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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1887

State of Minnesota,
Respondent,

vs.

Steven Gary Mlnarik,
Appellant.

Filed October 15, 2013
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-11-16281

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, III, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Maria Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Stoneburner, 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 conviction of first-degree arson, appellant argues that (1) the circumstantial evidence was insufficient to support the conviction; and (2) the

prosecutor committed misconduct by (a) arguing during closing that appellant was "like all criminal defendants" who think they are smart enough to get away with a crime, and (b) misstating the burden of proof during rebuttal. We affirm.

FACTS

On November 4, 2009, Mound police officers and firefighters were called to a fire at a home owned by appellant Steven Gary Mlnarik. Appellant lived on the lower level and rented the upper level to a tenant. Mound Deputy Fire Marshal Anthony Myers arrived at the scene as the fire was being extinguished. Myers spoke with appellant, who said that he had been working in the basement trying to remove an electrical outlet. Appellant said that the saw he was using hit a wire and caused an arc and shut off. Appellant said that the saw was plugged into the outlet that he was attempting to remove. Appellant went out to the garage to check the circuit breaker, saw that it had been tripped, and turned it back on. When appellant returned to the house, he saw heavy smoke and fire around the outlet and went to a neighbor's house to call 911.

Myers examined the basement area where appellant said that he saw the fire and found very little damage near the outlet where appellant said he had been working, which was inconsistent with appellant's explanation about how the fire started. The damage was much greater in the floor trusses and ceiling beams above the outlet. Myers spoke with appellant a second time. This time, appellant said that he had plugged a fluorescent light into the outlet and the saw into an extension cord. He said that the light had gone out, he was uncertain whether the saw had gone out, and he did not recall seeing an arc.

Deputy State Fire Marshal Ron Rahman investigated the fire. He was told that the fire had been in the basement and that it "was high up by the floor joists for the main level, the sub floor, and then the main laminated support beam or brace through the middle of the residence," and his observations were consistent with that report. He determined that the fire did not originate in the area near the outlet and that it originated "just above the laminated support beam and in between floor joists in the basement level just underneath the sub floor of the main level." Rahman determined that the ignition source for the fire was "an open flame device," such as a match or a lighter and that the fire was "incendiary or intentionally set."

Appellant told Rahman that he was working in the basement with a sawzall attempting to separate a metal outlet box from the wall stud. Appellant said that he put up a plastic tarp to protect the rest of the basement from dust and that he was using a fluorescent light to provide illumination. Appellant said that as soon as he began working, the saw and the light went out. Appellant went to the garage to check the circuit breaker, saw that it had been tripped, turned it back on, and returned to the house. As appellant entered the basement, he saw smoke and a fire a few inches from the floor.

Appellant's homeowner's-insurance carrier hired Mark Bishop, a fire explosion investigator, to investigate the fire. Bishop determined that appellant's story that the fire started near the outlet was inconsistent with the fire damage. Bishop explained that a fire spreads upward and outward from the point of origin and that there was no damage to the studs near the outlet. Bishop testified that if the fire had started near the outlet, the

nearby studs would have been charred, if not destroyed, but they were not damaged. The fire damage that Bishop saw was five feet above the outlet and four and one-half feet over from it. Bishop ruled out potential accidental causes of the fire and, with the assistance of an electrical engineer, ruled out potential electrical causes. Bishop determined that the fire was intentionally set and testified that it is very easy to start a fire without leaving behind evidence of an accelerant. Bishop testified:

> Crumpled newspaper works wonderfully and of course by the time it's burned and the fire departments come through and put water on it, you're not going to find it . . . . So it's generally it's called readily available combustibles. Newspaper, toilet tissue, note paper . . . . Paper stuff that's around. Very easy to wedge into a space and start a fire.

Bishop testified further:

> I'm absolutely confident something had to be put up there. Because there is nothing, if you stood there with a propane torch you couldn't get that beam ignited. You might get the sub floor ignited, but to ignite that beam, to get that fire damage on the beam, something is up there. It has to be.

Gary Hoag, a forensic electrical engineer, testified that he did not see any evidence that the outlet that appellant was working on played a role in causing the fire. Hoag also testified that "the appliances, the branch circuits, the wiring, did not play a role in the cause of this fire."

Appellant had insurance coverage in the amount of $264,300 for the residence and $198,300 for personal property. Appellant made a claim for the entire value of the policy on the residence and $44,000 for personal property.

