

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1082**

State of Minnesota,
Respondent,

vs.

Kissie Marie Haynes,
Appellant.

**Filed February 27, 2023
Affirmed
Jesson, Judge**

Hennepin County District Court
File No. 27-CR-20-16222

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

Kristyn Anderson, Minneapolis City Attorney, David S. Bernstein, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Haley, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Connolly, Judge; and Johnson, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

On an afternoon in July 2020, as appellant Kissie Marie Haynes entered her apartment building with her three-year-old son, she threw the contents of her coffee cup at

one of her fellow residents. Haynes was charged with fifth-degree assault and disorderly conduct. A jury found Haynes guilty of both charges.

On appeal from her convictions, Haynes alleges that the evidence is insufficient to support her convictions for fifth-degree assault and disorderly conduct. She further alleges that statements made by the prosecutor during closing argument amounted to prosecutorial misconduct; that the district court violated her constitutional right to be present at trial when it proceeded in her absence on the final day of trial; and that the postconviction court abused its discretion when it dismissed her petition related to these claims. Because both the district court and postconviction court's decisions are supported by the law and fall within their wide discretion, we affirm.

FACTS

As M.H. returned home, she walked towards the main entrance of her apartment building. Once there, she walked through a secured door held open by Haynes, who was with her young son. Haynes then threw a cup of hot coffee on M.H. Law enforcement arrived at the scene and cited Haynes for misdemeanor fifth-degree assault¹ and respondent State of Minnesota added the charge of disorderly conduct later.²

In July 2021, a five-day jury trial was held. The jury heard testimony from M.H., as well as the two responding police officers. In addition, the apartment building surveillance footage of the incident was played for the jury, as were the recordings from the officers' body-worn cameras. Haynes did not testify.

¹ In violation of Minnesota Statutes section 609.224, subdivision 1(2) (2018).

² In violation of Minnesota Statutes section 609.72, subdivision 1(3) (2018).

M.H.'s testimony spanned two days of trial. During it, she explained that she opened the unsecured, exterior door of the apartment building and walked towards the secured, interior door when she saw Haynes—a woman that she did not know—and a young child standing near the entryway. The building's surveillance footage shows Haynes holding the secured, interior door open with one hand, while grasping a coffee cup in her other hand. According to M.H.'s testimony, as she made her way past Haynes and her son, she said "excuse me" to Haynes, who was still holding the door open.

As she walked through the open doorway, M.H. testified that she felt a hot liquid, later confirmed to be coffee, hit her upper back. The building's security footage shows that M.H. never made physical contact with Haynes or her son as she walked past them. And M.H. testified that her hijab and clothing were soaked from the coffee. Confused at what had just taken place, M.H. turned to Haynes and said "excuse me" again.

M.H. described Haynes's demeanor as angry or mad. She testified that Haynes looked violent. And started screaming obscenities at M.H., demanding to know why M.H. would think that she could go through the door that Haynes was holding open. Haynes's tone was "very loud and scary," and M.H. began to cry.

A few moments later, another resident attempted to enter through the same entrance and called a security guard that worked in the building. While she waited for the security guard, M.H. removed her hijab because it was still wet. Haynes continued cursing and making derogatory comments about M.H. for about 15 minutes after she threw the coffee, according to M.H., who then stepped outside of the building to call the police. During the 911 call, M.H. told the dispatcher that she did not need immediate medical attention. But

M.H. testified that she suffered lingering pain caused by the hot coffee contacting her skin and that her skin was red and swollen for over two weeks.

The responding officers also testified. One officer described M.H.'s demeanor as "distraught." Haynes told the officers at the scene that she poured coffee on M.H. because M.H. pushed her son to get inside the building. But the officer explained that, based on his subsequent review of the surveillance footage, he determined that M.H. made no contact with the child.

