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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1722**

State of Minnesota,
Respondent,

vs.

Ilyes Omar Ibrahim,
Appellant.

**Filed July 23, 2018
Affirmed
Bratvold, Judge**

Benton County District Court
File No. 05-CR-14-1651

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

Philip K. Miller, Benton County Attorney, Foley, Minnesota (for respondent)

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

Considered and decided by Schellhas, Presiding Judge; Reilly, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this sentencing appeal, appellant argues his sentence for first-degree aggravated robbery was the result of unobjected-to prosecutorial misconduct. Even assuming that

prosecutorial misconduct occurred, we conclude it did not affect appellant's substantial rights; therefore, we affirm.

FACTS

On September 13, 2014, appellant Ilyes Omar Ibrahim and three other men entered a gas station store that had two clerks behind the counter. After the clerk opened the cash register, Ibrahim grabbed money from the register. At about the same time, Ibrahim brandished what the clerk believed was a handgun for "a short period of time." The weapon was actually a BB gun. While Ibrahim took cash from the register, two men took coins from a safe, assaulted one clerk, and took another clerk's phone. The group stole cash, coins, and other items totaling \$2,331.11 and then drove away. Police eventually apprehended and arrested all four men.

The state initially charged Ibrahim with aiding and abetting first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2014). The state later amended the complaint to "remove any reference to 'Aiding and Abetting.'"¹ On August 3 and 4, 2015, the district court held a jury trial and instructed the jury that a BB gun was a firearm for the purposes of the first-degree aggravated robbery statute. The jury found Ibrahim guilty and also found that he committed the crime as part of a group of three or more persons who all actively participated in the crime, which is an aggravating sentencing factor under Minn. Stat. § 244.10, subd. 5a(10) (2014).

¹ First-degree aggravated robbery requires that the person commit the offense while carrying a "dangerous weapon" or any article used to lead a victim to believe it is a "dangerous weapon." Minn. Stat. § 609.245, subd. 1. A firearm is a "dangerous weapon." Minn. Stat. § 609.02, subd. 6 (2014).

The presentence investigation report (PSI) stated that Ibrahim’s offense had a severity level of eight and that he had zero criminal history points, yielding a “presumptive disposition [of] 48 months.”² The PSI recommended an upward durational departure due to the jury’s finding that Ibrahim committed the robbery in a group of three or more persons. At sentencing, the state asked the district court to impose a sentence of 96 months, twice the middle-of-the-box presumptive sentence. Ibrahim asked for a downward departure, but did not specify the precise sentence. The district court entered a judgment of conviction, determined that an upward durational departure was warranted, and sentenced Ibrahim to 72 months in prison.

Ibrahim appealed, arguing that the district court erroneously instructed the jury that a BB gun was a firearm. After this court’s nonoral conference regarding Ibrahim’s appeal, the supreme court held that a BB gun was not a firearm for the purposes of Minn. Stat. § 609.165 (2014) (ineligible firearm possession). *See State v. Haywood*, 886 N.W.2d 485, 489-90 (Minn. 2016). In an order opinion, we followed *Haywood*, held that a BB gun was not a firearm for purposes of first-degree aggravated robbery, determined that the district court plainly erred by instructing the jury that a BB gun was a “firearm,” and reversed Ibrahim’s conviction and remanded for a new trial. *See State v. Ibrahim*, No. A16-0049 (Minn. App. Jan. 5, 2017) (order op.).

² We note that, according to the Minnesota Sentencing Guidelines, Ibrahim’s presumptive sentence was between 41 and 57 months with 48 months being the middle-of-the-box sentence. *See* Minn. Sent. Guidelines IV.A. (2014).

On June 26, 2017, shortly before his new trial was scheduled to begin, Ibrahim pleaded guilty to first-degree aggravated robbery without any agreement as to sentencing. During his plea, Ibrahim admitted to the aggravating factor of committing the robbery along with three other people and waived his right for a jury to make that finding. Ibrahim's attorney stated that Ibrahim would present involuntary intoxication as a mitigating factor at sentencing.

A second PSI report was submitted, included findings that were almost identical to the first PSI, noted the "presumptive disposition [was] 48 months," and recommended an upward durational departure of 72 months.

During the sentencing hearing on August 9, 2017, the state again asked for a 96-month prison sentence. Ibrahim argued that involuntary intoxication was a mitigating circumstance and asked for a guidelines sentence "within [the] box." After finding a durational departure was justified, the district court imposed a 72-month prison sentence. Ibrahim appeals his sentence.

D E C I S I O N

A defendant cannot receive a greater sentence than originally imposed before a successful appeal. *State v. Holmes*, 281 Minn. 294, 303-04, 161 N.W.2d 650, 656-57 (1968). Ibrahim argues that the prosecutor committed prejudicial misconduct because at Ibrahim's second sentencing hearing, the prosecutor stated, "[w]ith regard to our argument for an upward durational departure, we are requesting that the [c]ourt commit [Ibrahim] to the [c]ommissioner actually for the 96 months, which is double the [middle-of-the-box sentence] or at very least the 72 months that was previously ordered by the [c]ourt prior to

remand.” Based on this alleged misconduct, Ibrahim argues his sentence should be reversed and remanded for imposition of the presumptive sentence.

