STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1878

State of Minnesota,
Respondent,

vs.

Jordan Eugene Berg,
Appellant.

Filed February 11, 2019
Affirmed
Hooten, Judge

Hennepin County District Court
File No. 27-CR-17-8234

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Hooten, Judge; and Klaphake, 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

HOOTEN, Judge

In this appeal from a conviction of aiding and abetting first-degree aggravated robbery, appellant argues that the evidence was insufficient to support the jury's verdict, the district court abused its discretion by not granting his request for a mistrial, and the prosecutor committed reversible misconduct. We affirm.

FACTS

In early April of 2017, appellant Jordan Eugene Berg was riding in the back of a bus in Minneapolis. While sitting on the bus, he spoke, and shared a bottle filled with liquor, with Jeremy Jenkins. J.E. was sitting a few rows in front of appellant and Jenkins near the exit. Jenkins was playing loud music on his phone; J.E. asked him to put in headphones or turn the music down. In response, Jenkins physically confronted J.E. and snatched the video-game controller that J.E. was using to play video games on his phone. Jenkins immediately tossed the controller to appellant. As soon as appellant caught the controller, he stood up, grabbed Jenkins's backpack and phone, and exited the bus with J.E.'s controller. While appellant was walking toward the exit, J.E. tried to grab at appellant to get his property back and yelled out that appellant was stealing his property. While this was happening, Jenkins prevented J.E. from reaching appellant by pushing J.E. back into his seat and grabbing J.E. around his neck. J.E. suffered bruising, scratches, and pain during the encounter. Appellant and Jenkins exited the bus within about 30 seconds of each other. Approximately 15 to 20 minutes later, police found appellant and Jenkins

walking together and arrested both of them. When police searched Jenkins after the arrest, they found J.E.'s controller.

The state charged appellant with first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2016). Following a three-day trial, a jury found appellant guilty of this charge under the theory of accomplice liability, as well as the lesser-included offense of simple robbery. The district court convicted appellant of first-degree aggravated robbery, granted appellant a dispositional departure from the presumptive 58-month executed prison sentence, and sentenced appellant to a 50-month stayed sentence, three years of probation, and 180 days in the workhouse. This appeal follows.

D E C I S I O N

I. The evidence is more than sufficient to sustain the jury's verdict that appellant is guilty of aiding and abetting first-degree robbery.

Appellant argues that the evidence produced at trial was insufficient to prove that he intended to aid Jenkins's robbery and that this element must be analyzed under our circumstantial-evidence standard of review.

When reviewing a conviction based on circumstantial evidence, we apply a two-step analysis. *State v. Harris*, 895 N.W.2d 592, 598–601 (Minn. 2017). The first step is to identify the circumstances proved "by resolving all questions of fact in favor of the jury's verdict," in deference to the jury's credibility determinations. *Id.* at 600. "In identifying the circumstances proved, we defer 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 State." *State v. Sterling*, 834 N.W.2d 162, 175 (Minn. 2013) (quotations

omitted). Second, we independently consider the "reasonable inferences that can be drawn from the circumstances proved." *Harris*, 895 N.W.2d at 601. "To sustain the conviction, the circumstances proved, when viewed as a whole, must be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id.*

Accomplice liability attaches when an individual "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2016). The "intentionally aids" requirement includes two "important and necessary principles: (1) that the defendant knew that his alleged accomplices were going to commit a crime, and (2) that the defendant intended his presence or actions to further the commission of that crime." *State v. McAllister*, 862 N.W.2d 49, 52 (Minn. 2015) (quotations omitted).

The state makes a cursory argument that because there is direct evidence of appellant's participation in the crime, this court should apply the lower direct-evidence standard of review to this case. The state is incorrect on this point. The contested element of appellant's conviction is his intent, i.e., his state of mind. Appellant did not testify that he intended to aid Jenkins in the theft, and so his state of mind has to be inferred through the circumstantial evidence of his actions. *Cf. id.* at 53 ("It is rare for the State to establish a defendant's state of mind through direct evidence."). Therefore, we will apply the circumstantial-evidence standard of review to appellant's conviction. But even under this standard, the evidence is more than sufficient to support appellant's conviction.

