STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2055

State of Minnesota,
Respondent,

vs.

Victor Issac Wion,
Appellant.

Filed October 28, 2019
Affirmed
Worke, Judge

Ramsey County District Court
File No. 62-CR-18-2137

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Worke, Judge; and Kirk, 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

WORKE, Judge

Appellant challenges his conviction for first-degree aggravated robbery, arguing that he is entitled to a new trial because the prosecutor elicited inadmissible *Spreigl* evidence. We affirm.

FACTS

On March 22, 2018, Officer Sherwood responded to a 911 call about a robbery. Officer Sherwood spoke to the victim, J.D., and learned that he had been robbed by an individual known as "Libking." The two had used Facebook Messenger to arrange for J.D. to buy a cell phone. When they met in J.D.'s vehicle, Libking asked to see the money. J.D. complied. Libking then covered his face with a handkerchief, announced that it was a stickup, and pulled a small object wrapped in cloth out of his pocket. J.D. believed the object was a small handgun and handed Libking the money. Libking exited the vehicle and J.D. called 911 to report the robbery.

Officer Sherwood photographed two of Libking's Facebook Messenger profile pictures. Using the pictures, an investigator identified Libking as appellant Victor Issac Wion. Officer Sherwood then issued an order to arrest Wion for the robbery.

Two days later, Officer Sherwood returned to the area where J.D. had been robbed. He noticed two individuals in a vehicle and thought he recognized the passenger as Wion. After approaching the vehicle, Officer Sherwood confirmed that the passenger was Wion. When Officer Sherwood questioned the driver, B.F., he learned that B.F. and Wion met to

trade cell phones. Officer Sherwood asked Wion to identify himself. Wion provided him with a false name and date of birth.

Wion was arrested and charged with first-degree aggravated robbery. Officers searched Wion incident to arrest and found two cell phones, marijuana, and a .177 caliber BB gun.

At trial, both the prosecutor and Wion's attorney discussed Wion's arrest in their opening statements and closing arguments. The prosecutor told the jury about the BB gun found on Wion. The prosecutor argued that regardless of whether the BB gun found on Wion at the time of his arrest was the one used in the robbery, Wion displayed something to frighten J.D. into handing over the money for the phone. Wion's attorney argued that the individual who committed the robbery was not the same individual who was arrested in the car with B.F. because the two events were different in nature, namely, that Wion and B.F. met to smoke marijuana.

The state called B.F. and Officer Sherwood to testify about the circumstances of Wion's arrest. B.F. testified that an officer showed him the BB gun found on Wion. Officer Sherwood testified about his investigation into the robbery and the circumstances of Wion's arrest. The state introduced several photographs of the objects found on Wion, the BB gun, and a video of the arrest.

The jury found Wion guilty of first-degree aggravated robbery. The district court sentenced Wion to 99 months in prison. This appeal follows.

D E C I S I O N

Wion argues that he is entitled to a new trial because the prosecutor committed misconduct by exposing the jury to inadmissible evidence of his prior bad acts. Specifically, he contends that the prosecutor improperly elicited evidence that he possessed and attempted to sell marijuana, lied about his identity, possessed a BB gun in a public place, and was attempting a different robbery when he was arrested.

Because Wion did not object to the alleged prosecutorial misconduct, this court applies a modified plain-error standard. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). Under this standard, Wion must demonstrate that the misconduct constituted error and that the error was plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* If Wion establishes these first two elements, "[t]he burden then shifts to the [s]tate to demonstrate that the error did not affect the defendant's substantial rights." *Carridine*, 812 N.W.2d at 146. To satisfy that burden, "the state would need to show 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." *Ramey*, 721 N.W.2d at 302 (quotation omitted). If all prongs of the modified plain-error test are met, an appellate court "then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.*

Wion argues that it was plain error for the prosecutor to present inadmissible evidence of his other bad acts, commonly referred to as *Spreigl* evidence.[1] *Spreigl*

[1] *State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965).

evidence is generally inadmissible because "the jury may convict because of those other crimes or misconduct, not because the defendant's guilt of the charged crime is proved." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). It is improper for a prosecutor to elicit inadmissible testimony. *See State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994).

Based on a review of the record, the prosecutor was not attempting to elicit *Spreigl* evidence. Instead, Wion raised the issue of the circumstances of his arrest from the outset of his trial. The supreme court has indicated that district courts, generally, should not interfere with a defendant's trial strategy. *See State v. Washington*, 693 N.W.2d 195, 205 (Minn. 2005). We address each piece of evidence in turn.

First, Wion argues that the prosecutor improperly elicited evidence that he possessed and attempted to sell marijuana. While the state concedes that the marijuana evidence was not particularly relevant, Wion himself referred to this evidence in his opening statement as part of his trial strategy. Therefore, the prosecutor's elicitation of evidence about the marijuana was not plain error.

Second, Wion argues that the prosecutor improperly elicited evidence that he provided Officer Sherwood with false information about his identity. As with evidence of the marijuana, Wion placed the circumstances of his arrest at issue in his opening statement as part of his trial strategy. Therefore, evidence relating to Wion's attempt to conceal his identity was not inadmissible as it was not offered as *Spreigl* evidence and thus was not plain error.

Next, Wion argues that the prosecutor improperly elicited evidence that he possessed a BB gun in a public place. This court has held that a physical object is

admissible into evidence if it tends to connect the defendant to the crime. *State v. Olson*, 436 N.W.2d 817, 820 (Minn. App. 1989), *review denied* (Minn. Apr. 26, 1989). In addition, the prosecutor did not plainly err by eliciting evidence of the BB gun as it tended to connect Wion to the robbery and, as with the marijuana and false-identification evidence, related to the circumstances of his arrest.

Finally, Wion argues that the prosecutor committed misconduct by eliciting evidence that his interaction with B.F. was an attempted robbery. Given that Wion's overall trial strategy was to compare the circumstances of his arrest to the robbery, the prosecutor's elicitation of this evidence was not plain error.

Because none of the above evidence was objected to at trial, Wion is essentially arguing that the district court, sua sponte, should have intervened. *See State v. Vick*, 632 N.W.2d 676, 687 (Minn. 2001) ("[T]he real question before us is *not* whether the [district] court erred in *admitting* the evidence, but instead is whether the [district] court's failure to sua sponte strike the testimony or provide a cautionary instruction was plain error."). In this case, it would have been inappropriate for the district court to sua sponte strike the testimony or provide a limiting instruction, because Wion raised the circumstances of his arrest as part of his trial strategy. *See Washington*, 693 N.W.2d at 205.

Because Wion has failed to establish plain error, we decline to consider the remaining steps of the modified plain-error test.

Affirmed.