STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0184

State of Minnesota,
Respondent,

vs.

Gerry Thomas Cardinal,
Appellant.

Filed June 12, 2017
Affirmed
Ross, Judge

Beltrami County District Court
File No. 04-CR-15-959

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

Annie P. Claesson-Huseby, Beltrami County Attorney, David P. Frank, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Ross, Judge; and Kalitowski, 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

ROSS, Judge

A jury found Gerry Cardinal guilty of selling methamphetamine. Cardinal appeals from his conviction, arguing that the prosecutor unfairly aligned himself with the jury. He also contends that he must be resentenced under the new provisions of the Minnesota Drug Sentencing Reform Act (DSRA) because that act is now effective and his conviction is not yet final. Because the prosecutor's allegedly improper comments acceptably prepared the jury to hear evidence about the presumably unfamiliar world of drug dealing, we reject Cardinal's prosecutorial-misconduct assertion. And because the DSRA applies only to crimes committed on or after the DSRA's effective date and Cardinal committed his crime before that date, Cardinal's sentencing challenge also fails. We therefore affirm.

FACTS

The Paul Bunyan Drug Task Force is a cooperative of law enforcement officers operating in the north-central part of the state. The state charged Gerry Cardinal with a second-degree controlled substance crime in violation of Minnesota Statutes section 152.022, subdivision 1(1) (2014), for selling methamphetamine to a task force informant in February 2015.

According to the state, task force agent Robert Fraik worked with the informant, D.K., to arrange for D.K. to purchase two "8-balls" of methamphetamine from Cardinal. D.K. picked up Cardinal at his home. Cardinal handed D.K. two baggies of what appeared to be methamphetamine. D.K. paid Cardinal $360 in cash, and they agreed that D.K. would owe $840. D.K. dropped Cardinal off and immediately called Agent Fraik to deliver the

purchased substance and to provide his debriefing statement. A forensic scientist at the Bureau of Criminal Apprehension determined that the substance was 6.932 grams of methamphetamine.

At Cardinal's October 2016 jury trial, the prosecutor made the following comments, which have become a subject of this appeal, during his opening statement:

> May it please the Court, Counsel, Mr. Cardinal, ladies and gentlemen of the jury, this case is about Bemidji. It's about our community. We live here. Many of us have lived here our whole lives. Many of us have retired. We know Bemidji pretty well. We work here; we go to church here; we shop here. This is where we belong; this is where -- the area that we know.
>
> This case is about Bemidji, but it's not about the Bemidji that you might be familiar with. This is a case about drug use, drug sales, here in the Bemidji community. It's a world that exists in the shadows. It's a world that exists in secret. It's a world that exists behind closed doors. Today and tomorrow, that world is going to be opened up to you through the testimony of a number of witnesses.
>
> . . . .
>
> Agent Billings is going to explain to you that it's necessary to use addicts and other dealers in the law enforcement investigation because this is a world, this is a part of our community, that exists in shadows, in secret, behind doors.
>
> . . . .
>
> You're going to learn that Agent Fraik is an experienced drug enforcement agent. He's going to tell you how drug deals take place. He's going to tell you they're not like commercial transactions.
>
> We go to Lueken's, we go to Wal-Mart, we go to Menards, and we know what we're getting. We get a receipt. We talk to customers who explain the products. You're going to learn that in drug sales in the shadows and the secret and behind closed doors, those words aren't used. They're not heard in transactions. But make no mistake about [it]; Agent Fraik will explain to you that the sale that took place by Gerry Cardinal to [D.K.] and the discussions between [D.K.] and [Cardinal] were about drugs. He's going to explain how he, as

> an experienced task force agent, knew what these individuals were talking about.

The prosecutor presented testimony from three task force agents, D.K., and the BCA forensic scientist. The agents informed the jury of the task force's purpose, described its members, explained the role of informants, and detailed the elements of a controlled purchase. Agent Fraik and D.K. described Cardinal's sale to D.K., and the prosecutor introduced D.K.'s communications with Cardinal.

Cardinal did not testify and did not call any witnesses.

