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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1283**

State of Minnesota,
Respondent,

vs.

Eithan Armani Green,
Appellant.

**Filed June 22, 2020
Affirmed
Rodenberg, Judge**

St. Louis County District Court
File No. 69DU-CR-18-3503

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this direct appeal from his conviction for aiding and abetting first-degree robbery, appellant Eithan Green argues that the evidence is insufficient to prove that his presence

was intended to aid in the commission of the robbery, the prosecutor committed misconduct in summation by misstating the law, and the 98-month sentence imposed was excessive when compared to the sentences of his codefendants. We affirm.

FACTS

In September 2018, B.C. met K.G., also known as “The Piercing Queen,” on a dating app¹ called Skout. K.G. worked at a strip club and also gave private lap dances² at her home in Duluth. B.C. engaged K.G. to give him lap dances on multiple occasions. He also occasionally drove K.G. to work.

On the night of October 14, 2018, B.C. texted K.G. and inquired whether K.G. was available for a private lap dance. K.G., who was at her home with Cameron Richmond, Chazmun McBeath, and appellant, responded that she was available. Richmond was using K.G.’s phone that evening and saw the text messages from B.C. concerning B.C. coming over for a private dance. Richmond suggested to K.G., McBeath, and appellant that they should rob B.C. when he arrived for the lap dance.

At approximately 11:50 p.m., B.C. arrived at K.G.’s home. K.G. let B.C. into her residence. Upon entering the home, B.C. noticed that K.G. was “acting funny” and seemed nervous. Based on K.G.’s demeanor, B.C. had a “gut feeling” that something was not right. He indicated that he was going to leave the home to retrieve something from his car.

¹ An “app” is commonly defined as “[a] computer application.” *The American Heritage Dictionary of the English Language* 85 (5th ed. 2018).

² At trial, K.G. testified that lap dances are “private dances” that she performs for customers.

As B.C. turned to leave, Richmond suddenly entered the room with McBeath and appellant. K.G. turned off the lights. Richmond, McBeath, and appellant had their faces covered by either the hoods of their sweatshirts or by bandanas. B.C. “kind of froze up.”

B.C. testified at trial that the three men approached him, removed his coat, and all of them participated in emptying his pockets. They took his wallet, keys, watch, and cellular phone. B.C. testified that he was scared, and pleaded with the men to “[j]ust let me go, and take whatever you want.”

One of the men told B.C. to take off all of his clothes, including his shoes, socks, and underwear. The men forced B.C. to sit in a chair. When B.C. tried to stand, one of the men said, “Shut up or I’ll smoke you[,]” which B.C. testified was “[s]lang for kill.” Although B.C. did not see a weapon, one of the men “was making a gesture with his hand in his pocket.” B.C. told the men to “[j]ust take whatever it is and let me take my car and leave.”

The men took \$400 in cash and B.C.’s automated teller machine (ATM) card from B.C.’s wallet, and demanded that B.C. tell them the card’s PIN.³ B.C. complied. Richmond and McBeath then left the home, taking B.C.’s car keys with them. K.G. and appellant stayed in the home with B.C. While they were gone, appellant hit B.C. in the face “three or four times.” Appellant then put a sock in B.C.’s mouth. After 10 to 15

³ A PIN, or personal identification number, is “a number allocated to an individual and used to validate electronic transactions.” *New Oxford American Dictionary* 1308 (3d ed. 2010).

minutes, appellant removed the sock from B.C.'s mouth, and he eventually allowed B.C. to clothe himself.

While K.G. and appellant stayed with B.C., Richmond and McBeath went to multiple ATM locations in McBeath's car and withdrew money from B.C.'s account. In total, they withdrew \$480 from two ATMs. Two other cash-withdrawal attempts were unsuccessful.

Richmond and McBeath returned to K.G.'s home. Richmond and K.G. led B.C. to his car, directing him to keep his head down until he reached the vehicle. Although he was clothed, B.C.'s jacket and hat were not returned to him. When they reached B.C.'s car, Richmond asked B.C. if he had any weapons. B.C. indicated that he did not have a gun, but did have a baton and a knife in the glove box. Richmond removed the weapons from B.C.'s car. Richmond again threatened B.C., stating, "Go to the police and we'll find you and kill you, 'cause we have your ID and your address."

B.C. then drove home and told his sister, A.J., about the robbery. B.C. testified that he "was scared and panicking" and that he "couldn't really process what had just happened." He preferred not to call the police "[b]ecause they said if I call 911, they would kill me and they would kill my family." A.J. eventually called 911 to report the robbery.

