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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1390**

State of Minnesota,
Respondent,

vs.

Vyachesla Viktorovich Shcherbin,
Appellant.

**Filed May 7, 2012
Affirmed
Harten, Judge***

St. Louis County District Court
File No. 69DU-CR-11-546

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard A. Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Ross, Judge; and Harten,
Judge.

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

UNPUBLISHED OPINION

HARTEN, Judge

Appellant challenges his assault convictions, arguing that the district court abused its discretion and deprived appellant of his right to a fair trial by allowing the redaction of some exhibits, and that he is entitled to a new trial because the prosecutor committed misconduct by an inadvertent comment on the standard of proof. Because we see no abuse of discretion and no prejudice to appellant from the prosecutor's inadvertent misstatement, we affirm.

FACTS

Appellant Vyachesla Viktorovich Shcherbin lived with his girlfriend, B.L.L., in Duluth. On 13 February 2011, they spent the day drinking vodka, and B.L.L. passed out. She remembered waking to appellant's hitting and choking her, cutting her finger on a piece of glass, and striking appellant in the face with a candlestick. They went to the hospital. B.L.L. stated that a group had jumped her; she was treated for a wrist fracture, broken eardrums, a cut on her finger, and bruises. Appellant said he had been trying to break up a fight and had been hit with a candlestick holder; he was treated for a facial injury and sore ribs.

On 14 February 2011, B.L.L. returned to the hospital alone and said she had been injured by appellant. She was referred to a battered women's shelter, where she went until the early morning of 15 February, when she returned home. The shelter asked police to investigate her home. When the police arrived, B.L.L. was on the back porch

and appellant was in the bedroom. The police helped B.L.L. collect her property, drove her back to the shelter, and photographed her injuries.

B.L.L. returned to the hospital for treatment on 15, 16, and 18 February. The doctor's report of the 18 February visit indicates that he told B.L.L. he was concerned about her obtaining narcotics; that they were habit-forming; that he would not prescribe them for her; and that she needed to see her regular provider if she wanted them. The doctor also noted that B.L.L. said she would go to someone who would help her if he would not and that, in autumn 2010, B.L.L. had been seen by another doctor who questioned her behavior as drug-seeking. On 3 March 2011, B.L.L. returned to the hospital. The doctor who saw her reported that she had a history of drug-seeking behavior and alcohol abuse; that she appeared to be under the influence of an intoxicant or medication; that he told her she would not get any narcotics; that she refused to provide a urine sample; and that another doctor shared his view that B.L.L. was seeking drugs.

On 17 February, appellant was charged with terroristic threats, felony domestic assault by strangulation, and misdemeanor domestic assault. On 9 March, a charge of third-degree assault was added. Appellant pleaded not guilty and the matter was set for a jury trial that began on 12 April.

At appellant's trial, B.L.L.'s medical records were offered in evidence, but were redacted to conceal her substance-abuse history and the doctors' opinions that she was seeking treatment to get pain medication. In rebuttal closing argument, the prosecutor discussed the state's burden, saying first, "It is a high burden, but it's not beyond all

reasonable doubt,” immediately adding, “Okay. It’s not beyond any doubt. It’s reasonable doubt,” and finally repeating “It’s not beyond all reasonable doubt.” The jury found appellant guilty of third-degree assault and domestic assault by strangulation; he was acquitted by the district court on the terroristic threats charge and found not guilty of misdemeanor domestic assault.

Appellant challenges his convictions, arguing that the district court abused its discretion in allowing the redacting of B.L.L.’s medical records and that the prosecutor’s remarks on the standard of proof constitute plain error that affected appellant’s substantial rights.

D E C I S I O N

1. Redacted Evidence

“Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Relevant evidence is defined as evidence having a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401.

The district court found:

[T]he statements in B.L.L.’s medical records [that the state asked to have redacted] lack relevance. They concern alleged narcotic seeking behavior on the part of B.L.L. and have no tendency to make the existence of any fact that is of consequence to determining whether [appellant] is guilty or not guilty of the charged offenses more or less probable than it would be without the statements.

The record supports this finding. The redacted statements concern only doctors' opinions as to B.L.L.'s drug-seeking propensity in connection with this incident and other incidents. None of the redacted material states that B.L.L. was exaggerating her symptoms; thus, appellant's argument that she was exaggerating them and that, if the jury had known this, it would "likely have found [appellant] acted reasonably" fails. Moreover, B.L.L.'s injuries were not presented to the jury through her medical records.

The jury was asked to consider whether appellant was guilty of the acts with which he was charged; none of the redacted material pertains to or even reflects on those acts. Appellant also claims that the jury would not have rejected his claim of self-defense if it had seen the redacted material, but the redacted material does not pertain either to appellant's injuries or to B.L.L.'s propensity or capacity to commit a violent act against him.

The district court did not abuse its discretion in permitting the redaction of references to B.L.L.'s drug-seeking behavior.

