STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2146

State of Minnesota,
Respondent,

vs.

James Edward Reed,
Appellant.

Filed December 17, 2012
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CR-10-55027

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, Davi Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Chutich, Judge.

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

HUDSON, Judge

Appellant challenges his conviction of second-degree intentional murder, arguing that the prosecutor committed reversible error by expressing his personal opinion about

the strength of the state's case and that the district court abused its discretion by admitting impeachment evidence of appellant's prior convictions of third-degree assault and terroristic threats. We affirm.

FACTS

The state charged appellant James Edward Reed by amended complaint with second-degree intentional murder, in violation of Minn. Stat. § 609.19, subd. 1(1) (2010), resulting from an incident in which P.B. was killed in a St. Louis Park motel room. In an opening statement at appellant's jury trial, defense counsel argued that the evidence would show that another person, L.H., committed the murder.

The jury heard evidence that, the day before the murder, P.B. and R.W. picked up L.H. at a homeless shelter. P.B. and L.H., who at times had an intimate relationship, bought clothes, and R.W. drove them to a motel in St. Louis Park. P.B. paid for the room, and L.H., who had identification, rented the room, where P.B., R.W., and L.H. smoked crack cocaine, drank alcohol, and smoked cigarettes.

They eventually left the room and drove to Franklin Avenue, where they met appellant, who had been smoking crack and hanging out for several days. After P.B. decided that she wanted to spend time with appellant and have L.H. leave, she and L.H. argued and pushed each other. P.B. then gave L.H. some crack, L.H. agreed to stay on the street, and R.W. drove P.B. and appellant back to the motel.

Late that evening, L.H. returned to the motel room to get the clothes P.B. had bought him. After a short time, he returned to Franklin Avenue. He testified that around 4:30 a.m., he took the bus from Franklin Avenue to his mother's home in New Brighton

and slept and watched television. His mother testified that L.H. was at her home at 9 a.m. and at 2 p.m., when she returned from shopping with a friend; her friend corroborated that version of events.

R.W. testified that after L.H. left, appellant also told R.W. to leave because appellant wanted to spend time with P.B. R.W. then left, purchased more drugs at appellant's direction, and returned to the motel. R.W., P.B., and appellant returned to Franklin Avenue, where they purchased liquor when the stores opened at about 8 a.m. R.W. then dropped P.B. and appellant off at the motel. R.W. testified that he asked P.B. if he could return to the room to pick up his clothes, and that P.B. said he could after he parked the car. But he testified that although he waited for five or ten minutes at the back of the motel, appellant and P.B. did not let him in, so he left.

About 1:15 p.m. that afternoon, a motel resident heard a man and woman arguing in the room rented by P.B. and L.H. He testified that he heard the woman swearing; a loud crash like glass breaking; the woman yelling "get off me," which was then muffled; a banging against the wall; and then silence. He then heard the faucet running in the bathroom for 10 to 20 seconds. When police were called, they discovered the room in disarray, with a large mirror shattered, and P.B. lying on the floor with her throat cut and a shard of mirror glass embedded in her neck. P.B. also had injuries on her hands and arms that were compatible with defensive injuries.

P.L., who then had a relationship with appellant, testified that, at about 2 p.m., appellant called and asked her to pick him up on Lake Street; she found him at a gas station on Lake Street and France Avenue. P.L. testified that appellant's hands were

bleeding, that he told her that he needed to leave the state, and that she eventually took him to the bus depot, where he took a bus to Chicago. He was ultimately arrested in Chicago.

Appellant testified on his own behalf. His testimony was largely consistent with that of L.H. and R.W. regarding events up to the time that R.W. dropped appellant and P.B. at the motel. But appellant testified that after R.W. parked the car, appellant went out to look for R.W. but could not find him. He testified that he then returned to the motel room and observed L.H. in the room fighting with P.B., although they were not arguing; that he tried to intervene and hurt his hands in doing so; and that L.H. killed P.B. and then fled. He testified that he ran water on his hands to see how badly they were cut.

Police initially regarded L.H. as a suspect because he had rented the motel room. In response to questioning by the prosecutor, a St. Louis Park police officer testified that he had reviewed New Brighton police reports, which indicated that when L.H. was taken into custody he had scratches on his hand; he spontaneously told police, "It's not from her, she didn't do this"; and he asked if this was "about the hotel room in [his] name." But the officer also testified that police began to focus their investigation on appellant when they learned that P.L. had picked up appellant a few blocks from the motel and that a latent palm print from the motel-room desk matched appellant's.

Police continued their investigation using DNA swabs from R.W., L.H., and appellant. Appellant's DNA could not be excluded as a match for DNA extracted from blood-like samples from the motel-room bathroom. L.H.'s and R.W.'s DNA could not be

excluded as a match to DNA obtained from cigarette butts and a towel in the motel room, but was excluded as a match from the other bathroom samples.

