STATE OF MINNESOTA
IN COURT OF APPEALS
A09-243

State of Minnesota,
Respondent,

vs.

Brett David Borg,
Appellant.

Filed March 26, 2012
Affirmed
Stauber, Judge

Mille Lacs County District Court
File No. 48K604001375

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

Jan Jude, Mille Lacs County Attorney, Milaca, MN (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, MN (for appellant)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

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

STAUBER, Judge

On remand from the supreme court, appellant challenges his conviction of third-degree criminal sexual conduct arguing that (1) his conviction must be reversed because the prosecutor engaged in prejudicial misconduct; (2) the district court abused its discretion by

refusing to impose a dispositional departure; and (3) he was denied the effective assistance of counsel. We affirm.

FACTS

Following a jury trial, appellant Brett David Borg was found guilty of third-degree criminal sexual conduct. Appellant raised several issues on appeal, including a claim that the district court erred by allowing the state to elicit evidence of appellant's pre-arrest silence in the state's case-in-chief. This court agreed, holding that the district court erred by permitting a police officer "to testify about appellant's pre-counseled, pre-arrest, and pre-*Miranda* silence in the state's case-in-chief." *State v. Borg*, 780 N.W.2d 8, 16 (Minn. App. 2010), *rev'd and remanded*, 806 N.W.2d 535 (Minn. 2011). This court further held that "in light of the weakness in the state's case" the error was not harmless beyond a reasonable doubt. *Id.* Thus, we reversed and remanded for a new trial without addressing the remaining arguments. *Id.*

The supreme court granted review and in a 4-3 decision, reversed this court, stating that "[w]hen the government does nothing to compel a person who is not in custody to speak or to remain silent, . . . then the voluntary decision to do one or the other raises no Fifth Amendment issue." *State v. Borg*, 806 N.W.2d 535, 543 (Minn. 2011). In regard to appellant's pre-arrest, pre-*Miranda* silence, the supreme court held that "if a defendant's silence is not in response to a choice compelled by the government to speak or remain silent, then testimony about the defendant's silence presents a routine evidentiary question that turns on the probative significance of that evidence." *Id.*

(quotation omitted). The supreme court then remanded the case to this court "for consideration of [appellant's] remaining arguments." *Borg*, 806 N.W.2d at 548.[1]

D E C I S I O N

I.

A prosecutor engages in prejudicial misconduct if the prosecutor's acts have the effect of materially undermining the fairness of a trial. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). A prosecutor also engages in prejudicial misconduct if the prosecutor violates rules, laws, orders by a district court, or this state's caselaw. *Id.* Appellate courts reviewing claims of prosecutorial misconduct "will reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

Appellant argues that the prosecutor engaged in misconduct by (1) encouraging a verdict based on sympathy for the complainant; (2) eliciting inadmissible evidence; (3) vouching for the complainant's credibility; and (4) violating the discovery rules. Although appellant admits that much of the misconduct was not objected to at trial, he argues that he is entitled to a new trial because the misconduct was plain and prejudicial error.

[1] A more thorough recitation of the facts of this case may be found in this court's opinion in *Borg*, 780 N.W.2d at 9–12, and the supreme court's opinion in *Borg*, 806 N.W.2d at 538–41.

A. Objected-to misconduct

The supreme court has used two different harmless-error standards to review objected-to prosecutorial misconduct. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (citing *State v. Caron*, 300 Minn. 123, 127–28, 218 N.W.2d 197, 200 (1974)). The *Caron* harmless-error test for less-serious prosecutorial misconduct requires the reviewing court to ask "whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.* (quoting *Caron*, 300 Minn. at 128, 218 N.W.2d at 200). The *Caron* harmless-error test for "unusually serious" misconduct requires us to ask whether the alleged misconduct was "harmless beyond a reasonable doubt." *Id.*; *State v. Martin*, 773 N.W.2d 89, 104 (Minn. 2009). An appellate court "will find an error to be harmless beyond a reasonable doubt only if the verdict rendered was 'surely unattributable' to the error." *State v. Nissalke*, 801 N.W.2d 82, 105-06 (Minn. 2011) (quoting *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008).[2]

1. Alleged improper elicitation of inadmissible evidence

Appellant argues that the prosecutor committed misconduct at trial by asking S.C. who purchased the beer because the question was irrelevant and damaged S.C.'s credibility by suggesting that S.C. purchased alcohol for under-aged girls. The general rule is that a prosecutor may not ask a question to advance an improper inference to the

[2] We note that the supreme court recently recognized in *Nissalke* that whether the two-tiered test set forth in *Caron* is "still good law has been questioned in some of [their] recent decisions." 801 N.W.2d at 105 n.10. But the supreme court in *Nissalke* did not decide the issue, and the issue has not been addressed further by the supreme court. *Id.* Therefore, at this point, the two-tiered test set forth in *Caron* is still the controlling standard for objected-to misconduct.

jury. *State v. Jahnke*, 353 N.W.2d 606, 609 (Minn. App. 1984). But here, the record reflects that appellant's attorney first asked a witness who brought alcohol and, thus, the prosecutor's question concerning the alcohol was not improper.

