STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0464

State of Minnesota,
Respondent,

vs.

Adam Colby Mitchell,
Appellant.

Filed April 21, 2009
Reversed and remanded
Stoneburner, Judge

Ramsey County District Court
File No. K2071965

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, Ramsey County Government Center West, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

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

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Collins, 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

STONEBURNER, Judge

On appeal from his conviction of third-degree controlled substance crime, appellant argues that he is entitled to a new trial because the prosecutor improperly injected race into the case when race is not relevant and thereby deprived him of a fair trial. In the alternative, appellant asserts that he is entitled to resentencing because the sentencing court indicated that it was refusing to consider any sentence other than the guideline sentence as a result of appellant having exercised his right to stand trial. Because we conclude that the prosecutor's misconduct constituted reversible plain error, we reverse and remand for a new trial.

FACTS

Undercover St. Paul police officer Michael Conroy, who is white, encountered appellant Adam Mitchell, who is black, in the area of Sherburne and Rice Streets in St. Paul and indicated that he wanted to buy $40 worth of crack cocaine (crack). Conroy held out the money. Mitchell grabbed the money and told Conroy to follow him. According to Mitchell's testimony, Mitchell took the $40 never intending to provide crack to Conroy. Mitchell led Conroy to various places in the neighborhood and left him waiting outside of an apartment building while Mitchell went inside. Mitchell later testified that he was trying to get Conroy to leave the area without his money or drugs and that he bought crack which he consumed while Conroy waited outside of the apartment building. Conroy left the site of the apartment building but then spotted Mitchell on the street. Conroy testified that Mitchell eventually gave him a small amount

of crack. A surveillance team captured part of the odyssey on videotape, and one of the surveillance officers saw Mitchell pass something to Conroy after which Conroy signaled to the surveillance team that a drug deal had occurred.

Mitchell was charged with third-degree controlled substance crime. The state offered to recommend a sentence of 43 months, which was six months less than the low end of what the parties believed to be the applicable presumptive-sentencing range.[1] When Mitchell rejected the plea, the district court told him that it would not consider the offer again. The district court stated: "You take your chances at trial, then you get what the guidelines call for if you're convicted."

In his opening statement at trial, the prosecutor described the neighborhood where the transaction occurred as "very diverse" but went on to explain his theory of how Conroy, a "white" police officer, was able to engage in a drug transaction in this neighborhood, noting that "certainly there are white people who buy crack cocaine."

From viewing the videotaped portions of the encounter, the jury was aware that the people who approached Mitchell and Conroy are black. Mitchell, who admitted that he is a crack addict who supports his habit by stealing and "ripping people off," testified that the people who approached him were trying to buy liquor from him. He testified that he continued to "spin" Conroy until Conroy left without his money or any drugs.

[1] At the time of the plea offer, the parties believed that Mitchell had a criminal history score of six and that the applicable presumptive-sentencing range was 49-68 months. In fact, Mitchell's criminal history score was seven and included a custody status point, so the actual presumptive-sentencing range was 52-71 months.

The prosecutor started his closing argument by asking the jury if they were going to believe the "police officer witnesses" or "the greedy defendant." Referring to the videotape, the prosecutor told the jury that the people who approached Mitchell and Conroy were people who knew Mitchell's reputation for ripping people off. The prosecutor said:

> And what kind of people are these? What are they doing there? What is their involvement? Why are they interested in whether or not the white guy who's come to buy cocaine at Sherburne and Rice is going to get an honest deal? Why do they care if he gets cocaine? And how much do they care?

The prosecutor explained to the jury that "these other people from the street are upset and concerned that [Mitchell] maybe is going to rip off this white guy. And what does that do for the business of Sherburne and Rice?" The prosecutor told the jury that if word got out that you get ripped off there, people would go elsewhere to buy crack.

At trial, Mitchell did not object to the prosecutor's references to race. In closing, Mitchell argued that Conroy had left without his money and without drugs. He argued that Conroy had not attacked Mitchell for taking his money because by taking Conroy into Mitchell's neighborhood, among Mitchell's friends and acquaintances, Mitchell effectively implied: "You're not going to walk in here a perfect stranger and take me out."

The jury found Mitchell guilty of third-degree controlled substance crime. At sentencing, Mitchell requested a continuance so that he could be considered for Minnesota Teen Challenge. The district court denied a continuance, stating that it would not consider Teen Challenge for Mitchell or participate in any type of sentence that

would make him eligible for Teen Challenge, because "that would involve a deviation from the guidelines, which I'm not inclined to do on a person that went to trial the way he did. He took his chance." The district court went on to say that it might have considered Teen Challenge if Mitchell had pleaded guilty.

