STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1850

State of Minnesota,
Respondent,

vs.

Joel Allen Wortman,
Appellant.

Filed October 28, 2019
Affirmed in part, reversed in part, and remanded
Worke, Judge

Brown County District Court
File No. 08-CR-16-681

Keith Ellison, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Charles W. Hanson, Brown County Attorney, New Ulm, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Worke, Judge; and Kirk, 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

WORKE, Judge

Appellant argues that: (1) his convictions for third-degree controlled-substance crime and contributing to the delinquency of a minor should be reversed because the evidence was based on insufficiently corroborated accomplice testimony; (2) he is entitled to a new trial because the prosecutor committed prejudicial misconduct during opening statements and closing arguments; and (3) the district court erred by imposing sentences for both convictions because the offenses were part of the same behavioral incident. We affirm in part, reverse in part, and remand for resentencing.

FACTS

An officer with the Brown-Lyon-Redwood Drug Task Force was contacted by a confidential informant (CI) who told the officer that he could purchase Suboxone[1] pills from his classmate, L.C. The CI introduced an undercover agent of the Redwood County Sheriff's Office to L.C. On June 21, 2016, the undercover agent and the CI picked up L.C. from her home and drove her around. The undercover agent was wearing an electronic recording device. During the drive, L.C. sold three Suboxone pills to the agent for $45. The agent got L.C.'s phone number so he could directly arrange a future purchase, and they dropped her off at her home.

On June 22, 2016, the undercover agent again picked up L.C. from her home and drove her around. The agent was wearing an electronic recording device. During the drive,

[1] Suboxone is a prescription medication used to treat opiate addiction, but is also sometimes used as an off-label pain reliever.

L.C. sold the agent eight Suboxone pills for $100, and indicated that her stepfather, appellant Joel Allen Wortman, was the source of the Suboxone. When the undercover agent dropped L.C. off, he observed Wortman greet L.C. outside of their home and saw her hand Wortman the cash from the transaction.

Wortman was charged with two counts of conspiracy to commit third-degree sale of narcotics, two counts of third-degree aiding and abetting a narcotics sale, two counts of soliciting a juvenile to commit a crime, and two counts of contributing to the delinquency of a minor. A jury found Wortman guilty of the June 22 aiding-and-abetting charge and the June 22 charge of contributing to the delinquency of a minor. The jury found him not guilty of the remaining six charges.

The district court stayed imposition of the sentence for the felony aiding-and-abetting charge, imposed 60 days in jail, and 365 days in jail concurrent on the contributing-to-the-delinquency-of-a-minor charge, with 305 of those days stayed for two years. This appeal followed.

D E C I S I O N

Corroboration of accomplice testimony

Wortman argues that his convictions should be reversed because they were based upon the uncorroborated testimony of his accomplice, L.C. "A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense . . . ." Minn. Stat. § 634.04 (2018). Whether the evidence is sufficient to corroborate an accomplice's testimony is reviewed in the light most favorable to the verdict, assuming that the jury disregarded any

evidence conflicting with that verdict. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 519 (Minn. 2013).

L.C. testified that in June 2016, Wortman had a prescription for Suboxone, and she did not. L.C. testified that on June 21, 2016, she sold three Suboxone pills to the undercover agent for $45, and sold him eight Suboxone pills for $100 on June 22. Regarding the June 22 transaction, L.C. provided the following testimony implicating Wortman's participation in the sale:

> Q: [W]here did the pills come from . . . on June 22?
> A: From [Wortman].
> Q: Again, how did you get them from him?
> A: I asked him for them, and he gave them to me.
> Q: Did he know what was going to be done with them?
> A: Yes . . . . I told him that they were going to be sold. He confirmed the sale.
> Q: And was he expecting any of the money from the sale?
> A: Yes.
> Q: How much?
> . . .
> A: Forty dollars.
> . . .
> Q: And what happened after you got back to your residence?
> A: I got out of the car, and I gave [Wortman] knucks, and then I went inside.
> Q: What happened to the money . . . ?
> A: I gave him the [$]40 inside the house.

"Corroborating evidence is sufficient if it restores confidence in the accomplice's testimony, confirming its truth and pointing to the defendant's guilt in some substantial degree." *State v. Ford*, 539 N.W.2d 214, 225 (Minn. 1995) (quotation omitted). Appellate courts consider the following factors when determining whether an accomplice's testimony has been sufficiently corroborated:

> participation in the preparation for the criminal act; opportunity and motive; proximity of the defendant to the place where the crime was committed under unusual circumstances; association with persons involved in the crime in such a way as to suggest joint participation; possession of an instrument or instruments probably used to commit the offense; and unexplained affluence or possession of the fruits of criminal conduct.

