STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2266

State of Minnesota,
Respondent,

vs.

Olga Marina Franco Del Cid,
Appellant.

Filed July 20, 2010
Affirmed
Connolly, Judge

Lyon County District Court
File No. 42-CR-08-220

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Richard R. Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

Neal A. Eisenbraun, Neal A. Eisenbraun, Chartered, Minneapolis, Minnesota; and

Manuel P. Guerrero, Guerrero Law Office, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Connolly, Judge; and Collins, Judge.[*]

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

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

CONNOLLY, Judge

Appellant challenges her convictions of criminal vehicular homicide, criminal vehicular operation, providing false identification to a peace officer, driving without a valid driver's license, and a stop-sign violation after a jury trial. Appellant argues that the evidence was legally insufficient, a statement she made to two peace officers while in a hospital was involuntary and therefore inadmissible, she was entitled to lesser-included-offense and alternative-perpetrator jury instructions, and statements by the prosecutor and the state's witnesses amounted to prosecutorial misconduct warranting reversal. Because the evidence was sufficient to permit the jury to find appellant guilty of the charges, appellant's hospital statement was voluntary, the jury instructions were not given in error, and the prosecutorial misconduct was not prejudicial, we affirm.

FACTS

On February 19, 2008, a maroon 1998 Plymouth Voyager (minivan) was driven through a stop sign and struck the side of a school bus in an intersection. The accident occurred in Lyon County, just outside of Cottonwood, at the intersection of County Road 24 and Highway 23. Four children in the school bus were killed and 17 more were injured in varying degrees of severity.

Appellant Olga Marina Franco Del Cid was found pinned in the front of the minivan somewhere between the driver's seat and the passenger's seat; she was later charged with several crimes, all but one of which were based on the act of driving the

minivan.[1] After a struggle to extricate her from the minivan, appellant was taken to a hospital in Marshall, where she received treatment for her injuries. As a result of the crash, appellant suffered a broken tibia and compound fracture of her ankle; these injuries were extremely painful and required her to undergo reconstructive orthopedic surgery.

Minnesota State Patrol Trooper Dana Larsen and Sergeant Dean Koenen visited appellant at the hospital. Trooper Larsen and Sergeant Koenen interviewed appellant with the assistance of the hospital's interpreter. At trial, appellant testified that she could not remember speaking with Trooper Larsen and Sergeant Koenen at the hospital. Appellant presented expert testimony from Paul Diekmann, M.D., a board-certified orthopedic surgeon who discussed appellant's injuries and the likely effect of the combination of sedative and narcotic drugs administered to appellant. Dr. Diekmann testified that appellant's shattered ankle would have been "very painful," and that she was appropriately administered substantial doses of intravenous morphine and midazolam, a hypnotic drug with a strong predilection for causing anterograde amnesia.

[1] Specifically, appellant was charged with four counts of felony criminal vehicular homicide in violation of Minn. Stat. § 609.21, subds. 1(1), 1a(a) (Supp. 2007); four counts of felony criminal vehicular operation in violation of Minn. Stat. § 609.21, subds. 1(1), 1a(b) (causing great bodily harm) (Supp. 2007); six counts of felony criminal vehicular operation in violation of Minn. Stat. § 609.21, subds. 1(1), 1a(c) (causing substantial bodily harm) (Supp. 2007); seven counts of gross-misdemeanor criminal vehicular operation in violation of Minn. Stat. § 609.21, subds. 1(1), 1a(d) (causing bodily harm) (Supp. 2007); one count of gross-misdemeanor providing false identification to a peace officer in violation of Minn. Stat. § 609.506, subd. 2 (2006); one count of misdemeanor stop-sign violation in violation of Minn. Stat. §§ 169.20, subd. 3(a) (failing to stop at stop sign at entrance of through highway having right-of-way), .89, subd. 1 (enhancing petty misdemeanor to misdemeanor) (2006); and one count of misdemeanor driving without a valid driver's license in violation of Minn. Stat. §§ 171.02, subd. 1, .241 (2006).

Pharmacological effects of this combination typically include an altered state of mind and reduced level of alertness. Trooper Larsen testified that appellant stated during the hospital interview that she was driving the minivan, which belonged to her boyfriend, Francisco Sangabriel Mendoza, who had stayed home sick that day.

At trial, appellant's defense theory was that she was entirely innocent of all the driving-related offenses because Mendoza was driving. Appellant testified that Mendoza ran away after the crash because he was afraid of being deported to Mexico, and that he threatened her not to tell anyone that he was driving. Appellant testified that she removed her seatbelt from her passenger seat before the crash because she saw that Mendoza was going to strike the school bus and she wanted to get out of the minivan before the crash. Appellant's crash-reconstruction expert testified that the impact would have caused her to be thrown to the left, which meant that she must have been the passenger. Two witnesses testified that right after the crash they saw a man standing next to the passenger side of the minivan and that he quickly disappeared from the scene of the accident.

