

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0591**

State of Minnesota,
Respondent,

vs.

Zakarie Farah Hassan,
Appellant.

**Filed March 6, 2023
Affirmed in part, reversed in part and remanded
Florey, Judge***

Stearns County District Court
File No. 73-CR-19-5294

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Janelle P. Kendall, Stearns County Attorney, River D. Thelen, Assistant County Attorney,
St. Cloud, Minnesota (for respondent)

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Considered and decided by Johnson, Presiding Judge; Bratvold, Judge; and Florey,
Judge.

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

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this appeal from the final judgments of conviction for first-degree aggravated robbery and simple robbery, appellant argues that he is entitled to a new trial because the prosecutor committed prejudicial misconduct in closing arguments. Appellant also argues that the judgment of conviction for simple robbery must be vacated because it is a lesser-included offense of aggravated robbery. We conclude that the prosecutor did not commit prejudicial misconduct in closing arguments but agree that appellant's conviction for simple robbery must be vacated. Thus, we affirm in part, reverse in part, and remand.

FACTS

On July 1, 2019, respondent State of Minnesota charged appellant Zakarie Farah Hassan with one count of simple robbery in violation of Minn. Stat. § 609.24 (2018). The complaint was later amended to include additional counts, including aiding and abetting first-degree aggravated robbery with infliction of bodily harm in violation of Minn. Stat. § 609.245, subd. 1 (2018). The complaint alleged that on June 27, 2019, Hassan and several other individuals drove up to 16-year-old H.A. in a park and began yelling at him, claiming he stole a phone. One individual exited the vehicle and pushed H.A. to the ground and another began to punch H.A. while demanding his phone. The individuals then stole H.A.'s phone, watch, and wireless headphones. H.A. identified one of the individuals as Hassan, who he knew from summer school. Hassan pleaded not guilty to the charges and the district court set the case for a jury trial.

Before trial the state sought to introduce *Spreigl*¹ evidence of two prior bad acts. The first incident occurred on June 8, 2019, and involved Hassan and several others approaching a man, accusing him of getting a friend in trouble over a stolen phone, assaulting the man, and stealing his phone. The second incident occurred on June 17, 2019, and involved Hassan and H.A. During this incident, Hassan approached H.A. after summer school and asked to borrow his phone. H.A. agreed, and Hassan took the phone and fled. H.A. tracked the phone later that evening and discovered that it was in Hassan's apartment. H.A. went to Hassan's apartment with his dad to get the phone back. When Hassan refused, H.A. called the police and an officer located the phone in Hassan's room. The state argued that both incidents were more probative than prejudicial and could help prove identity, intent, and modus operandi.

The district court ruled that the June 17, 2019, incident was admissible *Spreigl* evidence to show identity and common scheme and that the probative value outweighed the danger of unfair prejudice. But the district court excluded the June 8, 2019, incident because it determined that the evidence would unfairly prejudice the defense.

The trial began on October 25, 2021. H.A. testified first on behalf of the state. Counsel for the state indicated they would ask H.A. about the prior incident on June 17, 2019, and asked the judge whether a jury instruction would be appropriate. The judge read the following instruction:

¹ Evidence of other crimes or bad acts is known in Minnesota as "*Spreigl* evidence." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (citing *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965)).

Ladies and gentlemen of the jury, you are about to hear evidence of occurrences on June 17, 2019. This evidence is being offered for the limited purpose of assisting you in determining whether the defendant committed those acts with which the defendant is charged in the [c]omplaint. This evidence is not to be used to prove the character of the defendant or that the defendant acted in conformity with such character. The defendant is not being tried for and may not be convicted of any offense other than the charged offenses. You are not to convict the defendant on the basis of any occurrences on June 17, 2019. To do so might result in unjust double punishment.

H.A. then testified about the incident and stated he was walking to his car after his summer school program ended for the day when Hassan approached him. Hassan asked if he could use H.A.'s phone to call someone. H.A. gave Hassan his phone, and Hassan ran away with it to the back of the school and got into a car. When H.A. got home he checked a phone-locator application, and it showed his phone at an apartment complex. H.A. testified that he and his dad went to the apartment complex to retrieve the phone and the tracking application led him to Hassan's apartment. They knocked on the door, and Hassan's family member answered and stated they would look for the phone. Approximately ten minutes later, H.A. and his father knocked again. This time Hassan answered and told them that his phone was not there and slammed the door. H.A. called the police, and an officer came, spoke with Hassan's mother, and retrieved the phone. H.A. identified Hassan in the courtroom as the individual who took his phone on June 17, 2019.

