STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0864

State of Minnesota,
Respondent,

vs.

Brittany Ann Vacko,
Appellant.

Filed March 20, 2017
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-CR-15-2417

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Amie Penny Sayler, Special Assistant Public Defender, Jessica Kometz (certified student attorney), Bassford Remele, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

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

LARKIN, Judge

Appellant challenges her convictions of perjury and forgery, arguing that the district court violated her right to present a complete defense, that the state engaged in prosecutorial misconduct, and that the cumulative effect of the purported trial errors deprived her of her right to a fair trial. We affirm.

FACTS

Respondent State of Minnesota charged appellant Brittany Ann Vacko with two counts of perjury and one count of forgery. The complaint alleged that Vacko falsified a phone-log exhibit and made false statements regarding her address during a hearing on her earlier petition for a harassment restraining order (HRO) against R.T. A jury found Vacko guilty of all charges. The district court sentenced Vacko to a 15-month stayed prison term and placed her on probation for five years. Vacko appeals.

D E C I S I O N

I.

Vacko contends that "[t]he district court abused its discretion when it sustained the state's objections to relevant testimony, which prevented [her] from being able to present a full defense." Specifically, she argues that the district court did not allow her to present her version of the facts.

The Due Process Clauses of the United States and Minnesota Constitutions afford criminal defendants "a meaningful opportunity to present a complete defense." *State v. Quick*, 659 N.W.2d 701, 712 (Minn. 2003) (quotations omitted). But a defendant does not

have a right to introduce irrelevant evidence. *State v. Crims*, 540 N.W.2d 860, 866 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). Relevant evidence means evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Irrelevant evidence is not admissible. Minn. R. Evid. 402.

Evidentiary rulings "will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). An appellant must show that the district court abused its discretion and that the appellant was prejudiced. *Id.* Appellate courts review evidentiary rulings for an abuse of discretion, "even when it is claimed that the exclusion of evidence deprived the defendant of his constitutional right to present a complete defense." *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006).

Vacko argues that the district court erroneously excluded her testimony regarding why she had multiple home addresses. The state alleged that Vacko used a false St. Paul address in her HRO petition. Vacko claimed that she was transitioning from the St. Paul address to a Forest Lake address. She testified as follows until the state objected that her testimony was narrative:

> Q: Can you explain why you were living [at the St. Paul address] in early 2014?
> A: Because my son he has autism spectrum disorder and he has trouble with change and transitions. He had, sorry, he had a hard time transitioning. He would have meltdowns, bang his head on the floor, he wouldn't eat. It was a huge change from living with [J.] for a while so that was where we were staying most of the time until we would transition him slowly into the house in Forest Lake.
> Q: How long did that transition take?

> A: The house in Forest Lake it took—he got better in about, about nine months, about eight to nine months it took.
> Q: And was it after that eight, nine month period that you just moved in all at once?
> A: No, it was, it was a long period of transitioning like slowly. Well we had our household stuff there mostly like common house stuff but my son's comfort items and our basic living stuff was at [J.'s] but we would bring his comfort stuff to the place in Forest Lake. We would maintain consistency because that is what is key with him. He needs consistency. He's very rigid. He needs routine. He's very rigid and is routine based so we would bring that stuff. Eventually we would cook a meal there. We spent a couple of nights there—and this was all throughout while he was getting extra treatment and therapy for his autism so it was.
> [Prosecutor]: I'm going to object, Your Honor move to strike. It's becoming a narrative.
> THE COURT: Sustained.

The district court instructed the jury to disregard the last sentence of Vacko's testimony.

The district court has discretion to prohibit narrative testimony and did not abuse its discretion by sustaining the state's objection. *See* Minn. R. Evid. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses . . . so as to (1) make the interrogation and presentation effective for the ascertainment of the truth . . . .").

Vacko also argues that the district court erred by sustaining objections on relevancy grounds when Vacko's attorney asked, "[O]ther than slowly transitioning . . . your son, into the new living space what else did you do to address his needs," and when her attorney asked why her son did not "take" to a particular apartment. Vacko argues that her credibility was at issue and that her testimony that she had multiple addresses due to her son's special needs was relevant to the jury's credibility determination.

The district court allowed Vacko to generally testify that her multiple addresses stemmed from her attempt to meet her son's special needs. More specific testimony regarding her son's individual needs and why her son did not acclimate to a particular apartment was not relevant. The district court did not abuse its discretion by excluding such testimony.

