

*This opinion is nonprecedential except as provided by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
A22-0761**

State of Minnesota,
Respondent,

vs.

Antonio Albert Schally,
Appellant.

**Filed March 27, 2023
Affirmed
Cleary, Judge***

Washington County District Court
File No. 82-CR-21-3359

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

Kevin Magnuson, Washington County Attorney, Kayla K. Wengronowitz, Assistant
County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant
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Considered and decided by Smith, Tracy M., Presiding Judge; Larkin, Judge; and
Cleary, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

CLEARY, Judge

Appellant Antonio Albert Schally challenges his conviction for fleeing a police officer in a motor vehicle, arguing that (1) the evidence was insufficient to prove that he was the driver, (2) the district court violated his right against self-incrimination by ordering him to reveal a tattoo, and (3) the prosecutor committed misconduct by shifting the burden of proof. We affirm.

FACTS

On September 26, 2021, at approximately 9:30 a.m., a lieutenant on patrol observed a maroon Chevy Tahoe pass him at a high speed. The lieutenant pursued the Tahoe for a speed violation. The lieutenant activated his emergency lights, but the Tahoe sped up. The lieutenant followed the Tahoe as it took an exit ramp and continued to a residential area. The lieutenant discontinued active pursuit for safety reasons but followed the Tahoe at a normal speed.

The lieutenant lost sight of the Tahoe for a short time before he observed it make a U-turn and approach his squad car “head-on.” As the Tahoe passed, the lieutenant observed the driver, “a white male” in a dark baseball hat with a “large tattoo or blob” on his neck. The lieutenant noted the license-plate number. The lieutenant learned that appellant was the vehicle’s registered owner and had two arrest warrants.

Officers were dispatched to locate the Tahoe. Around 11:00 a.m., an officer located the Tahoe at an apartment complex. The officer saw an individual quickly enter a building. The officer went to a rear entrance of the building where appellant exited and was arrested.

A trooper heard of the pursuit over his radio and traveled to where the Tahoe was found. The lieutenant had told the trooper that the driver had “a very distinctive neck tattoo.” The trooper took photographs of appellant, one of which focused on appellant’s neck tattoo. The trooper searched appellant and found keys to the Tahoe in appellant’s pocket.

The trooper transported appellant to jail where he turned custody of appellant over to the lieutenant. The lieutenant identified appellant as the driver. The state charged appellant with fleeing a peace officer in a motor vehicle, in violation of Minn. Stat. § 609.487, subd. 3 (2020).

At appellant’s jury trial, the lieutenant testified that when he discontinued active pursuit, he became “hyper-focused” on getting a visual of the driver for future investigation. The lieutenant testified that he got “a good look at the driver” and had “[n]o doubt at all” that appellant was the driver.

At trial, the district court admitted the photographs the trooper took of appellant at the time of his arrest. The prosecutor asked appellant to “pull down his turtleneck” to reveal any tattoo he might have. Appellant complied. The prosecutor asked the lieutenant: “Is that the tattoo that you saw on the driver?” The lieutenant replied: “I just know that it was a big tattoo on his neck. And I saw the defendant later; yes, same one.” The prosecutor asked: “Regardless of whether you can specifically say that’s the tattoo, are you able to say without a doubt that that is the driver?” The lieutenant testified: “A hundred percent.”

The jury found appellant guilty as charged. The district court sentenced appellant to 22 months in prison. This appeal follows.

DECISION

I. The direct evidence is sufficient to sustain appellant's conviction.

When evaluating the sufficiency of the evidence, this court views the evidence in the light most favorable to the conviction. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We “carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the [jury] to reasonably conclude that the defendant was guilty beyond a reasonable doubt.” *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted).

Appellant argues that the evidence was insufficient to establish his identity as the driver. While appellant claims that the state relied on direct and circumstantial evidence to prove that he was the driver, we conclude that the state sufficiently proved that appellant was the driver with direct evidence alone. *See State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016) (stating that “when a disputed element is sufficiently proven by direct evidence alone . . . it is the traditional standard, rather than the circumstantial-evidence standard, that governs”). “Direct evidence” is “based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004) (quotation omitted).

Here, the lieutenant testified about his observations. He testified that after the Tahoe completed a U-turn and approached him head-on, he was “hyper-focused” on getting a visual of the driver. As the Tahoe passed, the lieutenant got a “good look at the driver.” When the lieutenant saw appellant at the jail, appellant was wearing the same hat that the

driver was wearing and had the same neck tattoo. The lieutenant testified that he had “[n]o doubt at all” that appellant was the driver.

The “assessment of witness credibility is a jury function.” *State v. Reese*, 692 N.W.2d 736, 741 (Minn. 2005). And “a conviction can rest upon the testimony of a single credible witness.” *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990). The lieutenant provided direct evidence that appellant was the driver. The jury found the lieutenant to be credible. This record permits the jury to reasonably conclude that appellant was the driver.

II. The district court did not violate appellant’s right against self-incrimination.

We review constitutional questions de novo. *See State v. Borg*, 806 N.W.2d 535, 541 (Minn. 2011) (reviewing de novo whether Fifth Amendment privilege prohibits eliciting certain testimony).

