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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1824**

Nathan Thomas Tow-Arnett, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 21, 2018
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-15-3539

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, Max Kittel (certified student attorney), St. Paul, Minnesota (for appellant)

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

Susan L. Segal, Minneapolis City Attorney, David S. Bernstein, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Bjorkman, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his conviction of violating a domestic-abuse no-contact order (DANCO), arguing that the evidence was insufficient to support his conviction and that he was denied a fair trial because of erroneous statements the prosecutor made about the law during closing argument. Because the evidence was sufficient to support the conviction and the prosecutor did not commit prejudicial error, we affirm.

FACTS

For conduct that occurred on November 15, 2014, involving W.S., appellant Nathan Thomas Tow-Arnett was charged with multiple domestic-assault related charges. During his first court appearance on November 20, the district court issued a DANCO prohibiting Tow-Arnett from having contact with W.S. In capital letters, the DANCO states, “THIS ORDER WILL REMAIN IN EFFECT UNTIL DISPOSITION OF THE CASE OR UNTIL FURTHER ORDER OR MODIFICATION.” The DANCO also provides that violation of the order is a crime. Tow-Arnett was served the DANCO, and it remained in effect until cancelled by court order on March 23, 2015.

On February 7, while the DANCO was in effect, W.S. initiated contact with Tow-Arnett. She had been out with friends at a Minneapolis bar and realized at closing time that they had “ditched” her and she was alone. W.S. repeatedly called Tow-Arnett for a ride home because she knew that he would be awake. Tow-Arnett finally answered his phone after several calls. W.S. pleaded with Tow-Arnett to drive her home.

Shortly after Tow-Arnett picked up W.S., a deputy stopped his car for driving in the bus lane. The deputy discovered the existence of the DANCO. Tow-Arnett told the deputy that he was aware of the DANCO but “thought that [W.S.] had nullified the order” because she told him that “it was no longer in effect.” W.S. told a different deputy who interviewed her at the scene that she knew the DANCO was still in effect but did not want it enforced. Tow-Arnett was arrested and charged with violating a DANCO.

At trial, W.S. testified that in January or February 2015 she called “Brandy” and two other victim advocates associated with the Domestic Abuse Service Center, located in the Hennepin County Courthouse. She left messages for all three indicating that she wanted the DANCO “dropped.” But she did not file anything with the district court or take any other step to persuade the court to cancel the DANCO. W.S. also testified that she twice saw Tow-Arnett in a bar during the week before the offense. He did not approach or speak to her on either occasion, even though she told Tow-Arnett or his friend that the DANCO was “null and void, that it was over with.” Tow-Arnett did not testify.

The jury found Tow-Arnett guilty of violating the DANCO. Tow-Arnett did not file a direct appeal but timely petitioned for postconviction relief. The district court denied the petition. Tow-Arnett appeals.

D E C I S I O N

I. The evidence is sufficient to support Tow-Arnett’s conviction.

In reviewing a claim of insufficient evidence, this court “view[s] the evidence in a light most favorable to the verdict to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that

the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Hanson*, 800 N.W.2d 618, 621 (Minn. 2011) (quotations omitted). We are mindful that “[j]uries are generally in the best position to weigh the credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony.” *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (quotation omitted).

Minn. Stat. § 629.75, subd. 2(b) (2014), provides that “a person who knows of the existence of a [DANCO] issued against the person and violates the order is guilty of a misdemeanor.” Tow-Arnett argues that the state failed to prove that he “knew that the DANCO continued to be in effect at the time he had contact with [W.S.]” To establish a defendant “knows” of a DANCO, the state must prove “only that the [defendant] *believes* that the [DANCO] exists.” Minn. Stat. § 609.02, subd. 9(2) (2014) (emphasis added).

The knowledge element of a crime is often proved through circumstantial evidence. *State v. Al-Naseer*, 734 N.W.2d 679, 688 (Minn. 2007) (stating that “[t]he proof of knowledge may be by circumstantial evidence”). We apply a two-step analysis when reviewing a conviction based on circumstantial evidence. *State v. Harris*, 895 N.W.2d 592, 598-601 (Minn. 2017). First, we identify the circumstances proved “by resolving all questions of fact in favor of the jury’s verdict.” *Id.* at 600. Second, deferring to the jury’s credibility determinations, we determine whether “the reasonable inferences that can be drawn from the circumstances proved” are “consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 598, 600 (quotation omitted).

Evidence supporting the jury’s determination that Tow-Arnett knew of the DANCO on February 7 consists of the following circumstances: the DANCO was issued at Tow-Arnett’s first court appearance on November 20; Tow-Arnett signed the DANCO, which specifically notified him that he was to have no contact with W.S.; the DANCO stated, in prominent language, that it would remain in effect until the criminal proceeding was resolved or until further court order; Tow-Arnett studiously avoided W.S.’s two separate attempts to make contact with him during the week preceding the February 7 offense; Tow-Arnett answered his phone on the night of February 7 only after W.S. called him multiple times, and he agreed to give W.S. a ride only after she “begged” him to do so; and W.S. told a deputy that night that she was aware that the DANCO remained in effect.

