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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1086**

State of Minnesota,
Respondent,

vs.

Ronald John Impola,
Appellant.

**Filed May 7, 2018
Affirmed
Connolly, Judge**

Clay County District Court
File No. 14-CR-16-1312

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

Brian J. Melton, Clay County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Connolly, Judge; and Smith,
John, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his conviction of fleeing a peace officer in a motor vehicle,
arguing that the district court erred in concluding that appellant did not have standing to

challenge the seizure of the vehicle and abused its discretion in allowing the state to reopen its case to present additional evidence; appellant also argues that the prosecutor's closing argument included reversible misconduct. Because we see no error in the district court's conclusion, no abuse of discretion, and no prejudice to appellant in the prosecutor's closing argument, we affirm.

FACTS

On March 29, 2016, a sheriff's deputy on patrol in Minnesota observed a white vehicle with a Colorado license plate and a misaligned headlight approach the deputy, turn on its bright lights when about 1,000 feet from the deputy, and pass the deputy. The deputy turned around to follow the vehicle, which then accelerated. The deputy determined that the vehicle was moving at 104 m.p.h. in a 55-m.p.h. zone and pursued it into Fargo, North Dakota, when he stopped the pursuit for safety reasons.

The deputy notified Fargo police officers to be on the lookout for the vehicle, which he described to them. Some hours later, Fargo police officers notified the deputy that a vehicle matching his description had been found in a parking lot. The deputy went to the parking lot and identified the vehicle, which was parked diagonally across two parking spots with its doors locked and its windows closed. The deputy noticed that men's clothing and papers were lying on the floor of both front and back seats.

The deputy determined that the vehicle's owner was Jessica Impola. He checked the name "Impola" and found that a Fargo resident, appellant Ronald Impola, had previous contact with law enforcement while driving the vehicle and that there was a warrant for

appellant's arrest. The deputy seized the vehicle and had it towed to a police impound lot in Minnesota.

On April 4, 2016, the deputy was informed that someone was trying to get the vehicle out of the impound lot. He telephoned that person and recorded the call. The person identified himself as appellant and the brother of the vehicle's owner; he said that he was driving the vehicle "not fast enough" when the deputy pursued him and that he needed the personal property, i.e. the papers and clothing, in the vehicle.

Appellant was charged with fleeing a peace officer in a motor vehicle. He moved to suppress the evidence found in the vehicle and to dismiss the case. The district court denied the motion to suppress on the grounds that: (1) there was no evidence to suppress as a result of the impounding of the vehicle, (2) appellant lacked standing to challenge the seizure of the vehicle because he was not the owner, and (3) nothing in the record indicated that appellant was manipulated or coerced into making statements to the deputy over the telephone.

The day before the jury trial, an investigator prepared a search warrant for the vehicle and searched it. He did not find the papers and men's clothing seen by the deputy in the vehicle and mentioned by appellant during the phone call, but he did find a receipt with appellant's name, address, and phone number. Appellant's counsel challenged the admission of the receipt on the ground of spoliation, saying that the receipt "could have been" put in the vehicle before the investigator searched it. The district court admitted the receipt into evidence.

At trial, appellant's counsel gave a very brief opening statement, asserting that the evidence would show that the person who spoke to the deputy on the phone and admitted fleeing in a vehicle was not appellant.

The state called the deputy as its first witness. He testified about pursuing the vehicle and about finding it; the recording of his phone conversation was admitted into evidence; he went on to testify that papers and men's clothing were lying on the floor of the vehicle when he impounded it and had it towed. The investigator then testified that the purpose of the warrant was to look for the papers and clothing that the deputy had seen in the vehicle and that appellant had said were in the vehicle during his phone conversation with the deputy, that those items had not been in the vehicle when the investigator executed the warrant the previous day, and that the investigator had found a receipt identifying appellant in the vehicle. The state then rested its case.

Appellant moved for a judgment for acquittal on the grounds that the state had failed to prove appellant was the man speaking to the deputy on the phone and that the vehicle had obviously been tampered with, so the receipt could have been put into it by anyone at any time. The motion was denied, and the court adjourned.

Later that afternoon, the state looked into who had had access to the vehicle while it was impounded and discovered that Jessica Impola, appellant's sister, the vehicle's owner, and a resident of Michigan, had asked the chief deputy to allow her mother, who lives near the lot where the vehicle was impounded, to remove the papers and clothing. The chief deputy had allowed the mother to do this and would testify to that effect.

The next morning, after extensive debate, the state's motion to reopen its case was granted on the grounds that appellant was actually asserting an alternative-perpetrator defense and the state's evidence would be relevant to that defense. The state called the chief deputy, who testified that, at the direction of appellant's sister, he had brought appellant's mother to the vehicle and permitted her to remove appellant's papers and clothing.

Appellant did not testify and called no witnesses. During closing argument, the prosecutor told the jury that it had to weigh two competing theories of the case: the state's theory that appellant drove the vehicle that fled from the deputy and spoke to the deputy on the phone, and appellant's theory that some other person drove the vehicle and spoke to the deputy.

The jury found appellant guilty of fleeing a peace officer in a motor vehicle. Appellant challenges his conviction, arguing that the district court erred in concluding that appellant did not have standing to challenge the seizure of the vehicle and abused its discretion in allowing the state to reopen its case and that the prosecutor committed reversible error during closing argument.¹

¹ As a threshold matter, appellant argues that the state waived the issue of standing by failing to raise it at the hearing on his motion to suppress. But although standing was not mentioned at the hearing, the state in its memorandum opposing appellant's motion to suppress said, "[t]he fact that [appellant] was not the registered owner of the vehicle would mean that he has no privacy interest in the vehicle and would have no standing, whatsoever, to assert a fourth amendment challenge" Thus, the issue of appellant's standing was presented to the district court in writing, if not orally.