Officers responded to B.C.'s residence, and B.C. told officers that he was attacked and robbed when he went to K.G.'s home for a private lap dance. One of the responding officers testified that she noticed that B.C.'s cheek was swollen and that he had a cut on his lip.

B.C. identified the location of K.G.'s home, and officers set up surveillance of the residence while an investigator obtained a search warrant. At 1:40 a.m., officers observed McBeath get into his car outside of K.G.'s home and drive away. Officers initiated a traffic stop of McBeath after they noticed that his car had a broken head lamp. McBeath was wearing a jacket similar to the one taken from B.C., although officers did not know this at the time. McBeath did not have a valid driver's license and was taken to another residence.

Around 4:20 a.m., K.G. called 911 to request that officers remove Richmond from her home because he was "tweakin' out" and "breaking stuff inside [her] house." An hour later, officers executed a search warrant for K.G.'s home. Officers knocked on K.G.'s door and announced their presence, but no one opened the door. Officers forced the door open.

As officers entered K.G.'s home, appellant attempted to leave the residence through the back door, but was stopped by officers. Appellant was wearing black pants and a dark hoodie that matched the description given by B.C. of one of the men who robbed him. Appellant also had \$883 on his person. Appellant identified himself to police as "Orlando James."

A search of K.G.'s residence revealed several items belonging to B.C., including a hat and B.C.'s fishing license. Officers also searched the home where officers had dropped off McBeath earlier, and B.C.'s jacket was located inside that residence.

On October 22, 2018, the state charged appellant with aiding and abetting first-degree aggravated robbery and providing a false name to police. On March 26, 2019, appellant pleaded guilty to providing a false name to police and proceeded to a jury trial on the remaining charge.

At trial, B.C. testified that he had gone to K.G.'s residence for a lap dance and was attacked by three men, forced to sit naked in a chair, and threatened until he gave the men his ATM PIN. B.C. testified that all three men actively participated in emptying his pockets and taking his money. He did not identify appellant at trial, but testified that two of the men left with his property, while K.G. and the third man stayed with him in the home. He testified that this third man hit him in the face and put a sock in his mouth. B.C.'s description of this third man matched that of appellant when police apprehended him as he left K.G.'s residence.

K.G. testified that the three men in her home on the evening of October 14 were Richmond, appellant, and a man she knew only as "Twin." K.G. described the robbery, and testified that she and appellant stayed behind with B.C. while Richmond and McBeath withdrew money using B.C.'s ATM card. McBeath also testified. He said that he, Richmond, and appellant were at K.G.'s home when the robbery occurred. There was no evidence at trial of any other males—other than appellant, Richmond, and McBeath—having been present in K.G.'s residence during the robbery.

A.J. testified that B.C. returned home in the early-morning hours of October 15, crying and "was just freaking out." She described B.C.'s face as being swollen and said that he had a cut on the inside of his cheek.

Finally, the state presented photographic evidence of Richmond and McBeath withdrawing money from B.C.'s account during the time that appellant and K.G. stayed at the home with B.C.

In its closing argument, the state, in explaining aiding and abetting, argued to the jury:

The case is charged that the Defendant here, Eithan Green—the term is—the legal term is Aided and Abetted, but, you know, assisted. Aided in—in the commission of a robbery

....

[A]nd there's a definition in the instructions—as when a person is responsible for crimes committed by others. It talks about, you know, you got presence or—or actions. If you look at all the evidence in this case, the Defendant's presence and his actions assisted in the commission of this crime.

In further explaining aiding and abetting, the prosecutor argued that the jury needed to focus on appellant's "presence." The state then noted that, "it's an intentional act, you know."

The jury found appellant guilty of aiding and abetting first-degree aggravated robbery. Before sentencing, appellant moved the district court for a durational departure from the Minnesota Sentencing Guidelines. The district court denied the motion and sentenced appellant to the presumptive 98-month prison sentence on the aiding and abetting first-degree aggravated robbery count and a concurrent 90-day sentence for providing a false name to police.

This appeal followed.

DECISION

The evidence supports appellant's conviction for aiding and abetting first-degree aggravated robbery.

Appellant argues that the evidence of his having aided the robbery is entirely circumstantial and that the "the state failed to prove beyond a reasonable doubt that

[appellant] intentionally aided the robbery.” Appellant relies on the circumstantial-evidence review standard requiring that circumstantial evidence must eliminate all rational inferences inconsistent with guilt in order to support a guilty verdict. *See State v. Al-Naseer*, 788 N.W.2d 469, 473-74 (Minn. 2010) (describing the appellate standard of review concerning appeals challenging the sufficiency of circumstantial evidence). Appellant does not argue that no robbery was proved, but only that the state’s evidence of his having aided in it is lacking.

