STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0077

State of Minnesota,
Respondent,

vs.

Michael Scott Hansen,
Appellant.

Filed December 16, 2019
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

Carver County District Court
File No. 10-CR-17-507

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

Mark Metz, Carver County Attorney, Peter Ivy, Assistant County Attorney, Chaska, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

SMITH, TRACY M., Judge

Appellant Michael Scott Hansen appeals his convictions for aiding and abetting first- and second-degree burglary and possession of burglary tools. Hansen argues that this

court should reverse the convictions because (1) the state failed to prove the charges beyond a reasonable doubt and (2) the prosecutor deprived Hansen of his due-process right to a fair trial by eliciting inadmissible evidence of other bad acts. Hansen contends, in the alternative, that the district court erred by sentencing Hansen for both aiding and abetting burglary and possession of burglary tools because the offenses were part of the same behavioral incident. We affirm in part, reverse in part, and remand to vacate the conviction for possession of burglary tools.

FACTS

On the morning of May 1, 2017, the property manager of Sun Lake Woods Apartments—a secured apartment complex in Chaska—noticed that stereo equipment was missing from the apartment complex's community room and called the Chaska police. Video surveillance cameras captured two men, later identified as Hansen and Ezekiel McDermott, removing the stereo equipment late the previous night. The surveillance video shows that McDermott went alone to a side exterior door of the complex and "popped" it open with a tool. McDermott then walked through the building to let Hansen in the apartment complex's main entrance. The two men then split up and walked around in the building until meeting together in the hallway leading to the locked community-room door. Hansen stood behind McDermott as McDermott used a tool to open that door. Inside the dark community room, McDermott worked under a flashlight to remove the room's stereo equipment. Hansen stood in the background while McDermott removed the stereo equipment and then held the door while McDermott walked out with the equipment.

Chaska Police Detective Jamie Personius investigated the burglary. The detective took a still shot of the apartment building's surveillance footage and sent a crime alert to the surrounding law enforcement agencies for help in identifying the two men. A Ramsey County sheriff's deputy responded to the alert after recognizing McDermott from his booking photograph following a DUI arrest by New Brighton police on May 4, 2017—a few days after the robbery. The detective followed up with the New Brighton police and learned that Hansen was a passenger in the vehicle while McDermott was driving under the influence. The detective also learned that the vehicle, a black Chevy Tahoe registered to Hansen's girlfriend, had been towed to an impound lot.

The detective obtained the girlfriend's consent and searched the Tahoe. Inside, the detective found the stolen stereo; the jacket and hat worn by Hansen in the surveillance footage; a large number of tools, including crowbars and screwdrivers; scrapping receipts; and a blue notebook and loose paper containing addresses, business names, and odd location notes.[1] The detective phoned Hansen while he was traveling from the impound lot. In that call, Hansen originally stated that the tools in the Tahoe were his, but later in the conversation, after the detective told him they were "construction type tools," said that he did not know where they came from. Hansen also stated that McDermott "stopped at a couple of places that he just hangs his hat at and grabbed some s--t but I have no idea what he all grabbed." When the detective told Hansen about the surveillance video, Hansen said,

[1] The detective testified that there was "writing on [the notes that] indicated that whoever was writing that on these books was talking about pop machines, vending machines, inside those hotels and apartment buildings and whether or not they would be easy to get into or not."

"I never once took a piece of equipment out of any apartment building or any house period." He said that he thought the stereo was McDermott's, but he also said that McDermott likes to tell lies and that "what I've known about [McDermott] in the past is he's been a booster . . . . That he boosts from stores . . . . Everybody knows that." He followed with, "[S]o when he said that he was taking out some of his equipment I didn't know if it was something, ya know, I know I didn't, but I told him straight out I ain't helping for s--t." Hansen stated that McDermott was "gonna go ahead and get rid of [the stereo] cause he was hurtin for money."

