STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1896

State of Minnesota,
Respondent,

vs.

Jason J. Snyder,
Appellant.

Filed February 26, 2008
Affirmed
Minge, Judge

Clay County District Court
File No. K4-06-307

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Brian J. Melton, Clay County Attorney, Jenny M. Samarzja, Assistant County Attorney, Clay County Courthouse, 807 Eleventh Street North, P.O. Box 280, Moorhead, MN 56561 (for respondent)

John M. Stuart, State Public Defender, Jodie L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

MINGE, Judge

Appellant challenges his conviction under Minn. Stat. § 609.52, subd. 2(1), (5) (Supp. 2005) on the ground that (1) his conduct in retaining a loaner vehicle past the date of its expected return was not criminal; and (2) there was prejudicial prosecutorial misconduct. We affirm.

FACTS

Appellant Jason James Snyder dropped his car off for repairs at Intense Collision Center on January 25, 2006. He was allowed to use a loaner vehicle while his car was in the shop. The repairs on his vehicle were completed on approximately February 3, 2006, and the repair shop called to let him know that he could come pick it up. Snyder's wife said that he was out of town on a fishing trip, but that he should be able to bring the car back on the following Monday, February 6. Appellant's wife called on either February 6 or 7 to tell the repair shop that they were trying to return the loaner car, but that they did not have enough money to purchase the gas to get it back to the shop.

On Thursday, February 9, 2006, the repair shop reported the car stolen because it had not been returned by Snyder. A police officer went to Snyder's residence, asked Snyder where the vehicle was, and told Snyder that it had been reported stolen, which Snyder had not realized. Snyder showed the officer the car, which was parked in his garage. The car was towed back to the repair shop. Snyder was arrested on an unrelated warrant, and later charged with temporary theft of a motor vehicle under Minn. Stat. § 609.52, subd. 2(1), (5) (Supp. 2005). He was convicted by a jury. This appeal follows.

D E C I S I O N

I.

The first issue raised by Snyder is whether the evidence was sufficient to support a conviction for the temporary theft of a motor vehicle under Minn. Stat. § 609.52, subd. 2(1), (5) (Supp. 2005). Appellant argues that his retention of a loaner vehicle after his car had been repaired was not a criminal act, and that his failure to return the vehicle was due to a misunderstanding.

On a sufficiency of the evidence claim, an appellate court need only inquire whether a fact finder could reasonably conclude that the defendant was guilty of the offense charged. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). The determination must be made under the assumption that the jury believed the state's witnesses and disbelieved any contrary evidence, and be made in the light most favorable to the conviction. *Id.* Despite the foregoing, the jury must have acted with due regard for the presumption of innocence and the necessity of overcoming that presumption by proof beyond a reasonable doubt. *State v. Combs*, 292 Minn. 317, 320, 195 N.W.2d 176, 178 (1972).

When reviewing circumstantial evidence, an appellate court applies a more stringent standard. Under this standard, "evidence is entitled to the same weight as any evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Bias*, 419 N.W.2d at 484; *see also State v. Walen*, 563 N.W.2d 742, 750 (Minn. 1997). The circumstantial evidence must form a complete chain that, in view of the evidence as a

whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Because a jury is in the best position to evaluate circumstantial evidence, its verdict is entitled to due deference. *Id.*

The jury found the appellant guilty of theft under Minn. Stat. § 609.52, which states in relevant part:

> Subd. 2. Acts constituting theft. Whoever does . . . the following commits theft . . . :
>
> (1) intentionally and without claim of right . . . *retains possession* of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property; or . . .
>
> . . . .
>
> (5) *intentionally commits any of the acts listed in this subdivision but with intent to exercise temporary control only* and:
>
> (i) the *control exercised manifests an indifference to* the rights of the owner or *the restoration of the property* to the owner.

(Emphasis added.) The Minnesota Supreme Court has held that

> unauthorized use [of a vehicle] is a crime requiring more than a mere general intent; the intent is the intent to use a vehicle knowing that one does not have permission from the true owner to do so . . . . Any other approach would theoretically permit the conviction of people who in good faith used cars loaned to them by people who did not have permission to use them.