The jury found appellant guilty, and the district court sentenced him to 480 months, the maximum guidelines sentence. This appeal follows.

D E C I S I O N

I

Appellant argues that the prosecutor committed prejudicial misconduct by improperly injecting his personal opinion into the case. A prosecutor engages in prejudicial misconduct by violating rules, laws, court orders, or this state's caselaw, or engaging in conduct that materially undermines the fairness of a trial. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). A conviction will be reversed "only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

We apply a modified plain-error analysis to review claims of unobjected-to prosecutorial misconduct. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (citing *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)). "Under this test, the defendant must establish both that the misconduct constitutes error and that the error was plain." *Id.* An error is plain "if [it] contravenes case law, a rule, or a standard of conduct." *Id.* (quotation omitted). If plain error is established, the state has the burden to demonstrate that it did not prejudice the defendant's substantial rights. *Id.* This burden is met if the state can show that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Ramey*, 721 N.W.2d at 302.

A prosecutor may not "express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (quotation omitted). But a prosecutor may direct the jury to consider circumstances that corroborate a witness's testimony or cast doubt on a witness's veracity. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984).

Appellant argues that the prosecutor improperly expressed his personal opinion of the case by asking the St. Louis Park police officer whether he had reviewed the New Brighton police reports relating to L.H., furnished those reports to prosecutors, and was aware that New Brighton officers were sitting in the courtroom hallway. Appellant argues that, by this questioning, the prosecutor intended to communicate to the jury that he decided to prosecute the case despite knowing a New Brighton officer's upcoming defense testimony that L.H. spontaneously told police that his injuries were not from P.B. and asked whether he was being investigated about the "hotel room in his name."

But the prosecutor also questioned the St. Louis Park officer regarding the police decision to include appellant in the investigation. In response, the officer testified that police had learned that P.L. had picked up appellant near the motel immediately after the crime and that appellant's palm print had been discovered in the motel room. Therefore, the prosecutor's questions did not relate to his decision to bring charges but rather elicited testimony supporting the police decision to investigate appellant as the person who may have killed P.B. Consequently, they did not constitute plain error.

Appellant also argues that the prosecutor committed misconduct by interjecting his personal opinion in closing remarks. While an attorney may argue about a particular

witness's credibility, the attorney "may not interject his or her personal opinion so as to personally attach himself or herself to the cause which he or she represents." *Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (quotation omitted). This rule helps prevent "exploitation of the influence of the prosecutor's office." *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991); *see also State v. Leutschaft*, 759 N.W.2d 414, 425 (Minn. App. 2009) (stating that "[t]he use of the first-person pronoun 'I' indicates that the prosecutor has injected his or her personal opinion into an argument"), *review denied* (Minn. Mar. 17, 2009).

The prosecutor stated in his closing argument, "[T]he state was aware of the burden of proof when they charged this case. The state accepts the burden of proof, the state agrees with the burden of proof, and most importantly, the state has met the burden of proof." These statements did not state the prosecutor's personal opinion of the case or misstate the burden of proof, which would have constituted misconduct. *See State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985) (stating that misstatements of the burden of proof constitute prosecutorial misconduct); *cf. State v. Trimble*, 371 N.W.2d 921, 926 (Minn. App. 1985) (noting as improper prosecutor's statement likening presumption of innocence to a "blank chalkboard"), *review denied* (Minn. Oct. 11, 1985).

Appellant also challenges the prosecutor's statement on rebuttal that "[t]o suggest the police or I or anyone somehow presumed Mr. Reed was guilty, is a disservice to those who seek justice." But "the prosecutor has the right to fairly meet the arguments of the defendant." *State v. Jackson*, 773 N.W.2d 111, 123 (Minn. 2009); *see also State v. Simion*, 745 N.W.2d 830, 844 (Minn. 2008) (noting that a prosecutor has the right to

argue that a particular defense lacks merit). The prosecutor's statement followed defense counsel's closing remarks that "the evidence shows from th[e] moment [that L.H. denied he killed P.B.] the police skewed their investigation in an attempt to blame someone else." The prosecutor was therefore responding to the defense argument that the police drove the investigation to appellant, and this statement was not error.

Appellant also argues that the prosecutor committed misconduct by stating at closing:

> [The attorneys] all have jobs to do. They represent the defendant and his interests. I represent the State of Minnesota and the interest of the state citizens. I do not represent L.H. I'm not his attorney. I'm not [P.B.]'s attorney. I am the state's attorney. And it's incumbent to examine the evidence in that light.

But this statement also responded to the defense's articulation of its theory that L.H., not appellant, killed P.B. And taken in this context, the prosecutor's reference to "examin[ing] the evidence in . . . light" of the fact that he represented the state, not L.H. or P.B., did not amount to plain error.

