STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1026

State of Minnesota,
Respondent,

vs.

Devin Charles Neeland,
Appellant.

Filed May 21, 2012
Affirmed
Chutich, Judge

Clearwater County District Court
File No. 15-CR-10-615

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Richard C. Mollin, Clearwater County Attorney, Bagley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Chutich, Judge; and Randall, Judge.*

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

U N P U B L I S H E D O P I N I O N

CHUTICH, Judge

In this criminal appeal, appellant Devin Charles Neeland asserts that the evidence was insufficient to convict him of third-degree criminal damage to property because the circumstantial evidence failed to establish that he intentionally damaged his friend's truck. Neeland also argues that the prosecutor committed misconduct by asking him questions about his failure to call witnesses and to contradict the state's evidence. Because we conclude that the evidence was sufficient to support the jury's verdict on the third-degree damage to property charge and because the prosecutor did not commit error or misconduct, we affirm.

FACTS

Neeland's convictions arose from events taking place over three days, November 10–12, 2010, in and around Bagley. On November 10, Neeland was at the home of his friend A.C. in Bagley. Neeland asked A.C. if he could borrow his vehicle, a 1991 GMC Jimmy, and A.C. agreed with the understanding that Neeland would return it later that evening. Neeland did not return the truck until the following morning; when A.C. inspected it after its return, he noticed that the truck was newly damaged. The driver's door contained a bullet hole and the driver's side front window had been shot out. The rear end of the truck was "smashed in" and several large gouges or scratches were present on the tailgate. A.C. later determined that it would cost about $1,500 to repair the damage to the truck.

On the afternoon of November 11, the Clearwater County Sheriff's Office received information of an abandoned trailer down a dead-end road near Ebro, a town neighboring Bagley. Deputy Larry Olson went to the area, found the trailer, and also observed "tracks on the road that were in a weaving motion at a pretty good side to side, as if you hooked up to something with a chain and were dragging it but it wasn't fastened to a hitch." Deputy Olson observed that the cup part of the trailer's hitch appeared to be freshly damaged, as if something had been rubbing on it. He also observed a shattered window lying on the ground where the driver's side of any tow vehicle would have been.

That same day, R.K. and C.K., acquaintances of Neeland, agreed to help Neeland move some things with their pickup truck. After picking up Neeland and his friend M.R. around 1:00 p.m., they drove to a hardware store where Neeland purchased a receiver hitch and a trailer hitch ball. Neeland then asked that they drive to Ebro where he needed to pick up a trailer full of items that he claimed belonged to him. Neeland led them to an out-of-the-way area off a dead-end dirt road, and upon not seeing the trailer, R.K. testified that Neeland said "it's gone, my family must have took it." R.K. then overheard Neeland tell Rabideau "that the cops must have found it because it's not here." Throughout the trip, Neeland used R.K.'s cell phone numerous times to make phone calls and send and receive text messages stating that he needed to hide from the police. Neeland was then dropped off at the Bagley home of his friend J.S.

Meanwhile, Officer Clarence LaCroix of the Bagley Police Department had responded to a report of theft at the home of Bagley resident L.M. L.M. lived only about a block from A.C.'s house, where Neeland borrowed the truck. Sometime before 1:00

p.m. on November 11, L.M., a retired electrician, discovered several items missing from his property, including an open utility trailer and large amounts of wire and other electrical equipment. The officer took several photographs of the scene, including photos of a tire tread imprint in the mud. L.M. later identified the trailer found in Ebro by Deputy Olson as the one stolen from his property. After receiving a call about the damaged GMC Jimmy, Officer LaCroix went to A.C.'s house and observed the damage to the truck's window and tailgate. Deputy Olson and Officer LaCroix later obtained scale photographs of the tire print in the mud at L.M.'s residence and compared them with the tire tread on A.C.'s truck; the treads were very similar and looked to be the same.

On November 12, after learning that Neeland sometimes stayed at J.S.'s house, Officer LaCroix went to the house and found Neeland's medical assistance card and a number of electrical sockets and other small electrical parts in the guest bedroom. L.M. later identified the electrical parts as belonging to him. J.S. testified that Neeland had asked him if he could stay at his house on November 10, but did not actually stay there, and later asked J.S. to tell the police that Neeland had been there all night.

Neeland, who denied that he took the truck or stole L.M.'s property, was charged with four crimes in connection with the events of November 10–12, 2010: (1) third-degree burglary; (2) theft of a motor vehicle; (3) third-degree criminal damage to property; and (4) felony theft. A jury found Neeland guilty of every count except for theft of a motor vehicle. This appeal followed.

D E C I S I O N

I.

Neeland first argues that the evidence presented by the state was insufficient to sustain the jury's guilty verdict on the third-degree criminal damage to property charge. "In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the state and assume that the jury believed the state's witnesses and disbelieved contrary evidence." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). "The question on review is whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992). The jury's verdict is given due deference because it was in the best position to weigh the evidence and determine the credibility of the witnesses. *Cooper*, 561 N.W.2d at 179.