In re Welfare of C.D.L., 306 N.W.2d 819, 820 (Minn. 1981). In *State v. Beito*, the defendant took a truck owned by the City of Mankato while he was on work release for a probationary jail term. 332 N.W.2d 645, 647 (Minn. 1983). He drove it to Iowa, where

he abandoned it in a parking lot with the keys hidden under one of the front tires. *Id.* The *Beito* court found that although the defendant may not have intended to permanently deprive the owner of the truck, this was not required under the statute. *Id.* at 648-49. It was enough that the defendant had manifested "indifference" to the rights of the owner or the restoration of the property to the owner. *Id*.

Here, Snyder had a loaner vehicle pursuant to an agreement that limited its use to the Fargo-Moorhead area. The date that he was to return the loaner vehicle was not specified in the agreement, but its return was expected when the repair work was completed. The owner of the repair shop testified that after the shop completed repairs on Snyder's vehicle on February 3, the shop left three voice messages for Snyder regarding return of the loaner car, that the shop learned Snyder was gone on a fishing trip, that the shop never gave consent for Snyder to have the vehicle past February 6 or 7, and that the shop spoke to Snyder's wife and conveyed this expectation. In addition, Snyder manifested his understanding that he had been asked to return the loaner vehicle before Thursday, February 9, in two ways: He cleaned out the vehicle at the shop of a friend to get it ready for its return, and admitted to the officer sent to his house to seize the vehicle that it should have been returned.

We conclude that the evidence on the record is sufficient to support the jury's implicit findings that Snyder intentionally retained possession of the loaner vehicle after permission to use it had expired, that he intended to exercise temporary control, and that his actions manifested "an indifference to the rights of the owner or the restoration of the

property to the owner." Minn. Stat. § 609. 52, subd. 2(5)(i). We conclude the evidence is sufficient to support Snyder's conviction.

II.

The second issue raised by Snyder is whether the prosecutor's statements (1) involving the burden of proof; (2) regarding facts not in evidence; (3) and minimizing Snyder's defenses constituted reversible misconduct.

The alleged prosecutorial misconduct was not objected to during trial. Ordinarily, the defendant's failure to object to an error at trial forfeits appellate consideration of the issue. *State v. Darris*, 648 N.W.2d 232, 241 (Minn. 2002). Despite the foregoing, "[p]lain errors or defects affecting substantial rights may be considered by the court . . . on appeal although they were not brought to the attention of the [district] court." Minn. R. Crim. P. 31.02; s*ee also State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006) (discussing use of plain-error analysis in cases of prosecutorial misconduct); *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (discussing generally review of plain error). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *Griller*, 583 N.W.2d at 740). When evaluating alleged misconduct, we examine the closing argument as a whole. *State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005); *State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003).

A. Burden of Proof

1. Error

It is improper for a prosecutor to misstate the burden of proof or the presumption of innocence in a criminal case. *Ramey*, 721 N.W.2d at 300. Such improper statements have been held to include, for example, statements that constitutional rights are meant to protect the innocent but not to shield the guilty, *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993) (acknowledging that such a statement constitutes reversible error), or that the presumption of innocence is a shield for the innocent but not a cloak for the guilty, and that the presumption disappears when the state has proven its case, *State v. Jensen*, 308 Minn. 377, 379, 242 N.W.2d 109, 111 (1976). In *State v. Trimble*, 371 N.W.2d 921, 926 (Minn. App. 1985), this court considered the propriety of a closing argument that stated in part:

> Presumption of innocence is like a blank chalkboard. There is nothing on there against the defendant, and until you go into the jury room and start determining what evidence is credible and what evidence there is against the defendant, that presumption stays with him. The chalkboard stays blank. When you enter the jury room you will discuss among yourselves the evidence which you have heard, the testimony of the various witnesses, and you'll decide which evidence or items of evidence to believe. And believable evidence is written down, or in this analogy, put on a chalkboard. *As more and more evidence against the defendant is found to be credible, gradually the presumption of innocence disappears*.

