STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1939

State of Minnesota,
Respondent,

vs.

Richard Paul Richey,
Appellant.

Filed December 12, 2011
Affirmed in part, reversed in part, and remanded
Hudson, Judge

St. Louis County District Court
File No. 69DU-CR-09-1676

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

Mark S. Rubin, St. Louis County Attorney, Leslie E. Beiers, Assistant St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate State Public Defender, Jessica Merz Godes, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

HUDSON, Judge

On appeal from his conviction of second-degree assault, appellant argues that prosecutorial misconduct constituted plain error and requires a new trial. In addition, appellant argues that a clerical error in appellant's warrant of commitment requires correction. We conclude that, although the prosecutor did engage in prosecutorial misconduct, these errors did not affect appellant's substantial rights, and accordingly, we affirm appellant's conviction. But we reverse and remand to correct appellant's warrant of commitment.

FACTS

A jury convicted appellant Richard Richey of second-degree assault in violation of Minn. Stat. § 609.222 (2008), based on evidence that appellant stabbed an acquaintance, J.Y., in the chest with a sword during a multi-person altercation at J.Y.'s apartment.

The jury heard testimony that appellant and J.Y. encountered each other the night of the stabbing at a bar where J.Y. and his friend, R.O., were drinking beer. Appellant entered the bar and approached J.Y. and R.O. Appellant and J.Y. began arguing, which escalated into a fistfight between J.Y., R.O., and appellant, as well as several other bar patrons. After the fight, the men left the bar. The fight resumed at J.Y.'s apartment.

When appellant, appellant's nephew, and another friend arrived at the apartment, R.O. came into the hallway outside J.Y.'s apartment carrying a mace[1] and a hammer.

[1] A mace is a medieval club with a spiked head used to crush armor. *The American Heritage Dictionary* 1076 (3d ed. 1996).

R.O. hit appellant in the face with the mace and hit appellant's nephew in the face with the hammer. Inside the apartment, appellant and J.Y. wrestled for a medieval sword J.Y. had borrowed that night from a neighbor. J.Y. fell to the apartment floor, and appellant used the sword to stab him.

At trial, four witnesses to the altercation at J.Y.'s apartment—three of whom participated in the fight—testified for the prosecution. Appellant's cousin, who was present at the bar, and appellant's nephew, who also was involved in the fight, testified for the defense. The witnesses offered differing accounts of what occurred at J.Y.'s apartment.

At trial, appellant raised the issue of self-defense. The district court's jury instructions stated that the prosecution carried the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense and that self-defense imposes a duty to retreat or avoid the danger at issue, if possible. Additionally, the district court told the jurors before closing arguments to disregard any statement of law argued by the attorneys that was inconsistent with the law in the jury instructions. The district court also instructed jurors on the defendant's right to not testify.

In its closing argument, the state argued that J.Y., and not appellant, defended himself from attack. The prosecutor also referred to the issue of self-defense as a claim by appellant and indicated that appellant was asking the jury to prove he had acted in self-defense. Additionally, the prosecutor stated that self-defense applies to people acting inside their homes and imposes a duty to retreat. The prosecutor also told the jury that appellant had no right to be in J.Y.'s secure apartment building and alluded to appellant's

failure to testify. Finally, the prosecutor stated, "We're here because somebody needs to care." The prosecutor also asked the jury to care about the victim and to do the right thing. Appellant's attorney did not object to any portion of the prosecutor's closing argument and, in his own closing argument, did not dispute any statements made by the prosecutor.

The jury found appellant guilty, and the district court sentenced appellant to 21 months. The warrant of commitment issued by the district court incorrectly states the subdivision of Minn. Stat. § 609.222 under which appellant was convicted. This appeal follows.

D E C I S I O N

I

Prosecutorial misconduct not objected to at trial is analyzed under a plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). The standard requires (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If appellant establishes the first two prongs, the burden shifts to the state to establish a lack of prejudice and that the misconduct did not affect the case's outcome. *Ramey*, 721 N.W.2d at 302. This burden is met if the state can show that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Id.* If the three prongs are satisfied, the court then assesses whether "fairness and the integrity of the judicial proceedings" require addressing the error. *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010). Finally, we may reverse a conviction for prosecutorial misconduct in the interests of justice even if appellant was not

prejudiced. *State v. DeRosier*, 695 N.W.2d 97, 106 (Minn. 2005) ("A reviewing court also retains, under its supervisory power, the right to reverse prophylactically or in the interests of justice, without a further finding of prejudice.") (quotation omitted)).

Appellant argues that the prosecutor committed five instances of prosecutorial misconduct during closing argument, specifically: (1) improperly shifting the burden of proof, (2) alluding to appellant's failure to testify, (3) aligning with the jury and appealing to the jury's sympathy, (4) misstating the law of self-defense, and (5) arguing facts not in evidence.

A. Shifting the burden of proof

"Misstatements of the burden of proof are "highly improper and . . ., if demonstrated, constitute prosecutorial misconduct." *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). Appellant argues that the state, in its closing argument, improperly shifted the burden of proof on self-defense from the state to appellant.

In his closing argument, the prosecutor stated, "[I]t's kind of hard to understand *a claim* of self-defense . . . . What in his own words what did you hear that [appellant] told the officers? 'I didn't stab anybody. I didn't stab anybody.' How can you then *ask a jury* to say, well, it was self-defense." (Emphases added.) The prosecutor later stated in his closing argument, "Does he say anything to the police that he stabbed [J.Y.] in self-defense? From what you've heard in the evidence, no. How in the world can you be asked *to prove* [sic] that what he did was in self defense." (Emphasis added.)

Once a defendant raises the issue of self-defense, the state carries the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. *State v.*

McKissic, 415 N.W.2d 341, 344 (Minn. App. 1987). But the state is not precluded from vigorously arguing its case, including that the evidence does not support a particular defense. *State v. Davis*, 735 N.W.2d 674, 682–83 (Minn. 2007).

We agree with appellant that the prosecutor's use of the words "claim," "ask," and "prove" improperly shifted the burden of proof to the defense and constituted plain error. An error is plain if it "contravenes caselaw, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. Once appellant satisfied his burden of production with respect to self-defense, it was no longer a "claim" made by him but an element on which the state had the burden of proof. Thus, the use of such words by the prosecutor could have led the jury to think that because appellant "claimed" self-defense, he therefore carried the burden of "proving" the elements. Furthermore, the prosecutor failed to minimize any potential confusion in his closing argument or rebuttal by reminding the jury that the burden of proving that appellant did not act in self-defense rested with the state. *Cf. State v. McDaniel*, 777 N.W.2d 739, 751 (Minn. 2010) (finding any confusion regarding prosecutor's possible misstatement of burden of proof minimized by prosecution restating state's burden numerous times during closing argument).

But we conclude that the prosecutor's error did not substantially affect appellant's rights. If the defendant establishes plain error, the state must then show that the prosecutorial misconduct did not have a significant effect on the jury's verdict. *Ramey*, 721 N.W.2d at 302. We consider "the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *Davis*, 735 N.W.2d at 682.

Appellant's attorney could have addressed the prosecutor's burden-shifting error in closing argument. Instead, appellant's attorney emphasized his theory of the case that J.Y., not appellant, was the aggressor. Additionally, the district court minimized the impact of the prosecution shifting the burden by properly instructing the jury on the state's burden of proof for self-defense and further instructing the jury to disregard arguments that differed from the law provided by the district court. Juries are presumed to follow the district court's instructions. *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005) (citing *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002)).

Because appellant had an opportunity to respond to the prosecutor's error in shifting the burden and the district court properly instructed the jury on the burden of proof, we conclude that the prosecutor's improper burden shifting did not prejudice appellant's right to a fair trial.

B. Alluding to appellant's failure to testify

Appellant argues that the prosecutor committed misconduct and plain error by alluding to appellant's failure to testify. Alluding to a defendant's failure to testify constitutes prosecutorial misconduct. *Ramey*, 721 N.W.2d at 300. Indirect references to a defendant's failure to testify are prohibited if they (1) manifest the prosecution's intention to call attention to a defendant's failure to testify or (2) are of such a nature that the jury would have taken them to be a comment on a defendant's failure to testify. *DeRosier*, 695 N.W.2d at 107.

In his closing argument, the prosecutor stated, "Members of the jury, [J.Y.] got assaulted by [appellant] from what you've heard here. From what you've heard in the

evidence he didn't act in self-defense." The prosecutor then stated, "Does [appellant] say anything to the police that he stabbed [J.Y.] in self-defense? From what you've heard in the evidence, no." The state admits the argument "may have been somewhat inartful" but contends it was an accurate summary of the evidence.

