STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0793

State of Minnesota,
Respondent,

vs.

Matthew Steven Kimmes,
Appellant.

Filed June 14, 2021
Affirmed in part, reversed in part, and remanded
Jesson, Judge

Dakota County District Court
File No. 19HA-CR-18-762

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

Kathryn M. Keena, Acting Dakota County Attorney, Anna Light, Heather D. Pipenhagen, Assistant County Attorneys, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Reyes, Judge.

SYLLABUS

Tampering with a motor vehicle is a lesser-included offense of motor-vehicle theft.

OPINION

JESSON, Judge

After police officers responded to reports of a vehicle in a ditch, they discovered appellant Matthew Kimmes and his girlfriend. Though neither was the registered owner

of the car, they claimed to have the owner's permission to use it. Because of this, one of the officers documented the scene by taking photographs of the car and its contents—including several tools—with his cell phone. Kimmes then left the scene—with the officer's cell phone in his backpack. At roughly the same time, another officer had located a recently stolen truck in a field less than two miles away from the car in the ditch. Kimmes's DNA was later found on the truck's steering wheel.

Following these incidents, the state charged Kimmes with theft of a motor vehicle, theft of an item worth $500 or less, and tampering with a motor vehicle.[1] He was convicted on all three counts and sentenced for the theft-of-a-motor-vehicle offense. Kimmes appeals. Because the district court did not abuse its discretion by admitting limited testimony about the tools and because the prosecutor did not elicit inadmissible testimony which affected Kimmes's substantial rights, we affirm in part. But because tampering with a motor vehicle is a lesser-included offense of theft of a motor vehicle, we reverse in part, and remand to the district court with instructions to vacate that conviction.

FACTS

This case involves two vehicles: a blue Dodge Avenger and a white Chevrolet Silverado.[2] Police officers received a report of the Avenger crashed in a ditch in rural Dakota County. When officers arrived on scene they found appellant Matthew Kimmes and his girlfriend, who claimed to have permission from the registered owner to use it.

[1] Minn. Stat. §§ 609.52, subd. 2(a)(1), (17), .546(2) (2016).
[2] The following is a summary of the facts established at trial.

Officers confirmed the story with the registered owner and a tow truck was called to haul the Avenger away.

When Kimmes's grandfather arrived to pick him up, officers helped move items from the Avenger into grandfather's car. Because Kimmes did not own the Avenger, one of the officers, following standard procedure, took photographs of the scene and items in the car with his department-issued cell phone. Inside the car were a black backpack, a purse, a number of tools, and a case of water. When the officer asked about the tools—one of which had the initials "R.H." and the name "Huber" on it—Kimmes stated that they were his. Although the officer suspected that the tools were stolen, he had no reason to prevent Kimmes from taking the tools with him. After taking the photographs, the officer placed his phone on the hood of his squad car.

After Kimmes left the scene, the officer noticed that his cell phone was missing. Officers searched for and called the cell phone several times before contacting Kimmes's grandfather, who told officers that the phone was in Kimmes's backpack. When Kimmes returned to the scene, he was placed under arrest for theft of the officer's phone.

As these events were unfolding, another officer was responding to a report of a stolen vehicle—the Silverado—nearby. The officer found the Silverado in a field less than two miles away from where the Avenger had crashed and took DNA samples from the steering wheel. The sample contained a mixture of DNA from three or more individuals, but the major DNA profile matched Kimmes's. Based on the DNA evidence and the officer's belief that Kimmes had stolen the cell phone, the state charged Kimmes with theft

of a motor vehicle and theft of an item worth $500 or less.[3] A third count of tampering with a motor vehicle was added at trial.[4]

Before trial, Kimmes moved the district court to exclude testimony about the first officer's suspicion that the tools were stolen, arguing that it was irrelevant, unnoticed *Spreigl* evidence that was unfairly prejudicial.[5] The state agreed that testimony about the officer's suspicion would be "highly improper," but argued that "the relevance of why [the officer was] taking these pictures is very important to the state's case." The district court denied Kimmes's motion, but still limited the scope of admissible testimony to a "fair inquiry" regarding why the officer took the photographs with his phone. The court explained:

> [The officers] were there, they were investigating, they see different initials on tools and whatever, and you just did an inventory in case you find things out later, you just want to have things—here's the car, here's what's in the car. I wanted to take an inventory and use my phone in that regard.

Evidence of the tools was relevant and could be admitted, the district court determined, because the presence of the tools tended to show that Kimmes knew that the officer took pictures with his phone. But the district court also directed the state to avoid any discussion of whether the tools were stolen. This limited use of the testimony about the tools, the court reasoned, would not be "inflammatory" against Kimmes.

