STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1173

State of Minnesota,
Respondent,

vs.

Deitrick Aaron Gill,
Appellant.

Filed July 13, 2020
Reversed and remanded
Florey, Judge

Redwood County District Court
File No. 64-CR-17-123

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

Jenna Peterson, Redwood County Attorney, Grey Jensen, Assistant County Attorney, Redwood Falls, Minnesota (for respondent)

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

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

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

FLOREY, Judge

In this direct appeal, appellant Deitrick Aaron Gill challenges his convictions for second-degree arson and conspiracy to commit insurance fraud. Gill argues that his

convictions must be reversed because (1) his wife was incompetent to testify against him based on the marital privilege; (2) it was plain error affecting his substantial rights for the district court to permit a police officer to testify that he knew Gill through prior contacts; (3) it was misconduct for the prosecutor to elicit inadmissible evidence, fail to prepare a witness's testimony, and to imply that jurors must conclude that law-enforcement officers were lying in order to return a not guilty verdict; (4) the jury instructions erroneously omitted an accomplice-liability instruction; (5) the cumulative effect of trial errors deprived him of a fair trial; and (6) the evidence was insufficient to prove the value element of arson. We reverse and remand.

FACTS

On August 26, 2016, Chad Green called 911 shortly after midnight and reported that a parked car was on fire on a street in Redwood Falls. Firefighters and police arrived around five minutes later. The car's tires blew up, and several of its windows exploded, at which point people began to emerge from nearby houses. Two of the people outside were identified as the residents of the home the car was parked in front of—Tasha Comstock[1] (Tasha) and her then-boyfriend, appellant Deitrick Aaron Gill. Tasha and Gill spoke with police that night. Tasha stated that she believed the car, which she and Gill owned, had last been driven "a couple days" before, but she gave conflicting accounts. Tasha and Gill told police that they had gone to bed at 10:00 p.m. and did not hear police knocking at their door or ringing their doorbell. They said they woke to "loud noises," including the sounds

[1] Tasha (now Tasha Gill) and Gill were unmarried at the time of the offense. They were married in March 2017—before trial.

of the car windows breaking and the firetruck's siren. Gill told police that he had been working on the car earlier in the day and replaced the rear tires and rims with the originals. Gill also stated that a week before, he had removed stereo equipment, subwoofers, and an amplifier. Gill invited police inside the house and showed them the subwoofers he had removed. The police also observed a car battery near the stereo equipment.

Because the officers believed that the circumstances surrounding the car fire were suspicious, they contacted the fire marshal. The car was towed and impounded for further investigation. Gill and Tasha were interviewed by the fire marshal before examining the car. They stated that they had purchased the car in February 2016 for $4,700 in cash. They stated that they co-owned the car and that Gill was its primary driver. Gill said he had previously replaced the alternator, water pump, and fan clutch.

After examining the car, the fire marshal learned that the damage was concentrated in the passenger compartment. BCA testing of foam samples from the front seat confirmed the presence of gasoline. The fire marshal also identified numerous mechanical defects with the vehicle.

The fire marshal interviewed Gill again after examining the car. Gill said that the car was running on the day of the fire and that he had replaced the rear tires and parked the car in front of the house that day. Gill also said it was common for him to replace the stereo equipment in his car and that he had used more than one battery in that car, but did not remember whether he had removed a battery the day of the fire. The fire marshal later spoke with representatives from Progressive Insurance and learned that the policy on the vehicle began roughly three weeks before the fire.

Gill was charged in February 2017 with one count of second-degree arson in violation of Minn. Stat. § 609.562 (2016) and one count of conspiracy to commit insurance fraud in violation of Minn. Stat. § 609.611, subd. 1(a)(2) (2016). Tasha was charged with the same offenses.

A three-day jury trial took place in March 2019. The state's witnesses included Chad Green, Tasha, and several police officers, firefighters, and investigators, including police sergeant Randy Braun. Braun testified that he was the first to arrive at the scene of the fire. Braun testified that when he arrived on the scene, he gave the license-plate number of the burning car to dispatch, but that "from prior contacts," he was "aware that it belonged to Deitrick Gill . . . and Tasha Comstock." Braun testified that he "also knew that they were apparently living at the address" the car was parked in front of. Braun observed Tasha and Gill when they came out of the house, and spoke with Tasha while another officer spoke with Gill. Braun testified that Tasha and Gill's demeanor was "very, very flat . . . kinda just . . . a stoic look." Braun testified that their demeanor stood out because "it almost felt like they didn't feel surprised . . . that we were there having this conversation." When asked why he had that feeling, Braun stated, "Um just considering everything that . . . I had kind of known from . . . prior calls."

