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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0324**

State of Minnesota,
Respondent,

vs.

Shane Lee Olson,
Appellant.

**Filed January 16, 2018
Affirmed
Halbrooks, Judge**

Stearns County District Court
File No. 73-CR-16-2963

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

Cynthia R. Kirchoff, St. Cloud City Attorney, Mark C. Hansen, Assistant City Attorney,
St. Cloud, Minnesota (for respondent)

Mark D. Nyvold, Fridley, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his conviction of misdemeanor theft based on his allegation of prosecutorial misconduct. We affirm.

FACTS

Appellant Shane Lee Olson lived in a house in St. Cloud with his wife, teenage daughter, and brother. M.V. lived for seven years in a rental house located across the alley from Olson. M.V. moved out in December 2015. After obtaining permission from the manager of the rental property, M.V. left her basketball hoop in the driveway for the next family moving in.

C.E., her daughter, and her teenage son, M.W., moved into the rental house on or around January 15, 2016. At approximately 11:00 p.m. on January 17, 2016, M.W. observed a man walk into their backyard, grab the basketball hoop, and drag the hoop by its rim across the alley and into a different backyard.

The next day, a shouting match unrelated to the basketball hoop developed in the alley between C.E., Olson, and other neighbors. Two police officers, Susan Proshek and Mike Warner, responded to the incident. Before Officers Proshek and Warner left, C.E. advised Officer Prohsek that Olson had taken the basketball hoop from C.E.'s driveway the night before. C.E. identified a basketball hoop in Olson's driveway as the one that was taken.

Officer Proshek saw two basketball hoops on Olson's driveway and questioned him. Olson admitted taking the basketball hoop from C.E.'s house. Officer Warner heard Olson admit, "Yes, I took the basketball hoop, it was mine before. I took it back." Officer Proshek subsequently confirmed with M.W., C.E., M.V., and the property manager that Olson did not own the basketball hoop or have permission to take it.

At trial, Olson testified that he did not take the basketball hoop. He stated that when he told the officer that he had taken it, he was being sarcastic. At the close of evidence, the prosecutor began his closing argument with:

[A]s I think about the facts that came before this, the testimony, I was thinking of some of my experiences in Afghanistan where, in that case, part of the mission of the government was to try to build rule of law. And we talk about that all the time here and what a blessing it is to have the rule of law.

And over there, there was a person in a rural part by himself in his hut who was under surveillance for a few days and eventually searched and they found contraband of an IED-type nature. And in part of the job was to build the rule of law. He was taken in front of the Afghan court systems where they have a judge, not a jury, and the people testified, the soldiers testified, the Afghan enforcement people testified. It was there, they found it, there was pictures of it.

And the person, the defendant, testified and said, "I'd never do this," or something along those lines, and his relatives were there and the judge found him not guilty. And eventually I talked to the judge and I'm like, "It was there, how did you do it?" He was like, "Well, maybe the angel Gabriel put it there." And I submit to you, that's a struggle with the rule of law and that's going to be a struggle with the country with Afghanistan.

But we are blessed here because the Judge has just read much of the rule of law. And I ask you to go through this because first thing, as we look at the elements, what do we know?

The prosecutor then stated the elements of the crime of misdemeanor theft and highlighted the evidence that supported a conviction, including corroborating testimony by the state's witnesses, conflicting testimony by the defense witnesses, and Olson's

admission that he took the basketball hoop. The prosecutor ended his closing argument with:

Look at the thoroughness of the police because they did not rush to judgment here, they did not issue a ticket there. They investigated it and let the process work out. I submit to you that's the rule of law at work. I submit there is credible evidence beyond a reasonable doubt that [Olson] took this basketball hoop.

Now, as we go forward, they could argue oh, the garbage people took it. Well, that does not make sense. They could argue somebody else took it. There's no evidence of that because [M.W.] and [C.E.] knew it was there so it was obviously there when they moved in, plus they said they saw it in [Olson]'s yard.

And then you have [Olson]'s admissions at the time. So when we come to the rule of law and what I submit makes this country great, is the Judge gives it to you. Because the defense can argue anything fanciful and capricious. And you look at places where struggling is, I submit they would say, "Well the Angel Gabriel did it." That's not the case here. In this case [Olson] took that hoop. Thank you.

During the defense's closing, Olson's counsel attempted to create doubt by arguing that (1) someone else took the basketball hoop, (2) the police did not conduct a thorough investigation, and (3) M.W. could not see Olson through his kitchen window. The prosecutor did not mention the Afghanistan story during his rebuttal argument. After a two-day trial involving ten witnesses, the jury convicted Olson of misdemeanor theft under Minn. Stat. § 609.52, subd. 2(a)(1) (2014), with reference to Minn. Stat. § 609.52, subd. 3(5) (2014). This appeal follows.

DECISION

Olson, who claims on appeal that the prosecutor committed misconduct, did not object to the prosecutor's closing argument during trial. Therefore, our standard of review is one of modified plain error. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). Olson has the burden to establish that the prosecutor committed an error that contravenes caselaw, a rule, or a standard of conduct, or is otherwise plain. *Id.* at 302. If Olson demonstrates plain error, the burden shifts to the state to demonstrate that its misconduct did not affect Olson's substantial rights. *Id.* Misconduct does not affect a defendant's substantial rights if "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *Id.* (quotations omitted). We will reverse a conviction due to prosecutorial misconduct only if, in light of the whole trial, the misconduct impaired the defendant's right to a fair trial. *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

Olson contends that the prosecutor committed plain error by (1) referencing non-record, personal experiences and asserting his own credibility; (2) conveying personal knowledge as an unsworn witness; and (3) diverting the jury from its duty by disparaging Olson's defense theory. The state maintains that the prosecutor's story "was relevant to rebutting defense themes mentioned throughout the trial."

