**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-0494**

State of Minnesota,
Respondent,

vs.

Estella Margaret Linse-Anderson,
Appellant.

**Filed June 2, 2009**
**Affirmed**
**Shumaker, Judge**

Hennepin County District Court
File No. 27-CR-07-014375

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, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Johnson, 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

**SHUMAKER**, Judge

In this appeal from her convictions of assault and refusal to submit to chemical testing, appellant argues that she was deprived of a fair trial because the district court erroneously admitted certain evidence and the prosecutor committed prejudicial misconduct. We affirm.

## FACTS

A jury found appellant Estella Margaret Linse-Anderson guilty of assaulting D.W. and of refusal to submit to chemical testing. Linse-Anderson contends that the district court abused its discretion by allowing evidence of her prior relationship with D.W.'s husband, R.W., and that the prosecutor engaged in misconduct.

The assault occurred on the evening of March 4, 2007, when Linse-Anderson came to D.W. and R.W.'s home. Both D.W. and R.W. were present with two dinner guests. When Linse-Anderson arrived, D.W. and one of the guests were in the garage. The overhead door was open and Linse-Anderson, who appeared intoxicated, walked up the driveway and began to call D.W. names and to argue with her. Linse-Anderson then kicked her twice "in the crotch" and pushed her down. R.W. called the police but Linse-Anderson left before they arrived.

The police found Linse-Anderson sitting in her car in a church parking lot. They performed a preliminary breath test, which registered a .16 alcohol concentration. Linse-Anderson refused to submit to further alcohol testing.

Linse-Anderson testified in her own defense. She denied that she was intoxicated on March 4 and stated that she went to R.W.'s home to speak with him about prior business dealings. She testified that D.W., whom Linse-Anderson had not previously met personally, became upset, screamed at her, and then came after her. Linse-Anderson stated that she merely put her arms up to stop her. She did not admit to kicking D.W.

The personal and business relationship between Linse-Anderson and R.W. became part of the focus of the trial. From early 2001 until late 2004, Linse-Anderson and R.W. were business partners and were involved with each other personally. When Linse-Anderson accused R.W. of stealing money from the business, both relationships ended. But Linse-Anderson continued to call him and, at one point, she called his girlfriend, who eventually became his wife, D.W., to "badmouth him." Linse-Anderson was previously convicted twice of domestic assault against R.W., and of violating an order for protection issued for his benefit.

Over Linse-Anderson's objection, the district court allowed evidence of various aspects of her turbulent relationship history with R.W. The admission of this evidence and allegations of prosecutorial misconduct give rise to this appeal.

## D E C I S I O N

*Alleged Evidentiary Errors*

Linse-Anderson contends that the district court abused its discretion in allowing, over her objection, evidence of various instances of her past conduct during her relationship with R.W. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the

appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted).

The evidence of which Linse-Anderson complains consisted of R.W.'s testimony about her gambling, drinking, anger, physical assaults, and phone calls and voice-mail messages that he characterized as obscene and harassing. It is not necessary to describe Linse-Anderson's alleged conduct in detail but it would be fair to characterize much of it as hostile and abusive.

The first item of concern involves Linse-Anderson's two prior convictions of domestic assault against R.W. She stipulated to the convictions "to keep that information from the jury," and she moved to exclude any reference to the convictions or to the conduct on which the convictions were based. The district court granted her motion as to the convictions but ruled that evidence of the underlying conduct constituted part of the relationship history of Linse-Anderson and R.W., was relevant to the issue of motive, and was admissible.

Linse-Anderson contends that relationship evidence under Minnesota's domestic-abuse law in Minn. Stat. § 634.20 (2006) is admissible only when prior assaults involved the same victim of the crime currently charged. Her prior assaults were committed against R.W., whereas the charged crime was against D.W. Although Linse-Anderson's reading of the statute is accurate, the district court here did not base its ruling on that law.

