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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0272**

State of Minnesota,
Respondent,

vs.

Kent David Olson,
Appellant.

**Filed November 18, 2019
Affirmed
Cleary, Chief Judge**

Carlton County District Court
File No. 09-CR-18-52

Keith Ellison, Attorney General, Peter D. Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Lauri A. Ketola, Carlton County Attorney, Carlton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Haley, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Cleary, Chief Judge; and Peterson, Judge.*

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

UNPUBLISHED OPINION

CLEARY, Chief Judge

In this direct appeal, appellant challenges the sufficiency of the evidence for his first-degree burglary conviction. He also argues that the district court erred by admitting evidence that he fled police prior to the burglary, and by allowing impeachment of his testimony about his prior felonies because he misstated how many he had and thereby “opened the door.” Because the evidence was sufficient, and the district court did not commit reversible error, we affirm.

FACTS

On January 4, 2018, at around 4:15 p.m., officers responded to a disturbance at a home on 10th Street in Cloquet, Minnesota. Officer Kyle Voltzke approached the home and saw appellant Kent David Olson in a nearby driveway. He tried to speak with appellant, who told him that the residents needed help. When the officer went to check on the residents, appellant fled east on foot. Officer Voltzke and other officers searched for appellant, but failed to locate him.

An elderly couple, K.K. and D.K., lived several blocks east. Sometime after 5:00 p.m., D.K. left to play cards. At around 7:30 p.m., K.K. heard sounds coming from the basement. She investigated, and a man wearing a ski mask grabbed her arm. He took her cellphone and, during the encounter, brandished a knife. After about 20 minutes, he left on foot. D.K. came home around 10:00 p.m., and K.K. told him what happened. They did not call police that night. It was later discovered that D.K.’s buck knife was taken.

The following morning, on January 5, Officer Voltzke arrested appellant at a casino. He was wearing the same clothes that the officer saw him wearing the previous day, a black ski mask rolled up onto his head like a hat, a black leather jacket, blue jeans, and black boots. The stolen cellphone and buck knife were in his possession, though the officer was unaware of the burglary at that time.

Meanwhile, on January 5, K.K. told her daughter what had happened, and the daughter called law enforcement. Officer Corey Schneberger took a statement from K.K., who described the intruder as six-foot-three and wearing jeans, black boots, and a tannish-green coat. Officers Schneberger and Voltzke later discussed the possibility that the burglary and earlier disturbance were connected. A third officer drafted a search warrant for appellant's jail property, and appellant's black ski mask, as well as the stolen cellphone and buck knife, were seized. The state charged appellant with first-degree burglary with a dangerous weapon.

Before trial, the state moved to impeach appellant with two prior felony convictions. The district court granted the motion. The state also moved to present evidence that appellant was identified by officers responding to the disturbance on 10th Street. Appellant did not object, so long as the disturbance was not referred to as a domestic assault. The district court granted the motion, subject to the defense's caveat.

At trial, K.K. testified that, on January 4, she and her husband stayed in their home most of the afternoon, but ventured outside around 2:00 or 3:00 p.m. She testified that the intruder was wearing a black ski mask, but she could see his eyes. She described them as "pale," but it was difficult for her to tell under the bright basement lights. She observed

appellant's eyes in the courtroom and described them as darker in color than those of the intruder. She described the intruder as tall, Caucasian, and wearing beige-green, solid-colored, "fatigue-type clothes," black pants, and black boots.

K.K. testified that she asked the intruder why he was there, and he responded that he was cold and needed a ride. He said that he had been in the basement all afternoon. She gave him a blue jacket to wear, but told him she did not have a car. The man accused her of lying because he saw a car in her driveway when he arrived. She told him her husband had taken the car. The man showed her a knife, and told her not to lie and that he could hurt her. At the time of the incident, she believed the man was in his late 20s or early 30s.

Appellant testified that he is 47 years old, just under six feet tall, and has hazel eyes. He testified that on January 4 and 5, he was wearing a black ski mask, a hoodie, a black leather jacket, blue jeans, and black boots. He wore a ski mask because "[i]t was 30 below." He was not from Cloquet, and on January 4, he drove to the home on 10th Street. His car broke down and would not start. He admitted to running from Officer Voltzke. He testified that he hid for an hour and a half to two hours before walking back the way he had come. He hid another hour and a half beneath a truck and then returned to the residence on 10th Street, but was told to leave. He again hid beneath the truck for approximately one half hour, and he then walked several blocks before encountering "Justin."

