STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1099

State of Minnesota,
Respondent,

vs.

Darryl K. Brown,
Appellant.

Filed July 8, 2008
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 06056214

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Worke, Judge; and Collins, Judge.*

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

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

STONEBURNER, Judge

Appellant challenges his conviction of felony theft, arguing that the prosecutor committed misconduct constituting reversible error. Appellant also challenges the portion of his sentence ordering restitution. Because the prosecutor did not commit misconduct, we affirm appellant's conviction. Because appellant failed to timely challenge the restitution order, we affirm the sentence.

FACTS

B.J. was waiting for a friend on Chicago Avenue in South Minneapolis and talking on his cellular telephone when a person on a bicycle rode by and snatched the phone out of B.J.'s hand. B.J. gave chase. The thief abandoned the bicycle. B.J. continued the chase and found the thief lying on the ground in a backyard. B.J. demanded his phone. The thief threw the phone at B.J., jumped up and reached into his pocket. B.J., who thought the thief could be reaching for a gun, used the phone to call the police as the thief ran away. B.J. then returned to the location of the abandoned bicycle. When the police arrived, B.J. pointed to a man on the north side of Lake Street, about a quarter of a block away, and said he was the thief. The police arrested that man, appellant, Darryl K. Brown. Brown was charged with felony theft from a person, convicted by a jury, and sentenced to a stayed 18-month sentence and payment of restitution in the amount of $150 for damage to B.J.'s cell phone. This appeal followed.

D E C I S I O N

I. Prosecutorial misconduct

Brown argues that the prosecutor committed misconduct during closing argument by prefacing several of his statements with the phrase "I submit." Brown did not object to these statements at trial. This court applies plain-error analysis when examining unobjected-to prosecutorial conduct. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Under this analysis, we examine whether (1) there is error; (2) the error is plain; and (3) the error affected a defendant's substantial rights. *Id.* at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The defendant bears the burden of demonstrating "both that error occurred and that the error was plain." *Id.* If a defendant demonstrates that plain error occurred, the state bears the burden of proving that there is no reasonable likelihood that the absence of the prosecutor's misconduct would have a significant effect on the jury's verdict. *Id.*

All of the statements that Brown challenges refer to B.J.'s testimony, and Brown argues that by prefacing comments about B.J.'s testimony with "I submit," the prosecutor improperly vouched for B.J.'s testimony. We disagree. It has been consistently held that a prosecutor's use of "the state submits" or "I submit" does not constitute vouching. *See State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000) (holding that the prosecutor's use of "I submit" was not misconduct because it signaled an offer of the state's interpretation of the evidence rather than a personal opinion); *State v. Hobbs*, 713 N.W.2d 884, 888 (Minn. App. 2006) (concluding that the prosecutor's use of "I submit," while acknowledging the jury's role as fact-finder, did not constitute prosecutorial misconduct),

vacated in part on other grounds (Minn. Dec. 12, 2006); *State v. Reed*, 398 N.W.2d 614, 617 (Minn. App. 1986) (distinguishing between the propriety of a prosecutor's use of "the state submits" and "I think"), *review denied* (Minn. Feb. 13, 1987).

The record in this case likewise demonstrates that the prosecutor engaged in permissible analysis of the evidence and vigorous argument that the state's witnesses were credible without vouching for the witnesses. *See State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977) (stating that a prosecutor is permitted to "analyze the evidence and vigorously argue that the state's witnesses are worthy of credibility"). Because Brown has failed to demonstrate that the prosecutor committed misconduct, there was no error, and our plain error analysis ends.

II. Restitution

"A defendant may not challenge restitution after the [statutory] 30-day time period" for such a challenge has expired. Minn. Stat. § 611A.045, subd. 3(b) (2006). Brown concedes that his challenge to the restitution order is untimely, but he argues that he can nonetheless challenge this aspect of his sentence under Minn. Stat. § 244.11, subd. 1 (2006) (providing that a defendant may appeal "any sentence imposed or stayed by the district court"). But a challenged sentence is reviewed for a determination of "whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2006). And we have previously held that failure to challenge a restitution order within 30 days renders a postconviction challenge untimely and precludes review on the merits. *Mason v. State*, 652 N.W.2d 269,

273 (Minn. App. 2002). We conclude that imposition of unchallenged restitution does not make Brown's sentence inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or unwarranted by the district court's findings of fact.

Affirmed.