The Fifth Amendment guarantees that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. “The privilege against self-incrimination bars the state from (1) compelling a defendant (2) to make a testimonial communication . . . (3) that is incriminating.” *State v. Diamond*, 905 N.W.2d 870, 873 (Minn. 2018). But making a defendant “the source of ‘real or physical evidence’ does not violate [the privilege].” *Schmerber v. California*, 384 U.S. 757, 764 (1966); *see Diamond*, 905 N.W.2d at 875-76 (concluding that compelling defendant to provide fingerprint was not testimonial communication because it is akin to gathering evidence of defendant’s physical characteristics). The disputed issue here is whether appellant’s tattoo is testimonial. We conclude that it is not.

Appellant argues that his tattoo is testimonial because it could be seen as conveying a belief he held; specifically, his “B.\$.” tattoo communicated that he distrusted authority and was unlikely to respect an officer’s demand to pull over. But as the state asserts, there was no testimony at trial regarding the belief that the tattoo represents. Rather, the tattoo was merely a physical feature used to identify appellant as the driver.

The lieutenant testified that he saw a “big tattoo on [the driver’s] neck” that was a “dollar sign symbol and then some other markings.” The state requested that appellant “pull down the collar of his turtleneck to reveal” his tattoo because the lieutenant got a good look at the driver’s “very distinctive” neck tattoo. Appellant’s neck tattoo was offered as a physical feature to prove that he had a distinctive tattoo on his neck in the same location as the driver.

Moreover, appellant cannot show any prejudice because the lieutenant testified that he was “[a] hundred percent” sure that appellant was the driver “[r]egardless of whether [he could] specifically say that’s the [same] tattoo.” Even if the district court had not compelled appellant to show his tattoo, the state was still able to provide evidence showing that appellant was the driver. The district court did not violate appellant’s right against self-incrimination.

III. The prosecutor did not shift the burden of proof.

Finally, appellant argues that the prosecutor committed misconduct by shifting the burden of proof. Appellant did not object at trial. We review this alleged prosecutorial misconduct under a modified plain-error test. *See State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (citing *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)).

Under the modified plain-error test, appellant must show error that was plain. *See id.* An error is plain if it “contravenes case law, a rule, or a standard of conduct.” *Ramey*, 721 N.W.2d at 302. If appellant shows plain error, the “burden then shifts to the [s]tate to demonstrate that the error did not affect [appellant]’s substantial rights.” *Carridine*, 812 N.W.2d at 146. Plain error affects substantial rights “if the error was prejudicial and affected the outcome of the case.” *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). If prejudicial plain error exists, we will assess “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Ramey*, 721 N.W.2d at 302.

If the prosecutor shifted the burden of proof, it is “highly improper and constitutes prosecutorial misconduct.” *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010) (quotation omitted). The prosecutor improperly shifts the burden of proof by implying that a defendant has the burden of proving his innocence. *Id.* To determine whether the prosecutor shifted the burden of proof, we look at the prosecutor’s closing argument “as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence.” *Carridine*, 812 N.W.2d at 148 (quotation omitted).

Here, the prosecutor stated to the jury in closing argument:

I want to talk for a minute about reasonable doubt. . . . What does it really mean? Well, you have gotten the instruction from the Judge that tells you what it means, and I want to highlight two parts of it.

Number one is it’s a doubt based on reason and on common sense. It’s something that isn’t just, [o]h, my spidey senses are tingling and I don’t know why. It’s a doubt based on reason. It’s something that you can articulate. It isn’t just this, [w]ell, geez, I don’t know why I have doubt, but I have doubt. It’s something tangible. It’s something meaningful. And it also doesn’t mean beyond all possibility of doubt. Think

of it as a practical matter, it is really difficult to prove things with absolute certainty. I mean, there was a period of time when people thought it had been proven with absolute certainty that the earth was flat. Guess what? They were wrong. We are not talking about proving it beyond all shadow of a doubt, all possibility of doubt. We are talking about proving it beyond a reasonable doubt, to a reasonable certainty, that it happened. And so it's important that you keep that in mind. This doesn't mean, you know, prove it—it's reasonable doubt. It's a doubt based on reason.

Appellant argues that the prosecutor shifted the burden of proof by saying that reasonable doubt is “something that you can articulate.” He argues that to require someone to “articulate” something imposes a legal burden. Appellant claims that this statement implied to the jury that appellant had to articulate a reason why he was not the driver, that he had to prove his innocence.

Appellant fails to meet his plain-error burden. The prosecutor did not shift the burden. He merely explained that reasonable doubt is based on something concrete, not just a feeling. And the prosecutor did not state that appellant had to articulate anything; the suggestion was that the jurors should be able to explain, beyond a feeling, what led them to the conclusion that their reasonable doubt was or was not satisfied. Additionally, appellant challenges just a few words in an entire argument. And the district court instructed the jury twice on the state's burden of proof. *See State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) (stating that juries are presumed to follow instructions). The district court instructed: “The [s]tate must convince [the jury] by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant has no obligation to

prove [his] innocence.” Based on this record, appellant has not shown plain error in the prosecutor’s closing argument.

Affirmed.