STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1848

State of Minnesota,
Respondent,

vs.

Tamico Annette Reed,
Appellant.

Filed December 16, 2019
Affirmed in part, reversed in part, and remanded
Hooten, Judge

Hennepin County District Court
File No. 27-CR-17-8039

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Erik Nilsson, Interim Minneapolis City Attorney, Paula Kruchowski Barrette, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Hooten, Judge; and Smith, Tracy M., Judge.

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

HOOTEN, Judge

In this direct appeal from judgment of conviction for DWI, appellant argues that the prosecutor committed misconduct by: (1) disparaging the defense during the prosecution's

closing statement; (2) misstating the law concerning an element of the offense during closing arguments; and (3) introducing inadmissible *Spreigl* evidence. We affirm in part, reverse in part, and remand.

FACTS

In the early morning hours of April 2, 2017, J.B. and his husband were traveling in a Mazda sedan near Hennepin Avenue and Dunwoody Boulevard in Minneapolis. As J.B's car proceeded through the intersection, it struck appellant Tamico Annette Reed's Chevrolet Tracker as she turned left through the intersection. Both drivers believed they had a green light. Immediately after the crash, J.B. and his husband saw Reed exit from the driver's side of the vehicle. Both men also saw one or two other individuals run from the passenger side of the Tracker.

Police responded to the scene of the accident shortly after the crash and spoke to both parties. During this conversation, Reed identified herself as the owner and the driver of the Tracker. After doing so, she changed her story and told the officer that her friend "Jo-Jo" was actually the driver. Reed explained that she was in the passenger seat and was briefly knocked unconscious by the collision. When she came to, Jo-Jo had fled the scene. Reed tried to leave the car but the passenger-side door was jammed and so she slid across the center console and exited through the driver's side door. Officers found a one-quarter full bottle of Miller High Life in Reed's center console.

While Reed spoke, officers noticed a smell of alcohol on her breath and that her eyes were bloodshot and glassy. Reed subsequently failed several field sobriety tests. Officers arrested Reed and she agreed to a breath test that returned a value of .20. A routine

record check revealed that Reed had been convicted of two DWIs in the past. Reed's driving privileges had been revoked in early 2017 and had not been reinstated at the time of the accident.

The state charged Reed with one count of second-degree driving while impaired—under the influence of alcohol in violation of Minn. Stat. § 169A.20, subd. 1(1) (2016), one count of second-degree driving while impaired with an alcohol concentration over .08 in violation Minn. Stat. § 169A.20, subd. 1(5), one count of driving after revocation in violation of Minn. Stat. § 171.24, subd. 2 (2016), and one count of keeping an open bottle in a motor vehicle in violation of Minn. Stat. § 169A.35, subd. 4 (2016).

Before trial, Reed stipulated that she had two prior DWI convictions and the state agreed that it would not present those certified convictions to the jury. A jury trial commenced, and a partially redacted copy of Reed's driving record was admitted into evidence in order to show that Reed's driver's license had been revoked at the time of the accident. Although the stipulated convictions were redacted, Reed's driving record showed many other unredacted offenses in addition to the fact that her license was revoked at the time of the accident.

At the close of trial, the district court read the jury instructions to the jury. The instructions stated that unsworn statements by the attorneys were not evidence and witness testimony and admitted exhibits were the only evidence the jury was to consider. The district court also made reference to Reed's driving record, stating that it was a redacted document and that the jury was not to speculate as to the nature of any of the redactions.

The judge also instructed the jury on the meaning of "physical control" of a vehicle under Minnesota's DWI laws, stating:

> A person is in physical control of a motor vehicle when the person is present in a vehicle and is in a position to either direct the movement of the vehicle or keep the vehicle in restraint. It is not necessary for the engine to be running in order for a person to be in physical control of a motor vehicle.

In his closing argument, the prosecutor referenced the judge's recitation of the jury instructions and highlighted that an individual need not be driving the car to be in physical control of a car. The prosecutor specifically stated, "Sometimes you can exert physical control over a motor vehicle and not be driving." Reed did not object to the prosecutor's statements.

