STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0356

State of Minnesota,
Respondent,

vs.

Eddie Morris Miller,
Appellant.

Filed March 31, 2009
Affirmed
Schellhas, Judge

Anoka County District Court
File No. 02-CR-07-6666

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

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, 2100 Third Avenue, 7th Floor, Anoka, MN 55303 (for respondent)

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

Considered and decided by Toussaint, Chief Judge; Schellhas, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

SCHELLHAS, Judge

In this challenge to a conviction of fifth-degree felony domestic assault, appellant argues that (1) the prosecutor's closing argument constituted misconduct and (2) the district court abused its discretion in sentencing by assigning a felony point for his 1997 Wisconsin conviction for battery. We affirm.

FACTS

On an evening in July 2007, Fridley police officers Michael Morrissey and Nicholas Knaeble were dispatched to victim P.C.'s duplex in Fridley, Minnesota, in response to a report of domestic assault. Upon arrival, the officers entered the duplex and observed P.C. sitting on a couch with a scraped hand and face and a bloody, swollen lip. Appellant Eddie Morris Miller was in the kitchen. When Officer Knaeble asked Miller what happened, he stated that he and P.C. had argued, she walked away from him, he "pushed her in the back," and she fell and hit her head on the ground. In a post-*Miranda* taped statement, Miller admitted that he and P.C. had an intimate relationship and had been living together for three months. Due to her injuries from the incident, P.C. was hospitalized for six days.

Miller was initially charged with third-degree assault but on the second day of trial, the charges were amended to felony domestic assault. After Miller stipulated that he had prior qualifying convictions necessary to be charged with felony domestic assault, the sole issue at trial was whether Miller committed the crime of domestic assault against P.C. During opening and closing argument, defense counsel told the jury that on the

evening in question, Miller did not want P.C. to leave because she was intoxicated. Defense counsel told the jury that, as Miller tried to stop P.C. from leaving, he accidentally pushed her to the ground.

P.C. testified that, prior to the evening of the assault, she and Miller had lived together for three or four months. P.C. stated that on the day of the assault, she was at home with Miller and her cousin, K.C. P.C. explained that Miller was upset about something that had happened the previous day, and she wanted to leave because of his demeanor. As P.C. and K.C. walked away from the home, Miller approached P.C. and said something to her. The next thing P.C. remembered is trying to get up, having been knocked to the ground.

K.C. testified that when she went to P.C's house on the day in question, she sensed that there was tension between Miller and P.C. and that P.C. appeared to be avoiding Miller. P.C. told K.C. that she wanted to leave and stated, "I'm not feeling right, something is going to pop off here, something is going to happen here. I need to go." As K.C. and P.C. walked away from the home, Miller approached P.C., said to her, "You've been f---ing with me all night," and then hit her with a closed fist.

During his rebuttal closing argument, the prosecutor stated:

> We talked about this one punch and the power of that one punch, and I submit to you that domestic violence is about power, it's about control, and I've suggested that the one punch – and the evidence and the law demand law and order. That law and order carries a lot more power than the one punch. Guilty.

The jury convicted appellant of fifth-degree felony domestic assault.

During the sentencing hearing in November 2007, the prosecutor and defense counsel disputed whether Miller's criminal history score should include a felony point for a 1997 Wisconsin battery conviction for which Miller was sentenced to prison for one year and a day. The prosecutor argued that because the victim in that case suffered a broken tooth, the conviction was analogous to a felony conviction in Minnesota. The district court stated: "[W]hether we look at the facts of the [conviction] or whether we look at the amount of time that [Miller] spent in custody . . . I am going to count [this conviction] as a [felony] point." Based on the severity level for fifth-degree felony domestic assault and a criminal history score of 5, the district court sentenced Miller to the presumptive sentence of 27 months' imprisonment. This appeal follows.

D E C I S I O N

I.

Despite the fact that Miller did not object to the prosecutor's closing rebuttal argument until after the jury began its deliberations, he argues that this court should apply the harmless-error standard to his claim of prosecutorial misconduct. But Miller made his objection to the prosecutor's argument past the point at which the district court could address the matter. In *State v. Ramey*, the Minnesota Supreme Court explained that when a defendant fails to make a *contemporaneous objection* at trial, "the district court does not have the opportunity to rule on the misconduct or make a determination as to whether a corrective instruction is required or appropriate." 721 N.W.2d 294, 298-99 (Minn. 2006). Here, Miller made his objection too late to serve the intended purpose of an objection—to give the court an opportunity to correct the alleged error.