Haynes was present for the first four days of the trial. On the fifth and final day—during which closing arguments and jury instructions were to take place—Haynes was not present. And her attorneys were unable to reach her. The district court delayed the proceedings for Haynes's counsel to attempt to contact their client. After about an hour, Haynes's counsel confirmed that she had been able to reach Haynes by telephone and learned that Haynes had been in the hospital since the previous evening.

Outside the presence of the jury, counsel described Hayne's medical situation and confirmed that Haynes specifically and affirmatively stated that she wanted the trial to proceed without her. The state had no objection to proceeding in Haynes's absence. The district court agreed with the parties and determined that the trial would proceed without Haynes.

Prior to the district court's final jury instructions, the court asked the parties to review an additional jury instruction, given the change in circumstances Haynes's absence

created. Neither party objected to the proposed instruction, and the jury was called into the courtroom to receive the final jury instructions.³

During these instructions, at Haynes's request, the district court instructed the jury on the defense of self or others stating:

The legal excuse of defense of self or others is available only to those who act honestly and in good faith. A person may use force in defense of self or others only if the person was not the aggressor and did not provoke the offense To prove guilt the [s]tate has a burden of proving beyond a reasonable doubt that at least one of the requirements of the self-defense has not been met.

And the court included the following defense-of-property instruction:

The legal excuse of defense of property is available only to those who act honestly and in good faith. A person may act in defense of property only if the person was not the aggressor and did not provoke the trespass on or unlawful interference with the property Haynes is not guilty of a crime if she acted as authorized by law in resisting a trespass upon or other unlawful interference with property. To prove guilt the [s]tate must prove beyond a reasonable doubt that at least one of the requirements of defense of property has not been met.

After about 20 minutes of deliberation, the jury returned two guilty verdicts for fifth-degree assault and disorderly conduct.

The district court imposed a stayed sentence of 90-days' local confinement and placed Haynes on probation for one year for the fifth-degree assault conviction, and it imposed a concurrent sentence of five-days' local confinement for the disorderly-conduct

³ The district court gave the following jury instruction regarding Haynes's absence: "Haynes was not present at all parts of the trial because of unforeseen circumstances. You should not draw any inference from the fact that Ms. Haynes is not present, nor should you hold that against her."

conviction. Haynes appealed from the convictions and moved this court to stay the appeal to pursue postconviction relief. This court granted the motion. In her subsequent postconviction petition, Haynes requested that the court vacate her conviction and grant a new trial or schedule an evidentiary hearing to develop the record regarding whether Haynes knowingly and voluntarily waived her right to be present during all stages of the trial. The postconviction court denied the petition and we reinstated this appeal.

Haynes appeals.

DECISION

On appeal, Haynes raises three issues: (1) whether sufficient evidence supports her two convictions; (2) whether the prosecutor engaged in misconduct during closing argument; and (3) whether the district court erred in allowing the jury trial to continue in her absence during the final day of trial. We review each issue in turn.

I. Sufficient evidence supports Haynes’s convictions for fifth-degree assault and disorderly conduct.

Haynes argues that the evidence was insufficient to sustain her convictions for fifth-degree assault and disorderly conduct. Alternatively, she contends that the state failed to present sufficient evidence that her actions were not justified as performed in defense of others or defense of property. Below, we first address the framework governing sufficiency-of-the-evidence arguments, before turning to the specific convictions and asserted defenses.

When evaluating the sufficiency of the evidence, we review the record to determine whether the evidence, when viewed in the light most favorable to the verdict, was sufficient

to allow the jury to convict the defendant of the charged offense. *State v. Robertson*, 884 N.W.2d 864, 871 (Minn. 2016). We “assume the fact-finder disbelieved any testimony conflicting with that verdict.” *State v. Balandin*, 944 N.W.2d 204, 213 (Minn. 2020) (quotation omitted). We defer to the jury’s credibility determinations and will not reweigh the evidence on appeal. *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). “[W]e 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.” *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012).

