STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1258

State of Minnesota,
Respondent,

vs.

Eric Lee Fry,
Appellant.

Filed September 6, 2022
Affirmed
Wheelock, Judge

Koochiching County District Court
File No. 36-CR-20-739

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Jeffrey Naglosky, Koochiching County Attorney, International Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Reyes, Judge; and Klaphake, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges his conviction following a jury trial for one count of first-degree burglary of an occupied dwelling and one count of first-degree burglary involving an assault, alleging prosecutorial misconduct based on statements the state made during its closing argument. Appellant raises additional arguments in a pro se supplemental brief, alleging ineffective assistance of counsel, insufficient evidence, jury bias, and prejudice resulting from COVID-19 social-distancing protocols in the courtroom. Because the prosecutor's statements were permissible inferences supported by facts in the record and thus did not constitute error, and because the pro se arguments are not adequately briefed and are not otherwise supported by the record, we affirm.

FACTS

After a May 2021 jury trial, the district court convicted appellant Eric Lee Fry of one count of first-degree burglary of an occupied dwelling and one count of first-degree burglary involving an assault.

At trial, the victim, K.J., testified that he answered a knock on the door to find Fry and an acquaintance there. He heard Fry say, "[Y]ou thought I forgot," and at that point K.J. attempted to close the door, but the two men forced their way into the kitchen and began punching him. K.J.'s roommate heard the fight and entered the kitchen, where she saw Fry and the acquaintance hitting K.J. and pulling out his hair. The roommate called the police. Fry and the acquaintance left the home, and K.J. followed them. Police then intercepted K.J., who told the responding officer that Fry had forced his way into the

residence and assaulted him. K.J. also testified that he and Fry had a previous physical altercation and that he understood Fry's statement, "[Y]ou thought I forgot," to be a reference to the prior dispute.

The investigating officer appeared as a witness for the state. He testified that just after the incident, Fry commented that the fight was about K.J. having pushed Fry's motorcycle over, scratching the gas tank. The officer testified that he returned to the scene of the assault and took photographs depicting broken glass and clumps of K.J.'s hair on the floor. The photographs were entered into evidence. The officer also took a statement from the roommate.

In the state's closing argument, the prosecutor claimed that "Mr. Fry had a grievance with [K.J.]" dating back to an incident with a scratched motorcycle and that Fry "got" the other individual and went to the residence where K.J. was staying to "extract some street justice." Fry did not object to the prosecutor's statement. The jury returned a verdict of guilty on both counts, and Fry was sentenced to a 41-month prison term. Fry appeals.

DECISION

I. The state did not commit prosecutorial misconduct based on statements in its closing argument.

Fry requests a new trial on the basis of unobjected-to prosecutorial misconduct in the form of remarks during closing argument. We review a prosecutor's unobjected-to alleged prosecutorial misconduct using the modified plain-error test. *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016). To apply the test, we consider whether there is "(1) error, (2) that is plain, and (3) affects substantial rights." *State v. Ramey*, 721 N.W.2d

294, 302 (Minn. 2006). Error is plain when it is "clear or obvious," which is generally established when the error "contravenes case law, a rule, or a standard of conduct." *Id.* (quotation omitted). If the defendant establishes the existence of plain error, "the burden shifts to the State to establish that the plain error *did not* affect the defendant's substantial rights." *State v. Epps*, 964 N.W.2d 419, 423 (Minn. 2021). Plain error affects substantial rights if it affects the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). Even where misconduct occurs, this court will reverse only when the defendant was denied a fair trial. *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995).

We first review whether the prosecutor's statements constitute error. "[T]he State may present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence in its closing argument." *State v. Munt*, 831 N.W.2d 569, 587 (Minn. 2013) (quotation omitted). However, a prosecutor may not speculate without a factual basis, and a prosecutor who intentionally misstates the evidence or misleads the jury as to the inferences it may draw engages in misconduct. *Peltier*, 874 N.W.2d at 804-05. Inferences not adequately supported by the facts in evidence are improper. *Id.* at 805. When reviewing a closing argument for prosecutorial misconduct, "we look to the closing argument as a whole, rather than to selected phrases and remarks." *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted).

Fry specifically argues that the prosecutor's assertions in the state's closing argument that Fry enlisted a friend and went to the house with the intent to get even with K.J. for the prior altercation were not supported by facts in the record and were therefore improper inferences.

The state made the following statement in its closing argument:

> Mr. Fry had a grievance with [K.J]. I believe [the officer] testified that Mr. Fry made the comment after he was arrested that this dates back to an incident involving a tipped over motorcycle and a scuffed up or scratched gas tank. There's ways to deal with that; the right way and the wrong way. Mr. Fry decided to deal with it the wrong way. When he had the first altercation with [K.J.], *and then when he got [the other individual] and a second time went and had an altercation with [K.J.]*. Knew where he was, went to [the roommate's] home, without anybodies [sic] permission forced his way in, and assaulted [K.J.]. *Gonna extract some street justice*. There are two ways to do things; the right way and the wrong way. And that is the wrong way.

