STATE OF MINNESOTA
IN COURT OF APPEALS
A11-583

State of Minnesota,
Respondent,

vs.

Eric Lee Budreau,
Appellant.

Filed March 19, 2012
Reversed and remanded
Cleary, Judge

Cass County District Court
File No. 11-CR-10-1151

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Christopher J. Strandlie, Cass County Attorney, Walker, Minnesota (for respondent)

Bradford S. Delapena, Bradford Delapena, Ltd., St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Klaphake, Judge; and Cleary, Judge.

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

CLEARY, Judge

Appellant challenges his conviction of unlawful possession of a firearm under Minn. Stat. § 609.165, subd. 1b (2008), arguing that the district court erred when it allowed the prosecutor to comment during opening statements about respondent's failed

efforts to subpoena Anthony LaRose to testify. Although appellant did not object to the statements at trial, he argues that this court should reverse and remand for a new trial under the plain-error standard for prosecutorial misconduct. Because the prosecutor's comments constituted plain error, we reverse and remand.

FACTS

Appellant was arrested when deputies from the Cass County Sheriff's Office responded to a call about gunshots in the Cass Lake area. Deputy Richard Wolske was the first to respond and came upon two men arguing in front of a house. When Deputy Wolske approached, one of the men, appellant Eric Lee Budreau, ran from the scene. Deputy Wolske got out of his vehicle and pursued appellant on foot. The other man, Anthony LaRose, told Deputy Wolske that appellant had a gun. Deputy Wolske noticed that appellant was running bent over with his hands in front of him, as if he was trying to secure something. Deputy Wolske did not see any object. Deputy Wolske started to pursue appellant along the side of the house, but stopped when appellant turned around the back corner of the house. At that point, Deputy Wolske turned around to cut appellant off by running to the other side of the house and discovered that LaRose was following him as he chased appellant. Deputy Wolske ordered LaRose to wait on the road, but LaRose instead circled around the other side of the house to where appellant had first started running.

As Deputy Wolske was running, he saw a pine tree branch moving about 75 feet away from him. Deputy Wolske heard appellant and LaRose arguing again as he was running around the house. When Deputy Wolske regained sight of them, appellant and

LaRose were standing next to each other. Deputy Wolske ordered the two men to the ground and arrested appellant. LaRose ran away while Deputy Wolske was securing appellant. LaRose was immediately apprehended and arrested by Deputy Bill Conner, who had arrived on the scene shortly after Deputy Wolske.

When Deputy Conner arrived on the scene, he saw LaRose running around the house and observed appellant make a throwing motion. Deputy Conner heard Deputy Wolske ordering the two men to the ground and saw LaRose running again. Deputy Conner then apprehended LaRose and handcuffed him. While Deputy Conner was handcuffing him, LaRose stated that appellant shot at him.

Once both men were secured in separate squad vehicles, the deputies searched the area. They found a pistol near the tree that Deputy Wolske had seen moving earlier. The deputies also discovered damage to the tree where it appeared an object had struck it. The deputies, along with an investigator and another deputy who arrived, collected and documented various pieces of evidence, including used and unused rounds from the gun, a magazine for the gun, and evidence of bullet marks. Deputy Brian Sherwood, one of the deputies who had arrived at the scene late, secured the gun, handling it with his bare hands.

Appellant was charged with attempted first-degree murder, attempted second-degree murder, second-degree assault, and two charges of unlawful possession of a firearm, one for a previous conviction for a crime of violence and one for an adjudication of delinquency.

Prior to trial, the prosecution attempted to subpoena LaRose to testify. Between October 15, 2010, and October 27, 2010, five different attempts were made to serve LaRose. All of these attempts were unsuccessful, and LaRose was not present to testify at trial.

During opening statements at trial, the prosecutor stated:

> You're not going to hear from Anthony LaRose. Anthony LaRose is not going to testify in this trial. He is the alleged victim. He is the one who said to Deputy Wolske in response to Deputy Wolske's question, "Is there a weapon?" "Yes." And then as he's being handcuffed, he said to Deputy Conner, "He shot at me."
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> And then you'll see the evidence of the gunshots, the markings in the ground and the spent bullets, but you're not going to hear from Anthony LaRose. We couldn't find him. We tried to subpoena him. He's not here. He's not going to be a witness in this case.[1]

[1] Just prior to trial, outside the presence of the jury, the court ruled on a motion by respondent to admit statements made by LaRose during and after the initial chase and apprehension of LaRose and appellant. Respondent argued that, in LaRose's absence, the nontestimonial portions of LaRose's statements should be admitted under the excited-utterance hearsay exception. The statements that respondent wanted the court to admit included LaRose's statement to Deputy Wolske that appellant had a gun, his statement to Deputy Conner that appellant shot at him, and various other related statements he made once secured inside a squad car. Appellant argued that none of the statements fell under an ongoing emergency situation and they should not be admitted. The district court determined:

> The Court is going to, subject to the State showing an effort, good faith effort to procure the appearance of the witness, the Court is going to allow the statement in response to the officer's question whether [appellant] had a weapon. That will be allowed.
>
> The statement by the alleged victim as he was being handcuffed that "he shot at me" will be allowed. The other statements will not be allowed.