State v. Sorg, 144 N.W.2d 783, 786 (Minn. 1966).

Wortman argues that insufficient evidence was presented at trial to corroborate L.C.'s testimony. The parties dispute whether evidence originating from L.C.—her text messages and recorded statements to the officer during the transactions which implicated Wortman—can be used to corroborate her testimony. Wortman relies on *State v. Armstrong*, where the supreme court stated that "the corroborating evidence must, independent of the testimony of the accomplice, tend in some degree to establish the guilt of the accused." 101 N.W.2d 398, 407 (Minn. 1960). However, *Armstrong* only states that the corroborating evidence must be independent of the *testimony*, not that the source of the evidence must be independent of the testifying *accomplice*. The text messages and recorded statements which implicated Wortman in the two transactions were introduced as exhibits independent of L.C.'s testimony, even though she was also the source of this corroborating evidence.

However, it is not necessary to address Wortman's argument regarding the sufficiency of corroborating evidence originating from his accomplice, because other evidence entirely independent of L.C. was presented at trial which sufficiently corroborates her testimony. The strongest corroboration was supplied by the undercover agent, who

provided direct evidence of Wortman's participation in the June 22 sale—the only transaction for which the jury convicted him. The state introduced the audio recording captured by the agent's clandestine recording device during the June 22 sale, on which the undercover agent recounts his real-time observations: "Alright, [Wortman is] wearing a blue shirt and shorts outside with a small, young child . . . . Alright, actually watching [L.C.] hand him the hundred dollars right now so the money is going straight to the step-dad."

The undercover agent also testified to his observations of Wortman's involvement in the June 22 transaction. The agent testified that "[m]y attention was drawn to [Wortman] because he was identified as the person who was supplying the Suboxone pills." Regarding his observation of L.C. handing Wortman the cash, the agent testified as follows:

> A: I proceeded to watch [L.C.] walk up to Mr. Wortman and hand him the hundred dollars that I had given her.
> Q: How did you know it was the same money?
> A: It never left her hand from the time I handed it to her. She was wearing clothes without pockets, so she held onto everything, I guess.

This evidence not only restores confidence in L.C.'s testimony, but directly implicates Wortman as a participant in the June 22 Suboxone sale.

Wortman argues that the agent's real-time recorded description and testimony regarding his observations on June 22 are insufficient to corroborate L.C.'s testimony because L.C. testified that she only bumped fists—gave him "knucks"—with Wortman outside, and gave him his share of the money inside the trailer. However, when reviewing the sufficiency of corroborating evidence, this court views the evidence in the light most

favorable to the verdict and assumes the jury disregarded conflicting evidence. *Chavarria-Cruz*, 839 N.W.2d at 519. In accordance with that standard, it is reasonable to assume that the jury credited the undercover agent's testimony and evidence, and disregarded L.C.'s testimony that she gave Wortman the money inside the trailer.

Additional corroboration was provided by Wortman's father, who testified to Wortman's strained financial circumstances in 2016, which goes to motive. Wortman's father testified that in June 2016 he was helping his son financially by paying his bills, and that he had a power of attorney which gave him "control over [Wortman's] finances." This evidence corroborates L.C.'s testimony because it shows that Wortman possessed a motive—financial necessity—to participate in the sale of his Suboxone medication in June 2016.

Finally, corroboration was provided by Dr. Wiberg, the Executive Director of the Minnesota Board of Pharmacy. Dr. Wiberg testified to Wortman's access to the instrument used to commit the offense—his prescription for Suboxone. Dr. Wiberg testified that Wortman had three prescriptions filled between May and July 2016 for buprenorphine/naloxone, which is the generic form of Suboxone.

Wortman argues that Dr. Wiberg's testimony does not corroborate L.C.'s testimony, because Wortman was prescribed Suboxone in sublingual form, meaning it goes under the tongue, and Wortman asserts that Dr. Wiberg's testimony did not establish that the Suboxone pills recovered from the June 22 sale match his prescription. Wortman relies on Dr. Wiberg's testimony that the pills recovered from the sale "don't look like an under-the-tongue code would normally look like." However, Dr. Wiberg also testified that "without

actually being able to look [the code on the recovered pills] up, it's possible it could be sublingual, but without being able to look it up, I could not tell you if those are sublingual or not at this point." Viewing Dr. Wiberg's evidence in the light most favorable to the verdict, it was possible for the jury to conclude that the Suboxone pills recovered from the June 22 sale matched Wortman's prescription, which further corroborated L.C.'s testimony.

