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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-420**

Myron Lee Benais, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed February 2, 2010  
Affirmed  
Peterson, Judge**

Hennepin County District Court  
File No. 27-CR-06-027892

Marie L. Wolf, Interim Chief Appellate Public Defender, Theodora K. Gaitas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Peterson, Judge; and Ross, Judge.

**UNPUBLISHED OPINION**

**PETERSON**, Judge

This appeal is from an order denying appellant's petition for postconviction relief.

We affirm.

## **FACTS**

On April 8, 2006, between 12:48:00 and 12:48:22 a.m., a man was shot and killed near a gas station at the intersection of 25th Street and Bloomington Avenue in Minneapolis. The shooting was recorded by gas-station security cameras that took about one photo per second.

Following an investigation of the shooting, a grand jury indicted appellant Myron Lee Benais on one count of first-degree murder in violation of Minn. Stat. § 609.185 (2004) (intentional murder during the course of an aggravated robbery). The case was tried to a jury. Trial testimony revealed that the victim was shot once in the thigh, once in the back of the neck, and once in the shoulder. The wound to the thigh would not have been fatal or incapacitating. The shot to the back of the neck caused the fatal injury and would have been immediately incapacitating. The shoulder wound would have been fatal, but not immediately.

A medical examiner reviewed the video recording of the shooting several dozen times to reach an opinion about the order and timing of the shots. The medical examiner opined that the first shot occurred at 12:48:11 when the assailant's gun was pointed down toward the victim's leg. The medical examiner could not determine the order of the other two shots but opined that they both occurred at 12:48:17 when the assailant's and the victim's body positions were consistent with the neck and shoulder wounds.

Witnesses in the area of the shooting testified that they heard two separate sets of shots. P.E. testified that on hearing the first set of shots, he and his sister approached the corner of the gas station, looked around the side of the building, and saw two men

struggling. The second set of shots occurred while P.E. and his sister were watching the two men struggle. A Minneapolis police detective showed a six-person photo display to P.E., who had also seen appellant walk by just before the shooting, and P.E. identified appellant as the shooter.

A.G., who was on his porch across the street from the gas station, also heard two separate sets of shots. When A.G. heard the first shots, he turned around, went into his house, and then heard the second set of shots. J.C. was bumming cigarettes from a security guard in the gas-station parking lot when she heard the first set of shots. The guard pulled her behind a van, and then she heard the second set of shots.

A.R., appellant's longtime friend, testified at trial that he was staying at his brother's residence near the shooting scene when appellant came there early in the morning on April 8, 2006. Appellant said that he had shot someone and then pulled out a gun. A.R. recognized the gun, a black .40-caliber Glock, because he had seen appellant with it before. A.R. testified that appellant said that "[h]e tried to gank<sup>1</sup> somebody . . . and that person grabbed for the gun or something and he ran a couple of rounds on him." Later that morning, A.R. and appellant went to the scene of the shooting. A.R. knew that there was a surveillance camera pointed at the area of the shooting. Appellant swore when A.R. pointed out the camera to him. A couple of times about two weeks before the shooting, appellant had asked A.R. to help appellant rob people to get money for rent, but A.R. refused.

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<sup>1</sup> A.R. testified that "gank" means rob.

P.T., appellant's cousin, testified that during the afternoon following the shooting, when he picked up appellant at a barbecue, appellant said that he had shot a black man near the gas station. Appellant claimed that the man "tried to rob him or jump him or something." P.T. saw scratches on appellant's wrist, and appellant said he got them struggling with the man he shot.

Although the gun used in the shooting was not recovered, police found five .40-caliber discharged cartridge casings at the shooting scene. The casings were consistent with having been fired from a .40-caliber pistol with a Glock-type firing pin. A forensic scientist testified that all five of the discharged casings produced matching features and opined that they were all fired from the same gun. The forensic scientist also testified that a discharged cartridge casing found during a search of appellant's residence was also fired from the same gun.

Appellant testified at trial. He admitted shooting the victim but claimed that he had acted in self-defense. Appellant claimed that after drinking beer all afternoon and evening, he bought some marijuana from the victim. He later attempted to get his money back from the victim because the marijuana was of poor quality. Appellant claimed that he pulled out his gun and demanded his money back but became afraid because the victim threatened to take away the gun and shoot him. According to appellant, the victim lunged for the gun, and the gun went off during a struggle. Appellant admitted on cross-examination that there were no physical obstructions that prevented him from backing away after he got scared, that after he pulled the gun, the victim attempted to retreat, but

appellant got in front of the victim and blocked his path, and that he could have let the victim walk away but chose not to do so.

