**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-0990**

State of Minnesota,
Respondent,

vs.

Dustin Allen Vaughn,
Appellant.

**Filed July 6, 2020**
**Affirmed**
**Slieter, Judge**

Washington County District Court
File No. 82-CR-18-3331

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bratvold, Judge; and Slieter, Judge.

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

**SLIETER**, Judge

In this direct appeal from the judgment of conviction for fourth-degree assault, appellant argues (1) the prosecutor committed misconduct during closing argument, and

(2) the evidence was insufficient to prove that he committed fourth-degree assault. Because the record shows that any error that was committed by the prosecutor does not warrant reversal, and because the evidence was sufficient for a jury to find appellant guilty of fourth-degree assault, we affirm.

## FACTS

Appellant was charged with aiding and abetting third-degree assault (substantial bodily harm), in violation of Minn. Stat. § 609.223, subd. 1 (2016), and fourth-degree assault of a correctional employee, in violation of Minn. Stat. § 609.2231, subd. 3 (2016), following his involvement in a fight between inmates and corrections officers at the Oak Park Heights Correctional Facility. The case was presented to a jury and the following facts are based on the testimony and exhibits presented at trial.

In March 2018, appellant and several inmates were in the prison's recreational center and ordered to stand at one end of the gym. One inmate, M.S., ignored the order and approached a group of corrections officers and swung at one of the officers. While officers attempted to restrain M.S., appellant and other inmates rushed to join the fight. The fight eventually broke into a number of smaller, separate fist fights. The surveillance video shows appellant following R.A., a corrections officer, out of the melee and punching him several times in the right side of the face before other corrections officers stopped him.

A photograph was submitted to the jury which shows injuries to R.A.'s right cheek and right lip sustained in the fight. Appellant acknowledged punching R.A. and stated he "could have definitely hurt [R.A.] worse." When an investigator asked appellant if he admitted to assaulting R.A., appellant said, "How can I deny it . . . you got a bunch of

cameras." Appellant explained to the jury that the reason he joined the fight was to protect other inmates. The jury found appellant not guilty of aiding and abetting third-degree assault (substantial bodily harm) and guilty of fourth-degree assault on a correctional employee. This appeal follows.

## D E C I S I O N

### I. The prosecutor did not commit reversible misconduct.

Appellant asserts that his conviction must be reversed because the prosecutor committed the following misconduct during closing argument: (1) misstated the law and the burden of proof regarding self-defense; (2) asked the jury to "send a message" with its verdict; (3) disparaged him and his defense strategy; and (4) inflamed the jury's passions by making a reference to race. Each argument is addressed below.

***Misstatements of Burden of Proof and Law***

During closing argument, the prosecutor told the jury, "I'll walk you through the law. Self-defense, Defense of others: In order for [appellant] to prove self-defense . . . ." At that point, defense counsel raised an objection on grounds that the prosecutor was engaging in "burden switching" by claiming appellant held the burden of proving self-defense, rather than the state needing to disprove it. The prosecutor corrected his statement before the district court ruled on the objection.

The prosecutor clearly erred in misstating the burden. "Although the defendant must come forward with evidence to support his claim, it is the State that bears the ultimate burden of disproving self-defense." *State v. Radke*, 821 N.W.2d 316, 324 (Minn. 2012). We review objected-to prosecutorial misconduct for harmless error, *State v. Hunt*,

615 N.W.2d 294, 302 (Minn. 2000), but we will reverse a conviction for prosecutorial misconduct "only when the misconduct, considered in the context of the trial as a whole, was so serious and prejudicial that the defendant's constitutional right to a fair trial was impaired," *see State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000).

In assessing whether an error is harmless in the context of prosecutorial misconduct, we must look at the severity of the misconduct. *Hunt*, 615 N.W.2d at 302 (Minn. 2000). In cases of serious misconduct, "the misconduct is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error." *Id*. When determining if an error was harmless beyond a reasonable doubt, we must consider how the evidence was presented, whether the defendant countered the error, whether the error was emphasized at trial, and whether it was highly persuasive to the jury. *See State v. Wren*, 738 N.W.2d 378, 394 (Minn. 2007). But in cases involving less serious misconduct, the test is "whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.* at 390 N.8 (quotation omitted).

Appellant fails to establish that the error meets either test. Immediately after appellant's objection, the prosecutor corrected himself and accurately informed the jury of the four elements that the state must disprove when a defendant raises a claim of self-defense. The prosecutor next applied the facts to each element to argue they have been disproved. The error was brief, immediately countered by the defendant, not emphasized by the prosecutor, and therefore was unlikely to have been persuasive or to have influenced the jury in any manner. In sum, we conclude the error was harmless beyond a reasonable doubt and did not play a substantial role in influencing the jury's decision to convict.

