STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1518

State of Minnesota,
Respondent,

vs.

Darron I. Shelton,
Appellant.

Filed August 26, 2008
Affirmed
Harten, Judge*

Benton County District Court
File No. CR-06-1600

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Robert J. Raupp, Benton County Attorney, Benton County Courthouse, 615 Hwy 23, Foley, MN 56329 (for respondent)

Lawrence Hammerling, Chief Appellant Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Harten, Judge.

* Retired judge of the Minnesota Court of Appeals, serving 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

HARTEN, Judge

Appellant Darron I. Shelton challenges his conviction and sentence for aiding and abetting first-degree robbery. Because the prosecutor did not commit misconduct by asking appellant on cross-examination if the victim's account of the robbery was true or by asking a police witness how he learned the identity of appellant's girlfriend; because the district court did not abuse its discretion by admitting evidence of appellant's prior conviction or by refusing to replay the tape of the victim's 911 call; and because using appellant's two juvenile adjudications to calculate his criminal history score did not violate his Sixth Amendment rights, we affirm.

FACTS

On 15 June 2006, appellant received a phone call from Jamar Overton. Overton and Martell Walker were then in an apartment with Todd Chauvin and knew that Chauvin had over $600 in cash in his pocket. Overton arranged to go with Chauvin and Walker to a nearby convenience store to purchase marijuana from appellant.

Appellant drove to the convenience store and picked up the three men. Chauvin testified that: (1) the four men drove first to a gas station, then to an apartment building; (2) appellant stopped the car, got out, and hit the trunk; (3) Walker then threatened Chauvin with a pistol; (4) appellant pulled Chauvin's door open, grabbed him by the neck and yanked him out of the car, saying, "You know what I'm . . . doing. Give me your . . . money"; (5) Overton jabbed Chauvin with what Chauvin thought was a knife; (6) appellant and Walker took Chauvin's money and cell phone; (7) Overton said that he

would kill Chauvin if Chauvin told anyone about the robbery; (8) appellant, Overton and Walker then drove away; and (9) Chauvin returned to the gas station, called 911, and told the dispatcher that "three blacks" had used a gun and robbed him as he walked down the street.

When police interviewed appellant, he said he had been present but denied being involved in the robbery. Police found a car in a salvage yard that fit the description of the car appellant had been driving on the day of the robbery; it was registered to appellant's girlfriend's mother. Chauvin later identified appellant from a photo lineup as one of the men who robbed him. Appellant was charged with aiding and abetting aggravated robbery.

After a jury trial at which appellant testified that he had been present but did not rob Chauvin, the jury found appellant guilty of aiding and abetting aggravated robbery in the first degree. He was sentenced to the maximum presumptive sentence, 93 months. He challenges his conviction, arguing that two of the prosecutor's questions to witnesses constituted prosecutorial misconduct and that the district court abused its discretion in two evidentiary decisions. He also challenges his sentence, asserting that the inclusion of two juvenile adjudications in his criminal history score violated his Sixth Amendment rights.

D E C I S I O N

1. Prosecutorial Misconduct

Appellant claims the prosecutor committed misconduct first by improperly cross-examining appellant when he asked whether the victim's account of the robbery was true

and then by asking a police witness how he learned the identity of appellant's girlfriend. Appellant's counsel made no objection to the cross-examination at trial and requested no curative jury instruction. Only if prosecutorial misconduct is unduly prejudicial will relief be granted when there was no trial objection or request for a cautionary instruction. *State v. Whittaker*, 568 N.W.2d 440, 450 (Minn. 1997).

a. Appellant's Cross-examination

Absent an objection at trial, we review the propriety of a prosecutor's cross-examination for plain error. *State v. Morton*, 701 N.W.2d 225, 234-35, (Minn. 2005); *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). The prosecutor asked appellant if he was telling the jury that none of Chauvin's testimony identifying appellant as one of the individuals who committed the robbery was true; he answered, "Yes." He challenges this "was he lying?" type of question.