We conclude that the prosecution committed plain error by referring to what the jury did *not* hear in evidence on the issue of self-defense. The jury could easily have understood the reference as a comment on appellant's failure to testify. But our analysis does not end there. We must now determine if the prosecutor's statement is per se reversible error and, if not, we then apply a harmless-error analysis. *DeRosier*, 695 N.W.2d at 107–08. Misconduct related to a statement regarding a defendant's refusal to testify is per se reversible "if (1) the comment is extensive, (2) the comment stresses to the jury that an inference of guilt from silence is a basis for conviction, and (3) there is evidence that could have supported acquittal." *Id.* at 107. Based on our careful review of the record, we conclude that none of these three factors applies to the prosecutor's comments alluding to appellant's failure to testify.

Thus, we inquire whether, absent the improper statement, "it [is] clear beyond a reasonable doubt that the jury would have returned a guilty verdict." *Id.* at 108 (quotation omitted). As in *DeRosier*, where the court concluded that the prosecutor's error was harmless, the district court judge in this case instructed the jury on the defendant's right to not testify, the defense did not object to the prosecutor's comment, and, taken with other evidence, the comment appeared to have minimal cumulative

effect. Accordingly, we conclude that the prosecutor's plain error in alluding to appellant's failure to testify was harmless error.

C. Prosecutor aligned himself with jury and appealed to its sympathy

Appellant argues that the prosecutor committed misconduct by aligning himself with the jury and appealing to the jury's sympathy. "A prosecutor's closing argument should be based on the evidence presented at trial and inferences reasonably drawn from that evidence. It should not be calculated to inflame the passions of the jury or prejudice the jury against the defendant." *State v. DeWald*, 463 N.W.2d 741, 744–45 (Minn. 1990).

In his closing argument, the prosecutor stated, "Remember when [appellant's nephew] was on the witness stand, I think the last question I asked him, 'Do you care who stabbed [J.Y.]?' What was his response. 'No.' We're here because somebody needs to care." Later, the prosecutor stated, "Members of the jury, maybe [appellant's nephew] doesn't care who stabbed [J.Y.], but we should. On behalf of [J.Y.], on behalf of the people in whose name this lawsuit has been brought, I'm asking you to care." Additionally, the prosecutor stated, "All you can do is rely on your common sense and ask [sic] you to do what's right."

Statements that inflame the jury are particularly harmful when credibility is a central issue in a case. *State v. Mayhorn*, 720 N.W.2d 776, 787 (Minn. 2006). As appellant argues, credibility was a central issue regarding who was the aggressor in the fight that ended with J.Y.'s stabbing. At trial, the prosecutor bookended his closing argument with appeals to the jury's sympathy and three times improperly appealed to the passions of the jury. In light of the cumulative nature of these appeals and the

inappropriateness of the statements, the prosecutor's comments constituted misconduct, and that misconduct was plain error. But, again, we conclude that appellant's right to a fair trial was not prejudiced. *See State v. Greenleaf*, 591 N.W.2d 488, 506 (Minn. 1999) (concluding prosecutor's statement to jury to "do the right thing" comes close to detracting from jury's role, but is not so prejudicial as to require a reversal).

Although the prosecutor committed misconduct that constituted plain error on three occasions in his closing argument, we conclude that these errors, on their own or collectively, do not rise to the level of egregious prosecutorial misconduct that would require the court to reverse in the interests of justice. *Cf. State v. Salitros*, 499 N.W.2d 815, 820 (Minn. 1993) (reversing conviction in interests of justice based on prosecutor's improper comments, which included denigrating defense by stating that constitutional rights were not designed as shield for guilty and asking jurors to teach defendant a lesson). But we caution prosecutors about the use of language in their closing arguments that could lead to shifting the burden of proof, alluding to a defendant's failure to testify, or appealing to the jury's sympathies. Under different circumstances, such language may warrant reversal in the interests of justice. Here, the district court issued proper instructions to the jury, and we presume the jury followed these instructions. Additionally, the prosecutor's statements did not consume the argument. *State v. Cao*, 788 N.W.2d 710, 718 (Minn. 2010) (finding potential misconduct not pervasive when statements covered three lines of fifteen-page closing argument). Appellant also chose to not address the prosecutor's errors at trial, all of which leads us to conclude that the errors were not so harmful as to require correction in the interests of justice.

