STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0051

State of Minnesota,
Respondent,

vs.

Alfonso Quiroz,
Appellant

Filed December 9, 2019
Affirmed
Kirk, Judge[*]

Clay County District Court
File No. 14-CR-18-1262

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

Brian Melton, Clay County Attorney, Tara B. Nagel, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Smith, Tracy M., 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

KIRK, Judge

Appellant challenges his convictions of driving while impaired (DWI) and fleeing a police officer in a motor vehicle, arguing that the prosecution committed misconduct by eliciting evidence that violated his right to remain silent and to due process, and that the district court denied him his right to present a complete defense. Appellant makes additional arguments in a pro se supplemental brief. We affirm.

FACTS

In April 2018, respondent State of Minnesota charged appellant Alfonso Quiroz with DWI test refusal under Minn. Stat. § 169A.20, subd. 2(1) (Supp. 2017), felony first-degree DWI under Minn. Stat. § 169A.20, subd. 1(1) (2016), and felony fleeing a peace officer in a motor vehicle under Minn. Stat. § 609.487, subd. 3 (2016).

The case proceeded to trial, and appellant sought to use an alternative-perpetrator defense to argue that someone else had committed the crimes with which he was charged. Before trial, appellant notified the state and the district court of his intent to use the defense and moved to introduce evidence to support his defense theory, requesting that the district court allow him to name the alleged alternative perpetrator. The only evidence appellant put forth to support his alternative-perpetrator defense was a name. At the hearing, appellant's counsel explained that there was no additional information to disclose. The district court ruled that because the evidence was "just a name," and there was not "any tendency to connect [the] name of some individual with the charged crime," appellant could not name the alleged alternative perpetrator at trial.

At trial, Moorhead Police Department Officer Cooper Gauldin testified that during the early morning hours of April 1, 2018, he received a report that a car had fled from a traffic stop in Fargo. He testified that he observed the suspect car traveling through Moorhead and confirmed that the car's license plate and description matched the fleeing car. He explained that he tried to conduct a traffic stop, but that the car continued to drive away from him. He continued to pursue the car as it reached speeds around 95 to 100 miles per hour.

Moorhead Police Department Officer Zachary Johnson assisted Officer Gauldin in the pursuit. He testified that he had planned to put down stop sticks, but the car was traveling too fast and he was unable to do so. He caught up to the car, and when the fleeing car passed him, he saw an individual in the driver's seat, but could not see into the back of the car.

The officers continued to follow the car until it came to a stop when it crashed into part of a railroad track at an intersection and struck a pole. Officer Gauldin described that appellant got out of the driver's side door of the car and he "began to run . . . eastbound along the railroad tracks." He further testified that he did not see anyone else in the car and that as far as he knew, there were no other individuals in the area. Officer Johnson testified that the man who got out of the car had the same "basic characteristics" as the person he saw driving the car that had passed him. Officer Gauldin testified that when he made contact with appellant, he observed that a "strong odor of alcohol [was] coming from [appellant's] person," that his speech was slurred, that he was having a hard time maintaining his balance, and that his eyes were "extremely bloodshot and watery." Officer

Gauldin believed that appellant was impaired by alcohol and transported him to the law enforcement center to complete field sobriety testing.

At the law enforcement center, appellant refused to perform field sobriety tests. Officer Gauldin read appellant Minnesota's implied-consent advisory, but appellant told Officer Gauldin that he "was not going to perform the field sobriety tests because he was guilty" and refused to take a breath test. Officer Gauldin testified that at no time during his interaction with appellant did appellant mention that another individual had been driving his car, and testified that he did not think it was possible that someone else had been driving the car.

Appellant testified that on the day of the incident he had "no control" of the situation because he was a passenger in someone else's car. He explained that after the car crashed, he crawled over the center console to get out of the car from the driver's side because the passenger-side door would not open. He testified that when he refused the breath test he said that he was guilty, but that he meant he "was guilty of having drinks" and "going with somebody that was going to do that."

