STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0815

State of Minnesota,
Respondent,

vs.

Travis Clay Andersen,
Appellant.

Filed March 20, 2017
Affirmed
Hooten, Judge

Carver County District Court
File No. 10-CR-15-803

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark Metz, Carver County Attorney, Angella Erickson, Assistant County Attorney, Chaska, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

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

HOOTEN, Judge

In this appeal from his conviction for violation of an order for protection (OFP), appellant argues that the prosecutor committed multiple reversible errors and that the

district court erred by allowing the state to use his prior felony conviction for violation of an OFP as impeachment evidence. We affirm.

FACTS

In July 2015, after her romantic relationship with appellant Travis Clay Andersen ended, A.A. obtained an OFP that barred Andersen from having any contact with her. The OFP also barred Andersen from visiting A.A.'s residence.[1]

On August 1, 2015, at approximately 3:55 a.m., A.A. was awakened by loud knocking on her glass patio door. One of A.A.'s roommates, A.B., opened the blinds and looked outside. The area outside the patio door was lit, and both A.A. and A.B. recognized the person knocking as Andersen. A.A. immediately called the police, but by the time officers responded, Andersen had fled.

Andersen was later charged with one count of felony violation of an OFP. After a jury trial, Andersen was found guilty of violation of an OFP. The district court imposed a 21-month stayed prison sentence, which included 365 days in jail. Andersen now appeals.

D E C I S I O N

I.

Andersen argues that the prosecutor committed multiple reversible errors during trial. "[The] standard of review for claims of prosecutorial error depends on whether an objection was raised at the time of the alleged error." *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). Because Andersen did not object to the prosecutor's conduct at trial, we

[1] Andersen conceded at trial that the OFP was valid and in effect at the time of the incident in question, and that he was aware of its existence.

review under a modified plain error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). This standard requires Andersen to establish that the prosecutor committed an error and that the error was plain. *Id.* An error is plain if the prosecutor's conduct "contravenes case law, a rule, or a standard of conduct." *Id.*

Misstating the State's Burden of Proof

Andersen first asserts that the prosecutor committed plain error by misstating the state's burden of proof. The defendant enjoys a presumption of innocence. *State v. Bauer*, 189 Minn. 280, 284, 249 N.W. 40, 42 (1933). That presumption is not rebutted unless the state meets its burden of proving every element of each crime charged beyond a reasonable doubt. *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995).

On multiple occasions during trial, the prosecutor drew an analogy where he equated the evidence presented by the state to "little blue bricks" which "at the end of the day" would eventually "add up to make a wall." Andersen argues that this brick wall analogy "suggests that reasonable doubt disappears as the state presents more bricks (evidence) and that the state has met its burden when it presents enough bricks (evidence) to form a wall." To support his claim that this argument constitutes plain error, Andersen points to *State v. Trimble* as controlling precedent. 371 N.W.2d 921 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985). However, *Trimble* is distinguishable.

In *Trimble*, during closing arguments the prosecutor stated that the "[p]resumption of innocence is like a blank chalkboard . . . [where] believable evidence is . . . put on a chalkboard. *As more and more evidence against the defendant is found to be credible, gradually the presumption of innocence disappears*." *Id.* at 26 (emphasis in original). This

court found the prosecutor's description of the presumption of innocence in *Trimble* unacceptable, stating that it "suggests that once a large amount of evidence is presented, appellant loses the presumption of innocence. That is incorrect." *Id.* We identified that the correct standard for conviction "is proof beyond a reasonable doubt, and that standard does not depend on quantity. It depends completely on the jury's evaluation of whatever is presented." *Id.*

Here, the prosecutor did not mention Andersen's presumption of innocence disappearing as a result of the "blue brick wall." Instead, the prosecutor informed the jury that the blue bricks would "stack on each other" and "spread out." Then, the prosecutor focused on the role of the jury in evaluating the evidence, saying "[a]t the end of this case I'm going to ask you to think about everything that you've heard, see if all the bricks add up to make a wall, and then convict." Similarly, during closing arguments, the prosecutor concluded with:

> And I would ask you to determine that there is a brick wall here. It may not be the highest brick wall or the widest, but yet there is still the brick wall. There is the evidence to show, . . . that [Andersen] is guilty beyond a reasonable doubt. And I ask that you find him guilty.