2. Prosecutorial Misconduct

Appellant did not object during trial to the prosecutor's closing argument. His objection on appeal is therefore evaluated under the plain-error criteria: (1) there must be error, (2) the error must be plain, and (3) it must have affected the defendant's substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The defendant must prove the first two prongs; the state must disprove the third. *Id.* An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* The error affects a defendant's substantial rights if there is no reasonable likelihood that the absence of the

misconduct would have had a significant effect on the jury's verdict. *Id.* "If these three prongs are satisfied, the [appellate] court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)).

Appellant objects to a six-word phrase the prosecutor used twice when discussing the state's burden of proof: "[I]t's not beyond all reasonable doubt." That the prosecutor recognized this as a misstatement is evident from the context:

The state does have a burden of reasonable doubt, and it is a high burden, but it's not – it's not a burden that requires 100 and percent – 110 percent surety. It is a high burden but *it's not beyond all reasonable doubt*. Okay. It's not beyond any doubt. It's reasonable doubt. It's doubt we use –the level of certainty we need to make important decisions. Okay. It's not like we need a printout from an abstract of a – of a company we're thinking about investing in and being able to analyze that with our financial planner to see if this is a good company. It's not like that. It's beyond your reason and common sense. When you judge how this case is, it's that. It's reason and common sense. *It's not beyond all reasonable doubt*.

(Emphasis added.) The italicized words can be found to be plain error only by disregarding the language surrounding them, which indicates that the prosecutor misspoke, recognized the mistake, attempted to correct it, but then inadvertently repeated it.

Even if the six words and their repetition are taken as plain error despite the prosecutor's correction, their effect on the jury's verdict would have been minimal. Before the jury heard the six words in the prosecutor's rebuttal, they had heard them contradicted by the district court, by the prosecutor herself, and by appellant's attorney.

First, the district court explained reasonable doubt. A district court's instructions should be considered in determining whether a prosecutor's comments unduly influenced the jury. *State v. Washington*, 521 N.W.2d 35, 41 (Minn. 1994). The district court instructed the jury as follows:

The burden of proving guilt is on the State. The Defendant does not have to prove innocence.

Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.

Second, the prosecutor said in her closing argument:

The State would submit that each of those elements in each of those charges has been proven to you beyond a reasonable doubt. . . . Remember the elements of the charge and that those are the questions that you have to be able to answer beyond a reasonable doubt.

Third, appellant's attorney said in closing argument:

[The presumption of innocence] remains with [appellant] unless and until each of you find[s] that the State has proven each element of each charge by proof beyond a reasonable doubt.

. . . .

Beyond a reasonable doubt is a certain level of certainty, a certain level of knowing that gives you enough . . . information to be comfortable that you know what happened. . . . [i]f you're making an important life decision like buying a house, switching jobs, you think about how certain do you have to be before you make an important life decision like that. You think that level, that standard of proof, how much information, how many facts do you need before you make an important decision in your life. That's a good starting point.

. . . . [When] I was, maybe eight . . . one week we're [at a lake] and the lake is open. Next week we're there, lake looks frozen. . . . I got to get on that ice. . . .

So I go taking off down the hill, and next thing I know, my dad comes running up behind me, grabs me around the waist.

. . . Because in his mind, he knew that the lake was not frozen last week. He knew that it sure looked like there was some ice out there, but at some point, when he saw me going for that ice, he didn't have enough certainty, he didn't have enough information about how safe that ice was, how thick that ice was

And to me, I think that's a real good example of that level of certainty that you need. You have to be so certain. You have to be so convinced that you really know what happened before you can return a guilty verdict in any criminal case.

Folks often think, well, you know, he probably did it. It's – it's kind of likely that he did it, did something. Probably, yeah. That's – that – that's – that's enough for me.

That's not enough under the criminal rules. It's not enough in this country to convict someone if you think they might have or they probably did something. Our standard is so high, that you must find that there's proof beyond any reasonable doubt, which is a much higher standard than that inkling of something happened, must have done something. It's just not enough under our criminal rules to be able to return a guilty verdict.

Thus, before the jury heard the prosecutor's misstatement, it had heard several other discussions of the standard of proof. It had heard from the district court that the state's burden was to prove appellant's guilt beyond a reasonable doubt, which is the standard of proof prudent people use in important affairs. It had heard from both the prosecutor and from appellant's attorney that the jury had to find appellant guilty of each element of each charge beyond a reasonable doubt before convicting him. And it had heard from appellant's attorney that proof beyond a reasonable doubt is the degree of certainty a parent requires about the thickness of the ice before letting a child play on a

frozen lake. Having heard all this, the jury would not have been unduly influenced by the prosecutor's inadvertent phrase in rebuttal. The absence of that phrase would not have had a significant effect on the jury's verdict. *See generally Ramey*, 721 N.W.2d at 302.

Appellant was not deprived of his right to present a defense and the district court did not abuse its discretion by allowing the redaction of B.L.L.'s medical records. Moreover, the misstatement in the prosecutor's rebuttal closing argument would not have had a significant effect on the jury's verdict because the jury had been repeatedly and thoroughly informed of the correct burden of proof.

Affirmed.