On cross-examination, appellant testified that the car that police had stopped was registered to his wife. He admitted that when Officer Gauldin asked him to perform field sobriety tests, he did not tell Officer Gauldin that he was not driving, that he did not tell the officers he was a passenger, and that he failed to mention someone else had been with him.

The jury found appellant guilty of the charged offenses. The district court entered judgments of conviction on counts 2 and 3 and sentenced appellant to a 60-month prison

term on count 2, and a 19-month prison term on count 3 to run concurrent with count 2. This appeal follows.

D E C I S I O N

I. The prosecutorial misconduct did not affect appellant's substantial rights and therefore a new trial is not warranted.

Appellant argues that the prosecutor "violated [his] constitutional rights to remain silent and to due process" by eliciting evidence, during his/her case-in-chief and on cross-examination, that appellant did not tell officers that someone else was driving the car. Because appellant did not object at trial, we apply the modified plain-error test and consider whether there is "(1) error, (2) that is plain, and (3) affects substantial rights."[1] *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Error is plain if it is clear or obvious, and is typically shown if the error "contravenes case law, a rule, or a standard of conduct." *Id.* "[T]he state bears the burden of persuasion on claims of prosecutorial misconduct to demonstrate that the misconduct did not affect substantial rights." *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011) (quotation omitted). If the state fails to carry its burden, we then assess whether to address the error to ensure fairness and the integrity of the judicial proceedings. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

[1] The Minnesota Supreme Court has reviewed the state's use of a defendant's silence under 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 apply the modified plain-error standard.

Appellant's plain-error argument is premised on his right not to be penalized for exercising his right not to incriminate himself. Both the United States and Minnesota Constitutions guarantee the right of a person in a criminal matter to remain silent. U.S. Const. amend. V; Minn. Const. art. I, § 7. Because exercising this right may be erroneously interpreted as an admission of guilt, admitting evidence of a defendant's silence may deprive the defendant of a fair trial. *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245 (1976). A prosecutor's reference to a defendant's post-arrest, post-*Miranda* silence is a violation of due process because it comments on the defendant's exercise of a constitutional right. *Id.* at 618, 96 S. Ct. at 2245. The state may not use a defendant's post-arrest, post-*Miranda* silence as substantive evidence in its case-in-chief, *Wainwright v. Greenfield*, 474 U.S. 284, 292, 106 S. Ct. 634, 639 (1986), or to impeach the defendant during cross-examination, *Doyle*, 426 U.S. at 611, 96 S. Ct. at 2241.

Appellant asserts that it was plain error for the prosecution to ask, during its direct examination of Officer Gauldin, about "whether [appellant] ever told him another person was driving the car that night," and for the prosecution to ask, during cross-examination, questions about whether appellant told Officer Gauldin that someone else was driving the car that night. As appellant points out, these questions referred to his post-arrest, post-*Miranda* silence because his silence occurred after he had been read the implied-consent advisory, arrested, and given a *Miranda* warning. The state concedes that some questions asked by the prosecutor were plain error but argues that the questions did not affect appellant's substantial rights.

The prosecution's questioning appears to have been in response to appellant's defense theory that someone else had been driving the car. But we do not address the alleged errors further because even if the errors were plain, appellant's substantial rights were not affected. If an appellant seeks reversal of an unobjected-to claim of prosecutorial misconduct, 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." *Hill*, 801 N.W.2d at 654 (quotation omitted). When deciding whether the state has met this burden, we consider "(1) the strength of the evidence against the defendant; (2) the pervasiveness of the improper conduct; and (3) whether the defendant had an opportunity (or made efforts), to rebut the prosecutor's improper suggestions." *Id.* at 655.