Relying on ABA, *Criminal Justice Standards for the Prosecution Function*, §§ 3-6.8(a), 3-6.9 (4th ed. 2015) (*ABA Standards*), Olson first argues that the prosecutor improperly stated non-record facts during his closing argument, reasoning the argument "had no connection to the events contained in the trial record." Prosecutors have

“considerable latitude” during closing argument and are not required “to make a colorless argument.” *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998). But although “the state’s argument need not be ‘colorless,’ it must be based on the evidence produced at trial, or the reasonable inferences from that evidence.” *State v. Morton*, 701 N.W.2d 225, 237 (Minn. 2005); *see ABA Standards*, § 3-6.8(a) (“In closing argument to a jury, . . . the prosecutor may argue all reasonable inferences from the evidence in the record.”); *see also ABA Standards*, § 3-6.9 (“[T]he prosecutor should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience, or are matters of which a court may take judicial notice.”).

Here, the prosecutor did not suggest to the jurors that they rely on or make inferences from the underlying facts of his story arising out of his military service in Afghanistan. The prosecutor, instead, responding to Olson’s theory that Olson did not take the basketball hoop, used the story as a way to underscore the importance of the jury’s role in applying the rule of law and, in so doing, addressed each element of the crime of misdemeanor theft with evidence that supported each one.

Additionally, the district court properly instructed the jury on the elements of misdemeanor theft and the the state’s burden to prove each element beyond a reasonable doubt. The district court further instructed the jury that the attorneys’ arguments were not evidence. We “presume that the jury followed the [district] court’s instruction.” *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002); *see State v. Gassler*, 505 N.W.2d 62, 69

(Minn. 1993) (concluding that no error occurred where district court instructed the jury that arguments were not evidence).

Second, Olson argues the prosecutor asserted his own credibility and put himself in the position of an unsworn witness, reasoning that the prosecutor expressed his personal opinion and conveyed facts without personal knowledge. We disagree. “The personal opinion rule is designed to prevent . . . a prosecutor . . . from becoming an unsworn witness and otherwise personally attaching himself . . . to the cause which he . . . represents.” *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991). The prosecutor did not inject his personal opinion that Olson took the basketball hoop or state to the jury that Olson was not credible.

Third, Olson contends that the prosecutor diverted the jury from its duty and unfairly disparaged Olson’s defense strategy, arguing that the prosecutor sought “to have the jurors believe that if they acquitted Olson, they would be acting as contrary to the rule of law as had the judge in the Afghan trial.” “While the prosecutor is free to argue that there is no merit to a particular defense or argument, and prosecutors are free to anticipate arguments defense counsel will make, the prosecutor may not generally belittle a particular defense in the abstract.” *State v. Ashby*, 567 N.W.2d 21, 28 (Minn. 1997). “Prosecutors act improperly when they suggest that the arguments of defense counsel are part of some sort of syndrome of standard arguments that one finds defense counsel making in cases of this sort.” *State v. Rucker*, 752 N.W.2d 538, 553 (Minn. App. 2008) (quotations omitted), *review denied* (Minn. Sept. 23, 2008).

But a prosecutor may attack a defense theory on its merits. *See Ashby*, 567 N.W.2d at 28 (concluding that prosecutor’s comments that “allegations are easy to make, but the

jury must look at the evidence” were not improper but instead “more properly characterized as addressing the defense’s main theory—that someone else committed the crime”). Here, the prosecutor told the story of the Afghan trial not to disparage defense counsel but rather to combat Olson’s theory that someone else had taken the basketball hoop. The prosecutor then painstakingly discussed how eyewitness trial testimony undermined that theory.

Olson also asserts that “the jury did not fairly evaluate the evidence and hold the prosecution to its burden of proof beyond a reasonable doubt.” We disagree. The prosecutor took the jury through each element of the offense, discussed what testimony supported each element, and argued that there was “credible evidence *beyond a reasonable doubt* that the defendant took this basketball hoop.” (Emphasis added.) The prosecutor did not misstate the state’s burden of proof. *See State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000) (concluding that a prosecutor’s closing argument in which the prosecutor made “an analogy to the ancient Greek juries, the substance of which implied that Greek juries would place a stone on either side of a scale for each successful argument by one party or the other” did not constitute plain error). Because the prosecutor did not rely on non-record evidence, inject himself as an unsworn witness, or disparage Olson’s defense theory, Olson has not met his burden to demonstrate plain error.

But even assuming that the prosecutor’s argument constituted plain error, any error did not prejudice Olson. “An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the jury’s verdict.” *State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010). On review, we “consider the strength of evidence against the defendant, the pervasiveness of improper suggestions, and whether the defendant had an opportunity to

(or made efforts to) rebut the improper suggestions.” *Id.* M.V. testified she did not give Olson permission to take the basketball hoop. M.W. provided eyewitness testimony that Olson took the basketball hoop. Officer Proshek and C.E. both testified that they saw the basketball hoop in Olson’s yard. And Officer Proshek and Officer Warner testified that Olson admitted to taking the basketball hoop. The evidence supports Olson’s conviction. *Cao*, 788 N.W.2d at 717-18.

In determining whether misconduct affected a defendant’s substantial rights, we review the argument as a whole. *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009). Considering the length of the Afghan story relative to the entire argument, the prosecutor’s 27-line story within a 227-line argument was not pervasive. *See Cao*, 788 N.W.2d at 718 (determining that the prosecutor’s statement covering 3 lines of a 15-page closing argument did not affect the defendant’s substantial rights). We therefore conclude that no prosecutorial misconduct occurred.

Affirmed.