

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0446**

State of Minnesota,
Respondent,

vs.

Christopher Scott Bailey,
Appellant.

**Filed February 22, 2022
Affirmed in part, reversed in part, and remanded
Cochran, Judge**

St. Louis County District Court
File No. 69HI-CR-19-386

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

Kimberly J. Maki, St. Louis County Attorney, Stacey Sundquist, Assistant County Attorney, Hibbing, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie L. Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Connolly, Judge; and Smith, John, Judge.*

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

NONPRECEDENTIAL OPINION

COCHRAN, Judge

Following a jury trial, appellant was convicted of two counts of first-degree drug sale, one count of first-degree drug possession, and one count of second-degree drug possession. In this direct appeal, appellant argues that he is entitled to a new trial because the prosecutor committed misconduct. Alternatively, appellant argues that his conviction of second-degree drug possession must be vacated because it is a lesser-included offense of one of his first-degree drug-sale convictions.

We first conclude that the alleged prosecutorial misconduct does not warrant reversal of his convictions and a new trial. We next conclude that the second-degree drug-possession charge is a lesser-included offense of one of appellant's first-degree drug-sale convictions and, therefore, the district court erred when it convicted appellant of that offense. Accordingly, we affirm in part, reverse in part, and remand with instructions to vacate the conviction of second-degree drug possession.

FACTS

The state charged appellant Christopher Bailey with two counts of first-degree sale of a controlled substance, one count of first-degree possession of a controlled substance, and one count of second-degree possession of a controlled substance following a search of Bailey's residence in Hibbing, Minnesota. The following facts were established at Bailey's jury trial.

On May 20, 2019, officers with the Lake Superior Drug and Violence Task Force executed a search warrant at Bailey's residence. Officers from the St. Louis County

sheriff's office and the Hibbing police department assisted. The search warrant authorized officers to search Bailey's person, house, and two detached garages for illegal drugs and other evidence of illegal drug activity. Officers apprehended Bailey and a second individual, S.J., in the house.¹

Officers found the following items in the house: methamphetamine, heroin, marijuana, mushrooms, more than \$9,000 in cash, digital scales, and drug paraphernalia. In one of the detached garages, officers found more methamphetamine and a scale. Officers also found a key on Bailey's person that opened a padlock located on the detached garage where the methamphetamine was found.

Officers submitted some of the drugs found during the search for testing. The methamphetamine submitted for testing weighed over 3,000 grams. The heroin weighed over ten grams. Six bags that contained drugs found during the search were also submitted for DNA testing. One bag, which contained heroin, showed a mixture of DNA from two or more individuals with the "[m]ajor male DNA profile" matching Bailey. Another bag, which contained methamphetamine, showed a major mixture of DNA profiles from which Bailey could not be excluded as "a possible contributor," but an estimated 99.99999994% of the general population could be excluded.

The state initially charged Bailey with two counts of first-degree sale of a controlled substance—17 grams or more of methamphetamine (count one) and ten grams or more of heroin (count two)—in violation of Minn. Stat. § 152.021, subds. 1(1), (3) (2018). At trial,

¹ S.J. was the subject of an outstanding arrest warrant for fifth-degree possession of a controlled substance.

the state amended the complaint to add two more charges: first-degree possession of a controlled substance—50 grams or more of methamphetamine—in violation of Minn. Stat. § 152.021, subd. 2(a)(1) (2018) (count three), and second-degree possession of a controlled substance—six grams or more of heroin—in violation of Minn. Stat. § 152.022, subd. 2(a)(3) (2018) (count four).

Before trial, Bailey filed several motions in limine including a request to prohibit testimony about any investigation or surveillance operations involving Bailey prior to or after the date that the drugs were discovered on his property. In his motion, Bailey argued that any allegations relating to “surveillance, information, or investigation of Mr. Bailey on any date prior to, or after, the date of the search in this case . . . are not relevant, unduly prejudicial, and not properly admissible as ‘other crimes’ evidence.” At a pretrial motion hearing, the state agreed to establish at trial only that Bailey had been under investigation and that a search warrant had been issued for his residence.

