STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1185

State of Minnesota,
Respondent,

vs.

Weldon K. Welch,
Appellant.

Filed August 12, 2008
Affirmed in part and reversed in part
Worke, Judge

Hennepin County District Court
File No. 06033129

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Lansing, Judge; and Stoneburner, Judge.

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

WORKE, Judge

On appeal from his convictions of aiding and abetting third-degree burglary and receiving stolen property, appellant argues that (1) the district court committed plain error affecting his right to a fair trial by permitting the prosecutor to impeach him with his pre-release investigation report, in violation of Minn. R. Crim. P. 6.02; (2) the prosecutor committed misconduct by asking "were they lying" questions and by vouching for the police officer's testimony; and (3) the district court erred by imposing a sentence for the receiving stolen property conviction. We affirm in part and reverse in part, vacating the sentence imposed for the receiving-stolen-property conviction.

FACTS

A witness reported seeing two black males outside a store carrying boxes with purses sticking out of the top, and that the front window of the store was broken. The witness stated that one of the males was wearing a brown and tan shirt. Minutes later, an officer located two black males fitting the witness's description, carrying large boxes and walking in the direction the witness observed them leave. Appellant Weldon K. Welch was arrested and charged with aiding and abetting third-degree burglary, possession of burglary tools, and receiving stolen property. A jury found appellant guilty of aiding and abetting third-degree burglary and receiving stolen property. At sentencing, the district court stayed execution of a 21-month sentence on the aiding and abetting third-degree burglary conviction, and imposed a concurrent sentence of 17-months for the receiving-stolen-property conviction. This appeal follows.

D E C I S I O N

Impeachment

Appellant argues that the district court erred in allowing the prosecutor to impeach him with information provided during his pre-release investigation. Appellant objected to the line of questioning, but on different grounds than that argued on appeal. *See generally State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993) (holding that objection failed to alert the district court to the evidentiary issue raised on appeal), review denied (Minn. Oct. 19, 1993). Generally, failure to object to evidence at trial constitutes waiver of those issues on appeal. *State v. Beard*, 288 N.W.2d 717, 718 (Minn. 1980). Therefore, we review the issue for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To establish plain error, appellant must show that the ruling (1) was an error, (2) that was plain, and (3) that affected appellant's substantial rights. *Id.* "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.*

"An error is plain if the error is clear or obvious." *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002) (quotation omitted). "*Any information* obtained from the defendant in response to an inquiry during the course of the [pre-release] investigation and any evidence derived from such information, shall not be used against the defendant at trial." Minn. R. Crim. P. 6.02, subd. 3 (emphasis added). During the cross-examination of appellant, the district court allowed the prosecutor to impeach appellant with information obtained in appellant's pre-release investigation report—specifically, appellant's employment and residence. Because this information was obtained as part of appellant's

pre-release investigation, the admission of this information for impeachment purposes constituted plain error.

Under the third prong of the plain-error test, appellant must show that the ruling affected his substantial rights. *State v. Martinez*, 725 N.W.2d 733, 738-39 (Minn. 2007). In light of the overwhelming evidence of appellant's guilt, the admission of the pre-release investigation statements for impeachment purposes did not affect appellant's substantial rights. *See State v. Farr*, 357 N.W.2d 163, 166 (Minn. App. 1984) (holding reversal unnecessary when testimony suggesting that the defendant may have been suspected of committing another crime was made in passing and evidence of the defendant's guilt was overwhelming). The overwhelming evidence includes the testimony of the eyewitness and the officer, and the fact that the box appellant was carrying contained the CD player missing from the store. Appellant's argument that he met the other suspect, identified as Robert Harrison, on the street and was helping him by carrying one of the boxes is inconsistent with the testimony of the witness and the officer. Further, there was no blood on the box appellant was carrying. Harrison had a fresh cut on his hand, which left blood on the box he was carrying, some of the items inside the box, and the shirt he was wearing. Based on the overwhelming evidence of appellant's guilt, the admission of the pre-release investigation statements for impeachment purposes did not affect appellant's substantial rights.