At trial, the evidence against appellant was strong. Despite appellant's assertion that someone else had been driving the car, both officers testified that they only saw one person inside the fleeing car and that there were no other individuals near the scene once the car was stopped. The fleeing car was registered to appellant's wife. When officers were finally able to stop the car, appellant got out from the driver's door and ran, and when officers finally apprehended him, he appeared to have been impaired by alcohol, and later refused to take a breath test and told Officer Gauldin that he was guilty. Moreover, the prosecution's improper use of appellant's silence was not pervasive. The alleged misconduct was limited to only a few instances in a two-day trial, and appellant had an opportunity to rebut the evidence while presenting his case and after the state's cross-

examination. Because the state has met it burden to show appellant's substantial rights were not affected, a new trial is not warranted.

II. The district court did not violate appellant's right to present a complete defense.

Appellant next argues that "[t]he district court violated [his] right to present a complete defense by preventing him from naming the person driving the car." Even where a defendant alleges that his inability to present a complete defense violates his constitutional rights, we review evidentiary questions for an abuse of discretion. *State v. Wilson*, 900 N.W.2d 373, 384 (Minn. 2017).

A criminal defendant is guaranteed a constitutional right to present a meaningful defense. *State v. Ferguson*, 804 N.W.2d 586, 590-91 (Minn. 2011). That right encompasses, among other things, "the right to present the defendant's version of the facts . . . to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923 (1967). But, "[c]ourts may limit the defendant's evidence to ensure that the defendant does not confuse or mislead the jury." *Ferguson*, 804 N.W.2d at 591.

Included within the right to present a complete defense is the right to present evidence showing that an alternative perpetrator committed the crime with which the defendant is charged. *Id.*; *State v. Nissalke*, 801 N.W.2d 82, 99 (Minn. 2011). "Determining whether alternative perpetrator evidence was improperly excluded at trial involves a two-step analysis." *State v. Atkinson*, 774 N.W.2d 584, 590 (Minn. 2009). "First, we must determine whether the defendant laid a proper foundation for admission of

such evidence by offering evidence that has an inherent tendency to connect the alternative perpetrator to the commission of the charged crime." *Id.* If the defendant fails to lay a proper foundation, the alternative perpetrator defense will not be permitted; but if the defendant lays a proper foundation, he may then introduce evidence of a motive of the third person to commit the crime, threats by the third person, or other miscellaneous facts tending to prove the third party committed the crime. *Id.*

When appellant notified the state and the district court of his intent to rely on the alternative-perpetrator defense at trial, the only evidence he offered to support his theory was that "[someone else] committed the crime with which [appellant] is charged." He offered no further evidence to support his theory, and the district court therefore properly rejected his motion because he had given "no information," and the name alone provided "no connection" between the crime and the alleged perpetrator. And the district court's ruling did not bar appellant from putting forth a meaningful defense. At trial, appellant testified at length regarding the series of events that led to his arrest and his testimony suggested that someone else had been driving the car.

Because appellant did not offer any evidence connecting someone else to the charged offenses and, because he was not precluded from presenting a complete defense, the district court did not abuse its discretion by prohibiting appellant from naming the alleged alternative perpetrator at trial.

III. Appellant's pro se arguments do not warrant relief.

In a pro se supplemental brief, appellant argues that the officers committed perjury while testifying at trial and that transcripts were incomplete.

Appellant cites no authority and provides no argument to further his assertions. Because the issues were not adequately briefed and no prejudicial error is obvious on mere inspection, we do not consider appellant's argument.[2] *See State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (stating that an assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

Affirmed.

[2] Moreover, the record contradicts his argument. His argument regarding the officer's testimony was a credibility issue for the jury. *See State v. Steinbuch*, 514 N.W.2d 793, 800 (Minn. 1994) (explaining that it is well-settled in Minnesota that it is within the province of the jury to determine the credibility and weight to be given to the testimony of any individual witness). In addition, appellant's argument that the transcripts are incomplete is mistaken. The transcripts that he claims are incomplete are included in the record.