The state's theory of the case was that appellant was driving and that her boyfriend may or may not have been present, but if he was, he was the passenger. Although a definitive identification of the driver could not be made, one witness testified that he thought he had seen appellant driving and that there was no passenger in the minivan. Various witnesses testified that they saw the crash, and that the minivan drove full speed through a stop sign and struck the side of the school bus. Both sides offered the

testimony of crash-reconstruction experts, who articulated differing theories of the crash based on their interpretations of the forensic evidence.

After five days of testimony at trial, the jury convicted appellant of all 24 counts. This appeal follows.

D E C I S I O N

I. The evidence was sufficient to sustain the convictions.

Appellate review of a sufficiency claim involves "a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Yang*, 774 N.W.2d 539, 560 (Minn. 2009) (quotation omitted). The appellate court must presume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009). If the "conviction is based solely on circumstantial evidence, that evidence must be consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt." *Yang*, 774 N.W.2d at 560 (quotation omitted).

a. The driver's identity

Appellant contends that the evidence produced at trial was insufficient to prove beyond a reasonable doubt that she was in fact driving the minivan when it collided with the bus, which is a necessary element of all of the driving convictions.[2] Appellant contends that Mendoza was driving the minivan when it crashed. Appellant cites the testimony of J.K., a witness who arrived on the scene shortly before emergency personnel

[2] This does not include the false-identification conviction.

arrived. J.K. testified that appellant's right foot was stuck near the gas pedal, and that he observed this by crawling into the minivan through the passenger-side window because the passenger door would not open.

Appellant also cites the testimony of her expert witness, Donn Peterson, a mechanical engineer with expertise in crash analysis and accident reconstruction. Peterson testified that, due to the way the vehicle was spinning as a result of the collision, and the fact that the driver-side door popped open upon impact, a driver who was not wearing a seatbelt would have been thrown out of the minivan.

Appellant testified at trial that Mendoza was the one driving the minivan that day, and that he was not wearing a seatbelt. Appellant testified that in the crash her boyfriend "got out" and that when the airbags expanded she was thrown to where her boyfriend had been seated. According to appellant's testimony, Mendoza told her after the accident that he did not wish to be deported to Mexico again, and he fled the scene, running down County Road 24.

Other witness testimony arguably corroborates Mendoza's initial presence on the scene. L.M., a truck driver, testified that he saw the collision. After dialing 911 on his cell phone, L.M. looked and saw "one person . . . standing on the passenger side of the van." This person then walked away. C.D., who was returning from a nurse's aide class, saw appellant's minivan drive through a stop sign and strike the side of the school bus. Similarly, while or just after she called 911, C.D. saw a man standing on the passenger side of the minivan attempting to open the door. The man quickly disappeared.

Appellant argues that the above evidence makes her theory "far more plausible" than the state's theory. In response to this contention, the state points to other evidence tending to support its theory that appellant was the driver. L.M. testified that he only saw one person in the minivan as it approached the intersection as well as after the collision. He testified that he was "pretty sure" that the person he saw in the minivan as it approached the intersection was the same person in the driver's seat following the crash.

Trooper Larsen testified that he and Sergeant Koenen had interviewed appellant at the hospital with the aid of an interpreter. Trooper Larsen testified that appellant said she was driving to work in Mendoza's minivan, she was wearing her seatbelt, and Mendoza had stayed home sick that day.

The state also called Minnesota State Patrol Trooper Paul Skoglund, who had experience in crash reconstruction. Trooper Skoglund calculated the school bus as moving between 56 and 60 m.p.h. and the minivan as moving between 46 and 50 m.p.h. when the vehicles collided. He testified that after the crash, the minivan began spinning and spun about 270 degrees clockwise. He testified that the axle was not moved and the principal direction of force was "all forward movement," and that his reconstruction did not find any indications of force that would cause a driver or passenger to move from side to side.

Appellant contends that the state's case is undermined by a lack of evidence concerning how Mendoza exited the minivan if he was the passenger. But J.K. was able to crawl in and out of the minivan through the passenger-side window, so a reasonable inference is that if Mendoza had been the passenger, he also could have climbed out the

window. This conclusion is buttressed by the fact that the eyewitnesses who saw a person standing outside the minivan saw him next to the passenger-side door, not the driver-side door. It is also possible that Mendoza was not in the minivan at all and that appellant was the sole occupant.

As the state correctly points out, "[t]he assumption that the jury believed the state's witnesses is particularly appropriate when resolution of the case depends on conflicting testimony," *State v. Pippitt*, 645 N.W.2d 87, 92 (Minn. 2002), and "all inconsistencies in the evidence are . . . resolved in favor of the state," *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990). Both sides presented expert testimony attempting to reconstruct the accident, and while appellant's expert testified that the driver and passenger would have been thrown to the left, the state's expert testified that the driver and passenger would have been thrown forward. This is precisely the type of determination that is reserved for the jury.

