

*This opinion is nonprecedential except as provided by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
A22-1334**

State of Minnesota,
Respondent,

vs.

Anthony John Tavarez,
Appellant.

**Filed August 14, 2023
Affirmed
Slieter, Judge**

Chisago County District Court
File No. 13-CR-21-232

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

Janet Reiter, Chisago County Attorney, David Classen, John Lovasz, Assistant County Attorneys, Center City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrew J. Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Slieter, Judge; and Kirk,
Judge.*

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

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this direct appeal from the judgment of conviction for fleeing police in a motor vehicle, fourth-degree assault of a peace officer, and refusal to submit to a chemical test for allegedly driving while impaired (DWI), appellant Anthony John Tavaréz argues (1) that the evidence was insufficient to prove beyond a reasonable doubt that he fled police and that he refused to submit to a DWI breath test, and (2) that the prosecutor committed misconduct in closing argument by injecting improper character evidence and aligning himself with the jury. Because sufficient evidence supports the jury's guilty verdicts and the prosecutor did not commit misconduct, we affirm.

FACTS

This case arises from a late-night traffic incident after which the state charged Tavaréz with fleeing a peace officer in a motor vehicle in violation of Minn. Stat. § 609.487, subd. 3 (2020), fourth-degree assault on a peace officer in violation of Minn. Stat. § 609.2231, subd. 1(c)(2) (2020), and gross-misdemeanor DWI-test refusal in violation of Minn. Stat. § 169A.20, subd. 2(1) (2020). The case was tried to a jury on May 31 and June 1, 2022, and the following facts are based on evidence presented at trial.

At approximately 10:13 p.m. on March 28, 2021, the Chisago County Sheriff's Office received a report that a male in a silver sedan was "aggressively doing a burnout or spinning his tires" in the caller's driveway. As the responding officer began driving towards the reported location, a dispatcher informed him that the suspect had fled in the vehicle and was headed towards his location. The officer observed two cars traveling

towards him followed by a sedan with “very distinctive headlights” traveling 97 miles per hour and “flashing its high beams on and off very aggressively, and constantly.” The officer activated his squad car’s emergency lights and turned around to initiate a traffic stop. As the officer’s squad car approached the speeding vehicle, the vehicle braked and then “all of a sudden it accelerated to even higher speeds.” The officer then observed the vehicle swerve into oncoming traffic and terminated the pursuit out of concern for public safety.

Dash-camera footage of the pursuit was played for the jury. Shortly after terminating his pursuit, the officer learned that another driver had called 911 and reported seeing the vehicle flee the officer and “come to a screeching halt and park in a parking spot” along the side of the highway. The caller described the vehicle as a silver sedan.

As the officer searched for the vehicle, the “911 caller that saw the vehicle come to that screeching halt, . . . reported following . . . the vehicle into Holiday’s parking lot.” Officers then responded to the Holiday gas station, noticed few people around and only one car parked at the gas pumps—a silver sedan with distinctive headlights. The officers found the driver inside the gas station and identified him as Tavaréz.

Suspecting Tavaréz of DWI, officers handcuffed and searched Tavaréz, finding keys to the silver sedan that was parked at the gas pumps. Body-camera footage from the officer’s interaction with Tavaréz inside the Holiday was played for the jury. The time stamp from the video indicated that officers encountered Tavaréz at the Holiday within seven minutes of the initial report. The jury watched security video of the inside of the Holiday.

Tavarez was transported to the Chisago County Jail. An officer attempted to provide Tavarez with the Minnesota Breath Test Advisory. However, Tavarez was “extremely verbally combative and noncompliant throughout the whole process.” The officer “ended up reading the entire breath test advisory multiple times to attempt to give him every opportunity” to take the test. The entire test advisory was videotaped, and the recording was played for the jury.

The prosecutor began his closing argument to the jury by stating that “[t]his is a case about a man who has contempt for authority, law enforcement in particular.” Defense counsel ended her closing remarks by reminding the jury that “[c]ontempt for law enforcement, doesn’t equal criminal behavior.” The jury found Tavarez guilty on all three counts, and the district court imposed concurrent sentences. This appeal follows.

DECISION

I. The evidence was sufficient for the jury to convict Tavarez of fleeing a peace officer in a motor vehicle and DWI-test refusal.