When defense counsel asked the court to consider sentencing Mitchell to the low end of the presumptive range, the court stated:

> That's another thing that we might have been able to work out had he indicated that he was interested in accepting responsibility for his actions. At that point I would have considered something like that, because I would have thought that he would have learned something from his mistakes. As opposed to continuing to deny what obviously happened.

The district court sentenced Mitchell to the presumptive sentence of 60 months. This appeal followed.

D E C I S I O N

I. Prosecutorial misconduct

The supreme court has identified the injection of race into a case when race is not relevant as prosecutorial misconduct. *Ramey*, 721 N.W.2d at 300 (citing *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005)). And the supreme court has stated that the issue of race "must be confronted whenever improperly raised in judicial proceedings. Even statements made without a biased intent may have a negative effect when it comes to issues of race." *State v. Varner*, 643 N.W.2d 298, 305 (Minn. 2002) (requiring a new trial where the district court failed to question jurors about the effect of hearing one juror's racially derogatory comment).

"Plain errors or defects affecting substantial rights may be considered by the court upon motions for new trial, posttrial motions, and on appeal although they were not brought to the attention of the trial court." Minn. R. Crim. P. 31.02. Prosecutorial error is plain if the prosecutor's conduct contravenes a standard of conduct, a rule, or caselaw. *Ramey*, 721 N.W.2d at 302. Viewing the prosecutor's statements referencing race in light of existing caselaw, we conclude that the prosecutor injected race into this case; that injection constituted error that was plain.

II. Challenge to prosecutorial misconduct not waived

The state argues that because Mitchell failed to object at trial to the prosecutor's references to race and instead addressed the issue in his own closing argument, he has waived the right to have this issue reviewed on appeal. We disagree.

The supreme court has cautioned defense counsel that the failure to object to improper closing argument may waive any claim of prosecutorial misconduct on appeal. *State v. Ray*, 659 N.W.2d 736, 747 n.4 (Minn. 2003). And the supreme court has held that "where defense counsel does not object to improper prosecutorial argument and instead chooses to respond in the defense summation, the defendant forfeits consideration of the issue on appeal." *State v. Ramey*, 721 N.W.2d 294, 299 n.3 (Minn. 2006) (citing *State v. Whisonant*, 331 N.W.2d 766, 769 (Minn. 1983)).

But Mitchell's references in closing argument to "my neighborhood," "my friends," and "my acquaintances" were not overt references to race. The prosecutor specifically characterized the neighborhood as "very diverse." These statements did not

constitute a response to the prosecutor's injection of race and do not mandate forfeiture of Mitchell's right to have the prosecutor's conduct considered on appeal.

III. Failure to show Mitchell's substantial rights not prejudiced by injection of race

Once the defendant demonstrates prosecutorial error that is plain and was not addressed by the defendant's summation, the burden shifts to the state to show that there is no "reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *Id.* at 302 (quotations omitted). "This court 'will pay special attention to statements that may inflame or prejudice the jury where credibility is a central issue.'" *State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997) (citation omitted). The only issue in this case was credibility.

The state argues that (1) there is no evidence that the prosecutor intended to appeal to the passions or prejudice of the jury; (2) the remarks were brief; (3) the jury was not expressly invited to make an improper comparison; and (4) the remarks were not demeaning. But the intent of the prosecutor who injects race into a trial is not dispositive—it is the impact of the statement on the jury that matters. *Varner*, 643 N.W.2d at 305. And there is no authority to suggest that an improper injection of race into the courtroom is harmless because it is brief.

The state's remaining arguments also fail to show that Mitchell's substantial rights were not prejudiced by the prosecutorial error. As *Varner* makes clear, the prosecutor's repeated references to the race of the officer and statement that "certainly there are white

people who buy crack cocaine" need not explicitly invite the jurors to make improper comparisons or be explicitly demeaning to prejudice the rights of a defendant.

> To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended.

Id. at 304 (citing *McFarland v. Smith*, 611 F.2d 414, 417 (2nd Cir. 1979)). And the prosecutor's reference to Mitchell as "the greedy defendant" and suggestion that "these people" were trying to protect their local drug market could reasonably be construed to be demeaning and derogatory. On this record, we conclude that the state has failed to meet its burden to show that the misconduct did not affect Mitchell's substantial rights. As the supreme court stated in *State v. Cabrera*, "[a]ffirming this conviction would undermine our strong commitment to rooting out bias, no matter how subtle, indirect, or veiled." 700 N.W.2d at 475. We conclude that Mitchell is entitled to a new trial free of improper references to race.

IV. Sentencing

Because we are reversing and remanding for a new trial, we need not reach Mitchell's alternative argument that the sentencing court punished him for exercising his right to trial. But we take this opportunity to express our concern and to caution the district court that statements indicating that a sentencing court is refusing to consider a defendant's sentencing arguments merely because the defendant rejected a plea offer and exercised his right to trial can result in reversal of even a presumptive sentence.

Reversed and remanded.