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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0287

State of Minnesota,
Respondent,

vs.

Robert Raisch,
Appellant.

Filed April 21, 2009
Affirmed
Stoneburner, Judge
Concurring specially, Poritsky, Judge[*]

Isanti County District Court
File No. CR05236

Lori Swanson, Attorney General, Rita Coyle Demeules, Assistant Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Jeffrey Edblad, Isanti County Attorney, Government Center, 555 18th Avenue Southwest, Cambridge, MN 55008 (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 Stoneburner, Presiding Judge; Shumaker, Judge; and Poritsky, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

STONEBURNER, Judge

Appellant challenges his convictions of aggravated robbery and theft of a motor vehicle, arguing that circumstantial evidence was insufficient to support the conviction of aggravated robbery and that both convictions should be reversed because the prosecutor ridiculed his defense. Appellant also challenges the sufficiency of the findings to support an upward sentencing departure for aggravated robbery, and, in a pro se supplemental brief, asserts violations of his right to a speedy charge and trial, ineffective assistance of counsel, evidentiary errors, and faulty jury instructions. We affirm.

FACTS

On a 2004-August evening, 74-year-old L.J. was assaulted, and his truck was stolen from his farm in rural Isanti County. L.J. had stopped at the farm to feed his horses. L.J. remembers feeding the horses and shutting the barn door. His next memory is waking up lying on the ground with blood on his face and his truck missing. The pocket where he kept his truck keys was ripped. He went to the caretaker's house, where his son was recuperating from a broken foot, for assistance.

A deputy en route to the farm in response to the report of the assault found a Dodge pickup truck with Michigan license plates (the Michigan truck) in the ditch approximately one-half mile from L.J.'s farm. The truck's hood was warm. An open box of Icehouse beer with bottles still cold to the touch was in the truck. The deputy learned that the Michigan truck had been reported as stolen.

A police dog tracked a scent from the driver's door of the Michigan truck to a location outside of the caretaker's house on the farm, to a bottle of Icehouse beer lying in the ditch close to the barn, and then to a location where there was blood on the ground. A pole was found in the grass on the side of the barn three to five feet from a pool of blood. L.J. identified the pole as one that he kept in the bed of his truck and used to move his hogs around. L.J.'s glasses were found next to the pole. L.J. was certain that he had not removed the pole from his truck.

Later, Blaine police found L.J.'s truck stalled at an intersection in Blaine, 18 miles from L.J.'s farm. The keys were in the ignition and the driver's door was open. Still later, a Jeep Liberty was reported stolen from a townhouse about four blocks from where L.J.'s truck was found. Because of the proximity between L.J.'s truck and the stolen Jeep, officers assumed that the events were related.

Officers began to look for the Jeep, and at 1:00 a.m. a Mounds View police officer saw the Jeep run a stoplight. The driver of the Jeep led the officer on a five-mile high-speed chase that ended in Ramsey County when the Jeep rolled. Appellant Robert Sam Raisch, covered with blood and smelling of alcohol, was apprehended as he climbed out of the Jeep's driver's side door. A 16-year old female, W.W., was unconscious on the passenger side. Keys, a digital camera, an empty key ring, and an armed-forces identification card in the name of the Jeep's registered owner were found in Raisch's pockets when he was searched incident to arrest.[1] The only blood on Raisch's clothing

[1] Raisch was convicted of theft of the Jeep in Ramsey County, and that conviction is not involved in this appeal.

was determined to be his own. The key found in Raisch's pocket fit the ignition of the Michigan truck.

In June 2005, Raisch was charged in Isanti County with one count of first-degree aggravated robbery of L.J., based on the alleged assault on L.J. and theft of L.J.'s truck; one count of conspiracy to commit aggravated robbery; and one count of motor vehicle theft for theft of the Michigan truck.

W.W. was given immunity from prosecution and testified at Raisch's September 2007 trial that she was a runaway who met Raisch in Duluth and rode with him toward Cambridge in a truck with Michigan plates that Raisch told her was stolen. The truck broke down, and they left it in a ditch to look for another car to steal. Raisch took a beer with him from the Michigan truck, and they walked to a house where they peered inside and saw a man with a cast on his leg watching television and a set of car keys on a table. While they contemplated stealing those keys, which they assumed were for a car parked nearby, a truck drove up to the barn. Raisch told W.W. to wait by a tree while he walked in the direction of the truck. W.W. heard people yelling and then Raisch drove up in the truck and told her to get in. She asked him what happened. He said something like: "We got the truck . . . it doesn't matter." When that truck broke down in a town, W.W. and Raisch walked to some nearby townhouses and stole the Jeep. Raisch ran a red light, and an officer signaled for them to stop, but Raisch fled. As they drove over railroad tracks, the Jeep blew a tire and rolled.

