STATE OF MINNESOTA
IN COURT OF APPEALS
A09-632

State of Minnesota,
Respondent,

vs.

Robert Bruce Ford,
Appellant.

Filed April 13, 2010
Affirmed; motion granted
Worke, Judge

Dakota County District Court
File No. 19AV-CR-08-18439

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Christine J. Cassellius, Michael E. Molenda, Ryan J. Bies, Severson, Sheldon, Dougherty & Molenda, P.A., Apple Valley City Attorneys, Apple Valley, Minnesota (for respondent)

Marcus A. Jarvis, Jarvis & Associates, PC, Burnsville, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

WORKE, Judge

Appellant challenges his disorderly-conduct conviction, arguing that (1) the district court abused its discretion by denying his motion to exclude the investigating

officer's testimony; (2) the court abused its discretion by refusing to give appellant's requested jury instruction; (3) the prosecutor committed misconduct by allowing the investigating officer to testify that appellant refused to give a pre-arrest statement, failing to introduce a videotape, and allowing witnesses to testify regarding details that they did not report to police; and (4) the evidence is insufficient to support the conviction. The state moved to strike appellant's reply brief. We affirm and grant the state's motion.

FACTS

On Friday, September 12, 2008, H.B. was at a credit union when appellant Robert Bruce Ford approached him. H.B. and appellant had previously worked together. Appellant told H.B., "you're a f***ing loser," "[y]ou're a f***ing scum bag, you f***ing piece of s**t. I want to put my fist into your body." Appellant then said, "I'd like to put my fist into your body as I crawl all over it, and I would like to kick the s**t out of you," "I want to kick your a**, meet me outside."

C.P., the teller assisting H.B., asked H.B. if she should call the police. H.B. declined C.P.'s offer and went outside where appellant was waiting. H.B. told appellant, "show me what you got." And appellant replied, "I bet you would like to do that out here, to fight." H.B. told appellant to take a shot, appellant did not do anything, and H.B. left.

H.B. did not immediately report the incident. But after learning from coworkers that this was not an isolated incident, he filed a report the following Monday. Appellant was charged with disorderly conduct, in violation of Minn. Stat. § 609.72, subd. 1(3) (2008). A jury found appellant guilty as charged, and this appeal follows.

D E C I S I O N

Admission of Evidence

Appellant first argues that the district court abused its discretion by denying his motion to exclude the testimony of Officer Peter Matos, contending that the officer had no personal knowledge of the incident. The district court permitted the officer to testify regarding his investigation, finding that the officer's testimony was "relevant to give context to how this matter came about in front of the jury. . . . [that it] gives context to the situation so both parties can explain their case." "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Minn. R. Evid. 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Appellant claims that because Officer Matos learned of the incident after it occurred, he lacked personal knowledge. But Matos did not testify regarding the incident. Officer Matos testified that H.B. contacted him to file a report. He conducted an investigation, interviewed C.P., and attempted to interview appellant. Matos explained how he created a police report and described the type of information that he included in the police report. As the state argues, the officer's testimony was also important to identify appellant as the perpetrator in order to meet an element of the offense. Thus, Matos testified regarding matters within his personal knowledge, and the district court did not abuse its discretion in permitting the officer to testify.

Jury Instruction

Appellant next argues that the district court abused its discretion by refusing to give his requested jury instruction. The district court has broad discretion in selecting jury instructions and in refusing to give a requested instruction. *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). "The court need not give the instruction as requested by the party if it determines that the substance of that request is contained in the court's charge." *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977).

Appellant's proposed instruction read: "(1) If you determine that 'I am going to kick your a**' are not 'fighting words'; and (2) If you determine that [appellant] did not make contact with [H.B.], then you should find that [appellant] has NOT committed the crime of Disorderly Conduct." Appellant relies on *State v. Ackerman* in support of his argument. 380 N.W.2d 922 (Minn. App. 1986). In *Ackerman*, the defendant yelled obscenities at police officers, including "f**k you pigs"; came into physical contact with an officer; scuffled with officers; and yelled at and threatened the officers. *Id.* at 924, 926. He argued on appeal that the district court should have instructed the jury that "f**k you pigs" could not constitute disorderly conduct because they were not fighting words. *Id.* at 926. This court stated that "[t]he facts and circumstances of each case determine whether particular conduct constitutes disorderly conduct." *Id.* This court held that obscenities may constitute disorderly conduct and, under the circumstances, the court did not err in refusing to give the requested instruction. *Id.* at 926-27.

