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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1675

State of Minnesota,
Respondent,

vs.

Michael Anthony Pitts,
Appellant.

Filed August 19, 2019
Affirmed
Klaphake, Judge[*]

Hennepin County District Court
File No. 27-CR-17-23933

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

Michael O. Freeman, Hennepin County Attorney, John Patrick Monnens, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Reilly, Presiding Judge; Hooten, Judge; and Klaphake, 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

KLAPHAKE, Judge

Following a jury trial, appellant Michael Anthony Pitts was found guilty of promoting the prostitution of an individual by knowingly procuring a patron for prostitution. *See* Minn. Stat. §§ 609.322, subd. 1a(2), .321, subd. 7(1) (2016). On appeal, appellant argues that (1) the state failed to prove beyond a reasonable doubt that he knowingly procured a patron for a prostitute; (2) the state committed prejudicial misconduct in its closing argument; and (3) the district court erroneously included prior federal convictions in the calculation of his criminal history score, resulting in an excessive and unreasonable sentence of 180 months' imprisonment. We affirm.

D E C I S I O N

I.

In considering a claim of insufficient evidence, appellate courts "conduct a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *Lapenotiere v. State*, 916 N.W.2d 351, 360 (Minn. 2018) (quotation omitted). "Assessing the credibility of a witness and the weight to be given a witness's testimony is exclusively the province of the jury." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006). Indeed, the jury may accept part of a witness's testimony, and reject the rest. *Id.*

We assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "And we will not disturb

the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012).

"[T]he due process clause of the fourteenth amendment to the United States Constitution requires the state to prove each element of the crime charged beyond a reasonable doubt." *State v. Merrill*, 428 N.W.2d 361, 366 (Minn. 1988). Thus, to convict appellant of section 609.322, subdivision 1a(2), the state was required to prove, beyond a reasonable doubt, that appellant, "while acting other than as a prostitute or patron, intentionally . . . promote[d] the prostitution of an individual." *Id.* Promoting the prostitution of an individual is defined as knowingly soliciting or procuring a patron for a prostitute. Minn. Stat. § 609.321, subd. 7(1).

Procuring is not statutorily defined. Thus, at trial, the district court instructed the jury to apply "the common, ordinary meaning" of the word, "procure." "In the absence of a given definition[,] . . . we often consult dictionary definitions to ascertain the plain and ordinary meaning of words or phrases." *State v. Washington*, 908 N.W.2d 601, 607 (Minn. 2018) (quotation omitted). Black's Law Dictionary provides that procure, a verb, is "[t]o obtain a sexual partner for another, esp. an unlawful partner such as a minor or a prostitute." *Black's Law Dictionary* 1401 (10th ed. 2014). Similarly, Merriam-Webster provides that procure is "to obtain (someone) to be employed for sex (as for an individual or in a house of prostitution)." *Merriam-Webster* (July 2019), https://www.merriam-webster.com/dictionary/procure. The American Heritage Dictionary provides that procure

is “[t]o obtain (a sexual partner) for another.” *The American Heritage Dictionary* 1405 (5th ed. 2018).

Appellant’s conviction of promoting the prostitution of an individual stems from conduct that took place near the intersection of Lake Street and Bloomington Avenue on a night in September 2017. Minneapolis police officers were working an undercover sting operation targeting individuals suspected of engaging in street-level prostitution and/or the sale of narcotics. Based on observed conduct, officers identified appellant as a potential target. Undercover officer Omar Foulkes, driving an unmarked vehicle, approached appellant to purchase crack cocaine.

Hidden cameras in Officer Foulkes’s vehicle recorded the encounter wherein appellant walked up to the passenger window and sold the officer what appeared to be crack cocaine. During the transaction, the following exchange took place:

Officer: Any b*tches out here you know I can get?

Appellant: What you tryin’ do?

Officer: Trying to get me some a** tonight. Do a little somethin’.