If the elements of an offense are proved with direct evidence, our review is limited to a careful “analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction,” was sufficient to allow the jurors to reach the verdict that they did. *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted). “[D]irect evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted).

But when the state relies on circumstantial evidence to prove an element of an offense, we apply a heightened standard of review in which we independently examine, with no deference to the jury, “the reasonableness of all inferences that might be drawn from the circumstances proved.” *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017).

Fifth-Degree Assault Conviction

Haynes was convicted of fifth-degree assault, in violation of Minnesota Statutes section 609.224, subdivision 1(2). Fifth-degree assault is committed whenever a defendant “intentionally inflicts or attempts to inflict bodily harm upon another.” Minn. Stat. § 609.224, subd. 1(2). “Bodily harm” is defined as “physical pain or injury, illness, or any impairment of physical condition.” Minn. Stat. § 609.02, subd. 7 (2018).

At trial, the state presented the following direct evidence to prove fifth-degree assault: M.H.’s testimony, the investigating officers’ testimony, the investigating officers’ body-camera footage, and surveillance footage. Through this evidence, the state showed that Haynes committed a volitional act that caused bodily harm when she:

- was at the entryway of her apartment building with her son on the afternoon of July 8, 2020;
- was holding the security-access-controlled door to the apartment building open for her son with one hand, and a cup of coffee with her other hand;
- held the door open while her son entered the building, followed by M.H.;
- threw her coffee on M.H.’s back; and
- caused M.H. pain when she threw her coffee on M.H.’s back.

These acts are sufficient to prove that appellant committed a volitional act that caused bodily harm given that M.H. testified that she felt physical pain from the hot coffee down her back.

But Haynes points out (without classifying the state’s proof as either direct or circumstantial evidence) that M.H. had no visible injuries, refused medical care, and waited over 15 minutes to call 911. And Haynes further refers to inconsistencies in M.H.’s testimony. But these points relate to M.H.’s credibility—an assessment we leave to the jury and do not second guess. *Pendleton*, 759 N.W.2d at 909. Assuming the jury believed the state’s witness, as we must, the direct evidence presented by the state in the form of witness testimony, police body-camera footage, and surveillance footage were sufficient in proving each element of fifth-degree assault.

Disorderly Conduct Conviction

Haynes argues that the First Amendment to the United States Constitution protected her statements to M.H. and, as a result, the evidence is insufficient to support her conviction for disorderly conduct. When addressing the sufficiency of the evidence in a disorderly conduct conviction, we consider the evidence in the light most favorable to the state, but we review de novo whether the conduct is constitutionally protected. *State v. Hensel*, 901 N.W.2d 166, 170 (Minn. 2017).

Here, Haynes was convicted for disorderly conduct, in violation of Minnesota Statutes section 609.72, subdivision 1(3). To show Haynes is guilty of disorderly conduct, the state must prove, beyond a reasonable doubt that she (1) while in a public or private place, (2) knowing, or had reasonable grounds to know, that her conduct would “alarm, anger or disturb others or provoke an assault or breach of the peace,” (3) “engage[d] 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(3). But the content of speech is only considered disorderly conduct if it consists of “fighting words.” *State v. Crawley*, 819 N.W.2d 94, 102, 105-06 (Minn. 2012). Generally, fighting words are words that, as a matter of common knowledge, are inherently likely to provoke acts of violence by those persons to whom the statement is being addressed. *State v. Jorgenson*, 946 N.W.2d 596, 604 (Minn. 2020).

The state presented the following direct evidence, in the form of witness testimony from M.H., police body-camera footage, and surveillance footage, with regard to Haynes’s words and actions during this incident:

- Haynes cursed at M.H. in a mad, angry manner;
- Haynes used a loud, scary, and aggressive tone and spoke “in a violent way”;
- Haynes said to M.H., “F--k you, b---h . . . [w]hy would you go in the door” and continued to shout obscenities at M.H. for about 15 minutes;
- Haynes threw hot coffee at M.H.;⁴ and
- Haynes told M.H., “You’re from Africa. You don’t belong here. You don’t know how to speak English.”

