STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0126

State of Minnesota,
Respondent,

vs.

Jamie M. Carlson,
Appellant.

Filed May 12, 2009
Affirmed
Shumaker, Judge

Clay County District Court
File No. 14-K8-06-2660

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101-2134; and

Brian J. Melton, Clay County Attorney, Clay County Courthouse, 807 N. 11th Street, P.O. Box 280, Moorhead, MN 56561 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Collins, 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

SHUMAKER, Judge

In this appeal of his conviction of unlawful sale of methamphetamine, appellant argues that the district court erroneously allowed a police detective to give expert testimony on matters within the understanding of the lay jury, and that the prosecutor committed misconduct by vouching for a witness and by arguing facts not in evidence. We affirm.

FACTS

A jury found that, on August 7, 2006, appellant Jamie M. Carlson sold three or more grams of methamphetamine in violation of state drug laws. During the trial, the state introduced evidence that the sale had been arranged by a police detective as a "controlled buy" and that the purchaser was a confidential informant. The state also presented evidence of recordings made of conversations the informants had with Carlson at later dates which allegedly confirmed Carlson's August 7 sale. The court permitted the police detective to testify to what the parties meant by certain words and phrases in those conversations. Carlson contends that the court abused its discretion in allowing the detective to interpret the conversations. He also raises issues of prosecutorial misconduct, the propriety of allowing the jury to read transcripts of the recorded conversations, and the sufficiency of the evidence to convict him.

On August 7, 2006, Clay County Detective Charles Anderson gave to confidential informant J.J. $450 to use in a controlled buy of an "eight-ball" (3.5 grams) of methamphetamine. J.J. contacted S.S. about the possibility of buying methamphetamine.

S.S. enlisted her boyfriend, J.C., to help. J.J. gave the money to S.S. who then gave it to J.C. J.C. left his apartment and returned with a soft-drink can containing methamphetamine that J.C. testified he bought from Carlson. Detective Anderson had conducted a surveillance and saw J.C. with the can but did not see Carlson. J.C. gave the methamphetamine to J.J., telling her that he had only 2 grams and that she should come back later for the rest. J.J. returned later that day and obtained the rest of the methamphetamine. The total amount of methamphetamine J.J. received on August 7 was 3.1 grams.

S.S. and J.C. had also worked as confidential informants for the police and, on August 23, Detective Anderson talked to them. He stated that he knew about the August 7 drug transaction and reminded them that they were not supposed to be selling drugs. They admitted their involvement and alleged that Carlson was their supplier. Detective Anderson then asked them to wear wires and to engage Carlson in a conversation to get him to implicate himself and to identify his own source of drugs.

Wearing a wire to record her conversation, S.S. went to see Carlson on August 31, purportedly to buy additional drugs with $100 Detective Anderson had given her. Carlson accepted the money as down payment on an eight-ball, and S.S. said she wanted the drugs in the morning, "cause I don't want to get like half of it and then you know like last time half and half." Carlson responded, "and then do you have the 30 I gave?" This transaction was recorded.

Carlson called S.S. on the telephone on September 1, and S.S. told him that she "wanted to cover up the mess you made last time," being "short a half." Carlson indicated that he had provided the entire amount. This conversation was recorded.

Over Carlson's objection, the district court permitted the state to play the recordings at trial. As to portions of the contents of the recordings, the court indicated that it would treat Detective Anderson as an expert witness. The court permitted Detective Anderson to interpret the September 1 conversation as referring back to the August 7 transaction in which Carlson had not initially delivered the entire eight-ball. Carlson alleges that the court erred in allowing this and related testimony. This appeal followed.

D E C I S I O N

Expert Testimony

The district court enjoys broad discretion in deciding whether to allow expert testimony and we will reverse only for a clear abuse of that discretion. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999). Furthermore, even if the court errs in allowing such testimony, "[a] reversal is warranted only when the error substantially influences the jury to convict." *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981). Expert testimony is admissible, within the court's discretion, if it will assist the jury in understanding the evidence or determining a fact at issue. Minn. R. Evid. 702; *State v. Grecinger*, 569 N.W.2d 189, 194-95 (Minn. 1997). To be admissible, expert testimony must enhance the jury's ability to decide matters not within its unassisted experience. *State v. DeShay*, 669 N.W.2d 878, 888 (Minn. 2003).

Carlson concedes that police officers may testify to the meanings of narcotics codes and jargon in intercepted conversations. *See State v. Williams*, 525 N.W.2d 538, 548 (Minn. 1994) (listing as permissible "testimony that coded language related to [drugs]"). Thus, according to Carlson, there is no problem when an officer defines "teener" and "half" and explains the going price for drugs. But, he urges, Detective Anderson exceeded the limits of permissible expert testimony when he was permitted to state what S.S. and Carlson were talking about when the terms "half," "half and half", and "last time" were used.

Detective Anderson testified that the use of those terms referred to the August 7 transaction in which Carlson failed to deliver the entire amount purchased in a single delivery. Carlson claims that the jury could figure that out without expert assistance.

