STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1349

David Bryan Alfano, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 30, 2009
Affirmed
Bjorkman, Judge

Washington County District Court
File No. 82-K8-06-001278

Lawrence Hammerling, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

Doug Johnson, Washington County Attorney, Jennifer S. Bovitz, Assistant County Attorney, Law Enforcement Center, 15015 62nd Street North, P.O. Box 3801, Stillwater, MN 55082 (for respondent)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

In this postconviction appeal, appellant argues that he is entitled to a new trial because the prosecutor committed prejudicial misconduct in closing argument by impeaching appellant's testimony based on his presence during trial. Although the prosecutor's argument was improper without specific evidence that appellant tailored his trial testimony, the error was not plain and did not affect appellant's substantial rights. We therefore affirm.

FACTS

Appellant David Alfano was charged with illegal possession of a firearm after police officers searched the apartment where he lived and recovered a gun from under a mattress in the bedroom appellant shared with his brother, Jesse Alfano.

At trial, the witnesses gave varying accounts of how the gun came to be in the Alfanos' apartment. One of the officers who conducted the search testified that appellant told police shortly after the search that a man named Donald VanSlyke had come to the apartment wanting to sell or give the gun to Jesse Alfano. VanSlyke testified that he had arranged with appellant to come to the apartment with the gun, spoke first with Jesse Alfano upon arriving, and then handed the gun to appellant, who handed it to Megan Flug, who was temporarily living in the apartment. Flug testified that she did not handle the gun or participate in any gun transactions. She stated that appellant had brought the gun into the apartment, saying, "Look what I have." Appellant testified that he came home to find VanSlyke at his apartment, that VanSlyke threw him the gun when he

walked in, and that, after checking the chamber to make sure it was empty, he returned it to VanSlyke. Appellant also testified that VanSlyke then tried to negotiate a deal with Flug to trade the gun for methamphetamine.

The jury found appellant guilty. He did not pursue a direct appeal but petitioned the district court for postconviction relief two years later. Appellant argued that the prosecutor committed prosecutorial misconduct during closing argument by asserting that his presence during trial enabled him to tailor his testimony to the state's case. The district court denied appellant's petition, ruling that the prosecutor's comments were not error because appellant's account of the events leading to his arrest significantly changed from investigation to trial, and that any error was harmless because the evidence against appellant was "very strong." This appeal follows.

D E C I S I O N

On appeal from a denial of postconviction relief, we review issues of law de novo but examine the postconviction court's findings to determine if they are supported by sufficient evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). We will reverse the denial of postconviction relief only if there has been an abuse of discretion. *Id.*

Appellant concedes that he did not object to the prosecutor's argument at trial. When a defendant fails to object to alleged prosecutorial misconduct, we apply the plain-error standard of review. *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). "Under that standard, 'there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights.'" *Id.* (quoting *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). An error is plain if it "contravenes case

law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006); *see also State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002) (stating that error must be plain at the time of appeal). Prosecutorial misconduct affects a defendant's substantial rights if there is a reasonable likelihood, after considering the strength of the evidence against the defendant and the pervasiveness of the improper suggestions, that the absence of misconduct would have had a significant effect on the jury's verdict. *State v. Davis*, 735 N.W.2d 674, 681-82 (Minn. 2007) (citing *Ramey*, 721 N.W.2d at 302).

The defendant bears the burden of proving plain error. *Ramey*, 721 N.W.2d at 302. "[W]hen the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden would then shift to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Id.*

Four months before appellant's trial, the Minnesota Supreme Court held that a prosecutor "cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case." *State v. Swanson*, 707 N.W.2d 645, 657-58 (Minn. 2006). The *Swanson* court required "specific evidence of tailoring," lest questions and comments by the prosecutor about the defendant's presence at trial and opportunity to hear the testimony of other witnesses "imply that all defendants are less believable simply as a result of exercising the right of confrontation." *Id.* at 658. We subsequently applied *Swanson* and found sufficient evidence of tailoring when a defendant's account of events changed significantly after he observed discovery and

became aware of the state's evidence. *State v. Ferguson*, 729 N.W.2d 604, 616-17 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).

