STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1163

State of Minnesota,
Respondent,

vs.

Terrance Maurice Melton,
Appellant.

Filed August 8, 2011
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-09-5321

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Schellhas, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

SCHELLHAS, Judge

Appellant challenges his conviction of possession of a firearm by an ineligible person, arguing that (1) the prosecutor committed prejudicial error, (2) the district court erred by allowing inadmissible testimony, (3) the district court erred by accepting his stipulation to the existence of a prior conviction without first informing him of his jury-trial right and obtaining an express waiver of that right, and (4) cumulative errors deprived him of a fair trial. We affirm.

FACTS

In January 2008, police officers executed a search warrant in Long Lake, Minnesota, looking for evidence related to items purchased online with a stolen gift card and shipped to appellant Terrance Melton at the address searched. Melton directed the officers to the items in his bedroom. The officers escorted Melton to another room and searched the bedroom for additional evidence. The officers returned Melton to the bedroom for further questioning. The officers testified that, after returning Melton to the bedroom, he positioned himself between the officers and a bedroom closet, "kind of walking back towards the corner of the closet." The officers then stopped Melton and removed him from the room.

In the corner of the bedroom closet, the officers found an unzipped red duffle bag that contained a .357 Taurus revolver wrapped in a t-shirt, Melton's Illinois driver's license, Melton's son's social security card, Melton's employee name tag, and a

prescription bottle with Melton's name on it. Subsequent tests revealed that the gun contained a single-source DNA profile that matched Melton's DNA profile.

On January 28, 2009, respondent State of Minnesota charged Melton with one count of possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subds. 1(b), 2(b) (2006). The jury found Melton guilty and the district court sentenced him. This appeal follows.

D E C I S I O N

Prosecutorial Error

Melton argues that he is entitled to a new trial due to prosecutorial error committed during the trial.[1] "The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Generally, a prosecutor's acts may constitute error "if they have the effect of materially undermining the fairness of a trial." *Id.* Error may result from violations of "rules, laws, orders by a district court, or clear commands in this state's case law." *Id.*

[1] Melton characterizes his complaints as being about prosecutorial "misconduct." "[T]here is an important distinction . . . between prosecutorial misconduct and prosecutorial error." *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). The term prosecutorial misconduct "implies a deliberate violation of a rule or practice, or perhaps a grossly negligent transgression," while the term prosecutorial error "suggests merely a mistake of some sort, a misstep of a type all trial lawyers make from time to time." *Id.* This court applies the same standard to allegations of both prosecutorial misconduct and prosecutorial error. *Id.* Here, because none of the instances of which Melton complains rises to the level of deliberate rule violations or gross negligence, we use the term "prosecutorial error."

Melton did not object to any of the alleged prosecutorial errors at trial. Unobjected-to prosecutorial error is reviewed under a modified plain-error test in which the defendant has the burden to show plain error, and the burden then shifts to the state to show that the error did not affect the defendant's substantial rights, i.e., "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). "An error is plain if it was clear or obvious." *Id.* (quotation omitted). "Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *Id.*

Prosecutor's Opening Statement

The prosecutor gave her opening statement before the parties argued about and the district court ruled on the admissibility of evidence that the gun was loaded. The prosecutor told the jury that the case was about "[a] loaded gun, a Taurus .357 revolver with this defendant's DNA found in this defendant's duffle bag." The prosecutor also told the jury that the gun had "three bullets in the chambers." Melton did not object to the statements.

"The prosecution may outline the facts in the opening statement which he [or she] expects to prove to aid the jury in following the testimony." *State v. Kline*, 266 Minn. 372, 382, 124 N.W.2d 416, 423 (1963). "[An opening] statement is not evidence but a recital of factual claims expressed with an intention and expectation that testimony will be offered and received to support them." *Id.* Referring to evidence in an opening statement without a good-faith basis for believing the evidence is admissible is improper.

State v. Smallwood, 594 N.W.2d 144, 150 (Minn. 1999). "If the evidence sought to be admitted is questionable, a prosecutor should obtain a ruling from the trial court before commenting on the evidence." *Id.*

Melton argues that the prosecutor's statements constitute error because whether the gun was loaded is irrelevant. The state argues that it had a good-faith basis for believing the evidence was admissible because the fact that the gun was loaded "made it more likely that the gun had not been abandoned, and that, therefore, [Melton] had knowledge of the gun, i.e., that [Melton] knowingly possessed the gun." *See* Minn. R. Evid. 401 (stating that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). We conclude that the prosecutor's statements did not constitute plain error because evidence that the gun was loaded was not clearly and obviously inadmissible and the prosecutor made the statements with a good-faith belief that the evidence was admissible before the district court ruled that the evidence was inadmissible.

