

*This opinion is nonprecedential except as provided by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
A23-1668**

State of Minnesota,
Respondent,

vs.

Cory Gene Dustan Lutz,
Appellant.

**Filed August 12, 2024
Affirmed
Schmidt, Judge**

Stearns County District Court
File No. 73-CR-23-3569

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

Renee N. Courtney, St. Cloud City Attorney, Courtney J. Petruzates, Assistant City Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Greg Scanlan, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Harris, Presiding Judge; Worke, Judge; and Schmidt, Judge.

NONPRECEDENTIAL OPINION

SCHMIDT, Judge

Appellant Cory Gene Dustan Lutz argues that his conviction for fleeing by means other than a motor vehicle must be reversed for insufficient evidence. Alternatively, Lutz argues that he is entitled to a new trial because the district court plainly erred by instructing

the jury that certain video exhibits would not be available in the jury deliberation room and by misstating the elements of the fleeing offense, and the prosecutor committed plain-error misconduct in closing argument. In a supplemental brief, Lutz also claims he received ineffective assistance of counsel. We affirm.

FACTS

An officer patrolling Highway 23 East in St. Cloud—at approximately 9:00 p.m. when it was dark and the streetlights were activated—observed Lutz on his bicycle with no head lamp or rear reflector. The officer believed Lutz was a hazard for both other vehicles and himself.

The officer followed Lutz and activated his fully marked squad car's emergency lights. Lutz did not stop. The officer rolled down his window and told Lutz to stop. Lutz said he could not stop. The officer gave Lutz repeated commands to stop and sounded the squad's airhorn. Lutz verbally responded to the officer multiple times, but did not stop.

After traveling several city blocks, the officer told Lutz that he was under arrest for fleeing a police officer. Lutz responded that he was not under arrest and continued to bike away. The officer told Lutz, multiple times, that he was under arrest. The officer requested assistance from additional officers. Lutz then crossed Highway 10 against a red light. Another officer arrived, and Lutz finally stopped in a grassy area. The officer instructed Lutz to put his hands behind his back because he was under arrest. Lutz argued with the officers and resisted their attempts to arrest him.

Respondent State of Minnesota charged Lutz with operating a bicycle at night without the required equipment, fleeing by means other than a motor vehicle, and

obstructing legal process. At trial, the officer testified about first observing Lutz, the failed attempts to stop him, and his subsequent arrest. The officer also testified about the unknowns with traffic stops, particularly when individuals are noncompliant, and the heightened nature of traffic stop concerns at night.

Lutz testified that the officer revved his engine, which concerned Lutz that the officer would be aggressive with him. Lutz testified that it was dark, he did not feel safe, and that he wanted to go to a different intersection to interact with the officer. Lutz also testified that he has a medical condition that may have impacted the events. On cross-examination, Lutz admitted that there were no lights on his bicycle. He also admitted that he heard the officer tell him to stop and tell him that he was under arrest. Lutz conceded that he did not stop until after he crossed Highway 10.

The district court instructed the jury, without objection, on the elements for the fleeing offense. After closing arguments, the court informed the jury that “[t]here were three exhibits that were received, however, it is not feasible to send the audio/video exhibits to the jury deliberation room with you so you will not have those available for your review.” Lutz did not object to this instruction or request any additional instructions.

The jury found Lutz not guilty of obstructing legal process but found him guilty of the traffic violation and of fleeing. Lutz was fined for the traffic violation and sentenced to 90 days in jail for fleeing, with 85 days stayed for one year.

Lutz appeals.

DECISION

I. The evidence is sufficient to prove Lutz's conviction for fleeing the police.

Lutz raises a sufficiency-of-the-evidence challenge to his fleeing conviction. “When evaluating the sufficiency of the evidence, appellate courts 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 of the offense of which he was convicted.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). We view the evidence in the light most favorable to the verdict and assume that the jury disbelieved any evidence conflicting with the verdict. *Id.* We will not overturn a verdict if the fact-finder could reasonably have found the defendant guilty of the charged offense. *Id.*

The fleeing-by-other-means section of the fleeing statute required the state to prove (1) the defendant attempted to evade or elude a peace officer, (2) the officer was acting in the lawful discharge of an official duty, (3) the defendant's flight occurred by means of running, hiding, or by any other means except fleeing in a motor vehicle, and (4) the defendant acted with the specific intent to avoid arrest, detention, or investigation. Minn. Stat. § 609.487, subd. 6 (2022); *State v. Wilson*, 830 N.W.2d 849, 854 (Minn. 2013) (“[F]leeing by other means as defined in Minn. Stat. § 609.487, subd. 6, is a specific-intent crime.”). Lutz limits his challenge to the sufficiency of the evidence to the element regarding his intent to avoid arrest, detention, or investigation.

