STATE OF MINNESOTA
IN COURT OF APPEALS
A09-82

State of Minnesota,
Respondent,

vs.

Charles Lynch Pettis,
Appellant.

Filed January 19, 2010
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 27-CR-07-129575

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Johnson, Judge; and Crippen, 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 his conviction for aiding and abetting first-degree, aggravated robbery and second-degree burglary, Charles Pettis challenges the district court's admission of other-crime evidence and denial of a jury instruction on receiving stolen property as a lesser-included offense. We conclude that the district court did not abuse its discretion in instructing the jury or in admitting evidence of Pettis's past robberies and that it was not reversible error to admit evidence that two cars used in conjunction with the crimes were stolen. We also conclude that the arguments in Pettis's supplemental pro se brief on jury selection, jury instruction, and sufficiency of the evidence do not present grounds for reversal. We therefore affirm.

F A C T S

A jury found Charles Pettis guilty of aiding and abetting first-degree, aggravated robbery for his involvement in the forceful theft of a purse from a woman who was injured in the process. The jury also found him guilty of aiding and abetting second-degree burglary for entering the same woman's apartment and stealing her belongings while she was hospitalized for her injuries. Two codefendants were involved in the incidents.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Neither the woman who was robbed nor another eyewitness could positively identify Pettis as the robber, and his connection to both crimes was the major issue at trial. A codefendant testified to Pettis's involvement in both crimes. Another witness testified that he saw the car used in the robbery a block from Pettis's house and watched the driver get out of the car and enter the back of Pettis's house. Items stolen from the woman's house were found in Pettis's home, in Pettis's pockets, and in the possession of two of his siblings. Police found other stolen items in a car that also contained a cigarette pack with Pettis's fingerprint and a jacket with his cell phone.

The district court excluded part of the state's *Spreigl* evidence, but admitted, over Pettis's objection, the *Spreigl* testimony of two women whose purses Pettis had stolen within the past fourteen months. The state also introduced evidence that both the car used in the robbery and the one used in the burglary were stolen, which was not objected to at trial. Pettis requested a jury instruction on receiving stolen property, arguing that it is a lesser-included offense of burglary predicated on theft. The district court disagreed and denied the motion.

The jury found Pettis guilty of both crimes. In this appeal from conviction, Pettis challenges the admission of the *Spreigl* and stolen-car testimony and the denial of his jury-instruction motion. In a supplemental, pro se brief, Pettis contends that his conviction should be reversed based on jury-selection and jury-instruction errors as well as insufficient corroboration of accomplice testimony.

D E C I S I O N

I

Evidence of other crimes, referred to as *Spreigl* evidence, is inadmissible as proof of a person's character or to show that the person acted in conformity with that character. Minn. R. Evid. 404(b); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). But *Spreigl* evidence may be admitted to establish "motive, intent, absence of mistake, identity, or a common scheme or plan." *State v. Asfeld*, 662 N.W.2d 534, 542 (Minn. 2003). Five requirements must be met, however, to admit the *Spreigl* evidence. *See* Minn. R. Evid. 404(b); *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006) (listing five requirements). We review the admission of *Spreigl* evidence for abuse of discretion. *Ness*, 707 N.W.2d at 685. If abuse of discretion is shown, the defendant must also show prejudice. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Pettis argues that two of the necessary five requirements for admission of *Spreigl* evidence were not met: the requirement that evidence must be relevant and material to the charged offense and the requirement that the probative value outweighs any prejudicial effect. The state argues that the *Spreigl* evidence was relevant to prove identity through a common scheme or plan and that the evidence was not unduly prejudicial.

The first *Spreigl* witness testified that she parked her car in a parking garage near her work and was walking through the parking area toward her office at 7:30 a.m. when she noticed Pettis walking in front of her. The witness said that Pettis turned around, put his arm through the strap of her bag, and threatened her when she did not immediately let

go. She testified that after she let Pettis have her purse, she watched him get into a car in which another man was waiting and drive away.

