STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1575

State of Minnesota,
Respondent,

vs.

Wallace Michael Hotzler,
Appellant.

Filed December 2, 2008
Affirmed in part, reversed in part, and remanded
Ross, Judge

Mower County District Court
File No. 50-CR-06-3193

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Kristen M. Nelsen, Mower County Attorney, Mower County Courthouse, 201 First Street Northeast, Austin, MN 55912 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Marie L. Wolf, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, presiding Judge; Ross, Judge; and Larkin, Judge.

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

ROSS, Judge

This appeal arises from appellant Wallace Hotzler's convictions of second-degree burglary, third-degree burglary, possession of burglary or theft tools, and fleeing a peace officer in a motor vehicle. Hotzler argues that the evidence is insufficient to support his burglary convictions; that prosecutorial misconduct violated his right to a fair trial; that he received ineffective assistance of counsel; and that the district court erroneously sentenced him.

Because sufficient evidence supports the convictions and none of the complained-of errors by the prosecutor are plain or affected Hotzler's substantial rights, we affirm the burglary convictions. Because we find that Hotzler's counsel did not concede his guilt on the possession of burglary tools charge, we affirm that conviction. But because the record does not establish whether Hotzler consented or acquiesced to his attorney's conceding the offense of fleeing a police officer, we expressly acknowledge that Hotzler has not waived his right to pursue an ineffective assistance of counsel claim on that narrow issue if he seeks postconviction relief. Because imposing consecutive sentences for burglary with a tool and possession of burglary tools was improper, Hotzler's duplicative sentence for possession of burglary tools must be vacated. We therefore affirm in part and reverse in part, remanding for the district court to amend the sentence.

FACTS

In October 2006, Officers Mark Walski and David Miller went to Jennings Scrap Yard in Austin, responding to a silent alarm. The scrap yard had three, ordinarily locked gates. The officers arrived at the locked main gate at 11:49 p.m. and climbed over it.

Once in the scrap yard, Officer Walski noticed a partially opened garage door. As the officers inspected the door, they heard a car starting. They quickly turned and saw an older, boxy, General Motors car moving from the direction of the third gate, down the street, along the three gates, and past the parked squad cars. The officers ran to their cars and pursued.

Officer Miller closed the distance to the fleeing car and initiated his emergency lights. But the car did not stop. Instead, its operator turned its headlights off and continued in flight. Officer Walski caught up and joined the chase. Both officers drove at speeds from 80 to 100 miles per hour to keep pace with the fleeing car.

The car turned sharply onto a gravel road, dropped into a ditch, and became stuck in the soil. The officers approached with guns drawn, ordering the driver—later identified as Wallace Hotzler—from the car. But Hotzler rocked his car back and forth and managed to free it from the ditch, and the chase continued. Hotzler drove across a field with Officer Miller again in pursuit.

Hotzler's flight ended when he came to a grove of trees, which stopped him and allowed Officer Miller to position his squad car directly behind, pinning him in. Hotzler rammed his car into Officer Miller's squad car, vainly attempting to flee. Officer Miller ordered Hotzler out of his car, and this time he complied.

The officers arrested and searched Hotzler. They found a screwdriver, wrenches, a pocket knife, bolts, and a magnet attached to a copper wire. They searched Hotzler's car and found a bolt cutter in the passenger compartment and a larger one in the trunk. The car contained clothing, sleeping bags, tools, and personal belongings, and it appeared to the officers as if Hotzler had been living in it.

Sergeant Steven Sandvik went to the scrap yard to investigate the burglary scene. Sandvik found that two of the gates were chained and padlocked, but the third gate—the one from which the officers had first seen Hotzler's car fleeing—was open with its chain cut. Sandvik found a forklift in the middle of the scrap yard loaded with a box of copper. Daniel Jennings, the scrap yard's owner, told Sandvik that the forklift was usually stored in the warehouse. Jennings found nothing in Hotzler's car from the scrap yard and found nothing missing from the scrap yard.

