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**STATE OF MINNESOTA
IN COURT OF APPEALS
A15-1754**

State of Minnesota,
Respondent,

vs.

Tyrone Levar Price,
Appellant.

**Filed March 6, 2017
Affirmed
Rodenberg, Judge**

Mower County District Court
File No. 50-CR-14-2245

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Stauber, Judge; and Rodenberg,
Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant challenges his convictions of attempted first- and second-degree murder
and first-degree assault. He argues that (1) the district court abused its discretion by

erroneously excluding evidence at trial, (2) the prosecutor committed misconduct by eliciting improper character evidence and referencing in trial summation appellant's refusal to submit to a DNA test, and (3) the district court abused its discretion by refusing to compel discovery or conduct an *in camera* review of police records. We affirm.

FACTS

Appellant was charged with attempted first- and second-degree murder and first-degree assault after an incident on September 16, 2014. Appellant fired three shots at T.M. from his silver car, striking T.M. in the chest and leg. Two witnesses saw T.M. fall to the ground and separately called 911 to report the shooting. The 911 calls were logged at 5:55 p.m., and a police lieutenant and detective arrived at the scene a few minutes later. A witness told the emergency dispatcher that she saw a car pass her immediately after the shots were fired, travelling away from the location of the shooting. She provided the license plate number and described the vehicle as a silver car with a decorative stripe.

Officer Hartman received the description of the silver car and license plate number shortly after the 911 calls were made. He was familiar with the described car and where it was normally parked from having seen it five to six times per day. He also knew that appellant normally drove such a car. Officer Hartman drove to the area where he typically saw the car and found appellant walking from a backyard to the car. Officer Hartman apprehended appellant in the silver car at 6:01, six minutes after the shooting was reported by dispatch. The car's license plate number corresponded with the witness report from the shooting scene. Appellant acknowledged that he had possession of his vehicle during the time of the shooting and that no other person had used his car during that time.

Appellant had previously lived at the address where he was arrested and had frequently used the garage there to work on vehicles. A search of the garage revealed three spent cartridge cases, two live cartridges, and a five-shot revolver hidden in the insulation of a partially covered wall. Bullet fragments were recovered from the scene of the shooting and from T.M.'s knee. A forensic scientist with the Minnesota Bureau of Criminal Apprehension determined that the bullet fragment recovered from the scene of the shooting had been fired from the pistol found in the wall of the garage. Appellant's DNA could not be excluded from a mixed-DNA sample found on the pistol, though 99.6% of the general population could be excluded from the mixture.

When T.M. was interviewed by police at the hospital, he identified appellant as the shooter. He testified that he knew appellant, where he lived, and the silver car that he usually drove. He testified that the incident began shortly after he walked past appellant's house. Appellant's silver car was in his driveway. Shortly after T.M. walked past appellant's house, appellant pulled alongside where T.M. was walking and told him not to walk by his house anymore. T.M. testified that appellant then fired three shots, striking T.M., and then drove away.

After his arrest, appellant waived his right to remain silent and spoke with investigators. His recorded statements were played for the jury, including a portion in which appellant refused a request to provide a DNA sample. At trial, appellant testified that he declined to provide a DNA sample but had hoped that the investigators would test his hands for gunshot residue (GSR). No GSR test was done. After appellant testified that he had hoped a GSR test would be completed, the state asked him during cross examination: "But

when they asked to do the DNA, what was your response?” Appellant answered that he had said “no” to a DNA test.

During the state’s summation at trial, the state argued to the jury that appellant’s testimony was not credible because of the various inconsistencies in his statement. The state argued:

You know, he gets up, and he says, “Oh, GSR. I studied GSR.” Well, apparently he never studied DNA. He studied GSR because they didn’t do that, and that’s what he wanted them to do because that would have exonerated him.

But the DNA, you heard on the tape, he wanted no part of that test. He didn’t know that they could just go get a search warrant. They are asking to see his reaction. And he gets up here in court and says, “Well, yeah, I wanted them to do the test.” If you didn’t commit the offense . . . you would want them to do the DNA, because that’s going to exclude you. Even if that had been all the evidence in the case, that would be a tremendous amount of evidence that [appellant] committed this offense. He eliminates the reasonable possibility in his statement of somebody else having done it.

The jury returned guilty verdicts on all three counts. The district court denied appellant’s post-trial motions for acquittal or a new trial.

This appeal followed.

D E C I S I O N

I. The district court’s proper application of the rules of evidence did not violate appellant’s constitutional right to present a complete defense.

Appellant argues that he was prevented from presenting a complete defense because the district court excluded evidence at trial of both the testimony of a detective concerning

an out-of-court statement of a non-testifying witness and a copy of an image from the ballistics investigation.

