**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-256**

State of Minnesota,
Respondent,

vs.

Tensa Aweke,
Appellant.

**Filed May 12, 2009**
**Affirmed**
**Ross, Judge**

Hennepin County District Court
File No. CR-06-053388

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

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

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

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

**ROSS**, Judge

This case arose from a scuffle between a bar patron and bar employees after the patron's bank declined to cover his $13 tab. Tensa Aweke challenges his convictions of second-degree assault and terroristic threats, contending that the prosecutor committed misconduct that deprived him of his right to a fair trial. We agree that the prosecutor committed misconduct, but because we conclude that the misconduct was harmless beyond a reasonable doubt, we affirm.

## FACTS

The state charged Tensa Aweke with second-degree assault and terroristic threats after an incident that occurred at Blondie's Bar in Brooklyn Park. Aweke and a group of his friends, including Lula Mohamed, went to Blondie's for drinks. Aweke ordered two for himself and two more for the ladies sitting at the next table. But the waitress soon returned and told Aweke that the bank declined his bank card. Aweke then offered to pay the $13 tab by check. The waitress refused to accept a check. So Aweke tried to convince the manager, Clifford Banks, to accept his check.

Aweke had five $100 bills in his pocket, but Aweke told the manager that he could only pay by check. Aweke testified that he intended to pay the bill, but he admitted that he never mentioned to Banks or the waitress that he had five hundred dollars in his pocket. Banks became impatient after several minutes of debate, and he accused Aweke of refusing to pay. Banks grabbed Aweke's arm to force him to leave. From this point, Banks's version of events differs from Aweke's.

Banks testified that Aweke freed himself, pulled a pocket knife, flipped it open, and held the knife about four inches from Banks's stomach. He testified that Aweke said, "You're not going to touch me. I'm going to kill you." Banks then backed away from Aweke and watched him walk toward the parking lot. He told one bouncer to follow Aweke and told another to call the police. Banks and the bouncers confronted Aweke in the parking lot and informed him that the police were coming, demanding, "You're not going anywhere." Banks noticed that Aweke's knife was not in his hand, so he and a bouncer tackled him. Banks testified that he reached into Aweke's pocket, pulled the knife out, and threw it. They held Aweke down until police arrived.

Aweke testified differently. He testified that after Banks grabbed his arm, he shrugged off the hold and asked Banks not to touch him. Aweke asserted that although he had a knife in his pocket, he did not remove it or threaten Banks. He told jurors that Banks pushed him toward the exit and that three or four bouncers joined Banks. Aweke testified that as soon as the group got outside, one of the bouncers put him in a choke hold and took him to the ground.

Lula Mohamed testified on Aweke's behalf. She testified that she saw Aweke talking with Banks and gesturing with his hands but that she never saw Aweke brandish a knife. She also testified that it was too loud in the bar for her to hear Aweke or Banks, but that Banks appeared upset. She said that she saw Banks push Aweke and start to lead him toward the exit. Mohamed started to walk toward Aweke, but a bouncer stopped her and asked her to sit down.

Because no waitress or bouncer corroborated Banks's assertion that Aweke threatened him with the knife, witness credibility was critical at trial. The jury had to decide whether Banks or Aweke and Mohamed told the truth. The jury considered Banks's testimony to be credible, finding Aweke guilty of second-degree assault and terroristic threats.

Aweke objected to the prosecutor's contact with a prospective juror before trial and to several comments the prosecutor made during trial. Aweke moved to dismiss the charges or grant a new trial. The district court sustained objections and gave curative instructions to the jury regarding some of the prosecutor's comments, but it denied Aweke's motions to dismiss or grant a new trial. This appeal follows.