DECISION

1. Standing

“A defendant may not vicariously assert fourth amendment rights; they are personal. Furthermore, it is the burden of the party seeking suppression to show his fourth-amendment rights were violated, that he had a personal and legitimate expectation of privacy” *State v. Robinson*, 458 N.W.2d 421, 423 (Minn. App. 1990) (citations omitted). The district court, relying on *Robinson*, concluded that

[Appellant] does not claim to have any ownership interest in the vehicle, and therefore, does not have sufficient legal standing to allege that the vehicle was wrongfully seized in Fargo, North Dakota, and then transported over to Clay County, Minnesota. Under the circumstances of this case, the only person who would have a sufficient privacy interest to have legal standing to complain about the seizure of the vehicle would be the rightful owner of the vehicle.

Appellant argues that the district court relied on facts not in evidence when it found that appellant’s sister was the registered owner of the vehicle because there was no reference to ownership of the vehicle at the hearing on appellant’s motion to suppress. While this is true, the state’s post-hearing memorandum opposing the motion to suppress provided evidence of ownership supplied by appellant during his phone conversation with the deputy, in which he said, “I don’t care where the car goes . . . it’s actually my sister’s car,” and answered the deputy’s question, “[I]s . . . your car just registered to her then or what?” with “Well no it’s in her name . . . the bank and everything is all in her name.” In any event, appellant did not show that he had any expectation of privacy in the vehicle in which he fled a peace officer.

2. Re-opening the State's Case

“In the interests of justice, the [district] court may allow any party to reopen that party's case to offer additional evidence.” Minn. R. Crim. P. 26.03, subd. 12(g). Thus, the standard of review is abuse of the district court's discretion.

Appellant argues that the district court abused its discretion in allowing the state to reopen its case because appellant did not identify a specific individual as the alternative perpetrator and was therefore not presenting an alternative-perpetrator defense. But an alternative-perpetrator defense may be asserted without identifying the individual. *See, e.g., State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013) (addressing “whether the State presented sufficient evidence that Silvernail, rather than an unidentified alternative perpetrator, caused [the victim's] death”); *Staunton v. State*, 784 N.W.2d 289, 301-02 (Minn. 2010) (concerning “claims that counsel failed to investigate . . . an unidentified burglar or intruder as alternative perpetrators”). Appellant argues that he was “simply challenging the state's proof on the element of identity.” But, as the district court observed, since appellant did not assert that the car that fled the deputy was driving itself and did assert that he was not the driver, he was “in essence raising the defense of an alternative perpetrator.”

Appellant then argues that the state should not have rested its case when it did. But, at the time it rested its case, the state had no further evidence to present: it had no reason to investigate the chief deputy or produce him as a witness until the investigator testified that the papers and clothing the deputy saw in the vehicle when it was seized were not there when the investigator searched the car the day before trial.

Appellant argues further that the chief deputy's evidence "was not material in that it did not directly address any of the elements of the charged offense." But he also argues that "[t]he strongest piece of evidence tying [him] to [the vehicle] was the . . . receipt . . . that contained his name and telephone number." Appellant does not explain how "the strongest piece of evidence" was also "immaterial"; nor does he explain why that evidence should have been kept from the jury.

Given the circumstances here, the district court did not abuse its discretion in allowing the state to reopen its case.

3. Closing Argument

Appellant claims the prosecutor committed misconduct in his closing argument. No objection was made to the closing argument at trial.

[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

State v. Griller, 583 N.W.2d 736, 740 (Minn. 1998). On the third prong, the state bears the burden of proving that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Appellant argues that the prosecutor misstated the state's burden of proof by telling the jury it had to weigh the state's theory that appellant drove the vehicle that fled the deputy against appellant's theory that some other unidentified individual, referred to as "a

mystery man,” drove that car. But a prosecutor “has the right to fairly meet the arguments of the defendant.” *State v. Jackson*, 773 N.W.2d 111, 123 (Minn. 2009). Appellant’s counsel repeatedly argued that appellant was not the driver of the vehicle, beginning with his opening statement. When the deputy identified appellant at trial, appellant’s counsel objected: “The deputy certainly identified my client as Ronald John Impola, but he has no way of identifying him as the man on the phone.” The objection was sustained. Appellant’s counsel asked the deputy if he had taken any steps to identify the voice of the man on the phone, and the deputy said no. The prosecutor had the right to respond to appellant’s argument that the driver of the vehicle was someone other than appellant; he did not commit misconduct in contrasting that argument with the state’s view that appellant was the driver. *See id.*

Finally, appellant argues that the prosecutor “implied [appellant] had to come up with a reasonable theory of innocence in order for the jury to acquit him.” But the prosecutor explicitly told the jury near the end of his closing argument,

[W]hen you . . . think about everything, you should look at and reread the instruction, specifically the talk about proof beyond a reasonable doubt. Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based on reason.

The prosecutor also urged the jury to reread the district court’s instructions, including the instruction that “[t]he state must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant has no obligation to prove innocence.”

The jury had heard the deputy testify about pursuing the vehicle, finding the vehicle, and having a phone conversation with someone who identified himself as the driver of the vehicle; it had heard the investigator testify about finding a receipt bearing appellant's name, address, and phone number in the vehicle; it had heard the chief deputy testify about receiving a request from the vehicle's owner, appellant's sister, and taking appellant's mother to retrieve appellant's personal property from the vehicle. Even if the prosecutor had committed misconduct in his closing argument, there is no reasonable likelihood that the misconduct would have had a significant effect on the verdict.

Affirmed.