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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1085**

State of Minnesota,
Respondent,

vs.

Leroy Oliver Ruddock,
Appellant.

**Filed July 28, 2009
Affirmed; motion granted
Shumaker, Judge**

Scott County District Court
File No. 70-CR-07-14895

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

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Lawrence Hammerling, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant contends that various instances of prosecutorial misconduct—to which he did not object during his trial on charges of third-degree criminal sexual conduct, fifth-degree criminal sexual conduct, burglary, and domestic assault—constituted plain error and denied him a fair trial. Because no reversible plain error occurred during appellant's trial, we affirm.

FACTS

The state charged appellant Leroy Oliver Ruddock with criminal sexual conduct in the third degree, criminal sexual conduct in the fifth degree, burglary, and domestic assault for allegedly entering N.J.O.'s home without her permission and forcibly engaging in sexual intercourse with her. Contending that N.J.O. allowed him to come to her home and that she consented to have sexual intercourse with him, Ruddock pleaded not guilty, and the case proceeded to a jury trial.

The undisputed evidence at trial showed that Ruddock and N.J.O. met through an online dating service and, on the night of their first personal meeting, they had consensual sexual intercourse in Ruddock's SUV. Their sexual relationship continued for at least the next two weeks, and Ruddock often drove from his home in Minneapolis to N.J.O.'s home in Jordan where he would spend the night and engage in consensual sexual intercourse with her.

The duration of the relationship was in dispute at the trial. N.J.O. testified that she and Ruddock mutually agreed to end it in the third week after they had met. Ruddock, on the other hand, testified that he and N.J.O. continued to see each other socially three times a week or more for several months.

N.J.O. testified that, at about 2:00 a.m. on June 29, 2007, Ruddock entered her unlocked home and came into her bedroom while she slept. N.J.O. was startled and woke up and asked Ruddock why he was in her house. He said he wanted to resume their relationship, and he tried to kiss her. N.J.O. pushed him away but allowed him to stay for several hours and allowed him to eat and drink. Eventually, according to N.J.O., Ruddock forced her onto the bed, pried her knees apart, pushed her underwear aside, and penetrated her vagina with his penis. N.J.O. testified that she tried to push him off her, biting him in the process, and that she was successful only after he had ejaculated. She ordered him to leave her house, and he did so at about 7:00 a.m.

Ruddock testified that he went to N.J.O.'s house at about 1:00 a.m., that she let him in after he knocked on the door, that they went to bed and had consensual sexual intercourse when they woke up in the morning.

With credibility as the central, dispositive issue in the case, Ruddock claims that the prosecutor injected emotion and sympathy for N.J.O. into the trial, belittled his consent defense, and stated a personal opinion about the credibility of the state's witnesses.

The jury found Ruddock guilty of two counts of criminal sexual conduct but not guilty of burglary and domestic assault. He contends that the prosecutor's misconduct deprived him of a fair trial.

DECISION

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).

Because Ruddock failed to object at trial to any of the misconduct alleged in this appeal, we apply a modified plain-error test, by which Ruddock "must establish both that 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 Ruddock 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.* (quotations 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).

Ruddock claims that several of the prosecutor's remarks in his final argument were misconduct. 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 is not constrained to deliver a colorless argument. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). 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 to give them undue prominence. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Inflaming Jury Emotions

Ruddock argues that the “prosecutor unfairly injected emotion and sympathy into the case where credibility was the only issue.” A prosecutor’s closing argument must not be designed to incite prejudice against the defendant or inflame the passions of the jury. *Porter*, 526 N.W.2d at 363 (citation omitted). This is especially so when credibility is a key issue. *State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997). Ruddock complains that the following statements made by the prosecutor “evok[ed] the jurors’ sympathy for [N.J.O.]”

The central question in this case, who is telling the truth? Only one person is, lady and gentlemen, one person. Either [N.J.O.] was sexually assaulted without her consent and at the urging of a friend she reported it and went to a hospital and she reluctantly partook in a very, very humiliating interview and exam and then gave a snively interview to Chief Bob Malz and then came in here and genuinely told you what happened while she was quiet and even crying at times. And either the defendant is guilty of criminal sexual conduct or this woman lays down on a table and has to partake in a vaginal exam, recount the story and come in here, and what? Lie to you folks? Why? For what? That is ridiculous, lady and gentlemen.

We conclude that his statement was not improperly inflammatory because the prosecutor focused on the evidence in the case and on an inference of credibility that

could reasonably be drawn from that evidence. During direct examination, the prosecutor inquired about the “rape kit” examination that medical personnel ordinarily conduct following an allegation of rape, and he brought out the nature of the examination and N.J.O.’s reaction to it. These facts were relevant and proper to show that, absent evidence of a motive to falsely accuse a defendant, a woman who has not been sexually assaulted would be unlikely to subject herself to such an examination. Defense counsel did not object to this testimony but instead cross-examined the medical personnel in an effort to show that the rape-kit examination is similar to an ordinary gynecological examination.

The prosecutor’s remarks during closing arguments were based on the evidence of the rape-kit examination, and the credibility inference the prosecutor offered was properly tied to that evidence. This was not prosecutorial misconduct.

Defense Denigration

Next, Ruddock argues that the prosecutor denigrated his defense theory by arguing that “consent was a default defense.” 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). Ruddock argues that the following statement by the prosecutor “denigrated” his defense:

[Defense counsel] touched upon their defense being consent. Isn’t that pretty much the defense that the defendant is stuck with since the physical evidence shows the presence of semen? He can’t really come in and argue that he wasn’t there. It’s what they’re stuck with.

