STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1473

State of Minnesota,
Respondent,

vs.

Darrol Allen Shepersky,
Appellant.

Filed July 10, 2017
Affirmed
Johnson, Judge

Hubbard County District Court
File No. 29-CR-15-1359

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Donovan D. Dearstyne, Hubbard County Attorney, Park Rapids, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Reilly, Judge.

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

JOHNSON, Judge

A Hubbard County jury found Darrol Allen Shepersky guilty of a first-degree controlled-substance crime based on evidence that he sold methamphetamine to a

confidential informant. On appeal, Shepersky argues that the prosecutor engaged in misconduct by eliciting inadmissible evidence. In the alternative, Shepersky argues that he is entitled to be resentenced pursuant to the 2016 Minnesota Drug Sentencing Reform Act. We affirm.

FACTS

The state presented evidence at trial that, on February 18, 2015, Shepersky contacted a man who was an informant for the Paul Bunyan Drug Task Force and offered to sell him one-half ounce of methamphetamine for $1,000. The informant contacted Agent Diekmann of the Hubbard County Sherriff's Office. The informant met with Agent Diekmann and Agent Rasmus to arrange a controlled buy from Shepersky. The agents provided the informant with audio-recording equipment and $1,000 in cash. While the informant was meeting with the agents, he received a telephone call from Shepersky. The informant and Shepersky agreed to meet in front of Shepersky's apartment building.

The informant drove himself to Shepersky's apartment building. Agent Diekmann and Agent Rogers followed the informant to the apartment building and parked nearby. Agent Rasmus and Agent Seaberg already were parked nearby in an unmarked vehicle. The informant contacted Shepersky and told him that he had arrived. Shepersky exited the apartment building and entered the informant's car. The informant asked Shepersky whether the "stuff" was "good," and Shepersky replied, "Yeah." Shepersky set a package of methamphetamine next to the car's gear-shifting knob, and the informant handed the cash to Shepersky. After Shepersky exited the informant's vehicle, Agent Rasmus saw Shepersky walk back into the apartment building. The informant then drove to a pre-

arranged place and met with Agent Diekmann and Agent Rogers, who followed him there. The informant told Agent Diekmann that the methamphetamine was on the floor of the passenger side of the front seat of his car. Agent Diekmann found the methamphetamine there.

In December 2015, the state charged Shepersky with one count of first-degree controlled substance crime, in violation of Minn. Stat. § 152.021, subd. 1(1) (2014). The case was tried to a jury in May 2016. The state called five witnesses: the informant, Agent Rasmus, Agent Rogers, Agent Diekmann, and a forensic scientist from the state bureau of criminal apprehension, who testified that she tested and weighed a substance that was 13.8 grams of methamphetamine. Shepersky did not testify.

The jury found Shepersky guilty. The district court sentenced him to 104 months of imprisonment. Shepersky appeals.

D E C I S I O N

I. Prosecutorial Misconduct

Shepersky argues that the prosecutor engaged in misconduct by eliciting inadmissible evidence. His argument is based on this portion of the prosecutor's direct examination of the confidential informant, which concerns the informant's communications with Shepersky shortly before they met at the apartment building:

> Q: And did you receive a – a phone call?
>
> A: Yes, I did.
>
> Q: Who did you receive the phone call from?
>
> A: Darrol Shepersky.

> Q: And what did Mr. Shepersky tell you?
>
> A: Told me that he was done meeting. Well, first of all, he was at his probation officer, so that was what I was waiting for. And then he called me. And then he said, where do you want to meet up at, and I said just outside his apartment.
>
> Q: Okay. So Mr. Shepersky chose the meeting place?
>
> A: Yeah.

Shepersky argues that this evidence is inadmissible and prejudicial because the informant mentioned a meeting with a probation officer, which suggests that Shepersky previously had been convicted of a crime.

The right to due process of law includes the right to a fair trial, and the right to a fair trial includes the absence of prosecutorial misconduct. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005); *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). "It is generally misconduct for a prosecutor to 'knowingly offer inadmissible evidence for the purpose of bringing it to the jury's attention.'" *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014) (quoting *State v. Milton*, 821 N.W.2d 789, 804 (Minn. 2012)). "Even if the prosecutor unintentionally elicits" inadmissible evidence, a defendant may be entitled to a new trial if the inadmissible evidence "prejudiced the defendant's case." *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974). The unintentional eliciting of inadmissible evidence may be misconduct because a prosecutor "has a duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements," especially if the district court has made pre-trial rulings that certain

matters are inadmissible. *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003) (citing *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978) (citing *State v. Huffstutler*, 269 Minn. 153, 155-56, 130 N.W.2d 347, 348 (1964))). But the admission of inadmissible and prejudicial evidence is not reversible error if the prosecutor did not intentionally elicit the testimony, the statement at issue was merely a "passing" reference, and the evidence supporting guilt was "overwhelming." *State v. Haglund*, 267 N.W.2d 503, 505-06 (Minn. 1978). We note that only some of the above-cited caselaw characterizes these principles as matters of "prosecutorial misconduct." For purposes of this opinion, we assume without deciding that the caselaw on which Shepersky relies supports his theory of prosecutorial misconduct.

