STATE OF MINNESOTA
IN COURT OF APPEALS
A09-132

State of Minnesota,
Respondent,

vs.

Elliot Lamar-Seccer Pierson,
Appellant.

Filed February 9, 2010
Affirmed as modified
Worke, Judge

Hennepin County District Court
File No. 27-CR-06-025878

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Shumaker, 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 erred by giving a no-adverse-inference jury instruction; (2) the

district court clearly erred by admitting expert testimony; (3) the prosecutor committed misconduct in argument and by eliciting improper testimony; (4) the evidence is insufficient to sustain his conviction; (5) the cumulative effect of the errors requires a new trial; and (6) he received a greater sentence than the one originally imposed, which this court reversed and remanded. Because appellant's sentence was improper, we affirm as modified.

FACTS

On August 28, 2005, officers were dispatched to Ron's Market where they met R.F., a store clerk. R.F. reported that after he closed the store and walked to his car, he observed an individual attempting to open the store doors. The individual approached R.F. carrying a knife and instructed R.F. to give him the money in the store. R.F. unlocked the doors and attempted to close the doors between him and the assailant. The assailant lodged his foot in the doorway, and he and R.F. began to struggle. R.F. removed the knife from the assailant's grip and ran outside. The assailant jumped behind the counter and took an undisclosed amount of money before fleeing.

R.F. returned to the store and noticed a watch lying on the floor where he and the assailant struggled. The watch had not been present before the struggle and it did not belong to R.F. The Minnesota Bureau of Criminal Apprehension (BCA) conducted a DNA analysis, which indicated that the DNA on the watch matched that of appellant Elliott Lamar-Seccer Pierson. Appellant fits the description of the suspect given by R.F.

Appellant was charged with first-degree aggravated robbery. An officer interviewed appellant regarding the robbery. Appellant denied being in the area of Ron's

Market in August 2005, ever being in Ron's Market, and ever robbing Ron's Market. However, appellant had pleaded guilty to a February 2000 first-degree aggravated robbery of Ron's Market. Appellant also denied ever owning a watch. However, the officer reminded appellant that appellant had a watch during a previous jail booking.

In October 2006, another complaint was filed, charging appellant with one count of first-degree aggravated robbery from September 2005, and two counts of first-degree aggravated robbery from November 2005. *See State v. Pierson*, No. A07-0829, 2008 WL 853556, at *1 (Minn. App. Apr. 1, 2008). The parties agreed to submit all four counts (including the August 2005 robbery of Ron's Market) for a stipulated facts trial. *Id.* The district court found appellant guilty of all four counts, and, based on an agreement, the state dismissed two of the counts before sentencing. *Id.* The district court sentenced appellant to 95 months in prison for the August 2005 first-degree aggravated robbery of Ron's Market. The court sentenced appellant to a concurrent 104 months in prison for the September 2005 first-degree aggravated robbery.

Appellant appealed, and this court concluded that appellant's trial-rights waiver was insufficient and reversed and remanded the matter. *Id.* Following remand, appellant decided to have a jury trial for the first-degree aggravated robbery of Ron's Market. The jury found appellant guilty as charged, and the district court sentenced him to 108 months in prison. This appeal follows.

D E C I S I O N

No-Adverse-Inference Jury Instruction

Appellant first argues that the district court erred by instructing the jury that it was to draw no adverse inference from appellant's decision not to testify. Appellant did not request the instruction, but did not object to it. Therefore, his claim is reviewed for plain error. *State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002). Plain error exists when there is a plain error that affected the defendant's substantial rights. *Id.* A "defendant who fails to object to the no-adverse-inference instruction bears a heavy burden of showing that substantial rights have been affected." *State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006).

A court should not instruct the jury about a defendant's right not to testify unless the defendant specifically requests an instruction. *Id.*; *See McCollum v. State*, 640 N.W.2d 610, 617 (Minn. 2002) (stating that a no-adverse-inference instruction regarding a defendant's decision not to testify draws attention to the defendant's silence and should not be given absent a request). If requested, the court or the defendant's counsel must make a record of the defendant's consent that the instruction be given. *Gomez*, 721 N.W.2d at 880.

