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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2334**

State of Minnesota,
Respondent,

vs.

Karen J. Lucht,
Appellant.

**Filed February 24, 2009
Affirmed
Kalitowski, Judge**

St. Louis County District Court
File No. 69-HI-CR-06-144

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

Melanie S. Ford, St. Louis County Attorney, Jeffrey M. Vlatkovich, Assistant County Attorney, 107D Courthouse, 1810 12th Avenue East, Hibbing, MN 55746 (for respondent)

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

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Karen J. Lucht challenges her second-degree driving while impaired (DWI) conviction, arguing that the prosecutor committed error by asking appellant “were they lying”-type questions during cross-examination. We affirm.

DECISION

Appellant argues that the prosecutor’s use of “were they lying”-type questions during cross-examination constituted prosecutorial error. Appellant contends that because these questions amounted to plain error that resulted in her conviction, she is entitled to a new trial. We disagree. The record indicates that appellant opened the door to the questions by putting the other witnesses’ credibility into central focus and that the prosecutor’s questions were probative in clarifying a line of questioning.

Appellant failed to object to the prosecutor’s questions during trial and, therefore, the alleged prosecutorial error is reviewed under the plain-error standard announced in *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To establish plain error, appellant must show that (1) there was error, (2) the error was plain, and (3) the error affected appellant’s substantial rights. *Id.* “If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.” *Id.* On the third “prejudice” prong, the state bears the burden of proving that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury’s verdict. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Generally, questions designed to elicit testimony from one witness about the credibility of another have no probative value and are considered improper and argumentative. *See State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999) (stating that, in general, “were they lying”-type questions are improper). But the prosecutor may ask these questions “when the defendant holds the issue of the credibility of the state’s witnesses in central focus.” *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005) (quotation omitted). And “were they lying”-type questions may be permissible when those questions would be particularly probative in clarifying a line of testimony, or when the jury must evaluate “the credibility of a witness [who claims] that everyone but the witness lied,” or when the witness “flatly denies the occurrence of events,” and thereby places the central focus on the credibility of the state’s witnesses. *Pilot*, 595 N.W.2d at 518 (quotation omitted).

Appellant was in a rollover car accident on the evening of August 21, 2005. This accident resulted in appellant encountering Justin Hill, David Hill, and Sergeant James McKenzie. Justin Hill was the first person at the scene of the accident and gave appellant a ride to his family’s residence to use the telephone. David Hill, Justin’s father, spoke with appellant at his residence and called the police on her behalf. Justin Hill and David Hill drove appellant to her residence and left her there while they went to appellant’s vehicle to retrieve her house keys. While at the car, the Hills spoke with Sergeant McKenzie, who was the first police officer to arrive at the scene of the accident. Sergeant McKenzie went to appellant’s residence where he spoke with her about the accident and called an ambulance. When appellant was eventually taken to the hospital

for medical care, her blood alcohol content (BAC) was tested approximately three hours after the accident and found to be .20. Appellant was charged with (1) second-degree DWI with a BAC of at least .08 at the time of driving in violation of Minn. Stat. § 169A.20, subd. 1(5) (2006), and (2) second-degree DWI in violation of Minn. Stat. § 169A.20, subd. 1(1). After a one-day trial, a jury convicted appellant of the latter offense and found her not guilty of the former offense. During trial, the prosecutor questioned appellant about the accuracy of the statements of three witnesses. Appellant alleges that these questions constituted prosecutorial error.

Justin Hill

Justin Hill observed appellant directly after the rollover accident and testified that when he asked appellant if she needed help, the first thing she did was ask him if her breath smelled like alcohol. On direct-examination, appellant denied that she asked Justin Hill to smell her breath immediately. Appellant now challenges the prosecutor's question to appellant on this issue. The prosecutor had asked, "So [Justin Hill] would be inaccurate when he says that, right? Not you?" But because appellant flatly denied the occurrence of events that Justin Hill had testified to (that appellant immediately asked him if she smelled like alcohol), we conclude that appellant placed the credibility of Justin Hill in central focus. Thus, the questions asked by the prosecutor were proper and did not constitute prosecutorial error.

