STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0223

State of Minnesota,
Respondent,

vs.

David Paul Peterson,
Appellant,

Filed February 12, 2018
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-16-16020

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan L. Segal, Minneapolis City Attorney, Heather Robertson, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Mary Moriarty, Hennepin County Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

A Hennepin County jury found David Paul Peterson guilty of disorderly conduct based on evidence that he punched and screamed at his roommate. We conclude that the

evidence is sufficient to support the conviction and that the prosecutor did not plainly misstate the applicable law in closing argument. Therefore, we affirm.

FACTS

Peterson was arrested during the evening of June 15, 2016, after he quarreled with his roommate, D.M., about the payment of their bills. The state charged him with three offenses: (1) domestic assault by causing fear, in violation of Minn. Stat. § 609.2242, subd. 1(1) (2014); (2) domestic assault by inflicting bodily harm, in violation of Minn. Stat. § 609.2242, subd. 1(2) (2014); and (3) disorderly conduct, in violation of Minneapolis, Minn., Code of Ordinances (M.C.O.) § 385.90.

The case was tried on two days in January 2017. The state called two witnesses: D.M. and Officer Payne, who responded to D.M.'s report.

D.M. testified as follows: He and Peterson became friends after meeting at a homeless shelter. They began sharing a home in February 2016. They regularly disagreed about how to divide their bills. One such disagreement occurred on June 15, 2016. Peterson became angry because he believed that D.M. had not paid his share of a utility bill. They argued until D.M. retreated to his bedroom. Peterson later burst into the bedroom and hit D.M. numerous times on his head and face. While doing so, Peterson screamed at D.M. and threatened to cause him physical harm in a way that no one would notice. D.M. testified that he was fearful for his life and that Peterson was out of control. Peterson's blows bent D.M.'s glasses and caused bruises and scrapes on his face. D.M. left the residence out of fear, walked down the street, and called the police to report the incident. D.M. also called a friend and asked him to take photographs of his injuries. The

photographs were introduced into evidence as exhibits. The photographs show two raised bumps on D.M.'s face and a cut on the side of his face. The photographs also show that D.M.'s glasses were bent.

Officer Payne testified as follows: He responded to D.M.'s report and met him a block away from D.M.'s home. D.M. appeared to be shaken up when the officer first encountered him. Officer Payne saw that D.M. had a cut on his left cheek and an injury near his eye. D.M. said that Peterson had threatened to take him out and that no one would know about it. The officer went to D.M.'s home. Peterson denied engaging in a physical altercation but admitted to yelling at D.M.

Peterson testified in his defense as follows: He and D.M. previously had argued about bills and had met with a mediator in March 2016. On June 15, 2016, he told D.M. that he would no longer pay more than his share of the bills and that D.M. would be responsible for his own share in the future. D.M. stormed off to his bedroom and stayed there for approximately 45 minutes before telling Peterson that he was going for a walk and that they would talk about the bills when he returned. Peterson waited for an hour before taking his service dog on a walk. When he returned, squad cars were parked outside, and police arrested him. Peterson testified that he and D.M. had a verbal argument but not a physical altercation.

In closing argument, the prosecutor urged the jury to find Peterson guilty of the third charge for the following reasons:

> As to the disorderly conduct charge, the defendant engaged in conduct which disturbed the peace of another. Well, according to the defendant's own words, he yelled at

> Mr. D.M., and Mr. D.M. left the house. Cops were called. Three squad cars. Multiple police officers walking around their neighborhood investigating an assault. That's not a typical evening. Mr. D.M.'s peace was disturbed.

Peterson did not object to this part of the prosecutor's closing argument.

The district court instructed the jury on the elements of disorderly conduct as follows:

> First, the defendant engaged in, attempted to engage in or threatened to engage in fighting, brawling, tumultuous conduct, act of violence, or other conduct which disturbs the peace and quiet of another.
>
> Second, that the conduct disturbed the peace and quiet of another.
>
> Third, the conduct did not take place at a sporting event.
>
> Fourth, the defendant's conduct took place on or about June 15 in the City of Minneapolis, in Minnesota.

The jury found Peterson not guilty of the two assault charges and guilty of disorderly conduct. The district court imposed a sentence of 90 days in a workhouse but stayed execution and placed Peterson on unsupervised probation. Peterson appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Peterson argues that the evidence is insufficient to support his conviction of disorderly conduct.

When reviewing whether there is sufficient evidence to support a conviction, this court undertakes "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient" to support the

conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). We "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." *Ortega*, 813 N.W.2d at 100.

Peterson was found guilty of violating a city ordinance that provides:

> No person, in any public or private place, shall engage in, or prepare, attempt, offer or threaten to engage in, or assist or conspire with another to engage in, or congregate because of, any riot, fight, brawl, tumultuous conduct, act of violence, or any other conduct which disturbs the peace and quiet of another save for participating in a recognized athletic contest.

