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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0781**

State of Minnesota,
Respondent,

vs.

Leo Ralph Meyers,
Appellant.

**Filed February 19, 2013
Affirmed
Schellhas, Judge**

Mille Lacs County District Court
File No. 48-CR-11-396

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

Janice S. Jude, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney,
Milaca, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Bjorkman, Judge; and
Klaphake, Judge.*

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his conviction of fifth-degree assault-fear, arguing that he did not commit “an act,” as required by Minn. Stat. § 609.224, subd. 1(1) (2010), and that the prosecutor engaged in prosecutorial misconduct. We affirm.

FACTS

In January 2011, appellant Leo Meyers and L.W. resided in a house owned by M.K. The record is unclear about whether only L.W. or both L.W. and Meyers were M.K.’s tenants. After Meyers and L.W. moved into the house, M.K. removed an affixed surveillance camera from the house. When Meyers discovered that the surveillance camera was gone, he approached the house next door in which M.K.’s mother lived. The parties dispute the events that resulted in respondent State of Minnesota charging Meyers with one count of gross-misdemeanor fifth-degree assault-fear in violation of Minn. Stat. § 609.224, subds. 1(1), 2(b) (2010), and one count of gross-misdemeanor fifth-degree assault-harm in violation of Minn. Stat. § 609.224, subds. 1(2), 2(b) (2010).

Before trial, Meyers stipulated to the existence of his December 29, 2010 conviction of domestic assault for an offense committed on May 13, 2009. At trial, the parties presented dramatically different versions of the facts to the jury. M.K. testified that Meyers beat and banged on the door to his mother’s house; Meyers was in a rage and was belligerent and belittling toward him; M.K. directed Meyers away from his mother’s house and left the house to speak with Meyers; Meyers said to M.K., “[Y]ou motherf---er. I’m gonna to take you out,” which scared M.K. because Meyers is physically larger

than M.K.; Meyers grabbed M.K. by the throat with one hand and threw M.K. backwards; and M.K. “bolt[ed]” towards his mother’s house because he was “physically scared” and then called 911. M.K. also testified that he had red marks where Meyers had grabbed him around his throat and that the marks turned black and blue.

Meyers testified that he encountered M.K. in the driveway of M.K.’s mother’s house, he told M.K. that M.K. had broken the law, he had “no physical contact whatsoever” with M.K., and

[M.K.] had a coffee cup in his hand and [M.K.] started to swing at [Meyers], but [Meyers] just kinda ducked out of it and [M.K.] didn’t hit [Meyers] with [the coffee cup] or there was no contact, and [Meyers] actually slipped a little . . . , but caught [himself], and [M.K.] took off, said, “I’m callin’ the cops.”

Meyers’s friend, who was sitting in Meyers’s nearby vehicle during the incident, testified that, during “the whole interaction” between Meyers and M.K, “[t]here was no contact,” “[n]obody ever touched anybody,” and he did not see anyone fall down. He also testified that he “couldn’t tell . . . exactly what was said” but that Meyers and M.K. were “just talkin’” and that, “if there was screamin’ and yellin’, [he] coulda heard the whole conversation, but there wasn’t.”

Officer Timothy Kintop, who responded to the 911 call, testified that he observed that M.K. was “afraid,” “very nervous,” his “hands were shaky,” and M.K. “was excitable.” Officer Kintop also observed “scratches and red marks . . . on [M.K.’s] neck” of which he took two photographs, which the district court received as evidence.

The jury found Meyers guilty of gross-misdemeanor fifth-degree assault-fear but not guilty of gross-misdemeanor fifth-degree assault-harm.

This appeal follows.

D E C I S I O N

Sufficiency of Evidence

The jury convicted Meyers of committing gross-misdemeanor fifth-degree assault-fear under section 609.224, subdivision 2(b), which provides that a person commits gross-misdemeanor fifth-degree assault by “violat[ing] the provisions of subdivision 1 within three years of a previous qualified domestic violence-related offense conviction.” Minn. Stat. § 609.224, subd. 2(b) (2010). Subdivision 1(1) provides that a person commits misdemeanor fifth-degree assault by “commit[ing] an act with intent to cause fear in another of immediate bodily harm or death.” Meyers challenges his conviction on the basis that section 609.224, subdivision 1(1), requires that he committed “an act,” and that his statement to M.K., “I’m gonna take you out,” does not constitute the requisite “act” because it was speech. We construe Meyers’s challenge as a challenge to the sufficiency of evidence.

