STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0452

State of Minnesota,
Respondent,

vs.

Roland N. Walton,
Appellant.

Filed May 19, 2009
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Hennepin County District Court
File No. CR07012084

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, 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 and sentences for criminal vehicular homicide and criminal vehicular operation, arguing that the evidence was insufficient to support the convictions; the district court erred in instructing the jury; the prosecutor committed prejudicial misconduct; and the district court erred in the order of sentencing. Because sufficient evidence exists to support the convictions, the jury instructions were not in error, and no prejudicial misconduct occurred, we affirm the convictions, but we reverse and remand for resentencing in the proper order.

FACTS

Minneapolis police responded to an accident at the intersection of 26th Street and Park Avenue South in the early morning hours of February 23, 2006. Officers found an unoccupied, black Infiniti sedan (the Infiniti) with extensive front-end damage and a Geo Metro vehicle that was severed in half. The two occupants of the Geo Metro were transported to the hospital. One of the victims died en route, and the other was admitted with critical head injuries.

A witness to the accident, Lance Bernstein, reported that the Infiniti, traveling around 100 miles an hour, ran a red light and struck the Geo Metro, which had entered the intersection on a green light, splitting the Geo Metro in half and causing two people to "fly out of the car." The Infiniti stopped on 26th Street. Both the driver's and passenger's airbags deployed in the crash, and crime scene photographs show that both the driver's and passenger's doors were open after the crash. Police made detailed maps

and measurements at the scene of the crash, but these were lost and not available at the time of trial.

Immediately before the accident, Minneapolis police sergeant John Rouner had been following the Infiniti after observing suspicious activity in a nearby area of high drug-trafficking. He lost sight of the Infiniti for a while, but saw taillights "tearing down" 26th Street. Rouner continued to pursue the Infiniti on 26th Street, but he stopped for a red light. Rouner was several blocks behind the Infiniti when he saw a huge cloud of debris and realized that the Infiniti had crashed. Rouner proceeded to the crash site. He saw one person running from the Infiniti and gave chase, but he was unable to apprehend the person.

Police discovered that on February 19, 2006, the Infiniti's owner had loaned the Infiniti to her brother, who was driving it when he purchased crack from Nathaniel Banks. Banks stole the car after the drug transaction. The owner promptly reported the theft.

Five days after the crash, Minneapolis police sergeant Nancy Dunlap questioned Banks, who was in custody on another matter. Banks told Dunlap that he took the Infiniti during a drug deal, but, after driving around in the Infiniti with Rebecca Anderson for awhile, he sold the car to "Roland" in exchange for crack.

Dunlap spoke with Anderson, who confirmed that Banks stole the Infiniti during a drug transaction and later sold it for $50 worth of crack. Using descriptions of "Roland" given by Banks and Anderson, Dunlap concluded that "Roland" is appellant Roland Walton. Walton's cell phone was found in the Infiniti.

Dunlap spoke to Walton, who had been arrested on an unrelated matter. Walton admitted that he had been riding in the Infiniti with Banks and Anderson two days before the accident. He admitted sitting in the front seat and touching a lot of items. Walton said they were driving around smoking crack. Initially, Walton said that Banks and Anderson drove off with his cell phone when Walton went into a Super America store, but during a subsequent conversation with Dunlap, Walton said that he was dropped off in a location other than the Super America. Walton admitted that he had sat in the driver's seat of the Infiniti but denied that he ever drove it.

The airbags, shift knob, and some bottles from the Infiniti were sent to the Bureau of Criminal Apprehension (BCA) for DNA testing and for comparison with DNA samples obtained from Walton, Banks, and Anderson. The BCA confirmed that Walton's DNA matched a sample taken from blood on the driver's side airbag. There was additional DNA on this airbag from an unidentified source. Walton's DNA was also found on two of the bottles found in the Infiniti. Anderson's DNA was found on another item from the Infiniti, and Banks's DNA was found on a straw from a plastic bottle found in the Infiniti.

Walton was charged with criminal vehicular homicide and criminal vehicular operation under Minn. Stat. § 609.21, subds. 1(1), 2(1) (2004). At Walton's trial, Banks testified that he stole the Infiniti and that Walton "rented" it from him after Banks had driven it for about a half day. Banks denied having been in the Infiniti after Walton rented it.

Walton's accident reconstructionist testified that, based on his measurements made at the scene and police photographs, he concluded that the Infiniti was travelling between 42 and 43 miles per hour at the time of the crash and that the Geo Metro was split in two when it hit a pole, not when it was hit by the Infiniti. In rebuttal, the state called an officer trained in accident reconstruction who testified that the speed of the Infiniti at the time of the crash was closer to 80 miles per hour and at a minimum of 58 miles per hour. He also opined that the Geo Metro was split by the impact with the Infiniti.