"We have previously expressed our concern with 'were they lying' questions, and stated that as a general rule, they are inappropriate." *Morton*, 701 N.W.2d at 235 (citing *Pilot*, 595 N.W.2d at 516). But "such questions are permitted in the circumstances when the defendant '[holds] the issue of the credibility of the state's witnesses in central focus.'" *Id.* (alteration in original) (quoting *Pilot*, 595 N.W.2d at 518).

In *Pilot*, "were they lying" questions did not constitute error because "the focus of the defense was that the state's witnesses were lying and that the evidence against him was fabricated . . . . [T]he defense held the issue of the credibility of the state's witnesses in central focus." *Pilot*, 595 N.W.2d at 518. In *Morton*, "were they lying" questions constituted plain error because "Morton did not hold the credibility of [two witnesses] in

central focus. Though he contradicted their testimony, he did not state or insinuate that they were deliberately falsifying any of it." *Morton*, 701 N.W.2d at 235. Thus, our analysis centers on whether this case is similar to *Pilot* or to *Morton*.

A review of the transcript discloses an obvious similarity to *Pilot*. The only defense appellant raised was that Chauvin's testimony was not credible. In opening statements, appellant's counsel insinuated that Chauvin's testimony that he had been robbed might have been fabricated and that the evidence would show that, in reality, Chauvin simply lost the $600. During cross-examination of Chauvin, appellant's counsel repeatedly pointed out the differences between Chauvin's testimony and his prior statements about whether he spoke to Overton on the phone, whether he was in the car when he was robbed, whether he dropped his cell phone, whether a knife was pulled on him, whether his shoes were pulled off, whether he had previously met Walker, and why the group met at a store. In closing argument, appellant's counsel said, "I have to . . . show what is underneath Todd Chauvin's story here."

Appellant's testimony contradicted Chauvin's: he testified that Chauvin had not purchased marijuana from him and that Chauvin's testimony about the alleged robbery and altercation was not true. The focus of the defense on Chauvin's credibility was not just central; it was almost exclusive. *See Pilot*, 595 N.W.2d at 518. There was no plain error in asking appellant whether Chauvin had been speaking the truth.

b. Police Testimony

In response to appellant's in limine motion, the prosecutor agreed not to discuss appellant's prior "bad acts" or the fact that appellant was hiding in Minneapolis after

Chauvin was robbed. It is misconduct for a prosecutor to knowingly offer evidence that will bring excluded evidence to a jury's attention. *State v. Harris*, 521 N.W.2d 348, 354 (Minn.1994). Denial of a new trial based on prosecutorial misconduct is reversed only if the defendant's constitutional right to a fair trial was impaired. *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2008).

During direct examination, the prosecutor asked the police officer who had brought Chauvin to a woman's address to explain who the woman was. Appellant's counsel objected on grounds of foundation, hearsay, and relevance. The court overruled the objection and the question was repeated; the officer answered, "The girlfriend of [appellant]." Asked how he knew this, the officer answered, "Previous investigations and attempts to locate [appellant]." Appellant's counsel then objected on grounds of relevance and violation of an in limine order. Following discussion, the objection was sustained.

Relying on *Harris*, appellant argues that asking the officer how he knew the woman was appellant's girlfriend was misconduct. But the question as to how the officer knew this was not designed to elicit information as to appellant's prior bad acts or the fact that he was hiding, and the answer, "Previous investigations and attempts to locate appellant" did not explicitly disclose any of appellant's prior bad acts or the fact that he was hiding. There was no violation of the in limine order.

Appellant's counsel had also objected on grounds of foundation, hearsay, and irrelevance when the prosecutor asked the officer who the woman was. The prosecutor's

logical response was asking a question to establish how the officer knew who she was. The question was not prosecutorial misconduct.

