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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0290

State of Minnesota,
Respondent,

vs.

Mark Alan Peterson,
Appellant.

Filed April 14, 2009
Affirmed
Bjorkman, Judge

Polk County District Court
File No. 60-CR-06-6487

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, 816 Marin Avenue, Suite 125, Crookston, MN 56716 (for respondent)

Melissa Sheridan, Assistant State Public Defender, 1380 Corporate Center Curve, Suite 320, Eagan, MN 55121 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his conviction of one count of first-degree criminal damage to property, arguing that the prosecutor's statements in closing argument constituted misconduct. We affirm.

FACTS

On May 24, 2006, appellant Mark Alan Peterson was incarcerated at Northwest Regional Corrections Center (NWRCC) in Crookston. Appellant was housed in cell number three of Area 2, an area with six single cells. While conducting a routine check in Area 2, Security Supervisor Andrew Larson observed water coming up through the floor drains and covering the floor between cells three and six. Larson looked into appellant's cell and saw a blanket in the toilet. When Larson asked appellant about the blanket, appellant responded that he was angry about being locked down earlier in the day for what he deemed to be no reason. Larson testified at trial that he did not observe items in other Area 2 toilets, and that water continued backing up from the floor drains even after appellant removed the blanket from his toilet.

Plumber John Nimens testified that he was called to address the flood in Area 2. Nimens testified that he performed plumbing work at NWRCC on a regular basis, frequently removing sheets that had been flushed into the sewer system. Nimens testified that on the day in question he removed two sheets that had been tied together from the sewer line in Area 2.

Mitchell Avila, who was also confined in Area 2, testified for the defense that appellant had previously placed his belongings outside of his cell because he thought that he was being released. Avila stated that when appellant learned he would not be released, appellant did not want to put his two sheets and other personal property back in the cell. Avila testified that he threw the items out while cleaning the common area because he did not want everyone in Area 2 to lose privileges. Avila stated that he did not tell any NWRCC employees or the investigating police officers that he threw out appellant's sheets because he "didn't want to get put in lockdown."

Defense witness Dustin Hulst, another Area 2 inmate, testified that he saw a "bundle of blankets" on the floor in the entryway the night before the flood, but that he did not see what happened to it. Gary Sundquist, an Area 3 inmate, also testified for the defense that he thought it was "somebody in area 3 that flushed the sheets because [prison officials] took [Area 3's] T.V." But Sundquist acknowledged that he did not actually see anyone flushing sheets down a toilet in Area 3 and did not hear anyone talking about having done so.

Appellant testified that he believed he was going to be released on bail on May 23, 2006, so he bundled his dirty jail linens and clothes and placed them outside his cell door. When he was unable to make bail as expected, he grabbed a blanket and pillow from the bundle and returned to his cell. The next morning the rest of his items were gone. Appellant testified that a guard told him that someone had thrown them away. Because appellant was responsible for these items, the guard put him in lockdown. Appellant

testified that he became angry and tried to flush his blanket down the toilet. He denied flushing anything else and removed the blanket from the toilet at Larson's request.

The district court permitted the state to impeach each of the defense witnesses, including appellant, with evidence of their prior convictions. Avila had numerous convictions for first-degree controlled-substance and burglary crimes. Hulst had three convictions for fifth-degree controlled-substance crimes and one conviction for fleeing a peace officer. Sundquist also had several controlled-substance and other felony convictions. And appellant had two convictions for providing false information to police, three convictions for fifth-degree controlled-substance crimes, and one conviction for felony violation of an order for protection.

The jury found appellant guilty. This appeal follows.

D E C I S I O N

Appellant argues that the prosecutor deprived him of a fair trial by committing prejudicial misconduct during closing argument. Appellant's attorney did not object to the prosecutor's statements during trial.

"Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial." *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008) (quotation omitted). However, a party's failure to object to a trial error generally precludes this court from considering the issue. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). An unobjected-to error, including one involving alleged prosecutorial misconduct, is subject to review only if it constitutes plain error affecting substantial rights. Minn. R. Crim. P. 31.02; *Jones*, 753 N.W.2d at 686; *Ramey*, 721 N.W.2d at 297, 299.

"The plain error standard requires that the defendant show: (1) error; (2) that was plain;[[1]] and (3) that affected substantial rights. If those three prongs are met, [this court] may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (alteration in original) (citations and quotations omitted). If the defendant makes the required showing with respect to the first two prongs, the state must prove that the error was not prejudicial by showing that the misconduct did not affect the defendant's substantial rights.[2] *Ramey*, 721 N.W.2d at 302.

