STATE OF MINNESOTA
IN COURT OF APPEALS
A10-85

State of Minnesota,
Respondent,

vs.

Jessica Ann Reynolds,
Appellant.

Filed October 19, 2010
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-CR-09-5793

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

LARKIN, Judge

Appellant challenges her conviction of fifth-degree possession of a controlled substance, arguing that the prosecutor committed prejudicial misconduct by repeatedly

telling the jury, during closing argument, that it could acquit appellant only if it found that the state's main witness, a police officer, had lied while testifying. Because appellant did not object to this argument and the alleged error is not plain, we affirm.

FACTS

On February 27, 2009, St. Paul police officers executed a search warrant at appellant Jessica Ann Reynolds's home. Following the search, Reynolds was charged with fifth-degree possession of a controlled substance, and the case was tried to a jury.

At trial, Reynolds testified that she was in bed when the police entered her home. She got out of bed to investigate a thumping sound and was met by a police officer. She was handcuffed and ordered to sit on a couch.

Officer Heather Kuchinka testified that she was called to the scene to search Reynolds and her mother, T.R. Officer Kuchinka searched T.R. first. Officer Kuchinka found a rock of suspected crack cocaine in T.R.'s jeans pocket. Reynolds's brother and her boyfriend testified that Officer Kuchinka took other items from T.R. and threw them on the floor during the search, but Officer Kuchinka did not recall doing so. Officer Kuchinka testified that she was certain, however, that there was no crack cocaine on the floor before she searched Reynolds.

Shortly after searching T.R., Officer Kuchinka searched Reynolds in the same location where she had searched T.R. Officer Kuchinka testified that she pulled at the front of Reynolds's bra during the search and saw something fall to the floor, which appeared to be a rock of crack cocaine. Officer Kuchinka stated that she watched the

rock drop from knee-level to a spot between Reynolds's feet. Officer Kuchinka seized the rock, which was later determined to contain .09 grams of cocaine.

During closing argument, the prosecutor told the jury: "The defendant is guilty of this offense. And in order to find her not guilty you have to conclude that Officer Kuchinka was lying." At the conclusion of her closing statement, the prosecutor said:

> On February 27th, the defendant possessed cocaine. And in order to find she is not guilty you have to find that Officer Kuchinka lied. And in finding so, really there's no reason why Officer Kuchinka would lie. There is no reason why she would come here in court and lie about what she did on February 27th, and what she observed. I am asking you to find [Reynolds] guilty because she's in fact guilty.

Reynolds did not object to the prosecutor's closing argument. The jury found Reynolds guilty as charged, and the district court stayed imposition of sentence. This appeal follows.

D E C I S I O N

Reynolds argues that the prosecutor committed prejudicial misconduct by telling the jury that it could not acquit Reynolds unless it found that Officer Kuchinka lied during her testimony. Reynolds asks this court to reverse her conviction and remand the case for a new trial.

"The standard for prosecutorial misconduct (which would seem equally applicable to prosecutorial error) is that we reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009) (quotation omitted). "Furthermore, when, as here, there has been no objection to the alleged

improprieties, we apply the plain-error standard of review." *Id.* The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights. *State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (citing *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 1548-49 (1997))). The burden is on appellant to demonstrate that plain error occurred. *Id.* at 302. "[W]hen [appellant] demonstrates that the prosecutor's conduct constitute[d] an error that is plain, the burden would then shift to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Id.*

Reynolds likens the prosecutor's argument in this case to "were-they-lying" questions asked during cross-examination, which are generally impermissible. *See State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005) (holding that were-they-lying questions asked during cross-examination constituted plain error because they "shifted the jury's focus by creating the impression that the jury must conclude that these two witnesses were lying in order to acquit [the defendant]"); *State v. Pilot*, 595 N.W.2d 511, 516 (Minn. 1999) (holding that were-they-lying questions asked during cross-examination are "perceived as unfairly giving the jury the impressions that in order to acquit, they must determine that witnesses whose testimony is at odds with the testimony of the defendant are lying"). Were-they-lying questions are generally disfavored, and, in fact, "[i]t appears that a majority of jurisdictions that have considered the issue . . . have found them categorically improper." *Leutschaft*, 759 N.W.2d at 420.

> Although the courts in these jurisdictions have given various reasons for their holdings, the basis that is consistent among all is that such questions, and the answers thereto, are devoid of probative value. The other deficiencies those cases have identified are that such questions invade the province of the jury, are argumentative, are misleading, distort the government's burden of proof, tend to shift the burden of proof, are improper opinion evidence, invite mere speculation, constitute an unfair litigation tactic, and seek evidence beyond the witness's competence.