Through this direct evidence, the state sufficiently showed that Haynes delivered offensive, obscene, or abusive language in a loud and angry manner that reasonably would arouse alarm, anger, or resentment in others, in a public place by denigrating M.H.’s

⁴ The conduct of pouring hot coffee on M.H. is not speech protected by the First Amendment. *See State v. Casillas*, 952 N.W.2d 629, 636 (Minn. 2020) (explaining that although the First Amendment protections are not limited to the spoken word, the only extension of these protections to conduct is for *expressive* conduct, such as videos or photographs).

nationality. Minn. Stat. § 609.72, subd. 1(3). The bellicose content of the statements would likely provoke an act of violence from the intended target of such comments. As would the manner of the speech, shouting the “fighting words” in a loud, scary, and aggressive tone. As such, much—if not all—of this evidence is outside the purview of First Amendment protections. *See In re T.L.S.*, 713 N.W.2d 877, 881 (Minn. App. 2006) (holding that boisterous or noisy conduct may trigger punishment without offending the First Amendment because it is not the speech itself but the manner of delivery); *see also Hensel*, 901 N.W.2d at 176-77. Thus sufficient evidence supports Haynes’s conviction for disorderly conduct.

Haynes’s Asserted Defenses

Haynes contends that even if sufficient evidence supports the two convictions, as discussed above, her conduct was justified under the law that authorizes the use of force against another when done in the defense of others or in the defense of property. At trial, she argued that she threw coffee on M.H. in defense of her young son as well as in defense of property against someone—that was quickly entering the building without stopping—who could have been a trespasser.

Minnesota’s self-defense law allows a person to use “reasonable force” to resist an offense by another. Minn. Stat. § 609.06, subd. 1(3) (2018); *State v. Pollard*, 900 N.W.2d 175, 178 (Minn. App. 2017). A defendant bears the burden of producing evidence to support a claim of self-defense. *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006). If the defendant meets that burden, the state has the

burden at trial of disproving one or more of the following self-defense elements beyond a reasonable doubt:

- (1) the absence of aggression or provocation on the part of the defendant;
- (2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm;
- (3) the existence of reasonable grounds for that belief; and
- (4) the absence of a reasonable possibility of retreat to avoid the danger.

State v. Basting, 572 N.W.2d 281, 285-86 (Minn. 1997).

Here, the district court instructed the jury on the defense of others and property. As a result, the burden was on the state to prove beyond a reasonable doubt that Haynes did not act in defense of either person or property. *Id.* at 286. The question before us, then, turns upon whether the state presented sufficient evidence for the jury to have concluded that at least one of the multiple requirements of self-defense were not met. *Id.* Put another way, we determine whether the circumstances proved in this case support a reasonable hypothesis that Haynes had an actual and honest belief that either her young son was in imminent danger or that she was acting to prevent a trespass, and whether her actions, including throwing the hot coffee at M.H., were reasonable under the circumstances.

Given the following evidence from witness testimony and the surveillance footage, we conclude that sufficient evidence supports the jury's rejection of Haynes's defenses:

- M.H. did not touch Haynes or her son;
- M.H. made no threats or physical movements to suggest she was attacking Haynes's young son;

- M.H. said “excuse me” as she tried to move past Haynes; and
- Haynes’s reaction after M.H. said “excuse me” was to immediately pour coffee on M.H., after which M.H. said “excuse me” again.

Given this direct evidence, sufficient evidence supports the jury’s rejection of Haynes’s asserted defenses. *See* Minn. Stat. § 609.06, subd. 1(3)-(4) (2018).

In sum, because there was sufficient evidence to support Haynes’s convictions for fifth-degree assault and disorderly conduct and to support the jury’s rejection of her self-defense claim, Haynes’s convictions cannot be reversed on these grounds.

