STATE OF MINNESOTA
IN COURT OF APPEALS
A10-309

State of Minnesota,
Respondent,

vs.

Fred Joseph Bona,
Appellant.

Filed January 25, 2011
Affirmed
Connolly, Judge

Olmsted County District Court
File No. 55-CR-09-817

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

Mark A. Ostrem, Olmsted County Attorney, Jeffrey D. Hill, Assistant 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 Connolly, Presiding Judge; Klaphake, Judge; and Halbrooks, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of driving under the influence of alcohol, driving a motor vehicle with an alcohol concentration of .08 or more as measured within

two hours of driving, and driving after suspension of his license, arguing that the prosecutor committed misconduct during closing argument by his remarks on reasonable doubt, to which appellant objected, and by remarks that appellant construed as pertaining to the burden of proof, to which appellant did not object. Because we see no error in the prosecutor's remarks, we affirm.

FACTS

Shortly after 1:00 a.m. on October 27, 2008, J.R. saw appellant Fred Joseph Bona walking away from a car accident. J.R., who lived nearby and heard the bang caused when a moving car hit a parked car, called the police; when an officer arrived, J.R. told him that he had seen the car's driver, an African-American male wearing a dark coat, walking east. The officer notified other officers in the area, one of whom found appellant, an African-American male wearing a dark coat, walking east about a block from the accident.

As the officer spoke to appellant, he noticed the strong odor of alcohol and the watery, bloodshot appearance of appellant's eyes. Appellant admitted to the officer that he had been driving the car and refused to take any field sobriety tests. The officer then took appellant back to the scene of the accident, where J.R. identified him as the man J.R. saw walking east after the accident. Appellant was taken to jail, where his alcohol concentration was determined to be .22.

Appellant was tried on three charges: driving under the influence of alcohol, driving a motor vehicle with an alcohol concentration of .08 or more as measured within two hours of driving, and driving after suspension. The identity of the driver is an

element of each of these crimes and needs to be proven beyond a reasonable doubt. *See* 10A *Minnesota Practice*, CRIMJIGS 29.02, 29.12, 29.36 (2006). In his opening statement, the prosecutor told the jury that the state had the burden of proving the elements of each crime.

The state's evidence on this element included the testimony of three witnesses. First, J.R. testified that he heard the crash and "saw the driver and the driver obviously was not happy at the time" and that the driver "was walking" and "was like five feet away from the driver's door." Second, an officer testified that he went to the accident scene and determined that the car was registered to appellant; that "[J.R.] had told me that . . . the driver had walked past him and went towards the post office"; and that J.R. later "identified [appellant] as the driver, as the person that walked past him" and that he "was certain" about his identification of appellant as the driver. Third, another officer testified that "when I arrived on the scene I pulled up next to [appellant] as he was walking and approached him. When I approached him he raised his arms up in—in the air" and that "I asked [appellant] if he had driven the vehicle that got in the accident. He said he did."

This testimony was unrefuted until appellant testified at trial that the driver of the car was a person named I.D. On cross-examination, appellant was questioned:

> THE PROSECUTOR: So who is this [I.D.] that apparently we're hearing about for the first time today?
> THE DEFENDANT: Well, just a guy. . . . Like I told you, I don't know him well. I just saw him that day . . . .
> . . . .
> THE PROSECUTOR: And you never told the police officer that this guy was driving? In fact, you never told him about this guy at all, did you?
> THE DEFENDANT: No.

> THE PROSECUTOR: Why not?
> . . . .
> THE DEFENDANT: Because he wasn't—he was asking me are you driving the car. . . . I thought maybe he was asking me . . . this was your car or are you the one driving the car.
> . . . .
> THE PROSECUTOR: And [the officer] testified that you told him that you were driving and got into an accident. . . . And are you saying that [the officer is] lying about that?
> THE DEFENDANT: No. He wasn't lying about that because, you know, he—he was pressuring me, he was asking me question and I—I thought he was asking me that's, you know, the car you driving . . . .
> THE PROSECUTOR: So you never denied driving to him either, did you?
> THE DEFENDANT: At that moment, no.
> THE PROSECUTOR: You never told him about this other guy that was driving, this [I.D.]?
> THE DEFENDANT: No.
> THE PROSECUTOR: Why not?
> THE DEFENDANT: Like I said, he was pressuring me and it was the way he was talking and just he didn't give me any chance to explain myself more.
> . . . .
> THE PROSECUTOR: In fact, this is the first time this has come out, is today, right?
> THE DEFENDANT: Yes.
> THE PROSECUTOR: That there was this other driver?
> THE DEFENDANT: Well, yes.
> THE PROSECUTOR: Okay.
> THE DEFENDANT: We were—I just told our attorney.