Appellant argues the prosecutor committed misconduct during closing argument by: (1) improperly suggesting that appellant's prior convictions demonstrated a propensity to commit the charged crime, (2) disparaging appellant's defense, and (3) suggesting that appellant had the burden to prove someone else committed the charged crime. "When assessing alleged prosecutorial misconduct during a closing argument, we look to the closing argument as a whole, rather than to selected phrases and remarks." *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted). We address each of appellant's arguments in turn.

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[1] An error is plain if it is clearly or obviously contrary to caselaw, a rule, or a standard of conduct. *Ramey*, 721 N.W.2d at 302.

[2] Substantial rights are affected when there is a reasonable likelihood that the misconduct "would have had a significant effect on the verdict of the jury." *Ramey*, 721 N.W.2d at 302 (quotation omitted).

I. The prosecutor did not improperly suggest that appellant's prior convictions demonstrated a propensity to commit the charged crime.

We first consider appellant's argument that the prosecutor improperly inflamed the jury by using the evidence of his prior convictions to show that he had a criminal disposition. In support of his claim, appellant points to the prosecutor's closing argument:

> Now the defendant, of course, has twice before been convicted for lying to law enforcement in 2004. Once in Beltrami County, once in Cass County. He's also got two convictions for controlled substance crime in the fifth degree for selling marijuana, one conviction in 2007 for possession of methamphetamine, and a felony conviction for violation of an Order for Protection. We're talking witnesses here who have lengthy criminal histories.
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> . . . .
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> Now what do you have from the defendant's testimony? Well, you have the defendant telling you that he didn't flush those sheets down the toilet. You have to make a judgment call as to whether or not you believe his testimony. Well, as I've indicated before, he's previously been convicted twice for lying. That clearly is a factor that you may consider in determining whether or not he's telling the truth now. Clearly, that crime, providing false information to law enforcement, to a peace officer, falls within the type of crime that would indicate a likelihood the witness is telling or not telling the truth now.

When viewed in context, it is evident that the prosecutor discussed appellant's prior convictions in relation to appellant's credibility and capacity for truth telling. *See* Minn. R. Evid. 609(a) (evidence that a witness has been convicted of a crime shall be admitted "if the crime . . . involved dishonesty or false statement"). The record indicates that the prosecutor did not refer to appellant's prior convictions outside the context of

appellant's credibility as a witness. The district court expressly permitted the state to impeach appellant with evidence of these prior crimes, and appellant does not challenge the district court's evidentiary ruling.

Even if the prosecutor committed error in commenting on appellant's prior crimes, such error did not prejudice appellant's substantial rights or undermine the fairness of the proceeding. Prior to closing arguments, the district court instructed the jury that "[i]n the case of the defendant, you must be especially careful to consider any previous conviction only as it may affect the weight of the defendant's testimony. You must not consider any previous conviction as evidence of guilt of the offense for which the defendant is on trial." We presume that the jury followed the district court's instructions. *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998). Any potential prejudice occasioned by the prosecutor's comments did not significantly affect the verdict.

II. The prosecutor did not improperly disparage appellant's defense.

We next address appellant's argument that the prosecutor belittled his defense during closing argument "by listing the number of prior felony convictions [appellant] and his witnesses had, listing the number of months the witnesses were sentenced to serve in prison and adding the numbers to suggest the totals alone rendered [appellant's] defense ridiculous and unworthy of belief."

A prosecutor has discretion to fashion a persuasive closing argument, and the rhetoric need not be colorless. *State v. Bolstad*, 686 N.W.2d 531, 544 (Minn. 2004); *State v. Roman Nose*, 667 N.W.2d 386, 402 (Minn. 2003). Comments that belittle the defense in the abstract, however, may constitute misconduct. *See State v. Salitros*, 499

N.W.2d 815, 818 (Minn. 1993) (stating that prosecutors may not belittle a defense in the abstract, for example by implying that the offered defense is one given because nothing else will work). But a "prosecutor is free to specifically argue that there is no merit to a particular defense in view of the evidence or no merit to a particular argument." *Id.*

We first note that the prosecutor did not characterize appellant's defense as "ridiculous" or otherwise. *Compare State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000) (noting that it is misconduct to call a type of defense "soddy" or to suggest that the jurors would be "suckers" if they believed the defense); *State v. Hoppe*, 641 N.W.2d 315, 321 (Minn. App. 2002) (concluding that the prosecutor committed misconduct by referring to the defense's argument as "ridiculous" and telling the jury not to be "snowed" by the defense), *review denied* (Minn. May 14, 2002). Moreover, credibility was a central issue in this case. The district court allowed evidence of the defense witnesses' prior crimes for impeachment purposes because of the centrality of the credibility issues in this case. *See* Minn. R. Evid. 609(a) (evidence of prior crimes admissible if the court determines the probative value outweighs prejudicial effect). Each of the prosecutor's challenged comments regarding the witnesses' convictions and sentences had a clear basis in the record. The prosecutor's argument addressed evidence that challenges the plausibility of appellant's defense.

