STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1317

State of Minnesota,
Respondent,

vs.

Kristina Rae Beare,
Appellant.

Filed July 5, 2022
Affirmed in part, reversed in part and remanded
Connolly, Judge

Carlton County District Court
File No. 09-CR-19-2505

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

Lauri A. Ketola, Carlton County Attorney, Nicole L. Ketola, Assistant County Attorney, Carlton, Minnesota (for respondent)

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

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

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant contends that unobjected-to prosecutorial misconduct during the opening and closing statements requires that she be granted a new trial. We conclude that the prosecutor's references to a "magic tab fairy" were plain error. However, we also conclude

that the references did not affect appellant's substantial rights. We further conclude that the district court erroneously entered convictions and sentences on multiple counts. Therefore, we affirm in part, reverse in part, and remand.

FACTS

Respondent State of Minnesota charged appellant Kristina Beare with gross misdemeanor motor vehicle registration with intent to escape tax, misdemeanor theft, and misdemeanor receiving stolen property in December 2019. The charges stemmed from a series of events in September that led law enforcement to suspect Beare had stolen vehicle registration tabs from A.F. A.F. noticed that the tabs on his personal vehicle parked in his driveway had gone missing. Beare often parked her own vehicle just a few feet away on a narrow grass strip between the driveways. A.F. reported the missing tabs to law enforcement. A few days later, while walking home, A.F. noticed that the tabs on Beare's vehicle—now parked in the street—looked as if they had recently been moved. Upon inspection, the serial number for the tabs on Beare's vehicle matched the tabs that had been stolen from his own vehicle. A.F. again reported his findings to law enforcement.

The morning after, a Carlton County sheriff's deputy took pictures of the tabs on Beare's vehicle, confirmed that the tabs were registered to A.F., and returned the tabs to him. In doing so, the deputy discovered that the registration for Beare's vehicle was not current. When the deputy spoke to Beare that day, Beare produced a written warning issued in August 2019, for expired registration and explained that she had not driven her vehicle since receiving the warning. Beare also did not appear aware that A.F.'s tabs were found on her vehicle and denied knowledge as to why the tabs were on her license plates.

A jury trial was held on the charges on June 15, 2021. During its opening statement, the prosecution introduced the theme of "the magic tab fairy," remarking that "the facts will show you that the magic tab fairy did not steal [the] tabs." Beare's counsel responded to this theme in Beare's opening statement, commenting that Beare "is not contending that it was, in fact, the magic tab fairy that placed these tabs on her vehicle, but the best she could tell you is that it wasn't her." Beare testified to this effect at trial, alleging that she was out of town during the days A.F. discovered the tabs were missing and found them on her vehicle, and that she had been the victim of troublemaking in the neighborhood around that time.[1]

Nonetheless, the prosecution returned to the theme of the "magic tab fairy" in its closing statement, arguing that "[t]he magic tab fairy did not steal [the] tabs and place them on the defendant's vehicle. [Beare] did." Beare's counsel did not object to the prosecution's use of the notion of the "magic tab fairy" at any time. At the conclusion of the trial, the jury returned guilty verdicts on all three counts.

At sentencing, the district court entered convictions on all three counts. It imposed concurrent sentences of 180 days for the intent-to-escape-tax conviction, and 90 days for the theft conviction. But the district court stayed all but one day of both sentences, gave Beare credit for one day for time served, and placed her on probation. No sentence was imposed for the receiving-stolen-property conviction. Beare appeals.

[1] Beare described three events that took place leading up to September 2019, including her cat being shot at with a BB gun, her garbage bins being stolen, and her vehicle being scratched down the side. She did not report these incidents to law enforcement.

DECISION

I. The prosecutor's unobjected-to statements did not affect Beare's substantial rights.

We may grant relief on the basis of unobjected-to conduct at trial if the conduct was plain error that affected the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The burden is on "the nonobjecting defendant to demonstrate both that error occurred and that the error was plain." *Id.* "An error is plain if it was clear or obvious." *Id.* (quotation omitted). Generally, plain error is shown if the prosecutor's conduct "contravenes case law, a rule, or a standard of conduct." *Id.*

Beare argues that the prosecutor's theme of the "magic tab fairy" was plain error for disparaging the defense in the abstract. We agree. A prosecutor "may not seek a conviction at any price" and may not "disparag[e] the defendant's defense to the charges." *Id.* at 300. Prosecutors disparage the defense if they make arguments "belittling a particular defense in the abstract." *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). Prosecutors also commit misconduct for disparaging the defense if they "attempt to impinge on juror independence" by implying a defense raised at trial simply cannot be believed. *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995).

