STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0535

State of Minnesota,
Respondent,

vs.

Anthony John Soper,
Appellant.

Filed July 1, 2008
Affirmed
Ross, Judge

Anoka County District Court
File No. K9-01-6831

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

Robert M.A. Johnson, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303-5550 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Davi E. Axelson, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Harten, 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

ROSS, Judge

A man who matches the general description of Anthony Soper, accompanied by a dog who matches the general description of Anthony Soper's dog, stole a bicycle from a garage about a mile from Anthony Soper's home. An eyewitness positively identified Soper as the burglar. Soper appeals from his conviction of first-degree burglary, arguing that the prosecutor committed misconduct during his closing argument by stating that Soper's alibi was "silly" and comparing it with a story that might be found in the *National Enquirer*. Because the prosecutor's comments do not constitute misconduct, we affirm Soper's conviction.

FACTS

At about 11:00 at night on June 22, 2006, 15-year-old girls M.M. and K.L. were in the kitchen of M.M.'s Circle Pines home when they saw from the window that someone was in a neighbor's driveway. The girls went outside, mistakenly thinking it was a friend. As they neared the neighbor's home, they saw that it was a man whom they did not recognize.

The man was in the attached garage standing on his toes, peering into a minivan parked inside. The girls saw a white standard poodle that appeared to be with the man. The man tried unsuccessfully to open a door to the minivan, and he then moved around the van out of the girls' sight. M.M. then yelled, "What are you doing?" She yelled again when it seemed that the man may try to enter the house. The man came to the other

side of the minivan, which agitated the poodle. The poodle settled and sat down immediately when the man put a finger to his lips.

The man then left the garage on the neighbor's bicycle, and the poodle followed. They passed within ten feet of M.M. She later described the man's distinctive cheekbones, long dark hair, and outfit consisting of a windbreaker, khaki "cargo" style shorts, white socks, and white sneakers. The girls reported the events to police.

Police learned that a man and a poodle matching the descriptions given by the girls lived approximately one mile away. This man is Anthony Soper, and his poodle is Jocko. Two officers went to Soper's house. They entered with permission given by Soper's housemate. Soper was not home, but Jocko was. The officers gave Jocko commands, which he obeyed, and they later took Jocko's photograph. They found khaki cargo-style shorts and white sneakers in the area of the home in which Soper lived.

A few days later, M.M. identified Soper in a photo lineup with "100 percent" certainty. K.L. was shown Jocko's photograph before trial, and she stated that it looked exactly like the dog present with the burglar. M.M. made an in-court identification of Soper, repeating that she had no doubt that he was the man she saw leaving the garage.

Soper did not testify at trial, but his housemate's father and Soper's girlfriend did, presenting Soper's alibi. His housemate's father stated that he had seen Soper grilling steaks at 10:00 or 10:30 p.m. on the night of the burglary. Soper's girlfriend testified that she and Soper fell asleep on the couch after grilling the steaks, and when she awoke at 1:00 in the morning, Soper was there.

The prosecutor began his closing argument with the following remark, to which Soper did not object but which is the focus of his appeal:

> If you believe that the defendant, Mr. Soper, sat on his couch or slept on his couch, along with his dog being there, his large white well-trained poodle, on the night of June 22, 2006, while half a mile away, his look alike, along with a white large poodle that was well-trained, committed the offense of burglary, then you should find the defendant not guilty. If you find that that's not the case and that that's silly, then you should find him guilty. Really it sounds like something out of the *Enquire*[*r*] headlines; doesn't it?

The jury convicted Soper of first-degree burglary of a dwelling in violation of Minnesota Statutes section 609.582, subd. 1(a) (2006). Soper appeals.

D E C I S I O N

Soper argues that by calling Soper's alibi "silly" and by likening it to a tabloid headline, the prosecutor committed misconduct that requires reversal. Because Soper did not object to the prosecutor's closing remarks, we apply "a modified plain error test." *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007). We first analyze the challenged prosecutorial conduct to determine whether any misconduct occurred, *State v. Ford*, 539 N.W.2d 214, 228 (Minn. 1995), examining the closing argument as a whole and without taking phrases or remarks out of context. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993), *as amended* (Minn. Feb. 19, 1993). If we conclude that there was misconduct, we then decide whether a new trial is warranted. *Wren*, 738 N.W.2d at 390.

