STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0756

State of Minnesota,
Respondent,

vs.

Emilio Ozornia,
Appellant.

Filed June 20, 2023
Affirmed
Ross, Judge

Kandiyohi County District Court
File No. 34-CR-21-191

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

Shane D. Baker, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Ross, Judge; and

Rodenberg, Judge.*

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

NONPRECEDENTIAL OPINION

ROSS, Judge

Emilio Ozornia sold 24 grams of methamphetamine to a man who was unknowingly serving as a middleman for a government informant's controlled drug purchase from Ozornia. Ozornia appeals from his consequent conviction of first-degree sale of a controlled substance, contending first that the prosecutor engaged in misconduct by calling the confidential informant as a trial witness knowing that the informant would refuse to testify and second that the district court violated his Confrontation Clause rights by admitting into evidence an audio recording captured by the transmitter that the informant wore immediately before and during the transaction. Because neither alleged error unduly prejudiced Ozornia's defense and because we are not persuaded by the arguments in his supplemental brief, we affirm.

FACTS

A confidential reliable police informant, whom we will call John to preserve his privacy, contacted a multijurisdictional drug and gang task force comprised of law enforcement agencies in March 2020, offering to buy drugs under police surveillance. John communicated directly with task force agent Joshua Helgeson, a Willmar police officer assigned to the task force. Agent Helgeson arranged for John to perform a controlled drug buy. He met with John, searched him to confirm that he possessed no drugs, outfitted him with an audio-transmitting and recording device, and gave him cash for the controlled buy. Task force agents inconspicuously watched John approach a predetermined house, where John met with and spoke briefly with appellant Emilio Ozornia.

Ozornia did not immediately sell drugs to John. Instead, Ozornia went toward a different house about a block away. John spoke to the observing officers through the transmitting device and by phone, announcing that he was heading to the second house to meet again with Ozornia. On his way, John encountered an acquaintance, whom we will call Scott to maintain his privacy. Rather than make the purchase himself as planned, John asked Scott to "run over there and grab that zip" from Ozornia and handed him the purchase money. John did not tell Scott that the transaction was under police surveillance. He and Scott walked toward the house to meet Ozornia, and both went to the backyard. The officers lost sight of them, but they continued to listen through the transmitter as the events unfolded. Scott approached the back door alone, leaving John in the yard. Scott handed Ozornia the cash through the back door, and Ozornia handed Scott a clear plastic bag containing a white substance. Scott walked over to John and handed him the bag.

John and Scott separated. John walked about two blocks from the house, and he met with Agent Helgeson. He gave Agent Helgeson the bag containing the white substance, which forensic testing later revealed to be about 24 grams of methamphetamine. The state charged Ozornia with first-degree controlled substance sale.

On the day of Ozornia's trial, the prosecutor informed the court that John had indicated that he would refuse to testify. The prosecutor asked "how the Court wants to handle that if there's going to be anything outside the presence of the jury." The district court responded that it would address the issue of John's refusal to testify after testimony from the state's first witnesses.

Scott was the state's first witness. Scott recounted the events just described. He acknowledged that the state had also charged him with a first-degree controlled substance offense because of his participation in the purchase and that he avoided incarceration by agreeing to plead guilty to a fourth-degree controlled substance offense. When asked whether he was getting anything in exchange for his testimony, Scott answered, "I don't believe so."

The prosecutor then called John to the witness stand. The district court excused the jury and addressed John's reported refusal to testify. John advised the district court that he "wish[ed] not to testify." The district court explained that, because the state had offered him use immunity, the state could not use his testimony in criminal proceedings against him. And it warned that refusing to testify could result in his being held in contempt of court. John responded, "Yeah, I'm fine with that. You can charge me with whatever you guys want." The district court again explained the consequences of refusing to testify and asked John, "And do you know how you're going to proceed here today?" John replied, "I want contempt. Take me to jail."

The prosecutor asked the district court to clarify the impact a contempt charge could have on John's pending criminal penalties, specifically that he "would not get credit for any time served on a contempt charge against his pending criminal sanctions." The district court agreed that this could be a consequence if John was held in contempt. The district court offered John a brief time to speak with his lawyer. John declined the offer, stating, "I've got my mind set."

