STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0946

State of Minnesota,
Respondent,

vs.

Maker Dut Yual,
Appellant.

Filed June 24, 2008
Affirmed
Muehlberg, Judge*

Olmsted County District Court
File No. K8-04-1142

Lori Swanson, Attorney General, Kimberly Ross Parker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mark A. Ostrem, Olmsted County Attorney, 151 S.E. Fourth Street, Rochester, MN 55904 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Steven P. Russett, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Wright, Judge; and Muehlberg, Judge.

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

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

MUEHLBERG, Judge

Appellant was convicted by a jury of attempted third-degree criminal sexual conduct in violation of Minn. Stat. §§ 609.344, subd. 1(c); .17 (2006), and fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(c) (2006), stemming from his sexual assault of A.A. Appellant asserts that his trial was unfair because the outcome, which depended on credibility determinations, was improperly influenced by the prosecutor's vouching for A.A.'s veracity during closing arguments and a police officer's opinion testimony that "a crime definitely had occurred." Because the verdict was surely unattributable to any improper vouching testimony by the prosecutor under the harmless error test and the police officer's opinion statement did not affect the outcome of the case under the plain error test, we affirm.

FACTS

On the morning of March 9, 2004, Rochester police investigated a 911 hang-up call from A.A.'s apartment. When they arrived, appellant Maker Dut Yual answered the door and, under police questioning, A.A. stated that she had made the call because appellant had attempted to sexually assault her. A.A. and appellant, both Sudanese immigrants, knew each other through extended family.

At trial, A.A.'s daughter, G.A., who was 14 years old at the time of the offense, testified that she telephoned appellant to ask for a ride to school, as was often her habit, and that when she left for school, A.A. was asleep in a bedroom with her two siblings, who were two and four years old. G.A. further testified that when appellant arrived at

their home, he asked for her apartment key, and when she was reluctant to give it to him, he contrived to keep the apartment unlocked by asking her to leave the door open so he could return later to make a telephone call to Africa.

A.A. testified that she awoke to find appellant naked in bed behind her, kissing and licking the back of her neck and shoulder and attempting to initiate sex. She made a pretext to use the bathroom, discovered a telephone in the bathroom, and called 911, but appellant intercepted and terminated the call. Appellant then forcibly took A.A. to another bedroom, where he continued his attempt to have sex with her and she continued to resist until police arrived. A.A. informed police at that time that appellant was wearing two pairs of pants, which they confirmed. Subsequent DNA tests revealed a match between appellant's DNA and DNA found on A.A.'s body.

Police investigator Julie Claymon interviewed A.A. following the assault and obtained a more detailed account of the incident. During Claymon's examination at trial, the prosecutor asked her what her recommendation was after she completed the interview with A.A., and Claymon stated:

> After interviewing [A.A.] I did speak with [appellant], and in the time being I also asked [the responding officer] to go contact, a face-to-face contact with [A.A.'s] daughter and get a statement from her. When I was finished talking with [appellant] I talked with [the responding officer] again and talking—once I spoke with all parties and got a statement out of [G.A.] then I made a—that a crime definitely had occurred and I placed [appellant] under arrest.

Defense counsel did not object to this testimony.

During the state's closing argument, the prosecutor stated that witness credibility would be a crucial factor in the jury's decision and talked at length about why A.A. should be considered a credible witness. In arguing that A.A.'s willingness to overcome her language barrier demonstrated her credibility, the prosecutor stated:

> Then we layer upon that her language barrier. Wouldn't it have been just so much easier for [A.A.] just to not talk to [the responding officer], not to even attempt to try to get across what happened here? Her story was not a lie. It was the truth. And if you believe her, then the defendant is guilty.

At the end of the argument, defense counsel objected on the basis that the argument included improper vouching by the prosecutor and asked for a curative instruction. The district court denied the motion, finding that there was no "transgression for vouching for credibility of witnesses" because "most if not all" of the prosecutor's comments were couched in hypothetical language.

The jury found appellant guilty of attempted third-degree criminal sexual conduct and fourth-degree sexual conduct. Appellant was sentenced to a 22-month executed prison term and a five-year term of conditional release.

D E C I S I O N

1. Prosecutorial Misconduct

"The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). A prosecutor may commit misconduct by engaging in acts that "undermin[e] the fairness of a trial," or "violat[e] . . . clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in

this state's case law." *Id.* The prosecutor "must avoid inflaming the jury's passions and prejudices against the defendant." *State v. MacLennan*, 702 N.W.2d 219, 235 (Minn. 2005) (quotation omitted).

