STATE OF MINNESOTA
IN COURT OF APPEALS
A09-523

State of Minnesota,
Respondent,

vs.

Richard Thomas Tessmer,
Appellant

Filed May 4, 2010
Affirmed in part, reversed in part, and remanded
Wright, Judge

Ramsey County District Court
File No. 62-CR-08-4591

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Stephen L. Smith, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Wright, Judge; and Worke, Judge.

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

WRIGHT, Judge

Appellant challenges his convictions of aggravated robbery and possession of burglary or theft tools, arguing that the prosecutor committed prejudicial misconduct

during cross-examination of appellant and that the evidence is insufficient to support his conviction of first-degree aggravated robbery. Appellant also contends that the district court erroneously sentenced him for two offenses arising from a single behavioral incident. We affirm in part, reverse in part, and remand.

FACTS

On June 18, 2008, at approximately 5:30 a.m., I.A. left his apartment and approached his vehicle from the passenger side. When I.A. unlocked the vehicle with his remote control and caused its interior lights to illuminate, he saw a person, later identified as appellant Richard Tessmer, sitting in the driver's seat.

According to I.A., Tessmer held the steering wheel with his left hand while he attempted to use a screwdriver in his right hand to start the ignition. I.A. called 911 on his cell phone and yelled at Tessmer to stop and to leave the vehicle. I.A. approached the driver's-side front door and attempted to open it. But Tessmer opened the door, exited the vehicle, approached I.A, and jabbed the screwdriver in the direction of I.A.'s face and head. Because he was afraid, I.A. backed away from Tessmer, who fled with the screwdriver and a black garbage bag. I.A. chased Tessmer until the 911 operator advised him to stop. The officer who responded to I.A.'s emergency call picked up I.A., and they searched for Tessmer. When they located Tessmer a few blocks away, he dropped the bag and fled. Officers subsequently apprehended Tessmer on Interstate 94.

According to Tessmer's account, he was homeless and earned money by selling items that he stole from vehicles. Prior to his encounter with I.A., Tessmer had been searching unlocked vehicles for cigarettes and items to sell. He had stolen the

screwdriver, several cell phones, a radar detector, and other items before he broke into I.A.'s vehicle. With the screwdriver, Tessmer broke the rear passenger-side window of I.A.'s vehicle and removed the stereo. While exiting the vehicle, Tessmer saw I.A. leave the apartment, which was approximately 25 feet away. When I.A. was approximately ten feet from Tessmer, Tessmer ran. Tessmer denied approaching or assaulting I.A., and he denied attempting to steal I.A.'s vehicle.

Tessmer initially was charged with possession of burglary or theft tools, a violation of Minn. Stat. § 609.59 (2006), and attempted theft of a motor vehicle, a violation of Minn. Stat. §§ 609.52, subd. 2(17), 609.17, subd. 1 (2006). The complaint was amended to add a charge of first-degree aggravated robbery, a violation of Minn. Stat. § 609.245, subd. 1 (2006). Following a three-day jury trial, Tessmer was convicted of first-degree aggravated robbery and possession of burglary or theft tools. He was acquitted of attempted theft of a motor vehicle. The district court imposed concurrent sentences of 108 months' imprisonment for aggravated robbery and 23 months' imprisonment for possession of burglary or theft tools. This appeal followed.

D E C I S I O N

I.

Tessmer argues that the prosecutor committed prejudicial misconduct during Tessmer's cross-examination by asking him whether I.A. was lying during his testimony. Tessmer did not object to the questions on this ground at trial. A defendant who fails to object at trial generally waives the right to appellate review of a prosecutor's conduct. *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997). But under limited circumstances, we

may review claims of prosecutorial misconduct that are raised for the first time on appeal. Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Before doing so, however, there must be a plain error that affects an appellant's substantial rights. *Ramey*, 721 N.W.2d at 299. A plain error is an error that is obvious or that "contravenes case law, a rule, or a standard of conduct." *Id.* at 302. The burden rests with the appellant to demonstrate that plain error has occurred. *Id.*

If plain error is established, the burden shifts to the state to demonstrate that the plain error did not affect the defendant's substantial rights. *Id.* An error affects substantial rights when it was "prejudicial and affected the outcome of the case." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). To determine whether a plain error affects substantial rights, we consider the strength of the evidence against the defendant, the pervasiveness of the improper conduct, and whether the defendant had an opportunity, or made efforts, to rebut the improper conduct. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). If plain error affecting the defendant's substantial rights is established, we assess whether to address the error to ensure the fairness and integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740.

