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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0022**

State of Minnesota,
Respondent,

vs.

John Lee Bartel,
Appellant.

**Filed February 10, 2020
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Hennepin County District Court
File No. 27-CR-18-1628

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Patrick R. Lofton, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Mark D. Kelly, Law Offices of Mark D. Kelly, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Ross, Judge; and
Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

ROSS, Judge

Police found 53 grams of methamphetamine near John Bartel's car immediately after they pulled him over and an additional 30 grams when they executed a search warrant in his alleged home. Bartel appeals from his controlled-substance sale and possession convictions, arguing that the district court erred by denying his pretrial motion to suppress evidence, that multiple evidentiary errors and instances of prosecutorial misconduct rendered his trial unfair, and that the state's circumstantial evidence was insufficient to support his convictions. We reject Bartel's suppression and insufficient-evidence arguments as unconvincing. But we hold that the prosecutor's elicitation of inadmissible *Spreigl* testimony constitutes plain error affecting Bartel's substantial rights, and we therefore reverse and remand for a new trial.

FACTS

Pretrial Proceedings

The state charged John Bartel with one count of first-degree sale of methamphetamine, one count of first-degree possession of methamphetamine, and one count of second-degree possession of methamphetamine. The state alleged that officers discovered methamphetamine just outside Bartel's car during a traffic stop and, after executing a search warrant, located more methamphetamine in the apartment where they believed he resided. Bartel moved to suppress all evidence found during the apartment search on the theory that the warrant was not supported by probable cause.

Minneapolis Police Officer Aaron Collins had applied for that search warrant. His application alleged, in relevant part, that (1) a confidential reliable informant's tip led officers to discover the two ounces of methamphetamine outside Bartel's vehicle; (2) a cooperating defendant (CD) told officers that Bartel was storing methamphetamine and a firearm in a specific apartment on Stevens Avenue; (3) officers corroborated the CD's information that K.S., a woman, lived in the apartment; and (4) when officers arrested and searched Bartel following the traffic stop, they discovered a key to that same apartment's mailbox. The district court denied Bartel's motion to suppress, concluding that officers took appropriate measures to corroborate the CD's information before seeking the warrant by verifying that K.S. lived at the apartment with Bartel and by discovering a key to the apartment's mailbox on Bartel's person.

Trial and Verdict

The case proceeded to a jury trial. Minneapolis Police Sergeant Jeff Carter told the jury that, on January 17, 2018, he stopped Bartel's black SUV after he shone his squad car's spotlight on the SUV and saw Bartel driving erratically before pulling into a driveway. Bartel behaved nervously, and his passenger, R.S., refused to make eye contact. Bartel initially told the sergeant that he knew people who lived at a home near where he had stopped. Other officers arrived to assist. They noticed items just outside the SUV in the snow: a box for an AWS digital scale and a plastic bag containing about two ounces of methamphetamine. Sergeant Carter searched Bartel and found a set of keys and \$872 in cash, and he found a cell phone in the SUV. Bartel later told Sergeant Carter that he had

been headed to visit friends and pulled into the driveway only to turn around. He said he had no idea how the drugs came to be on the ground near the car.

The jury also heard Sergeant Carter testify to facts tending to link Bartel to the searched apartment. He said that Bartel had told him he lived at an address on 23rd Avenue but that he discovered that Bartel's key fit the lock on the Stevens Avenue apartment. Searching officers noticed the name "Johnny" on uniform shirts for Absolute Tire, Bartel's employer at the time of the search. They found methamphetamine behind a Marilyn Monroe poster on the wall, packaged similarly to the methamphetamine discovered outside Bartel's car. The packaging was unique; Sergeant Carter described it as knotted with "a lot of loose baggie in between where the drugs were and where the knot was," which was unlike drug packaging the sergeant customarily encountered with "the knot . . . tied up tight with the drugs and either cut off or torn off."

Officer Collins testified that he helped in the search after he used Bartel's key to open the apartment door. He told the jury that officers found paperwork bearing Bartel's name, including pay stubs for "John L. Bartel" dated November 3, 2017, November 24, 2017, and January 5, 2018. Officer Collins said he found a digital scale with methamphetamine residue. He testified that, a day after Bartel's arrest, he and Sergeant Carter executed a search warrant at the 23rd Avenue address where Bartel had claimed to live. The search revealed nothing associating Bartel with that address.

