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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1417**

State of Minnesota,
Respondent,

vs.

D'Marco Shane Buckney,
Appellant.

**Filed July 23, 2012
Affirmed
Connolly, Judge**

Dakota County District Court
File No. 19HA-CR-10-3810

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

James C. Backstrom, Dakota County Attorney, Scott A. Hersey, Assistant County
Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Johnson, Chief Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his conviction of robbery, assault, and being an ineligible person in possession of a firearm, arguing that the circumstantial evidence was not sufficient to support the jury's verdict, that the prosecutor's misstatement on "beyond a reasonable doubt" during rebuttal closing argument had a significant effect on the jury's verdict, and that the district court abused its discretion in permitting the jury to hear for a second time the tape of appellant's statement to a detective. Because we see sufficient evidence to support the verdict, no likelihood that the absence of the prosecutor's statement would have had a significant effect on the jury's verdict, and no abuse of discretion in permitting the jury to hear the tape, we affirm.

FACTS

On October 27, 2010, \$978 was taken from the Burnsville branch of a bank. In connection with this event, appellant D'Marco Shane Buckney was investigated. He gave a recorded statement to a detective saying first that the van in which the items used in the robbery were found was his and that his gun had been stolen; then that the van had been stolen from him at gunpoint by a person using some of those items; then that this person had stolen only the keys to the van, not the van itself. Appellant also said in a phone call that the wig worn by the robber during the robbery was his.

Appellant was charged with robbery, assault, and being an ineligible person in possession of a firearm. Appellant did not testify at his trial; however, four bank employees did testify.

C.V., a teller, testified that a man with a gun walked into the bank, approached her window, pointed the gun at her, and said he wanted all the money from her drawer. She opened the drawer and put money in the tan fabric bag the man gave her. The man then spoke to L.W., another teller, who was next to C.V., took the bag of money, and left.

L.W. testified that she was in the process of delivering some money to C.V. when a man walked up and asked C.V. to empty her drawer. He then pointed the gun at L.W. and told her to empty her drawer. When L.W. replied that she did not have a drawer, he turned, yelled at the people behind him not to do anything, grabbed the bag in which C.V. had put money, and left.

P.M., the bank's senior fraud investigator, testified that her counting and reconciling of C.V.'s drawer immediately after the robbery showed that \$978 was missing.

M.A., the branch manager, testified that, from his office window, he saw a man run across the street. He then saw a man in the same clothes, but with significantly longer hair, enter the bank, and concluded that the man had put on a wig. He saw that the man was wearing gloves, had a gun in his hand, and pointed the gun at the two tellers.

Two informants, A.C. and C.H., who were acquaintances of appellant, also testified, and their testimony was corroborated by the testimony of the police officer to whom A.C. gave information.

The jury found appellant guilty as charged. He challenges his convictions, arguing that (1) the circumstantial evidence supports an inference other than that of his guilt and was therefore insufficient to support his convictions; (2) there is a reasonable likelihood

that the prosecutor's misstatement in rebuttal closing argument had a significant effect on the jury's verdict; and (3) the district court abused its discretion in granting the jury's request during deliberations to review the evidence of appellant's recorded statement to the detective.

D E C I S I O N

I. Sufficiency of the Evidence

A conviction based entirely on circumstantial evidence merits stricter scrutiny than a conviction based in part on direct evidence. *State v. Jones*, 516 N.W.2d 545, 549 (Minn. 1994).¹ A jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). A reviewing court does not examine conflicting facts or circumstances that the jury has rejected, or the inferences from them; it examines only the inferences that can be drawn from the circumstances proved. *State v. Stein*, 776 N.W.2d 709, 715 (Minn. 2010). In assessing those inferences, the court examines whether there are any other reasonable inferences that are inconsistent with guilt. *Id.* at 716.