Appellant's consent is not part of the record and, therefore, giving the instruction was plain error. However, giving the no-adverse-inference instruction without consent is harmless unless the defendant shows prejudice. *Id.* Prejudice exists "when there is a reasonable likelihood that the giving of the instruction would have had a significant effect on the jury's verdict." *Darris*, 648 N.W.2d at 240. In *Gomez*, the supreme court held

that Gomez failed to show that giving the no-adverse-inference instruction was prejudicial because it did not affect the jury's verdict. 721 N.W.2d at 881-82. The primary issue in *Gomez* was the identity of the murderer of an elderly couple. *Id.* at 876, 881. There was no direct evidence connecting Gomez to the murders, but there was circumstantial evidence, including a partial DNA profile and similar crimes committed by Gomez. *Id.* at 881. The court held that, based on the totality of the evidence, it seemed unlikely that the jury would have reached a different verdict; therefore, Gomez failed to show that the error was prejudicial. *Id.*

Here, similar to *Gomez*, the primary issue is the identity of the person who robbed Ron's Market. There is circumstantial evidence linking appellant to the crime, including the DNA profile found on the watch and the evidence that appellant robbed Ron's Market in 2000. It seems unlikely that the jury would have reached a different verdict if the district court had not given the no-adverse-inference instruction. This is especially true because the instruction was only one sentence long. The district court instructed the jury:

> The defendant has the right not to testify. This right is guaranteed by the federal and state constitutions. *You should not draw any inference from the fact that the defendant has not testified in this case.*

(Emphasis added.) Appellant has failed to show prejudice; thus, the district court did not commit plain error affecting substantial rights by giving the no-adverse-inference jury instruction.

Expert Testimony

Appellant also argues that the district court erred by admitting expert testimony that the DNA profile in the case was "unique." The admissibility of expert testimony has generally rested in the discretion of the district court and will not be reversed absent clear error. *State v. Koskela*, 536 N.W.2d 625, 629 (Minn. 1995).

In *State v. Bloom*, the supreme court held that an expert can testify only that there is a DNA "match" and express an opinion as to the relative strength of that match. 516 N.W.2d 159, 168 (Minn. 1994). The court limited an expert's testimony; determining that an expert may not testify that a DNA sample is "unique" to a defendant, that a defendant is the source of the evidence to the exclusion of all others, or express an opinion as to the strength of the evidence. *Id.*

Appellant contends that the expert's testimony exceeded the limits set forth in *Bloom*. The expert in this case was a laboratory analyst from the BCA. The following exchange occurred between the prosecutor and the expert:

> Q: So when you say you're looking for DNA, what are you looking for? What is it? Tell us a little more about that, will you?
>
> A: Well, for DNA profiling what we're doing is we're targeting certain areas of DNA. And we actually target 15 different areas of DNA plus the sex-determining area. And that puts together a DNA profile that is unique to that individual, except in the case of identical twins, because identical twins have the exact same DNA profile.
>
> Q: So when you get a DNA profile, say on me, it would be unique to me?
>
> A: Unless you have an identical twin, yes.

Q: Okay. But if I don't [] it would be unique to me?

A: Yes.

Appellant contends that the testimony was inadmissible because the expert testified that the DNA profile in his case is unique. But appellant mischaracterizes the testimony, because the expert did not testify that *appellant's* DNA profile was unique; rather, she testified regarding the general character of DNA profiling and the unique nature of an *individual's* DNA profile. This testimony was not improper; therefore, the district court did not clearly err in permitting this testimony.

Prosecutorial Misconduct

Appellant next argues that the prosecutor committed misconduct. We will reverse a conviction only when prosecutorial error, considered in light of the whole trial, impaired the defendant's right to a fair trial. *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006).

Objected-to Alleged Misconduct

Appellant objected to one of the alleged instances of prosecutorial misconduct. Appellant objected after the prosecutor stated in opening statement that "the DNA is an exact match to [appellant], and only him." The parties had a discussion at the bench, but the district court did not issue a ruling on the objection. If the defendant objects to the prosecutorial misconduct, a new trial will be granted unless the misconduct was harmless beyond a reasonable doubt. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006).