The state charged Hotzler with second-degree burglary, third-degree burglary, possession of burglary or theft tools, and fleeing a peace officer. He waived his right to attend the trial. The district court judge and Hotzler's court-appointed counsel urged Hotzler many times to attend the trial, but he refused. In her opening statement, Hotzler's attorney told the jury that Hotzler had burglary tools in his car but that many of the jurors likely did, too. She told jurors that they would find Hotzler guilty of fleeing the police and possessing burglary tools, but not guilty of burglary. During cross-examination of the police officers, she obtained admissions that the "burglary tools" found in Hotzler's car also have legitimate uses. During her closing argument, Hotzler's attorney again admitted that Hotzler was guilty of fleeing a police officer. And after she reminded the

jury that Hotzler possessed the so-called burglary tools, she contended that he did not intend to commit a burglary with them. The jury found Hotzler guilty on all charges. Hotzler appeals his conviction and sentence.

D E C I S I O N

Hotzler seeks to have his burglary convictions reversed for insufficient evidence. He urges that he is entitled to a new trial for possession of burglary tools and fleeing a peace officer because of ineffective assistance of counsel and prosecutorial misconduct. And he contends that his sentence must be modified. His sentencing argument has merit, but we affirm his conviction.

I

Hotzler claims that the evidence is insufficient to convict him of burglary. We review a claim of insufficiency of the evidence to determine whether a jury could reasonably conclude that the defendant is guilty of the charged offenses beyond a reasonable doubt based on the facts in the record and all legitimate inferences that can be drawn in favor of the convictions from those facts. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999). Hotzler's burglary conviction was based largely on circumstantial evidence. "[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). But circumstantial evidence nevertheless has "the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). A jury is in the best position to balance circumstantial evidence, and its verdict is entitled to deference. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

The facts and their legitimate inferences overwhelmingly support the jury's finding that Hotzler committed second and third-degree burglary. A person commits second-degree burglary when he "enters a building without consent and with intent to commit a crime." Minn. Stat. § 609.582, subd. 2(a) (2006). A person commits third-degree burglary when he "enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building." *Id.*, subd. 3. A jury could easily conclude that Hotzler forcibly entered the warehouse in the scrap yard intending theft. A burglary occurs upon the entry with the intent to steal even if nothing is stolen. *State v. Hall*, 286 Minn. 424, 431, 176 N.W.2d 254, 258 (1970). Hotzler was the only person near the scrap yard when police arrived soon after someone or something triggered the silent alarm. Someone had cut one of the three gates' chain, and police found bolt cutters in Hotzler's car. Hotzler's car was parked at that same gate. The warehouse door had been opened and the forklift driven from the warehouse out into the scrap yard loaded with a box of copper. Hotzler fled the scene and attempted vigorously to elude police. Flight suggests consciousness of guilt. *State v. Bias*, 419 N.W.2d 480, 485 (Minn. 1988). The facts presented allowed the jury to reasonably conclude that Hotzler broke into the warehouse to commit a theft and that he failed to complete the theft only because police interrupted his crime. Ample evidence supports the jury's finding that he is guilty of burglary.

II

Hotzler argues that his conviction should be reversed because the prosecutor committed multiple acts of misconduct at trial. Hotzler did not object to the prosecutor's

conduct during trial. The failure to object to error at trial generally constitutes waiver of a challenge to that error on appeal, allowing reversal only if the error is plain and affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error affects substantial rights if it was prejudicial and affected the outcome of the case. *Id*. at 741. When we review claims of prosecutorial misconduct we "reverse 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). If the alleged prosecutorial misconduct occurs during closing argument, and if the defendant shows that there was plain error, the state bears the burden of proving that there is no reasonable likelihood that the absence of the misconduct would have a significant effect on the jury's verdict. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Hotzler cites three instances of alleged prosecutorial misconduct. He contends that the prosecutor invited impermissible speculation during his closing argument. He next asserts that the prosecutor hinted that Hotzler had committed similar prior offenses. And Hotzler claims that the prosecutor denigrated his theory of the defense. None of these alleged acts of misconduct merits reversal.

