STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2149

State of Minnesota,
Respondent,

vs.

Stanton Aurelius Williams,
Appellant.

Filed December 22, 2009
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-08-26401

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

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

Marie L. Wolf, 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 Shumaker, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

WORKE, Judge

Appellant challenges his first-degree aggravated robbery conviction, arguing that (1) the district court abused its discretion by refusing to instruct the jury on a lesser-

included offense, (2) the prosecutor committed misconduct by eliciting irrelevant character evidence and asking the jury to "do the right thing," and (3) the district court impermissibly enhanced his sentence when the jury did not find that the offense was more substantial and compelling than a typical first-degree robbery. We affirm.

D E C I S I O N

Lesser-Included-Offense Jury Instruction

Appellant Stanton Aurelius Williams was convicted of first-degree aggravated robbery. He argues that the district court abused its discretion by refusing to instruct the jury on fifth-degree assault. "[W]e review the denial of a requested lesser-included offense instruction under an abuse of discretion standard." *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005). When the "evidence warrants an instruction, the [district] court must give it." *Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986). Failure to give a lesser-included-offense instruction is grounds for reversal if the defendant is prejudiced. *Id.* Prejudice exists when there was a rational basis to convict on the lesser offense and acquit on the greater offense. *Id.*

In considering whether to give a lesser-included-offense instruction, the district court must determine whether (1) the offense is a lesser-included, (2) the evidence provides a rational basis for a conviction on the lesser offense, and (3) the evidence provides a rational basis for an acquittal on the greater offense. *Id.* A lesser offense is included if it is impossible to commit the greater offense without committing the lesser. *State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986). In determining whether an offense is a lesser-included, the court looks at the elements of the offense, not the facts of the

particular case. *Id.* If the offense is a lesser-included, the court must then determine whether the evidence provides a rational basis for a conviction on the lesser offense and an acquittal on the greater offense. *Bellcourt*, 390 N.W.2d at 273. "[P]roof of the elements which differentiate the two crimes must be sufficiently in dispute so that a jury may make this distinction." *Id.* (quotation omitted). The district court must view the evidence as a whole in the light most favorable to the party requesting the instruction. *Dahlin*, 695 N.W.2d at 598 (requiring the district court to view the evidence in the light most favorable to the requesting party); *State v. Griffin*, 518 N.W.2d 1, 3 (Minn. 1994) (requiring the district court to view the evidence as a whole). Under this examination, the district court is not permitted to weigh the evidence or make credibility determinations. *Dahlin*, 695 N.W.2d at 598.

Lesser-Included Offense

The district court determined that fifth-degree assault was not a lesser-included offense of first-degree aggravated robbery. The state, however, concedes that fifth-degree assault is a lesser-included offense, and we agree.

This court has held that fifth-degree assault is a lesser-included offense of simple robbery. *State v. Stanifer*, 382 N.W.2d 213, 220 (Minn. App. 1986). The elements of simple robbery include, the defendant (1) took personal property from the victim knowing that he was not entitled to it and (2) used force or the threat of imminent force in order to take and carry away the property. 10 *Minnesota Practice*, CRIMJIG 14.01, 14.02 (2006). To sustain a conviction for first-degree aggravated robbery, the evidence must show that the defendant (1) took personal property from the victim knowing that he

was not entitled to it; (2) used force or the threat of imminent force in order to take and carry away the property; and (3) was armed with a dangerous weapon or with an item used or fashioned in a manner to lead the victim to reasonably believe that the item was a dangerous weapon, or inflicted bodily harm. 10 *Minnesota Practice*, CRIMJIG 14.03, 14.04 (2006). Thus, first-degree aggravated robbery is a simple robbery with the added element of either a dangerous weapon or the infliction of bodily harm. Because fifth-degree assault is a lesser-included offense of simple robbery, and simple robbery is a lesser-included offense of first-degree aggravated robbery, fifth-degree assault is a lesser-included offense of first-degree aggravated robbery. The next step is to determine whether the evidence provides a rational basis for a conviction on the lesser offense and an acquittal on the greater.

Rational Basis for a Conviction on the Lesser Offense

Appellant was charged with first-degree aggravated robbery of M.M. Appellant and M.M. met each other at the apartment of appellant's girlfriend, who is M.M.'s sister-in-law. When M.M. was leaving, appellant asked M.M. if he planned to return for a barbeque. M.M. agreed to return, and appellant asked him to chip in money. M.M. pulled money out of his pocket that he had folded together with a twenty dollar bill on top, a ten, a five, and several singles. M.M. handed appellant a five dollar bill. Appellant looked at M.M.'s money and stated: "Oh, you're banked up. You can give me [] five dollars." M.M. told his wife that he met appellant and described him as "gutter." M.M.'s wife was upset when she heard that appellant asked for money because her sister often visited her home and she never asked for money for food.