In this "blue brick wall" analogy, the prosecutor did not imply that Andersen's presumption of innocence would vanish, or fall away. Instead, the prosecutor reiterated that the "wall" of evidence might not be the "highest" or "widest," but that there would be a sufficient amount to demonstrate that Andersen was guilty beyond a reasonable doubt. We conclude that the prosecutor did not misstate the state's burden of proof.

Improperly Shifting the State's Burden of Proof

Andersen next asserts that the prosecutor committed plain error by improperly shifting the state's burden of proof. The state may not shift the burden to the defendant to disprove an enumerated element of a crime. *Auchampach*, 540 N.W.2d at 816.

During cross-examination, the prosecutor asked Andersen if anyone could corroborate his claim that he was home the night of the incident. Andersen replied that no one could. During closing, the prosecutor again mentioned that Andersen could not corroborate his alibi, stating, "He has no corroboration for the fact that he was simply at home that night. How do you weigh that?"

In support of his position, Andersen points to *State v. Fields*, where the Minnesota Supreme Court stated that a prosecutor's "commenting on [a] defendant's failure to call witnesses to corroborate his testimony" is "clearly disapproved of." 306 Minn. 521, 522, 237 N.W.2d 634, 634 (1976). This is because "such comment might suggest to the jury that defendant has some duty to produce witnesses or that he bears some burden of proof." *Id*. (quotation omitted). The state points to *State v. Nissalke* for support of its position that a prosecutor may comment on "an absence of evidence to support theories that [the defendant] put[s] before the jury." 801 N.W.2d 82, 107 (Minn. 2011).

In *Fields*, the prosecutor made the following statements during closing:

> There is no corroborating evidence on this point. The brother has not been called, the girlfriend has not been called. There is no evidence, other than the defendant's word for it, other than his explanation of why he was there that supports that particular version of the facts.

306 Minn. at 522–23, 237 N.W.2d at 635. The supreme court determined that this statement was prosecutorial misconduct. *Id*. Further, the supreme court opined that this particularly "strong language" made it "difficult to affirm," but concluded that it was able to do so "only because the evidence is so strong." *Id*. at 523, at 635. Yet, in *Nissalke*, the supreme court found the prosecutor's statement that "there's nobody who can really provide an alibi for the defendant" during closing argument was not an attempt to shift the burden of proof and "did not constitute prosecutorial misconduct of any type." 801 N.W.2d at 106–07.

While *Fields* and *Nissalke* appear contradictory, the cases decided between *Fields* and *Nissalke* demonstrate that the touchstone of the misconduct analysis is whether the prosecutor refers to a defendant's failure to call a specific witness, not a general lack of support for an alibi.[2] Viewing the misconduct analysis through this lens allows *Nissalke* to be read in harmony with *Fields*. In *Nissalke*, the prosecutor commented that there were no attendees from a party Nissalke had been at "who testified or could testify that they were there with the defendant the entire night." 801 N.W.2d at 106. In *Fields*, the

[2] *See State v. Mayhorn*, 720 N.W.2d 776, 787 (Minn. 2006) (finding misconduct where prosecutor asked whether defendant knew last name of potential witness and questioned whether that witness could have helped with defendant's alibi); *State v. Redd*, 310 Minn. 145, 146, 245 N.W.2d 257, 258 (1976) (finding misconduct where prosecutor argued in closing that defendant failed to call fingerprint expert to challenge state's fingerprint expert); *State v. Richardson*, 514 N.W.2d 573, 578 (Minn. App. 1994) (finding misconduct where prosecutor questioned defendant about his failure to call potentially helpful witnesses); *State v. Roden*, 380 N.W.2d 520, 526 (Minn. App. 1986) (finding misconduct where prosecutor commented about defendant's failure to call specific named witness), *aff'd as modified*, 384 N.W.2d 456 (Minn. 1986). *But cf. State v. Jensen*, 308 Minn. 377, 379, 242 N.W.2d 109, 110–11 (1976) (not finding misconduct where prosecutor referred to state's witness testimony as "uncontradicted").

prosecutor noted that "[t]he brother has not been called, the girlfriend has not been called." 306 Minn. at 522–23, 237 N.W.2d at 635.