The court instead ruled that evidence of Linse-Anderson's turbulent relationship with R.W. was admissible to help the jury understand why Linse-Anderson, a stranger to

D.W., would assault her. In other words, the district court said, that evidence provided a motive for the assault. "Evidence of a defendant's assaultive conduct toward a third party related to or a close friend of the victim is generally admissible both to show a highly strained relationship between the defendant and the victim and to establish a motive . . . ." *State v. Blanchard*, 315 N.W.2d 427, 431 (Minn. 1982) (quotation omitted); *see State v. Mills*, 562 N.W.2d 276, 285 (Minn. 1997) (stating that "evidence which tends to show the 'strained relationship' between the accused and the victim is relevant to establishing motive and intent and is therefore admissible").

Although motive is not an element of assault, it meets the test of relevancy. Relevant evidence is that which has a tendency to make the existence of a consequential fact more probable, or less probable, than it would be without such evidence. Minn. R. Evid. 401. Linse-Anderson denied that she assaulted D.W. The prosecution was entitled to present evidence to prove that she did assault D.W. Without the relationship evidence, it is implausible that Linse-Anderson would have assaulted a person she had never met, had no connection with, and had no reason to be hostile toward. The relationship evidence supplied a reason for the assault and made the assault more likely than if no such evidence were presented. The district court did not abuse its discretion in ruling that the relationship evidence was admissible as to the issue of motive.

Linse-Anderson contends that, even if some relationship evidence was admissible as to motive, the district court allowed extensive and unnecessary bad-conduct evidence that she was unfairly prejudiced by. She argues that "[p]erhaps the most important consideration in deciding whether the danger of unfair prejudice outweighed the

probative value of the evidence is the state's need for it." For that proposition she relies on *State v. Ness*, 707 N.W.2d 676 (Minn. 2006), and *State v. Bell*, 719 N.W.2d 635 (Minn. 2006). Neither authority supports that proposition as stated. *Ness* dealt with Minn. R. Evid. 404(b) evidence and expressly rejected the notion that courts are required to perform an independent analysis of the need for evidence and, instead, held that need should be a consideration in balancing probative value against the potential for unfair prejudice. 707 N.W.2d at 690. *Bell* dealt with domestic-abuse evidence offered under Minn. Stat. § 634.20, and the court declined to require a rule 404(b) analysis for evidence offered under that statute. *Bell*, 719 N.W.2d at 639. The evidence of Linse-Anderson's past conduct was not offered under rule 404(b) or Minn. Stat. § 634.20. Thus, *Ness* and *Bell* do not control the analysis here.

Linse-Anderson also relies on Minn. R. Evid. 403 for her contention that the probative value of her conduct evidence was substantially outweighed by its danger of unfair prejudice. And, as *Ness* held, a consideration of the need for evidence should be part of the balancing analysis. *See Ness*, 707 N.W.2d at 690. It is apparent that the district court considered the state's need for the evidence because the district court concluded that the evidence would help show a motive for Linse-Anderson's assault on D.W. Although the district court did not disclose on the record its full rule 403 analysis, it was not necessary for it to do so as long as there is some indication that an analysis was made. *Bell*, 719 N.W.2d at 640; *see also State v. Lee*, 645 N.W.2d 459, 468 (Minn. 2002).

The district court seemed to allow virtually a full recounting of the numerous instances of Linse-Anderson's untoward conduct during her relationship with R.W. Although we have some concern about the quantity of the evidence allowed, the district court is in the best position to assess that issue, and Linse-Anderson "bears a 'heavy burden' of persuasion to show that [any error in allowing the evidence] 'was prejudicial and affected the outcome of the case.'" *Lee*, 645 N.W.2d at 466 (quoting *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998)). Linse-Anderson has not carried her burden. For the jury to fully understand and appreciate the issue of motive, it is likely that the jury had to learn of the nature, extent, and intensity of Linse-Anderson's animosity toward R.W. That Linse-Anderson reviled R.W. so thoroughly and deeply that she would assault his wife would likely require a showing of ongoing, serious strife to make the proposition of motive plausible. Thus, the entire history of the relationship between Linse-Anderson and R.W. had probative value. Precisely where to draw the line as to the quantity of such evidence is uniquely within the district court's discretion, and Linse-Anderson has not shown a clear abuse of that discretion here.