The prosecutor made the following comments, which are also a subject of this appeal, during his closing statement:

> As I told you in my opening comments, this case is about an aspect of this community that few of us understand or know. It is about the use and sale, trafficking drugs; specifically, trafficking, sale, of methamphetamine. And as I stated in my opening comments, meth is sold in secret, sold in the shadows, and it's sold and used behind closed doors. The people that understand this world are the addicts who use the drugs and the dealers who exploit and profit from the misery and addiction of addicts.
>
> It's also understand -- it's also understood by a law enforcement community who's specially trained and dedicated to, every day, going out and trying to stop drug trafficking. It's understood by the members of the Paul Bunyan Drug Task Force, our public servants in this community who've undertaken the responsibility to try to stop drug trafficking and enforce the laws here in the state of Minnesota.
>
> . . . .
>
> Rob Billings used a phrase I'd like you to consider when you consider the evidence in this case: We have to work with informants, the people that we deal with, the people that we investigate, and the people that we wind up prosecuting, in order to achieve the greater good. We have to work with informants to not only hold them accountable but the dealers that they work with accountable as well. As unsavory as that

> aspect is, it's necessary in order to uphold the law in our community.
>
> . . . .
>
> Through the testimony and the evidence presented today, you were exposed to an area of this community that very few people see, very few law-abiding people see. We shed some sunlight on the secret world. We shed some sunlight on the shadows of methamphetamine trafficking. It's an unsavory business, I grant you that. But it's a business that's necessary to enforce the laws in this community and to stop, at least to a certain extent, methamphetamine trafficking.

The jury found Cardinal guilty, and the district court sentenced him to 57 months in prison.

Cardinal filed a direct appeal, which we stayed on his request to file a postconviction petition. Cardinal petitioned the district court for a reduced sentence under the DSRA, which had just been enacted. The district court denied his petition, and Cardinal asked that his appeal be reinstated. We now address the merits of his appeal.

D E C I S I O N

Cardinal challenges his conviction, alleging that prosecutorial misconduct during opening and closing statements deprived him of a fair trial. Alternatively, he challenges his sentence under the DSRA. For the following reasons, we affirm his conviction and sentence.

I

Cardinal accuses the prosecutor of improperly aligning himself with the jury during his opening and closing arguments. Cardinal did not object during trial, so we review his accusation under the modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, Cardinal can prevail only if he first establishes that

the prosecutor committed an error and that the error was plain. *See id.* An error is plain if the prosecutor's conduct violates caselaw, a rule, or a standard of conduct. *Id.* If Cardinal demonstrates plain error, the state can avoid reversal if it shows that the error did not affect Cardinal's substantial rights. *See id.* Even if the state fails to make this showing, we will reverse only if a new trial is necessary to ensure fairness and the integrity of the judicial proceedings. *See State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

Cardinal argues that the prosecutor's repeated use of the terms "our community," "we," and "us" during his opening and closing statements improperly aligned the jurors with the prosecution. We review for misconduct as a whole without focusing on particular phrases or remarks that might be taken out of context or unduly emphasized. *State v. Jackson*, 714 N.W.2d 681, 694 (Minn. 2006).

Cardinal argues that the prosecutor erred under *State v. Mayhorn*, 720 N.W.2d 776 (Minn. 2006). In *Mayhorn*, the supreme court emphasized that a prosecutor may not align herself with a jury by using "we" and "us" so as to appeal to jurors' passions. *Id.* at 790. But *Mayhorn* does not declare that using those words *always* establishes misconduct. The court said, "[T]o use 'we' and 'us' is inappropriate and *may be* an effort to appeal to the jury's passions." *Id.* (emphasis added). The supreme court later suggested that a prosecutor's use of "we" in closing argument should be reviewed on a case-by-case basis to determine whether misconduct occurred. *Nunn v. State*, 753 N.W.2d 657, 663 (Minn. 2008) (finding prosecutor's use of "we" could "reasonably be interpreted . . . to refer to everybody who was in court when the evidence was presented").

Cardinal contends that by using the terms here, the prosecutor improperly depicted two worlds—one in which the jury, prosecutor, and law enforcement live, and a shadow-world in which Cardinal, drug dealers, and addicts live. The supreme court has noted that when "the prosecutor invited the jurors to view the entire occurrence as 'involving three young black males in the hood in North Minneapolis,' a world wholly outside their own," the remark "ask[ed] the jury to apply racial and socio-economic considerations that would deny a defendant a fair trial." *State v. Wren*, 738 N.W.2d 378, 392 (Minn. 2007) (quoting *State v. Ray*, 659 N.W.2d 736, 747 (Minn. 2003)). A prosecutor may not imply that a defendant should be convicted based on his racial or socio-economic background. *State v. Jackson*, 773 N.W.2d 111, 124 (Minn. 2009). But when a prosecutor's comments that the defendant was not from the same world as the jurors are designed merely to "prepare the jury for evidence of an unfamiliar world involving drugs," the comments are not misconduct. *Wren*, 738 N.W.2d at 392 (quoting *State v. Robinson*, 604 N.W.2d 355, 363 (Minn. 2000)); *see also Jackson*, 714 N.W.2d at 695 (allowing prosecutor's references to "gang world" where designed to introduce jurors to unfamiliar behaviors and customs of gang culture).

