STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1589

State of Minnesota,
Respondent,

vs.

Dana Dionte Davis,
Appellant.

Filed August 12, 2019
Affirmed
Smith, John, Judge[*]

Dakota County District Court
File No. 19HA-CR-16-4075

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

James C. Backstrom, Dakota County Attorney, Torrie J. Schneider, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Smith, John, 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

SMITH, JOHN, Judge

We affirm the judgment of conviction of appellant Dana Dionte Davis because we conclude that the prosecutor did not err by impeaching an alibi witness with details of a prior conviction or by impeaching appellant's testimony with alleged "were they lying" questions when referring to work schedules.

FACTS

Appellant quit his position as a cook at Smashburger in Eagan, Minnesota, where he had worked for approximately three weeks. The following day, shortly before Smashburger closed at 10:00 p.m., appellant entered the restaurant wearing a blue hooded sweatshirt with the hood covering part of his face. An employee, A.M., was "sitting in a booth reading" on her phone and "wasn't paying a lot of attention," but remembered a man entered the restaurant who was "tall, black, [and] wearing a hoodie," which was "a dark color, gray or black."

Appellant walked into the kitchen where a manager, G.W., was working. Although G.W. and appellant had not worked a shift together, G.W. knew who appellant was and recognized him. Appellant demanded all the money in the safe, to which G.W. replied "Very funny, Dana." Appellant then removed his hood and said "he was tired of motherf----rs disrespecting him." Appellant reiterated his demand for the money in the safe. Another employee, M.H., who had previously worked with appellant and recognized him due to his height, body shape, and uncovered face, approached to ask appellant what was

wrong but appellant pushed M.H. away to continue demanding money. At trial, both M.H. and G.W. were "100 percent" certain that appellant was the robber.

G.W., either on his own accord or because he was forced by appellant, entered the refrigerator unit, where he spent between "30 seconds and two minutes" before exiting. At some point during this time, G.W. pulled the silent alarm in the refrigerator. While G.W. was in the refrigerator, M.H. spoke with appellant for at least a minute. During this talk, M.H. referred to appellant as "Dana" and appellant "stated that he was disrespected the day prior to him quitting." Appellant asked M.H. whether the store had any cameras, and M.H. replied that the store did have cameras. However, appellant then asked for the cameras' tapes and M.H. admitted there were no cameras in the store.

Once G.W. exited the freezer, appellant began repeatedly punching G.W. in the face and body while demanding money. After appellant stopped punching G.W., G.W. opened the safe and gave appellant "leather banking envelopes," "plastic deposit envelopes," and "rolls of change," for a total of $700-$1,100. Afterwards, A.M. entered the kitchen and did not see either the assault or G.W. giving money to appellant. As A.M. entered the kitchen, M.H. saw "an accomplice" standing outside the kitchen door, whom he described as an "African-American" male wearing a "black hoodie or jacket" and "[b]lack pants and a black pair of shoes with red stripes." M.H. noticed that this second man had "what appeared to be the outline of a gun," although the man did not enter the kitchen.

Appellant then forced G.W., M.H., and A.M. into the freezer (which could only be accessed through the refrigerator unit) and locked the refrigerator door by zip tying the key to the handle. Appellant made threats to the effect that "if anyone exited the freezer, he

would kill everyone." Due to appellant's threats, G.W., M.H., and A.M. waited several minutes before calling 911.

Officers responded within a minute or two of the silent alarm going off at Smashburger. Officer Roche of the Eagan Police Department arrived at the restaurant and saw "a van with its hazard lights on stopped in the lane of traffic immediately adjacent to the back door." Officer Roche did not see any pedestrians nearby nor did he see anyone run to the vehicle from the restaurant. Officer Roche stopped behind the van and exited his squad car to approach the van, but the van took off. Officer Roche pursued the vehicle for around 15 minutes, and ended the pursuit using a precision immobilization technique. After stopping the car, police arrested D.C. and W.D. W.D., appellant's brother, is an African-American male who was "wearing a black hooded sweatshirt," "red shorts under his black jeans," and "[b]lack shoes with white trim." A loaded handgun was recovered from the car, but no bank bags, "large amounts of cash," or rolls of coins were found in the van.

Other officers arrived on scene at Smashburger within 10 minutes, and did not see anyone fleeing the restaurant. After securing the building, officers discovered A.M., G.W., and M.H. locked in the freezer. G.W. and M.H. immediately identified appellant as the perpetrator to officers. Officers also discovered rolls of coins strewn throughout the restaurant and outside, some of which were discovered near the back entrance and others were found "more towards the southeast, nowhere near" where the getaway van had been located.