Prosecutorial misconduct

Wortman argues that during the course of opening statements and closing arguments, the prosecutor used two phrases, each of which constituted misconduct entitling him to a new trial. Wortman identifies seven instances where the prosecutor referred to him as a "drug dealer," and six times where the prosecutor used the pronoun "we" to align himself with the jury. Wortman did not object to any of these instances of alleged misconduct during the state's argument. When a defendant fails to object during trial, prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The defendant bears the burden of establishing error that is plain, but upon doing so, the burden shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict. *Id*.

Use of the term "drug dealer"

Wortman asserts that the prosecutor committed misconduct during his opening statement and closing argument by referring to him as a drug dealer. "Prosecutorial misconduct results from violations of clear or established standards of conduct, e.g., rules,

laws, orders by a district court, or clear commands in this state's case law." *Nunn v. State*, 753 N.W.2d 657, 661 (Minn. 2008) (quotation omitted). "When assessing alleged misconduct during . . . argument, we look to the . . . argument as a whole, rather than to selected phrases and remarks." *Id*.

On six separate occasions, twice during his opening statement and four times during his closing argument,[2] the prosecutor used the refrain: "[Wortman] should have been a step-dad who stopped it, but instead he was a drug dealer who profited." Wortman argues that by referring to him as a "drug dealer," the prosecutor sought to inflame the passions of the jury and thus committed misconduct entitling him to a new trial.

During argument "the prosecutor must refrain from language that might inflame the passions and prejudices of the jury." *State v. Montgomery*, 707 N.W.2d 392, 399-400 (Minn. App. 2005). In *Montgomery*, a case involving an undercover drug arrest in Kasson, the prosecutor asked the jury during his opening statement to imagine a hypothetical newspaper headline describing the crime: "Twin Cities Drug Dealer Caught in Kasson Sting." *Id*. at 396. This court stated that while "it might be argued that that is precisely what the prosecutor intended to prove and, in hindsight, did prove[,] . . . the language was inflammatory and could have little effect other than to arouse jurors' negative emotions towards Montgomery." *Id*. at 400.

[2] The prosecutor also used the phrase "drug dealers don't create contracts," but this was only a general observation about the nature of illegal drug sales, meant to explain the lack of a formal agreement in accordance with the state's theory of the case.

In *Montgomery*, the prosecutor's statement constituted misconduct because, even though it went to the ultimate issue of the trial, the only purpose for the reference to a made-up newspaper headline was to prey upon the jurors' emotions. Here, the prosecutor's refrain that Wortman "should have been a step-dad who stopped it, but instead he was a drug dealer who profited," while emotionally charged, was directly tied to an issue to be determined by the jury.

Wortman was not only tried and convicted of third-degree aiding and abetting a narcotics sale, but also convicted of contributing to the delinquency of a minor, who in this case was his own stepdaughter. Therefore, unlike a hypothetical newspaper headline whose sole purpose was to inflame, the prosecutor's emotionally charged refrain goes directly to the interconnected charges the state was trying to prove: that Wortman aided and abetted a drug sale, and he did so by contributing to the delinquency of his own stepdaughter. While the prosecutor's presentation of the interconnected nature of these offenses was emotionally charged, a prosecutor is not required to make a colorless argument. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995).

This court has also stated that referring to a defendant as a drug dealer constitutes prosecutorial misconduct where "[t]he prosecutor was improperly attempting to prove appellant's guilt by establishing his character as a drug dealer." *State v. Richardson*, 514 N.W.2d 573, 577 (Minn. App. 1994) (citing Minn. R. Evid. 404(a)). Unlike in *Richardson*, here, the prosecutor was not encouraging the jury to convict Wortman based on his character of being a drug dealer, but rather was asking the jury to determine that Wortman aided and abetted his stepdaughter's sale of Suboxone, based upon the evidence presented.

Therefore, the prosecutor did not commit error by referring to Wortman as a drug dealer during his opening statement and closing argument.