Appellant also contends that the prosecutor committed misconduct by asking S.C.: "Do you remember [appellant] telling you that he had fondled [the complainant] but that he did not have sex with her?" Appellant argues that the prosecutor's question was improper because it asked S.C. if he "remembered" appellant making the statement, rather than asking him "if" appellant made the statement. Appellant further argues that the question was improper because the prosecutor incorrectly phrased the question despite being advised by the court outside the presence of the jury how to ask the question.

We agree that the question initially posed by the prosecutor was different than the question discussed outside the presence of the jury. But the record indicates that there was some confusion concerning how the question should be asked. And there is no indication that the misstatement was intentional. We conclude that the misstatement does not rise to the level of prosecutorial misconduct.

2. Alleged discovery violations

Appellant argues that the prosecutor engaged in misconduct by violating the discovery rules when she faxed certain witness statements to defense counsel's office rather than to counsel's hotel. But the district court found that the prosecutor had no way of knowing that, at the time the faxes were sent, defense counsel had checked into his hotel. Appellant points to no evidence in the record to refute this finding, nor does our

careful review of the record reveal any such evidence. Accordingly, appellant has not established that the prosecutor engaged in misconduct by violating the discovery rules.

B. Unobjected-to misconduct

For unobjected-to prosecutorial misconduct, the court applies a plain-error test. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Before an appellate court will review an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. *Id.* The appellant has the initial burden of showing that the error was plain; if he does so, the burden shifts to the state to show that the error did not affect appellant's substantial rights. *Id.* Thus, 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." *Id.* (quotation omitted). Only if the three prongs of the plain-error test are met does the reviewing court determine whether the error seriously affected the integrity and fairness of the proceedings as to require reversal. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1983).

1. Improperly inflaming the passions and prejudices of the jury

Appellant argues that the prosecutor inflamed the passions of the jury by asking the nurse and the complainant to describe the intrusiveness of the sexual-assault exam and by commenting during opening and closing remarks that appellant made a choice "for another when she was not in a position to even make a choice." But it is well settled that the reviewing court considers the prosecutor's closing argument as a whole and does not focus on selected phrases taken out of context. *State v. Taylor*, 650 N.W.2d 190, 208 (Minn. 2008).

Here, when looking at the closing argument as a whole, there is nothing improper about the prosecutor's statements. Appellant was charged with third-degree criminal sexual conduct based on his alleged knowledge that the complainant was physically helpless. The prosecutor's comments go directly to the crux of the case. Moreover, the questions regarding the sexual-assault exam were helpful in explaining to the jury the relevancy of the evidence discovered through the sexual-assault examination, and pertinent to establishing the complainant's credibility. Because appellant claimed that the sex was consensual, the state presented evidence explaining the intrusiveness of the exam to bolster the complainant's claim that she was not fabricating her story. Therefore, the prosecutor's arguments and questions did not improperly inflame the passions and prejudices of the jury.

2. Alleged elicitation of inadmissible evidence

Appellant next argues that the prosecutor improperly elicited the substance of an inadmissible out-of-court statement under the guise of impeachment. Specifically, appellant complains about the prosecutor's question to K.K. asking her if she remembered giving a statement indicating that appellant was "chasing after [the complainant] all night?" K.K. responded by stating: "No, I remember saying he was just friendly with everybody." Although appellant acknowledges that the prior inconsistent statement is admissible for impeachment purposes, appellant argues that the prosecutor improperly elicited the testimony because it was inadmissible as substantive evidence.

Appellant's argument is without merit. The prosecutor properly used the statement for impeachment purposes, and appellant fails to explain how it was used substantively. The question does not constitute prosecutorial misconduct.

3. Improper vouching

Appellant argues that the prosecutor improperly vouched for the complainant by stating in closing argument that the complainant would not have taken the stand and testified about personal and embarrassing things if she were making them up. Appellant also contends that it was improper vouching for the prosecutor to ask an investigator, who also questioned the complainant, whether J.S.'s statement was consistent with the events described by the complainant. Appellant further claims that Sergeant Niemeyer's testimony that D.C. said the same thing as the complainant about partying that evening constituted vouching.

Prosecutorial misconduct occurs "when the [prosecutor] implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quoting *United States v. Beasley*, 102 F.3d 1440, 1449 (8th Cir. 1996)). While a prosecutor must not personally endorse a witness's credibility, the state may, in closing argument, argue that a witness was or was not credible. *State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006).

Here, the prosecutor's comments about the complainant during closing argument do not constitute improper vouching because she did not personally endorse the complainant's credibility. Rather, the prosecutor attempted to provide an explanation as

to why the complainant's testimony was credible. *See id.* Moreover, the challenged testimony of the investigating officers did not constitute vouching because neither investigator testified that they believed the complainant or that other witnesses believed her. Instead, the testimony was elicited in order to establish credibility by attempting to show that the complainant's version of the events was consistent throughout the investigation. Therefore, appellant has failed to establish that the prosecutor engaged in misconduct during the trial.

II.