Bailey’s main argument on appeal arises from the closing arguments made at trial. During closing arguments, Bailey’s attorney argued that the drugs recovered from Bailey’s residence belonged to S.J.—the other individual apprehended at the house—not to Bailey, and that the state had failed to prove beyond a reasonable doubt that Bailey had actually or constructively possessed the drugs. Bailey’s attorney further argued that the officers that executed the search warrant had an “agenda” to personally target and convict Bailey. In response, the prosecutor made the following statement during rebuttal argument:

[Defense counsel] is right; the Task Force does have an agenda and you heard about that. Their agenda is to investigate people for selling and possessing dangerous drugs within the

community. They weren't specifically targeting Mr. Bailey just because he was Mr. Bailey. They were targeting Mr. Bailey because he was selling large quantities of methamphetamine and heroin in the community.

Bailey's attorney objected to the final sentence of this statement on the grounds that it asserted facts not in evidence and violated Minnesota Rule of Evidence 404(b). Bailey's attorney also moved for a mistrial on the same basis, arguing that the statement constituted prosecutorial misconduct. The district court sustained the objection but denied Bailey's motion for a mistrial. The district court then repeated, as a curative instruction, a general instruction reminding the jury that "attorneys are officers of the court" and that "arguments or remarks of an attorney are not evidence." The district court went on to remind the jury that "[i]f the attorneys or [the district court] have made . . . any statement as to what the evidence is which differs from your own recollection of the evidence, you should disregard the statement."

The jury found Bailey guilty on all four counts. The district court entered convictions on all four counts and imposed sentences for the sale counts (one and two) but not the possession counts (three and four).

Bailey then moved for a new trial. The motion was based in part on alleged prosecutorial misconduct. The district court denied Bailey's motion, concluding that Bailey was not denied a fair trial.

DECISION

Bailey raises two arguments on appeal. First, he argues that this court should reverse his convictions and remand for a new trial because the prosecutor engaged in misconduct

during closing argument.² Second, and in the alternative, he argues that his conviction of second-degree possession of six or more grams of heroin (count four) must be vacated because it is a lesser-included offense of his conviction of first-degree sale of ten or more grams of heroin (count two). We address each argument in turn.

I. Bailey is not entitled to a new trial based on alleged prosecutorial misconduct during closing argument.

A prosecutor engages in misconduct when they “violate[] clear or established standards of conduct, e.g. rules, laws, orders by a district court, or clear commands in this state’s case law.” *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted). When prosecutorial misconduct claims arise from a closing argument, courts “look to the closing argument as a whole, rather than to selected phrases and remarks.” *State v. Hallmark*, 927 N.W.2d 281, 308 (Minn. 2019) (quotation omitted). “A prosecutor’s closing argument should be based on the evidence presented at trial and inferences reasonably drawn from that evidence.” *State v. Bauer*, 776 N.W.2d 462, 475 (Minn. App. 2009) (quotation omitted). A prosecutor engages in misconduct when they refer to facts that were not admitted as evidence. *State v. Mayhorn*, 720 N.W.2d 776, 788-89 (Minn. 2006).

Bailey argues that the prosecutor engaged in misconduct by arguing facts not in evidence during closing argument. He specifically contends that the prosecutor engaged in misconduct when she stated in rebuttal argument that law enforcement was “targeting

² Bailey does not challenge the district court’s denial of his motion for a new trial. Instead, he directly challenges the district court’s determination during trial that the prosecutor’s alleged misconduct in closing argument did not require a new trial.