David Hill

David Hill observed appellant shortly after the rollover accident and testified that appellant did not want to call law enforcement about the accident because she had told

him that she had been in trouble with the law before. On direct-examination, appellant's testimony regarding whether she agreed or disagreed with David Hill's testimony was incoherent. The following colloquy occurred between defense counsel, appellant, and the court during direct-examination:

COUNSEL: Ms. Lucht, did you hear testimony from Justin Hill and David Hill, the father, that you didn't want law enforcement called?

APPELLANT: I said I wanted to call my friend because I don't always understand what –

THE COURT: Ms. Lucht, I'm going to instruct you to answer the question. Be responsive, Listen to what your attorney asks you and then answer the question.

....

THE COURT: [D]o you remember the testimony that Mr. Hill said that you did not want to call 911. That's essentially a yes or no answer.

APPELLANT: Well, yes and no.

COUNSEL: Did you hear Mr. Hill saying that you didn't want to call 911?

APPELLANT: Yes, I did hear him say that.

COUNSEL: And did you hear his father saying that you didn't want to call the police?

APPELLANT: Yes, I heard that also.

COUNSEL: Or the ambulance? Did you hear that testimony?

APPELLANT: No. Well, yeah I did. But I don't recall that, no.

COUNSEL: Why didn't you want the police called? That's my question.

APPELLANT: Because I was on probation.

Appellant challenges the prosecutor's question about the accuracy of David Hill's testimony. The prosecutor asked appellant, "So Mr. Hill, Mr. David Hill, would have been inaccurate about [whether appellant wanted to call law enforcement]?" But this question appears to be an attempt by the prosecutor to clarify appellant's convoluted direct testimony. Because "were they lying"-type questions are permissible when they

are particularly probative in clarifying a line of testimony, and because the prosecutor was merely trying to elicit a clear statement from appellant about David Hill's testimony, we conclude that this question does not constitute prosecutorial error.

Sergeant McKenzie

Appellant testified that the reason her BAC was .20 three hours after the rollover accident was because when she was outside of her residence waiting for the Hills to retrieve her house keys from her vehicle, appellant found a quart of vodka and drank half of it before Sergeant McKenzie arrived at her residence. Sergeant McKenzie observed appellant at both her residence and the hospital after the accident. He testified that appellant appeared intoxicated when he first observed her and that appellant told him that she had not consumed any alcohol since the morning.

On direct examination, the following colloquy occurred between defense counsel and appellant:

COUNSEL: So why didn't you tell Sergeant McKenzie that you just consumed this vodka?

APPELLANT: *Well, I think I did.* I think I told him I didn't drink. *I think I told him I drank.* I don't know. I was really – I was drunk then. I was – I was intoxicated.

(Emphasis added.) Although her testimony is somewhat confusing, appellant did assert that she told Sergeant McKenzie that she drank vodka before he arrived at her house. Appellant challenges the prosecutor's questions to her about the accuracy of Sergeant McKenzie's testimony on this issue. But because appellant previously testified that she did tell Sergeant McKenzie that she drank after the accident and thereby flatly denied the accuracy of his testimony, appellant placed Sergeant McKenzie's credibility in central

focus. It was permissible, therefore, for the prosecutor to ask appellant about the accuracy of Sergeant McKenzie's testimony.

Appellant argues that her substantial rights were affected because the jury could have believed that it could not credit appellant's testimony without also finding that the Hills and Sergeant McKenzie testified untruthfully. Because we conclude that there was no plain error, appellant's substantial rights were not affected.

Finally, even if there was plain error, the error did not affect appellant's substantial rights. *See Griller*, 583 N.W.2d at 740 (stating that for the plain error test to be met, the error must affect substantial rights). In criminal cases, it is well settled that judging the credibility of witnesses and the weight given to their testimony rests within the province of the finder of fact. *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997). And in light of the strong evidence against appellant—testimony from three witnesses about appellant's intoxication, the BAC test results, and appellant's unclear and inconsistent testimony—we conclude that there is no reasonable likelihood that the absence of any prosecutorial error would have significantly affected the jury's verdict.

Affirmed.