STATE OF MINNESOTA
IN COURT OF APPEALS
A11-39

State of Minnesota,
Respondent,

vs.

Gary Allen Kachina,
Appellant.

Filed January 23, 2012
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CR-09-44859

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Michael K. Walz, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

William M. Ward, Hennepin County Public Defender, Paul J. Maravigli, Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Ross, Judge; and Huspeni, Judge.*

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

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

ROSS, Judge

Gary Kachina was convicted of first-degree burglary after he was found in someone else's residential garage, surveying its contents, with the garage-door opener in his hand. During his trial, the state sought to introduce evidence of Kachina's prior first-degree burglary conviction under similar circumstances to prove that he entered intending to steal, that he did not enter by mistake or accident, or that he was following a common plan or scheme. The district court did not permit the conviction itself to be admitted, but it permitted the former victim's testimony from the prior trial to be read to the jury and informed the jury that the testimony referred to Kachina. Kachina argues on appeal that the district court's statement was either a structural error regardless of whether it harmed his defense, or a procedural error that did harm his defense. He also argues that the evidence was insufficient to convict him of first-degree burglary and that his due process rights were violated when the prosecutor withheld exculpatory evidence. Because the judge's statement was a harmless error, because the evidence was sufficient to convict Kachina of first-degree burglary, and because Kachina's due process rights were not violated by the prosecutor's failure to produce squad car videotapes, we affirm.

FACTS

At about 7 o'clock on a Saturday morning in September 2009, D.L. prepared to wash his car in the driveway of his Hopkins home. He readied a wash bucket and a sponge, but went inside his house momentarily for a cup of coffee. He left his unlocked

car in the driveway, his garage-door opener on the car's front seat, and the overhead garage door closed.

While he was inside the house, D.L. heard his electric garage-door motor opening the garage door. Concerned, he locked the pass door between his garage and house and went outside through the front door. He saw a man, later identified as Gary Kachina, standing inside the open garage. Kachina was holding D.L.'s garage-door opener and looking around. D.L. asked Kachina what he was doing in his garage and called him a burglar. Kachina replied that he was just a neighbor who had entered D.L.'s garage mistakenly. D.L. knew that Kachina was no neighbor. He wrested the garage-door opener from Kachina's hand, forced him from the garage, and "tossed" him down a ditch beside the driveway. D.L. then sat on Kachina, restraining him. But he eventually decided he had to get off to call police. He did, and Kachina fled.

Later that afternoon, T.N. was also washing his car in his Hopkins driveway. He saw the door of his screened-in porch, which was attached to his garage, suddenly open and a man (Kachina) run out and leap over a fence. T.N. pursued and caught Kachina and asked him why he was in his porch. Kachina replied that T.N. was mistaken, that he was never in his porch. T.N. telephoned police.

When police officers arrived, Kachina again fled. The officers chased him on foot. During his flight, Kachina discarded his identification and a GPS unit. Police caught Kachina. T.N. and D.L. separately identified him as the intruder they each had encountered. The GPS unit that Kachina tossed away during the chase had been reported stolen from a car parked in a driveway in St. Louis Park.

The state charged Kachina with one count of first-degree burglary under Minnesota Statutes section 609.582, subdivision 1(a) (2008) and one count of receiving stolen property under Minnesota Statutes sections 609.53, subdivision 1 (2008) and 609.52, subdivision 3(5) (2008). The case proceeded to trial.

Before trial, the state notified Kachina that it intended to introduce evidence of his first-degree burglary conviction in August 2004 pursuant to *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). The state anticipated that it would rely on the evidence to prove that Kachina intended to steal, that he had not entered the garage by mistake or accident, or that he was following a common plan or scheme. The 2004 burglary involved Kachina entering a home in a Minneapolis suburb during the early morning hours. The homeowner awoke to discover Kachina, who then fled through a screen door. Kachina was soon apprehended possessing the homeowner's credit card.