Because Miller failed to timely object at trial, we review his claim of prosecutorial misconduct under the plain-error standard announced in *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To meet the plain-error standard, three prongs must be satisfied. *Griller*, 583 N.W.2d at 740. The appellant must show: (1) error; (2) that is plain; and (3) that affects the defendant's substantial rights. *Id.* If plain error exists, respondent must prove that the error did not affect the defendant's substantial rights by showing that "there is no reasonable likelihood that the absence of misconduct in question would have had a significant effect on the verdict of the jury." *Ramey*, 721 N.W.2d at 302 (quotation omitted). If the plain-error standard is met, a reviewing court must then assess whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740.

Counsel is not entitled to make arguments that have no factual basis in the record evidence, and such arguments are improper. *See State v. Thompson*, 578 N.W.2d 734, 742 (Minn. 1998) (concluding that prosecutor's remarks that contained pure speculation without factual basis were improper); *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (stating that the prosecutor cannot intentionally misstate the evidence). But counsel may present "all legitimate arguments on the evidence, [in order] to analyze and explain the evidence, and [in order] to present all proper inferences to be drawn therefrom" to the jury at trial. *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980). And in order to determine whether a prosecutor's statements during closing argument are improper, a reviewing court looks to the "closing argument as a whole, rather than just

selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Miller argues that because there was no evidence presented at trial that equated domestic violence with power and control, the prosecutor committed misconduct by suggesting the connection in his closing argument. The prosecutor stated, "I submit to you that domestic violence is about power, it's about control . . . ." The record contains substantial evidence that Miller's assault of P.C. arose out of domestic violence. Because of the charge against Miller, the jury was aware that the state alleged that Miller committed domestic assault against P.C. P.C. testified that she and Miller lived together, and K.C. testified that she witnessed Miller hit P.C. in the face with a closed fist. Although the record does not reveal that before the closing statement, "power" and "control" were mentioned at trial, counsel is permitted to "present all proper inferences to be drawn therefrom." *Wahlberg*, 296 N.W.2d at 419. Here, common sense leads to the conclusion that a component of domestic violence is power and control. That Miller was exercising his power and his control over P.C., by preventing her from leaving the home, is a proper inference that can be drawn from the evidence.

Additionally, although Miller argues that the evidence contains no factual basis to support a connection between domestic violence and "power" or "control," this court has held that a prosecutor's closing remarks need not always be supported by expert evidence at trial on the subject at issue. *See State v. Rose*, 353 N.W.2d 565, 569 (Minn. App. 1984) (concluding that a reference to a sexual assault victim's future mental anguish was

proper despite the lack of expert medical evidence presented at trial on the issue), *review denied* (Minn. Sept. 12, 1984).

Miller also argues that when the prosecutor equated domestic violence with "power" and "control," he diverted the jury's attention from the issue of whether Miller intentionally assaulted P.C. and focused attention on the general problem of domestic violence. Prosecutors must not inject into trial issues broader than the guilt or innocence of the defendant, thereby diverting the jury from its duty to base its verdict on the evidence. *State v. Washington*, 521 N.W.2d 35, 39-40 n.3 (Minn. 1994) (citing I ABA Standards, The Prosecution Function, Standard 3-5.8(d) (2d ed. 1982)). The Minnesota Supreme Court has determined that comments suggesting that the jury represented the people of the community and that the verdict would determine the kind of conduct tolerated in public improperly injected issues broader than guilt or innocence. *State v. Threinen*, 328 N.W.2d 154, 157 (Minn. 1983).

But, here, the jury was already aware that Miller was charged with domestic assault, which requires the occurrence of an act of domestic violence. The jury was charged with determining not only whether Miller assaulted P.C. but whether this assault could be considered a domestic assault. Further, if a challenged statement makes up only a small portion of the closing argument and does not characterize the entire argument, the comments may not warrant a reversal. *State v. Lewis*, 547 N.W.2d 360, 364 (Minn. 1996). And when reviewing claims of prosecutorial misconduct, we consider the closing argument as a whole. *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000). In this case, the prosecutor's use of the terms "power" and "control" are in a single

sentence – 44 words out of 11 pages of transcript that encompass the prosecutor's closing and rebuttal arguments. Considered as a whole, we conclude that the prosecutor's comments did not characterize the entire closing statement, whether domestic assault occurred was an issue at trial, the prosecutor's use of the terms "domestic violence" coupled with "power" and "control" did not inject a broader issue than appellant's guilt or innocence, and that the record contains evidence that the use of "power" or "control" by Miller in the circumstances of this case can be properly inferred from the facts.