A question intended to elicit testimony from one witness about the credibility of another witness ordinarily is improper because the question is argumentative and has no probative value. *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999) (analyzing "were they lying" questions). But this type of question may be permissible when the defendant "[holds] the issue of the credibility of the state's witnesses in central focus." *Id.* To meet this standard, the defendant's testimony must not merely contradict the witnesses'

testimony. *State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005). So called "were they lying" questions are permissible "only when the defense expressly or by unmistakable insinuation accuses a witness of a falsehood." *State v. Leutschaft*, 759 N.W.2d 414, 423 (Minn. App. 2009), *review denied* (Minn. Mar. 27, 2009).

Although Tessmer contends that he did not hold the issue of I.A.'s credibility in central focus, on multiple occasions during his testimony, Tessmer accused I.A., either expressly or by insinuation, of lying. For example, on direct examination, Tessmer testified as follows:

> Q. Now, you heard [I.A.'s] testimony about his belief that you were trying to steal the actual car itself?
> A. That is not the case. *It's the farthest from the truth.*
> . . . .
> Q. You also heard [I.A.'s] testimony about the interaction between you and him once he exited the building that he was in?
> A. Yes, I did.
> Q. Did you assault [I.A.]?
> A. No, I did not.
> Q. Did you come after him in any way?
> A. That is the farthest thing from being a possibility, stealing that car and stabbing at him. That's not my nature, none of my past reflects that. *That's the farthest from the truth.*

(Emphases added.) This testimony reflects Tessmer's theory of the case—although Tessmer may have stolen items from I.A.'s vehicle, the charges of attempted theft of a motor vehicle and first-degree aggravated robbery are founded on I.A.'s false testimony. Consequently, I.A.'s credibility is the central focus of the case, and Tessmer directly challenged it by unmistakably insinuating that the state's witness was lying. *See Pilot*,

595 N.W.2d at 518 (discussing credibility of state's witnesses as focus of defense's case); *Leutschaft*, 759 N.W.2d at 423 (same).

Tessmer's insinuation that the state's witnesses were giving false testimony continued on cross-examination. When the prosecutor asked Tessmer about the screwdriver that both I.A. and an officer testified Tessmer possessed, Tessmer responded, "I put [I.A.] in a spot to want to think he saw the screwdriver . . . , but I must defend that that's not the truth and not the case." At that point, the prosecutor asked whether I.A. and the officer were lying when they identified the screwdriver as the one Tessmer was carrying in the black bag. Tessmer then expressly accused I.A. of lying in the following exchange:

> Q. Now, he said that you had the black bag when you ran from the vehicle?
> A. As the Lord Jesus Christ as my judge, as I am telling the truth, unfortunately, *I put him in the spot to lie*, and I feel real bad about that. . . .
> Q. So [I.A.] is lying?
> A. I would like to say that, but I'm going to leave that on judgment day to the big judge to judge all judges.
> Q. Well --
> A. *I personally know he is.*

(Emphases added.)

Based on this record of Tessmer's repeated accusations that the state's witnesses were giving false accounts about Tessmer's actions, the standard articulated in *Pilot* and *Leutschaft* clearly has been met. Because a frontal attack on the credibility of the state's witnesses was central to Tessmer's defense, Tessmer's contention that the prosecutor committed misconduct by asking Tessmer "were they lying" questions on cross-

examination is without merit. Tessmer has failed to establish the first prong of the plain-error test for prosecutorial misconduct. He, therefore, is not entitled to relief on this ground.

II.