Appellant argues that the evidence was insufficient to prove that he actually "intended his presence or actions to further the commission of that crime." A jury is permitted to find that a defendant had the requisite state of mind through circumstantial evidence, including "the defendant's presence at the scene of the crime, a close association with the principal offender before and after the crime, a lack of objection or surprise under the circumstances, and flight from the scene of the crime with the principal offender." *Id.* The evidence of appellant's intent is strong. The video clearly shows appellant and Jenkins talking and sharing a bottle that appellant later testified was filled with alcohol. They confer about something quietly. Jenkins then snatches the controller from J.E., tosses it toward appellant, and appellant catches the controller. Once he has the controller, appellant immediately picks up Jenkins's backpack and phone and starts walking off of the bus with J.E.'s controller. Jenkins and appellant are arrested together, between 15 and 20 minutes after the robbery was reported with J.E.'s controller in their possession.

All of the factors mentioned in *McAllister* support the jury's determination that appellant intended to aid Jenkins in the commission of the robbery. *See id.* Appellant argues that the record "supports the reasonable hypothesis that the incident on the bus occurred as a reaction to [J.E.'s] request" and that, upon witnessing the robbery, he simply tried to remove himself from the situation as quickly as possible. But this is not a reasonable hypothesis considering the following circumstances proved: appellant did not hesitate when Jenkins threw him the stolen controller, took the controller with him, did not slow down when J.E. was shouting about his things being stolen, took Jenkins's backpack

and phone with him, did not stop when J.E. was reaching out and grabbing at him, and was found walking with Jenkins, who had the controller on his person, 15 to 20 minutes later.

It is unclear if appellant also intends to challenge whether he knew Jenkins was going to commit a crime. But because appellant's own testimony indicated that he knew "something not good was about to happen" immediately before the robbery took place, this challenge is without merit. And, his catching of the controller after it was taken from J.E. and thrown to him by Jenkins indicates that he was an immediate and willing participant in the robbery.

Because these circumstances contradict appellant's asserted alternative hypotheses, as well as any other reasonable hypothesis other than guilt, we hold that the evidence was sufficient for the jury to find that appellant intended to aid Jenkins in the commission of first-degree robbery.

II. The district court did not abuse its discretion by denying appellant's motion for a mistrial following the inadvertent mention of appellant's silence by the state's witness.

Appellant argues that the district court abused its discretion in denying his motion for a mistrial following a police officer's mention of his post-arrest pre-*Miranda* desire not to speak with police. The district court denied appellant's motion, but sustained appellant's objection to the response and ordered the jury to disregard it. The district court also reminded the jury before deliberations to "disregard all evidence that I've ordered stricken or have told you to disregard."

A district court's denial of a motion for a mistrial is reviewed for an abuse of discretion. *State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016). "A mistrial should be

granted only if there is a reasonable probability, in light of the entirety of the trial including the mitigating effects of a curative instruction, that the outcome of the trial would have been different had the incident resulting in the motion not occurred." *Id.* The district court is in the best position to determine if a mistrial is warranted, or if an alternate remedy is appropriate. *Id.* When a court orders a jury to disregard a question, we presume that the jury followed that instruction. *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005).

While the state may not constitutionally introduce evidence of a defendant's post-*Miranda* silence, whether the state may introduce evidence of a defendant's post-arrest pre-*Miranda* silence in its case-in-chief has not been conclusively resolved. *See State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017). Recently, in *Salinas v. Texas*, Justice Thomas, joined by Justice Scalia, went beyond the issues reached by the plurality and wrote that he would allow the prosecution to make use of a defendant's silence in such circumstances. 570 U.S. 178, 192, 133 S. Ct. 2174, 2184 (2013) (Thomas, J., concurring).

Here, the state's accidental introduction of appellant's post-arrest pre-*Miranda* silence in its case-in-chief may have been error, but was not necessarily so. *See Lilienthal*, 889 N.W.2d at 785. The district court determined that the mention of appellant's silence was potentially a violation of appellant's Fifth Amendment right to remain silent under *Doyle*, but denied appellant's motion for a mistrial.[1] *See Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245 (1976) (holding that the state may not make use of a defendant's post-*Miranda* silence in its case-in-chief).

[1] The district court equivocated, calling the mention of appellant's silence a "half *Doyle*," before deciding, "I'm not going to get into that."

We decline to address whether or not the mention of defendant's post-arrest pre-*Miranda* silence was error because even if it was, there is no "reasonable probability" that this brief mention of appellant's silence changed the outcome of the trial. *Griffin*, 887 N.W.2d at 262. We begin with the presumption that the jury followed the district court's instructions. *Pendleton*, 706 N.W.2d at 509. The district court ordered the jury to disregard the reference to appellant's silence and, before deliberations, reminded the jury not to consider evidence it was instructed to disregard. Appellant has failed to rebut the presumption that the jury followed these instructions.