Mr. Bailey because he was selling large quantities of methamphetamine and heroin in the community.” He argues that this statement asserted facts not in evidence because it implied that Bailey was under prior investigation by law enforcement for drug activity—evidence that the state had expressly agreed *not* to introduce at trial. Bailey also argues that the statement improperly introduced evidence of prior bad acts in violation of Minnesota Rule of Evidence 404(b). The state contends that the prosecutor’s statement did not constitute misconduct but rather was a justified rebuttal argument “entirely supported” by the facts in evidence. The district court concluded that, “although a close call,” the statement *did* constitute prosecutorial misconduct by interjecting other-crimes evidence into the jury trial.

Assuming without deciding that the prosecutor’s statement constituted misconduct, we turn to the standards of review applied to determine whether prosecutorial misconduct warrants a new trial. The standard of review for a prosecutorial-misconduct claim depends on whether the defendant objected during trial. *State v. Nissalke*, 801 N.W.2d 82, 103, 105 (Minn. 2011). Where, as here, the defendant has objected to alleged misconduct, we apply “a two-tiered harmless-error test under which the standard of review varies based on the seriousness of the misconduct.” *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016).³ In

³ We note that recent supreme court cases have questioned whether the two-tiered standard for reviewing objected-to misconduct remains viable. *See State v. Carridine*, 812 N.W.2d 130, 150 (Minn. 2012) (discussing *State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974), which sets forth the two-tiered approach); *Whitson*, 876 N.W.2d at 304 n.2 (stating that “[r]ecent cases have questioned whether the two-tiered *Caron* standard . . . remains viable” but declining to resolve the issue). But no supreme court case has expressly rejected or revised the two-tiered standard set forth in *Caron*. Therefore, the existing two-tiered

cases involving “unusually serious” objected-to prosecutorial misconduct, appellate courts must be certain beyond a reasonable doubt that the misconduct was harmless before affirming. *Carridine*, 812 N.W.2d at 150. In cases involving “less serious” objected-to prosecutorial misconduct, appellate courts must analyze “whether the misconduct likely played a substantial part in influencing the jury to convict.” *Id.*

Bailey argues that the prosecutor’s statement constituted “unusually serious” misconduct because it violated both a rule of evidence and the state’s agreement not to introduce certain evidence at trial. The state contends that the prosecutor’s statement should be treated as “less serious” misconduct.

We conclude that the standard for “less serious” misconduct applies. As an initial matter, the district court’s acknowledgement that it was a “close call” as to whether misconduct occurred at all supports the conclusion that the alleged misconduct was “less serious.” More significantly, the prosecutor’s statement was not so egregious that it constitutes “unusually serious” misconduct under Minnesota case law.

Minnesota courts have generally found serious prosecutorial misconduct only in extreme circumstances. In *State v. Porter*, for example, the supreme court found that “[t]o the extent that the closing argument suggested to the jurors that they would be suckers if they acquitted [the defendant],” the prosecutor engaged in serious misconduct that “struck at the heart of the jury system.” 526 N.W.2d 359, 365 (Minn. 1995). Similarly, in *State v. Hoppe*, this court found that statements made by the prosecutor during closing

standard applies in this case. See *State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) (explaining that the court of appeals is bound by supreme court precedent).

argument “far exceeded the bounds of an ethical professional summation” where the prosecutor inappropriately referred to character evidence, suggested that the defendant would continue to engage in criminal activity unless convicted, implied that a conviction was necessary to protect society, disparaged the defense by stating that the defendant’s argument was ridiculous, and warned the jury not to be “snowed” by the defense. 641 N.W.2d 315, 319-22 (Minn. App. 2002), *rev. denied* (Minn. May 14, 2002). In *State v. Steward*, by contrast, the supreme court held that a prosecutor’s pattern of misconduct, which included improperly introducing evidence of a defendant’s prior bad acts and suggesting that the jury draw inferences from facts not in evidence, did not amount to serious misconduct. 645 N.W.2d 115, 121-25 (Minn. 2002). The supreme court reached this conclusion in part because the prosecutor’s theme, “in context, [could] be seen as refuting appellant’s self-defense theory.” *Id.* at 125.

