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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-225

State of Minnesota,
Respondent,

vs.

Paul David Faga,
Appellant.

Filed February 23, 2010
Affirmed
Hudson, Judge

Becker County District Court
File No. 03-CR-07-2103

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

Michael Fritz, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Marie Wolf, Interim Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

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

HUDSON, Judge

On appeal from his conviction of attempted third-degree criminal sexual conduct, appellant argues that his conviction must be reversed because the state failed to prove

beyond a reasonable doubt that he had the specific intent to accomplish penetration with force or coercion; that the prosecutor committed prejudicial misconduct during her closing argument; and that he received ineffective assistance of counsel. Because the evidence was sufficient to support his conviction, the prosecutor did not commit prejudicial misconduct, and appellant has not shown that he received ineffective assistance of counsel, we affirm.

FACTS

In the spring of 2007, appellant Paul Faga offered KM, an 18-year-old woman, a job as a bartender at a bar that he purported to run. KM accepted the offer but only bartended one or two times and spent the majority of her time cleaning during the day shift.

KM turned 19 years old on May 19, 2007. On May 21, 2007, KM received a call from the manager of appellant's bar, asking KM to meet appellant at the Broken Wheel 3 bar in Detroit Lakes. Appellant had previously called the manager and asked her to contact KM to have KM meet him in Detroit Lakes. When the manager could not immediately reach KM, appellant instructed her to also contact two other young female employees. The manager told KM that KM would be posing as someone who would be helping appellant purchase the Broken Wheel 3, that she would be "throwing out numbers," and that she should dress professionally. KM agreed to go to Detroit Lakes because she was told that appellant would pay her hourly wage and because she needed the money.

A male employee of appellant's bar drove appellant to Fargo on May 20, 2007, for medical testing. During the drive to Fargo, appellant told the male employee that he liked KM and had previously had sex with her. The next day, after the tests were finished, appellant and the male employee drove to Detroit Lakes and began drinking. KM and the two other female employees met appellant and the male employee at the Broken Wheel 3 on the evening of May 21, 2007. At the bar, appellant made several remarks to KM about the size of her breasts. KM ignored these remarks, but the owner of the Broken Wheel 3 became offended by appellant's behavior after appellant called the young women his "bitches." The owner of the Broken Wheel 3 determined that the discussions about buying the bar were not legitimate. Appellant and the bar owner got into an argument, and the group left the bar after appellant paid for their drinks.

KM agreed to stay with the group at a hotel in Detroit Lakes because she did not want to drive home after dark. While the other employees went to the hotel, appellant and KM went to a store where appellant purchased swimsuits for the group to use in the pool. While at the store appellant told a store employee that KM was his wife and put his arm around her. Appellant also told the hotel desk clerk that KM was his new wife. KM ignored the comments, believing appellant to be intoxicated.

Later, while KM was in the bathroom, the other three employees left to buy food, leaving KM alone with appellant in one of the two hotel rooms rented by the group. KM sat on a couch watching television and appellant sat next to her. After ten to fifteen minutes appellant put his hand on KM's thigh, telling her that their respective boyfriend and girlfriend were not there and that "[w]hat happens in Detroit Lakes stays in Detroit

Lakes." KM testified that she was "appalled" and went into the bathroom. She went into the bathroom several more times because she was uncomfortable and was trying to avoid being alone with appellant. While in the bathroom, KM heard a knock at the door to the room. KM believed that this knock was the other employees dropping off food. One of the female employees who dropped off the food testified that when appellant answered the door while KM was in the bathroom, he told her that he and KM were going to the hot tub.

When KM came out of the bathroom she saw the food on top of the hotel-room desk. While walking across the room, KM noticed appellant lying completely naked on the bed. KM believed that appellant was sleeping and drunk. She went to retrieve her cellular phone and purse from the coffee table. While her back was turned, appellant grabbed her and threw her onto the bed. Still naked, appellant crawled on top of KM and tried to kiss her. KM tried to push appellant away and told him "no." Appellant continued to try to kiss KM despite her trying to push him away. Appellant repeatedly stated that he wanted to perform oral sex on KM and tried to put his hand down her pants. Appellant also tried to pull down KM's pants. When appellant proceeded to move his body down towards KM's vaginal area, KM was able to push appellant off her. KM began crying, retrieved her phone, and left the room. KM testified that she felt "distraught about the whole thing."

KM went to the pool area and called her boyfriend. The male employee came to the pool area and asked if KM was okay. She testified that she did not know what to do and needed time to think so she did not immediately tell anyone what had happened. KM

went back to the rooms to get advice from the other female employees about the incident when she heard appellant telling the women that "she liked it and I went down on her," among other obscene comments. KM again began crying and yelled at appellant that she was quitting her job and leaving the hotel immediately. KM grabbed her purse and left the hotel "in a hurry" shortly after midnight.