We think Cardinal's narrow reading of the prosecutor's comments ignores their ambiguity. Their context within the entire opening and closing statements suggests that the prosecutor was attempting to establish that Bemidji has aspects to its community that most of its citizens, including the jurors, are not familiar with ("This case is about Bemidji, but it's not about the Bemidji you might be familiar with." "[T]his case is about an aspect of this community that few of us understand or know."). The evidence included drug-dealing

communication between D.K. and Cardinal involving code phrases and vague terminology that persons outside of the drug trade would not immediately understand (saying, "in drug sales in the shadows and the secret and behind closed doors, those words aren't used"). The prosecutor did not appear to be establishing a we-versus-they framework, nor did he imply that Cardinal was guilty merely because he associated with the illegal-drug community. He never explicitly placed Cardinal in the "shadow world" of drug sales or stated that Cardinal is not a part of the Bemidji community. We observe that Cardinal's attorney referred to Bemidji as "our community" in her opening statement as well. We see no misconduct and need not consider the other plain-error elements.

II

Cardinal argues that the district court erred by denying his postconviction petition seeking resentencing under the DSRA. We review the decision to deny postconviction relief for an abuse of discretion, and in doing so, we address questions of law de novo. *Lussier v. State*, 853 N.W.2d 149, 153 (Minn. 2014).

Cardinal argues that the DSRA should apply because his conviction was not final when the law became effective on August 1, 2016. A statute's retroactivity is a matter of statutory interpretation, which we review de novo. *State v. Basal*, 763 N.W.2d 328, 335 (Minn. App. 2009). Interpreting the sentencing guidelines is also subject to de novo review and the rules of statutory construction. *State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012).

Cardinal seeks the benefit of the DSRA's milder sentencing provisions despite the timing of his crime, well over a year before the law became effective. As a general rule, "[n]o law shall be construed to be retroactive unless clearly and manifestly so intended by

the legislature." Minn. Stat. § 645.21 (2016). When a law is amended, "the new provisions shall be construed as effective only from the date when the amendment became effective." Minn. Stat. § 645.31, subd. 1 (2016). And "repeal of any law shall not affect any . . . penalty incurred . . . under or by virtue of the law repealed." Minn. Stat. § 645.35 (2016). So for a statute to be applied retroactively, the legislature must provide clear evidence for it to be applied that way, such as using the word "retroactive." *State v. Traczyk*, 421 N.W.2d 299, 300 (Minn. 1988).

Cardinal argues that he is not seeking retroactive application, but rather application of the amelioration doctrine. Cardinal's argument centers on *State v. Coolidge*, which establishes the amelioration doctrine as an exception to the general retroactivity rule: "[A] statute mitigating punishment is applied to acts committed before its effective date, as long as no final judgment has been reached." 282 N.W.2d 511, 514–15 (Minn. 1979). A conviction becomes final when any direct appeal is exhausted or the time for filing a direct appeal has expired. *See State v. Losh*, 721 N.W.2d 886, 893–94 (Minn. 2006).

Cardinal is correct that the DSRA essentially mitigates punishment and that the amelioration doctrine under *Coolidge* seems suited for this circumstance. But the supreme court has explained that *Coolidge* applies only "absent a contrary statement of intent by the legislature." *Edstrom v. State*, 326 N.W.2d 10, 10 (Minn. 1982). The *Edstrom* court refused to apply a statute enacted after Edstrom's crime even though it would have reduced his sentence because the legislature "clearly indicated its intent" that the statute would "have no effect on crimes committed before the effective date of the act." *Id.* The conduct underlying Edstrom's conviction occurred in March 1975, and the effective date of the act

in question was August 1, 1975. *Id.* The new statute provided, "Except for section 8 of this act, crimes committed prior to the effective date of this act are not affected by its provisions." 1975 Minn. Laws ch. 374, § 12, at 1251.

