STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0933

State of Minnesota,
Respondent,

vs.

Douglas Michael Trebtoske,
Appellant.

Filed April 28, 2014
Affirmed
Halbrooks, Judge

Olmsted County District Court
File No. 55-CR-12-1374

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, Rochester, Minnesota (for respondent)

Thomas R. Braun, David L. Liebow, Restovich Braun & Associates, Rochester, Minnesota (for appellant)

Considered and decided by Halbrooks, 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

HALBROOKS, Judge

Appellant challenges his conviction of hiring, offering to hire, or agreeing to hire an individual to engage in prostitution in a public place, arguing that (1) the statute under which he was convicted does not apply to prostitution in hotel rooms; (2) the state's evidence was insufficient to convict him; and (3) the prosecutor committed prejudicial misconduct in closing argument by stating that criminal defendants are not entitled to a presumption of honesty. We affirm.

FACTS

Appellant Douglas Michael Trebtoske responded to an advertisement for the services of a woman named Riley that was posted in the "escort" section of an online-classifieds publication. The woman was depicted wearing revealing undergarments, and the advertisement offered an "unrushed exotic experience to discerning gentlemen looking for erotic companionship." The advertisement was placed by the Rochester Police Department Street Crimes Unit as part of an undercover operation targeting prostitution. A female Rochester police officer was assigned to the role of Riley.

Trebtoske contacted Riley, asked to hire her for one-half hour, agreed to pay her $150 for that time, and arranged to meet her at a hotel in Rochester. When Trebtoske arrived at the hotel room, he entered and placed cash on the counter. The officer confirmed that Trebtoske wanted her services for one-half hour and asked if he had brought a condom. Trebtoske said that he had not. The officer stated that she would "grab one" from the bathroom. Trebtoske replied "Okay" and remarked that it was "a

pleasant surprise" that they were able "to make this work." He then removed his shirt and pants. At that time, other officers entered the room and placed Trebtoske under arrest.

Trebtoske was charged with one count of hiring, offering to hire, or agreeing to hire an individual to engage in sexual contact in a public place in violation of Minn. Stat. § 609.324, subd. 2(2) (2010). He moved to dismiss the complaint for lack of probable cause, arguing that subdivision 2 of the prostitution statute does not apply to hotel rooms and that the state's evidence was insufficient to require that he stand trial. The district court denied the motion, and the matter proceeded to jury trial.

Trebtoske testified at trial that he intended to hire Riley for a "strip dance," not sexual contact. The jury found him guilty. The district court denied Trebtoske's posttrial motions for judgment of acquittal or a new trial and stayed imposition of his sentence. This appeal follows.

D E C I S I O N

I.

Trebtoske challenges the district court's order denying his motion to dismiss the complaint for lack of probable cause, arguing that the district court erroneously construed the term "public place" in Minn. Stat. § 609.324, subd. 2. We review de novo a district court's construction of a statute. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

Minnesota law makes it a gross misdemeanor to intentionally hire, offer to hire, or agree to hire an individual 18 years of age or older to engage in sexual penetration or

sexual contact in a "public place." Minn. Stat. § 609.324, subd. 2(2). Public place is defined as

> a public street or sidewalk, a pedestrian skyway system . . ., a hotel, motel, steam room, sauna, massage parlor, shopping mall and other public shopping areas, or other place of public accommodation, a place licensed to sell intoxicating liquor, wine, nonintoxicating malt beverages, or food, or a motor vehicle located on a public street, alley, or parking lot ordinarily used by or available to the public though not used as a matter of right and a driveway connecting such a parking lot with a street or highway.

Minn. Stat. § 609.321, subd. 12 (2010).

Trebtoske asserts that the term "hotel" is ambiguous because hotels are made up of several components, some of which are public and others private. We disagree with the assertion of ambiguity in this context. "A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation." *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quotation omitted). The term "hotel" is not subject to multiple reasonable interpretations. We therefore apply the statute according to its plain language. *See Brua v. Minn. Joint Underwriting Ass'n*, 778 N.W.2d 294, 300 (Minn. 2010).

Trebtoske relies on the dissenting opinion in *State v. White*, 692 N.W.2d 749 (Minn. App. 2005), in support of his argument that we should construe "hotel" to exclude hotel rooms from its meaning. *White* involved the state's challenge to the district court's pretrial dismissal of a gross-misdemeanor prostitution charge after White got into an undercover officer's vehicle and negotiated a price for oral sex. The issue in *White* was whether the interior of a motor vehicle traveling on a public street constituted a "public

place" under Minn. Stat. § 609.324 (2002). The majority deemed the statute as applied to those facts to be ambiguous. 692 N.W.2d at 751.[1] Our decision in *White* does not control our interpretation of the relevant statutory provisions in this case. Unlike in *White*, the relevant definition of a public place—"a hotel"—is unambiguous. Because the term "hotel" can only reasonably be understood to mean a hotel in its entirety, a hotel room is a public place for the purposes of Minn. Stat. § 609.324, subd. 2. Accordingly, the district court did not err in its conclusion that the statute applies to conduct in hotel rooms.