And even if the prosecutor's statements constitute prosecutorial error, "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *Ramey*, 721 N.W.2d at 302. First, the district court instructed the jury multiple times that the lawyers' opening statements are not evidence, and, second, the record contains overwhelming evidence of Melton's guilt. The officers found the gun in Melton's room in an unzipped duffle bag, which also contained Melton's Illinois driver's license, his son's social security card, Melton's employee name

tag, and a prescription bottle with Melton's name on it. The gun contained a single-source DNA profile that matched Melton's DNA profile. No reasonable likelihood exists that absence of the error in stating that the gun was loaded would have had a significant effect on the verdict. Any error is therefore not reversible.

Evidence that Firearm was Loaded

Melton argues that the prosecutor erred by introducing "an exhibit and testimony referencing the three cartridges recovered from the firearm" in violation of the court's ruling that evidence that the gun was loaded was inadmissible. After the first witness testified and before the gun was introduced into evidence, the state moved the district court in limine to exclude evidence that the gun was inoperable. Melton opposed the motion, arguing that he should be allowed to present evidence that the gun was inoperable because the prosecutor's opening-statement reference to the gun being loaded was "an attempt . . . to invoke fear in the jury that the gun could and would have been used to hurt someone if the government's agents hadn't recovered the weapon." The district court ruled as follows:

> The issue of operability . . . is not an element that the state has to prove, and so I don't think it is appropriate for the jury to be told that the gun is inoperable since that is not relevant to the case, and I think that given the issues or concerns that [defense counsel] is raising, the state will instruct its witnesses not to make reference to any bullets that may have been recovered from the gun, and there would be no testimony about that. The jury is told that the evidence is what witnesses say, and so there would be no reference to it in closing statements. And if there is no evidence on it, it's my belief the jury won't be considering that issue.
>
> But I don't see whether the gun is loaded or not has any relevance in the case either, so the state is precluded from

> offering testimony on whether the gun is loaded or not since that's not relevant.

The district court admitted the gun without objection by Melton. A crime-laboratory evidence specialist then testified, without objection, that she "received a Taurus revolver, which also contained cartridges." Later, the prosecutor notified the court that the box containing the gun had "Taurus revolver, three cartridges" written in magic marker on the cover and the description stated, "Taurus revolver .357 cleared, three cartridges separated." With respect to the box, the court stated that the writings did not "indicate whether the gun was loaded at the time or not" and "[t]he bullets are not coming into evidence." With respect to the evidence specialist's testimony, the district court noted that although she testified that cartridges were delivered to her, she did not testify that the cartridges were loaded into the gun. The parties agreed to the district court's proposal to leave the box unaltered to avoid drawing attention to it.

Before closing arguments, Melton again requested that he be permitted to inform the jury that the gun was inoperable. The district court denied the request, stating that "[t]he jury is told the statements of attorneys are not evidence, and there was no testimony permitted . . . about whether the gun was loaded . . . and . . . there has been no evidence that the gun was loaded . . . and so . . . I don't believe that . . . there is unfair prejudice."

Prosecutorial error results from violations of established standards of conduct, including "orders by a district court," and "attempting to elicit or actually eliciting clearly inadmissible evidence may constitute misconduct." *Fields*, 730 N.W.2d at 782.

"Minnesota law is crystal clear [that] the state has an absolute duty to prepare its witnesses to ensure that they are aware of the limits of permissible testimony." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). A prosecutor must prepare witnesses so that they "will not blurt out anything that might be inadmissible and prejudicial." *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978).

We conclude that the writing on the exhibit box does not constitute plain error. About mid-trial, during the state's case-in-chief, the prosecutor notified the district court of the writing on the box. The court proposed to either redact the writing or leave the box unaltered to avoid drawing attention to it, and the parties agreed to leave the box unaltered.

