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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0107**

State of Minnesota,
Respondent,

vs.

Anthony Mitchell Spry,
Appellant.

**Filed February 8, 2021
Affirmed
Bratvold, Judge**

Hennepin County District Court
File No. 27-CR-18-11092

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Minneapolis, Minnesota; and

James R. Rowader, Jr., Minneapolis City Attorney, Rebekah M. Murphy, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Christopher L. Mishek, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Worke, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant seeks review of his final judgments of conviction, entered after a jury found him guilty of interfering with the operation of a transit vehicle, Minn. Stat.

§ 609.855, subd. 2(a) (2016), and trespassing on “posted” private property, Minneapolis, Minn., Code of Ordinances (MCO) § 385.380, subd. (b)(3) (2017). Appellant argues that (1) the record evidence is insufficient to support his conviction of interfering with the operation of a transit vehicle; (2) the record evidence is insufficient to support his conviction of trespass because the notice was not “posted”; and (3) during closing argument, the prosecuting attorney committed misconduct by impermissibly vouching for the officers who testified. Because the evidence is sufficient to support appellant’s convictions for both offenses, and because appellant was not prejudiced by any alleged error in the prosecuting attorney’s closing argument, we affirm.

FACTS

These facts summarize the testimony and videotaped evidence received during trial. On April 13, 2018, around 2:00 p.m., appellant Anthony Mitchell Spry was at the Hiawatha Avenue and Lake Street light-rail transit station in Minneapolis. Spry walked to the north end of the station platform and stepped off the platform and onto the tracks. Spry began walking north on the southbound tracks, which travelled along an overpass or bridge over a city street. Spry continued walking on the tracks toward 26th street, about the distance of four blocks from the station. Metro Transit officers arrested Spry when he reached 26th street.

The state charged Spry with two counts—trespassing on a critical public-service facility, Minn. Stat. § 609.6055, subd. 2(a)(3) (2016) (count one), and interfering with the operation of a transit vehicle (count two). The state later amended a tab-charge of trespass by entering a posted private property (count three). On the first day of trial, the state

dismissed count one because, as the prosecuting attorney stated, the state “cannot prove beyond a reasonable doubt that the lettering on the no trespassing signs” was at least two inches high, as required by the charging statute.

The state called three Metro Transit Police officers at trial. Officer Lor testified that on April 13, she responded to a dispatch for a “priority-one rail trespass” near the light-rail station on Lake Street, where “a party was observed walking northbound from the platform” on the southbound tracks. Lor testified that a “priority-one” event means that there is a public safety concern, so responding officers activate lights and sirens. Lor explained that a person in a restricted area threatens public safety because light-rail trains travel at about 45 mph. Lor also testified that the light-rail track alarms trigger automatically—a sensor on the platform alerts the dispatch center when an individual rather than a train passes by. As Lor arrived at 24th Street, she saw Spry walking on the tracks and Lor helped other officers arrest Spry. Lor identified Spry in the courtroom.

During Lor’s testimony, the state played two videos, which were received into evidence. First, the video from Lor’s squad car (first squad video) showed that, as officers seized Spry, a light-rail train slowed to a stop and remained stopped for at least 20 minutes. Second, the video from the Lake Street Station surveillance camera (surveillance video) showed a man walking to the end of the platform, pausing, and then moving a barrier to leave the platform and walk alongside the light-rail tracks. During Lor’s testimony, she identified the man in the surveillance video as Spry. Lor also testified that the platform sign in the second video said “no trespassing.” Lor testified that this incident suspended light-rail travel for 27 minutes.

Officer Wright testified that he also responded to the trespass dispatch, echoing Lor's testimony. During Wright's testimony, the state played a third video, taken from Wright's squad car after Spry was arrested (second squad video). In the second squad video, Spry says he walked on the tracks because he wanted to "meditate" and "not be near anyone."

Lieutenant Dietz investigated the incident. Dietz testified that the Lake Street platform had "no trespassing" signs on both the northbound and southbound sides. The state showed Dietz two photographs created from the surveillance video, one of which depicted Spry walking in the direction of the northbound "no trespassing" sign—though the photograph is blurred. The second photograph showed the southbound "no trespassing" sign. Both photos were received into evidence. Dietz testified that the southbound sign in the photo is "the same" as the northbound sign on the platform. After the incident, the signs were replaced with "more vibrant" signs, according to Dietz, but the previous signs were "clear" on the date of the incident.