Similarly, we must assume that the jury believed Trooper Larsen's testimony pertaining to the hospital interview, which establishes that appellant told Trooper Larsen that she was driving the minivan by herself that day. Accordingly, the jury is deemed to have disbelieved appellant's trial testimony that her boyfriend was the one driving. The decision whether to believe appellant's testimony calls for a credibility determination, which is solely a question for the jury and which the jury plainly resolved against appellant. Finally, appellant was found near the driver's seat with her right foot pinned below the accelerator. There was sufficient evidence to allow the jury to find that the state had proven beyond a reasonable doubt that appellant was driving the car.

b. Gross negligence

Appellant also contends that the evidence was insufficient to support a finding that whoever was driving the minivan did so in a grossly negligent manner.

Gross negligence differs in degree from ordinary negligence. *State v. Al-Naseer*, 690 N.W.2d 744, 752 (Minn. 2005). Gross negligence contemplates "a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence," and has been defined as "very great negligence, or the absence of slight diligence, or the want of even scant care." *Id.* (quotation omitted). Whether conduct constitutes gross negligence is generally a question of fact for the jury. *Id.* at 751.

Appellant contends that there was evidence that the driver attempted to slow down. Trooper Skoglund calculated that the minivan was moving 46 to 50 m.p.h. when it broadsided the bus. Appellant testified that she looked at the speedometer as her boyfriend was approaching the intersection, and that it read 55 m.p.h. But at most, this would show that the minivan slowed down *slightly* before driving into the school bus. Further, Trooper Skoglund testified that the physical evidence that would have shown an attempt to swerve or brake before driving into the bus was absent. Thus, for purposes of a sufficiency claim, we must assume that the jury believed that appellant was traveling close to 50 m.p.h. and did not attempt to brake.

K.M.-K., an EMT who responded to the accident, testified that the weather was clear that day. D.D., the bus driver, testified that the minivan appeared to be moving too fast. D.D. testified that the minivan did not attempt to swerve or slow down as it went

through the intersection, which included railroad crossing arms and a stop sign that required the minivan to stop, and that the minivan struck "perfectly in the middle of the bus." Trooper Larsen testified that there are no obstructions of view approaching that intersection and that the view is clear all the way to Cottonwood, which is between one-half mile and one mile away. Trooper Larsen also testified that there are railroad-crossing and stop-ahead signs before the intersection.

Appellant argues that the evidence shows that "the van was being driven properly and under control up to and until the immediate time of the crash," and that the only reasonable inference is momentary inattention or distraction by the driver. But viewing the evidence in the light most favorable to the jury's verdict, and disbelieving any conflicting evidence, the jury was presented with evidence that appellant was driving fast; that the weather did not create any visibility or road-surface problems; that the view on this area of road is unobstructed; that there are signs along the approach to the intersection, including one warning of an impending stop; and that appellant broadsided a large yellow school bus without even attempting to swerve or brake. Thus, the evidence was sufficient to allow the jury to conclude that the state proved beyond a reasonable doubt that appellant drove the minivan in a grossly negligent fashion.

II. Appellant's hospital statement was voluntary.

Appellant argues that the district court erred in failing to suppress the statements she made to the police officers at the hospital because these statements were involuntary. We review de novo a district court's legal conclusion as to the voluntariness of a statement based on all of its factual findings that are not clearly erroneous. *State v.*

Clark, 738 N.W.2d 316, 333 (Minn. 2007). The state must show the voluntariness of a confession by a preponderance of the evidence. *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991).

Following an omnibus hearing, the district court found the following facts. On the evening of February 19, two uniformed state patrol troopers interviewed appellant at the hospital with the aid of a hospital interpreter. Appellant was not provided with a *Miranda* warning. The interview was brief; it consisted of 11 questions. Appellant "appeared to understand the questioning that was posed to her (via the interpreter) and she gave appropriate responses (again, via the interpreter)." The district court held that appellant's *Miranda* rights had not attached because she was subject to noncustodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966) (holding that *custodial* interrogation requires the use of certain procedural safeguards for a statement to be admissible). Appellant does not maintain her *Miranda*-violation claim on appeal.

The district court also held that appellant's statement was voluntary. The district court found "no evidence that [appellant] was under the influence of any drugs." It noted that appellant was an employed adult, and found no evidence that appellant lacked maturity or intelligence. It found that "there was nothing coercive about the questioning." It found no evidence of any intimidation, threat, or trickery, and found that appellant was "not deprived of any physical needs." It concluded that, under these circumstances, there was simply no coercive state activity implicating voluntariness. Appellant subsequently offered further proof of the pharmacological effects of the drugs

given to appellant and moved for reconsideration, and the district court issued an order reaffirming its order denying appellant's motion to suppress the hospital statement. The district court explained that its reasoning did not depend on whether appellant exhibited signs of impairment, but rather whether she was able to understand and respond to questions.

