STATE OF MINNESOTA
IN COURT OF APPEALS
A10-942

State of Minnesota,
Respondent,

vs.

Quantelize Jerell Welch,
Appellant.

Filed May 3, 2011
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-09-15093

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

Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, 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

WORKE, Judge

Appellant challenges his first-degree-aggravated-robbery conviction, arguing that (1) the district court should have suppressed the show-up evidence; (2) the district court abused its discretion by admitting *Spreigl* evidence; and (3) the prosecutor committed misconduct by shifting the burden of proof in rebuttal argument. We affirm.

D E C I S I O N

Show-up Evidence

A jury found appellant Quantelize Jerell Welch guilty of first-degree aggravated robbery. He first argues that the district court violated his due-process rights by admitting show-up identification evidence. This court reviews de novo whether a defendant has been denied due process. *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008). The admission of pretrial identification evidence violates due process if the procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 83-84. In determining whether a pretrial identification must be suppressed, this court applies a two-part test. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). We determine whether the identification procedure was unnecessarily suggestive, and if so, whether the identification created "a very substantial likelihood of irreparable misidentification" under the "totality of the circumstances." *Id.*

Appellant claims that the show-up was improperly suggestive because the police told the victim and the witness that they were being transported to identify a suspect. The

district court found that the show-up was not unnecessarily suggestive. Whether the show-up procedure was unnecessarily suggestive "turns on whether the defendant was unfairly singled out for identification," *id.*, and "whether the procedure used by the police influenced the witness identification of the defendant." *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999).

The victim, P.Y.L., was sitting in the passenger side of her vehicle outside of a market when appellant and another man approached. Appellant opened the door, pointed a gun at P.Y.L., took her purse, and fled. As he fled, appellant turned around and P.Y.L.'s husband, V.F.L., saw his face. Officers tracked a shoe print left in the snow to a nearby home where they found six men. An officer drove P.Y.L. and V.F.L. to the home for a show-up, telling them that the people they would see were not necessarily at fault. When he approached the address, the officer noticed one male sitting on the front steps of the house. This individual was appellant. P.Y.L. and V.F.L. saw appellant and "began pointing to [him] and . . . stating he was one involved." A show-up was then conducted, approximately 15-20 minutes after the robbery, and six males were presented one at a time; they were not handcuffed, but were escorted by an officer. Appellant was the third male presented to the couple, and they positively identified him and rejected the others.

The district court correctly concluded that this show-up was not unnecessarily suggestive. Officers did not tell P.Y.L. and V.F.L. that they had the suspects for identification, only that they were to look at individuals and tell the officers if any were involved in the robbery. An officer testified that he told the couple that they should not assume that any individual presented was at fault. Additionally, P.Y.L. and V.F.L.

spontaneously reacted upon seeing appellant sitting on the steps, which occurred prior to the show-up and was not elicited by officers. Further, the males were presented one at a time but were not handcuffed, and appellant was the third male presented and the couple rejected everyone but appellant. Thus, the district court did not violate appellant's due-process rights by admitting the show-up evidence. *Compare In re Welfare of M.E.M.*, 674 N.W.2d 208, 215 (Minn. App. 2004) (stating that the show-up was unnecessarily suggestive when police presented a singled-out, handcuffed suspect); *State v. Anderson*, 657 N.W.2d 846, 851 (Minn. App. 2002) (stating that the show-up was unnecessarily suggestive when police brought the defendant to the crime scene in a squad car, presented him while handcuffed and flanked by police, and told the victim that the defendant matched the description).

Spreigl Evidence

Appellant argues that the district court abused its discretion when it admitted *Spreigl* evidence. Evidence of other crimes is not admissible to prove that a person acted in conformity with that act on the particular occasion at issue. Minn. R. Evid. 404(b). But evidence of other crimes or bad acts may be admissible when offered for other purposes, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Evidence of other crimes, known as *Spreigl* evidence, *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965), is admissible only if five conditions are met:

> 1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; 2) the prosecutor clearly indicates what the evidence will be

> offered to prove; 3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; 4) the evidence is relevant to the prosecutor's case; and 5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Id.; *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). The principal consideration is whether the evidence is material and relevant and whether the probative value of the evidence outweighs the potential for unfair prejudice. *State v. Burrell*, 772 N.W.2d 459, 466 (Minn. 2009); *see also State v. Clark*, 738 N.W.2d 316, 347 (Minn. 2007) (weighing probative value against potential for unfair prejudice despite determination that *Spreigl* evidence had only modest probative value). When the probative value of the evidence exceeds its potential for unfair prejudice the *Spreigl* evidence is admissible. *See Clark*, 738 N.W.2d at 347.

