STATE OF MINNESOTA
IN COURT OF APPEALS
A09-696

State of Minnesota,
Respondent,

vs.

Arthur James McCoy, III,
Appellant.

Filed May 4, 2010
Affirmed
Stauber, Judge

Olmsted County District Court
File No. 55CR087301

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from his conviction of two counts of first-degree burglary, terroristic threats, and fifth-degree assault, appellant argues that (1) he was prejudiced when the

prosecutor violated the discovery rules by interviewing the complainant during voir dire and then failing to disclose her notes of the interview or a summary of the complainant's oral statements to appellant; (2) the prosecutor committed prejudicial misconduct by repeatedly referring to the complainant's "uncontroverted" testimony during closing arguments; and (3) the evidence was insufficient to sustain his burglary convictions. Appellant also makes several arguments in his pro se supplemental brief. We affirm.

FACTS

In July 2008, appellant Arthur McCoy was charged with fifth-degree assault, terroristic threats, and two counts of first-degree burglary. The charges stemmed from an incident occurring on July 16, 2008, in which appellant allegedly entered the home of E.J.'s parents without consent, threatened and assaulted E.J., and attempted to recruit her as a prostitute.

During voir dire, appellant represented himself, with his public defender acting as standby counsel. At trial, E.J. testified that shortly before she turned 17 years old, she ran away from home, met appellant at a shopping mall in Rochester, and agreed to go with appellant to his residence in Wisconsin. E.J. discovered that appellant was a pimp. A few days later, appellant took E.J. to meet three of his friends. Appellant left E.J. with the men, who each had sex with her without her consent. Afterward, the men told E.J. that they each paid appellant $75 to have sex with her. E.J. further testified that she lived with appellant in Wisconsin for approximately six months, and that during this time appellant forced her to engage in prostitution about five times. E.J. also claimed that

appellant occasionally slapped her face, and threatened to kill her, beat her up, and get her pregnant.

After living in Wisconsin for a few months, E.J. moved with appellant to California. There, appellant suggested that E.J. start prostituting again. When E.J. refused, appellant became angry, pushed E.J. against the wall, and strangled her. According to E.J., appellant then had sex with her, and when he finished, he dropped her to the floor and kicked her face. E.J. suffered a dislocated jaw and a shattered cheekbone.

E.J. testified that after the assault in California, she moved to New Jersey where she had extended family. According to E.J., she had no further contact with appellant until a few years later when she happened to see him at a bar in Rochester, Minnesota. E.J. testified that she said "hello" to appellant and did not converse with him further.

In August 2007, E.J. moved in with her parents, who live outside Rochester. According to E.J., appellant called her parents' house several times between March and July 2008. E.J. also testified that appellant came to her parents' house twice during this time but was told by her sister and her mother that he was not welcome.

On July 16, 2008, E.J. was home alone with her six-month-old daughter. According to E.J., she heard a knock at the door and thought it was the meter reader. E.J. answered the door while holding her six-month-old daughter and discovered appellant. When E.J. told appellant that he was not welcome, appellant stated that he just came by to say "hi." E.J. latched the screen door when appellant pulled on it. Appellant told E.J. that he knew what cars her parents drove and that he knew they were not home. Appellant also made remarks about E.J.'s figure, which E.J. interpreted to mean that he

wanted to recruit her to prostitute again. Appellant was pulling on the screen door and becoming very angry. E.J. testified that she was afraid that appellant was going to break the screen door, so she made a "rash" decision to unlock the door.

After E.J. unlocked the screen door, appellant entered the house and insisted that he just wanted to "talk and hang out and chill." When E.J. repeated that appellant was not welcome in the house, appellant shoved E.J, causing her to slide down the stairs of her parents' split-entry home while still holding her daughter. According to E.J., she then ran down to the basement, put her daughter in a "playpen," ran back up the stairs, and proceeded to shove appellant out the front door.