We further note that, even if these statements somehow amounted to misconduct that constituted plain error, the state has met its burden to show that no reasonable likelihood exists that they had a significant effect on the jury's verdict. *See Ramey*, 721 N.W.2d at 302. Here, the district court properly instructed the jury on the burden of proof and told them both at the beginning of trial and immediately before closing arguments that the attorneys' statements were not to be considered evidence. This court presumes that a jury follows the district court's instructions. *See State v. Gatson*, 801

N.W.2d 134, 151 (Minn. 2011). Therefore, we decline to reverse appellant's conviction on the basis of prosecutorial misconduct.

II

Appellant challenges the district court's decision to admit impeachment evidence of his convictions of third-degree assault and terroristic threats, which occurred within the last ten years. This court reviews the district court's decision to admit evidence of a defendant's prior convictions for abuse of discretion. *State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009). When ten or fewer years have elapsed since a felony conviction, evidence of the conviction may be admitted for impeachment purposes, provided that the probative value of the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1), (b). In determining whether the probative value of the evidence outweighs its prejudicial effect, a district court considers

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Ihnot, 575 N.W.2d 581, 586 (Minn. 1998) (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)).

Impeachment value of prior convictions

Appellant challenges the district court's application of a "whole-person" analysis to determine that this factor favored admission of the convictions. The Minnesota Supreme Court has concluded that "impeachment by prior crime aids the jury by

allowing it to see 'the whole person'" and better judge credibility because "abiding and repeated contempt for laws [that one] is legally and morally bound to obey" demonstrates a lack of trustworthiness. *State v. Brouillette*, 286 N.W.2d 702, 707 (Minn. 1979) (quotations omitted). Appellant argues that admission of the terroristic-threats and assault convictions does not tend to impeach his credibility but only shows the jury that he had a propensity for violence. But the supreme court has recently affirmed that "*any* felony conviction is probative of a witness's credibility." *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011). It is not this court's role to review supreme court decisions. *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998); *see Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that "[t]he function of the court of appeals is limited to identifying errors and then correcting them"). Under existing law, the district court properly determined that the impeachment value of the crimes favored their admission.

Timeliness

"[R]ecent convictions [are considered] to have more probative value than older ones." *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007). Because appellant's convictions occurred within ten years, he does not contest that this factor favors their admission.

Similarity of prior offenses

Appellant challenges the district court's determination on this factor, arguing that his terroristic-threats and third-degree assault convictions were similar to the charged crime because they involved violence. "[I]f the prior conviction is similar to the charged crime, there is a heightened danger that the jury will use the evidence not only for

impeachment purposes, but also substantively." *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). The supreme court has concluded that the application of this *Jones* factor weighed against the admission of assault convictions in a defendant's murder trial because those crimes were similar. *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006); *see also State v. Irby*, 820 N.W.2d 30, 37 (Minn. App. 2012) (concluding that first-degree aggravated-robbery conviction was similar to charged first- and second-degree assault). *But see Gassler*, 505 N.W.2d at 67 (concluding that attempted murder conviction was not so similar to murder charge as to create unacceptable danger that jury would use conviction for substantive purposes). The district court stated that appellant's offenses may be considered violent, but because they were significantly different from murder, there was less danger that the jury would use them for an improper purpose. Although we reject appellant's argument that the violent nature of these offenses is determinative, we disagree with the district court's analysis on this *Jones* factor, based on *Swanson* and *Irby*.

Importance of defendant's testimony and centrality of credibility

Courts often combine the fourth and fifth *Jones* factors. *See, e.g.*, *Swanson*, 707 N.W.2d at 655 (stating that "[i]f credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions"). If the admission of a prior conviction prevents a jury from hearing a defendant's version of events, and that testimony is important to the jury's determination, this factor weighs against admission of the evidence. *Gassler*, 505 N.W.2d at 67. Admitting the

impeachment evidence is favored, however, if the defendant's credibility is the main issue for the jury. *Id.*

Although appellant's testimony was important to his defense, the fourth factor does not weigh against admitting the prior-convictions evidence because appellant testified on his own behalf, so the jury had the benefit of hearing his version of events. As to the fifth factor, appellant's credibility was central because his version of events contrasted with that of L.H., who, the defense alleged, was the person who killed P.B. As the district court acknowledged, "[C]redibility is a significant issue in this case . . . [because] there's an allegation that an alternative perpetrator committed the murder."

In summary, although the similar-conviction *Jones* factor does not support admission of appellant's prior assault and terroristic-threats convictions, we agree with the district court that the other four *Jones* factors weigh in favor of admitting those convictions, and the district court did not abuse its discretion in doing so.

Affirmed.