Officer Collins told the jury how methamphetamine is typically packaged for individual use and how it is commonly stored for its anticipated sale. The jury heard that

scales are customarily used for sales of methamphetamine and that transactions occur as a “cash business,” causing sellers to carry relatively large amounts of cash.

Officer Collins described the search and contents of Bartel’s cell phone. The jury also saw a text purportedly from R.S. (Bartel’s passenger during the traffic stop) to Bartel sent on January 16, 2018, which read, “And you got 3 grand and a pound n-gga and you didn’t give me sh-t[.]” The prosecutor asked, “And do you have any, based off your training and experience, any idea what that text message may be referring to?” The officer answered, “Robbing someone of three grand and a pound of methamphetamine.” Defense counsel did not object at the time, but the district court later prompted an off-the-record discussion with the attorneys about the exchange. It then instructed the jury about it:

[Y]ou heard testimony from the witness we just excused, Officer Collins, relating to an inbound message he testified was found on the defendant’s phone. That -- and I just want to instruct you that the defendant is not being tried for and may not be convicted of any offense other than the charged offenses here. So you’re not to convict the defendant on the basis of any conduct that occurred . . . prior to the offense date here.

Later, during its final instructions, the district court similarly advised the jury that the text message was “admitted for the limited purpose of assisting you in determining whether the defendant committed those acts with which the defendant is charged in the complaint. The defendant is not being tried for and may not be convicted of any offense other than the charged offenses; to do so might result in unjust double punishment.”

The state called multiple forensic-science witnesses, who generally testified that no DNA or fingerprint evidence linked Bartel to the methamphetamine, bags, or scales. But they did establish that the mixtures contained methamphetamine, that the apartment

methamphetamine weighed 30.42 grams, and that the traffic-stop methamphetamine weighed about 53 grams.

Bartel waived his right to testify and called only one witness in his defense. The woman testified that she lived at the 23rd Avenue address where Bartel claimed to live. She said that she was dating Bartel and that they had moved into the 23rd Avenue residence together in December 2017. She testified that on the night of Bartel's arrest about three weeks after they moved there, she had intended to meet Bartel at the 23rd Avenue address to drive to a casino.

The jury found Bartel guilty on all three counts. Bartel moved unsuccessfully for a new trial or a judgment of acquittal. The district court entered convictions on each count and sentenced Bartel to concurrent prison terms of 128 months for possession with intent to sell based on the methamphetamine outside his vehicle, and 108 months for possession based on the methamphetamine discovered inside the apartment.

Bartel appeals.

D E C I S I O N

Bartel argues that the district court erred by denying his motion to suppress evidence found during the apartment search, that the cumulative effect of evidentiary errors and prosecutorial misconduct warrants a new trial, and that the circumstantial evidence of his guilt is not sufficient to support the jury's guilty verdicts. For the following reasons, we conclude that the circumstances adequately support the warrant and the evidence supports the convictions. But we conclude Bartel is entitled to a new trial because of irregularities in the proceeding.

I

Bartel unpersuasively maintains that the warrant application insufficiently connected the methamphetamine-possession investigation to the searched apartment and that, as a result, the district court erroneously refused to grant his motion to suppress evidence found in the apartment. A proper search warrant requires probable cause. U.S. Const. amend. IV. We review a judge’s decision to issue a search warrant by considering whether there was a sufficient basis to determine the existence of probable cause. *State v. Fawcett*, 884 N.W.2d 380, 384 (Minn. 2016). We look to the information in the warrant application and affidavit. *Id.* at 384–85. Probable cause requires specific facts establishing a “nexus”—“a direct connection between the alleged criminal activity and the site to be searched.” *State v. Souto*, 578 N.W.2d 744, 749 (Minn. 1998). The requisite “direct connection” might actually be established by an inference, and the district court should determine whether it exists by considering “the type of crime, the nature of the items sought, the extent of the defendant’s opportunity for concealment, and the normal inferences as to where the defendant would usually keep the items.” *State v. Yarbrough*, 841 N.W.2d 619, 622–23 (Minn. 2014).