H.A. then testified about the incident on June 27, 2019. He testified that he was jogging on a trail in a park with his cellphone, watch, and wireless headphones. He testified that a car approached him in the parking lot and that he could see several people exiting

the vehicle. Three people approached him, and he noticed one of the three was Hassan. H.A. testified that one of the individuals “said something about stealing a phone” and then he was hit from behind. H.A. testified that he fell to the ground and one individual started punching him while Hassan dug through his pockets and took his phone. H.A. testified that while he was still on the ground, he felt Hassan “yanking” on his wrist and pulling his watch off. H.A. testified that one of the individuals stated he would stab H.A. with a knife, but that H.A. never saw the knife. H.A. testified that he believed Hassan also kicked and hit him a few times, but that with the three attackers it was hard to tell exactly where everyone was in the moment. H.A. testified that the individuals took his phone, watch, and wireless headphone case, returned to the vehicle, and drove off. H.A. then located a man in the park who called 911.

The man who called 911 for H.A. on June 27, 2019, along with the two responding officers also testified on behalf of the state. The man who called 911 testified that he was in his car getting ready to leave when he saw a young man with a torn shirt who “looked like maybe something had happened to him.” He testified that he also saw a vehicle leaving the parking lot shortly before seeing the young man, but that he only recognized it as a small compact car with about three people in it. Approximately 10 to 15 minutes after the man called for help, officers responded to the scene. One of the responding officers testified that, when she arrived at the scene, she noticed H.A. with scrapes on his arms and a torn shirt. She testified that he told her that he had been jogging in the park when the individuals approached him, pushed him to the ground, and began punching him. She testified that H.A. identified one of the attackers as Hassan.

The second responding officer testified that he also responded to the call on June 17 to help H.A. locate his phone in Hassan's apartment building. He testified that when he arrived at the apartment, he spoke with Hassan's family member who led him to Hassan's bedroom where he located H.A.'s phone.

The state rested, and the defense did not call any witnesses. The judge then read the following jury instruction.

You have heard evidence of an occurrence on June 17, 2019, in the city of St. Cloud. As I told you at the time this evidence was offered, it was admitted for the limited purpose of assisting you in determining whether the defendant committed those acts with which the defendant is charged in the complaint. This evidence is not to be used as proof of the character of the defendant or that the defendant acted in conformity with such character. The defendant is not being tried for and may not be convicted of any offense other than the charged offense. You are not to convict the defendant on the basis of any occurrence on June 17, 2019, in the city of St. Cloud. To do so, might result in unjust double punishment.

During closing remarks, the prosecutor argued that the reason H.A. knew Hassan as one of the individuals in the group who hit him and took his phone on June 27 was because he had gone to summer school with Hassan and that H.A. had allowed Hassan to use his phone just 10 days prior, and Hassan took off running with it. Counsel described the incident on June 17:

So when we ask ourselves about [H.A.'s] identification of the defendant, you have to realize that he had multiple instances in a short amount of time, 10 days, multiple high-level instances and interactions with the defendant. These weren't just passing conversations. This was getting robbed twice by the defendant, going and confronting him at his residence about this phone. Those are the kind of interactions that people remember. Those are the things that you carry with you. In fact, I would

say getting robbed just once is not something that [H.A.] will probably ever forget, and remembering the details of the individual he knew who robbed him are going to be burned into his mind.

Counsel argued that the second responding officer's "testimony critically confirms an important aspect of [H.A.'s] testimony, right. The first incident happened on June 17th, and that is how Mr. Hassan certainly came to [H.A.'s] attention. This was the first time that he robbed him." Counsel urged the jury to "think about [H.A.'s] testimony . . . His version of the events all make sense. He's located at a park that is extremely close to his house, and he's located by the individual who robbed him ten days prior."

The jury found Hassan guilty of both aggravated robbery and simple robbery. The district court entered a conviction on both counts and sentenced Hassan to 48-months' imprisonment. Hassan appeals.

DECISION

I. Hassan has not demonstrated that the prosecutor committed plain error during closing arguments.

Hassan claims he is entitled to a new trial because the prosecutor committed prejudicial misconduct in closing arguments by stating Hassan "robbed" H.A. twice. Hassan did not object to the statements at trial.

"When a defendant fails to object at trial, he generally forfeits consideration of prosecutorial misconduct on appeal," but appellate courts may review unobjected-to prosecutorial misconduct under the modified plain-error standard. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006); *State v. Ramey*, 721 N.W.2d 294, 296 (Minn. 2006). Under this standard of review, the defendant bears the burden "to demonstrate both that

error occurred and that the error was plain.” *Ramey*, 721 N.W.2d at 302. “An error is plain if it was clear or obvious,” which is typically established “if the error contravenes case law, a rule, or a standard of conduct.” *Id.* (quotation omitted).

If the defendant demonstrates an error that is plain, the burden then shifts to the state “to demonstrate lack of prejudice” by showing “that 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.” *Id.* (quotation omitted). In determining whether there is a reasonable likelihood that the absence of the misconduct would have a significant effect on the jury’s verdict, “we consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions.” *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). If “any one of the requirements” of the plain-error test is not satisfied, the reviewing court “need not address any of the others.” *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017) (quotation omitted). If all three prongs of the plain-error test are satisfied, the reviewing court then decides “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).