¹ Because two witnesses testified that appellant admitted to them that he committed the robbery, the state argues that the evidence is not purely circumstantial because a confession is direct, not circumstantial, evidence. *See State v. Vaughn*, 361 N.W.2d 54, 56 (Minn. 1985) (“A confession is any statement by a person in which he explicitly or implicitly admits his guilt of a crime.”); *State v. McClain*, 208 Minn. 91, 95, 292 N.W. 753, 755 (Minn. 1940) (“[A] confession is adequately supported [as the basis of a conviction] by other plain admissions of guilt made both by declarations and conduct of the defendant.”). But even using the “stricter scrutiny” required for circumstantial evidence, *see Jones*, 516 N.W.2d at 549, the witnesses’ testimony of appellant’s confessions, as well as the other evidence here, is sufficient to support the convictions.

Appellant argues that, while the state proved the robbery happened, it did not prove that he was the robber because “[t]he only evidence actually linking [appellant] to the commission of this crime . . . came from [A.C.’s] and [C.H.’s] claims that [appellant] confessed to them.” But the jury apparently believed the uncontradicted and corroborated testimony of A.C. and C.H. A.C. testified that he had known appellant ten or eleven years and that he had given police officer M.F. information about appellant in 2010. That information included: (1) before the robbery, appellant told A.C. he was planning a robbery; (2) he asked A.C. to provide a car and drive it; (3) he told A.C. he had bought a gun and showed A.C. the gun; (4) after the robbery, appellant told A.C. he had robbed a bank and was disappointed by the amount of money he took; (5) appellant showed A.C. items used in the robbery, including a wig, a piece of white cloth, a fabric bag, and the gun, which were then in appellant’s van; (6) A.C. did not remember appellant saying he had used the van in the robbery; (7) appellant said he was wearing the same shirt, a white button-up shirt, that he had worn for the robbery; (8) the gun was also in the van, and appellant left it there when he fled the van when it was stopped by a police officer, leaving A.C. and his son inside it; (9) when the police showed A.C. pictures of the robbery and of items used in it, he recognized appellant and the items appellant had showed him; (10) specifically, A.C. recognized the sleeve of a white T-shirt that appellant was wearing over his face in the picture of the robbery; and (11) appellant gave A.C. some money when they were together the day after the robbery, but both of them were drunk and A.C. did not remember how much money.²

² A.C. also testified that he had a criminal record and was on house arrest.

C.H. testified that appellant told him: (1) appellant, in a brown wig, a white mask, and “a white T-shirt, button-up to the collar” and carrying a bag and a 9 mm handgun, robbed the Burnsville bank; (2) appellant gave A.C. some money after the robbery; (3) when stopped by the police while driving his van, appellant fled on foot, leaving the gun, the bags, his mask and some gloves in the van; and (4) appellant had purchased the gun from A.C. and someone else for about \$400.³

The testimony of C.H. corroborated that of A.C., and both informants’ testimony was corroborated by the testimony of police officer M.F. and of the detective. Thus, the jury heard information from several sources that supported no inference other than that of appellant’s guilt. We therefore conclude there was sufficient evidence to support his convictions.

II. Prosecutorial Misconduct

When a defendant has not objected to it, prosecutorial misconduct is reviewed under the plain-error standard, which requires (1) an error that (2) is plain and (2) no reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

In closing argument, appellant’s counsel referred to the fact that the items found in appellant’s van were similar to items the bank robber had been described as wearing and using. During closing argument, appellant’s counsel said, “[S]imilar is not proof beyond a reasonable doubt, which is the burden the State has in proving this case.” In rebuttal

³ C.H. also testified about his own criminal history and said that the detective to whom he gave a statement said she would report to C.H.’s probation officer that C.H. had been cooperative.

closing argument, the prosecutor said, “[Appellant’s counsel] gave the opinion ‘Well, they are similar and that is not proof beyond a reasonable doubt.’ Proof beyond a reasonable doubt is what you believe when you make that comparison. It is up to you, not to me and not to [appellant’s attorney].”

Appellant argues that, with these words, the prosecutor impermissibly “diminished the burden of proof,” “invited the jury to apply its own standard,” and “suggested that the jurors could convict [appellant] if they believed the evidence supported a conviction.” But, even assuming that these statements are true, appellant is not entitled to a new trial on the basis of plain error because the state meets its burden of showing that there was no reasonable likelihood that the absence of this error would have had a significant effect on the jury’s verdict. *See id.* (noting that the state has the burden of showing that the prosecutor’s misconduct did not affect appellant’s substantial rights).