Kachina moved the district court to exclude evidence of his 2004 first-degree burglary conviction as improper character evidence under Rule 404 of the Rules of Evidence. During the pretrial conference, Kachina suggested that the court should consider the evidence overall and then later decide if the state's case was strong enough without the challenged conviction evidence. The court agreed to listen closely to the state's evidence during trial before ruling on the admissibility of evidence of the 2004 burglary, but it stated that in any event it would not allow the 2004 conviction itself to be admitted. The jury trial began that same day.

During the trial, the district court decided to allow evidence of the 2004 burglary because it believed that the state's evidence on the element of Kachina's intent was

otherwise weak and because the evidence proved that Kachina acted with a common plan. Kachina objected, contending that the evidence was inadmissible because evidence of his intent was *not* weak and that the 2004 burglary evidence was more prejudicial than probative. The district court held that the evidence's probative value outweighed any prejudice. Because the state's witness from the 2004 burglary trial was unavailable to testify and Kachina had a prior opportunity to cross-examine him, the district court permitted the transcript of that witness's prior testimony to be read to the jury. It allowed Kachina to first review the transcript and remove any objectionable portions. The district court instructed the jury on the evidence's limited use before admitting the testimony and it did so again at the close of trial when it gave its complete jury instructions. After the jury heard the testimony from the 2004 burglary trial about a man being found inside a home, the district court clarified that the testimony referred to Kachina, stating, "Ladies and gentlemen, the person that [the witness] was talking about as it relates to the event on May [10,] 2004, at 8432 Queen Avenue North, [is] Mr. Kachina." Kachina objected to the statement, and the district court overruled the objection. In the district court's view, although the conviction identifying Kachina was itself admissible, informing the jury of the conviction would have been more prejudicial than allowing it to hear the testimony about the underlying conduct.

The jury found Kachina guilty of both first-degree burglary and receiving stolen property. Kachina moved the district court for judgment of acquittal or, in the alternative, a new trial. The district court denied the motion. It sentenced Kachina to 57

months in prison for the burglary and 90 days for receiving stolen property, the sentences to be served concurrently.

Kachina appeals.

D E C I S I O N

I

Structural Error

Kachina argues that the district court was not impartial because the judge identified him in the 2004 burglary testimony and that the judge's partiality constitutes a structural error requiring reversal. The state concedes that the district court erred by stating that the testimony referred to Kachina, so for the purposes of this analysis we assume without discussion that the district court erred.

Kachina is correct that a criminal defendant has a constitutional right to a trial before an impartial judge. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005). A judge must not have any actual bias against a defendant or interest in the outcome of his case. *Id.* at 252. One type of constitutional error is a structural defect. *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 1264–65 (1991). Structural defects infect "the constitution of the trial mechanism" and "defy analysis by harmless error standards." *Id.* at 309, 111 S. Ct. at 1265. Structural errors include a trial before a biased judge. *Id.* at 309, 111 S. Ct. at 1265. So if a defendant has been deprived of a trial before an impartial judge, we must reverse. *Dorsey,* 701 N.W.2d at 253.

Kachina maintains that the trial judge's "testimony" advanced the prosecution's case and demonstrated judicial bias that prevented a fair trial. We see no evidence that

the trial judge was biased against Kachina or that he intended to advance the prosecution's case. Erroneous or not, the judge's decision to introduce testimony from the 2004 burglary trial rather than to admit evidence of the 2004 burglary conviction itself arose from the judge's express effort to ensure that Kachina was not unfairly prejudiced by evidence of the conviction. When the state first sought to introduce evidence of Kachina's 2004 burglary, the judge stated that he would wait to hear the other evidence to establish that the state needed it. He also stated that he would not allow the jury to learn of the conviction itself because he was concerned that the jury would "peruse and look over" the judgment of conviction. After he decided to allow the transcript from the 2004 burglary trial to be read to the jury, he gave the jury a limiting instruction before the reading and again during the general jury instructions. And the judge also allowed Kachina's attorney to remove any portions of the testimony that he did not want read to the jury. This careful effort by the district court to avoid undue prejudice against Kachina's defense dispels any appearance of bias against him. Kachina mistakenly asserts that the judge stated that Kachina actually *committed* the 2004 burglary. But the judge's statement merely identified Kachina as the subject of the identifying witness's testimony.

