STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1091

State of Minnesota,
Respondent,

vs.

Sadik Ahmed Hussein,
Appellant.

Filed June 10, 2013
Affirmed in part, reversed in part, and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CR-11-24449

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Peterson, Judge; and Ross, Judge.

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

ROSS, Judge

Four men shoved a disoriented 82-year-old man suffering from Alzheimer's disease into a wall and stole $800 from his billfold. Witnesses identified Sadik Ahmed

Hussein, who was charged with and found guilty of aiding and abetting first-degree aggravated robbery. Hussein appeals from his conviction and sentence, arguing that the eyewitness testimony was insufficient to prove him guilty, that the district court failed to properly instruct the jury on the aggravated sentencing factors, and that the evidence does not establish particular vulnerability as a valid sentence-enhancement factor. The evidence of Hussein's guilt was abundant and the district court did not plainly err in its instructions to the jury on the sentencing findings. But we reverse in part and remand for resentencing because it is undisputed that the jury's particular-vulnerability finding lacks an essential element to support the upward sentencing departure.

FACTS

One evening in July 2011, 82-year-old R.B. wandered from his son's southeast Minneapolis home and became disoriented. His son noticed that R.B. was missing, and he left the house searching for him. During the search, R.B. used a cellular telephone and called his son's house several times, leaving voicemail messages saying he was lost. Accented voices were in the background of R.B.'s voicemail messages.

R.B.'s son finally found R.B., wounded and being treated in an ambulance at 24th Avenue South and 9th Street. His head was bleeding. A witness told police that he had seen R.B. walking down the sidewalk and four young men of Somali appearance approach him, shove him into rocks and a retaining wall, and dig into his pockets. He also told police that he got a good look at the primary aggressor, who was wearing a red shirt and blue jeans, and that he followed the attackers for a longer look. He estimated that the man and his companions were about 18 to 20 years old. R.B. told police that the

men took his wallet, which contained $800 in cash. Police found the wallet nearby, but the cash was gone.

Police investigated and learned of a connection between one of the attackers and R.B.'s voicemail messages on his son's home phone: R.B. had made the calls from a cellular telephone that had a number belonging to Hussein. Police developed a photographic array that included Hussein. They showed the array to the witness who had described the attackers, and he immediately recognized and positively identified Hussein as the primary aggressor. R.B.'s son explained that R.B. could have made the telephone calls to the house for help only after he opened his wallet because his memory loss left him needing help to remember the house phone number, which he kept on a card in his wallet.

The state charged Hussein with aiding and abetting first-degree aggravated robbery under Minnesota Statutes sections 609.245, subdivision 1, and 609.05 (2010). The trial evidence showed that Hussein was 38 years old at the time of the robbery. The identifying witness told the jury that he was "100 percent" certain that Hussein was one of the robbers. The district court instructed the jury that Hussein was presumed innocent and that the state had to prove each element of the charged offense beyond a reasonable doubt. It added that the presumption of innocence applied "unless and until the jury determines Defendant has been proved guilty beyond a reasonable doubt."

After closing arguments and immediately before instructing the jury to begin deliberations, the district court instructed the jury that its verdict had to be unanimous, saying also, "[I]f you find the defendant guilty, we're going to ask you to determine any

additional aggravating factors. We will put those questions to you when you return with your verdict."

The jury found Hussein guilty. After it returned the guilty verdict, the district court instructed it to consider two additional questions as to whether R.B. was "particularly vulnerable due to his reduced physical and mental capacity" and whether Hussein committed the crime "as part of a group of three or more individuals." The court did not give any new instructions or repeat its initial instructions. When the jurors expressed confusion about whether the requirement for a unanimous verdict continued to apply, the court said that it did. Without further deliberation, the jury answered "yes" to both sentencing questions.

The district court sentenced Hussein to 120 months' imprisonment, an upward departure from the sentencing guidelines. The district court declared that "the basis for this upward departure is the . . . particular vulnerability of the victim," a fact that rested on R.B.'s reduced physical capacity and cognitive impairment.

Hussein appeals from his conviction and sentence.

D E C I S I O N

I

Hussein argues that the evidence—particularly the eyewitness's identification—is too unreliable to convict him. The argument has no merit.