Voluntariness analysis entails "a subjective factual inquiry" to determine "the effect that the totality of the circumstances had upon the will of the defendant and whether the defendant's will was overborne when he confessed." *Pilcher*, 472 N.W.2d at 333. "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 522 (1986).

Appellant does not allege any element of police coercion. The state, relying heavily on *Connelly*, contends that this dooms her claim that her hospital statements were involuntary. Appellant relies exclusively on *State v. Anderson*, 247 Minn. 469, 78 N.W.2d 320 (1956). The *Anderson* court held that the defendant's admission that he was driving the car involved in the accident at issue was an involuntary statement. *Id.* at 479, 78 N.W.2d at 327. Anderson was under the influence of alcohol and a morphine-derivative painkiller and was in severe pain. *Id.* He regained and lost consciousness, and made his statement immediately upon regaining consciousness. *Id.* The *Anderson* court did not discuss police coercion.

The state suggests that *Anderson* is no longer good law, since the Minnesota Supreme Court decided *Anderson* in 1956 and the United States Supreme Court did not

decide *Connelly* until 1986. The *Connelly* Court held that the due-process test for determining the voluntariness of a confession contains a threshold element of coercive police activity. 479 U.S. at 167, 107 S. Ct. at 522. Thus, Connelly's confession to the police was voluntary even though he was a chronic schizophrenic in a psychotic state hearing command hallucinations from God that interfered with his ability to make rational decisions. *Id.* at 161, 107 S. Ct. at 518-19. We need not decide whether *Connelly* implicitly overruled *Anderson*. It is sufficient for our purposes that the Minnesota Supreme Court has subsequently cited *Connelly* and required the existence of coercive police activity as a threshold element of finding that a statement to the police was involuntary. *See, e.g.*, *State v. Williams*, 535 N.W.2d 277, 287 (Minn. 1995) (citing *Connelly* for the proposition that a statement will not be held involuntary within the meaning of the Due Process Clause in the absence of coercive police activity).

Following the Supreme Court's decision in *Connelly*, federal courts have consistently found defendants' hospital statements to be voluntary absent some element of police coercion beyond mere questioning. *E.g.*, *United States v. Lopez*, 437 F.3d 1059, 1065 (10th Cir. 2006) (confession of hospitalized patient "suffering from the beating he had received two days earlier" not involuntary on that account, but was involuntary because of FBI agents' misrepresentations of their evidence combined with promise of lenient treatment in exchange for confession); *Abela v. Martin*, 380 F.3d 915, 928 (6th Cir. 2004) (incriminating statement made while in hospital, in pain, and on pain medication was voluntary because there was no evidence of police coercion); *United States v. Cristobal*, 293 F.3d 134, 141 (4th Cir. 2002) (holding statements voluntary even

though Cristobal was given narcotic painkillers such as morphine because there was no evidence that the special agents "exploited Cristobal's weakened condition with coercive tactics"); *United States v. George*, 987 F.2d 1428, 1430-31 (9th Cir. 1993) (observing that George "was a sick young man" while overdosing on heroin, but holding statements voluntary because he was coherent, gave responsive answers, and had regained consciousness at the time he was answering questions); *see also Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988) ("The due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the Constitution of the United States.").

"The rule that a confession must be voluntary is designed to deter improper police interrogation." *Williams*, 535 N.W.2d at 287. Thus, while courts must consider the totality of the circumstances to determine whether a confession is voluntary, a confession is not involuntary in the absence of any coercive police activity. *Id.* Important factors are the use of "stress-inducing techniques" and "the kind of statements that would make an innocent person confess." *Id.* at 288. Appellant does not point to any evidence of police coercion or improper interrogation techniques, and we find none in the record. Appellant's entire argument is that the police should not have questioned her because she was in pain and under the influence of prescription narcotics and sedatives, which rendered her unable to make rational decisions. However, appellant does not contend that any of the district court's factual findings are clearly erroneous. The record supports the district court's findings that the police did not do anything but question appellant for a

brief period of time with the aid of an interpreter. It therefore follows that her statement was voluntary.

Appellant also argues in the alternative that, under *Anderson*, the district court was at a minimum required to give a cautionary instruction that the statements she made to the police while at the hospital might not be reliable. In *Anderson*, the defendant made an admission to the insurance representative following four administrations of a narcotic painkiller. 247 Minn. at 479, 78 N.W.2d at 327. The supreme court held that while it was "not conclusive that this admission was involuntary, it would still seem that in justice the court should have given the jury a cautionary instruction as to the weight to be attached to it in view of the circumstances under which it was made." *Id.* at 479-80, 78 N.W.2d at 327.