The prosecutor did not commit misconduct either by cross-examining appellant as to whether Chauvin was telling the truth or by asking the officer how he knew the woman's identity.

2. Evidentiary Decisions

A district court's ruling on the impeachment of a witness by prior conviction is reviewed, as are other evidentiary rulings, for a clear abuse of discretion. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

a. Impeachment

Appellant claims that the district court abused its discretion in admitting evidence of appellant's 2004 conviction for a controlled-substance offense because the prejudicial effect of the evidence outweighed its probative value. *See* Minn. R. Evid. 609(a)(1), (b) (providing that evidence of prior convictions punishable by more than one year's imprisonment is admissible if it is less than ten years old and its probative value outweighs its prejudicial effect).

Factors to be considered in deciding the relative weights of probative value and prejudicial effect are: (1) impeachment value of the prior crime; (2) its date and the defendant's subsequent history; (3) similarity of the prior crime to the charged crime; (4) importance of defendant's testimony; and (5) centrality of defendant's credibility. *Ihnot*, 575 N.W.2d at 586. Appellant does not challenge the second factor.

As to the first factor, the absence of a dishonesty element does not deprive a prior conviction of impeachment value: the purpose of impeachment by any prior crime is to allow the jury "'to see the [defendant as a] whole person and thus to judge better the truth of his testimony.'" *Id.* (quoting *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993)). As to the third factor, the controlled-substance crime was not similar to robbery, so there was no risk of the jury convicting on the basis of repetition of a given crime. *See id.* As to the fourth and fifth factors, appellant's testimony was important and credibility was central because the case hinged on whether the jury found appellant's or Chauvin's testimony as more credible. The probative value of evidence about appellant's 2004 conviction outweighed its prejudicial effect; its admission was not an abuse of discretion.

b. Refusal to Replay Tape

On the first day of the trial, the state played for the jury the audio tape of the 911 call. The next day, appellant's counsel asked to replay it as part of his closing argument. The state objected, and the district court sustained the objection. Appellant's counsel said that his purpose in replaying was to show the jury that the call lasted four and a half minutes. He provided this information to the jury in his closing argument.

In support of his argument that the district court abused its discretion, appellant relies on *State v. Carroll*, 639 N.W.2d 623, 629-30 (Minn. App. 2002) (finding an abuse of discretion when a district court admitted a child victim's inconsistent videotaped statements but did not allow the victim to be cross-examined about them, other witnesses to testify about them, or counsel to refer to them in closing argument). The *Carroll* court concluded that the defendant had the right "to refer to the inconsistency in closing

argument" and held that district courts must permit parties in their closing arguments to make use of any evidence presented. *Id.* at 629. In closing argument, appellant's counsel was able to refer to the length of the 911 call, which was his motive for wanting to replay it.

Moreover, in order to prevail in this claim, appellant would need to establish not only that the district court abused its discretion but that appellant was prejudiced as a result. *See State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Because the tape was to be replayed so the jury could establish the length of the 911 call and the jury was informed of the length, no prejudice could have resulted. The district court did not abuse its discretion either in admitting evidence of appellant's prior conviction or in disallowing a second playing of the 911 call.

3. Criminal History Score

The district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002). Appellant argues that the use of his juvenile adjudications to calculate his criminal-history score violated his Sixth Amendment right to have only facts found by a jury used to enhance a sentence. This argument was rejected in *State v. McFee*, 721 N.W.2d 607, 619 (Minn. 2006). We cannot overrule or ignore supreme court precedent. *See Terault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (extending existing law is the duty of the supreme court or the legislature, not of this court), *review denied* (Minn. 18 Dec. 1987). The district court did not abuse its discretion in calculating appellant's criminal-history score.

We conclude that the prosecutor did not commit misconduct, the district court did not abuse its discretion, and the use of appellant's two prior adjudications to calculate his criminal-history score was not erroneous.

Affirmed.