We review sufficiency of the evidence claims to determine only whether the evidence, viewed in a light most favorable to the verdict, could support the conviction. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that the jury believed the

state's witnesses and disbelieved all contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The testimony of even a single witness may be sufficient. *State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998). And eyewitness identification can alone be sufficient. *State v. Landa*, 642 N.W.2d 720, 725 (Minn. 2002). Eyewitness identification need only reflect the witness's belief that he saw the defendant commit the crime; it does not need to be "positive and certain." *Id.*

Hussein highlights the eyewitness's limited opportunity to observe him, his erroneous estimate of Hussein's age, and his failure to comment on Hussein's facial hair when he initially described him to police. But any discrepancies between the witness's original identification to police and his line-up identification were matters of credibility for the jury to decide, and we will defer to its assessment. *See State v. Mems*, 708 N.W.2d 526, 531–32 (Minn. 2006) (noting that inconsistencies in eyewitness identification do not require reversal). And the eyewitness saw Hussein and the other attackers not just once, but three times, because he followed them on foot and also later searched for them and found them by his car. We add that a witness's identification that rests even on a limited opportunity to observe can be sufficient to sustain a conviction if the identification is supported by other evidence. *See State v. Lloyd*, 345 N.W.2d 240, 244 (Minn. 1984). Plenty of other evidence exists here. Hussein's presence at the scene with others having direct contact with R.B. is corroborated by the cellular telephone records and the multiple accented voices in the background of the voicemail messages that R.B. made immediately before he was robbed. Hussein counters that the phone evidence demonstrates only that he allowed R.B. to borrow his phone—an act of supposed

benevolence that belies the guilty verdict. The problem with Hussein's kindness theory is that it overlooks that, on appeal, we view the evidence in the light most favorable to the verdict. And in that light, the circumstances tend to indicate that even if Hussein was initially motivated by kindness in sharing his phone, his motivation darkened after he saw the cash in R.B.'s wallet as R.B. retrieved his son's phone number.

The evidence readily supports Hussein's conviction.

II

Hussein challenges the jury's sentencing finding that the crime was committed by three or more people. Hussein argues that the district court erred when it failed to reiterate at the sentencing stage the beyond-a-reasonable-doubt instruction that it had given at the verdict stage. We review unobjected-to jury instructions for plain error, determining whether there was error, whether the error was plain, and whether the error affected the defendant's substantial rights. *State v. Gunderson*, 812 N.W.2d 156, 159 (Minn. App. 2012). If the challenge meets each of those elements, we then decide whether to exercise our discretion to reverse. *Id*.

If there was an error, it certainly was not plain, so we do not address any other element. We review jury instructions "as a whole, in their entirety." *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). Failing to explain the beyond-a-reasonable-doubt standard is not plain error as long as the content of the instructions as a whole does not misstate the standard of proof. *See State v. Caine*, 746 N.W.2d 339, 355–56 (Minn. 2008) (upholding a conviction where the jury instructions failed to expressly apply the beyond-a-reasonable-doubt requirement to an element of the offense where the instructions as a

whole repeatedly emphasized the beyond-a-reasonable-doubt standard). The jury instructions here contained identical language to that which the supreme court found was not plainly erroneous in *Caine*. *See id.* at 355. The district court's initial instructions correctly stated the standard of proof as beyond a reasonable doubt and at no point did the district court state any other standard of proof. It merely did not reiterate its instructions before presenting the jury with additional questions.

Under other circumstances, we might hesitate because the district court added that the presumption of innocence applied "unless and until the jury determines Defendant has been proven guilty beyond a reasonable doubt." The reference to "unless and until" could theoretically invite a juror to speculate that the state need not prove the elements of sentencing beyond a reasonable doubt because by the time the jury considered the sentencing issues it had already found Hussein guilty. But we do not think this constitutes a plain error here, because the jury convicted Hussein beyond a reasonable doubt of aiding and abetting the robbery and the undisputed evidence was that four attackers committed the robbery. So to the extent the district court's initial instructions might be read as not expressly instructing the jury as to the sentencing standard of proof, we are satisfied that the jury's guilty verdict demonstrates that the jury implicitly found beyond a reasonable doubt that Hussein engaged with three others in the crime. And the district court's answer to the jurors' question about the continuing force of the unanimity requirement also implicitly indicated that the original high standard continued to apply. We therefore hold that any error in failing to make the jury instructions more explicit as

to sentencing was not plain, and we hold that the jury's finding that the crime was committed by three or more persons was valid.

III

Hussein also argues that that the district court abused its discretion by relying on the finding that the victim was particularly vulnerable as a basis for an upward departure at sentencing without also finding that Hussein knew or should have known of R.B.'s particular vulnerability due to his reduced physical capacity and cognitive impairment. The state concedes the point. Because of this concession and the district court's exclusive reliance on the particular-vulnerability finding when it departed upward, we reverse the sentence and remand for the district court to resentence within its discretion. *See State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009) (requiring remand for resentencing when the record does not contain express, independent justifications for an upward departure).

Affirmed in part, reversed in part, and remanded.