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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1252**

State of Minnesota,
Respondent,

vs.

Angel Obidio Calix,
Appellant.

**Filed June 11, 2018
Affirmed in part, reversed in part, and remanded
Reyes, Judge
Concurring specially, Tracy M. Smith, Judge**

Todd County District Court
File No. 77-CR-16-271

Lori Swanson, Attorney General, Edwin Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Charles Rasmussen, Todd County Attorney, Long Prairie, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and T. Smith, Judge.

UNPUBLISHED OPINION

REYES, Judge

On appeal from his conviction of four counts of first-degree controlled-substance crime, appellant argues that: (1) the state failed to produce sufficient evidence that he sold

methamphetamine to a confidential informant; (2) he is entitled to a new trial because the prosecutor committed prejudicial misconduct during his opening argument and direct examination; and (3) he is entitled to resentencing under the Drug Sentencing Reform Act (DSRA). We affirm appellant's convictions, but reverse and remand for resentencing.

FACTS

In December 2015, police arrested H.H. (the informant) for possession of methamphetamine while she was on probation. To avoid prosecution, she became a paid confidential informant for the Central Minnesota Drug and Violent Crime Task Force (the task force). Between December 2015 and January 2016, the informant executed four controlled buys from appellant Angel Obidio Calix, each for one-half ounce of methamphetamine. The informant completed each controlled buy in appellant's auto-body shop or in his home that is attached to his shop.

On March 11, 2016, the task force obtained a search warrant for appellant's auto-body shop and home, and on March 16, 2016, the task force obtained a warrant for appellant's arrest. During the search warrant's execution, officers found marijuana, marijuana paraphernalia, a "bug detector,"¹ and a digital scale, but did not find methamphetamine. The task force also seized \$1,000 in cash from appellant's auto-body shop. Later that day, Todd County police arrested appellant and seized his car, but found no evidence of drugs or drug dealing on his person or in his car.

¹ A "bug detector" is a device that is able to alert to the presence of, locate, and disable electronic equipment such as microphones, cameras, and GPS-tracking devices.

Respondent State of Minnesota charged appellant with four counts of first-degree controlled-substance crime in violation of Minn. Stat. § 152.021, subd. 1(1) (2014). The jury found appellant guilty of all charges. The district court sentenced appellant to concurrent sentences of 86, 110, 134, and 158 months based on his criminal-history scores of 0, 2, 4, and 6 points for each count. This appeal follows.

D E C I S I O N

I. The state produced sufficient evidence that appellant sold methamphetamine to the informant.

Appellant first argues that the state failed to prove beyond a reasonable doubt that he was the person who sold methamphetamine to the informant because the informant was unreliable, and her testimony was uncorroborated. We are not persuaded.

When considering a claim of insufficient evidence, we conduct “a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in the light most favorable to the verdict, were sufficient to allow the jury to reach its verdict.” *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (quotation omitted). We assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). And we will not disturb the verdict if, giving due regard to the presumption of innocence and to the prosecution’s burden of proving guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty of the charged offense. *State v. Vang*, 847 N.W.2d 248, 258 (Minn. 2014) (quotation omitted).

Appellant argues that the informant's testimony was unreliable because she was a chronic methamphetamine user, had multiple felony drug convictions, lied to her probation agent about her drug use to avoid a probation violation, and had a motive to lie. The informant herself admitted to each of these facts during her direct examination. But she also testified that she was attending outpatient drug treatment at the time of trial and had ultimately agreed to be an informant because it would discredit her name in the drug world and block future opportunities to purchase drugs and relapse. She was "tired of that life."

It is the exclusive function of the jury to weigh the credibility of witnesses because it is in the best position to do so. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010); *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002). Because our review is rooted in the assumption that "the jury believed the state's witnesses and disbelieved any evidence to the contrary[.]" *Caldwell*, 803 N.W.2d at 384, we decline to undermine the jury's credibility determination of the informant.

Appellant also argues that, because the informant's testimony was unreliable, the state's evidence was insufficient to sustain appellant's convictions absent independent corroboration. But Minnesota law does not require corroboration of a police informant's testimony unless the informant is also an accomplice. *State v. Hadgu*, 681 N.W.2d 30, 34 (Minn. App. 2004), *review denied* (Minn. Sept. 21, 2004). A person who purchases illegal drugs cannot be an accomplice of a person charged with selling drugs because each offense is separate and distinct. *State v. Swynningan*, 304 Minn. 552, 555-56, 229 N.W.2d 29, 32-33 (1975). The informant did not aid appellant in distributing the methamphetamine. Instead, she was the buyer. The state did not have to provide evidence corroborating the

informant's testimony and appellant's arguments attacking the sufficiency of the state's evidence fail.

II. Appellant's prosecutorial-misconduct claims fail.

Appellant argues that the prosecutor committed prejudicial misconduct, violating his right to a fair trial, by: (1) questioning a task-force investigator about the reliability of the informant's testimony; (2) commenting on the reliability of the informant's testimony during his opening argument; and (3) eliciting evidence of appellant's prior bad acts.

