STATE OF MINNESOTA
IN COURT OF APPEALS
A08-64

State of Minnesota,
Respondent,

vs.

Jason Dominic Supino,
Appellant.

Filed June 2, 2009
Affirmed
Ross, Judge

Anoka County District Court
File No. K6-06-10237

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

Robert M.A. Johnson, Anoka County Attorney, Kathryn M. Timm, Assistant County Attorney, 2100 Third Avenue, Anoka, MN 55303 (for respondent)

Brian Karalus, 332 Minnesota Street, Suite W-1610, St. Paul, MN 55101 (for appellant)

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

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

ROSS, Judge

Jason Supino's on-again, off-again relationship with his occasional live-in girlfriend ended the night he twice grabbed her by the throat and choked her. Supino

appeals from his conviction of felony domestic assault by strangulation. He argues that the district court erroneously admitted police testimony concerning the absence of any strangulation marks and erroneously prohibited him from informing the jury that the victim had once been a nude dancer. He also contends that the prosecutor committed misconduct in closing argument by making improper inferences from the evidence and by misstating the burden of proof. Because the district court's evidentiary rulings were sound and because the prosecutor did not mislead the jury, we affirm.

FACTS

Just after midnight on October 8, 2006, Blaine Police Detective Thomas Johann responded to a 911 call placed by Supino's occasional girlfriend, H.P. Detective Johann found H.P. barefoot on the side of the road. She told Detective Johann that she and Supino had gotten into an argument while Supino was driving, and that Supino choked her multiple times.

The state charged Supino, and it tried him for domestic assault by strangulation in violation of Minnesota Statutes sections 609.2247, subdivision 2 and 609.101, subdivision 2 (2006). According to H.P.'s trial testimony, Supino snapped from calm to enraged while they were driving on a date, and he grabbed her by the throat and pressed her against the car window. H.P. said that she could barely breathe. She testified that she leapt from the car as it traveled slowly. She left her personal belongings in the car, including her cell phone. Supino stopped the car and offered to drive H.P. back to her Ford Explorer, which was at his home. She declined Supino's offer, and she reached inside his car and removed her cell phone from the floor. Supino drove off.

Detective Johann testified to finding H.P. at the side of the road and to seeing a fresh, superficial wound on her foot. The detective saw no other injuries. He drove H.P. to her truck. There, he saw that someone had put H.P.'s purse and the other personal items that H.P. had left in Supino's car on top of the truck. Detective Johann also testified that he had investigated dozens of cases involving strangulation or choking and that "more often than not" he observed no strangulation marks on the alleged victim.

Supino testified that he never touched H.P. except to remove her hand from the steering wheel. He contradicted H.P.'s claim that she jumped from the moving car and later retrieved her cell phone. He testified that because she was screaming and attempting to grab the steering wheel, he told her to get out of the car or *he* would call the police. Supino acknowledged, however, that H.P. had left her shoes, belt, and purse in his car.

In his closing argument, the prosecutor referred to Detective Johann's experience that cases of strangulation do not necessarily result in physical marks on the victim. He compared that testimony to his own experience of self-inflicted razor burn as a "brief redness" that goes away, but there had been no testimony regarding razor burns. The prosecutor characterized the state's burden of proof as "not so high that it's impossible." He asserted that "[p]eople have trials every day. And we know what the results are in many of those cases." He stated that once the state has met its burden of proof, the defendant no longer has the presumption of innocence. Supino's trial counsel did not object to the prosecutor's closing argument.

The jury was not persuaded by Supino's exculpatory testimony. It convicted him of domestic assault by strangulation. Supino appeals.

D E C I S I O N

Supino argues that the district court improperly included some evidence, improperly excluded other evidence, and that the prosecutor committed misconduct justifying a new trial. We first consider the challenges to the evidence, then the claim of misconduct.