The second *Spreigl* witness stated that she was returning to her apartment about midnight and noticed a car with two people backing into a parking spot. She testified that she saw Pettis coming toward her as she walked to the door of her building and that when she tried to walk faster Pettis got in front of her, pointed a gun at her, and told her to give him her purse. The witness said she dropped her purse and Pettis picked it up and returned to the car that she had noticed earlier.

To show a common scheme, the other act must be markedly similar to the charged offense. *Ness*, 707 N.W.2d at 688. The closer in time, place, or modus operandi the other act is to the charged offense the greater the relevance and probative value. *Id.* In significant respects the *Spreigl* evidence admitted is similar in modus operandi to the robbery charged. Pettis and an accomplice parked in a lot. Pettis targeted women as they walked from their cars through the parking area and threatened to use force to take their purses. Pettis then returned to the car where an accomplice was waiting and drove away. Also, the robberies took place within fourteen months of the charged robbery and within the Twin Cities metropolitan area. *See State v. Clark*, 738 N.W.2d 316, 346 (Minn. 2007) (holding that prior act within same metropolitan area was sufficiently close in place). The record supports the district court's conclusion that these acts were markedly similar and sufficiently close in time and place to be relevant to show identity through a common scheme or plan.

In weighing the probative and prejudicial value of the evidence, the district court noted that identity is a "seriously contested issue in this case" and that the prejudicial effect of the evidence could be mitigated by specific instructions on the permissible use of the evidence. The evidence of Pettis's past robberies was highly probative of his involvement in the charged robbery and was needed to help corroborate the accomplice testimony. *See Ness*, 707 N.W.2d at 690 (stating need for evidence can be considered in weighing prejudice against probative value). The probative value of the evidence outweighed the risk of unfair prejudice, and the district court did not abuse its discretion in admitting the testimony of Pettis's past purse robberies.

II

Pettis challenges the testimony offered by several police officers and the codefendant that the cars used to commit the robbery and the burglary were stolen. Pettis did not object to this testimony at trial. Generally, the failure to object to the admission of evidence constitutes a waiver of the issue on appeal. *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). But under the plain-error doctrine, we may consider the evidentiary issue if there is error that is plain and that affects the defendant's substantial rights. *Id.* at 685.

Although evidence of other crimes or acts is generally inadmissible, when "two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the res gestae, [evidence of the other offense] is admissible." *State v. Wofford*, 262 Minn. 112, 117-18, 114 N.W.2d 267, 271 (1962). This evidence is often referred to as

"immediate-episode evidence." *State v. Riddley*, ___ N.W.2d ___, ___, 2009 WL 4079147, *6 (Minn. Nov. 25, 2009). To qualify as immediate-episode evidence, however, there must be "a close causal and temporal connection between the prior bad act and the charged crime." *Id.*

A different car was used to commit the robbery than the one used to commit the burglary. Three different police officers and Pettis's codefendant testified that both cars were stolen. These witnesses did not testify that Pettis himself stole the cars, which makes this evidence somewhat distinct from other cases that address immediate-episode evidence. But the codefendant testified that Pettis directed the disposition of one of the cars and controlled the keys for the other car, creating a strong inference that Pettis was involved in their theft. The circumstances surrounding the cars differ and we analyze the evidence of each auto theft separately.

The record indicates that the car used in the robbery had been stolen three days earlier, making any temporal connection attenuated at best. *See Riddley*, ___ N.W.2d ___, ___, 2009 WL 4079147, at *7 (requiring "close" temporal and causal connection); *but see State v. Nunn*, 561 N.W.2d 902 (Minn. 1997) (admitting evidence of kidnapping as immediate-episode evidence despite its occurrence more than one month earlier). The causal connection is also weak. The state did not introduce evidence that the car was stolen for the purpose of committing or concealing the robbery or that the two crimes were committed in connection with one another, aside from the fact that the car was the means of driving to and from the robbery. *See Riddley*, ___ N.W.2d ___, ___, 2009 WL 4079147, at *7 (holding that robbery committed fifteen minutes before and within one