Id. at 421. Minnesota is in the minority on this issue, having "opted to decline a bright-line prohibition in favor of case-by-case resolution through the exercise of judicial discretion." *Id.* In Minnesota, were-they-lying questions are permissible "when the defendant [holds] the issue of the credibility of the state's witnesses in central focus." *Id.* (quotation omitted). "The 'central focus' test appears to apply when the defense *expressly* accuses opposing witnesses of falsehoods or fabrications." *Id.* at 422.

Reynolds also relies on *United States v. Reed* as support for her claim that the prosecutor's closing argument was improper. 724 F.2d 677, 681 (8th Cir. 1984). In *Reed*, the prosecutor argued that "for the jury to acquit Reed '[they] must determine that Mr. Reed is telling the truth and that all [the government witnesses] are lying to you.'" *Id.* The federal court concluded that "[t]his form of argument is improper because it involves a distortion of the government's burden of proof." *Id.*

The were-they-lying cases, as well as the opinion in *Reed,* tend to support Reynolds's allegation of error. As noted by the *Leutschaft* court, "credibility is a broader concept than truthfulness versus lying." 759 N.W.2d at 422. "[Credibility] also encompasses honest inaccuracy stemming from deficiencies in the ability or the

opportunity to acquire personal knowledge of the facts; honest but faulty recall; and honest but inadequate narrative on the witness stand, which may have numerous linguistic, cultural, and cognitive influences." *Id.* Therefore, were-they-lying questions "create[] a structural unfairness by providing only two choices when others not only might exist but also might be more likely." *Id.* That concern is relevant here. The prosecutor's argument that the jury could find Reynolds not guilty only if it determined that Officer Kuchinka had lied on the witness stand ignores other possible grounds to discredit her testimony, such as honest but faulty recall and mistake. Furthermore, as in *Reed*, the argument tended to create "a distortion of the government's burden of proof," 724 F.2d at 681, by shifting the jury's focus away from the proper inquiry—whether the state had proved the charged offenses beyond a reasonable doubt—and improperly framing the issue to be determined as whether Officer Kuchinka had lied.

The state counters that

> [t]he prosecutor's argument did not amount to plain error, because given the facts, the argument was accurate. . . . Kuchinka was not relating a subjective judgment or describing events that occurred in a confused or distant setting—she could not have been simply mistaken about something that happened in front of her nose. She was correct or she was lying.

But this argument incorrectly oversimplifies the analysis. The jury's determination of Officer Kuchinka's credibility was not limited to a determination of whether "[s]he was correct or she was lying." *See Leutschaft*, 759 N.W.2d at 422. The jury was permitted to consider whether Officer Kuchinka was simply mistaken, especially where Officer Kuchinka could not clearly recall, during direct examination,

facts related to the search, such as whether Reynolds was handcuffed during the search and whether the crack cocaine that fell from Reynolds was wrapped in plastic. We are therefore concerned that the prosecutor inappropriately attempted to limit the jury's assessment of witness credibility to a determination of whether Officer Kuchinka lied during her testimony and thereby distorted the state's burden of proof. However, given the absence of an objection to the prosecutor's argument,[1] the alleged error would not justify reversal unless it is plain.

"An error is plain if it was clear or obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotations omitted). An error cannot be plain when the law is unsettled and no binding precedent exists. *State v. Jones*, 753 N.W.2d 677, 684, 689 (Minn. 2008). Minnesota appellate courts have not applied the principles that underlie the were-they-lying line of cases to a prosecutor's closing argument. And *Reed* is a federal case, which is not precedential in this court. *See Robins v. Conseco Finance Loan Co.*, 656 N.W.2d 241, 246 (Minn. App. 2003) ("[D]ecisions from other states and federal courts are not precedential. . . ."). Although the reasoning behind *Reed* and the were-

[1] We note that if there had been an objection, the district court could have instructed the jury that its assessment of witness credibility was not limited to a determination of whether Officer Kuchinka lied during her testimony. The district court should consider providing an instruction regarding the assessment of witness credibility in any case in which a determination of guilt hinges on the assessment. *See State v. Larson*, 281 N.W.2d 481, 485 n.3 (Minn. 1979) ("We recommend that the jury be instructed to evaluate the credibility of witnesses by using the considerations set out in 4 Minnesota Practice, Jury Instruction Guides (2 ed.) Civil, JIG 21 G-S, which is equally valid for criminal as for civil cases."); 10 *Minnesota Practice*, CRIMJIG 3.12 (2006) (listing factors that a jury may consider when assessing a witness's credibility including relationship to the parties, manner, age and experience, frankness and sincerity, and any other factors that bear on believability and weight).

they-lying cases might seem to apply with equal force to a prosecutor's closing argument, this conclusion would not make the alleged error plain. Rather, it is an issue of first impression. And because the alleged error is not clear or obvious, it is not a basis for relief. *See State v. Crowsbreast*, 629 N.W.2d 433, 438 (Minn. 2001) (choosing not to consider whether an alleged error violated substantial rights after concluding that it was not plain).

Affirmed.

Dated:

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Judge Michelle A. Larkin