Shepersky concedes that he did not object to the informant's testimony about the probation officer. Accordingly, this court applies a modified plain-error test. *Mosley*, 853 N.W.2d at 801. To prevail, Shepersky must establish that there was an error and that the error is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If Shepersky can establish a plain error, the burden would shift to the state to show that the plain error did not affect Shepersky's substantial rights. *Id.* "If all three prongs of the test are met, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) (quotation omitted).

Shepersky's argument fails for three reasons. First, it appears that the prosecutor did not intentionally elicit evidence that Shepersky was on probation. Rather, the prosecutor asked an open-ended question, and the informant answered it by unnecessarily

referring to the reason why Shepersky had been unavailable to meet with him before their telephone call. Second, the prosecutor did not mention or refer to Shepersky's probationary status at any subsequent point in the trial. Third, the state's evidence against Shepersky was very strong. In short, the state's witnesses testified that the informant was provided with $1,000 in cash, had a brief meeting with Shepersky inside the informant's car, and immediately thereafter was in possession of methamphetamine but not in possession of the cash. This case is similar to *Haglund*, in which the prosecutor did not intentionally elicit the testimony, the statement at issue was merely a "passing" reference, and the evidence supporting guilt was "overwhelming." *See* 267 N.W.2d at 505-06. We conclude that the prosecutor did not commit a plain error that affected Shepersky's substantial rights.

Thus, Shepersky is not entitled to a new trial on the ground that the prosecutor committed misconduct by eliciting inadmissible and prejudicial evidence when conducting a direct examination of the confidential informant.

II. Drug Sentencing Reform Act

Shepersky argues in the alternative that he should be resentenced pursuant to the 2016 Minnesota Drug Sentencing Reform Act (MDSRA), which became effective August 1, 2016. He does not argue that the district court erred at the time of sentencing in June 2016. Nonetheless, he asks this court to remand the case to the district court for resentencing.

Shepersky was convicted of and sentenced for a first-degree controlled-substance crime. *See* Minn. Stat. § 152.021, subd. 1(1) (2014). In 2016, the legislature amended the statutes governing controlled-substance crimes by, among other things, increasing the

threshold quantities associated with each degree, thereby reducing the degree of the offenses associated with some quantities of controlled substances. *See* 2016 Minn. Laws, ch. 160, §§ 3-7, at 577-85; *see also* Minn. Stat. §§ 152.021-.025 (2016). Shepersky asserts that his conduct would be only a second-degree controlled-substance crime under the MDSRA. *See* Minn. Stat. § 152.022, subd. 1(a)(1) (2016). The presumptive guidelines sentencing range for second-degree controlled-substance crime for someone with Shepersky's criminal history score is 67 to 93 months. Minn. Sent. Guidelines 4.C (2016).

Section 4 of the MDSRA, which amends section 152.022 of the Minnesota Statutes, states, "This section is effective August 1, 2016, and applies to crimes committed on or after that date." 2016 Minn. Laws, ch. 160, § 4, at 581. Notwithstanding this language, Shepersky argues that the MDSRA applies to his offense, which was committed in February 2015. This court applies a *de novo* standard of review to the question whether the statute applies. *State v. Basal*, 763 N.W.2d 328, 335 (Minn. App. 2009).

Shepersky cites *State v. Coolidge*, 282 N.W.2d 511 (Minn. 1979), in support of his argument. In *Coolidge*, the appellant was convicted of committing sodomy against a 16-year-old child and was sentenced to ten years of imprisonment. *Id.* at 512-13. After his offending conduct, the legislature amended the relevant statutes by reducing the maximum punishment for his act to one year of imprisonment. *Id.* at 514 & 514 n.8. The supreme court concluded that the appellant was entitled to the benefit of the statutory amendments. *Id*. However, in *Edstrom v. State*, 326 N.W.2d 10 (Minn. 1982), the supreme court clarified that *Coolidge* does not apply if it is contrary to the legislature's intent:

> In *Coolidge*, we ruled that a statute mitigating punishment is to be applied to acts committed before its effective date, as long as no final judgment has been reached, at least absent a contrary statement of intent by the legislature. In this case the legislature has clearly indicated its intent that the criminal sexual conduct statutes have no effect on crimes committed before the effective date of the act, August 1, 1975.

Id. at 10.

In *State v. McDonnell*, 686 N.W.2d 841 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004), this court considered an appellant's argument that a statutory amendment should apply to an offense committed before the effective date of the amendment. *Id.* at 846. The session law in that case provided that the amendment "is effective August 1, 2003, and applies to violations committed on or after that date." *Id.* at 845-46 (quoting 2003 Minn. Laws 1st Spec. Sess. ch. 2, art. 9, § 1, at 1446). We reasoned that *Coolidge* was distinguishable because, in *McDonnell*, the legislature had clearly stated that the statutory amendment does not apply to crimes committed before the amendment's effective date. *Id.* Accordingly, we concluded that the statutory amendment did not apply. *Id.* at 846.

The language of the MDSRA is unambiguous with respect to the effective date of the act. It provides that, with respect to the amendments in section 4, the MDSRA "is effective August 1, 2016, and applies to crimes committed on or after that date." 2016 Minn. Laws ch. 160, § 4, at 581. This language is practically identical to the language of the session law in *McDonnell*. *See* 686 N.W.2d at 846. For the same reasons we expressed in *McDonnell*, the statutory amendments of the MDSRA do not apply to Shepersky's conviction of first-degree controlled-substance crime.

Thus, Shepersky is not entitled to be resentenced under the MDSRA.

Affirmed.