Miller also argues that the prosecutor's use of the term "law and order" during his closing argument constitutes misconduct. Closing arguments with "law and order" themes are improper. *State v. Clark*, 291 Minn. 79, 82, 189 N.W.2d 167, 170 (1971). But closing arguments are not required to be free from all error. *State v. Thaggard*, 527 N.W.2d 804, 812 (Minn. 1995). And if a challenged statement makes up only a small portion of the closing argument and does not characterize the entire argument, the comments may not warrant a reversal. *Lewis*, 547 N.W.2d at 364. Here, the prosecutor's reference to "law and order" appears in only two sentences out of the 14 pages of transcript that comprise the prosecutor's closing and rebuttal arguments. The prosecutor's minimal use of the term "law and order" is distinguishable from its use in *Clark* in which the prosecutor referred to the concept of "law and order" before suggesting to the jury that it should convict the defendant because of the crime problem in general. 291 Minn. at 82, 189 N.W.2d at 170. In *Clark*, the prosecutor stated:

> I believe I already stated to this concept of law and order. When are we going to concede that at night time, at 1:30 in the morning, the police are going to control the

> streets? That we are not going to allow bottle throwing, obscenity shouting, young men to run the streets . . . When are we going to concede in this society that this kind of behavior must be stopped? It can be stopped right here with you six people by a verdict of guilty.

Id. Here, by contrast, the prosecutor did not give a broad example of domestic violence, nor ask the jury to send a message to society through a guilty verdict. When the prosecutor's entire statement is considered as a whole, we conclude that "law and order" was not a theme throughout the statement, and because the use of the term "law and order" was brief and isolated, its use does not amount to prosecutorial misconduct. Thus, plain error did not occur and appellant's substantial rights were not prejudiced under *Griller*.

And even if plain error occurred here, the conviction is supported by overwhelming evidence: testimony from victim P.C. and eyewitness K.C., and Miller's admission that he and P.C. were in a domestic relationship. Thus, the jury was presented with overwhelming evidence to support the conviction, and there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury verdict.

II.

Miller argues that the state failed to prove that his Wisconsin battery conviction constitutes a felony under Minnesota law. He argues that the district court erroneously relied on unproven allegations to determine that his conviction was the equivalent of a third-degree assault, and that his year-and-a-day sentence alone does not convert a misdemeanor assault into a felony assault. The district court's determination of a

defendant's criminal history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Out-of-state convictions must be considered in calculating a defendant's criminal history score. Minn. Sent. Guidelines cmt. II.B.502. The district court exercises its discretion in determining the equivalent Minnesota felony for an out-of-state felony, based on the definition of the out-of-state offense and the sentence received by the offender. Minn. Sent. Guidelines II.B.5. The state has the burden to establish the facts necessary to justify consideration of an out-of-state conviction in calculating a defendant's criminal history score. *State v. Jackson*, 358 N.W.2d 681, 683 (Minn. App. 1984).

Miller was convicted of battery under Wis. Stat. § 940.19(1) (1995), which states, "[w]hoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor." According to the criminal complaint filed regarding Miller's 1997 conviction, the victim suffered a broken tooth. Under Minnesota caselaw, a broken tooth constitutes great bodily harm. *State v. Moore*, 699 N.W.2d 733, 737 (Minn. 2005). And, under Minn. Stat. § 609.02, subd. 7a. (2006), a fracture of any bodily member is considered "substantial bodily harm." Considering the underlying facts of the conviction—the broken tooth—Minn. Stat. § 609.223, subd. 1 (2006), stating that "[w]hoever assaults another and inflicts *substantial bodily harm*" is guilty of a felony, applies. (Emphasis added.)

