STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0675

State of Minnesota,
Respondent,

vs.

Anthony Donte Collier,
Appellant.

Filed February 4, 2013
Affirmed
Stoneburner, Judge

Clay County District Court
File No. 14-CR-11-1144

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

Brian J. Melton, Clay County Attorney, Heidi M. Fisher Davies, Assistant County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Melissa V. Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Hooten, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of aiding and abetting first-degree aggravated robbery, arguing that prosecutorial misconduct and the district court's failure to instruct on the proper use of prior-crimes evidence entitle him to a new trial. We affirm.

FACTS

In February 2011, appellant Anthony Collier, his brother Antoine Collier, and James Taylor robbed a Stop-N-Go convenience store in Moorhead. Taylor held the store clerk, Chris Bauck, at gunpoint and forced him to retrieve money from the safe. Collier's defense was that Bauck had orchestrated the theft of money from the store, which is owned by Bauck's father, by staging a fake armed robbery, such that Collier was guilty of theft but not first-degree aggravated robbery.

At trial, Juan Flores, Jr., who knew Bauck well, testified for the defense that about a year before the robbery, Bauck told Flores when the best time to rob the store would be and where some of the money was kept. Flores, on cross-examination about why he had not previously revealed this information, testified that although he was represented by the same defense counsel as Collier, he had not thought that the information from Bauck was important and did not disclose it to defense counsel until he met Collier for the first time outside a courtroom shortly before Collier's trial.

The jury was instructed on aiding robbery and conspiracy to commit robbery, as well as on the lesser-included offenses of theft, aiding theft, and conspiracy to commit theft. The jury found Collier guilty of aiding first-degree aggravated robbery and

conspiracy to commit first-degree aggravated robbery. The district court sentenced Collier to the presumptive executed prison term of 68 months in prison and ordered restitution. This appeal followed.

D E C I S I O N

I. Prosecutorial misconduct

A conviction will be reversed for prosecutorial misconduct only if, "when considered in light of the whole trial, [the misconduct] impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). A prosecutor engages in prejudicial misconduct if the prosecutor's acts have the effect of materially undermining the fairness of a trial. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). A prosecutor also engages in prejudicial misconduct if the prosecutor violates "clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *Id.*

A. Belittling defense; disparaging defense counsel

Collier argues that the prosecutor belittled his defense and disparaged defense counsel by implying that defense counsel conspired with Flores to fabricate Collier's defense. Although prosecutors are allowed to argue that there is no merit to the specific defense raised by the defendant, they may not belittle a particular defense in the abstract. *State v. Matthews*, 779 N.W.2d 543, 552 (Minn. 2010). Disparaging defense counsel and questioning his or her personal credibility constitutes misconduct. *State v. McDaniel*, 777 N.W.2d 739, 751-52 (Minn. 2010) (finding closing argument improper when prosecutor argued that defense counsel misrepresented the truth).

Viewing the record as a whole, there is no merit to Collier's argument that the prosecutor attacked the personal integrity of defense counsel by implying that defense counsel conspired with Flores to fabricate a defense. Rather, the record shows that the prosecutor was implying that Collier conspired with Flores to fabricate a defense. The point of the prosecutor's line of questioning was to show that, in addition to failing to report this information to the authorities who were investigating the robbery, Flores, despite being represented by the same defense attorney for two months prior to Collier's trial, failed to mention Bauck's conversation suggesting staging a robbery at the Stop-N-Go until the day he met Collier at the courthouse, just six days before trial. Nothing in the prosecutor's questioning of Flores implies that defense counsel had a role in fabricating evidence. The prosecutor's questions challenged the veracity of Flores's testimony and did not attack the personal integrity of defense counsel.

B. Prior convictions

Collier argues that the prosecutor also committed prejudicial misconduct by using his prior convictions to prove that he has a propensity to commit crimes. Collier does not contest the admission of his prior convictions—defense counsel admitted them during Collier's direct testimony—but asserts that the prosecutor subsequently used that evidence improperly.