Appellant argues that there is a reasonable probability that the verdict was affected because this was "a close case," but analyzing the "entirety of the trial including the mitigating effects of a curative instruction" refutes this argument. *Griffin*, 887 N.W.2d at 262. The evidence against appellant was strong. As mentioned above, among other things, the jury had video evidence from five different cameras of appellant committing the crime. The mention of appellant's silence was brief, just one line of testimony out of a three-day trial, which was immediately objected to, and was stricken from the record.[2]

Therefore, there is no reasonable probability that the police officer's brief mention of appellant's post-arrest pre-*Miranda* silence affected the outcome of the trial, and we

[2] Further, by all indications, the prosecutor did not mean to elicit the mention of appellant's silence. The police officer mentioned appellant's silence in response to the question, "[A]fter you returned that controller to [J.E.], do you have any further involvement after that?" And the district court explicitly declined to make a finding that the prosecutor intentionally induced the police officer's response.

hold that it was not an abuse of discretion for the district court to deny appellant's motion for a mistrial.

III. The prosecutor did not commit misconduct while cross-examining appellant or by referring to appellant's explanation as "preposterous." He did commit misconduct by implying that appellant tailored his testimony to fit the evidence without support, but the error was harmless.

Appellant's final claim is that the state committed prosecutorial misconduct while cross-examining appellant and during the state's closing argument. The district court did not rule on these issues because appellant did not object at trial.

To warrant reversal for a new trial, the prosecutor's misconduct, placed into the context of the entire trial, must be so serious and prejudicial as to impair the defendant's constitutional right to a fair trial. *State v. Johnson*, 616 N.W.2d 720, 727–28 (Minn. 2000). The standard of review on a claim for prosecutorial misconduct depends on whether the defense objected to the claimed misconduct at trial. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010).

Generally, if a defendant fails to object to misconduct at trial, he "forfeits the right to have the issue considered on appeal." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). However, we may address the issue under a modified plain-error test. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011). On review, the appellant must show that there was error and that it was plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Plain error is usually shown if an error "contravenes case law, a rule, or a standard of conduct." *Id.* If an appellant shows plain error, the burden shifts to the state to show that the error did not affect the appellant's substantial rights. *Id.* An error affects appellant's

substantial rights if there is prejudice, meaning that there is a reasonable likelihood that the error had a significant effect on the verdict. *State v. Barrientos-Quintana*, 787 N.W.2d 603, 611 (Minn. 2010). If the three prongs are satisfied, the court may order a new trial only if doing so is necessary to ensure the fairness and the integrity of the judicial proceedings. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). But if the claimed error did not affect an appellant's substantial rights, we need not consider the other plain-error factors. *Montanaro*, 802 N.W.2d at 732.

Cross-examination

A prosecutor may not personally vouch for the credibility of a witness. *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006). A prosecutor vouches for a witness "when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. App. 2006) (quoting *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998)). The supreme court distinguished permissibly addressing witness credibility and impermissibly vouching for a witness in *Swanson*. 707 N.W.2d at 656 (holding that "the statement '[t]he state believes [name of a witness] is very believable' is impermissible vouching on its face because the state directly endorsed the credibility of a witness"). A prosecutor may discuss "'factors affecting the credibility of the witnesses,' but may not imply that the state endorses a witness's credibility." *State v. Rucker*, 752 N.W.2d 538, 552 (Minn. App. 2008) (quoting *Swanson*, 707 N.W.2d at 656), *review denied* (Minn. Sept. 23, 2008).

Appellant argues that when the prosecutor asked appellant questions during cross-examination about how appellant explained differences between the video of the robbery and appellant's testimony, the prosecutor impermissibly "aligned himself with the jury." But the prosecutor did not directly state what his opinion was about appellant's claims. Instead, he merely pointed out the differences between appellant's story and the video footage of the robbery. And this is exactly the type of comparison that is expressly permitted by Minnesota law. *See State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984) ("An advocate may indeed point to circumstances which cast doubt on a witness' veracity or which corroborates his or her testimony, but he may not throw onto the scales of credibility the weight of his own personal opinion."). The prosecutor's cross-examination of appellant did not constitute error much less plain error.

