STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0981

State of Minnesota,
Respondent,

vs.

Larry Darnell Lakes,
Appellant

Filed May 19, 2014
Affirmed in part, reversed in part, and remanded
Worke, Judge

Ramsey County District Court
File No. 62-CR-12-2304

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

John Choi, Ramsey County Attorney, Peter Reed Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Marie Yauch-Erickson, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Worke, Judge; and Toussaint, 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

WORKE, Judge

Appellant challenges the district court's denial of his motion to suppress evidence leading to his conviction, alleges that the prosecutor committed misconduct at trial, and argues that the district court improperly calculated his criminal history score before imposing a top-of-the-box sentence. We affirm appellant's conviction but reverse and remand for resentencing.

FACTS

In March 2012, police arrested appellant Larry Darnell Lakes on suspicion of promoting prostitution after responding to a health-and-welfare check at his New Brighton apartment and finding R.L inside. At trial, R.L., a recovering heroin addict, testified that, while she was undergoing methadone treatment for her addiction, Lakes called her and told her that he had heroin, that she agreed to go with Lakes to the apartment to use heroin, and that she began prostituting herself for Lakes when he promised her that he would continue giving her heroin if she did.

R.L. testified that Lakes eventually invited her friend F.W. to the apartment. F.W. learned that R.L. was being prostituted and called the police on March 19, 2012, to offer an anonymous tip that R.L. was being held against her will in an apartment in the general area of Lakes's apartment. New Brighton police dispatched an officer to the area, but he could not pick out the specific apartment based on the information F.W. provided.

On March 20, F.W. informed R.L.'s aunt and uncle of the situation. Police received a 911 call from the aunt and uncle alleging that R.L. was being kept as a

prostitute in the New Brighton apartment by a man with the street name "Larry Marble," that "Marble" was giving R.L. heroin, and that "Marble" drove a white Cadillac Escalade. A second New Brighton police officer met R.L.'s uncle and aunt near Lakes's apartment. Police, who still did not have an exact address for the apartment, described "Larry Marble" to a caretaker of one of the buildings. The caretaker told police that the description matched Larry Lakes, who drove a white Escalade and had recently moved out of one of the apartments, and whom the caretaker had seen with a woman who looked like a heroin addict. When officers went to the apartment and knocked, the apartment echoed as if empty, no one answered the door, and officers left.

Just as officers were leaving, they spotted Lakes, who matched the description of "Larry Marble," behind the wheel of a white Escalade in the parking lot. When police tried to flag Lakes down, he attempted to flee, and police had to block the exit to the parking lot to stop him. The officers who detained Lakes searched his vehicle and discovered, among other items, the apartment key, which they used to enter the apartment and locate R.L. Officers testified that, once they definitively "discovered which apartment it was," they entered based on the fact that R.L. had not yet been located and their concern that she might be in danger because of imprisonment, assault, or drug use. At first, R.L. refused to provide officers with information, but she eventually broke down and told them that she had been held in the apartment and forced into prostitution.

R.L. told police that Lakes had a home in Minneapolis, which police procured a warrant to search. The warrant application listed several items that R.L. told police could be found in the home, but inadvertently omitted pen-shaped covert recording devices

called video pens. While searching for other items in Lakes's closet, the officer who prepared the application "saw clearly visible video pens in a shirt pocket." The officer "immediately recognized the pens as [] covert recording device[s] and thought that they were the video pens that [R.L.] had described." The officer verified that the pens were recording devices, removed them from the house, and obtained a search warrant for a forensic examination of their contents that revealed photos of R.L. and other women in the New Brighton apartment.

Lakes was charged with solicitation to practice prostitution in violation of Minn. Stat. § 609.322.1(a)(1) (2012), promotion of prostitution in violation of Minn. Stat. § 609.322.1(a)(2) (2012), and receiving profit derived from prostitution in violation of Minn. Stat. § 609.322.1(a)(3) (2012). In January 2013, the district court denied Lakes's motion to suppress evidence, and Lakes was subsequently convicted of all three charges at a jury trial. The jury also made a special finding that an aggravating factor was present because Lakes provided R.L. with illegal drugs in the commission of the offenses. Over Lakes's objection to the calculation of his criminal history score, the district court gave him a top-of-the-box, 180-month sentence. This appeal follows.