We disagree with Meyers that his statement and other conduct are insufficient to constitute “an act” under the statute. The Minnesota Supreme Court has stated “that the legislature intended to forbid *conduct* that is done with the intent of causing fear in another of immediate bodily harm or death.” *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998) (emphasis added) (quotation omitted). Speech is conduct that may trigger punishment without offending the First Amendment. *See In re Welfare of T.L.S.*, 713

N.W.2d 877, 881 (Minn. App. 2006) (explaining that disorderly conduct statute could be applied to punish the manner of delivery of speech when the disorderly nature of the speech did not depend on its content). The speech itself does not trigger punishment; rather, the manner of delivery of the speech is the conduct triggering punishment. *Id.*; see also *City of St. Paul v. Mulnix*, 304 Minn. 456, 460, 232 N.W.2d 206, 208 (1975) (concluding that anti-noise ordinance was not unconstitutional with respect to “defendant whose disorderly *conduct* consisted of shouting and screaming, of using ‘fighting words,’ and of conduct which was clearly disturbing” (emphasis added)); cf. *Matter of Welfare of S.L.J.*, 263 N.W.2d 412, 419 n.6 (Minn. 1978) (“Mulnix involved disorderly conduct which would have been sufficient to warrant a conviction without the addition of the offensive speech.”). Nothing in section 609.224, subdivision 1(1), suggests that “an act” does not include speech.

An appellate court reviews a sufficiency-of-the-evidence challenge to “determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow a jury to reach a guilty verdict.” *State v. Hurd*, 819 N.W.2d 591, 598 (Minn. 2012) (quotation omitted). In doing so, an appellate court “assume[s] that the factfinder disbelieved any testimony conflicting with that verdict” and “will not overturn a guilty verdict if, giving due regard to the presumption of innocence and the prosecution’s burden of proving guilt beyond a reasonable doubt, the jury could reasonably have found the defendant guilty of the charged offense.” *Id.* (quotations omitted). “It is well established that a conviction can rest upon the testimony of a single credible witness.” *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990).

Here, the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jury to reasonably conclude that Meyers engaged in gross-misdemeanor fifth-degree assault-fear. Meyers stipulated to the predicate conviction that enhanced the offense to a gross misdemeanor, and the evidence at trial was sufficient to permit the jury to reasonably conclude that Meyers committed gross-misdemeanor fifth-degree assault-fear.

We reject Meyers's argument that this court cannot rely on evidence of Meyers's alleged physical assault of M.K. because the jury acquitted Meyers of the charge of gross-misdemeanor fifth-degree assault-harm. In *State v. Montermini*, this court rejected Montermini's argument that the jury's acquittals of him on the kidnapping charges rendered circumstances underlying the charges "unproven" for the purposes of this court's review of the sufficiency of circumstantial evidence. 819 N.W.2d 447, 460–61 (Minn. App. 2012), *review denied* (Minn. Nov. 20, 2012). This court reasoned that the acquittals "shed no light on which circumstances the jury believed or disbelieved," "only demonstrate[d] that the jury believed the state failed to establish the elements of kidnapping," and "may simply [have been] an expression of the jury's power of lenity." *Id.* at 461 (citing *State v. Perkins*, 353 N.W.2d 557, 561–62 (Minn. 1984) ("It is clear that the jury in a criminal case has the power of lenity—that is, the power to bring in a verdict of not guilty despite the law and the facts.")); see *State v. Holbrook*, 305 Minn. 554, 556–57, 233 N.W.2d 892, 894–95 (1975) (rejecting appellant's argument that insufficient evidence supported the jury's conviction of him for heroin possession with intent to sell because the jury acquitted appellant of charge of heroin sale, reasoning that other

“possibilities” for the jury’s acquittal of appellant were available, including the jury “exercis[ing] its power of lenity”). This court further reasoned that Montermini’s argument, “taken to its logical conclusion, . . . would lead to the absurd result that a reviewing court could not consider evidence underlying the common elements of an offense and a lesser-included offense if the defendant is acquitted of one and convicted of the other.” *Id.*; *cf. State v. Laine*, 715 N.W.2d 425, 435 (Minn. 2006) (“Generally, a defendant who is found guilty of one count of a two count indictment or complaint is not entitled to relief simply because the jury found him not guilty of the other count, even if the guilty and not guilty verdicts may be said to be logically inconsistent.” (quotations omitted)). Instead, this court “rel[ie]d on [its] well-established assumption on review that ‘the jury believed the state’s witnesses and disbelieved any evidence to the contrary.’” *Id.* (quoting *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989)).

