STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2436

State of Minnesota,
Respondent,

vs.

Charles Lockhart,
Appellant.

Filed April 15, 2008
Affirmed
Willis, Judge

Hennepin County District Court
File No. 05075263

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

Mike Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge; and Willis, Judge.

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

WILLIS, Judge

Appellant challenges his conviction of first-degree aggravated robbery, arguing that the evidence was insufficient to support the conviction and that the prosecutor committed misconduct. We affirm.

FACTS

On November 22, 2005, L.M. called police and reported that three men were assaulting another man near the Target Center in downtown Minneapolis. When officers arrived on the scene, they found the victim, M.L., bleeding from his head, neck, and stomach. M.L. had been stabbed at least 12 times. M.L. told the officers that he had been beaten and robbed by three men, whom he recognized from a nearby homeless shelter where he had stayed. In an interview several days after the attack, police showed M.L. a photo line-up, and M.L. identified appellant Charles Lockhart as the man who stabbed and robbed him.

Lockhart was arrested and charged with first-degree aggravated robbery, in violation of Minn. Stat. § 609.245, subd. 1 (2004). At trial, M.L. testified that (1) he had an opportunity to look at the faces of all three of his attackers; (2) he got a "very good look" at Lockhart during the attack; (3) he recognized the faces of all of his attackers and that there was "one that I knew for sure"; and (4) "there is no doubt in my mind" that Lockhart was the man who stabbed him. The state also introduced testimony of L.M., the eyewitness who called police to report the attack; the police officers who responded to

the call; and the police officer who showed M.L. the photo line-up. In September 2006, a jury found Lockhart guilty, and he appeals.

D E C I S I O N

Lockhart claims that the evidence presented at trial was insufficient to support his conviction of first-degree aggravated robbery. He also contends that the prosecutor committed misconduct during closing argument by vouching for the truthfulness of the victim and by shifting the burden of proof to Lockhart to demonstrate the victim's motive for fabricating the identification. We consider each issue in turn.

I. The evidence offered at trial was sufficient to support the conviction.

When considering a claim of insufficient evidence, this court carefully examines the record to determine "whether the jury could reasonably find the defendant guilty given the facts in evidence and the legitimate inferences which could be drawn from those facts." *State v. Miles*, 585 N.W.2d 368, 372 (Minn. 1998). A reviewing court views the evidence in the light most favorable to the conviction. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). And we must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Lockhart contends that the evidence was insufficient to support his conviction because "the only evidence implicating [him] in the crime was the victim's identification

testimony, [which] was not credible." Lockhart claims that this is one of those "rare cases" that requires a reversal "in the interests of justice" because M.L.'s testimony "didn't make any sense, and there was no corroboration and no independent evidence to link [Lockhart] to the crime." We disagree.

It is well established that "a conviction may rest on the testimony of a single credible witness" and that identification testimony is "sufficient if the witness expresses a belief that she or he saw the defendant commit the crime." *Miles*, 585 N.W.2d at 373. Assessing the credibility of witness testimony, including a witness's identification of the defendant, is the role of the jury, not of this court. *Id.* In determining the trustworthiness of an eyewitness's identification, the jury must consider the opportunity that the eyewitness had for accurate and deliberate observation while in the presence of the accused. *State v. Gluff*, 285 Minn. 148, 151, 172 N.W.2d 63, 65 (1969). And the supreme court has recognized that not all eyewitness identifications are the same: "[W]hen the single witness' identification of a defendant is made after only fleeting or limited observation, corroboration is required if the conviction is to be sustained." *State v. Walker*, 310 N.W.2d 89, 90 (Minn. 1981) (citing *State v. Spann*, 287 N.W.2d 406, 407-08 (Minn. 1979)).

Here, Lockhart has not demonstrated that M.L.'s observation of Lockhart was "fleeting or limited." *See id.* The record shows that M.L. "got a very good look at" Lockhart and, therefore, made an unequivocal identification of Lockhart. The record also shows that M.L. knew Lockhart before the attack took place, which supports the trustworthiness of the identification. *See State v. Zernechel*, 304 N.W.2d 365, 366 (Minn.

