STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0057

State of Minnesota,
Respondent,

vs.

Jermon Anderson Schwatka,
Appellant.

Filed December 9, 2013
Affirmed
Johnson, Judge

Crow Wing County District Court
File No. 18-CR-12-3415

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

Donald F. Ryan, Crow Wing County Attorney, Bruce F. Alderman, Assistant County Attorney, Brainerd, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

JOHNSON, Judge

A Crow Wing County jury found Jermon Anderson Schwatka guilty of making terroristic threats based on evidence that he threatened to kill his neighbors during an argument about their barking dogs. On appeal, Schwatka challenges his conviction on multiple grounds and his sentence. We affirm.

FACTS

In July 2012, Schwatka was residing in the city of Brainerd. During the afternoon of Thursday, July 26, at approximately 3:30 p.m., Schwatka took a walk to "cool off" after arguing with his mother by telephone. As he walked past the home of a neighbor, K.T., the neighbor's dogs barked. Schwatka yelled at the dogs to "[s]hut the f--k up." When the dogs did not quiet, Schwatka picked up a stick, broke it across his knee, and began walking toward the dogs.

At the same time, K.T. heard his dogs barking and went outside. K.T.'s girlfriend, T.H., followed him. K.T. yelled at the dogs to quiet down and then noticed Schwatka walking toward him. Schwatka yelled at K.T. and threw one half of the broken stick at K.T.'s dogs. K.T. and T.H. testified at trial that Schwatka stated that he was going to "f--king kill" the dogs, that he would "shut them up," and that he was going to "take care" of K.T. and the dogs. Schwatka, however, testified that he said, "If you can't get the dogs to shut the f--k up, I can help you if you like." Schwatka maintained that this was a genuine offer to train the dogs and that this was the extent of the confrontation.

K.T. and T.H. further testified as follows. During the exchange, Schwatka stepped onto K.T.'s front yard. K.T. said to Schwatka, "Get off my property." Schwatka initially complied by dropping the other half of the stick and walking toward the street. But then he suddenly turned around and "stormed" toward K.T. and T.H., who were standing on the steps of K.T.'s home. As he approached them, Schwatka repeatedly said, "I'm going to f--king kill you. I'm going to f--king kill your dogs." Schwatka stopped four feet in front of T.H. and K.T., grabbed a handful of landscaping rocks, and threw the rocks at both of them. One of the rocks hit K.T. in the neck, causing him to bleed. Schwatka left after K.T. told T.H. to call the police.

Officer Timothy Glen Friis of the Brainerd Police Department responded to T.H.'s 911 call and interviewed both K.T. and T.H. Officer Friis testified that K.T. appeared shaky, nervous, and excited, and that K.T. said that the incident had "definitely affected him." Officer Friis noted a slight cut on K.T.'s neck. Officer Friis also testified that T.H. was "shaken up" and that her tone of voice indicated that she was excited and nervous.

Officer Friis then went to Schwatka's residence to speak with him about the incident. Schwatka stated to Officer Friis that he and K.T. had a "heated conversation" but that he let it go and went home. During this conversation, Schwatka "kept himself under control" but appeared "excited" and "angry about something." Officer Friis arrested Schwatka for assault and trespassing.

When Officer Friis was booking Schwatka at the county jail, Schwatka became "more aggressive and resistant." Schwatka puffed out his chest and took a strong stance to "intimidate" officers. Schwatka told them that it "was going to take ten officers to take

him to the booking room," that the officers did not "want to know what's in store" for them once they opened the door, that he could not control his actions without his medication, and that he had "assaulted officers in the past because officers did not listen to his needs or requests." Law-enforcement officers were able to "talk him down," and the booking process was completed at approximately 4:45 p.m.

In July 2012, the state charged Schwatka with one count of making terroristic threats, in violation of Minn. Stat. § 609.713, subd. 1 (2012); one count of fifth-degree assault with intent to cause bodily harm, in violation of Minn. Stat. § 609.224, subd. 1(2); and one count of fifth-degree assault with intent to cause fear, in violation of Minn. Stat. § 609.224, subd. 1(1).

The case was tried in September 2012. K.T. and T.H. testified about the incident as described above. K.T., a former security guard, testified that his "blood went cold" as Schwatka approached him. K.T. testified that the look in Schwatka's eyes left "no doubt that he was meaning business." T.H. testified that Schwatka "looked like he wasn't there" and looked "like he was going to kill us."