Before closing arguments, the district court instructed the jury that:

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 upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.

After closing argument, the district court asked if the state would like a curative instruction and, at the state’s request, repeated this instruction.

Factors relevant to a consideration of whether a prosecutor’s error was harmless beyond a reasonable doubt include “how the improper evidence was presented, whether the state emphasized it during the trial, whether the evidence was highly persuasive or

circumstantial, and whether the defendant countered it[;] . . . the strength of the evidence, while not controlling, [is] part of the harmless error analysis.” *State v. Wren*, 738 N.W.2d 378, 393 (Minn. 2007) (holding that neither prosecutor’s misstatement during closing argument nor two other prosecutorial errors entitled defendant to a new trial). Here, the prosecutor’s misstatement was only a few lines of a five-page rebuttal, which followed over 30 pages of closing argument, and the jury heard a curative instruction. There is no reasonable likelihood that the prosecutor’s misstatement of the probable-cause standard had a significant effect on the jury’s verdict.

III. Review of the Recorded Statement

“A jury may request review of testimony or other evidence after it has retired to deliberate, and the court has discretion to grant the request.” *State v. Reed*, 737 N.W.2d 572, 586 (Minn. 2007) (citing Minn. R. Crim. P. 26.03, subd 19(2)). The decision to grant a juror’s request to review evidence is within the district court’s discretion, and an appellate court will not overturn it absent an abuse of that discretion. *Id.*

During deliberations, the jury asked to hear again the tape of appellant’s statement to the detective. Over appellant’s objection, the district court granted this request, allowing the jury to hear the tape of the entire statement once, so no portion would be emphasized. Appellant argues that this was an abuse of discretion because it unduly prejudiced him in that “the jury likely focused on the inconsistencies in the statement” But “[t]he jury is permitted to choose which evidence it will re-examine. If the jury was unsure of what had occurred as [the defendant] asserts, it was proper for the jury to listen to the tape to inform itself of what occurred.” *Id.* (quotation omitted).

In deciding whether to grant a jury's request to review evidence during deliberations, the court must consider: (1) whether the evidence will aid the jury in its proper consideration of the case; (2) whether any party will be unduly prejudiced by the evidence, and (3) whether the evidence may be subjected to improper use by the jury. *State v. Kraushaar*, 470 N.W.2d 509, 515 (Minn. 1991). Any error that may result from granting a jury's request to review evidence during deliberations is subject to a harmless-error analysis. *Id.* at 516. *Kraushaar* noted that it is preferable for a jury's review of evidence to take place in a courtroom rather than in the jury room and concluded

that any error was nonprejudicial because: (i) the videotape viewed in the jury room was no different from the videotape that the jury would have seen in the courtroom, (ii) at worst, the replaying of the tape allowed the jury to rehear what it had already heard, (iii) the testimony of the victim was positive and consistent and was corroborated by other evidence, and (iv) it is extremely unlikely that the replaying of the tape by the jury affected the verdict by prompting the jury to convict where it otherwise would not have done so.

Id. The same factors apply here: (1) the tape was replayed in the courtroom; (2) the jury simply reheard a tape it had already heard; (3) the tape was consistent with the evidence of the detective who took the statement and with appellant's attorney's closing argument, which asserted that the tape showed appellant could not be connected to the crime; and (4) hearing appellant's statement to the detective a second time was very unlikely to persuaded the jury to convict when it would not otherwise have convicted. Even assuming that there was error in granting the jury's request to hear the tape again, that error was harmless.

Because sufficient evidence supported appellant's convictions, because there was no reasonable likelihood that the absence of the prosecutor's misstatement as to the meaning of "beyond a reasonable doubt" would have had a significant effect on the jury's verdict, and because the district court did not abuse its discretion in permitting the jury to hear again the tape of appellant's statement to the detective, appellant's convictions are affirmed.

Affirmed.