Appellant did not object to the prosecutor's questions and comments at trial. We review unobjected-to prosecutorial misconduct under a modified plain-error standard. *Caldwell v. State*, 886 N.W.2d 491, 501 n.6 (Minn. 2016); *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "Under this modified test, the defendant has the burden to prove the existence of an error that is plain." *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). An error occurs and is plain if it violates precedent, a rule, or a standard of conduct, or if it is obvious "conduct the prosecutor should know is improper." *Ramey*, 721 N.W.2d at 299-300, 302. If prosecutorial misconduct amounts to plain or obvious error, the burden shifts to the state to demonstrate that the plain error did not affect the defendant's substantial rights. *Parker*, 901 N.W.2d at 926. But if the defendant does not prove that the state plainly erred, our analysis ends. *State v. Milton*, 821 N.W.2d 789, 804 (Minn. 2012).

A. The witness's vouching testimony.

Appellant first argues that the prosecutor elicited impermissible testimony from the task-force investigator that vouched for the informant's credibility. We disagree.

One witness may not vouch for the credibility of another because it would interfere with the jury's duty to assess credibility. *State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005). Improper vouching testimony is testimony that another witness is telling the truth or testimony that one believes one witness over another. *State v. Ferguson*, 581 N.W.2d 824, 836 (Minn. 1998).

Here, the prosecutor asked the investigator for background information about controlled buys and what generally makes a confidential informant reliable. The investigator testified that a confidential informant is deemed reliable when the task force verifies the informant's information through independent means, including other people, its own observations, and precautionary measures such as searching the informant before and after the controlled buy and requiring the informant to wear a wire during the controlled buy. None of this testimony specifically referred to the informant in this case.

The investigator's statements do not constitute impermissible vouching testimony, and their admission was not error, much less error that was plain, because the statements were made in the context of how the task force determines when an informant is reliable for purposes of their controlled buys. We also note that plain error cannot be established absent binding precedent. *State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008). Caselaw does not expressly prohibit the admission of statements about an informant's reliability in the context of their duties as an informant. And, contrary to appellant's assertion, veracity and truthfulness are not synonymous with reliability. As such, these statements did not constitute vouching.

B. The prosecutor's vouching comments.

Appellant also argues that the prosecutor made impermissible vouching comments during his opening argument. Appellant focuses on two of the prosecutor's comments:

[T]he State will present evidence that the buys took place between a confidential, reliable informant and the defendant.

...

And, finally, too, we'll have the confidential reliable informant testify. There will be testimony as to the drug task force using CRIs. It's common. And I think you'll learn that these confidential reliable informants have a past. They – they – they know the trade. They're – they're familiar with it. And that's why the task force uses them.

“A prosecutor may not personally endorse the credibility of a witness.” *State v. Fields*, 730 N.W.2d 777, 786 (Minn. 2007). However, the state is free to argue that a particular witness is or is not credible, which is not a personal endorsement of the witness's testimony. *Id.* The prosecutor's statements referred to the testimony of a confidential, reliable informant, which is a term commonly used by police in drug transactions, and was not a personal endorsement of the informant's credibility. The prosecutor's comments during his opening argument were not plain error.

C. Prior-misconduct testimony about appellant.

Appellant argues that the prosecutor elicited inadmissible testimony from the informant in the form of *Spreigl* evidence of prior misconduct to which the state failed to provide prior notice in accordance with Minn. R. Evid. 404(b). The state argues that the evidence is non-*Spreigl* evidence that provided the jury with contextual information about the investigation.

During the prosecutor's direct examination of the informant, he asked her how she knew appellant:

- Q: Okay. And were you just friends over these last four years or –
A: Yeah. It was – it was a drug-sex relationship.
Q: With – with the defendant?
A: Yes.
Q: And what do you mean by that?
A: I mean, I would go over there and exchange sex for drugs.

Evidence concerning events triggering a police investigation of a defendant are admissible to provide the jury with the context for the investigation. *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014); *State v. Griller*, 583 N.W.2d 736, 743 (Minn. 1998). In *Griller*, the supreme court held that the district court did not abuse its discretion in admitting both testimony about a letter sent to the Sioux Falls Police Department that initiated the police investigation of appellant for murder and the content of the police interviews with the appellant's neighbors. *Id.* at 743. The court reasoned that the testimony "provided the jury with the context necessary to explain how the investigation against Griller began and why the police were excavating [Griller's] backyard." *Id.* And in *State v. Czech*, the supreme court held that the district court did not err in refusing to redact a tape recording that indicated that the defendant was involved in other crimes because the prosecutor was entitled to provide the jury with the context of the recorded conversation between the defendant and undercover agents. 343 N.W.2d 854, 856 (Minn. 1984).