Appellant: ‘K.

Officer: You got a b*tch for me?

Appellant: Um, huh.

Officer: What’s that?

Appellant: How much money you got?

Officer: I got forty.

Appellant:	Hey, Tasha?
N.J.B.:	What?
Appellant:	Come here.
N.J.B.:	[Inaudible.]
Appellant:	He looking for a girl.
N.J.B.:	No.
Officer:	How much for some a** tonight, baby?
N.J.B.:	For some a**? What do you mean a**?
Officer:	Some a**, man, somethin'. That's forty?
Appellant:	Yep.
N.J.B.:	Are we talking for play or are you talking for the whole a**?
Officer:	Well, how much you charge, baby girl?
N.J.B.:	Oh, sh*t, there goes police.
Officer:	What the f*ck?
N.J.B.:	Go around the corner, I'm gonna meet you on the other side, 'K?

Officer Foulkes drove around the corner, as instructed, and met up with N.J.B. Appellant was with her. N.J.B. approached the officer's vehicle, and she and Officer Foulkes continued to negotiate a price for sexual acts. Officer Foulkes and N.J.B. settled on a price of fifty dollars for oral sex. N.J.B. then got into the officer's vehicle, and, after a short drive, they were pulled over by officers working the sting. N.J.B. was arrested, and appellant, who tried to flee officers, was also apprehended.

Appellant argues that, regardless of this court's interpretation of the word, "procure," his conviction must be reversed because he did not procure a patron. At oral argument before this court, appellant's counsel conceded, "There was a procurement of a prostitute," but not "a procurement of a patron." Appellant's counsel contended that, under the subdivision of the statute of which appellant was convicted, "the thing that must [have been] procured is the patron, not the prostitute." Appellant did not brief this argument. *See Brodsky v. Brodsky*, 733 N.W.2d 471, 479 (Minn. App. 2007) ("A party who inadequately briefs an argument waives that argument."). Nevertheless, appellant's argument is illogical, and without legal merit.

Appellant's concession that "[t]here was a procurement of a prostitute," necessarily implies that there was a procurement of a "patron," that is, "an individual who engages in prostitution." Minn. Stat. § 609.321, subd. 4. This logical inference is further supported by "the common, ordinary meaning" of the word, "procure." *See, e.g.*, *Black's Law Dictionary* 1401 (10th ed. 2014) (defining procure as "obtain[ing] a sexual partner for another, esp. an unlawful partner such as a minor or a prostitute").

Based on the evidence presented at trial, the state established beyond a reasonable doubt that appellant procured a patron for prostitution. At trial, the jury heard from the police officers who were working the undercover operation on the night of appellant's arrest, including Officer Foulkes. The jury also heard from N.J.B. Further, the surveillance videos of Officer Foulkes' interaction with appellant, as well as his later interaction with N.J.B., were played for the jury and received into evidence. The foregoing evidence showed that: (1) Officer Foulkes, acting undercover as a john, asked appellant if he had "a

b*tch" for him, explaining that he was "[t]rying to get . . . some a** tonight"; (2) "a b*tch" referred to "a prostitute," as Officer Foulkes testified to at trial; (3) appellant was aware that N.J.B., who was with him on the street at that time, was engaged in prostitution; (4) in direct response to Officer Foulkes's inquiry, appellant called N.J.B. over and stated, "He looking for a girl"; and (5) as N.J.B. testified at trial, appellant's purpose in calling her over to Officer Foulkes was for her "to have sex with [the officer] for money."