Schwatka testified in his own defense as described above. He also called his girlfriend, D.R., to support his claim that he did not threaten K.T. or throw rocks. D.R. testified that she was standing outside Schwatka's residence, which was near K.T.'s residence, at the time of the incident and could see Schwatka the entire time. She testified that she saw Schwatka throw a stick at the dog kennel and say, "What are you going to do?" She testified that she saw a further exchange between K.T. and Schwatka but could not hear it. She testified that she saw Schwatka leave and then re-enter K.T.'s

property. She testified that she did not see Schwatka throw any rocks. Officer Friis and K.T. testified during the state's rebuttal case that they did not see D.R. in the area that day.

The jury found Schwatka guilty of making terroristic threats and fifth-degree assault with intent to cause fear. The jury found Schwatka not guilty of fifth-degree assault with intent to cause bodily harm. The district court sentenced Schwatka to 32 months of imprisonment for the conviction of making terroristic threats, the maximum presumptive sentence for that offense, and vacated the conviction of fifth-degree assault with intent to cause fear. Schwatka appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Schwatka argues that the evidence is insufficient to support his conviction of making terroristic threats. Specifically, he contends that the evidence is insufficient to prove that he had the requisite intent to terrorize because he was upset about his neighbor's dogs and was expressing mere transitory anger. In his *pro se* supplemental brief, Schwatka reiterates the argument made by his appellate attorney.

Schwatka may be found guilty of making terroristic threats if the state proves that he (1) threatened K.T. with the purpose to terrorize him or (2) recklessly disregarded the risk of causing such terror. *See* Minn. Stat. § 609.713, subd. 1. The word "terrorize" in this context means "to cause extreme fear by use of violence or threats." *State v. Schweppe*, 306 Minn. 395, 400, 237 N.W.2d 609, 614 (1975). A "threat" is a "declaration of an intention to injure another or his property by some unlawful act,"

communicated either by acts or words. *Id.* at 399, 237 N.W.2d at 613. Under the recklessness prong of this offense, "declaring the intent to injure by an unlawful act constitutes a terroristic threat when the person who utters the statement recklessly disregards the risk of terrorizing another." *State v. Bjergum*, 771 N.W.2d 53, 57 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009). "Recklessness requires deliberate action in disregard of a known, substantial risk." *Id.*

When reviewing the sufficiency of evidence to support a conviction, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction," is sufficient to allow jurors to reach a verdict of guilty. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). We "will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

Intent to terrorize generally is proven with circumstantial evidence "by drawing inferences from the defendant's words and actions in light of the totality of the circumstances" and from a victim's reaction to a threat. *State v. Smith*, 825 N.W.2d 131, 136 (Minn. App. 2012), *review denied* (Minn. Mar. 19, 2013) (quotation omitted). When reviewing the sufficiency of evidence to support a conviction that depends on circumstantial evidence, we apply a two-step test to evaluate the circumstantial evidence.

State v. Andersen, 784 N.W.2d 320, 329-30 (Minn. 2010). First, we "identify the circumstances proved." *Id.* at 329 (quotation omitted). At this first step, we "defer . . . to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id.* (quotation omitted). Second, we "examine independently the reasonableness of all inferences that might be drawn from the circumstances proved," including "inferences consistent with a hypothesis other than guilt." *Id.* (quotation omitted). At this second step, we "give no deference to the fact finder's choice between reasonable inferences." *Id.* at 329-30 (quotation omitted). Circumstantial evidence supporting a conviction must be "consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 330. "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010) (quotation omitted). Nonetheless, "the trier of fact is in the best position to determine credibility and weigh the evidence" and we "will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *Id.* (quotation omitted).

As noted above, Schwatka's argument focuses on whether the state proved that he intended to terrorize. His brief urges this court to narrowly interpret the statute criminalizing terroristic threats. He contends, quoting *State v. Marchand*, that the legislature did not intend to proscribe "the kind of verbal threat which expresses transitory anger rather than settled purpose to carry out the threat or to terrorize the other

person." 410 N.W.2d 912, 914-15 (Minn. App. 1987) (quotation omitted), *review denied* (Minn. Oct. 21, 1987).

