STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1171

State of Minnesota,
Respondent,

vs.

August Leroy Kihlgren,
Appellant.

Filed December 15, 2009
Affirmed as modified
Toussaint, Chief Judge

Hennepin County District Court
File No. 27-CR-07-116190

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

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

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Hudson, Judge.

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

TOUSSAINT, Chief Judge

Appellant August Leroy Kihlgren challenges his first-degree criminal-sexual-conduct conviction. Because we conclude that the prosecutor did not commit prejudicial misconduct and the district court did not err in limiting the scope of cross-examination or in failing to require disclosure of the victim's conversations with the prosecutor's office, we affirm, but we modify the judgment to reflect that appellant was not convicted of a lesser-included offense.

FACTS

Appellant has known the victim, M.O., for about 27 years. When he came to her front door on the night of October 3, 2007, and told her his car's engine had blown, she let him into her home to wait for his engine to cool. She later found him asleep on the couch, woke him, and said he should check on his engine.

M.O. testified that appellant then got up, punched her in the face, and began choking her; that she repeatedly told him to stop; that he attempted to force her to perform oral sex on him; that he performed oral sex on her; that he digitally penetrated her; and that he attempted intercourse but was unable to maintain an erection.

M.O. dialed 911, and police were dispatched to her home. They found appellant hiding in some bushes. He asked the police if they had found his glasses, which were later located in M.O.'s home.

M.O. was taken to the hospital where she received a sexual-assault exam. At trial, the nurse who examined her testified that her injuries were consistent with

something being forced into her vagina. Appellant was charged with two counts of first-degree criminal sexual conduct. The jury found him guilty on both counts, and he was sentenced to 187 months in prison.

He challenges his conviction, arguing that the prosecutor committed prejudicial misconduct during closing argument and that the district court erred by limiting cross-examination of M.O., by failing to require the state to disclose the substance of conversations between M.O. and the prosecutor's office, and by convicting appellant of a lesser-included offense.

D E C I S I O N

I.

Appellant argues that his conviction should be reversed due to prosecutorial misconduct. We do not reverse based on prosecutorial misconduct if the misconduct is harmless beyond a reasonable doubt. *State v. Mayhorn*. 720 N.W.2d 776, 785 (Minn. 2006). An error is "harmless beyond a reasonable doubt only if the verdict rendered was surely unattributable to the error." *Id.* (quotation omitted). Specifically, appellant claims the prosecutor disparaged appellant's defense theory, impermissibly alluded to appellant's failure to testify, and misrepresented the burden of proof.

A. Disparagement of Defense Theory

It is error for a prosecutor to disparage the defense in closing argument. *State v. Bailey*, 677 N.W.2d 380, 403 (Minn. 2004). To determine whether a prosecutor's statements during closing argument are improper, a reviewing court looks to the "closing argument as a whole, rather than just selective phrases or remarks that may be taken out

of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Appellant's defense theory involved characterizing M.O.'s injuries as minimal and inconsistent with sexual assault. He argues that the prosecutor mocked this theory by stating "apparently [M.O.] wasn't beaten well enough for [appellant's] counsel's liking" and "apparently [M.O.'s] vagina just wasn't traumatized enough." The district court sustained appellant's objections to these statements. But they represented just two lines in the prosecutor's four-page argument and were a direct response to appellant's characterization of M.O.'s injuries. Considered in the context of the entire closing argument, these statements did not rise to the level of prosecutorial misconduct nor did they prejudice appellant.

B. Allusion to Appellant's Failure to Make a Statement

Appellant did not testify at trial. He argues that the prosecutor committed prejudicial misconduct by referring to certain facts as "undisputed." "A prosecutor's description of the evidence as 'uncontradicted' [or 'undisputed'] may be viewed by the jury as a reference to the defendant's silence when the defendant is the only person that could be expected to challenge the government's evidence." *State v. Streeter*, 377 N.W.2d 498, 501 (Minn. App. 1985). But the use of "uncontradicted" or "undisputed" does not amount to prejudicial misconduct when the usage would not suggest that the defendant had any obligation to call witnesses or testify. *State v. DeVere*, 261 N.W.2d 604, 606 (Minn. 1977).

