STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2279

State of Minnesota,
Respondent,

vs.

Gaylord Stewart Quinn,
Appellant.

Filed October 31, 2011
Affirmed
Klaphake, Judge

Chisago County District Court
File No. 13-CR-08-1215

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

Janet Reiter, Chisago County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Center City, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Stauber, Judge.

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

KLAPHAKE, Judge

In this criminal appeal, Gaylord Stewart Quinn challenges his conviction for three counts of criminal vehicular operation arising out of his involvement in a September 22,

2007 traffic accident in which his vehicle rear-ended another vehicle on Highway 8 in Chisago County. He claims that there was insufficient evidence to prove that he was the driver of his vehicle on the night of the accident and that the prosecutor committed misconduct during closing argument. Because the evidence was sufficient to establish that he was the driver of the vehicle that caused the collision and because any prosecutorial misconduct did not affect appellant's substantial rights or affect the trial outcome, we affirm.

D E C I S I O N

Sufficiency of Evidence Claim

Appellant first claims that he should not have been convicted of criminal vehicular operation because the evidence was insufficient to prove that he was the driver of his vehicle at the time of the accident, a necessary element of the crime. See Minn. Stat. § 609.21, subd. 1 (2006) (requiring person guilty of criminal vehicular operation to cause injury to another "as a result of operating a motor vehicle"). In *State v. Gatson*, 801 N.W.2d 134, 143 (Minn. 2011), the supreme court reiterated its method for reviewing sufficiency-of-the-evidence challenges:

> When reviewing a claim of insufficient evidence, our review of the evidence is to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted. The verdict will be upheld if, giving due regard to the presumption of innocence and to the state's burden of proof beyond a reasonable doubt, the jury could reasonably have found the defendant guilty. We consider the evidence in the light most favorable to the verdict and assume that the

> jury disbelieved any evidence conflicting with the result reached.

(Quotations and citations omitted.)

In cases that rely on circumstantial evidence, "'the circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt.'" *State v. Hawes*, 801 N.W.2d 659, 668 (Minn. 2011) (quoting *State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010)). In examining sufficiency of the evidence in a case that relies on circumstantial evidence, the reviewing court must first identify the circumstances proved, and then determine whether those circumstances are "'consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt.'" *Hawes*, 801 N.W.2d at 669 (quoting *Andersen*, 784 N.W.2d at 329).

Here, the state offered no direct evidence identifying appellant as the driver of his vehicle at the time of the accident. But the state offered strong circumstantial evidence to show that appellant was the driver. Appellant was the registered owner of the vehicle, and appellant's vehicle contained paperwork with his name. Immediately after appellant's car rear-ended the victim, J.M.'s vehicle struck the victim's vehicle. J.M. observed a Caucasian man standing by appellant's vehicle just after the accident; that man disappeared a "minute" later. J.M. told police that he suspected the man must have taken off across a field adjacent to the highway.

In addition, a witness who lived within a short distance of the accident scene, C.G., whose attention was drawn by the sound of the accident, saw a man running away

from the accident in the direction of C.G.'s small neighborhood. Soon after, appellant, in an obviously inebriated state, approached C.G., attempted to insinuate himself into C.G.'s group of bystanders, and suggested to C.G. that they go into his house to drink vodka. Appellant ran away when C.G. countered that they should go check out the accident scene. A police dog discovered appellant's scent in the immediate area where appellant ran from C.G. and located appellant hiding in nearby woods, less than a mile from the accident scene. Police discovered on appellant's person tinted glass that matched the tinted glass from his vehicle.

As directed by *Hawes*, we must consider whether these circumstances are consistent only with the hypothesis that appellant was the person who was the driver of his vehicle at the time of the accident. Appellant suggests that another person was the driver by demonstrating that both his windshield and the roof glass were broken on the passenger side, and both airbags in the front seat deployed during the accident. Appellant also points out that J.M. could not state that appellant was the only person he observed near appellant's vehicle at the time of the accident. Finally, appellant suggests that the police could not link him to his vehicle because they began the canine search at the point where appellant was last seen, and not at his vehicle.

The damage to appellant's vehicle does not clearly establish that there was another person in appellant's vehicle at the time of the accident—the damage to his vehicle as likely could have been caused by the force of the collision itself, torque on the frame of the vehicle, or the force of other items struck by the vehicle, including the ditch, as the vehicle continued on its trajectory after the collision with the victim's car. Appellant

offered no other evidence to suggest that the damage to his vehicle was from a vehicle occupant other than himself. In addition, no person other than appellant was seen in the vicinity of the accident scene or fleeing from the scene with appellant.

Further, the state did not have a burden to show that there was not another person in appellant's vehicle, so J.M.'s testimony that he could not rule out another person being near appellant's car after the accident is of little import. "The [s]tate does not have the burden of removing all doubt, but of removing all reasonable doubt." *Gatson*, 801 N.W.2d at 144 (citing *State v. Hughes*, 749 N.W.2d 307, 313 (Minn. 2008)); *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010) (same); *see State v. Swain*, 269 N.W.2d 707, 716 (Minn. 1978) ("The state is not required to negative any possible defense, but must prove its case beyond a reasonable doubt.").