block of charged crime was not immediate-episode evidence for lack of causal connection); *State v. Fardan*, 773 N.W.2d 303, 316 (Minn. 2009) (holding that evidence of offenses committed later in same night of charged crime were not immediate-episode evidence because of lack of causal connection). Whether or not the evidence implicated Pettis as the one who stole the car, the car's status was not a necessary part of the state's proof. *See State v. Reed*, 737 N.W.2d 572, 586 (Minn. 2007) (emphasizing centrality of bad act evidence to proving crimes charged regardless of "whether or not [it was] evidence of criminality by itself"). The theft of the car and the robbery in which it was used lack a causal and temporal connection, consequently, we conclude that the testimony about the car's status as stolen was admitted in error.

Having determined that it was error to admit evidence that the car used in the robbery was stolen, we address whether the error requires reversal. An error is "plain" if it was "clear" or "obvious." *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). An error affects substantial rights if there is a reasonable likelihood that the error substantially affected the verdict. *State v. Smith*, 582 N.W.2d 894, 896 (Minn. 1998). Regardless of whether the error was clear or obvious, the record shows that the stolen-car testimony did not substantially affect the jury's verdict. The evidence connecting Pettis to the robbery through the car, his prior similar robberies, and the codefendant's testimony was strong. And, significantly, the jury returned with two questions during their deliberations. Those questions centered on the legal implications of certain actions and states of mind that related to fact finding. The questions demonstrate that the jury was focused on whether the elements of each crime was proved beyond a reasonable doubt, not evidence that was

related to the auto theft or other peripheral issues that would be inappropriate for consideration. In light of the other evidence tying Pettis to the robbery, we conclude that the stolen-car evidence did not likely substantially affect the verdict.

When applied to the car used to commit the burglary, the first prong of the plain-error test, whether the district court erred in admitting evidence of the stolen-car status, presents a closer question. Again, the state did not introduce evidence that the car was stolen for the purpose of committing the burglary or to show that the two crimes were connected. *See Riddley*, ___ N.W.2d ___, ___, 2009 WL 4079147, at *7 (requiring close causal connection). But items stolen from the woman's home as well as Pettis's cell phone and a cigarette pack with his fingerprint were found in this car. *See id.* (recognizing that finding evidence of charged crime at site of other offense might show causal connection required for immediate-episode evidence). And this testimony was provided as part of the state's explanation for how this car became part of the burglary investigation. *See Wofford*, 262 Minn. at 118, 114 N.W.2d at 271 (stating that "the rule excluding evidence of the commission of other offenses does not necessarily deprive the state of the right to make out its whole case against the accused . . ."). For these reasons we conclude that admission of this evidence was not error. And, in any event, admitting the testimony did not likely substantially affect the verdict for the same reasons that the other stolen-car evidence did not likely affect the verdict. The admission of evidence that both cars were stolen was not plain error and does not require reversal.

III

We review the denial of a lesser-included-offense instruction under an abuse-of-discretion standard. *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005). But if the evidence warrants a requested lesser-included-offense instruction, the district court must give it. *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005). A lesser-included-offense instruction is warranted if the lesser offense is included in the higher charge, the evidence provides a rational basis for acquitting the defendant of the offense charged, and the evidence also provides a rational basis for convicting the defendant of the lesser-included offense. *Dahlin*, 695 N.W.2d at 595.

When deciding whether a lesser-included-offense instruction is warranted, district courts cannot weigh conflicting evidence or make witness credibility determinations. *Hannon*, 703 N.W.2d. at 510. In determining whether an offense is a necessarily included offense, reviewing courts must look at the elements of the offense rather than the facts of the particular case. *State v. Coleman*, 373 N.W.2d 777, 780-81 (Minn. 1985). "A lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former." *State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986). We review the record in the light most favorable to the requesting party to determine whether the district court abused its discretion in refusing the instruction. *Hannon*, 703 N.W.2d at 510.

