STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1650

State of Minnesota,
Respondent,

vs.

Jerwulu D. Wright,
Appellant.

Filed August 26, 2019
Affirmed
Jesson, Judge

Dakota County District Court
File No. 19WS-CR-16-13578

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Jerome M. Porter, Eagan City Prosecutor, Alina Schwartz, Assistant City Prosecutor, Campbell Knutson Professional Association, Eagan, Minnesota (for respondent)

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

Considered and decided by Smith, Tracy M., Presiding Judge; Schellhas, Judge; and Jesson, Judge.

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

JESSON, Judge

Appellant Jerwulu D. Wright challenges his theft conviction stemming from a shoplifting incident at the Eagan outlet mall. First, he argues that the two witnesses

identifying him lacked credibility. Second, he asserts that the prosecutor improperly aligned himself with the jury by using the term "we" numerous times in his closing argument. Because sufficient evidence supports Wright's conviction, and because any prosecutorial misconduct does not warrant a new trial, we affirm.

FACTS

In November 2016, the loss-prevention officer for Saks Fifth Avenue, located in Eagan, noticed a man behaving suspiciously. On a surveillance camera, the officer observed the man take several pairs of socks and a suit coat, which he concealed under his own jacket. At this point, the loss-prevention officer contacted the police, who told him to continue watching the man. The man left the store with the items and the loss-prevention officer followed him until he was confronted by law enforcement in the parking lot.

After being surrounded by two police cars, the man stopped, quickly took the stolen pairs of socks out of his jacket, and placed them on the hood of one of the cars while an officer was getting out. Once out of the car, the officer told the man he was under arrest. As the officer approached the man, she noticed he was wearing the stolen suit coat underneath his jacket. The man then cooperated while officers handcuffed and removed his jacket. Eventually, he admitted that he took the items without paying. At that time, the store's loss-prevention officer valued the recovered stolen items at $108.

During the parking lot interaction, the police officer found a driver's license in the man's wallet identifying him as appellant Jerwulu D. Wright. Using this information, the officer pulled up Wright's information on her computer, where the search showed the same photo as the one on the driver's license, along with the same height, weight, and eye color

information. When asked by the officer, the man identified himself as Wright and provided his date of birth, phone number, and address. The officer later took Wright's photo while he was sitting in the back of her police car.

At trial, both the loss-prevention officer and the arresting officer identified Wright as the person who stole the items. The jury was also able to compare the photo the officer took with Wright's enlarged driver's license photo. At the end of the jury trial, the parties presented closing arguments. Wright did not object at any point during the state's closing argument.

The jury found Wright guilty of theft. The district court sentenced Wright to a stay of imposition with four days in jail, with credit for one day. Wright appeals.

D E C I S I O N

Wright first argues that insufficient evidence supports his conviction because the witnesses identifying him lacked credibility. Second, he contends that the prosecutor committed misconduct during his closing argument by using "we" statements. We address each argument in turn.

I. Sufficient evidence supports Wright's theft conviction.

Wright argues that his conviction is not supported by sufficient evidence. Specifically, Wright contends that the state failed to prove beyond a reasonable doubt that he was the person who stole the clothing items from Saks Fifth Avenue. Rather, Wright postulates, the culprit could have been his brother or someone physically similar.

In sufficiency-of-the-evidence challenges, if an element of the offense is supported by direct evidence, we examine the record to determine if the evidence is sufficient to

permit jurors to reach their verdict "when viewed in a light most favorable to the conviction." *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted). When examining the record, this court assumes that the jury believed the state's witnesses and did not believe contrary evidence. *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004). If the jury, acting with regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could "reasonably conclude that the defendant was guilty of the charged offense," this court will not disturb the verdict. *Id.* at 25-26.

Under Minnesota law, a conviction for theft requires that the state prove *the defendant* intentionally and wrongfully took the property of another without consent and with the intent to permanently deprive the owner of possession. Minn. Stat. § 609.52, subd. 2(a)(1) (2016). Here, our review of the record leads us to conclude the state presented significant evidence at trial regarding the identity of the thief. First, the store's loss-prevention officer identified Wright in court as the same man he observed conceal the items, leave the store, and get confronted by the police. Likewise, the arresting officer identified Wright as the same man she arrested that day. This testimony provided direct evidence based on personal knowledge that, if believed, proved Wright was the man who stole the items. *See Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004) (defining direct evidence). Accordingly, sufficient evidence supports the verdict.

Still, Wright argues that the two witnesses were not credible. He first points to the possibility that the loss-prevention officer may have been multitasking when he initially saw the man on camera. Also, he notes the loss-prevention officer testified that he only saw the man from 20 or 25 feet away. But these concerns were brought to the jury's

attention during cross-examination and closing argument. And it is well established that weighing evidence and determining credibility are proper tasks for the jury. *State v. Dahlin*, 695 N.W.2d 588, 596 (Minn. 2005). As such, it was within the jury's discretion to conclude that the loss-prevention officer's testimony was credible.

Next, Wright asserts that the police officer was not credible because she should have done more to verify Wright's identity than simply match the individual with the picture and information on the driver's license. But the officer testified that she got a "good look" at the man's face and was confident in the man's identity with no reason to dispute it. Here, again, the jury properly viewed the officer's testimony as credible and reasonably concluded from the evidence that Wright committed the theft.