II. The prosecutor’s statements during closing argument do not entitle Haynes to a new trial.

Haynes argues that the prosecution’s statements during closing argument disparaged the defense and inflamed the passions of the jury by interjecting her personal opinions about the veracity of witnesses and implying that Haynes was lying. Because Haynes did not object to the alleged misconduct, we apply a modified plain-error standard of review. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). This test requires the defendant to show that an error was made and that it was plain. *Id.* If the defendant meets this burden, the burden then shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have significantly affected the jury’s verdict. *Id.* Even if the error affected the defendant’s substantial rights, we will not address the error unless doing so is necessary to ensure fairness and the integrity of the judicial proceedings. *Id.*

Here, Haynes challenges the following specific unobjected-to statements made during the state's closing argument:

- “Uncivil conduct” is rampant throughout the country, and this incident “would be one such incident of uncivil behavior”;
- Haynes’s conduct was “mean, spirited behavior, random, unprovoked” and “filthy mouth[ed] conduct”;
- Haynes was not “entitled to a pass on the defense of self, others, or property” and the jury must decide if Haynes’s account “is reasonable or if it is a bold face[d] lie”; and
- Haynes’s version of events was a “false narrative.”

The cumulative effect of these statements, Haynes asserts, substantially influenced the jury’s verdict.

During closing arguments, the prosecution “must avoid inflaming the jury’s passions and prejudices against the defendant.” *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). Nor may a prosecutor disparage or belittle the defense. *State v. Martin*, 773 N.W.2d 89, 108 (Minn. 2009). But the prosecution may argue that a particular defense has no merit. *Id.* And in so doing, the prosecution may “respond to the arguments made by the defendant.” *State v. Vue*, 797 N.W.2d 5, 16 (Minn. 2011).

Here, while the tone of the prosecution’s isolated comments during closing argument (e.g., “bold face[d] lie,” “filthy mouth[ed] conduct,” and “false narrative”) approaches inflammatory conduct, the closing argument as a whole focused on the lack of facts supporting Haynes’s theories, suggesting they were not believable in light of the evidence considered all together. And even the “bold face[d] lie” and “false narrative”

comments were made in the alternative—i.e., *either* Haynes’s conduct was reasonable, or her version of events was a “bold face[d] lie.” Given the closing argument overall, we discern no error that plainly required intervention by the district court.

And even if we made the assumption that the prosecution engaged in misconduct, the error did not prejudice Haynes’s right to a fair trial. The alleged misconduct occurred only sporadically during the closing argument and rebuttal, which was lengthy. The short duration of any misconduct was particularly isolated given the length of the entire five-day trial. More importantly, the district court—because of an unrelated sustained objection based upon the prosecution’s characterization of the evidence and theories of the case—granted Haynes’s counsel a surrebuttal, providing Haynes the last word at trial. And the jury was instructed that the arguments of counsel are not evidence. *See State v. Matthews*, 779 N.W.2d 543, 550 (Minn. 2010) (explaining that we presume the jury followed the district court’s instructions).

In sum, even if prosecutorial misconduct occurred, given its limited context and the strength of the evidence against Haynes, the state has met its burden to show that there is no reasonable likelihood that the alleged misconduct significantly affected the verdicts. Nor do we discern a necessity to exercise our discretionary power to grant relief here, based on unobjected-to error, because “a failure to correct the error would have an impact beyond the current case by causing the public to seriously question the fairness and integrity of our judicial system.” *Pulczynski v. State*, 972 N.W.2d 347, 356 (Minn. 2022).

III. The district court did not plainly err when it proceeded with the jury trial in Haynes's absence.

Haynes argues that the district court erred by proceeding with the trial in her absence because she did not knowingly or intentionally waive her right to be present at all stages of her jury trial. Because Haynes did not object to continuing the trial—and according to her trial counsel, it was her own request to continue the trial in her absence—we review the district court decision for plain error. *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011).