A defendant's state of mind is generally proved with circumstantial evidence. *State v. Washington-Davis*, 867 N.W.2d 222, 235 (Minn. App. 2015), *aff'd*, 881 N.W.2d

531 (Minn. 2016). Because the issue is Lutz’s intent, we must closely scrutinize the sufficiency of that evidence. *Id.*; *State v. Al-Naseer*, 788 N.W.2d 469, 473-75 (Minn. 2010). We conduct a two-step analysis when evaluating the sufficiency of circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013).

First, we identify the circumstances proved. *Id.* In doing so, we “consider only those circumstances that are consistent with the verdict,” meaning we assume the jury believed the state’s witnesses and disbelieved the defense’s witness. *Id.* at 599.

Second, we review the circumstantial evidence as a whole and “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* In doing so, we independently examine “the reasonableness of all inferences that might be drawn from the circumstances proved.” *Id.* “Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted).

The circumstances proved.

Here, the circumstances proved that are consistent with the verdict are as follows:

1. An officer patrolling Highway 23 East in St. Cloud observed Lutz on his bicycle with no head lamp or rear reflector.
2. The officer followed Lutz across Highway 23 and activated the emergency lights on his fully marked St. Cloud Police squad vehicle. Lutz did not stop.

3. The officer rolled his window down and instructed Lutz to stop. Lutz did not stop.
4. The officer gave Lutz repeated commands to stop and sounded the squad car's airhorn. Lutz verbally responded to the officer but did not stop biking.
5. After traveling several city blocks, the officer informed Lutz that he was under arrest for fleeing a police officer. Lutz responded that he was not under arrest and continued to bike away.
6. The officer told Lutz multiple times that he was under arrest as Lutz approached Highway 10. Lutz did not stop.
7. At Highway 10, Lutz crossed the highway against a red light. As another officer arrived to assist, Lutz finally stopped in a grassy area.
8. Lutz admitted that he heard the officer tell him to stop and that he was under arrest. Lutz also admitted that he did not stop despite hearing the officer's commands.

The circumstances proved are consistent with guilt.

Having established the circumstances proved, we next consider whether those circumstances are consistent with guilt and inconsistent with any rational hypothesis other than guilt. *Silvernail*, 831 N.W.2d at 599.

When viewed as a whole, the circumstances proved are inconsistent with any rational hypothesis other than guilt. The circumstances show that Lutz knew the officer was attempting to stop him, but Lutz continued to bike. After continuing to bike for a few blocks, the officer informed Lutz that he was under arrest for fleeing, but Lutz continued to bike away. And once Lutz reached Highway 10, he biked through a red light. Lutz only stopped after another officer arrived.

Lutz argues that the circumstances support the hypothesis that his intent was to stop at the larger intersection where he felt safer given more streetlights and cameras. But, contrary to our standard of review, Lutz's argument relies on evidence that is inconsistent with the verdict. *Id.* at 598. The circumstances proved, in the light most favorable to the verdict, support the conclusion that Lutz acted with the intent to evade the officer for the purpose of avoiding arrest, detention, or investigation. These circumstances are inconsistent with any rational hypothesis other than guilt.

II. The district court did not commit plain error in its instructions to the jury.

A. Availability of video exhibits.

Lutz argues the district court erred in instructing the jury that they would not have video exhibits available to them in the jury room. Lutz contends the district court should have informed the jury how they could review those exhibits when there was no equipment in the jury room. Lutz did not, however, object to the district court's instructions.

In the absence of an objection, we may review alleged errors in jury instructions under a plain-error review. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). Under this test, the challenging party must show: (1) error, (2) that is plain, and (3) that affects substantial rights. *Id.* If all three prongs are satisfied, we then determine whether the error must be addressed to ensure the fairness and integrity of the judicial proceedings. *Id.*

In general, district courts “must permit received exhibits or copies into the jury room including audio or video exhibits.” Minn. R. Crim. P. 26.03, subd. 20(1). However, the court may exclude audio or video exhibits from the jury room if the court determines that allowing the exhibits into the jury room is “not feasible.” *Id.*

Lutz has not shown that the district court erred. The video exhibits were played for the jury at trial. In the final instructions, the court informed the jury that “it is not feasible to send the audio/video exhibits to the jury deliberation room with you so you will not have those available for your review.” The district court used the same language from the criminal rule relating to the feasibility of allowing the video exhibits in the jury room.¹ See Minn. R. Crim. P. 26.03, subd. 20(1). Accordingly, the court did not err by informing the jury that the video exhibits would not be available for their review in the jury room.²

B. Elements of the fleeing offense.

Lutz argues that the district court abused its discretion in instructing the jury on the elements of fleeing. Lutz claims the district court misled jurors by confusing elements of motor-vehicle fleeing with the elements of non-motor-vehicle fleeing.