This case is more similar to *Nissalke*. Like in *Nissalke*, the prosecutor did not inappropriately shift the burden of proof to Andersen by commenting on Andersen's failure to call a specific witness or by explicitly commenting on Andersen's lack of witnesses. Instead, the prosecutor commented that Andersen's alibi was not corroborated by any evidence and questioned how his testimony should be weighed. Therefore, we conclude that the prosecutor did not impermissibly shift the burden of proof.

Arguing Evidence Not in the Record to Demonstrate Propensity

Andersen next argues that the prosecutor committed misconduct by arguing evidence not in the record during closing, and by urging jurors to use that evidence to determine if he had the propensity to commit the crime. In a closing argument, a prosecutor may only use evidence in the record or reasonable inferences drawn from that evidence. *State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006). Using a defendant's past crimes to establish that the defendant had a propensity to commit the charged crime constitutes prosecutorial misconduct. *State v. Duncan*, 608 N.W.2d 551, 555 (Minn. App. 2000), *review denied* (Minn. May 16, 2000).

When questioning Andersen about his prior convictions, the prosecutor attempted to elicit testimony that Andersen fled the scene of a prior crime, but Andersen denied having done so. Yet, in his closing argument, the prosecutor stated:

> [H]ow do we know that he was actually there? . . . Just because police did not find him on the premises does not mean that he was not there. As we heard, in the past Mr. Andersen runs

> away from the scene when he knows the police are on the way. . . . I think that's reasonable to assume that that's exactly what he did. He skedaddled, he got out of there.

Because the prosecutor's statement in closing that Andersen previously fled the scene of a crime when he knew police were on the way was not based on evidence in the record, it was plainly erroneous.

The state concedes that it was plain error for the prosecutor to argue facts not in the record, but contends that the prosecutor did not urge the jury to use these facts as evidence of Andersen's propensity to commit the crime. The state further argues that because Andersen was not charged with fleeing a police officer and flight from the scene was not an element of the charged offense, the prosecutor's use of the facts not in evidence was not misconduct.

However, the very words the prosecutor used demonstrate otherwise. The prosecutor first asked a question: "[H]ow do we know that [Andersen] was actually there?" Then, the prosecutor answered the question: "Just because police did not find him on the premises does not mean that he was not there. As we heard, in the past Mr. Andersen runs away from the scene when he knows the police are on the way." These statements constitute improper use of past acts not in evidence to show criminal propensity and were plainly erroneous.

Once the defendant has established that plain error occurred, the prosecution bears "the burden of demonstrating that its misconduct did not prejudice the defendant's substantial rights." *Ramey*, 721 N.W.2d at 299–300. "An error affects a defendant's substantial rights if there is a reasonable likelihood that the error had a significant effect on

the jury's verdict." *State v. Milton*, 821 N.W.2d 789, 809 (Minn. 2012) (quotation omitted). If the state does not meet this burden, "the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Ramey*, 721 N.W.2d. at 302.

Ultimately, we will reverse a conviction "only if the [prosecutorial] misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). When the prosecutor commits multiple instances of misconduct, we consider the cumulative effect of all misconduct in order to determine whether the misconduct deprived a defendant of a fair trial. *State v. Dobbins*, 725 N.W.2d 492, 506 (Minn. 2006).

The state argues that Andersen was represented by zealous defense counsel, and the combination of defense counsel arguments and instructions by the district court sanitized any misconduct, so that Andersen's substantial rights were not affected. However, even if the conduct of defense counsel and the district court's instructions were insufficient to sanitize the misconduct, the state's evidence of Andersen's guilt is so strong that any prosecutorial misconduct did not have a significant effect on the jury's verdict.

Multiple eyewitnesses testified that Andersen knocked on A.A.'s window on the night in question, in violation of the OFP. A.A. stated that she was "100 percent sure" that the person she saw outside her apartment was Andersen. When asked if A.B. was sure the person outside the apartment was Andersen, A.B. responded, "Yes." After seeing Andersen, A.A. immediately called the police. The responding officer testified that when she arrived shortly after the call, she found A.A. in a distressed state.