We have held that “[i]t is improper for [a prosecutor] to disparage the defense in closing arguments.” *State v. Hoppe*, 641 N.W.2d 315, 321 (Minn. App. 2002) (citing *State v. Griese*, 565 N.W.2d 419, 427 (Minn. 1997)), *review denied* (Minn. May 14, 2002). To “disparage” a defense means to belittle it or to reduce its esteem. *The American Heritage Dictionary* 536 (3d ed. 1992). A prosecutor disparages a defense, for example, by calling it ridiculous, or by “telling the jury not to be ‘snowed’ by the defense.” *Hoppe*, 641 N.W.2d at 321; *see also State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994) (stating that prosecutor’s argument that defense was the kind raised when “nothing else will work” is improper).

A prosecutor is free to argue that there is no merit to a defense. *Williams*, 525 N.W.2d at 549; *Salitros*, 499 N.W.2d at 818. To be proper, such an argument must be tied to the evidence or to the inferences reasonably to be drawn from that evidence. The prosecutor here based his remark about Ruddock’s consent defense on the physical evidence in the case, indicating that Ruddock could not deny his presence in N.J.O.’s home or that he had sexual intercourse with her.

But even if the prosecutor’s argument is tied to the evidence, the language the prosecutor chooses to describe a defense can be improper disparagement. To argue, as the prosecutor did here, that, considering all the evidence against him, consent was the only defense Ruddock was “stuck with” is virtually indistinguishable from the “only-defense-that-works” argument that the supreme court has condemned as improper. *Williams*, 525 N.W.2d at 549. The supreme court explained the problem with such an argument: “This argument improperly invited the jurors to speculate with respect to the

motivation behind [the] defendant's decision to try the case as [the defendant] did." *Id.* A disparaging argument has the effect of shifting the jury's focus from the facts of the case and the inferences to be drawn therefrom to the accused's motive for selecting a particular defense. The jury is invited to conclude, speculatively, that, among the possible defenses to a charge, the accused selected a particular defense not because it was meritorious but because the evidence was so overwhelming that a jury might be persuaded.

Based on *Williams*, we conclude that the "stuck with" argument was plain error. But the prosecutor used the phrase only twice in a brief portion of his rebuttal argument, and we are unable to conclude that the jury would have reached different verdicts had the prosecutor not used this phrase. Therefore, the improper language does not constitute reversible error. *See State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005) (concluding that the jury would have reached the same verdict even if the prosecutor had not denigrated the defense).

Character

Ruddock also argues that the prosecutor committed misconduct by attacking his character during cross-examination. This argument is based on the following exchange between the prosecutor and Ruddock:

- Q. Would you say that you were in love with [N.J.O.], Mr. Ruddock?
- A. Yes. I had strong feelings for her. I wouldn't say it was totally love-love, but I do have strong feelings for her.
- Q. And is it your view that most adults if they are in a loving relationship only meet up after dancing and

drinking for sex, is that your view of a good relationship?

The prosecutor was entitled to argue to the jury that Ruddock's relationship with N.J.O. did not fit with his version of the facts. *See State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980) (stating that a prosecutor has "the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom"). Ruddock's testimony and N.J.O.'s testimony support the prosecutor's comments regarding Ruddock and N.J.O.'s relationship.

The parties met through an online dating service. They met face-to-face, drank alcohol, and danced before engaging in consensual sexual intercourse. Although the parties dispute the duration of their relationship, they both testified that Ruddock would drive to N.J.O.'s home in Jordan where they would eat dinner together and drink alcohol. Ruddock would stay overnight, and the couple would engage in consensual intercourse.

Ruddock characterized his relationship with N.J.O. at the time of the offense as cordial and consensual and one in which the couple had strong romantic feelings for each other. The prosecutor did not attack Ruddock's character but rather properly inquired about the nature of the relationship he claimed to have had with N.J.O. There was no prosecutorial misconduct in doing so.

Endorsing Credibility

Ruddock alleges several instances in which the prosecutor improperly endorsed the credibility of the state's witnesses. "It is improper for a prosecutor in closing

argument to personally endorse the credibility of a witness.” *Porter*, 526 N.W.2d at 364. “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 502, 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).

First, Ruddock argues that the prosecutor vouched for N.J.O.’s credibility by suggesting that she would not have subjected herself to an unpleasant pelvic exam if she was not telling the truth. This comment does not intimate that the prosecutor had any particular knowledge of N.J.O.’s truthfulness. Rather, he invited the jury to make its own assessment on the basis of what it heard and saw in the courtroom. It is not prosecutorial misconduct to argue that a witness’s credibility is supported by the evidence.

Ruddock also argues that it was prejudicial for the prosecutor to invite the jury to choose who was more truthful, Ruddock or the testifying officers. At trial, two arresting officers testified that Ruddock initially denied ever having been in Jordan or knowing N.J.O, facts that he ultimately admitted at trial. During closing arguments, the prosecutor summarized the inconsistencies between the officers’ testimony and Ruddock’s testimony. It was not prosecutorial misconduct for the prosecutor to argue that Ruddock’s credibility was undermined by this evidence.

Motion to Strike Appellant's Pro Se Brief

Ruddock timely filed his pro se supplemental brief containing his version of the facts in this case. The state filed a motion to strike Ruddock's pro se brief, arguing that it is testimonial and contains facts not in the trial record that the state has not been afforded an opportunity to challenge and that it is an attempt to present evidence that was excluded at trial. We agree. The state's motion to strike Ruddock's pro se supplemental brief is granted.

Affirmed; motion granted.