Braun testified that he had responded to car fires before as both a police officer and a firefighter. He stated that he found it "very suspicious" that "there was nothing in this car." Braun testified that "immediately when [he] . . . got on the scene, [he] . . . thought this was an arson case." When asked why, he answered, "Um just considering kinda some of the back story um and the dealings that I've had with . . . Mr. Gill and then if you consider

everything that happened in this case where there's nobody around. There's nothing inside the vehicle that could have lit this fire, it . . . had to be litten [sic] by an individual."

Braun testified that the fire marshal was contacted due to "the suspicious events surrounding the actual fire itself." Braun testified that he "briefed the Fire Marshal on kinda my dealings with Mr. Gill and the events that took place the prior night."

An insurance investigator testified that, about three weeks before the fire, Tasha had added the car to her existing Progressive policy. The policy was standard, with comprehensive coverage which included fire damage. The investigator testified that Tasha filed an insurance claim the morning of August 26. That morning, the investigator interviewed Tasha and Gill. Tasha said that Gill was the primary driver and that she did not know the condition of the vehicle on the day of the fire or why anything would have been removed from it. Gill told the investigator that he was unemployed at the time of the fire and that "money was tight." Tasha and Gill authorized the investigator to obtain their cell-phone records and credit reports and provided Tasha's bank statements. The balance on one of the bank statements was negative $19.76, and another was $0.22. The credit reports showed that about three weeks before the fire, Tasha and Gill had their credit histories checked at car dealerships.

Progressive hired David Hallman to assess the condition of the car at the time of the fire. Hallman noted numerous mechanical problems, including an external oil leak from the engine and into the spark-plug wells, coolant leaks, damaged alternator wires, air-filter housing, and vacuum lines. Hallman noted that numerous homemade repairs had been undertaken. Some were not complete, while others had been done poorly. Hallman

concluded that, when it was burned, the car was in poor condition, and while it may have started and run, it would have been unlikely to travel more than five miles. Progressive also had a "valuation report" created to determine how much money a claim for the loss of the car would pay. The report based its determination of market value by comparing it to the list price for the same model vehicle with roughly similar mileage at three Midwest dealerships. The report required that the condition of the car be described, including the condition of the interior, exterior, and mechanical parts. The report described the condition of every part of the car as "good" which meant that the car was "in ready-for-sale condition." The report adjusted the car's market value upward because of the CD player, two pairs of speakers, and aftermarket wheels. The report valued the car at $5,656.48. Ultimately, Progressive denied the insurance claim.

The jury found Gill guilty of both offenses. The district court imposed an executed sentence of 48 months in prison for the arson conviction but did not impose a sentence for the conspiracy conviction. Gill appeals.

D E C I S I O N

As a preliminary matter, we note that none of the complained-of errors were objected to at trial or otherwise raised in district court, with the exception of an objection to the compelled testimony of Tasha on grounds other than those argued on appeal. "This court generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But, this court will consider an issue not raised before the district court if it constitutes plain error.

> The United States Supreme Court has established a three-prong test for plain error, requiring that before an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

State v. Griller, 583 N.W.2d 736, 740 (Minn. 1998). Accordingly, the plain-error standard of review governs each of the arguments raised, with the exception of Gill's assertions of prosecutorial misconduct, as discussed below.

Marital Privilege

First, Gill contends that spousal privilege applies and that allowing Tasha's compelled testimony without his consent was plain error. Minn. Stat. § 595.02, subd. 1(a) (2016), states that "[a] husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either . . . be examined as to any communication made by one to the other during the marriage."

Here, Gill did not consent to Tasha's testimony, and in fact, he objected to it, though not on the grounds of spousal privilege. Tasha was subpoenaed and invoked her fifth-amendment right not to testify. Her counsel and Gill's counsel objected to her testimony being compelled, but the district court allowed the testimony and granted her use of immunity.