After the parties rested, but before the jury was instructed, Walton asked the district court to: (1) instruct the jury that it could infer that measurements lost by the police were unfavorable to the prosecution and (2) change the standard presumption-of-innocence jury-instruction language from "[t]he defendant does not have to prove innocence" to "[t]he defendant does not have to prove that he is not guilty." The court denied both requests.

The jury found Walton guilty of both counts. Over his objection to the order of sentencing, Walton was sentenced to 88 months for criminal vehicular homicide (Count 1) and a consecutive 18 months for criminal vehicular operation (Count 2). This appeal followed.

D E C I S I O N

I. Sufficiency of Evidence

Walton first argues that the evidence is insufficient to support a finding that he was driving the Infiniti at the time of the accident. In considering a claim of insufficient 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 that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "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).

"[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). "While it warrants stricter scrutiny, circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). 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. *Jones*, 516 N.W.2d at 549. A jury, however, is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *Webb*, 440 N.W.2d at 430.

Walton denied driving the car and argued at trial that Banks may have been the driver. Walton asserts that the DNA evidence only showed that he may have been inside the car at the time of the accident but does not establish that he was driving. Walton asserts that his DNA could have gotten on the driver's airbag before, during or after it had deployed, without explaining how this could have occurred. Walton argues that even though Rouner only saw one person running from the car, crime scene photos showing both the driver's and passenger's doors open indicate that two people ran from the car.

But Banks denied being in the car after Walton rented it, and Banks was excluded as a source of DNA found on the driver's airbag. The forensic scientist who testified for the state established that the driver's side airbag is a one-time use item that deployed straight back toward the driver in this crash, supporting the state's argument that Walton's DNA got on the airbag when it deployed in the crash. A BCA witness testified that the predominant DNA profile from that airbag matched Walton's DNA with a profile that would be expected to occur only once in the world's population. Walton's cell phone was left in the vehicle, and his DNA was on two bottles found in the car, further confirming that he had been in the vehicle. Viewed in the light most favorable to the verdict, we conclude that the evidence is sufficient to support the jury's finding that Walton was the driver of the Infiniti at the time of the crash.

II. Jury Instructions

Walton next argues that he is entitled to a new trial based on the district court's refusal to give an adverse-inference instruction about the loss of the police measurements from the scene and refusal to modify the presumption-of-innocence instruction. The refusal to give a requested jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). The focus of the analysis is on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001). "An instruction is error if it materially misstates the law." *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005).

Walton relies on civil cases for the proposition that when a party fails to produce evidence that was in its possession and control, the jury may infer that "the evidence, if

produced, would have been unfavorable to that party." *See Wajda v. Kingsbury*, 652 N.W.2d 856, 861–62 (Minn. App. 2002) (citation and quotation omitted) (concluding that the district court did not abuse its discretion by instructing the jury that it was permitted, but not required, to infer that evidence lost by the defendant was favorable to the plaintiff), *review denied* (Minn. Nov. 19, 2002). Walton has cited no authority, however, in which the failure to give such an instruction was held to be an abuse of discretion.

Here the district court based denial of Walton's request for an adverse-inference instruction primarily on the fact that Walton's expert testified that he did not need the state's measurements in order to formulate his opinions because he was able to recreate the scene and take his own measurements. On this record, we conclude that the district court did not abuse its discretion by denying the adverse-inference instruction that Walton requested.

Walton also argues that the district court abused its discretion by denying his request to change the presumption-of-innocence instruction from "the defendant does not have to prove innocence" to "the defendant does not have to prove that he is not guilty." The district court instructed the jury using the pattern jury instruction contained in 10 *Minnesota Practice*, CRIMJIG 3.02 (2006). Because this instruction accurately states the law, the district court did not abuse its discretion by refusing Walton's proposed modification.

Walton also argues that even if neither jury instruction ruling, standing alone, is sufficiently prejudicial to warrant a new trial, taken together, his right to a fair trial was prejudiced. *See State v. Litzau*, 650 N.W.2d 177, 187 (Minn. 2002) (granting a new trial

when cumulative errors deprived the defendant of a fair trial). Having concluded that neither jury-instruction ruling was an abuse of discretion, we disagree.

III. Prosecutorial Misconduct

Walton asserts that he was unfairly prejudiced by the unobjected-to remarks in the prosecutor's closing argument speculating about how Walton's DNA got on the driver's airbag and inferring that a witness identified Walton as the Infiniti's driver. When a defendant fails to object at trial to alleged prosecutorial misconduct or request curative instructions, this court may grant relief if it concludes that the state's conduct constituted plain error affecting substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); Minn. R. Crim. P. 31.02 (2008). The plain-error analysis asks whether (1) the prosecutor's unobjected-to argument was error; (2) the error was plain; and (3) it affected the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006).