With these examples in mind, we conclude that the severity of the misconduct alleged in this case—the prosecutor’s violation of a pretrial agreement not to introduce certain evidence and the rule against introducing evidence of prior bad acts—is most similar to the misconduct at issue in *Steward*. The prosecutor’s statement *could* have reasonably been understood by the jury as refuting Bailey’s own argument regarding law enforcement’s “agenda” against him and as a reference to facts already in evidence—namely, that he had been charged with multiple counts of drug sale and possession. Therefore, the prosecutor’s alleged misconduct here does not approximate the level of severity, illustrated in other examples relayed above, that would be sufficient to categorize it as “unusually serious.”

Having determined that the prosecutor's alleged misconduct is "less serious," we next apply the relevant harmless-error standard—"whether the misconduct likely played a substantial part in influencing the jury to convict." *Carridine*, 812 N.W.2d at 150. To make this determination, we "examine the record as a whole and consider the strength of the state's evidence and the weakness of any defense evidence." *State v. Borg*, 806 N.W.2d 535, 557 (Minn. 2011) (quotation omitted).

Bailey contends that the prosecutor's alleged misconduct was not harmless. He argues that the statement deprived him of a fair trial because (1) the district court's "rereading of a generic instruction did not cure the misconduct," (2) the evidence against Bailey "was not so strong that the prosecutorial misconduct did not impact the jury's decision to convict," and (3) the jury's quick verdict did not suggest, as the district court reasoned in denying Bailey's motion for a new trial, that the prosecutor's statement did not have significant impact. The state counters that the defense "invited" the prosecutor's statement about law enforcement's motives by asserting that law enforcement had an "agenda" against Bailey. The state further argues that the alleged misconduct was harmless because the evidence against Bailey was so overwhelming that the prosecutor's statement could not have affected the verdict.

For two primary reasons, we conclude that it was unlikely that the misconduct played a substantial part in influencing the jury to convict. First, viewing the closing argument as a whole, the prosecutor's statement was brief and did not "permeate the entire argument" or establish a "theme." *See State v. Matthews*, 779 N.W.2d 543, 552 (Minn. 2010) (finding that defendant's substantial rights were not affected by prosecutor's

alleged misconduct during closing arguments where prosecutor's improper statements did not "permeate the entire argument"); *State v. Johnson*, 616 N.W.2d 720, 729-30 (Minn. 2000) (finding no prosecutorial misconduct in part because prosecutor did not emphasize allegedly inadmissible testimony and "that testimony in no way provided a theme"). The statement at issue here consisted of only a single sentence of the rebuttal argument. On the other hand, the entire closing argument (including rebuttal) spanned approximately 13 pages of transcribed argument. This brief statement is unlikely to have had a substantial part in influencing the jury's decision to convict. *See State v. Wren*, 738 N.W.2d 378, 392 (Minn. 2007) (finding that misconduct spanning three pages in a 70-page closing argument did not affect defendant's substantial rights).

Second, the strength of the record evidence against Bailey supports the conclusion that the prosecutor's statement was harmless. "As a general rule, the stronger the evidence of guilt, the less likely that any error is prejudicial." *State v. Dillon*, 532 N.W.2d 558, 558 (Minn. 1995). And overwhelming evidence against an appellant may be enough to establish that a prosecutor's improper statement in closing argument did not substantially prejudice a jury and impair a defendant's right to a fair trial. *See, e.g., State v. McNeil*, 658 N.W.2d 228, 236 (Minn. App. 2003) (finding that prosecutor's improper statements in closing arguments did not impair defendant's right to fair trial "given the extraordinary weight of the evidence").