Linse-Anderson also notes that, despite the district court's order that her prior convictions were not to be disclosed, the district court nevertheless allowed the state to inquire about the convictions themselves. It is not clear whether she is claiming that error occurred on this issue. Suffice it to say that the district court allowed inquiry about the convictions only after Linse-Anderson denied them. Her testimony that she had not been convicted of assaulting R.W. was simply false, and the district court permitted the state to show that fact and to thereby impeach Linse-Anderson. There was no error.

The state argues that the convictions were admissible on cross-examination under Minn. R. Evid. 608(b). That rule does not apply. The rule allows a showing under certain circumstances of a prior specific instance of a witness's untruthful conduct "other than conviction of crime . . . ." The state's inquiry was about prior convictions. That inquiry is governed by Minn. R. Evid. 609. Furthermore, the prior conduct about which the state inquired was assaultive, rather than untruthful, behavior.

*Alleged Prosecutorial Misconduct*

Next, Linse-Anderson contends that the prosecutor engaged in several instances of misconduct. When reviewing a claim of prosecutorial misconduct, we first determine whether misconduct occurred. *State v. Wren*, 738 N.W.2d 378, 390 (Minn. 2007). If the prosecutor engaged in misconduct, we next determine whether the misconduct was so serious and prejudicial in light of the entire trial that it impaired the defendant's right to a fair trial. *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000). The standard used to evaluate whether prosecutorial misconduct was prejudicial depends on whether the defendant objected. *Wren*, 738 N.W.2d at 389. Thus, we examine separately the conduct to which objection was made and conduct to which no objection was made.

*Conduct to which objection was made*

If misconduct is shown and the defendant objected to the misconduct, we will reverse unless the state establishes that the misconduct was harmless beyond a reasonable doubt. *Id.* at 393-94. As a discovery sanction, the district court prohibited the prosecution from introducing evidence regarding the contents of several 911 calls made during the charged incident, but expressly permitted witnesses to testify that 911 calls

were made. Linse-Anderson claims that the prosecutor elicited testimony from R.W. regarding the content of his 911 calls in violation of the district court's order. In response to a question regarding Linse-Anderson's behavior on the night of the assault, R.W. stated, "She continued on. I had to call 911 when I first came out of the house and saw her there. Now, I called them again and said, you got to get somebody over here right now." Later, the prosecutor asked R.W. about Linse-Anderson's return to the home. R.W. testified that he and his wife heard pounding on the window and repeated ringing of the door bell. When he looked outside, he saw Linse-Anderson on the "front stoop . . . . [a]nd I went and got on the phone and called 911 again and said, she's back here."

Contrary to Linse-Anderson's claim, neither instance constituted misconduct. The prosecutor did not "elicit" this testimony, and none of this testimony was prejudicial. The alleged "contents" revealed by R.W.'s answers demonstrate only the obvious inference that one calls the police because the caller wants police assistance. Furthermore, when Linse-Anderson objected, the court instructed the jury to disregard "the last statement by the witness." We presume that the jury followed these instructions. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). This was not misconduct.

The rest of Linse-Anderson's claims of prosecutorial misconduct stem from the state's closing argument. A prosecutor's closing argument must be based on the evidence presented at trial and any inferences fairly drawn from the evidence. *Nunn v. State*, 753 N.W.2d 657, 663 (Minn. 2008). A prosecutor may argue reasonable inferences from evidence in the record and is not constrained to deliver a colorless argument. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). The closing argument should not be