E.J. testified that while she was trying to push appellant out of the house, appellant was insisting that he just wanted to "hang out." E.J. testified that after she managed to push appellant out of the house, she told appellant she was going to call the police. Appellant then became "scary upset," started swearing at E.J., and told E.J. that she did "not know who he knows" and that her daughter would not see her first birthday.

E.J. walked to appellant's car to get the license plate number so that she could report it to police. As E.J. walked toward the car, appellant grabbed her, threw her over his shoulder, and slammed her to the ground. Appellant then drove away as E.J. got his license number. According to E.J., the incident caused her to be "very afraid" because she "didn't know what [appellant] was capable of."

The jury found appellant guilty of the charged offenses. Appellant's subsequent motion for a judgment of acquittal or for a new trial was denied. The district court also denied appellant's request for a dispositional or durational departure and sentenced

appellant to 69 months in prison for burglary and a concurrent sentence of 21 months for terroristic threats. This appeal followed.

D E C I S I O N

I. Violation of discovery rules

If a party fails to comply with a discovery rule, the district court "may upon motion and notice order such party to permit the discovery or inspection, grant a continuance, or enter such order as it deems just in the circumstances." Minn. R. Crim. P. 9.03, subd. 8. "The construction of a procedural rule is a question of law subject to de novo review." *State v. Bailey*, 677 N.W.2d 380, 397 (Minn. 2004). But when a discovery violation has occurred, the district court is particularly suited to determine the appropriate remedy for the violation and has discretion in deciding *whether* to impose sanctions. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). Absent a clear abuse of discretion, this court will not overturn the district court's ruling. *Id.* When determining the remedy, the district court should consider the reason why disclosure was not made, the extent of prejudice to the opposing party, the feasibility of rectifying such prejudice with a continuance, and any other relevant factors. *Id.*

Here, during cross-examination of E.J., appellant moved to strike E.J.'s testimony on the basis that the prosecutor violated the rules of discovery. The prosecutor admitted that she interviewed the complainant during the noon break during voir dire, that the complainant provided her with information that was not in the police reports, that the prosecutor made notes of the interview, and that she did not disclose the notes or the information from the interview to appellant. The undisclosed information consisted of:

(1) E.J.'s claim that appellant raped her in California; (2) E.J.'s statement that appellant allowed her to be raped twice by three men in Wisconsin who paid $75 each to have sex with her; and (3) E.J.'s claim that appellant took her to Wisconsin when she was 16 years old. The district court concluded that there was no discovery violation and denied appellant's motion.

Appellant argues that the prosecutor's failure to disclose this information was deliberate and that he was prejudiced by the discovery violation. We agree that this was a very serious discovery violation and, as the state concedes, the information should have been disclosed. The record reveals that investigators were unable to locate the complainant until immediately before trial, and the complainant did not arrive in town until the morning the trial began. A noon recess was taken during voir dire, and the prosecutor met briefly with E.J. at 12:45 p.m. to discuss the case. In discussing her meeting with E.J., the prosecutor stated:

> the evidence regarding rape, prostitution, moving to [Wisconsin] when she was sixteen with [appellant], that stuff was not directly in the police reports. I, in fact, learned some of it myself on the stand as [E.J.] was testifying. I learned some of it at twelve forty-five yesterday.

The prosecutor then explained that "I did not have the opportunity to type up my notes and disclose them to [appellant] because we started trial again at [1:30 p.m.]." The prosecutor's excuse that she did not have the opportunity to disclose the information is unacceptable. Even in light of the hectic nature of trial and the fact that the complainant was not located until immediately before trial, we are not persuaded by the state's excuse for the prosecutor's failure to provide full, complete, and immediate disclosure of the

new and previously undisclosed information. The failure allowed appellant to risk being ambushed.