The state charged Hansen with aiding and abetting burglary in the first and second degree and possession of burglary tools. After a two-day trial, the jury returned a guilty verdict on all three counts. The district court sentenced Hansen to a stayed prison term of 57 months for first-degree aiding and abetting burglary and a stayed prison term of 23 months for possession of burglary tools.

Hansen appeals.

D E C I S I O N

I. Hansen's aiding-and-abetting-burglary convictions are supported by sufficient evidence, but there is insufficient evidence to support his conviction for possession of burglary tools.

Hansen argues that his aiding-and-abetting-burglary and possession-of-burglary-tools convictions were not supported by sufficient evidence. When a disputed element of an offense is proved by both direct and circumstantial evidence, appellate courts apply a heightened standard of review. *See Al-Naseer*, 788 N.W.2d 469, 474-75 (Minn. 2010). Here, the element of intent is disputed for both the aiding-and-abetting-burglary and the

possession-of-burglary-tools offenses. Intent is generally shown through circumstantial evidence. *State v. Essex*, 838 N.W.2d 805, 809 (Minn. App. 2013), *review denied* (Minn. Jan. 21, 2014). We therefore apply the heightened standard.

To apply the circumstantial-evidence standard, an appellate court follows a two-step analysis. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we identify the circumstances that the state has proved. *See State v. Anderson*, 784 N.W.2d 320, 329 (Minn. 2010). In doing so, we "defer . . . to the jury's acceptance of the proof of these circumstances." *Id.* (quotation omitted). Appellate courts "construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the State's witnesses and disbelieved the defense witnesses." *Moore*, 846 N.W.2d at 88 (quotation omitted). Second, we "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotations omitted). In other words, we evaluate whether the established circumstances rationally lend themselves to inferences that are inconsistent with guilt. *See State v. Stein*, 776 N.W.2d 709, 719 (Minn. 2010). If they do, we must reverse the conviction. *See Al-Naseer*, 788 N.W.2d at 481.

A. The evidence is sufficient to support the aiding-and-abetting-burglary convictions.

Hansen does not dispute that the circumstances proved are consistent with guilt of aiding and abetting burglary but argues that they also allow a reasonable inference of innocence—specifically, "that Hansen believed McDermott had permission to take the stereo equipment and he merely assisted by driving him and holding the door open."

A person is criminally liable for aiding and abetting a crime committed by another "if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2016).

The state proved the following circumstances. Hansen drove McDermott to the apartment building in Hansen's girlfriend's Tahoe. McDermott broke into the building and then let Hansen in. The two men separated, walked through the building, and joined up again outside the community room. With Hansen several feet away, McDermott popped the locked community-room door open. The men walked into the community room. Neither man turned on the community-room lights, although the room was dark and there was a light switch immediately inside the door. Hansen watched as McDermott used a flashlight while removing the stereo. Hansen held the door open for McDermott, who was carrying the stereo. The two left together, with the equipment, in the Tahoe. Hansen knew McDermott was a "booster" and in need of money and that McDermott intended to sell the stereo.

Hansen argues that it is reasonable to infer that he believed McDermott had permission to take the stereo equipment, emphasizing that he was not with McDermott when McDermott broke into the apartment building, that the surveillance video showed that the parties did not try to hide their faces from the cameras, that McDermott might have used a flashlight because the men did not see the light switch, that Hansen might not have seen McDermott break into the community room while Hansen was standing nearby, and that McDermott took only the stereo and not other electronics in the building.

In evaluating the reasonableness of a hypothesis of innocence, we examine the evidence as a whole and do not rely on mere conjecture. *State v. German*, 929 N.W.2d 466, 475 (Minn. App. 2019). Applying those principles to the evidence in this case, we conclude that the circumstances proved make Hansen's alternative theory implausible. Hansen drove McDermott, a known "booster," to an apartment building in the middle of the night, waited while McDermott broke into the locked building and then let him in the building, walked through the building and then stood nearby while McDermott broke into the locked community room, watched as McDermott—using a flashlight—removed a stereo, and then opened the door for McDermott and drove him away with the equipment. There is only one plausible interpretation of these facts: Hansen knowingly aided and abetted the burglary.