Prosecutorial misconduct is harmless beyond a reasonable doubt if the verdict was surely unattributable to the error. *Id.*

In *State v. Roman Nose*, the appellant claimed that the prosecutor committed misconduct by suggesting that Roman Nose was the source of the DNA to the exclusion of all others. 667 N.W.2d 386, 401 (Minn. 2003). The prosecutor stated that: "everywhere you look it's the defendant's semen[,]" "[t]he defendant is the only source of the perineal swab. It's only the defendant[,]" "[t]he blood and the semen identified . . . it's only the defendant[,]" "[y]ou are led to the inescapable conclusion that she was raped by [defendant]. Nobody else. There's no other contributor of that semen. Nobody[,]" "[a]nd we know that who raped her also killed her." *Id.* The supreme court held that the prosecutor's statements were not improper because a prosecutor "may present to the jury all legitimate arguments on the evidence, analyze and explain the evidence, and present all proper inferences to be drawn from the evidence." *Id.* at 402.

Here, the prosecutor argued that "the DNA is an exact match to [appellant], and only him." This argument was appropriate because, similar to the arguments in *Roman Nose*, the prosecutor explained the evidence and presented an inference that could be drawn from the evidence. Therefore, the prosecutor did not commit misconduct.

Unobjected-to Alleged Misconduct

Appellant contends that the prosecutor committed misconduct in closing argument by commenting on the DNA evidence, but he failed to object to the alleged misconduct. Unobjected-to prosecutorial misconduct is waived, but may be reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Plain

error exists if there is plain error that affected the defendant's substantial rights. *State v. Washington*, 725 N.W.2d 125, 133 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007). An error is plain if it is clear or obvious, meaning it "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. The defendant bears the burden of demonstrating plain error, but upon satisfying this obligation, the burden shifts to the state to show that the error did not affect the defendant's substantial rights. *Id.* If "the state is unable to meet the burden of showing that there is no reasonable likelihood of a significant effect, the appellate courts then assess whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Washington*, 725 N.W.2d at 133-34 (quotation omitted).

Appellant challenges four of the prosecutor's statements. First, the prosecutor argued, "We are asking you to convict this defendant because the DNA profile . . . from this watch belongs to him. It's his profile, and only the defendant's profile." Second, the prosecutor stated, "And thanks to modern technology, the DNA on the watch gives us the proof we need to find the defendant guilty." Third, the prosecutor argued in rebuttal, "His and only his [DNA] profile [is] on [the watch]. There's no mixture. There's nobody else's DNA on there." Fourth, the prosecutor stated:

> You've been invited to speculate, well, what if he borrowed or gave the watch or the watch moved around to other people? There's no evidence of that. The only evidence is his DNA, and only his, [] on the watch which was left at the scene . . . .
>
> Proof beyond a reasonable doubt. I ask you what reason do you have to doubt that?

Appellant argues that the statements are not appropriate because the prosecutor argued that the DNA profile is unique to appellant. This contention is misplaced for at least two reasons. First, *Bloom* limited an *expert's* testimony regarding the uniqueness of a DNA sample. 516 N.W.2d at 168. Appellant is challenging the *prosecutor's* closing argument, which is not evidence; *Bloom* relates to evidence, not a prosecutor's argument. Second, the prosecutor did not state anything regarding appellant's unique DNA profile. These statements are similar to the statements in *Roman Nose* that the supreme court determined were appropriate because the prosecutor is explaining the evidence and presenting an inference that can be drawn from the evidence. *See* 667 N.W.2d at 402. The prosecutor explained away appellant's theory that the watch was worn by someone other than appellant on the night of the robbery. The prosecutor stated that there is no evidence to support this theory because there was no other DNA profile found on the watch. Appellant has failed to show plain error in the prosecutor's closing argument.