Tessmer argues that there is insufficient evidence to support his conviction of first-degree aggravated robbery. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis of the record to determine whether the jury reasonably could find the defendant guilty of the offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *Id*. 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, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

"Whoever . . . takes personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person to overcome the person's resistance . . . or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery[.]" Minn. Stat. § 609.24 (2006). "Whoever, while committing a robbery, is armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or

inflicts bodily harm upon another, is guilty of aggravated robbery in the first degree[.]" Minn. Stat. § 609.245, subd. 1.

Tessmer concedes that the state proved that he stole a stereo. But he argues that the state failed to prove that he used force or a threat of force to overcome I.A.'s resistance. Tessmer contends that I.A. would not have chased him if Tessmer had used a threat of force to overcome I.A.'s resistance. This argument, however, does not acknowledge evidence in the record that supports the jury's verdict. I.A. testified that he retreated in fear when Tessmer approached and stabbed at him with the screwdriver. That I.A. initially approached Tessmer does not preclude the jury's determination that Tessmer's threat of force in response temporarily overcame I.A.'s resistance. Because we assume that the jury believed I.A.'s testimony and rejected Tessmer's testimony, there is ample evidentiary support for the jury's verdict.

Tessmer also argues that the state failed to prove that Tessmer possessed a dangerous weapon because, although he ran with the screwdriver in his hand, he did not use it in a threatening manner. A dangerous weapon includes "any device designed as a weapon and capable of producing death or great bodily harm, . . . or other device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm." Minn. Stat. § 609.02, subd. 6 (2006). A screwdriver can be used to produce death or great bodily harm. *See State v. Salazar*, 289 N.W.2d 753, 754 (Minn. 1980) (defendant stabbed victim with screwdriver); *State v. Kastner*, 429 N.W.2d 274, 275-76 (Minn. App. 1988) (defendant pointed scissors and screwdriver at police officer and made threatening statements), *review denied* (Minn.

Nov. 16, 1988). Contrary to Tessmer's account, I.A. testified that Tessmer stabbed at I.A.'s face and head, which caused I.A. to be afraid and back away. Because, when viewing the evidence in the light most favorable to the verdict, the jury reasonably could conclude that Tessmer used an instrument capable of producing death or great bodily harm and that he possessed the requisite intent when doing so, the evidence is more than sufficient to support Tessmer's conviction of first-degree aggravated robbery.

III.

Tessmer next contends that the district court erred by sentencing him for first-degree aggravated robbery and possession of burglary or theft tools because Minnesota law prohibits multiple sentences for offenses arising from a single behavioral incident. A district court's sentencing decision ordinarily entails factual determinations that will not be reversed on appeal unless they are clearly erroneous. *See Effinger v. State*, 380 N.W.2d 483, 488-89 (Minn. 1986). But on established facts, whether multiple offenses are part of a single behavioral incident presents a question of law, which we review de novo. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

Subject to limited exceptions that do not apply here, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2006). Thus, when multiple offenses arise from a single behavioral incident, the district court may sentence for only one offense. *See id.* Section 609.035 protects against exaggerating the criminality of an offender's conduct by making punishment and prosecution commensurate with the offender's culpability. *State v. Secrest*, 437 N.W.2d 683, 684

(Minn. App. 1989), *review denied* (Minn. May 24, 1989). If section 609.035 applies, all multiple sentences, including concurrent sentences, are barred. *State v. Bookwalter*, 541 N.W.2d 290, 293 (Minn. 1995).

Whether two offenses arose from the same behavioral incident depends on the facts and circumstances of the particular case. *State v. Hawkins*, 511 N.W.2d 9, 13 (Minn. 1994). The Minnesota Supreme Court has set forth two tests for this determination. *State v. Johnson*, 273 Minn. 394, 404, 141 N.W.2d 517, 525 (1966). The test to be applied depends on whether the offenses involved are intentional crimes. *Id*. When conducting a single-behavioral-incident analysis for two intentional crimes, Minnesota courts consider whether the conduct (1) shares a unity of time and place and (2) was motivated by an effort to achieve a single criminal objective. *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000); *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997). When the offenses include both intentional and nonintentional crimes, however, the proper inquiry is whether the offenses (1) occurred at substantially the same time and place and (2) arose from "a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment." *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991) (quotation omitted); *Johnson*, 273 Minn. at 404, 141 N.W.2d at 525. This second test substitutes the factor of "single criminal objective" with the singleness of the conduct itself, as measured primarily by the state of mind it manifests. *Johnson*, 273 Minn. at 404, 141 N.W.2d at 525.