We hold that the prosecutor's comments regarding Soper's alibi defense do not amount to misconduct. A prosecutor has discretion to fashion a persuasive closing argument, and his rhetoric need not be colorless. *State v. Bolstad*, 686 N.W.2d 531, 544

(Minn. 2004); *State v. Roman Nose*, 667 N.W.2d 386, 402 (Minn. 2003). A prosecutor's comments that belittle the defense in the abstract, however, may constitute misconduct. *See State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993) (stating that prosecutors may not belittle a defense in the abstract, for example by implying that the offered defense is one given because nothing else will work). But a "prosecutor is free to specifically argue that there is no merit to a particular defense in view of the evidence or no merit to a particular argument." *Id.* So the pivotal issue here is whether the prosecutor's comments argued that Soper's alibi was meritless in light of the evidence, and therefore are permissible, or whether the comments denigrated the defense generally, and therefore are impermissible.

Several cases have marked the difference between a proper argument against the merits of a defense and an improper degradation of a defense in the abstract. *See, e.g.*, *id.* (noting that comment by prosecutor that defense attorneys always try to draw attention away from their clients was improper); *State v. Kirvelay*, 311 Minn. 201, 202, 248 N.W.2d 310, 311 (1976) (holding that it was improper for prosecutor to state it is a "soddy" defense for a defendant to claim someone else committed the crime); *State v. Bettin*, 309 Minn. 578, 579, 244 N.W.2d 652, 654 (1976) (holding that prosecutor improperly commented that insanity defense is "pushbutton" defense that defendants raise when all else fails); *cf. State v. Simion*, 745 N.W.2d 830, 843–44 (Minn. 2008) (holding that it was not improper for a prosecutor to comment that the defendant attempted to distract the jury from the issues at trial); *State v. Ashby*, 567 N.W.2d 21, 28 (Minn. 1997) (holding that it was not improper for prosecutor to comment that a

defendant's allegations are easily made, but the jury must look at the evidence); *State v. Coleman*, 560 N.W.2d 717, 721 (Minn. App. 1997) (stating it is misconduct to accuse the defendant of "shopping around for a defense" and deliberately attempting to mislead the jury).

It is clear that the prosecutor was attacking only the worthiness of Soper's specific alibi and not generally attacking the use of an alibi defense in the abstract. He did not state or imply that Soper's defense was routine, desperate, reflexive, or categorically meritless. He used common language and a modern cultural reference to characterize Soper's defense as implausible. The prosecutor colorfully urged the jury not to believe that a man fitting Soper's description accompanied by a well-trained poodle matching Jocko's description committed the burglary within "half a mile" of Soper's home. This was not misconduct.

Soper also claims that the prosecutor improperly denigrated his defense by comparing it to the idea that the sun would not rise the next day. But this misconstrues the argument. The prosecutor referred to the sun not rising as an example of capricious doubt, which he contrasted with reasonable doubt. He was reminding the jury that the state must prove its case only beyond a reasonable doubt, not beyond any conceivable doubt. This court has held that the following instruction, which distinguishes "reasonable doubt" from "any doubt," appropriately advises the jury of the standard: "Proof beyond a reasonable doubt means that the evidence must be such as to remove from your minds any reasonable doubt as to the defendant's guilt, but it is not necessary that the evidence be such as to convince you beyond any doubt whatsoever of the defendant's guilt." *State*

v. Taylor, 369 N.W.2d 30, 32 (Minn. App. 1985), *review denied* (Minn. Aug. 20, 1985). The prosecutor's reference to the rising sun to make the standard more understandable for the jury here is not grounds to reverse. *Cf. State v. Harwell*, 515 N.W.2d 105, 108–09 (Minn. App. 1994) (finding no error where prosecutor adequately informs the jury of its legal duty), *review denied* (Minn. June 15, 1994).

Because none of the prosecutor's challenged comments constitute misconduct, we end the analysis.

Affirmed.