STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2058

State of Minnesota,
Respondent,

vs.

Jack Kramer Allen,
Appellant.

Filed October 5, 2010
Affirmed
Halbrooks, Judge

Wadena County District Court
File No. 80-CR-09-582

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Kyra L. Ladd, Wadena County Attorney, Wadena, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

HALBROOKS, Judge

Appellant challenges his conviction of fifth-degree felony assault, arguing that the evidence is insufficient to sustain his conviction and that the prosecutor committed misconduct. We affirm.

FACTS

On May 7, 2009, appellant Jack Kramer Allen engaged in a physical altercation with D.H. that resulted in injuries to D.H. and some property damage. Appellant was charged with two counts of first-degree burglary, one count of felony fifth-degree assault, and one count of first-degree criminal damage to property. Before trial, appellant notified the state of his intent to claim self-defense. Appellant waived his right to a jury trial, and the case proceeded to a bench trial.

During trial, the state called three witnesses, D.H., and two police officers. The witnesses testified that appellant arrived at D.H.'s residence that evening with another individual. At some point, appellant and D.H. got into an argument, and appellant was removed from D.H.'s residence. But the witnesses also testified that a short time later, appellant returned to D.H.'s residence and assaulted D.H. Appellant testified on his own behalf and denied that he returned to D.H.'s residence and argued that he acted in self-defense.

Based on its findings, the district court found appellant not guilty of the charges of burglary and criminal damage to property. But the district court found appellant guilty of felony fifth-degree assault and rejected appellant's claim of self-defense. The district

court noted that "[t]he defense of self-defense can be nullified if a person had a reasonable opportunity to retreat" and concluded that because appellant voluntarily returned to the altercation, he could not claim self-defense. The district court also found that the state had demonstrated the requisite prior offenses necessary to increase the assault to a felony level. *See* Minn. Stat. § 609.224, subd. 4(b) (2008). Appellant was sentenced to 18 months in prison, stayed for five years. This appeal follows.

D E C I S I O N

I.

Appellant argues that the evidence was insufficient to prove that he did not act in self-defense. *See State v. Boitnott*, 443 N.W.2d 527, 532 (Minn. 1989) (noting that the state has the burden of disproving a defendant's claim of self-defense). In considering a claim of insufficient evidence, this court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the [fact-finder] to reach the verdict which [it] did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This court will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). The principle that this court does not reweigh

evidence applies whether the trier of fact is a jury or the district court. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009).

The testimony at trial consisted of three eyewitnesses, D.H., the responding police officers, and appellant. While the testimony of the three eyewitnesses and D.H. varied to some degree, the testimony on the material issues was consistent. J.S. testified that appellant arrived at D.H.'s residence that evening, and at some point, appellant began asking D.H.'s friend about her age. According to J.S., D.H. told appellant that everyone was 18 years old, and appellant took offense to that statement. The two got into an argument and appellant "kind of pushed [D.H.] a little bit." After a brief scuffle, the two were separated. Appellant left the trailer, but came back about ten minutes later and slammed D.H. into a window. J.S. testified that D.H. called 911 when appellant was leaving after the first confrontation, and the police arrived almost immediately after the second altercation.

J.Q. also testified that two incidents occurred that evening and that D.H. called 911 following the first altercation. But J.Q. testified that the time between the first and second incidents was about 20 to 30 minutes. N.E. also testified to two altercations between appellant and D.H. Notably, N.E. testified that D.H. called 911 after the second incident occurred, but agreed with J.Q. that approximately 20 minutes elapsed between the two incidents.

D.H. also testified. Similar to J.S., D.H. stated that the first argument started because appellant began asking his friends personal questions, and D.H. replied that everyone was of age. The two got into a scuffle, and the other individuals eventually

separated the two. D.H. testified that appellant made the first contact between the two. According to D.H., he called the police after the first scuffle and that only five to six minutes elapsed between the two incidents.

Officer Nick Grabe, the responding officer, also testified. According to Officer Grabe, he received the dispatch about the incident and arrived at D.H.'s residence within minutes of that dispatch.

