tested positive for methamphetamine and an empty glass vial.

Incident to the arrest, the officers searched Armstrong's vehicle. In it, they found a leather jacket with 3.4 grams of methamphetamine in one of the pockets. In a pouch on the passenger seat, they found a small electronic scale, two prescription bottles with Armstrong's name on them, and a tin that held 11 small baggies of methamphetamine. Also on the seat, they found a day planner with $607 in cash inside. Another tin

containing four baggies of methamphetamine was discovered in the car's overhead console.

Armstrong was charged with the possession of a controlled substance with intent to sell in violation of Minn. Stat. §§ 152.021, subds. 1, 3(a), .01, subd. 15a (1), (3) (2006) and possession of more than six grams of a controlled substance in violation of Minn. Stat. § 152.022, subds. 2(1), 3(a) (2006).[1] He was convicted by a jury, and this appeal follows.

D E C I S I O N

I.

The first issue is whether there was prosecutorial misconduct that requires reversal. The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006).

A. Reference to Appellant's Exercise of his Constitutional Rights

Armstrong argues that his convictions should be reversed because the prosecutor engaged in prejudicial misconduct that infringed upon his constitutional right to counsel. Because Armstrong complains about two lines of questioning that took place at different times and during the questioning of two different witnesses, we consolidate consideration of whether these questions were improper. Because one line of questioning was objected

[1] Several other charges were brought. Because they are not at issue in this appeal, they are omitted.

to and the other was not, we will analyze separately the impact of any error on the convictions.

"[I]t has long been recognized that a defendant's decision to exercise his constitutional rights to silence and to counsel may not be used against him at trial." *State v. Litzau*, 650 N.W.2d 177, 185 (Minn. 2002); *see also State v. Dobbins*, 725 N.W.2d 492, 509 (Minn. 2006) ("[T]he state generally may not refer to or elicit testimony about a defendant's post-arrest silence and/or request for counsel."). Such references are prohibited because a jury "is likely to infer from the testimony that [the] defendant was concealing his guilt." *Litzau*, 650 N.W.2d at 185 (alteration in original) (quotation omitted); *see also Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990) ("A prosecutor may not imply that an accused's decision to meet with counsel, even shortly after the incident giving rise to a criminal indictment, implies guilt. Neither may she suggest to the jury that a defendant hires an attorney in order to generate an alibi, 'take care of everything' or 'get his story straight.' Such statements strike at the core of the right to counsel, and must not be permitted." (alterations omitted)); *State v. Billups*, 264 N.W.2d 137, 138-39 (Minn. 1978) (holding that the use of counseled silence for impeachment at trial is constitutionally prohibited). A reviewing court is more likely to find prejudicial misconduct when the state intentionally elicits impermissible testimony. *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974).

Armstrong's defense at trial was that he had driven a drug dealer to the cul-de-sac where the police had found him, and that although some of the drugs in the car were his own, some of them belonged to the dealer he had given a ride to. He argued that because

several grams of the methamphetamine did not belong to him, he should not be convicted of possession of controlled substance with intent to distribute them. The prosecutor cross-examined Armstrong regarding this defense by asking him how and when he first brought his alternate story to the attention of the police. The questioning involved nine questions indicating that Armstrong had not mentioned the possibility of other potential defendants to the police upon his arrest, culminating in the prosecutor's statement that "[i]n fact, you didn't say anything [about the other persons allegedly involved] until after you had gotten off the phone with your attorney; isn't that true?" Armstrong stated "[n]o, sir," and responded to the prosecutor's other questions by stating that he had told the police about the other potential defendants in the squad car on the way to the station. This line of questioning was *not* objected to, and is therefore subject to a plain-error analysis.

Later, when questioning an officer as a witness for the state, the prosecutor again asked several questions about Armstrong's timing when notifying the police that there may be other people implicated in the drug charges and ultimately asked:

> PROSECUTOR: Is it safe to say that he didn't mention anything to you until after he had talked with his attorney?
> WITNESS: He never spoke –
> DEFENSE COUNSEL: Objection, objection to the form of the question, the suggestion that somehow fabrication was involved, and also privilege.
> THE COURT: Sustained, as to the form of the question.

In this instance, the prosecutor's questions *were* objected to and is subjected to a harmless-error analysis.