Bartel argues that the CD’s information recounted in the warrant affidavit is insufficient to establish a nexus between the alleged criminal activity and the Stevens Avenue apartment. An informant’s tip may support a probable-cause determination, but the district court must consider the truthfulness and source of knowledge of those providing hearsay information. *Souto*, 578 N.W.2d at 750. Bartel maintains that the warrant application contained “no corroboration of the information provided by the CD.”

Corroboration of the details of an informant's tip may establish reliability. *State v. Holiday*, 749 N.W.2d 833, 840 (Minn. App. 2008). The warrant application indicated that officers confirmed that K.S. lived at the apartment, as she was listed on the mailbox. They also determined that the key Bartel possessed matched the mailbox's number. These details not only corroborate the CD's information, they provide an independent, direct link between Bartel and the apartment. The link was further established by the circumstances of Bartel's traffic stop, where officers found methamphetamine. "It may be reasonable to infer that drug wholesalers keep drugs at their residences." *Yarbrough*, 841 N.W.2d at 623. The circumstances and reasonable inferences sufficiently link the drug investigation to the apartment. The district court properly denied Bartel's motion to suppress.

II

Bartel maintains that the district court allowed prosecutorial misconduct and made evidentiary errors and that the cumulative effect warrants a new trial. Bartel primarily challenges *Spreigl* evidence the prosecutor elicited, informing the jury that he had committed a prior robbery related to a deal involving a substantial amount of drugs. *See State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965). He also points to irregularities surrounding hearsay testimony, speculative testimony about the lack of outgoing messages in his phone, and improper opinion testimony about the frequency that criminal suspects deny they knew about or were involved in crimes. A new trial is warranted if the cumulative effect of errors denies a defendant a fair trial. *See State v. Fraga*, 898 N.W.2d 263, 279 (Minn. 2017). For the following reasons we conclude that the improper eliciting of inadmissible *Spreigl* testimony is enough by itself to require a new trial.

The prosecutor prompted the challenged testimony by asking Officer Collins whether he had “any idea” what the text message purportedly sent to Bartel “may be referring to.” The question construed literally calls only for an innocuous “yes” or “no” answer. But like many witnesses in this situation, the officer did not answer the literal question and instead skipped to the substance and gave the prejudicial response the question seemed to be looking for: “Robbing someone of three grand and a pound of methamphetamine.” Bartel failed to object, and the district court did not immediately intervene.

Bartel asserts that the prosecutor’s question constitutes misconduct. We review claims of unobjected-to prosecutorial misconduct for plain error. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Bartel bears the burden of demonstrating an error that is plain, and, if he is successful, the burden shifts to the state to demonstrate that the plain error did not affect Bartel’s substantial rights. *See id.* If a plain error affects substantial rights, we then consider “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.*

Bartel has met his burden of demonstrating that the prosecutor committed plainly erroneous misconduct by eliciting inadmissible *Spreigl* testimony. A plain error is one that is “clear or obvious,” and an error is clear or obvious if it violates “case law, a rule, or a standard of conduct.” *Id.* (quotations omitted). The officer’s testimony was undeniably improper. It included a reference to a highly prejudicial prior crime, often called *Spreigl* evidence. The introduction of *Spreigl* evidence is controlled by strict procedural safeguarding prerequisites that the prosecutor did not follow here. *See Minn. R.*

Evid. 404(b). The officer did not blurt out the answer unsuspectingly; he was drawn to testify by the prosecutor. “It is improper for a prosecutor to ask questions that are calculated to elicit or insinuate an inadmissible and highly prejudicial answer.” *State v. Henderson*, 620 N.W.2d 688, 702 (Minn. 2001).