Appellant's insurance carrier hired attorney Randall Gottschalk to get documents

from appellant and to interview appellant and other relevant parties under oath. Appellant's tax records showed that in 2006 he received a $16,149 inheritance and had no income from employment. In 2007, appellant received a $15,700 inheritance and had no income from employment. In 2008, appellant received a $31,088 inheritance and $1,200 in gambling winnings and earned $3,000 doing handyman work for neighbors, but that work ended about one month before the fire. Appellant's mortgage payment was $1,250 per month, and he had monthly bills for gas and electricity, a land-line telephone, and trash services. He also had expenses for food, gasoline, and home and automobile insurance. Appellant stated that he was borrowing on a home-equity line of credit to meet expenses. Appellant stated that he had been trying to sell the house since 2006. The day before the fire, the district court had ruled against appellant in an eviction proceeding against his tenant.

A jury found appellant guilty of first-degree arson. This appeal followed sentencing.

D E C I S I O N

I.

When considering a claim of insufficient evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," was sufficient to allow the jurors to reach the verdict that they reached. *State v. Caine,* 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). We must assume that "the jury believed the [s]tate's witnesses and disbelieved the defense witnesses." *State v. Tscheu,* 758 N.W.2d 849, 858 (Minn. 2008). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence

and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the crime charged. *Bernhardt v. State,* 684 N.W.2d 465, 476-77 (Minn. 2004).

The arson statute provides that "[w]hoever unlawfully by means of fire . . . intentionally destroys or damages any building that is used as a dwelling at the time the act is committed, whether the inhabitant is present therein at the time of the act or not . . . commits arson in the first degree." Minn. Stat. § 609.561, subd. 1 (2008). No witness identified appellant as the person who started the fire in his home, so we must examine the circumstantial evidence supporting his arson conviction.

We apply an elevated, two-step process in reviewing a conviction based on circumstantial evidence. *State v. Nelson*, 812 N.W.2d 184, 188 (Minn. App. 2012). "The first step is to identify the circumstances proved[,] . . . defer[ring] to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with" those circumstances. *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013) (quotation omitted). Second, "we examine independently the reasonable inferences that might be drawn from the circumstances proved[,] . . . giv[ing] no deference to the fact-finder's choice between reasonable inferences." *State v. Boldman*, 813 N.W.2d 102, 107 (Minn. 2012). "Under this second step, we must determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt, not simply whether the inferences that point to guilt are reasonable." *Silvernail*, 831 N.W.2d at 599 (quotation omitted).

The evidence established that appellant was alone in the home at the time of the fire, and in the opinion of two fire investigators, the fire was started from an incendiary source. Other sources were ruled out by the investigators and an electrical engineer. Appellant gave inconsistent statements about his actions before the fire, and the damage from the fire was inconsistent with his statements about how it occurred, particularly his statement that he saw fire coming from the outlet where he was working, although a post-fire inspection showed no fire damage in that area. Also, appellant admitted that he left the basement for only a short time. For these circumstances to be consistent with appellant's hypothesis of his innocence, during the short time that appellant was gone from the basement, someone would have had to enter the home unobserved, start a fire using an incendiary source in the area where appellant had been working, and leave the house unobserved before appellant returned. Further, the record includes evidence that appellant may have been motivated to commit arson because of insufficient funds to meet his monthly mortgage obligation, an inability to sell the house, and an unsuccessful attempt to evict the tenant. On this record, the circumstances proved are consistent only with the conclusion that appellant was guilty of arson.

II.

Appellant did not object to the prosecutor's argument at trial. Unobjected-to prosecutorial misconduct may be reviewed under a modified plain-error standard. *State v. Ramey,* 721 N.W.2d 294, 297-99 (Minn. 2006). Plain error exists if there is an error that is plain and that affects the defendant's substantial rights. *State v. Washington,* 725 N.W.2d 125, 133 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007). If the

defendant meets the burden of showing plain error, the burden shifts to the state to show that the error did not affect the defendant's substantial rights. *Ramey,* 721 N.W.2d at 302. "Prosecutorial misconduct affects substantial rights if there is a reasonable likelihood that the absence of misconduct would have had a significant effect on the jury's verdict. *State v. Davis,* 735 N.W.2d 674, 681- 82 (Minn. 2007).