Appellant testified that he bought the cellphone and buck knife on the evening of January 4 from Justin, a man he had never met. Appellant "was walking down the street" and "saw two vehicles pulled up to each other with the hoods open," and Justin "was trying to start his vehicle." Appellant testified that he asked Justin for a ride to the casino. He

testified that he saw a knife on Justin’s dash and asked to buy it. Justin told him that he also had a cellphone for sale, and appellant paid Justin \$20 for the knife, \$20 for the cellphone, and \$10 for the ride.

The jury convicted appellant, and the district court sentenced him to 108 months’ imprisonment. This appeal followed.

D E C I S I O N

I. The circumstantial evidence supports the conviction.

Appellant argues that the evidence was insufficient because the record supports a reasonable hypothesis that someone else committed the burglary. In considering a claim of insufficient evidence, we conduct a thorough analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

The parties agree that a circumstantial-evidence standard of review applies. Under that heightened standard, we first identify the circumstances proved, deferring “to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate.” *State v. Robertson*, 884 N.W.2d 864, 871 (Minn. 2016) (quotation omitted). Second, we “independently examine the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt.” *Id.* (quotation omitted). “In order to sustain a conviction based on circumstantial evidence, the reasonable

inferences that can be drawn from the circumstances proved as a whole must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Id.* (quotation omitted).

Appellant was convicted of violating Minn. Stat. § 609.582, subd. 1(b) (2016), which imposes criminal liability if a person enters a building without consent and possesses a dangerous weapon while inside, so long as the person entered with intent to commit a crime or actually committed a crime while inside.

Here, the circumstances proved are: (1) appellant was not from Cloquet; (2) on January 4, a very cold day, he arrived in a car, which broke down; (3) approximately three hours before the crime, Officer Voltzke saw him in the area of the crime, fleeing east on foot towards the site of the crime; (4) appellant was seen wearing a black ski mask rolled up onto his head like a hat, a black leather jacket, blue jeans, and black boots; (5) law enforcement attempted to locate him but were unsuccessful; (6) at around 7:30 p.m., a white man wearing a black ski mask, jeans, and black boots grabbed K.K. in her home; (7) the intruder stole her cellphone and a buck knife; (8) he threatened her with a knife; (9) he told her he was cold and needed a ride; (10) he told her he had been in her basement all afternoon; (11) he left on foot just before 8:00 p.m.; and (12) appellant was arrested the following day, and he possessed a black ski mask and the stolen cellphone and buck knife.

The circumstances proved are consistent with appellant’s guilt. It is reasonable to infer that appellant fled law enforcement, hid in K.K. and D.K.’s basement, and later donned his black ski mask, grabbed K.K., stole her cellphone, and threatened her with the buck knife.

Appellant asserts that another person committed the burglary. But mere conjecture is insufficient. “An alternative theory does not justify a new trial if that theory is not plausible or supported by the evidence.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Appellant was found with the stolen items, and he testified at trial that he bought them from Justin, but this is implausible for several reasons. It is illogical that Justin would burglarize K.K. and D.K.’s home seeking warmth and transportation, and hide in the basement all afternoon, if he had a vehicle nearby that was repairable on the street. It is not reasonable that appellant hid outside in frigid weather for approximately four hours before obtaining a ride from Justin. It is implausible that Justin would leave the stolen buck knife sitting on his dash, easily visible, and it is equally unlikely that Justin obtained the stolen items from an intermediary. Appellant’s alternative theory defies logic.

Appellant points to alleged discrepancies to support his alternative theory. K.K. testified that appellant’s eyes, as observed in the courtroom, were darker than those of the intruder. But she also testified that it was difficult for her to see the intruder’s eyes under the basement lights. A factfinder could have reasonably concluded that any discrepancy was due to the lighting in the basement, the lighting in the courtroom, or a combination.

As for the intruder’s jacket, appellant was seen by Officer Voltzke, both before and after the burglary, wearing a black leather jacket, but K.K. described the intruder as wearing a tan-green jacket. Again, a factfinder could have rejected K.K.’s testimony regarding the intruder’s jacket or reasonably concluded that appellant found a tan-green jacket prior to being seen by K.K., and discarded that jacket, as well as the blue jacket given to him by K.K., prior to his arrest at the casino.