In closing argument, the prosecutor discussed reasonable doubt:

> [It's d]oubt based on reason and common sense, I should say. It's not beyond all doubt. It's not a fanciful doubt. For instance, I—I maybe can't prove to you that there aren't little green men on the far side of the moon . . . . And you may believe there are little green men on the moon because I can't prove it. But I would suggest to you that's a fanciful belief . . . . Because of the fact that man's been on the moon . . . . We know that that would be a fanciful doubt for someone to

> actually believe that . . . or that the moon, for instance, is made of cheese. . . .

Defense counsel objected on the ground that reasonable doubt is "[what] a reasonable man would find doubt in, not stuff like if the moon is made of cheese." The objection was overruled. The prosecutor continued:

> [Reasonable doubt is] not beyond all doubt. Can't be beyond all doubt. It's a reasonable doubt. Doubt based on reason and common sense.
> . . . .
> Look at all the evidence in the case and what makes sense. And then if you have a doubt you have to ask yourself is it a reasonable doubt, because if it's not a reasonable doubt then the State's proven its case. It's okay to have some doubt. I'll repeat that. It's okay to have some doubt. It's got to be a reasonable doubt in order for the State to not meet its burden.
>
> Now, [appellant] wants you to believe that he was not driving. . . . He wants you to believe that someone named [I.D.] was driving that car. Well, he never tells the officer that the night of the incident. In fact, what he tells the officer is I was driving. Today he's changed his story. Oh, no, somebody named [I.D.] was driving. . . . I said is this the first time you mentioned that is today and he agreed, yeah, that's the first time he's mentioned that. First time it's come up.
>
> We don't even know if [I.D.] is a real person. . . . We don't even know if that person exists.

The jury found appellant guilty on all three counts. Appellant did not move for a new trial and now challenges his convictions on the ground that the prosecutor's comments on reasonable doubt and the burden of proof were prosecutorial misconduct.

D E C I S I O N

I. Reasonable doubt

Appellant objected to the prosecutor's remarks on reasonable doubt. Objected-to prosecutorial misconduct is reviewed under a harmless-error test, "the application of

which varies based on the severity of the misconduct." *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007). Serious misconduct is harmless beyond a reasonable doubt if "the verdict rendered was surely unattributable to the error"; less-serious misconduct is reviewed to determine if "the misconduct likely played a substantial part in influencing the jury to convict." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003) (quotation omitted).[1]

The misconduct alleged by appellant was the prosecutor's effort to illustrate a non-reasonable, or fanciful, doubt by asserting that it would be fanciful, rather than reasonable, to doubt the information produced by study and exploration of the moon and believe that the moon is inhabited by little green men or is made of cheese. Appellant argues that the prosecutor's comments "confused and misled the jury and caused them [sic] to misunderstand the law" and that the statements "confused the jury on the difference between a doubt based on reason and common sense and one that was merely fanciful." But when viewed in context, the prosecutor's statements provide a distinction between a doubt based on reason and a fanciful doubt. The former is supported by common sense; the latter disregards information that common sense would accept as accurate. "[C]ourts must look at the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence, to determine whether reversible error has occurred." *State v. McDaniel*, 777 N.W.2d

[1] *But see Wren*, 738 N.W.2d at 390 n.9 (noting that *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006), "applied the higher harmless beyond a reasonable doubt standard without reference to the seriousness of the misconduct").

739, 751 (Minn. 2010) (quotation omitted). The prosecutor's statements would not have caused the jury to misunderstand the law on reasonable doubt.