After appellant's testimony, the district court allowed the state to present rebuttal evidence about a report to police about shots fired at 9:25 p.m. on April 7 near the residence where appellant had been visiting and expert testimony that the discharged cartridge casings found at the scene of the April 7 shooting were fired from the same gun as the casings found at the murder scene and in appellant's residence.

The jury found appellant not guilty of the first-degree murder charge and not guilty of a lesser-included second-degree intentional-murder offense but guilty of a lesser-included second-degree unintentional-murder offense in violation of Minn. Stat. § 609.19, subd. 2 (2004) (unintentional murder during the course of an aggravated robbery). Appellant did not appeal his conviction. After the time for appeal expired, appellant filed a petition for postconviction relief. The district court denied relief. This appeal followed.

## **DECISION**

"A petition for postconviction relief is a collateral attack on a conviction that carries a presumption of regularity." *Shoen v. State*, 648 N.W.2d 228, 231 (Minn. 2002). A reviewing court will not overturn the postconviction court's determination absent an abuse of discretion. *Pippitt v. State*, 737 N.W.2d 221, 226 (Minn. 2007). We review the district court's legal determinations de novo and will not set aside its factual determinations unless they are clearly erroneous. *Id.*

## I.

Appellant argues that the trial court committed reversible error when it admitted hearsay evidence in violation of his constitutional right to confront witnesses. “A constitutional error does not mandate reversal and a new trial if . . . the error was harmless beyond a reasonable doubt.” *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006). “An error is harmless beyond a reasonable doubt if the guilty verdict actually rendered in the trial was surely unattributable to the error.” *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005). “[T]he constitutional harmless error analysis is not a matter of analyz[ing] whether a jury would have convicted the defendant without the error, [but] rather . . . whether the error reasonably could have impacted upon the jury’s decision.” *Caulfield*, 722 N.W.2d at 314 (quotation omitted).

“When determining whether a jury verdict was surely unattributable to an erroneous admission of evidence, the reviewing court considers the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant.” *Al-Naseer*, 690 N.W.2d at 748. Evidence of guilt is also an important factor, but “the court cannot focus on the evidence of guilt alone.” *Id.*

During the medical examiner’s testimony explaining her opinion about the order and timing of the shots, the prosecutor asked the medical examiner if she had consulted with other personnel in the medical examiner’s office regarding her opinions. Over defense counsel’s objection, the medical examiner was allowed to testify that the opinions of the chief medical examiner and a forensic-pathology fellow were consistent

with her opinions. The postconviction court concluded that the medical examiner's reference to her colleagues' opinions was hearsay that should not have been admitted at trial.

While cross-examining appellant, the prosecutor asked about an incident that occurred several hours before the victim was killed during which shots were fired near a residence that appellant had been visiting.<sup>2</sup> The cross-examination was based on statements to police by B.M., who reported hearing the shots fired and turned over four spent cartridge casings to police but did not testify at appellant's trial, and on an expert opinion that the spent casings that B.M. gave to police had been fired from the same gun as the cartridge casings found at the scene of the murder and in appellant's home. The prosecutor questioned appellant about whether he was the person who had fired those shots, about ballistic evidence that indicated that the spent casings came from appellant's gun, and about a description of the person who fired the shots that matched appellant. The prosecutor's questions repeatedly referred to information that B.M. had reported that was included in a police report. The prosecutor also asked several questions that implied that appellant lied during his testimony.

Following appellant's cross-examination, the prosecutor called as a rebuttal witness the police officer to whom B.M. had given the cartridge casings and who had spoken with B.M. and prepared a report about what B.M. said. Over appellant's

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<sup>2</sup> The cross-examination occurred after appellant was asked whether he was out on the street at 9:30 shooting a gun, and he answered, "No."

objection, the trial court allowed the officer to testify about B.M.'s statements about the shooting incident.