But the transcript reveals that the evidence specialist testified that she "received a Taurus revolver, which also contained cartridges." Melton argues that this testimony violated the district court's prior ruling that excluded testimony that the gun was loaded. The court ruled that the evidence specialist's testimony did not violate its prior ruling because the witness "didn't say it was a loaded gun. . . . And even though cartridges were there, the cartridges quite conceivably could have been near the gun or found somewhere else." We cannot conclude that the testimony constitutes plain error because it is not clearly and obviously a violation of the court's ruling. *See Ramey*, 721 N.W.2d at 302.

And even if the testimony was plain error, it did not affect Melton's substantial rights. The testimony was a minor part of the trial and the prosecutor did not reference it in her closing arguments. Additionally, the evidence of Melton's guilt is overwhelming. No reasonable likelihood exists that absence of the error in eliciting inadmissible

testimony by the evidence specialist that she received the gun and cartridges would have had a significant effect on the verdict. The error is therefore not reversible.

Inoperability of Firearm—Theory of Curative Admissibility

Melton argues that the district court erred by refusing to allow him to present evidence that the gun was inoperable to counter the state's evidence that cartridges were with the gun. "Where one party introduces inadmissible evidence, he cannot complain if the court permits his opponent in rebuttal to introduce similar inadmissible evidence." *State v. DeZeler*, 230 Minn. 39, 45, 41 N.W.2d 313, 318 (1950). In *Carlson*, the supreme court discussed the theory of curative admissibility, explaining that one party may have the right to introduce evidence that refutes the impression created by the other party's evidence. 264 N.W.2d at 642; *see also State v. Hull*, 788 N.W.2d 91, 101 (Minn. 2010) (citing *Carlson*).

Assuming the evidence specialist's testimony that she received the gun and cartridges was inadmissible pursuant to the district court's ruling, Melton should have been allowed to rebut the state's evidence with evidence that the gun was unloaded. But Melton did not offer evidence that the gun was unloaded and the record contains no evidence that the gun was unloaded. Instead, Melton offered evidence that the gun was inoperable. This evidence does not rebut the state's evidence that the gun was loaded. The district court did not err by excluding evidence that the gun was inoperable under the theory of curative admissibility.

But if the district court did err, the error is constitutional because exclusion of the evidence implicates Melton's constitutional right to present a complete defense. *See*

State v. Anderson, 789 N.W.2d 227, 235 (Minn. 2010) (stating that a defendant "has a constitutional due process right to present a meaningful defense"). If the court erred, Melton's conviction will stand only if the error is harmless beyond a reasonable doubt. *See State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009) ("A conviction will stand if the constitutional error committed was harmless beyond a reasonable doubt."). "For constitutional error, . . . the inquiry is whether the guilty verdict actually rendered was surely unattributable to the error." *State v. Chomnarith*, 654 N.W.2d 660, 665 (Minn. 2003).

> To determine whether a constitutional evidentiary error is harmless beyond a reasonable doubt, we look to the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, . . . whether it was effectively countered by the defendant, and the strength of the evidence of guilt.

State v. Larson, 788 N.W.2d 25, 32 (Minn. 2010) (quotation omitted).

The evidence specialist's testimony that she received the gun and cartridges was not highly persuasive of the state's claim that Melton illegally possessed the gun nor was it highly prejudicial. The testimony was a minor part of the trial and was not referenced in the prosecutor's closing argument. And the strength of guilt is overwhelming. Based on the record, the error is harmless beyond a reasonable doubt because the jury's verdict is surely unattributable to the error.

Allowance of Inadmissible Testimony

On direct examination, one of the officers testified that he tried to speak to Melton about the items purchased with the stolen gift card, but "Melton felt that he wanted an

attorney present, so therefore I didn't ask him any other questions." Melton did not object or request a curative instruction. Melton now argues that the officer's testimony constituted plain error entitling him to relief.

"A defendant's choice to exercise his constitutional right to counsel may not be used against him at trial." *State v. Hall*, 764 N.W.2d 837, 841 (Minn. 2009) (quoting *State v. Juarez*, 572 N.W.2d 286, 290 (Minn. 1997)). "[T]he state generally may not refer to or elicit testimony about a defendant's . . . request for counsel." *State v. Dobbins*, 725 N.W.2d 492, 509 (Minn. 2006). "This is so because a jury would be likely to infer from the testimony that the defendant was concealing his guilt." *State v. Litzau*, 650 N.W.2d 177, 185 (Minn. 2002) (quotation omitted). We conclude that the testimony that Melton requested an attorney constituted plain error.