**D E C I S I O N**

Aweke argues that his conviction should be reversed and the case remanded for a new trial because the prosecutor's "conduct throughout the trial fundamentally undermined [his] right to a fair trial." This court "will reverse a conviction if prosecutorial error, considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Washington*, 725 N.W.2d 125, 133 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007). A defendant's right to a fair trial is impaired when the prosecutor's misconduct is not harmless beyond a reasonable doubt. *See State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006) (discussing the new "streamlined approach" to reviewing claims of prosecutorial misconduct concluding that "[i]f the state has engaged in misconduct, the defendant will not be granted a new trial if the misconduct is harmless beyond a reasonable doubt"). "Prosecutorial misconduct is

harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error." *Washington*, 725 N.W.2d at 133. In reviewing claims of prosecutorial misconduct, the first question is whether misconduct occurred. *State v. Wren*, 738 N.W.2d 378, 390 (Minn. 2007). If there was misconduct, then the dispositive question becomes whether the misconduct was sufficiently prejudicial to entitle the defendant to a new trial. *Id.*

Aweke alleges that the prosecutor committed misconduct in three ways: (1) by contacting a prospective juror's mother during voir dire; (2) by accusing a defense witness of committing perjury during closing argument; and (3) by eliciting inadmissible prior bad acts testimony during cross examination of Aweke and another defense witness. We consider each allegation in turn.

***Contacting Prospective Juror's Mother***

Aweke argues that the prosecutor committed misconduct by contacting a prospective juror's mother during voir dire. There is no dispute that the prosecutor made the phone call and inquired about the prospective juror. The state contends that this court need not address whether the prosecutor committed misconduct because the prospective juror was not chosen to serve on the jury and did not communicate anything material to fellow panelists. The state acknowledges that the prosecutor's contact may have violated the Minnesota Rules of Professional Conduct, but it argues that any violation should be dealt with in a disciplinary proceeding rather than a criminal appeal.

Minnesota caselaw does not expressly answer whether a prosecutor's contact with a prospective juror's family member is misconduct. But the contact is a clear violation of the rules of professional conduct:

> (a) Before the trial of a case, a lawyer connected therewith shall not, except in the course of official proceedings, communicate with or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.
>
> . . .
>
> (e) All restrictions imposed by this rule apply also to communications with or investigations of members of a family of a juror or prospective juror.

Minn. R. Prof. Conduct 3.5(a), (e). The state argues that a professional rule that establishes a lawyer's obligation does not necessarily establish a defendant's right, because a comment to the rules provides that "[v]iolation of a rule should not itself . . . create any presumption . . . that a legal duty has been breached . . . [and] violation of a rule does not necessarily warrant any other nondisciplinary remedy." Minn. R. Prof. Conduct, Scope cmt. 20. But that same comment also instructs that "because the rules do establish standards of conduct for lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct." *Id*. The state's argument may be persuasive regarding the violation of other rules, but not this one.

The potentially chilling impact of an attorney in a criminal matter contacting a juror's family member leads us to conclude that this contact constitutes prosecutorial misconduct. The practical harm of a prosecutor contacting a juror's family member was discussed in a recent South Carolina case. In that case, police detectives, acting at the

direction of the prosecutor, contacted jurors' family members and "asked [them] whether their relative could impose the death penalty" if the defendant was convicted. *State v. Bryant*, 581 S.E.2d 157, 161 (S.C. 2003). The court specifically noted that "[d]uring the trial, the jurors were aware police investigators had contacted their family members." *Id*. The court found that "the questioning of jurors' family members by . . . [p]olice detectives in a case in which the victim was a . . . [police] officer was, at minimum, an attempt to influence the jury . . . [and] the questioning could have been perceived as an attempt to intimidate jurors." *Id*. (citation omitted). Because the court concluded that the jurors could have been intimidated and would therefore not be "fair and impartial," it reversed the appellant's murder and armed robbery convictions. *Id*. We find this reasoning persuasive regardless of the victim's relationship to the police. And the pressure that a juror would likely feel from personal contact with *the juror's close family member* by either the prosecutor or defense counsel in some respects is even more intrusive, personal, and potentially intimidating than contact with the juror.