“A defendant has the constitutional right to present a complete defense.” *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). But this right is not unrestricted. *Id.* In exercising the right to present a complete defense, the defendant must comply with evidentiary rules “designed to ensure both fairness and reliability in the ascertainment of guilt and innocence.” *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003) (quotation omitted). “[W]hen a defendant alleges that his inability to present a defense violates his constitutional rights, evidentiary questions are reviewed for abuse of discretion.” *State v. Henderson*, 620 N.W.2d 688, 698 (Minn. 2001). Appellant bears the burden of establishing that the district court abused its discretion and that he was prejudiced by the error. *State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015). An abuse of discretion occurs “when the district court’s ruling is based on an erroneous view of the law or is against logic and the facts in the record.” *Id.* (quotation omitted).

Statement of R.H.

During trial, appellant attempted to elicit testimony from a detective that R.H., a person who had been speaking with T.M. on the phone at the time of the shooting, told the detective that she heard T.M. say, “I don’t know who you is,” immediately before the shots were fired. R.H. did not testify as a witness at trial, and T.M. testified that he did not remember making such a remark. The state objected to the detective’s testimony concerning R.H.’s statement as inadmissible hearsay. The district court sustained the state’s objection. Appellant argues that the exclusion of the out-of-court statement

rendered him unable to present his theory that an alternative perpetrator shot T.M. In making a record of the excluded evidence, appellant's attorney stated that the evidence was "offered for the specific purpose that [T.M.] did not know who shot him."

On appeal, appellant does not explain how R.H.'s statement to the detective should have been considered admissible under the evidentiary rules. Instead he relies solely on arguments concerning the statement's relevance to his defense. But relevant evidence may be excluded under the rules of evidence. See Minn. R. Evid. 402 (providing that all relevant evidence is admissible except as provided by these rules). Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). The rules of evidence bar the admission of hearsay evidence unless an exception to the rule against hearsay applies. Minn. R. Evid. 802. Appellant attempted to admit R.H.'s out-of-court statement—that R.H. heard T.M. indicate that he did not know the shooter—for its truth. Appellant identifies no applicable exception to the rule against hearsay. The district court acted within its discretion in sustaining the objection to inadmissible hearsay.

The ballistics photocopy

Appellant argues that his ability to present a complete defense was limited by the district court's exclusion of a copy of a photo taken by the forensic scientist during examination of the bullet fragments. He argues he was unable to effectively cross-examine the witness because of the exclusion of this evidence.

The copy was excluded on foundation grounds after the witness explained that it was a "very dark copy" of the original photograph and did not accurately represent the

conditions she viewed through the microscope. Adequate foundation for photographic evidence requires testimony that the image accurately depicts the conditions at issue. *LaCombe v. Minneapolis St. Ry. Co.*, 236 Minn. 86, 93, 51 N.W.2d 839, 844 (1952), *cited with approval in State v. Jackson*, 770 N.W.2d 470, 483 (Minn. 2009). The district court acted within its discretion in excluding the copy on foundation grounds as not accurately depicting the original photograph and the condition of the bullet portrayed in the photograph.

Even if the exclusion were considered an abuse of the district court's discretion, which it was not, appellant was not prejudiced by the exclusion in any event. *See Bustos*, 861 N.W.2d at 666 (stating reversal is not warranted if a claimed constitutional error is "harmless beyond a reasonable doubt"). Appellant was permitted to question the forensic scientist regarding her methodology. He challenged the conclusions derived from her examination. The district court's ruling was neither erroneous nor prejudicial.

II. Appellant is not entitled to a new trial on the basis of prosecutorial misconduct.

Appellant argues that his conviction must be reversed because the prosecutor committed misconduct by (1) eliciting improper character evidence concerning Officer Hartman's previous contacts with appellant and (2) arguing that the jury could infer guilt based on appellant's refusal to give a DNA sample. Appellant did not object to the alleged misconduct during trial.

Alleged prosecutorial misconduct is reviewed under a modified plain-error standard when no objection was made during trial. *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016). This standard requires appellant to establish that the prosecutor committed an error

and that the error was plain. *Id.* “An error is plain if it is clear or obvious,” and typically “contravenes case law, a rule, or a standard of conduct.” *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010) (quotation omitted). If appellant demonstrates that a plain error occurred, the burden shifts to the state to demonstrate that the error did not affect appellant’s substantial rights. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). The state must show “there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotations omitted). If the state fails to show substantial rights were not affected, this court “may correct the error only if it seriously affects the fairness, integrity or public reputation of judicial proceedings.” *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014) (quotations omitted). Ultimately, we will reverse a conviction “only if the misconduct, when considered in light of the whole trial, impaired the [appellant’s] right to a fair trial.” *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

Elicitation of questions about prior contacts with police

Appellant argues that the prosecutor elicited improper character evidence from Officer Hartman regarding appellant’s prior contacts with law enforcement.