Here, the prosecutor engaged in prosecutorial misconduct by improperly referring to Armstrong's decision to exercise his right to counsel for impeachment purposes. *See Dobbins*, 725 N.W.2d at 509-10; *Litzau*, 650 N.W.2d at 185. The entire line of questioning regarding Armstrong's failure to mention any other defendants climaxes with the prosecutor's inquiry about his decision to consult counsel. The prosecutor wrongfully implied through these questions that, because Armstrong did not make any statements regarding any other possible defendants until after he had spoken to his attorney, his story might be a fabrication and that Armstrong's exercise of his right to counsel was to "get his story straight." This strikes at the core of a defendant's right to counsel, is not permitted, and constitutes plain error.

i. Objected-to Prosecutorial Misconduct

Because the line of questioning directed at the officer, a witness for the state, was objected-to, we analyze its impact on the verdict separately from the unobjected-to misconduct. Our supreme court has recently clarified that objected-to prosecutorial misconduct is no longer viewed under the "two tiered" system used in earlier Minnesota appellate opinions. [2] *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). Instead,

[2] As the state notes, the Minnesota Supreme Court has made some conflicting statements regarding the applicable standard of review by rejecting the two-tiered standard of review for objected-to prosecutorial misconduct embodied in *State v. Caron*, 300 Minn. 123,127-28, 218 N.W.2d 197, 200 (1974) in *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). Ordinarily, this might indicate that *Caron* has been overruled, and we should adhere to the standard articulated in *Mayhorn*. However, not long after *Mayhorn* was decided, the Minnesota Supreme Court stated that the question of whether the "*Caron* two-tiered approach should continue to apply to cases involving objected-to prosecutorial misconduct" was left for "another day." *Ramey*, 721 N.W.2d at 299 n.4; *see also State v. Wren*, 738 N.W.2d 378, 390 n.9 (Minn. 2007) (acknowledging *Ramey's* suggestion that

reversal must occur if the misconduct, considered in the context of the whole trial, deprived the defendant of a fair trial. *Id.* We will find an error to be harmless beyond a reasonable doubt only if the verdict rendered was surely unattributable to the error. *Id.*; *see also Dobbins*, 725 N.W.2d at 507-08 (stating that objected-to prosecutorial misconduct is reviewed to determine whether the misconduct was harmless beyond a reasonable doubt, i.e., whether the verdict was surely unattributable to the misconduct).

Here, because Armstrong proffered an alternate story, the credibility of the defendant and his explanation of events is at issue. As a result, prosecutorial misconduct is particularly troublesome. *See State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997) (noting that reviewing courts "will pay special attention" to prosecutorial misconduct "where credibility is a central issue"). At trial, Armstrong contended that although some of the drugs were his, he should not be convicted as a dealer because a large portion of the drugs had been left in the car by someone else. Armstrong testified that: the pouch containing methamphetamine was not his; the baggies of methamphetamine he admitted were his matched those elsewhere in the car because he had just purchased them from the drug dealer that owned the rest of the methamphetamine; he had cash in the car because he had just cashed a check from working at a beet harvest; and the leather jacket, which had 3.4 grams of methamphetamine in one of the pockets, was not his.

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the standard of review was an open question but applying the standard articulated in *Mayhorn*). In this uncertain situation, we adhere to the standard articulated in *Mayhorn*. The application of the *Mayhorn* standard ensures that defendants will not be unfairly prejudiced based on any lack of clarity involved in the issue.

However, the evidence against the defendant is overwhelming. The number, variety, and location of items found, including a scale, cash, and numerous baggies with methamphetamine at different locations in the car, make his other-person explanation dubious. Armstrong tested positive for having methamphetamine in his body. Most importantly, Armstrong's version of events was directly contradicted by statements he made in a phone call to his girlfriend shortly after his arrest. During that call, Armstrong told her that he had been the only one involved and that no one else was in the car with him prior to the arrest. A tape of this call was played at trial and severely damaged Armstrong's account of events.

We also consider how the improper question was raised and the objection was handled. The objection to the improper questioning of the officer was sustained at the outset. Although the prosecutor was able to plant the seed of doubt about the integrity of Armstrong's account in jurors' minds and imply that legal counsel suggested the alternative story, only a hint was given. The court's prompt ruling brought the jury's attention to the fact that an error had occurred and ended the improper questioning. *See Dobbins*, 725 N.W.2d at 508 (considering that the district court timely sustained Dobbins' objections as part of its harmless-error analysis).

Based on the overall record in this case, we conclude the jury's verdict was surely unattributable to the prosecutor's objected-to misconduct posing the improper questions to the officer.

ii. Unobjected-to Prosecutorial Misconduct

The next consideration incident to the unobjected-to questioning of the defendant is whether the misconduct was prejudicial. Prosecutorial misconduct that was not objected to is analyzed under the plain-error standard, whereby an appellant must establish that an error occurred and that the error was plain. *Ramey*, 721 N.W.2d at 299, 302. If the appellant does so, the burden shifts to the state to establish that the misconduct did not prejudice the defendant's substantial rights. *Id*. at 302. The state meets this burden if it can show that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Id*. at 302; *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). This is not as great a burden as the state faces in establishing that the verdict is surely unattributable to the misconduct.