Pettis was charged with aiding and abetting second-degree burglary. The elements of this charge are: (1) intentionally aiding another person in (2) entering a dwelling without the consent of the owner (3) and committing a crime or having the intent to

commit a crime in the dwelling. Minn. Stat. §§ 609.582, subd. 2(a), .05, subd. 1 (2006). A person is guilty of receiving stolen property if the person (1) receives, possesses, transfers, buys, or conceals stolen property (2) knowing or having reason to know the property was stolen. Minn. Stat. § 609.53 (2006); 10 *Minnesota Practice* CRIMJIG 16.48 (2006).

Pettis asserts that he was charged with burglary by committing theft, not merely intending to commit theft. He therefore argues that receipt of stolen property, which can be a lesser-included offense of theft, must also be a lesser-included offense of burglary. Because burglary can be proved without proving the completion of a crime inside the building, Minnesota courts have held that "[t]heft is neither a lesser degree of burglary nor a crime *necessarily* proved upon proof of burglary." *State v. Minton*, 276 Minn. 213, 215, 149 N.W.2d 384, 386 (1967); *see State v. Williams*, 403 N.W.2d 322, 324-25 (Minn. App. 1987) (holding theft is not lesser-included offense of burglary because actual theft need not occur to be convicted of burglary). As theft is not required to commit burglary, it follows that receiving or possessing stolen property is not required to commit burglary. The district court did not abuse its discretion in refusing to instruct the jury on the crime of receiving stolen property.

IV

In his pro se, supplemental brief, Pettis raises jury-selection, jury-instruction, and sufficiency-of-the-evidence claims. We address each of them and conclude that none provides grounds for reversal.

Pettis argues the district court committed plain error by failing sua sponte to strike a juror Pettis asserts was biased. In a claim of juror bias, an appellant must show that the specific juror was subject to a challenge for cause, that actual prejudice resulted from the failure to dismiss, and that the appellant properly objected. *State v. Stufflebean*, 329 N.W.2d 314, 317 (Minn. 1983); *see also State v. Blais*, 379 N.W.2d 236, 238 (Minn. App. 1985) (affirming conviction because appellant failed to challenge juror for cause, failed to make timely objection, and failed to show prejudice on appeal), *review denied* (Minn. Feb. 14, 1986). But even in the absence of a challenge for cause, juror bias may require reversing a conviction. *See State v. Evans*, 756 N.W.2d 854, 863 (Minn. 2008) ("[B]ecause the impartiality of the adjudicator goes to the very integrity of the legal system, we have recognized that the bias of a single juror violates the defendant's right to a fair trial." (Quotations omitted.)); *State v. Brown*, 732 N.W.2d 625, 629-30 (Minn. 2007) (discussing bias claim when juror was not challenged at trial but admitted racial prejudice).

Racial bias generally falls within the category of actual bias, rather than implied bias. *Brown*, 732 N.W.2d at 629 n.2. Actual bias is a "state of mind on the part of the juror . . . which would prevent the juror from trying the issue impartially and without prejudice to the substantial rights of either party." *Id.* A juror who has an actual bias is subject to rehabilitation and may sit on the jury if he or she agrees to set aside any preconceived notions and make a decision based on the evidence and the court's instructions. *Id.* It might be possible that a juror's bias is so strong that he or she is not

subject to rehabilitation. *Id.*; *but see State v. Williams*, 764 N.W.2d 21 (Minn. 2009) (suggesting that no juror is beyond rehabilitation).

Pettis argues the district court should have struck a white juror who volunteered in a prison literacy program in which nearly all participants were people of color. In voir dire, the juror stated that he was realizing he had some form of racial bias with which he was struggling. The juror also stated that he understood his responsibility as a juror and would treat Pettis impartially, not based on his race. Pettis's attorney did not challenge the juror for cause or use a peremptory strike. The juror's comments about his own prejudice could have represented actual bias but he also volunteered his aspiration to be impartial. Through the juror's discussion of his growing recognition of his own bias, his desire to eliminate it, and the importance of not letting it affect his assessment of Pettis's case, he rehabilitated himself. The record indicates that the juror's bias was not so strong as to be beyond rehabilitation, and we conclude that Pettis was not deprived of a fair trial.