D E C I S I O N

Denial of motion to suppress

Lakes argues that the district court erred by failing to suppress evidence at five junctures: when the police (a) entered the New Brighton apartment without a warrant, (b) arrested appellant and seized his keys, (c) took R.L.'s statement at the scene, (d) obtained a search warrant for his Minneapolis home, and (e) seized video pens. A district court's

decision on the suppression of evidence is a question of law that we review de novo. *State v. Othoudt*, 482 N.W.2d 218, 211 (Minn. 1992).

Entering the apartment

Lakes argues that all evidence leading to his conviction should be suppressed because police improperly entered his New Brighton apartment. The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A warrantless search or seizure is unreasonable unless it falls into a recognized exception. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). Police may enter a residence without a warrant if they have probable cause to believe a crime has been committed and exigent circumstances are present. *Payton v. New York*, 445 U.S. 573, 588-89 (1980); *State v. Storvick*, 428 N.W.2d 55, 61 (Minn. 1988). The need to protect human life is a factor that weighs heavily in favor of exigent circumstances being present. *State v. Gray*, 456 N.W.2d 251, 256 (Minn. 1990). Courts analyze whether an exigency is present based on the totality of the circumstances. *Id.* Although this court often examines the totality of the circumstances using the factors set forth in *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970), those factors are "not exhaustive," and we may also consider "unfolding developments" that occur as a situation develops in "the field." *Gray*, 456 N.W.2d at 256-57 (quotation omitted).

Here, police arrived on the scene without knowing the exact address of the apartment. The caretaker informed police that he had seen a man matching the description of the "Larry Marble" that police were seeking, but that "Marble" had vacated

his apartment. Police had no reason to be sure that either Lakes or R.L. was inside the apartment until they spotted Lakes in the parking lot. Lakes's attempt to flee the officers, coupled with the knowledge that R.L. was a heroin addict being held against her will, gave police both probable cause of the crime of kidnapping and a reason to suspect that R.L. might be nearby and in danger.

Lakes argues that the conduct of the police indicates that officers did not have a reasonable belief that R.L. was in imminent danger when they arrived on the scene. But under the totality of the circumstances, the unfolding development of Lakes's presence and attempt to flee transformed a seemingly empty apartment into a probable crime scene and the site of a potentially life-threatening emergency involving R.L. *See id.* Police were justified to enter Lakes's apartment without a warrant.

Seizure of the keys and other objects in Lakes's vehicle

Lakes argues that the seizure of his keys and other personal items in his vehicle incident to his arrest was not supported by probable cause. Under the Minnesota constitution, we analyze the propriety of a search incident to a traffic stop via a two-step test. First, we assess whether the initial traffic stop was lawful. *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004). And second, if the stop was lawful, we ask "whether the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place." *Id.*

Lakes does not contest that the initial stop was supported by probable cause. The "actions of police," *see id.*, were seizing the key and items that were later connected to prostitution. The "circumstances that gave rise to the stop in the first place," *see id.*, were

Lakes's attempt to flee, and police suspicion that he was holding R.L. against her will and forcing her into prostitution. The seizure of the key was directly related to police concern that Lakes was holding R.L. against her will in his apartment. The seizure of the other equipment was directly related to police suspicion that Lakes was promoting prostitution. The warrantless seizures were valid.

R.L's statement

Because the police did not violate the Fourth Amendment by entering the apartment or arresting Lakes, their discovery of R.L. and her statement accusing Lakes of kidnapping and prostitution were not the result of an illegal search or seizure, and the fruit-of-the-poisonous-tree doctrine does not apply.