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 conviction, is sufficient to allow the jurors to reach their verdict.” *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004). We assume the jury believed evidence that supported the verdict and disbelieved any evidence that conflicted with the verdict. *Id.* “We will not disturb the verdict if the jury, while acting with proper regard for the presumption of innocence and regard for the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Id.* at 25-26.

A finding of guilt can be based on direct or circumstantial evidence. Circumstantial evidence is “evidence from which the [fact-finder] 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). “In contrast, direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Id.* (quotations omitted).

When considering a sufficiency challenge to a guilty verdict based on direct evidence, we carefully analyze the record to determine whether the evidence, viewed in the light most favorable to the verdict, was sufficient to permit the fact-finder to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that the fact-finder believed the state’s witnesses and disbelieved any contrary evidence. *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). We, as an appellate court, defer to the fact-finder’s credibility determinations and will not reweigh the evidence on appeal. *State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009); *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002). We will not disturb a guilty verdict if the fact-finder, acting with due regard for the presumption of innocence and requirement of proof beyond a reasonable doubt, could have reasonably concluded that the state proved the defendant’s guilt. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

However, if the state relied on circumstantial evidence to prove an element of an offense, we apply a heightened standard of review. *See Harris*, 895 N.W.2d at 599-601 (discussing circumstantial-evidence standard); *State v. Al-Naseer*, 788 N.W.2d 469, 471 (Minn. 2010) (stating that “the heightened scrutiny applies to any disputed element of the

conviction that is based on circumstantial evidence”). Pursuant to the circumstantial evidence standard of review, we first determine the circumstances proved, disregarding evidence that is inconsistent with the verdict. *Harris*, 895 N.W.2d at 600-01. Next, we must “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt.” *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (quotation omitted). We do not defer to the fact-finder’s choice between reasonable inferences. *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013). But we will not reverse a conviction based on circumstantial evidence unless there is a reasonable inference other than guilt. *Loving*, 891 N.W.2d at 643.

Fleeing a Peace Officer

Tavarez was found guilty of fleeing a peace officer pursuant to Minn. Stat. § 609.487, subd. 3, which provides that “[w]hoever by means of a motor vehicle flees or attempts to flee a peace officer who is acting in the lawful discharge of an official duty, and the perpetrator knows or should reasonably know the same to be a peace officer, is guilty of a felony.”

Because the state relied on circumstantial evidence to prove that Tavarez was the driver of the vehicle that fled police, we apply the circumstantial evidence standard of review. The circumstances proved are as follows:

- A male in a silver sedan was doing burnouts and spinning his tires in someone’s driveway.
- The responding officer encountered a silver sedan with “very distinctive” headlights traveling 97 miles per hour and “aggressively” flashing its headlights.

- The vehicle accelerated to speeds estimated to exceed 100 miles per hour when the officer attempted to make a traffic stop.
- The vehicle swerved into oncoming traffic, forcing the officer to terminate the pursuit out of concern for public safety.
- Another driver followed the speeding silver sedan into the Holiday gas station parking lot.
- Officers responded to the Holiday, finding Tavaréz inside and a silver sedan with distinctive headlights that smelled of “hot burning brake pads” outside.
- Tavaréz possessed keys to the silver sedan.
- Officers encountered Tavaréz at the Holiday within seven minutes of receiving the initial report of a male in a silver sedan doing burnouts in a driveway.

Tavaréz maintains that the circumstances proved were insufficient to show that he fled police in a motor vehicle. We disagree and, as evidenced by the jury’s guilty verdicts, so did the jury. *See Harris*, 895 N.W.2d at 600 (noting that under the first prong of the circumstantial-evidence standard, we defer to the jury’s credibility determinations and “resolv[e] all questions of fact in favor of the jury’s verdict”). The circumstances proved demonstrate that a male driving a silver sedan with distinctive headlights fled police, and officers located the same vehicle with “very distinctive” headlights shortly thereafter. Though officers lost sight of the vehicle for a brief period of time, another driver saw the vehicle flee and followed it to the Holiday. When officers found the vehicle and Tavaréz at the Holiday, Tavaréz had keys to the vehicle in his pocket. The circumstances proved support the jury’s inference that Tavaréz was the driver of the silver sedan with distinctive headlights.

