STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0875, A07-0876

State of Minnesota,
Respondent,

vs.

Christina M. Boyd,
Appellant.

Filed September 16, 2008
Affirmed
Toussaint, Chief Judge

Mille Lacs County District Court
File Nos. CR-06-656; CR-06-376

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

Janice S. Kolb, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney, Courthouse Square, 525 Second Street Southeast, Milaca, MN 56353 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Toussaint, Chief Judge; and Ross, Judge.

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

TOUSSAINT, Chief Judge

In this consolidated appeal, appellant Christina M. Boyd challenges her felony first-degree burglary and misdemeanor disorderly-conduct convictions resulting from one incident and the denial of her motion for a continuance or a new trial on charges resulting from another incident. Because we conclude that (1) the misdemeanor disorderly-conduct conviction supports the first-degree burglary conviction, (2) the evidence is sufficient to support both convictions, (3) the district court did not abuse its discretion in denying appellant's motion for a continuance, and (4) appellant is not entitled to a new trial on the basis of prosecutorial misconduct, we affirm.

FACTS[1]

The second incident occurred on the evening of January 31, 2006. Appellant's cousin, C.S., age 18, was at her mother's home drinking alcohol with three 14-year-old females: appellant's sister, P.B., appellant's half-sister, M.S., and C.B. Appellant testified that she entered the house, without permission, to bring P.B. home. She denied hitting any of the girls but admitted to grabbing C.B.'s arm, grabbing P.B. and wrestling her up the stairs, and grabbing M.S. and taking her outside. She also testified to a prior felony conviction for second-degree assault.

All four occupants of the house testified that they were intoxicated when appellant arrived. C.S. testified that she did not remember appellant coming to the house or giving

[1] The first incident resulting in charges against appellant occurred on November 4, 2005. Its facts are not relevant to this appeal because appellant does not challenge the sufficiency of the evidence for the convictions based on that incident.

a statement to the police herself. C.B. testified that she heard knocking on the locked front door and appellant yelling that she wanted P.B. and that that they should open the door; that no one opened the door, which was eventually kicked open; that, as she was running down the stairs, appellant grabbed her, put her up against the wall, and demanded to know who she was; that appellant grabbed P.B., knocked P.B. to the floor on her hands and knees, and kicked P.B. once; and that appellant used profanity during these events.

P.B. testified that she had just came out of an alcohol-induced blackout and was hiding in the basement because she did not want to go home with appellant and get into trouble with her mother. P.B. did not recall appellant knocking on the front door but did recall appellant trying to get her to leave the house. P.B. denied that appellant kicked or hit her and also denied that she was afraid of appellant.

M.S. testified that she was hiding downstairs with P.B. and heard the front door hit the wall after it was kicked open; that appellant grabbed her and P.B. by their hands, told them they had to leave, and pulled P.B. back inside a window she was trying to climb through; that she ran off because she did not want to be forced to leave the house; and that she did not remember what she told the police.

At the end of the trial regarding this incident, the jury found appellant guilty of one count of felony first-degree burglary and one count of misdemeanor disorderly conduct. The following day, trial began regarding the first incident.[2] Before testimony was heard, appellant's counsel requested a continuance, stating that she was not prepared

[2] Appellant had requested a speedy trial, and trial had initially been set for October 3, 2006. Appellant failed to appear on that date, so trial was rescheduled for November 7, 2006, after appellant made another speedy-trial demand.

to go forward because the complaint was incorrect and the witness list she had just received from the prosecutor was not accurate.[3] The prosecutor objected, arguing that the two trials had been scheduled consecutively because appellant had demanded a speedy trial, that appellant's counsel already knew who the witnesses would be, and that the amended complaint was accurate. Appellant's counsel replied that appellant would not be adequately represented without a continuance because witnesses were not present and she had not seen certain photos produced as documents. The prosecutor told the district court that the photos had been available and that defendant's counsel had been notified of their location.

The district court denied appellant's motion for a continuance, stating that (1) it would recess so that a subpoena could be issued for the missing witness, (2) the discrepancies in the complaint did not sufficiently prejudice appellant to justify a continuance, (3) the notes of witnesses conformed to earlier statements, and (4) the photos had been available.

The prosecutor used the theme of violence in both her opening statement and closing argument. She concluded the closing argument by stating that "whatever the reason in any situation violence is not the answer. It simply just breeds more violence. And by returning a guilty verdict, you can uphold the law. You can make it clear that violence was a problem."

[3] Appellant's counsel thought that this was a gross-misdemeanor matter because it was designated as such on the first complaint. But the amended complaint's probable-cause section stated that this was a felony matter due to appellant's prior convictions, even though the gross-misdemeanor check-box was mistakenly marked.