Some of the considerations previously discussed in the context of our harmless-error analysis are also applicable here. The strength, quantity, and quality of the evidence against Armstrong, as well as his admission in a post-arrest phone call to his girlfriend that his story was fabricated, all indicate that the prosecutorial misconduct in this case is not likely to have prejudiced him. Additionally, we note that although the prosecutor questioned Armstrong about the development of his story, the potential prejudice to Armstrong's trial was at least partially limited by his response to those questions. Armstrong denied the prosecutor's implications by insisting that he had discussed the other two potential defendants in the squad car before contacting an attorney. While not dispositive, this fact, in conjunction with the others, leads us to conclude that the state met its burden of showing that the misconduct was not prejudicial.

B. Objected-to Inflammation of the Jury's Passions

Armstrong also claims that he was deprived of a fair trial because the prosecutor made an improper closing argument. While a state's closing argument is not required to be "'colorless, [] it must be based on the evidence produced at trial, or the reasonable inferences from that evidence.'" *State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006) (quoting *State v. Porter*, 526 N.W.2d 359, 263 (Minn. 1995)). When evaluating alleged misconduct, we look to the closing argument as a whole. *State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005). A prosecutor may not make arguments calculated to inflame the passions or prejudices of the jury. *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993). Minnesota courts also object to closing arguments that use "law and order" themes. *E.g.*, *State v. Threinen*, 328 N.W.2d 154, 157 (Minn. 1983) (stating that closing argument suggesting that the jury represented the people of the community and that their verdict would determine what kind of conduct would be tolerated on the streets was improper).

Here, the objected-to portion of the prosecutor's closing argument is as follows:

> PROSECUTOR: The second thing is this: This is my final thing at this point. This gets awfully dry. When you're a prosecutor your job is to present the evidence, make sure that it's tied together, and make sure that you've covered the JIGS. But this crime goes beyond that. When you see pictures of individual bags like this, of methamphetamine, remember each one of these bags has a person's name on it. And that person who gets this methamphetamine might be a first-time user or someone who is already addicted.
>
> But it goes beyond that. It goes to the family and the friends of the people who are worried about the person who's going to get one of these bags and use one of these drugs, and what methamphetamine is going to do to them.
>
> DEFENSE COUNSEL: Objection, your Honor, improper argument.

> THE COURT: Sustained.
> PROSECUTOR: Okay. I would just ask you to remember that this goes beyond just dry evidence. Thank you.

Later, in his own closing argument, the defense counsel stated:

> This is not a referendum where you go back and make your deliberations at this time, whether you're for drugs or against drugs. And in your minds you should be satisfied with his admission, his confession, his pleading of guilty so to speak, on the record. He's not walking away from here.
>
> And . . . I don't think I can belabor the point that when we have the circumstances as you do, you're not voting against the police, you're not voting against [the prosecutor] or the State of Minnesota when you find Mr. Armstrong not guilty of the first degree and the two second degrees. What you're doing is you're applying the law.

The complained-of portion of the prosecutor's closing argument was improper. Because it tended to inflame the passions of the jury and is similar to "law and order themes" that the Minnesota Supreme Court has determined are impermissible, we conclude the district court properly sustained the objection.

Because it was objected to, the next question is whether the "verdict rendered was surely unattributable to the error." *See Mayhorn*, 720 N.W.2d at 785 (quoting *State v. Swenson*, 707 N.W.2d 645, 658 (Minn. 2006)). The prosecutor's closing argument spanned 24 transcribed pages, and the impermissible argument is only one page. *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (considering the relative length of a transcribed passage in determining whether, in the context of the entire closing argument, a comment deprived the defendant of a fair trial). Additionally, the objection was sustained, which can help to cure any potential prejudice. *Ness v. Fisher*, 207 Minn. 558, 560, 292 N.W. 196, 197 (1940) ("The jury was duty bound to disregard the

statement [where the objection was sustained.]"). Finally, the closing argument of the defense attorney at least partially negated the improper comments of the prosecutor. We conclude that given these circumstances, together with the strong evidence of Armstrong's guilt, his conviction was surely unattributable to the prosecutor's improper comments.

C. Combined Influence of the Prosecutor's Misconduct

A court may reverse based on the cumulative effect of errors committed at trial, even if none of them, standing alone, merit reversal. *State v. Underwood*, 281 N.W.2d 337, 344 (Minn. 1979); *State v. Al-Naseer*, 690 N.W.2d 744, 750 (Minn. 2005) (stating that multiple problems with the trial are compounded when the erroneously admitted evidence is used to depict the defendant to be untruthful).

In *Ramey*, the Minnesota Supreme Court noted that "[c]ourts have struggled to effectively respond to the problems presented when prosecutors engage in off-limits conduct." 721 N.W.2d at 301. We emphasize that the conduct at issue here is impermissible and that in a closer case it would result in reversal. Prosecutors may not flout well-established rules regarding acceptable conduct at trial; this behavior runs the risk of depriving a defendant of his constitutional rights. *See Powers*, 654 N.W.2d at 678 (stating that prosecutorial misconduct can impair a defendant's right to a fair trial). Nonetheless, we conclude that the cumulative effect of these errors does not merit the grant of a new trial.

