STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0577

State of Minnesota,
Respondent,

vs.

Daniel Lamar Ford,
Appellant.

Filed March 31, 2014
Affirmed
Klaphake, Judge[*]

Hennepin County District Court
File No. 27CR1227198

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Klaphake, 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

KLAPHAKE, Judge

Appellant Daniel Ford appeals his conviction of being a prohibited person in possession of a firearm, arguing that (1) the district court abused its discretion by denying his motion for a mistrial after a witness testified in violation of a pre-trial order and (2) the prosecutor committed reversible error by misstating the presumption of innocence. We affirm.

D E C I S I O N

Mistrial motion

We review the denial of a motion for a mistrial for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). The district court can best determine whether an outburst was sufficiently prejudicial to deny the defendant a fair trial and whether it is reasonably probable that the trial outcome would be different had the outburst not occurred. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). When analyzing whether potentially prejudicial, but inadvertent, testimony has deprived a defendant of the right to a fair trial, the relevant factors this court considers include: "the nature and source of the prejudicial matter, the number of jurors exposed to the influence, the weight of evidence properly before the jury, and the likelihood that curative measures were effective in reducing the prejudice." *State v. Hogetvedt*, 623 N.W.2d 909, 914 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. May 29, 2001).

In its pretrial order, the district court ruled that witness E.J. could not testify that Ford "pointed" the gun at him because such testimony amounted to second degree

assault, with which Ford was not charged, and would be unduly prejudicial under Minn. R. Evid. 403. The district court limited E.J.'s testimony to his observation of the gun and stated that E.J. could testify that Ford "pulled out a gun," finding that terminology to create "a fair balance."

At trial, when asked by the state to describe his interaction with Ford on the date of the incident, E.J. stated:

> Well, at that time – and I was still seated in my work truck, and he came over with the pistol. And he was telling me how – what – the money – he needed some money. He – then he was – pointed the gun at me. Pointed the gun at me and –

The state immediately interrupted E.J. and the court instructed the jury: "I'm specifically telling the jury to disregard what he just said about point[ing] the weapon . . . . [T]hat was totally improper. So please disregard that comment." E.J. later testified, without objection, that Ford "displayed" the gun to him, "displayed the gun through the window," and "brandished" the gun.

Following E.J.'s testimony, Ford moved the court for a mistrial because of E.J.'s testimony that Ford had "pointed" the gun at him, asserting that the curative instruction was not enough to overcome the prejudice to Ford. The court denied the motion, explaining that the prosecutor acted in good faith, the testimony was unexpected and inadvertent, a curative instruction was given immediately, and the reference itself was limited and brief.

On appeal, Ford argues that E.J.'s statement that Ford pointed the gun at him was unfairly prejudicial given that this was only a gun possession case. Ford asserts that it

was the state's duty to control its witness and that the curative instruction was insufficient to overcome any prejudice, insisting that E.J.'s statement impacted the jury verdict.

"[T]he state has an obligation to caution its witnesses against making prejudicial testimony." *Manthey*, 711 N.W.2d at 506. Appellate courts are "much more likely to find prejudicial misconduct when the state intentionally elicits impermissible testimony." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). We will reverse, even if the prosecutor unintentionally elicited impermissible testimony, if we conclude that the testimony prejudiced the defendant's case. *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974). But "unintended responses under unplanned circumstances ordinarily do not require a new trial." *State v. Hagen*, 361 N.W.2d 407, 413 (Minn. App. 1985), *review denied* (Minn. Apr. 18, 1985).

Here, the state interrupted E.J.'s testimony after he made the impermissible statement, and the prosecutor indicated that he had instructed E.J. to use different terminology. In addition, the district court promptly instructed the jury to disregard the statement and indicated that the statement was improper, and "[w]e presume that jurors follow a judge's instructions." *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998) (affirming district court's denial of a mistrial when witness testified about defendant's prior felonies but district court gave prompt curative instruction).

Ford argues that E.J.'s statement, despite the curative instruction, inhibited the "jury's ability to fairly maintain the presumption of [Ford's] innocence . . . beyond repair." The record shows: the information heard on the 911 call from E.J. matched the situation police came upon when responding to the call; police recovered a gun in a white

towel, as described in the call, under Ford's chair; E.J. testified that Ford told him that the gun was a .357 Magnum, as was the recovered gun; and witness testimony in support of Ford was contradicted by the police officer who testified that he had specifically asked both Ford and the witness about the gun. Under these circumstances, there is no reasonable possibility that E.J.'s brief testimony that Ford pointed the gun at him affected the jury's verdict. The district court did not abuse its discretion by denying Ford's motion for a mistrial.

Prosecutorial misconduct

"We review prosecutorial misconduct to determine whether the conduct, in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Milton*, 821 N.W.2d 789, 802 (Minn. 2012) (quotation omitted). When statements made in closing argument are challenged, we will consider the closing argument as a whole. *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006).

During the state's closing argument, the prosecutor stated:

> [W]hen this case began, you heard [the court] say that the defendant is presumed innocent. This presumption need not remain forever . . . . [The court] will read to you the instructions related to the presumption of innocence. It states, the presumption of innocence remains with the defendant unless and until – focus on those words when [the court] reads that instruction – unless and until the defendant has been proven guilty beyond a reasonable doubt. This is how the concepts work together. And this case, this morning, when [Ford's attorney] stood up and rested, that presumption of innocence no longer remains. The defendant lost the presumption.