The prosecutor concluded his closing statement. In his rebuttal, the prosecutor again stated, "[t]his is what someone trying to get out of a DWI looks like." The jury proceeded to deliberation and Reed moved for a mistrial on the basis of the prosecutor's "looks like" statement. The district court responded by stating, "I think it was an improper statement. I do not think that it is at the level that would warrant a mistrial." The jury returned guilty verdicts on all counts.

This appeal followed.

D E C I S I O N

I. The prosecutor's actions at trial do not constitute prosecutorial misconduct.

Reed argues that she is entitled to a new trial because the prosecutor committed misconduct when he: (1) made disparaging comments about her defense during closing

statements; (2) misled the jury by repeating the definition of "physical control" so as to allow the inference that a passenger may still be in physical control of the car; and (3) exposed the jury to improper *Spreigl* evidence of other bad acts noted in her driving record.

As Reed did not object at trial, this court applies a modified plain-error test to the alleged misconduct and considers whether there is "(1) error, (2) that is plain, and (3) affects substantial rights." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). On the first two elements, an error occurs if the prosecutor's conduct "contravenes case law, a rule, or a standard of conduct," and is plain if it is "clear or obvious." *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016). If plain error is found, the state bears the burden of proving that the misconduct did not affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302. When deciding if the state has met this burden, this court considers: (1) the strength of the evidence against the defendant; (2) the pervasiveness of the misconduct; and (3) whether or not the defendant had the opportunity, or made efforts, to rebut the prosecutor's improper suggestions. *State v. Hill*, 801 N.W.2d 646, 654–55 (Minn. 2011).

If all three elements of the modified plain-error test are met, this court must then assess whether the error should be addressed "to ensure fairness and integrity of the judicial proceeding." *Ramey*, 721 N.W.2d at 302. Prosecutorial misconduct does not require that a defendant be granted a new trial when, in spite of the conduct, the defendant received a fair trial. *State v. Griese*, 565 N.W.2d 419, 428 (Minn. 1997).

A. The prosecutor's closing comments were improper but not plain error.

Reed argues that the prosecutor's statement, "[t]his is what someone trying to get out of a DWI looks like," was plain error because it amounted to the prosecutor suggesting

that Reed's arguments were common to defendants who are, in fact, guilty. Such an inference, Reed argues, has been repeatedly warned against by the supreme court.

During closing arguments, the state "may not belittle [the] 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." *Peltier*, 874 N.W.2d at 804; *see also Griese*, 565 N.W.2d at 427 (warning against arguments that a defense is standard when "nothing else will work"). However, a "prosecutor is free to specifically argue that there is no merit to a particular defense in view of the evidence or no merit to a particular argument." *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). Furthermore, the state "is free to make arguments in anticipation of the defense closing argument." *State v. Banks*, 875 N.W.2d 338, 348 (Minn. App. 2016), *review denied* (Minn. Sept. 28, 2016). When determining if a prosecutor's statements were plain error, a reviewing court looks to the closing argument as a whole. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

In *State v. Salitros*, the supreme court held that a prosecutor's actions are "clearly improper" when he or she argues that a defendant is merely presenting a boiler-plate defense common to defendants to avoid culpability when nothing else will work. 499 N.W.2d at 818. However, this holding was subsequently limited in *Griese*.

In *Griese*, the supreme court commented that a new trial was warranted in *Salitros* not merely because the prosecutor suggested the defendant's defense was some sort of standard defense offered by defendants when nothing else would work, but also because the prosecutor's actions were "considerably more egregious" as the prosecutor suggested, among other arguments, that constitutional rights were not designed to protect the guilty.

565 N.W.2d at 428. The supreme court also noted that where disparaging comments occupied only a small portion of a larger closing argument, and did not permeate the entire closing argument, the supreme court was reluctant to find the conduct so egregious as to deny a defendant the right to a fair trial and warrant the grant of a new trial. *Id.*; *see also State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995) (stating that prosecutorial misconduct occurs when a prosecutor's impermissible arguments permeate an entire closing argument and are intended to play on the fears and emotions of a jury).