Appellant was subsequently charged with attempted third-degree criminal sexual conduct, with force or coercion, in violation of Minn. Stat. §§ 609.17, subd. 1, 609.344, subds. 1(c), 2 (2006). After a jury trial, he was found guilty. This appeal follows.

D E C I S I O N

I

Appellant argues that his conviction must be reversed because the state failed to prove beyond a reasonable doubt that he possessed the specific intent to accomplish penetration with force or coercion. He argues that he did not intend to use force or coercion to engage in sexual penetration with KM, but intended only to convince or persuade KM to engage in sexual penetration.

Review of a claim of insufficient evidence is "limited to ascertaining whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). This court does not retry facts but takes the view of the evidence most favorable to the state and assumes that the jury believed the state's witnesses and disbelieved any contrary evidence. *Id.* If the jury could have reasonably found the defendant guilty, giving due regard to the presumption

of innocence and the state's burden of proof beyond a reasonable doubt, the verdict will not be reversed. *State v. Pierson*, 530 N.W.2d 784, 787 (Minn. 1995).

A conviction based solely on circumstantial evidence requires stricter scrutiny than those based in part on direct evidence. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994). "[W]e examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with innocence." *State v. Stein*, __ N.W.2d __, __, 2010 WL 26520, at *6 (Minn. Jan. 7, 2010). Nevertheless, the jury is in the best position to evaluate the circumstantial evidence surrounding the crime, and its verdict is entitled to due deference. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). In circumstantial evidence cases, "inconsistencies in the state's case or possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable." *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008).

The state had the burden of proving the elements of attempted third-degree criminal sexual conduct beyond a reasonable doubt. A person is guilty of an attempt when, "with intent to commit a crime, [that person] does an act which is a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1. Criminal liability for attempt requires specific intent to commit the particular crime for which the defendant is charged. *State v. Zupetz*, 322 N.W.2d 730, 735 (Minn. 1982). Intent "is generally proved by inferences drawn from a person's words or actions in light of all the surrounding circumstances." *State v. Thompson*, 544 N.W.2d 8, 11 (Minn. 1996).

As relevant here, a person is guilty of third-degree criminal sexual conduct if he "engages in sexual penetration with another person" and "uses force or coercion to accomplish the penetration." Minn. Stat. § 609.344, subd. 1(c). Force is defined as

> the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit.

Minn. Stat. § 609.341, subd. 3 (2006).

Coercion is defined as

> the use by the actor of words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon the complainant or another, or the use by the actor of confinement, or superior size and strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant's will. Proof of coercion does not require proof of a specific act or threat.

Id., subd. 14 (2006).

Viewed in the light most favorable to the jury verdict, the evidence is sufficient to convict appellant. Appellant's acts of grabbing KM while her back was turned, throwing her onto the bed, climbing on top of her while naked, attempting to put his hand down her pants, and attempting to remove her pants are all acts that may constitute the use of force or coercion. During this sequence of events, appellant was naked and repeatedly told KM that he wanted to perform oral sex on her and that no one would know about it. The jury was entitled to infer that this series of acts and statements showed appellant's intent to

sexually penetrate KM using force or coercion and his willingness to use his superior size and strength to make KM submit to him.

While appellant's claim, if taken as true, would provide a reasonable inference other than guilt, the jury did not believe it. That circumstantial evidence warrants stricter appellate scrutiny "does not mean that the jury is to abdicate its function of fact finding to the extent that it may not determine what evidence is entitled to belief where the testimony of defendant is inconsistent with other circumstances proved." *State v. Pankratz*, 238 Minn. 517, 532, 57 N.W.2d 635, 644 (1953). The jury made the reasonable inference based on the evidence as a whole that appellant intended to sexually penetrate KM using force or coercion and took a substantial step toward the commission of that crime.

II

Appellant argues that the prosecutor committed prejudicial misconduct during her closing argument that warrants reversal. During her rebuttal closing argument, the prosecutor made a statement concerning the standard of proof, which appellant claims misled the jury. But no objection was made to the statement during the trial and no specific cautionary instruction was requested by appellant. "Ordinarily, by failing to take either step the defendant is deemed to have forfeited his right to have the issue considered on appeal." *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). "[A]n unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). "For unobjected-to prosecutorial misconduct, we apply a modified plain error test." *State v. Wren*, 738 N.W.2d 378, 389

(Minn. 2007). Under this test, appellant must establish that the alleged prosecutorial misconduct constitutes error and that the error was plain. *Id.* at 393. Error is plain if it "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. The burden then shifts to the state to show that the error did not affect appellant's substantial rights. *Id.* Substantial rights are affected if the error affected the outcome of the case and was prejudicial. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). To determine this, we consider "[1] the strength of the evidence against the defendant, [2] the pervasiveness of the improper suggestions, and [3] whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). This court considers the closing argument as a whole when determining whether prosecutorial misconduct occurred. *State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005).

