STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1680

State of Minnesota,
Respondent,

vs.

Shane Lester Gullickson,
Appellant.

Filed September 10, 2018
Affirmed
Kirk, Judge

Wabasha County District Court
File No. 79-CR-17-6

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Karen Kelly, Wabasha County Attorney, Wabasha, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Kirk, Judge.

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

KIRK, Judge

Appellant challenges his convictions of criminal-vehicular operation and second-degree assault with a dangerous weapon, arguing that the district court erred in denying his

proposed jury instruction defining a dangerous weapon, the prosecutor committed misconduct by misstating the evidence and using inflammatory language, and the cumulative effect of these trial errors deprived him of his due-process right to a fair trial. Appellant also raises several pro se arguments. We affirm.

FACTS

On December 31, 2016, appellant Shane Lester Gullickson and his girlfriend S.T. went out to lunch. S.T. testified that appellant ordered a Long Island iced tea, but they left the restaurant when the food arrived because of an issue with the service. Appellant was angry about the situation and drove to a second restaurant, but S.T. refused to get out of the vehicle, causing appellant to get even angrier.

S.T. testified that appellant then started driving home and sped up to 80 miles per hour in a 55 mile per hour zone. As appellant drove, S.T. called K.H., a mutual friend. S.T. told K.H. that appellant was driving at a high rate of speed and had crossed the centerline but that he had pulled back over before the other car was near them. At some point during the drive, appellant told S.T. that he would kill them both. They stopped on the way home, and appellant went into a bar, leaving S.T. in the car.

K.H. and her husband J.H. drove to the bar. J.H., who had known appellant for over ten years, went inside the bar and found appellant sitting at the bar with a beer and a shot of liquor in front of him. J.H. testified that appellant had bloodshot eyes, smelled like alcohol, and appeared to be intoxicated. J.H. described appellant's emotional state as "threatening," and he was concerned that appellant might hurt himself or others. S.T. and K.H. also went inside the bar briefly. When appellant decided to leave the bar, S.T., J.H.,

and K.H. followed him out to his car. J.H. testified that he tried unsuccessfully to take appellant's car keys from him because he thought appellant should not be driving.

Appellant got into the driver's seat of the car and turned on the engine. In an effort to prevent appellant from driving, S.T. got partway into the driver's side and tried to take the keys from the ignition. As appellant and S.T. struggled for the keys, appellant punched S.T. in the ribs. While S.T. and J.H. were still standing next to the open driver's door, appellant put the vehicle in reverse and backed up, striking S.T. and J.H. with the door and injuring them both. Appellant then drove away. As he was driving southbound, he swerved into the northbound lane and struck another vehicle, injuring the driver.

A resident of a nearby house heard the impact of the crash and looked outside to see what had happened. The resident observed appellant quickly walking away from the scene. Emergency personnel responded to the scene. Appellant was not present but law enforcement located him later that evening. During a police interview that same evening, appellant characterized himself as being very angry and frustrated that day, stating "I was more angry than I think I've been ever." Appellant acknowledged that his anger got the best of him that day.

The state charged appellant with three counts of criminal-vehicular operation under Minn. Stat. § 609.2113, subd. 2 (2016), and two counts of second-degree assault with a dangerous weapon under Minn. Stat. § 609.222, subd. 1 (2016). Following a jury trial, appellant was found guilty on all charges. This appeal follows.

D E C I S I O N

I. The district court did not err in its jury instruction on the definition of "dangerous weapon."

Appellant argues that the district court erred in denying his proposed jury instruction defining a dangerous weapon. This court "review[s] a district court's refusal to give a requested jury instruction for abuse of discretion." *State v. Scruggs*, 822 N.W.2d 631, 640 (Minn. 2012). A district court properly exercises its discretion "if the instructions read as a whole 'correctly state[] the law in language that can be understood by the jury.'" *Id.* at 642 (quoting *State v. Anderson*, 789 N.W.2d 227, 239 (Minn. 2010)) (alteration in original). Under Minn. Stat. § 609.02, subd. 6 (2016), a dangerous weapon includes any "device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm[.]"

Here, the district court instructed the jury on the definition of a dangerous weapon as defined in the Minnesota Practice Criminal Jury Instruction Guide: "A 'dangerous weapon' is . . . anything else that, in the manner it is used or intended to be used, is known to be capable of producing death or great bodily harm." 10 *Minnesota Practice*, CRIMJIG 13.10 (2015). Appellant argues that CRIMJIG 13.10 incorrectly states the law because the statute uses the phrase "calculated or likely to" and CRIMJIG 13.10 uses the phrase "known to be capable of." This court addressed this argument in *State v. Weyaus*, holding that "CRIMJIG 13.10 correctly states the statutory dangerous-weapon definition in language that a jury can understand." 836 N.W.2d 579, 583 (Minn. App. 2013) (applying 10 *Minnesota Practice*, CRIMJIG 13.10 (2006)), *review denied* (Minn. Nov. 13, 2013).

Appellant argues that *Weyaus* is not applicable because in that case there was no request for a different jury instruction at the district court. Despite the lack of an objection at the district court in *Weyaus*, appellant's argument is unavailing. This court fully analyzed the difference between the statutory language and CRIMJIG 13.10, and we agree with our prior analysis. *Id*. at 582-85.

