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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1526**

State of Minnesota,
Respondent,

vs.

Shawn Richard Riesgraf,
Appellant.

**Filed January 19, 2010
Affirmed
Wright, Judge**

Ramsey County District Court
File No. 62-K1-07-003674

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Roy G. Spurbeck, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Huspeni, Judge.*

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

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant challenges his conviction of second-degree criminal sexual conduct, arguing that the prosecutor committed prejudicial misconduct during closing argument by shifting or diminishing the state's burden of proof. We affirm.

FACTS

In August 2007, appellant Shawn Riesgraf asked his sister if he could temporarily live with her and her family in their St. Paul home. Riesgraf's sister, who lived with her three children, her boyfriend, and her boyfriend's two children, S.S. and A.S., consented. On September 10, 2007, S.S. told Riesgraf's sister that, when she was having trouble sleeping the previous evening, Riesgraf entered her bedroom and began rubbing her stomach. Riesgraf then tickled her legs and thighs and reached inside her pajama pants and underwear and rubbed her vagina. When Riesgraf stopped touching her, he whispered in her ear, "Did you like that?" Frightened by Riesgraf's conduct, S.S. pretended to be asleep.

Riesgraf's sister informed her boyfriend of the incident. He directed Riesgraf to leave their home, and the police were called. Saint Paul Police Officer Adam Siegfried responded to the call and took statements from Riesgraf's sister, her boyfriend, S.S., and two other children. Riesgraf was arrested later that evening and subsequently charged with second-degree criminal sexual conduct.

S.S. testified at trial consistent with her statements to Riesgraf's sister and the police. Riesgraf also testified. He denied inappropriately touching S.S. and asserted that

S.S. lied about the incident. During her closing argument, the prosecutor addressed the conflicting evidence and urged the jury to convict Riesgraf. The jury convicted Riesgraf of second-degree criminal sexual conduct, and this appeal followed.

DECISION

Riesgraf argues for the first time on appeal that the prosecutor's closing argument shifted or diminished the state's burden of proof, thereby constituting prejudicial misconduct that deprived him of a fair trial. Although a defendant who fails to object at trial ordinarily waives the right to appellate review, *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997), we have the discretion to review unobjected-to prosecutorial misconduct if plain error is established, Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). The plain-error standard is met if an appellant demonstrates that (1) the prosecutor's unobjected-to argument was error, (2) the error was plain, and (3) the error affected substantial rights. *Ramey*, 721 N.W.2d at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). An error is usually considered plain error if it "contravenes case law, a rule, or a standard of conduct." *Id.*

If an appellant establishes plain error, the burden shifts to the state to prove that the plain error did not affect the defendant's substantial rights. *Id.* To determine whether the state has satisfied its burden, we consider the strength of the evidence against the defendant, the pervasiveness of the improper conduct, and whether the defendant had an opportunity to, or made efforts to, rebut the improper conduct. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). When reviewing comments made by a prosecutor during closing argument that may shift the burden of proof to the defendant, we also consider

any mitigating statements that correctly place the burden of proof on the prosecution. *See State v. Tate*, 682 N.W.2d 169, 178-79 (Minn. App. 2004) (concluding that prosecutor's comments as a whole did not indicate that burden of proof was shifted to defendant because prosecutor stated in closing argument that defendant "doesn't have to prove anything" and that state "ha[s] to prove [its] case"), *review denied* (Minn. Sept. 29, 2004); *see also State v. McDonough*, 631 N.W.2d 373, 389 n.2 (Minn. 2001) (stating that when district court properly instructs jury after prosecution misstates burden of proof, the misconduct typically will not require reversal).

In a criminal trial, the state has the burden of proving each element of the offense beyond a reasonable doubt. *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986). A prosecutor impermissibly shifts or diminishes the burden of proof by urging the jury to "weigh the story in each hand and decide which one is most reasonable, which one makes the most sense," *State v. Strommen*, 648 N.W.2d 681, 690 (Minn. 2002) (reversing and remanding for a new trial), or by advising the jury that it must believe a victim's testimony if there was no direct evidence that the victim was lying or had a motive to lie, *State v. Thaggard*, 527 N.W.2d 804, 812 (Minn. 1995) (holding that improprieties in prosecutor's closing argument did not require a new trial). A prosecutor may not comment on a defendant's failure to contradict testimony or call witnesses. *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995); *State v. McCurry*, 770 N.W.2d 553, 562-63 (Minn. App. 2009).