I

Supino contends that he should have been allowed to inform the jury that H.P. once worked as a nude dancer and that Detective Johann should not have been allowed to testify about his observation regarding injuries of other strangulation victims. Evidentiary rulings are subject to the district court's discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). To successfully challenge the evidentiary rulings on appeal, Supino must show that any one of the challenged rulings was beyond the district court's discretion and prejudiced him. *Id.*

Supino's challenge to the district court's ruling about the admissibility of evidence regarding H.P.'s former work as a nude dancer fails. The record reflects that the district court never ruled that evidence concerning H.P.'s prior employment was inadmissible. Instead, Supino's trial counsel conceded that the information would be irrelevant and voluntarily refrained from broaching the subject. Before trial, the prosecutor asked the district court to exclude any reference to H.P.'s prior employment. The district court remarked: "I don't know how that would be relevant. Would that be relevant?" Supino's

trial counsel responded: "No, your honor. We're not going to get into that." So the matter was dropped. A short time into H.P.'s trial testimony, the prosecutor asked her about her most recent employment. She described having recently resigned from a position tutoring adults and children with learning disabilities. Supino's trial counsel did not object to the prosecution's limited questioning about H.P.'s recent employment, and did not attempt to enter evidence of her prior employment as a dancer.

After the guilty verdict, Supino moved for a new trial. His trial counsel argued that his "recollection" was that the district court had ruled that the prior-employment evidence was inadmissible. But Supino points us to no place in the record where the district court so ruled. The district court judge addressed the question when it ruled on the motion for new trial, stating that he warned the parties that evidence pertaining to H.P.'s prior employment was unduly prejudicial, "and I think defense adhered to my admonitions."

When a purported error was not objected to, the complaining party must show a plain error that affected his substantial rights. *State v. Jones*, 678 N.W.2d 1, 17–18 (Minn. 2004). Even if the "plain error" analysis is satisfied, this court may only reverse such error "if the fairness, integrity, or public reputation of the judicial proceeding is seriously affected." *Id.* at 18. An error is plain if it is clear or obvious, which is ordinarily shown by establishing that it violated a law, rule, or standard of conduct. *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007).

Supino has not only failed to attempt to show that the error was plain, he fails to show that the district court committed any error at all. The record indicates that Supino's

trial counsel voluntarily refrained from pursuing the line of inquiry. Supino's argument amounts to an assertion that the district court erred by failing to rule on the admissibility of evidence that Supino's trial counsel never offered because he conceded that the evidence was irrelevant. The argument is not persuasive. The district court took no action that can be considered error.

Supino's trial counsel did object to Detective Johann's testimony concerning his experience with strangulation investigations. But the record does not indicate that the district court ruled on the objection. When the prosecutor began eliciting this testimony from Detective Johann, Supino's trial counsel objected. The district court then engaged the attorneys in an off-the-record conversation. After the conversation, the questioning resumed with no ruling on the objection. Failure to insist on a ruling constitutes waiver of the objection. *Quick v. Benedictine Sisters Hosp. Ass'n*, 257 Minn. 470, 486, 102 N.W.2d 36, 47 (1960); *see also State v. Word*, 755 N.W.2d 776, 783 (Minn. App. 2008) (requiring a defendant to obtain a "definitive ruling" to preserve an evidentiary issue for appeal).

The record also lacks any indication of the basis for the objection. Supino's trial counsel nonetheless argued, in support of Supino's new-trial motion, that the basis for the objection was discussed during the off-the-record conversation. Supino asserts on appeal that irrelevance was the basis for the objection. The district court denied the motion for a new trial, observing that the detective's experience investigating strangulations rendered his testimony relevant and helpful to the jury. The district court pointed out that the attorneys received an opportunity at trial to record their objections, and Supino's

substitute counsel acknowledged that Supino's trial counsel "forgot to do it." We conclude that the objection was waived and no ruling was made, and we therefore apply the plain error standard.

Supino fails to establish that the district court plainly erred. The district court found that Detective Johann's testimony would be relevant and helpful to the jury in evaluating the evidence. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Relevant evidence is generally admissible, and a witness may testify to matters that are based on his perception and helpful to the finder of fact. Minn. R. Evid. 402, 701.