Warrant to search Lakes's home

Lakes argues that the search warrant for his Minneapolis home was not supported by probable cause because police received information they used to obtain the warrant from R.L.'s unlawfully obtained testimony. But police did not obtain R.L.'s testimony unlawfully, so the warrant was supported by probable cause.

Video pens

The plain view doctrine is an exception to the Fourth Amendment's general warrant requirement. *State v. Zimmer*, 642 N.W.2d 753, 756 (Minn. App. 2002). The doctrine prevents the exclusion of evidence that was discovered without a further violation of a person's privacy than the law had already authorized. *Id.* Under the plain view doctrine, a seizure is valid if police were lawfully in position to view and access an

object whose incriminating nature was immediately apparent. *State v. Milton*, 821 N.W.2d 789, 799 (Minn. 2012).

Here, even though the warrant did not allow the officer to search for the video pens specifically, it did provide him with a lawful position to view and access them. The officer testified that he was familiar with video pens, that R.L. alerted him to the fact that video pens in the home might contain incriminating evidence, and that the lenses on the end of the pens made their incriminating nature immediately apparent. Under the plain view doctrine, the officer's seizure of the video pens was valid. *See Milton*, 821 N.W.2d at 799.

Prosecutorial misconduct

Lakes argues that the prosecutor committed misconduct during opening and closing arguments. The prosecutor, in the opening statement, called on the jury to believe R.L.'s testimony despite her history of drug use and crime by stating that "the business of prostitution is very destructive to people's lives." During closing arguments, the prosecutor reiterated that "prostitution is devastating to people's lives, and . . . [i]t can be worse for people who are already struggling, who already have [] imperfections." The prosecutor went on to state that the defense's contention that "[b]ecause of [R.L's] imperfections, she is somehow not believable" was incorrect, asking the jury, "Isn't [R.L.] or someone with these types of imperfections just the type of person you would expect would be the target of recruitment for prostitution?" Lakes did not object to the prosecutor's opening or closing statement.

A party that does not object to a prosecutor's statement at trial must "establish both that [the purported] misconduct constitutes error and that the error was plain." *State v. Wren*, 738 N.W.2d 378, 393 (Minn. 2007). A plain error typically "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Lakes argues that the prosecutor committed plain-error misconduct by (a) inflaming the passions of the jury and (b) providing a personal endorsement of R.L.'s credibility.

Inflaming the passions of the jury

Prosecutors may not "inflame[e] the jury's passions and prejudices against" a defendant, *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995), by calling upon juries to hold defendants accountable for the societal impact of their criminal behavior. *See State v. Threinen*, 328 N.W.2d 154, 157 (Minn. 1983). Prosecutors may, however, make "reasonable inferences from the evidence on the record, [] analyze or explain the evidence, and [] make legitimate arguments to the jury based on the evidence." *State v. Rucker*, 752 N.W.2d 538, 552 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). A prosecutor's argument "must be taken as a whole to determine if it provides basis for reversal." *State v. Daniels*, 332 N.W.2d 172, 180 (Minn. 1983).

Here, the prosecutor did not deliver comments about the "devastating" impact of prostitution in a call for the jury to hold Lakes accountable for his alleged misdeeds. Instead, the prosecutor's comments addressed R.L.'s credibility in light of her history of drug use and crime. In the fabric of the prosecutor's broader argument about R.L.'s

credibility, comments about the effect of prostitution on people's lives constitute a legitimate argument based on the evidence.

Improper endorsement

Lakes argues that the prosecutor's statement about R.L.'s credibility was an improper endorsement. Prosecutors may not personally endorse the credibility of a witness or imply that the state endorses a witness's credibility. *State v. Outlaw*, 748 N.W.2d 349, 358-59 (Minn. App. 2008). But prosecutors may discuss "factors affecting the credibility of a witness" as long as they do not imply that the state endorses the witness's credibility. *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006). Thus, a prosecutor's statement that a witness is "very believable" is not misconduct, but the statement that "[t]he state believes the witness is very believable" is. *Id.*

Here, although the prosecutor discussed a factor affecting R.L.'s credibility—her vulnerability to the type of crime that Lakes allegedly committed—the prosecutor did not personally vouch for R.L.'s credibility or imply that the state found R.L.'s testimony believable. Because the prosecutor did not improperly inflame the passions of the jury or vouch for R.L.'s credibility, there was no prosecutorial misconduct.