While we recognize that appellant's conduct was somewhat minimal compared to other promotion-of-prostitution offenses, the prostitution statutes "evince a legislative intent to enact a comprehensive scheme to eradicate furtherance of prostitution, even if it does not rise to the level of commercialized vice." *State v. Montpetit*, 445 N.W.2d 571, 573 (Minn. App. 1989) (citing Minn. Stat. §§ 609.321-609.33 (1986)), *review denied* (Minn. Oct. 31, 1989). Further, while we are mindful that N.J.B. provided inconsistent statements, indicating initially that appellant was not involved with her prostitution services, she later clarified for the jury the reasons for denying appellant's involvement, explaining she "wanted to be loyal to him," and that she was scared. In finding appellant guilty of promoting prostitution, the jury, in effect, found N.J.B. to be credible and accepted her testimony as true. Because the jury could reasonably conclude, based on the evidence that was presented, that appellant was guilty of the charged offense, we affirm his conviction. *See Ortega*, 813 N.W.2d at 100.

II.

Appellant alleges that, by referring to facts not in evidence and misstating the evidence as presented to the jury, the state committed prejudicial misconduct in its closing

argument entitling him to a new trial. "A prosecutor engages in prosecutorial misconduct when 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." *State v. Smith*, 876 N.W.2d 310, 334-35 (Minn. 2016) (quotations omitted). A prosecutor may "present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence," but may not "misstate the evidence." *State v. Pearson*, 775 N.W.2d 155, 163 (Minn. 2009); *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009) (quotations omitted).

Our standard of review depends on whether the defendant objected to the alleged misconduct at trial. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). When a defendant does not object to allegations of prosecutorial misconduct, we review the claim under a modified plain-error standard. *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016). Appellant concedes that a modified plain-error analysis applies here.

Under this standard, the defendant bears the initial burden of establishing error that is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). A plain error is one that is "clear or obvious." *Id.* (quotation omitted). If the defendant is able to show that the misconduct constitutes an error that is plain, the burden then shifts to the state to prove that any misconduct did not prejudice the defendant's substantial rights. *Id.* at 302. To meet this burden, the state must show that there is no reasonable likelihood that the absence of the misconduct would have had a significant impact on the jury's verdict. *Id.*

In determining whether the misconduct affected appellant's substantial rights, we consider the following factors: "(1) the strength of the evidence against [the defendant]; (2) the pervasiveness of the erroneous conduct; and (3) whether [the defendant] had an

opportunity to rebut any improper remarks." *Peltier*, 874 N.W.2d at 805-06; *see also State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). "To warrant reversal for a new trial, the prosecutor's misconduct—placed into the context of the entire trial—must be so serious and prejudicial that it impairs a person's constitutional right to a fair trial." *State v. Banks*, 875 N.W.2d 338, 348 (Minn. App. 2016), *review denied* (Minn. Sept. 28, 2016). In examining a closing argument for prosecutorial misconduct, "we consider the argument as a whole, rather than focusing on particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008) (quotation omitted).

Appellant challenges two portions of the state's closing argument. First, he contends that the following statements constituted prejudicial misconduct:

> What matters is what he did on September 20, 2017. And what he did on that day is he was standing on a street corner in South Minneapolis, which is obviously in Hennepin County, and he caught the police's attention for the conduct that he was engaged in. And they believed he was engaged in prostitution and drug dealing. And so they sent the undercover officer to engage him . . . .

Appellant argues, "This statement that police observed [appellant] engaging in prostitution and drug dealing was an egregious misstatement of the evidence." He contends, "There was no evidence that police observed [appellant] himself engaging in prostitution or promotion of prostitution; the conduct that police observed that made them decide to approach [appellant] was unspecified and undescribed." Appellant contends that the statement amounted to misconduct because "it improperly invited the jury to draw an inference that because the police saw [him] engaged in prostitution activities before they

approached him, he must have actually been promoting prostitution when he called [N.J.B.] over to Foulkes."