For the second incident, appellant was sentenced to 50 months imprisonment on the count of first-degree felony burglary; for the first incident, she was sentenced to 21 months and 18 months on two counts of felony fifth-degree assault with intent to cause fear. All sentences were concurrent.

D E C I S I O N

I.

Related to the second incident, appellant was charged with violating Minn. Stat. § 609.582, subd. 1 (a) (2004), which provides: "Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building, . . . commits burglary in the first degree . . . if . . . the building is a dwelling and another person, not an accomplice, is present in it . . . ." For a burglary conviction to stand, the state must prove that a defendant intended to commit or committed some independent crime other than trespass. *State v. Larson*, 358 N.W.2d 668, 670 (Minn. 1984). "Crime" is statutorily defined as "conduct which is prohibited by statute and for which the actor may be sentenced to imprisonment, with or without a fine." Minn. Stat. § 609.02, subd. 1 (2004). Here, the independent "crime" that appellant committed was disorderly conduct.

Appellant argues that, because her underlying disorderly-conduct charge was a misdemeanor, she should have been charged with fourth-degree burglary instead of first-degree burglary. *See* Minn. Stat. § 609.582, subd. 4 ("Whoever enters a building without consent and with intent to commit a misdemeanor" commits fourth-degree burglary.). But "crime," as defined in Minn. Stat. § 609.02, subd. 1, includes misdemeanors. *State*

v. Olson, 382 N.W.2d 279, 282 (Minn. App. 1986).[4] Appellant was properly charged with first-degree burglary.

II.

In an appeal challenging the sufficiency of evidence, we review the record and the legitimate inferences from the record in a light most favorable to the adjudication. *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995). We must assume the jury believed the witnesses whose testimony support the conviction and rejected contrary evidence. *State v. Steinbuch*, 514 N.W.2d 793, 799 (Minn. 1994).

The record establishes that: (1) appellant entered a building without consent; (2) she committed a crime (disorderly conduct) while in the building; (3) the building was a dwelling; and (4) other persons (the victims) were present in the building at the time of the burglary. *See* Minn. Stat. § 609.582, subd. 1(a). The evidence is sufficient to support appellant's first-degree burglary conviction.

Disorderly conduct charges "must be closely scrutinized." *State v. Klimek*, 398 N.W.2d 41, 42 (Minn. App. 1986). "Whether particular conduct constitutes disorderly conduct depends on the facts and circumstances of each case." *Id.* at 43. Disorderly conduct must be conduct that will affect the peace and quiet of persons who may witness it and may be disturbed or driven to resentment by it. *State v. Reynolds*, 243 Minn. 196, 201, 66 N.W.2d 886, 890 (1954).

[4] Appellant contends that *Olson* was improperly decided, but even if this were true, we are bound by it. *See Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 176 (Minn. 1988) (holding that this court's decisions acquire legal force when deadline for petitioning for review has expired).

Minn. Stat. § 609.72, subd. 1(3) (2004), provides that whoever "[e]ngages 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" and knows or has 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, which is a misdemeanor." Appellant raises four challenges to the sufficiency of the evidence upholding her disorderly-conduct conviction.

First, appellant argues that her speech while in the house did not amount to the "fighting words" necessary for a disorderly-conduct conviction. *See In re Welfare of S.L.J.*, 263 N.W.2d 412, 419 (Minn. 1978) (holding that disorderly-conduct conviction cannot be predicated only upon defendant's words unless they constitute "fighting words"). But in the context of disorderly conduct, a "defendant's words are considered as a package in combination with conduct and physical movements, viewed in the light of the surrounding circumstances." *In re Welfare of M.A.H.*, 572 N.W.2d 752, 757 (Minn. App. 1997) (quotation omitted).

Appellant's conduct of yelling, using profanity, kicking holes in the wall, grabbing and pushing C.B. up against the wall, knocking down and kicking P.B., and grabbing M.S. and P.B. and physically leading them upstairs was "offensive, obscene, abusive, boisterous, or noisy" and would have reasonably tended "to arouse alarm, anger, or resentment in others." *See State v. McCarthy*, 659 N.W.2d 808, 811 (Minn. App. 2003) (affirming disorderly-conduct conviction based upon both words and conduct where appellant "placed his hands" on victim, refused to leave, and "became loud and

boisterous"); *Klimek,* 398 N.W.2d at 43 (affirming disorderly-conduct conviction where appellant words and physical conduct of shaking fists were threatening and scared victim).

Second, appellant argues that she was not guilty of disorderly conduct because the victims were not afraid of her. But the record indicates that two of the victims were so alarmed by appellant's conduct that they ran away from her and that, when police arrived at the house, the victims were agitated and excited. The jury reasonably found that appellant's conduct aroused "alarm, anger, or resentment" in the victims.