To convict a defendant of third-degree criminal damage to property, the state must show that the defendant intentionally caused damage to another person's property without the other person's consent. Minn. Stat. § 609.595, subd. 2(a) (2010). The state must also show that the damage reduced the value of the vehicle by more than $500. *Id.*; *see also* 10A *Minnesota Practice*, CRIMJIG 18.28 (2011). The jury's guilty verdict in this case indicates that the state made these showings beyond a reasonable doubt.

Neeland contends that the evidence, which was all circumstantial, does not show beyond a reasonable doubt that he intentionally caused the damage to the truck. Intent is a state of mind that is generally proved by circumstantial evidence—"by drawing

inferences from the defendant's words and actions in light of the totality of the circumstances." *Cooper*, 561 N.W.2d at 179. "'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result." Minn. Stat. § 609.02, subd. 9(3) (2010). The jury may infer that the defendant intended the natural and probable consequences of his actions. *Cooper*, 561 N.W.2d at 179.

When reviewing the sufficiency of circumstantial evidence, "our first task is to identify the circumstances proved." *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (quoting *State v. Stein*, 776 N.W.2d 709, 718 (Minn. 2010) (plurality opinion)). In identifying these circumstances, we defer "to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflict[s] with the circumstances proved by the State." *Id.* (quoting *Stein*, 776 N.W.2d at 718 (plurality opinion)).

Here, the circumstances proved concerning the damage to A.C.'s GMC Jimmy are as follows: Neeland borrowed the truck on November 10 and returned it with considerable damage on November 11; L.M.'s utility trailer was stolen from his residence sometime on the night of November 10 or early morning of November 11; a tire print was found on L.M.'s property that matched the tires on the borrowed truck; the damage to the rear of the Jimmy was consistent with the scraping and gouging caused by a trailer hitch that was not properly connected to the truck, but that was connected with chains such that the trailer swung back and forth behind the truck; L.M.'s trailer was found at the end of a dead-end road near Ebro with fresh damage to the cup area of the hitch; Deputy Olson

found tracks on the road near where the trailer was found consistent with a trailer that was connected by chains rather than with a properly connected hitch; Deputy Olson also discovered glass at the scene that he deduced was from a driver's side window and the Jimmy was missing its driver's side window; Neeland went to Ebro on November 11 looking for a trailer and commented that "the cops must have found it" when he discovered it was not there; and the total amount of damage to the vehicle was $1,500.

We next "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved." *Andersen*, 784 N.W.2d at 329 (quoting *Stein*, 776 N.W.2d at 716 (plurality opinion)). The circumstances proved leading to guilt must not only be reasonable, but "must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 330. In making this determination, "we give no deference to the fact finder's choice between reasonable inferences." *Id.* at 329–30 (quoting *Stein*, 776 N.W.2d at 716 (plurality opinion)).

Based on the circumstances proved in this case, the jury could reasonably infer that Neeland borrowed A.C.'s truck on November 10, went to L.M.'s residence, and stole his utility trailer (among other items). Since he did not have the proper equipment to hook the trailer to the Jimmy via the hitch, Neeland attached the trailer with chains. As he was driving, the cup part of the hitch on the trailer made contact with the back of the truck as the hitch swung back and forth on the chains, gouging and scratching the tailgate. It is reasonable to further infer that Neeland was aware of this contact between the trailer hitch and the truck soon after he started driving and knew it would damage the

truck, but chose not to stop and therefore intended to cause the damage.[1] *See Cooper*, 561 N.W.2d at 179 (fact finder may infer that the defendant intends the natural and probable consequences of his actions). We conclude that the circumstantial evidence is sufficient to support the jury's finding that Neeland intentionally caused damage to the rear of the GMC Jimmy.

We cannot conclude, however, that the evidence is sufficient to support an inference that Neeland intentionally damaged the truck's door and window. No evidence at trial pertained to the bullet hole and shattered window besides the following: Neeland returned the truck to A.C. with a bullet hole in the door that was not there previously; the driver's side window was shot out; and a shattered window was found on the ground near the trailer that appeared to be the missing window from A.C.'s truck. No evidence or testimony suggested that Neeland caused this damage let alone that he did so intentionally; nor was any firearm found during the investigation. Reasonable inferences can be drawn that someone other than Neeland fired the shot that damaged the window. *Andersen*, 784 N.W.2d at 330 ("[C]ircumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt."). Therefore, the evidence is insufficient to support the finding that Neeland intentionally damaged the door and window.

[1] Neeland urges the alternative inference that the damage to the back of the truck was not intentional, but rather that attaching the trailer with chains instead of the hitch was merely negligent or careless. This inference is not reasonable in light of the considerable damage to the rear of the truck; Neeland certainly knew he was causing damage to the vehicle when towing the trailer with the chains, but he chose not to stop.