Ibrahim did not object to the prosecutor’s statement, and so this court reviews the alleged misconduct under the modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 297-99 (Minn. 2006). Under this test, the appellant must show (1) that there was error and (2) that the error was plain. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). If the appellant satisfies these first two parts, the state carries the burden (3) to “demonstrate lack of prejudice; that is, the misconduct did not affect [the appellant’s] substantial rights.” *Ramey*, 721 N.W.2d at 302. In effect, the state must show that there was no “reasonable likelihood that the error had a significant effect on the proceeding.” *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014). If the state “meets its burden, [appellate courts] need not decide whether the prosecutor committed an error that was plain.” *Parker*, 901 N.W.2d at 926-27. But if the state is unable to show the alleged error did not affect the defendant’s substantial rights, the court considers (4) “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Ramey*, 721 N.W.2d at 302.

We conclude that the state has satisfied its burden to prove that the alleged misconduct did not affect Ibrahim’s substantial rights. *Id.* Thus, we do not address the other parts of the modified plain-error test. *See Parker*, 901 N.W.2d at 926-27. Three reasons support our decision. First, the district court rejected the prosecutor’s sentence request and imposed the same sentence it had imposed before Ibrahim appealed, leading us to conclude that the state’s request did not affect Ibrahim’s sentence or his substantial rights.

Second, the district court did not abuse its discretion by imposing the 72-month sentence. The supreme court has stated that “courts may depart from the [sentencing] guidelines only when substantial and compelling circumstances are present.” *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003); *see also* Minn. Sent. Guidelines II.D.1. (2014). Determining that substantial and compelling circumstances are present is a discretionary decision for the district court, but the district court must justify its decision. *Taylor*, 670 N.W.2d at 588. The legislature has identified a non-exclusive list of aggravating factors, including committing the crime “as part of a group of three or more persons who all actively participated in the crime.” *See* Minn. Stat. § 244.10, subd. 5a(10).

Here, the district court determined that Ibrahim admitted facts that established that he committed the crime in a group of three or more people. The district court also determined that this aggravating factor justified the departure, among other reasons. It stated:

The fact is undisputed that three or more persons actively participated in this crime. That is a basis for an upward departure. And it’s clear from the victim impact statements that have been offered here today as well as the video . . . that the victim’s sense of fear was greatly increased by the presence of multiple offenders on all sides of them

All of these unified acts of you and the three other defendants made a terrible act even more terrifying for the victims. In this court’s opinion that does justify an upward durational departure, and there are substantial compelling reasons to impose that sentence.

The district court also discussed Ibrahim’s contention that he was impaired:

I understand your contention that you were under the influence at the time of the offense. I don’t see a lot of persuasive evidence that supports that claim, and your actions

on the day in question don't really show an impairment; rather, they show a deliberate, preplanned, joint effort between yourself and three other codefendants to commit a robbery with a handgun or, in this case, a pellet gun used in a manner such as to lead the store employees to believe it was a real centerfire handgun.

Your actions on the day in question, during the robbery and your flight from police in the car and on foot after the robbery, I believe show that your acts were intentional and deliberate and not the result of an impairment from any controlled substance.

Ibrahim does not contend that the district court abused its discretion by imposing a 72-month sentence. Thus, Ibrahim's substantial rights were not affected.

Third, based on our review of the sentencing transcript, the state's sentencing request did not influence the district court's sentencing decision. The district court explained its decision on the record and did not mention the state's request for a 96-month sentence, beyond stating that it had considered counsels' arguments. Further, the district court stated, "I still believe that the 72-month sentence that was imposed initially in this case is appropriate, and that is what I'm going to impose today." We are satisfied that the state's request did not influence the district court's sentencing decision.

Ibrahim argues that the alleged prosecutorial misconduct affected his substantial rights because "it is impossible to tell the impact of the [s]tate's argument on the district court's sentence." To support this argument he points to *State v. Strommen*, in which the supreme court held that a new trial was warranted when a prosecutor incorrectly stated the law to the jury because the court could not say "with certainty that the prosecutor's misstatement of the law did not play a role" in the jury's rejection of the defendant's proffered defense. 648 N.W.2d 681, 689-90 (Minn. 2002).

But *Strommen* is distinguishable. First, the prosecutor in *Strommen* misstated the law to the jury, while the prosecutor in Ibrahim’s case allegedly misstated the law to the district court. *Id.* A district court is less susceptible to being misguided than a jury. Also, the district court in this case did not accept the state’s recommendation for a longer sentence. Second, jury deliberations are private, meaning that outside observers cannot know the basis for a jury’s decision. *See State v. Crandall*, 452 N.W.2d 708, 710 (Minn. App. 1990) (noting the “cardinal principle that the deliberations of the jury shall remain private and secret in every case”). In contrast, here, the district court explained its sentencing decision on the record.

We conclude that there is no reasonable likelihood that the prosecutor’s request for a 96-month sentence had any effect on Ibrahim’s sentence. Accordingly, even assuming that the prosecutor’s statement was plain error, the state has met its burden of proving any error did not affect Ibrahim’s substantial rights.

Affirmed.