STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2317

State of Minnesota,
Respondent,

vs.

Olu Dweh,
Appellant.

Filed March 3, 2009
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 07029209

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, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

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

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

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

LANSING, Judge

In this appeal from conviction of first-degree aggravated robbery, Olu Dweh argues that he was denied a fair trial by the prosecutor's misconduct of eliciting police testimony of prior contact and disparaging Dweh's defense as "crafted." We conclude that the police officer's unobjected-to testimony was not improperly elicited. And, although the prosecutor's unobjected-to comments in closing argument about Dweh's "crafted" defense are plainly proscribed error, the state has shown that the error did not affect Dweh's substantial rights. We, therefore, affirm.

F A C T S

Olu Dweh's charge of first-degree aggravated robbery arose from an encounter in the early morning hours of May 4, 2007, outside a closed Target store in Brooklyn Park. ADH, who had used a pay phone at an adjacent Cub Foods, was walking across on the connecting sidewalk when Olu Dweh and another man approached him. After a brief exchange, ADH attempted to leave, but, as he turned to respond to a question, Dweh pointed a red-handled "flip" knife at him, patted him down, and found in one of his pockets a paycheck issued by a company in Hopkins. Holding the knife at ADH's throat, Dweh made ADH sign the paycheck over to Dweh, spelling his name for ADH to write on the check. When the two men left, ADH called 911.

Brooklyn Park police responded to the 911 call, and ADH gave a description of the two men. ADH described one robber as having braided hair and the other as having an Afro hairstyle. ADH also provided a partial recollection of Dweh's name. The police

took ADH to the Brooklyn Park police station and showed him a photo array. The array included a file photo of Dweh, with a short Afro hairstyle. ADH identified Dweh as the person who had held the knife to his throat and had taken his paycheck.

The police then drove to Dweh's residence. One of the officers had been in contact with Dweh several days before this incident and knew where he lived. He had also seen Dweh sitting on the steps of the house on the evening preceding this incident. When the officers arrived at the house, the person who answered the door said that Dweh was downstairs, but the police were denied entry without a warrant. After obtaining a search warrant, the police found a red-handled folding knife, an electric razor, human hair, and marijuana. The police arrested Dweh, whose head was clean-shaven, and took a booking photo of him.

At trial, Dweh's niece, who had been subpoenaed by the state, initially denied remembering anything about the morning of the incident. But, when the district court permitted the prosecutor to question her as a hostile witness, she testified that Dweh had a check that had the word "Hopkins" on it when she later saw him at the house. ADH testified to the events before, during, and after the robbery. The state then called the police officer who responded to the 911 call. The officer recounted ADH's description of the robbers and also identified Dweh's booking photo that showed him with a closely shaven head.

During the officer's testimony, the prosecutor asked about his prior contact with Dweh. The officer said that he had been to Dweh's residence a few days before the incident and that he saw Dweh around 7 p.m. on May 3—about six hours before the

robbery. He testified that "[Dweh] had an [A]fro" about an inch in length at that time. The officer acknowledged that Dweh's hair was noticeably different when he was arrested. Dweh did not object to this line of questioning.

Dweh testified in his own defense. He admitted that he had been involved in an encounter with ADH. Dweh described the encounter as a marijuana-sale transaction in which he took a third-party check from ADH as payment for marijuana but then decided not to give ADH the marijuana and ran from the area with the friend who had accompanied him. Dweh acknowledged that he had committed theft but denied that he had ever possessed the red-handled knife or that he had threatened ADH. Dweh also testified that after the incident he had shaved his head and ripped up the check and flushed it down the toilet.

In response to his attorney's questions, Dweh admitted that he had access to most of the information in the case file, including police reports and witness statements. In closing argument, the prosecutor argued that Dweh only admitted to theft in order to avoid a robbery conviction. The prosecutor commented on Dweh's and defense counsel's access to information, saying that Dweh "crafted" his testimony to fit the state's proof. Dweh did not object. The jury found Dweh guilty of first-degree aggravated robbery, and he now appeals.

D E C I S I O N

This appeal centers on two claims of prosecutorial misconduct that were not objected to at trial. The fundamental problem presented by prosecutorial misconduct is that it may deny the defendant's right to a fair trial. *State v. Ramey*, 721 N.W.2d 294,

300 (Minn. 2006). We will reverse a conviction if prosecutorial error, considered in light of the whole trial, impaired the defendant's fair-trial rights. *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006).

If the defendant failed to object to the prosecutorial misconduct, a new trial will be granted only if the misconduct meets the requirements of the plain-error doctrine. *Ramey*, 721 N.W.2d at 299. The plain-error doctrine has three components: an error must occur, the error must be plain, and the error must affect the defendant's substantial rights. *Id.* at 302. An error is plain if "it was clear or obvious," which usually means that it "contravenes case law, a rule, or a standard of conduct." *Id.* If the error is clear or obvious, the state then bears the burden of showing that the error does not affect substantial rights. *Id.* The state must show that there was no reasonable likelihood that the misconduct would have had a significant effect on the jury's verdict. *Id.*

First, Dweh argues that the state committed prosecutorial misconduct when it asked about the officer's prior contact with Dweh, thereby suggesting that Dweh has a criminal record. Comments elicited from witnesses that suggest a defendant has a criminal record are not admissible without complying with the procedures required in *State v. Spreigl*, 272 Minn. 488, 496-97, 139 N.W.2d 167, 173 (1965). If the prosecutor improperly elicits evidence implying that the defendant has a prior record, the conduct may result in reversal. *State v. Richmond*, 298 Minn. 561, 562-63, 214 N.W.2d 694, 695-96 (1974) (per curiam). Looking carefully at the officer's prior-contact testimony leads us to conclude that the state did not commit prosecutorial misconduct by asking about prior contact with Dweh.

The officer testified that he had been to Dweh's residence and that he had also seen him on May 3. The prosecutor then asked, "Now, when you saw him at 7:00 p.m. the previous evening on May 3, was the defendant bald[,]" and the officer replied, "no." None of this testimony referred to any prior incarcerations or arrests. Dweh admitted that he shaved his head before being arrested in the early hours of May 4. The officer's testimony only serves to further explain the discrepancy between ADH's description of the robber and the photo taken at the time of the arrest. It also corroborates other evidence that Dweh tried to conceal his involvement in the crime. The prior-contact testimony did not affirmatively suggest that Dweh had a criminal record or had ever been arrested. Furthermore, it was relevant to whether Dweh committed the robbery and eliciting it was not an error. *See State v. Halverson*, 381 N.W.2d 40, 43 (Minn. App. 1986) (noting that references to defendant's incarceration were relevant to caller's identity in terroristic-threats case because calls stopped during his incarceration), *review denied* (Minn. Mar. 21, 1986). No prosecutorial misconduct occurred during the officer's direct examination.

Second, Dweh contends that the state committed prosecutorial misconduct during closing argument by suggesting that he and defense counsel colluded to tailor his testimony to the evidence. When reviewing closing arguments, we examine them "as a whole rather than focusing on particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005) (quotation omitted).

Dweh's claim of prosecutorial misconduct in closing argument rests on the prosecutor's following statements:

> Now [defense counsel] is a smart man and he's seen the evidence in this case and we know from the defendant he's seen the police reports and the statements, too. And it is the defendant who crafted a defense with his testimony. The defendant was crafty enough to admit a crime he can't possibly deny, theft, in order to avoid the greater offense of robbery. Don't you be fooled. There is one truth in this case and it's that the defendant robbed [ADH]. And what the defendant didn't admit in his testimony, the use of a weapon, force, the threat of force, the evidence and common sense fills in.

The record is unclear on the reason that the prosecutor made these comments. In its brief, the state argues that the prosecutor was attempting to refute the defense counsel's "earlier suggestion that [Dweh] could not, in fact, be tailoring his testimony." It is well established, however, that a prosecutor may not suggest that the defendant and defense counsel used their access to the evidence to tailor the defendant's testimony without definitive proof of these actions. *See Swanson*, 707 N.W.2d at 657-58 (rooting prohibition of this type of statement in defendant's fundamental right to confront evidence against him); *State v. Ellert*, 301 N.W.2d 320, 323 (Minn. 1981) (noting that suggestion of collusion between defense counsel, defendant's attorney in a civil action, and defendant was error, but corrective instruction cured error); *Laughnan v. State*, 404 N.W.2d 326, 331 (Minn. App. 1987) (noting that prosecutor's comments about defendant devising his alibi were improper but harmless), *review denied* (Minn. June 9, 1987).

Despite the state's plain error, we conclude that it has met its burden of showing that there was no reasonable likelihood that the misconduct would have a significant effect on the verdict and, therefore, did not affect Dweh's substantial rights. ADH

identified Dweh in a photo array and provided a detailed description of a robbery, not a theft. He described the specific type and color of the knife used to execute the robbery. Dweh's niece saw Dweh with a check that had the word "Hopkins" on it. The surveillance tape places Dweh at the robbery, and he admitted to theft. The police found a red-handled knife in the residence where Dweh rented a room. Although the police did not find the knife in his room, Dweh had ample time to hide the knife while the police obtained a search warrant. Dweh admitted using that time to alter his appearance and flush the stolen check down the toilet. A jury could reasonably conclude that he had also removed the knife from his room.

All of this evidence demonstrates that there is no reasonable likelihood that the prosecutor's few improper references in its extensive closing argument would have had a significant effect on the jury finding Dweh guilty of robbery rather than theft. Because the plain-error doctrine's third prong is unmet, Dweh is not entitled to a new trial.

Affirmed.