Appellant argues that he was seriously prejudiced by the discovery violation because he was unable to move in limine to challenge the admissibility of the undisclosed information before trial, as he did with disclosed evidence. Understandably, the information was not available until after trial began because the prosecutor did not talk to E.J. until after appellant's motions in limine had been heard and decided and the parties were in the midst of voir dire. But again, this does not excuse the lack of immediate disclosure.

The record reflects that as soon as the prosecutor finished her opening statement, which included comments about the newly discovered evidence, appellant stated in his opening statement: "This information I just heard about me allegedly raping this victim, even knowing this victim at the age of sixteen, all of this stuff is new. None of this is in the police report. This is the first time I ever heard of this. Okay." But rather than promptly moving to address the issue either after the state's opening statement or before trial testimony began, appellant waited until he was in the middle of his cross-examination of the complainant to move to strike the challenged statement. In fact, appellant never objected to the statement, nor did he request a continuance. *See Liptak v. State ex rel. City of New Hope*, 340 N.W.2d 366, 367 (Minn. App. 1983) (stating that pro se litigants generally are held to the same standards as attorneys). Accordingly, appellant cannot successfully argue that he was prejudiced because he was unable to move in

limine to challenge the admissibility of the undisclosed information. He could have objected during or immediately after the prosecutor's opening statement.

Appellant further argues that he was prejudiced by the discovery violation because the failure to disclose the information hindered his defense in conducting the jury selection. To support his claim, appellant points out that one of the jurors disclosed that she had been the victim of a sexual assault. Appellant contends because of the prosecutor's failure to disclose, he was unable to use the information about the alleged rape of E.J. in California in questioning the prospective juror and deciding whether or not to strike her.

But the record reflects that the juror was told that prostitution would come up in the case, and when asked if any sexual-assault discussions would be difficult for the juror to hear, the juror answered: "No." The juror also said that her experience would not make it more likely for her to convict appellant. Appellant heard the juror's response to the prosecutor's questions, and he did not challenge the juror. Appellant fails to demonstrate how his questioning and selection of the jury would have changed had the information been disclosed. Moreover, once the information came to appellant's attention, he never made any objection or claim that the withholding of the information adversely affected his selection of the jury. Accordingly, appellant cannot demonstrate prejudice by not having been provided the information during jury selection.

We further note that through the complaint, police reports, and other documentation, the accusations about prostitution and physical and sexual abuse were already known to appellant. Consequently, appellant should have known that the

complainant's testimony could include those issues. Moreover, appellant could have, but never did, move for a continuance.

Because the discovery violation likely did not significantly prejudice appellant, a decision to strike the victim's testimony would have been a harsh sanction. *See State v. Rasinski*, 472 N.W.2d 645, 649 (Minn. 1991) (stating that the preclusion of evidence is a severe sanction that should not lightly be invoked). Therefore, we conclude that the district court did not abuse its discretion in denying appellant's motion to strike E.J.'s testimony. *See State v. Scanlon*, 719 N.W.2d 674, 685 (Minn. 2006) (stating that in determining remedies for discovery violations, the district court considers (1) the reason why the disclosure was not made; (2) the extent of the prejudice to the opposing party; (3) the feasibility of rectifying the prejudice with a continuance; and (4) other relevant factors).

II. Prosecutorial misconduct

Appellant argues that the prosecutor engaged in prejudicial misconduct by referring to the complainant's testimony as "uncontroverted" during closing arguments. But appellant admits that he did not object to the conduct at 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), this court has the discretion to review unobjected-to prosecutorial misconduct if plain error is established, *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).

The record reflects that during her rebuttal argument, the prosecutor referred to E.J.'s testimony as "uncontroverted" three times. The state concedes that the prosecutor's references to E.J.'s testimony as "uncontroverted" constitute prosecutorial misconduct. *See State v. Stephani*, 369 N.W.2d 540, 547 (Minn. App. 1985) (stating that prosecutors should abstain from using the term "uncontroverted" because it may improperly suggest that a defendant has an obligation to prove facts), *review denied* (Minn. Aug. 20, 1985). Thus, the state concedes that appellant has satisfied the first two prongs of the plain-error analysis. But the state contends that because the misconduct was not prejudicial, appellant is not entitled to a new trial.