Defense counsel did not make any objection to the respondent mentioning its inability to subpoena LaRose to testify at trial.

At trial, respondent presented the DNA evidence collected at the scene. The sample from the gun contained DNA from at least two different people. That DNA did not match samples provided by Deputy Sherwood or appellant. Although the scientist performing the analysis did not have a known sample from LaRose, his name and birthday are listed in the database the scientist used and no matches were found in that database for the sample. There was also a portion of a fingerprint, or ridge detail, found on the gun. The fingerprint did not match appellant, LaRose, or Deputy Sherwood.

At the close of respondent's case, the court granted appellant's motion for judgment of acquittal on both attempted-murder charges. Appellant stipulated to the previous conviction elements of the unlawful-possession charges, so the jury was presented with the second-degree assault charge and special questions as to the unlawful-possession charges.[2] The jury acquitted appellant of the assault charge and answered "yes" to both special questions. At sentencing, the court dismissed one of the unlawful-

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> The analysis really comes down to whether the statements are testimonial or not. The analysis that the Court makes is that the first two statements are not testimonial but as a result of an emergency or an excited utterance in light of the situation.
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> The other statements when the witness is in the vehicle gets into the nature of a testimonial statement to establish what had happened through police examination, and that makes it testimonial in nature.

[2] The special questions presented to the jury were: "Did the defendant knowingly possess a pistol or other firearm or consciously exercise dominion and control over it?" and "Second, did this take place on June 3rd, 2010, in Cass County, Minnesota?"

possession charges and sentenced appellant to 60 months for felony unlawful possession in violation of Minn. Stat. § 609.165, subd. 1b. Appellant challenges the conviction.

D E C I S I O N

Appellant argues that the respondent committed prejudicial misconduct when it improperly mentioned that LaRose was not going to testify at trial because respondent was unable to subpoena him. Appellant argues that the statement implied that LaRose's testimony would have been favorable to respondent. Although appellant did not object to the statement when it was made, nor did he object to the statement at any other time during the trial, he argues that this court should reverse and remand under plain error review.

"Ordinarily, the defendant's failure to object to an error at trial forfeits appellate consideration of the issue." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). "On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *Id*. *See also* Minn. R. Crim. P. 31.02. "With respect to any unobjected-to prosecutorial misconduct, we will apply the plain error doctrine." *State v. Dobbins*, 725 N.W.2d 492, 506 (Minn. 2006). *See also Ramey*, 721 N.W.2d at 297–99.

"[B]efore an appellate court reviews unobjected-to trial error, there must be (1) error, (2) that is plain, and (3) affects substantial rights." *Id*. at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). "If each of these requirements is met, we then assess whether we should address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Prtine*, 784 N.W.2d 303, 314 (Minn. 2010). *See also Ramey*, 721 N.W.2d at 302.

Error

Appellant argues that there was error in the prosecutor's opening statement when the prosecutor said LaRose would not testify and stated, "You're not going to hear from Anthony LaRose. Anthony LaRose is not going to testify in this trial. . . . [B]ut you're not going to hear from Anthony LaRose. We couldn't find him. We tried to subpoena him. He's not here. He's not going to be a witness in this case." Appellant argues that this statement implied that LaRose's testimony would have been favorable to respondent. Respondent argues that merely telling the jury that respondent tried to subpoena LaRose does not indicate that his testimony would have been favorable to respondent or that he would have given any additional evidence to inculpate appellant.

"It is improper conduct for a prosecutor to refer to a witness who was not called." *State v. Page*, 386 N.W.2d 330, 336 (Minn. App. 1986), *review denied* (Minn. June 30, 1986). *See also State v. Shupe*, 293 Minn. 395, 196 N.W.2d 127 (1972).

In *Shupe*, the defendant alleged that the prosecutor erred during his closing argument by discussing witnesses he did not call during the trial. The prosecutor stated during closing:

> Now as I mentioned in my opening statement, I was going to call a series of witnesses. Several of the witnesses I did not call . . ., this was due to unexpected illness and hospitalization so it's unfortunate that this supplementary testimony could not come in, but things like that happen.

Id. at 396, 196 N.W.2d at 128. The court found that the statement discussing other witnesses who could add testimony related to defendant's guilt amounted to prejudicial error. *Id.* The court stated, "we cannot assume that the jury was not influenced by the

prosecutor's reference to the asserted fact that there was other testimony bearing upon defendant's guilt which he was prevented from submitting because of 'unexpected illness and hospitalization.'" *Id.*

Conversely, reference to witnesses who were not called but who would have been merely duplicative has been found to not amount to prejudicial error. *State v. Thomas*, 305 Minn. 513, 232 N.W.2d 766 (1975). In *Thomas*, the prosecutor discussed witnesses he did not call and stated, "From this entire list of persons that might be able to shed some light, some truth on what actually happened . . . we have attempted to avoid duplication. We have refrained from calling witnesses who would merely repeat what other witnesses would say." *Id*. at 515 n.1, 232 N.W.2d at 767 n.1. The court found that it was unlikely that the prosecutor's statement adversely affected the verdict because the statement "contains no prejudicial inference of supplementary evidence of guilt as prohibited in Shupe." *Id*. at 517, 232 N.W.2d at 769.