The prosecutor here was indignant at the objection, seemingly unaware of her rule violation. After Aweke's attorney objected to her conduct, she responded that his accusations were "baseless," and she took the offensive, pressing that "he can't cite what's illegal or unethical about anything that I did." She concluded, "I did nothing unethical or illegal." Because of the practical implications and chilling impact that the prosecutor's rule violation has on the district court's objective to impanel a fair and impartial jury, we hold that the prosecutor committed misconduct when she contacted the prospective juror's mother to inquire about the juror.

***Commenting on the credibility of a witness***

Aweke argues that the prosecutor committed misconduct in her closing argument when she made the following remark characterizing a defense witness's testimony as "ludicrous" and "perjury":

> If you want to acquit this man based on the ludicrous testimony of this young woman, as [the defense attorney] is asking you to do, that would not be proper because your decision is to be based on all the evidence you hear and not reward people for coming in under oath and committing perjury.

The defense attorney immediately objected and moved for a mistrial, but the district court denied the motion. The state argues that the prosecutor's comments "merely highlighted the credibility determination that the jury would have to make." The state's argument glosses over the prosecutor's remarks.

Although a prosecutor has considerable latitude during closing argument, it is "improper for [her] to give her own opinion about the credibility of a witness in closing argument." *Mayhorn*, 720 N.W.2d at 786. "When assessing prosecutorial misconduct, the closing argument will be considered as a whole." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). The prosecutor here expressed her own opinion about the credibility of a defense witness by declaring as fact that the witness committed "perjury" with "ludicrous" testimony. It is true that the prosecutor's improper statement constitutes only a small portion of a closing argument that was more than 40 transcribed pages long. So if we took a purely quantitative approach, we might conclude that the statement does not amount to misconduct. *See id.* at 679 (concluding that the prosecutor's comments in

closing which disparaged the defense and expressed a credibility opinion were improper, but did not amount to misconduct because "[t]he improper statement was only two sentences in a closing argument that amounted to over 20 transcribed pages").

But we cannot disregard the quality of the comment by virtue of its brevity. In *Mayhorn*, the supreme court kept the misconduct question separate from the prejudice question, reasoning that although a prosecutor's "improper statement" was quantitatively a small portion of the closing argument, it still constituted prosecutorial misconduct. 720 N.W.2d at 786, 791. Similarly here, we conclude that the prosecutor's statement was misconduct even though it was a small portion of her closing argument. It was a clear breach and the last thought that she left with the jury.

***Improper Cross-Examination***

Aweke next argues that the prosecutor committed misconduct by eliciting inadmissible evidence on cross-examination. He contends that the purpose of the prosecutor's cross-examination of both Mohamed and Aweke "was to introduce evidence of [Aweke's] prior bad acts without any of the safeguards or procedural requirements for admitting such evidence being met." Aweke maintains that asking Mohamed whether she previously had been arrested with Aweke improperly announced a prior bad act. He also contends that questioning him about another arrest at a bar following a physical confrontation improperly exposed the jury to a prior bad act.

A prosecutor commits misconduct when she violates "orders by a district court, or clear commands in [Minnesota] case law." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). "[A]ttempting to elicit or actually eliciting clearly inadmissible evidence may

constitute misconduct." *Id.* Before trial, the district court ruled that it would not allow the prosecutor to introduce or ask Mohamed about an incident where she was arrested with Aweke "[i]f she acknowledges a friendship with [Aweke] . . . [because] that's sufficient demonstration of a factor [of bias] that the jury can take into account." At trial, Mohamed acknowledged that she was friends with Aweke. Disregarding the district court's ruling, the prosecutor asked Mohamed about the incident with a narrative "question" detailing the encounter, saying: "[Y]ou were out at 3:00 o'clock in the morning [in] downtown Minneapolis with [Aweke] shouting obscenities at police officers and ended up getting arrested with him. Correct?" Mohamed answered, "Yes, ma'am."