Tavarez has not clearly articulated a second-prong circumstantial-evidence argument. *See State v. Tschou*, 758 N.W.2d 849, 858 (Minn. 2008) (noting that to successfully challenge a jury’s verdict, an appellant must “point to evidence in the record that is consistent with a rational theory other than guilt”). Nevertheless, we next consider whether the circumstances proved are consistent with guilt and inconsistent with a reasonable hypothesis other than guilt. *Harris*, 895 N.W.2d at 600-01; *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (citation omitted) (noting appellate courts have a responsibility “to decide cases in accordance with law, and that responsibility is not to be diluted by counsel’s oversights, lack of research, failure to specify issues or to cite relevant authorities” (quotation omitted)).

An alternative hypothesis to guilt may not be based on “mere conjecture.” *Tschou*, 758 N.W.2d at 858. Tavarez suggests that the evidence does not exclude the possibility that someone else was driving the silver sedan that was fleeing from law enforcement. Or that, even if the evidence was sufficient to demonstrate he was driving, it was insufficient to demonstrate that he knew the officer was trying to stop his vehicle. However, Tavarez points to no evidence in the record that supports these inferences. *Id.* And, because Tavarez was the driver of the silver sedan parked at the Holiday within minutes of the initial call to the dispatcher, this claimed inference is unreasonable. *See id.*; *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) (quotation omitted) (noting that “possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable”).

DWI-Test Refusal

Tavarez argues that the evidence was insufficient to prove beyond a reasonable doubt that he refused to submit to a breath test. “It is a crime for any person to refuse to submit to a chemical test . . . of the person’s breath” Minn Stat. § 169A.20, subd. 2(1). To be guilty of refusal to submit to a chemical test, the state must prove an “[a]ctual unwillingness to submit to testing.” *State v. Ferrier*, 792 N.W.2d 98, 101 (Minn. App. 2010), *rev. denied* (Minn. Mar. 15, 2011). Express refusal is not required. *Id.* Instead, “refusal to submit to chemical testing includes any indication of actual unwillingness to participate in the testing process, as determined from the driver’s words and actions in light of the totality of the circumstances.” *Id.* at 102. A driver’s actions that “frustrate the testing process . . . amount to refusal to test.” *State v. Collins*, 655 N.W.2d 652, 658 (Minn. App. 2003), *rev. denied* (Minn. Mar. 26, 2003).

Tavarez and the state contend the circumstantial-evidence standard applies. We disagree. Because the state relied on video of the breath test advisory and the officer’s testimony about his observations during this advisory, we conclude that the direct-evidence standard applies. *See Harris*, 895 N.W.2d at 599 (“[D]irect evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” (quotation omitted)); *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”).

The jury observed from the video the officer's multiple attempts to read the breath test advisory to Tavarez. The video demonstrated that the officer was unable to complete the advisory because Tavarez repeatedly interrupted the officer, refused to answer questions and, at one point, tried leaving the room. The officer also testified that Tavarez was "extremely verbally combative and noncompliant throughout the whole process."

The assessment of witness credibility is a jury function, 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 video of the breath test advisory and the officer's testimony provided direct evidence of Tavarez frustrating the testing process, which amounts to refusal to test. *Collins*, 655 N.W.2d at 658. We will not question the weight of the video evidence, *Franks*, 765 N.W.2d at 73, and we presume the jury found the officer's testimony credible, *see State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997) (noting appellate courts defer to jury credibility determinations). Viewing the evidence in a light most favorable to the conviction, the jury reasonably concluded that Tavarez refused to submit to a breath test. *Olhausen*, 681 N.W.2d at 25-26.

II. The prosecutor did not commit misconduct.

When the defendant fails to object during trial, alleged prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "An error is plain if it was clear or obvious." *Id.* (quoting *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002)). The defendant bears the burden of establishing error that is plain, but upon doing so the burden shifts to the state to prove that there is no

reasonable likelihood that the absence of the misconduct would have had a significant impact on the jury's verdict. *Id.*

Tavarez argues the prosecutor committed misconduct in two ways. First, Tavarez claims the prosecutor attacked his character by referencing his “contempt” for law enforcement. Second, Tavarez suggests that the prosecutor aligned himself with the jury by using “we” statements.

