STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1629

State of Minnesota,
Respondent,

vs.

Robert Nicholas Trapp,
Appellant.

Filed January 11, 2011
Affirmed
Huspeni, Judge[*]

Anoka County District Court
File No. 02-CR-07-12822

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

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Johnson, Chief Judge; and Huspeni, 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

HUSPENI, Judge

On appeal from his convictions for first-degree burglary, aiding and abetting second-degree assault, and fifth-degree assault, appellant argues that (1) the prosecutor committed misconduct during closing argument by arguing that the jury could infer a lack of consent to enter the victims' attached garage from a lack of consent to enter the rest of the victims' home; and (2) the postconviction court erred by denying appellant's challenge to his remaining criminal history point. Because we conclude that the prosecutor's statements during closing argument were not plain error and the postconviction court properly assigned appellant the criminal history point, we affirm.

FACTS

Appellant Robert Trapp was convicted of first-degree burglary, aiding and abetting second-degree assault, and fifth-degree assault, all stemming from an incident that arose out of a dispute over appellant's parenting time with his five-year-old son. Appellant had previously dated a woman named K.M. and the two had a son together. K.M. had primary custody of the child and lived with her husband, B.M. Appellant and B.M. argued over appellant's visitation rights. B.M. testified that appellant called their home on the day of the incident and demanded to have custody of his son for the weekend. B.M. informed him that he could not have visitation for the weekend because the child's grandparents were visiting from out of town. The exchange was reportedly very hostile. Two of appellant's witnesses, F.C. and N.H., both testified that they overheard a phone call between appellant and B.M. on the evening of the incident in

which B.M. challenged appellant by saying, "come over," and "we can deal with this." B.M. testified that he never invited appellant over and, in fact, he and his wife had moved and changed numbers multiple times in order to avoid appellant.

Appellant, F.C., N.H., and another male drove to B.M. and K.M.'s home that night around midnight. They parked a block away from the residence and appellant and F.C. got out and approached the home on foot. F.C. carried with him a baseball bat. B.M. and K.M. were sitting inside their attached garage working on a motorcycle when appellant entered, followed by F.C. with the bat. Appellant approached B.M. and reportedly said, "what part of 'I want to see my kid' don't you understand?" Appellant then punched or attempted to punch B.M. There was a scuffle between appellant and B.M., and soon F.C. joined in and began beating B.M. with the baseball bat. B.M. testified that during the assault, appellant punched him approximately ten times and F.C. hit him with the bat at least 15 times. When B.M. stopped moving, F.C. and appellant ran off.

After a jury trial, appellant was found guilty of burglary in the first degree, aiding and abetting assault in the second degree, and assault in the fifth degree. He was sentenced to 68 months for the burglary conviction, 33 months concurrent for the aiding and abetting second-degree assault conviction, and 68 days for the fifth-degree assault conviction with credit for 68 days served.

Appellant's direct appeal was stayed and remanded to the district court to allow for postconviction proceedings, where appellant challenged the calculation of his criminal history score. His sentencing worksheet indicated that he had one criminal history point for two juvenile adjudications and a second point for four misdemeanor and

gross misdemeanor convictions. Appellant argued that his criminal history score should have been zero because his two juvenile adjudications arose from a single behavioral incident and because two of his misdemeanor convictions were sentenced in the wrong order in relation to the charged offense. The postconviction court determined that appellant's criminal history score had been improperly calculated because it included the juvenile criminal history point. The court resentenced appellant to 58 months for the burglary conviction and 27 months concurrent for the aiding and abetting second-degree assault conviction. The court dismissed appellant's challenge to his remaining criminal history point. The district court also vacated appellant's conviction and sentence for fifth-degree assault.

D E C I S I O N

I.