Because the closing argument in *Trimble* indicated that once a large amount of evidence was presented, the defendant would lose the presumption of innocence, it was an improper statement. *Id.* In *Trimble*, this court emphasized that the correct standard of

proof was beyond a reasonable doubt and that the standard does not depend on quantity, but rather the jury's evaluation of the evidence presented. *Id.*

Here, the prosecutor stated during opening argument:

> You have been told several times about the burden of proof in a criminal case is beyond a reasonable doubt. You have also been told about the Defendant's presumption of innocence and you will continue to be told that several times. It is very important. They are very important concepts in our legal system. The state today is willingly accepting the burden of proof and not disputing that the defendant as he sits here today is not guilty, but as the evidence is presented, Ladies and Gentlemen, please pay particular attention, and I believe – I know that you will see that – presumption of innocence, think of it as a bubble surrounding the defendant as he sits there at counsel table today, and it will start to disappear, little by little. It will be picked at and it will disappear, and at the end of our case we will ask for you to find the defendant guilty of temporary theft of a motor vehicle.

During her closing argument, the prosecutor again stated:

> The state must prove their case beyond a reasonable doubt and, again, I told you earlier we accept that burden. We've taken that burden on. I believe we've met that burden above and beyond.
>
> The defendant had a presumption of innocence at the beginning of this trial and I equated it to a bubble around him? I think that bubble has burst at this point. I think each of the seven elements has been met by a – beyond a reasonable doubt.

Much like the prosecutor in *Trimble*, the prosecutor here indicated to the jury that Snyder's presumption of innocence was something that disappeared little by little, and that once a large amount of evidence was presented, it would disappear altogether. Again, like the statement in *Trimble*, these statements misinformed the jury that the

standard depended on quantity rather than the jury's evaluation of the evidence presented. We conclude that the statements made by the prosecutor were error.

2. Plain Error

For purposes of the plain error rule, "'plain' is synonymous with 'clear' or, equivalently, 'obvious.'" *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993) (citations omitted). An error is plain if it is "clearly contrary to the law at the time of appeal." *State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) (quoting *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 1549 (1997)); *see also State v. Ihle*, 640 N.W.2d 910, 917 (Minn., 2002) (finding that "the error of instructing a jury on the elements of obstructing legal process without including the parameters . . . renders the error clear and obvious").

Misstatements concerning the burden of proof in criminal cases are reversible errors under Minnesota law. *See, e.g., State v. Bohlsen*, 526 N.W.2d 49, 50 (Minn. 1994) ("Where any explanation of what is meant by a reasonable doubt [or the presumption of innocence] is required, it is safer to adopt some definition which has already received the general approval of the authorities, especially those in our own state."); *Salitros*, 499 N.W.2d at 818 (misstatements concerning the presumption of innocence can constitute reversible error); *Trimble*, 371 N.W.2d at 926 (a misstatement concerning the burden of proof was improper); *State v. DeVere*, 261 N.W.2d 604, 606 (Minn. 1977) (the prosecutor should "try to adhere as closely as possible to the normal statement of the presumption"); *Jensen*, 308 Minn. at 379-80, 242 N.W.2d at 111 (misstatement regarding presumption of innocence can constitute reversible error).

It is well established that prosecutors have a duty to correctly state the burden of proof in a criminal case, and they should avoid novel characterizations of this burden in order to avoid potential misunderstandings by the jury. Here, because the prosecutor adopted a novel characterization of the burden of proof that closely resembles language considered by Minnesota courts to be improper since at least the mid-1980's, we conclude the error was plain.

3. Prejudice

On the third, or "prejudice" prong, the state now bears the burden of demonstrating that its misconduct did not prejudice the defendant's substantial rights. *Ramey*, 721 N.W.2d at 300. Plain error is considered prejudicial if "there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Young*, 710 N.W.2d 272, 279 (Minn. 2006) (quotations omitted). The Minnesota Supreme Court has noted that improper statements require reversal in close cases. *Jensen*, 308 Minn. at 379-80, 242 N.W.2d at 111; *but see State v. McDonough*, 631 N.W.2d 373, 389 n.2 (Minn. 2001) ("[A] prosecutor's attempts to shift the burden of proof are often nonprejudicial and harmless where . . . the district court clearly and thoroughly instructed the jury regarding the burden of proof."). In *Trimble*, 371 N.W.2d at 927, the court determined that the "blank chalkboard" theory discussed earlier did not require reversal because the jury was otherwise fully instructed on the presumption of innocence, the district court had informed the jury that the statement was an incorrect statement of the law, and the remarks therefore did not play a substantial part in influencing the jury to convict.