In addition to his argument claiming bias, Kachina also maintains that the district court's statement constituted an automatically reversible structural error. We are not persuaded by the cases that Kachina relies on in support. Those cases are all distinguishable. In them, the judge took the witness stand to testify as a witness, or conducted an independent fact investigation, or engaged in a bitter exchange with the

defendant. *See Mayberry v. Pa.*, 400 U.S. 455, 465–66, 91 S. Ct. 499, 504–05 (1971) (holding that the judge that charged defendant with contempt could not sit to determine whether he was guilty of contempt because the judge had become "embroiled in a running, bitter controversy" with the defendant and he could not be impartial); *In re Murchison*, 349 U.S. 133, 134–39, 75 S. Ct. 623, 624–27 (1955) (holding that the judge should have recused himself from defendant's trial when he was the same judge that originally charged him during a one-man grand jury in which he made factual findings); *State v. Dorsey*, 701 N.W.2d 238, 253 (Minn. 2005) (holding that there was structural error when the judge conducted an independent fact investigation of an assertion made by a "key defense witness" and revealed those results to counsel); *State v. Sandquist*, 146 Minn. 322, 323–27, 178 N.W.2d 883, 884–85 (1920) (holding that the defendant was prejudiced when the judge left the bench, took the witness stand, and testified as a witness himself). Kachina also relies on two federal cases; they are also factually distinguishable, and lower federal court decisions are not binding on us. *See Midland Credit Mgmt. v. Chatman*, 796 N.W.2d 534, 536 (Minn. App. 2011).

Kachina argues that he was not given the opportunity to explain or clarify his prior misconduct that was the subject of the disputed prior witness testimony from the 2004 burglary trial. He cites *State v. Frisinger*, which held that the district court erred by "refusing to allow the explanation or clarification" to the jury "that the [defendant's] prior conviction was the result of a guilty plea by defendant and that an attorney did not represent her when she entered the plea." 484 N.W.2d 27, 32 (Minn. 1992). Most relevant to our analysis, the *Frisinger* court added that in the case of

> prior misconduct proved by a conviction: the defendant should be allowed to give his or her version of the facts underlying the conviction and to explain the circumstances relating to the conviction, *but any error in refusing to allow the defendant to do so is subject to harmless error impact analysis*.

Id. at 33 (emphasis added). Kachina did not attempt to explain the circumstances of his prior conviction by taking the stand, unlike the defendant in *Frisinger*. And even if he had and was refused, *Frisinger* would not call for a structural error requiring reversal but a harmless error analysis.

Harmless Error

Kachina maintains that even if there was no structural error, the judge's violation of Rule 605 of the Minnesota Rules of Evidence, which prohibits a judge presiding at trial from testifying as a witness, was harmful and unfairly prejudicial. A constitutional error is prejudicial "if there is a reasonable possibility that the error might have contributed to the conviction." *State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986). When applying the harmless error test, we must "look to the basis on which the jury rested its verdict and determine what effect the error had on the actual verdict." *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996) (citation omitted). "If the verdict actually rendered was surely unattributable to the error, the error is harmless beyond a reasonable doubt." *Id.* We have no difficulty concluding that Kachina's conviction was surely unattributable to the error.

We first reject Kachina's assertion that the judge "testified" that Kachina was guilty of the 2004 offense; we have already determined that the judge did not state that

Kachina was guilty of the offense. And whatever the error, we see copious evidence apart from the treatment of the challenged 2004 testimony for the jury to have convicted Kachina of the present offenses. The jury learned that Kachina was found inside D.L.'s garage holding the garage-door opener that he had taken without permission from D.L.'s unoccupied car, that he falsely claimed to be D.L.'s neighbor, that he was looking around inside the garage, that he had to be physically removed from the garage, and that he fled from police. The jury learned that the GPS unit that Kachina tossed away (along with his own identification) while fleeing police had been stolen from a car that had been parked in the driveway of another home. The jury also heard T.N. testify that he saw Kachina running out of his screened-in porch attached to his garage the same day that Kachina was in D.L.'s garage and that Kachina falsely denied being there. We can conceive of no plausible explanation other than theft for why Kachina was in D.L.'s garage.