Vacko further argues that the district court improperly excluded testimony intended to explain why she was unaware of her husband's multiple phone numbers. She testified as follows:

> Q: Do you know what phone number your husband had at that time?
> A: No. We've had multiple phone numbers from harassments so.
> [Prosecutor]: Move to strike the answer should have just been no.
> THE COURT: Sustained. . . . .
> Q: Why can't you recall what your husband's cell phone number was?
> A: Because we've had a lot of different—
> [Prosecutor]: Objection, irrelevant.
> THE COURT: Sustained.

Vacko argues that the reason she did not know her husband's phone number "was an important piece of information that the jury needed to . . . assess her credibility." Given Vacko's previous attempt to present irrelevant details regarding her son's special needs, we understand the district court's reluctance to allow Vacko to explain that her lack of recall was due to harassment that she and her husband allegedly had suffered. We therefore cannot say that the district court abused its discretion.

II.

Vacko contends that "[t]he state committed prosecutorial misconduct throughout [her] trial that played a significant role in the jury's decision" to find her guilty.

This court's standard of review for prosecutorial-misconduct claims depends on whether the defendant objected at trial. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). If the defendant objected, this court follows a two-tiered approach. *Id.* For serious misconduct, "the misconduct is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error," whereas less serious misconduct is harmless unless "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).

A defendant who fails to object ordinarily forfeits the right to appellate review. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). However, this court may review unobjected-to prosecutorial misconduct if plain error is shown. Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). A plain-error claim based on prosecutorial misconduct has three requirements: (1) the prosecutor's unobjected-to act must constitute error, (2) the error must be plain, and (3) the error must affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302. The defendant has the burden of showing error that is plain. *Id.* If plain error is established, the burden shifts to the state to show that the error did not affect the defendant's substantial rights. *Id.*

Badgering and Were-they-lying Questions

Vacko argues that the state impermissibly badgered her during cross-examination, relying on *State v. Beecroft*, which states, "in determining whether the State has infringed

on a defendant's constitutional right to present a complete defense by interfering with a witness," appellate courts consider "whether the government actor's interference with a witness's decision to testify was substantial." 813 N.W.2d 814, 839 (Minn. 2012) (quotation omitted). Substantial interference "occurs when a government actor actively discourages a witness from testifying through threats of prosecution, intimidation, or coercive badgering." *Id.* (quotation omitted).

Vacko argues that the state continually asked her the same questions multiple times during cross-examination, "in an attempt to coerce [her] into admitting that she knew [a] document at issue . . . was forged." Vacko concludes, "This constitutes coercive badgering, which substantially interfered with [her] right to present a complete defense." Given that Vacko testified at trial and continued to testify after the alleged badgering, we fail to see how the persistent questioning constitutes badgering under *Beecroft*. *See id.* at 840 (concluding that state actors had substantially interfered with two potential witnesses by making it too risky to their careers to testify at trial).

Vacko also argues that the state's cross-examination included improper "were they lying" questions. "Were they lying" questions ask the defendant to comment on the truthfulness of another witness's testimony and are generally inappropriate. *See State v. Morton*, 701 N.W.2d 225, 233, 235 (Minn. 2005) (concluding that the state had asked "were they lying" questions by asking the defendant, "[S]o Janet Spencer wasn't telling the truth when she was on the stand?" and "so Catherine Cox is not telling the truth?"); *State v. Pilot*, 595 N.W.2d 511, 517-18 (Minn. 1999) (noting that the state had asked the defendant to "comment on the veracity of three of the state's witnesses" before concluding

that the prosecutor's "were they lying" questions were permissible). These questions are "perceived as unfairly giving the jury the impression that in order to acquit, it must determine that the witness whose testimony contradicts the defendant's testimony is lying." *Morton*, 701 N.W.2d at 233. Here, the state did not ask Vacko to comment regarding the truthfulness of any witness's testimony. Thus, the were-they-lying doctrine is inapplicable.

Improper Closing Argument

Vacko argues that the "entirety of the State's closing argument is rife with improper comments that belittle [her]." In determining whether the state committed prosecutorial misconduct during a closing argument, this court looks to the "the closing argument as a whole, rather than to selected phrases and remarks." *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009) (quotation omitted). "The determination of the propriety of a State's closing argument is within the sound discretion of the [district] court." *Id.* (quotation omitted).