(Emphases added.) The state further referred to Fry's entering the house without consent and with the intent to assault K.J., stating:

> When [K.J.] opens the door and sees [the other individual] and Mr. Fry standing there, and hears Mr. Fry say, "I bet you thought I forgot" he knew what was coming. He tried to close the door. He was not giving consent. He was denying consent to enter [the] home. They didn't accept that denial. They forced their way in. And what happened? The next thing they were there to do, commit an assault. *He had a grudge, and he was gonna get even one way or the other*. . . . He's got a lot of options. The legal options do not include getting his buddy, going to [the] house, forcing their way in and beating up the person on the inside. *So, when they formulated that intent, you know what, you and me, let's go, we're gonna go there and we're gonna get him*. They went with the intent to commit a crime.

(Emphases added.)

Fry argues that the prosecutor's statements about his "plan and purpose" in going to K.J.'s house with another individual are not adequately supported by facts in evidence. He acknowledges the testimony of the investigating officer, in which the officer recalled that

Fry made a statement to him that the fight was a result of K.J. scratching Fry's motorcycle gas tank. But Fry characterizes this testimony as the "single piece of evidence" supporting the inference that he entered the house with the intent to retaliate against K.J. Fry claims that because this "single piece" of evidence of his intent to commit the assault was a hearsay statement, there was "no basis" in the record to infer that Fry's actions were motivated by a grudge and that he entered the house to "get even" with K.J.

Fry fails to account for K.J.'s testimony (1) that K.J. and Fry had previously fought and (2) that when Fry said, "[Y]ou thought I forgot," K.J. understood him to be referring to the previous altercation, which K.J. stated "didn't end so good" for Fry. While it is true that K.J. did not testify that the earlier fight was about a motorcycle specifically, he testified that there was an earlier fight about something that did not have anything to do with K.J. He also testified that when he heard Fry say, "[Y]ou thought I forgot," he "tried to hurry up and shut the door," but the men forced their way through the door and into the house. We therefore conclude that the prosecutor's inference that Fry had a grievance with K.J. and went to the house with the intent to assault K.J. was reasonable and adequately supported by evidence in the record.

Fry contends that here, as in *Peltier*, the prosecutor's inference is a "psychological hypothesis" not supported by evidence. 874 N.W.2d at 805. In *Peltier*, however, the impermissible conjectures implying the defendant's commonality with other offenders had no basis in evidence. *Id.* Here, the prosecutor's argument inferred Fry's intent from circumstances established by the record, as we previously concluded.

We note, and Fry points out, that the prosecutor's recounting of the events leading up to the assault includes an assertion that Fry enlisted an accomplice, stating that Fry "got" the other individual and "went and had an altercation with [K.J.]." We discern no factual basis in the record supporting the assertion that Fry sought out the other person or explaining how the two arrived at the residence together at the time of the assault. Nonetheless, we conclude that this statement about the accomplice is irrelevant to the reasonableness of the inference of Fry's intent for going to K.J.'s residence given the other facts in the record.

Finally, Fry argues that because there was no evidence of when the alleged motorcycle incident occurred, there is no factual basis to support a reasonable inference that the assault was motivated by a desire to "extract some street justice" for damage to the motorcycle. Other testimony, however, clearly suggests that some conflict had occurred that predated the assault. Thus, the prosecutor's inference that Fry's motivation for the assault was related to an earlier conflict was reasonable and supported by evidence in the record. *See State v. Smith*, 876 N.W.2d 310, 335 (Minn. 2016) (prosecutors may argue all reasonable inferences from evidence in the record).

We conclude that the prosecutor's statements during the state's closing argument regarding Fry's intent to assault K.J. because of a grudge from a previous encounter are based on an inference supported by evidence in the record and thus do not constitute error. Because the first prong of the modified plain-error test is not satisfied, we need not reach the questions of whether an error was plain or whether Fry's substantial rights were affected. *See State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017) (stating that if the

court finds that any one of the plain-error prongs is not satisfied, it need not address the others). Fry's allegation of prosecutorial misconduct therefore fails.

II. Fry's claims of ineffective assistance of counsel, insufficient evidence, improperly suppressed evidence, jury bias, and prejudice resulting from COVID-19 social-distancing protocols in the courtroom are not supported by the record.

We discern five distinct claims that Fry makes in his pro se supplemental brief, none of which are supported by legal arguments or citations to legal authority. We do not "consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority." *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008). Further, "[a]n assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *State v. Yang*, 774 N.W.2d 539, 552 (Minn. 2009) (quotation omitted). Because Fry's claims are based on mere assertion, we need not consider them; however, having carefully reviewed Fry's claims and the record, we conclude that Fry's claims still fail.

First, Fry alleges his counsel was ineffective. We evaluate claims of ineffective assistance of counsel using a two-pronged test that requires finding (1) that the attorney's performance fell below an objective standard of reasonableness and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). "Counsel does not act unreasonably by not asserting claims that counsel could have legitimately concluded would not prevail." *Wright v. State*, 765 N.W.2d 85, 91

(Minn. 2009). Our review of a trial counsel's performance does not extend to reviewing trial strategy, which includes the examination of witnesses and the selection of evidence presented to the jury. *White v. State*, 711 N.W.2d 106, 111 (Minn. 2006).