We review claims of prosecutorial misconduct when an objection has been made under a harmless error analysis. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006); *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). If the misconduct, considered in the context of the whole trial, deprived the defendant of a fair trial, we will reverse. *Mayhorn*, 720 N.W.2d at 785. But the defendant will not be granted a new trial if the misconduct is harmless beyond a reasonable doubt. *Id.* An error is harmless beyond a reasonable doubt if the verdict was surely unattributable to the error. *Id.*

Appellant claims that the prosecutor's statement during closing argument constituted improper vouching for A.A.'s credibility. A prosecutor may not personally endorse the credibility of a witness. *State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003). Nor may the prosecutor imply a guarantee of a witness's truthfulness. *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998); *In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. App. 2006). However, it is not misconduct for the prosecutor to analyze the evidence and "argue that particular witnesses were or were not credible." *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003). In determining whether improper vouching has occurred, the court must view a statement by a prosecutor "in the context of the closing argument taken as a whole." *Powers*, 654 N.W.2d at 679 (ruling that prosecutor's relatively short reference that seemed to express an opinion on the

credibility of a defendant did not amount to misconduct in light of entire closing argument).

Here, the prosecutor stated that A.A.'s story "was not a lie. It was the truth." But the statement also introduced the topic of whether A.A. should be deemed a credible witness, and the prosecutor immediately stated, "If you believe her, then the defendant is guilty." The proximity of this statement to the prior statement suggests that the prosecutor was merely arguing that A.A. was worthy of being found credible, which is permissible. *See Lopez-Rios*, 669 N.W.2d at 614.

Even if we were to conclude that the prosecutor committed misconduct by vouching for A.A.'s credibility, application of the harmless error rule does not support appellant's request for a new trial. The record includes significant evidence corroborating A.A.'s testimony, including DNA evidence, G.A.'s testimony, and other evidence obtained from appellant, including the fact that he was wearing two pairs of pants at the time of his arrest, as A.A. had asserted to police. Further, the court specifically instructed the jury on factors to consider in determining witness credibility and instructed the jury that they were the "sole judges of whether a witness is to be believed." The court also instructed the jury that statements made by the attorneys were "not evidence." While the prosecutor should not have stated that A.A.'s story "was the truth" and "not a lie," this statement was isolated, and in the context of the entire 14-page closing argument, did not taint appellant's trial. *See State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) ("We look . . . at the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence."). For

all these reasons, we conclude that the verdict was surely unattributable to any error from prosecutorial misconduct.

2. Police Officer Opinion Testimony

Appellant next claims that Claymon's opinion testimony that "a crime definitely had occurred" constitutes plain error mandating a new trial. Defense counsel did not object to this testimony, but appellant now argues that Claymon's testimony was "egregious" error because it expressed an opinion on the ultimate issue before the jury and also vouched for A.A.'s credibility.

We apply a plain error analysis to trial errors when no objection was made. We will reverse a criminal conviction for plain error only if it affects the defendant's substantial rights, which the supreme court has defined as being both "prejudicial and affect[ing] the outcome of the case." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998); *see also State v. Vance*, 734 N.W.2d 650, 655-56 (Minn. 2007); *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). The defendant has the burden of persuasion to show a plain error affecting substantial rights, a burden that the supreme court has labeled as "heavy." *Vance*, 734 N.W.2d at 659. When the three prongs of the plain error test are met, a reviewing court may correct the error only if "it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Reed*, 737 N.W.2d 572, 584 (Minn. 2007); *Strommen*, 648 N.W.2d at 686.

The improper testimony at issue here meets the first two prongs of the plain error test. First, Claymon's testimony could have prejudiced appellant before the jury, violating his right to an impartial jury, and on its face the testimony violated the state's

duty to "ensure that its witnesses know the limits of permissible testimony." *State v. Hogetvedt*, 623 N.W.2d 909, 914 (Minn. App. 2003), *review denied* (Minn. May 29, 2003). Second, because this sort of testimony was prohibited in *Hogetvedt*, the error was plain when it occurred in this case. *Id.* at 915 (finding improper, police testimony that "I told [the victim] that I believed it was [the defendant] that assaulted her."). The more difficult determination is whether the error would have affected the outcome in this case. For the following reasons, we conclude that it did not: the improper testimony was embedded in other testimony about the officer's probable cause determination; the testimony appeared to be a reflection of the officer's probable cause determination rather than an opinion on appellant's guilt; the testimony was not objected to at trial, nor was it referred to again at trial; and other evidence strongly supported a finding of guilt. On these facts, we conclude that Claymon's testimony did not affect the trial outcome and did not otherwise affect the fairness or integrity of the proceedings. *Cf. State v. Flowers*, 261 N.W.2d 88, 89 (Minn. 1977) (requiring reversal of conviction and retrial where prosecutor and police "persist[ed] in trying to inject into a trial indirectly matters which they know they cannot introduce directly").

Affirmed.