The jury returned to the courtroom, and the prosecutor called John to the witness stand. The prosecutor asked John to state and spell his name, and he did. The prosecutor asked whether John went by any other name and whether he knew Scott. John answered yes to both questions. The prosecutor next asked whether John provided Scott with cash. John refused to respond. The prosecutor then sought and received the district court's permission to treat John as a hostile witness and began asking leading questions. The prosecutor asked a series of questions, receiving no response, interspersed with the district court's instructing John to answer the questions: "You gave [Scott] money on March 10, 2020; is that correct?" "Is there a reason why you don't want to testify today?" "You were working for the task force in 2020; is that correct?" "You received a baggie of methamphetamine from [Scott] on March 10, 2020?" The district court then found John in contempt of court for refusing to answer the questions, qualifying the finding by adding, "The Court will indicate that the witness will be provided a half hour to purge himself of this if he agrees to testify further with regard to this matter."

The prosecutor called and questioned the state's forensic expert before re-calling John as a witness. The district court told John that answering questions would purge his contempt. The prosecutor asked John, "[Scott] gave you a baggie of white substance; is that correct?" John did not respond. The district court directed him to answer, to no avail. Then the prosecutor asked, "You took that baggie directly from [Scott] and gave it to task force agents?" Again, the court instructed John to answer, and again, he did not. The court restated its contempt finding.

Agent Helgeson testified last, describing the same events summarized above. During his testimony, the state offered as evidence portions of the audio recording from the transmitting device John wore during the controlled buy. Ozornia objected, asserting a lack of foundation and hearsay. The district court overruled the objection and admitted the recording into evidence. Although much of the recorded conversation is inaudible, John can be heard talking to Ozornia about the price of Ozornia's "shit" as compared to another's. And John tells police that Ozornia told him to go to another house. The recording also reveals John telling Scott to go receive something from Ozornia and stating that he has the money "right here." Later, John is heard telling police where to pick him up.

The jury found Ozornia guilty. The district court convicted him of first-degree controlled substance sale and sentenced him to serve 125 months in prison. Ozornia appeals.

DECISION

Ozornia assumes on appeal that Scott served as Ozornia's accomplice in the controlled buy, meaning that Scott's testimony cannot support Ozornia's conviction unless the testimony is corroborated. *See* Minn. Stat. § 634.04 (2022) (mandating that a conviction cannot rest on the testimony of an accomplice's uncorroborated testimony). The state does not dispute the characterization in its brief. The district court likewise assumed that he was an accomplice and so instructed the jury. Neither party includes argument or cites authority supporting the assumption, and we think it is inaccurate. The supreme court has stated unqualifiedly that "one who receives [a controlled substance] cannot be an accomplice of a person charged with distributing [it]." *State v. Swyningan*, 229 N.W.2d 29, 32 (Minn.

1975). We will address the issues raised on appeal with the understanding that Scott was not an accomplice whose testimony required corroboration.

Ozornia makes five arguments. He argues first that the prosecutor improperly called John to testify knowing John would refuse to answer questions. He argues second that the district court violated his Confrontation Clause rights by admitting the audio recording of John's voice during the controlled buy. Ozornia's supplemental brief raises three additional alleged legal errors. None of Ozornia's arguments leads us to reverse.

I

Ozornia maintains that the prosecutor's calling John to testify knowing he would refuse to answer questions constitutes reversible error based on the supreme court's decisions in *State v. Morales*, 788 N.W.2d 737 (Minn. 2010), and *State v. Mitchell*, 130 N.W.2d 128 (Minn. 1964). The *Morales* court identified two theories of error requiring reversal when the district court allows the state to call a witness who refuses to testify:

> Under the first theory of error—the bad-faith theory—reversible error results, regardless of actual prejudice, where the prosecution calls a witness for the purpose of prejudicing the defendant in the minds of the jury, knowing that the witness will claim immunity. . . . Under the second theory of error—the unfair-prejudice theory—reversible error results if the State calls a witness in good faith and the State's examination is of a type that has prejudiced defendant to the extent that he has been denied a fair trial.

788 N.W.2d at 753 (quotations and citation omitted). Neither *Morales* nor *Mitchell* discusses the appropriate standard of review in cases like this one where the alleged error was not objected to at trial. One plausible approach on appeal would be to apply the plain-error standard governing forfeited challenges to the erroneous admission of evidence. *See*

State v. Vasquez, 912 N.W.2d 642, 650 (Minn. 2018). Another would be to analyze the alleged error applying the modified plain-error standard, as in cases of unobjected-to prosecutorial misconduct, which subjects a prosecutor's conduct to a "more scrutinizing review" by this court. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The United States Supreme Court implied those two possibilities:

> First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. . . . A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness'[s] refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.