Fry specifically claims that his counsel should have entered into evidence K.J.'s subsequent criminal conviction, that his counsel should have objected to the investigating officer's hearsay statement that Fry told him the previous fight was over a motorcycle, and that his counsel should have questioned another witness further about elements of her testimony. Fry's claims do not demonstrate that his counsel's performance fell below an objectively reasonable standard. Fry's counsel acted reasonably in determining whether evidence of K.J.'s subsequent conviction would be permitted and its value to the proceeding, as well as the importance of the investigating officer's claim that Fry told him the dispute arose from an issue with a motorcycle given other evidence in the record that the two men had a prior dispute. The record shows that Fry's counsel's cross-examination of the witness in question was thorough. Because Fry's claims about his counsel's performance fall within trial strategy or otherwise fail to satisfy one or both prongs of *Strickland*, his apparent argument that his counsel was ineffective fails.

Second, Fry asserts a lack of evidence against him, citing insufficient statements from the victim and assailants; no DNA evidence; and the lack of photographs of the house's exterior, the door jamb, or a damaged television. When reviewing the sufficiency of evidence, we carefully "examine the record to determine whether the facts and legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *State v. Griffin*, 887 N.W.2d 257, 263

(Minn. 2016) (quotation omitted). "The evidence must be viewed in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict." *Id.* We will not reverse a conviction for insufficient evidence "if the jury, acting with due regard for the presumption of innocence" and the need for proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

To convict Fry of first-degree burglary of an occupied dwelling, the state had to prove beyond a reasonable doubt that Fry entered an occupied dwelling without consent and with intent to commit a crime—in this instance, the crime of assault. *See* Minn. Stat. § 609.582, subd. 1(a) (2020). To convict Fry of first-degree burglary involving an assault, the state had to prove beyond a reasonable doubt that Fry entered a building without consent and assaulted a person inside the building. *See id.*, subd. 1(c) (2020).

Here, the state presented photographic evidence of the house where the assault occurred, showing a rug crumpled and pushed away from its place by the back door, clumps of K.J.'s hair on the floor, and photographs of bruising to K.J.'s face. The jury heard testimony from the investigating officer, a witness to the assault, and K.J. Viewed in a light most favorable to the verdict, the facts and legitimate inferences from the evidence and testimony sufficiently permit the jury to conclude that the elements of first-degree burglary of an occupied dwelling and first-degree burglary involving an assault were proved beyond a reasonable doubt. Therefore, Fry's claim that the evidence was insufficient fails.

Third, Fry asserts that the district court improperly suppressed testimonial evidence that K.J. possessed two knives when he followed the assailants away from the scene of the assault, arguing that the excluded evidence is relevant to K.J.'s aggression and credibility as a witness. "We largely defer to the trial court's exercise of discretion in evidentiary matters and will not lightly overturn a trial court's evidentiary ruling." *State v. Robertson*, 884 N.W.2d 864, 872 (Minn. 2016) (quotation omitted). "A defendant claiming error in the district court's reception of evidence has the burden of showing both the error and the prejudice resulting from the error." *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009) (quotation omitted).

While K.J.'s credibility was no doubt important to the state's case, the defense introduced other evidence of K.J.'s aggressive behavior toward his assailants following the assault. Fry does not show how the court erred by excluding the specific testimony regarding K.J.'s possession of knives, nor how its exclusion prejudiced Fry. Therefore, the district court did not err in excluding the testimony in question.

Fourth, Fry alleges that the jury was biased based on the profile of the jurors selected and the fact that a number of jurors had recently served on a previous jury for a different first-degree-burglary trial. But Fry does not present any legal argument or point to any facts demonstrating that actual prejudice resulted from the district court's inclusion of the selected jurors in the jury for his trial. A review of the record from voir dire shows that the district court heard from the jurors in question regarding whether either their employment or their relationship with the victim would impact their ability to be impartial and then thoroughly considered whether to remove them for cause. Any jurors who had previously

served on a jury for a first-degree-burglary trial were questioned about the impact of their prior service on their ability to be impartial in a case with similar issues. The district court determined that the jurors at issue were able to be impartial. Thus, the district court did not err by seating the jurors selected to hear Fry's case.

Finally, Fry argues that COVID-19 social-distancing protocols used in the courtroom had "a huge effect on the jury" because the jurors were seated on uncomfortable benches and because the distance between the jurors and the witness stand meant that the jury could not see the witnesses' faces or Fry's face at counsel table. Fry, however, does not point to any facts in the record indicating that the jurors were physically uncomfortable or that they were unable to see the faces of witnesses. To the contrary, at the outset of trial, the district court confirmed with the jurors that they were able to see and hear witnesses and exhibits, and it instructed them to inform the court if at any time they were unable to see or hear a portion of the proceeding. Fry points to no particular instance where the jury's ability to view testimony or evidence was compromised, nor does Fry demonstrate that any prejudice resulted. Fry's arguments in his pro se supplemental brief therefore fail to persuade us that a new trial is warranted.

Affirmed.