---

[3] Minn. Stat. § 609.52, subd. 2(a)(1), (17).
[4] Minn. Stat. § 609.546(2).
[5] *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

At trial, the state called the officer who took the photographs to testify about them, asking him to "tell the jury what we're looking at in this photograph" and to "describe for the jury the significance of [the] photograph" for each picture. Included in the 20 photographs the officer reviewed were images of the Avenger in the ditch, the car's license plate, damage to the exterior, and all of the items inside the car—both the tools and other objects. While describing the images, the officer also testified that it was typical practice to inventory the items in a car when someone is "going to be taking items with them from the vehicle and it's not their vehicle." Kimmes objected to the questions about the photographs multiple times during trial, most of which the district court overruled. But the officer never mentioned his suspicion that the tools were stolen.

The state then called a second officer to the stand and asked similar questions, including why the first officer took photographs of the items in the car with his cell phone. This led to the following exchange between the prosecutor and the second officer:

> Q: Did [the other officer] speak to you about the purpose of taking any of those photographs?
>
> A: Well, I believe that [the officer] thought that there was some suspicious items in the car, so he wanted to photograph them in case they came back stolen later.

Kimmes did not object and the prosecutor moved on to other questions.

After hearing the parties' arguments, the jury found Kimmes guilty on all three counts. The district court then sentenced Kimmes on the theft-of-a-motor-vehicle conviction to 27 months' imprisonment with credit for 205 days served. The district court

entered a judgment of conviction on the tampering-with-a-motor-vehicle conviction, but did not impose a sentence.

Kimmes appeals.

ISSUES

I. Did the district court abuse its discretion by admitting testimony about the tools?

II. Did the second officer's inadmissible testimony affect Kimmes's substantial rights?

III. Must Kimmes's conviction of tampering with a motor vehicle be vacated as a lesser-included offense of motor-vehicle theft?

ANALYSIS

Kimmes raises three challenges to his conviction. First, he argues that the district court abused its discretion by admitting testimony about the tools at trial because the tools were irrelevant, inadmissible *Spreigl* evidence. Second, Kimmes contends that the prosecutor committed misconduct by questioning the second officer about why pictures of the tools were taken. Finally, Kimmes argues that the district court erred by convicting him of tampering with a motor vehicle because it is a lesser-included offense of theft of a motor vehicle. We address each argument in turn.

I. The district court did not abuse its discretion by admitting testimony about the tools.

Kimmes argues that the district court abused its discretion by admitting testimony about the tools at trial because the tools were irrelevant, unnoticed *Spreigl* evidence. Although the court excluded testimony about the officer's suspicions, Kimmes asserts that the state still elicited testimony implying that he had stolen the tools. We review a district

court's evidentiary rulings for an abuse of discretion. *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). The appellant bears the burden of proving that the evidence was improperly admitted and that it resulted in prejudice. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006).

We begin our review of the district court's evidentiary ruling by identifying the applicable rules of evidence. Generally, all evidence must meet threshold questions of relevance and prejudice to be admitted. Relevant evidence tends to make the existence of any fact of consequence more or less probable and is admissible. Minn. R. Evid. 401, 402. But even relevant evidence may be excluded if the court determines that its potential for unfair prejudice substantially outweighs its probative value. Minn. R. Evid. 403. So-called *Spreigl* evidence—evidence of a criminal defendant's other bad acts—is often excluded for this reason. *Spreigl*, 139 N.W.2d at 172-73; *see also* Minn. R. Evid. 404(b). Therefore, even when probative of a defendant's guilt, *Spreigl* evidence is inadmissible if the danger that the jury may convict the defendant based on those other crimes outweighs the evidence's probative value. *Spreigl*, 139 N.W.2d at 172.

Here, the district court determined that the presence of the tools in the vehicle was relevant and probative of the fact that Kimmes saw the officer use his cell phone to photograph the contents of the vehicle. But the court also recognized the potential for prejudice and instructed the prosecutor to avoid eliciting testimony about whether the tools were stolen. We discern no abuse of discretion in the district court's decision. And the limited testimony about the tools did not rise to the level of *Spreigl* evidence—it was not evidence of a prior bad act. *Ture v. State*, 681 N.W.2d 9, 17 (Minn. 2004) (explaining that

where there is nothing "per se wrong" with the defendant's actions, evidence of those acts is not *Spreigl* evidence).

As the court noted, testimony about the tools explained why the officer used his cell phone. In turn, the fact that the officer used his phone makes a fact of consequence—whether Kimmes saw the officer use the phone—more likely. Minn. R. Evid. 401. Whether Kimmes saw the officer use his cell phone is a fact of consequence because it relates to whether Kimmes stole the cell phone or mistakenly ended up with the phone in his backpack. And although testimony about the officer's suspicion could have been prejudicial, the district court appropriately balanced the potential for unfair prejudice against the probative value of the evidence by limiting the scope of admissible testimony with this in mind. As such, the district court did not abuse its discretion by admitting the officer's testimony about taking pictures of the tools with his cell phone.