“It is improper for a prosecutor to ask questions that are calculated to elicit or insinuate an inadmissible and highly prejudicial answer.” *Henderson*, 620 N.W.2d at 702. It is reversible error for the prosecutor to “deprive a defendant of a fair trial by means of insinuations and innuendos which plant in the minds of the jury a prejudicial belief in the existence of evidence which is otherwise inadmissible.” *State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994) (quotation omitted). “Use of such insinuation and innuendo is reversible

error whether the allusion to prior misconduct is contained in the question which the prosecutor asks or in the answer which the witness gives.” *Id.* (quotation omitted).

Officer Hartman testified about his prior knowledge of the silver car reportedly involved in the shooting. He testified that he knew that a man who looked like appellant typically drove the car because he knew appellant “from the past.” He also testified that he knew from “previous contacts” where the car was normally parked. When asked if he was aware of a connection between appellant and the location where he was arrested, the officer replied that he knew that the house at that location belonged to a relative of appellant. The prosecutor then asked, “[H]ow do you know that?” The officer replied, “Previous contacts there. . . . I have been there before. I was there for a domestic, I think, probably about two years ago.”

Appellant argues that this line of questioning by the state was designed to elicit, and did elicit, improper character evidence. He argues that similar questioning constituted prosecutorial misconduct in *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002). In *Strommen*, a case where identity was not an issue, the Minnesota Supreme Court held that it was plain error affecting the defendant’s substantial rights for the state to elicit testimony from an officer that he knew the defendant from prior contacts. 648 N.W.2d at 688. The supreme court concluded that, because the defendant did not deny his involvement in the attempted robbery, the state’s purpose in asking the questions was to establish that the defendant was a person of bad character who had frequent contact with police. *Id.* In *State v. Valentine*, we likewise held that it was error for the state to elicit testimony that the officer knew the defendant from prior contacts when the defendant’s identity was not at

issue in the case. 787 N.W.2d 630, 641 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010).

Here, the identity of the shooter *was* at issue. Appellant denied any involvement in the shooting. The state's questions and the officer's responses about prior contacts were intended to establish the location of the car, appellant's connection to it, and appellant's connection to both the scene of the shooting and where appellant and the gun were located just minutes after the shooting. Because the identity of the shooter was at issue, the admission of this testimony was not plain error.

We also note that the testimony about Officer Hartman's previous contacts with appellant and the property where he was found after the shooting made no reference to any earlier criminal conduct by appellant. And the reference by the officer was brief, only providing context for why he went to that property looking for appellant and his car. It did not affect appellant's substantial rights in any event.

Appellant's refusal to consent to warrantless search

Appellant argues that the prosecutor committed misconduct "by arguing the jury should infer guilt from [appellant's] initial refusal to provide a DNA sample." The state responds that the argument in its summation was permitted to rebut appellant's claim that the investigation was inadequate because a GSR test was not completed. The state also argues that the reference was permitted as a challenge to appellant's credibility.

Appellant did not object to the introduction of the portion of the recording containing appellant's refusal to permit warrantless DNA testing, nor did he object to the state's use of that refusal during trial summation. Counsel for appellant explained during the motion for

a new trial that he made a strategic decision not to object during trial because he did not want to draw attention to the evidence.

“It is a violation of the defendant’s right to due process for a prosecutor to comment on a defendant’s failure to consent to a warrantless search.” *State v. Jones*, 753 N.W.2d 677, 687 (Minn. 2008) (*Jones II*); see also *State v. Jones*, 678 N.W.2d 1, 12 n.3 (Minn. 2004) (*Jones I*) (“A passive refusal to consent to a search cannot be treated as evidence of a crime.”). The defendant’s due process rights are violated “when the state presents *direct* evidence that the defendant failed to consent to a search, but not when the state creates an inference based on little more than speculation that a defendant did not consent to the search.” *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011) (quotations omitted). If the government was permitted to use the refusal of a warrantless DNA search as evidence of guilt, “an unfair and impermissible burden would be placed upon the assertion of a constitutional right and future consents would not be freely and voluntarily given.” *Jones I*, 678 N.W.2d at 12 n.3 (quoting *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (quotation marks omitted).