We review the admission of *Spreigl* evidence for an abuse of discretion. *State v. Rucker*, 752 N.W.2d 538, 549 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). "Appellant bears the burden of showing the error and any prejudice resulting from it." *Id.* (citing *Kennedy*, 585 N.W.2d at 389). Reversal is warranted only if there is a reasonable possibility that the evidence significantly affected the jury's verdict. *Clark*, 738 N.W.2d at 347.

In front of the home where officers tracked the footprints they found a bank card belonging to M.X. who had been robbed two days prior at the same market by two males. The district court admitted the evidence after finding that appellant's involvement was established by clear-and-convincing evidence, including: (1) the robberies occurred two

days apart, (2) the victims were similar, (3) the locations were identical, (4) the robberies involved a gun and purse snatching, and (5) the bank card was found at the house where appellant was staying and his fingerprint was recovered off the bank card. The district court did not abuse its discretion in admitting this evidence because these facts show that this prior act is admissible to show motive, opportunity, intent, preparation, plan, knowledge, and identity. *See* Minn. R. Evid. 404(b). And the probative value of the evidence outweighed its potential for unfair prejudice. The evidence was presented for a very limited purpose, and not to support the unfair and general inference that appellant was a bad person.

Prosecutorial Misconduct

Finally, appellant argues that the prosecutor committed misconduct in his rebuttal argument. Appellant failed to object. Although a defendant who fails to object ordinarily forfeits the right to appellate review, *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984), this court has the discretion to review unobjected-to prosecutorial misconduct if plain error is established. Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). To establish plain error based on a claim of prosecutorial misconduct, (1) the prosecutor's unobjected-to argument must be erroneous, (2) the error must be plain, and (3) the error must affect the appellant's substantial rights. *Ramey*, 721 N.W.2d at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). An error is plain if it is "clear" or "obvious," *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), or if it "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. The burden rests with the appellant to demonstrate that plain error has occurred. *Id.* If

plain error is established, the burden shifts to the state to demonstrate that the plain error did not affect the defendant's substantial rights. *Id.* An error affects substantial rights when it was "prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. If plain error affecting substantial rights is established, we will assess whether to address the error to ensure the fairness and integrity of the judicial proceedings. *Id.* at 740, 742 (stating that a court may exercise discretion to correct a plain error only if such error seriously affected the fairness, integrity, or public reputation of judicial proceedings).

During her closing argument, appellant's attorney stated: "There is only one relevant question in this case . . . do you believe that the ID made by [P.Y.L. and V.F.L.] was reliable enough for beyond a reasonable doubt." She argued that everything else was "irrelevant," claiming that the fingerprint on the bank card had nothing to do with the case, that there was no evidence that the footprints matched appellant's, that the video-taped surveillance from the market barely showed the suspects, and that appellant did not live in the home were the evidence was found. During his rebuttal, the prosecutor stated: "If you want to find [appellant] not guilty you get to do that. You might have to ignore some very, very compelling evidence to get to that, but you get to, because that's what you get to do as a juror." Appellant claims that this statement shifted the burden of proof. But that is an incorrect assessment of the prosecutor's statement, because the statement was made in response to the argument made by appellant's attorney that all of the other evidence did not show appellant's guilt; thus, the prosecutor was permitted to argue that the other evidence presented at trial was compelling. *See State v. Atkins*, 543 N.W.2d

642, 648 (Minn. 1996) (stating that it is not misconduct for a prosecutor to argue that the nature of the evidence requires conviction and stating that it would be an "unspeakable injustice" to acquit).

Appellant relies on an unpublished case, but this case supports the opposite determination. In *State v. Opelt*, the appellant claimed that the prosecutor committed misconduct by arguing to the jury that the evidence was "overwhelming," and that if the jury ignored the evidence they would "be violating [their] oath as [] juror[s]." No. A06-996, 2007 WL 1599022, *3 (Minn. App. June 5, 2007). We determined that the prosecutor did not commit misconduct because the prosecutor did not attempt to impinge upon the independence of the jury. *Id.*; *see also State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995) (stating that it is misconduct to argue that the jurors would be "suckers" for acquitting the defendant because such misconduct "struck at the heart of the jury system, juror independence"). The prosecutor's statement here was less questionable than that made in *Opelt*; thus, appellant has failed to show plain error.

Affirmed.