In this case, the circumstances proved are within the scope of the statute. Schwatka said to his victims, "I'm going to f--king kill you" several times while "storming" toward them. K.T. testified that Schwatka looked "like he was going to kill" T.H. and him and that "there was no doubt he was meaning business." Both K.T. and T.H. testified to being scared during the incident. A police officer testified that K.T. appeared shaky, nervous, excited, and "quite fearful" soon after the incident. These circumstances support an inference that Schwatka intended to terrorize K.T. and cannot reasonably be interpreted in any other way. Even if Schwatka did not specifically intend to terrorize K.T., the circumstances proved nonetheless would support an inference that he disregarded a substantial risk that his actions would cause terror. *See* Minn. Stat. § 609.713, subd. 1.

Thus, the evidence is sufficient to support Schwatka's conviction of making terroristic threats.

II. Transitory Anger Instruction

Schwatka next argues that the district court erred by not instructing the jury that a person does not engage in the offense of making terroristic threats if he is motivated by mere "transitory anger."

A district court must instruct the jury in a way that "fairly and adequately explain[s] the law of the case" and does not "materially misstate[] the applicable law." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011). A district court has "considerable

latitude" in selecting language for jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). Accordingly, this court applies an abuse-of-discretion standard of review to a district court's jury instructions. *Koppi*, 798 N.W.2d at 361.

On prior occasions, this court has held that a district court does not err by declining to instruct a jury on "transitory anger." *E.g.*, *State v. Dick*, 638 N.W.2d 486, 492-93 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002); *State v. Lavastida*, 366 N.W.2d 677, 680 (Minn. App. 1985). In fact, the phrase "transitory anger" does not appear in the statute setting forth the offense of terroristic threats. *See* Minn. Stat. § 609.713. Furthermore, a transitory-anger instruction might be inconsistent with the statute, which allows the state to prove guilt based on a reckless disregard of the risk of causing terror. *See id.*

Thus, the district court did not err by not giving the "transitory anger" jury instruction requested by Schwatka.

III. Post-Arrest Conduct

Schwatka next argues that the district court erred by admitting Officer Friis's testimony concerning Schwatka's aggressive and threatening behavior while he was being booked at the county jail. Schwatka contends that such evidence concerns other bad acts and, thus, is inadmissible *Spreigl* evidence. In his *pro se* supplemental brief, Schwatka reiterates the argument made by his appellate attorney.

Before jury selection, counsel addressed the district court concerning the issue of the admissibility of this evidence. The state contended that the evidence is relevant to

Schwatka's state of mind during the incident at K.T.'s home. Schwatka contended that the evidence is irrelevant because it concerns a separate incident, which followed the incident at K.T.'s home by more than an hour. The parties' respective arguments focused solely on the relevance and probative value of the evidence. At no time did either party mention Minnesota Rule of Evidence 404(b) or *State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). Rather, both parties focused on the applicability of an unpublished opinion, *State v. Philipp*, No. C8-02-1485, 2003 WL 22233559 (Minn. App. Sept. 30, 2003), *review denied* (Minn. Dec. 16, 2003), which considered whether a similar type of evidence was relevant and probative of the appellant's intent to engage in the offense of making terroristic threats. *Id.* at *2-3. The *Philipp* opinion does not discuss *Spreigl* evidence. *See id.* The district court ruled provisionally that the evidence is admissible on the ground that it is relevant to Schwatka's state of mind on the same afternoon in which he allegedly engaged in criminal conduct. The district court allowed counsel to revisit the issue the following day, before opening statements. At that time, the parties again focused on *Philipp*, and the district court confirmed its earlier ruling that the evidence is admissible.

Schwatka's argument is governed by a rule of evidence that states, in relevant part:

> Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Minn. R. Evid. 404(b). Schwatka's actions and statements during booking, which occurred after the incident for which he was charged, fall within the scope of rule 404(b) because they are other bad acts. If evidence is to be admitted pursuant to rule 404(b), certain procedural safeguards must be taken. The state must, among other things, give notice of its intent to offer the evidence and prove the defendant's participation in the other crime or bad act by clear and convincing evidence. *Id.*; *Spreigl*, 272 Minn. at 490, 139 N.W.2d at 169.

