STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0833

State of Minnesota,
Respondent,

vs.

William Leon Lane,
Appellant.

Filed June 10, 2013
Affirmed in part and remanded
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-09-45771

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Kirk, Judge.

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

BJORKMAN, Judge

Appellant challenges his conviction of aiding and abetting second-degree intentional murder, arguing that (1) the state violated his right to due process by

destroying potentially useful evidence, (2) the prosecutor committed misconduct during closing argument, (3) the district court erred by closing the courtroom for the final jury instructions and closing arguments, and (4) he is entitled to a restitution hearing. We affirm appellant's conviction but remand for further consideration of the restitution issue.

FACTS

Late in the evening on August 31, 2009, a number of people were gathered near D.T.'s townhouse, drinking and listening to music. When D.T. opened his door to ask the group to move inside, he overheard two men arguing about a gun and recognized one of them as appellant William Lane. D.T. went back inside and, minutes later, heard gunshots. D.T. ran outside and saw the taillights of a dark truck heading south down the alley.

D.T.'s teenage son, C.T., was upstairs in his bedroom at the time and also heard the shots. C.T. looked out his window and saw Lane near the parking lot firing a gun toward a man later identified as C.D., who did not have a gun and appeared to be trying to avoid getting hit.[1] C.T. saw Lane fire multiple times and thought C.D. might have been shot because he looked like he was limping.

D.T. called 911. Responding police officers collected one live .45 caliber round from the yard near D.T.'s townhouse and seven discharged cartridge casings (five .45

[1] At trial, one of the responding officers testified that C.T. stated that he saw two men shooting at each other. C.T. denied telling police that both C.D. and Lane were shooting. The district court subsequently ruled that the officer's testimony about C.T.'s initial statement was not substantive evidence but a prior inconsistent statement for impeachment purposes, instructed the jury that prior inconsistent statements may be used in weighing witness credibility, and permitted the prosecutor to argue that "there was never any evidence that [C.D.] had a gun."

caliber and two 9 mm) from the area of the parking lot. Officers also interviewed D.T. and C.T. but could not find a victim.

Shortly thereafter, police received a call reporting a "slumper" in a blue Jeep Liberty at the end of the alley near D.T.'s townhouse. Responding officers found the Jeep crashed into a utility pole with C.D. in the driver's seat. C.D. was pronounced dead at the scene from a gunshot wound to the groin. Realizing that C.D. was the victim in the previously reported shooting, police photographed the Jeep and searched it and the surrounding area for weapons; they found none. Police seized the Jeep and towed it to a forensic garage for further analysis.

The following afternoon, officers recovered a .45 caliber handgun from S.S., an acquaintance of Lane. She explained that Lane and two other men came to her home shortly after the shooting, gave the gun to her mother, and told S.S. not to say anything to the police about him. Scientific testing matched the gun with the live .45 caliber round and discharged .45 caliber casings recovered from the scene of the shooting. Police also learned that on August 26, C.D. had been involved in an altercation with V.H. in which both fired guns but neither was shot. Lane was present during the altercation but did not participate.

On September 11, 2009, respondent State of Minnesota charged Lane with second-degree intentional murder; the state subsequently amended the charge to aiding and abetting second-degree murder. Police arrested Lane on November 24, 2009. He admitted to police that he was present when C.D. was shot but denied shooting him. Lane claimed that V.H. and a "buddy" shot C.D., explaining that the shooting was a

continuation of the August 26 shooting incident. Lane also stated that he did not see C.D. with a gun but believed that he had one.

Before trial, Lane moved to dismiss the charge on grounds that the state violated his due-process rights by releasing the Jeep to its owner's insurance company in October 2009. The district court denied the motion, concluding that the Jeep was, at best, potentially useful evidence and the police did not act in bad faith in releasing it to the insurance company.

The jury found Lane guilty. The district court sentenced him to 346 months' imprisonment and ordered him to pay $3,320 in restitution to C.D.'s mother. This appeal follows.