designed to incite prejudice against the defendant or to inflame the passions of the jury. *Id.* (citation omitted). In reviewing claims of misconduct in a closing argument, we consider the closing argument as a whole and reject efforts to take certain phrases or remarks out of context and accord them undue prominence. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Linse-Anderson makes several objections to the prosecution's treatment, in closing argument, of her testimony at trial and of the defense she presented. Linse-Anderson testified about her belief that R.W. stole $7,000 from her business. She denied leaving voicemails on R.W.'s answering machine and claimed that R.W. had actually been the one "stalking" her after the relationship ended. She also denied ever assaulting R.W., at which point the court permitted the prosecution to introduce evidence of her two prior convictions for impeachment purposes. Despite evidence from the PBT that Linse-Anderson had a blood alcohol content of .16, she denied having more than 1 ½ alcoholic drinks at lunch time. She said that at about 5:25 p.m., she went over to R.W.'s home in order to speak with him "as a lady" about a cashier's check and to confront him about the money that she believed he had stolen from her. According to Linse-Anderson, D.W. began screaming at her from the garage as soon as she arrived. Although she had not previously indicated that she was acting in self-defense, Linse-Anderson claimed on cross-examination that D.W. had initiated the attack. The overall theory of Linse-Anderson's defense was that R.W., D.W., and the other two eyewitnesses—all of whom testified consistently about the events of that night—were lying in order to get her into trouble and thereby avoid paying her the money that she was owed.

Linse-Anderson claims the following statement made by the prosecutor was denigrating to her defense:

> One drink early in the afternoon and a few sips of another . . . . It's all a big conspiracy you see and everyone, everyone is in on it . . . they're all in on the conspiracy because the defendant knows what happened, she's telling you the truth, and all these other people, gee, they must have gotten together and cooked this thing up, including three police officers.

The court overruled Linse-Anderson's objection to this statement. The prosecutor added that "maybe the 911 people are in on the conspiracy too. Because we know when those phone calls are made and they don't line up in any way, shape or form with the defendant's testimony. " No objection was made as to this comment.

A prosecutor may argue that a defense has no merit but may not denigrate or belittle the defense itself. *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). The prosecutor here did not employ tactics that were denigrating to the defense, such as calling the defense "ridiculous" or suggesting that Linse-Anderson offered a standard defense or just any defense that might work. *See State v. Hoppe,* 641 N.W.2d 315, 321 (Minn. App. 2002), *review denied* (Minn. May 14, 2002) (finding prosecutorial misconduct where counsel referred to the defense's argument as "ridiculous"). The prosecutor may point out that a defense is unlikely in light of the evidence presented at trial. This commentary was not misconduct.

*Conduct to which no objection was made*

If the defendant fails to object to alleged instances of misconduct, we apply a "modified plain error test," wherein the defendant must establish both that the

misconduct constitutes error and that the error was plain. *Wren*, 738 N.W.2d at 393. "Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the defendant satisfies his burden, the state must then demonstrate that there is no "reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id*. (quotation omitted). If the plain-error test is satisfied, this court "will correct the error only if the fairness, integrity, or public reputation of the judicial proceedings is seriously affected." *State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006) (quotation omitted).

Linse-Anderson's first claim of plain error is that the prosecutor wrongfully argued evidence that was excluded by the district court when she said, "R.W. called [911] again and said, come on, get here, she's out of control, you know, she's doing stuff, she's hitting people. You got to get here." As previously noted, evidence of the content of the 911 calls was excluded by the district court. Prosecutorial misconduct can occur when the prosecutor argues facts that are not in evidence. *State v. Steward*, 645 N.W.2d 115, 122 (Minn. 2002).

The state concedes that this was prosecutorial error, but argues that the conduct was not intentional and did not affect the jury's verdict. While we reject the contention that the prosecutor's conduct was "not intentional," we find that the comments did not significantly affect the jury's verdict. Four eyewitnesses testified consistently about the night of the assault, characterizing Linse-Anderson as being "out of control," intoxicated, and hitting people. What R.W. told the police in his 911 call added little if anything to the inculpatory eyewitness testimony. *See State v. Parker*, 417 N.W.2d 643, 648 (Minn.

