STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0574

State of Minnesota,
Respondent,

vs.

Richard John Mattson,
Appellant.

Filed December 9, 2013
Affirmed
Worke, Judge

Roseau County District Court
File No. 68-VB-12-1199

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

Karen M. Foss, Roseau County Attorney, Michael P. Grover, Assistant County Attorney, Roseau, Minnesota (for respondent)

Steven R. Fredrickson, Plymouth, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

WORKE, Judge

Appellant challenges his petty misdemeanor inattentive-driving violation, arguing that the evidence was insufficient to prove that he was inattentive, the district court failed

to apply the reasonable-person standard of care, and the district court plainly erred by denying him a closing argument. We affirm.

D E C I S I O N

Sufficiency of the evidence

The district court concluded that appellant Richard John Mattson failed to drive with due care, violating Minn. Stat. § 169.14, subd. 1 (2012). Mattson argues that the evidence was insufficient to show that he was "inattentive."

In reviewing a claim of insufficient evidence, we apply the same standard to a jury trial or a bench trial. *State v. Hughes*, 355 N.W.2d 500, 502 (Minn. App. 1984), *review denied* (Minn. Jan. 2, 1985). We review the record to determine whether the evidence, when viewed in the light most favorable to the verdict, is sufficient to allow the fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We 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 was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

On October 12, 2012, Mattson was working as a substitute school bus driver. During the after-school route, the children informed Mattson that he missed a turn. Mattson put the bus in reverse and hit a vehicle behind it. Mattson was cited for violating Minn. Stat. § 169.14, subd. 1, which provides: "Every driver is responsible for becoming and remaining aware of the actual and potential hazards then existing on the highway and must use due care in operating a vehicle."

Witnesses who work at the school bus garage testified that because of their length and size, buses have a blind spot and the driver cannot see everything with a mirror. They testified that reversing a school bus should be done only when it is absolutely necessary. One witness stated that when he drove a commercial semi and needed to back up, he would get out of the vehicle to scope out the situation before he proceeded. Even Mattson agreed that "no matter what the circumstances, [one] should keep backing up of a school bus to a minimum." He failed to explain, however, why this set of circumstances—missing a turn—made it necessary for him to back up the bus. Mattson was also aware that the school bus had a blind spot, that the back windows were covered in mud, and that he was driving in a rural residential area. And Mattson acknowledged that there were driveways in which he could have turned the bus around. The state trooper who cited Mattson testified that Mattson admitted that he did not see the vehicle behind him. The district court concluded that Mattson failed to use due care in operating the bus because he backed up the bus "knowing he had a blind spot," rather than "utilizing the other available ways" to turn around. The evidence supports the district court's conclusion.

Mattson argues that a driver is attentive when he "look[s] and see[s] what is to be seen." Mattson claims that he satisfied that duty when he checked his mirrors. However, the record shows that a bus driver cannot see everything using the mirrors. If the mirrors do not reveal everything, using them alone is inadequate. Mattson admitted that it was impossible to see what was behind the bus and conceded: "Certainly there was a potential

risk that there could be something in the blind spot."[1] Because it was impossible to see what was behind the bus in the blind spot, Mattson did not "see what is to be seen." Because he was not certain that the roadway was clear, Mattson was not "aware of the actual and potential hazards then existing." *See* Minn. Stat. § 169.14, subd. 1. Mattson asserts that "there was a conceivable possibility a vehicle was in the blind spot, but that is not enough to make [him] liable." But that is what the statute requires—that a driver be aware of actual and *potential* hazards; thus, the evidence is sufficient to show that Mattson failed to operate the bus with due care. *See id.*

Standard of care

Mattson argues that the district court erred by applying the "absolutely necessary" standard, rather than a "reasonable person" standard. Mattson claims that if the district court had applied the correct standard, it would have concluded that a reasonable person would have backed up the bus.