The state contends that the prosecutor did not intentionally elicit the inadmissible *Spreigl* testimony. The context belies the contention. The text message included the phrases “you *got* 3 grand and a pound” (emphasis added) and “you didn’t give me sh-t.” The prosecutor’s question invited the officer to remark broadly on what the “text message may be referring to,” which implicitly included not only the “3 grand and a pound” but also how Bartel “got” those items. The state’s contention is also undercut by its acknowledgment that the prosecutor had “evidence of the drug robbery, which had been provided to [Bartel] in discovery.” While opposing Bartel’s motion for a new trial, the state had actually maintained that the text message itself could be treated as notice of *Spreigl* evidence. On appeal, the state contends that the lack of an explicit robbery reference in the text message supports “the notion that the prosecutor did not know” the officer would testify about the robbery. Having previously asserted that the text message might suffice as a *Spreigl* notice, the state cannot credibly contend that the prosecutor did not anticipate the improper testimony. Knowing of the *Spreigl* incident and believing the text message referred to that incident, the prosecutor led the officer to opine about what the message referred to. It is impossible to conclude that the elicitation was unintentional. We add that the prosecutor had the duty to prepare his witnesses in advance to avoid inadmissible or prejudicial

testimony. *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978). Bartel has identified a plain error.

The burden therefore shifts to the state to demonstrate that the plain error did not affect Bartel's substantial rights. *Ramey*, 721 N.W.2d at 302. To do so, the state must establish "that there is no reasonable likelihood that the absence of the misconduct . . . would have had a significant effect on the verdict." *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014) (quotation omitted). We review by considering the strength of the state's other evidence, the pervasiveness of the misconduct, and whether Bartel had an opportunity to rebut the improper evidence. *See id.* at 803.

The misconduct was not pervasive. The prosecutor did not emphasize the officer's answer during later examination, and neither party referenced it during closing arguments. This factor favors the state. But the state unpersuasively emphasizes that "Officer Collins did not say who had committed the robbery or any other specifics regarding it." Context filled in these supposed omissions for the jury. Officer Collins described a search "on cell phones of Mr. Bartel," the relevant text message was observed on a phone that witnesses and the district court described as the "defendant's phone," and the robbery testimony referred to how Bartel (the recipient of the text message) "got" the money and drugs. This demonstrates that, although the misconduct was not pervasive, it resulted in a clearly damaging disclosure.

The state's properly admitted evidence was substantial but not overwhelming. It built its case primarily on circumstantial evidence that Bartel possessed methamphetamine intending to sell it. Bartel was physically present in close proximity to the

methamphetamine and scale box discovered outside his vehicle. He possessed a large amount of cash. Officers discovered his work shirts and pay stubs at an apartment where they found digital scales and more methamphetamine. Bartel's phone contained a message indicating he had "3 grand and a pound." But it was the officer's offending testimony that established that the "pound" referred to methamphetamine that Bartel supposedly obtained along with cash during a robbery. This factor does not weigh favorably toward the state's burden.

Bartel also had no fair opportunity to rebut the improper evidence. Attempting to rebut the evidence would have spotlighted the inadmissible evidence and risked compounding its prejudicial effect. Bartel adds that the district court's cautionary instruction aggravated rather than mitigated the effect of the improper evidence. And the state agrees that the district court should have instructed the jury simply to disregard the testimony rather than imply that the jury could rely on it for some legitimate purpose. We need not consider whether the district court's other-crimes instruction was itself error, concluding only that the instruction given failed to cure the prejudice.

The state has failed to make a convincing showing that there is no reasonable likelihood that the absence of the misconduct would have significantly affected the jury's verdicts. We therefore address whether we should remedy the error "to ensure fairness and the integrity of the judicial proceedings." *Ramey*, 721 N.W.2d at 302. We conclude that ordering a new trial would best serve those interests. Evidence of other crimes inherently exposes a defendant to potentially unfair prejudice, as is indicated by the rule strictly limiting its introduction at trial. *See* Minn. R. Evid. 404(b). Because the prosecutor

circumvented the rule’s safeguards and invited highly prejudicial evidence, because the state reasonably concedes the impropriety of the evidence, and because the state’s remaining evidence was not overwhelming, we believe that fairness and judicial integrity require a new trial. We need not address Bartel’s various additional assertions.

III

Bartel argues that, although he is entitled to a new trial, he should not have to face one because the state introduced insufficient evidence to support his convictions. The argument fails.