Use of "we"

Wortman argues that the prosecutor also committed misconduct during his closing argument by repeatedly using the pronoun "we" to impermissibly align himself with the jury. "[A] prosecutor is not a member of the jury, so to use 'we' and 'us' is inappropriate and may be an effort to appeal to the jury's passions." *State v. Mayhorn*, 720 N.W.2d 776, 790 (Minn. 2006).

Wortman asserts that the following statements made by the prosecutor during closing argument constitute misconduct: "So we know beyond a reasonable doubt that Mr. Wortman was the source of the pills"; "[l]et's talk about the story of the buys because that's also how we know that he was a source"; "[w]e know that these are the two phone numbers"; "[m]oney. We heard some testimony about that"; "I'm not going to drag you through all those charges because we've been in this land for quite awhile. We've been talking about speculation and irrelevant details"; and "[n]ow there was a statement during [Wortman's closing] we got to prove that those pills are sublingual beyond a reasonable doubt."

In *Mayhorn*, the supreme court held that the statement "[t]his is kind of foreign for all of us, I believe, because we're not really accustomed to this drug world and drug dealing" constituted prosecutorial misconduct because it was impermissible for the prosecutor to describe herself and the jury as "a group of which the defendant is not a part." *Id*. at 789-90. However, the supreme court in *Nunn* distinguished statements such as "[w]e

learned in this case that he possesses and carries guns. We learned that he threatened to hurt people if it involves his money or his drugs" from the language it found impermissive in *Mayhorn*. 753 N.W.2d at 662-63. "Although this use of 'we' may align the prosecutor with the jurors, it does not necessarily exclude the defendant because the 'we' could reasonably be interpreted in this context to refer to everybody who was in the court when the evidence was presented." *Id*. at 663.

Most of the "we" statements identified by Wortman in the present matter are of the generally inclusive type allowed in *Nunn*, as opposed to the exclusionary type described in *Mayhorn*, because they recite evidence heard by everyone in the courtroom, instead of creating an impermissive us-versus-them dichotomy of prosecutor and jury on one side and Wortman on the other. However, two of the prosecutor's "we" statements constitute misconduct. The statements: "So we know beyond a reasonable doubt that Mr. Wortman was the source of the pills," and "[l]et's talk about the story of the buys because that's also how we know that he was a source" cannot reasonably be construed to include Wortman in their use of the pronoun "we," because Wortman asserted that he was not the source of the Suboxone. As such, these statements align the prosecutor with the jury as a group distinct from Wortman, and thus constitute plain error.

Upon a showing of plain error, the burden shifts to the state to demonstrate that Wortman's substantial rights were not affected by the error. *Ramey*, 721 N.W.2d at 302. Appellate courts look to the pervasiveness of the misconduct and the strength of the evidence against Wortman, among other factors, to determine whether the errors affected his substantial rights. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017).

Here, the errors constitute two statements made by the prosecutor during closing argument. However, the district court instructed the jury that the arguments of the attorneys are not evidence. Also, the evidence against Wortman was strong. The state introduced the recorded statements and text messages of L.C., along with her testimony and that of the undercover officer, which directly implicated Wortman in the June 22 sale. Evidence was also presented that Wortman possessed a prescription for Suboxone at that time, and had a motive—financial necessity—to participate in the sale. Upon this basis, the prosecutor's two erroneous "we" statements did not affect Wortman's substantial rights, and therefore he is not entitled to a new trial.

Resentencing

The state concedes that this matter should be remanded for resentencing because Wortman's two convictions—for aiding and abetting a drug sale and contributing to the delinquency of a minor—occurred as part of the same behavioral incident, and therefore only one sentence should have been imposed. *See* Minn. Stat. § 609.035, subd. 1 (2018) (stating that with certain exceptions, "if a person's conduct constitutes more than one offense . . . the person may be punished for only one of the offenses . . . .").

While this court is not bound by a party's concession, *see State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) ("[I]t is the responsibility of appellate courts to decide cases in accordance with law. . . ."), the behavior for which Wortman was separately punished satisfies the single-behavioral-incident test for intentional crimes set forth in *State v. Bauer*. 792 N.W.2d 825, 828 (Minn. 2011) ("In order to determine whether two intentional crimes are part of a single behavioral incident, we consider factors of time and

place . . . [and w]hether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." (quotation omitted)). Therefore, remand for resentencing is appropriate.

Affirmed in part, reversed in part, and remanded.