Although we conclude that the evidence supports the finding of intentional damage to the tailgate but not the door and window, we nonetheless believe that the evidence supports the jury's finding that the intentional damage to the truck was greater than $500. Even though the total damage of $1,500 was not itemized, based on A.C.'s testimony and the admitted photos of the damaged tailgate, the jury could have reasonably inferred that this damage accounted for slightly over one-third of the total damage, or more than $500. *See State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989) (analyzing whether the evidence "was sufficient to permit the jurors to reach the verdict which they did," especially when viewing the evidence "in a light most favorable to the conviction"). Thus, even though intentional damage to the window and door cannot be inferred, we affirm the jury's guilty verdict based on damage that Neeland intentionally caused to the truck's tailgate.

II.

Neeland next argues that the prosecutor committed error by asking him certain improper questions on cross-examination. Neeland did not object to these questions at trial. "[B]efore an appellate court reviews unobjected-to trial error, there must be (1) error, (2) that is plain, and (3) affects substantial rights. If these three prongs are satisfied, the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). If an appellant meets his burden of showing the first two prongs, the burden then shifts to the state to show that the appellant was not prejudiced by the plain error. *Id.* Only if all

three prongs are met does this court determine whether it should address the error. *Griller*, 583 N.W.2d at 740.

Plain error is "clear" or "obvious" and usually is shown "if the error contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. It is error for the prosecutor to comment on a defendant's failure to call witnesses or to produce evidence. *State v. Mayhorn*, 720 N.W.2d 776, 787 (Minn. 2006); *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995); *see also State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985) (stating that "misstatements of the burden of proof are highly improper and constitute prosecutorial misconduct").

Neeland first claims that the prosecutor erred in his cross-examination when Neeland denied knowing anything about the small electrical parts found in J.S.'s guest bedroom. In response to this denial, the prosecutor asked, "And you have no other evidence to the contrary to indicate that they weren't there?" Neeland answered in the negative, and shortly after the prosecutor asked again about the parts found in Stonecipher's house:

> Q. How do you account for that, Mr. Neeland?
> A. I don't know.
> Q. Is somebody setting you up?
> A. No, I don't believe so.

While the wording of the single question asking Neeland whether he had "other evidence" to contradict the state's evidence about the electrical parts was poorly chosen, it did not suggest that Neeland had a duty to produce evidence. Rather, this question and the two that followed appear to be an attempt to ask Neeland to explain to the jury where

the parts came from, consistent with Neeland's theory of the case that someone else brought the parts to J.S.'s house. *See State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993) (concluding that the prosecutor is permitted to comment on or challenge defendant's theory of the case). Neeland testified that he had no reason to disbelieve that the electrical items were found in J.S.'s guest bedroom so the presence of these parts was not a contested issue. Thus, we conclude that the prosecutor's questions did not convey to the jury that Neeland had any burden to produce evidence, particularly where the prosecutor did not make any similar suggestion in his closing argument.

In the same way, the prosecutor did not erroneously comment on any failure by Neeland to call witnesses. Neeland testified that he spent part of the evening of November 10 with P.W. and M.R. During cross-examination, the prosecutor asked, "Would [P.W.] know about your whereabouts that night?" and "Would [M.R.] . . . know about your whereabouts during the course of that evening?" Neeland claims that these questions inappropriately suggested that he should have called the two women as witnesses.

The court in *State v. Haynes*, 725 N.W.2d 524 (Minn. 2007), addressed and rejected a similar argument. The defendant in *Haynes* was on trial for murder and testified that he was at home asleep on the couch at the time of the murder. *Id.* at 530. His mother and sisters were at home at that time and could have seen him on the couch. *Id.* On cross-examination, the prosecutor asked: "It stands to reason that these four people saw you sleeping on the couch at the time when the murder at the flower shop took place, isn't that right?" *Id.* The court concluded that this question was not the same

as directly commenting on the defendant's failure to call his mother and sisters as witnesses; the questions were isolated instances in a long cross-examination and the prosecutor made no reference to the questions or the absence of the women's testimony in his closing argument. *Id.*

Likewise, the questions at issue here were only two questions in about eighteen pages of cross-examination, the prosecutor did not directly imply that Neeland should have produced these witnesses, and he made no reference to the questions in his closing argument.

Further, while defense counsel took note of these questions, he chose not to object, suggesting to this court that he did not believe that they were out of bounds. After the close of testimony but before the jury had been brought in for closing arguments and instructions, defense counsel mentioned to the court that the prosecutor "kind of intimated" on cross-examination that Neeland should have called certain witnesses. He did not formally object, but warned that he would object to any similar suggestion in the prosecutor's closing argument, which did not happen. While defense counsel's failure to object does not foreclose review on appeal, we believe it further indicates that these limited questions did not amount to plain error.

In sum, Neeland has not met his burden of showing that the highlighted questions amount to plain error that would shift the burden to the state to show lack of prejudice. The questions were short, isolated instances in the entire cross-examination, there was no attempt to shift the burden of proof to Neeland, the prosecutor did not reference any failure by Neeland to produce evidence or call witnesses in his closing argument, and the

jury was properly instructed on the presumption of innocence and the applicable burden of proof beyond a reasonable doubt.[2]

Affirmed.

[2] These factors also show that, even assuming error occurred, it was harmless.