Prosecutorial Misconduct

Appellant next argues that the prosecutor committed misconduct by asking "were they lying" questions and by vouching for the officer's testimony. Appellant's counsel

did not object to the questions at trial; therefore, we review the unobjected-to conduct for plain error. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). "An error is plain if the error is clear or obvious." *Burg*, 648 N.W.2d at 677 (quotation omitted). The third prong of the plain-error test requires the state to bear the burden of persuasion to demonstrate that there was a lack of prejudice by the error and that the error did not significantly affect the outcome of the case. *Ramey*, 721 N.W.2d at 302.

Appellant argues that the prosecutor committed misconduct by asking appellant if he could explain why the officer testified that he saw the box that Harrison was carrying and it had purses in it and if appellant could explain why the witness who called 911 said that she saw two individuals carrying a box of purses. Generally, questions designed to elicit testimony from one witness about the credibility of another "have no probative value and are improper and argumentative." *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). But the prosecutor may ask these questions "when the defendant holds the issue of the credibility of the state's witnesses in central focus." *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005) (quotation omitted). The prosecutor did not ask appellant to comment on the credibility of the witness or the officer. Further, the questions were permissible because appellant held the credibility of the state's witnesses in "central focus." Appellant testified that he ran into Harrison on the street and was not with him at the store, and that there was nothing hanging out of the boxes so he had no way of knowing that there were stolen items in the boxes. Therefore, the prosecutor's questions did not constitute plain error.

Appellant also argues that the prosecutor vouched for the officer's credibility by asking appellant to explain the fact that the officer, with 16 years of experience, testified that when he approached appellant his box was open and he could see what was inside of it. "[V]ouching [] occurs when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003) (quotations omitted). Because the prosecutor did not guarantee the truthfulness of the officer's testimony, refer to facts outside the record, or express a personal opinion as to the officer's credibility, no vouching occurred.

Even if the prosecutor's questions constituted misconduct, we will not reverse if the misconduct was harmless beyond a reasonable doubt. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). "[A]n error [is] harmless beyond a reasonable doubt only if the verdict rendered was surely unattributable to the error." *Id.* (quotation omitted). Based on the limited nature of the alleged prosecutorial misconduct and the strong evidence of guilt, the jury's decision to convict was surely unattributable to the misconduct and did not affect appellant's substantial rights. Therefore, any error was harmless.

Receiving-Stolen-Property Conviction

Finally, appellant argues that the district court erred by imposing a sentence for both the aiding and abetting third-degree burglary conviction and the receiving-stolen-property conviction, which appellant argues is a lesser-included offense. The receiving-stolen-property conviction is not a lesser-included offense to the aiding and abetting third-degree burglary conviction. We agree, however, that the district court erred in

imposing a sentence for the receiving-stolen-property conviction because the offenses were part of a single behavioral incident.

Minn. Stat. § 609.035 (2006) generally prevents the imposition of more than one sentence for a single behavioral incident. In determining whether a series of offenses constitutes a single behavioral incident, the relevant factors are: (1) unity of time and place, and (2) whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). "The district court's decision of whether multiple offenses are part of a single behavioral incident is a fact determination and should not be reversed unless clearly erroneous." *State v. Carr*, 692 N.W.2d 98, 101 (Minn. App. 2005). The single-behavioral-incident rule is subject to an exception for crimes affecting multiple victims. *See State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006) (stating that exception to general rule allows multiple sentencing when there are multiple victims and the sentences do not unfairly exaggerate the criminality of the conduct).

Appellant was charged with aiding and abetting third-degree burglary and receiving stolen property. Minn. Stat. §§ 609.582, subd. 3, .05, subd. 1 (2006) provide that: "[w]hoever [aids and abets a person to] enter[] a building without consent and with intent to steal . . . while in the building" is guilty of aiding and abetting third-degree burglary. Minn. Stat. § 609.53, subd. 1 (2006) provides that a person is guilty of receiving stolen property if the person "receives, possesses, transfers, buys or conceals any [] property . . . knowing or having reason to know the property was stolen." There was unity in time and place for the offenses, the victim was the same for both crimes, and

appellant was charged with receiving stolen property based on the property he took during the burglary. Because the convictions were part of a single behavioral incident, the district court clearly erred in imposing a sentence for the receiving-stolen-property conviction, and it must therefore be vacated.

Affirmed in part and reversed in part.