STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1749

State of Minnesota,
Respondent,

vs.

Ian Robert Guzzo,
Appellant.

Filed July 13, 2010
Affirmed
Wright, Judge

St. Louis County District Court
File No. 69DU-CR-07-6211

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Melanie Ford, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Bradford Delapena, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Ross, Judge.

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

WRIGHT, Judge

In this appeal from his conviction of aiding and abetting first-degree burglary, appellant argues that (1) the district court abused its discretion by improperly instructing

the jury on liability for the crimes of another, and (2) the prosecutor committed prejudicial misconduct by using other-crime evidence for an improper purpose during closing argument. We affirm.

FACTS

Appellant Ian Guzzo played hockey with W.H. on the Marshall School hockey team during the 2006-07 season. Because Guzzo lived 45 minutes away from the school, W.H.'s parents regularly permitted Guzzo to spend the night in their home after late practices. This arrangement continued until the end of the hockey season in March 2007.

Shortly thereafter, in late spring or early summer 2007, Guzzo told his friend David Schiller about W.H.'s family. At Schiller's request, Guzzo drew a diagram of W.H.'s home, which he gave to Schiller. The diagram indicates the layout of the house, the bedroom used by each family member, and the location of a safe. Guzzo also told Schiller about the family's schedule. On August 30, 2007, Schiller and Jonathan Phipps broke into W.H.'s home through a basement door, threatened W.H.'s mother and nine-year-old brother at gunpoint, and fled after learning that there was no money in the safe. During the investigation, police contacted Guzzo and others suspected of helping Schiller and Phipps to navigate the distinctive floor plan of W.H.'s home. Guzzo admitted to police that he drew the diagram for Schiller.

Guzzo was charged with aiding and abetting first-degree burglary, a violation of Minn. Stat. §§ 609.582, subd. 1(a)-(c), 609.05, 609.11 (2006), and the case proceeded to trial. Schiller and Phipps pleaded guilty to offenses arising from the August 30 home invasion, and significant portions of the transcripts from their respective guilty-plea

hearings were presented to the jury at Guzzo's trial. Guzzo also testified and admitted drawing the diagram for Schiller. But he denied any knowledge of what Schiller intended to do with it. The jury found Guzzo guilty as charged, and the district court imposed a sentence of 57 months' imprisonment. This appeal followed.

D E C I S I O N

I.

Guzzo first argues that the district court abused its discretion by denying his request to supplement the standard jury instruction on liability for the crimes of another. We review a district court's denial of a defendant's requested jury instruction for an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). To warrant reversal on this ground, an appellant must demonstrate both that the district court's decision was erroneous and that the error was prejudicial. *See State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) (explaining analytical framework). A district court has considerable latitude when selecting the particular language for jury instructions. *State v. Kycia*, 665 N.W.2d 539, 542 (Minn. App. 2003). At a minimum, jury instructions must define the offense without materially misstating the law. *Kuhnau*, 622 N.W.2d at 556. We consider jury instructions in their entirety to determine "whether they fairly and adequately explained the law of the case." *Id.* at 555-56.

The pattern jury instruction on liability for crimes of another reads: "The defendant is guilty of a crime committed by another person when the defendant has intentionally aided the other person in committing it, or has intentionally advised, hired, counseled, conspired with, or otherwise procured the other person to commit it." 10

Minnesota Practice, CRIMJIG 4.01 (2006); *see also* Minn. Stat. § 609.05, subd. 1 (providing for criminal liability for a crime committed by another when defendant "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime"). Guzzo objected to the district court's use of the pattern jury instruction, arguing that it did not adequately instruct the jury that the state is required to prove that Guzzo "knew his accomplice was going to commit a crime and intended his presence or actions to further the commission of the crime." The district court overruled Guzzo's objection, denied his request to give an alternate or supplementary instruction, and instructed the jury according to the pattern jury instruction with the added clarification that "[t]he defendant is guilty of a crime committed by another person when *it is proved beyond a reasonable doubt that* the defendant has intentionally aided, advised, hired, counseled, conspired with or otherwise procured the other person to commit it." (Emphasis added.)