When considering the sufficiency of the evidence supporting a defendant’s conviction, we thoroughly analyze the record “to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach they verdict which they did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We 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). Appellate courts will not “disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense charged.” *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (alteration and quotation omitted).

The Minnesota Supreme Court has defined direct evidence as “evidence that is based on personal knowledge or observation that, if true, proves a fact without inference or presumption.” *Id.* at 477 n.11 (alteration and quotation omitted). “Such evidence can be provided in the form of testimony by a person who perceived the fact through her senses or physical evidence of the fact itself.” *State v. Brazil*, 906 N.W.2d 274, 278 (Minn. App.

2017), *review denied* (Minn. Mar. 20, 2018). Circumstantial evidence, in contrast, is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). “[C]ircumstantial evidence always requires an inferential step to prove a fact that is not required with direct evidence.” *Id.* For the reasons set forth below, we conclude that appellant’s conviction does not depend on circumstantial evidence and that every element of aiding and abetting robbery is supported by direct evidence.

A person is guilty of aiding and abetting another in the commission of a crime “if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05, subd. 1 (2018). The term “intentionally aides” means that “the defendant knew his alleged accomplice was going to commit a crime,” and that “the defendant intended his presence or actions to further the commission of that crime.” *State v. Milton*, 821 N.W.2d 789, 808 (Minn. 2012).

To prevail on a charge of criminal liability for aiding and abetting another in committing a crime, the state is required to prove that appellant “played a knowing role in the commission of the crime.” *Bernhardt*, 684 N.W.2d at 477 (quotation omitted). We distinguish a “knowing role in the crime” from “inaction, knowledge, and passive acquiescence.” *Id.* (quotation omitted).

Although B.C. did not identify appellant at trial as one of the three men who robbed him, K.G. and McBeath both testified that appellant was one of the three males involved in the robbery. Appellant concedes that he was “present” at the time, but argues that the evidence of his participation in the robbery is insufficient to support the jury’s verdict

because it is all circumstantial. But B.C. testified that *all three* of the men whose faces were covered rummaged through his pockets. This is direct evidence of all three men participating in the robbery. The proof of appellant's active participation in the robbery required the jury to link together multiple pieces of direct evidence—the testimony of B.C., K.G., and McBeath—but combining multiple instances of direct evidence does not make the evidence circumstantial. The jury had only to believe the testimony of B.C., K.G., and McBeath to conclude that appellant participated in the robbery, and it need not have made any inferential leap beyond that testimony to so conclude. *See State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (defining testimony as to what a witness saw as direct evidence).

And, if any further evidence of appellant's active participation in the robbery were to have been needed, the record also contains direct evidence that appellant stayed with B.C. while Richmond and McBeath went to withdraw money using B.C.'s ATM card. This is also direct evidence of appellant's active participation in a continuing robbery. K.G. described at trial how she and appellant stayed behind with B.C. while Richmond and McBeath withdrew money from B.C.'s ATM card. B.C. testified to this as well, and testified that, while Richmond and McBeath were away, appellant forced him to sit in a chair to prevent B.C. from leaving. The success of stealing money using B.C.'s ATM card depended on detaining B.C. while the card was used—once the card was reported as stolen, its usefulness to steal B.C.'s money would be reduced if not completely eliminated. So this, too, is direct evidence that appellant actively participated in the robbery.

The record contains ample direct evidence of appellant's knowing involvement in the robbery to support the conviction.

The state did not commit misconduct in its closing argument by misstating the law.

Appellant argues that the state committed misconduct by “repeatedly [telling] the jury in closing argument [that] it could find [appellant] guilty based on [appellant’s] presence alone.” Appellant asserts that such error affects his substantial rights and warrants the grant of a new trial.

Appellant did not object to the state’s summation, and we therefore review for plain error. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under the plain-error standard, a defendant must show “(1) error; (2) that is plain; and (3) the error must affect substantial rights.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). An appellant bears the burden of showing error that is plain and, upon that showing, the burden of demonstrating that there was no effect on the appellant’s substantial rights shifts to the state. *Ramey*, 721 N.W.2d at 302. If all three elements of the plain-error test are met, we “address the error to ensure fairness and the integrity of judicial proceedings.” *State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006) (quotation omitted). “We will correct the error only if the fairness, integrity, or public reputation of the judicial proceeding is seriously affected.” *Id.* (citation and quotation omitted).