Finally, although the canine search proved only that appellant was the person who ran from C.G., other evidence strongly suggested that appellant was the driver of his vehicle, including that he owned the vehicle, was discovered very close to the accident scene, and had tinted glass on his person that matched the tinted glass on his vehicle. Considering the evidence as a whole, we conclude that the evidence was sufficient to prove beyond a reasonable doubt that appellant was the driver of his vehicle at the time of the accident. *See Hawes*, 801 N.W.2d at 669 (noting that circumstances proved should be considered "on the whole" to determine guilt).

Prosecutorial Misconduct Claim

Appellant next claims that the prosecutor committed misconduct during closing argument. Defense counsel did not object during closing argument when the alleged

misconduct occurred. Under these circumstances, appellate review is to examine the record for plain error. *State v. Prtine*, 784 N.W.2d 303, 314 (Minn. 2010). "In order for us to review for plain error, the appellant must establish that there is: (1) error; (2) that is plain; and (3) that affects substantial rights." *Id.* If each element of the plain error test is met, the appellate court determines whether it should "address the error to ensure fairness and the integrity of the judicial proceedings." *Id.*

The prosecutor spent a significant portion of his closing argument making references to the "sad tragedy" of this case.[1] The prosecutor told the jury the case was sad because the victim's, D.E.'s, life was "stolen from her" by appellant's "choices, the intoxication, the avoidance of responsibility, the callousness, and the lack of caring and human kindness of [appellant]. Cut short by someone . . . who placed [D.E.'s] value as a human being at less than his own selfish needs." The prosecutor also told the jury that the case was sad because D.E. would not be able to see her grandchildren grow up, participate in sports, or graduate from high school, and because D.E. was "the object of such callousness to the degree that we've seen here." The prosecutor further stated that the case was sad because appellant "had so little concern for human life, so little concern," and asked, "How could anybody run away from a scene like that and not go and try to help those people who were so obviously injured? As human beings, we have to be supremely sad at that." The prosecutor concluded this portion of his argument by saying that appellant's and D.E.'s lives were "inextricably bound together" in the jury's

[1] The prosecutor's closing argument encompassed fourteen pages of trial transcript, and the alleged misconduct included approximately five pages of that argument.

decision and that "[D.E.'s] death is in your hands. Determining responsibility for the death of [D.E.] is in your hands."

Defense counsel addressed the impropriety of the prosecutor's argument at the beginning of his closing argument, stating:

> I got a whole stack of notes here about this trial and about – my closing, but I think we need to have a candid discussion about the facts and remove ourselves from the emotions, the horrible tragedy that occurred here, the terrifying nature of an automobile accident, and talk about proof and facts. . . . [L]istening to [the prosecutor's] closing, [he] does this very well, but it is a very unusual closing for the State. It was rhetoric and hyperbole, it did not talk about the facts[.]

Defense counsel reminded the jury not to "get clouded by the emotions in determining what occurred on September 22nd[.]" Defense counsel also stated that the prosecutor's "whole closing didn't address hard facts, but asked you to rely on emotion. . . . But our job is harder and it's more clinical than that. And these are very serious charges. Expect quality of proof."

During rebuttal, the prosecutor also reminded the jury, "You can consider only what's inside the circle. The documents, the evidence, the testimony, the photos, and the credibility of the witnesses. You can't consider what's outside the circle. Passion, sympathy for the defendant, public opinion, public feeling, sentiment, conjecture, prejudice, and most of all you can't speculate."

The district court submitted written instructions to the jury at the close of the case. The first instruction states, "It is your duty to decide the questions of fact in this case. . . . Deciding questions of fact is your exclusive responsibility." The district court also

instructed the jury that they "must not permit sympathy, prejudice or emotion to influence your verdict."

The prosecution in a criminal case may not obtain a conviction at any price. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006); *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993). Á prosecutor must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Morton*, 701 N.W.2d 225, 236 (Minn. 2005) (quotation omitted). In a homicide case, "the state may offer information about a victim's life, but may not use such information to attempt to influence the jury to decide the case based on passion or prejudice." *Id.* (citing *State v. Buggs*, 581 N.W.2d 329, 342 (Minn. 1998)).

The prosecution committed plain error by appealing to the jury's passions and prejudice during oral argument. *See Ramey*, 721 N.W.2d at 302 (defining plain error as one that contravenes case law, a rule or a standard of conduct). Once plain error is established, the burden shifts to the state to show lack of prejudice. *Id.* Here, the error in the prosecutor's remarks was ameliorated by defense counsel's closing argument. *See id.* at 299, 299 n.3 (noting that when defense counsel chooses not to object to prosecutorial misconduct and "instead chooses to respond in the defense summation, the defendant forfeits consideration of the issue on appeal"). Because defense counsel addressed the impropriety of the prosecutor's appeal to the jury's passions during closing argument and because the district court instructed the jury that it was to decide the case on the facts, we cannot conclude that the error affected appellant's substantial rights or resulted in an unfair trial to appellant. *See id.* (stating that even if prosecutorial misconduct was error, verdict will be affirmed if "there is no reasonable likelihood that the absence of the

misconduct in question would have had a significant effect on the verdict of the jury"). As noted above, even the prosecutor reminded the jury during his rebuttal argument that the jury should decide the case on the facts and not because of passion or prejudice.

While we affirm appellant's conviction today, we must once again remind prosecutors not to use this type of inflammatory argument in closings. The prosecutor's role is to function as "a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public." *Salitros*, 499 N.W.2d at 817 (quotation and citation omitted).

Affirmed.