Appellant also contends that the prosecutor committed misconduct in referring to the defense witnesses as a "dealer," a "burglar," and a "thief." In *State v. DeWald*, 463 N.W.2d 741, 745 (Minn. 1990), the supreme court held that a prosecutor exceeds permissible bounds when using a defendant's prior convictions to personify him as a

"burglar" or "thief" as opposed to noting the defendant had been convicted of burglary or theft. There is merit to appellant's argument that the prosecutor went beyond noting the witnesses' prior convictions.

But appellant did not suffer unfair prejudice as a result of the prosecutor's remarks. *See Ramey*, 721 N.W.2d at 302 (providing that unobjected-to prosecutorial misconduct does not require reversal if there is no reasonable likelihood it affected the verdict). First, appellant's trial counsel mitigated the impact of the prosecutor's characterization of the defense witnesses by pointing out that it is not surprising that witnesses to an incident that occurred in a correctional center would have a criminal record. Second, the district court cautioned the jury that evidence that a witness has been convicted of a crime may be considered only for "whether the kind of crime committed indicates the likelihood the witness is telling or not telling the truth." Third, the jury's conduct, including the submission of questions to the court and deliberating for several hours over two days, indicates the jurors were not unduly inflamed by the prosecutor's comments.

Based on these circumstances, we conclude that the prosecutor's characterization of the defense witnesses, while outside generally permissible bounds, was not unduly prejudicial so as to require a new trial.

III. The prosecutor did not improperly shift the burden of proof to appellant.

Lastly, we consider appellant's argument that the prosecutor committed misconduct during closing argument by improperly suggesting to the jury that appellant was obligated to prove who committed the crime. Appellant points to the prosecutor's

statement that “there really hasn’t been any evidence introduced in this trial to suggest that anyone other than the defendant was the person responsible for this act. All we have is a little bit of speculation coming from the defendant that it had to have been somebody else, not him.” The state responds that “the prosecutor simply was commenting upon the fact that there was no evidence to support Appellant’s claim that someone else flushed the sheets down the toilet,” particularly in light of Larson’s testimony that he did not observe any other possible causes of the flooding. We agree.

At trial, the state bears the burden of proving all the elements of an offense beyond a reasonable doubt and the prosecutor is prohibited from shifting the burden of proof to a defendant to prove his innocence. *Strommen*, 648 N.W.2d at 690. Misstatements of the burden of proof are “highly improper” and, if demonstrated, constitute prosecutorial misconduct. *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985). But a prosecutor’s remark regarding the lack of evidence supporting a defense’s theory does not necessarily shift the burden of proof to the defense. *See State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993) (citing *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986)) (holding that prosecutor’s remark regarding defense counsel’s failure to produce evidence of an alternate perpetrator, as promised in defendant’s opening statement, was a comment on the defense theory and thus not improper so as to require a new trial).

Here, the overall effect of the prosecutor’s statements was not to shift the burden of proof, but rather to challenge appellant’s defense theory. The challenged comments comprise a relatively short portion of the closing argument, and the district court adequately instructed the jury on the presumption of innocence and that “[t]he burden of

proving guilt is on the State. The defendant does not have to prove innocence." *See State v. Henderson*, 620 N.W.2d 688, 703 (Minn. 2001) ("Comments suggesting that Henderson had the burden of proof were likely cured by the judge's instruction to the jury that the defendant does not have to prove innocence."); *see also Gassler*, 505 N.W.2d at 69 (stating that "corrective instructions may cure certain kinds of prosecutorial error").

In sum, we conclude that the prosecutor's statements in closing argument do not constitute plain error affecting appellant's substantial rights. The district court properly instructed the jury on the elements of the offense, that the attorney's statements were not evidence, how to consider evidence of prior crimes when determining credibility, the burden of proof, and the presumption of innocence. *See State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (stating that the district court's jury instructions "are also relevant in determining whether the jury was unduly influenced by the improper comments"). To the extent any of the prosecutor's comments were improper, they did not have a significant effect on the jury's verdict. Appellant's failure to object to any of the alleged prosecutorial error at trial further undermines his argument that he was deprived of a fair trial. *See id.* (noting that defense counsel's failure to object "weigh[s] heavily" against a reversal when determining whether improper statements were prejudicial (quotation omitted)).

Affirmed.