Despite this, Kimmes argues that the district court's instructions regarding the scope of testimony still allowed the *implication* that the tools were stolen. We are not persuaded. When asked about his reasons for taking the photos, the officer testified that it was standard procedure to take pictures and inventory the contents of a car when someone other than the registered owner would be taking the items with them. He also testified that there was no reason to stop Kimmes from taking the tools from the car. Even if the testimony did suggest that Kimmes might have stolen the tools, that mere implication does not substantially outweigh the probative value of testimony regarding the tools. Minn. R. Evid. 403; *see also Ture*, 681 N.W.2d at 17 (noting that although the defendant's behavior in a previous

incident could be characterized as stalking, because there was nothing inherently wrong with defendant's conduct, evidence of his actions was not *Spreigl* evidence).

In sum, testimony about the tools was relevant to whether Kimmes had seen the officer use his cell phone and any potential prejudice did not substantially outweigh the probative value of testimony about the tools. As such, the district court did not abuse its discretion by admitting testimony about the tools for the limited purpose of showing that the officer used his cell phone.

II. The second officer's inadmissible testimony did not affect Kimmes's substantial rights.

Kimmes also makes a claim of prosecutorial misconduct, alleging that the prosecutor improperly elicited testimony from the second officer about why pictures of the tools were taken. The state disagrees, arguing that any error was unintentional, and as such, could not be prosecutorial misconduct.

Where, as here, a defendant alleges prosecutorial misconduct but failed to object at trial, we review the claim under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, the defendant must prove that the prosecutor's alleged misconduct constituted plain error—usually by showing that it contradicted caselaw, a standard of conduct, or a rule. *Id.* Once the defendant shows that the prosecutor's misconduct was plain error, the burden shifts to the state to prove that the misconduct did not affect the defendant's substantial rights. *Id.*

Here, Kimmes points to a single exchange between the prosecutor and the second officer as evidence of misconduct:

> Q: Did [the other officer] speak to you about the purpose of taking any of those photographs?
>
> A: Well, I believe that [the officer] thought that there was some suspicious items in the car, so he wanted to photograph them in case they came back stolen later.

The second officer's statement violated the district court's instructions to exclude testimony about whether the tools were stolen. But our review of the record does not suggest that the prosecutor *intentionally* elicited that testimony. *See State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003) ("A reviewing court is much more likely to find prejudicial misconduct when the state intentionally elicits impermissible testimony."). The prosecutor's question was effectively the same as those posed to the first officer—"what is the significance of taking this photograph?" That question, although it elicited inadmissible testimony, was part of the "fair inquiry" allowed by the district court.

But assuming the prosecutor's question was misconduct, we discern no prejudice. Under the modified plain-error standard, the state must prove 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 (quotations omitted). To determine whether there is a reasonable likelihood that the misconduct impacted the jury's verdict, we look to the strength of the evidence against the defendant, the pervasiveness of the alleged misconduct, and the defendant's opportunity or effort to rebut the misconduct. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

Here, the state's evidence against Kimmes was substantial. The DNA evidence collected from the Silverado's steering wheel identified Kimmes as the major DNA profile in that sample. As one of the state's witnesses, a forensic scientist, explained:

> A major profile means that one person is contributing a significant amount more DNA than the other contributors in that profile. So major profiles, we almost treat like it's a single source. So we can say a major profile is almost like a single source profile, meaning it came from one person.

The probability of that DNA profile matching an unrelated individual is one in 980,000. The state also produced strong evidence against Kimmes with regard to the officer's cell phone. The first officer testified that he had not mistakenly placed the phone in Kimmes's backpack, nor had the backpack been placed on the hood of the squad car with the cell phone.

Furthermore, the alleged misconduct was not pervasive. The prosecutor asked one question—which was compliant with the district court's instructions—that elicited one inadmissible statement in the course of a three-day trial. No further reference was made to that statement.[6]

In sum, there is no support in the record for Kimmes's claim that the prosecutor intentionally elicited inadmissible testimony from the second officer. The second officer's

[6] Still, Kimmes cites to *State v. Ray* to argue that the prosecutor committed misconduct. 659 N.W.2d 736 (Minn. 2003). But the facts here are distinct from those in *Ray*. There, the supreme court concluded that the prosecutor committed misconduct by repeatedly attempting to elicit inadmissible testimony and failing to properly instruct the witness to avoid the inadmissible testimony. *Id.* at 744-45. The prosecutor's actions in this case do not rise to the same level of repeated, intentional violation of the district court's instructions.

statement about the first officer's suspicions was the result of questioning consistent with the district court's instructions. Most fundamentally, assuming that the prosecutor did commit misconduct, there is no reasonable likelihood that it affected Kimmes's substantial rights.

