STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2040

State of Minnesota,
Respondent,
vs.

Ryan Joseph Felt,
Appellant.

Filed October 1, 2012
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-10-41507

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Hooten, Judge.

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

PETERSON, Judge

In this appeal from his convictions of aiding and abetting second-degree burglary and trespassing, appellant argues that he was denied a fair trial because the prosecutor

failed to properly prepare a witness and committed misconduct during closing argument. We affirm.

FACTS

When K.F. and M.O. returned home, they found parts of their house in disarray. They also found that laptop computers, a television, and $300 from their guest K.H.'s wallet were missing.

K.F. and M.O. contacted the police, and the responding officers found appellant Ryan Joseph Felt in a basement laundry room "seemingly asleep underneath a pile of clothes." An officer woke appellant and put handcuffs on him. While escorting appellant out of the house, the officer asked him what he was doing in the house. Appellant replied that he had entered the home to burglarize it with two people he called "The Bruce's" and that he was hit in the head and knocked unconscious. The officer searched appellant and found K.H.'s social security card, a bank receipt in K.H.'s name, and almost $300 in cash, in denominations that K.H. had reported missing. K.H. kept all of these items in the same slot in her wallet.

Direct Examination of the Officer

Appellant was charged with second-degree burglary. Appellant moved to suppress the statements that he made to the officer while leaving the house, and the district court granted the motion because the statements were made in violation of appellant's *Miranda* rights. During the prosecutor's direct examination of the officer at trial, the officer testified that he escorted appellant out of the house. Then, the following exchange occurred:

Q And was he able -- were you able to talk to him?
A Yes, yep.
Q Was he responding to your questions?
A Yes.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

Q When -- you said he was walking. How was he walking?
A Relatively normally. He was able to walk freely on his own. We didn't have to carry him out of the house or anything.
Q Okay. After getting him outside, what happened?
A You know, we started talking to him about, "What are you doing here?" You know, trying to figure out if he had a reason for being there or what the situation was.

At this point, the district court excused the jury for a short break. After the jury left, defense counsel reiterated her objection, stating, "This was the subject of a suppression hearing." The prosecutor responded that she "spoke to the officer this morning about him not talking about any response from [appellant] at all" and that the defense was arguing "that he was so drunk he couldn't do anything; he was passed out. The fact that he could coherently answer questions and they had a conversation, we won't talk about that conversation at all."

Appellant moved for a mistrial. The district court denied the motion. The district court considered whether appellant was prejudiced by the question and answer about what happened after appellant was outside and indicated to the parties that, if appellant was convicted, it would reconsider the prejudice issue in a motion for a new trial. The district court accepted the prosecutor's explanation that when she asked the officer what happened next, she thought that the officer would say that he put appellant in the squad car. The court found that the prosecutor's error, if any, was unintentional.

Prosecutor's Closing Argument

During defense counsel's opening statement, counsel discussed the items found when appellant was searched and noted that although police found K.H.'s social security card on appellant, they found no other forms of identification. Counsel implied that another person may have been responsible for the missing items because K.H.'s driver's license was missing and had not been found.

Following opening statements, the prosecutor disclosed to defense counsel for the first time that K.H.'s driver's license had been found in a dresser drawer in the house almost a month after the burglary. Then, despite having failed to tell defense counsel until after opening statements that the license had been found, the prosecutor said during closing argument, "[Defense counsel] told you that the driver's license was never found. You know that it was found. It was found in the home." Defense counsel objected, and the objection was sustained. The district court instructed the jurors that they "must disregard what the prosecutor said about the finding of the driver's license."

The state continued its closing argument, and the prosecutor described appellant's movements through the house. The prosecutor said that appellant had been in many rooms throughout the house, which was not supported by the evidence. Defense counsel objected, the objection was sustained, and the court instructed the jury to "disregard what the lawyer says and go by your own memory."

Post-Trial

Appellant was convicted of second-degree burglary and trespass, a lesser included offense. Appellant renewed his motion for a mistrial, arguing that the prosecutor

committed misconduct by eliciting inadmissible evidence and by disparaging defense counsel and speculating about the evidence during closing argument. The district court denied the motion. The district court stayed imposition of appellant's sentence and placed him on probation for three years.

D E C I S I O N

A prosecutor engages in prejudicial misconduct if the prosecutor's acts have the effect of materially undermining the fairness of a trial. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). A prosecutor also engages in prejudicial misconduct if the prosecutor violates rules, laws, orders by a district court, or this state's caselaw. *Id*. Appellate courts reviewing claims of prosecutorial misconduct "will reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

Minnesota has used two different harmless-error standards to review objected-to prosecutorial misconduct. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (citing *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974)). The *Caron* harmless-error test for less-serious misconduct requires the reviewing court to ask "whether the misconduct likely played a substantial part in influencing the jury to convict." *McDaniel*, 777 N.W.2d at 749 (quoting *Caron*, 300 Minn. at 128, 218 N.W.2d at 200). The *Caron* harmless-error test for "unusually serious" misconduct requires us to ask whether the alleged misconduct was "harmless beyond a reasonable doubt." *McDaniel*, 777 N.W.2d at 749; *State v. Martin*, 773 N.W.2d 89, 104 (Minn. 2009). This court "will find an error to be harmless beyond a reasonable doubt only if the verdict

rendered was 'surely unattributable' to the error." *State v. Nissalke*, 801 N.W.2d 82, 105 (Minn. 2011) (quoting *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008)).

Even if we assume that the prosecutor committed "unusually serious" misconduct, we conclude that the jury's verdict was surely unattributable to the misconduct. The jury heard evidence that appellant was found unconscious in the laundry room of a house that had just been burglarized, and some of the missing items were found on his person. The officer's statement that he asked appellant what he was doing at the house (without disclosing appellant's response), the prosecutor's unsupported statements about appellant's movements through the house, and the prosecutor's implication during closing argument that defense counsel misrepresented whether a driver's license had been found surely did not affect the jury's determination that appellant entered the house without permission and took some of the missing items.

The district court instructed the jury to disregard the prosecutor's statements about the driver's license, repeatedly sustained defense objections to the improper closing argument, and twice instructed the jury that counsel's arguments were not evidence. *See State v. Hill*, 801 N.W.2d 646, 658 (Minn. 2011) (appellate courts presume that the jury follows the district court's instructions). Under these circumstances, we conclude that there was no prejudice and a new trial is not warranted.

Affirmed.