Vacko first asserts that "[t]he state committed serious misconduct when it disparaged [Vacko] and her defense." The state has the right to vigorously present its case and may argue that the evidence does not support particular defenses. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). "[T]he state's argument is not required to be colorless." *Id.* However, the state "may not belittle [a] defense either in the abstract or by suggesting that the defendant raised the defense because it was the only one with any hope for success." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016). The state also cannot argue that a defense is the type of defense raised when "nothing else will work." *State v. Griese*, 565 N.W.2d 419, 427 (Minn. 1997) (quotation omitted). For example, the prosecutor

cannot argue, "What kind of defense could you raise in a drug case?" and suggest, "What might work? Okay. So there was cocaine in my bag, but I didn't put it there and I don't know how it could have gotten there." *See State v. Williams*, 525 N.W.2d 538, 548-49 (Minn. 1994); *see also State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993) (concluding that the prosecutor improperly argued: "What do you typically hear about a rape case? You hear about the defense attorney putting the victim on trial. They do that because they focus the attention away from the client").

Vacko asserts that the following statements by the prosecutor were impermissibly disparaging: "[Vacko] cannot possibly believe that this is true," "It did not happen and there is no way that [Vacko] was somehow mistaken about that," and "[Vacko] did not believe the statement to be true." These statements are not comparable to the impermissibly disparaging statements in the caselaw.

Vacko next asserts that the prosecutor improperly stated his personal opinion regarding her credibility. A prosecutor may not "give [his] own opinion about the credibility of a witness in closing argument." *State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn. 2006). This rule prevents "exploitation of the influence of the prosecutor's office." *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005) (quotation omitted). However, the prosecutor may argue that particular witnesses were or were not credible. *State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007).

Vacko complains that the prosecutor repeatedly indicated she was a liar and not believable. Vacko argues that the "most concerning instance" was the statement, "[Vacko] understands the psychology on how to persuade. This is what is kind of scary here is she

understands the bigger the lie the more persuasive it is." Vacko's complaints are without merit because the prosecutor did not state a personal opinion regarding her credibility. Instead, he permissibly argued why the jury should not believe her.

Lastly, Vacko asserts that the state improperly shifted the burden of proof in its closing argument by stating, "Let's give [Vacko] the benefit of the doubt and say the phone is in the Vacko family, okay." She argues that "[b]y saying this to the jury, the State insinuated that Ms. Vacko had the responsibility of proving her innocence." Vacko did not object to the statement during trial. We therefore review for plain error. *See Ramey*, 721 N.W.2d at 302 (an appellate court reviews unobjected-to trial errors, including prosecutorial misconduct, for plain error).

The state's "misstatement of the burden of proof is highly improper and constitutes misconduct." *State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009) (quotation omitted). The state improperly shifts the burden of proof when it implies that a defendant has the burden of proving her innocence. *Id.* Misstatements of the burden of proof are curable with final jury instructions. *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986) (concluding that the allegedly improper statements by the prosecutor were mitigated because the "trial court, in its final instructions, reiterated that the burden of proving guilt rests with the state and that the defendant has no burden of proving innocence").

The prosecutor's use of the phrase "benefit of the doubt" might confuse a jury because "doubt" suggests a connection to "beyond a reasonable doubt." However, the district court instructed the jury before closing arguments that the presumption of innocence "remains with the defendant unless and until the defendant has been proven

guilty beyond a reasonable doubt" and that "the burden of proving guilt is on the state." The district court also instructed the jury after closing arguments that "if an attorney's argument contains any statement of law that differs from the law I give you disregard the statement." In *Race*, the supreme court concluded that similar instructions mitigated any misstatements by the prosecutor regarding the burden of proof. 383 N.W.2d at 664.

Considering the prosecutor's closing argument as a whole and the district court's correct instructions regarding the burden of proof, Vacko has not shown that the prosecutor's single "benefit of the doubt" statement constitutes plain error. *See Graham*, 764 N.W.2d at 356 (stating that the reviewing court considers the prosecutor's closing argument as a whole). She is therefore not entitled to relief under the plain-error standard.

III.

Vacko contends that "the collective effect of [the] errors is unmistakable: [she] was deprived of a fair trial." The cumulative effect of numerous errors may deprive a defendant of her right to a fair trial. *Mayhorn*, 720 N.W.2d at 792. Because Vacko has not shown any error, there are no errors to aggregate, and Vacko's cumulative error claim fails.

IV.

In Vacko's reply brief, she "moves to strike" several factual assertions from the state's brief, arguing that they are "wholly irrelevant" and are "a blatant attempt to convince this Court that [she] is a liar."

The Minnesota Rules of Civil Appellate Procedure govern civil and criminal appeals. Minn. R. Civ. App. P. 101. Rule 127 states that "[u]nless another form is prescribed by these rules, an application for an order or other relief shall be made by serving

and filing a written motion for the order or relief." Minn. R. Civ. App. P. 127. Because Vacko did not serve and file a written motion, her request to strike is not properly before this court, and we do not consider it.

Affirmed.