D E C I S I O N

I. The state did not violate Lane's right to due process by releasing the Jeep to the owner's insurance company.

Lane contends that the state violated his right to due process by releasing the Jeep to the owner's insurance company because the Jeep was potentially useful evidence. "A defendant's right to due process of law is implicated when the State loses, destroys, or otherwise fails to preserve material evidence." *State v. Jenkins*, 782 N.W.2d 211, 235 (Minn. 2010); *see also Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S. Ct. 333, 337 (1988). But the state does not have "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Youngblood*, 488 U.S. at 58, 109 S. Ct. at 337. When evidence is merely "potentially useful," the defendant must show bad faith on the part of the state

to establish a due-process violation. *Id.*; *State v. Nissalke*, 801 N.W.2d 82, 110 (Minn. 2011).

Nothing in this record indicates bad faith. The police photographed the Jeep at the scene and further documented its condition in a crime-scene videotape before towing it to a police impound lot. A forensic analyst tested two bullet strike marks on the Jeep, took additional photographs, and prepared a report of his observations. The owner subsequently filed an insurance claim pertaining to the Jeep and requested the vehicle's release as part of that claim. Because the police had completed their testing and "typically" grant an owner's request to release an item of evidence if it has "been processed," the police released the Jeep to the insurance company on October 26, 2009. After determining that repair costs would exceed the value of the Jeep, the company destroyed the Jeep.

Lane contends that releasing the Jeep nearly a month before he was apprehended indicates bad faith because it precluded his independent examination of the Jeep. We disagree. First, the police did not release the Jeep until almost two months after the offense (and nearly as long after Lane was charged). The release was prompted by the owner's request that the Jeep be returned to her so that her insurance company could finalize her claim and she could satisfy her outstanding loan. Second, the police thoroughly documented the Jeep's condition with numerous photographs, a videotape, and a written report that Lane could independently evaluate. On this record, we discern no bad faith.

Lane also argues that Minnesota should abandon the bad-faith standard based on the Minnesota Constitution. We are not persuaded. "The task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *State v. Rodriguez*, 738 N.W.2d 422, 432 (Minn. App. 2007), *aff'd*, 754 N.W.2d 672 (Minn. 2008). And our supreme court has consistently—and recently—required a showing of bad faith in its review of due-process claims when it is alleged that the police destroyed potentially useful evidence. *See, e.g., State v. Hawkinson*, 829 N.W.2d 367, 371 (Minn. 2013); *Nissalke*, 801 N.W.2d at 110; *Jenkins*, 782 N.W.2d at 235, 237. Because Lane has not shown bad faith, his due-process claim fails.

II. The prosecutor did not commit misconduct in closing argument.

When, as here, an appellant claims prosecutorial misconduct based on unobjected-to arguments, we review under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 299-300, 302 (Minn. 2006); *see also* Minn. R. Crim. P. 31.02. Under this standard, an appellant must demonstrate that the prosecutor's unobjected-to argument was erroneous and the error was plain. *Ramey*, 721 N.W.2d at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The burden then shifts to the state to prove that the error did not affect the appellant's substantial rights. *Id.* We consider closing arguments in their entirety to determine whether prejudicial misconduct occurred. *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008).

Lane asserts that the prosecutor committed misconduct by misstating the law and shifting the burden of proof regarding his self-defense claim. Once a defendant comes forward with evidence supporting a claim of self-defense, "the state has the burden of

disproving one or more of these elements beyond a reasonable doubt." *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). Misstatements of the burden of proof constitute prosecutorial misconduct. *State v. Fields*, 730 N.W.2d 777, 786 (Minn. 2007). But the state is not precluded from "vigorously argu[ing] its case," including that the evidence does not support a particular defense. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). Lane asserts error in three portions of the prosecutor's closing argument. We address each in turn.

First, Lane contends that the prosecutor misstated the burden of proof by arguing that Lane was "asking" the jury to find that he "shot [C.D.] in self defense" and that Lane was "claiming" self-defense. We are not persuaded. Whether such references could confuse a jury depends on the context in which they are made. *See Jones*, 753 N.W.2d at 691 (requiring consideration of argument as a whole, not phrases or remarks out of context). Here, the prosecutor argued that the evidence is inconsistent with Lane's "claim" of self-defense, noting Lane's statement to police that he was merely a witness to the shooting, his equivocal statements to police about whether C.D. was armed, his threatening of witnesses, and his three-month flight from police. We conclude that the prosecutor did not misstate the burden of proof but properly argued that the evidence does not support Lane's defense.

