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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1237**

State of Minnesota,
Respondent,

vs.

Rahman Mann,
Appellant.

**Filed September 1, 2009
Affirmed
Bjorkman, Judge**

Ramsey County District Court
File No. K9-07-4104

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his conviction of first-degree aggravated robbery, arguing that the prosecutor committed misconduct in his rebuttal closing argument. Appellant contends that by mentioning a plea agreement negotiated with an accomplice, the prosecutor erroneously vouched for the accomplice's credibility and presented facts not in evidence. Because the prosecutor's comments did not amount to reversible error, we affirm.

FACTS

Appellant Rahman Mann was charged with first-degree aggravated robbery after police officers found him in the process of stripping a stolen Chrysler 300M of its valuable components.¹ The Chrysler's owner and a passenger both identified appellant as the person who approached them while they were standing outside of the Chrysler in a gas station parking lot, pointed a gun at them, and drove away in the stolen car.

Appellant's accomplice in the crime, Jared O'Donnell, pleaded guilty to a lesser charge of simple robbery and testified for the state during appellant's trial. O'Donnell testified that he was a passenger in the car appellant was driving before appellant stole the Chrysler, that appellant drove the Chrysler away from the gas station, and that the day after the robbery appellant called to tell him that the Chrysler was going to be stripped in a garage in North Minneapolis. O'Donnell also testified that he told A.S. the location of

¹ The 2002 Chrysler 300M had many expensive after-factory upgrades, including 22-inch chrome rims, 9 LCD televisions, and a custom stereo system.

the garage where the Chrysler was going to be stripped. The Chrysler's owner obtained this information and reported it to the police. During his trial testimony, O'Donnell acknowledged his agreement with the state that in exchange for his truthful testimony he would be permitted to plead guilty to a lesser charge of simple robbery.

The jury found appellant guilty, and the district court sentenced him to 78 months' imprisonment. This appeal follows.

D E C I S I O N

Appellant argues that the prosecutor committed misconduct during his rebuttal closing argument. As an initial matter, the state challenges appellant's characterization of the prosecutor's statements as misconduct, arguing instead that the issue should be framed as prosecutorial error. We have previously noted that "there is an important distinction to be made between prosecutorial misconduct and prosecutorial error." *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). Prosecutorial misconduct "implies a deliberate violation of a rule or practice, or perhaps a grossly negligent transgression," while prosecutorial error "suggests merely a mistake of some sort, a misstep of a type all trial lawyers make from time to time." *Id.* However, "[e]ven with this valid distinction, prosecutorial error theoretically can be egregious enough to deprive a defendant of a fair trial," and our established analytical framework for prosecutorial misconduct applies equally to alleged prosecutorial error. *Id.*

We will reverse a conviction if prosecutorial error, considered in light of the whole trial, impaired the defendant's fair-trial rights. *State v. Swanson*, 707 N.W.2d 645, 658

(Minn. 2006). When a defendant fails to object to alleged prosecutorial error, as in this case, we apply the plain-error standard of review. *Leutschaft*, 759 N.W.2d at 418. “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 was clear or obvious,” which usually means that it “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). If the error is clear or obvious, the state then bears the burden of showing that the error does not affect substantial rights. *Id.* Prosecutorial error 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 error 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).

Appellant challenges the following portion of the prosecutor’s rebuttal argument:

[Defense counsel] talked about O’Donnell’s sweet deal that I gave him. He’s getting a deal, keep in mind he hasn’t even pled guilty yet, but remember his involvement in this case, he is the lesser involved of the two parties. He’s the one that directed [the Chrysler’s owner’s] friends to be able to go and find the car in the first place, and I’ll bet that without that, it may never have been found. This may have never been solved. He is not the one that was identified as driving the car from the scene, and he didn’t get caught in the garage the next day stripping the car. That is why O’Donnell got the deal he got.