But the error did not affect Melton's substantial rights. The statement was brief. And, as noted above, the evidence of guilt is overwhelming. Absence of the error in eliciting inadmissible testimony that Melton requested an attorney would not be reasonably likely to have a significant effect on the verdict. The error is therefore not reversible.

Jury-Trial Waiver

To establish a defendant's guilt of possession of a firearm by an ineligible person, the state must prove that the defendant is ineligible to possess a firearm. Minn. Stat. § 624.713, subds. 1(b), 2(b). Before commencement of trial, the following colloquy occurred:

THE COURT: . . . [Defense counsel], . . . do you want to cover whether there would be any stipulation on one of the elements of the offense so that the prior felony conviction is not known to the jury?
DEFENSE COUNSEL: Mr. Melton, you understand that you have a prior . . . motor vehicle theft that makes you ineligible or prohibited from possessing a firearm, correct?
THE DEFENDANT: Yes, sir.
DEFENSE COUNSEL: And what the Court is referring to now is what's called a stipulation, which means that we are not going to require the government to bring in your plea agreement or certificate of guilt in terms of your motor vehicle theft. That way the jury won't be informed of your felony motor vehicle theft conviction; they would just be told that you are a person that is prohibited from possessing a firearm. Do you understand what I'm saying?
THE DEFENDANT: Yes.
DEFENSE COUNSEL: Okay. Are you in agreement with that stipulation?
THE DEFENDANT: Yes.
DEFENSE COUNSEL: I would offer that.
THE COURT: And what that means, Mr. Melton, just to say it in a little different terms—I know you have gone over it with your lawyer, but to say it in a little bit different terms, what that means is that you are agreeing that there is proof beyond a reasonable doubt that . . . one of the elements of the offense, that you are prohibited by law from possessing a firearm, you are agreeing there is proof beyond a reasonable doubt for that because of your prior conviction, and therefore, the jury does not need to consider that conviction for the crime of violence, which . . . by statutory definition includes the theft of a motor vehicle. You understand that?

What you're saying is that you are agreeing that there is proof beyond a reasonable doubt that you're prohibited from possessing a firearm because of the motor vehicle theft felony conviction, and therefore, the jury is not going to consider that. Does that make sense?
THE DEFENDANT: Yes.
THE COURT: Do you agree with that?
THE DEFENDANT: I don't know, sir.
THE COURT: Do you want to talk to your attorney further?
THE DEFENDANT: Yes, please.
THE COURT: Okay. That's fine.

> . . . .
> THE COURT: Sir, have you had enough time to talk with your attorney about your questions?
> THE DEFENDANT: Yes, sir.
> THE COURT: Do you agree that there is proof beyond a reasonable doubt . . . that on January 15th of 2008 that you were prohibited by law from possessing a firearm?
> THE DEFENDANT: Yes.
> THE COURT: And do you agree that the jury does not need to decide that question because of your stipulation or agreement here today on that question?
> THE DEFENDANT: Yes, sir.
> THE COURT: So . . . as part of the state's case in chief, the jury . . . would not be informed of your prior felony conviction.
> THE DEFENDANT: Yes, sir.

Melton now argues that the district court "erred by accepting [his] stipulation without first informing him of his jury trial right and obtaining an express waiver of that right."

A criminal defendant has the right to a jury trial for any offense punishable by incarceration. *State v. Fluker*, 781 N.W.2d 397, 400 (Minn. App. 2010); *see also* U.S. Const. amend. VI; Minn. Const. art. I, § 6; Minn. R. Crim. P. 26.01, subd. 1(1)(a). "A defendant's right to a jury trial includes the right to be tried on each and every element of the charged offense." *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). The right to a jury trial cannot be waived by silence. *State v. Osborne*, 715 N.W.2d 436, 442 (Minn. 2006). A defendant may waive his right to a jury trial with respect to an element of a charged offense and stipulate that the element has been proved. *Wright*, 679 N.W.2d at 191; *see also Old Chief v. United States*, 519 U.S. 172, 191–92, 117 S. Ct. 644, 655–56 (1997) (holding that a district court abuses its discretion when it spurns defendant's offer to admit to evidence of previous-conviction

element of offense and instead admits full record of previous judgment of conviction when name or nature of previous offense raises risk of unfair prejudice); *State v. Hinton*, 702 N.W.2d 278, 282 n.1 (Minn. App. 2005) (noting that because of the prejudicial nature of previous convictions, district courts should accept a defendant's stipulation to previous convictions unless they are relevant to a disputed issue), *review denied* (Minn. Oct. 26, 2005).