Appellant also argues that the prosecutor misstated the law on self-defense (1) by asserting that R.A.'s injuries were attributable to appellant even if he did not cause them, and (2) by telling the jury that the aggressor in a conflict does not have the right to raise a claim of self-defense. Respondent points out that the prosecutor never made the first statement, and that the second statement was legally accurate because appellant did not argue he was acting in self-defense after first being the aggressor.

There was no objection to either of these alleged errors at trial. When the defendant fails to object during trial, prosecutorial misconduct is reviewed under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, the defendant bears the burden of establishing that there was an error and that it was plain. *Id.* If such showing is made, the burden then shifts to the state to prove that there was no "reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotations omitted).

Appellant has not identified anything in the record supporting the first allegation, and we find none.

Regarding the second allegation, the transcript shows that the prosecutor told the jury, "If [appellant] starts the fight, it's not self-defense" and, "If you start the fight, you do not have a right to go self-defense." The first prong of a self-defense claim states the defense is generally not available if the defendant was the aggressor or provocateur. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). The law recognizes an exception in that a defendant may claim self-defense as the aggressor provided specific conditions are met. *See* 10 *Minnesota Practice*, CRIMJIG 7.07 (2016). The defendant must then show that he

or she—acting as the aggressor—actually and in good faith withdrew from the conflict and communicated that withdrawal in some manner to the intended victim. *State v. Bellcourt*, 390 N.W.2d 269, 272 (Minn. 1986).

However, the record indicates that appellant at no time presented evidence to invoke this exception. Appellant did not argue at trial that he made an attempt to withdraw, nor does the surveillance video show he made such an attempt. Appellant testified that he threw the first punch at R.A. and the surveillance video confirms this. The jury would therefore have had no reason to consider the exception, and appellant has not demonstrated that the prosecutor's statement was an error.

***Asking the Jury to "send a message" with its Verdict***

Appellant argues that the prosecutor committed misconduct by telling the jury during his closing argument: "And I'd ask you to prove a point." Appellant argues this is misconduct because it is improper for a prosecutor to ask a jury to "send a message" with its verdict and improper to use the personal pronoun "I" in closing argument. Appellant objected to the statement at trial, and the district court did not rule on the objection.

Because this alleged error is also objected-to, we review it for harmless error and we must look to the severity of the misconduct to determine whether reversal is required. *Hunt*, 615 N.W.2d at 301-02. It is generally improper for a prosecutor to ask a jury to send a message with its verdict. *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). In assessing claims of prosecutorial misconduct arising out of closing arguments, appellate courts "consider the closing argument as a whole rather than focus on particular 'phrases or remarks that may be taken out of context

or given undue prominence.'" *Johnson*, 616 N.W.2d at 728 (quoting *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993)). The prosecutor stated, "Ladies and gentlemen, the intent wasn't to defend a friend, it was to prove a point like he had earlier talked about. And I'd ask you to prove a point. Close a chapter on this day that began like any other[.]" This statement references appellant's earlier testimony in which he stated that he had been in prison riots with inmates of different races and ethnic backgrounds to "work together to prove a point" of protesting prison policies. Within this context, the prosecutor's statement appears to be a reference to appellant's language and not an attempt to ask the jury to "send a message" with its verdict. In addition, while using the first-person pronoun "I" can improperly inject personal opinion into a closing argument, *see Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004), that is not what occurred here. While a prosecutor is not permitted to offer personal opinion as to a defendant's guilt, a prosecutor may offer an interpretation of the evidence. *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000). Because the prosecutor's statement was not an error, reversal is not warranted and we need not address whether the statement influenced the jury.

***Disparaging the Defendant***

Appellant also argues that the prosecutor disparaged him and his defense by asking the jury to "see past the performance and see past the charade," and by stating the "defense is asking you to ignore what you saw and ignore common sense." Neither comment was objected-to, so the alleged misconduct is reviewed under the modified plain-error standard referenced above. *See Ramey*, 721 N.W.2d at 302.

Appellant has not established that either statement was an error. "While the state may argue that there is no merit to the particular defense, the state may not disparage the defense either in the abstract or by suggesting that the defendant raised the defense because it was the only defense that may be successful." *State v. Wright*, 719 N.W.2d 910, 919 (Minn. 2006) (quotation omitted). It is not improper for a prosecutor to draw the jury's attention to a defendant's attempts to distract from the issues at trial. *State v. Simion*, 745 N.W.2d 830, 844 (Minn. 2008). It is also not improper for a prosecutor to ask the jury to base its decision on evidence rather than on emotional appeals from the defendant. *State v. Waiters*, 929 N.W.2d 895, 902 (Minn. 2019). Because the prosecutor asked the jurors to focus their decision on the evidence presented, the comments are not errors.