Although Schwatka objected to the state's evidence, he did not object on the ground that the evidence is inadmissible *Spreigl* evidence. Rather, he raises a *Spreigl* argument for the first time on appeal. Accordingly, we review for plain error. *See* Minn. R. Crim. P. 31.02. Under the plain-error test, we may not grant appellate relief unless (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is "plain" if it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, we then consider the fourth requirement, whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted). When determining whether the admission of *Spreigl* evidence results in plain error, the precise question is whether the trial court failed to *sua sponte*

strike the evidence or to provide a cautionary instruction. *State v. Vick*, 632 N.W.2d 676, 685 (2001).

In this case, the record does not reveal whether the parties or the district court considered whether the state's evidence is admissible pursuant to rule 404(b) and *Spreigl*. Schwatka's argument to the district court was phrased solely in terms of whether his post-arrest behavior was relevant and probative, and the district court's ruling was responsive to the argument that was made. Because we are reviewing for plain error, the relevant question is whether the district failed to conduct a *Spreigl* analysis and exclude the state's evidence on a *sua sponte* basis. *See Vick*, 632 N.W.2d at 685. Based on the manner in which the evidentiary issue was presented to the district court, we cannot say that the district court should have excluded the evidence of Schwatka's actions and statements during booking on its own initiative based on *Spreigl*.

Thus, the district court did not plainly err by admitting evidence of Schwatka's post-arrest conduct and statements.

IV. Prosecutorial Misconduct

Schwatka next argues that the prosecutor committed misconduct on several occasions during trial. Schwatka challenges one comment made during the prosecutor's opening statement and several comments made during the prosecutor's closing argument.

"Due process guarantees in our state and federal constitutions include the right to a fair trial." *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005). Prosecutorial misconduct may deny a defendant's right to a fair trial. *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).

A. Opening Statement

Schwatka argues that the prosecutor engaged in misconduct during his opening statement on September 11, 2012, by improperly referencing the terrorist attacks of September 11, 2001. The prosecutor stated:

> I should probably ask the Judge about this before I say what I'm going to say -- and I don't want to appear to be smiling, I don't want to appear to be condescending, I don't want to appear to be ingratiating, but obviously today is September 11 --

Schwatka's counsel interrupted the prosecutor's comment with an objection, which the district court sustained. Later, outside the presence of the jury, the prosecutor explained that his purpose was to let the jury know that, on the anniversary of the September 11 terrorist attacks, the parties had the victims of the tragedy and their families in their thoughts and prayers.

A prosecutor may not "introduce issues broader than the guilt or innocence of the accused into his argument." *State v. Spaulding*, 296 N.W.2d 870, 876 (Minn. 1980). Similarly, it is misconduct for a prosecutor to attempt to impassion the jury by linking a criminal defendant to a notorious crime. *State v. Thompson*, 578 N.W.2d 734, 743 (Minn. 1998) (holding that prosecutor's comparison of defendant to O.J. Simpson had no purpose but to "impassion the jury"); *State v. Angulo*, 471 N.W.2d 570, 575 (Minn. App. 1991) (holding that prosecutor's comparison of appellant to Manuel Noriega during closing statements was misconduct), *review denied* (Minn. Aug. 2, 1991).

In this case, the prosecutor's reference to 9/11 was improper. There is no correlation whatsoever between Schwatka's guilt or innocence of the charge of making

terrorist threats on July 26, 2012, in Brainerd, and the terrorist attacks of September 11, 2001. Whatever the prosecutor's intentions, his comment created a risk that jurors would become impassioned by their memories of the event and bring it to bear on the evidence concerning whether Schwatka is guilty of making terroristic threats. The risk posed by the comment may not have been significant because the two events are so obviously distinct from each other, but it was a risk nonetheless. Thus, the prosecutor engaged in misconduct by referring to 9/11.

The state contends that the prosecutor's remark is harmless. This court applies a two-tiered harmless-error test to prosecutorial misconduct. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). If the misconduct is "unusually serious," we will reverse a conviction unless there is "certainty beyond a reasonable doubt that misconduct was harmless." *Id.* But if the misconduct is "less serious," we ask "whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.* A single objectionable statement may be deemed "less serious." *State v. Steward*, 645 N.W.2d 115, 122-23 (Minn. 2002); *see also State v. Bauer*, 776 N.W.2d 462, 472-73 (Minn. App. 2009), *aff'd on other grounds*, 792 N.W.2d 825 (Minn. 2011) (noting that two brief comments were "less serious"). In this case, the prosecutor made a short inappropriate remark during his opening statement, which was interrupted by an objection before it was concluded. This statement qualifies as "less serious" misconduct.