The postconviction court concluded that admitting the evidence elicited during appellant's cross-examination and during the officer's rebuttal testimony was error:<sup>3</sup>

The evidence elicited by the prosecutor through questioning of [appellant] about the content of a police report concerning the non-testifying [B.M.] was improper for several reasons: it contained extensive testimonial hearsay subject to no exception, and thus violated [appellant's] right to confrontation; it was not proper impeachment, but was for the most part extrinsic evidence on a collateral issue, following [appellant's] denial; it was at best not very probative – it merely suggested [appellant] was at a different place sometime before the incident on trial, but had substantial potential for an unfair prejudice – it suggested improper discharge of a gun by [appellant] for possibly sinister reasons but unrelated to the crime on trial; it created possible confusion about a collateral matter; the defense had not opened the door to this evidence; the evidence had little foundation; proper notice was not given. All of this is true of the police officer's testimony concerning [B.M.], as well as the questioning of [appellant] himself.

(Citation omitted.)

Although the postconviction court concluded that it was error to admit hearsay during the medical examiner's testimony, during appellant's cross-examination, and during the rebuttal testimony, the court also concluded that the errors were harmless beyond a reasonable doubt. In explaining its conclusion that the errors were harmless beyond a reasonable doubt, the court stated:

The evidence of unintentional second degree murder was very strong, including a video recording of the incident

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<sup>3</sup> The state concedes that admission of the rebuttal and substantive evidence was error.



itself. [Appellant's] own testimony supported most of the prosecution's case, excluding, of course, its theory of [appellant's] state of mind. There was, in other words, little dispute or room for doubt that [appellant], armed with a loaded firearm, approached the [victim] intending and expecting and indeed provoking a hostile and potentially violent confrontation.

Whether [appellant] was acting in self-defense, accidentally, or in a some other state of mind was pre-eminently and emphatically a question for the jury. Here the jury had the uncommon advantage of a contemporaneous visual recording of the incident on trial, an expert's interpretations of it, and [appellant's] own description.

Even accepting the defense version, it is clear that [appellant] killed [the victim] in a confrontation that he – [appellant] – precipitated. No intent to kill was required for this verdict. The claim of self-defense was, as it always is, a subjective one, and a doubtful one because of [appellant's] own version of his role and actions.

Defense counsel at trial was very vigorous and competent, in resisting the state's case and presenting the defense case, both as evidence and in argument.

The jury's verdicts, in particular the acquittals and conclusion that the killing was not intentional, suggest that the jurors carefully considered all the evidence and arguments, and were not swayed by either the improperly received evidence or the prosecutor's improper remarks. More specifically, the verdicts reflect the conclusion that there was at least reasonable doubt as to whether [appellant] was attempting to rob [the victim] or intended to kill him. This implies in turn that the jurors believed [appellant's] testimony at least to a degree, and therefore that the erroneous evidence and argument did not improperly destroy his credibility in the minds of the jurors.

None of the errors in this record, individually or collectively, creates any reasonable possibility of improper influence on the verdict, or shows any reasonable likelihood that the result of a new trial free of those errors would come

to a different conclusion. That is to say, I find that the improper evidence and remarks (considering their substance and manner of presentation, the response to them, and all the attendant circumstances of the case) were harmless beyond a reasonable doubt.

Appellant argues that in finding that the improper cross-examination was harmless beyond a reasonable doubt, the postconviction court did not consider the four factors that the supreme court has said should be considered when determining whether evidence admitted in violation of the Confrontation Clause was harmless beyond a reasonable doubt and, instead, focused almost exclusively on the strength of the prosecution's case. But in its conclusions of law, the postconviction court explicitly addresses each of the factors identified in *Al-Naseer* as factors to be considered.

The postconviction court's explanation why the cross-examination evidence should not have been admitted addresses the manner in which the evidence was presented and its probative value and potential for unfair prejudice. The district court also addressed the prosecutor's use of the evidence during closing argument, stating that the argument "underscore[ed] and aggravat[ed] the error, both by improperly attacking [appellant's] veracity, and character, and by improperly attributing to him violent and reckless conduct shortly before the incident on trial."

And the postconviction court's explanation of its rationale for concluding that the error of admitting the hearsay was harmless beyond a reasonable doubt demonstrates that the court considered whether the hearsay was highly persuasive and whether it was effectively countered by appellant. The court determined that because appellant acknowledged that he killed the victim during a confrontation that appellant initiated, the

central issue for the jury was determining appellant's state of mind. The court then noted defense counsel's vigorous representation and concluded that the jury's determination that the killing was not intentional demonstrates that the jurors were not swayed by the improperly admitted evidence and that the evidence did not destroy appellant's credibility.