Spry maintained his right to remain silent and did not testify. The defense moved for judgment of acquittal, which the district court denied. The jury found Spry guilty on both counts. The district court adjudicated Spry guilty on both counts, and sentenced Spry on count two to 90 days in jail, with credit for 90 days.

Spry appeals.

DECISION

I. Sufficient evidence supports Spry's conviction of interfering with the operation of a transit vehicle.

When addressing a sufficiency-of-the-evidence challenge, we undertake “a painstaking analysis of 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 the 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). “[I]f the jury, acting with due regard for the presumption of innocence” and the need for proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the offense, then we affirm the conviction. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted). In reviewing the sufficiency of the evidence, we defer to the jury’s credibility determinations and weighing of the presented evidence. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011).

Spry was convicted under Minn. Stat. § 609.855, subd. 2(a), which requires the state to prove beyond a reasonable doubt that the defendant “intentionally commit[ted] an act that interferes with or obstructs, or tends to interfere with or obstruct, the operation of a transit vehicle.” Spry argues that the evidence cannot support his conviction for two reasons.

First, Spry contends that the video evidence showed a light-rail train freely moving when he was on the tracks and, because officers quickly removed him from the tracks, the

state failed to prove that he interfered with the operation of a transit vehicle. Spry relies on the surveillance video and Lor's testimony that the trains did not stop. Spry is correct that the surveillance video shows a southbound light-rail train moving as he walks alongside the track. And Lor testified, while watching the surveillance video, that the trains "were not stopped yet." Lor also testified that the trains were stopped for 27 minutes.

We are not persuaded by Spry's argument. The first squad video, which recorded events at about the time Spry was arrested, shows a different train slowing to a stop and remaining stopped for at least 20 minutes. Thus, the surveillance video does not conflict with the first squad video, as the videos depict different times and different trains. Even if we assume that the two videos conflict, on appellate review, we view the evidence in a light favorable to the jury's verdict and do not second-guess the jury's role in weighing the evidence. *See Webb*, 440 N.W.2d at 430.

Second, Spry argues that Lor's testimony about the 27-minute delay cannot support the conviction. Lor agreed on cross-examination that she had no personal knowledge about how long train movement was suspended. Lor explained that she relied on information relayed to her by the rail transit-control center. Spry did not object to Lor's lack of personal knowledge during trial, but argues that this court cannot rely on the testimony about the 27-minute delay.

We disagree. Spry is mistaken about what the state needed to prove. The statute does not require proof of the length of delay, only that Spry's actions "tend[ed] to interfere" with operation of a transit vehicle. Minn. Stat. § 609.855, subd. 2(a). Also, Spry's argument relies on a hearsay analysis of Lor's testimony and plain-error review. We generally decline

to review hearsay issues on plain-error review because, had the objection been made during trial, the state would have had the opportunity to lay more foundation or establish admissibility under a hearsay exception. *See State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (noting that unobjected-to hearsay is particularly difficult to deem inadmissible on plain-error review due to the many hearsay exceptions and the lack of a clear ruling on the issue at trial). Finally, even if we disregard Lor’s testimony about the 27-minute delay, the first squad video shows that a train was stopped for at least 20 minutes.

Thus, we conclude that the evidence is sufficient to support Spry’s conviction of interfering with the operation of a transit vehicle.

II. Sufficient evidence supports Spry’s conviction of trespass.

Spry was also convicted of trespassing on the property of another under MCO § 385.380, subd. (b)(3), which requires the state to prove beyond a reasonable doubt that the defendant “enter[ed] or remain[ed] upon or within the . . . posted property of another . . . without claim of right or consent of a lawful possessor or his or her agent.”

The ordinance does not define the word “posted.” After opening statements, the parties agreed that the district court did not need to instruct the jury on the meaning of “posted property,” and the district court stated that “posted property has [a] common ordinary meaning.” Spry contends that the state, though, failed to offer evidence that the light-rail property was posted. Spry argues that the state’s proof is insufficient because “[t]he lettering on the sign in question was not discernable in the surveillance video or the video still shots.”

