STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1870

Shantha Jayapathy, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 19, 2014
Reversed and remanded
Stauber, Judge

Hennepin County District Court
File No. 27CR1013438

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Lori A. Swanson, Minnesota Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Hudson, Judge; and Rodenberg, Judge.

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

STAUBER, Judge

In this first review by postconviction proceedings following her conviction of first-degree controlled-substance crime, possession with intent to sell, appellant argues

that (1) the district court erred by denying her suppression motion because police lacked probable cause to arrest her without a warrant; (2) the evidence was insufficient to support her convictions; and (3) she is entitled to a new trial because the prosecutor committed prejudicial misconduct. Because the prosecutor committed misconduct by attempting to elicit information at trial that had previously been ruled inadmissible, and the misconduct cannot be said to be harmless, we reverse and remand.

FACTS

In March 2010, Minneapolis police received a tip from a confidential informant (CI) that appellant Shantha Jayapathy was selling narcotics. Based on the tip, officers stopped a vehicle driven by appellant and arrested her without a warrant. A search of the vehicle revealed a black case containing methamphetamine. Appellant was then charged with first-degree possession with intent to sell under Minn. Stat. § 152.021, subd. 1(1) (2008), and first-degree possession under Minn. Stat. § 152.021, subd. 2(1) (2008).

Appellant moved to suppress the evidence on the basis that the stop, arrest, and search of the vehicle were unconstitutional. At the suppression hearing, Officer Gregory Jeddeloh testified that he received information that a woman named "Rose" was dealing methamphetamine in the area of 46th and Columbus Avenue South. "Rose" was described as between the ages of 49 and 52, measuring 5' 3" to 5' 5" tall, medium build with long brown hair and wearing glasses. The CI then conducted two controlled buys from "Rose" approximately three weeks prior to her March 23, 2010 arrest. Officer Jeddeloh testified that he witnessed the controlled buys and field tested the drugs, which were confirmed to be methamphetamine.

Officer Jeddeloh testified that on March 23, 2010, he was informed by the CI that the CI intended to buy methamphetamine from "Rose" later that day at a grocery store near "59th and Nicollet." The CI stated that "Rose" would be driving a white Suburban and that she had a "large amount" of methamphetamine that she kept in a black case on the back seat of her vehicle. The CI also provided the license-plate number for the Suburban and "Rose's" cellular-telephone number.

Based on the information from the CI, Officer Jeddeloh contacted his team of officers to set up surveillance of the area. Officer Jeddeloh then parked his car near the area of 46th and Columbus and eventually witnessed a woman matching the description of "Rose," and later identified as appellant, arrive as the sole occupant in a white Suburban. After appellant parked the vehicle and went into a house, Officer Jeddeloh received a call from the CI who informed him that the buy location had changed to 46th and Nicollet. Shortly thereafter, Officer Jeddeloh observed appellant leave the house and then drive the Suburban in the direction of the new buy location.

At Officer Jeddeloh's direction, the Suburban was stopped by a marked squad car. The license plate of the Suburban matched the one provided by the CI, and the CI positively identified appellant as the seller. Appellant was arrested and the Suburban was then driven to the precinct where it was searched without a warrant. During a search of the vehicle, officers found two cell phones, one of which rang when officers dialed the number provided by the CI. Officers also discovered a black case that was sitting on the back seat behind the driver's seat. In the black case, officer's discovered plastic baggies, a digital scale, and two bags totaling approximately 39 grams of methamphetamine.

Following the evidentiary hearing, the district court made findings on the record and denied appellant's suppression motion. The matter then proceeded to trial where the district court granted appellant's motion to exclude any testimony beyond information that "the set-up was done on the basis of the receipt of a tip." At trial, Sergeant Todd Sauvageau testified that when he stopped the white Suburban driven by appellant, he noticed appellant make "some movement." The jury also heard testimony that the Suburban was registered to someone else and that during a search of the Suburban at the precinct, officers discovered a black case on the floor behind the driver's seat, which contained a digital scale, plastic baggies, and two separately bagged amounts of methamphetamine totaling 39.4 grams. Officers also found two cell phones on the dashboard, a glass smoking pipe mixed in with some clothing on the front passenger seat, and "a small plastic bag on the driver's floorboard," which contained .3 grams of methamphetamine.

A jury found appellant guilty of the charged offenses, and the district court sentenced appellant to 84 months in prison. Appellant subsequently filed a petition for postconviction relief arguing that (1) the district court erred by denying appellant's suppression motion because the CI's tip failed to provide probable cause to justify the warrantless arrest of appellant; (2) the state failed to prove beyond a reasonable doubt that appellant possessed the drugs; and (3) the prosecutor committed prejudicial misconduct. The district court denied appellant's postconviction petition. This appeal followed.