During a closing argument, a prosecutor may explain the state’s burden of proof to the jury. *State v. McDaniel*, 777 N.W.2d 739, 751 (Minn. 2010). But a prosecutor may not misstate the law. *Id.* In determining whether a prosecutor misstated the law and reversible error has occurred, we must look “at the closing argument as a whole, rather than

just selective phrases or remarks that may be taken out of context or given undue prominence.” *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Appellant points to the portion of state’s summation where the prosecutor argued that appellant’s “presence specifically, or a hypothetical defendant’s presence hypothetically, is sufficient for aiding and abetting liability,” and argues that this is a clear misstatement of the law. This specific portion of the prosecutor’s argument appears to be a reference to appellant remaining with B.C. at K.G.’s home when Richmond and McBeath left the residence with B.C.’s ATM card. The prosecutor also made clear in summation, however, that appellant needed to intentionally aid his confederates in furtherance of the crime, analogizing appellant’s participation in the robbery as being part of a “team.” The prosecutor argued that appellant was “there to help, if needed. . . . It’s an intentional act, you know.”

Considered in isolation, the prosecutor’s comments on presence alone come close to misstating the law. *See State v. Ostrem*, 535 N.W.2d 916, 924 (Minn. 1995) (holding that “[m]ere presence at the scene of a crime does not alone prove that a person aided or abetted, because inaction, knowledge, or passive acquiescence does not rise to the level of criminal culpability”). But, after his comments about appellant’s “presence,” the prosecutor informed the jury that appellant needed to intentionally act to further the crime. The prosecutor later told the jury that “[y]ou don’t gotta be the main person, the main actor . . . if you intentionally assist,” and “the law says everybody is responsible and culpable if you intentionally assist.” In viewing the state’s summation as a whole, we see no error in the prosecutor’s statements that is plain.

And even if the prosecutor's statements were considered to be error that is plain, which we do not think it was, the state nevertheless met its burden of showing that the error did not affect appellant's substantial rights. *Ramey*, 721 N.W.2d at 302. Misstatements of the law during closing argument have been held to be harmless beyond a reasonable doubt when a prosecutor states the law correctly at some point during the argument and the district court properly instructs the jury on the law. *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996).

Here, after the challenged statements in summation concerning appellant's "presence," the prosecutor properly informed the jury several times that appellant must have intended his presence and actions to aid the crime in order for the jury to convict him. The district court properly instructed the jury concerning aiding and abetting. The evidence against appellant was strong. For these reasons, any error that there may have been in the prosecutor's statements did not affect appellant's substantial rights.

The district court acted within its sentencing discretion.

Appellant argues that his 98-month sentence is excessive, unjustifiably disparate, and exaggerates the criminality of his conduct. Specifically, appellant asserts that he should not have received a longer prison sentence than those given to Richmond and McBeath.

"Whether to depart from the sentencing guidelines rests within the district court's discretion, and the district court will not be reversed absent an abuse of that discretion." *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). Sentences prescribed by the Minnesota Sentencing Guidelines "are presumed to be appropriate." Minn. Sent.

Guidelines 2.D.1 (2018). But we “may review a sentence to determine whether it is inconsistent with the statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court.” *Vickla v. State*, 793 N.W.2d 265, 270 (Minn. 2011) (quotation omitted).

Here, appellant requested a downward durational departure because appellant was “the least involved [in the robbery] out of the three alleged co-defendants.” The district court denied appellant’s departure request, and found that there were no “substantial and compelling reasons to depart from the guidelines.”

Appellant makes no argument that the district court improperly computed his criminal history score of five or that it erred in determining the severity level of his offense. *See* Minn. Sent. Guidelines 2.C.1 (2018). He agrees that the relevant guidelines cell provides for a presumptive 98-month sentence. Appellant’s involvement in the robbery appears to us to have been typical of the charged offense. Appellant was actively involved in the crime, he played an active role in emptying out B.C.’s pockets, and he forced B.C. to sit naked in a chair and struck him in the face repeatedly while his confederates used the ATM card taken from B.C. to steal money from B.C.’s bank account.

The sentences given to Richmond and McBeath do nothing to suggest that the district court abused its discretion in sentencing appellant as it did. We do not know what sentencing considerations may have been taken into account in those sentences other than that appellant’s codefendants pleaded guilty to a lower-level offense than that of which appellant was convicted after trial. What the codefendants’ criminal history scores were is not revealed by the record. The district court was not required to have detailed a

comparison of appellant's sentence with those of his codefendants. It applied the sentencing guidelines and declined to depart, a decision which we afford considerable deference. *Dillon v. State*, 781 N.W.2d 588, 595-96 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

The district court acted within its discretion in sentencing appellant.

Affirmed.