Third, appellant argues that her conduct cannot support a disorderly-conduct conviction because it did not affect "others." For conduct to be disorderly, it is "not sufficient that a single person or, depending on circumstances, only a few have grounds to complain." Minn. Stat. Ann. § 609.72 advisory comm. cmt. (West 2004). But the record indicates that more than one victim witnessed appellant's behavior, and, when they were interviewed by police, all of the victims (except P.B.) were agitated and excited. Appellant's behavior affected more than one victim.

Finally, appellant argues that her disorderly-conduct conviction cannot be upheld because the jury acquitted her of charges of assault and damage to property. But a defendant who is found guilty of one count and not guilty of other counts is not entitled to a new trial even if the guilty and not-guilty verdicts are logically inconsistent, because the jury may exercise its power of lenity. *See State v. Juelfs*, 270 N.W.2d 873, 873-74 (Minn. 1978). Appellant is not entitled to a new trial because the jury exercised its power of lenity.

Substantial evidence, based on appellant's conduct, supports her disorderly-conduct conviction, which in turn supports her first-degree burglary conviction.

III.

We review the trial court's ruling on a defendant's request for a continuance for an abuse of discretion. *See In re Welfare of T.D.F.*, 258 N.W.2d 774, 775 (Minn. 1977). "On review, we look to the circumstances surrounding the requested continuance and whether the denial was so prejudicial in the preparation of an adequate defense as to materially affect the outcome of the trial." *State v. Sanders*, 598 N.W.2d 650, 654 (Minn. 1999) (quotation omitted). "A trial court's ability to control the timing of a trial is critical in ensuring sound judicial administration and a speedy trial for all criminal defendants." *Id*. at 655. "[B]road discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." *State v. Jones*, 451 N.W.2d 55, 61 (Minn. App. 1990), *review denied* (Minn. Feb. 21, 1990) (quotations omitted).

Appellant argues that she was deprived of the effective assistance of counsel because the district court did not grant a continuance when appellant's counsel told the court that she was unprepared to represent appellant. But, on the first day of trial, appellant's counsel gave an appropriate opening statement, adequately cross-examined the police-officer witnesses, and two other witnesses were dismissed to give counsel time to prepare for their testimony. On the second day of trial, appellant's counsel cross-examined the remaining state witnesses, presented appellant's case-in-chief, and gave a

closing argument to the jury. Nothing in the record indicates that appellant's counsel failed to adequately present appellant's case during the trial or that appellant's defense was prejudiced by her counsel's representation.[5] The trial court did not abuse its discretion in denying appellant's motion for a continuance.

IV.

For the first time on appeal, appellant argues that the prosecutor use of the theme of violence during opening statement and closing argument constituted misconduct. "Typically, a defendant is deemed to have waived the right to raise an issue concerning the prosecutor's final argument if the defendant fails to object or seek cautionary instructions." *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997). "A defendant's failure to object to the prosecutor's statements implies that the comments were not prejudicial." *Id.*

But on appeal, an unobjected-to error can be reviewed if it constitutes "plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). Appellant has the burden of showing that the prosecutor's conduct constituted an error that was plain; the burden then shifts to the state to show that the plain error did not affect appellant's substantial rights. *Id.* at 300.

Appellant cannot show plain error. The prosecutor's comments during opening statement and closing argument did not disparage appellant's character or the evidence

[5] Appellant also argues that the denial of a continuance meant her co-defendant was unavailable to testify. Even if the co-defendant could have been found, she could not have testified for appellant because she had not yet pleaded and therefore likely would have been precluded from incriminating herself. Appellant cannot show that her missing witness would have provided favorable, noncumulative evidence. *See State v. King*, 414 N.W.2d 214, 219 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988). Appellant was not prejudiced by the absence of this witness.

she presented at trial, did not divert the jury's attention from the duty to decide the case based upon the evidence, or did not tell the jury that there would be negative social consequences if appellant were not convicted. *See State v. Clark*, 291 Minn. 79, 82, 189 N.W.2d 167, 170 (1971) (stating that prosecutor "should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict"). Prosecutors are given considerable latitude during final argument and are not required to make colorless arguments. *See State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996); *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996). Appellant offers no support for her argument that use of a theme such as violence during opening statement and closing argument is misconduct.

Moreover, any misconduct committed by the prosecutor must be viewed against the overwhelming evidence of appellant's guilt. *Ives*, 568 N.W.2d at 714. Overwhelming evidence upholds appellant's convictions for fifth-degree assault. Thus, any prosecutorial misconduct would not have influenced the verdict.

Affirmed.