The prosecutor said to the jury: "Use some reason and common sense to the undisputed facts. Undisputed, [M.O.] comes running out of the home beaten, hysterical." This statement followed the prosecutor's reference to appellant's remark when the officers apprehended him, "[Appellant had] one thing to say, 'Did you get my glasses?'" Appellant argues that the reference to the glasses was intended "to imply that appellant should have said something more if he were innocent" and that the repeated references to the "undisputed" nature of certain evidence "explicitly commented on appellant's failure to testify." The juxtaposition of the term "undisputed" and the statement that appellant had "one thing to say" presents a close question. But, because the implication that appellant should have contradicted the testimony was extremely oblique and the prosecutor used the term "undisputed" only twice, we conclude that the use of "undisputed" was not misconduct. *See, e.g.*, *Streeter*, 377 N.W.2d at 501 (emphasizing repetition of references to evidence as "undisputed" or "uncontradicted" in finding misconduct).

Even if the prosecutor's use of "undisputed" was erroneous, an erroneous comment is harmless and not prejudicial if the district court clearly instructs the jury that a defendant had no duty to produce evidence. *State v. Buggs*, 581 N.W.2d 329, 341-42 (Minn. 1998). The district court's clear instructions that the jury was obliged to weigh the credibility of all evidence, that the state had the burden to prove appellant guilty beyond a reasonable doubt, that appellant had no obligation to testify, and that the presumption of innocence was to be maintained would have rendered any error in the prosecutor's use of "undisputed" harmless.

C. Misrepresented Burden of Proof

Finally, appellant argues that respondent impermissibly misstated the burden of proof. Throughout a criminal trial, the state has the burden to prove all elements of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 1071 (1970). "Misstatements of the burden of proof are highly improper and would, if demonstrated, constitute prosecutorial misconduct." *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). This court reviews unobjected-to prosecutorial misconduct under a modified plain-error standard of review, which requires a defendant to demonstrate an error that is plain. *State v. Jones*, 772 N.W.2d. 496, 506 (Minn. 2009). The state then has the burden of showing that the defendant's substantial rights were not affected. *Id.*

In summarizing M.O.'s testimony, the prosecutor made three statements: "[M.O.] does everything and more you can ask a rape victim to do to meet her burden of proof[,]" "[M.O.] met her burden of proof when she submit[ted] to the sexual assault exam[,]" and "[M.O.] has gone above and beyond the burden of beyond a reasonable doubt, and the [only] reasonable verdict on these charges is guilty." Although appellant did not object to these statements at trial, he now argues that they impermissibly shifted the burden of proof from the state and emphasized appellant's failure to testify. But the district court clearly instructed the jury that the state alone had the burden of proving guilt, and the state acknowledged its obligation to prove appellant guilty beyond a reasonable doubt.

Further, appellant is alleging only that the state shifted the burden to a prosecution witness, not that it shifted the burden to appellant. We cannot conclude that the state's references to the witness's burden constituted plain error or were prosecutorial

misconduct.

II.

The scope of cross-examination is left largely to the district court's discretion and will not be reversed absent a clear abuse of discretion. *State v. Parker*, 585 N.W.2d 398, 406 (Minn. 1998). Appellant argues that the district court committed reversible error when it excluded two areas of inquiry from the cross-examination of M.O. To establish that the exclusions were a violation of appellant's constitutional right to confront his accuser, appellant must show "that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness . . . ." *State v. Lanz-Terry*, 535 N.W.2d 635, 640 (Minn.1995) (quotation omitted). "Bias is a catchall term describing attitudes, feelings, or emotions of a witness that might affect her testimony, leading her to be more or less favorable to the position of a party for reasons other than the merits." *Id*. (quotation omitted). The "district courts retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things . . . interrogation that is repetitive or only marginally relevant." *State v. Brown*, 739 N.W.2d 716, 720 (Minn. 2007); *see also Lanz-Terry*, 535 N.W.2d at 640 (stating that district court may exclude evidence that is only marginally useful to show bias).