The state admits that "[t]he prosecutor erred in pursuing this topic with Mohamed because Mohamed had admitted her friendship with [Aweke]." But the state contends that the prosecutor did not commit misconduct by asking the question because it was admissible under evidentiary rule 608(b) and (c) "to put the witness's credibility and neutrality into question." The state is incorrect. "Under Minn. R. Evid. 608(b), specific instances of conduct of a witness may be inquired into on cross-examination *if they are probative of the witness's truthfulness or untruthfulness*." *Mayhorn*, 720 N.W.2d at 790 (emphasis in original). Previously being downtown at 3:00 o'clock in the morning, shouting obscenities at police officers, and being arrested with Aweke, are not probative of Mohamed's credibility. Because the question was not admissible under Rule 608 and because the state concedes that "[t]he prosecutor erred in pursuing this topic with Mohamed" after the district court prohibited the inquiry, we conclude that this part of the prosecutor's cross-examination of Mohamed constitutes misconduct.

The prosecutor cross-examined Aweke about prior incidents at bars with security guards and police. She asked him if he had "got into it" with security guards and police officers at bars in the past, and she then asked about a specific incident in June 2005 when he had been arrested at Lone Tree Bar. She asked about his being taken to jail in a squad car and whether he spit at the officer who drove him to the jail. Aweke's attorney objected to the relevance of the questions and the attorneys approached the bench and had a discussion off the record. Because the discussion occured off the record, the details of the objection and the court's ruling are not apparent. The prosecutor then asked Aweke about whether he had threatened the police officer by saying, "death would come to [the officer] sooner than it would come to [Aweke]." Aweke responded that he did not remember saying that.

The state argues that questions about Aweke's prior incidents at bars were proper "under Minn. R. Evid. 608(b) [and] (c) as evidence of [Aweke's] conduct to attack his credibility." Rule 608(b) provides that "[s]pecific instances of the conduct of the witness, for the purpose of attacking . . . the witness' character . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness." But Minn. R. Evid. 608(c) limits the use of 608(b) evidence in criminal cases. It provides that

> [t]he prosecutor in a criminal case may not cross-examine the accused . . . under subdivision (b) unless (1) the prosecutor has given the defense notice of intent to cross-examine pursuant to the rule; (2) the prosecutor is able to provide the trial court with sufficient evidentiary support justifying the cross-examination; and (3) the prosecutor establishes that the

> probative value of the cross-examination outweighs its potential for creating unfair prejudice to the accused.

Minn. R. Evid. 608(c). The supreme court noted that evidence offered under rule 608(b) "shall not be received unless the notice required by amended Minn. R. Evid. 608(c) is memorialized in the record." *Fields*, 730 N.W.2d at 784. The record contains no notice from the prosecutor. The *Fields* court held that when the procedural requirements of rule 608(b) are not met, the prosecutor may be committing misconduct. *Id*. at 782.

Beyond the procedural defects, prosecutorial misconduct under rule 608(b) may occur when the evidence is not probative of truthfulness or untruthfulness. *See Fields*, 730 N.W.2d at 782. Whether Aweke "got into it" with security guards and police officers at bars in the past has little bearing on the truthfulness or untruthfulness of his testimony. Over the limited extent the information might bear legitimately on his credibility, we hold that the prosecutor committed misconduct by failing to give prior notice of her intent to cross examine Aweke so as to introduce his prior bad acts in this manner.

***Does the misconduct warrant a new trial?***

Having concluded that the prosecutor committed misconduct, we turn to the closer question of whether Aweke is entitled to a new trial. Because Aweke objected to the misconduct, we will reverse unless the state establishes that the misconduct was harmless beyond a reasonable doubt. *Wren*, 738 N.W.2d at 393–94. Misconduct is harmless beyond a reasonable doubt if the jury's verdict is "surely unattributable" to it. *State v. Dobbins*, 725 N.W.2d 492, 507 (Minn. 2006).

Individually, Aweke's claims of prosecutorial misconduct do not support granting him a new trial. First, the prospective juror did not serve on the jury, and the record shows that she neither knew of the prosecutor's call to her mother nor talked to any of the other prospective jurors about the case. The jury's verdict was therefore surely unattributable to the prosecutor's improper contact with the prospective juror's mother.