The district court found that "buses should not be backed up upon the roadway unless absolutely necessary." That finding is supported by the evidence. Based on that finding, the district court concluded that Mattson "knowing he had a blind spot . . . and not utilizing the other available ways to avoid backing up the bus" violated Minn. Stat. § 169.14, subd. 1, which requires every driver to "use due care in operating a vehicle." The district court concluded that Mattson failed to use "due care"; his argument that the district court measured his conduct against an absolutely necessary standard is meritless.

[1] While Mattson blindly backed the bus into a vehicle, his acknowledgment that "[c]ertainly there was a potential risk that there could be something in the blind spot" evokes that "something" could have been "anything," including an animal or a person.

Closing argument

Finally, Mattson argues that the district court deprived him of "his right to effective assistance of counsel" by not offering his counsel the opportunity to present a closing argument.

Neither party presented a closing argument, nor did they request to make a closing argument. In *State v. Morrow*, the appellant argued that the district court committed reversible error by denying his request for surrebuttal closing argument. 834 N.W.2d 715, 728-29 (Minn. 2013). The supreme court stated that "[t]he decision to grant surrebuttal closing argument lies within the sound discretion of the district court. Minnesota Rule of Criminal Procedure 26.03, subd. 12(k), provides that a district court 'may allow' the defense a surrebuttal closing argument." *Id.* at 729. Thus, an appellate court reviews a district court's decision to limit closing arguments for an abuse of discretion. *Id.* (*citing State v. Richards*, 495 N.W.2d 187, 197 (Minn. 1992)).

The Rules of Criminal Procedure recognize that a closing argument is not a mandatory requirement of trial procedure. *See* Minn. R. Crim. P. 26.03, subd. 12(i) (stating that the defendant "may" make a closing argument). Thus, Mattson's argument that "[c]learly the [district] court violated [rule 26.03] by not offering counsel . . . the opportunity to speak" is flawed because a closing argument is not mandated.

But even if the district court erred by not affording Mattson a closing argument, any error was harmless. Mattson did not object. And Mattson's attorney stated that he realized immediately that he was not afforded this opportunity, but he did not request to

present a closing argument. Neither did Mattson submit a written closing argument nor a posttrial motion asserting that he was denied this right.

"Under the invited error doctrine, a party cannot assert on appeal an error that he invited or that could have been prevented at the district court." *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). But "[t]he invited error doctrine does not apply . . . if an error meets the plain error test." *Id.* Mattson satisfies the plain-error test when he shows an error, that is plain, and that affected his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If Mattson establishes the three prongs of the test, we determine whether the plain error affected the fairness and integrity of the judicial proceeding. *Id.*

Even if Mattson established plain error because rule 26.03, subdivision 12(i) contemplates a closing argument, he fails on the final prong because he cannot show that his substantial rights were affected. *See State v. Brown*, 792 N.W.2d 815, 823-24 (Minn. 2011) (stating that plain error contravenes a rule, caselaw, or a standard of conduct, or when it disregards well-established and longstanding legal principles, and that plain error affects substantial rights when "there is a reasonable likelihood that the error substantially affected the verdict"). Mattson argues that counsel "had reserved several comments for his closing argument. One of those comments related to the applicability of the reasonable person standard rather than the absolutely necessary standard." But closing arguments are not evidence, and the district court heard all of the evidence to render its decision. *See State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010). Additionally, the trial transcript does not reveal a dispute regarding the appropriate standard of care. While

Mattson provided an affidavit with his brief to this court in which he presents this argument, the affidavit is not part of the district court record; thus, it is not part of our review. *See* Minn. R. Civ. App. P. 110.01 (stating that the record on appeal includes the "papers filed in the [district] court, the exhibits, and the transcript of the proceedings").

Finally, Mattson does not elaborate on how his attorney's comments "related to the applicability of the reasonable person standard rather than the absolutely necessary standard" would have affected the verdict. He states only that they "could have enlightened the [district] court on a key issue," but fails to provide any legal basis for his argument. *See State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (stating that a mere assertion of error without supportive argument or authority is waived unless prejudicial error is obvious on mere inspection), *aff'd*, 728 N.W.2d 243 (Minn. 2007). Mattson failed to establish plain error; thus, the district court did not err by failing to offer Mattson a closing argument.

Affirmed.