Appellant argues that because the videotape and the other evidence in the case revealed nothing about his intentions as he approached the victim, the credibility of his account of the incident was central to his defense of self-defense, and, therefore, the prosecutor's improper attack on his credibility during cross-examination could not have been harmless beyond a reasonable doubt. But in making this argument, appellant fails to acknowledge that the other evidence included A.R.'s testimony that appellant told him that "[h]e tried to gank somebody . . . and that person grabbed for the gun or something and he ran a couple of rounds on him" and appellant's testimony that nothing prevented him from backing away from the victim after he got scared and that the victim tried to retreat but appellant blocked his path. There was also evidence that there were two separate sets of shots, which contradicted appellant's claim that the gun went off during a struggle. In light of this evidence, the postconviction court did not abuse its discretion in concluding that the improperly admitted hearsay evidence could not reasonably have impacted upon the jury's decision.

## **II.**

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of

establishing that the trial court abused its discretion and that appellant was thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). This court applies a harmless-error analysis to determine whether appellant was prejudiced by the exclusion of evidence. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). The erroneous exclusion of evidence is harmless only if we are satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (i.e., a reasonable jury) would have reached the same verdict. *Id.* If there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, the erroneous exclusion of the evidence is prejudicial. *Id.*

Appellant sought to introduce evidence that the victim was a marijuana dealer, including a bag of marijuana found on the victim’s person and the victim’s business card, which stated, “Felonious Entertainment – One-Stop Shopping.” The trial court allowed evidence that marijuana was found on the victim’s person and evidence that THC (a substance found in marijuana) was in the victim’s system but did not allow the business card into evidence. The postconviction court noted, the “exhibit was ambiguous and inflammatory – it did not necessarily refer to proposed sale of drugs by [the victim] and may have suggested any imaginable ‘felonious’ conduct by him.”

Appellant wanted the business card admitted into evidence to corroborate his claim that the victim was a drug dealer from whom he bought marijuana earlier in the evening. This claim was part of appellant’s argument that he was not attempting to rob the victim and was, instead, trying to get back the money that he paid the victim for

marijuana after he discovered that the marijuana was bad. Appellant claimed that when he attempted to get back his money, the situation turned bad and, fearing that the victim would shoot him, appellant shot the victim in self-defense.

The damaging potential of the card was that it would have bolstered appellant's claim that the victim was a drug dealer. The card did not refer to drug dealing, however, and it was not highly probative regarding whether the victim was a drug dealer or whether appellant bought marijuana from the victim. Based on other evidence admitted at trial, the jury knew that the victim was carrying a bag of marijuana when he was killed and that he had THC in his system when he died, which indicated that he had used marijuana before the shooting. This other evidence tended to corroborate appellant's claim that the victim was a drug dealer, and appellant has not shown that there is a reasonable possibility that if the card had been admitted, the jury would have reached a different verdict because it would have concluded that the victim was a drug dealer and, based on that conclusion, believed appellant's claim that he was trying to get his money back, rather than trying to rob the victim. Furthermore, to conclude that appellant was not trying to rob the victim, the jury would have had to reject A.R.'s testimony that appellant told him that he had tried to rob the victim.

### **III.**

Prosecutorial misconduct that was objected to at trial is reviewed under the harmless-error standard, and this court will reverse unless the misconduct was harmless beyond a reasonable doubt, that is, unless the verdict is surely unattributable to the

misconduct. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006) (citing *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006)).

While questioning appellant about inconsistencies in his testimony, the prosecutor asked,

“Which is the truth?”

“Hard to keep the truth straight, is it?”

“You haven’t been completely honest with us, have you?”

“You have no problem looking them all in the eye and saying that you have not lied to them, that everything that you have told them is the truth?”

“Practically everything you’ve told us is a bold-faced lie?”

“You just can’t tell the truth?”.

Appellant argues that the prosecutor’s questions persistently offered the prosecutor’s opinion of appellant’s credibility. The postconviction court concluded that the questioning was not improper. In *State v. Wright*, the supreme court rejected an argument similar to appellant’s. The supreme court explained:

Wright argues that the prosecutor’s “overall theme,” that Wright’s account of what occurred was a lie, amounted to improper comment on his credibility and character. It is improper for the state to express a personal opinion on the defendant’s credibility. But it is not misconduct for the state to analyze the evidence and argue that particular witnesses were or were not credible, which is what the prosecutor did at Wright’s trial.