Here, the record reflects that the officers who executed the search warrant at Bailey's residence discovered large amounts of methamphetamine, heroin, and cash along with digital scales, drug paraphernalia and other drugs. Bailey's DNA was present on two

of the bags containing illegal substances. And, significantly, the state introduced evidence that the property belonged to Bailey and recordings of calls Bailey made from jail in which he made comments suggesting that he had engaged in selling methamphetamine—strong circumstantial evidence supporting a theory of constructive possession. See *State v. Barker*, 888 N.W.2d 348, 353-54 (Minn. App. 2016) (explaining that constructive possession may be established “by proof of a strong probability that the defendant was at the time consciously exercising dominion and control over [the relevant item], even if the item was in a place to which others had access” (quotation omitted)).

In sum, the minimal role of the prosecutor’s statement in the closing argument as a whole and the strength of the evidence against Bailey lead us to conclude that the alleged prosecutorial misconduct did not play a substantial part in influencing the jury to convict. Accordingly, the alleged prosecutorial misconduct was harmless and does not require reversal.⁴

⁴ We note that even if we were to apply the stricter standard of review for “unusually serious” misconduct under *Caron*, we would reach the same result. “Unusually serious” misconduct is reviewed to determine whether the misconduct was harmless beyond a reasonable doubt. *Whitson*, 876 N.W.2d at 304. Misconduct is harmless beyond a reasonable doubt “if the verdict actually rendered was surely unattributable to the error.” *State v. Cabrera*, 700 N.W.2d 469, 474 (Minn. 2005) (quotation omitted). As discussed in detail above, the minimal role of the prosecutor’s statement in the closing argument as a whole and the strength of the evidence against Bailey would lead us to conclude that the jury’s verdict was “surely unattributable” to the prosecutor’s statement and the alleged misconduct was therefore harmless beyond a reasonable doubt.

II. The district court erred by convicting Bailey of second-degree possession of heroin because it is an included offense of first-degree sale of heroin.

Bailey argues that the district court erred by convicting him of second-degree possession of heroin (count four) because it is a lesser-included offense of first-degree sale of heroin (count two). He contends that his conviction on count four should therefore be vacated. The state agrees, as do we.

Under Minnesota law, a defendant “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2020). An “included offense” is defined in part as “a crime necessarily proved if the crime charged were proved.” *Id.*, subd. 1(4). To determine whether one offense is “necessarily proved” by the proof of another, courts compare the statutory definitions of the offenses. *State v. Carr*, 692 N.W.2d 98, 102 (Minn. App. 2005).

Comparing the statutory definitions at issue here, second-degree possession of six or more grams of heroin is necessarily proved when first-degree sale of ten or more grams of heroin is proved. A person is guilty of the first-degree sale offense if they “unlawfully sell one or more mixtures of a total weight of ten grams or more containing heroin” within a 90-day period in violation of Minn. Stat. § 152.021, subd. 1(3). A person is guilty of the second-degree possession offense if they “unlawfully possess one or more mixtures of a total weight of six grams or more containing heroin” in violation of Minn. Stat. § 152.022, subd. 2(a)(3). Because Bailey could not have possessed ten or more grams of heroin with intent to sell (count two) without possessing at least six grams of heroin (count four), he cannot be separately convicted on count four. We therefore reverse and remand with

instructions to vacate the judgment of conviction of second-degree possession of six grams or more of heroin but otherwise leave the jury’s guilty verdict for that offense intact. *See Loving v. State*, 891 N.W.2d 638, 649 (Minn. 2017) (explaining that the supreme court has typically “vacated convictions of unsentenced, duplicative offenses and left the jury’s guilty verdicts on those counts intact”).⁵

Conclusion

In sum, we conclude that the prosecutorial misconduct Bailey alleges does not warrant reversal of his convictions. However, the district court erred by entering a conviction on count four because it is a lesser-included offense of count two. Therefore, we reverse and remand to the district court to vacate Bailey’s conviction on count four.

Affirmed in part, reversed in part, and remanded.

⁵ According to the supreme court, “the proper procedure to be followed by the [district] court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be adjudicated at [that] time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated and sentence imposed” *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).