Sufficient evidence supports the jury's finding of aiding and abetting burglary.[2]

B. The evidence is insufficient to support the possession-of-burglary-tools conviction.

Hansen also argues that the evidence was insufficient to support his conviction for possession of burglary tools. Minnesota law states that "[w]hoever has in possession any device, explosive, or other instrumentality with intent to use or permit the use of the same to commit burglary or theft may be sentenced to imprisonment." Minn. Stat. § 609.59

[2] We note that the district court, in the warrant of commitment, entered convictions on both the first- and second-degree aiding-and-abetting burglary offenses (counts 1 and 2, respectively). Though not raised by the parties, we direct the district court to correct the warrant of commitment to remove the conviction for the second-degree offense (count 2) because it is a lesser-included offense of the first-degree offense. *See* Minn. Stat. § 609.04, subd. 1 (2018); *State v. Crockson*, 854 N.W.2d 244, 248 (Minn. App. 2014), *review denied* (Minn. Dec. 16, 2014).

(2016). The required intent "may be drawn from the character of the objects and from the circumstances surrounding their possession." *State v. Conaway*, 319 N.W.2d 35, 41 (Minn. 1982). "The intent necessary is a general intent to use the tools in the commission of a burglary and not an intent to commit a particular burglary." *Id.*

In their briefing, the parties advance different theories as to which burglary tools the jury found Hansen guilty of possessing. Hansen contends that the charge pertains to the tool used by McDermott to break into the apartment building and community room on May 1, while the state relies on the items found in the impounded Tahoe on May 4. We look at the state's theory of the case at district court. The amended complaint identifies May 1, 2017—the date of the burglary—as the date of the possession-of-burglary-tools offense. At sentencing, the prosecutor told the district court that the possession offense occurred during the burglary, stating, "I think you do have to pronounce sentence on the burglary tools though because that is a separate crime even though it occurred during the course of this burglary, it is separate." Finally, the warrant of commitment identifies May 1, 2017, as the date of the possession-of-burglary-tools offense. Following this theory of the case, we review Hansen's conviction for possession of burglary tools based on the tool that McDermott used to prop doors open during the burglary on May 1.

Possession may be actual or constructive. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). Constructive possession can be shown one of two ways. *Id.* "The State may show that the police found the item in a place under the defendant's exclusive control to which other people normally did not have access," or the state "must show that there is a

strong probability . . . the defendant was consciously or knowingly exercising dominion and control over it." *Id.*

Here, the circumstances proved do not lead to the rational inference that Hansen possessed the tool used in the burglary. The video surveillance footage shows only McDermott using a tool. No evidence supports the notion that Hansen ever possessed McDermott's tool. Further, police could not determine whether any of the tools later found in the Tahoe were the specific tool McDermott used. The circumstances proved do not establish that Hansen was in possession of the tool nor do they exclude the rational inference that Hansen never possessed the tool. We reverse the district court's possession-of-burglary-tools conviction because, even when viewed in the light most favorable to the guilty verdict, the evidence is insufficient to convict Hansen of possession of burglary tools.

II. Eliciting testimony about other bad acts was not reversible plain error.

In another challenge to his aiding-and-abetting-burglary convictions, Hansen argues that the district court erred when it allowed the state to commit prosecutorial misconduct by eliciting testimony from the detective about the potential criminal nature of evidence found in the Tahoe. Specifically, Hansen argues that the detective's testimony about the "notebook that appeared to be a list of other places they could have been burglarizing," items the detective believed to be too new to be lawfully scrapped, equipment the detective thought could be used to syphon gas, and a mask which could be used to "cover up their identity, if they were doing something they weren't supposed to," was testimony of other bad acts that deprived Hansen of a fair trial. Hansen did not object to this evidence at trial.