II.

Second, Armstrong argues that his trial was impermissibly tainted by officers' reference to their prior experience with him. The officer's testimony was not objected to at trial. As previously discussed, we review the unobjected-to testimony under the plain error standard, which requires the finding of a plain error that impaired the defendant's substantial rights. Minn. R. Crim. P. 31.02; *see also Griller*, 583 N.W.2d at 740. If these requirements are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740.

References to prior incarceration of a defendant can be unfairly prejudicial. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). Direct or indirect reference to a defendant's prior offense or prior incarceration is inadmissible. *State v. Haglund*, 267 N.W.2d 503, 505-06 (Minn. 1978). The state has an obligation to caution its witnesses against making prejudicial statements. *Manthey*, 711 N.W.2d at 506. A conviction is more readily reversed when a prosecutor intentionally elicits other-crime evidence knowing that it is inadmissible. *Haglund*, 267 N.W.2d at 506.

Here, the prosecutor twice asked an officer involved in the incident whether he "recognized" Armstrong. The officer stated that he did recognize Armstrong, but merely identified him rather than referring to any crime, wrongdoing, or bad act. Because the officer could have recognized Armstrong from prior benign interactions and did not indicate that he "recognized" Armstrong based on prior bad acts or for any other negative reason, the evidence is admissible.

Armstrong also complains that, after another officer testified that he had heard the suspicious vehicle information over dispatch, the prosecutor asked: "And what did you do?" In response, the officer stated that he recognized Armstrong's name and that he responded to the dispatch call "based on [his] past experience with that name." This testimony was not specifically solicited. There is no indication on this record that in this instance, the prosecutor failed to properly prepare the state's witnesses, that he intentionally solicited inadmissible testimony, or that the two fleeting statements were prejudicial to Armstrong. Based on this record, we conclude that the officer's statements did not seriously affect the fairness of the proceeding and are not a basis for reversal.

III.

The final issue is whether there was sufficient evidence to support the jury's determination that Armstrong was guilty of the intent to sell methamphetamine. On a sufficiency-of-the-evidence claim, the reviewing court carefully examines the record to determine whether a fact-finder could reasonably conclude that the defendant was guilty of the offense charged. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). The determination must be made under the assumption that the fact-finder believed the state's witnesses and disbelieved any contrary evidence, and must be made in the light most favorable to conviction. *Id.* Despite the foregoing, the fact-finder must have acted with due regard for the presumption of innocence and the necessity of overcoming that presumption by proof beyond a reasonable doubt. *State v. Combs*, 292 Minn. 317, 320, 195 N.W.2d 176, 178 (1972).

When reviewing a conviction based on circumstantial evidence, this court applies a more stringent standard. Under this standard, "evidence is entitled to the same weight as any evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Bias*, 419 N.W.2d at 484; *State v. Walen*, 563 N.W.2d 742, 750 (Minn. 1997). The circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

A person who sells a mixture containing methamphetamine of ten grams or more is guilty of a first-degree controlled substance crime. *See* Minn. Stat. § 152.021, subd. 1(1) (2006). Under Minnesota law, to "sell" means: "(1) to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture; or (2) to offer or agree to perform an act listed in clause (1); or (3) to possess with intent to perform an act listed in clause (1)." Minn. Stat. § 152.01, subd. 15a (2006). Evidence of possession with intent to sell has been determined to be sufficient where drugs, packaging materials, and a scale are evidentiary items found by officers at the scene, and are accompanied by separate cardboard bindles of drugs found on defendant's person. *State v. Heath*, 685 N.W.2d 48, 57 (Minn. App. 2004).

Armstrong contends that he merely "possessed" illicit drugs; however, there is evidence on the record that he possessed 12.2 grams of methamphetamine; that there were a total of 17 individual packets of methamphetamine in his immediate surroundings;

that there was a small electronic scale, which can be associated with dealing drugs; and that he had a significant amount of cash. His telephone call to his girlfriend discredits his claim that much of this evidence belonged to another person. This evidence provided "a complete chain which, in light of the evidence as a whole" indicated that Armstrong possessed the methamphetamine with an intent to "sell . . . [it] to another" beyond a reasonable doubt. *See* Minn. Stat. § 152.01, subd. 15a (1), (3) (defining "sell" for the purposes of controlled substance statutes); *Webb*, 440 N.W.2d at 430 (outlining the standard of review for circumstantial evidence). Therefore, we conclude Armstrong's conviction for possession of methamphetamine with intent to sell is based on sufficient evidence.

Affirmed.

Dated: