STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1688

State of Minnesota,
Respondent,

vs.

Lindsey Samuel Pearson,
Appellant.

Filed November 4, 2019
Affirmed
Ross, Judge

Dakota County District Court
File No. 19HA-CR-16-701

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

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Ross, Judge; and Reilly, Judge.

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

ROSS, Judge

The state charged information-technology employee Lindsey Pearson with theft by swindle and identity theft for alleged schemes victimizing his employer. A detective testified at trial without objection that Pearson had invoked his right to remain silent during

police questioning. The district court dismissed the identity-theft charge after the state rested its case, but it did not instruct the jury about the dismissal. The jury found Pearson guilty of theft by swindle. Pearson asks us to order a new trial, arguing that the state's eliciting testimony about his silence and the district court's failing to instruct the jury about the dismissed charge were plain errors requiring reversal. We affirm his conviction because, even if plain error occurred in both instances, they could not have significantly influenced the verdict.

FACTS

The state charged Lindsey Pearson with felony theft by swindle and felony identity theft under Minnesota Statutes sections 609.52 and 609.527 (2014), alleging that Pearson fraudulently obtained reimbursement payments from his employer, Safe Step Tubs of Minnesota, Inc., and that he used Safe Step's credit accounts for unauthorized personal purchases. The following circumstances at Pearson's jury trial underlie this appeal.

The State's Case-in-Chief

Craig Dauffenbach, Safe Step Tubs's owner, testified that Safe Step employed Pearson as its information-technology director. Dauffenbach expected Pearson to perform all IT duties and that K&E Consulting (a third-party IT service provider) would perform any necessary backup work. He said that he never authorized Pearson to hire any other outside consultant. Dauffenbach testified that, at some point after Pearson suffered an injury that kept him from work, Pearson told him that "Auggie at Creative Consultants" would take Pearson's emails. Dauffenbach did not then know who Auggie was.

The state introduced ten expense reports dating from July 30, 2015, through January 20, 2016. The reports included reimbursement forms, sales receipts, and check stubs that resulted in payments by Safe Step to Pearson. Safe Step used a standardized form to process employee-reimbursement requests. The sales receipts were ostensibly issued by "Creative Technology Consulting" (CTC) or "Creative Technology Solutions," and each of them represented that services or products had been "sold to . . . Lindsey Pearson." The check stubs documented reimbursement payments from Safe Step to Pearson totaling $6,785.20.

Dauffenbach was unaware of CTC's existence at the time Pearson submitted his expense reports to Safe Step. He said that Safe Step never authorized or knew of the work purportedly being performed by CTC. After reviewing a "rather large invoice" from CTC, Dauffenbach asked Pearson to explain it. Pearson responded that he "had outside services doing stuff." Suspicious, Dauffenbach asked K&E Consulting to research "CreativeTechnologies.com," and he learned that the domain was "created by Lindsey Pearson in Phoenix, Arizona." Dauffenbach wanted to establish Pearson's relationship with CTC, so he sent CTC an email stating, "We appreciate all your help in this time of need," hoping "to see what kind of response [Safe Step] would get back." Dauffenbach got no response, confirming his suspicion that "Auggie" and Pearson were the same person.

Dauffenbach also testified Safe Step had allowed Pearson to use Safe Step's Wells Fargo check card as well as a Capital One credit card issued to "James M. Leech, Jr.," Safe Step's former IT director, to make online purchases. Dauffenbach discovered that unauthorized Amazon purchases had been made with Safe Step's credit cards between

January 10 and February 18, 2016, and that merchandise, including computers, had been shipped to Pearson's home. Safe Step terminated Pearson's employment.

The jury also heard testimony from a Burnsville detective and police officers. Detective Jeffrey Klingfus testified that he contacted Amazon and Comcast and verified that the card purchases were made from Pearson's home IP address. Officers executing a search warrant on Pearson's home seized an HP Envy laptop computer, a laptop computer still inside an Amazon shipping box, another laptop computer, a label printer, an Amazon receipt, and a severed credit card bearing James Leech's name.

Detective Klingfus also testified about his interview of Pearson. He said that Pearson told him that CTC was Pearson's sole proprietorship and implied that Safe Step knew this. Pearson told the detective that CTC's mailing address on some of the invoices was his brother's address, but he said he had not talked to his brother about using his address. Pearson could not explain the existence of a Harris, Minnesota, address that appeared on other invoices. The jury also heard the following exchange between the prosecutor and Detective Klingfus about Pearson's decision to stop answering the detective's questions:

> Q: Detective Klingfus, I want to go back to your conversation with Mr. Pearson about Creative Technology Consulting. Did you ask him whether or not he had any employees in his business?
> A: I believe I asked him, you know, who was working for him and in that context of who was providing services to the Dauffenbachs for that; yes, I did.
> Q: And what did he respond?
> A: At one point he said that, you know, when I asked him specifically about I recall one particular transaction or one reimbursement form that was for $1,500 for

consulting fees, I asked him who did the work. And he said me and the consultants, something to that effect. But then when I pressed him on information [about] who these other people were, at that point is when he started to invoke his rights not to speak with me.

Q: Your Honor, I have no more questions at this time.

Identity-Theft Charge Dismissed

The prosecutor rested the state's case, and Pearson moved for a judgment of acquittal on the identity-theft charge. The district court granted the motion, reasoning that the state offered no evidence that Pearson appropriated another person's identity using Safe Step's credit card.

Pearson's Testimony

Pearson testified, asserting that Safe Step authorized him to provide services through CTC. He told the jury he started CTC before joining Safe Step when he lived in Arizona. He said that he adopted the nickname "Auggie" to keep his IT consulting separate from his unrelated work. He disclaimed any intent to mislead Safe Step by using "Auggie" in his correspondence, insisting that he told Dauffenbach and others about the nickname. He also asserted that he and Dauffenbach discussed using outside consulting services for Safe Step's IT needs, that he told Dauffenbach about CTC, and that Dauffenbach knew CTC belonged to Pearson. According to Pearson, Dauffenbach instructed Pearson to "use consulting hours" to facilitate being compensated for extra hours. He said that he spoke with a Safe Step accountant, who directed him to submit expense reports to account for CTC billings.

Verdict

The district court instructed the jury on the definition and elements of theft by swindle and gave no instruction about the dismissed identity-theft count. The jury was given a verdict form seeking its verdict only on theft by swindle, and, after deliberating, it found Pearson guilty of that crime. Pearson appeals from his conviction.

D E C I S I O N

Pearson argues that we should reverse his conviction and remand for a new trial based on the state's elicitation of testimony about his silence and the district court's failure to instruct the jury about the dismissed charge. Neither argument leads us to reverse.

I

Pearson maintains that the prosecutor's elicitation of testimony referencing his post-arrest, post-*Miranda* silence warrants reversal and remand. Pearson never objected to the exchange at trial, limiting our review to a plain-error assessment. *See State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). Under this standard, we will reverse only if, among other things, a plain error affects a defendant's substantial rights. *Id.* The supreme court has reviewed the state's use of a defendant's silence under both the standard plain-error framework and the burden-shifting, modified plain-error framework. *Compare State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017) (applying standard plain-error framework), *with State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006) (applying modified plain-error framework). Because the alleged error is attributable to the prosecutor, we will apply the modified plain-error standard. *Ramey*, 721 N.W.2d at 302. If the appellant demonstrates that the misconduct was both error and plain, "[t]he burden then shifts to the [s]tate to

demonstrate that the error did not affect the defendant's substantial rights." *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). If the state fails to carry its burden, "the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (quotation omitted).

Pearson's plain-error argument arises from his right not to be penalized for exercising his right not to incriminate himself. The United States and Minnesota Constitutions protect a defendant's right to be free from compelled self-incrimination. *See* U.S. Const. amend. V; Minn. Const. art. I, § 7. Generally, the state cannot use a defendant's post-arrest, post-*Miranda* silence as evidence in its case-in-chief. *See Wainwright v. Greenfield*, 474 U.S. 284, 294–95, 106 S. Ct. 634, 640–41 (1986). Pearson maintains that the prosecutor did just this, implicating the concern that juries tend to view a Fifth Amendment assertion as a badge of guilt. *See State v. Roberts*, 208 N.W.2d 744, 747 (Minn. 1973).

The state concedes that if Detective Klingfus's testimony referred to post-arrest, post-*Miranda* silence, an error occurred and the error was plain. The concession is reasonable, because the "prosecutor has an obligation to caution his own witnesses to avoid testifying about the defendant's invocation of his right to silence." *State v. Sutherlin*, 396 N.W.2d 238, 242 (Minn. 1986). But the state argues that the record precludes a plain-error determination because it does not show that Pearson was actually under arrest and received a *Miranda* warning before he invoked his right not to answer the detective's questions.

We need not decide whether Pearson or the state correctly interprets the record because, even if we assume a plain error occurred, we will not reverse because the state has carried its burden of demonstrating that the error did not affect Pearson's substantial rights. If an appellant seeks reversal because of prosecutorial misconduct that did not draw an objection at trial and that constitutes a plain error, the state avoids reversal if it shows "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Dobbins*, 725 N.W.2d at 508 (quotations omitted). We are satisfied for the following reasons that the state has shown that there is no reasonable likelihood that, without the alleged error, the verdict would have been different.