II. The prosecutor did not commit misconduct.

Appellant argues that the prosecutor committed prosecutorial misconduct by suggesting S.T. was a victim of domestic violence and referencing appellant's anger during closing argument. Appellant did not object to the prosecutor's closing argument below. "[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). For unobjected-to prosecutorial misconduct, our review is under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If an appellant establishes that the prosecutorial misconduct is plain error, then the burden shifts to the state to show that the misconduct did not affect the appellant's substantial rights. *Id.* If all prongs of the modified plain-error standard are met, "the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* (citing *Griller*, 583 N.W.2d at 740).

During closing argument, a prosecutor "may present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence." *State v. Pearson*, 775 N.W.2d 155, 163 (Minn. 2009). But a prosecutor may not argue facts not in evidence. *State v. Lehman*, 749 N.W.2d 76, 86 (Minn. App. 2008), *review denied* (Minn. Aug. 5,

2008). A prosecutor may not intentionally misstate the evidence or advance arguments calculated to inflame the jury's passions. *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993).

Here, appellant argues that the prosecutor made reference to facts not in evidence by suggesting that S.T. may have been reluctant to testify honestly because she was a victim of domestic violence. However, the jury heard testimony that appellant and S.T. were in a relationship and that appellant punched her in the ribs and then backed into her with his car door during the incident. These allegations could constitute domestic violence, and the prosecutor did not refer to any other incidents of domestic violence. *See* Minn. Stat. § 518.01B, subd. 2 (2016) (defining "domestic abuse" to include physical harm against a person involved in a significant romantic or sexual relationship). On this record, appellant has not shown that the prosecutor committed misconduct by referring to facts not in evidence.

Appellant also argues that the prosecutor committed misconduct by repeatedly referring to appellant's anger because the comments were intended to inflame the jury's passions and prejudices. The state argued to the jury that appellant assaulted S.T. and J.H. by intentionally inflicting bodily harm on them. *See* Minn. Stat. § 609.02, subd. 10(2) (2016) (defining assault). Our review of the record shows that the prosecutor's references to appellant's anger and frustration went directly to his state of mind and presented an argument for why appellant intentionally inflicted bodily harm on his girlfriend and long-time friend. On this record, appellant has not shown that the prosecutor committed misconduct by advancing arguments calculated to inflame the jury's passions.

Furthermore, even if we were to conclude that the state committed prosecutorial misconduct here, there is nothing in the record to establish that it had a substantial impact on the jury's verdict, which was overwhelmingly supported by the record.

III. Appellant failed to show any error warranting a new trial.

An appellant is entitled to a new trial if the cumulative effect of the trial errors effectively denied the appellant a fair trial. *State v. Jackson*, 714 N.W.2d 681, 698 (Minn. 2006). "Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006) (quotation omitted). Because we find neither trial error nor prosecutorial misconduct, there was no error here, and appellant's argument that he is entitled to a new trial based on cumulative trial errors must fail.

IV. Appellant's pro se arguments lack merit.

Appellant raises a number of arguments in his pro se supplemental brief. Appellant first argues that he received ineffective assistance of counsel. To prevail on an ineffective-assistance-of-counsel claim, appellant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984)). Careful review of the record indicates that appellant's counsel's representation did not fall below an objective standard of reasonableness.

Appellant next argues that the evidence in this case is insufficient to sustain his convictions. "We limit our review of the sufficiency of the evidence to ascertaining whether the jury, giving due regard to the presumption of innocence and to the state's burden of proving guilt beyond a reasonable doubt, could reasonably have found the [appellant] guilty." *State v. Webster*, 894 N.W.2d 782, 785 (Minn. 2017) (alteration in original) (quotation omitted). This involves adopting "the view of the evidence most favorable to the state [and] assuming the jury believed the state's witnesses and disbelieved any contradictory evidence." *Id.* (quotation omitted). Appellant's arguments go to the weight of the evidence and whether certain evidence was contradicted or unconvincing. However, viewing the evidence in the light most favorable to the state and disbelieving any contradictory evidence, the evidence here is sufficient to sustain all three of appellant's convictions.

Appellant also argues that he should not have been sentenced for multiple charges arising out of the same conduct. Although Minn. Stat. § 609.035, subd. 1 (2016), provides that a court may only enter a sentence for one crime arising out of a single behavioral incident, "courts are not prevented from giving a defendant multiple sentences for multiple crimes arising out of a single behavioral incident if: (1) the crimes affect multiple victims; and (2) multiple sentences do not unfairly exaggerate the criminality of the defendant's conduct." *State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006). Here, the district court entered sentences for appellant's three convictions, each of which related to a different victim. The sentences are concurrent and do not unfairly exaggerate the criminality of appellant's conduct.

Finally, appellant argues that the prosecutor vindictively prosecuted him and that the district court judge made inappropriate comments as the jury was exiting the courtroom to deliberate. The record does not support appellant's contention that the district court judge made any inappropriate comments in front of the jury or that the prosecutor's charging decision was vindictive.

Affirmed.