STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1925

State of Minnesota,
Respondent,

vs.

Reed Michael Nelson,
Appellant.

Filed October 19, 2010
Affirmed
Peterson, Judge

St. Louis County District Court
File No. 69HI-CR-08-15

Lori Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, St. Paul, Minnesota; and

Melanie S. Ford, St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

PETERSON, Judge

In this appeal from a conviction of first-degree sale of methamphetamine and fifth-degree possession of methamphetamine, appellant argues that (1) the district court erred

in refusing to suppress evidence seized pursuant to a warrant that did not describe the place to be searched with sufficient particularity; and (2) appellant is entitled to a new trial because the prosecutor engaged in prejudicial misconduct by (a) eliciting inadmissible bad-character evidence, (b) educating and predisposing the jury to find the informant's testimony credible, (c) implying a guarantee of the informant's truthfulness, and (d) arguing facts that were not introduced into evidence. We affirm.

FACTS

Cory Skorczewski, a special narcotics agent with the Minnesota Bureau of Criminal Apprehension (BCA), arrested J.S. on a first-degree methamphetamine charge. J.S. offered to help police in exchange for consideration on his case. The information provided by J.S. led to charges being filed against appellant Reed Michael Nelson. Hibbing Police Investigator Ryan Riley assisted Skorczewski in investigating appellant.

J.S. met Nelson during the spring of 2006. By September 2006, J.S. had made three or four drug purchases from appellant. Each time, J.S. bought between one and three and one-half grams of methamphetamine. The drug transactions always occurred in appellant's motor home, which was parked at a salvage yard on Highway 73.

J.S. told Skorczewski that appellant is "an ounce dealer of methamphetamines" and that appellant was associated with B.C., whom officers knew to be a large-scale methamphetamine supplier. J.S. also said that when the salvage-yard gate was open, it meant that appellant was open for business. Based on information received from J.S. and other informants and from two earlier investigations, Skorczewski and Riley were familiar with the location of appellant's motor home.

In September 2006, J.S. told Skorczewski and Riley that he had recently sold a motorcycle to appellant and had received a $500 down payment but was still owed additional money. J.S. agreed to assist officers in making a controlled buy from appellant. The plan was for J.S. to get an ounce of methamphetamine and cash from appellant as payment for the motorcycle.

The officers searched J.S.'s person and vehicle and found no drugs or money. After equipping J.S. with an electronic monitoring device, the officers followed him to the salvage yard. Skorczewski did not lose sight of J.S. from the time J.S. was searched until he entered the salvage yard. When J.S. arrived at appellant's residence, crushed cars were being loaded onto a semi-truck, and someone was there getting tires changed.

After the others left, J.S. had a conversation with someone whom the officers identified as appellant. Riley was able to identify appellant's voice because he had listened to it during a previous investigation, and appellant's voice was "fairly distinct." Also, J.S. repeatedly called the person by appellant's first name.

J.S. talked to appellant about payment for the motorcycle and also asked if appellant had heard from B.C. Appellant said that B.C. had been to appellant's residence and left appellant a "zip," meaning one ounce of methamphetamine. After talking to appellant for about ten minutes, J.S. asked, "Can we get the deal done?" J.S. made a couple of references to methamphetamine, using a slang term, and then the officers heard J.S. and appellant enter the motor home. J.S. asked about closing the deal, and appellant said that he would give J.S. $500 and also talked about guns that appellant had. The officers could hear rustling noises, someone grabbing something, and statements about

ounces. After appellant made a reference to 4.23 ounces, J.S. said: "That's way too much. I don't want all that." Appellant responded: "It ain't comin' from [B.C.]. It's coming from my hands first. Nobody in this state touches it first but me." After appellant gave J.S. the methamphetamine, appellant asked J.S. if J.S. could "move some stuff for him," meaning sell some methamphetamine.

J.S. left the salvage yard, and the officers followed him to a parking lot. J.S. gave Skorczewski a baggie containing a white powdery substance that field-tested positive for methamphetamine. BCA testing showed that the substance weighed 24.4 grams and contained methamphetamine. J.S. also had $900 in cash on his person.