***Inflaming Jury's Passions by Making an Irrelevant Reference to Race***

Finally, appellant argues that the prosecutor made an improper reference to race when he stated during closing argument that appellant participated in "riots with blacks and whites and Natives." He contends that this statement was meant to "inflame the jury's passions" by making him look like a dangerous person "because he worked with dangerous people of other races to commit acts of violence in prison." Respondent argues that the reference to race was relevant to countering appellant's argument that he was engaging in self-defense during the fight.

The statement was objected-to, so we review for harmless error. *Hunt*, 615 N.W.2d at 301-02. "The prosecutor must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). In addition, "it is

improper to inject race into a closing argument when race is not relevant." *State v. Cabrera*, 700 N.W.2d 469, 474 (Minn. 2005).

The prosecutor told the jury,

> [M.S] threw the first punch. And somewhere in the course of events [appellant] followed up with more punches.
>
> And when he went out there to attack those guards it wasn't to save a friend, it was just because, "My boys bangin', I'm banging too."
>
> [Appellant] told you during his direct testimony with his attorney that, "We don't like the CO's. I've been in riots with blacks and whites and Natives and we will work together to prove a point."

The prosecutor was referencing appellant's own statement to an investigator that he would join other inmates in a fight regardless of their race. ("If [his friend] is fightin' two-three blacks, two-three Mexicans, two-three Natives … if he's banging with [a corrections officer], I'm banging too."). When viewed in this context, the references to race were relevant to explaining appellant's motive for participating in the fight in that appellant has worked together with other inmates regardless of ethnicity to "prove a point" to corrections staff. Moreover, the jury already heard appellant's statements during his testimony and audio interview with the investigator. Because the statements were not apt to inflame prejudice and were relevant to the prosecutor's argument, appellant has not established that the statements are in error.

## II. The evidence was sufficient for the jury to find appellant guilty of fourth-degree assault of a correctional employee.

Appellant argues that the state produced insufficient evidence to prove that he injured R.A. Whoever assaults a correctional employee and inflicts "demonstrable bodily

harm" is guilty of a felony. *See* Minn. Stat. § 609.2231, subd. 3(1). For the jury to find appellant guilty, the state must prove that he intentionally inflicted demonstrable bodily harm to R.A. *See* Minn. Stat. § 609.02, subd. 10 (2016).

When an element of an offense is supported by direct evidence, this court's review is limited "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 permit the jurors to reach the verdict which they did." *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). We must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Appellant's conviction rests entirely on direct evidence, which is "evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). The evidence was sufficient for the jury to reach its verdict without making inferences. In particular, the jury heard appellant tell an investigator that he punched R.A., and heard the following exchange between the prosecutor and R.A.:

> Q: You tell [appellant] to stop, what does he do?
> A: Kept coming towards me.
> Q: Until he made contact?
> A: Yes.
> Q: Did you hit [appellant] first?
> A: No.
> Q: As a result of that assault, did you sustain any injuries?
> A: Yes.

Another officer testified that he saw appellant punching R.A. with a "closed fist." The jury saw surveillance video of M.S. punching an officer, inmates rushing in, appellant engaging

in a one-on-one fight with R.A., and appellant punching R.A. on the right side of R.A.'s face multiple times with his left hand.

Both appellant and R.A. acknowledged that they punched each other, and the jury saw a photo of injuries R.A. sustained to the right side of his face, including bleeding and bruising. There is also no dispute that appellant intended to hit and injure R.A. The jury determined based on the evidence that R.A.'s injuries were attributable to appellant. We conclude the direct evidence is sufficient to show that appellant intentionally caused "demonstrable bodily harm" to R.A. as required by the statute and to support the verdict.

The jury also heard, though rejected, appellant's argument that he was involved in the fight to defend others. Appellant testified that he joined the fight out of concerns for the safety of other inmates due to past abusive conduct by corrections officers. R.A. testified that he told appellant to stop as appellant approached him during the fight, but he did not listen. Based on this evidence, the jury concluded that appellant was the aggressor in the fight and not engaged in self-defense or defense of others.

In sum, a painstaking review of the evidence viewed in the light most favorable to the verdict supports the jury's finding of guilt.

**Affirmed.**