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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1842
A12-0346**

State of Minnesota,
Respondent,

vs.

Gabriel Lee Rocha,
Appellant.

**Filed October 29, 2012
Affirmed
Johnson, Chief Judge**

Hennepin County District Court
File No. 27-CR-09-55529

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaitas, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Stauber, Judge; and Collins,
Judge.*

*Retired judge of the district court, serving as judge of the Minnesota Court of
Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

JOHNSON, Chief Judge

A Minneapolis resident was assaulted and robbed at gunpoint by a group of men who invaded his home after he answered a knock at the back door. The victim recognized one of his assailants as the appellant in this case, Gabriel Rocha. At trial, Rocha's counsel cross-examined a police officer about whether, during the ensuing investigation, officers considered another man to be a suspect. The district court limited the cross-examination on the ground that Rocha had not given notice of an alternative-perpetrator defense and did not have sufficient evidence to lay a foundation for such a defense. We conclude that the district court did not err or plainly err in that ruling. We also conclude that there was no prosecutorial misconduct during the state's cross-examination of a defense witness or in closing argument. Therefore, we affirm.

FACTS

A Minneapolis man with the initials S.L. hired Rocha and his cousin, I.R., to give him the tattoo in 2009. Because Rocha and I.R. did not have a tattoo studio, they did the work at S.L.'s home on three occasions. Rocha set up the equipment and collected the money, while I.R. applied the ink to S.L.'s skin.

During the evening of October 26, 2009, S.L. was sleeping on a couch in his living room when he was awakened by a knock at the back door. According to S.L.'s trial testimony, he opened the door a crack and saw a man he recognized as Rocha, who immediately pushed the door open and entered S.L.'s home while brandishing a handgun. Rocha pushed S.L. into his living room while two or three other men also entered the

home. Rocha beat S.L. by hitting him on the head and face with the handgun approximately 20 times. Rocha and another man tied S.L.'s hands and feet with an electrical cord. While S.L. was tied up, Rocha held him down on the couch, pressed the handgun against S.L.'s head, and said that he was going to kill him. Meanwhile, the other men removed numerous items of personal property from S.L.'s home, including two televisions and two laptop computers. Rocha and the other men were present for approximately 20 minutes and left after S.L.'s telephone rang.

S.L.'s brother visited him approximately five minutes after Rocha and the other men left. The brother untied S.L. and called the police. After police officers arrived, S.L. identified the primary assailant to police as his "tattoo guy" and by his name, Gabriel Rocha. S.L. also described the primary assailant as "a light brown skinned male, heavy set with a large tattoo on his neck," a description that fits Rocha. A few days later, police officers presented S.L. with a series of six photographs, and S.L. identified Rocha's photograph as that of the primary assailant. Police officers later conducted a show-up, at which S.L. confirmed that Rocha was the primary assailant.

In November 2009, the state charged Rocha with one count of first-degree aggravated robbery, a violation of Minn. Stat. §§ 609.05, .245, subd. 1 (2008), and one count of second-degree assault, a violation of Minn. Stat. §§ 609.05, .222, subd. 1 (2008). Before trial, Rocha gave notice to the state that he intended to present an alibi defense.

The case was tried to a jury for four days in July 2010. At trial, Rocha's counsel cross-examined Sergeant Joel Sandberg about the police investigation and whether police sought to determine whether I.R. had committed the crime. Specifically, Rocha's trial

counsel asked Sergeant Sandberg whether he learned of I.R. during the investigation, whether he obtained I.R.'s fingerprints, whether officers sought out I.R., and why officers sought out I.R. When Rocha's trial counsel asked Sergeant Sandberg why I.R. was mentioned as a suspect, the prosecutor objected and requested a bench conference, which occurred but was unreported. After the bench conference, Rocha's trial counsel pursued a different line of questioning.

At the conclusion of trial, the jury found Rocha guilty on both counts. The district court sentenced Rocha to 90 months of imprisonment. Rocha timely filed a notice of appeal but later moved to stay the direct appeal to pursue postconviction relief, and this court granted the motion.

Rocha filed a postconviction petition in April 2011 with the assistance of appellate counsel. He alleged in the petition that his trial counsel provided constitutionally ineffective assistance and that the district court deprived him of his constitutional right to present a complete defense by prohibiting him from pursuing an alternative-perpetrator defense. The district court conducted an evidentiary hearing in September 2011, at which Rocha called his trial counsel as a witness. The district court denied relief in a detailed eight-page order and memorandum. Rocha appeals.