The state presented direct evidence that appellant refused a warrantless search when it played to the jury appellant’s recorded statements to police. Although appellant later testified that he had refused the request for a DNA sample, the state had already admitted and played to the jury appellant’s taped refusal. The state then argued in its summation:

If you didn’t commit the offense . . . you would want them to do the DNA, because that’s going to exclude you. Even if that had been all the evidence in the case, that would be a tremendous amount of evidence that [appellant] committed this

offense. He eliminates the reasonable possibility in his statement of somebody else having done it.

We decline the state's invitation that we hold that the prosecutor was permitted to make these arguments to rebut appellant's defense strategy. The use of this evidence, and the argument by the state in its summation, invited the jury to infer guilt from appellant's refusal of an unconstitutional search.

Here, and even if admission of the recording and the state's comment on it were plainly erroneous, the state has met its burden of showing that there is no reasonable likelihood that the evidence and argument had a significant effect on the verdict. *See Hill*, 801 N.W.2d at 654 (declining to decide whether the state committed prosecutorial misconduct because the state met its burden of demonstrating that the error had no effect on the jury's verdict). When deciding whether the state has met its burden, we consider the strength of evidence against the defendant, the pervasiveness of the misconduct, and whether the defendant had the opportunity, or made efforts, to rebut the prosecutor's improper conduct. *Hill*, 801 N.W.2d at 654-55. When examining alleged prosecutorial misconduct in the context of a closing argument, we "consider the closing argument as a whole rather than focus on particular phrases or remarks." *State v. Jackson*, 714 N.W.2d 681, 694 (Minn. 2006) (quotations omitted).

The state presented overwhelming evidence of appellant's guilt. T.M. identified appellant as the person who shot him. He testified that he knew appellant, his car, and the location of his residence. Another witness testified that she saw appellant's car, as identified by its description and license plate number, driving from the area of the shooting

moments after the shots were fired. She described the car's license plate number to the police, one of whom knew where that car was normally parked and that appellant was normally driving it. That officer apprehended appellant in the silver car minutes after the shooting in an alley near where appellant had recently lived. Appellant admitted that he had possession of his car at the time of the shooting and that no one else had been with him in the car. A gun, three cartridge cases, and two cartridges, were found in the garage where the car was kept. Witnesses testified that they heard three shots. A forensic scientist with the Minnesota Bureau of Criminal Apprehension concluded that the bullet fragment found during the investigation was fired from the recovered gun. Appellant's DNA could not be excluded from the DNA found on the gun.

The alleged misconduct by the prosecutor was not pervasive, and appellant had the opportunity to rebut the argument during his summation. Appellant's counsel, when making his closing argument, had the opportunity to rebut the state's argument concerning appellant's lawful refusal, but elected not to rebut the state's argument concerning the evidence.

We conclude that there is no reasonable likelihood that any error concerning the DNA-test-refusal evidence had a significant effect on the verdict. The evidence of appellant's guilt here is so significant that appellant's having declined a warrantless DNA test could not possibly have had any significant effect on the jury's verdict.

III. The district court did not abuse its discretion by refusing to conduct an *in camera* review of police files.

Appellant argues that the district court abused its discretion by declining to conduct an *in camera* review of police records concerning a separate shooting that may have involved T.M. The request stemmed from an informant's tip that T.M. may have been the shooter in a gang-related incident that happened after September 16, 2014 and before trial. The district court denied the motion. We review a district court's decision whether to allow *in camera* review of police records for abuse of discretion. *See State v. Evans*, 756 N.W.2d 854, 872-73 (Minn. 2008) (applying an abuse-of-discretion standard in reviewing district court's decision to limit its *in camera* review).

"Criminal defendants have a broad right to discovery in order to prepare and present a defense." *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012).

When a criminal defendant requests records that are subject to the Minnesota Government Data Practices Act or other legislation, the district court may screen the confidential records *in camera* to balance the right of the defendant to prepare and present a defense against the rights of victims and witnesses to privacy.

Id. To justify an *in camera* hearing, a defendant must "establish a plausible showing that the information sought would be both material and favorable to his defense." *Id.* (quotations omitted). Argument and conjecture about what the information sought may contain is insufficient to establish a plausible showing. *Evans*, 756 N.W.2d at 873.

Here, the district court did not abuse its discretion in denying appellant's request for *in camera* review. Appellant failed to make a plausible showing that information contained within the investigative files would be both material and favorable. All appellant argued

was that T.M. *might* have been involved in a separate shooting between the date of the charged offense and the trial. There was no showing that the recent shooting, even if there was one, was connected to the 2014 shooting of T.M. Appellant's argument that the investigative file might contain information material to his defense is based entirely on conjecture. The district court acted within its discretion in declining the requested *in camera* review.

Affirmed.