Here, the instructions submitted to the jury stated:

> The Defendant is presumed innocent. In order for you to find the Defendant guilty, the State must prove guilt. The Defendant does not have to prove innocence. The presumption of innocence remains with the defendant unless and until the Defendant has been proven guilty beyond a reasonable doubt by evidence admitted in this trial.

The instructions further stated:

> Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is doubt based upon reason and common sense; it does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.

Defense counsel also stated the proper standard of proof to the jury during closing argument. In addition, the jury read the definition of a reasonable doubt as it was given in the jury instructions and asked the district court what the word "capricious" meant to aid in their interpretation of the standard of proof.

Although the prosecutor's misstatements are troublesome and the jury did not immediately receive responsive corrective instructions, the jury was given several other statements which set forth the correct standard of proof and were adequate to overcome the misstatements. Therefore, we conclude that the plain error is not sufficiently prejudicial as to merit reversal in this case.[1]

[1] We note the inconsistency between cases determining that misstatements of the burden of proof constitute severe prosecutorial misconduct and those determining that such misconduct is nonprejudicial where the jury is properly instructed otherwise, which a jury presumably always will be. *See Ramey*, 721 N.W.2d at 301-303 (acknowledging that the ongoing problem justified shifting the burden to show prejudice from the defendant to the state, which now must show that there was no prejudice); *McDonough*, 631 N.W.2d at

B. Statements Regarding Evidence

Snyder argues that the prosecutor misstated the evidence during closing arguments to present a motive for the crime by arguing he did not return the loaner vehicle because he did not have enough money to pay the $500 deductible on the repairs that had been made to his own vehicle. While a state's closing argument is not required to be "'colorless, . . . it must be based on the evidence produced at trial, or the reasonable inferences from that evidence.'" *Young*, 710 N.W.2d at 281 (quoting *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995)). In *Young*, a prosecutor's misstatement of a date constituted misconduct because that misstatement was critical to making the prosecutor's argument plausible. *Id.*

Here, Snyder's wife told the repair shop that Snyder failed to return the loaner vehicle and pick up his own vehicle because he did not have enough money to purchase gas to get the loaner back to the shop. Snyder's wife testified that because he did not have money, his friend had paid for their recent fishing trip. It would not be unreasonable to infer from this that Snyder did not have the money to cover his deductible. In addition, the jury was properly instructed that what the attorneys said during closing arguments was not evidence and that the jury should rely on their own recollection of facts as they were presented during the trial. We conclude that the

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389 n.2 (misstatement of the burden of proof is not prejudicial if a jury is properly instructed otherwise). In *Ramey*, the Minnesota Supreme Court condemned this form of prosecutorial misconduct and observed that the shift of the burden of showing an absence of prejudice to the state should result in greater scrutiny by the court of appeals. 721 N.W.2d at 302. However, we are constrained by the rules articulated in both lines of cases.

prosecutor's statement regarding motive was a permissible inference from the evidence and does not constitute misconduct.

C. Statements Regarding Appellant's Defense

Snyder argues that several statements made by the prosecutor improperly disparaged or denigrated his defenses. A prosecutor may not state that the accused has offered a standard defense that is commonly used "when nothing else will work." *State v. Griese*, 565 N.W.2d 419, 427 (Minn. 1997). Statements that invite jurors to speculate with respect to the motivation behind an accused's decision to go to trial constitute prosecutorial misconduct. *Id.* at 428. While prosecutors may not belittle a defense, they are free to argue that a particular defense has no merit. *Id.*

Here, Snyder's primary defense was that his continued possession of the car was the result of a "misunderstanding." The prosecutor did not state that the misunderstanding defense was the only one that might work and therefore the one that Snyder employed; nor did the prosecutor state that a misunderstanding is the type of defense that that defendant uses when he has no other arguments. Rather, the prosecutor stated that the retention and use of the car was not a misunderstanding. Such an assertion constitutes an attack on the merits of a defense. Further, the prosecutor pointed out possible inconsistencies in the evidence by emphasizing that Snyder had money to go fishing and money to buy tobacco, but could not get the vehicle back to the repair shop. Again, this is an attack on the merits of the defense rather than a denigration of it, and it is not improper.

In sum, we conclude that these statements about Snyder's defense do not constitute prosecutorial misconduct.

Affirmed.

Dated: