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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0284**

State of Minnesota,
Respondent,

vs.

John Stephen Bense,
Appellant.

**Filed February 1, 2021
Affirmed in part, reversed in part, and remanded
Florey, Judge**

Blue Earth County District Court
File No. 07-CR-19-301

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Ross, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

Appellant argues that his misdemeanor theft convictions must be reversed because the district court improperly limited the scope of defense counsel's closing argument and because the prosecutor committed prejudicial misconduct by mischaracterizing witness testimony. Because the district court's erroneous evidentiary decisions were harmless and

the prosecutor did not commit misconduct, we affirm in part. However, because the district court erred by entering convictions for both theft and aiding and abetting theft involving the same behavioral incident, we reverse and remand to vacate one conviction.

FACTS

The state charged appellant John Bense with one count of misdemeanor theft and one count of aiding and abetting misdemeanor theft, in violation of Minn. Stat. § 609.52.2(a)(1) (2018), alleging that he stole or assisted his girlfriend, Kelly Nielsen, in stealing nail polish and vitamins from a Hy-Vee grocery store.

A jury trial was held on January 23, 2020. Officer Jesse Gilbertson testified as to his involvement in the investigation. Gilbertson explained that he received a photograph image from the grocery store's video footage of the suspects—appellant and Nielsen—a receipt from the EBT purchase, and an EBT account number, which allowed him to obtain a search warrant for the rest of the account information. Appellant and Nielsen were listed as account holders. Upon matching appellant's driver's license photograph with the image from the video footage, Gilbertson issued citations to both appellant and Nielsen.

On cross-examination, defense counsel asked whether Gilbertson watched the surveillance video, to which he responded “no.” Gilbertson stated that he relied on the citizen arrest paperwork, the EBT receipt, and the image of the video footage. Defense counsel then asked whether Gilbertson attempted to contact appellant or Nielsen to discuss the incident, to which he responded “[n]o, I believe that once they received the citation if they want to discuss anything with it, my name and information is on that citation and they

can reach out to me.” On redirect, Gilbertson clarified that it was standard procedure to mail citations without making phone calls or house visits.

Nielsen had previously pleaded guilty to stealing the nail polish and vitamins from the grocery store and was convicted of misdemeanor theft. At appellant’s trial, she testified that she was responsible for the theft and appellant was unaware of it until they got home. Defense counsel asked Nielsen why the jury should believe that she was being truthful and not lying under oath for her long-term boyfriend, to which she responded:

Because I plead[ed] guilty I – never at one point tried to say that I didn’t do it. I don’t have a history of doing it but I learned my lesson and I have paid my fines and I have – it is not something I would ever do again and it is something that [appellant] told me specifically to grow up and not do and it has affected our relationship since – because he is in trouble – because of me.

The state interpreted this testimony to mean that “she has never done this before,” and moved to impeach her statement with a second theft conviction that had been entered on the same day as the first for shoplifting at another store. The district court granted the state’s motion over defense’s objection. During cross-examination, Nielsen stated that she had stolen again at Walmart after stealing from Hy-Vee. She explained:

When the Hy-Vee incident had happened, I wasn’t aware that it had happened, they had mailed me a ticket so I didn’t – someone didn’t stop me at the door, there wasn’t a police officer, I didn’t speak to anybody, I was mailed a ticket and then I was to go to court. When I had gotten caught at Walmart, that is the only one I thought I had so, when I went to court for the Walmart one that is when I learned about the Hy-Vee one. Ever since the Walmart I haven’t done anything at all that was a lesson learned for me – big time because it wasn’t just the Walmart it was the Hy-Vee as well that I did not know about,

they mailed me a ticket. I had no knowledge of the Hy-Vee theft until the Walmart.

Appellant also testified on his own behalf and detailed his version of events. He testified that he did not steal anything and was not aware that Nielsen had stolen anything until they got home from Hy-Vee. On cross-examination, the state impeached appellant with three prior “sanitized” felony convictions.

In closing, the state again attacked the credibility of appellant and Nielsen:

[E]ven if what [appellant] and Ms. Nielsen stated, in their testimony, contradicts everything the State has provided. They are not credible. Judge Johnson gave you criteria to evaluate the credibility of individuals; I am not saying that [appellant] is a bad guy, the reality of the situation is that he – he is a felon – he has been convicted of three felonies in the last 10 years. That is the reality of the situation . . . that doesn’t make him more or less likely that he committed this crime, it does impeach his testimony. Judge Johnson told you that. That is the law.

The state then attacked Nielsen’s credibility, asserting that she lied under oath regarding the second theft incident.

In closing, defense counsel addressed the state’s witness-credibility arguments. First, defense counsel acknowledged that appellant had three felony convictions from 2010 and 2012, and implied that these past offenses should not immediately discredit appellant’s testimony. The state objected, and during a sidebar conversation stated: “[t]his is the law. Impeachment is decided by the Minnesota Supreme Court.” The district court agreed and cautioned defense counsel that she was going “a little bit too far” and the jury “can’t know more about it.” Defense counsel then proceeded to make a witness-credibility argument

pertaining to Nielsen by imploring the jurors to consider for themselves whether she actually lied on the stand based on their own recollection of her testimony.

Defense counsel then argued that the evidence was insufficient to convict appellant and began to critique the state's investigation:

[Officer Wilken] did not even bother to watch the video himself; did not bother to call the suspects to get their side of the story; fish for an admission; to get an explanation; to get some kind of corroborative evidence for what Mr. Wilkens told him on the video that he in fact did not watch. Mr. Wilkens stands up here today and he testifies that his narrative, that he developed in his head when he called the police was the following: that [appellant] and his girlfriend [Nielsen] came into the store; they were standing around health and beauty, they concealed those items; they concealed those items inside of coats that they then took out into the car and put in the car and that is the theft. And what he said was he stopped recording the video and stopped gathering the footage because the theft had already occurred when they went in to continue doing their shopping.

The state objected, arguing that defense counsel was misleading the jury. Defense counsel explained that she was using the evidence to demonstrate a lack of investigation, which went to the state's burden of proof. Reasoning that the issue should have been raised prior to trial, the district court prohibited defense counsel from making any further argument concerning what the police officer did.

Following the trial, appellant was convicted of both charges. The district court entered convictions on both counts and sentenced appellant to 30 days stayed for one year and a \$150 fine. This appeal follows.

DECISION

I. Scope of closing argument

The first issue we address is whether the district court abused its discretion in limiting the scope of closing argument by preventing defense counsel from fully contesting the state's impeachment evidence and critiquing the state's investigation. This court reviews a district court's ruling on the scope of arguments for an abuse of discretion. *State v. Romine*, 757 N.W.2d 884, 892 (Minn. App. 2008).

In limiting the scope of closing argument, a district court should recognize that a criminal defendant has a constitutional right to be "afforded a meaningful opportunity to present a complete defense." *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (quotation omitted). While this right encompasses the "right to make all legitimate arguments on the evidence, to explain the evidence, and to present all proper inferences to be drawn therefrom," it is not absolute. *State v. Atkinson*, 774, N.W.2d 584, 589 (Minn. 2009) (quotation omitted). As such, the district court has discretion to limit the scope of closing argument to safeguard the jury from misleading inferences. *Id.*

Two limitations are at issue here. First, appellant argues that the district court erred by impeding defense counsel's ability to fully address the state's impeachment arguments. During closing argument, defense counsel responded to the state's witness-credibility argument by noting that appellant's prior convictions were almost ten years old and stated:

[W]hat kind of world do you want to live in where a person who is accused almost a decade later, of a totally separate crime, cannot stand up in front of their peers and tell you something without the State telling you immediately that they

are automatically not credible and believable as witnesses because of something they did almost a decade ago.

The state objected, arguing that this was a misstatement of the law or an impermissible challenge to the current law, which is to be decided solely by the Minnesota Supreme Court. The district court implicitly affirmed the state's objection by cautioning defense counsel that she was going "a little bit too far" and directing her that the jury "can't know more about it." This evidentiary determination was a clear abuse of discretion. Defense counsel was addressing the weight the jury should give a nearly ten-year-old conviction when evaluating witness credibility, not challenging or contradicting the established law of impeachment. Because the objection that was raised here was misplaced, the district court erred in limiting defense counsel's impeachment argument on this issue.

Appellant next argues that the district court's second error was precluding defense counsel's critique of the state's investigation. The state objected to defense counsel's summary of the investigating officer's testimony, arguing that it was misleading the jury. The district court sustained this objection and prohibited defense counsel from making further arguments challenging the police investigation, reasoning that such issues should have been raised at an omnibus hearing or another point before trial. Again, we conclude the district court erred in this evidentiary ruling. Defense counsel was appropriately arguing that the state did not thoroughly investigate the matter, and thus, failed to prove its case beyond a reasonable doubt. A general challenge to the adequacy of an investigation need not be raised at an omnibus hearing, and defense counsel was entitled to discuss the

shortcomings of the investigation at trial, including her closing argument. The district court abused its discretion in limiting the scope of argument on this issue.

The above errors are subject to a harmless-error analysis; accordingly, we next consider “whether the guilty verdict actually rendered was surely unattributable to the error[s].” *State v. Larson*, 788 N.W.2d 25, 32 (Minn. 2010).

The potential impact that the district court’s evidentiary rulings had on defense counsel’s closing argument cannot be fully discerned after the fact, but it appears to be fairly limited after considering defense counsel’s full closing statements in light of the trial record as a whole. While the district court did prevent defense counsel from further arguing that the state’s investigation was insufficient, that limitation was imposed only after defense counsel had already made various statements to the jury suggesting the overall inadequacy of the investigation. Likewise, the district court cautioned defense counsel that her impeachment argument was going “too far,” but again, that warning was given only after defense counsel had implored the jury to consider the amount of weight the older convictions should have in making credibility determinations. Moreover, the district court did not instruct the jury to disregard any of counsel’s arguments, and so appellant was permitted at least in part to present them. Because defense counsel’s closing does not appear to be considerably different from what it might have been without the district court’s restrictions, we conclude that the errors here were harmless beyond a reasonable doubt and had no impact on the verdict.

II. Prosecutorial misconduct

The next issue raised by appellant is whether the prosecutor committed prejudicial misconduct that deprived appellant of his constitutional right to a fair trial.

This court reviews claims of unobjected-to-prosecutorial misconduct using a modified plain-error test. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). Under the modified plain-error test, appellant must show that there was an error that was plain. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). A plain error is one that is “clear or obvious.” *Id.* at 302. Once such an error is established, the burden then shifts to the state to show the plain error did not affect appellant’s substantial rights. *Id.* “An error affects a defendant’s substantial rights if there is a reasonable likelihood that the error actually impacted the verdict.” *McDaniel*, 777 N.W.2d at 749. If the reviewing court determines that a plain error affected the defendant’s substantial rights, it “then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Ramey*, 721 N.W.2d at 302.

Prosecutorial misconduct occurs when a prosecutor intentionally misstates evidence. *State v. Mayhorn*, 720 N.W.2d 776, 787-88 (Minn. 2006). In recognition of inadvertent misstatements, the law only requires that closing arguments be “proper, not perfect.” *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996). The state “may present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence in its closing argument.” *State v. Munt*, 831 N.W.2d 569, 587 (Minn. 2013).

Appellant argues the prosecutor committed misconduct by repeatedly mischaracterizing Nielsen's testimony during cross-examination and closing argument.

The prosecutor's cross-examination of Nielsen went as follows:

Q: Now you testified that [appellant] talked to you that this was a one time thing and you hadn't done it before and you have never done it since then, is that correct?

A: Can you say that again?

Q: You testified – you just told the jury that [appellant], after finding out that you stole, told you that you should never do it again and you said you had never done it before and that you are not gonna do it again, that is what you told [appellant] is that correct? That is what you just testified to?

A: Can you repeat that – I am sorry.

Q: You were asked – answering [defense counsel's] question is that correct?

A: Yes.

Q: While answering [defense counsel's] questions you stated that [appellant] said that you should not steal before – you should never steal again is that correct?

A: Yes.

Q: And you said that it is a one-time thing, that you never did steal again is that correct?

A: From Hy-Vee?

Q: Well I am asking you what you said.

A: I don't recall being asked that.

Q: I am asking you what was said, not what was asked.

A: I did not say that I have – that [appellant] never told me to steal again.

Q: Did you tell this jury that it was a one-time thing that you had never stolen before or after?

A: No, I did not tell the jury that.

Q: You did not testify that [appellant] told you not to steal and that you needed to stop?

A: He had told me that once before any of this, that is why I hadn't – that is why I it wasn't together on – that is why I did this behind [appellant's] back because he told me not to.

Q: Is it true that this is not the only theft conviction on your record?

A: Yes.

Then in closing, the prosecutor stated:

[Nielsen] lied to me – she came – she was under oath, she lied to you, she said she never been – she had never stolen before, she would never steal again and then when I pressed her on it, she equivocated, she said oh no that is not what I said, you were here you know what she said.

The parties dispute whether these instances constitute misstatements of Nielsen's testimony. The answers elicited from Nielsen, who was seemingly defensive and uncooperative during cross-examination, were reasonably subject to different interpretations. Appellant argues that the state incorrectly construed Nielsen's testimony to mean that she had never stolen before and asserts that she actually meant "she learned her lesson after facing criminal consequences for stealing, which happened at the same time for both offenses." Appellant's proposed interpretation is admittedly based on "[r]eading only slightly between the lines of [Nielsen's] testimony," and is a possible inference drawn from the testimony. However, because a reasonable person could also interpret Nielsen's testimony to involve some dishonesty based on her indirect, inconsistent, and vague answers, the record supports the prosecutor's characterization of her testimony. Because the prosecutor's characterization is based on a reasonable inference and was not an intentional misstatement of the evidence, there is no error here.

We further note that even if there was an error, it did not affect appellant's substantial rights. *See Ramey*, 721 N.W.2d at 302. This case involved ample evidence on which the jury could have based its verdict, including surveillance footage of the theft and the various witness testimonies presented throughout the trial. Moreover, as the state

emphasizes, the district court adequately informed the jury that statements made by the attorneys do not constitute evidence, at both the start of the trial and during final instructions. Additionally, immediately after asserting that Nielsen was lying, the prosecutor reminded the jury to follow the court's criteria in evaluating witness credibility.

III. Multiple convictions

The final issue is whether one of appellant's convictions must be vacated. The district court entered convictions on appellant's misdemeanor-theft offense and his aiding-and-abetting-misdemeanor-theft offense. Appellant argues that this amounts to reversible error because both offenses are violations of the same statute and arose from a single behavioral incident. "Whether a defendant's offense occurred as part of a single course of conduct is a mixed question of law and fact." *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). This court reviews a district court's finding of fact under a clearly erroneous standard, and its application of the law to those facts is de novo. *Id.*

The supreme court has interpreted Minn. Stat. § 609.04 (2018) to bar "multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Clark*, 486 N.W.2d 166, 170-71 (Minn. App. 1992) (citing *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985)). In determining whether two criminal acts constitute a single behavioral incident, courts consider the time and place of the crimes and whether the conduct was motivated by a desire to obtain a single criminal objective. *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011). It is the state's burden to establish by a preponderance of the evidence that the two offenses were not part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

Here, appellant was convicted of misdemeanor theft as well as aiding and abetting misdemeanor theft—both violations of Minn. Stat. § 609.52.2(a)(1). And the jury relied on the same factual basis to find appellant guilty of both charges. Appellant’s offenses occurred at the same location and time and were presumably motivated by a single criminal objective, demonstrating a continuous course of conduct. Because the district court did not find separate acts of theft to support separate convictions, appellant was improperly convicted twice under the same criminal statute for the same single act of theft.

While the district court properly sentenced appellant for only one conviction, it erred in formally adjudicating him guilty of both counts. *See State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999) (explaining that if a jury convicts a defendant of more than one offense from a single course of conduct, “the court [is] to adjudicate formally and impose sentence on one count only.”). One of appellant’s convictions must be vacated.

Affirmed in part, reversed in part, and remanded.