Gill points to *State v. Penkaty*, in which the Supreme Court held that it was plain error to admit the testimony of a defendant's wife without "first obtaining his consent." 708 N.W.2d 185, 203-05 (Minn. 2006). Here, like in *Penkaty*, Gill did not intelligently waive his right to invoke the privilege because the record does not reflect an "intentional

relinquishment" of his right to spousal privilege. *Id.* at 204-05. The *Penkaty* court concluded that allowing the defendant's spouse to testify was plain error because Minn. Stat. § 595.02 "unequivocally requires the nontestifying spouse's consent." *Id.* at 205. We conclude that allowing Tasha's testimony is plain error.[2]

We turn now to whether this error affected Gill's substantial rights. The *Penkaty* court concluded that the error affected the defendant's substantial rights because the spouse's testimony was lengthy, and because "she was the only eyewitness who had consumed no alcohol or drugs." *Id.* Much of what Tasha testified to, however, was already part of the record or could have been elicited by other means, such as through the bank statements and credit reports obtained by the insurance company. In fact, in his[3] objection to her testimony, Tasha's attorney argued that the information Tasha would offer was

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[2] The state maintains that an exception to the spousal-privilege rule applies here—namely that the arson of a car owned by his wife is a crime committed against Tasha, thus falling within the exception for a "crime committed by one [spouse] against the other." Minn. Stat. § 595.02, subd. 1(a). First, as Gill points out, the state charged Tasha with second-degree arson as well, and repeatedly argued that this was a crime that Tasha and Gill committed together (sort of a twist on the typical joint-participant-exception argument, which Minnesota does not recognize anyway. *See State v. Gianakos*, 644 N.W.2d 409 (Minn. 2002)). Second, the burning of a parked car on the street in front of appellant's home would likely not be considered a "crime committed by one spouse against the other" based on the current case law interpreting this exception. In *State v. Zais*, the supreme court concluded that "the crime exception to the marital privilege contemplates that the court must examine not only the elements of the crime charged, but also the underlying conduct supporting the crime to determine whether the crime charged was "committed by one [spouse] against the other." 805 N.W.2d 32, 39 (Minn. 2011). This exception contemplates a crime against a person, or a crime that would make the testifying spouse fearful, such as burning a dwelling they occupy while they are inside; or in the *Zais* case, disorderly conduct that causes alarm, anger, or fear in one's spouse. *Id.* at 41. Based on the relevant case law, the offense here would not fall within this exception.

[3] Gill's attorney did not make any of his own arguments against Tasha's testimony, but rather agreed with Tasha's attorney's objection.

"readily available from other witnesses" and that she had already provided information indicating "what her financial status was at the time" and "what she was doing that day." But Tasha's testimony also elicited the financial motivation that bolstered the state's theory of the case. Her testimony was also highlighted throughout the trial, including in closing argument. Based on our review of the record, we conclude that the decision to allow Tasha's testimony did affect Gill's substantial rights.

The next question is whether the "fairness and integrity" of judicial proceedings requires this court to address the error. Gill is correct in pointing out that the prosecutor's focus on Tasha's testimony, especially during closing argument, makes it much more likely that her testimony was prejudicial. Gill is also correct that Tasha's testimony provided the state with much stronger evidence of their theory of the underlying financial motive for the crime. While there was evidence of their financial struggles, Tasha's testimony emphasized their precarious financial position, and was strongly emphasized by the prosecutor. Additionally, Gill is correct in asserting that there is no direct evidence linking him to starting the fire. He was charged with arson as the principal, and Tasha's testimony strengthened the state's case about Gill's underlying motivation for setting the fire, and made it more likely that the jury would look past the lack of direct evidence on who specifically started the fire. We therefore conclude that Tasha's testimony had a fundamental effect on the fairness and integrity of the trial, and that it was plain error to allow her to testify without Gill's consent.

Relatedly, Gill also asserts that because his attorney failed to object to Tasha's testimony on the grounds of spousal privilege, he received ineffective assistance of

counsel. Because we conclude that permitting Tasha's testimony was reversible plain error, we need not determine whether Gill's counsel was ineffective.

