STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1958

State of Minnesota,
Respondent,

vs.

Larry Davis,
Appellant.

Filed December 16, 2008
Affirmed
Connolly, Judge

Ramsey County District Court
File No. K2-06-4676

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Crippen, 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

CONNOLLY, Judge

Appellant was convicted of first- and second-degree burglary after a jury trial. Appellant argues that his conviction should be reversed because of plain error. He argues that the prosecutor committed misconduct by asking a question on direct examination of a witness that elicited information that appellant had been previously arrested. Because no misconduct occurred and appellant's substantial rights were not affected, we affirm.

FACTS

During November 2006, Casey English was living with his cousin, Candise Eck, in St. Paul. On the morning of November 29, Eck was not home, and English had a scheduled doctor's appointment. English inadvertently left the back door of the house unlocked when he left for his appointment at 9:30 a.m. English returned to the house approximately one hour and fifteen minutes later, entered the front door, and saw a man, later identified as appellant Larry Davis, standing in the kitchen. Appellant was facing English and was 20 to 30 feet away. English chased appellant into the backyard. English confronted appellant, who handed English's watch to him and stated that he did not want any trouble. English said that he was going to call the police, and appellant unsuccessfully attempted to scale the backyard fence. Appellant then grabbed a small gardening trowel, flashed it at English, and English allowed him to leave.

English called the police. He described the intruder as a black male in his thirties, about 5 feet, 11 inches tall, 200 pounds, wearing dark blue or black jeans and a tan-brown

hooded sweatshirt. The police responded to the call and searched the area but did not find the intruder.

Ten days later, English looked out his kitchen window and saw a man in a neighbor's yard whom he believed to be the intruder. English had to leave for work shortly thereafter, but when he was done with work that evening, he and his cousin called the police. English spoke with Officer Theodore Mackintosh.

Mackintosh determined that the man English saw through the window had been standing in the yard of the house at 235 Ann Street. He then conducted a records search in a computerized database that contained information about persons mentioned in police reports. Mackintosh searched for 235 Ann Street, and appellant's name appeared in those entries. Mackintosh was able to get a physical description of appellant from the Driver and Vehicle Services (DVS) database. That physical description from DVS was almost identical to the one given by English when describing the intruder. Mackintosh gave the information to Sergeant Toupal for further investigation.

Toupal prepared a photo lineup for English that included a photograph of appellant and five other men. English recognized appellant from the lineup as the man he saw in his kitchen on November 29. English stated that he was 100% sure that the man he identified from the photo lineup was the burglar.

Appellant was ultimately convicted of first- and second-degree burglary. This appeal follows.

D E C I S I O N

Appellant argues that the prosecutor committed plain error by eliciting testimony from Officer Mackintosh that appellant's name and description were in a database that compiled information about people suspected of, or arrested for, crimes. The allegedly improper questioning occurred as follows:

> PROSECUTOR: Are one of the houses on this diagram 235 Ann Street?
> MACKINTOSH: I believe—yes, it is.
> PROSECUTOR: Which house is it?
> MACKINTOSH: Number 2, I believe.
> PROSECUTOR: Thank you. What did you do with the information that [English] gave you?
> MACKINTOSH: I went back to our office and I did a records search. We have a—well, we call it "RMS," it's [a] record management system. It's a computerized database that compiles information of victims, witnesses. Anytime a report is written that you're involved in a car accident or your purse is stolen, what have you, that information is entered into the computer. If we identify a person as a suspect, the general description will go into the computer. If a person has been arrested, their name and information, description, address, characteristics, cars they've driven, anything that they've been involved with, that's been entered in the computer and that database we can retrieve.
> PROSECUTOR: What information did you put into the system then?
> MACKINTOSH: I did a search for the specific address of 235 Ann Street.
> PROSECUTOR: And what did you find when you searched?
> MACKINTOSH: Specifically several different calls, one name I located was that of Larry Davis, Jr.
> PROSECUTOR: Did you have a way to check a physical description for the name you pulled up, Larry Davis, Jr.?
> MACKINTOSH: Yes. When people are arrested, they have their physical descriptions entered into the computer—height, weight, race, tattoos, scars, marks, hair. Yes, a general description of the physical characteristics.

> PROSECUTOR: Were you also able to get a physical description using DVS records?
> MACKINTOSH: I did.
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> . . . .
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> PROSECUTOR: What was the physical description of Larry Davis that you were able to pull off of the DVS?
> MACKINTOSH: It was similar. In fact, it was almost identical to the description that Mr. English gave me.

Appellant did not object to this alleged error at the district court. "If the defendant fail[s] to object to the misconduct at trial, he forfeits the right to have the issue considered on appeal, but if the error is sufficient, this court may review." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003) (citing *State v. Sanders*, 598 N.W.2d 650, 656 (Minn. 1999)). When the defendant fails to object, prosecutorial misconduct is reviewed under the plain-error standard announced in *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

The plain error standard requires (1) error, (2) that is plain, and (3) affects substantial rights. *Id.* at 740. A plain error is one that is "clear" or "obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). Once an appellant has shown 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). "If those three prongs are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Strommen*, 648 N.W.2d at 686 (quotations omitted).

Comments elicited from witnesses that suggest a defendant has a criminal record are inadmissible. *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974). But "unintended responses under unplanned circumstances ordinarily do not require a new trial." *State v. Hagen*, 361 N.W.2d 407, 413 (Minn. App. 1985), *review denied* (Minn. Apr. 18, 1985). It does not appear that the prosecutor in this case intended to elicit the answer that was given by the witness. The prosecutor asked if the police had a way to find the physical description of appellant, presumably assuming that he would discuss DVS records. The police officer instead answered that "[w]hen people are arrested, they have their physical descriptions entered into the computer—height, weight, race, tattoos, scars, marks, hair." Having obtained an unanticipated response, the prosecutor used her next question to change the subject from the police department database to the DVS website. Because this seemingly inadmissible testimony was not intended, there was no prosecutorial misconduct.

Furthermore, even assuming that the prosecutor committed plain error, it did not affect appellant's substantial rights. The discussion of the database was very brief, and it is unlikely that it had any effect on the jurors' decision as English's eyewitness identification of appellant was compelling. English observed appellant at close range during the burglary. He was able to pick appellant out of a photo lineup, and give a detailed, accurate description of appellant's appearance. This identification was central to the state's case. The prosecutor did not even mention the police department database or the DVS website in her closing argument. Rather, she concentrated almost exclusively

on English's testimony. It is clear that even if the question had not been asked, the outcome of this case would have been the same.

Affirmed.