Although the overwhelming nature of the evidence that Kachina intended theft inside the garage alone defeats Kachina's argument that his defense was prejudiced by the erroneous treatment of the 2004 burglary, we add an independent ground for rejecting it. As both the state and the trial judge pointed out, the evidence of the 2004 conviction itself could have been properly presented to the jury, and of course the conviction would have identified Kachina.

We hold that the jury did not likely rest its verdict on the judge's erroneous statement about the 2004 testimony. The jury's verdict was therefore not attributable to the statement identifying Kachina as the subject of that testimony, and the error was harmless beyond a reasonable doubt.

II

Kachina also contends that the evidence is insufficient to convict him of first-degree burglary. The contention is wholly unconvincing for the reasons just discussed.

We analyze claims of insufficient evidence by determining whether the evidence, when considered in the light most favorable to the conviction, could reasonably support the jury's verdict. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004). We assume that the jury believed the state's witnesses and evidence and disbelieved any contrary evidence. *State v. Robinson*, 539 N.W.2d 231, 238 (Minn. 1995). We will not disturb the jury's verdict if, acting with due regard for the presumption of innocence and the requirements of proof beyond a reasonable doubt, the jury could reasonably conclude that the defendant is guilty of the charged offense. *Bernhardt*, 684 N.W.2d at 476–77.

For the jury to have found that Kachina committed first-degree burglary, it must have been persuaded that he "enter[ed] a building without consent and with intent to commit a crime, or enter[ed] a building without consent and commit[ed] a crime while in the building." Minn. Stat. § 609.582, subd. 1(a). Kachina argues that the evidence is insufficient to support the "intent to commit a crime" element, which is usually proven circumstantially by inferences from the defendant's words or actions in their circumstantial context. *See State v. Johnson*, 616 N.W.2d 720, 726 (Minn. 2000). Circumstantial evidence may be just as convincing as direct evidence. *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999).

We have already determined that the evidence of guilt—particularly including evidence of Kachina's intent to commit a crime in the garage—was so overwhelming that

the error concerning testimony from Kachina's 2004 burglary trial was harmless. Kachina's entry with intent to steal was obvious and any remotely plausible innocent explanations were foreclosed by the surrounding circumstances. Again, we cannot imagine a theft-free motive for the intrusion.

III

Kachina also argues in a separate pro se brief that his due process rights were violated because the prosecutor withheld exculpatory evidence. Kachina unsuccessfully argued to the district court that the state should be sanctioned under Criminal Rule of Procedure 9.03 for destroying police squad car recordings of the two witness identifications of Kachina.

The supreme court has held that the state "has a duty to preserve evidence that it collects during the investigation of [a] crime." *State v. Nissalke*, 801 N.W.2d 82, 110 (Minn. 2011). A defendant's due process rights are implicated when the state "loses, destroys, or otherwise fails to preserve material evidence." *State v. Jenkins*, 782 N.W.2d 211, 235 (Minn. 2010). But "[t]he failure to preserve potentially useful evidence that is actually collected during a criminal investigation does not constitute a denial of due process unless the defendant shows bad faith on the part of the police." *Id.* With a destruction-of-the-evidence claim, we must determine "whether the destruction was intentional and whether the exculpatory value of the lost or destroyed evidence was apparent and material." *State v. McDonough*, 631 N.W.2d 373, 387 (Minn. 2001).

Officer Mark Kyllo testified that squad car cameras often record in-person identifications. He stated that he believed that he had recorded Kachina's identifications

and that he had notified the police department that the recording needed to be preserved. But if the recordings actually existed they were overwritten during the department's course of recycling squad car videotapes every six months. The department officials could not recall Officer Kyllo's request and his police report did not refer to any recordings. Because Kachina has not established that the evidence was destroyed intentionally or, if it was, that it would have been exculpatory, his due process rights were not violated. *Cf. Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

Affirmed.