Appellant elected to testify on his own behalf. Appellant testified that while he was in D.H.'s trailer, he asked D.H.'s friend her age because she looked young. At that point, D.H. "blew up." The two exchanged words, and D.H. swung at appellant. Appellant testified that he then grabbed D.H. by the throat and tried to walk him to the couch to put him down, but the two fell through the window. Others grabbed appellant and pushed him out of the door. Appellant testified that this was the only incident that evening.

Appellant argues that the district court erred by finding that two incidents occurred that evening, citing the inconsistent testimony of the state's eyewitnesses regarding the timing of events. We review factual findings for clear error, "giving substantial deference to the district court's observation of the witnesses and its advantageous position from which to understand the nature of the conduct at issue." *State v. Marinaro*, 768 N.W.2d 393, 397 (Minn. App. 2009), *review denied* (Minn. Sept. 29, 2009). The three eyewitnesses and D.H. testified that two incidents occurred between appellant and D.H. that evening. Only appellant disagreed with this testimony. And while there were some discrepancies in the testimony regarding the timing of the phone call to the police,

the district court found that the police were called after the second incident, which is consistent with N.E.'s testimony. This factual finding is also consistent with the testimony of Officer Grabe that he arrived a little more than two minutes after the 911 call was made. The district court was entitled to weigh the evidence and resolve the inconsistencies according to its own credibility determinations. Appellate courts are not at liberty to reweigh the testimony and reach their own conclusions on review. *Franks*, 765 N.W.2d at 73. Because this finding is supported by the record and is not clearly erroneous, we will not disturb the finding on appeal.[1]

Therefore, the record also supports the district court's conclusion that appellant did not act in self-defense. After the first altercation, appellant left D.H.'s residence. But he returned shortly thereafter and reengaged in a physical altercation by grabbing D.H.'s throat and throwing him into a window. This is inconsistent with appellant's theory of self-defense. *See State v. Basting*, 572 N.W.2d 281, 285 (Minn. 1997) (noting that the elements of self-defense include "the absence of a reasonable possibility of retreat to avoid the danger"). We conclude that the evidence is sufficient to sustain the determination that appellant did not act in self-defense.

[1] Appellant also argues that the district court erred with respect to another factual finding, namely that "[a]t one point, [appellant] began a conversation with a female who was present inside the residence. Although the exact details and context of statements remain unclear, at one point, [D.H.] made a comment about the female's age to [appellant]. [Appellant] took offense to the comment and confronted [D.H.]." Our review of the record leads us to conclude that this is an accurate recitation of the facts and is not clearly erroneous.

II.

Appellant also argues that he is entitled to a new trial because the prosecutor engaged in misconduct. Appellant did not object to the alleged misconduct at trial, which generally results in a waiver of the right to appellate review. *See State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997). This court's review is limited to whether the unobjected-to conduct constitutes plain error. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). The plain-error test applied to prosecutorial-misconduct claims requires the appellant to show that there was (1) error (2) that was plain, and (3) affects substantial rights. *Id.* at 302. A plain error "must be clear, or obvious, rather than merely hypothetical or debatable." *State v. Leutschaft*, 759 N.W.2d 414, 420 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009).

If appellant can demonstrate plain error, the burden shifts to the state to show that appellant's substantial rights were not affected or, in other words, that "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *Ramsey*, 721 N.W.2d at 302 (quotation omitted). If the state fails to meet this burden, an appellate court must then determine "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* This court will reverse for prosecutorial misconduct only if, in light of the whole trial, the misconduct impaired the defendant's right to a fair trial. *Leutschaft*, 759 N.W.2d at 418.

Appellant first argues that that the prosecutor engaged in misconduct by soliciting testimony from Officer Grabe about threatening comments appellant made following his arrest. According to his testimony, after Officer Grabe arrived at the scene and learned

that appellant had assaulted D.H., he arrested appellant and transported him to jail. The testimony then proceeded as follows:

> PROSECUTOR: Between leaving the residence of [D.H.] and transporting [appellant] to the county jail, [did] you have any conversations with [appellant]?
> OFFICER: [Appellant] told me he was going to kick my ass if he didn't have the cuffs on. I was lucky I was a cop. That one of these days we are going to dance, I assume then fight.