D. Misstatement of law and arguing facts not in evidence

Appellant's two remaining claims of prosecutorial misconduct are not without merit, but we discern no plain error. Specifically, appellant argues that the prosecutor misstated the law of self-defense by implying that self-defense applies only to those acting in their own homes and imposes on the defendant an absolute duty to retreat. When considering claims of prosecutorial misconduct, we evaluate a closing argument as a whole, rather than taking remarks out of context. *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008). The prosecutor's statement that appellant did not have the right to use any type of force against J.Y. in his own apartment, taken literally, is a misstatement of the law. As appellant notes, this statement implies that appellant had no right to use any force against J.Y. in J.Y.'s apartment, including reasonable force to defend himself. But upon review of the prosecutor's argument in its totality, the record suggests that the prosecutor may have been arguing that appellant could not lawfully use force to seek revenge when he stated that appellant did not have the "right to use any type of force" at J.Y.'s apartment. The state is not precluded from vigorously arguing its case, including claiming that the evidence does not support a particular defense. *Davis*, 735 N.W.2d at 682–83. We conclude that the prosecutor's potential misstatement of the law, when examined in the context of the whole closing argument, did not constitute plain error.

Additionally, the prosecutor did not commit plain error in stating that the use of self-defense is accompanied by a duty to retreat. The prosecutor stated in his closing argument, "[I]f you're going to legitimately act in self-defense first you have a duty to retreat." Appellant argues that the prosecutor's statement is an incorrect statement of the

law because the duty to retreat is limited by requiring retreat only if reasonably possible. The prosecutor's statement on the duty to retreat is nearly identical to the district court's instruction, which told jurors that a defendant employing self-defense has two options to satisfy the good-faith requirement: retreat or avoid the danger if reasonably possible. The prosecutor chose to repeat one of the two options laid out by the district court, and therefore the statement was not plain error.

Finally, appellant argues that the prosecutor committed misconduct by arguing facts not in evidence when the state argued that appellant had no right to be in J.Y.'s building because he lacked permission to be there. Misconduct includes intentionally misstating evidence. *Mayhorn*, 720 N.W.2d at 788. But a closing argument may draw reasonable inferences from the evidence presented at trial. *DeWald*, 463 N.W.2d at 744.

The record includes evidence that appellant may have been invited to the building but also that the apartment was located in a secure building. As the state argues, it is logical to infer that a secured building is intended to prohibit unauthorized individuals from entering. The prosecution drew a permissible logical inference that, because the building was secure, appellant should not have entered it. The prosecutor did not err by arguing facts not in evidence.

II

Appellant argues that his warrant of commitment should be corrected because it incorrectly identifies the crime for which appellant was convicted. The state does not oppose correction of appellant's warrant of commitment.

Appellant was charged with second-degree assault under Minn. Stat. § 609.222, subd. 2, which requires proof that a person assaulted another using a dangerous weapon and inflicted substantial bodily harm. But because the prosecution did not provide substantial-bodily-harm evidence, the parties agreed to instruct the jury as to subdivision 1 of the statute, which requires only that the assault be committed with a dangerous weapon. The district court may allow amendment of a complaint at any time before the jury reaches a verdict so long as no additional charges are added and the defendant's substantial rights are not prejudiced. *State v. Reed*, 737 N.W.2d 572, 580 (Minn. 2007); Minn. R. Crim. P. 17.05. Additionally, at appellant's sentencing, the district court noted that the docket incorrectly indicated the appellant was convicted under Minn. Stat. § 609.222, subd. 2, and that appellant was instead convicted under Minn. Stat. § 609.222, subd. 1. The prosecutor agreed with the district court's statement regarding appellant's conviction.

The warrant of commitment, however, states that appellant was convicted under subdivision 2. A defendant's formal adjudication of guilt "is usually determined by looking at the official judgment of conviction." *State v. Plan*, 316 N.W.2d 727, 729 (Minn. 1982). Here, the official judgment of conviction states that appellant was convicted of second-degree assault under Minn. Stat. § 609.222, subd. 2. Clerical mistakes apparent on the face of the district court record may be corrected by referencing the record. *Wilson v. City of Fergus Falls*, 181 Minn. 329, 332, 232 N.W. 322, 331 (1930). We therefore reverse and remand for the correction of appellant's warrant of commitment to state that appellant was convicted under Minn. Stat. § 609.222, subd. 1.

Affirmed in part, reversed in part, and remanded.