Spry’s argument asks us, in part, to interpret the ordinance, an issue we review de novo. *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017). Our purpose in interpreting an ordinance is the same as interpreting a statute—“to ascertain the intent of the Legislature.” *Id.* When an ordinance is unambiguous, we give words and phrases “their plain and ordinary meaning.” *Id.* (quotation omitted). Spry does not argue that the Minneapolis ordinance is ambiguous and we see no ambiguity.

First, Spry agrees that the ordinary meaning of posted applies and initially turns to dictionary definitions. We agree that it may help to “look to dictionary definitions to determine a term’s plain and ordinary meaning,” but we also keep in mind that “the plain meaning of a statutory phrase is also dependent upon context.” *State v. Gibson*, 945 N.W.2d 855, 858 (Minn. 2020). Spry relies on online dictionaries that define posted as “[t]o put up signs on (property) warning against trespassing.” This is the same as the definition of posted in a recent printed edition: “[t]o put up signs on (property) warning against trespassing.” *The American Heritage Dictionary of the English Language* 1376 (5th ed. 2011).

Expanding his argument, Spry argues that posted means “conspicuous” and “readable.” Spry relies on Minn. Stat. §§ 609.605, subd. 1(5), .6055, subd. 3 (2018), both of which define posted for the trespass statutes.¹ Minn. Stat. § 609.605, subd. 3, for example, provides that the sign stating “no trespassing” must “display letters at least two inches high” and be “posted in a conspicuous place.”

¹ As discussed above, the state charged Spry with violating a subdivision of section 609.6055, but dismissed the charge on the first day of trial.

We disagree with Spry's interpretation of posted for MCO § 385.380, subd. (b)(3). Neither conspicuous nor readable is found in the ordinance or in the common meaning of posted. In effect, Spry asks us to add words from the state trespass statute and apply them to an unambiguous city ordinance. We decline to do so. *County of Dakota v. Cameron*, 839 N.W.2d 700, 709 (Minn. 2013) (courts cannot “add words or phrases to an unambiguous statute.”). We note, however, that the jury was free to consider Spry's argument that the sign was not readable based on the video or photos. But we do not re-weigh evidence on appeal. *See State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012) (“The trier of fact is in the best position to determine credibility and weigh the evidence.”).

Second, Spry argues that Dietz testified that the “no trespassing” sign was “faded” and was replaced soon after the incident. Although that is an accurate description of Dietz's testimony, Spry fails to view the evidence in a light favorable to the jury verdict. *See Webb*, 440 N.W.2d at 430. Dietz also testified that the part of the sign that was faded was the red color stating “danger,” not the black and white lettering that stated “no trespassing.”

Thus, we conclude that the evidence is sufficient to support Spry's conviction of trespass.

III. The state has shown that any error in closing argument did not substantially affect the jury's verdict.

Spry argues that he is entitled to a new trial because the prosecuting attorney committed misconduct during closing arguments, which affected Spry's substantial rights. Because our standard of review depends on whether an objection was made, we first

observe that Spry’s counsel did not object during the state’s closing argument. Caselaw sets out the steps for a correct analysis.

When a defendant alleges unobjected-to prosecutorial misconduct, we apply a modified plain-error standard that requires the defendant to show an error was made that was plain. If the defendant satisfies this burden, the burden shifts to the [s]tate to establish that the un-objected to misconduct did not affect substantial rights.

State v. Waiters, 929 N.W.2d 895, 901 (Minn. 2019) (quotation omitted). An error is plain if it is “clear or obvious.” *Id.* (quoting *State v. Sanchez-Sanchez*, 879 N.W.2d 324, 330 (Minn. 2016)). Thus, Spry must establish plain error under the modified standard, after which the burden shifts to the state to show that Spry’s substantial rights were unaffected. *See id.*

Spry contends the prosecuting attorney’s closing arguments included three instances of improper vouching. During closing arguments, a prosecuting attorney may “analyze the evidence and argue that particular witnesses were or were not credible.” *State v. Wright*, 719 N.W.2d 910, 918-19 (Minn. 2006). A prosecuting attorney’s argument about witness credibility becomes misconduct when the attorney vouches for a witness by an argument that “implies a guarantee of a witness’s truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness’s credibility.” *State v. Smith*, 825 N.W.2d 131, 139 (Minn. 2012) (quotation omitted).