Subsequently, appellant was charged with one count of first-degree aggravated robbery (count 1), in violation of Minn. Stat. § 609.245, subd. 1 (2016); one count of aiding and abetting first-degree aggravated robbery (count 2), in violation of Minn. Stat. § § 609.05, subd. 1 (2016), .245, subd. 1; one count of kidnapping (count 3), in violation of Minn. Stat. § 609.25, subd. 1 (2016); and one count of false imprisonment (count 4), in violation of Minn. Stat. § 609.255, subd. 2 (2016). Before trial, the state amended the complaint to dismiss count 2 (aiding and abetting first-degree aggravated robbery) and to add a second count of kidnapping (count 5), in violation of Minn. Stat. § 609.25, subd. 1(2); a third count of kidnapping (count 6), in violation of Minn. Stat. § 609.25, subd. 1(2); a second count of false imprisonment (count 7), in violation of Minn. Stat. § 609.255, subd. 2; and a third count of false imprisonment (count 8), in violation of Minn. Stat. § 609.255, subd. 2.

Appellant waived his right to a jury trial and a bench trial was conducted. The district court found appellant guilty on all counts. Following conviction, appellant attempted to escape from custody. Before sentencing, appellant sought a downward dispositional departure (probation), although it was characterized as a downward durational departure. At the sentencing hearing, the district court sentenced appellant to 111 months for count 1, 21 months for count 3 to run concurrent with count 1, 21 months for count 5 to run consecutive with counts 1 and 6, and 21 months for count 6 to run consecutive with counts 1 and 5. Appellant was convicted of but not sentenced on counts 4, 7 or 8.

D E C I S I O N

I. The prosecutor did not err by eliciting details underlying D.J.'s 2006 conviction.

Appellant argues that the prosecutor committed prosecutorial misconduct by improperly impeaching a defense witness, D.J., by asking a question about the details of a 2006 conviction. Appellant contends that the prosecutor plainly erred because the prosecutor "impeached [D.J.] with his first-degree aggravated robbery conviction and asked him to confirm a key detail of that prior conviction—namely, that he had committed the crime with [appellant]." Appellant also contends that the prosecutor did not provide notice nor receive court approval to impeach D.J. with the 2006 conviction.[1] Appellant did not object at trial during the state's cross-examination or during closing argument.

This court reviews unobjected-to prosecutorial misconduct under a modified plain-error standard where the appellant must show (1) an error and (2) that was plain. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). An error is plain if it is "clearly contrary to the law at the time of the appeal." *State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006). If the appellant can show plain error, then the state bears the burden of demonstrating "that

[1] On April 9, 2018, the prosecutor informed the district court that it had not yet received from appellant the middle names or birthdates of appellant's witnesses and could not determine whether the witnesses had criminal records. On April 10, 2018, the prosecutor informed the district court that, despite not receiving the defense witnesses' middle names or birthdates, the state determined that at least one defense witness, D.J., had a criminal record and that the state intended to impeach D.J. with "a first-degree aggravated robbery that is from 2006 that was committed with both [appellant] and W.D. [appellant's brother]." Upon the state telling the court of its intent to impeach D.J., the district court merely responded "[o]kay." Appellant did not voice any objections to the state providing notice this way, nor does appellant now contend that the district court erred by not applying the *Jones* factors. *See State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978).

the plain error did not affect the [appellant's] substantial rights." *Parker*, 901 N.W.2d at 926. "If each of these [three] prongs is met, we will address the error only if it seriously affects the fairness and integrity of the judicial proceedings." *State v. Kuhlmann*, 806 N.W.2d 844, 852-53 (Minn. 2011).

Under the Minnesota Rules of Evidence, a witness's credibility may be attacked by evidence of a past conviction. *See* Minn. R. Evid. 609(a). Such a past conviction is not admissible, however, to "prove to the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). Generally, "cross-examination as to the witness's prior convictions may ordinarily extend only to the fact of conviction, the nature of the offense, and . . . identity." *State v. Griese*, 565 N.W.2d 419, 426 (Minn. 1997); *see State v. Williams*, 210 N.W.2d 21, 25 (Minn. 1973). This rule is not absolute and the district court has discretion regarding the scope of cross-examination, particularly when the witness is not the defendant. *Griese*, 565 N.W.2d at 426. One circumstance in which this is permitted is when the defendant "opens the door" to allowing in otherwise inadmissible evidence of the underlying facts of a conviction. *See State v. Valtierra*, 718 N.W.2d 425, 435-36 (Minn. 2006). That is to say, *Valtierra* and *Griese* permit further factual inquiry into a non-defendant witness's underlying conviction, subject to the district court's discretion. *See Valtierra*, 718 N.W.2d at 435-37; *Griese*, 565 N.W.2d at 426.

During cross-examination of D.J., the prosecutor impeached D.J. with a conviction for first-degree aggravated-robbery from 2006. The prosecutor asked D.J., "And you and [appellant] committed that crime together?" The prosecutor did not otherwise refer to D.J.'s 2006 conviction during cross-examination or re-cross-examination. During closing

argument, the prosecutor stated that D.J. "is [appellant's] cousin who is a felon and has committed crimes with [appellant] in the past." The prosecutor did not make any other reference to D.J.'s felony conviction in closing argument.

In *Griese*, the prosecution impeached the defendant's witness who testified "regarding the effects of the drugs taken by Griese, as well as the effects of combining drugs and alcohol on human behavior." *Griese*, 565 N.W.2d at 426. To impeach that witness, the prosecution questioned him on felony charges where the charges "dealt with his role in drug research." *Id.* In such instances, *Williams* is not an absolute bar to further inquiry of the facts underlying a conviction, and the state's questioning is instead subject to the district court's discretion.[2] *See Valtierra*, 718 N.W.2d at 435-37; *Griese*, 565 N.W.2d at 426. Here, as in *Griese*, the prosecution questioned one of appellant's witnesses about an underlying conviction when the facts of that underlying conviction were relevant to the witness's testimony for impeachment purposes.