An investigating officer testified that, two days after L.J. was assaulted, L.J. told the officer that he could not recall the details of the assault, but he believed that he had

been kicked by a horse. The investigator said he understood the comment, in context, to reflect that L.J. felt as bad as if he had been kicked by a horse. At trial, L.J. testified that he did not believe that he had been kicked by a horse because none of the horses were loose, and he woke up outside the horse barn.

No witnesses testified on behalf of Raisch, but through cross-examination and argument, Raisch asserted that the state's failure to investigate a horse or any other possible source of L.J.'s injuries raised a reasonable doubt that Raisch inflicted those injuries. The prosecutor questioned L.J. about the ability of his horses to "jump over the barn stall," "swing a club," or "drive a truck." In closing, the prosecutor told the jury that "with all the overwhelming evidence against [Raisch], the only way he could be not guilty . . . is in a fantasy world, where horses fly, they swing bats, they drive cars;" used the word "fantasy" twenty times in reference to Raisch's defense; and referred to the "ridiculous notion" of a horse engaging in various actions to injure L.J.

Raisch was convicted of aggravated robbery and motor-vehicle theft as charged, and the jury found that L.J.'s vulnerability due to age was an aggravating factor. Based on the aggravating factor, the district court sentenced Raisch to a double-upward departure for aggravated robbery (176 months) and a concurrent 21-months for motor-vehicle theft. This appeal followed.

D E C I S I O N

I. Sufficiency of evidence to support conviction of aggravated robbery

In a challenge to the sufficiency of the evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the

light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

The state had to prove beyond a reasonable doubt that Raisch inflicted bodily harm on L.J. while committing a robbery. Raisch admits that he stole L.J.'s truck, but argues that the circumstantial evidence fails to sufficiently prove that he inflicted bodily harm on L.J., noting that L.J. cannot recall how he was injured; there were no eyewitnesses to the assault on L.J.; W.W.'s testimony that she heard yelling before Raisch appeared with L.J.'s truck was not corroborated; there was no blood on the pole that the state theorized was used to injure L.J.; and none of L.J.'s blood was on appellant when he was arrested.

"[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence." *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). However, "circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The jury is in the best position to evaluate the circumstantial evidence surrounding the crime. *State v. Race*, 383 N.W.2d 656, 662 (Minn. 1986). Circumstantial evidence need not exclude the possibility of innocence, it need only make that possibility seem unreasonable. *State v. Anderson*, 379 N.W.2d 70, 78 (Minn. 1985).

In this case, we conclude that the circumstantial evidence amply supports the jury's finding that Raisch inflicted bodily harm on L.J. L.J.'s testimony explained why it was not reasonable to conclude that he had been injured by a horse. The presence of L.J.'s glasses and blood near a pole, which L.J. did not remove from his truck, is consistent with the hypothesis that the pole was used to injure L.J. And the evidence shows that Raisch is the only person who was near L.J. and his truck, which is consistent with a rational hypothesis that Raisch injured L.J. to get the keys to the truck, and inconsistent with any rational hypothesis that L.J. was injured by someone or something else. The jury's conclusion that Raisch inflicted bodily harm upon L.J. in order to steal his truck is adequately supported by the evidence.

II. No prosecutorial misconduct

Unobjected-to prosecutorial conduct is reviewed under the modified plain error test set out in *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (holding that when an appellant demonstrates prosecutorial misconduct constituting an error that is plain, the burden shifts to the state to demonstrate 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" (quotations and citations omitted)). "[W]here defense counsel does not object to improper prosecutorial argument and instead chooses to respond in the defense summation, the defendant forfeits consideration of the issue on appeal." *Id.* at 299, n.3.

