STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0980

State of Minnesota,
Respondent,

vs.

Jaimie Lee Mudge,
Appellant.

Filed May 19, 2014
Affirmed
Schellhas, Judge

Clay County District Court
File No. 14-CR-12-3462

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

Brian J. Melton, Clay County Attorney, Lori H. Conroy, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Harten, Judge.*

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

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

SCHELLHAS, Judge

Appellant challenges his aiding-and-abetting-theft conviction, arguing that the district court plainly erred by admitting character evidence and vouching testimony. We affirm.

FACTS

Appellant Jaimie Mudge pleaded not guilty to respondent State of Minnesota's charge of theft under Minn. Stat. § 609.52, subds. 2(1), 3(3)(c) (2012), and aiding and abetting such theft under Minn. Stat. § 609.05, subd. 1 (2012). Before Mudge's trial by jury, Mudge stipulated that he had a prior felony theft conviction, which enhanced the theft charge to a felony. At trial, the district court admitted in evidence a video recording of the alleged theft and a handwritten note that Mudge wrote to his girlfriend after committing the alleged theft, and the state called three witnesses to testify—a Wal-Mart asset-protection worker, Mudge's girlfriend, and Dilworth Police Department Officer Michael Iverson. Mudge moved for a directed verdict, arguing that the evidence was insufficient to prove that he committed theft or aided and abetted theft, and the district court denied his motion. Mudge waived his right to testify, and the jury found him guilty of aiding and abetting theft.

This appeal follows.

D E C I S I O N

Mudge seeks reversal of his aiding-and-abetting-theft conviction, arguing that the district court made two unobjected-to evidentiary errors at trial. "A defendant who fails to object to an error at trial . . . is ordinarily deemed to have waived his right to appellate review of that error." *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011). But "the plain error rule, Minn. R. Crim. P. 31.02, provides a court, on motion for new trial, post-trial motion, or appeal, the discretion to review an unobjected-to trial error." *Id.* "When the alleged error does not implicate prosecutorial misconduct, an appellant has the burden of proving (1) an error, (2) that the error is plain, and (3) that the plain error affects substantial rights." *State v. Dao Xiong*, 829 N.W.2d 391, 395 (Minn. 2013). If these three plain-error requirements are established, appellate courts "will order a new trial only if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *State v. Bahtuoh*, 840 N.W.2d 804, 811 (Minn. 2013). Although the state asks us not to exercise our discretion to conduct a plain-error analysis of Mudge's unobjected-to alleged trial error, we do not find the state's argument compelling and therefore proceed with a plain-error review of the unobjected-to alleged trial errors.

Under the first step of the plain-error analysis, our determination of whether the district court erred by admitting evidence turns on whether the court abused its discretion. *See State v. Hayes*, 826 N.W.2d 799, 808 (Minn. 2013) (declining to consider remaining plain-error steps after concluding that "the district court did not abuse its discretion in admitting the challenged testimony"); *State v. Jenkins*, 782 N.W.2d 211, 230–31 (Minn. 2010) (concluding in context of plain-error review that "the district court did not abuse its

discretion or commit any error when it granted the State's motion to exclude the evidence on relevance grounds").

Claim of Erroneous Admission of Character Evidence

Mudge argues that the district court abused its discretion by permitting the asset-protection worker (APW) to offer character evidence. We disagree. Wal-Mart's on-duty APW testified that she noticed a man and a woman pushing two separate carts and explained why the conduct caught her attention, as follows:

> THE PROSECUTOR: What was it that caught your attention about the[m]?
>
> THE APW: It was a tote that had a lot of items in the inside.
>
> . . . .
>
> THE PROSECUTOR: Was there something in particular that caught your attention about the fact that there was a tote in the cart? What made you notice that?
>
> THE APW: It was just something that I caught out of the corner of my eye. I usually just observe for things like that on a daily basis.
>
> THE PROSECUTOR: Why?
>
> THE APW: Because a lot of times that's what people use to conceal items to get out of the store without paying for them.

In court, the APW identified Mudge as the man she saw in Wal-Mart; the woman was Mudge's girlfriend.