Prosecutorial Misconduct

Meyers requests that this court reverse his conviction of gross-misdemeanor fifth-degree assault-fear and remand for a new trial, arguing that the prosecutor engaged in prosecutorial misconduct by “disparaging the defense” and “misstating, distorting, and shifting the burden of proof” during the prosecutor’s rebuttal closing argument. Meyers objected at trial to the prosecutor’s statement that defense counsel was “hiding the football” by suggesting that M.K. had an interest in evicting Meyers. Meyers argued that the prosecutor was “disparaging the defense” and asked the district court for permission to rebut the prosecutor’s rebuttal argument. The district court denied the request.

An appellate court “review[s] prosecutorial misconduct to determine whether the conduct, in light of the whole trial, impaired the defendant’s right to a fair trial.” *State v. Milton*, 821 N.W.2d 789, 802 (Minn. 2012) (quotations omitted). Similarly, an appellate court “determin[es] whether prosecutorial misconduct occurred during a closing argument” based on “the closing argument as a whole,” *State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010), “rather than . . . selected phrases and remarks,” *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009) (quotation omitted). *See also State v. McDaniel*, 777 N.W.2d 739, 752–53 (Minn. 2010) (observing that supreme court has “generally found prejudicial prosecutorial misconduct only in extreme circumstances”).

A prosecutor must not “disparage the defense in the abstract,” *State v. Pendleton*, 759 N.W.2d 900, 912 (Minn. 2009), or “belittle the defense,” *State v. Martin*, 773 N.W.2d 89, 108 (Minn. 2009). But a prosecutor may “argue that there is no merit to a particular defense,” *Martin*, 773 N.W.2d at 108, and “respond to the arguments made by the defendant,” *State v. Vue*, 797 N.W.2d 5, 16 (Minn. 2011). *See State v. Jackson*, 773 N.W.2d 111, 123 (Minn. 2009) (“The prosecutor has the right to fairly meet the arguments of the defendant.”). And “[t]he prosecutor’s argument need not be colorless.” *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010) (quotation omitted); *see State v. Radke*, 821 N.W.2d 316, 330 (Minn. 2012) (“While colorful, we view the State’s language as a reasonable and descriptive way to convey the State’s version of what happened in this case, and it was not outside the bounds of what is permissible.”).

This court has previously concluded that a prosecutor’s closing argument was improper when the prosecutor “refer[red] to the defense’s argument as ‘ridiculous’ and

[told] the jury not to be ‘snowed’ by the defense,” *State v. Hoppe*, 641 N.W.2d 315, 321 (Minn. App. 2002), *review denied* (Minn. May 14, 2002), and “refer[red] to the defense as a ‘game,’” *State v. Bashire*, 606 N.W.2d 449, 454 (Minn. App. 2000), *review denied* (Minn. Mar. 28, 2000). But the supreme court more recently concluded in *Pendleton* that “the prosecution did not commit misconduct by disparaging the defense” by “telling the jury not to buy ‘what they [the defense is] selling’” when “the prosecutor’s statements [were] based on the merits of its accomplice liability theory and witness credibility, not abstract statements about the defense generally.” 759 N.W.2d at 912–13. Similarly, the supreme court concluded in *State v. Simion* that the prosecutor did not denigrate the defense during closing argument by arguing that the defendant “took ‘every opportunity to dirty up [the defendant’s employer] by accusing and insinuating that [the employer was] violating some rule or regulation’” because “[t]he prosecutor’s comment . . . was designed to draw the jury’s attention to [the defendant]’s attempt to distract from the criminal issues at trial.” 745 N.W.2d 830, 843–44 (Minn. 2008).

In this case, as in *Pendleton*, the prosecutor’s statement that defense counsel was “hiding the football” was in response to defense counsel’s argument and, as in *Simion*, was designed to draw the jury’s attention away from an issue that the prosecution argued was collateral to the criminal issues at trial—M.K.’s alleged attempt to evict Meyers and L.W. During cross-examination of M.K., defense counsel asked M.K. a series of questions about whether M.K. was trying to evict L.W. at the time of the incident involving M.K. and Meyers. Upon the prosecutor’s objection, defense counsel said that the questions “go[] to motive,” and the district court overruled the prosecutor’s objection.

During closing argument, the prosecutor said: “I think the most important thing to realize now is we’re not here about an eviction. . . . What we are exactly here about is what happened on January 20th, 2011 between [M.K.] and the defendant, Mr. Meyers.” Defense counsel argued about M.K.’s motive, challenging M.K.’s credibility.

We conclude that the prosecutor’s argument regarding M.K.’s interest and motives and his statement that defense counsel was “hiding the football” did not constitute prosecutorial misconduct.