A district court has wide latitude in jury instructions, which we review for an abuse of discretion. *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019). A district court abuses its discretion if it fails to properly instruct on all elements of the charged offense. *Id.* We

¹ Lutz also relies on *State v. Spaulding*, 296 N.W.2d 870, 878 (Minn. 1980), to argue that it is improper for a court to determine that the jury will not review certain evidence. Unlike in *Spaulding*, the district court here never told the jury that they *could not* review the evidence during deliberations. Instead, the court informed the jury that it was *not feasible* to send the video exhibits to the jury room. Thus, under our standard of review, we cannot conclude that the district court plainly erred when it did not expressly instruct that the jury could request to review the exhibits in open court.

² Lutz also appears to argue for a novel jury instruction to accompany the infeasibility instruction that the district court provided. However, the function of this court is “limited to identifying errors and then correcting them.” *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Because there is no precedent for requiring the kind of instruction that Lutz requests for the first time on appeal, it cannot be said that the district court plainly erred by failing to give that instruction.

look at the jury instructions “in their entirety to determine whether they fairly and adequately explained the law.” *State v. Kuhnau*, 622 N.W.2d 552, 555-56 (Minn. 2001).

When, as here, there is no objection to jury instructions, we may consider the issue on appeal “if there was plain error affecting substantial rights or an error of fundamental law in the jury instructions.” *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted). If we determine a plain error affected the appellant’s substantial rights, then we assess “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Again, the elements for fleeing by means other than a motor vehicle are: (1) the defendant attempted to evade or elude a peace officer, (2) the officer was acting in the lawful discharge of an official duty, (2) the defendant’s flight occurred by means of running, hiding, or by any other means except fleeing in a motor vehicle, and (4) the defendant acted with the specific intent to avoid arrest, detention, or investigation. Minn. Stat. § 609.487, subd. 6; *Wilson*, 830 N.W.2d at 854.

Here, the district court instructed the jury:

Count 3; fleeing a peace officer other means than a motor vehicle. Under Minnesota law, whoever, for the purpose of avoiding arrest, detention, or investigation, attempts to evade or elude a peace officer who is acting in the lawful discharge of an official duty by means of running, hiding, or by any other means except fleeing in a motor vehicle is guilty of a crime. Elements. The elements of fleeing a peace officer are, first, the defendant fled by other means than use of a motor vehicle in order to evade or elude a peace officer. Second, the peace officer was acting in the lawful discharge of his duties. Third, the defendant acted for the purpose of avoiding arrest, detention, or investigation. Fourth, the defendant’s act took

place on or about May 1st, 2023, in the city of St. Cloud, Benton County, state of Minnesota.

Lutz did not object to the instruction at trial and, as such, on appeal he is required to show that the instructions were plainly erroneous. *Ramey*, 721 N.W.2d at 298. While the district court's instructions do not precisely mirror the statutory language, they do "fairly and adequately" explain the law. *Kuhnau*, 622 N.W.2d at 555-56. Because the jury instructions, as a whole, reflected the elements of non-motor-vehicle fleeing, the district court's instructions were not plainly erroneous. *See State v. Richardson*, 633 N.W.2d 879, 885 (Minn. App. 2001) (providing that instructions must be read as a whole and "if the instructions correctly state the law in a manner in which the jury could understand them, there is no reversible error").

III. The prosecutor's comments in closing argument did not have a significant effect on the verdict.

Lutz argues that we should order a new trial based upon prosecutorial misconduct. But Lutz did not object to the relevant conduct and, as such, we analyze this challenge under the plain error standard. *Ramey*, 721 N.W.2d at 302. If Lutz meets his burden to establish error that is plain, the burden shifts for the state to prove that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Id.*

Prosecutorial misconduct "results from violations of clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). When assessing alleged misconduct during a closing argument, we "look to the closing argument as a whole, rather than to selected phrases and remarks." *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004).