Detective Johann testified as follows after the objection and sidebar:

> Q: Detective Johann, have you previously investigated cases involving choking or strangulation where there have been no marks on the alleged victim?
> A: Yes.
> Q: How often did that occur in your investigations?
> A: I would say more often than not there's no marks.

This testimony explained that the strangulation does not always leave visible evidence. It related directly to H.P. having no discernable injury on her neck after her report of strangulation. The testimony was relevant and admitting it was not error. There being no error, we need not address whether prohibiting the evidence might have resulted in a different verdict.

Supino also makes a foundational challenge to the testimony. He emphasizes that Detective Johann never indicated whether the evidence in his prior strangulation

investigations ever established that the alleged victims had actually been strangled. But Supino's objection to the detective's testimony rested on relevancy, not foundation. The objection on foundational grounds is therefore waived. *See State v. Collins*, 276 Minn. 459, 472, 150 N.W.2d 850, 859 (1967) (requiring timely objection on basis of foundation); *Goss v. Goss*, 102 Minn. 346, 350, 113 N.W. 690, 692 (1907) (explaining that contemporaneous objection on foundation grounds provides ready opportunity to correct the defect). And Supino also could not show prejudice even if he had made and preserved a foundational challenge to the evidence. His trial counsel's cross examination addressed the newly asserted deficiency:

> Q: Now, you just testified that in—you've investigated these alleged domestic strangulation cases, right?
> A: Correct.
> . . . .
> Q: Let's talk about you being called to a scene and interviewing an alleged victim in one of these domestic strangulation cases. Let's just talk about that right now, okay?
> A: Okay.
> Q: You said that often in these cases where there's a claim of strangulation, you don't see any marks on the neck; is that right?
> A: That's right.
> Q: And it's fair to say when you interviewed this alleged victim and you don't see any marks, you don't know at that point if there's no marks because they didn't show up and actually there was a strangulation, or if there's no marks because the person's lying. You don't know, do you?
> A: No.

This cross examination pointed out any foundational weakness in the detective's testimony. Supino has not established error, and he also has not established that the

exclusion of the evidence might have resulted in a different verdict. We conclude that the admission of this evidence was not plain, prejudicial error.

II

Supino also contends that the prosecutor committed misconduct in his closing argument. He argues that the prosecutor referred to facts not in evidence and that he misstated the burden of proof. The errors were not objected to at trial. Unobjected-to prosecutorial misconduct is waived, but may be reviewed by this court according to the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 297–99 (Minn. 2006). A prosecutor's closing argument need not be "colorless." *State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008), *review denied*, (Minn. Sept. 23, 2008). Some inartful statements may not constitute misconduct, even though they do not accurately state the law. *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996). We view closing arguments as a whole. *Rucker*, 752 N.W.2d at 551.

Supino assigns error to the prosecutor's reference to facts not in evidence. He argues that the prosecutor "fabricated" the testimony of Detective Johann that it is not difficult to impede breathing. He also complains that the prosecutor referred to having had razor burn, despite there being no record evidence of the fact and no supporting expert medical testimony making it relevant. We conclude that the purported misconduct was waived, and we decline to review it under the plain-error standard. Supino did not object to the prosecutor's closing argument and his argument on the motion for new trial did not suggest to the trial court that these statements were misconduct. A district court "is in a unique position to determine what actions constitute prosecutorial misconduct."

Ramey, 721 N.W.2d at 298. The district court should be given an opportunity to rule on objections of misconduct and give jurors corrective instructions if warranted. *Id.* at 299. We add that the argument has no weight; the testimony that Supino asserts to have been fabricated actually appears in the record.