Appellant points to the fact that K.K. testified the intruder was wearing black pants and Officer Voltzke testified that appellant was wearing jeans as another inconsistency. But there was evidence that K.K. previously described the intruder as wearing jeans. “When there is a conflict in the evidence, we must defer to the jury’s factual determinations and reject evidence that is inconsistent with the verdict.” *Robertson*, 884 N.W.2d at 872. Lastly, based on K.K.’s age and the circumstances under which she observed the intruder, the jury could reasonably reject any inconsistencies regarding height and age.

The reasonable inferences drawn from the circumstances proved are consistent with appellant’s guilt and inconsistent with any rational hypothesis except that of guilt. The circumstantial evidence was sufficient.

II. The district court did not plainly err by admitting evidence that appellant fled law enforcement prior to the burglary.

Appellant argues that the district court erred by admitting prior-bad-acts evidence, specifically, his flight from police prior to the burglary. The state argues that appellant failed to raise a proper objection under Minn. R. Evid. 404(b), and therefore this court should review under a plain-error standard. Failure to object to prior-bad-acts evidence generally constitutes a forfeiture of the issue for purposes of appeal, unless the defendant can show plain error. *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005).

At trial, appellant objected to evidence of flight because it would give “an implication or presumption of guilt for conduct that’s not related to this case,” but appellant failed to expressly reference character evidence or Minn. R. Evid. 404, and to support his argument, he cited only *Alberty v. United States*, which involved a jury instruction that

unfairly stressed the inferences of guilt to be drawn from flight. 162 U.S. 499, 508, 16 S. Ct. 864, 867 (1896).

The district court did not view the issue as whether to admit prior-bad-acts evidence. The court deemed *Alberty* inapplicable, and relying on *State v. Givens*, 356 N.W.2d 58 (Minn. App. 1984), *review denied* (Minn. Jan. 2, 1985), concluded that the flight evidence was admissible. After the ruling, appellant was given the opportunity to offer additional argument, but he provided none. Because appellant failed to present a prior-bad-acts argument, and because the district court did not engage in a prior-bad-acts analysis, the issue is subject to plain-error review. See Minn. R. Evid. 103(a)(1) (requiring an objection to be specific, unless the ground is apparent from the context).

Under a plain-error analysis, appellant must establish (1) error, (2) that is plain, and (3) that affects his substantial rights. *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016). If all three of these requirements are met, we must determine “whether reversal is required to ensure the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (quotation omitted). “An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotations omitted).

There is a danger in admitting evidence of a defendant’s prior bad acts because “the jury may convict because of those other crimes or misconduct, not because the defendant’s guilt of the charged crime is proved.” *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). Because a defendant has a constitutional right to a fair trial, such evidence should generally

be excluded. *Id.* A prosecutor must give notice of intent to offer evidence of a defendant's prior crimes or bad acts. Minn. R. Evid. 404(b)(2).

The district court correctly determined that evidence of a defendant fleeing is admissible and probative of the defendant's consciousness of guilt. *Givens*, 356 N.W.2d at 63. But appellant ran *prior* to the charged crime, making the applicability of *Givens* questionable. Regardless of *Givens*, the state argued at trial that the evidence of appellant's flight provided a "motivation and explanation" for appellant to break into K.K. and D.K.'s residence and was "central to the fact pattern of this case." On appeal, the state asserts that the evidence was admissible as immediate-episode evidence. We agree. *See State v. Robinson*, 699 N.W.2d 790, 799 (Minn. App. 2005), *aff'd*, 718 N.W.2d 400 (Minn. 2006) (declining to reverse district court's admission of statement even though reasoning was erroneous because statement was admissible on other grounds); *see also State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003) (permitting the state to raise alternative argument on appeal when the record permitted review, there was legal support for the argument, and the alternative ground did not expand the relief).

The general rule against admitting other-crime evidence does not preclude the state from proving all relevant facts and circumstances which tend to establish any of the elements of the offense for which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant also committed other crimes. *State v. Wofford*, 114 N.W.2d 267, 271 (Minn. 1962). Immediate-episode evidence is a narrow exception to the general character-evidence rule. *State v. Riddley*, 776 N.W.2d 419, 425 (Minn. 2009). Such evidence "is admissible where two or more offenses are linked

together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the *res gestae*.” *Id.* (quotation omitted). In order for evidence to be properly admissible as immediate-episode evidence, the supreme court has “emphasize[d] the need for a close causal and temporal connection between the prior bad act and the charged crime.” *Id.* at 426.