III. Kimmes's conviction of tampering with a motor vehicle must be vacated because it is a lesser-included offense of motor-vehicle theft.

Kimmes argues, and the state agrees, that the district court erred by convicting him of tampering with a motor vehicle because it is a lesser-included offense of theft of a motor vehicle. Whether an offense is a lesser-included offense is a question of law which we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

A defendant may only be convicted of either the crime charged or an included offense, but not both. Minn. Stat. § 609.04, subd. 1 (2016). Included offenses encompass both a lesser degree of the same crime and crimes necessarily proved if the crime charged is proved. *Id.*, subd. 1(1), (4). To determine whether tampering with a motor vehicle is a lesser-included offense of theft of a motor vehicle, we look to the elements of each crime. *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006).

Theft of a motor vehicle is defined as the taking or driving of a motor vehicle without the consent of the owner, knowing or having reason to know that the owner did not give consent for the person to use the motor vehicle. Minn. Stat. § 609.52, subd. 2(17). Of particular relevance to this case are the terms "taking" and "driving." But because the statute does not define either term, we look to appropriate dictionary definitions for guidance. *State v. Friese*, ___N.W.2d ___, 2021 WL 1774478, at *3 (Minn. May 5, 2021).

To "take" in the context of motor-vehicle theft means to adversely possess the vehicle. *State v. Thonesavanh*, 904 N.W.2d 432, 436 (Minn. 2017). And to adversely possess a movable object is to exercise control over it to the exclusion of all others. *Black's Law Dictionary* 67, 1408 (11th ed. 2018) (defining "adverse possession" and "possession"). To "drive" a motor vehicle means to "guide, control, or direct" it. *The American Heritage Dictionary of the English Language* 547 (5th ed. 2018).

Tampering with a motor vehicle is defined as tampering with or entering into or on a motor vehicle without the owner's permission. Minn. Stat. § 609.546(2). Again, because the statute does not define the essential terms—tampering and entering—we look to their dictionary definitions. *Friese*, 2021 WL 1774478, at *3. To "tamper" with something is to "interfere improperly" with it. *Black's Law Dictionary*, *supra*, at 1766. To "enter" something is to "come or go into" it. *Id.* at 672.

Having established the definitions of both crimes, we now consider whether tampering with a motor vehicle is a lesser-included offense of motor-vehicle theft. To do so, we ask whether any element of tampering with a motor vehicle—tampering or entering into or on a motor vehicle—is true for each element of theft of a motor vehicle—taking or driving. *Bertsch*, 707 N.W.2d at 664.

We begin by determining whether "driving" a motor vehicle always entails either entering into or on the vehicle or tampering with it. Our review of the plain language of the statute leads us to conclude that it does. To "guide, control, or direct" a motor vehicle requires a person to enter into or onto a car. The most obvious example of this is a person getting into a car and driving away without the owner's consent. Because a person who

drives a car must also have entered into or onto the car to do so, at least one means of tampering with a motor vehicle will always be satisfied if the "driving" element of motor-vehicle theft is proven.

The same is true whenever a person *takes* a motor vehicle, even without entering into or on it. Again, to take a motor vehicle is to adversely possess it. *Thonesavanh*, 904 N.W.2d at 436. But a person who possesses a car to the exclusion of others does not need to enter into or onto the car in order to do so. For example, a person could tow a car away—and then possess it to the exclusion of others—without ever being in or on it.

A person cannot, however, take a motor vehicle without tampering with it. To adversely possess a car necessarily entails interfering improperly with the car and another's ownership of it. Our example of a person who steals a car by towing it away supports this conclusion. By towing a car away and possessing it to the exclusion of others without the owner's permission, the car is also interfered with improperly. Therefore, at least one form of tampering with a motor vehicle is always true for the "take" element of motor-vehicle theft. And because a form of tampering with a motor vehicle is true for both elements of theft of a motor vehicle, tampering with a motor vehicle is a lesser-included offense of theft of a motor vehicle.

Because the elements of tampering with a motor vehicle are necessarily proven when the elements of theft of a motor vehicle are proven, the former is a lesser-included offense of the latter. We conclude that the district court erred in convicting Kimmes of tampering with a motor vehicle.

DECISION

The district court did not abuse its discretion by admitting testimony about the tools for the narrow purpose of showing that the officer used his cell phone. Nor did the second officer's inadmissible testimony about the tools affect Kimmes's substantial rights. Therefore, we affirm in part. But because tampering with a motor vehicle is a lesser-included offense of motor-vehicle theft, we reverse and remand to the district court to vacate Kimmes's conviction of tampering with a motor vehicle.

Affirmed in part, reversed in part, and remanded.