Reed argues that by telling the jury that Reed "looks like" a typical person "trying to get out of a DWI," the prosecutor is impermissibly suggesting that Reed's arguments were "part of some sort of syndrome of standard arguments that one finds defense counsel making in 'cases of this sort.'" *Salitros*, 499 N.W.2d at 818. The state responds that not only did Reed fail to object to the statement at the time it was made, but that the prosecutor was merely arguing that Reed's testimony was not credible. *See State v. Fields*, 730 N.W.2d 777, 786 (Minn. 2007) (noting that the state is free to argue that a particular witness was not credible). Although the district court agreed that the remarks were improper, it noted that the remarks were not so improper as to warrant a new trial.

The prosecutor ended his nearly 20-page closing argument by stating:

> There's a lot of evidence. Two eye witnesses, an admission, purse in the center console of a vehicle that you own. All that evidence pitted against a claim, an unsubstantiated claim that "I wasn't driving." You have all the evidence in this case, and for the reasons that I set out, the State is asking that you find the defendant guilty of all counts. The factual disparities, we would argue, no disrespect to the defendant, but we would argue: *This is what someone trying to get out of a DWI looks like*.

(Emphasis added). The prosecutor went on to state in his nearly four-page rebuttal:

> All the evidence that you need to figure out all these questions is in the testimony, it's in the exhibits that have been submitted by the State, and it's in the video that you observed. For these reasons, the State is asking that you not find the defendant credible when she said that she was [sic] driving and as I stated in my first closing is that *this is somebody trying to get out of a DWI.*

(Emphasis added).

Like in *Griese*, the prosecutor's statements generalizing Reed's defense as "what someone trying to get out of a DWI looks like" were merely two lines out of nearly 25 pages of argument. Although the statement itself was disparaging, the prosecutor did not rely on an impermissible inference as a significant theme of his argument. Indeed, there is no evidence in the record that the prosecutor suggested that this was the only argument available to Reed.

Reed was given an opportunity to respond to the prosecutor's statement in her own closing statement. The jury listened to both attorneys, as well as the actual evidence from the trial, and came to the conclusion that Reed's defense lacked credibility. *See Fields*, 730 N.W.2d at 786 (holding it is not misconduct for a prosecutor to state that a witness is not credible). Although the supreme court has noted that it has a "strong distaste" for such tactics, *Griese* instructs that a prosecutor's disparaging comments must permeate the entire argument to be so egregious as to deny a defendant the right to a fair trial and constitute reversible prosecutorial misconduct. 565 N.W.2d at 428.

Although the district court was correct in criticizing the prosecutor's statement, its brevity in light of the scope of evidence presented to the jury at trial suggests that the comments were not plain error because they did not deny Reed the right to a fair trial.

B. The prosecutor's description of "physical control" was not plain error.

Reed argues that the prosecutor's recitation of the jury instruction for "physical control" improperly led the jury to infer that Reed could be a passenger but still be in "physical control" of the vehicle under Minn. Stat. § 169A.20. The state responds by arguing that the prosecutor simply was relaying the content of the jury instruction itself and directing the jury to follow the instruction already recited by the district court.

Although misleading the jury about the law is plain error and constitutes prosecutorial misconduct, *State v. Salyers*, 842 N.W.2d 28, 36 (Minn. App. 2014), *aff'd*, 858 N.W.2d 156 (Minn. 2015), it is presumed that juries follow instructions. *State v. Gatson*, 801 N.W.2d 134, 151 (Minn. 2011). Yet, even when the district court properly instructs a jury, when an attorney clearly misstates the law, a reviewing court may be more likely to find the error contributed to the jury's verdict. *See, e.g.*, *State v. Strommen*, 648 N.W.2d 681, 689–90 (Minn. 2002).

In *Strommen*, the supreme court held that a prosecutor errored, and therefore committed prosecutorial misconduct, when he misstated the law on abandonment in his closing argument by telling the jury that the defendant's actions after he entered a store were immaterial despite strong evidence that the defendant abandoned the crime after entering the store. *Id.* The supreme court held that even though the district court recited the correct instruction on abandonment to the jury, and ample evidence existed to suggest

abandonment occurred, the prosecutor's misstatements likely played a role in the jury's rejection of the defendant's abandonment defense. *Id.* at 690.

In this case, the district court's instructions to the jury on the definition of physical control stated:

> A person is in "physical control" of a motor vehicle when the person is present in a vehicle and is in a position to either direct the movement of the vehicle or keep the vehicle in restraint. It is not necessary for the engine to be running in order for a person to be in physical control of a motor vehicle.