Second, appellant contends that the prosecutor intentionally misstated the evidence when summarizing the conversation that Foulkes and appellant had regarding prostitution services:

> Then the undercover officer: You got a b*tch for me? Defendant: Uh-huh. How much you got? He asked the officer. He says: I got 40. Now that the officer has indicated he's got $40 for prostitution, the defendant does what? Well, he says very clearly on that tape: Hey, Tasha—clearly short for [N.J.B.]—come here. He summons her over to the police car—or the undercover police car, knowing that this person is looking to spend $40 for sex. So what does he do? He calls over his girlfriend, who he knows engages in prostitution.

Appellant contends that the argument constituted an intentional misstatement of the evidence because Officer Foulkes testified that he believed the 40 dollars was in reference to the sale of narcotics, and conceded that N.J.B. was the one who he negotiated with about the price for sexual activities.

Appellant argues that the two portions of the state's closing argument constituted prejudicial misconduct because the remarks "directly invited the jury to infer that [appellant] was promoting prostitution not just based on the properly-admitted evidence of his conduct of calling [N.J.B.'s] name, but also because, the prosecutor argued, police had seen [appellant] engaging in prostitution related activities and had discussed the price of prostitution services with Foulkes."

We are not persuaded. With regard to the first portion of the state's closing argument at issue, one of the state's witnesses, Officer Severance, expressly testified about the

interplay between the sale of narcotics and street-level prostitution. In response to the state's question regarding who the officers were targeting that night, Officer Severance explained:

> On that day—so just like I said before, there's three kind of—it's like an ecosystem that kind of works, right? You've got the money; you've got the people that are selling the sex; and then you have the people that are out there with the women that are lining up deals or selling narcotics that are working with these people. . . . On that day we were focused on the third, which is the person lining up the deal and then getting the female.

The prosecutor's remarks in closing argument constitute rational inferences based upon testimony regarding the officers' sting operation and identification of appellant as a potential target in that operation. *See State v. Munt*, 831 N.W.2d 569, 587 (Minn. 2013).

With regard to the second portion of the state's closing argument at issue, it is unclear, based on the surveillance video and transcript, whether the 40 dollars was, in fact, in reference to the sale of narcotics or prostitution services. Additionally, any potential error was corrected in the defense's closing argument when appellant's counsel stated to the jury:

> And I want to—I do want to point out one thing is that [the state] indicated that in the video when [appellant] is talking with the undercover officer, they talk about $40. What they were discussing is $40 for two—what the officer described as "dubs," the drugs. That's what the discussion was about, because obviously when the undercover officer later goes with [N.J.B.], they don't talk about $40; they're talking about $50. So there's no mention by [appellant] about any financial agreement. There was no exchange of money. There was nothing about that.

Furthermore, even if the prosecutor's remarks constituted plain error, the state's closing argument, reviewed as a whole, does not amount to prejudicial misconduct. *Peltier*, 874 N.W.2d at 805-06; *see also Parker*, 901 N.W.2d at 926. First, as indicated in the preceding section, the strength of the evidence against appellant was strong. Second, the erroneous conduct was not pervasive in light of the closing argument as a whole. The state emphasized in its closing argument that the entire crime was "all right there on the tape." It encouraged the jury to recall appellant's conduct that they observed on tape, as well as the words that he used. And the jury did just that. While deliberating, the jury asked to watch, again, and the district court replayed, the surveillance video capturing Officer Foulkes' and appellant's exchange.

Lastly, appellant had an opportunity to rebut any allegedly erroneous remarks. Both portions at issue of the state's closing argument took place before the defense presented its closing argument, and, in fact, as stated above, the defense did rebut the state's remarks regarding the 40 dollars. Accordingly, we conclude that appellant's claim of prosecutorial misconduct is without legal merit.

III.

Appellant argues that the district court erroneously used four federal offenses to calculate his criminal history score, and that the resulting sentence of 180 months' imprisonment was excessive and unreasonable. He argues that the use of all four federal offenses was error because the state failed to prove that they were separate courses of conduct, or otherwise subject to an exception justifying multiple sentences.

Under the Minnesota Sentencing Guidelines, convictions from other jurisdictions must be considered in calculating a defendant's criminal-history score. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001); *see* Minn. Sent. Guidelines 2.B.5.a. (Supp. 2017); *see also* Minn. Sent. Guidelines cmt. 2.B.502 (Supp. 2017) ("The Commission concluded that convictions from other jurisdictions must, in fairness, be considered in the computation of an offender's criminal history score."). Convictions from jurisdictions other than Minnesota include convictions under the federal criminal statutes. Minn. Sent. Guidelines cmt. 2.B.501 (Supp. 2017). An out-of-jurisdiction conviction may be counted as a felony in calculating a criminal-history score "only if it would *both* be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence." Minn. Sent. Guidelines 2.B.5.b. (Supp. 2017) (emphasis in original).

The state carries the burden of establishing the facts necessary to justify consideration of out-of-jurisdiction convictions in determining a defendant's criminal-history score. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983); *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006) ("[T]he district court may not use out-of-state convictions to calculate a defendant's criminal-history score unless the state lays foundation for the court to do so."). It must establish "by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota." *Id.*

Further, a defendant generally may not receive criminal-history points for more than one offense arising out of a single behavioral incident. *McAdoo*, 330 N.W.2d at 107; Minn. Stat. § 609.035 (2016); Minn. Sent. Guidelines cmt. 2.B.107 (Supp. 2017) ("In cases of

multiple offenses occurring in a single course of conduct in which state law prohibits the offender from being sentenced on more than one offense, only the offense at the highest severity level should be considered.”).

“Whether multiple offenses arose out of a single behavior incident depends on the facts and circumstances of the particular case.” *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). Courts consider factors including “the singleness of purpose of the defendant and the unity of time and of place of the behavior.” *Id.* (quotation omitted); *see also State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997) (“Under section 609.035, the factors to be considered in determining whether multiple offenses constitute a single behavioral act are time, place, and whether the offenses were motivated by a desire to obtain a single criminal objective.”). In the case of multiple convictions, the state must establish, in order to support inclusion of the convictions in the defendant’s criminal history score, “the divisibility of a defendant’s course of conduct for purposes of section 609.035.” *McAdoo*, 330 N.W.2d at 109.

The district court, however, “must make the final determination as to whether and how a prior non-Minnesota conviction should be counted” in a defendant’s criminal-history score. Minn. Sent. Guidelines 2.B.5.a. This court reviews the district court’s determination of a defendant’s criminal-history score for an abuse of discretion. *Maley*, 714 N.W.2d at 711.

At sentencing, appellant had nine criminal history points based, in part, on four prior federal convictions. His presumptive sentence was 180 months’ imprisonment. *See* Minn. Sent. Guidelines 4.B. (2016). To support the district court’s inclusion of the federal

convictions in the calculation of appellant's criminal history score, the state offered both the federal criminal complaint and the Eighth Circuit's affirmance of those convictions. The district court rejected appellant's argument that the four federal convictions arose from the same course of conduct, and it imposed the presumptive sentence of 180 months' imprisonment.

On appeal, appellant argues that the state failed to show that the four federal convictions did not arise from a single behavioral incident, and, consequently, the district court abused its discretion in its calculation of appellant's criminal history score. However, appellant concedes that his criminal history score at the time of sentencing should have been six points, and that the presumptive sentence with six criminal history points is 180 months' imprisonment. *See* Minn. Sent. Guidelines 4.B. (capping a defendant's criminal history score at six points).

Because appellant would be subject to the same presumptive sentence of 180 months' imprisonment with nine points, or an amended score of six points, we need not determine whether the district court abused its discretion by including the four federal offenses in the calculation of appellant's criminal history score. And, because 180 months' imprisonment is "presumed to be appropriate," we reject appellant's argument that his sentence is excessive or unreasonable. *See* Minn. Sent. Guidelines 2.D.1. (Supp. 2017).

Affirmed.