Appellant also argues that the prosecutor committed misconduct by eliciting inadmissible testimony from the BCA expert. Appellant challenges the previously quoted line of questioning, which we have already concluded was appropriate. The expert stated that individuals have a unique DNA profile; the expert did not state that *appellant's* DNA profile was unique, which is what *Bloom* prohibits. *See* 516 N.W.2d at 168 (stating that an expert may not testify that a DNA sample is unique to a defendant). Therefore, the prosecutor did not commit misconduct.

Sufficiency of the Evidence

Appellant also argues that the evidence is insufficient to sustain his conviction. In considering a claim of insufficient evidence, review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jur[y] to reach the verdict which [it] did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that the jury "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). And we will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant claims that the state's circumstantial evidence fails to prove beyond a reasonable doubt that he committed the robbery. "[C]ircumstantial evidence is sufficient to sustain a conviction when all the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt." *State v. Tscheu*, 758 N.W.2d 849, 857 (Minn. 2008) (quotation omitted). The circumstantial evidence need not exclude all inferences other than guilt, just all reasonable inferences. *Id.* Although an appellate court more strictly scrutinizes convictions based solely on circumstantial evidence, such evidence is entitled to as much weight as direct evidence. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994).

The evidence here shows that appellant's DNA profile matched the DNA profile taken from the watch found at Ron's Market. Appellant denied owning or wearing a

watch. But the watch did not belong to R.F. and the watch was found in a location where R.F. and the assailant struggled. The evidence further shows that appellant was wearing a watch when booked on an unrelated offense. Appellant also denied ever being at or robbing Ron's Market. But the evidence shows that in 2000, appellant pleaded guilty to first-degree aggravated robbery of Ron's Market. Further, R.F.'s description of the suspect matches appellant's physical description, and the surveillance footage of the robbery, while grainy, depicts a male matching appellant's description. Therefore, the evidence supports the conviction.

Additional support for sustaining the conviction comes from appellant's alternative hypothesis regarding the watch. Appellant claims that the state failed to show that he was wearing the watch, asserting that "someone else robbed Ron's Market while wearing a watch that happened to have [appellant's] DNA on it, but that person did not leave his DNA on the watch." While there was evidence that an item can be worn and DNA not left behind, there is no evidence of any other person potentially having worn the watch. *See State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (stating that an alternative theory does not justify a new trial if that theory is not plausible or supported by evidence); *State v. Wallace*, 558 N.W.2d 469, 473 (Minn. 1997) (stating that a conviction will not be overturned based on circumstantial evidence on the basis of mere conjecture). Therefore, appellant's alternative theory is not plausible or supported by the evidence; thus, the circumstantial evidence is sufficient to support his conviction.

Cumulative Effect

Appellant argues that the cumulative effect of the errors requires a new trial. Because there is no error, there is no cumulative error.

Sentence

Finally, appellant argues that his sentence is not authorized by law and should be corrected. Appellant contends that after his stipulated facts trial, the district court sentenced him to 95 months in prison, but after this court's remand and jury verdict, the district court increased his sentence to 108 months in prison. In Minnesota, "a court cannot 'impose on a defendant who has secured a new trial a sentence more onerous than the one he initially received.'" *Hankerson v. State*, 723 N.W.2d 232, 241 (Minn. 2006) (quoting *State v. Holmes*, 281 Minn. 294, 296, 161 N.W.2d 650, 652 (1968)).

The state counters that the sentence is proper because the first sentence was not the result of a thoughtful sentencing decision but, rather, was the result of an agreement between the parties. The agreement regarding the initial sentence was that if the district court found appellant guilty of four counts he would be sentenced on only the first two counts (one being the matter at issue here) and the other two counts would be dismissed. The sentencing transcript shows that the district court had discretion in imposing the sentences on the two counts.

We conclude that the 108-month sentence is impermissible based on *Holmes*, but we disagree with appellant that he should receive a 95-month prison sentence. The 95-month sentence initially imposed was to be served concurrently with the 104-month

prison sentence on the second count. Therefore, we modify appellant's sentence to 104 months in prison because that was the actual length of the initial sentence.

Affirmed as modified.