Given the witness testimony presented by the state, we conclude that any prosecutorial misconduct related to Andersen's propensity for fleeing the scene did not have a significant effect on the jury verdict.

II.

After Andersen chose to testify on his own behalf, the district court permitted the state to use evidence of Andersen's four prior felony convictions for impeachment purposes. Andersen argues that the district court erred by allowing the state to impeach him with one of his prior convictions, his 2012 conviction for violation of an OFP. We disagree.

A witness may be impeached by a prior felony conviction not involving dishonesty "only if . . . the court determines that the probative value of admitting this evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a). We review a district court's decision to admit a prior felony for impeachment purposes for an abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998).

In weighing whether the probative value of a prior conviction outweighs its potential prejudicial effect, the district court must weigh the following five factors, commonly known as the *Jones*[3] factors:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of

[3] These factors were outlined by the Minnesota Supreme Court in *State v. Jones*, 271 N.W.2d 534, 537–38 (Minn. 1978). Though *Jones* predates rule 609(a), the supreme court has held that the *Jones* factors are equally applicable to post-rule 609(a) analysis. *Ihnot*, 575 N.W.2d at 586.

> the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

Id. A district court should demonstrate on the record that it has weighed the *Jones* factors. *Swanson*, 707 N.W.2d at 655.

For the first *Jones* factor, a prior crime has impeachment value if it helps the jury "see the whole person of the defendant and better evaluate his or her truthfulness." *Id*. (quotation omitted). "The mere fact that a witness is a convicted felon holds impeachment value." *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011). On this factor, the district court stated that "all four different felonies, given the felony nature of the different convictions[,] have impeachment value."

For the second *Jones* factor, "even an older conviction can remain probative if later convictions demonstrate a history of lawlessness." *Swanson*, 707 N.W.2d at 655 (quotation omitted). The district court identified that the convictions were from "2013, 2012, 2012 and 2007." While the district court was concerned that the 2007 conviction "is a little bit older," the district court determined that all four convictions, including the 2007 conviction, "were within a time frame that make them relevant."

Regarding the third *Jones* factor, "[t]he more similar the alleged offense and the crime underlying a past conviction, the more likely it is that the conviction is more prejudicial than probative." *Id*. The district court found that this factor weighed against admissibility, stating "the similarity issue for number three, the felony [violation of an OFP] weighs against allowing that in."

The fourth and fifth *Jones* factors favor admission of the prior convictions "[i]f credibility is a central issue in the case." *Id*. Regarding these factors, the district court opined "that whether or not Mr. Andersen testifies[,] his credibility will be the main focus on whether or not the jury determines that he is guilty of the offense."

Andersen does not dispute that the first, second, fourth, and fifth *Jones* factors weigh in favor of admissibility. Instead, he argues that the magnitude of risk on the third *Jones* factor was so great as to outweigh any possible probative value, because the 2012 felony violation of an OFP "was identical to the offense for which he was being tried." It is true, as Andersen suggests, that the district court might have avoided any potential prejudice by preventing the state from describing his prior violation of an OFP conviction as anything other than an "unspecified felony." *See Hill*, 801 N.W.2d at 652. Indeed, this could be considered a best practice where the crimes are as similar as they are here. However, the district court is not required to limit the state to using an "unspecified felony" for impeachment purposes, and the decision to do so remains within the district court's discretion. *Id*.

Additionally, the district court gave the jury a limiting instruction, informing the jury they were to use Andersen's prior convictions for impeachment purposes only. Such a limiting instruction "adequately protects [a] defendant against the possibility that the jury would convict him on the basis of his character rather than his guilt." *State v. Lloyd*, 345 N.W.2d 240, 247 (Minn. 1984).

Because the district court weighed the *Jones* factors and gave appropriate limiting instructions, we conclude that the district court did not abuse its discretion by admitting Andersen's prior conviction for violation of an OFP for use as impeachment evidence.

Affirmed.