Raisch alleges that the prosecutor committed misconduct by calling the defense a "fantasy." Raisch relies on *State v. MacLennan* for the proposition that a prosecutor may not disparage or belittle the defense theory. 702 N.W.2d 219, 236 (Minn. 2005) (stating

that the state may specifically argue that there is no merit to the particular defense, but it may not belittle the defense in the abstract or by suggesting that it was raised because it was the only defense that may be successful). And Raisch cites *State v. Porter* for the proposition that it is misconduct for a prosecutor to imply that jurors would be 'suckers' if they believed the defense theory. 526 N.W.2d 359, 364 (Minn. 1995) (stating that a prosecutor improperly appealed to the passions and prejudice of the jury and struck at the heart of the jury system, juror independence, by suggesting that the jurors would be suckers who would feel bad if they acquitted the defendant).

Raisch argues that the prosecutor's remarks in this case went beyond legitimate comments on the evidence to effectively, if not obviously, imply that the jurors would be "suckers" if they believed his defense theory. And Raisch asserts that the prosecutor criticized defense theories not actually raised. But rather than objecting to the prosecutor's remarks, Raisch choose to address those remarks in his own closing argument, stating:

> Now, I've heard about fantasy world, and I've heard about assumptions and—I don't work in a fantasy world, okay? I work in law and fact. And here's the problem, okay? Here's the problem: We all learn this when we were younger. What happens when you assume? What we're dealing with here is incredibly serious. You don't assume on these cases . . . [t]hat's a fantasy world. Physical evidence shows he didn't do it.

We conclude that by choosing to address the prosecutor's conduct in his own closing argument rather than by objecting to it, Raisch has waived his right to raise the issue of prosecutorial misconduct on appeal.

Even if we were to reach the merits of Raisch's argument, under the facts of this case, we would conclude that the prosecutor did not commit misconduct by colorfully pointing out the impossibility of Raisch's implied theory that L.J. was injured by a horse or some unidentified person. As the state asserts, the prosecutor made permissible, pointed attacks on Raisch's specific defense. The state cites, among other cases permitting colorful comment in closing argument, *State v. Ali*, in which this court held that a prosecutor's characterization of a defense as "ludicrous" and a "yarn" did not constitute misconduct because it was commentary on a specific defense theory, not denigration of a defense in the abstract. 752 N.W.2d 98, 104–05 (Minn. App. 2008). Here, the prosecutor's remarks targeted a specific defense implicit in Raisch's cross-examination and argument and did not appeal to the jurors' passions or prejudices or attempt to affect juror independence.

Raisch also argues that the prosecutor's mischaracterization and disparagement of his defense improperly shifted the burden to Raisch to provide a reasonable explanation for L.J.'s injuries to prove his innocence of aggravated robbery. "[M]isstatements of the burden of proof are highly improper and constitute prosecutorial misconduct." *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985). Raisch asserts that the prosecutor suggested to the jury that Raisch was required to provide a believable explanation for L.J.'s injuries in order to avoid a conviction. But Raisch does not point to any specific statement by the prosecutor that misrepresents the burden of proof.

The prosecutor argued that, "with all the overwhelming evidence against this defendant, the only way he could be not guilty of these crimes is in a fantasy world."

But, in rebuttal argument, the prosecutor, noting that the state did not have to prove that Raisch used the pole to assault L.J., reiterated the state's burden to prove beyond a reasonable doubt that Raisch inflicted bodily harm on L.J.

The district court properly instructed the jury on burden of proof and to disregard any statements of counsel that were contrary to the district court's instructions. Although we caution prosecutors about the danger of using language that implies that a defendant has a burden to prove a plausible alternative to the state's allegations, on this record, we conclude that the prosecutor did not misstate the burden of proof, and any inference of burden shifting that could have been drawn from the prosecutor's remarks was remedied both by the prosecutor's statements and by the jury instructions and is unlikely to have influenced the jury. *See id.* (finding a new trial unnecessary where the trial court properly instructed the jury on the burden of proof, the state's case was strong, and it appeared unlikely that the jury would have been influenced by the prosecutor's remark).