Here, there was a close causal and temporal connection between appellant fleeing and the subsequent burglary. The fleeing provided motivation for, and gave context to, the burglary. *See State v. Martin*, 197 N.W.2d 219, 226-27 (Minn. 1972) (holding that district court properly admitted testimony regarding earlier robberies committed by the defendant because the defendant’s desire to conceal the earlier robberies motivated the charged murder). The district court’s decision to admit evidence that appellant fled from Officer Voltzke toward the site of the burglary was not plain error.

III. The district court abused its discretion by permitting impeachment under the opening-the-door doctrine, but reversal is unwarranted.

During appellant’s direct examination, his attorney asked if he had any felony convictions. Appellant responded, “Yes.” The attorney asked how many, and appellant responded, “Two.” Outside the presence of the jury, the prosecutor asserted that appellant’s testimony was inaccurate because he had “at least five prior felony convictions.”¹ The prosecutor asked to impeach appellant with his additional felony convictions. The district court permitted the impeachment.

¹ The two felonies admitted by the court were from 2003 and 2013. The state did not originally seek to admit other prior felony convictions with older offense dates.

Under Minn. R. Evid. 609, a district court may admit impeachment evidence that a witness has been convicted of a felony if the court determines that the probative value outweighs the prejudicial effect. Appellant concedes that the district court properly allowed impeachment with two of his prior felony convictions, but argues that the district court abused its discretion by concluding he opened the door to additional impeachment.

The state argues that appellant failed to object, and we are limited to plain-error review. While appellant failed to make a specific objection under rule 609, appellant did object as to whether the door had been opened, and we therefore review the district court's determination on the opening-the-door issue for an abuse of discretion. *See State v. Tscheu*, 758 N.W.2d 849, 861 (Minn. 2008).

Under the opening-the-door doctrine, which is based on principles of fairness and common sense, there is no error in admitting otherwise inadmissible evidence for the state if the defense first introduces evidence that creates a right to respond. *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006); *see United States v. Gilmore*, 553 F.3d 266, 272 (3d Cir. 2009) (“[P]rior felony convictions more than ten years old may be used to impeach by contradiction even if they do not satisfy [r]ule 609’s balancing and notice conditions.”). The purpose of the doctrine is to ensure that one party does not gain an unfair advantage by presenting the jury with an unrebutted, “distorted representation of reality.” *Valtierra*, 718 N.W.2d at 436.

The district court permitted impeachment with three additional felonies because appellant testified that he only had two. But the prosecutor was only intending to offer two, the jury was only going to hear about two, and appellant’s testimony was therefore in

accord with the anticipated evidence and did not create an unfair advantage. *See id.* Under these circumstances, the district court abused its discretion by relying on the opening-the-door doctrine. A district court abuses its discretion when it illogically construes the law. *Nunn v. State*, 868 N.W.2d 230, 232 (Minn. 2015); *Browder v. State*, 899 N.W.2d 525, 528 (Minn. App. 2017), *review denied* (Minn. Aug. 22, 2017).

Although the district court abused its discretion, we see no basis for reversal. Appellant must show prejudice. *See State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016) (stating that, if a district court abuses its discretion by admitting evidence, a reviewing court must determine “whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict”). Here, the additional impeachment was brief and nonspecific. The prosecutor asked appellant whether his testimony about having only two prior felonies was untrue, and appellant responded, “Yes.” The prosecutor asked if appellant had “three other felony convictions,” and appellant responded, “Yes.” During redirect, defense counsel was able to mitigate the damage:

DEFENSE COUNSEL: [W]hy did you say that you only had two felony convictions?

APPELLANT: Because I was told that’s, um, all I had to disclose today and that’s what was on the paperwork that was given to me.

DEFENSE COUNSEL: Were you trying to be inaccurate with that?

APPELLANT: No, not at all.

The prosecutor briefly commented on the impeachment during closing argument, stating that appellant “made a statement” and “he was impeached by me pointing out that he had made an untrue statement.” But, defense counsel again mitigated the damage:

[Appellant] testified that he had all these felonies. On [d]irect [e]xam he did state he had two, but that was because that's what he was told that he had to say. That there were—they were only talking about two. When asked if he had more, he readily gave that information out. He wasn't trying to hide.

In addition to the additional impeachment being brief, nonspecific, and mitigated by the defense, the jury was already aware that appellant was a convicted felon. While we recognize that appellant's credibility was relevant, the circumstantial evidence, particularly appellant's connection to the area of the crime and his possession of the stolen items, was strong. It is not reasonably likely that the additional impeachment affected the verdict.

Affirmed.