Aggravated robbery and possession of burglary or theft tools are both intentional crimes. *See State v. Southard*, 360 N.W.2d 376, 380, 384 (Minn. App. 1985) (analyzing

aggravated robbery as intentional crime). Consequently, we analyze whether the offenses shared a unity of time and place and were motivated by an effort to achieve a single criminal objective. *Williams*, 608 N.W.2d at 841.

In *State v. Scott*, the Minnesota Supreme Court held that a defendant convicted of burglary and possession of burglary tools may be sentenced for only one of the two offenses when a defendant possessed the burglary tools "for the purpose of facilitating the burglary of which he was convicted." 298 N.W.2d 67, 68-69 (Minn. 1980). The defendant in *Scott* allegedly burglarized several cabins in one day. *Id.* at 68. Although he could have been charged in connection with each incident, he was charged with one count of burglary with tools related to one of the cabin invasions, one count of burglary for reentering one of the cabins on the next day, and one count of possession of burglary tools. *Id.* at 68. The *Scott* court stated that, "[i]f it were clear that the charge of possession of burglary tools related to conduct occurring on a different date than the date of the burglary to which the defendant pled guilty," the defendant could have been properly sentenced for both burglary and possession of burglary tools. *Id.* But because the tools were seized when the defendant was caught committing that burglary, "it appears possible that the charge of possession of burglary tools related to the possession which was simultaneous with the burglary to which defendant pled guilty." *Id.*

The facts here are similar to those in *Scott*. Tessmer admitted his involvement in multiple thefts. But he was charged only for his criminal activity involving I.A.'s vehicle. The district court could have sentenced Tessmer for both of his convictions if his possession of burglary or theft tools were related only to the thefts for which Tessmer

was not charged. *See id*. But Tessmer used the screwdriver to facilitate the aggravated robbery for which he was charged, first as a tool to break into the vehicle and remove the stereo and then as a weapon to threaten I.A. and facilitate Tessmer's escape. Tessmer's possession of burglary or theft tools, therefore, shared a unity of time and place with his commission of aggravated robbery. *See Williams*, 608 N.W.2d at 842-43 (analyzing whether offenses share unity of time and place).

As to whether the offenses were motivated by an effort to achieve a single criminal objective, Tessmer used the screwdriver to break into I.A.'s vehicle, testified that he "needed it for the wires" of the stereo he was stealing, and used it to facilitate his escape. A jury reasonably could conclude that Tessmer possessed the screwdriver with the objective of stealing items from I.A.'s vehicle. Tessmer's motivation for committing aggravated robbery shares this objective, namely, to steal items from I.A.'s vehicle. *See* Minn. Stat. § 609.24 (defining simple robbery as knowingly taking personal property to which a person is not entitled). Thus, the two offenses here were motivated by an effort to achieve a single criminal objective.

Because Tessmer's offenses of conviction—aggravated robbery and possession of burglary or theft tools—shared a unity of time and place and were motivated by an effort to achieve a single criminal objective, the offenses arose from a single behavioral incident. Thus, the district court erred by sentencing Tessmer for both offenses. We, therefore, reverse the sentence imposed for possession of burglary or theft tools and remand to the district court with instructions to vacate the sentence imposed for that

offense. *See Gibson*, 478 N.W.2d at 497 (vacating lesser of two sentences when both offenses arose from single behavioral incident).

IV.

For the first time on appeal, Tessmer raises several issues in a pro se supplemental brief, including issues regarding double jeopardy, hearsay, and the Confrontation Clause of the Sixth Amendment to the United States Constitution. Generally, we will not consider issues, including constitutional challenges, that are raised for the first time on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *State v. Kremer*, 307 Minn. 309, 312-13, 239 N.W.2d 476, 478 (1976). Because Tessmer has not presented a basis for departing from the general rule, we decline to address these arguments.

Affirmed in part, reversed in part, and remanded.