Prior Contacts with Law Enforcement Testimony

Gill next asserts that the district court plainly erred by admitting the testimony of Sergeant Braun with respect to five references to prior contacts with Gill. Admitting an officer's testimony that the officer knows the defendant from prior contacts is error if the defendant's identity is not at issue in the case. *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App 2010). In *State v. Strommen*, the supreme court held that it was plain error for an officer to testify that he knew the defendant from prior contacts and knew that the defendant had previously killed someone. 648 N.W.2d 681, 686-88 (Minn. 2002). However, *Strommen* did not hold that the officer's comments about prior contacts, on their own, were reversible plain error. *Id.*

In *State v. Patzold*, which involved the same court, police officer, and attorney as in the case before us now, the prosecutor elicited testimony from the officer that he knew the defendant from prior contacts with law enforcement. 917 N.W.2d 798, 807 (Minn. App. 2018), *review denied* (Minn. Nov. 27, 2018). Although we observed that the officer's "brief and unsolicited comment" was improper, we concluded that this error by the prosecution had no effect on defendant's substantial rights. *Id.* at 807-08.

Unlike in *Patzold*, Braun's testimony included five references to previous interactions with Gill. These references were much more substantial than the "fleeting and unsolicited" reference to the defendant in *Patzold*. *Id.* at 807. Identity was not an issue in this case, making this type of testimony inappropriate. However, standing alone, the

officer's testimony about prior contacts, while error, likely did not impact Gill's substantial rights.[4] Because there are other issues in this case warranting reversal, we need not decide whether Braun's mentions of prior contacts with Gill affected Gill's substantial rights.

Prosecutorial Misconduct

Gill makes several assertions of prosecutorial misconduct, including that the prosecutor intentionally elicited the inadmissible references to Braun's prior contacts with Gill and that the prosecutor failed to prepare Braun as a witness. Additionally, Gill asserts that the implication that jurors must conclude that law-enforcement witnesses were lying in order to acquit him was error.

When the defendant fails to object during trial, prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The defendant bears the burden of establishing error that is plain, but upon doing so, the burden shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict. *Id.*

"The state has a duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements." *Patzold*, 917 N.W.2d at 807. Based on our review, we can fairly conclude that the prosecutor failed in the duty to prepare witnesses for trial. But, as discussed briefly above, and addressed more thoroughly below, it appears there are

[4] We are particularly troubled by Braun's testimony that "immediately when I . . . got on the scene, I . . . thought this was an arson case," followed by his explanation that this conclusion was based on, "kinda some of the back story um and the dealings that I've had with . . . Mr. Gill." This testimony was highly prejudicial and such statements alone may have had a substantial effect on the trial.

several errors of varying degrees of seriousness throughout this case. And, while some of the assertions made regarding prosecutorial misconduct may have amounted to error, it is difficult to ascertain whether they affected Gill's substantial rights, as the prosecutorial-misconduct allegations are fairly intertwined with Gill's other assertions of errors. Although we conclude that the prosecutorial misconduct asserted there is not enough on its own to warrant reversal, we note that we are particularly troubled by the fact that Gill's case involved not just the same police witness, but the same prosecutor, and the same alleged misconduct as in *Patzold*, which was released six months before Gill's trial.

Jury Instructions

Gill also asserts that his arson conviction must be reversed because of an erroneous jury instruction. When there is no objection to jury instructions at trial, the appellate court has discretion to consider a claim of error on appeal if there was "plain error affecting substantial rights" or an error of fundamental law in the jury instructions. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted); *see State v. Milton*, 821 N.W.2d 789, 807-08 (Minn. 2012).

When evaluating whether a plainly erroneous jury instruction affected substantial rights, we "look to all relevant factors including, but not limited to: (1) whether [the defendant] contested the omitted elements at trial and submitted evidence to support a contrary finding; (2) whether the State presented overwhelming evidence to prove those elements; and (3) whether the jury's verdict nonetheless encompassed a finding on those elements notwithstanding their omission from the jury instructions." *State v. Peltier*, 874 N.W.2d 792, 800 (Minn. 2016).