First, *Anderson* is inapposite because this holding concerns a statement that was not conclusively voluntary, whereas appellant's statements *were* voluntary. Second, appellant did not request such an instruction at trial. The supreme court confronted a similar scenario in *Clark*, in which it held that allegedly improper comments by the police, combined with the defendant's heroin withdrawal during interrogation, did not render the defendant's statements involuntary. 738 N.W.2d at 336. Because Clark argued for the first time on appeal that, in the alternative, he was entitled to a cautionary instruction under *Anderson*, the lack of a cautionary instruction could only be reviewed under the plain-error doctrine. *Id.* at 336 n.8. Because Clark "did not attempt to establish plain error on appeal," this claim failed and did not merit discussion. *Id.* Similarly, because appellant has not attempted to show that the alleged error in failing to give a

cautionary instruction amounted to plain error or affected her substantial rights, this claim fails.

III. The jury instructions given by the district court were correct.

a. Lesser-included-offense instruction

Appellant concedes that she did not request a lesser-included-offense instruction for careless driving, but asks this court to review the district court's failure to instruct the jury on careless driving in the interests of justice.

A defendant's failure to request a lesser-included-offense jury instruction generally results in forfeiture of the issue on appeal. *State v. Goodloe*, 718 N.W.2d 413, 422 (Minn. 2006). However, appellate courts have discretion to consider a district court's failure to give a jury instruction if it is plain error affecting substantial rights. *Id.* (citing Minn. R. Crim. P. 31.02). On plain-error review, the defendant must show that (1) there was error, (2) the error was plain, and (3) the error affected her substantial rights. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). Error is plain if it is clear or obvious and not hypothetical or debatable. *State v. Leutschaft*, 759 N.W.2d 414, 420 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). Error is usually plain if it "contravenes case law, a rule, or a standard of conduct." *State v. Hersi*, 763 N.W.2d 339, 344 (Minn. App. 2009) (quotation omitted). Error affects a defendant's substantial rights when it deprives her of a fair trial. *State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008). The defendant bears a "heavy burden" of showing that the error was prejudicial and affected the outcome of the case. *Id.* This "requires that the error have a significant effect on the verdict." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). If the three

prongs of the plain-error test are met, this court then decides whether it should address the error to ensure fairness and the integrity of the judicial proceedings, correcting the error only if the fairness, integrity, or public reputation of the judicial proceeding is seriously affected. *Goodloe*, 718 N.W.2d at 421.

Careless driving is a misdemeanor that occurs when a person operates or halts a vehicle "upon any street or highway carelessly or heedlessly in disregard of the rights of others, or in a manner that endangers or is likely to endanger any property or any person, including the driver or passengers of the vehicle." Minn. Stat. § 169.13. Criminal vehicular homicide occurs when a person operates a vehicle in a grossly negligent manner and thereby causes the death of another person. Minn. Stat. § 609.21, subd. 1(1). An "included defense" includes "[a] crime necessarily proved if the crime charged were proved" and "[a] lesser degree of the same crime." Minn. Stat. § 609.04, subd. 1. Careless driving is a lesser-included offense with respect to grossly negligent criminal vehicular homicide. *Al-Naseer*, 690 N.W.2d at 750-51.

Appellant cites *State v. Dahlin* for the proposition that a district court "must give a lesser-included offense instruction when 1) the lesser offense is included in the charged offense; 2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and 3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense." 695 N.W.2d 588, 598 (Minn. 2005). That determination entails viewing the evidence in the light most favorable to the party requesting the instruction, and the court may not weigh the evidence or make credibility determinations. *Id.* However, in that case the defendant had requested the lesser-

included instruction. *Id.* at 590. The *Dahlin* court "emphasize[d] that when a defendant fails to request a lesser-included offense instruction warranted by the evidence, the defendant impliedly waives his or her right to receive the instruction." *Id.* at 597-98. If a defendant has impliedly waived the lesser-included-offense instruction, the district court has discretion to give or withhold the instruction. *Id.* at 598.

Here, appellant waived her right to have a careless-driving instruction submitted to the jury by failing to request the instruction. *Cf. Goodloe*, 718 N.W.2d at 423. Further, a careless-driving instruction was not warranted by the evidence in this case. Careless driving contemplates "ordinary negligence." *Al-Naseer*, 690 N.W.2d at 752. Gross negligence differs in degree from ordinary negligence and contemplates "a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence," and has been defined as "very great negligence, or the absence of slight diligence, or the want of even scant care." *Id.* (quotation omitted).

In support of her claim that the evidence provided a rational basis for the jury to find ordinary negligence but not gross negligence, appellant claims that "the evidence demonstrates she drove competently." Appellant cites G.M.'s testimony that appellant's minivan passed G.M.'s vehicle and L.M.'s testimony that the minivan did not stop for the stop sign at the intersection and was moving excessively fast but "seemed to keep control" and did not lift into the air as it went over the railroad tracks.[3] Appellant also

[3] Appellant also cites her own testimony that Mendoza, who was driving the minivan, attempted to brake, but that it was too late to avoid colliding with the bus. Whether believed or disbelieved by the jury, appellant's own testimony plainly does not support

cites the testimony of Minneapolis Police Officer Ben Standahl that he had previously seen appellant driving the minivan approximately six times.