This was the extent of the prosecutor's reference to appellant's comments. Appellant asserts that this evidence was *Spreigl* evidence and that it was inadmissible because the state failed to follow proper *Spreigl* procedures. Eliciting inadmissible evidence is "improper for prosecutors." *Ramey*, 721 N.W.2d at 300.

While the prosecutor's question to the officer may have been improper,[2] we conclude that any misconduct did not have an effect on appellant's substantial rights. The discussion regarding appellant's statements to Officer Grabe was extremely brief. The prosecutor did not refer to these statements again during trial or closing arguments. In addition, there was ample evidence in the record to support the ultimate determination that appellant engaged in the assault. This brief reference to appellant's threatening remarks did not have a significant impact on the district court's verdict. *See State v. Prtine*, 784 N.W.2d 303, 316 (Minn. 2010) (declining to determine whether eliciting improper character evidence was misconduct because the brief and isolated nature of the statement did not affect the appellant's substantial rights); *State v. Harris*, 521 N.W.2d

[2] The state argues that soliciting this evidence was not misconduct because it constituted "immediate episode" evidence. Because we resolve this issue on other grounds, we do not address the state's argument.

348, 354 n.9 (Minn. 1994) ("We will only excuse the asking of improper questions where they are brief, not repeated, and unlikely to have had a substantial effect on the jury."). Additionally, the district court's findings of fact do not refer to this exchange, further suggesting that the comments did not have an effect on the verdict.

In fact, we note that the officer's comments regarding appellant's threats did become relevant shortly after the prosecutor elicited the complained-of testimony. On cross-examination, appellant's counsel asked Officer Grabe why he did not take appellant's statement that evening, to which Officer Grabe replied: "Because of his demeanor. He was extremely intoxicated, threatened me, told me he wanted to fight me." Because appellant's counsel also elicited this testimony and because it appears to have been relevant on cross-examination, we conclude that appellant's substantial rights were not affected by any misconduct on the part of the prosecutor by eliciting then-inadmissible evidence.

Appellant also argues that the prosecutor engaged in misconduct during her closing argument. During her closing argument, the prosecutor made the following comment: "The defendant, Judge, has a history of prior assaultive behaviors and that's evidenced by the elements as it relates to Count III with two prior convictions that support the fact that he's got two prior domestic violence convictions that get us to a felony assault." Appellant contends that the prosecutor used his prior convictions to show that he had the propensity to commit violent acts. Generally, evidence of a person's character or trait of character is not admissible to prove action in conformity therewith. Minn. R. Evid. 404(a).

On this record, we disagree that the comment by the prosecutor was misconduct. Minn. Stat. § 609.224, subd. 4(b), provides that it is a felony offense to commit an assault within three years of two or more qualified domestic-violence related convictions. Earlier in the proceeding, appellant agreed to the admission of his convictions into evidence at trial, but we see nothing in the record that supports appellant's argument that he stipulated to the prior-conviction element of the felony offense. Thus it was not improper for the prosecutor to refer to the convictions during her closing argument in order to demonstrate beyond a reasonable doubt that the prior-conviction element was satisfied. This was the only reference to appellant's prior convictions during the prosecutor's closing argument, and while the prosecutor's decision to refer to appellant's "history of prior assaultive behaviors" is questionable, we conclude that appellant failed to demonstrate that this comment, when taken in the context of the prosecutor's closing argument and its burden of proof on an element of appellant's felony assault charge, constitutes plain error.

Even if the prosecutor's comment amounted to misconduct, appellant's substantial rights were not affected by the reference to his prior convictions. The district court had knowledge of appellant's prior convictions, and the prosecutor's fleeting reference to "prior assaultive behaviors" was unlikely to have affected the district court's determination that appellant assaulted D.H. There was sufficient evidence in the record to support a finding of guilt, the convictions themselves were not improperly before the district court, and the district court made no reference to appellant's criminal history in its

findings except to note that the convictions satisfied an essential element of the state's case.

Affirmed.