A prosecutor, however, may urge the jury to discredit the defendant's theory of the case. *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993); *Race*, 383 N.W.2d at 664. And

because witness credibility is crucial to any trial involving a factual dispute, *see State v. Leutschaft*, 759 N.W.2d 414, 422 (Minn. App. 2009), a prosecutor may comment on witness credibility, *State v. Van Keuren*, 759 N.W.2d 36, 43 (Minn. 2008). When reviewing a prosecutor’s statements, we examine the arguments “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).

Riesgraf maintains that the prosecutor misstated the burden of proof during closing argument. In support of his argument, Riesgraf first directs us to the following portion of the prosecutor’s closing argument: “[Y]ou are now left with the decision of do I believe her. And I submit to you, that is all that this is. Do you believe her? Because if you believe her, then it happened and the defendant is guilty.” But when viewed in its proper context, the prosecutor’s statement arose in the midst of an argument urging the jury to weigh the credibility of the witnesses and choose which of the conflicting evidence to believe.

Although the prosecutor did not address the state’s burden to prove the offense beyond a reasonable doubt in conjunction with the statement to which Riesgraf objects, she accurately described the state’s burden elsewhere in the closing argument. Moreover, the district court instructed the jury regarding the state’s burden of proof immediately prior to the commencement of closing arguments, which was shortly before the prosecutor made the challenged statement. Shortly after this statement, the prosecutor directly addressed the state’s burden of proof, stating: “Beyond a reasonable doubt. That’s the standard. That’s the standard the state has to meet. The burden of proof, you

have heard the judge's instructions, and you decide whether or not the state has met that burden."

A prosecutor is not required to follow each assertion regarding the probative import of the evidence with a statement addressing the state's burden of proof. When considered in its proper context, the prosecutor's statement urged the jury to consider witness credibility when weighing conflicting evidence. Thus, this portion of the argument to which Riesgraf objects on appeal does not constitute plain error.

Riesgraf next argues that the following portion of the prosecutor's closing argument was improper:

Do you believe her or don't you? You got two stories. It's one or the other. [S.S.], she was telling the truth on the 12th and seven months later or she wasn't. It's either the defendant told you the truth this morning or he didn't. I submit to you, your job is simple. It's not easy; but, it's simple. Because I submit that if you believe her, then the state has proved this case beyond a reasonable doubt.

Without more, this portion of the prosecutor's closing argument arguably would be improper. But when considered in conjunction with the argument that followed, the statements are a proper preface to the summary of the state's most probative evidence—namely S.S.'s testimony—and how it satisfies each element of the offense.

The prosecutor followed the statement to which Riesgraf objects with the following review of the evidence:

Because she told you he touched her in her privates. She drew her genitalia and she showed you where. . . . And she told you it happened on September 9th, 2007. And she told you it happened at her home here in St. Paul, Ramsey County.

And you know the defendant is more than 36 months older than her. . . . Those are each and every one of the elements. Touched her with a sexual intent. . . . He reached in, underneath her pants, underneath her underwear, rubbed her bare skin for one to two minutes; and said, do you like it? Sexual intent.

The challenged statement properly addressed the credibility of two witnesses giving conflicting testimony. From the context of the statement, it is evident that the prosecutor illustrated how S.S.'s testimony credibly established each element of the charged offense and properly argued that, by doing so, the state satisfied its burden of proof beyond a reasonable doubt. This does not constitute plain error. Rather, it constitutes a correct and persuasive use of closing argument.

Riesgraf also contends that the prosecutor improperly shifted the burden of proof by focusing on S.S.'s credibility and highlighting the dearth of evidence in the record that S.S. had a propensity to lie. Riesgraf's argument is without merit.

The following portion of the prosecutor's argument is at issue:

So, let's look at [S.S.'s] credibility. You know a couple things about her. Her stepmother, the defendant's sister, tells you she's a good kid. The defendant says great kid. You didn't hear anything about a troubled child. You didn't hear anything about a child who has a propensity to lie. You don't hear about problems going on.

Riesgraf's theory of the case was that S.S. fabricated the September 10 incident. During his opening statement, Riesgraf's counsel first argued that Riesgraf "has always said he has not touched anyone inappropriately." His counsel later advised the jury of its responsibility to judge the credibility of the witnesses. Riesgraf subsequently testified that he no longer loved S.S. or believed that she was a "great kid" because S.S. "lied"

about this incident. Contrary to Riesgraf's argument on appeal, the prosecutor's statement properly addressed the issue of witness credibility and challenged the defense theory that S.S. falsely accused Riesgraf.

Because the prosecutor's closing argument, when viewed as a whole, did not shift or diminish the state's burden of proof, Riesgraf's contention that the prosecutor committed plain error affecting his substantial rights fails.

Affirmed.