In June 2007, a team of officers, including Riley, executed a search warrant on the salvage yard. In the motor home, officers found a letter to B.C. and a wedding invitation addressed to appellant. Forty guns were found in the motor home, including three that had been reported stolen. Appellant's DNA was on one of the stolen guns. Officers also found a pipe containing residue and plastic baggie corners containing suspected methamphetamine residue. The pipe residue tested positive for methamphetamine, but testing on the baggie corners was inconclusive.

Appellant was charged with one count each of first-degree sale of methamphetamine and fifth-degree possession of methamphetamine and three counts of receiving stolen firearms. The district court denied appellant's motion to suppress evidence discovered during execution of the search warrant, and the case was tried to a jury.

At trial, two witnesses testified for appellant. His mother testified that appellant lived in a motor home on his parents' property and worked at the salvage yard. Appellant's mother testified that he collected guns and intended to sell them for retirement funds.

A truck driver testified that he picked up crushed vehicles from the salvage yard and took them to places in Canada where he would receive a scale ticket. Using a scale ticket, appellant attempted to show that the truck driver could not have been at the salvage yard when J.S. arrived to purchase methamphetamine, as J.S. had testified, because the truck driver had been driving back from Canada. The truck driver, however, testified on cross-examination that he did not give the scale ticket to appellant and that he had no idea where it had come from.

The jury found appellant guilty of both controlled-substance offenses but not guilty of the three receiving-stolen-firearms charges. The district court sentenced appellant to the presumptive sentence of 86 months on the first-degree controlled-substance offense and a concurrent term of 15 months on the fifth-degree offense. This appeal followed.

D E C I S I O N

I.

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing--or not suppressing--the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The Fourth Amendment requires that a search warrant particularly describe the place to be searched. U.S. Const. amend. IV; *see also* Minn. Const. art. 1, § 10 (requiring that search warrant particularly describe place to be searched); Minn. Stat. § 626.08 (2008) (same). Evidence obtained in violation of the Fourth Amendment's particularity requirement is subject to exclusion. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961). The purpose of the particularity requirement is to prevent general exploratory searches and to "minimize the risk that officers executing search warrants will by mistake search a place other than the place intended by the magistrate." 2 Wayne R. LaFave, *Search and Seizure* § 4.5, at 562 (4th ed. 2004).

Appellant argues that the search warrant was defective because the application and warrant listed the address of the place to be searched as 3510 Highway 73, and appellant's motor home was located at 3512 Highway 73. But

> [n]ot all errors in the search warrant's description of the premises to be searched will invalidate a search pursuant to the warrant. The test for determining the sufficiency of the description of the premises is whether the description is sufficient so that the executing officer can locate and identify the premises with reasonable effort with no reasonable probability that [other premises] might be mistakenly searched.

State v. Gonzales, 314 N.W.2d 825, 827 (Minn. 1982) (alteration in original) (quotation omitted).

In *Gonzales*, after a reliable informant showed police a residence containing stolen property, police applied for and received a warrant to search "41 Wood Street." *Id.* But when the officer executing the warrant went to the residence that he had been shown by

the informant, he learned that the address was 41 Delos, not 41 Wood. *Id.* The supreme court reversed the district court's order suppressing evidence seized during execution of the warrant. *Id.* The supreme court concluded that even though the officer learned that the warrant's address was inaccurate when executing the warrant, "there was no reasonable probability that [the officer] was searching the wrong house." *Id.* The court based its conclusion on these facts: "(a) [the officer] knew . . . which house was [Gonzales's] house, (b) the house did have the number 41 on it, (c) the house was a corner house bounded by Wood Street on one side, and (d) there were no other houses bearing the number 41 in the neighborhood." *Id.*; *see also State v. Kessler*, 470 N.W.2d 536 (Minn. App. 1991) (reversing order suppressing evidence when application listed house number incorrectly but officers executing warrant had been shown correct house by informant and did in fact search the correct premises).

Here, the district court found that the fire number 3512 was located outside the gate to the salvage business and that the officers executing the warrant had knowledge of the correct premises "[f]rom prior contacts and ongoing investigation, as well as aerial photographs and a hand drawn map." The district court also found that appellant's home was located some distance away from his father's home, mail was only delivered to the address 3510 Highway 73, appellant's personal mail was delivered to his father's address, and the officers did in fact search the correct premises. The evidence in the record supports these findings, and the findings support the conclusion that there was no reasonable probability that the wrong premises might be mistakenly searched. Under *Gonzales* and *Kessler*, the district court properly denied appellant's suppression motion.

Relying on *State v. Souto*, 578 N.W.2d 744, 747-78 (Minn. 1998), and *State v. Cavegn*, 356 N.W.2d 671, 674 (Minn. 1984), appellant argues that the search warrant was defective because it included "any outbuildings" on the property without a showing of a nexus between the outbuildings and criminal activity. Both *Souto* and *Cavegn* involved a nexus between the defendant's residence and criminal activity. Neither addressed the showing required to establish a nexus between outbuildings and criminal activity when a nexus has been established between a residence on the property and criminal activity. Because appellant has failed to establish that there was an insufficient nexus between the outbuildings and criminal activity, we will not reverse on this basis. *See State v. McBride*, 666 N.W.2d 351, 363 (Minn. 2003) (stating, in a challenge to the admission of evidence discovered during a search, that defendant has burden of showing error).

II.

Objected-to Alleged Misconduct

If the defendant objects to prosecutorial misconduct, a new trial will not be granted if the misconduct was harmless beyond a reasonable doubt. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). Prosecutorial misconduct is harmless beyond a reasonable doubt if the verdict was surely unattributable to the error. *Id.*

Appellant argues that the prosecutor improperly elicited bad-character evidence when Riley testified that he recognized appellant's voice while monitoring the controlled buy because he had heard it during a previous controlled buy and then Riley referred to a shooting that had occurred at appellant's residence in 2007. The district court sustained appellant's objections to this testimony. *See State v. Harris*, 521 N.W.2d 348, 354

(Minn. 1994) (stating that a prosecutor may not intentionally elicit inadmissible character evidence); *State v. Goar*, 295 N.W.2d 633, 634-35 (Minn. 1980) (stating that evidence of bad acts otherwise inadmissible may be admissible when defendant testifies about his good acts).

Before trial, appellant moved to prohibit the prosecutor from obtaining testimony from the investigating officers regarding their identification of appellant's voice during the controlled buy. Appellant argued that the witnesses did not have the expertise to identify the voice and that there was no foundation for the testimony. The district court deferred ruling on appellant's motion until trial and stated, "I'll have to make a decision on a specific objection when it is made based on what the foundation is as put in at the time."

During the prosecutor's examination of Riley at trial, the following exchange occurred:

> Q. Okay. Later on, are you able to identify a voice that you think is the defendant's?
> A. Yes.
> Q. Explain to the jury how you are able to do that.
> A. Unbeknownst to [appellant], I'd had a separate investigation on him during which I sent out my own informant. My own informant had attempted to buy methamphetamine from [appellant] but it was what we call an unsuccessful buy because it didn't go down. There was … and I remember the audio on that. [Appellant] has a fairly distinct voice.
> Q. So based on a number of things, you're able to identify, at least at some point and time, the [appellant's] voice when [J.S.] went in there on September 27th, is that correct?

Appellant objected to this question on the ground of foundation, and the district court sustained the objection. The prosecutor then moved on to a different line of questioning. The prosecutor acted in accordance with the district court's pretrial evidentiary ruling and did not commit misconduct when he asked how Riley was able to identify appellant's voice. Riley's testimony about the previous controlled buy was admissible to show how Riley was able to identify appellant's voice and was not admitted to show action in conformity therewith. *See Harris*, 521 N.W.2d at 353 (stating that evidence of threats to witnesses may be relevant to show consciousness of guilt but not to show defendant's propensity or disposition to commit charged crime).

In response to a question about the execution of the search warrant at appellant's residence, Riley referred to a shooting that had occurred there in October 2006. The prosecutor did not elicit the testimony, and no details were provided about the shooting. Appellant objected to the testimony as irrelevant. The district court sustained the objection on the ground that the testimony was not responsive to the question and instructed the jury to disregard the statement about somebody being shot. The unsolicited testimony is not a ground for reversal. *See State v. Thompson*, 414 N.W.2d 580, 583 (Minn. App. 1987) (affirming conviction when officer made unsolicited statement about defendant's previous arrest), *review denied* (Minn. Jan. 15, 1988); *State v. Bobo*, 414 N.W.2d 490, 493 (Minn. App. 1987) (affirming conviction when police officer commented about defendant's criminal history), *review denied* (Minn. Dec. 22, 1987). Also, it is presumed that the jury follows the district court's instructions to disregard evidence. *State v. Miller*, 573 N.W.2d 661, 675-76 (Minn. 1998).

Unobjected-to Alleged Misconduct

The plain-error standard applies when reviewing claims of prosecutorial misconduct to which no objection was made at trial. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The plain-error doctrine applies if there is error that is plain and that affects the defendant's substantial rights. *State v. Washington*, 725 N.W.2d 125, 133 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007). An error is plain if it is clear or obvious, meaning it "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. The defendant bears the burden of demonstrating plain error, but upon satisfying this obligation, the burden shifts to the state to show that the error did not affect the defendant's substantial rights. *Id.*

Appellant argues that the prosecutor improperly indoctrinated the jury during voir dire. The purpose of voir dire is to discover "bases for challenge for cause and [to gain] knowledge to enable an informed exercise of peremptory challenges." Minn. R. Crim. P. 26.02, subd. 4(1) (2009). A defendant has a constitutional right to an impartial jury. U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 6; *State v. Greer*, 635 N.W.2d 82, 87 (Minn. 2001). But "either party may make a reasonable inquiry of a prospective juror or jurors in reference to their qualifications to sit as jurors in the case." Minn. R. Crim. P. 26.02, subd. 4(1) (2009).

Appellant argues that it was improper for the prosecutor to ask jurors their opinions about informants, ask if they believed that informants come forward of "their own free will," whether it was a "necessary or unnecessary cost of doing business for law enforcement to deal with informants, especially in the drug world," and whether they

understood that informants "may provide information but it has got to be truthful and accurate, right." Appellant also argues that it was improper for the prosecutor to ask jurors if they were familiar with the terms "flipping" or "climbing the food chain, the ladder, of people who are dealing drugs." A prospective juror, who was a drug counselor, stated that flipping was like "the hierarchy in like a gang. The different levels of people and associates that you go through, drug runners, or those kind of things and how you're pawning off responsibilities." The prosecutor then asked: "So there are situations where law enforcement arrests someone who's a little lower on the ladder, sort of the food chain, and they get that person to turn in the bigger fish? That type of stuff?"

Appellant also objects to the following questioning regarding the reliability of informants.

> Q. . . . Do you think law enforcement just accepts at face value everything that they're saying?
> A. Not necessarily.
> Q. Okay. Law enforcement, you would think, you'd have some controls in their dealing with informants. And by that I mean, you know, they might wire them up, things of that nature?
> A. You see it done on tv.

Appellant relies on *State v. Bolstad*, 686 N.W.2d 531 (Minn. 2004), in which the defendant was convicted of first-degree murder for killing his father. The prosecutor asked jurors whether they had ever offered money to have a parent killed or been in a situation where someone offered money to have a parent killed. 686 N.W.2d at 543-44. In contrast to the specific questions asked in *Bolstad*, here, the prosecutor asked general questions to determine whether jurors were biased with respect to informants. Appellant

also cites to the Minnesota Supreme Court's Jury Task Force Report, December 20, 2001, which contains recommendations that are not part of the rules. Because appellant has not shown that the prosecutor's questioning of jurors was improper, appellant has failed to satisfy the first two prongs of the plain-error test.