In sum, the prosecutor did not commit plain error by questioning the appellant's witness about the facts underlying his 2006 conviction.

II. The prosecutor did not ask "were they lying" questions and thus did not err.

Appellant also argues that the prosecutor "committed misconduct by improperly impeaching [appellant's] testimony with 'were they lying' questions." Appellant further contends that the prosecutor "impeached [appellant] with *inadmissible* evidence" and "was

[2] Appellant does not contend that the district court abused its discretion in doing so and we decline to address this issue.

essentially asking [appellant] whether the schedule's unknown creator was lying when he created the schedule." Appellant did not object at trial, either to the state's questioning of appellant during cross-examination or during closing argument.

The Minnesota Supreme Court has concluded that, "[a]s a general rule, 'were they lying' questions have no probative value and are improper and argumentative because they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence." *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). However, "an exception exists when a criminal defendant makes the issue of witness credibility a central focus of his case." *State v. Jones*, 755 N.W.2d 341, 353 (Minn. App. 2008), *aff'd*, 772 N.W.2d 496 (Minn. 2009). This court has explained that district courts "should allow 'were they lying' questions only when the defense expressly or by *unmistakable insinuation* accuses a witness of a falsehood." *State v. Leutschaft*, 759 N.W.2d 414, 423 (Minn. App. 2009) (emphasis added). Furthermore, in some cases, the state may question a witness whether evidence is wrong. *See State v. Morton*, 701 N.W.2d 225, 233-34 (Minn. 2005).

As noted above, this court reviews unobjected-to prosecutorial misconduct under a modified plain-error standard. *Parker*, 901 N.W.2d at 926.

At trial, appellant's attorney attempted to introduce a police photograph of the Smashburger work schedule, taken on October 23, 2016, into evidence. Contrary to appellant's assertions, the work schedule photograph was never deemed "inadmissible" but was not admitted because, following the state's objections, appellant failed to lay a proper

foundation. Neither the state nor appellant recalled the two officers who had taken photos at Smashburger to lay a proper foundation for the photograph.

At trial, testimony was adduced from M.H and D.J. about when M.H. and appellant worked together and what position M.H. worked. During appellant's testimony, he testified about his work schedule and how long he had worked at Smashburger. Appellant also testified that he didn't know M.H. and that he only "kn[e]w of the person [M.H.] now" at trial, before stating that he had worked with M.H. "once or twice." During the state's cross-examination of appellant, the state asked appellant about his work schedule at Smashburger. The state then engaged in the following exchange:

> Q. And in fact, you—between October 2 and October 22, you actually worked at least eight shifts with [M.H.]. Right?
> A. No.
> Q. So if the work schedule says that, you disagree?
> A. Yes.
> Q. Oh. In fact, [M.H.] worked as a cook on some of the shifts.
> A. Not at all.
> Q. So if the work schedule says he worked as a cook on some of the shifts, the work schedule's wrong?
> A. Yes.

In closing argument, the state characterized the line of questioning as:

> Q. Well, if the schedule says that you worked in those three weeks, if you worked eight shifts with [M.H.], is the schedule lying?
> A. Yep.
> Q. Well, and if it says that during those three weeks [M.H.] worked as a cook, is the schedule lying?
> A. Yep. Schedule's wrong.

This case is analogous to *Morton*. In *Morton*, "the state asked Morton if the facts were 'wrong,' but did not ask him to comment on whether anyone responsible for the

telephone records *intended* to perpetuate a falsehood. In other words, the state left open the possibility that the evidence could simply have been incorrect." *Morton,* 701 N.W.2d at 234. The supreme court did not "condone" and "carefully scrutinize[d] this line of questioning," but concluded that the district court did not abuse its discretion by permitting the state to ask such questions in relation to evidence. *Id.* But the supreme court did conclude in *Morton* that the state erred by asking "were they lying" questions of the defendant in regards to witness testimony. *Id*. at 234-235. "By asking 'were they lying' questions on th[o]se occasions, the state shifted the jury's focus by creating the impression that the jury must conclude that these two witnesses were lying in order to acquit Morton." *Id*. at 235.

Here, like *Morton*, the prosecutor did not ask appellant whether the creator of the workplace schedule was lying, but asking a hypothetical question of whether a record stating otherwise was wrong. M.H. testified that he knew who appellant was because he had worked with him on multiple occasions and as a cook. Appellant and D.J. testified that appellant and M.H. had only worked together one or two times and in different positions. The state did not ask appellant whether he thought M.H. was lying, but whether a record contradicting appellant's version could be incorrect. The state therefore did not commit error.

Because there was no error, appellant's argument regarding the cumulative impact of such errors is without merit. In sum, we conclude that the prosecution did not commit plain error and affirm appellant's convictions.

Affirmed.