Appellant argues that the prosecutor "committed obvious misconduct" during her closing argument by stating:

> You heard Investigator McAlister testify about what the Defendant said in his statement. Not once, not once did this story about a gun for Meth deal come up and that it was all Megan Flug's deal. Not once.
>
> When did it come up? It came up after the man who got to sit through the entire trial—he's the only one that up and testified as to that. And it's his right to confront and cross-examine his witnesses, but compare that with everyone else who sat up here. He is the only one who got to hear what everyone else said before he decided what he was going to tell you, as he turned and looked at you. He got to hear all the other evidence.
>
> And then this gun-for-Meth story comes up. Does that sound credible to you? Is that consistent with someone who is telling the truth? Megan Flug didn't sit through everyone else's testimony. In fact, there were orders in this case that witnesses weren't allowed to talk about their testimony. They might have all been out in the hall but they weren't able to talk to each other about what they testified to.

The state does not dispute that this portion of the prosecutor's argument impeached appellant's testimony based on his presence during trial. But the state argues that, because appellant's story changed between the time he first spoke to police and when he testified at trial, both with respect to the intended recipient of the gun and with respect to the nature of the transaction, the impeachment was justified. We disagree.

While appellant's story changed over the course of the case, the changes do not reflect tailoring. *Swanson* permits impeachment based on a defendant's presence at trial

only when there is evidence that the defendant "tailored his testimony to *fit the state's case*." *Swanson*, 707 N.W.2d at 657-58 (emphasis added); *see also Leutschaft*, 759 N.W.2d at 419 (defining tailoring as a witness "shap[ing] his testimony to fit the testimony of another witness or to the opponent's version of the case"). The evidence here is that appellant changed his story so that it diverged from, rather than "fit," the state's case. Appellant originally told police that VanSlyke sought to sell or give the gun to his brother, then indicated for the first time at trial that VanSlyke sought to trade the gun to Flug in exchange for methamphetamine. None of the other witnesses said anything about a gun-for-methamphetamine trade, and VanSlyke and Flug both testified that the gun was intended for appellant. Because there is no evidence that appellant tailored his testimony to fit the state's case, the prosecutor's argument was improper.

But our analysis does not end with this finding of error. Appellant must also demonstrate that the error was plain. The rule announced in *Swanson* was new and relatively undefined at the time of appellant's trial. Appellant's testimony changed significantly, and he asserted for the first time at trial facts that one might expect an individual who chooses to speak with police to divulge earlier. We therefore conclude that it was reasonably debatable whether appellant's testimony evidenced tailoring. Because the propriety of the prosecutor's argument was debatable, it does not constitute plain error. *See Leutschaft*, 759 N.W.2d at 419 (deciding that the prosecutor's implication of tailoring was not plain error because "the facts omitted by [the defendant] in his statements to the police were significant enough that it would be reasonable to

expect an arrested person to disclose them if they were true," creating "at least an arguable suspicion of tailoring").

We also conclude that the improper portion of the prosecutor's argument did not affect appellant's substantial rights. First, the evidence against appellant was strong. Appellant admitted briefly holding the gun, and three other witnesses testified that appellant held the gun or acknowledged holding the gun. While appellant argues that he could not have possessed the gun because he held it only temporarily, "a 'fleeting control' exception has not been recognized in Minnesota." *State v. Houston*, 654 N.W.2d 727, 734 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003).

Second, the challenged portion of the prosecutor's argument was relatively brief. Less than one page of the 15-page transcription of the prosecutor's argument addresses appellant's presence during trial. The prosecutor primarily argued that the changes in appellant's story demonstrated that appellant was not credible, not that he changed his testimony because he sat through trial. The jury also heard evidence of appellant's prior conviction of check forgery and appellant's admission that he lied to police during the investigation of this case, both of which the prosecutor noted during closing argument. The prosecutor's tailoring comments thus played a minimal role that was overshadowed by the numerous legitimate challenges to appellant's credibility. *See State v. Van Keuren*, 759 N.W.2d 36, 43 (Minn. 2008) (reaffirming that the state may use "all legitimate arguments on the evidence," including challenging the defendant's credibility (quotation omitted)).

After reviewing the prosecutor's closing argument in its entirety, and based on the record, we conclude that the challenged portion of the argument did not constitute plain error affecting appellant's substantial rights and, therefore, does not warrant reversal.

Affirmed.