“Character attacks are improper comments during a prosecutor’s closing argument.” *State v. Atkins*, 543 N.W.2d 642, 649 (Minn. 1996). In *State v. Atkins*, Atkins argued the prosecutor committed misconduct by referencing his “character” and labeling Atkins as “being a certain kind of human being.” *Id.* The court rejected the argument and reiterated that terms “must be read in the context of the entire closing argument.” *Id.* The court explained that when reading the term and phrase in context, “[t]hese facts were not discussed in order to show action in conformity with Atkins’ character, but to show proof of intent and knowledge pursuant to Minn. R. Evid. 404(b).” *Id.* Thus, statements made to show intent or knowledge are not character attacks constituting prosecutorial misconduct. *Id.*

Tavarez argues that the prosecutor’s comments were plain error because the multiple uses of the word “contempt” were improper character attacks. We are not persuaded. The prosecutor’s references to “contempt” were made within the context of Tavarez’s refusal to stop—i.e., despite the officer’s siren and emergency lights, Tavarez lead police on a high-speed chase. The prosecutor’s other use of the word “contempt” was followed by a reference to Tavarez’s evasive and uncooperative behavior during the breath

test advisory. Thus, when considering the entirety of his closing argument, the prosecutor's multiple uses of the word "contempt" goes to the intent required to support the charges. *See id.* (rejecting appellant's argument that the prosecutor improperly attacked his character because, when read in the context of the entire closing argument, the references to his "character" were made to "show proof of intent and knowledge"). To convict Tavaréz of fleeing an officer in a motor vehicle, the state had to prove that Tavaréz "increase[d] speed, . . . with intent to attempt to elude a peace officer following a signal given by any peace officer to the driver of a motor vehicle." Minn. Stat. § 609.487, subd. 1 (2020) (defining "flee"). Tavaréz's conviction of assault on a peace officer likewise required the state to prove that the assaultive act towards the officer was intentional. Minn. Stat. § 609.2231, subd. 1(c)(2) (criminalizing "*intentionally* throw[ing] or otherwise transfer[ring] bodily fluids or feces at or onto the officer" (emphasis added)). And to convict Tavaréz of DWI-test refusal pursuant to Minn. Stat. § 169A.20, subd. 2(1), the state had to prove his actual unwillingness to participate in the testing process. *Ferrier*, 792 N.W.2d at 101. Thus, the prosecutor did not commit misconduct during closing argument by using the word "contempt" because the statements were made to show Tavaréz's intent.

Tavaréz separately argues that the prosecutor committed misconduct by aligning himself with the jury with multiple "we" statements. "[A] prosecutor is not a member of the jury, so to use 'we' and 'us' is inappropriate" *State v. Mayhorn*, 720 N.W.2d 776, 790 (Minn. 2006). Prosecutors may use "we" statements to "present to the jury all legitimate arguments on the evidence, analyze and explain the evidence, and present all proper inferences to be drawn from the evidence." *See State v. Roman Nose*, 667 N.W.2d

386, 402 (Minn. 2003) (holding that prosecutor’s comments using “we” statements to summarize evidence were not prosecutorial misconduct).

Tavarez argues that three “we” statements amount to misconduct. The first two “we” statements Tavarez challenges occurred when the prosecutor stated: “so we know it’s the car. We know it’s the defendant.” This statement followed the prosecutor’s summation of the evidence connecting Tavarez and his silver sedan located at the Holiday gas station to the speeding vehicle. Because the record supports the inference that Tavarez was the driver of the vehicle that fled police, the prosecutor’s statement does not constitute misconduct. *See id.* (noting the “prosecutor may present all legitimate arguments and draw reasonable inferences based on the evidence presented to the jury in support of his theory of the case”).

The final “we” statement Tavarez argues was improper occurred when the prosecutor said, “so beyond a reasonable doubt. Ladies and Gentlemen, on all three counts, we are well beyond that threshold.” This statement came at the end of the prosecutor’s closing remarks—the prosecutor had reviewed, analyzed, and explained the evidence presented, and then presented an inference to be drawn, which was that the evidence presented satisfied the state’s burden of proving Tavarez guilty beyond a reasonable doubt. *See Atkins*, 543 N.W.2d at 648. The prosecutor therefore did not commit misconduct by using “we” statements during closing argument.

Because we find no error, we need not consider whether the statements had a significant impact on the jury’s verdict. *Ramey*, 721 N.W.2d at 302.

Affirmed.