Because Collier did not object to the alleged misconduct, the modified plain-error test applies. The plain-error doctrine requires that, before an appellate court reviews unobjected-to trial error, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). In the context of

prosecutorial misconduct, when the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden shifts to the state to demonstrate that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the verdict. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

"[P]ast-crimes evidence is only relevant to attack a witness's credibility or character for truthfulness and may be used only to impeach a witness." *State v. Swaney*, 787 N.W.2d 541, 562 (Minn. 2010) (citing Minn. R. Evid. 609(a)). Past-crimes evidence may not be used to prove that a witness has a propensity to commit crimes. *Id.*

Defense counsel admitted Collier's prior convictions into evidence after Collier testified that the robbery was staged, and that he was concerned about getting caught because he had been "in trouble" before. During cross-examination, Collier stated that his brother tried to lure him into committing the crime, which prompted the prosecutor to reference the fact that Collier had previously been "in trouble."

> Q: Who is trying to lure you in?
> . . . .
> A: Like, my brother was saying it, [Taylor] was saying it. I heard [Bauck] mention it.
> Q: Your brother Antoine, right?
> A: Yes.
> Q: He doesn't get in much trouble, does he?
> A: No.
> Q: In fact, he doesn't even have any felonies, does he?
> A: No.
> . . . .
> Q: So why would he be egging you on?
> A: Because I'm new -- I don't know [Bauck], I [don't] have any knowledge of how much money is in the store. And, I mean --

Q: But, Mr. Collier, you've been in trouble before; isn't it more likely that you were trying to get your brother in on it?
A: No.

We conclude that the prosecutor's use of Collier's past "trouble," viewed in context, was an attempt to impeach Collier's statement that his brother lured him into committing the crime. Because it is not clear that the prosecutor used past-crimes evidence as an impermissible attack on Collier's character, any error was not "plain." *See Ramey*, 721 N.W.2d at 302 (an error is plain if it is clear or obvious). And even if the prosecutor's question is plainly misconduct, we conclude that there is no reasonable likelihood that the absence of this questioning would have had a significant effect on the verdict. *See id.* Throughout the trial, Collier admitted that he was a participant in a crime: he waived his right to a jury determination on the element of identity and he testified to the jury that he accepted the fact that he was admitting his participation in a crime and that he was guilty of a crime. Because Collier already admitted to committing a crime, the jury could not have used Collier's propensity to commit crimes to conclude that Collier must have committed robbery rather than the theft he admitted to. That determination turned on whether the state proved beyond a reasonable doubt that Bauck was a victim. Collier's propensity to commit crimes has no bearing on that question. Additionally, the prosecutor's comment comprised a small portion of the entire cross-examination and the prosecutor did not further mention Collier's past crimes. There is no reasonable possibility that the prosecutor's question, asking whether it was "more likely"

that Collier lured his brother into committing the crime, had a significant effect on the verdict in this case.

II. Cautionary jury instruction

Collier argues that the district court erred by not sua sponte instructing the jury regarding the proper use of his prior felony convictions. He argues that, without the limiting instruction, the jury was allowed to infer that, because he committed crimes in the past, he "was likely to have committed the charged crimes." Because Collier did not request, or object to the lack of, a cautionary instruction, this issue is reviewed using the plain-error standard. *State v. Word*, 755 N.W.2d 776, 785 (Minn. App. 2008).

A district court generally should give a limiting instruction at the time it admits evidence of a defendant's prior convictions for impeachment purposes as well as in its final instructions to the jury. *State v. Bissell*, 368 N.W.2d 281, 283 (Minn. 1985). The complete absence of a cautionary instruction is plain error. *See State v. Barnslater*, 786 N.W.2d 646, 654 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010).

The district court did not give the jury a cautionary instruction at any time regarding the proper use of Collier's prior convictions. This constitutes plain error. *See id.* But the lack of a cautionary instruction could not have affected Collier's substantial rights because the jury did not need to use Collier's prior convictions to infer that he committed a crime—Collier admitted that he participated in a crime. The only question was whether Collier was guilty of theft or robbery, which depended solely on the jury's determination of whether Bauck was a participant in the crime or a victim. Collier's propensity to commit crimes had no bearing on that determination. The district court's

failure to give a cautionary jury instruction did not affect the outcome of this case. *See State v. Kuhlmann*, 806 N.W.2d 844, 853 (Minn. 2011) ("[Plain] error affects substantial rights if the error was prejudicial and affected the outcome of the case.").