Speculation During Closing Argument

Hotzler argues that the prosecutor engaged in "rampant speculation" during closing argument by presenting a factually baseless theory of what happened before and during the charged offenses. Prosecutors may not speculate, but they may invite jurors to draw logical inferences. *State v. Thompson*, 578 N.W.2d 734, 742 (Minn. 1998). Although Hotzler reproduced a page and a half of the prosecutor's closing argument in

his brief, it is not clear what parts of the argument Hotzler claims constitute speculation. This court reviews closing arguments as a whole without taking phrases or remarks out of context. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

We conclude that the prosecutor's closing argument as a whole was based on evidence presented at trial. The prosecutor told a story of Hotzler driving down 8th Avenue, cutting the chain on the third gate, and backing his car into the scrap yard. Evidence at trial showed that the scrap yard was on 8th Avenue, Hotzler's car was at the third gate, the gate's chain was cut, and Hotzler possessed bolt cutters. The prosecutor told about Hotzler setting off the warehouse's silent alarm and driving the forklift out of the building. Trial evidence showed that a silent alarm had been tripped and the forklift moved out to the scrap yard. Finally, the prosecutor said that when Hotzler heard one officer shout, he decided to flee. Evidence at trial showed that Officer Walski shouted to Officer Miller, Hotzler's car started, and Hotzler recklessly led police on a protracted chase. The prosecutor did not speculate; rather, he presented a reasonable theory of the case inferred logically from the evidence. This is neither plain error nor misconduct.

Hinting at Similar Past Offenses

Hotzler contends that the prosecutor's closing argument "hinted" that Hotzler had committed similar past offenses. It is improper for a prosecutor to suggest that because the defendant has committed similar crimes in the past, he likely committed the offense for which he is currently on trial. *State v. Smith*, 563 N.W.2d 771, 774 (Minn. App. 1997); *see* Minn. R. Evid. 404(b). The prosecutor suggested that Hotzler picked Sunday night to burglarize the scrap yard either because by "experience or by just dumb luck" he

knew that was the best night to do so. The prosecutor suggested that Hotzler attempted to steal copper because he knew it was the most expensive metal in the scrap yard again, "through experience or just dumb luck." Because Hotzler did not object to these comments at trial, we review only for plain error affecting his substantial rights. *Griller*, 583 N.W.2d at 740.

Hotzler's argument for reversal is not persuasive. We agree with Hotzler's premise that a prosecutor should not introduce the specter of a defendant's criminal "experience" by speculative comments. But these comments, while marginally objectionable, do not constitute plain error. It is not clear that the "experience" referred to was criminal experience; a person may have "experience" with the value of copper or with the operational hours of a scrap yard through wholly legal circumstances. Although jurors might have believed the prosecutor was suggesting criminal experience, this is not the only possible construction. Additionally, the district court instructed jurors that the comments of attorneys are not evidence. It is not enough to show that the comments might have been improperly suggestive and might have been objectionable. We hold that neither comment rises to the level of plain error. We therefore need not reach the issue of whether those statements prejudiced Hotzler's substantial rights.

Denigrating the Defense

Hotzler maintains that the prosecutor also denigrated his defense. A prosecutor may argue that a defense has no merit but may not denigrate or belittle the defense itself. *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). The prosecutor here did not employ tactics that were denigrating to the defense, such as calling the defense

"ridiculous" or suggesting that Hotzler offered a standard defense or just any defense that might work. *See State v. Hoppe*, 641 N.W.2d 315, 321 (Minn. App. 2002), *review denied* (Minn. May 14, 2002); *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994). The defense's theory was that Hotzler's presence at the scrap yard at the time of the burglary was a coincidence and Hotzler was just in the wrong place at the wrong time. Addressing this theory during his closing argument, the prosecutor made the following attack:

> [Hotzler] happens to wake up at that exact time that the burglar has gone and tripped that alarm. Of course, you don't know who that burglar is because there is no evidence of that. So this other person in an act of pure coincidence has tripped that alarm and Mr. Hotzler happens to wake up, and at that exact time, he thinks, "You know what? I need to get the heck out of here, as if I had committed the burglary, even though I haven't."

The prosecutor's use of sarcasm was a reasonable assault specifically on the defense's reasoning, not on the type of defense in the abstract. It is not improper for a prosecutor to argue that a defense has no merit. *Salitros*, 499 N.W.2d at 818. We hold that none of the prosecutor's comments constitute plain error.

