STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0988

State of Minnesota,
Respondent,

vs.

Christopher Robert Krych,
Appellant.

Filed June 9, 2014
Affirmed
Kirk, Judge

Carlton County District Court
File No. 09-CR-12-1044

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

Thomas H. Pertler, Carlton County Attorney, Jesse D. Berglund, Assistant County Attorney, Carlton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

KIRK, Judge

Appellant challenges his convictions of disorderly conduct and third-degree criminal damage to property, arguing that (1) the evidence is insufficient to support his conviction of disorderly conduct; (2) the prosecutor committed misconduct; and (3) the district court's instructions to the jury on an element of the disorderly conduct charge were an abuse of discretion. In a pro se supplemental brief, appellant argues that the district court erred by allowing the state to include a lesser and included charge for criminal damage to property and by ordering appellant to pay restitution. We affirm.

D E C I S I O N

I. The evidence was sufficient to support appellant's conviction of disorderly conduct.

In considering a claim of insufficient evidence, this court's review is limited to a thorough analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jury to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that "the jury 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 jury, 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).

The district court convicted appellant Christopher Robert Krych, a patient at the Minnesota Sex Offender Program (MSOP) in Moose Lake, of disorderly conduct and third-degree criminal damage to property. Appellant's convictions stem from his October 6, 2011 conduct when he threw a table at a window in the common area of the MSOP facility, and his conduct on November 2, when he threw a table at a window in a kitchenette area. Appellant's acts resulted in significant property damage to the windows and tables.

Appellant argues that the evidence is insufficient to support his conviction of disorderly conduct because the state failed to prove beyond a reasonable doubt that his conduct on October 6 caused alarm, anger, or resentment in others, as required under Minn. Stat. § 609.72, subd. 1(3) (2010). The statutory requirements for the offense of disorderly conduct provide that

> [w]hoever does any of the following in a public or private place, . . . knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor:
>
> (1) engages in brawling or fighting; or
>
> (2) disturbs an assembly or meeting, not unlawful in its character; or
>
> (3) engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.

Minn. Stat. § 609.72, subd. 1 (2010); *see also* 10 *Minnesota Practice*, CRIMJIG 13.121 (2006). This court views appellant's words, conduct, and physical movements "and measure[s] them as a package against the controlling statute." *State v. Klimek*, 398

N.W.2d 41, 43 (Minn. App. 1986). At trial, appellant testified that on October 6, the other MSOP patients were not alarmed even though his conduct triggered the facility's security alarm to sound.

Viewed in the light most favorable to the verdict, there is sufficient evidence in the record for the jury to conclude that appellant's conduct aroused alarm in others. Minn. Stat. § 609.72, subd. 1. The jury watched a surveillance video from October 6 that showed a number of people gathering in the common area of the MSOP facility in the seconds following appellant's act to investigate the source of the noise. This is sufficient to establish that appellant's conduct caused alarm in others. Therefore, the evidence is sufficient to support his conviction of disorderly conduct.

II. The prosecutor did not engage in prosecutorial misconduct.

We review unobjected-to prosecutorial misconduct under the plain-error standard announced in *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Plain error exists when (1) there is error, (2) that is plain, and (3) the error affects appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The state bears the burden of showing that the error does not affect appellant's substantial rights. *Ramey*, 721 N.W.2d at 302. Prosecutorial misconduct affects appellant's substantial rights when "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). When reviewing alleged prosecutorial misconduct in a closing statement, this court looks "at the whole argument in context, not just selective phrases or remarks." *State v. McNeil*, 658 N.W.2d 228, 234 (Minn. App. 2003).

On appeal, appellant objects to the prosecutor's opening statement that, "[Y]ou're here because the defendant took it upon himself to cause criminal damage to the property of the State of Minnesota that taxpayers of the [S]tate of Minnesota paid for." The state argues that the prosecutor's comment did not create bias in the jury and that the taxpayer reference was an isolated incident. Since appellant did not object to the prosecutor's statement at trial, we review the reference under the plain-error test.

We conclude that the prosecutor committed plain error when he referred to the jurors as taxpayers. *See Byrns v. St. Louis Cnty.*, 295 N.W.2d 517, 521 (Minn. 1980) (holding that defense counsel improperly referenced the fact that the jurors as taxpayers would be paying any verdict against the county in a personal-injury lawsuit because the comment was primarily aimed at each juror's self-interest). But the state has met its burden of proving that the error did not have a significant effect on the jury verdict. *Ramey*, 721 N.W.2d at 302. There was irrefutable evidence presented at trial that appellant damaged the window and table, and appellant admitted to the act. Furthermore, the prosecutor's jurors-as-taxpayers reference was a singular, isolated incident.