719 N.W.2d 910, 918-19 (Minn. 2006) (citations omitted). *See Mayhorn*, 720 N.W.2d at 786 (applying this standard to cross-examination). A prosecutor’s statements become

improper vouching when the prosecutor “implies a guarantee of a witness’s truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness’s credibility.” *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted).

The prosecutor’s cross-examination of appellant was directed toward specific evidence, including collateral impeachment about the shots fired several hours before the murder, appellant’s testimony that he had hidden the gun for a period of time before the shooting and that others would have had access to it, and appellant’s identification of another person who appellant claimed had fired the shots in the incident several hours before the murder. We agree with the postconviction court that although some of the questions and the prosecutor’s tone and demeanor may have implied that the prosecutor did not believe appellant, the questions amounted to an argument that appellant was not credible, rather than an expression of the prosecutor’s personal opinion about appellant’s credibility.

Appellant also argues that the prosecutor committed misconduct during rebuttal closing argument by referring to the rules of evidence and then stating that the jury “didn’t hear anything about [appellant’s] character.” The postconviction court found that this statement was misconduct but was harmless error. We agree. Even if the jurors interpreted the prosecutor’s improper comment as implying that the prosecutor knew things about appellant’s unsavory character that the prosecutor had not presented to the jurors, the jury’s acquittals on the intentional offenses persuade us that the jury was not improperly swayed by the prosecutor’s veiled suggestion that appellant is a bad person

and that its verdict on the unintentional offense is surely unattributable to the prosecutor's misconduct.

Appellant argues that the following statement during the prosecutor's closing argument was misconduct because the prosecutor argued facts that were not in evidence and improperly appealed to the jury's passion:

And how about the prior shooting that evening? He was waltzing along on direct and cross-examination that [sic] the idea that you folks weren't going to hear about this other shooting at 9:30 at night. . . . He thought you guys weren't going to hear about that.

But see the Constitution, you have a lot of protections in our Constitution to ensure our rights, our liberty, but nothing in the Constitution gives you the right to try to lie your way out of your responsibility. The defendant tried to do that in front of all of you, to all of you. Thinking he could do that, thinking you wouldn't hear about those gunshots.

Because appellant did not object to the argument at trial, we apply a "modified plain error test," that requires the defendant to establish both that the misconduct constitutes error and that the error was plain. *State v. Wren*, 738 N.W.2d 378, 393 (Minn. 2007). "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 the defendant satisfies this 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



proceeding is seriously affected.” *State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006) (quotation omitted).

The postconviction court did not separately address appellant’s claim that this argument was misconduct, and the state has not addressed appellant’s claim on appeal. But even if we assume that appellant has satisfied the plain-error test, we decline to correct the error because it did not seriously affect the fairness, integrity, or public reputation of appellant’s trial. At worst, the improper argument suggested to the jurors that appellant did not want them to hear about the earlier shooting because evidence about the shooting would catch appellant in a lie. However, when the prosecutor made the argument, evidence about the earlier shooting had been introduced, and that evidence contradicted appellant’s testimony. Even if there was no evidence that appellant actually thought that the jury was not going to hear about the earlier shooting, it is highly unlikely that the improper argument was understood as anything other than an argument that appellant was not credible because his testimony was contradicted by evidence about the earlier shooting.

#### IV.

Finally, appellant argues that the cumulative effect of the errors at his trial requires reversal of his conviction. Under some circumstances, the cumulative effect of multiple harmless errors may deny a fair trial and, therefore, require reversal for a new trial. *State v. Litzau*, 650 N.W.2d 177, 187 (Minn. 2002). When determining whether reversal is appropriate, we balance the egregiousness of the errors against the weight of proof against the defendant. *State v. Cermak*, 350 N.W.2d 328, 334 (Minn. 1984). A new trial

is not warranted when “errors did not affect the jurors’ deliberations or their assumptions about appellant’s innocence or guilt.” *State v. Erickson*, 610 N.W.2d 335, 341 (Minn. 2000). We agree with the postconviction court that “[n]one of the errors in this record, individually or collectively, creates any reasonable possibility of improper influence on the verdict[.]” Appellant has not shown that the postconviction court abused its discretion in denying appellant relief.

**Affirmed.**