1981) (affirming conviction in a case involving the identification of the defendant by a single witness when the witness recognized her attacker as former tenant of apartment building). M.L. testified that, although he did not know Lockhart's name, he recognized Lockhart from a homeless shelter where M.L. had stayed and from an incident that occurred several months before the robbery, when both M.L. and Lockhart were stopped by police as they pushed a stolen car and Lockhart was charged with motor-vehicle theft. We conclude that there was sufficient identification testimony to support Lockhart's conviction of first-degree aggravated robbery.

Even if we were to conclude that additional corroboration of M.L.'s identification of Lockhart were required, M.L.'s testimony was, in part, corroborated by L.M., who testified that he saw three attackers and they were wearing "dark hooded sweatshirts and dark pants." M.L. stated that he was attacked and robbed by three men who wore hooded sweatshirts.

Because M.L. unequivocally identified Lockhart as his attacker, M.L. knew Lockhart before the attack, and the record in addition contains some evidence to corroborate M.L.'s testimony, this case is distinguishable from the cases on which Lockhart relies. *See State v. Langteau*, 268 N.W.2d 76, 77 (Minn. 1978) (reversing a conviction in light of uncorroborated witness testimony, unsupported assertions by the prosecuting attorney, and irregularities in the jury's deliberation process); *Gluff*, 285 Minn. at 151, 172 N.W.2d at 65 (reversing a conviction that was based on testimony from a victim who was fixated on the assailant's gun, gave a description substantially different

from the actual physical features of the defendant, and there was no other corroborating evidence).

II. The prosecutor did not commit misconduct.

Lockhart argues that the prosecutor, during closing argument, improperly vouched for the credibility of M.L.'s testimony and improperly shifted the burden of proof to Lockhart to "prove a motive for [M.L.] to falsely implicate [Lockhart] in order for the jury to acquit."

At trial, Lockhart objected to only some of the prosecutor's statements that he now challenges on appeal. We must, therefore, apply two standards of review. *See State v. Dobbins*, 725 N.W.2d 492, 506 (Minn. 2006). Prosecutorial misconduct that was not objected to is analyzed under the plain-error standard, under which a defendant must establish that an error occurred and that the error was plain. *State v. Ramey*, 721 N.W.2d 294, 299, 302 (Minn. 2006). If the defendant does so, the burden shifts to the state to establish that the misconduct did not prejudice the defendant's substantial rights. *Id*. at 300. The state meets this burden if it can show that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Id*. at 302. By contrast, prosecutorial misconduct that was objected to at trial is reviewed under the harmless-error standard, and this court will reverse unless the misconduct was harmless beyond a reasonable doubt, that is, unless the verdict is surely unattributable to the misconduct. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006) (citing *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006)).

A. The prosecutor did not improperly vouch for M.L.'s credibility.

During the state's rebuttal argument, the prosecutor stated, "Truth is not hard to tell and [M.L.] did stand there and tell you the truth. It's very simple. He knows him and the man stabbed him. Under the law, if you believe him, it is reasonable grounds and sufficient grounds to convict." Lockhart claims that the statement was improper vouching for M.L.'s credibility. But Lockhart did not object, and, therefore, we review the statement under the plain-error standard. *See Ramey*, 721 N.W.2d at 299.

A prosecutor has considerable latitude during closing argument and 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." *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). Additionally, a prosecutor "is free to argue that particular witnesses were or were not credible." *State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007) (citing *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003)); *see also State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977) (stating that a prosecutor has "a right to analyze the evidence and vigorously argue that the state's witnesses were worthy of credibility whereas defendant and his witnesses were not"). But a prosecutor's statements become improper vouching when she "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." *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted).