When M.M. returned for the barbeque, his sister-in-law told him that appellant wanted to talk to him. The men went outside, and appellant started a conversation with M.M. but almost immediately punched M.M. in the face. Instantaneously, someone hit M.M. from behind. M.M. fell to the ground and was attacked by appellant and three other men. Appellant put his hand into M.M.'s pocket and pulled out his money and cell phone, telling M.M., "[i]t's about that five dollars." A vehicle pulled up and the assailants fled. Officers arrived, and M.M. reported that appellant and a group of men assaulted him and that appellant robbed him. Officers interviewed appellant, who admitted that he punched M.M., but denied involvement in the group attack. Because appellant admitted that he punched M.M., the evidence provides a rational basis for a fifth-degree assault conviction. *See* Minn. Stat. § 609.224, subd. 1(2) (2008) (providing that fifth-degree assault includes the intentional infliction of bodily harm).

Rational Basis to Acquit on the Greater Offense

Appellant argues that there was a rational basis for the jury to acquit on the first-degree aggravated-robbery charge because there were no eyewitnesses and the allegedly stolen items were never recovered. However, even viewing the evidence in the light most favorable to appellant, the evidence does not provide a rational basis for an acquittal on first-degree aggravated robbery.

The first officer to respond testified that M.M. immediately told him that "the guy that was up in the apartment," reached into his pocket and pulled out his money and cell phone. The officer testified that M.M. was positive that appellant robbed him. The lieutenant who investigated the robbery testified that M.M. knew the girlfriend of the

suspect. The lieutenant testified that he interviewed appellant, who admitted that he was upset with M.M and that he punched him two times. He also testified that each time he spoke with the victim, M.M. was very clear about appellant's involvement. Thus, two officers testified that M.M. was certain that appellant robbed him.

M.M. testified that appellant robbed him. He testified that appellant was the only person among the assailants who saw M.M. pull money out of his pocket that day. Appellant put his hand into the exact pocket where M.M. had put his money and cell phone. M.M. testified that during the attack, appellant kept saying that it was because of the "five dollars." One eyewitness testified that one of the attackers was wearing a white T-shirt. M.M. testified that appellant was wearing a white shirt. Another witness testified that she saw all four assailants leave in a red or maroon colored car. M.M. testified that earlier in the day, appellant left in a burgundy or maroon colored car.

Appellant testified that he punched M.M. because he was angry. Appellant claims that he then left with another man. As appellant was leaving, he looked back and saw M.M. being attacked by a group of men. He told the driver of the car to stop and he got out and walked toward M.M. in order to stop the attack. The group scattered, but when appellant returned to the vehicle, the group resumed attacking M.M. Appellant testified that he called his girlfriend and told her to call 911. But there were no 911 calls made by appellant's girlfriend. Thus, one element of appellant's testimony was shown to be inaccurate because presumably his girlfriend would have called 911 if appellant told her that M.M. was being attacked.

The jury found that appellant committed the crime as part of a group of three or more people who all actively participated in the crime. If the jury believed appellant's testimony and disbelieved all of the state's evidence, it would not have found that appellant committed the crime with others. Therefore, appellant was not prejudiced, because the evidence did not provide a rational basis to acquit on the first-degree aggravated-robbery charge. The district court did not abuse its discretion by refusing to instruct the jury on the lesser-included offense.

Prosecutorial Misconduct

Appellant next argues that the prosecutor committed misconduct by eliciting irrelevant character evidence and asking the jury to "do the right thing." Appellant did not object to the alleged misconduct. Generally, this court will not consider unobjected-to error. *State v. Darris*, 648 N.W.2d 232, 241 (Minn. 2002). We will review unobjected-to error only if it constitutes plain error affecting substantial rights. Minn. R. Crim. P. 31.02. To establish plain error, appellant must show: (1) error, (2) that was plain, and (3) which affected his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the three prongs are met, we then assess whether the error should be reviewed to ensure fairness and the integrity of the judicial proceedings. *Id.* When the claimed error involves prosecutorial misconduct, the burden shifts to the state "to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Character Evidence

Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Minn. R. Evid. 404(a). But all relevant evidence is admissible with certain exceptions. Minn. R. Evid. 402. "Relevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more [or less] probable than it would be without the evidence." Minn. R. Evid. 401.

Appellant contends that it was improper for the prosecutor to question him about living in a halfway house and consuming alcohol. On direct examination, appellant's attorney asked him about the barbeque. Appellant stated that he initially did not plan a barbeque but he had a friend over "who came through the program [he] was in." Appellant testified that his friend from the "program" invited two other men whom he knew "real well from the place, too." Later, appellant testified that when he was cooking he was "drinking a few beers." Appellant testified that after he punched M.M. he went to the store to get "some beer" because they "drank the beer."

On cross-examination, appellant testified that he was upset with M.M. because M.M. came to his house and made trouble. The prosecutor asked appellant if it was his home, and appellant stated that it was more his home than it was M.M.'s. The prosecutor stated, "You told [the] lieutenant [] that you hadn't even moved in there, that you were living in a halfway house." Later the prosecutor asked about the other men who were at the apartment and why appellant told the lieutenant that he did not know their names. The prosecutor asked: "And [the lieutenant] said, 'Well, what do you mean you don't

know their names, you've been living with them at a halfway house?'" The prosecutor then asked if it was a halfway house for chemical dependency. Appellant responded affirmatively. The prosecutor asked if the chemical-dependency treatment "took," considering appellant testified that he had been drinking beer. Appellant replied that he stopped doing drugs, but felt that it was fine to drink beer.

While it is improper for a prosecutor to ask questions calculated to elicit or insinuate inadmissible and highly prejudicial answers, a defendant may open the door to otherwise improper character-evidence inquiry by presenting a picture of himself at trial. *See State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994) (stating that a prosecutor may not intentionally elicit inadmissible character evidence); *State v. Goar*, 295 N.W.2d 633, 634-35 (Minn. 1980) (stating that evidence of bad acts otherwise inadmissible may be admissible when a defendant testifies about his good acts); Minn. R. Evid. 405(a). The prosecutor did not commit prejudicial misconduct because appellant raised the topics during his direct examination, and it was relevant evidence to show how appellant knew the other men and appellant's ability to recall events after he had been drinking alcohol. *See State v. Blair*, 402 N.W.2d 154, 157 (Minn. App. 1987) (stating that limited use of testimony regarding drinking alcohol was allowed in order to provide the jury with factual background).

Even if the prosecutor committed misconduct, appellant was not prejudiced because misconduct affects substantial rights only if there is a reasonable likelihood, after considering the strength of the evidence against the defendant and the pervasiveness of the improper suggestions, that the absence of misconduct would have had a significant

effect on the jury's verdict. *State v. Davis*, 735 N.W.2d 674, 681-82 (Minn. 2007). There is no reasonable likelihood that hearing that appellant lived in a halfway house and consumed beer had a significant effect on the jury's verdict.

"Do the Right Thing"

In closing remarks, the prosecutor stated:

> You know what this is about, folks? It's about justice. I am asking you for just a verdict, that's it. It's not that hard. It is that important, but it's not that hard. We want a just verdict. We want you to go back there and *do the right thing*. We want you to evaluate this evidence and take all the time you need to do it, because it is that important. And when you're done evaluating it and you listen to your own guts, what does it tell you?

(Emphasis added.) In *State v. Powers*, the prosecutor asked the jury to "do the right thing," and the supreme court concluded that it was not reversible misconduct. 654 N.W.2d 667, 679 (Minn. 2003). Reading this statement in context shows that the prosecutor asked the jury to evaluate the evidence, rely on their instincts, and to return a just verdict. *Powers* dictates that the prosecutor's do-the-right-thing statement neither inflames the jury's passions nor asks them to look beyond the parameters of the case. *Id.* Therefore, the prosecutor did not commit reversible misconduct.

Sentencing Enhancement

The jury found that appellant committed the offense with three or more active participants. *See* Minn. Sent. Guidelines II.D.2.b (10) (stating that an aggravating factor exists when "the offender committed the crime as part of a group of three or more persons who all actively participated in the crime"). Based on this finding, the district

court sentenced appellant to 72 months in prison, which was an upward departure from the presumptive sentence. Appellant argues that the district court abused its discretion by enhancing his sentence. A district court may depart from the presumptive sentence if "substantial and compelling" circumstances have been proved beyond a reasonable doubt. Minn. Sent. Guidelines II.D; *Griller*, 583 N.W.2d at 744. The decision to depart is reviewed under the abuse-of-discretion standard. *Griller*, 583 N.W.2d at 744. In general, an upward departure is not an abuse of discretion if the conduct involved was significantly more serious than the conduct that ordinarily occurs in the commission of a particular crime. *State v. Rasinski*, 472 N.W.2d 645, 649 (Minn. 1991).

Although the jury found that appellant committed the crime as part of a group of three or more who all actively participated in the crime, he claims that the jury was also required to find that this factor made the offense more substantial and compelling than a typical offense. The aggravating factor made the crime more substantial and compelling than a typical offense; thus, the jury was not required to make an additional finding. And the record supports the finding that the offense was more substantial and compelling than a typical first-degree aggravated robbery. The victim tried to protect himself from assaults from four individuals, which made it more difficult for him to protect himself and escape. This increased the likelihood that he would suffer more severe injuries than if he was attacked by only one individual. The district court did not abuse its discretion in enhancing appellant's sentence based on the jury finding of an aggravating factor.

Affirmed.