Officer Standahl's testimony at most permits the inference that appellant is capable of safe driving; this statement does not bear on her specific driving preceding the accident. G.M.'s testimony only indicates that appellant was driving fast. L.M.'s testimony likewise indicates that appellant was driving too fast and drove through a stop sign before driving into a school bus. The jury could have believed appellant's testimony that she was not driving, but there was no rational basis for the jury to conclude that appellant drove into the school bus negligently, but not grossly negligently. Thus, the district court's decision not to instruct the jury sua sponte on the lesser-included offense of careless driving was not plain error.

b. Alternative-perpetrator-defense instruction

Appellant argues that the district court abused its discretion by refusing to instruct the jury on appellant's alternative-perpetrator defense. The district court declined to give this instruction to the jury, but it did allow defense counsel to argue the point. As appellant points out, her defense was that she did not drive the minivan and that Mendoza did. The fact that she was driving was an element of the offense. It is inconceivable that the jury was somehow under the impression that it could convict appellant if it believed that she was not driving. Thus, appellant cannot show prejudice. *See* Minn. R. Crim. P. 31.01 (harmless error must be ignored).

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the conclusion that *she* was driving the minivan and attempted to stop but merely failed to do so.

A district court has discretion to refuse to give a requested jury instruction. *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). Although a party is entitled to the requested instruction if evidence exists to support it, if the substance of the instruction is already contained in the instructions when viewed as a whole, then the district court is not required to give the particular instruction requested. *Id.* Because the instructions did require the jury to find that appellant—and not Mendoza—was driving the van, appellant has not shown that the district court abused its discretion in refusing to specifically instruct the jury as to her alternative-perpetrator defense.

IV. Any prosecutorial misconduct did not substantially affect appellant's rights.

a. Closing argument

We first consider appellant's contention that the prosecutor misstated the evidence in closing argument. Appellant points to certain statements made in the prosecutor's closing argument. For instance, the prosecutor stated that appellant had testified "that they didn't try to brake, didn't try to swerve, ran right into the bus." A little later, the prosecutor stated, "There is zero evidence that anyone braked. . . . How do we know there wasn't any braking or swerving, or any attempts? From [appellant's] testimony yesterday, even though she wants you to believe someone else was behind the wheel, and from the witnesses." In fact, appellant testified that her boyfriend was driving and attempted to brake. While appellant's testimony cannot be fairly construed as testimony that *she* was driving and attempted to brake, it also cannot be construed, as it was in the state's closing argument, as testimony that she or her boyfriend *did not attempt to brake*. Apart from this misstatement of appellant's testimony, the prosecutor's statement—that

there was no evidence of braking—would be fair. Trooper Skoglund, the state's crash-reconstruction witness, testified that he estimated appellant's minivan to have been moving 46-50 m.p.h., and that the physical evidence associated with an attempt to swerve or brake was absent from the scene. Several witnesses also testified that appellant's minivan did not appear to slow down or brake before colliding with the bus. Appellant did not object to these statements by the prosecutor, so plain-error review applies.

The other alleged misstatements involve the prosecutor's recounting of Trooper Larsen's testimony about the statements made by appellant during the hospital interview as well as a subsequent interview. With respect to the second interview, defense counsel objected and moved to strike, which was sustained by the district court.[4] Appellant did not move for a mistrial. With respect to the hospital interview, the prosecutor's recap was basically that appellant told Trooper Larsen that she was driving Mendoza's minivan by herself and wearing a seatbelt, she stopped at a stop sign, she proceeded into the intersection, and the bus hit her. This is consistent with Trooper Larsen's testimony about her conversation with appellant, and therefore cannot support a claim of error.

It is prosecutorial misconduct to intentionally misstate the evidence or to make arguments that are not supported by the evidence. *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009); *State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006). During closing argument, a prosecutor may argue all reasonable inferences from the evidence in the record, but may not mislead the jury as to the inferences it may draw. *Bobo*, 770 N.W.2d

[4] According to Trooper Larsen's testimony, appellant had provided multiple stories at the second interview concerning who was driving, at one point indicating that Mendoza was driving and at another indicating that Mendoza made her drive.

at 142. Thus, the prosecutor's two statements that appellant had testified that she and her boyfriend did not brake or attempt to slow down were made in error, and we believe the error was plain.