The district court must order the presumptive sentence unless "substantial and compelling circumstances" justify departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Whether to depart from the sentencing guidelines rests within the district court's discretion, and this court will not reverse the decision absent a clear abuse of that discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Only in a "rare" case will this court reverse a sentencing court's refusal to depart. *Kindem*, 313 N.W.2d at 7. Even if there are reasons for departing downward, this court will not disturb the district court's sentence if the district court had reasons for refusing to depart. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

The Minnesota Sentencing Guidelines provide a nonexclusive list of factors that a district court may use as reasons for granting a downward departure. Minn. Sent. Guidelines II.D.2.a. Amenability to probation is not listed, but the district court may impose probation "in lieu of an executed sentence when the defendant is particularly amenable to probation." *State v. Gebeck*, 635 N.W.2d 385, 389 (Minn. App. 2001). To

assess a defendant's amenability to probation, the district court may consider the defendant's age, prior record, remorse, cooperation, attitude while in court, and the support of friends or family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Here, in denying appellant's motion for a downward dispositional departure, the district court concluded that appellant was not amenable to probation because appellant showed no remorse and continued to deny that he committed the offense. Appellant argues that the district court's reliance on his purported lack of remorse was improper because appellant's case was not yet final. Appellant also contends that the following factors demonstrate that he was amenable to probation: (1) his lack of a prior felony record; (2) his support from his family and friends; and (3) the fact that he was employed and a productive member of society while his case was pending. Thus, appellant argues that he was a candidate for a dispositional departure.

We acknowledge that the record may have supported a decision to dispositionally depart. But that the record may support a departure does not mean that the district court abused its discretion by declining to depart. A vital component is the sentencing court's impression of the defendant's sincerity and depth of remorse. *State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994), *review denied* (Minn. Apr. 21, 1994). The district court here found that appellant showed a lack of remorse and based its decision not to depart on this premise. Here, appellant's lack of remorse was likely attributable to his consistent belief that he was innocent of the charged offense. We commented earlier about the "weakness in the state's case." But, the district court had the opportunity to observe the defendant throughout the proceedings and we "must defer to the district

court's assessment of the sincerity and depth of the remorse and what weight it should receive in the sentencing decision." *Id.* The district court determined that there were no substantial and compelling reasons present to justify the departure, and that decision was based on the district court's determination that appellant failed to show remorse for the offense. Therefore, we cannot conclude that this is the "rare" case in which the district court abused its discretion by denying appellant's request to depart.

III.

Appellant finally argues that he was deprived of the effective assistance of counsel. A defendant has the burden of establishing that his attorney's representation "fell below an objective standard of reasonableness" and that a reasonable probability exists that, but for the attorney's error, the result of the proceeding would have been different. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2068 (1984)). To prevail on a claim of ineffective assistance of counsel, a defendant must overcome the strong presumption that his attorney's performance was "within the wide range of reasonable professional assistance." *Pierson v. State*, 637 N.W.2d 571, 579 (Minn. 2002) (quotation omitted).

Here, the record reflects that after the guilty verdict, appellant's trial counsel argued that appellant should not be remanded to custody because the sentence was not a presumptive prison commitment. In making the assertion, trial counsel relied on a letter from appellant's prior attorney indicating that a conviction of third-degree criminal sexual conduct is a presumptive stayed sentence. The district court corrected trial

counsel by stating that even though appellant has a criminal-history score of zero, the offense was a "Severity Level 8," with a "presumptive 48-month commit."

Based on the statements made by his trial counsel, appellant argues that his trial counsel erroneously advised him that his sentence was presumptively stayed. Appellant claims that had he been accurately advised that the offense sentence was a presumptive 48-month commit, he would have accepted one of the state's earlier plea offers. *See Leake v. State*, 737 N.W.2d 531, 540-41 (Minn. 2007) (holding that defendant who went to trial can claim his attorney was ineffective and there was a reasonable probability that absent the erroneous advice the defendant would have accepted the plea offer). The first plea offer would have allowed appellant to plead guilty to fourth-degree criminal sexual conduct with a 21-month stayed prison sentence and 90 days in jail. The second plea offer was for a gross-misdemeanor fifth-degree criminal sexual conduct plea and 90 days in jail. Appellant argues that because he was not accurately advised of the presumptive sentence for the charged offense, he received ineffective assistance of counsel. Appellant contends that he is entitled to specific performance of one of the state's original plea offers.

Ordinarily, a claim of ineffective assistance of counsel should be raised in a postconviction proceeding rather than on direct appeal. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). "A postconviction hearing provides the court with additional facts to explain the attorney's decisions, so as to properly consider whether a defense counsel's performance was deficient." *Id.* (quotation omitted). Without such facts, a reviewing court may decide not to address the merits of the issue. *Id.*

Because appellant's ineffective-assistance-of-counsel claim was raised on direct appeal, the record now before us does not adequately reflect whether appellant received accurate advice regarding the presumptive sentence and how this advice may have influenced his decision to go to trial. Therefore, we decline to reach the issue. We note, however, that appellant is free to raise the ineffective-assistance-of-counsel issue in a subsequent postconviction proceeding following this appeal.

Affirmed.