STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2061

State of Minnesota,
Respondent,

vs.

Romeo Davis,
Appellant.

Filed January 20, 2009
Affirmed in part and reversed in part
Johnson, Judge

Ramsey County District Court
File No. K1-06-3325

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Johnson, Judge.

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

JOHNSON, Judge

Shakira Johnson committed suicide with a shotgun belonging to her boyfriend, Romeo Davis. A Ramsey County jury found Davis guilty of possession of a firearm by an

ineligible person and possession of a short-barreled shotgun. On appeal, Davis challenges several evidentiary rulings, the district court's jury instructions, the prosecutor's closing argument, and his sentences. We conclude that there was no procedural error affecting the jury's verdict, but we conclude, as the state concedes, that the district court erred by imposing sentences on both counts of which Davis was convicted. Therefore, we affirm in part and reverse in part.

FACTS

On August 30, 2006, Davis, who then was 18 years old, and his girlfriend, Johnson, who then was 16 years old, argued about their relationship and whether they should continue seeing each other. At approximately 9:30 p.m., they were in Davis's bedroom in the home he shared with his mother, which was a first-floor apartment in a multi-unit building. Johnson left the room. Davis believed that she was going to a bathroom, but he soon heard a loud noise and heard Johnson's voice in the basement. Davis ran to the basement, where he found Johnson lying on the floor with a shotgun wound to her chest.

Davis and N.J., who lived in an upstairs unit of the building, then went to a neighbor's home to call 911. They returned to the basement and, with the assistance of the neighbor, performed CPR on Johnson. N.J. and the neighbor testified that Johnson had been shot in the chest and that a short-barreled shotgun was lying on the ground near her feet. N.J. asked Davis if he should move the shotgun, and Davis replied in the affirmative. N.J. then took the shotgun outside and propped it up against the side of the detached garage. Paramedics came to the home to treat Johnson. Police officers took both Davis and N.J. to

the law-enforcement center to gather more information. Police investigators later found the shotgun where it was hidden by N.J.

At the law enforcement center, Sergeant Anita Muldoon and Sergeant Janet Dunnom began interviewing Davis in a conference room at approximately 10:45 p.m. At approximately 12:40 a.m., the officers informed Davis that Johnson had died. At approximately 1:30 a.m., Sergeant Muldoon learned that N.J. had informed other officers that the shotgun found by the garage belonged to Davis. Sergeant Dunnom then read Davis his *Miranda* rights. Davis initialed each part of the waiver-of-rights form and signed it at the bottom.

After waiving his *Miranda* rights, Davis gave the officers several conflicting versions of how he came to possess the shotgun. He claimed, alternatively, that it had been left in the house when he moved in, that he had found it under a tree, and that he had obtained it from a gang member. Davis stated that he had been in possession of the shotgun for approximately 12 months and that, approximately one month earlier, he had shown the shotgun to Johnson, N.J., and another person. At no point did Davis ask for the interview to end. He asked for a lawyer at approximately 4:30 a.m., at which point the interrogating officer ceased questioning him. The officers placed Davis under arrest at approximately 4:40 a.m.

The state charged Davis with possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(b) (2006), and possession of a short-barreled shotgun in violation of Minn. Stat. § 609.67, subd. 2 (2006). At a pre-trial hearing, Davis moved to suppress the statements he made at the law-enforcement center on the grounds that

his waiver of his *Miranda* rights is invalid and that his statements were involuntary. The district court denied the motion.

The case was tried from May 1 to 3, 2007. The parties stipulated that, because of prior offenses, Davis was ineligible to possess firearms in 2006. The state called six witnesses, including N.J., Sergeant Muldoon, and the Ramsey County Medical Examiner. N.J. testified that the shotgun belonged to Davis and that Davis had shown it to him approximately one month before the incident. Davis's defense counsel argued to the jury that the state had not proved that Davis possessed the shotgun because N.J. was not credible and because numerous persons had access to the basement. The jury found Davis guilty on both counts. The district court imposed concurrent sentences of 60 months of imprisonment for the conviction of possession of a firearm by an ineligible person and 15 months of imprisonment for the conviction of possession of a short-barreled shotgun. Davis appeals.

ISSUES

I. Did the district court err by denying Davis's motion to suppress and admitting into evidence custodial statements made by Davis?