If there is sufficient direct evidence to establish the elements of a crime, we review the record to determine whether the evidence viewed in a light favorable to the verdict was sufficient to allow the jury to determine the defendant’s guilt. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). But where the state proves elements by circumstantial evidence, we apply heightened scrutiny, first identifying the circumstances proved by the state, and then considering whether those circumstances preclude any reasonable inference other than guilt. *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017). We will apply the circumstantial-evidence standard of review here.

There is no dispute that the officers found mixtures containing methamphetamine or that those mixtures exceeded the statutory weight thresholds for possession and sale crimes. See Minn. Stat. §§ 152.021, subds. 1(1), 2(a)(1), .022, subd. 2(a)(1) (2016). Bartel challenges the sufficiency of the state’s evidence that he possessed those drugs. “[T]he state must prove that [the] defendant consciously possessed, either physically or constructively, the substance.” *State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975).

Physical possession involves direct physical control. *State v. Barker*, 888 N.W.2d 348, 353 (Minn. App. 2016). The state can prove constructive possession either by establishing that the contraband was in a place exclusively controlled by the defendant and not normally accessed by others, or by showing a strong probability that the defendant consciously exercised “dominion and control” over the contraband, regardless of whether it was where others had access. *Id.* at 353–54. Circumstantial evidence of intent to sell possessed drugs may include the quantity and manner of packaging. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013).

We begin the circumstantial-evidence review by identifying the circumstances proved by the state, deferring to the jury’s rejection of evidence that conflicts with the state’s proved circumstances. *State v. Anderson*, 789 N.W.2d 227, 241–42 (Minn. 2010). The verdict here establishes that the state proved the following circumstances: Bartel began driving erratically when Sergeant Carter shone his spotlight on his car; Bartel gave contradictory explanations of why he pulled into the driveway; officers found 53 grams of methamphetamine and a scale box outside Bartel’s car; Bartel had \$872 cash and a key to the Stevens Avenue apartment on his person; officers found Bartel’s work shirts and recent pay stubs in the Stevens Avenue apartment; officers found digital scales in the apartment; officers found 30 grams of methamphetamine in the Stevens Avenue apartment; and the methamphetamine from the traffic stop and apartment search were packaged in a similar, unique fashion.

Of course these circumstances rationally support the guilty verdict, but we must consider next whether they are inconsistent with any rational hypothesis other than guilt.

See State v. Silvernail, 831 N.W.2d 594, 599 (Minn. 2013). Our review satisfies us that, considered as a whole, the circumstances point only to Bartel's guilt. No innocent hypothesis fits Bartel's evasive driving, the discovery of the large amount of methamphetamine near the car, the discovery of the large sum of cash on Bartel along with the key to the apartment where police found more methamphetamine packaged similarly to the drugs at the traffic stop, the presence of Bartel's personal belongings in the apartment, and the absence of Bartel's personal belongings at the address where he claimed to be living. No conceivable innocent hypothesis explains this set of circumstances.

Bartel argues for a different result by pointing to circumstances that are consistent with his innocence. But we consider only those circumstances consistent with the jury's verdict. *Id.* He also suggests that the state failed to present evidence eliminating the possibility that the drugs were possessed by others who were also near them, but the argument overlooks the fact that the state can prove constructive possession in either of the ways we outlined above and that more than one person can constructively possess an item jointly. *Harris*, 895 N.W.2d at 603 n.9.

It might seem incongruous that Bartel's *Spreigl* argument succeeds while his sufficiency challenge fails. But the decisions are compatible. In the prosecutorial-misconduct context, we examine the prejudice by considering the potential effect an error has on a verdict. *Mosley*, 853 N.W.2d at 801. By contrast, in the evidence-sufficiency context, we *begin* by considering "only those circumstances that are consistent with the verdict." *Silvernail*, 831 N.W.2d at 599. In the former instance, we consider how the state proved certain facts to the jury, while in the latter, we assume the

jury's acceptance of certain facts and question only whether those facts are inconsistent with innocence. Bartel is not entitled to acquittal but he is entitled to a new trial.

Affirmed in part, reversed in part, and remanded.