Guzzo challenges the district court's decision not to add a separate knowledge element to the pattern jury instruction, citing *State v. Mahkuk*, 736 N.W.2d 675 (Minn. 2007), and *State v. Williams*, 759 N.W.2d 438 (Minn. App. 2009). But both *Mahkuk* and *Williams* are distinguishable. *Mahkuk* involved a district court's deviation from the pattern jury instruction. 736 N.W.2d at 681-82 (district court erred by adding misleading language to pattern instruction). And *Williams* involved the district court's failure to provide an accomplice-liability instruction, such as the pattern instruction, when the instructions on the elements of the offense permitted liability for crimes of another. 759

N.W.2d at 444. Viewed together, therefore, these cases point toward the pattern jury instruction as an appropriate template for jury guidance.

Moreover, a district court may decline to give a requested instruction if "the substance of that request is contained in the [district] court's charge." *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977). And knowledge is a subset of intent. To act intentionally, "the actor must have knowledge of those facts which are necessary to make the actor's conduct criminal and which are set forth after the word 'intentionally.'" Minn. Stat. § 609.02, subd. 9(3) (2006). Knowledge that an accomplice intends to commit a crime is necessary to intentionally aid and abet the commission of the crime. *See State v. Gates*, 615 N.W.2d 331, 337 (Minn. 2000) (explaining that liability for aiding and abetting requires proof that defendant "played a knowing role in the commission of the crime"), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). Because the district court's instructions required a finding of intent, the district court did not erroneously omit a knowledge element.

Nor did the district court abuse its discretion by refusing to separately address knowledge. As *Mahkuk* demonstrates, such an instruction could have been misleading. In *Mahkuk*, the district court effectively understated the state's burden of proof by supplementing the pattern jury instruction with language that merely advised the jury to consider whether the defendant knew of his accomplices' intent, rather than requiring the jury to find that the defendant knew of his accomplices' intent. 736 N.W.2d at 681-82. Here, by contrast, Guzzo requested jury instructions that would have overstated the state's burden by requiring a finding that Guzzo knew of specific facts beyond the scope

of the aiding and abetting statute, such as the date on which Schiller intended to commit the crime or that Schiller intended to commit the crime with Phipps. Indeed, the district court properly sustained an objection to defense counsel's argument to the jury that "you can't have done something months before that then equates to intention, you have to know that that crime is gonna be committed on that day in order for there to be intent." Although a carefully crafted supplementary jury instruction regarding knowledge may have been within the district court's discretion, the decision not to include such an instruction does not constitute an abuse of discretion. Thus, the district court's instruction on liability for crimes of another was legally sound.

II.

Guzzo next argues that the prosecutor committed prejudicial misconduct during closing argument by misusing other-crime evidence. Guzzo objected to the prosecutor's argument on the ground that Guzzo was "not on trial for these other crimes and to specifically refer to it in closing is inappropriate." The state urges us to disregard this objection as insufficient and argues that we must apply a plain-error standard of review. *See State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006) (stating that unobjected-to prosecutorial misconduct may be reviewed for plain error); *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993) (requiring objection to be specific as to grounds for challenge), *review denied* (Minn. Oct. 19, 1993). We are not persuaded. Guzzo's objection was sufficient to permit the district court to address whether the prosecutor was using the evidence for an improper purpose. We, therefore, review Guzzo's claim of prosecutorial misconduct as one of objected-to error.

When reviewing claims of prosecutorial misconduct arising from closing argument, we focus on the closing argument as a whole rather than particular phrases or remarks that "may be taken out of context or given undue prominence." *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000). We will reverse a conviction because of prosecutorial misconduct "only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). For objected-to misconduct, a two-tiered harmless-error test has been employed. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). "For cases involving claims of unusually serious prosecutorial misconduct, there must be certainty beyond a reasonable doubt that misconduct was harmless." *Id*. But for cases involving claims of "less-serious prosecutorial misconduct," we determine whether the misconduct likely played a substantial part in influencing the jury to convict. *Id*. The Minnesota Supreme Court recently observed that it has not determined whether the two-tiered approach should continue to apply in cases involving objected-to prosecutorial misconduct. *State v. Jenkins*, 782 N.W.2d 211, 232 (Minn. 2010) (noting past use of two-tiered approach but stating that it has not been determined whether two-tiered approach should continue to apply); *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (expressly declining to reach issue of whether two-tiered analysis of objected-to prosecutorial misconduct is still viable).