Namet v. United States, 373 U.S. 179, 186–87 (1963). The *Morales* court at times attributed the reversible error to the district court but at other times to the prosecutor. 788 N.W.2d at 753, 755. The parties' briefs do not expound upon which is the proper standard of review. For that reason and because the outcome of this appeal does not depend on identifying the proper standard, we will apply the modified plain-error standard; Ozornia cannot prevail under that standard, even though it is the one more burdensome to the state, because the alleged error did not affect his substantial rights.

Under the modified plain-error standard, if an appellant meets his burden to establish plain error, the burden shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have significantly affected the jury's verdict. *Ramey*, 721 N.W.2d at 302. That likelihood is absent here. The state's questioning of John was brief, and, although some questions were factual in nature, the answers to them

were directly given by other witnesses whose testimony Ozornia does not challenge. It is true that the questions, which the prosecutor should have known would go unanswered, revealed the story that the prosecutor wanted John to tell. But that story—that John provided Scott money, was working for the drug task force, and received a bag of methamphetamine from Scott—was told through the state's other witnesses. Scott testified that he received money from John, gave Ozornia the money in exchange for the bag of methamphetamine, and gave the bag of methamphetamine to John. Agent Helgeson testified that John was working as an informant for the task force and that John gave him the bag of methamphetamine he received from Scott after Scott's transfer from Ozornia. He also testified that he saw John meet with Scott, walk with him toward the house where Ozornia had gone, enter the backyard, and leave the yard. The substance of the allegedly improper questions was properly presented to the jury through legitimate testimony, meaning that the questions had no effect on Ozornia's substantial rights.

We are not persuaded otherwise by Ozornia's contention that the questions resulted in unfair prejudice because they were "designed to establish chain of custody for the drugs to make sure the drugs were admissible." The chain-of-custody rule does not require the elimination of "[a]ll possibility of alteration, substitution, or change of condition." *State v. Farah*, 855 N.W.2d 317, 321–22 (Minn. App. 2014) (quoting *State v. Hager*, 325 N.W.2d 43, 44 (Minn. 1982)), *rev. denied* (Minn. Dec. 30, 2014). And under Minnesota Rule of Evidence 901(a), all that is required to authenticate or identify something is "evidence sufficient to support a finding that the matter in question is what its proponent claims." Scott testified that he received a plastic bag containing a white substance and gave that bag

to John. Agent Helgeson testified that John gave him a plastic bag containing a white substance. And a Bureau of Criminal Apprehension scientist testified that forensic testing of the substance in that bag established that it was methamphetamine. John's testimony was not necessary to adequately establish the chain of custody linking Ozornia and the forensically tested substance.

We emphasize that the prosecutor's direct examination of John was not a model approach to a recalcitrant witness, but we do not believe the examination crossed the bad-faith bright line underscored in *Morales*: "[W]here the prosecution calls a witness for the purpose of prejudicing the defendant in the minds of the jury, knowing that the witness will claim immunity, reversible error results, regardless of actual prejudice." 788 N.W.2d at 753 (quotation omitted). When a prosecutor has a legitimate reason for calling the witness other than creating an atmosphere prejudicial to the defendant, the prosecutor has not called the witness in bad faith. *See id.* at 754. The prosecutor here demonstrated good faith, first by affording John use immunity for his testimony, second by informing the district court of the possibility that John might nevertheless refuse to testify, third by indicating that the district court should determine how it wished to proceed, and fourth by implicitly suggesting that the court could consider a process "outside the presence of the jury" to determine whether John would testify. It was the district court that orchestrated the procedure employed here, directing the prosecutor to question the witness in the jury's presence, permitting the prosecutor to "ask any other questions," and implicitly directing the prosecutor to re-call the witness for more questioning after he refused to answer questions to afford the witness the opportunity to avoid the consequences of the contempt-

of-court finding. Applying best practices in the jury's presence, a prosecutor should ask a resistant witness no more questions than necessary to establish that the witness will not testify.

II

Ozornia unpersuasively contends that we must reverse because the district court violated his constitutional right to confront his accusers by admitting the recording of John's voice captured by the transmitter John wore during the purchase. Before turning to the merits of this argument, we first address the parties' dispute over whether Ozornia preserved this issue for appeal.