M.C.O. § 385.90. There is no reasonable dispute that the evidence satisfies the requirements of the ordinance. D.M. testified that Peterson hit him on his head and his face numerous times while screaming at him and threatening to cause him physical harm. As a result, D.M. sustained bruises and scrapes to his face. As stated above, we assume that the jury believed the state's witnesses. *See Caldwell*, 803 N.W.2d at 384. Given D.M.'s testimony, a jury could reasonably conclude that Peterson "engage[d] in . . . [a] riot, fight, brawl, tumultuous conduct, act of violence, or . . . other conduct which disturbs the peace and quiet of another." *See* M.C.O. § 385.90.

In his appellate brief, Peterson admits that "the state . . . provided evidence that Peterson engaged in assaultive conduct." Nonetheless, Peterson argues that the evidence

is insufficient as a matter of law. Peterson contends that the state's theory of the case was that Peterson violated the ordinance by engaging in non-physical, verbal conduct and that a conviction based solely on such evidence would violate Peterson's First Amendment right to free speech.

Peterson's argument is flawed because it is based on the incorrect premise that our appellate review is limited to the evidence that the prosecutor mentioned during closing argument. Peterson cites no authority for the proposition that the scope of our review must be limited to the evidence identified by a prosecutor in closing argument. To the contrary, our duty on appellate review is to determine whether the evidence introduced during trial is sufficient, and we are obligated to review the entire evidentiary record, not just the evidence that a prosecutor chooses to highlight in closing argument. As stated above, we conduct "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient" to support the conviction. *See Ortega*, 813 N.W.2d at 100. More specifically, we "examine the *entire* record to determine whether there is sufficient evidence to support the conviction." *State v. Dominguez*, 663 N.W.2d 563, 566 (Minn. App. 2003) (emphasis added). We have done so, and we easily conclude that the evidence in the record is sufficient to satisfy the elements of the offense.

Thus, the evidence is sufficient to support Peterson's conviction of disorderly conduct.

II. Claim of Prosecutorial Misconduct

Peterson also argues that the prosecutor engaged in misconduct by misstating the applicable law in closing statement. Peterson argues that the prosecutor implied that the jury could find Peterson guilty based solely on his non-physical, verbal conduct, which Peterson contends would be a violation of his First Amendment right to free speech.

Peterson did not object to the prosecutor's closing argument on this ground. Accordingly, "we apply a modified plain-error test." *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail under the modified plain-error test, Peterson first must establish that there is an error and that the error is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* If Peterson were to satisfy that burden, the state would need to show that the error did not affect his substantial rights, *i.e.*, 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." *Id.* (quotations omitted).

To establish that the prosecutor misstated the law, Peterson cites this court's opinion in *State, City of Minneapolis v. Lynch*, 392 N.W.2d 700 (Minn. App. 1986), in which we concluded that a conviction of disorderly conduct under the same Minneapolis ordinance may, consistent with the First Amendment, be based on a person's verbal conduct only if the person spoke "fighting words." *Id.* at 704. In response, the state cites *In re Welfare of T.L.S.*, 713 N.W.2d 877 (Minn. App. 2006), in which we concluded that a person may, consistent with the First Amendment, be found guilty under the state disorderly conduct statute for verbal conduct that is not in the nature of fighting words. *Id.* at 880-81. The

state introduced evidence in *T.L.S.* that the juvenile "shrieked" profanities at an officer who was attempting to remove her from the school building. *Id.* at 879. We concluded that the shrieking could be the basis of a disorderly conduct conviction:

> Although the disorderly conduct statute prohibits only fighting words" as applied to speech *content*, the disorderly shouting of otherwise protected speech or engaging in other "boisterous or noisy *conduct*" may still trigger punishment under the statute . . . . In that circumstance, it is not the speech itself that triggers punishment; the statute may be applied to punish the manner of delivery of speech when the disorderly nature of the speech does not depend on its content.

Id. at 881.

If we assume that the prosecutor's closing argument may reasonably be construed to mean that the jury could convict Peterson solely based on his verbal conduct, the prosecutor did not plainly misstate the law given the evidence presented at trial. We note that no appellate opinion ever has declared the ordinance to be facially unconstitutional. *Cf. State v. Hensel*, 901 N.W.2d 166, 170-81 (Minn. 2017) (holding that Minn. Stat. § 609.72, subd. 1(2) (2016), which criminalizes disturbance of meeting or assembly, is substantially overbroad and not readily susceptible to narrowing construction). The evidence of Peterson's verbal conduct would survive an as-applied constitutional challenge under both *Lynch* and *T.L.S.* D.M. testified that Peterson screamed at him for approximately eight to ten minutes and threatened to physically harm D.M. "in a way which nobody would be able to notice." Officer Payne testified that D.M. told him that Peterson had threatened to take D.M. out and that no one would know about it. Those are fighting words. *See Lynch*, 392 N.W.2d at 704. In addition, the manner in which Peterson

screamed at D.M., while punching him in the face and head in his own bedroom after an argument, would be a valid basis for a conviction, apart from the substance or meaning of Peterson's words. *See T.L.S.*, 713 N.W.2d at 881. If the jury had considered only Peterson's verbal conduct, the jury could have found him guilty of disorderly conduct without plainly violating his First Amendment right to free speech.

Thus, the prosecutor did not engage in misconduct because he did not plainly misstate the applicable law in closing argument.

Affirmed.