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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0311**

State of Minnesota,
Respondent,

vs.

Richard Preston Blackwell,
Appellant.

**Filed February 10, 2025
Affirmed
Bentley, Judge**

Ramsey County District Court
File No. 62SU-CR-22-3767

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

Douglas R. Biglow, Roseville City Attorney, Erickson, Bell, Beckman, and Quinn PA,
Roseville, Minnesota (for respondent)

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

Considered and decided by Slieter, Presiding Judge; Larson, Judge; and Bentley,
Judge.

NONPRECEDENTIAL OPINION

BENTLEY, Judge

In this direct appeal from a judgment of conviction for misdemeanor disorderly conduct and misdemeanor fifth-degree assault, appellant argues that his convictions must be reversed for insufficient evidence that he did not act in self-defense. Alternatively, he

argues that he is entitled to a new trial because the prosecutor committed plain-error misconduct by eliciting vouching and ultimate-issue testimony from a police officer. We conclude that the evidence was sufficient to support the convictions and, although we agree that the prosecutor engaged in misconduct rising to the level of plain error, the error did not affect appellant's substantial rights. We therefore affirm.

FACTS

The following relevant facts were elicited at a jury trial in which appellant Richard Preston Blackwell represented himself.

On the day of the incident, 70-year-old D.T. had just finished playing chess with a friend at the Roseville Library. They sat at a table near a window on the second floor in a common area shared with other patrons, including Blackwell. While the players were discussing their chess game, Blackwell brought over a chair and sat right next to them. Blackwell told D.T. and his friend that they were bothering him. Video footage recorded on Blackwell's cellphone reveals that the chess players expressed confusion over the confrontation. They told Blackwell that if they had bothered him by talking too loudly, it was unintentional. Blackwell responded, "You're trying to bother me, I'ma bother you," and, "Clearly you're doing it on purpose." As the conversation escalated, D.T. told Blackwell to "[g]et the f--k out of here" and started to call for support from library staff. Library surveillance video shows that, at about this time, D.T. stood up, grabbed his jacket, and turned to leave. The verbal altercation persisted, and when Blackwell said that he was recording the conversation, D.T. turned back and slapped the phone out of Blackwell's hand.

Library surveillance footage shows that D.T. had again started to turn away when Blackwell struck D.T. in the head. D.T. described Blackwell's blow as a "mule kick" and testified that he had "never been hit that hard." Blackwell continued to hit D.T.'s face and other parts of his body "[s]everal times" as D.T. eventually fell to the floor. D.T. testified that his upper body was bruised, "[his] face was pretty beat up," and he "couldn't see for several minutes." A photo of D.T. after the incident shows that he had a bruised eye, a bloody nose, and a bloodied face.

The state charged Blackwell with one count of fifth-degree assault in violation of Minn. Stat. § 609.224.1(2) (2022), and one count of disorderly conduct in violation of Minn. Stat. § 609.72, subd. 1(1) (2022). At trial, the state called one of the officers who interviewed D.T. and other witnesses after the incident. When the prosecutor asked if the officer's experience made him "acquainted with whether people are telling . . . the truth or not," the officer said yes. The prosecutor then asked if the officer believed that D.T. and the other witnesses had been truthful:

Q: The individuals that you spoke with on December 14th, did you form an opinion on whether or not they were being truthful?

A: I did.

Q: Would you say they were or were not?

A: Yes. . . . [D.T.] alleged that he'd been assaulted. Based on what he said, what his witness said; the injuries that I directly witnessed that he had sustained; I would say his claim that he had been involved in a violent altercation, been assaulted[,] I had no reason to disbelieve it.

Q: Okay. What about the other individuals that you spoke to? Did they display either truthful or nontruthful accounts?

A: Yes. I believe they were being accurate in what they witnessed and I don't know of any reason why they would've had to have told me something that was not true.

The officer also testified about his own characterization of what happened and Blackwell's credibility:

Q: Did you have enough interaction with the defendant to form a belief on whether he was being truthful or not?

A: As far as the extent of his story I did not—I was not the one directly interviewing him, as I said, when I first got there. So, I did not get his full story. But I would say based on everything I'd seen, it was very clear that when this incident occurred there was an assailant and there was a victim; and that [D.T.] was the victim and that [Blackwell] was the assailant. And this did not appear to be a case of mutual combatants.

Q: Why do you say that?

A: Because, like I said, [Blackwell] had no apparent injuries. Did not seem to be upset. And based upon what I had gleaned from the independent witnesses at the library, and from what [D.T.] and his friend's statement was, it was apparent to me that this was a one-way incident. That this was an assault directed against the victim. This was not something where they engaged in mutual—mutual sparring.

Q: And, again, . . . who would you say in your investigation was the assailant?

A: That'd be [Blackwell].

During closing arguments, the prosecutor referenced the officer's testimony "[t]hat he came; he interviewed some individuals; and in his 28 years of experience, applying it to

the information that he gathered, it was his determination that Mr. Blackwell had assaulted [D.T.]; and that this was not a usual fight.”

After a four-day trial, the district court instructed the jury, including on the issue of self-defense.¹ The jury found Blackwell guilty of disorderly conduct and fifth-degree assault. The district court entered a judgment of conviction on both counts and then sentenced Blackwell only on the assault conviction to 45 days’ incarceration.

Blackwell appeals.

DECISION

Blackwell argues that there was insufficient evidence for the jury to find that the state disproved any of the elements of his self-defense claim. He also argues that he is entitled to a new trial because the prosecutor elicited vouching and ultimate-issue testimony that constituted plain-error misconduct. We address each issue in turn.

I

We first consider Blackwell’s sufficiency-of-the-evidence challenge. The district court concluded that Blackwell was entitled to a jury instruction on self-defense, which required the state to disprove, beyond a reasonable doubt, at least one of the elements of self-defense. *State v. Basting*, 572 N.W.2d 281, 285-86 (Minn. 1997); *see also State v. McKissic*, 415 N.W.2d 341, 344 (Minn. App. 1987) (“The state need only prove the

¹ Blackwell asserted self-defense with respect to both the assault and disorderly conduct charges. A self-defense claim can apply to a disorderly conduct charge if the behavior involves bodily harm or presents a threat of bodily harm. *See State v. Soukup*, 656 N.W.2d 424, 426 (Minn. App. 2003), *rev. denied* (Minn. Apr. 29, 2003).

absence of one element of self-defense to sustain a conviction.”). The elements of self-defense are

- (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.

Basting, 572 N.W.2d at 285.

Before we reach the merits of Blackwell’s argument, we briefly address the applicable standard of review. A review for sufficiency of the evidence entails a “painstaking analysis of the record to determine whether the evidence . . . was sufficient” to support the jury’s verdict. *State v. Kremmin*, 889 N.W.2d 318, 320 (Minn. App. 2017) (citing *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989)), *rev. denied* (Minn. Mar. 28, 2017). With respect to determinations of guilt based on direct evidence, as compared to circumstantial evidence, appellate courts “view[] the evidence and any reasonable inferences that could be drawn therefrom in a light most favorable to the state” and determine whether “the jury could reasonably find the defendant guilty beyond a reasonable doubt.” *State v. Buchanan*, 431 N.W.2d 542, 547 (Minn. 1988). In that analysis, we “assume[] the jury believed the state’s witnesses and disbelieved evidence to the contrary.” *Id.*

We apply the direct-evidence standard here because, if direct evidence is sufficient to disprove an element of self-defense, an appellate court need not apply the heightened standard of review that applies to determinations of guilt based on circumstantial evidence.

See State v. Salyers, 858 N.W.2d 156, 160-61 (Minn. 2015). Considering the direct evidence in the case, we conclude that the evidence is sufficient to disprove two of the elements of self-defense: absence of aggression or provocation, and absence of a reasonable possibility of retreat. That conclusion, as to either element, defeats Blackwell's argument for reversal. *See McKissic*, 415 N.W.2d at 344.

Absence of Aggression or Provocation

Generally, “[a]n aggressor in an incident has no right to a claim of self-defense.” *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn. 1986). And if the defendant is the original aggressor, the defense is available “only if he actually and in good faith withdraws from the conflict and communicates that withdrawal, expressly or impliedly, to his intended victim.” *Id.*

Blackwell first argues that there is insufficient evidence to prove that he was the initial aggressor. Considering the direct evidence in the record, we disagree. D.T. testified that Blackwell approached him before he had even noticed Blackwell and that Blackwell said, “you’re bothering me,” unprompted. Blackwell testified that he “called [D.T.] a coward” and told him that “talk[ing] . . . behind a person’s back” was a “coward move,” and that “rapists are cowards.” In the video from Blackwell’s cellphone, D.T. or his friend can be heard telling Blackwell they do not know what he is talking about, asking if they were talking too loudly, and saying that if they were, it was unintentional. Blackwell responded to D.T. and his friend, “You’re trying to bother me, I’m a bother you,” and “Clearly you’re doing it on purpose.” Assuming, as we must, that the jury believed D.T. that Blackwell approached them unprompted and disbelieved Blackwell’s testimony that

that he approached the chess players because he “had a feeling” that they intended to provoke him, *see Buchanan*, 431 N.W.2d at 547, the jury reasonably could have concluded beyond a reasonable doubt that Blackwell’s statements and conduct made him the initial aggressor. *Buchanan*, 431 N.W.2d at 547; *see also State v. Carridine*, 812 N.W.2d 130, 144-45 (Minn. 2012) (suggesting that “initiat[ing] [a] verbal argument” can render someone the initial aggressor).

Blackwell next argues that, even if he was the initial aggressor, the state failed to disprove that he withdrew from the conflict and revived his right to self-defense. Again, we disagree. Video footage shows that Blackwell did not withdraw, physically or verbally, when D.T. and his friend asked in a nonconfrontational tone if they had been speaking too loudly. Instead, Blackwell continued provoking D.T., even after D.T. repeatedly asked Blackwell to “get . . . out of here” and called for library staff to intervene. Blackwell continued this conduct until D.T. knocked Blackwell’s phone out of his hand. At that point, the interaction quickly escalated. Library surveillance footage shows that Blackwell did not attempt to withdraw from the altercation at any point.

We conclude, considering the direct evidence presented at trial, that the jury reasonably could have found beyond a reasonable doubt that Blackwell did not “actually and in good faith withdraw[] from the conflict and communicate[] that withdrawal, expressly or impliedly, to his intended victim.” *Bellcourt*, 390 N.W.2d at 272.

Absence of a Reasonable Possibility of Retreat

A valid self-defense claim requires “the absence of a reasonable possibility of retreat to avoid the danger.” *Basting*, 572 N.W.2d at 285. A reasonable opportunity for safe retreat

exists if there are “options for escape or avoidance of peril . . . rather than directly confronting” someone. *State v. Austin*, 332 N.W.2d 21, 24 (Minn. 1983).

The direct evidence shows that Blackwell had multiple opportunities to retreat safely but instead directly confronted D.T. The video evidence shows that D.T. and his friend remained nonconfrontational for almost 20 seconds after Blackwell initiated the confrontation by approaching D.T.’s table. Blackwell could have reasonably retreated at any point in that timeframe, including when D.T. told him to leave. The video also shows that D.T. stood up and began to turn away, giving Blackwell another chance to retreat. And the video shows that, after D.T. slapped the cellphone out of Blackwell’s hand, D.T. again began to turn away, providing yet another opportunity for Blackwell to retreat. Instead of retreating at any of these points, Blackwell struck D.T. multiple times, even after D.T. fell. We conclude, based on direct evidence in the record, that the jury reasonably could have found, beyond a reasonable doubt, that Blackwell had a reasonable possibility of retreat.

In sum, the evidence was sufficient for a jury to find that the state disproved the first and fourth elements of Blackwell’s self-defense claim beyond a reasonable doubt. *Basting*, 572 N.W.2d at 285. Our conclusion with respect to either of those elements means that the evidence was sufficient to support the jury’s verdict. *Buchanan*, 431 N.W.2d at 548.

II

Alternatively, Blackwell argues that he is entitled to a new trial because the state committed prosecutorial misconduct by eliciting vouching and ultimate-issue testimony from the responding officer, who testified that Blackwell assaulted D.T. and that D.T. and

the other witnesses he interviewed were truthful. Blackwell did not object to the officer's testimony at trial.

Unobjected-to prosecutorial misconduct is reviewed under a modified plain-error test. *State v. Waiters*, 929 N.W.2d 895, 901 (Minn. 2019). The test first “requires the defendant to show an error was made that was plain,” or “clear or obvious.” *Id.* (quotation omitted). “Usually, prosecutorial error is clear or obvious if the prosecutor’s conduct contravenes case law, a rule, or a standard of conduct.” *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008). “If the defendant satisfies this burden, the burden shifts to the State to establish that the un-objected to misconduct did not affect substantial rights.” *Waiters*, 929 N.W.2d at 901 (quotation omitted).

The substantial-rights prong of the modified plain-error test “is the equivalent of a harmless error analysis.” *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011). “A plain error affects the substantial rights of the defendant when there is a reasonable likelihood that the error substantially affected the verdict.” *Id.* (quotation omitted). In other words, the state must show “there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). In making this determination, a reviewing court considers “(1) the strength of the evidence against [the defendant]; (2) the pervasiveness of the erroneous conduct; and (3) whether [the defendant] had an opportunity to rebut any improper remarks.” *State v. Peltier*, 874 N.W.2d 792, 805-06 (Minn. 2016). If the prosecutorial misconduct was plain error that affected substantial rights, “the appellate court then assesses whether it should address the error to ensure

fairness and the integrity of the judicial proceedings.” *Ramey*, 721 N.W.2d at 298 (quoting *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)).

A. Plain Error

Here, the parties do not dispute that the officer’s improper testimony rose to the level of plain error. We agree. On its face, the officer’s testimony about the witnesses’ truthfulness encroached on the jury’s duty to assess credibility and constituted vouching testimony. *State v. Myers*, 359 N.W.2d 604, 609-10 (Minn. 1984) (explaining that “[w]ith respect to most crimes the credibility of a witness is peculiarly within the competence of the jury, whose common experience affords sufficient basis for the assessment of credibility”). Also, the officer testified that the altercation “was a one-way incident,” that “this was an assault directed against the victim,” and that Blackwell was the assailant. This amounted to “ultimate issue testimony” that “merely [told] the jury what result to reach.” *State v. Lopez-Rios*, 669 N.W.2d 603, 613 (Minn. 2003). The prosecutor’s conduct in drawing out that testimony “contravene[d] case law” holding that vouching and ultimate-issue testimony is improper, *Jones*, 753 N.W.2d at 686, and it therefore constituted plain error.

B. Substantial Rights

We nevertheless conclude that the misconduct did not affect Blackwell’s substantial rights because “there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *Ramey*, 721 N.W.2d at 302 (quotation omitted). We address each substantial-rights factor in turn.

Strength of the Evidence

The evidence against Blackwell was strong. *Peltier*, 874 N.W.2d at 805. Considering the video evidence alone, there was ample evidence to support the jury's verdict that Blackwell was guilty of the assault and disorderly-conduct charges and that he did not act in self-defense.

With respect to the fifth-degree assault charge, the government had to prove that Blackwell intentionally inflicted or attempted to inflict bodily harm upon D.T. *See* Minn. Stat. § 609.224.1(2). The video and photo evidence shows that Blackwell struck D.T. multiple times with enough force to bruise D.T.'s face, even after he fell. Blackwell testified that he participated in the altercation and admitted to hitting D.T. intentionally, though he claimed it was in self-defense.

With respect to the disorderly conduct charge, the state had to prove that Blackwell (1) engaged in brawling or fighting; (2) in a public or private place; (3) knowing, or having reasonable grounds to know, that his conduct would alarm, anger or disturb others or provoke an assault or breach of the peace. *See* Minn. Stat. § 609.72, subd. 1(1). The video from Blackwell's cellphone reveals that Blackwell approached D.T. and his friend in a public library and repeated provocative statements. In the video, you can hear D.T. calling for support from library staff, and the surveillance video shows that library staff attempted to intervene and that other patrons were onlooking. In these circumstances, there was substantial evidence to support the jury's finding that Blackwell knew or should have known that his actions would anger or disturb others. Blackwell persisted to raise his voice and eventually struck D.T. multiple times.

Finally, with respect to self-defense, even excluding consideration of the improper testimony, there is no reasonable likelihood that the jury could have found that Blackwell acted in self-defense. Self-defense requires, at least, the absence of aggression or provocation by Blackwell—or, if he was the initial aggressor, that he withdrew from the conflict—and the absence of a reasonable possibility of retreat. *Basting*, 572 N.W.2d at 285. But again, video evidence establishes that Blackwell was the initial aggressor when he initiated a verbal confrontation by approaching D.T. and his friend’s table and making provocative statements. At no point did Blackwell attempt to withdraw from the altercation. Rather, despite reasonable possibilities for retreat, Blackwell escalated the situation. Based on the video footage alone, it is apparent that Blackwell could have safely retreated when D.T. told Blackwell to leave or when D.T. started to turn away from Blackwell in at least two instances.

In short, the evidence of Blackwell’s guilt was “overwhelming.” *State v. Valentine*, 787 N.W.2d 630, 641 (Minn. App. 2010), *rev. denied* (Minn. Nov. 16, 2010).

Pervasiveness and Opportunity for Rebuttal

Regarding the remaining two factors in our substantial-rights analysis, the misconduct was pervasive, but Blackwell had an opportunity to rebut the improper testimony.

With respect to pervasiveness, the prosecutor elicited improper vouching and ultimate-issue testimony in multiple instances through deliberate lines of questioning that spanned multiple pages of the trial transcript. The prosecutor also relied on that improper testimony in closing argument: “We’ve got [the officer’s] testimony. That he came; he

interviewed some individuals; and in his 28 years of experience, applying it to the information that he gathered, it was his determination that Mr. Blackwell had assaulted [D.T.]; and that this was not a usual fight.”

However, Blackwell “had an opportunity to rebut [those] improper remarks,” *Peltier*, 874 N.W.2d at 806, when he cross- and recross-examined the officer and presented his own closing argument.² For example, during the cross-examination, Blackwell showed a video clip of the officer’s interview with D.T. and then questioned the officer about whether D.T. was being truthful:

Q: [I]s it your position that . . . [D.T.] was telling the truth at this moment?

A: So, again, my job is to collect information and he admitted that yes, he knocked the phone out of your hand. Or grabbed at your phone. Something to that effect. And that you had words back and forth. So that’s the information that I was working with.

Blackwell proceeded to ask the officer questions aimed at undermining the truthfulness of D.T.’s statements to the officer. And during his closing argument, Blackwell addressed the credibility of the officers who responded to the scene:

And the police officers . . . did not begin to even try to investigate the case to know if I was doing anything wrong. Or to know if [D.T.] was even lying. They didn’t look at my video. They didn’t even try to review the video. I mean, you heard them openly admit they didn’t even watch the video in the library. So, they don’t even know what happened. They merely

² We acknowledge that Blackwell was self-represented at trial. But that does not affect our analysis because, as the district court told Blackwell, self-represented criminal defendants are held to the same standard as attorneys. *See State v. Bonkowske*, 957 N.W.2d 437, 440, 442 (Minn. App. 2021) (acknowledging that criminal defendants who waive their right to counsel “will be bound by the same rules as an attorney”).

said that [D.T.] made a statement and it resulted in a citation being issued.

Considering together the strength of the evidence, the pervasiveness of the misconduct, and the opportunity for rebuttal, we conclude that the state met its burden to show that the misconduct did not affect Blackwell's substantial rights. The jury was instructed on self-defense and considered Blackwell's version of the events and his arguments that D.T.'s version of the events was untrue. Yet, even excluding the improper testimony, the strength of the evidence of Blackwell's guilt was strong and there was substantial evidence to disprove at least two elements of self-defense. It follows that "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Ramey*, 721 N.W.2d at 302 (quotation omitted).³

Affirmed.

³ Because the error did not affect Blackwell's substantial rights, we do not address the final prong of the modified-plain-error test regarding whether this court "should address the error to ensure fairness and the integrity of the judicial proceedings." *Ramey*, 721 N.W.2d at 298.