The Minnesota Rules of Criminal Procedure provide that:

> The defendant, with the approval of the court may waive a jury trial on the issue of guilt provided the defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel.

Minn. R. Crim. P. 26.01, subd. 1(2)(a).

Because the district court did not explicitly advise Melton of his right to a jury trial on the ineligible-person element, Melton's jury-trial waiver did not meet the requirements of Minn. R. Crim. P. 26.01, subd. 1(2)(a). By failing to obtain a complete waiver from Melton in compliance with the requirements of Minn. R. Crim. P. 26.01, subd. 1(2)(a), the district court erred.

Under similar circumstances, this court has analyzed waiver errors by applying either a plain-error test or a harmless-error test. *See, e.g.*, *Fluker*, 781 N.W.2d at 400–03 (applying harmless-error test to district court's failure to obtain defendant's waiver of right to jury trial on previous-convictions element when defendant stipulated to having previous qualifying convictions for enhancement); *State v. Kuhlmann*, 780 N.W.2d 401, 404–05 (2010) (applying plain-error test), *review granted* (Minn. June 15, 2010); *Hinton*,

702 N.W.2d at 281–82 (applying harmless-error test); *Wright*, 679 N.W.2d at 190–91 (applying harmless-error test to district court's erroneous acceptance of a stipulation to one element of the charged offense without obtaining the defendant's personal waiver of the right to a jury trial). We conclude that Melton cannot meet the requirements for reversal under either the plain-error test or the harmless-error test.

Plain Error

The plain-error analysis "involves four steps." *State v. Jenkins*, 782 N.W.2d 211, 229 (Minn. 2010). "First, we ask (1) whether there was error, (2) whether the error was plain, and (3) whether the error affected the defendant's substantial rights . . . ." *Id.* at 230. Only if the first three steps are met do we assess whether we "should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted). An error is plain if it is "clear" or "obvious," which is shown "if the error contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302 (quotation omitted). When assessing whether substantial rights are affected, we look to "whether the error was prejudicial and affected the outcome of the case." *State v. Vance*, 734 N.W.2d 650, 659 (Minn. 2007).

Here, the district court plainly erred under Minn. R. Crim. P. 26.01, subd. 1(2)(a) by not explicitly advising Melton of his right to a jury trial on the ineligible-person element. But even if Melton could demonstrate that the error affected his substantial rights, he could not establish that the district court's error impaired the fairness or integrity of his trial. Melton benefited from the stipulation because the jury did not hear about his prior conviction, which made him ineligible to possess a firearm. As in

Kuhlmann, a new trial would likely result in either an identical trial after a complete jury-trial waiver or a potentially more prejudicial trial in which the jury is presented with evidence of the previous conviction. *See* 780 N.W.2d at 406. Under a plain-error analysis, Melton's conviction should be affirmed.

Harmless Error

"When the error implicates a constitutional right, a new trial is required unless the State can show beyond a reasonable doubt that the error was harmless." *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). "An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error." *Id.* The state bears the burden of establishing beyond a reasonable doubt that the error was harmless. *Wright*, 679 N.W.2d at 191.

The state has met its burden. Melton does not challenge the existence of the prior conviction and he benefitted from the stipulation because it kept potentially prejudicial evidence from the jury regarding his prior conviction. The district court's erroneous acceptance of the stipulation is therefore harmless beyond a reasonable doubt.

Cumulative Effect of the Errors

"An appellant is entitled to a new trial if the errors, when taken cumulatively, had the effect of denying appellant a fair trial." *State v. Jackson*, 714 N.W.2d 681, 698 (Minn. 2006) (quotation omitted). Even taken cumulatively, the errors in this case did not deny Melton a fair trial. The errors were minor, did not affect Melton's substantial rights, and the evidence of his guilt is overwhelming. Even if the prosecutor had not stated that the gun was loaded, elicited testimony that cartridges were with the gun, or

elicited testimony that Melton requested an attorney, there would be no reasonable doubt about Melton's guilt. And the stipulation benefited Melton despite the invalid jury-trial waiver.

Affirmed.