Although a prosecutor may not personally endorse the credibility of a witness, *State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003), the supreme court has “conclude[d] that testimony relating to the existence, the terms, including any truthfulness provision, and the witness’s understanding of the plea agreement between the witness and the state, without more, does not constitute vouching,” *State v. Patterson*, 577 N.W.2d 494, 498 (Minn. 1998). A prosecutor may also “present to the jury all legitimate arguments on the evidence . . . [and] all proper inferences to be drawn therefrom,” in order to analyze and explain the evidence. *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996).

Appellant contends that the prosecutor’s statement was plain error “because the prosecutor personally vouched for O’Donnell’s credibility and because he testified why he gave O’Donnell the deal,” which amounted to introducing facts that were not in evidence. Although we do not agree that the prosecutor’s statement constituted vouching, we are persuaded that the statement—“[t]hat is why O’Donnell got the deal he got”—went beyond permissible comment and amounted to testimony by the prosecutor regarding facts not in evidence.

We review closing arguments “as a whole rather than focusing on particular phrases or remarks that may be taken out of context or given undue prominence.” *State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005) (quotation omitted). Viewed in context, it is apparent that the prosecutor did not initially focus on his personal involvement with O’Donnell’s plea agreement. And he was not the first to call O’Donnell’s plea agreement a “sweet deal.” Rather, it was appellant’s counsel, in her closing argument, who argued

that O'Donnell's plea agreement was a "sweet deal" and characterized the prosecutor as a "let's make a deal prosecutor."

Additionally, the prosecutor did not directly comment on O'Donnell's general credibility or express any personal opinion or belief that O'Donnell's testimony was truthful. In responding to defense counsel's "sweet deal" argument, the prosecutor primarily referred to facts of the case that differentiated appellant's role in the robbery from O'Donnell's: O'Donnell testified that he is the one who told A.S. where the Chrysler was going to be stripped; the Chrysler's owner and passenger identified appellant, not O'Donnell, as the individual who stole the Chrysler at gunpoint and drove away in it; and the responding police officer testified that appellant was present in the garage where the vehicle was being stripped the day after it was stolen. These comments do not constitute impermissible vouching.

But neither O'Donnell nor any other witness testified as to why the state permitted O'Donnell to plead to a lesser sentence. The state contends that the prosecutor's statement about why O'Donnell received "the deal he got" was based on reasonable inference from the evidence presented at trial. We disagree. Although the evidence did reveal the differences between appellant's and O'Donnell's respective roles in the offense, there was no testimony from a state witness or other evidence as to the basis for O'Donnell's plea agreement. The prosecutor's comment alleged as fact a reason that the evidence did not sustain and was therefore improper. *See State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006) ("The state's closing argument . . . must be based on the evidence produced at trial, or the reasonable inferences from that evidence." (quotation omitted)).

Nonetheless, we are convinced that this error did not affect appellant's substantial rights. The improper statement was only a small portion of the closing argument and O'Donnell's plea agreement was not the sole focus. *See State v. Lewis*, 547 N.W.2d 360, 364 (Minn. 1996) (stating that if a challenged statement makes up only a small portion of the prosecutor's closing argument and does not characterize the entire argument, the comments may not warrant a reversal). The prosecutor reminded the jury, and the district court instructed the jury, that it could not convict appellant based on O'Donnell's testimony alone unless it was corroborated by other evidence. And the prosecutor specifically told the jury that "[l]uckily in this case, you do not have to rely on [O'Donnell's testimony]," referring instead to other extensive direct and circumstantial evidence of appellant's guilt that was introduced during trial.² On this record, we conclude that the prosecutorial error did not affect appellant's substantial rights.

Affirmed.

² Appellant contends that this other testimony and evidence was unreliable for various reasons, especially because "many of the state's witnesses, including O'Donnell, had questionable credibility based on their criminal records." But appellant's attorney was permitted to cross-examine and attempt to impeach the credibility of the state's witnesses using evidence of their prior convictions when applicable. We do not second-guess the jury's credibility assessments on appeal because the jury ultimately determines the credibility of witnesses and the weight of their testimony. *State v. Travica*, 398 N.W.2d 666, 670 (Minn. App. 1987).