Appellant also cites to *State v. McCarthy*, 659 N.W.2d 808 (Minn. App. 2003). In *McCarthy*, the defendant became loud and boisterous at his son's football game. 659

N.W.2d at 809. The referee told McCarthy to stop commenting, and McCarthy put his hands on the referee. *Id.* at 809-10. Spectators reported to officers that McCarthy "caused a disturbance, swore at spectators, and caused the game to be stopped and that they did not feel safe with [him] present." *Id.* at 810. This court upheld McCarthy's disorderly-conduct conviction, concluding that his "words and conduct reasonably caused alarm and resentment in others." *Id.* at 811.

Appellant claims that *Ackerman* and *McCarthy* show that conduct must be evaluated in the context of the facts and circumstances of each case. Appellant argues that his requested instruction would have instructed the jury to evaluate his conduct and words in order to determine whether the elements of the offense had been satisfied. It is true that whether conduct constitutes disorderly conduct depends on the facts and circumstances of each case and the victim's response. *See Ackerman*, 380 N.W.2d at 926; *McCarthy*, 659 N.W.2d at 811. But the district court was not required to give appellant's requested instruction because, as the district court ruled, the standard jury instructions were sufficient.

Under Minn. Stat. § 609.72, subd. 1(3), whoever "engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others" in a public or private place, "knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct." The district court instructed the jury that in order to find appellant

guilty, it needed to find that appellant engaged in such conduct or language. The court further instructed:

> If you find that [appellant's] conduct consists only of offensive, obscene or abusive language, you must also find that the words used were fighting words. Fighting words are words that constitute personally offensive epithets that, when spoken to the ordinary person under the particular circumstances of the case, are as a matter of common knowledge inherently likely to provoke a violent reaction or incite an immediate breach of the peace by . . . those to whom such words are addressed. The offense may be based on utterance of fighting words alone without resulting in actual violence. The focus is upon the nature of the words and the circumstances in which they are spoken rather than upon the actual response. Second [] [appellant] knew or had reasonable grounds to know that the conduct would or could tend to alarm, anger, disturb, provoke an assault [or] provoke a breach of peace by others. Third, [appellant's] act took place in a public or private place.

The district court instructed the jury according to the standard jury instructions, which substantially include appellant's requested instruction. *See* 10 *Minnesota Practice*, CRIMJIGS 13.120, .121 (2006); *see also Ruud*, 259 N.W.2d at 578 (stating that the court does not need to give a requested instruction when the substance of the request is in the court's charge). The district court did not abuse its discretion in refusing to instruct the jury as appellant requested.

Prosecutorial Misconduct

Appellant challenges several instances of alleged prosecutorial misconduct. Appellant failed to object in the district court. Because appellant failed to object his claims are reviewed for plain error. *See* Minn. R. Crim. P. 31.02 ("Plain error affecting a

substantial right can be considered by the court . . . on appeal even if it was not brought to the [district] court's attention."); *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006).

"The plain error standard requires [appellant to] show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). An error is "plain" if it is clear or obvious under current law. *Id.* at 688. A clear or obvious error "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. If appellant shows plain error, the state must prove that the error did not affect appellant's substantial rights. *Id.* Only if the three plain-error requirements are satisfied will this court then consider whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

Impermissibly Elicited Testimony

Appellant first claims that the prosecutor elicited testimony from Officer Matos that appellant failed to give a pre-arrest statement. The Fifth Amendment guarantees the defendant the right to remain silent during trial, and prevents the prosecution from commenting on that silence. *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233 (1965) (holding Fifth Amendment applicable to the states by reason of the Fourteenth Amendment). When a constitutional right is violated, this court will not reverse if the error is harmless beyond a reasonable doubt. *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989). Constitutional error is not harmless "if there is a reasonable possibility that the error complained of might have contributed to the conviction." *State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986) (quotation omitted). "If the record

contains overwhelming evidence of guilt, and the statement was merely cumulative and could not have played a significant role in the jury's conviction, it is harmless." *State v. Robinson*, 427 N.W.2d 217, 224 (Minn. 1988).