DECISION

I. Cross-Examination of Officer

Rocha's primary argument on appeal is that the district court erred by restricting his cross-examination of Sergeant Sandberg. Rocha frames the issue as whether the district court deprived him of his constitutional right to present a complete defense. A

criminal defendant has a constitutional right to present a complete defense. *State v. Ferguson*, 804 N.W.2d 586, 590-91 (Minn. 2011). The constitutional right to present a complete defense includes “the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045 (1973).

The specific legal basis of Rocha’s challenge to the district court’s evidentiary ruling has evolved during the life of the case. At trial, Rocha’s trial counsel asked the district court, off the record, to allow further cross-examination of Sergeant Sandberg on the ground that Rocha wished to present an alternative-perpetrator defense. The postconviction court made a finding to that effect, and that finding is supported by the testimony of both Rocha’s trial counsel and the prosecutor. The constitutional right to present a complete defense includes the right “to present evidence showing that an alternative perpetrator committed the crime with which the defendant is charged.” *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009).

Before alternative-perpetrator evidence is admitted, however, the defendant must make “a threshold showing that the evidence the defendant seeks to admit has an inherent tendency to connect the alternative perpetrator to the commission of the charged crime.” *Ferguson*, 804 N.W.2d at 591 (quotations omitted). The postconviction court found that Rocha’s proffer was rejected during the mid-trial bench conference for two reasons: first, Rocha had not given notice of an alternative-perpetrator defense, and, second, Rocha did not have evidence sufficient to lay a foundation for the defense. On appeal, Rocha does not directly challenge these conclusions of the postconviction court.

Following the evidentiary hearing on Rocha's postconviction petition, Rocha's appellate counsel argued in a memorandum of law that, even if further cross-examination of Sergeant Sandberg was not justified by an alternative-perpetrator defense, the district court should have permitted his trial counsel to attack the thoroughness and integrity of the police investigation into the crime. The supreme court has implied that the constitutional right to present a complete defense encompasses a right to attack a police investigation as an alternative to an alternative-perpetrator defense, although it appears to be a limited right. *See State v. Nissalke*, 801 N.W.2d 82, 103 (Minn. 2011) (rejecting argument because trial court allowed some evidence and argument). The postconviction court considered this argument but rejected it on the ground that trial counsel did not attempt to justify further cross-examination of Sergeant Sandberg on that ground.

On appeal, Rocha renews the argument he made after the postconviction evidentiary hearing. He argues that the district court erred by not permitting further cross-examination of Sergeant Sandberg on the ground that a defendant may attack a police investigation, and that the postconviction court erred by not granting relief on the ground that the trial court's ruling denied him of his constitutional right to present a complete defense. Because Rocha is seeking reversal on a ground that was not presented to the trial court at the time the evidence was offered, the plain-error rule applies. *See* Minn. R. Crim. P. 31.02. Under the plain-error test, we may not grant appellate relief on an argument that was not preserved at trial 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, *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, it would be appropriate to consider the fourth requirement, which asks 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).

The constitutional right to present a complete defense “is not without limitation.” *State v. Buchanan*, 431 N.W.2d 542, 550 (Minn. 1988). The right is limited by, among other things, the rules of evidence, which permit the district court to exclude evidence that is irrelevant or of marginal evidentiary value. *State v. Quick*, 659 N.W.2d 701, 713 (Minn. 2003). The district court permitted Rocha’s trial counsel to ask four questions about whether I.R. was part of the police investigation. The district court prevented Rocha’s trial counsel from going further because she was relying on an alternative-perpetrator theory to justify further examination on that issue, and the trial court reasonably concluded that Rocha was not entitled to pursue such a defense. Rocha’s trial counsel did not assert a right to attack the police investigation, and Rocha has not cited any caselaw to the effect that a trial court must permit such evidence *sua sponte*. In fact, the supreme court has stated that defendants should not be permitted to use an attack on a police investigation “to circumvent” the limitations on alternative-perpetrator evidence. *State v. Tran*, 712 N.W.2d 540, 551 (Minn. 2006). If the trial court had allowed Rocha to go further with the cross-examination of Sergeant Sandberg, the trial court essentially

would have permitted Rocha to introduce alternative-perpetrator evidence without satisfying the prerequisites for such evidence. *See Atkinson*, 774 N.W.2d at 589.

Thus, the district court did not plainly err by restricting Rocha's cross-examination of Sergeant Sandberg.