We conclude that the prosecutor's statement here was not improper vouching. *Cf. Mayhorn*, 720 N.W.2d at 786 (holding that the prosecutor's statement during cross-

examination that "[y]ou wouldn't know the truth if it hit you in the face, would you?" was improper vouching); *State v. Duncan*, 608 N.W.2d 551, 555 (Minn. App. 2000) (ordering a new trial when prosecutor twice stated during closing argument that the defendant was "lying"), *review denied* (Minn. May 16, 2000). The defense's theory at trial was that M.L. was not telling the truth. Lockhart's counsel argued that "[m]y five-year-old can tell the truth. It isn't that hard" and "here's a guy who is given immunity, what he says can't be used against him and the guy still can't tell the truth." The prosecutor's statement was a direct response to Lockhart's argument that the jury should not believe M.L. But we conclude that the prosecutor was arguing the credibility of M.L.'s testimony and did not improperly vouch for that testimony, we find no plain error. *See State v. Stephani*, 369 N.W.2d 540, 547 (Minn. App. 1985) (concluding that prosecutor's statement to the jury that a witness "told you what happened . . . she told the truth" was not misconduct), *review denied* (Minn. Aug. 20, 1985).

Even if we were to conclude that the prosecutor's statement was improper, a reversal is not appropriate because the statements were not prejudicial when viewed "in context of the closing argument taken as a whole." *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003). First, Lockhart did not object at the time of the statement, which suggests that he did not then consider the statement to be prejudicial. *See State v. Thomas*, 305 Minn. 513, 517, 232 N.W.2d 766, 769 (1975). Second, the statement was only a few sentences in a closing argument that exceeded 20 transcribed pages. *See Powers*, 654 N.W.2d at 679 (concluding that prosecutor's improper statement was not prejudicial when it "was only two sentences in a closing argument that amounted to over

20 transcribed pages"). Finally, the district court instructed the jury that it should consider only the evidence:

> Neither the arguments nor other remarks of a lawyer are evidence in this case. If the attorneys or I have made any statements or I have made any statements about the evidence that differ from your recollection of the evidence, then you should disregard those statements and rely upon your own recollection of what you saw and heard in this courtroom. You, not the lawyers or the Court, are the sole judges of the facts.

In light of this cautionary instruction, and the brevity of the comment and Lockhart's failure to object to it, we conclude that Lockhart was not prejudiced by the prosecutor's statement. *See State v. Ture*, 353 N.W.2d 502, 517 (Minn. 1984) (finding that prosecutor's improper vouching for the credibility of witnesses was not prejudicial when the evidence was otherwise sufficient to convict and the district court "gave an appropriate instruction to the jury that statements of counsel were not evidence and that its verdict could be based only on the evidence").

B. The prosecutor did not improperly shift the burden of proof to Lockhart.

Lockhart argues finally that statements made during the prosecution's rebuttal argument improperly shifted the burden of proof to him. The prosecutor stated to the jury: "We have heard nothing in the closing argument of the defense as to why [M.L.] would falsely identify Mr. Lockhart." After the district court sustained Lockhart's objection to this statement, the prosecutor stated that "[t]here is no reason for [M.L.] to fabricate the identification."

At trial, the state bears the burden of proving all the elements of an offense beyond a reasonable doubt, and the prosecutor is prohibited from shifting the burden of proof to a defendant to prove his innocence. *State v. Brechon*, 352 N.W.2d 745, 750 (Minn. 1984). Misstatements of the burden of proof are "highly improper" and, if demonstrated, constitute prosecutorial misconduct. *See State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985). But a "remark by a prosecutor on the lack of evidence regarding the defense's theory [does] not shift the burden of proof to the defense." *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993) (citing *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986)).

The prosecutor's statement here did not shift the burden of proof to Lockhart. As in *Race* and *Gassler*, the prosecutor addressed the absence of evidence regarding the defense's theory that M.L. had fabricated his testimony. *See Race*, 383 N.W.2d at 664; *Gassler*, 505 N.W.2d at 69. And it is well established that a prosecutor may "argue that there [is] no merit to [a] defense." *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994). We conclude that the prosecutor did not commit misconduct and note that, in any event, the district court properly instructed the jury on the burden of proof.

Affirmed.