III

Hotzler contends next that he was denied his right to the effective assistance of counsel. The United States and Minnesota Constitutions guarantee criminal defendants the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). To establish a claim of ineffective assistance of counsel that violated constitutional rights, a defendant must

show that his attorney's representation fell below an objective standard of reasonableness, and that, but for the errors, the result of the trial would have been different. *Id*. at 687, 104 S. Ct. at 2064; *Hathaway v. State*, 741 N.W.2d 875, 879 (Minn. 2007). The allegation of ineffective assistance faces the strong presumption that counsel's performance fell within a wide range of reasonable assistance. *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). This court may address the test's two parts in any order and may dispose of the claim on one without analyzing the other. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

Hotzler contends his trial counsel's representation fell below an objective standard of reasonableness because his trial attorney (1) failed to object to prosecutorial misconduct; (2) failed to object to a prejudicial instruction; (3) failed to object to an admission of speculative evidence; and (4) admitted his guilt of both fleeing a peace officer and possession of burglary tools without his consent. We address each claim separately.

Failure to Object to Alleged Prosecutorial Misconduct

Hotzler argues that he received ineffective assistance because a reasonable defense attorney would have objected during the prosecutor's closing argument. Hotzler points to alleged speculation, including what was supposedly going on in Hotzler's mind when he heard the police sirens. Instead of objecting, defense counsel addressed the prosecutor's comments directly in her own closing argument. She told the jury that the prosecutor's argument was a "nice story" but was not based on the evidence. We have already noted that the prosecutor's summary of the facts with reasonable inferences was not an

improper argument. There being no deficiency in failing to object to an unobjectionable argument, Hotzler's challenge fails. We add that even if the prosecutor's factual extrapolation had constituted error, Hotzler's attorney countered it by emphasizing the court's instruction to the jury that attorney comments are not evidence.

Failure to Object to a Prejudicial Instruction

Hotzler also argues that his right to effective assistance of counsel was violated because his appointed attorney failed to object to a preliminary jury instruction regarding juror tampering. The district court judge told the jurors before trial to report any improper influence or threats:

> Should anyone outside of the courtroom directly or indirectly influence you or threaten you relative to this matter, please advise the bailiff or the clerk or the local law enforcement agencies without delay, and they will bring that to my attention, and if need be, they will provide you with protection.

Hotzler argues that this instruction prejudiced him because it implied that he was a possible threat to the jurors. He contends that a reasonable defense attorney would have objected to this instruction and that his counsel's failure to do so was an unconstitutional deficiency. This contention is not compelling.

Hotzler's attorney's failure to object to this general instruction did not fall below an objective standard of reasonableness. The district court judge did not refer to Hotzler or imply that Hotzler might influence or threaten the jurors. Hotzler does not demonstrate how the instruction was improper or caused the prejudice necessary to make out a *Strickland* claim. He therefore has not shown that the trial's outcome would have

been different but for the failure to object to this instruction. So Hotzler's second theory of ineffective assistance of counsel also fails.

Failure to Object to An Admission of Speculative Evidence

Hotzler's third theory regarding his right to effective assistance of counsel rests on his attorney's failure to object during the officers' testimony about a "copper magnet" device found with Hotzler. At trial, both officers testified about the "copper magnet" device but it is unclear from their testimony what the device was. Hotzler contends that the officers implied that it could be used to detect the location of metal and thus would be especially useful for pillaging a scrap yard. He contends that the testimony lacked foundation.

The prejudice prong of *Strickland* is determinative. Hotzler has not shown that the trial's outcome would have been different had his attorney objected. It is difficult to see any prejudice from the testimony because the officers' testimony contradicts the allegedly improper implication that Hotzler identifies. Officer Walski testified that he did not know what the device was; Officer Miller knew it was a "copper magnet" but could only speculate as to its use; and Hotzler did not cite to anywhere in the record where the officers' testimony implied that the device was suited for stealing metal. This theory of ineffective assistance fails.