II. Closing Argument

Rocha also argues that the prosecutor committed prejudicial misconduct on two occasions during the trial. Specifically, Rocha challenges a comment made during the prosecutor's cross-examination of his sister and two comments during the prosecutor's closing argument.

Rocha did not preserve either of these arguments by making objections at trial. Accordingly, we apply a modified plain-error standard of review. *See 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." *State v. Wren*, 738 N.W.2d 378, 393 (Minn. 2007). "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).

A. Cross-Examination of Sister

Rocha argues that the prosecutor engaged in misconduct by cross-examining his sister in a manner that "implies a factual predicate which the examiner cannot support by

evidence.” *State v. White*, 295 Minn. 217, 223, 203 N.W.2d 852, 857 (1973). To support an alibi defense, Rocha’s sister testified that, on the evening of the crime, she and Rocha were at home, Rocha had a toothache, and she drove him to the Region’s Hospital emergency room. The prosecutor cross-examined her about a telephone call that Rocha later placed to her from jail. The prosecutor asked, “Do you remember him saying to you, nobody is going to say sh-t?” Rocha’s sister answered by saying she did not remember such a statement. The prosecutor did not examine the sister further on that subject.

Rocha contends that the prosecutor’s question constitutes misconduct because it implies a fact that the prosecutor could not support with evidence. The state responds by saying that Rocha’s argument is based on speculation and, furthermore, that the prosecutor actually had evidence of Rocha’s statement to his sister, which was disclosed to Rocha’s trial counsel before trial. Rocha has not introduced any evidence that the prosecutor did not have evidence to support the question. Rocha did not explore the subject during postconviction proceedings. Thus, Rocha has not demonstrated that the prosecutor engaged in misconduct when cross-examining his sister.

B. Closing Argument

Rocha argues that the prosecutor engaged in misconduct by making arguments to the jury that improperly instructed the jury and unfairly denigrated the defense.

In the state’s rebuttal case, an employee at Region’s Hospital testified that there is no record of Rocha having visited the emergency room on October 26 or 27, 2009. In closing argument, the prosecutor referred to this issue by stating:

He wasn't there, there's no record of him. That testimony contradicts and eliminates the testimony of the defendant's sister. He didn't go to the hospital, ladies and gentlemen. The defense is fabricating an alibi.

And why would someone do that? Well, there's a term that's used in the court sometimes called consciousness of guilt. If you know you're guilty, you do something like fabricate an alibi.

Later, in the state's rebuttal argument, the prosecutor stated:

Ladies and gentlemen, . . . I just want you to think about three main things. One, there's a theory in the law that says that a statement made soon after an incident happens has more credibility than a statement made a long time after that happens. Makes sense. People don't get a lot of time to make up a lie, they tell someone what happens right away. That's what happened here. [S.L.] told his brother and the responding officer within 20 minutes what happened to him and that that man robbed him (indicating).

. . . .

And, third, the defendant put witnesses up to give a fake alibi. Testimony that was completely refuted by records at a hospital. You don't do that unless you have a guilty mind.

The state argues that the first two comments were not intended to be jury instructions. We agree. The prosecutor's references to a "term that's used in the court" and to "a theory in the law" were essentially rhetorical devices that were designed to explain why S.L.'s identification of Rocha was more credible than Rocha's sister's alibi evidence. The prosecutor did not purport to give the jury a legal principle that would compel a particular conclusion. The prosecutor's argument preserved for the jury its task of determining the truthfulness of the trial witnesses.

The state also argues that the reference to a “fake alibi” was a fair comment on the evidence and the reasonable inferences from the evidence. Again, we agree. “A prosecutor’s closing argument should be based on the evidence presented at trial and inferences reasonably drawn from that evidence.” *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990). The reference to a “fake alibi” was not misconduct because the prosecutor compared Rocha’s alibi evidence to the state’s evidence that Rocha did not visit the hospital on the day of the crime. *See State v. Johnson*, 359 N.W.2d 698, 702 (Minn. App. 1984) (concluding that prosecutor’s references to defense witnesses’ “total lie[s]” and “total fabrications” were not reversible error). The comment fairly asserts that, based on the evidence, there is no merit to Rocha’s alibi defense. The prosecutor did not criticize Rocha’s defense without any reference to conflicting evidence. *See State v. Matthews*, 779 N.W.2d 543, 552 (Minn. 2010). Thus, the prosecutor did not engage in misconduct in closing argument.

Affirmed.