During his testimony, appellant maintained that B.M. challenged him to come over to his home. However, when questioned by the prosecutor, both appellant and F.C. acknowledged that if B.M. and K.M. had been inside their house when they arrived rather than in the garage, appellant and F.C. would not have felt they had consent to enter the house. Appellant argues that the prosecutor misled the jury during closing arguments by arguing that appellant knew he did not have consent to enter the garage based on the fact that he conceded he did not have consent to enter the rest of the home. During closing argument, the prosecutor stated:

> [Appellant] and [F.C.] did not have consent to go into [the victims'] home or garage that night, and they knew it. And we know they knew it, as indicated by their testimony

> that if, when they had gone to [the victims'] home . . . [i]f they had been inside their home and not in the garage, neither [appellant] or [F.C.] would have gone into the [] home. They knew they couldn't do that; they weren't invited. They weren't given consent or permission to go into [the victims'] home. The garage is part of that home. [Appellant] did not have permission to go into the home or to go into the garage.

During rebuttal, the prosecutor also stated:

> [Y]ou heard testimony from [F.C.] and [appellant] that [B.M.] said, "Come over, come over. Let's take care of this." Is it reasonable to believe that? Does it make common sense that [B.M.] saying that in that way, in that situation, that that was an open invitation for [appellant] and [F.C.] to go to [the victims'] home and go into any part of that home? No. And [appellant] knew it. Wouldn't have gone into the home. The garage is the same as the home. You need consent to enter it. [Appellant] did not have it.

Appellant did not object to these statements. Ordinarily, "failure to object to an error at trial forfeits appellate consideration of the issue." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). However, unobjected-to prosecutorial misconduct may be reviewed if it constitutes plain error. *Id.* at 299. Plain error requires (1) an error; (2) that is plain; and (3) that affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The defendant bears the burden of showing that an error occurred and that the error is plain. *Ramey*, 721 N.W.2d at 302. An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* If the defendant demonstrates that the prosecutor committed a plain error, "the burden . . . then shift[s] to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Id.* To satisfy this burden, the state would need to show that there is no "reasonable likelihood that the absence of the misconduct in question would have had

a significant effect on the verdict of the jury." *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005) (quotation omitted).

Appellant argues that the prosecutor's arguments were plain error based on the general prohibition against misleading inferences. While it is permissible for a prosecutor to "argue all reasonable inferences from the record," a prosecutor may not "misstate the evidence or mislead the jury as to the inferences it may draw." *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993). Appellant relies on *State v. McDonald*, 346 N.W.2d 351 (Minn. 1984), for the proposition that consent to enter a building may be limited in scope and an entrant may have consent to enter one part of a building but not another. Appellant argues that he presented sufficient evidence for the jury to conclude that he had consent to enter the garage because of B.M.'s challenge to "come over," but contends that the prosecutor negated this evidence and misled the jury by conflating appellant's acknowledged lack of consent to enter the home with lack of consent to enter the garage as well. We disagree, and conclude that the prosecutor's closing argument did not misstate either the evidence or the law.

Both appellant and F.C. contended that they interpreted B.M.'s statement as an invitation to come over; however, when questioned by the state they conceded they knew they did not have permission to enter the house. The prosecutor's statement that the garage is part of the home is factually accurate—it was an attached garage. The statement is an accurate statement of the law because the burglary statute defines a "building" to include appurtenant or connected structures. *See* Minn. Stat. § 609.581, subd. 2 (2006). The prosecutor argued that because appellant and F.C. conceded that

they did not have permission to enter the home, and because the garage was attached to the home, the jury could infer that appellant and F.C. also did not believe they had permission to enter the garage. This was a proper inference to be drawn from the evidence, but also one that was subject to refutation by appellant.[1]

Moreover, the district court correctly instructed the jury on the law of first-degree burglary, stating that "whoever enters a building without the consent of the person in lawful possession and assaults another within the building or on the building's appurtenant property is guilty of [the] crime." *See* Minn. Stat. § 609.582, subd. 1 (2006) (defining first-degree burglary). Appellant would have this court interpret the prosecutor's accurate statement that the garage is part of the home in such a way as to improperly limit or foreclose appellant's ability to argue that he, nevertheless, had consent to enter the garage. We cannot place such an expansive interpretation on the prosecutor's statements. The prosecutor did not mislead the jury into believing that lack of consent to enter the house also necessarily meant appellant could not have consent to enter the garage. Appellant was free to argue that the evidence showed he had permission to enter the garage even though he did not have permission to enter the rest of the house. Indeed, appellant actually made this argument during his closing argument.