III. Departure from presumptive sentence justified

"The decision to depart from a presumptive sentence under the Minnesota Sentencing Guidelines is within the district court's discretion . . . but when a district court departs from the presumptive sentence, it must articulate substantial and compelling reasons justifying the departure." *State v. Thao*, 649 N.W.2d 414, 421 (Minn. 2002). (quotation and citations omitted). "While there are only a small number of cases where substantial and compelling aggravating factors militate towards departing from the guidelines, the decision to depart is one for the trial court. . . . This court is loathe to overturn the exercise of that discretion without clear evidence of its abuse." *State v.*

Givens, 544 N.W.2d 774, 776 (Minn. 1996) (quotation and citations omitted), *superseded by statute*, Minn. Stat. § 244.09, subd.5(2) (Supp.1997) ("Sentencing pursuant to sentencing guidelines is not a right that accrues to a person convicted of a felony . . . ."). In *Givens*, the supreme court recognized that exploitation of the victim's vulnerability is one of the factors supporting an upward departure. *Id.* at 776.

Raisch argues that the jury was not asked whether he had exploited L.J.'s vulnerability due to age and that the finding of vulnerability alone is insufficient to justify an upward departure. Raisch argues that the evidence shows that L.J. was chosen for convenience, not targeted for his vulnerability.

The state asserts that age alone is sufficient to support a departure based on vulnerability and that the jury could have reasonably found that L.J.'s vulnerability was exploited by Raisch, citing as comparable the facts in *Givens*, in which the defendant knocked on the apartment door of a 74-year-old woman who walked with a cane, grabbed her cane, pushed her down, grabbed her purse, and ran. *Id.* at 775.

Though we decline to hold that a 74-year old victim is, as a matter of law, vulnerable, we find sufficient support in this record for the jurors' factual conclusion that Raisch exploited L.J.'s vulnerability. The jurors were in the best position to determine whether L.J. was vulnerable due to his age. Raisch has not provided any authority for the proposition that there must be a specific jury finding that a victim's vulnerability was exploited to support an upward departure. Under existing case law, the victim's vulnerability constitutes the aggravating factor.

IV. Pro se arguments meritless

a. Delay in notice of charges

Raisch first argues that he was not given timely notice of the charges against him. He does not cite to anything in the record that supports this claim and does not provide any legal authority that such a delay entitles him to postconviction relief. An assignment of error based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971)).

b. Ineffective assistance of counsel

Raisch argues that he was prejudiced by his attorney's failure to object to testimony from witnesses about changes in Raisch's appearance between the time of the incident and trial. Raisch asserts that the testimony could have suggested to the jury that he had been incarcerated during that time, in violation of the district court's ruling that evidence of his incarceration would not be admitted. We disagree with Raisch's speculation about the reasonable inferences from this testimony, and find no merit in his claim that failure to object to this testimony constituted ineffective assistance of counsel.

c. Preindictment delay

Raisch asserts that as a result of the 301-day delay from the incident to indictment, he was denied a speedy trial. Due process of law, in addition to the constitutional right to a speedy trial "may foreclose prosecution of tardily initiated charges." 8 *Minnesota Practice* § 25.1 (2008). Because due process and the right to a speedy trial are

constitutional questions, review is de novo. *See State v. Cham*, 680 N.W.2d 121, 124 (Minn. App. 2004), *review denied* (Minn. July 20, 2004) (stating that "appellate courts review constitutional questions de novo," and applying that standard to appellant's claim that the state violated his right to a speedy trial). To show that a pre-indictment delay violates due process, a defendant must establish that the delay caused substantial prejudice to his rights to a fair trial and that the delay was intentionally used by the state to gain a tactical advantage. *State v. Jurgens*, 424 N.W.2d 546, 550 (Minn. App. 1988) (citing *United States v. Marion*, 404 U.S. 307, 324, 92 S. Ct. 455, 465 (1971)). "A defendant challenging pre-indictment delay must show more than potential prejudice." *Id.* at 551.

Raisch asserts that he was prejudiced by the delay because he was prevented from collecting evidence inside the barn in a timely manner but he does not explain why such evidence would have been more available to him had he been charged earlier or how the state gained any tactical advantage from the delay. In fact, Raisch asserts that the state did not obtain any new evidence during the delay. On this record, we conclude that Raisch has not shown that he is entitled to any relief for pre-indictment delay. And because his argument that he was denied a speedy trial is based solely on pre-indictment delay, we find no merit in that claim.[2]

[2] The record does not reflect that Raisch ever asserted his right to a speedy trial in this matter, although he made two pro se motions to dismiss the charges against him based on denial of his right to a speedy trial. Late assertion of the right to a speedy trial through a motion to dismiss does not favor a defendant in a speedy-trial analysis. *State v. Sap*, 408 N.W.2d 638, 640 (Minn. App. 1987).

d. Evidentiary rulings

Raisch argues that the pole should have been excluded from evidence because there was nothing that connected the pole to L.J.'s injuries, and the admission of the pole was prejudicial to Raisch because it impermissibly buttressed the prosecution's theory that appellant used the pole to assault L.J. A trial court's admission of physical evidence will not be disturbed outside of an abuse of discretion. *State v. Daniels*, 361 N.W.2d 819, 827 (Minn. 1985).