The prosecution's use of the "magic tab fairy" theme belittled Beare's defense in the abstract. Beare's defense at trial was that, because she did not put the tabs on her vehicle, the perpetrator had to have been someone else. Equating this alternative-perpetrator defense to the "magic tab fairy" implied the defense was a mere fairytale that could not rationally be believed. It is akin to equating believing a defense to

believing in Santa Claus, which is undoubtedly prosecutorial misconduct. *See id.* (finding misconduct where the prosecutor suggested believing the defense's argument is the equivalent of buying a "time share in Santa's condo"). The prosecutor's unobjected-to references to the "magic tab fairy" thus constitute plain error.

Once the defendant demonstrates plain error, the burden is upon the prosecution "to show lack of prejudice" to the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302. To demonstrate lack of prejudice, the state must "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." *Id.* (quotations omitted). In other words, the plain error must have "affected the outcome of the case" to have affected Beare's substantial rights. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). We conclude that the state has met its burden here.

The evidence tending to connect Beare with A.F.'s stolen tabs leads to no other rational conclusion that Beare is guilty. Beare's vehicle was often parked a few feet away from A.F.'s. Beare knew her own tabs were expired. When A.F. first spotted the tabs on Beare's vehicle, it had recently been moved to the street. And nothing else from A.F.'s personal vehicle or his other vehicles had been stolen in the interim, suggesting that the tabs were the perpetrator's sole aim. The jury did not need to consider the prosecutor's misconduct to follow these connections in the testimony presented at trial.

In addition, the jury need not have believed in the "magic tab fairy" to have found Beare's defense not to be credible. Beare testified that she had been the victim of three instances of anonymous troublemaking, and suggested the perpetrator of these incidents

may have also been responsible for stealing A.F.'s tabs. But the law enforcement officers who testified at trial were unaware of any troublesome incidents in the neighborhood. Beare and her mother testified that they did not report any of the incidents to law enforcement because they did not know who may have been responsible. But Beare's mother testified that she suspected a different neighbor of shooting at their cat. The jury could thus have determined Beare's defense was not credible without relying on the prosecutor's statements.

Moreover, the "magic tab fairy" was not the sole theme of the prosecution's opening and closing statements. The theme of the "magic tab fairy" was ancillary to the prosecution's main theme of "facts and common sense." The prosecution forecasted the defense arguments and outlined the anticipated evidence during the opening statement. In the closing statement, the prosecution recounted the evidence that would lead the jury to "determine beyond a reasonable doubt the defendant was intending to escape tax by not renewing her tabs" through the exercise of its "common sense." And during the rebuttal, the prosecution addressed evidence directly relating to Beare's defense by noting her mother's testimony and stating "[i]t doesn't add up on what they're testifying" as to the potential troublemakers being responsible.

In short, the prosecution focused on the evidence supporting Beare's guilt and the lack of evidence supporting her defense. These arguments were supported by the evidence presented at trial. We are thus satisfied that the absence of the prosecutor's misconduct would not reasonably have affected the outcome of the jury's verdicts. We therefore affirm the jury's guilty verdicts.

II. The district court erred by imposing convictions and sentences on multiple charges.

Beare argues that the district court erred by entering convictions on both the misdemeanor theft and receiving-stolen-property charges, and by imposing separate sentences on the intent-to-escape-tax conviction and the theft conviction. The state agrees. Because receiving stolen property is an included offense of theft, the district court erred by entering a conviction on both charges. *See* Minn. Stat. § 609.04, subd. 1 (2018) (stating a defendant "may be convicted of either the crime charged or an included offense, but not both"); *State v. Lee*, 683 N.W.2d 309, 315 (Minn. 2004) ("[A] person may not be convicted of both theft and receiving stolen property with respect to property involved in the same transaction."). And because the intent-to-escape-tax conviction and the theft conviction arose from the same behavioral incident, the district court erred by imposing concurrent sentences on both convictions. *See* Minn. Stat. § 609.035, subd. 1 (2018) (stating "if a person's conduct constitutes more than one offense . . . the person may be punished for only one of the offenses"); *State v. Branch*, 942 N.W.2d 711, 713 (Minn. 2020) ("[A] person may be punished for only one of the offenses that results from acts committed during a single behavioral incident and that did not involve multiple victims."). We therefore reverse the entry of Beare's conviction of receiving stolen property, and sentence for theft, and remand for resentencing.

Affirmed in part, reversed in part, and remanded.