Admission of Guilt

Hotzler contends that he received ineffective assistance because his attorney acted without Hotzler's consent when she admitted his guilt on the charges of fleeing a peace officer and possession of burglary tools. When defense counsel admits her client's guilt

without consent, the attorney's performance is deficient, prejudice is presumed, and the defendant is entitled to a new trial regardless of whether he would have been convicted without the admission. *Dukes v. State*, 621 N.W.2d 246, 254 (Minn. 2001). The rationale for the rule is that the decision to concede guilt is solely the defendant's to make. *State v. Jorgensen*, 660 N.W.2d 127, 132 (Minn. 2003). But "[e]ven if counsel admits guilt without the defendant's permission, no error will be found if the defendant acquiesced in the strategy." *Dukes*, 621 N.W.2d at 254. A defendant acquiesces when defense counsel uses the strategy of conceding the defendant's guilt throughout the trial and the defendant fails to object. *Id*. A defendant also acquiesces when admitting guilt was a plausible strategy, and the defendant was present when the concessions occurred and admitted that he understood that his guilt was being conceded, but did not object. *Jorgensen*, 660 N.W.2d at 133.

On balance, the record reveals that Hotzler's trial attorney did not concede Hotzler's guilt to possession of burglary tools. During her opening statement, Hotzler's attorney told the jury that Hotzler was guilty of possessing burglary tools. But in doing so she also suggested that many of the jurors probably had "burglary tools" in their cars, the clear implication being that Hotzler was innocent despite his possession. Many times at trial, Hotzler's attorney urged that to be guilty of possessing burglary tools, Hotzler had to intend to use them as part of a crime; and because the state failed to show Hotzler's intent, he was not guilty. Hotzler's attorney conceded only that he had the tools in his car, but the record does not indicate that she ever conceded his criminal intent. She therefore did not admit that Hotzler was guilty of the crime of possession of burglary

tools. We need not reach the question of whether Hotzler consented or acquiesced to that alleged concession.

Hotzler also claims that he received ineffective assistance when his attorney conceded his guilt on the fleeing a peace officer charge. Hotzler's attorney expressly admitted his guilt on this offense in both her opening statement and closing argument. But we cannot determine on the record before us whether Hotzler consented or acquiesced to this admission. We therefore cannot determine that there is any basis to reverse Hotzler's conviction on this ground. Hotzler can, if he chooses, develop the facts and circumstances of his ineffective assistance claim on this theory in a petition for postconviction relief.

IV

Hotzler argues that his consecutive sentence for fleeing a peace officer must be vacated because it arose out of the same behavioral incident as the burglary. "When a single behavioral incident results in the violation of multiple criminal statutes, the offender may be punished only for the most severe offense." *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008); Minn. Stat. § 609.035, subd. 1 (2006). This rule avoids exaggerating the criminality of the defendant's conduct and makes both punishment and prosecution commensurate with culpability. *State v. Johnson*, 653 N.W.2d 646, 651 (Minn. App. 2002). To determine whether multiple offenses arise from a single behavioral incident, the court must consider "whether the offenses (1) arose from a continuous and uninterrupted course of conduct, (2) occurred at

substantially the same time and place, and (3) manifested an indivisible state of mind," or were motivated by a single criminal objective. *Id*. at 651–52.

Although Hotzler's charge of fleeing the police arose from the same behavioral incident as the burglary, flight is statutorily excluded from the prohibition on punishment for crimes arising from the same behavioral incident. *See* Minn. Stat. § 609.035, subd. 5 (2006) ("Notwithstanding subdivision 1, a prosecution or conviction for violating section 609.487 [fleeing a peace officer in a motor vehicle] is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct."). We therefore affirm Hotzler's consecutive sentence for fleeing a peace officer.

Hotzler similarly contends that the district court erred by imposing separate sentences for burglary and possession of burglary tools because the offenses were part of a single behavioral incident. He argues that his sentence for possession of burglary tools therefore must be vacated. The argument is persuasive. In *State v. Scott*, 298 N.W.2d 67 (Minn. 1980), the district court sentenced Scott to consecutive prison terms of five years and three years for the offenses of burglary and possession of burglary tools. *Id*. at 67. The offenses arose out of the same behavioral incident. *Id*. at 68. The *Scott* court held that when the offenses of burglary and possession of burglary tools are a part of the same behavioral incident, section 609.035 prohibits consecutive sentences. *Id*. at 68–69. It is possible that possession of burglary tools could occur apart from the burglary. But the state did not present evidence of earlier possession, and the state agrees that *Scott* is

dispositive. We reverse on this issue only and remand for the vacation of Hotzler's sentence for possession of burglary tools.

Affirmed in part, reversed in part, and remanded.