At that point, Ford's attorney objected, which the court overruled. The prosecutor continued, stating:

> That's because the State has introduced evidence that proves the defendant guilty beyond a reasonable doubt. All of the elements of the sole count, possession of a firearm as a prohibited person, are proven beyond any measure of reasonable doubt. These are the elements you must find to render a verdict, which is a verdict of guilty. Based on the evidence, you must find that the defendant is guilty.

Ford argues that the prosecutor's statement that the presumption of innocence, a right guaranteed by the Fourteenth Amendment, no longer remained was erroneous and prejudiced his right to a fair trial. Because Ford objected to this statement at trial, the prosecutor's statement is properly considered under the two-tiered harmless-error test. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). "When an error implicates a constitutional right, we will award a new trial unless the error is harmless beyond a reasonable doubt." *State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012). "An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error." *Id.* (quotation omitted).

In *State v. Young*, the supreme court determined that the prosecutor did not misstate the law when he stated in closing argument:

> When the trial began, the Court told you that that young man right there is an innocent man. He was. Until the defense stood up and rested. Because at that time the state had presented to you sufficient evidence to find the defendant guilty of all the crimes that the Court just gave you the-instructions on. He's no long [sic] an innocent man. The evidence that's been presented to you by the state has shown you that he's guilty beyond a reasonable doubt.

710 N.W.2d 272, 280 (Minn. 2006). Young argued that the prosecutor implied that he was not entitled to the presumption of innocence during jury deliberation, but the supreme court determined that, read in context, the state was really arguing that it had produced enough evidence of Young's guilt to overcome the presumption of innocence. *Id.*at 280-81. It reasoned that the prosecutor's statements were consistent with language explaining the presumption of innocence used in Minnesota's criminal jury guides and concluded that "[t]he argument of the prosecutor was not a misstatement of the law, and did not constitute error." *Id.* at 281 (citing 10 *Minnesota Practice*, CRIMJIG 3.02 (1999) ("The defendant is presumed innocent of the charge made. This presumption remains with the defendant unless and until the defendant has been proven guilty beyond a reasonable doubt."[1])).

But the prosecutor in this case, like the prosecutor in *State v. Vue*, indicated that the defendant is no longer entitled to the presumption of innocence. 797 N.W.2d 5, 13-14 (Minn. 2011) (finding no plain error when compared to the statement made in *Young* but declining to determine whether the prosecutor misstated the burden of proof). This is an erroneous statement of the law. "The presumption of innocence is a fundamental component of a fair trial under our criminal justice system. One accused of crime has the right to have the jury take it to the jury room with them as the voice of the law." *State v. Peterson*, 673 N.W.2d 482, 486 (Minn. 2004) (quotation omitted). "The presumption operates at the guilt phase of a trial to remind the jury that the State has the burden of

[1] The current version contains identical language. *See* 10 *Minnesota Practice*, CRIMJIG 3.02 (2012).

establishing every element of the offense beyond a reasonable doubt . . . . Once the defendant has been convicted . . . the presumption of innocence disappears." *Delo v. Lashley*, 507 U.S. 272, 278, 113 S. Ct. 1222, 225-26 (1993) (citations omitted). The presumption of innocence remains until a defendant has been proven guilty beyond a reasonable doubt, which is a determination to be made by the jury, not the prosecutor. *See United States v. Crumley*, 528 F.3d 1053, 1065 (8th Cir. 2008) ("The presumption of innocence remains with the defendant through every stage of the trial, most importantly, the jury's deliberations. It is extinguished only upon the jury's determination of guilt beyond a reasonable doubt." (quotation omitted)). By stating that Ford lost the presumption of innocence after Ford rested his case, the prosecution erred.

Because a misstatement of the presumption of innocence implicates the constitutional right to a fair trial, we must award a new trial unless the jury's verdict was unattributable to this error, making it harmless beyond a reasonable doubt. *Davis*, 820 N.W.2d at 533. To make this determination, we "look to the basis on which the jury rested its verdict and determine what effect the error had on the actual verdict." *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996).

In its jury instructions, the district court stated: "if an attorney's argument contained any statement of the law that differs from the law that I give you, you should disregard that attorney's statement." The court also instructed:

> The defendant is presumed innocent of the charge made against him. That presumption remains with the defendant unless and until he has been proved guilty beyond a reasonable doubt. . . . The burden of proving guilt is on the

> State of Minnesota. The defendant does not have to prove his innocence.

The district court's instructions on the presumption of innocence were clear and correct, and we presume that jurors will follow a judge's instructions. *Miller*, 573 N.W.2d at 675.

In *State v. Trimble*, we determined that the prosecutor misstated the legal standard for proof beyond a reasonable doubt by suggesting that the quantity of evidence, not the quality, causes a defendant to lose the presumption of innocence. 371 N.W.2d 921, 926 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985). But we concluded that this erroneous statement did not likely influence the jury's verdict because the district court informed the jury that this was incorrect and properly instructed it on the presumption of innocence. *Id.* at 926-927. Likewise, here, the district court provided clear instructions to the jury and warned it against accepting any contradictory statements of law. The jury instructions and the strong evidence supporting the jury's verdict cured any misstatements of law made by the prosecutor in his closing statement and made such statements harmless beyond a reasonable doubt.

Affirmed.