A prosecutor's closing argument should be based on the evidence and "should not be calculated to inflame the passions and prejudices of the jury." *State v. Clark*, 296 N.W.2d 359, 371 (Minn. 1980). But a prosecutor is free "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. Outlaw*, 748 N.W.2d 349, 358 (Minn. App. 2008) (quoting *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980), *review denied* (Minn. July 15, 2008)).

In closing argument, the prosecutor stated:

> There is no doubt that the collision in this case was immense. . . . And a collision like that is going to deploy the air bag with force behind it. And that force, when hitting

> someone right in the face, as the air bag generally does, very likely would draw blood from the lip, from the nose.
>
> That is what happened here, ladies and gentlemen. [Walton] was driving the car and he crashed it and the air bag deployed and hit him in the face and left the sample of his blood.

The jury saw photos of the deployed airbags in the Infiniti, heard testimony that there was blood on the driver's airbag, and heard testimony that the driver's airbag deploys directly into the driver. Because the prosecutor's argument is a reasonable inference from the evidence presented at trial, we find no merit in Walton's assertion that this argument constituted prosecutorial misconduct.

The prosecutor, arguing that the driver of the Infiniti drove in a grossly negligent manner, stated:

> You heard Sgt. Rouner's testimony, and you heard about his training and experience. [Rouner] believes that [Walton] was trying to avoid him. He ran a red light. Evade. The witnesses, Mr. Bernstein, in this case picked out [Walton]. The one man who saw this crash, Mr. Bernstein, testified that he had a green light, that the Geo Metro had a green light, and that the Infiniti, [Walton], had a red light. That is grossly negligent driving conduct.

It is undisputed that neither Rouner nor Bernstein identified Walton as the driver of the Infiniti. Although the prosecutor's statements were focused on the grossly negligent driving conduct of the Infiniti's driver as the cause of the accident and other evidence in the record supports an inference that Walton was the driver, the prosecutor misstated the record by implying that Rouner identified Walton as the driver and stating that Bernstein "picked out" Walton as the driver. Nonetheless, we conclude that the state has met its burden to show that there is no reasonable likelihood that the absence of the

misstatements would have had a significant effect on the verdict. *See State v. Ramey*, 721 N.W.2d at 302 (stating that if a defendant demonstrates that the prosecutor committed plain error, the burden shifts to the state to demonstrate lack of prejudice). The jurors were instructed by the court to disregard any statement by counsel that was contrary to their recollection of the evidence and to rely solely on their own recollection of the evidence. Walton's admitted connection to the Infiniti, coupled with his DNA on the deployed driver's airbag, strongly supports the jury's finding that Walton was the driver at the time of the crash, and there is no reasonable likelihood that absence of these brief misstatements would have changed the verdict.

IV. Sentencing

"When multiple current offenses are sentenced on the same day, . . . sentencing shall occur in the order in which the offenses occurred." Minnesota Sentencing Guidelines and Commentary II.B.101 (2006); *State v. Anderson*, 361 N.W.2d 896, 898 (Minn. App. 1985). Walton argues that because the infliction of injuries charged in Count 2 occurred prior to the injury-related death charged in Count 1, the district court erred in sentencing him first for criminal vehicular homicide (Count 1). Because the district court imposed consecutive sentences, the order of sentencing affected the aggregate length of Walton's sentence.

Walton asserts that the facts of this case are identical to the facts in *Anderson*, in which this court affirmed sentencing for an injury-related offense prior to sentencing for a death-related offense based on evidence that the death-related offense occurred subsequent to the impact which caused the injuries. *Anderson*, 361 N.W.2d at 898. We

agree. Here, as in *Anderson*, both victims were injured at impact, and death occurred subsequent to impact.

The state argues that because the injured victim continued to suffer additional injuries caused by his initial injuries after the death of the other victim, the district court correctly sentenced Walton first for the death-related charge. But it is plain that all of the injuries suffered resulted from injuries inflicted at the time of impact, and the death of one victim occurred after impact. We agree with Walton that, on this record, the district court erred in sentencing the death-related charge first.

The state also argues that the order of sentencing is irrelevant because the district court could have achieved the same sentence by imposing concurrent sentences. The presumptive sentence for Count 2 (involving great bodily harm), at severity level five with a criminal history of four is 38 months with a range of 33–45 months, and the presumptive concurrent sentence for Count 1 (involving death) at severity level eight with a criminal history score of five is 98 months with a range of 84–117 months. The state asserts that the district court could therefore have sentenced Walton concurrently to 106 months.

But the district court imposed permissive consecutive sentences and used the presumptive sentences, not sentences within the presumptive range of sentences. The presumptive sentence for Count 2 with a criminal history score of four is 38 months and the presumptive sentence for Count 1 using a criminal history score of zero is 48 months for an aggregate of 86 months, 20 months less than the aggregate sentence imposed. We

therefore reverse the sentence imposed and remand to the district court for resentencing in the appropriate order.

Affirmed in part, reversed in part, and remanded.