Appellant also argues that the prosecutor's comments were confusing because, unlike the example in which science provides a basis to reject beliefs in any connection between the moon and little green men or cheese, "there was no evidence or basis in fact to reject [appellant's] testimony." But the testimony of three other witnesses provided a basis for rejecting appellant's testimony that someone else was driving the car. The prosecutor's statements on reasonable doubt were not error and were certainly not misconduct.[2]

Even if the prosecutor's statements were considered to be serious misconduct, the misconduct was harmless: the jury's verdict could not be attributed to those statements. *See Powers*, 654 N.W.2d at 678. Appellant's own testimony that he admitted to, and did not deny, being the driver of the car when questioned by an officer at the scene would have removed any reasonable doubt on that point. Assuming that any misconduct was less serious, it did not likely play a substantial part in influencing the jury to convict appellant. *See id*.

Finally, appellant argues that the prosecutor's comments impermissibly belittled his defense that he was not the driver because "[t]he prosecutor's point was that anyone

[2] *See State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009) (distinguishing prosecutorial misconduct, which "implies a deliberate violation of a rule or practice, or perhaps a grossly negligent transgression," from prosecutorial error, which "suggests merely a mistake of some sort, a misstep of a type all trial lawyers make from time to time" and noting that prosecutorial error may nevertheless "theoretically . . . be egregious enough to deprive a defendant of a fair trial"), *review denied* (Minn. Mar. 17, 2009).

thinking that [I.D.] was driving would be likely to believe there were little green men on the moon or the moon was made of cheese—in other words, that person would be a fool." But a review of the closing argument shows that the prosecutor's references to the moon were solely in connection with the concept of reasonable doubt; they were not connected to appellant's testimony. The prosecutor did assert that there was no merit to appellant's defense that he was not the driver by pointing out that appellant had previously admitted being the driver and had not asserted the existence of another driver prior to trial, but a prosecutor is permitted "to specifically argue that there is no merit to a particular defense." *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993).[3]

The prosecutor's comments on reasonable doubt were not error and, in any event, would not have influenced, much less induced, the jury's verdict.

II. Burden of proof

Appellant did not object to the prosecutor's remarks on the burden of proof. "[W]e have determined that the plain error doctrine applies to unobjected-to prosecutorial misconduct." *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). "[T]he burden [is] on the nonobjecting defendant to demonstrate both that error occurred and that the error was plain." *Id.* at 302. If the defendant meets this burden, "the burden would then shift to the

[3] *But see State v. Porter*, 526 N.W.2d 359, 363-64 (Minn. 1995) (concluding that prosecutor's statement that, if jurors believed defense's witness, "I got time share in Santa Claus's condo at the north pole, and I will sell you some. You are not that big of suckers . . . ." was "intended to inflame the jury's passions and prejudices" and "a blatant attempt to impinge on juror independence" and was misconduct). *Porter* is readily distinguishable: the fanciful image (Santa Claus) there was mentioned to accuse the jurors of stupidity if they believed the witness. *See id.* at 363. The fanciful image in the present case was mentioned to illustrate a belief that would not be reasonable.

state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Id.*

Appellant has not met his burden. He argues that the prosecutor's comment that no one knew if I.D. really existed was misconduct because it could have led the jury to infer that "the state did not need to prove that [I.D.] was not driving." But appellant misstates the state's burden: the state had to prove that appellant *was* driving, not that any other person *was not* driving. The state met its burden with the testimony of three witnesses. Appellant cites no comment of the prosecutor in relation to the burden of proof that meets the standard for plain error, i.e., "contravenes case law, a rule, or a standard of conduct." *Id.*

Even if appellant could meet his burden, the state could show that any such comment did not affect appellant's substantial rights. Again, the closing argument must be considered as a whole; individual statements cannot be taken out of context to provide a basis for reversal. *McDaniel*, 777 N.W.2d at 751. As in *McDaniel*, here "the [s]tate clarified several times that it has the burden of proving each element of the offense . . . ." *Id.* Moreover, the district court told the jury that "[t]he burden of proving guilt is on the State" and that the first element of each charge against appellant was that he was driving a motor vehicle. A jury is presumed to follow the district court's instructions. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). Thus, the jury knew the state had to prove appellant was driving. The prosecutor's statements about the dubious existence of I.D. did not inaccurately represent the state's burden of proof, were not plain error, and are not a basis for reversal.

We see no error in either the prosecutor's comments on reasonable doubt or his statement that no one knew if I.D. really existed.

Affirmed.