Closing argument

Appellant next argues that the prosecutor's implication during closing arguments that appellant tailored his testimony to fit the evidence and calling appellant's story "preposterous" constituted prosecutorial misconduct. Attorneys are given "considerable latitude" in delivering their closing arguments. *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). "In closing arguments, counsel has the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom." *Id.* When evaluating a claim of prosecutorial misconduct in the context of a closing argument, we "look at the closing argument as a whole." *Swanson*, 707 N.W.2d at 656.

Analyzing each of the alleged errors in turn, we begin with appellant's claim that the prosecutor committed misconduct by calling his story "preposterous." While it may have been pushing the boundaries, the prosecutor's statement did not cross the line into error, and certainly not into plain error. This remark is similar to the statements made in *State v. Vue*, where the prosecutor said of the asserted defense that, "I would characterize [the defense] as asking you to believe the impossible." 797 N.W.2d 5, 15 (Minn. 2011). The supreme court held that this was not misconduct because immediately after the prosecutor made this comment he explained why the evidence in that case "necessitated such a belief." *Id.* at 16; *cf. State v. Starkey*, 516 N.W.2d 918, 928 (Minn. 1994) (holding that it was inappropriate where the prosecutor argued "I find that impossible to believe" when discussing the defendant's credibility). Similarly, here the prosecutor made the "preposterous" comment in the context of a discussion of the evidence in the case, including the bus footage of the robbery and the fact that appellant was sharing his liquor with Jenkins. The prosecutor also never directly stated his opinion about any of the witnesses' credibility.

However, the prosecutor did commit misconduct during his closing remarks by implying that appellant fabricated evidence. During closing, the prosecutor opined:

> [W]as that a really bizarre story that was corroborated by all this evidence, you know, because -- because there was another phone there and because, you know, the bottle of liquor? Well, of course, then he must of -- he must be telling the truth. Or was that -- is that something that was told to you to fit the evidence? Because you heard that. He was sitting here with you after all the evidence was presented from the State.

This implied that appellant was able to tailor his testimony to fit the evidence simply by exercising his Sixth Amendment right to review evidence and confront his accusers. *See Swanson*, 707 N.W.2d at 657–58. While the language that the prosecutor used here was not as explicit as the language in *Swanson*, it is still sufficient to constitute plain error. In that case, the prosecutor made the following statements:

> It's interesting that after the state rests it's [sic] case, after the Defendant heard everything the state had to offer, after the Defendant heard that his fingerprints were in [the victim's] home in two places, after the Defendant learned that his DNA had been discovered, after the Defendant heard the eyewitness accounts, after the Defendant heard Mr. Schaak testify about what he did afterwards to help out the Defendant, the Defendant's version is he just swaps places with Mr. Schaak. He knew he had to get his DNA in that house somehow. He knew he had to get his fingerprints in that house somehow.

Id. at 657.

While the statements in *Swanson* are much more direct in accusing the defendant of tailoring the evidence, each prosecutor argued that the respective defendant used his mere presence at trial to learn information about the state's case so he could fabricate a story effectively, in both cases without any actual evidence of fabrication. *See id.* at 657–58. We conclude that the prosecutor here committed misconduct by improperly commenting on appellant's presence at trial and implying that he tailored his testimony to fit the evidence without any support for that claim.

Substantial rights

But even though it was plain error for the prosecutor to insinuate that appellant tailored his story to fit the evidence, the error did not affect appellant's substantial rights.

When there is prosecutorial misconduct amounting to plain error, the burden shifts to the state to prove that any errors did not affect appellant's substantial rights at trial. *Ramey*, 721 N.W.2d at 302. Under the standard laid out in *Ramey*, the state needs "to show 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.* (quotations omitted).

And that is surely the case here. The evidence against appellant was strong, as catalogued above. The impermissible inference was not made directly, and in the trial transcript, the inference constituted one paragraph out of a twenty-page closing argument and three-page rebuttal. Appellant's counsel also had an opportunity to argue against this inference by delivering his closing argument. And the jury was properly instructed that counsel's closing arguments were not evidence that could be considered against appellant.

We conclude that even though the prosecutor committed misconduct by implying that appellant fabricated his story to fit the evidence, he is not entitled to relief because the state conclusively established that there is no reasonable likelihood that the absence of the error would have a significant effect on the jury's verdict.

Affirmed.