This instruction is a precise recitation of the element of physical control for driving while under the influence of alcohol. 10 *Minnesota Practice*, CRIMJIG 29.02 (2018).

In his closing argument, the prosecutor reiterated the elements of a DWI and highlighted the district court's instruction on physical control by stating:

> [W]hat this statutory definition suggests is that you don't have to be driving or operating a motor vehicle to be guilty of a DWI. As long as you meet the element of physical control, you are still just as culpable of DWI. You're going to see that instruction when you go in there. The court has given you instructions about physical control, but if you are driving, you are exerting physical control; however, the inverse is not true. Sometimes you can exert physical control over a motor vehicle and not be driving.

Reed argues that the prosecutor's statement, "you can exert physical control over a motor vehicle and not be driving," although not an incorrect statement of law, was intended to mislead the jury to find that Reed could be guilty of a DWI even if she was a passenger in the car. Yet, throughout the proceeding, the state's theory of the case was that Reed was driving the vehicle. Furthermore, the state presented testimonial evidence from several witnesses to support this theory.

Unlike in *Strommen*, the prosecutor here did not clearly misstate the law. Furthermore, "physical control" is a broad term that encompasses more than just the act of driving the car. *State v. Starfield*, 481 N.W.2d 834, 836 (Minn. 1992). And although this term is not intended to encompass intoxicated passengers, *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010), the record does not support the assertion that the prosecutor argued that Reed would be guilty of a DWI even if she was a passenger. A single line highlighting the district court's instruction was not plain error as the statement, while potentially misleading, was not clearly erroneous.

In light of the presumption that the jury follows the instructions presented to them by the district court, and the evidence presented at trial to support the jury's determination that Reed was the driver of the car, the prosecutor did not commit plain error when he described the broad definition of "physical control" in his closing statements.

C. The improper use of Spreigl evidence was plain error.

Reed argues that the prosecutor committed plain error when he exposed the jury to Reed's partially redacted driving record that contained inadmissible *Spreigl* evidence of Reed's other bad acts without proper notice. The state contends that Reed's driving record is not *Spreigl* evidence because the record was used as direct evidence to prove Reed's driving privileges had been revoked on the date of the accident. In the alternative, the state argues that even if the record contains *Spreigl* evidence: (1) no objection was made to its admission; (2) the listed convictions were exempt from the notice requirement of Minn. R. Evid. 404(b) by Minn. R. Crim. P. 7.02, subd. 1(a); and (3) Reed had knowledge of her

various license revocations thereby satisfying the notice requirement in Minn. R. Evid. 404(b).

Spreigl evidence is evidence of a defendant's prior bad acts. *State v. Thao*, 875 N.W.2d 834, 839 (Minn. 2016); *see State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965). There is a danger in admitting such evidence as "the jury may convict because of those other crimes or misconduct, not because the defendant's guilt of the charged crime is proved." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006).

Although *Spreigl* evidence is not admissible to prove that a defendant acted in conformity with her prior bad acts, it is admissible for other purposes such as to prove knowledge or absence of mistake. Minn. R. Evid. 404(b)(1). However, evidence of prior acts presented by the prosecutor must be relevant, must be proved by clear and convincing evidence, the prosecutor must give explicit notice of intent to offer such evidence, and the probative value of the evidence must not be outweighed by its potential for unfair prejudice to the defendant. *Id*. Notice is not required for previously prosecuted convictions. Minn. R. Crim. P. 7.02, subd. 1(a). Yet, evidence calculated to elicit or insinuate inadmissible and highly prejudicial character evidence is not tolerable. *See State v. Harris*, 521 N.W.2d 348, 353 (Minn. 1994) (holding a prosecutor's efforts to elicit inadmissible evidence, among other errors, deprived the defendant of a fair trial).

At the beginning of trial, Reed stipulated that she had two prior DWI convictions and the state agreed to keep those certified convictions from the jury. The district court ordered that the stipulated convictions be redacted from Reed's driving record. The prosecutor submitted a copy of Reed's driving record for the purpose of proving that

Reed's license was withdrawn at the time of the accident. It was admitted into evidence with no objection. However, the driving record showed that Reed's license was revoked not only at the time of the accident, but had been revoked no fewer than 20 times prior to the accident. Additionally, the record identified various other convictions and offenses completely unrelated to the purpose for which the prosecutor submitted the record.