Again, we reject the premise of Raisch's argument: the record contains substantial circumstantial evidence connecting the pole to the assault on L.J. The district court did not abuse its discretion in admitting the pole into evidence.

e. Jury instruction

Raisch argues that the district court improperly instructed the jury on aggravated robbery by describing the third element of the crime as requiring only infliction of bodily harm on the victim and omitting any reference to being armed with a dangerous weapon. An unobjected-to instruction is reviewed for plain error. *State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007). Plain error is "clear error affecting substantial rights that resulted in a miscarriage of justice." *Id.* at 656 (citing *United States v. Pennington*, 168 F.3d 1060, 1068 (8th Cir. 1999)).

Raisch's argument is based on a faulty premise. Raisch fails to understand that the third element of aggravated robbery can be proved in three ways: (1) that defendant was armed with a dangerous weapon; (2) that defendant was armed with anything that caused the victim to believe it was a dangerous weapon; or (3) that the defendant inflicted bodily

harm on the victim. 10 *Minnesota Practice*, CRIMJIG 14.04 (2008). The jury was properly instructed on the elements of aggravated robbery.

Affirmed.

PORITSKY, Judge (concurring specially)

I concur with the majority decision to affirm Raisch's convictions. I write separately to express my concern about portions of the prosecutor's final argument.

Raisch contends that the prosecutor committed error by denigrating Raisch's defense. With exceptions noted below, it is my view that the prosecutor's characterization of Raisch's defense was not misconduct. The prosecutor's comments did nothing more than point out the implausibility of that defense. That the comments were colorful and pointed was not misconduct. As Raisch admits, the prosecution has a right to vigorously argue its case and to argue that there is no merit to a particular defense in view of the evidence.

But Raisch further contends that the prosecutor committed error by arguing that Raisch had to provide a reasonable explanation for what happened to the robbery victim in order for the jury to acquit Raisch. Early in his closing argument, the prosecutor characterized Raisch's defense as something in a fantasy world, "where horses fly, they swing bats, they drive cars. *That's what you would have to believe, ladies and gentlemen, to believe that this defendant was not guilty of these crimes.*"

Later in his argument, the prosecutor told the jury, "Now, ladies and gentlemen, just to show you what kind of fantasy world *you would have to believe to believe this defendant was not the one who went from the Michigan truck to [the victim's] farm and assaulted him,* let's look at what kind of coincidences you would have to believe."

Contrary to these remarks, the defendant need not prove anything in order to be acquitted; the burden of proving each element of the offense is on the prosecution. *In re*

Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072 (1970). The jury may acquit a defendant without believing the defendant's case: It may acquit because it does not believe the prosecution's witnesses or because it sees a missing link in the prosecution's case or because it may look at the prosecution's evidence and conclude that the evidence does not prove the defendant's guilt beyond a reasonable doubt. Consequently, I conclude that the prosecutor's remarks were erroneous.

Although the prosecution may not argue that if the defendant's evidence is unbelievable the jury has to convict, the prosecution is free to argue—in forceful language, if it chooses—that any evidence the defendant offers is unbelievable. Here, much of the argument about which Raisch complains falls in the second category, that is, the prosecutor telling the jury that Raisch's evidence is unbelievable. But prosecutors and district courts should be careful that the argument does not go one step too far and thus shift the burden of proof to the defendant.

Although I view the quotes above as erroneous, I concur with the majority conclusion that the prosecutor's remarks do not warrant a new trial. The two remarks quoted above are the only remarks that, in my opinion, tended to shift the burden of proof to the defendant. Moreover, at the start of the prosecutor's final argument and again in his rebuttal, the prosecutor told the jury that the state had to prove the defendant's guilt beyond a reasonable doubt. And the court properly instructed the jury on the burden of proof. Given the evidence in the case, in my view there is no reasonable likelihood that the prosecutor's remarks had significant effect on the jury's verdict.