STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2090

State of Minnesota,
Respondent,

vs.

Phouminh Kullavongsa,
Appellant.

Filed October 26, 2010
Affirmed
Lansing, Judge

Mower County District Court
File No. 50-CR-09-1303

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

Kristen Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Wright, Judge.

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

LANSING, Judge

A jury found Phouminh Kullavongsa guilty of possession of methamphetamine and possession with intent to sell. On appeal, Kullavongsa contends that three trial errors require that we reverse and remand for a new trial: erroneous admission of *Spreigl* evidence, improper voir dire restriction, and prosecutorial misconduct during closing argument. Because we conclude that no reversible error occurred during the trial process, we affirm.

F A C T S

The police executed a search warrant at a residence in Austin, Minnesota in April 2009. The warrant was based on suspicion of drug sales from the residence and a "garbage pull" that yielded a large number of baggies with missing corners. A baggie subjected to a laboratory analysis tested positive for methamphetamine. Phouminh Kullavongsa and two other men were at the residence at the time of the search. Kullavongsa did not own the residence, but was a frequent visitor. In the course of the search, officers discovered methamphetamine and additional evidence that methamphetamine was being sold at the residence. The methamphetamine was found in a garbage canister in the kitchen, but none was found on Kullavongsa's person. Neither Kullavongsa nor anyone else admitted to the police conducting the search that they had any knowledge of the drugs at the residence.

The state charged Kullavongsa with third-degree possession of methamphetamine with intent to sell, fifth-degree possession of methamphetamine, ineligible person in

possession of a firearm that was found under a couch, and possession of stolen property (the firearm). In response to the state's pretrial motion, the district court admitted Kullavongsa's two prior convictions for possession of methamphetamine, one from 2006 and one from 2007. Both convictions were admitted over the objection of Kullavongsa as proof of knowledge or plan.

In addition to the *Spreigl* evidence, the two other people who were at the house at the time of the search and the owner of the house provided testimony describing Kullavongsa's possession, use, and distribution of methamphetamine. The state also admitted evidence of an incoming text message on Kullavongsa's cell phone that, although ambiguous, appeared to be an order for drugs.

The jury found Kullavongsa guilty of third-degree possession of methamphetamine with intent to sell and fifth-degree possession of methamphetamine. He was acquitted of the remaining charges. Kullavongsa now appeals, challenging the district court's admission of the *Spreigl* evidence, the restriction on voir dire, and the propriety of the prosecutor's comments in closing argument.

D E C I S I O N

I

Evidence of other crimes or misconduct is not admissible to show bad character. *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). It may be allowed, however, if offered for the limited purpose of showing "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). The admission of *Spreigl* evidence is subject to the district court's

discretion, and a ruling admitting or rejecting the evidence will not be reversed absent a clear abuse of discretion. *State v. Steinbuch*, 514 N.W.2d 793, 800 (Minn. 1994).

A five-step process governs the admissibility of *Spreigl* evidence: (1) "the state must give notice of its intent to admit the evidence"; (2) the state must clearly indicate the purpose for which the evidence is offered; (3) the defendant's participation in the offense must be clear and convincing; (4) "the evidence must be relevant and material to the state's case"; and (5) the probative value of the evidence must outweigh its potential for unfair prejudice. *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). In an appeal from the admission of *Spreigl* evidence, the defendant bears the burden of showing error and any resulting prejudice. *Id.* at 685.

The district court ruled that all five *Ness* requirements were met and that Kullavongsa's prior convictions for possession of methamphetamine were admissible to show knowledge and plan. Kullavongsa does not dispute that the state complied with the first three *Ness* requirements, but challenges the last two. He argues that admission of the evidence was error because it was not material to the state's case and its prejudice outweighed its probative value.

The evidence supports the district court's determination that the two prior convictions were material to the state's case. To convict Kullavongsa for either of the controlled-substance charges the state had to prove, among other elements, that Kullavongsa knew or believed the substance seized during the search was methamphetamine. *See* Minn. Stat. §§ 152.023, subd. 1(1), .025, subd. 2(1) (2008) (identifying elements of third-degree drug possession with intent to sell and fifth-degree

drug possession); *see also* 10A *Minnesota Practice*, CRIMJIG 20.16, 20.36 (2006) (identifying knowledge or belief as element). Kullavongsa's prior convictions for possession of methamphetamine provide strong evidence that he knew or believed the substance found by officers at the residence was methamphetamine. Before trial, Kullavongsa stipulated to his past criminal record for purposes of the ineligible-possession-of-firearms charge but did not stipulate to any other element of the charges. Consequently, the state had the burden of proving that Kullavongsa knew or believed the substance that he allegedly possessed or intended to sell was methamphetamine. Thus, the convictions were material to the state's case.

The evidence also supports the district court's determination that the probative value of admitting the prior convictions outweighed any unfair prejudice that would result. Unfair prejudice does not prevent the admission of all adverse or damaging evidence; it prevents the admission of damaging "evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

Kullavongsa essentially argues that the *Spreigl* evidence was unfairly prejudicial because it did not provide the jury with any additional probative information and the district court did not make specific findings on the necessity of the evidence. This argument ignores the evidence's relevance to the element of knowledge that is required for proof of each of the controlled-substance crimes and its relevance to a plan of distribution that is required for the third-degree offense. The previous convictions show familiarity with distribution of a controlled substance and knowledge of packaging.

Admission of this evidence was probative of Kullavongsa's knowledge and plan to sell methamphetamine. The district court considered the necessity of the *Spreigl* evidence on the two controlled-substance charges as part of balancing the probative value against the prejudicial effect. *See Ness*, 707 N.W.2d at 690 (defining need in *Spreigl* context and holding that need for *Spreigl* evidence must be considered when balancing probative value against possible prejudice). It is not required that the district court make separate findings on the necessity factor. *Id.* Although the evidence had a potentially prejudicial effect on the element of knowledge, it was not unfairly prejudicial because proving knowledge by evidence of prior convictions is a legitimate means of proof in Minnesota. *See* Minn. R. Evid. 404(b) (identifying permissible purposes for admitting evidence of another crime).

Because it was limited to its proper purpose, the evidence was not more prejudicial than probative. Before admitting the prior convictions, the district court instructed the jury not to use them as proof of character or that Kullavongsa acted in conformity with that character. *See State v. Berry*, 484 N.W.2d 14, 18 (Minn. 1992) (stating that cautionary instructions reduced any unfair prejudicial effect of *Spreigl* evidence). The district court gave these cautionary instructions to the jury again before closing arguments. It is presumed that the jury followed the district court's instructions. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002).

On this record, we conclude the district court did not abuse its discretion by determining that the probative value of the *Spreigl* evidence outweighed the prejudicial effect and admitting the two prior convictions.

II

The second ground that Kullavongsa advances for reversal relates to restriction of voir dire. The federal and state constitutions provide the right to an impartial jury trial. U.S. Const. amend VI; Minn. Const. art. I, § 6. This right includes the ability to perform a satisfactory voir dire to determine whether any jurors are unqualified. *State v. Greer*, 635 N.W.2d 82, 87 (Minn. 2001). The purpose of voir dire is to discover "bases for challenge for cause and for the purpose of gaining knowledge to enable an informed exercise of peremptory challenges." Minn. R. Crim. P. 26.02, subd. 4(1) (2009). The district court bears the responsibility of preventing abuse of voir dire, and it has the discretion "to deny permission to ask certain questions." *State v. Owens*, 373 N.W.2d 313, 315 (Minn. 1985). We will not overturn a district court's decision governing voir dire absent an abuse of discretion. *Greer*, 635 N.W.2d at 87.

The district court sustained an objection to Kullavongsa's inquiry of whether "anyone on the panel [had] ever been blamed for something that somebody else did?" Kullavongsa claims that the district court's refusal to allow this question prevented him from determining whether any juror believed he was guilty just by virtue of being charged with the offenses.

The Minnesota Supreme Court addressed a similar issue in *Owens*. The excluded question in *Owens* was, "[h]ave you ever been blamed in your life for something you did not do?" 373 N.W.2d at 315. *Owens* did not address the appropriateness of the prohibited question, but relied on the record in determining whether the limitation on voir dire "prevented the defendant from 'discovering bases for challenge for cause' or

'gaining knowledge to enable an informed exercise of peremptory challenges.'" *Id.* (quoting Minn. R. Crim. P. 26.02, subd. 4(1)). The supreme court held that prohibiting the question was not an abuse of discretion when the district court included in its preliminary instructions to the jury panel a specific instruction on "the presumption of innocence, burden of proof, and other pertinent legal principles." *Id.*

In this case the district court, in its preliminary instructions, instructed the jury on the presumption of innocence and burden of proof. The court also instructed the jury that when adjudicating guilt they should give no weight to the fact that a complaint was filed or that the defendant was arrested and charged. The court specifically asked, with no affirmative juror response, the question of whether anyone on the panel would automatically assume that a person must be guilty if he is on trial or has been charged with a crime. Kullavongsa's counsel also explained the presumption of innocence during voir dire. Under these circumstances the district court did not abuse its discretion by sustaining the objection to the question of whether a prospective juror had ever been blamed for something done by another person. The district court's ruling did not prevent Kullavongsa from discovering bases for challenge for cause or gaining knowledge to enable an informed exercise of peremptory challenges.

III

Finally, we address Kullavongsa's claim that the prosecutor committed misconduct in closing argument. The overarching consideration in allegations of prosecutorial misconduct is that it may deny the defendant's right to a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). We reverse a conviction if prosecutorial

misconduct, "when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). If the defendant failed to object to the prosecutorial misconduct, a new trial will be granted if the misconduct was plain error and affects substantial rights. *Ramey*, 721 N.W.2d at 302. An error is plain if it "contravenes caselaw, a rule, or a standard of conduct." *Id*. A prosecutor's misconduct affects substantial rights if there is a reasonable likelihood that its absence would have had a significant effect on the jury's verdict. *Id.* The state bears the burden of showing that an error does not affect substantial rights. *Id.*

Kullavongsa argues that the state lowered its burden of proof during closing and rebuttal arguments in three ways: (1) by stating that the jury's task was simply to choose the more credible version of two competing stories; (2) by misstating the law of accomplice-testimony corroboration; and (3) by suggesting that there was evidence not admitted at trial that supported a guilty verdict. A misstatement of the burden of proof constitutes prosecutorial misconduct. *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010). Kullavongsa did not object to the alleged misconduct at trial; therefore, plain error analysis is applicable.

First, Kullavongsa argues that the state lowered its burden of proof when the prosecutor said that the jury's task was simply to choose the more credible version of two competing stories. The Minnesota Supreme Court has held a similar statement to be a misstatement of the burden of proof. In *Strommen*, the court held that the statement, "weigh the story in each hand and decide which one is most reasonable, which one makes

the most sense" was a misstatement of the burden of proof in the "context" of that trial. *State v. Strommen*, 648 N.W.2d 681, 690 (Minn. 2002).

Unlike the context of *Strommen*, which included numerous errors and a potential for confusion, the burden of proof in Kullavongsa's trial was more clearly stated. Three sentences after telling the jury to choose between two stories, the prosecutor said that the state's burden was to prove every element of each offense beyond a reasonable doubt. And, just before closing arguments, the district court instructed the jury on the burden of proof. Counsel for Kullavongsa also described the burden of proof. In light of the whole trial, the prosecutor's error, if any, was not reasonably likely to have a significant effect on the jury's verdict. Therefore, any error did not affect Kullavongsa's substantial rights.

Kullavongsa's second argument on prosecutorial misconduct is that the state lowered its burden of proof by misstating the law of accomplice-testimony corroboration. The district court correctly instructed the jury on the law of accomplice testimony saying that "the corroborating evidence doesn't have to be enough in itself to convince [the jury] that the defendant committed the crime" and that "[i]t's enough that it tends to show that the defendant committed the crime . . . ." *See* Minn. Stat. § 634.04 (2008) (explaining relationship between accomplice testimony and corroborating evidence). The prosecutor said that the corroborating evidence must strengthen the accomplice testimony so that it "makes sense." Although the prosecutor's statement did not exactly restate the district court's instructions, the variation is insignificant and does not contravene caselaw, a rule, or a standard of conduct. Therefore, this statement was not plain error.

Finally, Kullavongsa argues that the state lowered its burden of proof by suggesting additional evidence outside the record proved guilt. The prosecutor said, "[t]here are a number of possibilities that you [do not] actually know about, a number of reasonable explanations for this thing . . . ." When making a closing argument, prosecutors may draw reasonable inferences from evidence produced at trial. *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009).

Kullavongsa takes this statement out of context. The prosecutor was responding to Kullavongsa's theory that the absence of any money negated his guilt by listing possible reasons why no money was found on Kullavongsa. The prosecutor suggested that Kullavongsa may have flushed money down the toilet, or that one of his accomplices had the money, or that an unidentified Asian male who left just before police arrived had the money, or that the police simply did not find the money. There was testimony at trial that Kullavongsa ran to the bathroom just before police broke into the house, that his accomplices were found with cash, and that an unidentified Asian male had left just before police arrived. Thus, these were all reasonable inferences based on evidence produced at trial and offered as an alternative explanation to Kullavongsa's theory. These statements do not constitute prosecutorial misconduct.

Affirmed.