Appellant next argues that the prosecutor committed misconduct during his closing argument when he warned the jury that if they failed to convict appellant, other MSOP patients would feel emboldened to violate MSOP's rules with impunity. Appellant argues that the prosecutor's comment appealed to the jury's passions and diverted their attention away from the issue of appellant's guilt or innocence. The state argues that the prosecutor's closing remarks were prompted by appellant's sympathetic testimony explaining that he damaged the windows in order to avoid being assigned a

roommate whom appellant believed to be sexually dangerous. Appellant testified that "[y]ou got to have a behavioral problem to get [a single room] . . . you've got to act out behaviorally." In the alternative, the state argues that the prosecutor's statement did not prejudice appellant because the jury had irrefutable evidence that appellant damaged the windows and tables. At trial, appellant did not object to the prosecutor's statement.

We again conclude that the prosecutor committed prosecutorial misconduct. "[T]he state should refrain from asking questions or making arguments that would divert the jury from its duty to decide a case on the evidence by injecting issues broader than a defendant's guilt or innocence into the trial." *State v. Dobbins*, 725 N.W.2d 492, 512 (Minn. 2006). Under *Ramey*, the prosecutor committed plain error. 721 N.W.2d at 302. But we see no prejudice to appellant caused by the error that would prompt reversal because there is no reasonable likelihood that the absence of misconduct would have significantly affected the jury's verdict. *See id.*

III. The district court's instructions to the jury on the elements of the disorderly conduct charge were not an abuse of discretion.

This court reviews the adequacy of jury instructions for an abuse of discretion. *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998). District courts are allowed "considerable latitude" in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). A criminal defendant has a constitutional right to a jury trial. U.S. Const. art. III, § 2, cl. 3, amend. VI; Minn. Const.

art. I, §§ 4, 6; Minn. R. Crim. P. 26.01, subd. 1(1). A defendant also has the right to be tried before a jury on every element of the charged offense. *State v. Hinton*, 702 N.W.2d 278, 281 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005).

Appellant contends that the district court violated his constitutional right to a jury trial when it instructed the jury that MSOP is a public or private place. Minn. Stat. § 609.72, subd. 1(3); CRIMJIG 13.121. Appellant argues that the district court's instruction constituted a directed verdict for the state on that element of the crime, and the case should be remanded for a new trial. *See United States v. Gaudin*, 515 U.S. 506, 522-23, 115 S. Ct. 2310, 2320 (1995) (holding a criminal defendant has the constitutional right to have the jury determine beyond a reasonable doubt every element of the crime with which defendant is charged); *State v. Moore*, 699 N.W.2d 733, 737-38 (Minn. 2005) (holding district court's jury instruction in first-degree assault case that the victim's loss of a tooth fulfilled great bodily harm element of assault offense was erroneous and remanding for new trial). The state argues that the district court did not err because it did not relieve the jury of the duty to find that appellant's acts occurred within MSOP and, in the alternative, any error was harmless because the district court provided instruction on a question of law.

When the district court instructs the jury, it must do so "on all matters of law necessary to render a verdict." Minn. R. Crim. P. 26.03, subd. 19(6). Here, the district court acted properly when it instructed the jury that, as a matter of law, MSOP is either a public or private place. The legislative intent for including the "public or private place" element in the disorderly conduct charge was to extend the prosecutorial reach of the

state to virtually anywhere in the State of Minnesota, including public and private places. Minn. Stat. Ann. § 609.72 advisory comm. cmt. (West 2011). The district court did not abuse its discretion when it defined MSOP as being within the scope of either a public or private place.

IV. Appellant's pro se arguments do not raise any issues of merit.

In his pro se supplemental brief, appellant contends that the prosecutor committed misconduct when he misrepresented the cost of the property damage. We disagree. The jury convicted appellant of third-degree criminal damage to property, which requires a finding that the damage reduced the value of the property between $500 and $1000. *See* Minn. Stat. § 609.595, subd. 2(a) (2010). This court defers to the fact-finder on determinations of credibility. *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995). Appellant appeared pro se at the trial and had the opportunity to cross-examine witnesses who testified about the valuation of the property damage as well as present his own evidence.

Appellant argues that the district court erred by instructing the jury on the lesser and included gross misdemeanor charge of criminal damage to property at the prosecutor's request. But "in evaluating whether a rational basis exists in the evidence for a jury to acquit a defendant of a greater charge and convict of a lesser, [district] courts must . . . view the evidence in the light most favorable to the party requesting the instruction." *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005). Here, viewed in the light most favorable to the state, the district court gave the jury instructions on third-

degree criminal damage to property because the evidence at trial demonstrated that a lower valuation of the MSOP property damage was warranted.

Finally, appellant disputes the amount of restitution that the district court ordered him to pay. "[District] courts are given broad discretion in awarding restitution." *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). A defendant may challenge restitution, but must request a hearing within 30 days of sentencing or receiving written notification about the amount of restitution requested, whichever is later. Minn. Stat. § 611A.045, subd. 3(b) (2010).

Our review of the record confirms that appellant disputed the amount of restitution he was ordered to pay at sentencing, but he did not request a hearing to challenge the state's request for restitution as required under Minn. Stat. § 611A.045, subd. 3(b). Appellant waived his challenge to restitution on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding this court will not consider arguments made for the first time on appeal).

Affirmed.