1988) (holding misconduct harmless in light of state's overwhelming evidence of guilt, and defendant's "ludicrous" explanation). This single sentence of the prosecutor's closing did not likely have a significant effect on the jury's verdict.

Next, Linse-Anderson argues that the prosecutor impermissibly argued that she had a propensity to commit crimes when she was intoxicated. The prosecutor said, "the PBT reading that night was .16, twice the legal limit to operate a car, unequivocally she was hammered, and we know what she did when she was hammered." The prosecutor then described the events on the night of the assault. Taken in context, it appears the prosecutor was using "we know what she did when she was hammered" as a transitional phrase to discuss the events of the evening, not as an indication of Linse-Anderson's propensity to commit assaults when she was intoxicated. The characterization of Linse-Anderson as "hammered," though colloquial, was a fair inference from the evidence presented at trial and does not rise to the level of plain error.

Finally, Linse-Anderson claims that the prosecutor impermissibly ridiculed her testimony in closing argument by indicating that the testimony was absurd and ridiculous and that she was making it up as she went along. Some portions of the argument were objected to.

The prosecutor began her commentary on Linse-Anderson's testimony by telling the jury to use their common sense and "consider the manner of the witnesses as they testified." She pointed out that she "[c]ouldn't get a straight answer out of [Linse-Anderson] yesterday . . . She didn't want to answer those questions. And you certainly

can consider her manner on the stand and her manner of answering the questions." The prosecutor went on to say:

> But even on direct testimony, think of the absurdity of what she was asking you to believe as she testified under oath. And, incidentally, if you find that someone has taken the witness stand and deliberately lied under oath, you're free to reject everything they say if you want to and ask yourselves if you want to believe a word of what's coming out of that woman's mouth yesterday. And ask yourself, who has the biggest reason in this case to not be telling the truth.

Linse-Anderson did not object. Nor did she object to the prosecutor's remark that "[t]he story got better and better and better as she testified."

It is improper for a prosecutor to personally endorse the credibility of a witness in closing argument. *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995). "An advocate may indeed point to circumstances which cast doubt on a witness' veracity or which corroborates his or her testimony, but he may not throw onto the scales of credibility the weight of his own personal opinion." *State v. Ture*, 353 N.W.2d 504, 516 (Minn. 1984). "When credibility is a central issue, this court pays special attention to the statements that may inflame or prejudice the jury." *State v. Mayhorn*, 720 N.W.2d 776, 787 (Minn. 2006).

The prosecutor here did not give her personal opinion as to Linse-Anderson's credibility, but her characterization of the testimony as "absurd" and getting "better and better" comes close to exceeding the bounds of proper professional conduct. However, the bulk of the prosecutor's commentary was in the nature of highlighting how Linse-Anderson's testimony did not align with anyone else's, that the judge had to repeatedly

remind her to answer the questions asked, and that she asserted for the first time on cross-examination that she was acting in self-defense. Because these comments were accurately tied to the evidence, we cannot conclude that they constitute plain error.

In this context, the prosecutor commented that Linse-Anderson was "making it up as she went along," and told the jury "I'm not going to sit here and go into all of her testimony because it was so absurd start to finish, and you heard it yourself and so I'm not going into each and every detail and how ridiculous it was in light of the evidence that you heard." Linse-Anderson objected to these statements. We note that these statements come dangerously close to misconduct. However the court gave curative instructions for these statements, and ordered the jury to "disregard all evidence and statements that I have ordered stricken or have told you to disregard." These instructions were an appropriate remedy for the remarks. *See State v. Davis*, 685 N.W.2d 442, 446 (Minn. App. 2004) (noting that any potential prejudice created by inappropriate remarks was cured when objection was sustained and jury was instructed to disregard the remark), *review denied* (Minn. Oct. 27, 2004).

Finding no evidentiary error or prosecutorial misconduct requiring reversal, we affirm.

**Affirmed.**