Sentencing

Lakes argues, and the state concedes, that the district court improperly calculated his criminal history score based on out-of-state convictions. The state has the burden to prove "the facts necessary to justify consideration of an out-of-state conviction in determining a defendant's criminal history score." *Outlaw*, 748 N.W.2d at 355.

Here, the district court sentenced Lakes to 180 months in prison, the top-of-the-box sentence based on his criminal history score. Instead of requesting an upward departure based on the aggravating factor, the state requested the top-of-the-box sentence because it was the statutory maximum for the offenses charged. Appellant's criminal history score of 4 felony points was calculated based on Wisconsin convictions for escape (1 point), first-degree burglary with a weapon (1.5 points), and first-degree aggravated robbery (1.5 points), and a conviction for fifth-degree cocaine possession (0.5 points).[1]

Escape conviction

Felony points for out-of-state convictions may be awarded "only if [the crime leading to the conviction] would both be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence." Minn. Sent. Guidelines 2.B.5.b(2). In Minnesota, escape constitutes a felony only if the person was in custody on a felony. Minn. Stat. § 609.485, subd. 4 (2012). Lakes argues, and the state concedes, that he was imprisoned on a misdemeanor charge when he was charged with escape. The felony point awarded for escape must be subtracted from Lakes's criminal history score on remand.

Burglary and robbery convictions

In February 2001, Lakes was charged with burglary and aggravated robbery arising from the same course of conduct in Wisconsin. In Minnesota, offenders who

[1] Because Lakes's criminal history score was rounded down, the cocaine possession conviction did not factor into the score, and the district court did not rule on Lakes's objection to the inclusion of that conviction.

commit another felony in the course of a burglary may be convicted of both burglary and the other felony. *See* Minn. Stat. § 609.585 (2012). But when computing criminal history scores, a district court may only consider "the most severe offense when there are prior multiple sentences under [Minn. Stat. § 609.585]." Minn. Sent. Guidelines cmt. 2.B.108; *see also* Minn. Sent. Guidelines 2.B.1.d(1). Because out-of-state convictions are governed by section 2.B.1 of the guidelines "and must be based on the severity level of the equivalent Minnesota felony offense," Minn. Sent. Guidelines 2.B.5.c, Lakes argues, and the state concedes, that he can only be awarded 1.5 total felony points for these offenses. We agree that, on remand, 1.5 additional felony points must be subtracted from Lakes's criminal history score.

Cocaine possession conviction

The record shows that the district court did not rule on whether Lakes's cocaine possession conviction should count for 0.5 felony points because the points would have been truncated anyway, rendering the issue irrelevant. On remand, after subtracting the above 2.5 felony points, Lakes would have 1.5 felony points, thus rendering the additional 0.5 points relevant. Lakes is allowed to challenge the 0.5 felony points from the cocaine possession change on remand.

Aggravating factor

Lakes argues that the jury's finding of an aggravating factor—that Lakes supplied R.L. with illegal drugs in the commission of the offenses—cannot be used on remand to calculate his criminal history score. The conduct underlying one conviction cannot be used as an aggravating factor to support an upward sentencing departure because "a

defendant should not be punished twice for the same conduct." *State v. Osborne*, 715. N.W.2d 436, 446 (Minn. 2006). But Lakes's convictions do not contain an element of providing illegal drugs to a victim of prostitution. *See* Minn. Stat. § 609.322 (2012). The district court may consider the aggravating factor on remand.

We therefore remand for imposition of sentence consistent with these guidelines.

Affirmed in part, reversed in part, and remanded.