Pettis also claims that his counsel's failure to challenge this juror represented ineffective assistance of counsel. To succeed on his ineffective-assistance-of-counsel claim, Pettis must demonstrate that his counsel's performance "fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998); *see also Strickland v. Washington*, 466 U.S. 668, 687-88, 689, 104 S. Ct. 2052, 2064, 2068 (1984). An attorney's actions are "within the objective standard of reasonableness when [the attorney] provides [the] client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent

attorney would perform under the circumstances." *Voorhees v. State*, 627 N.W.2d 642, 649 (Minn. 2001) (quotation omitted). Actions that are based on trial strategy are within the discretion of trial counsel and will not be second-guessed by appellate courts. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007).

Pettis has failed to show that his counsel's decision not to challenge the juror was unreasonable and independent from a decision on trial strategy. Pettis's lawyer may not have challenged the juror because the lawyer may have perceived the juror as a self-aware and thoughtful person and may have believed that the juror would view the contested issue of identity favorably for Pettis. *See Dunn v. State*, 499 N.W.2d 37, 38 (Minn. 1993) (finding no ineffective assistance when counsel did not strike juror related to witness after counsel questioned juror on issue and had favorable impression of juror); *see also State v. Prettyman*, 293 Minn. 493, 494, 198 N.W.2d 156, 158 (1972) (holding that representation is not ineffective when the record "affords no basis for second-guessing the experienced public defender's jury selection tactics as mistaken or improvident"). Because his counsel's decision not to strike the juror was likely tactical and not unreasonable, Pettis has not established a basis for his ineffective-assistance-of-counsel claim.

Pettis additionally argues that the district court erred by not instructing the jury that the testimony of his codefendant had to be corroborated. An instruction on accomplice testimony must be given in a criminal case in which any witness against the defendant might reasonably be considered an accomplice to the crime. *State v. Shoop*, 441 N.W.2d 475, 479 (Minn. 1989). The district court gave the jury instructions on

accomplice testimony based on the Minnesota Practice Criminal Jury Instructions Guide and specified that the testimony from the codefendant had to be corroborated. Thus, this claim is not supported by the record.

Finally, Pettis argues that there was insufficient evidence to corroborate the testimony of his codefendant. A conviction may not be sustained on uncorroborated accomplice testimony. Minn. Stat. § 634.04 (2008). Evidence corroborating an accomplice's testimony must link the defendant to the crime, but it need not establish a prima facie case of guilt. *State v. Adams*, 295 N.W.2d 527, 533 (Minn. 1980). Corroborating evidence, which may be direct or circumstantial, is viewed in a light most favorable to the verdict. *State v. Johnson*, 616 N.W.2d 720, 727 (Minn. 2000). It may consist of physical evidence connected to the crime, *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990); the testimony of witnesses at trial, *State v. Norris*, 428 N.W.2d 61, 67 (Minn. 1988); inconsistencies or admissions in defense testimony, *State v. Scruggs*, 421 N.W.2d 707, 713 (Minn. 1988); or evidence showing opportunity, motive, proximity, or "association with those involved in the crime in such a way as to suggest joint participation," *Adams*, 295 N.W.2d at 533.

The record includes sufficient circumstantial evidence to corroborate the codefendant's testimony and support the jury's verdict. Both the woman who was robbed and an eyewitness gave physical descriptions of the robber consistent with one another and matching Pettis's appearance. The car used in the robbery was found near Pettis's home and the driver was seen entering Pettis's home. Items stolen from the apartment were found on Pettis and in his siblings' possession. Other stolen items were discovered

in a car that contained a cigarette pack with Pettis's fingerprint on it and a jacket with Pettis's cell phone in it. Additionally, the codefendant's testimony about the robbery was corroborated by the *Spreigl* witnesses who described similar robberies committed by Pettis. This evidence linked Pettis to the robbery and burglary and is sufficient to corroborate the accomplice testimony.

Affirmed.