D E C I S I O N

I.

When reviewing pretrial orders on motions to suppress evidence, appellate courts normally review the facts and determine whether the district court erred, as a matter of law, by failing to suppress evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's findings of fact for clear error, but apply a de novo standard to determinations of law. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

A warrantless arrest is lawful if it is supported by probable cause. *State v. Williams*, 794 N.W.2d 867, 871 (Minn. 2011). Probable cause exists if a person of ordinary care and prudence would, based on the objective facts, entertain "an honest and strong suspicion" that a specific individual committed a crime. *Id.* (quotation omitted). "In applying this test, a court should not be unduly technical and should view the circumstances in light of the whole of the arresting officer's police experience as of the time of the arrest." *State v. Carlson*, 267 N.W.2d 170, 174 (Minn. 1978). Information acquired through regular police channels can be used to support probable cause regardless of whether the arresting officer knows the underlying basis of the official suspicion. *State v. Cavegn*, 294 N.W.2d 717, 721 (Minn. 1980).

Here, in arresting appellant, police relied primarily on information provided by the CI. Under Minnesota law, an informant's tip can give rise to probable cause so long as it has sufficient indicia of reliability to satisfy the totality-of-the-circumstances test. *State v. Cook*, 610 N.W.2d 664, 667 (Minn. App. 2000), *review denied* (Minn. July 25, 2000). To determine the reliability of a CI, courts consider the following factors: (1) a first-time

citizen informant is presumed reliable; (2) an informant who has given reliable information in the past is likely reliable; (3) reliability can be established by police corroboration; (4) an informant who voluntarily comes forward is presumed more reliable; (5) a "controlled purchase" is a term of art that indicates reliability; and (6) an informant who makes a statement against his or her interests is minimally more reliable. *State v. Ross*, 676 N.W.2d 301, 304 (Minn. App. 2004). The fact that an informant has given reliable information in the past "is fulfilled by a simple statement that the informant has been reliable in the past because this language indicates that the informant had provided accurate information to the police in the past and thus gives the magistrate reason to credit the informant's story." *Id*. (quotations omitted).

However, the recitation of facts establishing a CI's reliability by his proven track record does not, by itself, establish probable cause. *Cook*, 610 N.W.2d at 668. "The information obtained from the CRI must still show a basis of knowledge." *Id.* The basis of knowledge "may be supplied directly, by first-hand information, such as when a CRI states that he purchased drugs from a suspect or saw a suspect selling drugs to another." *Id.*

Appellant "concedes that Officer Jeddeloh's testimony that the CI had performed two controlled buys in the past establishes the CI's veracity." But appellant argues that there was not probable cause to support her arrest because the "state failed to show the basis of knowledge for the March 23, 2010 tip." To support her claim, appellant contends that police (1) "did not confirm that [the] person driving the suburban, appellant, matched the description of Rose provided by the CI"; (2) "did not corroborate

appellant's identify—that she was, in fact, 'Rose'—until after they arrested her"; (3) "did not corroborate where appellant was going"; and (4) "were unable to corroborate that appellant had any link to either the house she entered or the car she was driving." Thus, appellant argues that the district court erred by denying her motion to suppress.

We disagree. An informant's prediction of future behavior, verified by law enforcement prior to a search, provides probable cause for a warrantless search. *Ross*, 676 N.W.2d at 305; *see also State v. Munson*, 594 N.W.2d 128, 136-37 (Minn. 1999) (holding that officers' corroboration of tip's details, including vehicle destination, arrival time, and occupants, together with past reliability of confidential informant, gave officers probable cause to search vehicle). *But see Cook*, 610 N.W.2d at 669 (holding that because the informant did not predict any behavior on the part of the suspect, but merely related his present location, law enforcement did not have probable cause to arrest).