Ozornia argues that he preserved his confrontation-based challenge by objecting to the recording on hearsay and foundation grounds. The argument fails. A defendant preserves an evidentiary objection based on the specific rationale offered for the objection. *See State v. Rossberg*, 851 N.W.2d 609, 618 (Minn. 2014) (reasoning that a defendant's "exclusive focus" at trial on the residual hearsay exception indicated that "a Confrontation Clause challenge was not apparent from the context of the objection"). Because Ozornia's objection at trial focused exclusively on hearsay and foundation, the district court did not decide the objection as a Confrontation Clause challenge. Because Ozornia failed to preserve a Confrontation Clause challenge, we review his challenge under the plain-error standard, which requires Ozornia to show a plain error that impacted his substantial rights. *See id.* Here again, the challenge fails on the lack of prejudice.

Ozornia fails to show that the alleged error affected his substantial rights. We will conclude that an alleged error violated a defendant's substantial rights if there "is a

reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). In evaluating the alleged error's effect on the verdict, we consider the persuasiveness of that evidence and the way the evidence was presented. *State v. Jackson*, 764 N.W.2d 612, 620 (Minn. App. 2009), *rev. denied* (Minn. July 22, 2009). Most of the recording that Ozornia challenges as erroneously admitted lacked any significant persuasive value, because it involved only vague, barely audible, unrelated statements. It did not capture the drug deal itself, as John was not present at the exchange of money and drugs. The recording instead describes John's movements before and after the exchange between Ozornia and Scott. We recognize that John's telling officers that Ozornia instructed him to go to a second location to make the exchange has some probative value. But the value is little, as the jury had already heard Scott testify that Ozornia sold him drugs and Agent Helgeson testified that he watched Ozornia, John, and Scott travel to the second location. We are satisfied that the jury would have reached the same verdict without the audio recording.

III

Ozornia raises three additional arguments in his supplemental brief. None is convincing.

He argues first that the district court violated his right to a speedy trial. We review alleged speedy-trial violations de novo, *State v. Taylor*, 869 N.W.2d 1, 19 (Minn. 2015), and we consider the delay's length, the reason for the delay, whether the defendant asserted his right to a speedy trial, and any prejudicial effect, *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999). Ozornia fails to present any argument as to the length, reason, or effect

of the delay. And although he maintains that he asserted his right to a speedy trial at his July 2021 bail hearing, during the December 2021 review hearing Ozornia's attorney expressly stated that he was *not* requesting a speedy trial in this case, but rather had requested a speedy trial in two other cases pending against Ozornia. We need not address Ozornia's under-developed speedy-trial argument further.

Ozornia argues second that the district court violated his Sixth Amendment rights when it excluded the testimony of a witness he did not disclose to the state until the day of trial. Although the Sixth Amendment does afford defendants the opportunity to present a complete defense, it is not a shield against a defendant's failure to comply with discovery rules. *See State v. Lindsey*, 284 N.W.2d 368, 372–73 (Minn. 1979). A defendant must provide notice of defense witnesses and their statements before the omnibus hearing. Minn. R. Crim. P. 9.02. And the district court has discretion to impose sanctions for failure to comply with discovery requirements. Minn. R. Crim. P. 9.03, subd. 8. Because Ozornia did not disclose the substance of the witness's testimony until the morning of trial, he fails to establish that the district court abused its discretion by excluding the witness's testimony.

Ozornia argues third that the district court violated his right to due process when it addressed the jury outside his presence, and he claims that this changed the verdict. "[T]he general rule is that a trial court judge should have no communication with the jury after deliberations begin unless that communication is in open court and in the defendant's presence." *State v. Sessions*, 621 N.W.2d 751, 755–56 (Minn. 2001). Before the jury read its verdict, the district court informed the parties that the jury had indicated to the bailiff

that it was deadlocked. The district court recounted that it instructed the jury to reduce questions to writing. The record suggests that the district court so communicated outside the defendant's presence and not in open court. But any error here was harmless. When deciding whether the district court's erroneous exclusion of the defendant from judge–jury communications constitutes harmless error, we consider the strength of the evidence and the substance of the judge's response. *Id.* at 756. The evidence against Ozornia was strong, consisting of direct testimony from Scott recounting his drug deal with Ozornia and from Agent Helgeson providing details of the investigation. And the substance of the exchange with the jury was neutral and inconsequential, as it merely informed the jury of the proper method to notify the district court of any issues. The response "did not favor the prosecution or defense," *see id.* at 756–57, and it was therefore harmless.

Affirmed.