Appellate courts use a modified plain-error test when examining unobjected-to prosecutorial misconduct. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Under that test, the defendant bears the burden of establishing error that is plain. *Id.* at 302. "An error is plain if it is clear or obvious, and usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007) (quotations omitted). If the defendant establishes plain error, the burden shifts to the state to prove that the error did not affect the defendant's substantial rights. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). To do so, the state must establish that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict. *Ramey*, 721 N.W.2d at 302. If the state fails to meet that burden, we consider "whether the error should be addressed to ensure fairness and the integrity of judicial proceedings." *Parker*, 901 N.W.2d at 926.

Hansen argues that the prosecutor committed error by not offering a *Spreigl* notice before eliciting bad-act evidence. *See State v. Spreigl*, 139 N.W.2d 167, 173 (Minn. 1965) (establishing notice requirement for other-bad-acts evidence). Evidence of a defendant's prior bad acts may be admitted as *Spreigl* evidence if the evidence is used to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b); *State v. Washington*, 693 N.W.2d 195, 202 (Minn. 2005). To introduce this evidence, the state must (1) provide notice to the other parties, (2) "clearly indicat[e] what the evidence is being offered to prove," (3) provide "clear and convincing proof that the defendant participated in the other offense," (4) prove that the evidence is relevant, and (5) prove that the evidence's probative value "is not substantially

outweighed by its potential for unfair prejudice." *Washington*, 693 N.W.2d at 201 (citations omitted). The state did not offer any notice before eliciting the detective's testimony.

Even if, in the context of the charges in this case, Hansen's possession of the contents of the Tahoe on May 4 was other-bad-acts evidence, "a trial court's failure to sua sponte strike unnoticed *Spreigl* evidence or provide a cautionary instruction is not ordinarily plain error." *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001). And, even if it was plain error, reversal is not warranted if the state meets the third prong of the modified plain-error test. "In evaluating the reasonable likelihood that the erroneously admitted evidence significantly affected the verdict, this court must consider the persuasiveness of that evidence . . . [and] the manner in which the evidence was presented." *State v. Jackson*, 764 N.W.2d 612, 620 (Minn. App. 2009), *review denied* (Minn. July 22, 2009).

Here, while the evidence in question may have advanced a theory that Hansen possessed burglary tools on May 4, it is unlikely that this evidence would have significantly influenced the jury's determination that Hansen aided and abetted the burglary on May 1. This is especially true when compared to the amount and persuasiveness of the other evidence. Hansen drove McDermott to and from an apartment complex late at night. He is captured on the apartment complex's surveillance camera entering the complex and separating from McDermott to look around. He then reunites with McDermott and stands behind him while McDermott pops open the locked community-room door. Finally, he watches McDermott disassemble the stereo in the dark and then holds the door open for him as McDermott removes the stereo from the apartment complex and loads it into the Tahoe. Hansen also stated that he knew McDermott lies, is a "booster," and needs money.

Hansen's plain-error argument fails because the state met its burden of demonstrating that any error did not affect his substantial rights.

In sum, the aiding-and-abetting-burglary convictions were supported by sufficient evidence and were not infected by plain error. We affirm the first-degree aiding-and-abetting-burglary conviction. But because second-degree aiding and abetting burglary is a lesser-included offense of first-degree aiding and abetting burglary, we direct the district court to vacate the conviction on the second-degree offense. We conclude that the possession-of-burglary-tools conviction is not supported by sufficient evidence and reverse that conviction. Because the only sentence remaining after reversal of that conviction is Hansen's sentence for first-degree aiding and abetting burglary, we need not address his alternative argument that the district court erred by imposing two sentences. We remand for the district court to correct the warrant of commitment with respect to the second-degree aiding-and-abetting-burglary conviction and the possession-of-burglary-tools conviction.

Affirmed in part, reversed in part, and remanded.