Minnesota Rule of Evidence 404(a) provides that, 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." And "[p]rofile evidence, akin to

character evidence, is plainly inadmissible as substantive evidence of guilt." *State v. DeShay*, 669 N.W.2d 878, 887 n.8 (Minn. 2003). For example, the supreme court concluded in *State v. Williams* that officer testimony was "clearly and plainly inadmissible" when the officers "[b]asically . . . testified . . . that in their experience most drug couriers behave a certain way" and "the jury was impliedly urged to infer that since defendant's conduct fit the profile, she must have known that her luggage contained crack cocaine." 525 N.W.2d 538, 548 (Minn. 1994); *see also State v. Litzau*, 650 N.W.2d 177, 185 (Minn. 2002) (following *Williams*). But the court clarified that it was *not holding* that "all testimony by police officers as to techniques employed by other drug dealers or couriers is always inadmissible at trial" and noted that admissible testimony could include "testimony relating to techniques used by some other dealers to avoid detection admitted to explain defendant's conduct." *Williams*, 525 N.W.2d at 548.

Here, the APW did not expressly or impliedly urge the jury to infer that Mudge aided and abetted theft because his behavior fit the profile of a thief. The APW's testimony merely assisted the jury in understanding why, based on her personal experience, Mudge's otherwise lawful conduct caught her attention. *See State v. Barajas*, 817 N.W.2d 204, 223 (Minn. App. 2012) (concluding that district court did not err by admitting officer's unobjected-to testimony when it "established the relevance and significance of items in Barajas's possession by explaining the connection between those items and the sale of drugs," rather than suggesting that Barajas "must be a drug dealer" because he "possessed similar items or acted similarly to drug dealers"), *review denied* (Minn. Oct. 16, 2012); *see also Old Chief v. United States*, 519 U.S. 172, 189, 117 S. Ct.

644, 654 (1997) ("People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard."). We conclude that the district court did not abuse its discretion by admitting the APW's testimony.

Claim of Erroneous Admission of Vouching Testimony

Mudge argues that the district court abused its discretion by admitting Officer Iverson's testimony because it was vouching testimony as to the credibility of Mudge's girlfriend. "It is well settled that one witness may not vouch for or against the credibility of another witness." *State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (quotation omitted); *see, e.g.*, *State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005) (stating that officer's testimony "bordered on vouching" when it was testimony that "gang members generally do not falsely accuse their own gang members of crimes"); *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) (providing example of vouching when police officer testified, "I had no doubt whatsoever that I was taking a truthful statement" (quotation omitted)); *State v. Ellert*, 301 N.W.2d 320, 323 (Minn. 1981) (concluding that trial court should not have admitted police officer's opinion testimony that Ellert lied to him).

Here, before trial, Mudge's girlfriend—at the time of the offense—admitted the theft to Officer Iverson but claimed that Mudge played no role in it. At trial, the state played a video recording of the incident that shows Mudge picking up a tote from a Wal-Mart shelf, placing it in a shopping cart next to his girlfriend, and placing CDs in the tote. And Mudge's girlfriend read from Mudge's note to her, which states: "This is all my fault

babe 'Yes it is.' I'm sorry . . . . So we need to figure out our plans for when [we] do go to court." Mudge's girlfriend testified that Mudge placed the tote in her cart, she pushed the cart out of the store with the intent to steal the items within it, she and Mudge planned the theft together, and they played equal roles in it. The girlfriend also testified that she told Officer Iverson that Mudge played no role in the theft because she cared about Mudge and did not want him to get into trouble. She also stated that her testimony was true and that she did not want to testify but was under subpoena; she acknowledged that she agreed to testify in exchange for a plea offer from the state through which she would receive a continuance for dismissal.

Officer Iverson testified as follows on direct examination:

> THE PROSECUTOR: When you interviewed [Mudge's girlfriend], what did she say about . . . Mudge's involvement?
>
> THE OFFICER: She said that he had no involvement. He was just with, and that she made the decision to do that on her own.
>
> THE PROSECUTOR: Did your investigation reveal evidence contrary to that statement?
>
> THE OFFICER: What I witnessed in the surveillance video portrayed Mudge placing a tote—selecting a tote and placing the tote in the cart and putting merchandise inside the cart.

We conclude that Officer Iverson's testimony did not include vouching testimony about the credibility of Mudge's girlfriend. *Cf. Ferguson*, 581 N.W.2d at 836 (concluding that police sergeant's testimony was not vouching testimony when it was testimony that an informant "gave the police information in five or six other crimes" and not that the informant "was telling the truth or that he believed one witness over another"). We

further conclude that the district court did not abuse its discretion by admitting Officer Iverson's testimony.

Affirmed.