Appellant argues that the prosecutor committed misconduct by referring to appellant's story that he was working on an outlet in the basement and then stating, "What really happened is that [appellant], like all criminal defendants, think they are smart enough to get away with it." It is improper for a prosecutor to disparage the defense. *State* v. *Griese,* 565 N.W.2d 419, 427 (Minn. 1997). Disparaging the defense means belittling a defense in the abstract, for example, by implying that the offered defense is one that a defendant will raise when nothing else will work. *State* v. *Salitros,* 499 N.W.2d 815, 818 (Minn. 1993). But a prosecutor is free to argue that there is no merit to a particular defense in view of the evidence or no merit to a particular argument. *Salitros,* 499 N.W.2 at 818.

The prosecutor's argument, read as a whole, was based on the evidence presented at trial. The argument was that appellant's story that the fire accidentally started near the outlet was inconsistent with the experts' testimony that the fire was deliberately started between the floor joists, which meant that appellant, who was the only person present, deliberately started the fire. The argument, as a whole, was not improper. *See State* v. *Matthews,* 779 N.W.2d 543, 552 (Minn. 2010) (concluding that argument describing defense theory as concocted, ridiculous, and unbelievable was directed at

credibility of defendant's description of events and not at validity of a particular defense in the abstract). To the extent that comparing appellant to "all criminal defendants" was improper, it was an isolated remark, and there is not a reasonable likelihood that its absence would have had a significant effect on the jury's verdict.

Appellant also objects to the prosecutor's description of reasonable doubt during rebuttal argument. The prosecutor argued:

> A reasonable doubt, ladies and gentlemen is nothing magic, it is nothing mysterious. It's the same burden the State has used in court since the inception of the country. It is the same burden that people are convicted under every day in this country. Based on your reasons, based on your common sense, based on your life experiences, based on, ladies and gentlemen, as one juror said during jury selection, sometimes it is based on your gut.
>
> What does your gut tell you? Does your gut tell you that the experts are telling the truth? Does your gut tell you that [the tenant] is telling the truth? Does your gut tell you that he's telling the truth?
>
> Now ladies and gentlemen, as I said, there's nothing magical about reasonable doubt. Think of it this way, if you go back in that room and you started to deliberate, and in your gut, in your heart you say to yourself, I think he did it, I think he did it, he started his house on fire, I think he had the intent that's what I think. Look at it this way, if you can say to yourself comfortably, if you can comfortable say to yourself I think he did it, then you have no reasonable doubt, because if you have reasonable doubt, you couldn't say that to yourself.

Appellant argues that the prosecutor misstated the reasonable-doubt standard by telling jurors to rely on their "gut" in determining appellant's guilt or innocence. Although the argument was directed toward the jury's assessment of witness credibility, it was inconsistent with the reasonable-doubt standard because the reasonable-doubt standard requires jurors to apply the same level of reason and common sense that they would apply

when making their most important decisions; it requires the application of reason, rather than a gut feeling. But the district court instructed the jury:

> Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based on reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.

The district court also instructed the jury, "If an attorney's argument contains any statement of the law, that differs from the law that I give you, you should disregard their statement." Because we presume that the jury followed the court's instructions, any improper argument about the reasonable-doubt standard did not affect appellant's substantial rights. *See State v. McDonough*, 631 N.W.2d 373, 389 n.2 (Minn. 2001) (stating that presecutor's attempt to shift burden of proof is "often nonprejudicial and harmless where, as here, the district court clearly and thoroughly instructed the jury regarding the burden of proof"); *State v. Buggs*, 581 N.W.2d 329, 341-42 (Minn. 1998) (stating that erroneous comment was harmless error when district court clearly and thoroughly instructed jury that appellant had no burden of proof or duty to produce evidence).

III.

The state argues that the assertions in appellant's pro se brief should not be considered because they are not supported by argument or authority. *See State v. Yang,* 774 N.W.2d 539, 552 (Minn. 2009) (stating that "an 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”).

The first two pages of appellant’s pro se brief address alleged events that are not relevant to the arson offense. Appellant also asserts that his trial counsel was ineffective, but he does not explain his claim of ineffective assistance and asserts only that trial counsel was not prepared and did not represent him the way that she said she would. Because these assertions are not supported by any argument or authority, they are waived. Finally, appellant challenges the experts’ credibility, his tenant’s credibility, and the credibility of the evidence of motive. It is the jury’s role to determine credibility. *State v. Berrios*, 788 N.W.2d 135, 142 (Minn. App. 2010).

Affirmed.