Here, the CI accurately predicted that later in the day on March 23, 2010, an individual possessing a large amount of methamphetamine "would be arriving at the area of 46th and Columbus" and that she would be driving a white Suburban. The CI also accurately provided the license-plate number of the Suburban and provided a very detailed description of the individual. Moreover, the CI later called police and stated that the location of an earlier arranged buy had changed and that the new buy location was 46th and Nicollet. Although appellant was stopped before arriving at the new buy location, the CI accurately predicted that appellant would drive in that direction. Events bore out the significant verifiable details provided by the CI, and police were able to

corroborate these details before arresting appellant.[1] Furthermore, the CI's detailed description of appellant, the vehicle she would be driving, her actions, and the statement that appellant possessed a black case containing a large amount of methamphetamine that she kept on the back seat of the Suburban allows the inference that the tip was based on the CI's firsthand knowledge. Under *Munson* and *Ross*, this information, taken as a whole, provided police with probable cause to arrest. In fact, if the nod from the CI confirming that appellant was "Rose," and the corroboration of the cell-phone number, had occurred before appellant was arrested, the probable cause to support the arrest would have been even stronger. But even without this information, the district court properly denied appellant's motion to suppress.

II.

When the sufficiency of the evidence is challenged, 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 which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must 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). The verdict should not be disturbed "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably

[1] Appellant claims that the record fails to reflect that police connected the description of "Rose" as provided by the CI, with appellant. But after providing the CI's description of "Rose," Officer Jeddeloh identified appellant at the suppression hearing as the "white female with long brown hair, glasses." This description insinuates that police corroborated the CI's description of "Rose" before she was arrested.

conclude that [the] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

Appellant challenges her conviction of first-degree controlled substance crime—possession with intent to sell.[2] In order to convict appellant of that offense, the state was required to prove beyond a reasonable doubt that appellant unlawfully sold a mixture of a total weight of ten grams or more containing methamphetamine. Minn. Stat. § 152.021, subd. 1(1). The definition of "sell" includes possession with intent "to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture." Minn. Stat. § 152.01, subd. 15a (2008).

Possession means that appellant "physically possessed the substance and did not abandon [her] possessory interest in the substance but rather continued to exercise dominion and control over it up to the time of the arrest." *State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 610 (1975). To prove constructive possession, the state must establish either that: "(1) the controlled substance was found in an area under [appellant's] control and to which others normally had no access; or (2) if others had access to the location of the controlled substance, the evidence indicates a strong probability that [appellant] exercised dominion and control over the area." *State v. Denison*, 607 N.W.2d 796, 800 (Minn. App. 2000), *review denied* (Minn. June 13, 2000). "Proximity is an important consideration in assessing constructive possession," and "constructive possession need not be exclusive, but may be shared." *State v. Smith*, 619

[2] Appellant also filed a pro se supplemental brief in which the sole argument appears to be a challenge to the sufficiency of the evidence.

N.W.2d 766, 770 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). In determining possession, including cases of constructive possession, courts consider the totality of the circumstances. *Denison*, 607 N.W.2d at 800.

Appellant argues that the state failed to prove beyond a reasonable doubt that she constructively possessed the drugs found in the car she was driving. "[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). This court applies a two-step analysis when reviewing circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). The first step is to identify the circumstances proved by the state. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). The reviewing court presumes that the jury relied on these circumstances and rejected any conflicting evidence. *Id.* The second step is to independently examine the reasonableness of the inferences the jury could draw from those circumstances, including inferences that support a hypothesis other than guilt. *Id.* This court does not defer to the jury's choice between reasonable inferences. *Id.* at 329–30. To uphold a verdict, the circumstances proved must be consistent with the hypothesis that the defendant is guilty and inconsistent with any other rational hypotheses. *Id.* at 330.

Here, the circumstances proved by the state include: (1) police "received a tip that brought [them] to the area of 46th and Columbus"; (2) when appellant was stopped, she was the lone occupant of a Suburban that was registered to someone else; (3) officers who stopped appellant observed her make "some movement"; (4) a small amount of methamphetamine was found on the floor of the driver's side of the vehicle; (5) a large

amount of methamphetamine, along with baggies and a scale were found in a black case behind the driver's seat; and (6) the Suburban was filled with furniture, two cell phones, and other personal items that police did not identify as belonging to appellant.

The circumstances presented at trial established that appellant was the driver and lone occupant of the vehicle, and that a large amount of methamphetamine was discovered in that vehicle. This evidence, by itself, supports a conclusion that appellant constructively possessed the methamphetamine. *See* Minn. Stat. § 152.028, subd. 2 (2008) ("The presence of a controlled substance in a passenger automobile permits the factfinder to infer knowing possession of the controlled substance by the driver or person in control of the automobile when the controlled substance was in the automobile."). But appellant argues that because she was not the registered owner of the Suburban, and there was no evidence linking appellant to the drugs, a reasonable, rational inference from the evidence presented was that somebody else constructively possessed the methamphetamine.