A threshold determination for the admission of any prior act under rule 404(b) is relevance. *See, e.g.*, *State v. Horning*, 535 N.W.2d 296, 298 (Minn. 1995) (noting that a basic requisite for the admissibility of any evidence is that it be competent and relevant). Evidence is relevant when it 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.

Although Reed's driving record contains relevant evidence as to the status of her license on the date in question, it contains other information not relevant to the purpose for which the record was submitted, including a child-restraint violation and many driving-after-withdrawal violations. These other offenses do not tend to make the fact that Reed drove with a suspended license in this instance any more likely apart from impermissibly implying Reed's propensity to do so. The procedural safeguards in Minn. R. Evid. 404(b), including notice, are dependent on the evidence being relevant. The unrelated offenses simply lack the necessary relevance to be admissible.

As the driving record contains evidence that is not relevant to the purpose for which it is being offered, and therefore is inadmissible under Minn. R. Evid. 404(b), the

prosecutor committed plain error when he moved to admit Reed's entire certified driving record with limited redactions.

D. The prosecutor's plain error did not affect Reed's right to a fair trial.

Committing an error that is plain, while sufficient to demonstrate misconduct, *Peltier*, 874 N.W.2d at 799, is insufficient to demonstrate that Reed is entitled to a new trial; the error must also affect her substantial right to a fair trial. *State v. Johnson*, 616 N.W.2d 720, 727–28 (Minn. 2000). The defendant bears the burden of establishing error that is plain, but once plain error is established, the burden shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have had a significant impact on the jury's verdict. *Ramey*, 721 N.W.2d at 302.

In determining if the misconduct had a significant impact on the jury's verdict, this court considers the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to rebut the improper suggestion. *Hill*, 801 N.W.2d at 654–55.

The evidence that Reed drove her Tracker that night included a confession and testimony from two witnesses. Based on this evidence, the jury determined that Reed was the driver of the car and found her guilty of all counts.

Although the presentation of irrelevant *Spreigl* evidence was plain error, in light of the two witnesses who testified they saw Reed alight from the driver's side door moments after the accident occurred, we do not hold that the admission of the partially redacted driving record influenced the jury's decision so as to substantially affect her right to a fair trial.

Reed's sole defense was that she was not driving the car. This was a strategic decision made by her attorney and the success of which relied on Reed's credibility at trial. The prosecution submitted testimony from the occupants of the Mazda, as well as Reed's own statement to the police, to suggest that Reed was driving that night. Reed had an opportunity to cross-examine these witnesses and to object to the admission of the partially redacted driving record. Reed failed to do so and the jury found that she was guilty of all charges brought against her by the state.

Despite the admission of *Spreigl* evidence, the strength of the evidence against Reed, the relatively limited nature of the misconduct, and the opportunity Reed had to rebut or object to the conduct during trial suggests that any misconduct did not substantially affect her right to a fair trial.

II. Reed's conviction for driving while impaired must be vacated.

Among other convictions, the district court convicted Reed of one count of second-degree driving while impaired—under the influence of alcohol in violation of Minn. Stat. § 169A.20, subd. 1(1) and one count of second-degree driving while impaired with an alcohol concentration over .08 in violation of Minn. Stat. § 169A.20, subd. 1(5).

Minn. Stat. § 609.04, subd. 1 (2018) prohibits multiple convictions under different subdivisions of a criminal statute for acts committed during a single behavioral incident. *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992). Accordingly, a defendant cannot be convicted of driving under the influence of alcohol and driving with an alcohol concentration of over .08 when the two charges arise from the same behavioral incident. *Id.* at 170–71.

Both charges against Reed are under Minn. Stat. § 169A.20, subd. 1, and arose from the same behavioral incident. Even though Reed was only sentenced for the latter conviction, Minn. Stat. § 609.04, subd. 1, prohibits a district court from convicting Reed for both offenses based on this single behavioral incident. Therefore, the conviction for driving while impaired under Minn. Stat. § 169A.20, subd. 1(1) must be vacated.

Affirmed in part, reversed in part, and remanded.