Guzzo argues that the prosecutor used for an improper purpose evidence that Guzzo pawned a stolen ring for Schiller on July 16, 2007. The district court granted Guzzo's pretrial motion to preclude the state's use of this evidence; but based on defense

counsel's direct examination of two of its witnesses, the district court permitted the state to cross-examine two of Guzzo's witnesses about the incident. Guzzo also presented evidence about the incident several times during his case-in-chief. Thus, Guzzo does not challenge the admission of the evidence. Rather, he argues that the prosecutor used the evidence for an improper purpose in the following portion of his argument:

> Do we see any type of concert of action [in the burglary of W.H.'s home], giving information between . . . Guzzo and Mr. Schiller? Yes, we do. They were acting together.
>
> An example of them acting together is also shown—do you remember what they did together, [a] month-and-a-half at the very most, before this home invasion? What are they doing? They are driving—they are in Duluth and they have property.
>
> [Defense counsel interposed objection, which the district court overruled.]
>
> July 16th, what are Mr. Schiller and Mr. Guzzo doing in Duluth? They are at a pawnshop, pawning two rings. You've got pictures of the rings here (indicating). Mr. Schiller isn't pawning it. Who is pawning the rings? Ian Guzzo.

Guzzo contends that this argument improperly used the pawning incident "as substantive other-crime evidence demonstrating a pattern of concerted criminal conduct" rather than properly using it as a basis for challenging the knowledge of witnesses whom Guzzo called to demonstrate his good character. We agree.

The permitted uses of other-crime evidence are limited. Evidence of a defendant's prior bad acts may be admissible as so-called *Spreigl* evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 491, 139 N.W.2d 167,

169 (1965). Such evidence also may be used to "test the knowledge and credibility" of a witness who testifies to the defendant's good character. *Francis v. State*, 729 N.W.2d 584, 590 (Minn. 2007); *see* Minn. R. Evid. 404(a)(1), 405(a). Evidence of the defendant's prior bad acts is not admissible, however, "to prove the character of [the defendant] in order to show action in conformity therewith." Minn. R. Evid. 404(b). And it is improper for a prosecutor to attack the defendant's character during closing argument or to suggest that the defendant committed the charged offense because the defendant committed other bad acts. *See State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997) (prohibiting use of other-crime evidence to "prove the accused's propensity or disposition to commit crimes").

Here, the prosecutor overstepped the bounds of rule 404. Although the prosecutor was permitted to comment on the pawning incident, he misused the evidence by arguing to the jury that burglary of W.H.'s home was "[a]n example of [Schiller and Guzzo] acting together," which was similar to the pawning incident. This argument improperly suggested that Guzzo possessed the propensity to engage in criminal conduct with Schiller and acted in conformity with that character trait by drawing Schiller a diagram of W.H.'s home for the purpose of burglarizing it. The prosecutor's misuse of the evidence constitutes misconduct.

The prosecutor's misuse of the pawning incident is not "unusually serious" misconduct, however. And this record does not support the conclusion that the prosecutor's argument significantly affected the jury's verdict. The prosecutor referred to the pawning incident only briefly in a closing argument that was more than 25 transcribed

pages and focused primarily on Guzzo's admission to drawing the diagram of W.H.'s home. *See Powers*, 654 N.W.2d at 679 (holding that improper argument was harmless because it constituted only two sentences out of more than 20 transcribed pages). The jury was instructed that Guzzo was "not being tried for and may not be convicted of any offense other than the charged offense," and the jury is presumed to have followed that instruction. *See State v. Courtney*, 696 N.W.2d 73, 84 (Minn. 2005) (considering whether district court instructed jury not to convict based on other-crimes evidence); *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002) (stating presumption that jury follows district court's instructions). Moreover, the evidence against Guzzo, including his admission to drawing the detailed diagram for Schiller, was strong. *See State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006) (stating that the strength of other evidence is relevant to whether an error was harmless). Thus, on this record, the prosecutor's fleeting reference to the pawning incident did not significantly affect the jury's verdict.[1] Accordingly, Guzzo is not entitled to the relief he seeks on appeal.

Affirmed.

[1] Indeed, the brevity of the prosecutor's improper comments, the district court's instructions, and the weight of the evidence against Guzzo demonstrate that the misconduct here was harmless under even the more stringent beyond-a-reasonable-doubt standard applicable to serious misconduct.