In *Jenkins v. Anderson*, the Supreme Court concluded "that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility." 447 U.S. 231, 238, 100 S. Ct. 2124, 2129 (1980); *see also Fletcher v. Weir*, 455 U.S. 603, 607, 102 S. Ct. 1309, 1312 (1982) (permitting use of post-arrest, pre-*Miranda* silence on cross-examination). But we held that it is error for the state to introduce counseled, pre-arrest, pre-*Miranda* silence during its case-in-chief. *State v. Dunkel*, 466 N.W.2d 425, 428 (Minn. App. 1991). In *Dunkel*, the officer testified that an attempt was made to contact the defendant for an interview. *Id.* at 427. The defendant's attorney then contacted the officer, but the defendant declined an interview. *Id.* We held that the admission of this evidence was erroneous, but harmless error because it was "innocuous," the prosecutor did not elicit the testimony, the prosecutor did not mention the statement at any point during the trial, and the victim provided a detailed account of the incident and reported it only two days after it occurred. *Id.* at 428-29.

Here, appellant was not arrested. During direct examination, Officer Matos testified that he contacted appellant. The prosecutor then asked if appellant had anything to add to the reported incident. Matos stated that he

> made contact with [appellant's] attorney by phone, and eventually [appellant and his attorney] came down to the police department . . . the purpose was to take a recorded statement from them as to the incident, the facts and what had

> occurred, and [he] offered [appellant] an opportunity to give [] a statement, and [appellant] declined to give [] a statement.

Officer Matos commented on appellant's counseled, pre-arrest, pre-*Miranda* silence. Under *Dunkel*, this was erroneous. *See id.* at 428 (holding that the use of counseled, pre-arrest, pre-*Miranda* silence in the state's case-in-chief is erroneous). We must determine whether the error was harmless. *Dunkel* instructs us to review the record as a whole. *Id.* at 429. Considering the factors listed in *Dunkel*, the error was harmless. First, the statement was "innocuous." *Id.* at 429. The officer made a brief, unremarkable statement that appellant declined to give a statement. Second, the statement was not elicited. *See id.* The prosecutor asked the officer if appellant added anything to the reported incident. The officer could have simply replied, "no," but voluntarily offered the statement that appellant declined to give a statement. Third, the prosecutor did not mention the statement at any point during the trial. *See id.* Finally, the victim and the witness provided detailed accounts of the incident and the victim reported the incident shortly after it occurred. *See id.* Based on the record, the statement was harmless beyond a reasonable doubt because the average jury would not have changed the verdict had the statement been excluded.

Failure to Introduce Evidence

Appellant next claims that the prosecutor failed to introduce evidence of a videotape from the credit union. There is no evidence of a videotape; therefore, the prosecutor did not commit misconduct.

Witness Testimony

Finally, appellant claims that the prosecutor committed misconduct by allowing witnesses to testify regarding details that they did not report to the police. Appellant argues that he did not touch H.B. and that the prosecutor "planted this 'touching seed' into [H.B.'s] mind." The prosecutor asked H.B., "Did someone touch you?" H.B. replied that he felt somebody touch him on his right side. On cross-examination, appellant's attorney also asked H.B. if appellant touched him. H.B. replied that appellant's "body touched [his]." Appellant's attorney asked why this information was not included in the police report. H.B. stated that he apparently failed to tell the officer that appellant touched him, but that he did not think about it when he reported the incident. Appellant's attorney also asked H.B. why his testimony included other information that was not in the officer's report. H.B. replied that he told the officer everything that appellant said and that he did not know why the officer did not include everything in his report.