We next consider the prosecutor's unobjected-to statements concerning the state's burden of proof. We first decide whether Supino has established that prosecutorial misconduct constituted plain error. *Rucker*, 752 N.W.2d at 551. If so, because the claimed misconduct occurred during the prosecutor's closing argument, the burden would shift to the state to establish beyond a reasonable doubt that the jury's verdict was not affected by the error. *Id.*

Supino suggests that the prosecutor committed misconduct by misstating the burden of proof and by suggesting that other criminal trials result in convictions. Each of the complained-of comments constitute just single sentences in the context of a closing argument that spanned over 20 transcribed pages. The prosecutor stated that "[p]eople have trials [everyday]. And we know what the results are in many of those cases." Supino argues that this reference to other trials constituted misconduct. He cites cases in which the supreme court and this court have concluded that comparing the defendant to a notorious criminal constitutes misconduct. *State v. Thompson*, 578 N.W.2d 734, 743 (Minn. 1998); *State v. Angulo*, 471 N.W.2d 570, 575 (Minn. App. 1991), *review denied* (Minn. Aug. 2, 1991). These cases are inapposite; Supino was not compared to a notorious criminal.

He argues that the statement constituted misconduct in the form of a "law and order" argument and that "[t]he only possible invocation of the act of many other juries returning guilty verdicts is to insinuate that there is a high probability that a guilty verdict is the right one here because defendants are often guilty as many other juries have found." But in context, the statement could not have had the complained-of effect on the jury. The statement came within the prosecutor's discussion of the burden of proof, which went on for approximately two transcribed pages. It served only to illustrate the prosecutor's immediately preceding point that "[t]he burden is not so high that it's impossible." The complained-of statement does not amount to an improper effort to shift the jury's focus from Supino's guilt or innocence to results of other trials. Supino therefore has not established that this statement constituted plain error.

Supino bisects a different sentence in the prosecutor's closing argument and urges us to conclude that the prosecutor distorted the burden of proof. The prosecutor said that after the state has met its burden of proof, "[Supino has] no longer got the presumption of innocence." Supino contends that this misstates the law because a defendant's right to the presumption of innocence never disappears. The prosecutor's statement does not misstate the burden. The presumption of innocence is the approach the jury must take to weigh inculpatory evidence. The state can therefore meet its burden of proof only if it first overcomes the presumption of innocence and establishes the defendant's guilt beyond a reasonable doubt. So once the state has met its burden of proof, the presumption, already overcome, is not pertinent.

We considered a similar description in *State v. Trimble*, 371 N.W.2d 921 (Minn. App. 1995), *review denied* (Minn. Oct. 11, 1985). In *Trimble*, the prosecutor told the jury erroneously that accumulation of evidence against the defendant caused the presumption to disappear. *Id*. at 926. The manner in which the district court in that case corrected the erroneous statement is informative. It instructed the jury that the prosecutor had misstated the law, emphasizing that "[the] presumption does not gradually disappear, but it does not disappear whatsoever *unless and until a defendant's guilt is proved beyond a reasonable doubt*." *Id.* at 927 (emphasis added). The district court in *Trimble* instructed the jury with virtually the same explanation of the law that Supino's prosecutor gave in his closing argument. The *Trimble* court concluded that the district court had "fully instructed the jury on presumption of innocence," implicitly approving of the district court's correction. *Id.* at 926.

Inconsistent with this holding in *Trimble*, Supino argues that the prosecutor's alleged error has been previously deemed misconduct and warrants a new trial, citing *State v. Jensen*, 308 Minn. 377, 242 N.W.2d 109 (1976). This case does not resemble *Jensen*. In *Jensen*, the prosecutor argued that the presumption of innocence disappeared as soon as the jury entered deliberations and additionally characterized the burden as "a shield for the innocent, . . . not a cloak that the guilty can hide behind." 308 Minn. at 379, 242 N.W.2d at 111. The court disapproved of the remark. *Id.* at 380, 242 N.W.2d at 111. The statement constituted prosecutorial misconduct because it erroneously described the burden of proof as applying only to the innocent, a position that the supreme court had expressly rejected. *State v. Thomas*, 307 Minn. 229, 231–32, 239

N.W.2d 455, 457 (1976). Supino's prosecutor made no such statement, and *Trimble* informs our decision more precisely.

Because no judicial error or prosecutorial misconduct occurred in Supino's trial, we affirm.

Affirmed.