Here, the task-force investigator testified that the task force began its investigation of appellant after the informant was arrested and provided the task force with information

about the identity of her methamphetamine dealer. Appellant's defense centered on the contention that he was never involved in the drug trade and had not been the person who sold methamphetamine to the informant. Absent the informant's testimony that provided context about how she knew appellant, the jury might have wondered why the task force had trusted her tip to the task force that appellant was the person who had sold her methamphetamine prior to her work as an informant. Under these facts, we discern no error in the prosecutor eliciting testimony from the informant of prior misconduct because the evidence was admissible and relevant to provide the context of the initiation of the investigation.

III. Appellant is entitled to resentencing under the DSRA.

Finally, appellant argues that he is entitled to resentencing under the DSRA. The state agrees, as do we.

In 2016, the legislature passed, and the governor signed into law, the DSRA. *See* 2016 Minn. Laws ch. 160, at 576-92. The DSRA modified various statutory provisions of the guidelines to make certain presumptive sentences less severe. *See* 2016 Minn. Laws ch. 160, § 18(b), at 591. Section 18 of the DSRA provides that the section "is effective the day following final enactment." 2016 Minn. Laws ch. 160, § 18, at 591. Because the governor signed the DSRA into law on May 22, 2016, section 18 became effective on May 23, 2016. *See* 2016 Minn. Laws ch. 160, at 592.

In *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017), the supreme court held that section 18 of the DSRA applies to crimes committed before May 23, 2016, the effective date of that section, so long as three requirements are satisfied:

(1) there is no statement by the Legislature that clearly establishes the Legislature's intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered as of the date the amendment takes effect.

Id. at 490. Because the supreme court's analysis in *Kirby* applies to the first and second requirements as a matter of law, the only question remaining is the third requirement of the test. *See id.* at 490-96.

A judgment is final in a criminal case "when the district court enters a judgment of conviction and imposes or stays a sentence." Minn. R. Crim. P. 28.02, subd. 2(1). Here, the district court sentenced appellant on April 26, 2017, for the crimes he committed between December 2015 and January 2016. Section 18 of the DSRA was in force then, having become effective on May 23, 2016. Thus, final judgment in appellant's case had not been entered as of the date that section 18 of the DSRA took effect. The third requirement of the amelioration doctrine is satisfied, which means that section 18 of the DSRA applies to appellant's request for resentencing.

The district court sentenced appellant under the guidelines that were amended by the DSRA. Under those guidelines, first-degree controlled-substance crime was ranked as a severity-level-9 offense. Minn. Sent. Guidelines 4.A (2014). The district court sentenced appellant to presumptive sentences of 86, 110, 134, and 158 months, to be served concurrently, based on his criminal-history scores of 0, 2, 4, and 6.

First-degree controlled-substance crime is now designated as a severity-level-D8 crime. Minn. Sent. Guidelines 4.C, Drug Offender Grid (2016). Based on appellant's criminal-history scores of 0, 2, 4, and 6, the presumptive sentences for his convictions are

now 65, 85, 105, and 125 months. Therefore, appellant is entitled to resentencing under the DSRA.²

Affirmed in part, reversed in part, and remanded.

² We need not address appellant's claim that the district court violated his right to a unanimous, twelve-person-jury verdict. The original trial transcript received by this court did not indicate that each of the twelve jurors affirmed appellant's conviction. But that transcript contained a typographical error, which the court reporter amended in an updated transcript after the state asked the district court to supplement the record pursuant to Minn. R. Civ. App. P. 110.05. The corrected transcript shows that each of the twelve jurors unequivocally affirmed appellant's guilt. Thereafter, appellant withdrew this argument in his reply brief.

SMITH, TRACY M., Judge (concurring specially)

I concur but write separately only because I believe that law-enforcement testimony regarding the “reliability” of an informant who testifies at trial comes dangerously closer to vouching testimony than might be suggested by the opinion of the court. First, the term “reliability” will often mean and be understood to mean veracity and truthfulness. Second, although law enforcement certainly may testify to facts that corroborate a testifying informant’s account of events, when law enforcement testifies that it deemed an informant to be “reliable,” that testimony may in fact be vouching for the witness. Thus, at trial, proposed law enforcement testimony regarding a testifying informant’s “reliability” must be carefully scrutinized for possible impermissible vouching, as well as for relevance.

In this case, however, I agree that the prosecutor did not engage in prosecutorial misconduct under the modified plain-error test by referring to the informant as a “confidential reliable informant” or by eliciting testimony regarding confidential reliable informants generally. Both the prosecutor and defense counsel referred to the witness as a confidential reliable informant or, more typically, as a CRI.¹ Considering that defense counsel regularly used that term, I think it unlikely that the jury interpreted it as vouching for the informant’s credibility. And, with respect to the general testimony about how law enforcement uses informants, I believe that, in context, this testimony was elicited to explain how law enforcement corroborates controlled buys and not as improper vouching testimony for the particular testifying informant, although the term “reliable” was not

¹ The parties referred to the informant as “confidential,” which she was during the investigative phase of the case, but at trial, of course, her identity was public.

necessary to the task and could have been avoided. For these reasons, I agree that the prosecutor's unobjected-to use of the term "confidential reliable informant" or CRI, in the context in this case, did not constitute reversible plain error.