Spry identifies three instances: (1) The prosecuting attorney’s closing argument referred to the Metro Transit officers who testified as “seasoned,” and argued they “seemed honest and prepared.” (2) On rebuttal, the prosecuting attorney argued that the officers

were “qualified witnesses,” and (3) referred to Lor’s testimony as “unimpeached.” We consider each instance in turn.

First, the supreme court has held that a prosecuting attorney’s argument that a witness is “very believable” is vouching and plain error. *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006). Here, the prosecuting attorney’s argument that the transit officers were “honest” is like saying a witness is “very believable.” For that reason, this argument is vouching and plain error.

Second, Spry argues that the prosecuting attorney committed further misconduct during rebuttal by arguing the officers were “qualified” and “seasoned.” “Qualified” is one adjective to describe the officers’ testimony about their education and experience. The same can be said of the prosecuting attorney’s argument that the officers were “seasoned.” And a witness’s education and experience are relevant to credibility. *See 10 Minnesota Practice CRIMJIG 3.12* (2019) (listing experience as one consideration in determining witness credibility); *State v. Larson*, 281 N.W.2d 481, 485 (Minn. 1979) (directing that criminal juries be instructed on appropriate considerations for determining witness credibility). We conclude that the prosecuting attorney’s argument that the officers were “qualified” or “seasoned” is an argument about their experience and not improper vouching.

Third, Spry argues that the prosecuting attorney’s argument during rebuttal that Lor’s testimony was “unimpeached” was improper vouching. Caselaw supports Spry’s claim of error. *See State v. Porter*, 526 N.W.2d 359, 364-65 (Minn. 1995) (determining a prosecuting attorney committed misconduct when arguing that the testimony of a witness

was “without impeachment”). While different from vouching for a witness’s credibility, a prosecuting attorney’s argument that a witness is “unimpeached” is improper because it comments on the defendant’s failure to call witnesses or contradict testimony, suggesting that the defendant bears some burden of proof. *Id.* at 365. Here, the prosecuting attorney plainly erred when arguing that “we have the unimpeached testimony of Officer Lor who told us the light-rail runs at 45-miles-an-hour here.”

Thus, we conclude that two of the prosecuting attorney’s statements during closing arguments were plain error. Despite having clearly erred, we determine that the state met its burden to prove that any error did not affect Spry’s substantial rights. To determine whether reversible error has occurred, this court considers the closing argument as a whole, rather than “selective phrases or remarks that may be taken out of context or given undue prominence.” *State v. McDaniel*, 777 N.W.2d 739, 751 (Minn. 2010) (quotation omitted). Here, the improper argument that the transit officers were “honest” was minimized by the prosecuting attorney in this case. Reviewing the statement in context, the prosecuting attorney said, “[t]hey seemed honest and prepared—well, you can decide, but these are the factors to look at, and when you’re thinking about whether they give you credible testimony, you can think about these questions . . .” The prosecuting attorney urged the jury to decide the officers’ credibility, which is proper argument. *See Wright*, 719 N.W.2d at 918-19.

Also, the state’s case against Spry was strong. The jury viewed a video of Spry stepping off the light-rail platform and walking on the tracks. The jury viewed another video showing that a light-rail train was stopped for about 20 minutes. Dietz testified that

the text of the “no trespassing” sign was clear. Finally, the prosecuting attorney’s improper arguments were a small portion of a 14-page closing argument. We therefore determine that the state met its burden of proving that the prosecuting attorney’s clear error did not affect Spry’s substantial rights.

In sum, the record contains sufficient evidence to support Spry’s convictions for interfering with the operation of a transit vehicle, Minn. Stat. § 609.855, subd. 2(a), and trespassing on posted private property, MCO § 385.380, subd. (b)(3). Also, any error during the prosecuting attorney’s closing argument did not affect Spry’s substantial rights.

Thus, we affirm.

Affirmed.