The threshold distinction to be made is not between experts and laypersons but rather between expert *testimony* and lay testimony. An expert is not precluded from also giving lay testimony as long as he has firsthand knowledge of the subject matter. Minn. R. Evid. 602. Thus, when Detective Anderson testified about the circumstances of the recorded conversations with Carlson, he was testifying properly from personal knowledge. He arranged for S.S. and J.C. to contact Carlson and engage him in a recorded discussion that would implicate him in the August 7 sale. He knew that S.S. and J.C. would have to create a context within which Carlson's admissions could be elicited. Within that context, some ordinary words were used in a way that was meaningful only as they related to drug sales. Although the jury needed no help in understanding the ordinary meanings of the words "half," "half and half," and "last time,"

those words took on special connotation within the drug-transaction context. Detective Anderson provided that context and explained the special connotations of the words used. This was a proper use of expert testimony. *See State v. Carillo*, 623 N.W.2d 922, 926 (Minn. App. 2001) (stating police officers are permitted to provide expert testimony concerning subjects that fall within the ambit of their expertise in law enforcement), *review denied* (Minn. June 19, 2001). Without Detective Anderson's testimony, the jury would not likely understand the peculiar contextual usages of the ordinary words. The court did not err in allowing Detective Anderson's testimony.

Prosecutorial Misconduct

Carlson first claims that the state engaged in improper vouching for the credibility of J.C. during J.C.'s redirect examination by the prosecutor. After J.C. testified that he had engaged in controlled buys for the police and had received a reduction in his prison sentence, the prosecutor asked leading questions about consideration he received:

> [Prosecutor]: And when it comes to consideration that you receive for the various work that you've done as a confidential informant, that ultimate decision lies with me, is that correct?
> A. Correct.
> Q. Okay. You don't—you didn't have any part of negotiating that?
> A. I had no idea.
> Q. You just do the work and then I make the decision.
> A. Correct.

It is improper for a prosecutor to "personally [endorse] the credibility of the state's witnesses . . . ." *State v. Parker*, 353 N.W.2d 122, 128 (Minn. 1984). "[V]ouching occurs when the government implies a guarantee of a witness's truthfulness . . . ." *State*

v. Patterson, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted). But a prosecutor may otherwise properly demonstrate the credibility of the state's witnesses. *State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977).

Carlson failed to object to the testimony of which he now complains. Thus, we review the testimony for plain error. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If Carlson shows plain error, the burden shifts to the state to demonstrate that there is "no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted).

Carlson acknowledges that the elicitation of testimony about a plea agreement, including provisions relating to a witness's truthfulness, does not, without more, constitute improper vouching. *Patterson*, 577 N.W.2d at 498. But, he claims, the state failed to disclose the plea agreement J.C. had entered with the state and instead revealed only the prosecutor's involvement in approving the ultimate consideration J.C. would receive. Doing so, Carlson alleges, the prosecutor implicitly endorsed J.C.'s credibility.

Before evidence to which no objection was made can be found to be plain error, Carlson's burden is to demonstrate that the evidence was admitted in error. *Ramey*, 721 N.W.2d at 302. He has not carried his burden. The prosecutor did not state an opinion about J.C.'s credibility but rather elicited facts to rebut the implication that J.C. would lie for the police to obtain a favorable disposition of charges against him. The prosecutor's questions disclosed J.C.'s lack of incentive to falsify any facts because he was neither guaranteed nor promised any favorable treatment in return for his cooperation in and

assistance with controlled drug buys. Carlson has not demonstrated that the prosecutor violated *Patterson* or otherwise committed misconduct in adducing this evidence.

Carlson next contends that the state disclosed facts not in evidence during its rebuttal argument. A prosecutor's closing argument must be based on the facts adduced at trial, including reasonable inferences to be drawn from those facts. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). The court overruled Carlson's objection to the prosecutor's reference to cooperation by informants:

> [w]hen someone is arrested and they're looking to help themselves out, the fact that they are looking for consideration does not make their information unreliable. And Detective Anderson explained to you how they corroborate the information that is given to them.
>
> When a person wants to cooperate, they sit down, and they give information. Well, law enforcement has probably already gotten information from several other people and they'll compare that information of this cooperating individual with all those other people. They'll compare that information with information that they - -

Carlson contends that the reference to "several other people" suggests that several people had already implicated Carlson by the time J.C. and S.S. became involved.

Without objection during the trial, Detective Anderson described his procedure for using confidential informants. He testified that he acquires information from an informant and then reviews "that information against information from other sources to corroborate that their information was correct and accurate." The prosecutor did not say that several persons had implicated Carlson in the August 7 sale but rather was referring to the general procedure the police use in working with informants to help ensure their reliability. The prosecutor's brief statement that "law enforcement has probably already

gotten information from several other people" was a proper inferential reference to Detective Anderson's testimony that the police obtain information "from other sources." The court did not abuse its discretion in overruling Carlson's objection.

Finally, in his pro se supplemental brief, Carlson contends that the court erroneously allowed the jury to have transcripts of the recorded conversations after Detective Anderson had altered them, and that the evidence was insufficient to convict him because it was based entirely on uncorroborated accomplice testimony. Neither argument was raised in the district court and cannot be raised for the first time on appeal. *State v. Sorenson*, 441 N.W.2d 455, 459 (Minn. 1989).

Affirmed.