Meyers also argues that the prosecutor committed prosecutorial misconduct by “misstat[ing], distort[ing], and shift[ing] the burden of proof” by “repeatedly [telling] the jury that to reach a verdict it needed to decide between [M.K.]’s testimony and [Meyers]’s testimony.” Meyers argues that the prosecutor’s statements were a variation of prohibited were-they-lying questions. We are not persuaded. Although the supreme court “has not adopted a blanket prohibition of ‘were they lying’ questions, . . . such questions have no probative value and are generally improper.” *State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006) (quotation omitted).

“Were they lying” questions, in general, are questions the state poses to a criminal defendant *on cross-examination*. Typically, the prosecutor will first ask the defendant if he heard the testimony of one or more of the state’s witnesses. Then the prosecutor will ask the defendant if the witnesses’ testimony was accurate. If the defendant states that the witnesses’ testimony was not accurate, the prosecutor will ask the defendant to comment on the veracity of the witnesses’ testimony by asking the defendant, “Were they lying?”

State v. Pilot, 595 N.W.2d 511, 516 n.1 (Minn. 1999) (emphasis added).

But the statements that Meyers challenges were neither were-they-lying questions nor analogous to such questions. In *State v. Caine*, the supreme court concluded that the state's closing argument "did not include statements analogous to 'were they lying' questions" when the state only said "what we've got is a credibility determination," "it really has come down to who are you going to believe," "I want you to contrast [the defendant's] testimony with" one of the defendant's victims, and "we're back to [the victim's] credibility versus the defendant's." 746 N.W.2d 339, 359–60 (Minn. 2008). Similarly, here, the prosecutor argued that "these cases . . . come down to credibility," this case "really . . . comes down to two people's statements," and "the evidence really does come down to Mr. Meyers versus [M.K.] except for we also have the physical evidence." Moreover, the district court instructed the jury, "You are the sole judges of whether a witness is to be believed and of the weight to be given to the testimony of each" and explained what factors the jury should consider when weighing witness credibility. *See id.* at 360 (supporting conclusion that prosecutor's alleged were-they-lying questions during closing argument were not prosecutorial misconduct by noting that "[i]t is the job of a jury to determine the credibility of the witnesses" and "the district court instructed the jury that it is up to the jury to decide which witnesses to believe and explained what factors to consider in making this determination").

Meyers argues that the prosecutor erroneously "diminishe[d]" or "shifte[d]" the state's burden of proof by arguing that the truthfulness of a complainant is the sole determinative factor when determining guilt. Meyers's argument is unpersuasive.

“Prosecutors improperly shift the burden of proof when they imply that a defendant has the burden of proving his innocence,” *Jackson*, 773 N.W.2d at 122, and a “prosecutor’s misstatement of the burden of proof is highly improper and constitutes misconduct,” *Martin*, 773 N.W.2d at 105 (quotation omitted). In *State v. Strommen*, the supreme court concluded that the prosecutor misstated the burden of proof when the prosecutor told the jury during the prosecutor’s closing argument “to ‘weigh the story in each hand and decide which one is most reasonable, which one makes the most sense.’” 648 N.W.2d 681, 690 (Minn. 2002). And, as noted by Meyers, the Eighth Circuit concluded in *United States v. Reed* that a prosecutor’s closing-argument-rebuttal statement that, “if [defendant] had told the truth in his testimony[,] the government witnesses must have lied” is “improper because it involves a distortion of the government’s burden of proof.” 724 F.2d 677, 681 (8th Cir. 1984). But “a prosecutor’s comment on the lack of evidence supporting a defense theory does not improperly shift the burden,” *McDaniel*, 777 N.W.2d at 750, and “the state is free to argue that particular witnesses were or were not credible,” *State v. McCray*, 753 N.W.2d 746, 752 (Minn. 2008) (quotation omitted). *See State v. Fields*, 730 N.W.2d 777, 785–86 (Minn. 2007) (rejecting appellant’s argument that prosecutor misstated burden of proof, concluding that “the prosecutor’s argument, though inartful, did not constitute misconduct and instead made permissible arguments about credibility and reasonable inferences based on the evidence”).

Here, the prosecutor repeatedly emphasized witness credibility but at no time argued that Meyers had the burden to prove his innocence by providing credible

testimony or otherwise. The prosecutor did not argue that if Meyers testified truthfully, the state's witnesses must have testified falsely. Rather, the prosecutor asked the jury to consider the reasonableness of the testimony of Meyers, Meyers's friend, and M.K. "in light of the other evidence" and "in light of all of the evidence." And, we noted that the prosecutor began his opening statement by telling the jury that "[t]he burden of reasonable doubt lies upon the State at all times, no matter what," which was consistent with the court's jury instructions.

We conclude that the prosecutor did not engage in prosecutorial misconduct.

Affirmed.