Finally, Wright argues that both the witnesses' in-court identifications are inherently doubtful both because of a significant lapse in time between the events and the trial and because he was the only African-American man in the courtroom. A reasonable doubt, Wright claims, persists in the possibility that Wright's brother or another similar-looking individual took Wright's driver's license and faked his identity after getting caught stealing. But nothing prevented Wright from attempting to persuade the jury that the identifications were not credible. Indeed, both the passage of time and the possibility that a similar-looking man could have stolen Wright's identity were brought to the jury's attention. It nonetheless deemed the witnesses' identifications credible. And after having the opportunity to evaluate the credibility of both witnesses, the jury found that the state proved beyond a reasonable doubt that Wright was the individual who stole the items. Because the evidence here allowed the jury to reasonably conclude that Wright and the

man arrested were the same individual, we do not disturb the verdict. *See Olhausen*, 681 N.W.2d at 25-26. Accordingly, the evidence is sufficient to sustain Wright's theft conviction.

II. The prosecutor's alleged misconduct during closing argument does not amount to prejudicial error.

Wright argues that he was denied a fair trial because the prosecutor committed misconduct during his closing argument. Specifically, he contends that the prosecutor's use of the word "we" during closing argument improperly aligned the prosecution and the jury. Wright did not object to these statements at trial.

A prosecutor is a "minister of justice" with an obligation "to guard the rights of the accused as well as to enforce the rights of the public. *State v. Mayhorn*, 720 N.W.2d 776, 790 (Minn. 2006) (quotations omitted). Serving in this role, a prosecutor commits misconduct if he violates established standards of conduct, including caselaw, rules, or orders by a district court. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). When the defendant fails to object during trial, allegations of prosecutorial misconduct are reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard of review, the appellant must establish (1) error and (2) that the error was plain. *Id.* Plain error is one that was clear or obvious. *Id.* If misconduct reaches the level of plain error, the burden shifts to the state to demonstrate that the misconduct did not affect the defendant's substantial rights. *Id.* If all three elements of the test are met, "[this court] may correct the error only if it seriously affect[s] the fairness, integrity, or public

reputation of judicial proceedings." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) (quotations omitted).

Prosecutors are not members of the jury, and they have separate roles in a criminal trial. The supreme court has recognized the roles of the prosecutor and the jury must remain distinct and stated that using phrases like "we" and "us" may be an inappropriate effort to appeal to the jury's passions. *Nunn v. State*, 753 N.W.2d 657, 663 (Minn. 2008) (quoting *Mayhorn*, 720 N.W.2d at 790). But while these types of "we" statements may be disfavored generally, they are not prosecutorial misconduct per se. *Id.* The supreme court has explained that speaking in terms of "we" may not necessarily exclude the defendant or improperly align the prosecution with the jury if the "we" statement could reasonably be interpreted "to refer to everybody who was in court when the evidence was presented." *Id.* Accordingly, the use of "we" statements to simply summarize facts presented to everyone is not misconduct. *Id.*

Here, the prosecutor used "we" about 40 times during his closing argument. Almost all of the "we" statements merely summarized facts that were presented to everyone, as in *Nunn*. In that case, the prosecutor recounted several facts that "[w]e learned." *Id.* at 662. The bulk of the prosecutor's statements here—along the lines of "[w]e've heard questioning," "[w]e had a driver's license," or "[w]e have evidence"—are similar to *Nunn* and therefore not misconduct. But one statement here is more troubling. The statement "we know that the person in the back of the squad car is Mr. Wright" cannot be reasonably interpreted to refer to everyone in the courtroom. With that statement, the prosecutor was not merely summarizing facts that were presented to everyone, but advancing a one-sided

view of the main contested issue in this case: the identity of the man who stole items from Saks Fifth Avenue.

The problematic statement here is more similar to one that the supreme court in *Mayhorn* concluded was misconduct. There, the prosecutor said, "[t]his is kind of foreign for all of us, I believe, because we're not really accustomed to this drug world and drug dealing." *Mayhorn*, 720 N.W.2d at 789. While it may be permissible to *describe* a "drug world" or another piece of evidence the jury might need help understanding, the supreme court said it does not follow that the prosecutor may describe "herself and the jury as a group of which the defendant is not a part." *Id.* at 790. Here, the prosecutor similarly went beyond merely describing a piece of evidence and instead excluded the defendant with his "we" statement.

Assuming without deciding that the prosecutor's statement amounted to plain error, we conclude that Wright's substantial rights were not affected. When misconduct amounts to plain error, the burden shifts to the state to demonstrate that the misconduct did not affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302. The state must show that there is "no reasonable likelihood that the absence of misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). To evaluate the effect on substantial rights, we examine factors including the pervasiveness of the misconduct and the strength of evidence against the defendant. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017).

When considering the pervasiveness of the alleged misconduct, the problematic "we" statement here is more like an isolated remark rather than a pervasive, underlying

strategy. The closing argument consists of 18 pages out of a 264-page transcript. Although the prosecutor used the term "we" around 40 times during closing, only one instance is troubling. As such, the alleged misconduct was not pervasive.

In weighing the next factor—the strength of the evidence—it is clear that overwhelming evidence supports the case against Wright. Two eyewitnesses identified Wright as the same individual who shoplifted from the store. Several photographs of the man in question were entered into evidence, as well as a police car video showing him confessing. Simply stated, there is ample evidence to support the verdict. The strength of evidence here, as well as the isolation of the problematic remark, lead us to conclude that Wright's substantial rights were not violated.

In sum, sufficient direct evidence in the form of eyewitness testimony supported the conviction in this case. And because the alleged misconduct by the prosecutor was not pervasive and pales against significant evidence presented regarding Wright's identity, Wright's substantial rights were not affected.

Affirmed.