When determining whether prosecutorial misconduct occurred during closing argument, this court examines "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) *as amended* (Minn. Feb. 19, 1993). The use of "uncontradicted" does not amount to prejudicial misconduct where 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).

A review of the prosecutor's rebuttal argument indicates that the prosecutor did not use the term "uncontroverted" in conjunction with the fact that appellant did not testify. Rather, when read in the context of the prosecutor's rebuttal argument, the term "uncontroverted" was used in the context of discussing whether there were inconsistencies in E.J.'s testimony. In other words, the prosecutor's argument was that E.J.'s testimony was uncontroverted because her testimony was not inconsistent. Moreover, the prosecutor only used the term "uncontroverted" three times. *Compare Stephani*, 369 N.W.2d at 547 (holding that the fact that the prosecutor referred twice to certain "uncontroverted" evidence did not result in prejudice), *with State v. Streeter*, 377 N.W.2d 498, 501 (Minn. App. 1985) (emphasizing repetition of references to evidence as "undisputed" or "uncontradicted" in finding prejudicial misconduct). We do not minimize the misconduct or base the prejudice on quantity. The misconduct here occurred during one of the most critical stages of trial, the prosecution's rebuttal–the very last argument the jury heard. But because the implication that appellant should have contradicted the trial testimony was oblique and not highlighted by emphasis or objection, the misconduct was not prejudicial.

III. Sufficiency of evidence

In considering a claim of insufficient evidence, this court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the [fact-finder] to reach the verdict which [it] did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This court will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

Appellant was convicted of burglary in the first degree in violation of Minn. Stat. § 609.582, subd. 1 (2006). A conviction of first-degree burglary requires proof that the burglar entered a building without consent and "with intent to commit a crime." *Id.* The crime alleged by the state that appellant attempted to commit when he entered E.J.'s parents' home was the crime of solicitation, inducement, or promotion of prostitution.

Appellant argues that the evidence was insufficient to sustain his conviction of first-degree burglary because the state failed to prove that he intended to commit the crime of solicitation, inducement, or promotion of prostitution at the time he entered E.J.'s parents' home. We disagree. The record reflects that appellant told E.J. twice how much she had grown and how she would be able to make much more money for him. Specifically, E.J. testified that appellant "was making like comments towards my figure.

He made a few comments towards, you know, how much I've grown up, and how much more money I can make him. He said I filled out. I got thicker." When asked what she took the comments to mean, E.J. replied that appellant "was trying to recruit me to prostitute for him." In light of the parties' prior relationship, E.J.'s perception of intent was reasonable and her testimony is sufficient to support appellant's burglary convictions. Despite E.J.'s prior recorded statement in which she stated that she was not sure why appellant came over, we must assume the jury believed E.J.'s testimony that appellant intended to recruit her to prostitute for him again. The inconsistencies in E.J.'s testimony are not sufficient to overcome our deference to the jury's role of weighing the evidence and assessing credibility. *See State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998) (stating that the jury is in the best position to weigh evidence). Accordingly, there was sufficient evidence to support appellant's convictions for first-degree burglary.

IV. Appellant's pro se supplemental arguments.

Appellant raises several issues in his pro se supplemental brief. Specifically, appellant argues that: (1) he was unfairly prejudiced by the admission of relationship evidence; (2) the district court issued an improper cautionary instruction; (3) the prosecutor engaged in prejudicial misconduct; (4) the jury instructions were improper; (5) the evidence was insufficient to sustain his convictions; (6) the district court erred in not allowing him to impeach E.J. with her prior convictions; (7) he received ineffective assistance of counsel; and (8) the district court unjustly denied his post-verdict motion.

We have considered these arguments and conclude that they are without sufficient merit to warrant discussion.

Affirmed.