II. Did the district court err by admitting into evidence the testimony of the Ramsey County Medical Examiner?

III. Is Davis entitled to a new trial on the ground that the prosecutor made improper comments during his closing argument?

IV. Did the district court err by not sua sponte instructing the jury concerning the need for corroboration of accomplice testimony?

V. Did the district court err by imposing sentences for both offenses?

D E C I S I O N

I. Admissibility of Custodial Statements

Davis first argues that the district court erred by admitting into evidence the statements he made to the investigating officers during the interview at the law-enforcement center. Davis's pre-trial statements were admitted into evidence when Sergeant Muldoon testified that Davis told her how he had come to possess the shotgun; that Davis had shown the shotgun to Johnson, N.J., and another cousin; and that Davis asked N.J. to remove the shotgun from the house after Johnson shot herself. Davis contends that his *Miranda* waiver is invalid and that his statements were not voluntary.

A. *Miranda* Waiver

The state has the burden of proving that a defendant's waiver of his or her *Miranda* rights was knowing, intelligent, and voluntary. The state can meet this burden by establishing that a *Miranda* warning was given and that the defendant stated that he understood those rights. *State v. Camacho*, 561 N.W.2d 160, 168 (Minn. 1997). If the defendant presents evidence that the waiver is invalid, the district court must consider a number of factors, including the defendant's age, maturity, intelligence, education, experience, ability to comprehend, familiarity with the criminal justice system, physical and mental condition, the lack or adequacy of warnings, the length and legality of the detention, the nature of the interrogation, any physical deprivations, any language barriers, and limits on the individual's access to counsel, friends, and others. *Id.* "We review findings of fact surrounding a purported *Miranda* waiver for clear error, and we review legal conclusions based on those facts de novo to determine whether the state has shown by a fair

preponderance of the evidence that the suspect's waiver was knowing, intelligent, and voluntary." *State v. Burrell*, 697 N.W.2d 579, 591 (Minn. 2005).

At the pre-trial suppression hearing, the district court received testimony from the officers who interviewed Davis and admitted into evidence a videotape of the questioning. The district court found that, based on the totality of the circumstances, Davis's waiver of his *Miranda* rights was knowing, intelligent, and voluntary. The district court noted that Davis was "clearly upset" and that the two investigators had some concern about Davis's emotional state but nonetheless concluded:

> [Davis] listened when the detectives read his *Miranda* rights to him. He said he understood them. He is over 18 years old. And even based on his problems as outlined in the psychological evaluation, I do feel that he understood his rights. He knowingly waived them, and it was voluntary.

The district court further noted that because Davis had been involved in the criminal justice system before, he "was not completely naïve as to what was going on."

Davis's primary argument is that his *Miranda* waiver is invalid because he was overcome with emotion. Sergeant Muldoon testified that during the initial part of the interview, Davis was "very distraught, and so it was very difficult to have a conversation with him." She explained that Davis sometimes cried, that he sometimes sat with his arms inside the sleeves of his shirt "almost like a small child," and that he periodically was sobbing. But Sergeant Muldoon testified that Davis was able to answer questions appropriately. A defendant who is emotional still may be able to validly waive his *Miranda* rights. In *State v. Andrews*, 388 N.W.2d 723 (Minn. 1986), the defendant was "extremely upset and crying" but, "despite this distress," was "coherent and responsive while being

advised of his *Miranda* rights." *Id.* at 731. The supreme court concluded that the defendant was capable of knowingly and intelligently waiving his rights. *Id.* at 731. Similarly, in *State v. Hoffman*, 328 N.W.2d 709 (Minn. 1982), *superseded on other grounds by statute as recognized in State v. Bouwman*, 354 N.W.2d 1, 9 (Minn. 1984), the supreme court found that the defendant was capable of making a voluntary confession even though the defendant broke down several times during questioning. *Id.* at 713-14. The supreme court relied on a police officer's testimony that the defendant appeared to understand what was going on and to respond. *Id.*

Like the defendants in *Andrews* and *Hoffman*, Davis was upset and emotional at various times during the interview but was relatively calm at the time of his *Miranda* waiver. Furthermore, an analysis of the totality of the circumstances supports the district court's conclusion that his waiver is valid. Davis was 18 years old. He had prior experience with the criminal justice system. He was questioned in a large conference room, not a holding cell, and was not handcuffed. Sergeant Muldoon testified at trial that Davis was permitted to go to the bathroom. He did not ask to see any family members. He makes no claim that he was not sufficiently mature, intelligent, or educated to comprehend the warnings. Thus, the district court did not clearly err in determining that Davis voluntarily, knowingly, and intelligently waived his *Miranda* rights. *See Camacho*, 561 N.W.2d at 168.

B. Voluntariness of Statements

To be admissible, a confession must be voluntarily and freely given. *State v. Merrill*, 274 N.W.2d 99, 106 (Minn. 1978). "The test of voluntariness is whether the actions of the police, together with other circumstances surrounding the interrogation 'were

so coercive, so manipulative, so overpowering that [the defendant] was deprived of his ability to make an unconstrained and wholly autonomous decision to speak as he did.'" *State v. Jones*, 566 N.W.2d 317, 326 (Minn. 1997) (quoting *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991)). "The voluntariness of a statement depends on the totality of the circumstances." *State v. Bailey*, 677 N.W.2d 380, 407 (Minn. 2004). "[T]he entire course of police conduct" must be examined to determine the voluntariness of the suspect's statements. *Id.* (citing *Oregon v. Elstad*, 470 U.S. 298, 318, 105 S. Ct. 1285 (1985)). The same factors used to identify a knowing, intelligent, and voluntary waiver of *Miranda* rights are used to determine voluntariness of post-*Miranda* statements. *State v. Williams*, 535 N.W.2d 277, 287 (Minn. 1995). Nonetheless, "a suspect can knowingly, intelligently and voluntarily waive his or her right to remain silent, but still can be coerced into making an inculpatory statement." *Jones*, 566 N.W.2d at 323.

Davis contends that his admission that he had obtained the shotgun and kept it in the basement, which was part of Sergeant Muldoon's trial testimony, was not voluntary because the police officers subtly threatened him when they suggested that he shot Johnson and alluded to the possibility of murder charges. This court previously has stated, "It is not improper to inform a defendant of the possible charges or evidence marshalled against the defendant." *Pilcher*, 472 N.W.2d at 334. Simply suggesting that Davis might face charges if he were involved in Johnson's death was not improper.

Davis argues that the investigators coerced him into making the statements by asking him to "think about [Johnson]" and stating, "we need you to help us." The use of a "sympathetic approach" does not, by itself, make a defendant's statements involuntary. *Id.*

at 333-34; *see also State v. Scott*, 584 N.W.2d 412, 415, 419 (Minn. 1998) (holding that defendant validly waived *Miranda* rights despite police officer's statement that they wanted his help in solving murder). Although the officers employed a sympathetic approach and asked for Davis's help, their statements to him were not unduly coercive.

Davis also contends that the officers used unreasonable tactics by suggesting that they could protect him from others. Davis points out that at one point, the investigator told him, "a lot of people are pretty mad at you right now." The supreme court has held that a police officer's suggestion that a defendant should remain in custody for his own protection because of an unspecified threat of physical harm was coercive but that "[w]ithin the totality of the circumstances, . . . the statement did not induce [the defendant] to speak as he did or otherwise overcome his will." *Pilcher*, 472 N.W.2d at 334. Similarly, the district court did not err by concluding that the investigators' statements were not so coercive as to force Davis to make inculpatory statements.

Davis further contends that his statements were not voluntary because he was interrogated for more than six hours. Davis's interrogation was less than six hours long because there were several breaks totaling at least one and a half hours. He made the incriminating statements approximately three hours after the interview began. Davis has not cited any caselaw holding that three hours of interrogation makes a statement per se involuntary. *See Camacho*, 561 N.W.2d at 170 (holding that statements made during less than one and a half hours of questioning were admissible); *cf. Williams*, 535 N.W.2d at 288 (concluding that confession was voluntary where defendant had been in custody for six and a half hours before being questioned).

We conclude that the district court did not err by concluding, based on the totality of the circumstances, including all aspects of the officers' conduct, that Davis's custodial statements were voluntary. Thus, the custodial statements were properly admitted into evidence at trial.

II. Admissibility of Dr. McGee's Testimony

Davis next argues that the district court erred by admitting into evidence the testimony of Dr. Michael McGee, the Ramsey County Medical Examiner. Dr. McGee testified that Johnson died of a point-blank gunshot wound from a 12-gauge shotgun. He also testified that the short-barreled shotgun found at Davis's house was the same shotgun that caused Johnsons' fatal wound. Dr. McGee further testified that Johnson was able to reach the trigger because the shotgun was short-barreled.

Davis contends that Dr. McGee's testimony was irrelevant and prejudicial. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. With some exceptions, "[a]ll relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." Minn. R. Evid. 402. Furthermore, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused

its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Davis raised this issue before trial in a motion to preclude Dr. McGee from testifying. The district court denied the motion, reasoning that the testimony was relevant because it would help establish Davis's possession of the shotgun. Dr. McGee's testimony tended to corroborate the admissions Davis made in his custodial statement. The evidence that the shotgun found near the garage was used in the basement, in conjunction with N.J.'s testimony that Davis had shown the shotgun to him and Sergeant Muldoon's testimony that Davis stored the shotgun in the basement, tended to prove that Davis possessed the shotgun. Thus, the evidence was relevant to the elements of the offenses with which Davis had been charged.

Furthermore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Davis contends that Dr. McGee's testimony invited the jury to hold Davis responsible for Johnson's death. But it appears that the testimony also caused the jury to view Davis in a more favorable light because it made clear that Johnson died because of suicide, not homicide. In his closing argument, Davis's attorney emphasized this point by saying, "A young woman killed herself, and [Davis] for a while was a suspect in a homicide. But the Medical Examiner to his credit said no. The facts don't add up to that, and he said that not once but twice." In addition, the evidence was not designed to persuade by illegitimate means. *See State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005) (stating that "unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage"). Thus, the district court did not err by admitting Dr. McGee's testimony

into evidence. *See State v. Goodloe*, 718 N.W.2d 413, 424-25 (Minn. 2006) (holding evidence of possession of gun several months after murder was not unfairly prejudicial).

III. Alleged Prosecutorial Misconduct

Davis next argues that the prosecutor committed misconduct by making the following statements during closing argument:

> [Johnson] was able to kill herself with Exhibit 1 only because of its unique length, the illegal length of the gun. If the gun would have been longer, she wouldn't have been able to do it, at least in the way she did.
>
> . . . .
>
> We have laws to keep guns out of the hands of people that shouldn't have them for a reason. We have laws to prevent from – people from possessing illegal guns for a reason. It's to keep them from falling into the hands of distraught 16 years old who are upset about their relationship. Would she be alive today if that gun wasn't in the basement? I have no idea. But what I do know is if that illegal gun hadn't been possessed illegally by Mr. Davis, she wouldn't have been able to kill herself that night. That's the purpose of the law, and that's why we're here.

Davis's trial counsel did not object to these comments. Davis now contends that the comments about Johnson's death played on the sympathies of the jury and distracted them from the pertinent issue -- whether Davis illegally possessed the shotgun. If there is no objection to a comment that is claimed to be prosecutorial misconduct, we apply a "modified plain error test." *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007) (citing *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)). Under the modified plain-error test, "when the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain,

the burden would then shift to the state to demonstrate lack of prejudice." *Ramey*, 721 N.W.2d at 302.

The state's closing argument "'must be based on the evidence produced at trial, or the reasonable inferences from that evidence.'" *State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006) (quoting *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995)). A prosecutor may not make arguments "calculated to inflame the passions or prejudices of the jury." *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (quotation omitted). A prosecutor also may not "introduce issues broader than the guilt or innocence of the accused." *State v. Spaulding*, 296 N.W.2d 870, 876 (Minn. 1980); *see also State v. Eggert*, 358 N.W.2d 156, 162 (Minn. App. 1984). But a closing argument is not required to be "colorless." *Young*, 710 N.W.2d at 281 (quotation omitted). A reviewing court should look at the closing argument as a whole. *State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005).

In this case, the prosecutor referred to the purpose of laws prohibiting possession of illegal weapons. The prosecutor also referred to Johnson's death. The statement, "that's why we're here," is ambiguous. Although the prosecutor did not specifically ask the jury to convict Davis because of Johnson's death, his comments about Johnson's death may have distracted the jury somewhat from the issue of whether Davis possessed the gun. *See Spaulding*, 296 N.W.2d at 876; *Eggert*, 358 N.W.2d at 162. Nonetheless, we do not believe that the statements "played a substantial part in influencing the jury's verdict," *Spaulding*, 296 N.W.2d at 876, and, therefore, conclude that the comments do not constitute plain error.