[1]While the prosecutor elicited testimony from appellant during cross-examination that he knew he did not have permission to enter the victim's home, appellant would have had the opportunity on redirect examination to claim that he had permission to enter the garage portion of the building, or to claim his lack of knowledge that the garage was, in fact, part of the home. The record does not reflect that this line of questioning was pursued, however.

We conclude that the prosecutor's statements were within the bounds of what is permissible during closing argument and do not constitute plain error. Because appellant has not shown that a plain error occurred, we need not address whether appellant was prejudiced.

II.

Appellant also challenges the assessment of a criminal history point for misdemeanor and gross misdemeanor convictions. He argues that his criminal history score incorrectly included misdemeanor convictions arising from conduct that occurred later in time than the incident giving rise to this appeal but that were sentenced prior to sentences imposed in this case. Appellant's offenses in this case occurred on July 27, 2007. In September 2007, appellant violated an order for protection and was charged with a misdemeanor. In December 2007, appellant fled from a police officer on foot and was charged with another misdemeanor. Appellant pleaded guilty to these two misdemeanors and was sentenced in June 2009. When appellant was sentenced in July 2009 for his offenses in this case, both of these misdemeanors were included in his criminal history score and he was assigned the misdemeanor/gross misdemeanor point. Appellant argues that inclusion of these misdemeanor convictions in his criminal history score was error because offenses must be sentenced in the order in which they occur.

A 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), *review denied* (Minn. Aug. 20, 2002). But interpretation of the sentencing

guidelines is a question of law reviewed de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

Minnesota Sentencing Guidelines section II.B.3 provides that an offender is assigned one unit for each qualifying misdemeanor/gross misdemeanor conviction "for which a sentence was stayed or imposed before the current sentencing." Minn. Sent. Guidelines II.B.3 (2006). The guidelines make no reference to the date when the conduct actually occurred, only to when sentencing takes place. Because appellant was sentenced for the two misdemeanor convictions prior to the sentencing in this case, it was not error for the district court to include the convictions in his criminal history score.

Appellant also relies on another section of the guidelines which provides that "[w]hen multiple current offenses are sentenced on the same day before the same judge, sentencing shall occur in the order in which the offenses occurred." Minn. Sent. Guidelines cmt. II.B.101 (2006) (current version at Minn. Sent. Guidelines cmt. II.B.105 (2010)). This provision does not apply here, however, because the misdemeanor convictions were not sentenced on the same day as appellant's sentencing for the offenses in this appeal, and sentencing did not take place before the same judge.

Appellant contends that provisions of the Sentencing Guidelines should be construed to avoid potential manipulation of criminal history scores. *See State v. Zeimet*, 696 N.W. 2d 791, 796-98 (Minn. 2005). Therefore, he argues, "a defendant's criminal history score should reflect the order in which the offenses occurred," and that "[t]his should be true even when the offenses are not sentenced on the same day." The sentencing guidelines speak plainly on this issue, however; a prior conviction may be

included in a defendant's criminal history score so long as sentencing was stayed or imposed before the current sentencing. Minn. Sent. Guidelines II.B.3. Although appellant clearly wishes to have the guidelines construed to accommodate his claim, "[t]his court, as an error correcting court, is without authority to change the law." *Lake George Park, L.L.C. v. IBM Mid-America Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998), *review denied* (Minn. June 17, 1998). Further, this court has rejected a similar argument in the past. *See State v. Best*, 370 N.W.2d 691, 696 (Minn. App. 1985) (holding that district court correctly added one felony point for a prior conviction in which the underlying offense was committed after the offense at issue but sentencing occurred five months prior). Appellant's arguments regarding sentencing, to the extent those arguments may have merit, are more appropriately directed to the Sentencing Guidelines Commission.

The district court did not err by including the two misdemeanor convictions in appellant's criminal history score.

III.

Appellant has also submitted a pro se supplemental brief in which he appears to challenge the sufficiency of the evidence as well as the length of his sentence as compared to his codefendant. We have reviewed these arguments and find them to be without merit.

Affirmed.