III. Pro se issues

A. Instructing jury on robbery counts

In a pro se supplemental brief, Collier argues that there must have been reasonable doubt as to Bauck's participation in the crime because the district court instructed the jury on the lesser-included offense of theft.

> [W]hen evaluating whether to give a lesser-included offense instruction, [district] courts must determine whether 1) the lesser offense is included in the charged offense; 2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and 3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense.

State v. Dahlin, 695 N.W.2d 588, 595 (Minn. 2005). By instructing the jury on a lesser-included offense, the district court does not determine that reasonable doubt exists as to the greater offense; rather, the district court merely determines that there is a rational basis for the jury to acquit the defendant of the greater offense. *Id.* That rational basis existed here because the jury could have concluded that the state failed to prove beyond a reasonable doubt that Bauck was a victim in this crime. But the jury rejected Collier's theory of the case and found beyond a reasonable doubt that Collier committed a robbery. This court defers to the jury's credibility determination, *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009), and based on that finding the evidence supports the jury's findings of guilt as to the robbery charges.

B. Ineffective assistance of counsel

Collier argues that he received ineffective assistance of counsel due to defense counsel's failure to impeach a state witness's character with evidence of racial bias. Prior to trial, it was revealed that following the robbery, state witness E.S., a white female, sent a text message referring to the suspects that purportedly stated, "we need to keep these monkeys off the street, ha ha." Defense counsel sought to use the text message as evidence of racial bias. The district court reserved ruling on the issue. But when E.S. testified at trial, defense counsel did not attempt to bring up the text message.

To prevail on a claim of ineffective assistance of counsel, the appellant must affirmatively prove, first, that his counsel's representation "fell below an objective standard of reasonableness" and, second, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). This court may address these two prongs in any order and may dispose of a claim of ineffective assistance of counsel if one prong is determinative. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

Collier's argument is meritless for two reasons. First, this court does not review for competency matters of trial strategy, including cross-examination and impeachment. *State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001). Second, Collier was not prejudiced by counsel's failure to offer the text message. E.S.'s testimony consisted of two pages of the trial transcript in which she testified regarding identity. Specifically, she testified that

Antoine Collier, whom she dated, drove a vehicle identified as being used in the crime, and she also identified appellant Anthony Collier from a photograph. This testimony could not have affected the outcome of the case because Collier admitted his involvement in the crime. E.S.'s testimony had no bearing on the central issue in this case—whether Bauck was part of the crime—so impeaching her with evidence of racial bias would not have made a difference in this case.

C. False trial testimony

Collier argues that Detective Voxland falsely testified that he did not think Bauck was involved in the robbery. At trial, Voxland testified that during an interview with Bauck on March 14, 2011, he told Bauck that he was going to keep looking into him as a suspect. After that date, Voxland did not receive any information to remove his suspicions regarding Bauck's involvement. Nevertheless, he testified at trial that he did not believe Bauck was a suspect, even though Bauck was treated like a suspect. Voxland explained that, in his opinion, Bauck was not involved in the crime "based on his reaction to questions, types of answers that he was giving, consistency with those answers, as well as details observed on the video during the robbery."

Collier has not presented any evidence that Voxland's opinion regarding Bauck's involvement in the crime was "false." *See State v. Caldwell*, 322 N.W.2d 574, 584-85 (Minn. 1982) (requiring the court to be "reasonably well satisfied that the testimony given by a material witness is false" (quotation omitted)). Collier's argument regarding "false testimony" is essentially an attack on Voxland's credibility. Voxland explained why he did not believe Bauck was a real suspect and he provided reasons for that

conclusion. The jury apparently found Voxland credible, and this court defers to that determination. *Buckingham*, 772 N.W.2d at 71.

Affirmed.