Miller argues that the facts underlying the conviction cannot be considered here because the comments to the Minnesota Sentencing Guidelines no longer provide that the district court may consider the "nature of the offense." Instead, the Sentencing Guidelines now state only that "[t]he designation of out-of-state convictions as felonies, gross misdemeanors, or misdemeanors shall be governed by the offense definitions and sentences provided in Minnesota law." Minn. Sent. Guidelines II.B.5 (2008). But, Minnesota caselaw provides that "in deciding whether out-of-state convictions can be treated as felonies for determining a guidelines criminal history score, the [district] court may look to the definition of the offense, the nature of the offense, and the sentence received." *State v. Combs*, 504 N.W.2d 248, 250 (Minn. App. 1993) (citation omitted), *review denied* (Minn. Sept. 21, 1993). Thus, here, the district court could consider the nature of the offense.

In order to prove that Miller caused substantial bodily harm to the victim in the Wisconsin case, the state produced the judgment of conviction and the criminal complaint against Miller, which stated that the victim's tooth was broken as a result of Miller's actions. The sentencing court may consider extrinsic evidence in determining the defendant's criminal history score. *See Hill v. State*, 483 N.W.2d 57, 61-62 (Minn. 1992) (holding that the district court properly considered false statements the defendant filed with the Social Security Administration in determining that the misconduct constituted a felony under Minnesota law); *State v. Vann*, 372 N.W.2d 750, 752 (Minn. App. 1985) (determining that in an out-of-state concealed-weapon charge, the district court properly considered probation officer's report indicating that the defendant was

carrying a loaded pistol when arrested), *review denied* (Minn. Sept. 26, 1985). And courts are justified in relying on police reports to determine the underlying circumstances of out-of-state convictions. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983) (concluding that the district court properly relied on police reports to determine the facts underlying the foreign conviction). The district court, therefore, was justified, under *McAdoo*, in relying on the Wisconsin police report to determine Miller's criminal history score.

Miller argues that the criminal complaint itself does not prove that he caused substantial bodily injury to the victim and that, under *State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008), *review denied* (Minn. July 15, 2008), this court must limit its consideration to "admitted or stipulated facts or facts proved beyond a reasonable doubt" in the other jurisdiction. But the *Outlaw* court addressed whether an upward durational departure in sentencing from the statutory-maximum sentence could be granted based on a judge's findings, rather than those of a jury. *Id.* In that case, this court determined that a judge could order an aggravated durational departure from the presumptive sentence only if the court limited its consideration to "stipulated facts" or "facts proved beyond a reasonable doubt." *Id.* And although the *Outlaw* court determined that the defendant's out-of-state convictions could not be given felony points in Minnesota, it did so because it is unclear whether his offenses were considered felonies in Minnesota and because the state failed to prove that the convictions were felonies under Minnesota law. *Id.* at 356. *Outlaw* is distinguishable from this case because Miller was not sentenced to an upward durational departure and because here, Miller's Wisconsin conviction is considered a

felony under Minnesota law. And here, as permitted under *McAdoo*, the district court relied on the facts contained in the criminal complaint underlying the Wisconsin conviction in making its determination that Miller's Wisconsin conviction should be considered in calculating his criminal history score.

Miller also argues that the sole fact that he received a year-and-a-day sentence for the Wisconsin conviction is an insufficient reason to treat the offense as a felony. But the length of the sentence is not the sole factor supporting the assignation of a felony point to Miller's criminal-history score—Miller's Wisconsin conviction is considered a felony under Minnesota law and that fact also supports the felony point. Thus, this argument fails.

Miller submitted a pro-se supplemental brief in which he argues that his Wisconsin battery conviction has decayed because ten years have passed, and that the inclusion of a terroristic-threats conviction in his criminal history score is erroneous. These arguments are without merit.

The battery conviction was properly considered when computing Miller's criminal history score because the offense underlying his conviction is properly deemed a felony offense and is not subject to decay under Minn. Sent. Guidelines II.B.3.c. And, according to Miller's criminal-history worksheet, no prior offense of terroristic threats was included in his criminal-history score. Further, this issue was not raised in the district court, and it cannot be raised for the first time on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that this court will not generally consider matters not argued to and considered by the district court).

Because the state properly met its burden of proving that Miller's actions caused substantial bodily harm, we conclude that the district court did not abuse its discretion in assigning a felony point for Miller's 1997 Wisconsin battery conviction.

Affirmed.