Appellant argues that the prosecutor improperly used J.S.'s plea agreement to vouch for his credibility. Improper vouching occurs "when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003) (quotations omitted). Appellant argues that when the prosecutor asked Riley and Skorczewski if an informant would get a deal if he did not provide accurate and reliable information and stated in his opening statement that J.S. had to provide accurate and truthful information to get a deal, the prosecutor committed misconduct by implying that J.S. was credible.

"[M]ere inquiry by the government of its witnesses regarding their understanding of the [plea] agreements they have entered into does not in itself constitute vouching for the witness's credibility." *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (second alteration in original) (quotation omitted). The supreme court has held "that testimony relating to the existence, the terms, including any truthfulness provision, and the witness's understanding of the plea agreement between the witness and the state, without more, does not constitute vouching." *Id.* at 498.

The questions to the officers and the remark during opening statement do not go beyond stating the truthfulness requirement of the plea agreement. But even if there was

misconduct, it was at most minor, and J.S.'s testimony about the controlled buy was corroborated by Skorczewski and Riley, who heard the transaction as it occurred; by Riley's identification of appellant's voice; and by the searches of J.S. and his vehicle before the controlled buy and J.S.'s possession of methamphetamine and cash after the controlled buy.

Appellant argues that the prosecutor misstated the evidence during closing argument by insinuating that appellant was getting drugs from Canada, arguing that the salvage yard was a "great cover" for selling drugs due to all the places to hide drugs, and arguing that appellant accepted guns in exchange for drugs.

Counsel is not entitled to make arguments that have no factual basis in the record evidence, and such arguments are improper. *See State v. Thompson*, 578 N.W.2d 734, 742 (Minn. 1998) (concluding that prosecutor's remarks that contained pure speculation without factual basis were improper); *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (stating that the prosecutor cannot intentionally misstate the evidence). But counsel may present "all legitimate arguments on the evidence, [in order] to analyze and explain the evidence, and [in order] to present all proper inferences to be drawn therefrom" to the jury at trial. *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980). And in order to determine whether a prosecutor's statements during closing argument are improper, a reviewing court looks to the "closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

During the controlled buy, appellant stated: "It ain't comin' from [B.C.]. It's coming from my hands first. Nobody in this state touches it first but me." Although there was no evidence that semi-trucks going to Canada were involved in appellant's drug business, appellant's own statement implies that he was getting drugs from out of state. Regarding the argument about the salvage yard being a "great cover," although drugs were found only in the motor home, the statement that there were virtually unlimited places to hide drugs was accurate, as was the statement that the operation of the salvage yard gave a legitimate reason for people to be coming and going from appellant's property.

The state concedes that it may have been misconduct for the prosecutor to suggest that appellant accepted guns in exchange for drugs. But the jury found appellant not guilty of receiving stolen firearms, so it apparently accepted appellant's mother's testimony about his gun collection.

To the extent that there may have been prosecutorial misconduct during the opening statement and closing argument beyond the implication that appellant accepted guns in exchange for drugs, it consisted of a few isolated statements that were not repeated or emphasized. And there was very strong evidence corroborating J.S.'s testimony about the controlled buy. We conclude that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict. *See Ramey*, 721 N.W.2d at 302 (stating that when defendant shows plain error in prosecutorial misconduct context, burden shifts to state to show that there is no

reasonable likelihood that absence of misconduct would have had significant effect on jury's verdict).

III.

The claims in appellant's pro se brief are not supported by argument or legal authority, so they are deemed waived. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002).

If we were to address those claims, they would fail on the merits. Appellant claims that Riley's and Skorczewski's testimony conflicted. Inconsistencies in testimony and conflicts in evidence do not require reversal, but rather they are factors for the jury to consider when making credibility determinations. *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004); *see also State v. Pippitt*, 645 N.W.2d 87, 92-94 (Minn. 2002) (stating that it is jury's role to resolve conflicts in evidence and weigh witness credibility).

Appellant also claims that Skorczewski falsely testified that a letter from B.C. addressed to appellant was found at appellant's motor home and that the state failed to prove that J.S. owned a motorcycle or sold one to appellant. It was the jury's role to determine the credibility of Skorczewski's testimony and J.S.'s testimony about the motorcycle.

Affirmed.