We disagree. Although the vehicle was registered to another individual, appellant was the sole occupant of the vehicle when she was stopped. Moreover, there is no evidence that the black case containing the large amount of methamphetamine was hidden. Rather, the evidence suggests that it was sitting on the floor behind the driver's seat. And, when appellant was stopped, officers noticed appellant make "some movement," and a small amount of methamphetamine was discovered on the floor of the driver's side of the vehicle. Appellant's movement at the time the vehicle was stopped, along with the small amount of drugs found on the floor of the driver's side of the

vehicle, excludes the rational inference that someone else constructively possessed the drugs. Accordingly, the evidence was sufficient to sustain appellant's conviction.

III.

Appellant contends that she is entitled to a new trial because the prosecutor committed prejudicial misconduct, some of which was objected to and some of which was not. We review claims of prosecutorial misconduct that were objected to at trial under a two-tiered harmless-error test. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). Cases involving claims of "unusually serious" prosecutorial misconduct are reviewed for "certainty beyond a reasonable doubt that misconduct was harmless," while claims of less-serious prosecutorial misconduct are reviewed "to determine whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.* What distinguishes these two types of misconduct remains unclear. *See, e.g.*, *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (declining to reach "the issue of the continued applicability of the *Caron* test").

In contrast, when a defendant fails to object to alleged prosecutorial misconduct during trial, we review only for plain error. *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011). The nonobjecting defendant must show that there was error and that it was plain. *State v. Martin*, 773 N.W.2d 89, 104 (Minn. 2009). If that occurs, the burden then shifts to the state to demonstrate lack of prejudice from the error. *Id.*

Here, before trial started, the district court granted appellant's motion to exclude any testimony about the narcotics investigation beyond information that "the set-up was done on the basis of the receipt of a tip." But during opening statements, the prosecutor

began mentioning the substance of the tip, before the district court sustained appellant's objection. The prosecutor also attempted to elicit testimony regarding the substance of the tip several times during the examination of some of the investigating officers. Appellant objected to some of the questions, and the district court sustained most of the objections. But several of the questions were not objected-to by appellant.

Appellant argues that the prosecutor's conduct of attempting to reference inadmissible information pertaining to the substance of the tip constitutes "unusually serious" prosecutorial misconduct. Appellant also contends that the prosecutor committed misconduct by failing to prepare his witnesses to ensure that their testimony complied with the pretrial order on admissibility of the tip. Appellant argues that the prosecutor's conduct was not harmless beyond a reasonable doubt, and also constitutes prejudicial plain-error. Thus, appellant contends that she is entitled to a new trial.

We agree. "The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). A prosecutor also has a duty to prepare the state's witnesses, "prior to testifying, to avoid inadmissible or prejudicial statements." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). And a prosecutor may not intentionally elicit inadmissible testimony from a state's witness. *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978). When the state intentionally elicits impermissible testimony, a reviewing court is much more likely to find prejudicial misconduct. *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974). Moreover, the supreme court has indicated that it is misconduct for a prosecutor to seek to introduce evidence

that has previously been ruled inadmissible. *See State v. Ray*, 659 N.W.2d 736, 744 (Minn. 2003).

Here, it was misconduct for the prosecutor to attempt to elicit information regarding the substance of the tip, which had previously been ruled inadmissible. *See id.* As a result, the burden was on the state to demonstrate the lack of prejudice. *See Martin*, 773 N.W.2d at 104 (stating that if a defendant demonstrates plain error, the burden shifts to the state to demonstrate lack of prejudice from the error). The state, however, failed to address the issue of prejudice in its brief. If the state does not make a harmless-error argument with respect to an issue that is subject to the harmless-error rule, we are not required to undertake a harmless-error analysis. *See State v. Porte*, 832 N.W.2d 303, 306 (Minn. App. 2013). Therefore, the state has failed to meet its burden to demonstrate that appellant was not prejudiced by the unobjected-to prosecutorial misconduct.

Moreover, with respect to the objected-to misconduct, we conclude that the misconduct was unusually serious. The record reflects that despite being ruled inadmissible, the prosecutor repeatedly attempted to elicit information regarding the substance of the tip. Such conduct is clearly inappropriate and undermines the fairness of the trial. *See State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006) (stating that generally, a prosecutor's acts may constitute misconduct if they have the effect of materially undermining the fairness of a trial). And a review of the record indicates that the case against appellant was not particularly strong. In the absence of more compelling evidence demonstrating appellant's guilt, we cannot conclude with certainty beyond a

reasonable doubt that the misconduct was harmless. Accordingly, we reverse and remand for a new trial.

Reversed and remanded.