STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0402

State of Minnesota,
Respondent,

vs.

Curtis D. Slepica,
Appellant.

Filed February 12, 2008
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 06063951

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

Jay M. Heffern, Minneapolis City Attorney, Jessica L. Rugani, Assistant City Attorney, 333 South Seventh Street, Suite 300, Minneapolis, MN 55402 (for respondent)

Leonardo Castro, Hennepin County Public Defender, Peter W. Gorman, Assistant Public Defender, 317 Second Avenue South, Suite 200, Minneapolis, MN 55401 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Randall, Judge; and Hudson, Judge.

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

KALITOWSKI, Judge

Appellant Curtis D. Slepica challenges his reckless driving conviction, arguing that (1) the district court abused its discretion by issuing a curative jury instruction; (2)

the district court violated his due process rights by treating him in a biased manner; and (3) the evidence presented at trial was insufficient to support his conviction. We affirm.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion at trial by issuing a curative jury instruction. We disagree.

A district court has broad discretion to issue appropriate curative instructions in response to improper remarks made in closing arguments. *State v. Breaux*, 620 N.W.2d 326, 333 (Minn. App. 2001). Accordingly, issuance of a curative instruction "should be upheld unless the misconduct constitutes a miscarriage of justice." *Poston v. Colestock*, 540 N.W.2d 92, 94 (Minn. App. 1995) (quotation omitted), *review denied* (Minn. Jan. 25, 1996).

As a general rule, it is improper for a defendant to comment on the state's failure to call a witness equally available to both parties. *State v. Daniels*, 361 N.W.2d 819, 833 (Minn. 1985). Here, the record indicates that defense counsel improperly commented on the state's failure to call the alleged "real driver" as a witness in her closing argument. Moreover, the impropriety of defense counsel's argument was compounded by the fact that the witness was not equally available to both sides because appellant failed to disclose the correct last name of the alleged "real driver" before trial.

Appellant initially named the person he claimed was driving his car. And this same name continued to be used by the court and counsel for both parties as they referred to the alleged "real driver" throughout numerous pretrial discussions and their opening

statements at trial. Although appellant maintains that he disclosed a different name for the alleged driver, Tom Vernon, in a phone message he left for the officer, there is no evidence besides appellant's testimony to substantiate this claim. Moreover, defense counsel's assertion that she assumed the officer had shared the alleged driver's true name with the state is disingenuous in light of her continued usage of the initial name rather than Tom Vernon up until her cross-examination of the officer.

Because appellant made no effort to disclose the alleged driver's real name, it was unfairly prejudicial for defense counsel to point out the state's failure to call Tom Vernon to show that the state failed to meet its burden of proof. Accordingly, it was appropriate for the district court to issue a curative instruction addressing defense counsel's improper closing argument. And we reject appellant's argument that the curative instruction given by the district court resulted in an improper shifting of the burden of proof. Rather, the curative instruction appropriately identified the misconduct committed by defense counsel in suggesting an adverse inference from the state's failure to call Tom Vernon during her closing argument. Accordingly, we conclude that the district court acted within its discretion by issuing an appropriate curative instruction to the jury.

II.

Appellant contends that the district court violated his due process rights by treating him in a biased manner. Because the record indicates that appellant was provided a fair and unbiased trial, we disagree.

A criminal defendant has a constitutional right to a trial before a fair and impartial tribunal. *State v. Crow*, 730 N.W.2d 272, 282 (Minn. 2007). But when reviewing a

claim of judicial bias, this court presumes that the judge discharged his judicial duties in a proper manner. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). "Prior adverse rulings by a judge, without more, do not constitute judicial bias." *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006).

Here, an independent review of the record indicates that appellant's claims of judicial impropriety lack merit. Although appellant asserts that the district court treated defense counsel in a deprecating manner when it asked her if she had any more "surprises," this comment was made following defense counsel's motion to dismiss, which should not have been made in the presence of the jury. Moreover, because the judge's question was posed to defense counsel outside of the jury's presence, it had no impact on the jury's verdict.

Appellant also claims, without authority, that removing the jury from the courtroom at the conclusion of appellant's closing argument demonstrated bias and constituted misconduct. We disagree. And even if the court's removal of the jury did constitute error, it was harmless because the state's immediate request for a mistrial indicates that the state itself would have subsequently requested for a record to be made outside the jury's presence. *See* Minn. R. Crim. P. 26.03 subd. 11(l) (2006) ("[a]t the conclusion of the arguments the court shall allow the parties an opportunity, outside the presence of the jury and on the record, to make any objections . . .").

The district court also acted within its discretion when it questioned appellant, outside the jury's presence, to determine whether the alleged driver was a real person, and stated that it might impose costs on appellant if it granted a mistrial and then later

learned that the alleged "real driver" did not actually exist. *See* Minn. R. Evid. 614(b) (2006) (allowing interrogation by the court). Similarly, there is no merit to appellant's argument that the district court's use of the term "we" to refer to the entity that would look for the alleged driver demonstrated bias, since "we" is commonly used by the court to refer to the criminal justice system as a whole. Moreover, the curative instruction issued by the district court did not demonstrate bias because, as discussed above, the instruction appropriately addressed the impropriety of defense counsel's closing argument.

In sum, we conclude that the district court did not violate appellant's due process rights by treating him in a biased manner.

III.

Appellant asserts that the evidence presented at trial was insufficient to support his conviction. But because the state presented sufficient evidence for the jury to reasonably conclude that appellant engaged in reckless driving, we disagree.

When assessing the sufficiency of evidence, an appellate court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," was sufficient to permit the fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The verdict should stand "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [a] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotations omitted).

A defendant's testimony as to his intentions is not binding on the jury if the "natural and probable consequences of his actions" demonstrate a contrary intent. *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). When assessing the sufficiency of evidence, this court operates from the assumption that the fact-finder believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This assumption is particularly strong when resolution of the matter depends largely on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

Appellant was convicted of reckless driving in violation of Minn. Stat. § 169.13, subd. 1 (2006). This statute prohibits driving in a manner that demonstrates "a willful or a wanton disregard for the safety of persons or property[.]" Minn. Stat. § 169.13, subd. 1 (2006).

The jury heard the officer testify that appellant turned into the officer's lane, forcing the officer up onto the curb and sidewalk to avoid a collision, and then turned right across several active lanes of traffic against a red light marked "no turn on red." In addition, the jury heard appellant testify that he was not driving his vehicle when the incident took place. But apart from appellant's own testimony that he was not the "real driver," the state's evidence of appellant's reckless driving was uncontroverted.

Moreover, appellant's assertion that most of the evidence offered to prove the reckless nature of his driving was produced by improper questioning lacks merit. Because appellant's cross-examination of the officer opened the door to the substance of the officer's police report, the state's questions on redirect were relevant. And even

though the form of the questioning was leading, the issue of when and under what circumstances leading questions may be asked of a witness rests almost entirely within the district court's discretion, and does not warrant a new trial absent a gross abuse of discretion. *See* Minn. R. Evid. 611(c) (2006) (granting the court control over the mode of interrogating witnesses); *Kugling v. Williamson,* 231 Minn. 135, 140, 42 N.W.2d 534, 538 (Minn. 1950).

Accordingly, we conclude that the evidence presented by the state was sufficient for the jury to reasonably conclude that appellant engaged in reckless driving.

Affirmed.