Here the alleged prosecutorial misconduct occurred during the state’s closing argument when counsel stated that Hassan “robbed” H.A. twice. The prosecutor stated that Hassan first “came to [H.A.’s] attention” on June 17 because it was “the first time that he robbed [H.A.].” The prosecutor also stated that on June 27, H.A. was “located by the individual who robbed him ten days prior.” Hassan argues that by stating Hassan “robbed” H.A., the prosecutor committed plain error because the statements misstated the evidence

and went beyond the district court's order admitting the evidence in as a *theft* not a *robbery*. We are not persuaded.

A prosecutor may not use properly admitted *Spreigl* evidence “as a means to attack the defendant's character or to establish a criminal propensity,” *State v. Duncan*, 608 N.W.2d 551, 555 (Minn. App. 2000), *rev. denied* (May 16, 2000), nor may the prosecutor intentionally misstate the evidence, *Mayhorn*, 720 N.W.2d at 788. Viewing the prosecutor's statements as a whole, we cannot conclude that the prosecutor intentionally misstated the evidence or otherwise used the prior incident to attack Hassan's character. Instead, the prosecutor used the *Spreigl* evidence for a proper purpose of establishing identity. The prosecutor argued that H.A. specifically recognized Hassan as one of the individuals who attacked him in the park and stole his property because of the incident on June 17.

Further, when the alleged misconduct occurs during closing arguments, the reviewing court assesses “the closing argument as a whole” to determine whether a prosecutor committed misconduct constituting plain error. *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009) (quotation omitted). Here, the prosecutor's argument that H.A. could identify Hassan because Hassan “robbed” H.A. twice comprised only a few sentences within a 23-transcribed-page closing argument. *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (holding that a statement did not amount to misconduct because “[t]he improper statement was only two sentences in a closing argument that amounted to over 20 transcribed pages”); *State v. Tate*, 682 N.W.2d 169, 178 (Minn. App. 2004) (“[T]he [challenged] statements were short comments, involving 13 lines of a

closing argument transcript that is 25 pages long.”), *rev. denied* (Minn. Sept. 29, 2004). Accordingly, Hassan has failed to show an error that was plain.

But even if Hassan could show that the prosecutor plainly erred, any error did not affect his substantial rights in the context of this case. First, the evidence against Hassan is substantial. H.A. clearly identified Hassan as one of the attackers and detailed the robbery in his testimony consistent with injuries he sustained as shown in photographs. His testimony was largely corroborated by three witnesses. The witness who called 911 testified that he observed a vehicle leave the park with at least three people in it and then saw H.A. with a torn shirt and believed that H.A. “went through some kind of trauma.” The responding officers testified that H.A. detailed the attack and identified Hassan as one of the attackers.

Second, the district court provided a jury instruction warning the jury against convicting Hassan “on the basis of any occurrence on June 17, 2019” both before the prosecutor elicited testimony from H.A. and just before closing arguments. “[T]he prejudicial effect of misconduct can be cured by proper instructions to the jury,” and we presume the jury followed the district court’s instructions. *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016); *State v. Steward*, 645 N.W.2d 115, 122 (Minn. 2002). Thus, we conclude that the statements did not amount to plain-error misconduct and, even if the prosecutor erred, any misconduct did not have a significant effect on the jury’s verdict and therefore did not affect Hassan’s substantial rights.

II. The district court erred by entering a conviction for the lesser-included offense of simple robbery.

Hassan argues, and the state concedes, that the district court erred by entering a conviction for simple robbery because it is a lesser-included offense of his aggravated robbery conviction. We agree. A criminal defendant “may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2018). When a defendant is “convicted on more than one charge for the same act,” district courts should “adjudicate formally and impose sentence on one count only.” *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). When a district court errs by entering a conviction on both counts, this court remedies the error by reversing and remanding with instructions to vacate the erroneous conviction, but the district court should leave the jury’s finding of guilt intact. *State v. Crockson*, 854 N.W.2d 244, 248 (Minn. App. 2014), *rev. denied* (Minn. Dec. 16, 2014). Whether the entry of multiple convictions violates section 609.04 is a question of law that we review de novo. *State v. Bonkowske*, 957 N.W.2d 437, 443 (Minn. App. 2021).

Here, the jury found Hassan guilty of simple robbery and first-degree aggravated robbery. At sentencing the district court erred by convicting Hassan of both aggravated robbery and simple robbery because both convictions arise from the events occurring on June 27, 2019, and simple robbery is an included offense of aggravated robbery. *See State v. Oksanen*, 149 N.W.2d 27, 29 (Minn. 1967) (holding that because “one must be guilty of simple robbery before one can be guilty of aggravated robbery . . . simple robbery is a lesser and included offense within the crime of aggravated robbery.”). We therefore reverse and remand to the district court to vacate Hassan’s conviction for the lesser-

included offense of simple robbery, while leaving the findings of guilt for the offense intact, and to correct the warrant of commitment.

Affirmed in part, reversed in part, and remanded.