Tow-Arnett argues that the circumstances proved are consistent with only one reasonable hypothesis—innocence. He specifically contends the circumstantial evidence was not sufficient to prove that he knew the DANCO was still in effect on February 7. He points to W.S.’s testimony that she believed the DANCO was no longer in effect because of her repeated attempts to have it cancelled, and that she conveyed her belief to Tow-Arnett several times. We must reject this argument in light of our duty to resolve all questions of fact in favor of the jury’s verdict. *See id.* at 600. W.S.’s overall testimony was uncertain and self-contradictory. And the testimony Tow-Arnett cites conflicts with the statement she made to the officer at the time of Tow-Arnett’s arrest—that she knew the DANCO remained in effect. More importantly, W.S.’s testimony that she told Tow-Arnett that the DANCO was no longer in effect is inconsistent with the circumstances proved—if

the jury found this testimony credible, they would not have found him guilty. *See State v. Barshaw*, 879 N.W.2d 356, 366 (Minn. 2016) (“In determining whether the evidence is sufficient, we defer to the fact-finder’s credibility determinations and assume that the fact-finder disbelieved any evidence that conflicted with the verdict.” (quotation omitted)); *Andersen*, 784 N.W.2d at 329 (deferring to jury on weight and believability of a witness’s testimony). The evidence before the jury pointed unerringly to Tow-Arnett’s guilt and is sufficient to support his conviction.

Tow-Arnett cites *State v. Weldon*, No. A16-0533, 2017 WL 2535677 (Minn. App. June 12, 2017), where this court reversed the defendant’s conviction for violating a DANCO, as support for his assertion that the circumstantial evidence is insufficient. We disagree. *Weldon* is an unpublished decision, so it is not controlling. *See* Minn. Stat. § 480A.08, subd. 3(c) (2016) (“Unpublished opinions of the Court of Appeals are not precedential.”). And, critically, *Weldon* is distinguishable. That case turned on, among other things, the district court’s failure to properly instruct the jury on what it means to “know” that a DANCO exists. 2017 WL 2535677, at *6-7. Here, the district court properly instructed the jury on the statutory meaning of “know,” asking the jury to decide whether Tow-Arnett “knew of the existence of the [DANCO].” The jury answered the question affirmatively by finding Tow-Arnett guilty.

II. The prosecutor did not commit prejudicial error.

“The state has an overriding obligation . . . to see that the defendant receives a fair trial” *State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn. 2006). A prosecutor errs by violating “clear or established standards of conduct, e.g., rules, laws, orders by a district

court, or clear commands in this state’s case law.” *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted). Misstating the applicable law in a closing argument is error. *State v. Cao*, 788 N.W.2d 710, 715-16 (Minn. 2010); *State v. Strommen*, 648 N.W.2d 681, 689-90 (Minn. 2002). Historically, the standards of review for prosecutorial error have varied, depending on whether defense counsel objected to the error. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). When objected-to error is less serious, appellate courts have applied a harmless-error test to determine “whether the misconduct likely played a substantial part in influencing the jury to convict.” *Id.* For cases involving “unusually serious prosecutorial misconduct,” appellate courts consider whether it was certain beyond a reasonable doubt that the objected-to error was harmless. *Id.* Although our supreme court has questioned whether this distinction remains viable, *State v. Carridine*, 812 N.W.2d 130, 150 (Minn. 2012), we need not decide this issue because we conclude that the prosecutor’s statements made during closing argument here did not constitute misconduct.

Tow-Arnett asserts that he should receive a new trial because the prosecutor misstated the law three times during closing arguments. We address each in turn.

First, Tow-Arnett challenges the prosecutor’s statement:

No one really can know a fact that is not true, because if it’s not true, it’s not a fact. You can think it. You can want to think it. You can want to believe it. You can rely on someone saying something who is wishing it’s true and you can wish it’s true. But wishing or thinking or believing or counting on somebody who’s gonna do something when it’s a formal order of the court that tells you just how it can be changed—

Defense counsel objected, and a bench conference ensued. No ruling was made, and the prosecutor continued her argument.

We are not persuaded that Tow-Arnett is entitled to relief on this basis. The challenged statements regarding the intent element of the offense are confusing and perhaps too unclear to be of any import. But later in her argument, the prosecutor accurately defined the word “know” and identified it as an element of the offense that the state was required to prove. Defense counsel’s closing argument likewise included a proper reference to the meaning of “know.” And the district court ultimately corrected any confusion by accurately instructing the jury on the definition of “know” and on its inclusion as an element of the offense. The district court also instructed the jury that “[i]f an attorney’s argument contained any statement of the law that differs from the law that I’m giving you, you should disregard that statement.” Under these circumstances, we are not convinced that the prosecutor erred or that any claimed error affected the verdict.

Second, Tow-Arnett argues the prosecutor misstated the elements of the offense. After explaining the state was required to prove beyond a reasonable doubt that the DANCO existed, that Tow-Arnett knew of it, and that he “violated a term of the order,” the prosecutor stated that the state was not required to prove “that the defendant knew of the term of an order.” Tow-Arnett argues that this statement inserted a “temporal modifier” that misled the jury to think “that it did not matter that Tow-Arnett knew of the term, or length of time, that the DANCO would be in effect.” We disagree. The challenged language, read in context, suggests “term” meant a condition of the DANCO—such as a geographic restriction—rather than a temporal reference. Indeed, the language used by the

prosecutor in this portion of her argument merely stated that Tow-Arnett was aware of the DANCO, which was proper. The prosecutor's isolated use of the word "term" was not error.

Third, Tow-Arnett argues the prosecutor erred by stating "the State does not have to prove that [W.S.] said or didn't say anything[;] [i]t is not relevant to the effectiveness of the order." Tow-Arnett asserts that this statement informed the jury that W.S.'s testimony was not relevant. Again, we disagree. Read in context, the statement refers to a prior order for protection that had been cancelled by the time that Tow-Arnett violated the DANCO. We discern no prosecutorial error.

Affirmed.