Appellant also claims that C.P.'s testimony was a "total fabrication." C.P. testified that appellant came up "alongside of [H.B.] and called him an f-ing loser and . . . then was kind of whispering some things to him." C.P. heard appellant tell H.B. that he wanted to kick his a** and wanted to take it outside. Appellant's attorney asked C.P. why she failed to tell the officer that she heard appellant tell H.B. that he was a f***ing loser. C.P. testified that she did report hearing that statement.

Appellant seems to suggest that because the officer's report did not include some of the details included in the witnesses' testimonies, the witnesses fabricated their

testimonies. But H.B. and C.P. testified that they did report details to the officer. And H.B. testified that he may not have reported every detail because he was not sure what was important to report. There is no evidence that either witness testified untruthfully.

Appellant appears to challenge the witnesses' credibility. But assessing the credibility of a witness and the weight to be given to a witness's testimony is exclusively the province of the jury. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990). The jury is free to accept some aspects of a witness's testimony and reject others. *State v. Poganski*, 257 N.W.2d 578, 581 (Minn. 1977). And inconsistencies and conflicts in evidence do not necessarily provide the basis for reversal, *State v. Stufflebean*, 329 N.W.2d 314, 319 (Minn. 1983), because "[t]hey are a sign of the fallibility of human perception—not proof that false testimony was given at the trial." *State v. Hanson*, 286 Minn. 317, 335, 176 N.W.2d 607, 618 (1970)). The witnesses' testimonies, taken as a whole, were consistent. And the jury was free to believe whom it wanted, and apparently it believed the state's witnesses.

Sufficiency of the Evidence

Finally, appellant argues that the district court erred by failing to dismiss the charge against him. Because a jury found appellant guilty, the argument presents a challenge to the sufficiency of the evidence. When reviewing a claim for sufficiency of the evidence, this court must "ascertain[] whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that [appellant] was guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004). "[W]e view the evidence in a light most favorable to the

verdict and assume that the jury believed the state's witnesses and disbelieved contrary evidence." *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998).

Appellant claims that although he "may have said potentially fighting words to H.B.," those words alone do not amount to disorderly conduct. Appellant contends that the evidence fails to show that he "made contact with H.B. or [that he] disobeyed some command of a police officer in relation to this incident." But fighting words are enough to constitute disorderly conduct. *See* CRIMJIG 13.121 (stating that "[i]f you find that [appellant's] conduct consisted *only* of offensive, obscene, or abusive language, you must also find that the words used were 'fighting words'") (emphasis added). Fighting words are "personally offensive epithets that, when spoken to the ordinary person, under the particular circumstances of the case, are, as a matter of common knowledge, inherently likely to provoke a violent reaction or incite an immediate breach of the peace by those to whom such words are addressed." *Id.* "The focus is on the nature of the words and the circumstances in which they were spoken." *Id.*

The jury could reasonably have concluded that appellant's words and conduct constituted disorderly conduct. The evidence shows that appellant touched H.B.; called him "a f***ing loser"; told him, "[y]ou're a f***ing scum bag, you f***ing piece of s**t. I want to put my fist into your body"; said, "I'd like to put my fist into your body as I crawl all over it, and I would like to kick the s**t out of you"; and told H.B. that he wanted to "kick [his] a**," and to "meet [him] outside." H.B. was shocked, and responded by going outside to defend himself. C.P. heard appellant tell H.B. that he wanted to kick his a** and wanted to take it outside and asked H.B. if she should call the

police. C.P. was shaking because she assumed that appellant was going to be waiting outside for H.B. and that something was going to happen. The evidence sufficiently shows that appellant's offensive, obscene and abusive words and conduct caused "alarm, anger or disturb[ed] others or provoke[d] an assault or breach of the peace." *See* Minn. Stat. § 609.72, subd. 1(3). Therefore, the evidence supports appellant's conviction.

Motion

The state moved to strike appellant's reply brief in which he requested this court to take judicial notice that financial institutions have cameras. Because appellant argues facts not in evidence or considered by the district court, we grant the state's motion.

Affirmed; motion granted.