Lutz first argues that the prosecutor improperly used “we” and other grouping statements in her closing argument. In closing arguments, a prosecutor may not align themselves with the jury at the exclusion of the defendant. *Nunn v. State*, 753 N.W.2d 657, 663 (Minn. 2008). While the use of “we” and similar grouping statements by the prosecutor is generally considered improper, the use of those statements is not misconduct if they do not necessarily exclude the defendant. *See id.*

Lutz argues that the prosecutor improperly aligned herself with the jury by saying:

Police officers are people of authority in our community and the public. We place trust in them to protect our communities. And as part of their role in the community, it sometimes require[s] that they give us orders to ensure that safety and—for the safety of ourselves, for the safety of others all around us.

This statement does not necessarily exclude Lutz as it references society as a whole. Since Lutz is not excluded from this statement, it does not constitute plain error misconduct.³ *Id.*

Lutz next argues that the prosecutor violated the district court’s order that prohibited the state from encouraging a conviction or guilty verdict based on sympathy. A prosecutor must not appeal to the passions of the jury. *Nunn*, 753 N.W.2d at 661-62. But the cases that Lutz cites reference sympathy for a victim. *See, e.g., Rairdon v. State*, 557 N.W.2d 318, 323 (Minn. 1996) (determining that a prosecutor “may have improperly appealed to the passions and prejudices of the jury by encouraging a conviction based on sympathy for

³ Lutz also argues that the prosecutor’s use of personal pronouns, such as “I,” was improper. But Lutz does not provide, and we have not found, any caselaw supporting the argument that the use of a personal pronoun is improper. As such, the argument fails because Lutz cannot establish plain error.

the victim rather than the evidence at trial”). There was no victim in Lutz’s charged crimes, so it is unclear how the prosecutor encouraged a verdict based on sympathy for a victim.⁴

Finally, Lutz argues the prosecutor committed misconduct by making prohibited “law and order” overtones in her closing argument. Lutz challenges the following statements in the prosecutor’s closing argument:

Now, I want you all to imagine a world where people don’t have to follow laws. They don’t have to follow orders. They don’t have to follow rules. Is that a world that you want to live in?

Somewhere where anybody can decide unilaterally that, I’m not going to do that. I’m just going to ignore that command even though there was a lawful arrest being made.

We agree that this language constitutes plain error. The statement clearly violated established precedent that “law and order” overtones are improper in closing arguments. *State v. DeWald*, 463 N.W.2d 741, 745 (Minn. 1990).

We must, therefore, assess whether there is a reasonable likelihood that these statements had a significant effect on the jury’s verdict. *Ramey*, 721 N.W.2d at 302. “To evaluate the effect on substantial rights, we consider various factors, including the pervasiveness of improper suggestions and the strength of evidence against the defendant.” *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017) (quotations omitted).

⁴ Lutz also suggests the prosecutor encouraged a guilty verdict based on blanket sympathy for the officers involved by eliciting testimony about the dangers for officers when conducting a nighttime traffic stop. However, this testimony recited the facts related to the officers’ actions during the incident. The testimony did not elicit sympathy for the officers.

While the error here was plain, it was not pervasive. The above quote constituted the only reference to the improper overtone. Additionally, the state presented strong evidence in support of Lutz's fleeing, including videos and testimony from the officer. Thus, there is not a reasonable likelihood, such that we should reverse and remand for a new trial, that the inappropriate argument had a significant effect on the jury's verdict.

IV. There is no cumulative effect of errors to support requiring a new trial.

Lutz argues he is entitled to a new trial because “the errors, when taken cumulatively, had the effect of denying [him] a fair trial.” *State v. Keeton*, 589 N.W.2d 85, 91 (Minn. 1998). But Lutz has only identified one error—the prosecutor's use of language that carried law and order overtones—which we have determined did not affect Lutz's substantial rights. Accordingly, there is no cumulative error.

V. Lutz's trial counsel did not provide ineffective assistance.

In a supplemental pro se brief, Lutz argues his trial counsel failed to raise two key facts during trial: Lutz's medical condition, and Lutz's concerns regarding the officer's disposition. But the record reflects that during Lutz's testimony at trial, defense counsel asked Lutz about his medical condition and asked Lutz questions relating to the officer's disposition. Since both of the issues Lutz now raises in his pro se brief were previously addressed at trial, Lutz has not proved that his trial counsel's performance fell below an objective standard of reasonableness. *State v. Vang*, 881 N.W.2d 551, 557 (Minn. 2016).

Affirmed.