Recall that a defendant has met her burden in showing plain error if she can establish three prongs: “(1) an error, (2) that was plain, and (3) that affected the substantial rights of the defendant.” *Id.* If the defendant establishes these prongs, a new trial will only be ordered when the plain error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id.* We need not consider prongs one and two if the defendant fails to show that her substantial rights were affected under the third prong. *Id.*

In assessing the first factor of the plain-error analysis, we begin by recognizing that Minnesota caselaw provides that a defendant has a due process right—in addition to a confrontation right—to be present at trial. *State v. Swanson*, 707 N.W.2d 645, 657 (Minn. 2006). And our rules of criminal procedure specifically require that a defendant must be present at all stages of trial. Minn. R. Crim. P. 26.03, subd. 1. But this right may be waived by the accused. *State v. Cassidy*, 567 N.W.2d 707, 709 (Minn. 1997); *State v. Ware*, 498 N.W.2d 454, 457 (Minn. 1993). This decision is a personal one to be made by a defendant after consultation with counsel. *Ware*, 498 N.W.2d at 457.

Here, the record established that it was Haynes’s own request to continue the trial in her absence. One of her attorneys stated that Haynes affirmatively expressed that she “want[ed] us to move forward without her.” And the other attorney—who talked directly with Haynes—explained that “she sounded like she had had a very, very sick night . . . [a]nd her conduct this morning on the phone was consistent with [suffering from a seizure condition] We would also like to confirm that [Haynes] did speak that she wanted to move forward with the trial today.” Given these statements, we discern no error in the district court’s finding that Haynes knowingly and voluntarily waived her right to be present for the conclusion of the trial.

Still, Haynes asserts that this determination is insufficient because it was only “a general finding” based on the agreement of attorneys. But the Minnesota Supreme Court has not required a defendant to explicitly affirm a personal waiver of the right to be present at trial. *State v. Martin*, 723 N.W.2d 613, 619-20 (Minn. 2006). And while, in her petition for postconviction relief, Haynes states that she does not recall that conversation with her attorney, she does not deny that she informed her counsel that she wished for the trial to continue in her absence and does not now allege ineffective assistance of counsel. Given governing precedent and Haynes’s attorneys’ explicit statements to the court, the district court did not err in carrying on with these proceedings on the final day of trial in Haynes’s absence.

While we discern no error—much less plain error—in the district court’s decision to proceed with the trial, any such error did not affect Haynes’s substantial rights. *State v. Coleman*, 957 N.W.2d 72, 77 (Minn. 2021) (concluding that when an error occurs

that does not affect a defendant's substantial rights, a decision whether the error was plain is not required). This is particularly true given that the only parts of the trial that she missed were the reading of the final jury instructions, which were discussed the previous day in Haynes's presence, closing arguments, and the reading of the verdicts. Further, the district court gave a curative instruction regarding Haynes's absence.⁵

In sum, the state presented sufficient evidence to prove, beyond a reasonable doubt, that Haynes was guilty of fifth-degree assault and disorderly conduct. And the state met its burden in showing that Haynes's conduct was not justified as defense of others or property. Collectively, the statements made by the state during closing argument did not rise to a level of prosecutorial misconduct. Finally, we discern no error in the district court's determination to proceed with trial in Haynes's absence. Accordingly, we affirm.

Affirmed.

⁵ Nor did the postconviction court abuse its discretion in denying Haynes's request for an evidentiary hearing to further develop the record regarding whether she knowingly and voluntarily waived her right to be present. Minnesota Statutes section 590.04, subdivision 1 (2022), requires the district court to hold an evidentiary hearing on a postconviction petition "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." For the reasons discussed above (i.e., that Haynes does not recall what occurred while in the hospital yet does not deny informing her attorneys she wanted trial to continue without her and that Haynes's attorneys explicitly informed the district court that Haynes "wanted to move forward with the trial today") the postconviction court's determination that the record conclusively showed that Haynes was not entitled to relief falls within the court's discretion.