Second, Lane argues that the prosecutor misstated the law and shifted the burden of proof by describing a self-defense claim as a set of "conditions" that "need to be met." We disagree. The pattern jury instruction, which the district court gave, describes self-defense in terms of "conditions." *See* 10 *Minnesota Practice*, CRIMJIG 7.05 (2006).

And the supreme court recently rejected a defendant's challenge to the pattern jury instruction that mirrors the argument Lane advocates here. *See State v. Radke*, 821 N.W.2d 316, 327 (Minn. 2012). Lane has not demonstrated that the prosecutor's references to self-defense "conditions," which echoed the unchallenged language of the district court's jury instructions, constitute error.

Third, Lane contends that the prosecutor misstated the law by arguing, "How can you claim self defense when you don't admit doing anything to defend yourself?" He argues that this argument improperly suggests that a defendant must personally testify that he acted in self-defense. We disagree. Our careful review of the record reveals that the prosecutor was referencing Lane's statements to police in which he denied having a gun. Pointing to the tension between Lane's denial of involvement and his assertion of self-defense is the type of comment on the merits of a defense that the prosecutor is entitled to make.

Moreover, to the extent that any of the brief references Lane challenges could confuse the jury as to the burden of proof regarding self-defense, the repeated references by the district court, defense counsel, and the prosecutor to the state's burden to prove all elements beyond a reasonable doubt—including that Lane did not act in self-defense—eliminated any such confusion. Indeed, the prosecutor's final words to the jury in rebuttal reiterated that the state bears the burden of proof. On this record, we conclude that Lane's prosecutorial-misconduct claim fails.

III. The district court did not err by briefly closing the courtroom.

Lane argues that the district court erred by closing the courtroom during final jury instructions and closing arguments. Whether the district court erred by closing the courtroom to the public is a constitutional question that we review de novo. *State v. Mahkuk*, 736 N.W.2d 675, 684 (Minn. 2007). Lane concedes that resolution of this issue is controlled by the supreme court's recent decision in *State v. Brown*, 815 N.W.2d 609 (Minn. 2012), *cert. denied*, 133 S. Ct. 796 (2012). Emphasizing that "[n]ot all courtroom restrictions implicate a defendant's right to a public trial," the supreme court held that closing the courtroom during jury instructions did not violate the defendant's right to a public trial because nobody was removed or excluded and the closure was not for a proportionally large portion of the trial. *Brown*, 815 N.W.2d at 617-18. Here, the district court likewise closed the courtroom only briefly, for final jury instructions and closing arguments, explaining that the closure was "to make sure there are no distractions." Lane does not assert and the record does not reflect that anyone was removed from the courtroom or denied entrance because of the closure. Accordingly, while we are mindful that district courts should lock courtroom doors only "carefully and sparingly," *id.* at 618, we conclude that the courtroom closure in this case did not violate Lane's right to a public trial and does not warrant reversal.

IV. This record does not establish whether Lane may challenge restitution.

The district court ordered Lane to pay restitution of $3,320 to C.D.'s mother. Lane argues that there is insufficient information in the record to support the district court's restitution order and that this matter should be remanded for an evidentiary

hearing. *See State v. Fader*, 358 N.W.2d 42, 48 (Minn. 1984) (holding that remand for reconsideration of restitution award was appropriate when the record provided no factual basis for award). The state asserts that Lane waived this argument because a defendant challenging restitution must request a hearing "within 30 days of receiving written notification of the amount of restitution requested, or within 30 days of sentencing, whichever is later." *See* Minn. Stat. § 611A.045, subd. 3(b) (2012); *see also State v. Gaiovnik*, 794 N.W.2d 643, 646 (Minn. 2011). But the record does not indicate whether Lane or his attorney received written notification of the requested restitution amount. Accordingly, we remand for the district court to determine this threshold issue. If the district court finds that Lane or his attorney received written notification of the requested restitution amount, Lane's failure to timely request a hearing would waive his challenges. If the district court finds that Lane did not receive written notification of the restitution request, waiver does not apply and Lane may request an evidentiary hearing to challenge restitution.

Affirmed in part and remanded.