Unobjected-to prosecutorial misconduct is reviewed under a modified plain-error test. The burden remains on the appellant to show that plain error occurred, but shifts to the state to prove lack of prejudice. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Thus, the state bears the burden of showing that the misconduct did not affect appellant's substantial rights. *See id.* The district court instructed the jury that "the arguments or other remarks of an attorney are not evidence in this case." The court also instructed the jurors to rely solely on their own memory of the evidence in the event that their recollection differed from how it was portrayed by the court or either attorney. "We presume that juries follow instructions given by the court." *State v. Matthews*, 779 N.W.2d 543, 550 (Minn. 2010). Moreover, the evidence was substantial in this case. It is implausible that the prosecutor's indication in closing argument that appellant had said that Mendoza did not attempt to brake had a substantial effect on the verdicts. Several witnesses, including Trooper Skoglund discussing forensic physical evidence, indicated that the minivan did not brake or substantially slow down. Defense counsel, in its closing argument, rebutted this point, telling the jury that "you heard her tell you that Francisco Mendoza drove that van and that he tried to stop at the last second when she yelled out at him." On this record, we conclude that the state has met its burden of showing that the prosecutor's erroneous statement did not affect appellant's substantial rights.

We now turn to appellant's contention that the prosecutor improperly interjected his personal opinion into the case. Appellant quotes two statements. First, the prosecutor stated, "As I indicated, that brings me into the reason that I believe the state proved without any doubt that [appellant] was driving, and that's the fact that she had to be extricated from the vehicle." Second, shortly thereafter the prosecutor was anticipating defense counsel's emphasis of the fact that appellant's DNA was not found on the airbags but that an undisclosed male's DNA was, and he stated, "Well, if you extend that argument, if there is no DNA from their client, should she have never been there? I mean, she was obviously there; she was obviously involved. She told you she was involved."

"It is not for the prosecutor to tell the jury what he believes the truth to be." *State v. McNeil*, 658 N.W.2d 228, 235 (Minn. App. 2003). Thus, the prosecutor "may not throw his own opinion onto the scales of credibility." *Id.* It is well established in the Minnesota courts that a prosecutor may not express his personal belief or opinion—or the opinion of "the state"—as to the truth or falsity of any evidence or the guilt of the defendant. *State v. Ture*, 353 N.W.2d 502, 517 (Minn. 1984); *State v. Gulbrandsen*, 238 Minn. 508, 511-23, 57 N.W.2d 419, 422 (1953); *State v. Bauer*, 776 N.W.2d 462, 474 (Minn. App. 2009), *review granted* (Minn. Mar. 16, 2010).

There is no merit to appellant's argument that the prosecutor's use of the word "obvious" expressed his personal belief as to the truth of evidence or appellant's guilt. In context, the prosecutor was arguing that the lack of appellant's DNA on the airbags was irrelevant because appellant was in the minivan. All of the evidence, including

appellant's own testimony, indicated that she was in the minivan—the dispute concerned whether appellant was *driving*.

The prosecutor's statement that he believed that the state proved beyond a reasonable doubt that appellant was the driver of the minivan is more troubling. The state likens this to cases in which no error was found where the prosecutor said "I submit to you" or "I suggest to you." *See State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000); *State v. Anderson*, 720 N.W.2d 854, 864 (Minn. App. 2006), *aff'd* 733 N.W.2d 128 (Minn. 2007). We reject this comparison. In contrast to "I submit," "I believe" indicates an opinion, and the prosecutor stated this opinion in regard to whether appellant was driving, which was heavily disputed and was the lynchpin of the state's case. Accordingly, it was plain error.

However, under plain-error review we must affirm unless the error substantially affected the verdict, that is, if the defendant was deprived of a fair trial. The district court instructed the jury that "the arguments or other remarks of an attorney are not evidence in this case." The court also instructed the jurors to rely solely on their own memory of the evidence in the event that their recollection differed from how it was portrayed by the court or either attorney. We presume that the jury followed these instructions. The jury most likely based its decision on the fact that appellant's right foot was pinned next to the pedals on the driver's side of the minivan, appellant's initial admission to Trooper Larsen and Sergeant Koenen that she was the one driving, and L.M.'s testimony that he was "pretty sure" he saw appellant driving, rather than the prosecutor's improper statements during closing argument.

b. Witness statements

Appellant contends that the state's repeated failure to "control its witnesses" was prejudicial prosecutorial misconduct. Appellate review of a prosecutor's conduct at trial to which the defendant objected is based on a two-tiered harmless-error test. *Bauer*, 776 N.W.2d at 471. In cases involving "unusually serious" prosecutorial misconduct, we reverse unless we are certain that the error was harmless beyond a reasonable doubt. *Id.* (quotation omitted). For cases involving "less-serious prosecutorial misconduct," the question is whether the conduct "likely played a substantial part in influencing the jury to convict." *Id.* (quotation omitted). Since this case is not one involving unusually serious prosecutorial misconduct, the second test applies.

Two witnesses made three inadmissible statements referring to appellant as "the driver." First, Trooper Larsen testified that when she arrived on the scene, "there was a driver still pinned behind the wheel." Appellant objected and counsel approached the bench, where defense counsel moved for a mistrial. The court explained that it had already ruled that the state's witnesses could describe what they saw but not speculate or conclude who was the driver, which was ultimately a decision for the jury. The prosecutor requested a recess to "remind the witness," and defense counsel stated that all of the state's witnesses should be reminded. The court ordered a recess and offered a curative instruction that the jury must disregard the objected-to statement, and defense counsel withdrew the motion for a mistrial.