Appellant first challenges the exclusion of a prior police report of an attempted kidnapping at a bus stop, alleging that the report went to M.O.'s reliability as a witness and her tendency to exaggerate. The report indicated that a stranger grabbed the arm of M.O.'s developmentally-disabled child, that this caused M.O. to feel frightened or

shocked and fear for her child, and that a school bus driver instructed M.O. to call 911. After reviewing the police report, the district court excluded cross-examination on it because it was not "probative of anything" and therefore not relevant under Minn. R. Evid. 401. The exclusion was within the district court's discretion; the report was not probative of credibility. *See Lanz-Terry*, 535 N.W.2d at 640.

Second, appellant challenges the exclusion of M.O.'s financial circumstances and her claim to the Crime Victims Reparations Board from her cross-examination, arguing that they were probative of M.O.'s credibility, state of mind and "financial motive to lie about the allegations in this case." The district court concluded that an inquiry into M.O.'s financial circumstances and reparations claim would be tangential and irrelevant. That conclusion is supported by the fact that a victim's ability to recover through the Crime Victims Reparations Board is limited to "actual economic detriment incurred as a direct result of injury . . . ." Minn. Stat. § 611A.52, subd. 8(a) (2008). Thus, appellant's argument that M.O. could reap a financial gain from a false claim of sexual assault is without merit. Accordingly, the district court's exclusion of M.O.'s financial circumstances and reparations claim as too tangential to indicate bias was not an abuse of discretion.

III.

Whether a discovery violation occurred presents a question of law, which we review de novo. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). A prosecutor is required to disclose "the substance of any oral statements which relate to the case." Minn. R. Crim. P. 9.01, subd. 1(2). This rule is violated if the state fails to disclose or to

provide the substance of every oral statement that relates to the case. *Palubicki*, 700 N.W.2d at 490. But the "rules do not require that disclosure take any particular form." *State v. Colbert*, 716 N.W.2d 647, 655 (Minn. 2006).

Appellant argues that the state failed to disclose the substance of M.O.'s conversations with agents of the prosecutor's office, specifically, with victim-witness advocates. But nothing in the record indicates that the state failed to disclose any oral statement that related to appellant's case. The record indicates that the state provided appellant with summaries of oral statements given by M.O. as required under the rule. The district court did not err in failing to find a discovery violation.[1]

IV.

Appellant, pro se, argues that the district court impermissibly convicted him of a lesser-included offense. A defendant convicted of a crime may not also be convicted of an included offense. Minn. Stat. § 609.04 (2006). This statute "bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). A conviction is defined as either "a plea of guilty" or "a verdict of guilty by a jury or a finding of guilty by the court." Minn. Stat. § 609.02, subd. 5 (2006). The "key 'conviction' prohibited by [Minn. Stat. § 609.04] is not a guilty verdict, but is rather a formal adjudication of guilty." *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999). We may look to the

[1] Appellant also argues that the cumulative effect of prosecutorial misconduct and district court error deprived him of a fair trial. *See State v. Duncan*, 608 N.W.2d 551, 558 (Minn. App. 2000) (holding that cumulative effect of numerous errors may constitute the denial of a fair trial), *review denied* (Minn. May 16, 2000). Because we find neither prosecutorial misconduct nor district court error, we reject this argument.

"official judgment of conviction" in the district court file "as conclusive evidence of whether an offense has been formally adjudicated." *Id.* at 767.

Here the district court's statement at sentencing indicated that the two counts of first-degree criminal sexual conduct would merge. But the warrant of commit indicates that appellant was adjudicated on both counts, in violation of Minn. Stat. § 609.04. We therefore modify the warrant to clarify that appellant was adjudicated on only the first count of first-degree criminal sexual conduct.

Affirmed as modified.