II.

Trebtoske alternatively argues that the evidence is insufficient to support his conviction because the state's evidence of his intent to hire Riley for sexual contact was circumstantial and because he testified to the contrary. In considering a claim of insufficient evidence, we limit our review to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jurors to reach the verdict that 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 have reasonably concluded that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

[1] We note that the supreme court granted review of this court's *White* decision but dismissed review after the legislature amended Minn. Stat. § 609.321, subd. 12, to include "or a motor vehicle located on a public street." *See* 2005 Minn. Laws ch. 136, art. 17, §§ 19-23.

"[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). But "circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). In applying the circumstantial-evidence standard, we apply a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). At the first step, we identify the circumstances proved. *Id.* In doing so, we defer "'to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.'" *Id.* at 598-99 (quoting *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). We "construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the State's witnesses and disbelieved the defense witnesses." *Id.* at 599 (quotation omitted). "The second step is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted).

Here, the state's evidence established the following: (1) Trebtoske responded to an advertisement located in the "escort" section of a classifieds website for the erotic services of a woman named Riley, who was depicted in her underwear; (2) he did not respond to an advertisement in a separate "striptease" section of the website; (3) Trebtoske hired Riley for 30 minutes and agreed to pay $150 for her services; (4) Trebtoske met Riley in a hotel room to receive her services; (5) he placed money on the counter once inside the hotel room; (6) when the officer asked whether Trebtoske had a condom, he replied, "No," and was not surprised or confused by the question; (7) when

the officer stated that she would get a condom, Trebtoske replied, "Okay"; (8) Trebtoske removed his pants and shirt immediately after the officer stated she would get a condom; and (9) Trebtoske never stated that he was not seeking sexual contact or that he wanted to hire Riley for dancing.

Giving due regard to the jury's acceptance of the state's proof and viewing the evidence in the light most favorable to the jury's verdict, we conclude that these circumstances are entirely consistent with guilt. It is not reasonable to conclude that, upon these facts, Trebtoske intended to hire Riley for a strip dance. Even after the officer told Trebtoske that she was going to get a condom—the rational implication being that the two would use that condom—he never clarified that he was not seeking sexual services. Further, the price that Trebtoske agreed to pay for Riley's services, particularly in light of his concession at trial that a "lap dance" typically costs only $20, together with his conduct of undressing, is not rationally consistent with a theory other than guilt. The defense's theory of the case, which the jury discredited, was not reasonable given the circumstances proved. Under our standard of review, the testimony of the state's witnesses was sufficient to support a guilty verdict.

III.

Trebtoske claims that the prosecutor misstated and improperly shifted the burden of proof by stating in rebuttal closing argument: "Defendants . . . are entitled to the presumption of innocence; they are not entitled to the presumption of honesty." Defense counsel did not object but requested surrebuttal, which the district court granted.

When a defendant fails to object to prosecutorial misconduct, our review is under the modified plain-error standard articulated in *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). This two-tiered standard first requires the defendant to establish that the prosecution committed an error that contravenes case law, a rule, or a standard of conduct, or that is otherwise "plain." *Id*. If the defendant makes this showing, the burden shifts to the state to demonstrate that its misconduct did not affect the defendant's substantial rights. *Id.* We will reverse a conviction due to prosecutorial misconduct "only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

It is highly improper for a prosecutor to shift the burden of proof to a defendant during closing argument. *State v. Nissalke*, 801 N.W.2d 82, 106 (Minn. 2011). A prosecutor improperly shifts the burden of proof by implying "that a defendant has the burden of proving his innocence." *Id.* (quotation omitted). Misstatements of the burden of proof are also highly improper and constitute prosecutorial misconduct. *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985). But a prosecutor may challenge a defendant's theory of the case without necessarily shifting the burden of proof to the defense. *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986).

The prosecutor's statement that a criminal defendant is not entitled to a presumption of honesty does not address the state's burden to prove the defendant's guilt beyond a reasonable doubt, but instead implies that the jury is not required to believe a defendant's testimony or afford a defendant any presumption of credibility that the state would otherwise have to overcome. This is not inconsistent with the governing law. The

jury is the sole judge of credibility of the witnesses. *See State v. Lodermeier*, 539 N.W.2d 396, 397 (Minn. 1995). The jury also determines the weight to be given to testimony of any individual witness, including that of a defendant. *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980). Our review of the record reveals no plain error on the part of the prosecution by indicating that criminal defendants are not presumed to be credible. Nevertheless, we do note that the prosecutor's choice of language in this context and gratuitous use of "presumption," which is a term of art of particular significance, was ill-advised and should be avoided. But the comment neither misstated the law nor shifted the state's burden to the defendant. *See State v. Fields*, 730 N.W.2d 777, 785-86 (Minn. 2007) (rejecting argument that prosecutor misstated burden of proof concluding that "the prosecutor's argument, though inartful, did not constitute misconduct and instead made permissible arguments about credibility and reasonable inferences based on the evidence").

Affirmed.