We have since relied on *Coolidge* and *Edstrom* in two relevant published opinions. In *State v. McDonnell*, we determined that *Coolidge* did not apply because the legislature clearly indicated its intent that a statutory amendment should not apply to crimes committed before the amendment's effective date by providing that the amendment "is effective August 1, 2003, and applies to violations committed on or after that date." 686 N.W.2d 841, 846 (Minn. App. 2004) (quoting 2003 Minn. Laws 1st Spec. Sess. ch. 2, art. 9, § 1, at 1446), *review denied* (Minn. Nov. 16, 2004). In *State v. Basal*, we again determined that *Coolidge* did not apply when the legislature expressly provided that the relevant amendment "would become effective January 1, 2008." 763 N.W.2d at 336 (citing 2007 Minn. Laws ch. 147, art. 2, § 64, at 1901). We concluded that "[b]ecause the legislature provided for a specific effective date for the 2007 amendment, the legislature did not intend for the amendment to apply to conduct occurring before the effective date." *Id.*

The DSRA contains an effective-date provision that is substantially similar to the provision in *McDonnell*. It states that the revised section 152.022, subdivision 1, "is effective August 1, 2016, and applies to crimes committed on or after that date." 2016 Minn. Laws ch. 160, § 4, at 581. Cardinal argues that this statutory language does not satisfy *Edstrom* because it "does not contain an express statement prohibiting application of its provision[s] to non-final cases." But we specifically rejected this formulation in

McDonnell. The statute in *McDonnell* fit the *Edstrom* exception because its inclusive language applying to crimes committed "on or after" an effective date is equivalent to exclusive language applying to crimes committed before an effective date. *See McDonnell*, 686 N.W.2d at 846. The DSRA contains the same language.

Cardinal argues alternatively that he is entitled to reduced sentencing under section 18 of the DSRA, because that section became "effective the day following final enactment." He argues that this language triggers *Coolidge* and "demonstrates that the [l]egislature intended that the modifications to the sentencing guidelines applied to pending cases." But Cardinal misunderstands section 18's purpose. Section 18 rejects certain modifications proposed in the sentencing guidelines commission's "January 15, 2016" report, then instructs the commission how to modify certain portions of that report. 2016 Minn. Laws. ch. 160, § 18(a), (b), at 590–91. Section 18's becoming effective "the day following final enactment," *id.* at 591, did not bring those substantive modifications into effect but merely enabled the commission to incorporate them into its reported sentencing recommendations before the remainder of the DSRA became effective on August 1. Cardinal misreads section 18 as a substantive provision. And his misreading leads to an absurd result. Under his reading, section 18's modifications to the sentencing guidelines would predate the amendments to the corresponding criminal statutes. The legislature more reasonably intended for the revised criminal statutes and their corresponding guidelines revisions to become effective simultaneously. The commission effectuated this intent by plainly providing on the modified guidelines' cover page, "The Sentencing Guidelines are effective August 1, 2016, and determine the presumptive sentence for felony offenses

committed on or after the effective date." *See* Minn. Sent. Guidelines (2016); *see also* Minn. Sent. Guidelines 2 (2016) ("The presumptive sentence for any offender convicted of a felony committed on or after May 1, 1980, is determined by the Sentencing Guidelines in effect on the date of the conviction offense . . . ."); Minn. Sent. Guidelines 3.G.1 (2016) ("Modifications to the Minnesota Sentencing Guidelines and associated commentary apply to offenders whose date of offense is on or after the specified modification effective date.").

The supreme court is now deciding whether the DSRA applies to non-final convictions in two cases: *State v. Otto*, A15-1454 (Minn. App. July 18, 2016), *review granted* (Minn. Sept. 28, 2016), and *State v. Kirby*, No. A15-0117 (Minn. App. July 18, 2016), *review granted* (Minn. Sept. 28, 2016). In the meantime, we will follow our precedent. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). Following that precedent, we conclude that the DSRA's language establishing a clear effective date of August 1, 2016, meets the *Edstrom* exception to the amelioration doctrine. We also conclude that the substantive sentencing modifications detailed in section 18 of the DSRA took effect on August 1, 2016. The DSRA therefore does not apply to Cardinal's offense committed on February 19, 2015.

Affirmed.