Here, the state charged Gill with second-degree arson and only charged him as the principal. The state's sole theory was that Gill set the car on fire. The court instructed the jury on the elements of second-degree arson. The court instructed the jury that, to prove that Gill was guilty of arson, the state had to prove that "the defendant (or another for whose act the defendant is liable) caused the fire." The jury was given no other instruction on accomplice liability.

Jury instructions "must define the crime charged and explain the elements" of the charged offense. *State v. Smith*, 901 N.W.2d 657, 661 (Minn. App. 2017). The jury must be charged upon all applicable law, and they must be clearly instructed on exactly what it is they must decide. *State v. Vance*, 734 N.W.2d 650, 657 n.5 (Minn. 2007); *State v. Williams*, 759 N.W.2d 438, 444 (Minn. App. 2009). Jury instructions are erroneous if they "allow [the jury] to speculate over the meaning of the elements." *State v. Davis*, 864 N.W.2d 171, 177 (Minn. 2015).

A person commits second-degree arson when he "unlawfully, by means of fire . . . destroys or damages . . . personal property valued at more than $1,000." Minn. Stat. § 609.562. Thus, the state must prove as an element of the offense that the defendant is the person who set the fire.

Here, the jury was instructed that Gill could be found guilty if *another for whose act [Gill] was liable* set the fire. This does not accurately reflect the elements of second-degree arson because Gill was only charged as the principal. Additionally, the jury was not instructed on how to determine the liability "for another whose act [Gill] was liable." Gill correctly asserts that such an instruction constituted reversible plain error in *State v.*

Williams. 759 N.W.2d at 443-46. In *Williams*, the defendant was charged as both the principal and on a theory of accomplice liability. *Id.* The court reversed the conviction because the instruction left the jury to speculate over what acts the defendant needed to commit to be guilty of arson. *Id.* at 445. Without any instruction on how to determine "liability," the jury could have found the defendant guilty if it concluded he was liable for someone else setting the fire. *Id.* Here, the jury could have found Gill guilty of arson, even if it concluded that Tasha or Chad Green had set the fire. This is especially true because there was no direct evidence that Gill personally set the fire in this case, and because Tasha was implicated in the conspiracy to commit insurance fraud. Because the jury instruction could have allowed the jury to convict Gill even if it did not believe that he personally set the fire, we reverse Gill's conviction for arson and remand for a new trial.[5]

Sufficiency of Evidence on Second-Degree Arson

Finally, Gill asserts that his second-degree arson conviction must be reduced to a fifth-degree arson conviction because the evidence was insufficient to prove that the property damaged was valued at more than $1,000.

Value, for the purposes of determining criminal liability, means "the retail market value" at the time of the offense. *State v. Stout*, 273 N.W.2d 621, 623 (Minn. 1978). The retail market value (RMV) is the "value in the market in which the item [would be sold]. *Id.* The value element of an offense is proven when "the evidence is adequate to show"

[5] Gill also asserts that cumulative error warrants a new trial in this case. The cumulative effect of multiple errors may deprive the defendant of the right to a fair trial. *Penkaty*, 708 N.W.2d at 206. Because we have already identified numerous issues warranting reversal, we need not decide Gill's cumulative-error argument.

that the RMV of the property exceeds the statutory threshold. *See State v. Matousek*, 178 N.W.2d 604, 609 (Minn. 1970).

Here, the state presented the "valuation report" created by an insurance company employee, which indicated a value of the burned car of $5,646.48. However, that report appears to have been based on information that did not reflect the car's actual condition or content at the time of the fire. And, as Gill points out, the state contradicted this valuation repeatedly with the other evidence it offered.

Hallman testified that the car had numerous mechanical problems, including oil and coolant leaks, wiring damage, and amateur repairs that had not been completed or had been completed poorly. The state elicited testimony that even if the car started and ran, it could not have been driven for more than several miles before breaking down. The prosecutor argued that the car was of very little value and that no one would "purchase it in its condition." Thus, we conclude that the state did not prove the value of the car beyond a reasonable doubt. Because the state's evidence was insufficient to prove second-degree arson during this trial, on remand, the state is limited to a charge of fifth-degree arson.

We reverse Gill's convictions and remand for a new trial, limited to the charges of fifth-degree arson and insurance fraud, due to the improper jury instructions and the insufficiency of the evidence as to the value of the car at the time of the alleged offense.

Reversed and remanded.