Second, after the prosecutor's improper comment during closing argument, the district court specifically instructed the jury to disregard the comment. Immediately after the comment, the court instructed the jury, "The jury is to ignore that remark by [the prosecutor]. You are the ones who are to consider what the facts are and weigh the evidence, and that's your responsibility alone." Because cautionary instructions weigh against granting a mistrial, *State v. Robinson*, 604 N.W.2d 355, 361 (Minn. 2000), and because we assume that jurors follow a district court's directive, *Fields*, 730 N.W.2d at 785, we conclude that the jury's verdict was surely unattributable to the prosecutor's improper comment.

Third, although the prosecutor's cross-examination of Mohamed and Aweke is a more difficult call, we conclude that it was harmless beyond a reasonable doubt. Several factors are relevant to the harmless-beyond-a-reasonable-doubt analysis including "how the improper evidence was presented, whether the state emphasized it during the trial, whether the evidence was highly persuasive or circumstantial, . . . whether the defendant countered it . . . [, and] the strength of the evidence." *Wren*, 738 N.W.2d at 394. In *Wren*, the court concluded that the prosecutor's misconduct was harmless beyond a reasonable doubt because the prosecutor's "objectionable conduct was brief[;] [t]he

prosecutor did not emphasize or dwell on it[;]" the objectionable questions and commentary were "a very small part of [the detective's] lengthy testimony at trial[;] . . . [the defendant's] credibility was not a central issue in the trial[;] . . . [and] the evidence against [the defendant] was very strong." *Id.*

Similarly here, the prosecutor's misconduct was brief and she did not emphasize or dwell on the improper or objected-to questions and commentary. And the improper questions posed to Mohamed and Aweke consisted of a very small portion of their overall trial testimony. Unlike the situation in *Wren*, both Aweke's and Mohamed's credibility was central to the case. But in several instances, they contradicted each other's testimony regarding the events. Mohamed testified that Aweke did not drink any beer at the bowling alley before they went to Blondie's. Aweke testified that he shared a pitcher of beer with some other people at the bowling alley. At trial, Aweke also contradicted statements that he made in his recorded statement with the police after he was arrested at Blondie's. Even without the prosecutor's improper statements, the record shows that Aweke and Mohamed's credibility was questionable. It is clear that the conviction must have rested on the strength of the prosecution's witnesses, not on the weakness of Aweke's and Mohamed's testimony. Although only Banks actually observed Aweke brandish the knife, the other evidence against Aweke strongly substantiated Banks's description. Aweke admitted he was at the bar and that he and Banks quarreled over Aweke's request that Banks accept his check. Aweke carried the knife in his left pocket. Supporting Banks's testimony that Aweke took the knife out of his left pocket and thrust it towards Banks's stomach with his left hand, Aweke confirmed that he carried the knife

in his left pocket and that he is left handed. Banks knew to reach into Aweke's pocket to retrieve the knife and toss it away. On these facts and the weakness of the testimony offered in Aweke's defense, we hold that the prosecutor's misconduct in cross-examining Mohamed and Aweke was harmless beyond a reasonable doubt.

Aweke contends that the cumulative effect of all the prosecutorial misconduct deprived him of a fair trial. This argument fails. In cases where the "cumulative effect" of a prosecutor's misconduct has resulted in a new trial, the misconduct was more egregious than it is here. In *State v. Harris*, for example, the supreme court granted a new trial because it was convinced that the prosecutor's misconduct presented a trial record that, in its entirety, made the jury focus on the question of whether the defendant was a "bad man" rather than the question of whether the defendant had committed murder. 521 N.W.2d 348, 355 (Minn. 1994). Viewing the entire record, we conclude that the prosecutor's misconduct does not rise to that level. Additionally, the misconduct regarding juror contact and the closing comment about Mohamed's credibility had no prejudicial impact—taken alone or together—for the reasons already discussed.

We affirm Aweke's convictions for these reasons. In doing so, we emphasize that our characterization of the prosecutor's conduct as "harmless beyond a reasonable doubt," does not suggest that it was innocent or appropriate. We say only that the misconduct does not require a new trial because the state has convinced us beyond a reasonable doubt that the jury's verdict was not attributable to it.

**Affirmed.**