We next must determine whether the misconduct "likely played a substantial part in influencing the jury to convict." *Yang*, 774 N.W.2d at 559. Less-serious misconduct is less likely to affect a jury's verdict if the district court sustains a defendant's objection.

Steward, 645 N.W.2d at 122-23; *Bauer*, 776 N.W.2d at 472-73. The strength of the state's evidence and the relative length of the comment also are factors. *See State v. Wren*, 738 N.W.2d 378, 394-95 (Minn. 2007); *State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006). In this case, the district court promptly sustained Schwatka's objection and later instructed the jury to disregard it. In addition, the state's evidence was strong. K.T. and T.H. testified to Schwatka's actions and words. The responding officer testified that both victims appeared visibly shaken by the confrontation with Schwatka. Schwatka admitted to being angry to some extent and to confronting K.T. and T.H. The primary issue for the jury was whether Schwatka intended to terrorize K.T. For these reasons, it is unlikely that the prosecutor's reference to 9/11 substantially affected the jury's verdict. Even if the misconduct had risen to the level of being "unusually serious," the strength of the evidence in support of Schwatka's guilt is overwhelming, and the misconduct would be harmless beyond a reasonable doubt. *See Yang*, 774 N.W.2d at 559.

B. Closing Argument

Schwatka also argues that the prosecutor engaged in misconduct during his closing argument, first, by disparaging defense counsel and interjecting his personal view of the state's trial strategy and, second, by vouching for his own credibility and the credibility of his office.

Schwatka did not object to these allegedly inappropriate comments. This court applies a modified plain-error standard of review if a party fails to object to a prosecutor's alleged misconduct. *Ramey*, 721 N.W.2d at 299-300. Under the modified plain-error test, "the defendant must establish both that misconduct constitutes error and

that the error was plain." *Wren*, 738 N.W.2d at 393. "The defendant shows the error was plain 'if the error contravenes case law, a rule, or a standard of conduct.'" *Id.* (quoting *Ramey*, 721 N.W.2d at 302). "The burden then shifts to the state to demonstrate that the error did not affect the defendant's substantial rights." *Id.* The state must show "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Ramey*, 721 N.W.2d at 302 (quotations omitted).

1. Disparaging Defense Counsel

Schwatka argues that the prosecutor committed misconduct by making the following statement: "It upsets me greatly that [defense counsel], a man who wouldn't even let me this morning talk about 9/11, accuses me of being pretty much heartless . . . ."

It is inappropriate for a prosecutor "to disparage the defense in closing arguments." *State v. Bailey*, 677 N.W.2d 380, 403 (Minn. 2004) (quotation omitted); *see also State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). Also, it is improper to make character attacks in closing arguments. *Bailey*, 677 N.W.2d at 404; *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004). In addition, a prosecutor should not raise issues unrelated to innocence or guilt or attempt to impermissibly link a defendant to a notorious crime. *See Spaulding*, 296 N.W.2d at 876; *Thompson*, 578 N.W.2d at 743. Here, the prosecutor's second reference to 9/11, which related back to defense counsel's prior meritorious objection to the prosecutor's first reference to 9/11, clearly is improper. The statement had no purpose other than to cast the defense counsel in a negative light. The prosecutor

knew that defense counsel's prior objection was proper because the district court had sustained the objection. The prosecutor's second reference to 9/11 obviously was inconsistent with the district court's earlier ruling. The prosecutor's second reference to 9/11 plainly constitutes misconduct.

Nonetheless, the misconduct does not constitute reversible error because "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *See Ramey*, 721 N.W.2d at 302 (quotation omitted). We must view a closing argument as a whole because an individual statement "may be taken out of context or given undue prominence to determine whether reversible error has occurred." *State v. Munt*, 831 N.W.2d 569, 587 (Minn. 2013) (quotation omitted). We consider three factors to determine whether prosecutorial misconduct in closing argument affects a defendant's substantial rights: "(1) the strength of the evidence against the defendant; (2) the pervasiveness of the improper conduct; and (3) whether the defendant had an opportunity (or made efforts) to rebut the prosecutor's improper suggestions." *State v. Hill*, 801 N.W.2d 646, 654-55 (Minn. 2011).

In this case, the state has carried its burden of showing that the prosecutor's second reference to 9/11 was harmless. First, as previously discussed, the state's evidence in this case was strong. Second, the reference to 9/11 was not pervasive. Third, Schwatka did not have a compelling need to respond because the district court already had indicated that 9/11 was both irrelevant and improperly raised, and jurors are presumed to follow the court's instructions. *See State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998). Thus, the prosecutor's second reference to 9/11 constitutes harmless error.

2. Vouching

Schwatka argues that the prosecutor committed misconduct by providing his personal views of the prosecutorial strategy and vouching for his own credibility and the credibility of his office. The statements Schwatka challenges are as follows:

> Now I'm a little angry. [Defense counsel] stands up here and tells you that I intentionally pointed out that [Schwatka's girlfriend] was a homeless person and he thought that was unfair. Let me tell you why I asked her the question I did about where she was living. [Defense counsel] had a telephone call with [Schwatka's girlfriend] and wrote up a little statement of what they talked about. In that telephone conversation [Schwatka's girlfriend] told [defense counsel] that she was living with the Defendant.
>
> I don't know but I have a real good idea that she was not living with the Defendant in that house. That's the only reason I asked her about that. It makes no difference to me if she lives in a mansion, if she's homeless. I don't care about any of that. . . . .
>
> I also take great offense at [defense counsel's] insinuation that a charge comes into the County Attorney's Office at one level and we basically manufacture a higher level charge and send it out the door. The County Attorneys are charged with the duty to act as ministers of justice. The County Attorneys don't charge things just to charge things. The County Attorneys review police reports, which in this instance came from the City Attorney's Office at his request for our review to take a look at it. That was done and the charges were charged.

"[A] prosecutor should not refer to facts not in evidence or vouch for the veracity of any particular evidence." *State v. McArthur*, 730 N.W.2d 44, 53 (Minn. 2007); *see also In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. App. 2006). It also is improper for a prosecutor to interject his personal opinion into argument. *See State v.*

James, 520 N.W.2d 399, 405 (Minn. 1994). A prosecutor's improper argument in response to defense counsel's improper argument is nonetheless improper and may constitute prosecutorial misconduct. *See United States v. Young*, 470 U.S. 1, 11-13, 105 S. Ct. 1038, 1044-45 (1985).

The state contends that these statements are not misconduct because they were a response to Schwatka's counsel's closing argument. The state notes that Schwatka's counsel criticized the prosecutor for asking Schwatka's girlfriend whether she was a homeless person. The state also notes that Schwatka's counsel criticized the prosecutor's charging decision by stating that Schwatka's arrest "went in as a fifth degree assault and came out of the County Attorney's office as a terroristic threats." Under the circumstances, Schwatka has not established misconduct that is plainly erroneous. *See Wren*, 738 N.W.2d at 393. Schwatka's counsel was permitted to criticize the prosecutor's handling of the case, which provides the prosecutor with some leeway to respond to the criticism during his rebuttal argument. In doing so, the prosecutor did not vouch for the credibility of a witness. Thus, Schwatka cannot establish plain error in this part of the closing argument.

V. Evidence of Knives

In his *pro se* supplemental brief, Schwatka argues that the district court erred by "using two knives against him that had nothing to do with the incident." Schwatka contends that evidence of the knives "put . . . fear in the jury's eyes to work against him."

In response, the state argues that, at trial, it did not introduce into evidence, or attempt to introduce into evidence, any knives or any testimony about knives. The state

notes, however, that at the sentencing hearing, a law-enforcement officer testified that Schwatka possessed two large knives and attempted to hide them from his supervised-release agent. Schwatka did not object to the admission of the officer's testimony. Schwatka objected to the prosecutor's attempt to admit the knives into evidence, and the district court sustained the objection.

We interpret Schwatka's *pro se* argument to be a challenge to the admission of the officer's testimony at the sentencing hearing. Because Schwatka did not object, we apply the plain-error test. *See* Minn. R. Crim. P. 31.02; *Griller*, 583 N.W.2d at 740-41. The rules of evidence do not apply at a sentencing hearing. Minn. R. Evid. 1101(b)(3). Furthermore, a district court is required to "allow the record to be supplemented with relevant testimony." Minn. R. Crim. P. 27.03, subd. 1(7)(c). In the absence of a rule of exclusion, Schwatka cannot show that the district court plainly erred by admitting the officer's testimony about the knives.

Affirmed.