IV. Accomplice Testimony Instruction

Davis next argues that the district court erred by not instructing the jury that Davis could not be convicted on the basis of N.J.'s uncorroborated accomplice testimony. A conviction "cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense." Minn. Stat. § 634.04 (2006). Because of this statute, a district court should give an accomplice-testimony instruction in any criminal case in which any witness against the defendant might reasonably be considered an accomplice to the crime. *State v. Reed*, 737 N.W.2d 572, 582 (Minn. 2007).

The record indicates that Davis did not preserve an objection to the district court's failure to give an accomplice instruction. Accordingly, we will review for "plain error . . . affecting substantial rights." Minn. R. Crim. P. 31.02; *see also State v. Clark*, 755 N.W.2d 241, 251 (Minn. 2008) (applying plain-error test where defendant failed to object to lack of accomplice-testimony jury instruction). Plain error exists if (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three requirements are satisfied, "the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.*

For purposes of the statute, an accomplice is a person who could have been charged with and convicted of the same crime with which the defendant is charged. *State v. Palubicki*, 700 N.W.2d 476, 487 (Minn. 2005). For a witness to be an accomplice, "there must be some evidence that the defendant and witness were accomplices." *State v.*

Swanson, 707 N.W.2d 645, 653 (Minn. 2006). But a witness "who is alleged to have committed the crime *instead* of the defendant is, as a matter of law, not an accomplice under section 634.04." *Id.* Thus, if a defendant argues at trial that a witness, but not the defendant, committed the alleged crime, and if the state does not seek to prove that the witness was an accomplice to the defendant's offense, the defendant's version of the facts makes the witness an alternative perpetrator rather than an accomplice. *State v. Evans*, 756 N.W.2d 854, 877 (Minn. 2008) (concluding that witness was not accomplice because defense had argued witness was alternative perpetrator).

Davis argued at trial that N.J., not he, possessed the shotgun. During closing arguments, Davis's counsel stated that N.J. "trie[d] to pass it off on somebody else, blame Romeo for the gun. Convenient. . . . Blame it on that guy, get the onus away from me, okay, destroy the evidence, lie about it, push something on somebody else." Davis's counsel's suggestion that N.J. committed the crime instead of Davis means that N.J. was not an accomplice under Minn. Stat. § 634.04 but, instead, was an alternative perpetrator. *See Swanson*, 707 N.W.2d at 653; *Evans*, 756 N.W.2d at 877. Also, the prosecutor did not seek to portray N.J. as an accomplice to Davis's unlawful possession. Davis notes that N.J. "admitted to possessing a short-barreled shotgun in Juvenile Court." But N.J.'s juvenile adjudication for possession of a short-barreled shotgun does not make him an accomplice to Davis's offense because N.J.'s possession of the shotgun was separate from Davis's. Davis possessed the shotgun for a matter of months *before* Johnson used the shotgun; N.J. possessed the shotgun only briefly *after* Johnson used the shotgun, when he removed the shotgun from the basement and hid it next to the garage. N.J.'s possession of the shotgun

after Johnson used it may have made him an accessory after the fact, but it did not make him an accomplice to Davis's possession of the shotgun. *See* Minn. Stat. § 609.495, subds. 1, 3 (2006) (providing that person who destroys or conceals evidence of crime is subject to criminal penalties). For purposes of section 634.04, an "accessory after the fact is not an accomplice." *State v. Henderson*, 620 N.W.2d 688, 701 (Minn. 2001) (quotation omitted); *see also State v. Jensen*, 184 N.W.2d 813, 815 (Minn. 1971).

Because N.J. was not an accomplice, the district court did not err by not giving the jury an accomplice-testimony instruction.

V. Imposition of Two Sentences

Davis last argues that the district court erred by imposing two sentences based on the same behavioral incident. He contends that the 15-month sentence for possession of a short-barreled shotgun is erroneous. The state concedes that the district court erred by imposing two sentences. Generally, a defendant who commits multiple offenses during a single behavioral incident may be sentenced for only one of those offenses. Minn. Stat. § 609.035, subd. 1 (2006). The firearm exception to the prohibition against a duplicative sentence "for any other crime committed by the defendant as part of the same conduct," Minn. Stat. § 609.035, subd. 3 (2006), does not apply here because Davis did not engage in "any other crime," such as assault or robbery, beyond illegally possessing a firearm. Thus, Davis's 15-month sentence for possession of a short-barreled shotgun is reversed.

Affirmed in part and reversed in part.