Appellant challenges the portion of the prosecutor's rebuttal closing argument in which she gave an example regarding the standard of proof beyond a reasonable doubt. The prosecutor initially defined the standard of proof beyond a reasonable doubt as "such proof as ordinary prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean doubt beyond all possibility of a doubt." This is nearly identical to the district court's jury instruction that defines the standard of proof beyond a reasonable doubt. The prosecutor then gave a personal example of reasonable doubt, stating:

> Before I got married I met my husband and we dated. We dated a number of years. He asked me to marry him, and I said yes. So we plan the wedding. As the wedding date drew nearer things go through your mind. Well, I love him but is this the person I am going to spend the rest of my life with? Are things going to change? What about finances? Are we going to share our finances? Are we going to have one checking account? Are we going to keep it separate? I don't know. I have some doubts about that. I don't know how we are going to handle that. We haven't really talked about it, but I love him. We might have talked about children. We both want them at some point. What if my mind changes and at some point I don't want them? All of these doubts go—can go through a person's mind. They went through my mind before I got married. Are they reasonable? You bet they are, but I still got married.

Appellant argues that this example implied to the jury that it could convict appellant even if it had reasonable doubt as to his guilt. This statement, in isolation, was most likely confusing to the jurors and borders on misstating the burden of proof. But the prosecutor also accurately defined the burden of proof immediately before relating her "marriage" example. In *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000), the appellant contended that the prosecutor used a misleading analogy to imply that the state's burden of proof was not beyond a reasonable doubt.[1] The supreme court noted that "[m]isstatements of the burden of proof are highly improper and would, if demonstrated, constitute prosecutorial misconduct." *Id.* But the supreme court held that the prosecutor's analogy, while questionable and arguably confusing, did "not rise to the level of plain error." *Id.*

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[1] In the *Hunt* closing argument, "the prosecutor made an analogy to the ancient Greek juries, the substance of which implied that Greek juries would place a stone on either side of a scale for each successful argument by one party or the other." *Hunt*, 615 N.W.2d at 302.

Here, as in *Hunt*, the prosecutor used an analogy that arguably confused the jury and implied the wrong burden of proof. But the prosecutor here also stated the correct burden of proof immediately prior to the analogy. The prosecutor here also stated at the end of her analogy that "[t]here is no reasonable doubt if you are morally certain of your decision." The "moral certainty" analogy has been accepted by our supreme court. *See State v. Moorman*, 505 N.W.2d 593, 605 (Minn. 1993). And the rest of the prosecutor's closing argument focused on the elements of the offense and how the facts in evidence fit into those elements. She concluded that the testimony proved beyond a reasonable doubt that appellant committed the crime. When improper remarks are isolated and not representative of the closing argument as a whole, they have not been found to be prejudicial. *See State v. Glaze*, 452 N.W.2d 655, 662 (Minn. 1990).

The district court also instructed the jury, once before any testimony and again during its final instructions, that the attorneys' statements are not evidence and that any statement differing from the district court's instructions of law must be disregarded. The jury is presumed to have followed the district court's instructions. *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005). Because the prosecutor also stated the correct burden of proof in her closing argument, because the improper analogy was isolated, and because the district court instructed the jury on the correct burden of proof and also instructed the jury to disregard any statements to the contrary by an attorney, the prosecutor's conduct did not deny appellant his right to a fair trial. *See Hunt*, 615 N.W.2d at 302.

III

Appellant makes various pro se claims in which he appears to argue that he received ineffective assistance of counsel. Appellant alleges that his attorney (1) was aware that appellant has dyslexia but failed to make a record of that fact with the district court and failed to request a note-taker; (2) failed to call witnesses and submit evidence on his behalf; and (3) had conflicts of interest because the attorney knew the district court judge and one of the jurors.

To support a claim of ineffective assistance of counsel, appellant must affirmatively prove both "that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotations omitted).

Appellant is unable to show on this record that his counsel's representation fell below an objective standard of reasonableness. The record does not indicate that appellant timely requested that his attorney obtain a note-taker. There is also no evidence that appellant's counsel failed to seek evidence or to question witnesses, or that a conflict of interest was present. Furthermore, it does not appear that there is a reasonable probability that, but for any errors, the result of the trial would have been different.

Affirmed.