Second, the state called Steven Knutson, a member of the Marshall Fire Department,[5] who testified that when he arrived on the scene he "was instructed by one of [his] chiefs to leave the truck and help extricate a trapped female driver of a minivan." Defense counsel asked to approach the bench, counsel approached, and defense counsel requested a mistrial. The prosecutor stated that he thought he had already instructed all of his witnesses multiple times not to call appellant the driver. The court granted a recess and agreed to defense counsel's request to instruct the jury to disregard that statement. The court informed counsel that "the state is on notice that it needs to make sure, doubly sure, triply sure, that its witnesses know the rulings in that regard." The court gave the curative instruction and held a recess for the jury, and defense counsel again withdrew the motion for a mistrial.

Shortly after the recess, Captain Knutson was explaining the process of extracting appellant from the minivan when the prosecutor asked whether he noticed "any cuts on the individual's hands or face." Captain Knutson responded, "I guess I really wasn't—I looked at her—the driver a couple times. I was more—we were more concerned with right now getting her leg out." Defense counsel objected on the grounds of "non-responsive[ness]," and the court instructed the witness to rephrase, at which point the prosecutor asked the question as a yes or no question and the witness responded "No." Defense counsel did not move for a mistrial or request a curative instruction.

[5] At the time of the accident, Knutson was a Lieutenant of the Marshall Fire Department; he was a Captain at the time of trial. We will refer to him as Captain Knutson.

Appellant observes that "[b]oth Larsen and Knutson were in official uniform, inherently placing an official imprimatur of credibility on their testimony." The transcript does not mention what either witness was wearing, so that is not part of the record. Their official positions, however, are part of the record and noteworthy. Even more than citizen eyewitnesses, professional state witnesses should not make this sort of mistake after being cautioned by the prosecutor more than once.

The state contends that these witness statements do not amount to prosecutorial misconduct or error because the responses were not intentionally elicited by the prosecutor. There is no evidence in the record indicating that the prosecutor intentionally elicited these statements, and the questions asked at trial by the prosecutor appear innocent. First, Trooper Larsen's reference to appellant as "a driver" followed the prosecutor's question "Was there?" in response to Trooper Larsen's statement that he went to see if anybody was in the minivan. Second, Captain Knutson's first reference to "a trapped female driver" was made in response to the prosecutor's question of what responsibility the firefighter had upon arriving at the accident scene. Third, Captain Knutson's subsequent reference to "the driver" was made in response to the prosecutor's question asking if there were "any cuts on the individual's hands or face."

But while a reviewing court is more likely to find prejudicial misconduct when the state intentionally elicits impermissible testimony, "Minnesota law is crystal clear [that] the state has an absolute duty to prepare its witnesses to ensure that they are aware of the limits of permissible testimony." *McNeil*, 658 N.W.2d at 232. A prosecutor has a duty to prepare his witnesses so that they "will not blurt out anything that might be inadmissible

and prejudicial." *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978). Thus, the inadmissible statements by the state's witnesses referring to appellant as the driver amount to error.

Because the prosecutor did not intentionally elicit this testimony, this falls within the second class of prosecutorial error—misconduct that is not "unusually serious." *Yang*, 774 N.W.2d at 559. "We review cases involving claims of less-serious prosecutorial misconduct to determine whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.*

The district court issued curative instructions after Trooper Larsen referred to appellant as "a driver" and after Captain Knutson referred to appellant as "a trapped female driver," which we presume the jury followed. *See Matthews*, 779 N.W.2d at 550. As the state points out, these were brief references by two witnesses in a lengthy trial. Neither witness indicated that he saw appellant driving; these comments were made in the context of the witnesses explaining their actions and understanding when they arrived on the scene. Given the fact that the issue of whether appellant was driving was heavily disputed at trial, and defense counsel in closing argument stressed that no witnesses had testified that appellant was the one driving because Mendoza was the driver, it cannot be said that the erroneous references to appellant as the driver likely played a substantial part in influencing the jury to convict.

We also note that defense counsel withdrew both mistrial motions following the erroneous testimony. The supreme court has explained that "[d]efense counsel may not attempt to get two bites at the apple" by making a strategic gambit at trial, and then, "if

the first trial does not produce the desired verdict," seeking a new trial. *State v. Jackson*, 714 N.W.2d 681, 694 n.1 (Minn. 2006). Defense counsel made the decision that not only were the district court's curative instructions sufficient to preserve a fair trial, but that proceeding with trial was a superior alternative to maintaining either motion for a mistrial. A defendant is entitled to one fair trial, not two. *Cf. State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) ("We note that the Constitution guarantees a fair trial—not a perfect or error-free trial.")

Affirmed.