The error did not prejudice the outcome. In assessing prejudice, we consider the strength of the state's case, the pervasiveness of erroneous conduct, and whether the defendant had a chance to rebut any improper remarks. *State v. Peltier*, 874 N.W.2d 792, 805–06 (Minn. 2016). The verdict hinged somewhat on a credibility contest between Pearson and Dauffenbach, but it also depended on circumstantial evidence that overwhelmingly pointed to Pearson's guilt. We are not persuaded by Pearson's assertion that the reference to his silence was necessary to bolster an otherwise weak case. The state accurately highlights the fact that the challenged testimony was a brief reference and was not emphasized, and that, in contrast, the jury knew that Pearson created the Auggie character, falsely represented Auggie as a person different from himself in his interactions with Safe Step, and used incorrect mailing addresses for CTC. The jury also knew that Pearson never went by "Auggie" as a nickname at work, that Dauffenbach said he had not

known that Pearson was Auggie, that Pearson omitted his last name when he signed emails as Auggie, and that Pearson failed to mention CTC on his resume when he applied to work at Safe Step. It heard additionally that Pearson had not associated CTC with his own home address, that Pearson had not told his brother he was using his address for CTC correspondence, and that Pearson could not explain the existence of the other associated address. We do not suggest that a reference to a defendant's invocation of his right not to answer a key investigative question is insignificant. We say only that, in this case, the overwhelming imbalance of weight between the incriminating evidence and the reference to Pearson's choice not to answer is too substantial to call the integrity of the verdict into doubt.

Least plausible is Pearson's contention that the reference to his silence "pervaded the state's entire case." Detective Klingfus's offending testimony was limited to one sentence with no follow-up questions to emphasize it. Pearson maintains that the prosecutor "prejudicially highlighted Pearson's . . . silence" during closing and rebuttal argument by claiming that Pearson could not recall the identities of consultants who worked for him. He reasons that, because he "never testified that he did not know the names of the consultants who worked for him," the prosecutor's argument could refer only to his invocation of his right to remain silent. The reasoning is not compelling, but even if it were, the challenged references were not pervasive. The prosecutor's closing argument instead emphasized the proper evidence, summarized above, that pointed overwhelmingly to Pearson's guilt.

The state has adequately carried its burden. We hold that there is no reasonable likelihood that the alleged error significantly influenced the jury's decision.

II

Pearson argues that the district court's failure to instruct the jury about the dismissal of the identity-theft charge warrants reversal and remand. Pearson did not ask for any instruction about the dismissal or object to the proposed instructions. Our review is therefore only for plain error. *See State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). To prevail, Pearson must show that there was an error, the error was plain, and the error affected his substantial rights. *Id.* Even if he shows each of those elements, we will correct the error "only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *See id.* (quotations omitted). Pearson cannot prevail on this standard.

We need not consider whether omitting an instruction informing the jury about the dismissed charge constitutes a plain error because Pearson has not shown that the alleged error affected his substantial rights. Plain error affects substantial rights and is prejudicial if there is a "reasonable likelihood that the giving of the instruction in question would have had a significant effect on the verdict of the jury." *State v. Glidden*, 455 N.W.2d 744, 747 (Minn. 1990).

Pearson contends that the lack of instruction prejudiced him because the jury was left to speculate about what happened with the charge. But we see no reason that jurors would have speculated *negatively* about the omitted charge, if they speculated at all. Speculating jurors might readily have supposed, accurately, that the district court rejected the charge for lack of evidence. In any event, the district court instructed the jury in a fashion that directed it to deliberate only on the theft-by-swindle charge. The district court gave the definition and elements of theft by swindle and never referred to the dismissed

charge, its definition, or its elements. The special verdict left the jury with only one decision—guilty or not guilty on count one—defining the proper scope of the jury's deliberations.

We do not base our decision on the state's contention that the identity-theft evidence constituted a "very small part" of its case before the district court dismissed the count. The jurors heard testimony from Dauffenbach about company credit cards, purchase accounts, Pearson's authorization to make certain purchases, and Pearson's shipping of certain items to his home address. But on the record before us, we can see no reasonable likelihood that instructing the jury about the dismissal of the identity-theft charge would have significantly affected the theft-by-swindle verdict. The state's significant, incriminating evidence of swindling conduct was too substantial for us to hold otherwise.

Pearson has failed to establish that the alleged plain error affected his substantial rights. He has identified no basis for us to reverse his conviction.

Affirmed.