STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1177

State of Minnesota,
Respondent,

vs.

Michael James Jackson,
Appellant.

Filed June 25, 2012
Affirmed
Muehlberg, Judge[*]

Hennepin County District Court
File No. 27-CR-10-18051

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Schellhas, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

MUEHLBERG, Judge

Following a bench trial, appellant Michael James Jackson was convicted of aiding and abetting first-degree aggravated robbery, in violation of Minn. Stat. §§ 609.05, .11, .245, subd. 1 (2008). Appellant argues on appeal that the prosecutor committed misconduct by eliciting testimony about a prior conviction of second-degree assault despite the district court's pretrial ruling that appellant could not be impeached with that conviction. Because there was no prosecutorial error, we affirm.

FACTS

Appellant was charged by complaint on April 22, 2010, with one count of aiding and abetting a first-degree aggravated robbery in violation of Minn. Stat. §§ 609.05, .11, .245, subd. 1. The charge arose from a robbery that took place on April 20, 2010.

On the morning of the jury trial, appellant brought an oral motion in limine to bar the state from impeaching appellant with his prior felony convictions of second-degree assault and drive-by shooting. The district court did not immediately rule on the motion, instead allowing the state an opportunity to research the case law cited by appellant.

Following this pretrial hearing, a panel of prospective jurors was brought in and voir dire was conducted until the district court adjourned proceedings for lunch. When the trial was reconvened following the break, appellant waived his right to a jury trial, and proceedings were adjourned for the day.

The following morning, the district court heard argument on appellant's motion. The district court then weighed the *Jones* factors[1] for each of the convictions and ruled that appellant could not be impeached with his second-degree assault conviction, but could be impeached with his convictions of drive-by shooting and possession of burglary tools. The district court addressed appellant directly, informing him that it would not consider his second-degree assault conviction if he testified.

Appellant chose to testify at trial, and the state's cross-examination of appellant began as follows:

> Q Mr. Jackson, have you ever been convicted of a felony crime?
>
> A Yes.
>
> Q And what felony crimes have you been convicted of?
>
> A Drive-by shooting, second degree assault, and burglary two [sic].

Appellant's second-degree assault conviction was not mentioned at any other time during the trial. At closing, the state argued that the victim was more believable than appellant in part because it was "the defendant who comes to you with felony convictions."

The district court found appellant guilty from the bench at the close of the trial, but did not mention appellant's prior felony convictions when ruling. The district court later issued a written decision, which stated that appellant's credibility was weakened in part

[1] *See generally State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978) (laying out five factors that a district court must consider when evaluating whether a prior conviction is admissible for impeachment purposes).

because he had "two prior felony convictions—drive-by shooting and possession of burglary tools."

This appeal followed.

D E C I S I O N

Appellant argues that his conviction should be reversed because the state's question, which elicited his admission to the second-degree assault conviction, constitutes prosecutorial misconduct. The state argues that, at worst, the question amounts to prosecutorial error, and that it does not provide grounds for reversal.

This court has recognized that there is a distinction between prosecutorial misconduct, which "implies a deliberate violation of a rule or practice, or perhaps a grossly negligent transgression," and prosecutorial error, which "suggests merely a mistake of some sort, a misstep of a type all trial lawyers make from time to time." *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). Notwithstanding this distinction, this court applies the same standard of review to allegations of prosecutorial error as it applies to allegations of prosecutorial misconduct. *Id.*

A conviction will be reversed for prosecutorial misconduct only if, "when considered in light of the whole trial, [the misconduct] impaired the defendant's right to a fair trial." *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). Furthermore, if no objection was made at trial to the alleged misconduct, the review is conducted under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006).

Under the plain error standard as it is generally expressed, the appellant has the burden of demonstrating that there is "(1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). However, in cases where the prosecutor's conduct is being reviewed, the appellant bears the burden of showing that plain error occurred, but the state bears the burden of showing that the error did not affect the appellant's substantial rights. *Ramey*, 721 N.W.2d at 299-300, 302.

A prosecutor who elicits inadmissible testimony from a state's witness commits prosecutorial error, even if the prosecutor does not intentionally elicit the inadmissible testimony. *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978) ("[E]ven when the elicitation is unintentional, we will reverse if the evidence is prejudicial."); *see State v. Dunkel*, 466 N.W.2d 425, 428-29 (Minn. App. 1991) (noting that admission of inadvertent remark was error, but ultimately harmless beyond a reasonable doubt). But the testimony being complained of here was given by appellant himself, who had been present at the time that the district court ruled on the motion in limine and had been directly addressed and informed by the district court of the implications of the ruling. Furthermore, the prosecutor's question was broadly worded, and gives no indication that it was calculated to elicit the inadmissible testimony. Under these facts, any error is attributable to appellant himself, and not to the prosecutor.

"An error is 'plain' if it is clear or obvious," such as in cases where the prosecutor's conduct "contravenes case law, a rule, or a standard of conduct." *State v.*

Jones, 753 N.W.2d 677, 686 (Minn. 2008). Here, because no error is attributable to the prosecutor, appellant has not met his burden of demonstrating an error that is "plain."

An "error affects substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007). Even if appellant had met his burden with respect to the first two *Griller* factors, the state would have met its burden of establishing that appellant's unintentionally elicited admission did not affect the verdict in a way that would prejudice appellant's substantial rights.

First, appellant's reference to his second-degree assault was brief and made in passing. *Haglund*, 267 N.W.2d at 506 (holding that reversal was not necessary in a case where prosecutor had unintentionally elicited inadmissible evidence because the remark was made in passing and could have been easily missed, and the other evidence was overwhelming); *cf. Dunkel*, 466 N.W.2d at 429 (holding that unelicited, innocuous, passing statement, though error, was harmless beyond a reasonable doubt).

Second, appellant's statement plainly did not have a significant effect on the district court's decision. The district court's written findings made no reference to the second-degree assault conviction, specifically stating that appellant had been convicted of *"two* prior felony convictions—drive-by shooting and possession of burglary tools." (Emphasis added.) Therefore, the district court did not consider appellant's second-degree assault conviction in its verdict, and thus the appellant's error did not affect his substantial rights.

Third, and most significantly, at the time appellant admitted that he had been convicted of second-degree assault, the district court judge already knew of the conviction because she was the same judge who had ruled it inadmissible. Appellant's admission to the bare fact of conviction did not provide the fact-finder with any information she did not already know, and the fact that she did not mention it in her ruling from the bench or written decision demonstrates that she was able to put this information out of her mind while reaching the verdict.

Appellant has not met his burden of demonstrating that the prosecutor committed an error that was plain. Even if he had, the state has met its burden of proving beyond a reasonable doubt that appellant's rights would not have been prejudiced by any such error.

Affirmed.