Here, the prosecutor's statement that respondent was unable to call LaRose as a witness suggested to the jury that LaRose's testimony would have further inculpated appellant. The present situation is more comparable to *Shupe* than to *Thomas*. When the prosecutor made the comment in his opening statement, the three things the jury knew about LaRose were that he was the alleged victim, that he told deputies appellant had a gun, and that he told deputies appellant tried to shoot him. LaRose's statements were allowed under a hearsay exception and gave the jury an idea of what his trial testimony would have been. After the prosecutor explained respondent's efforts to subpoena LaRose, the jury could have reasonably assumed that his trial testimony would have

aligned with his out-of-court statements and would have further implicated appellant. Indeed, by looking at the hearsay statements the court refused to admit, it is clear that LaRose would have had more testimony than the hearsay statements that were presented at trial. This case is unlike *Thomas* because LaRose's testimony would not have been duplicative of the deputies' testimonies or his own hearsay statements that were admitted. LaRose was the only other person with appellant when the relevant events occurred and could have testified firsthand about appellant's actions as well as his own. The prosecutor's statement that LaRose would not be a witness at trial suggested that LaRose would have offered a unique perspective as the "alleged victim." If LaRose was going to testify to the same facts as the deputies or was going to testify only about his hearsay statements that were already admitted, it is unlikely that the prosecutor would have detailed respondent's efforts to subpoena him. Because the prosecutor's statement to the jury implied that LaRose's testimony would provide further evidence bearing upon appellant's guilt, it was error.[3]

Plain Error

The prosecutor's statement about LaRose not testifying at trial was error, so the next step of plain-error analysis is to determine whether this error was plain. Appellant argues that caselaw clearly prevents this type of statement by the prosecutor because it

[3] The prosecutor had several options. He could have chosen not to proceed with the prosecution in the absence of the alleged victim or he could have chosen to proceed with the prosecution based on the hearsay statements of the alleged victim that had been ruled admissible. What he could not do, and what he did here, was explain in an opening statement that the absence of the alleged victim and key witness was not the prosecution's fault, and that respondent wanted that testimony ("we tried to subpoena him"), thereby implying that the testimony of LaRose would further inculpate appellant.

implied that LaRose would have offered testimony favorable to respondent. Respondent argues that there is no controlling caselaw that prohibits a prosecutor from mentioning that he or she unsuccessfully tried to subpoena a witness. However, the improper statement to which appellant objects is not the mere assertion that LaRose would not be testifying, but rather the implication that his testimony would have been favorable to respondent by adding evidence regarding defendant's guilt.

"An error is plain if it is clear or obvious, and usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007) (quotations omitted).

The Minnesota Supreme Court's decisions in *Shupe* and *Thomas* hold that a prosecutor should not discuss failure to call witnesses when the discussion indicates that those witnesses would have added additional evidence regarding a defendant's guilt. The court has stated, "We adhere to our decision in Shupe that there may be circumstances in which it is prejudicial error for the prosecutor to state that he has failed to call witnesses who would, in effect, support the testimony of other witnesses." *Thomas*, 305 Minn. at 515, 232 N.W.2d at 768. As discussed above, the statement made by the prosecutor in the present case implied that LaRose's testimony would have been favorable to respondent and presumably would have provided additional evidence of appellant's guilt, so the prosecutor's statements about LaRose's absence contravened established caselaw.

Additionally, the court in *Thomas* also discussed a standard of conduct to which prosecutors should adhere when they plan to use a questionable statement about witnesses at trial. In those circumstances, the statement "should first be discussed in

chambers with the trial judge so that the trial judge may exercise his discretion as to whether such a statement should be included . . . ." *Id.* at 515–16, 232 N.W.2d at 768 (noting that courts should be guided by the then-current ABA Standards for Criminal Justice regarding the prosecution's function in closing arguments to the jury and references to facts outside the record).[4]

In the present case, there is no evidence in the record that the prosecutor asked the trial judge whether the comment about LaRose's absence could be included in his opening statement. The prosecutor's statement contravened caselaw because it implied that LaRose's testimony would have been favorable to respondent. The prosecutor's failure to consult with the trial judge before including the improper comment ignored the standard of conduct highlighted in *Thomas*. Accordingly, the error constituted plain error.

Plain Error Affecting Substantial Rights

"If plain error is proven . . . the burden shifts to the state to show that the defendant's substantial rights were not affected. Prosecutorial misconduct affects substantial rights if there is a reasonable likelihood that the absence of misconduct would have had a significant effect on the jury's verdict." *Davis*, 735 N.W.2d at 681–82 (citation omitted). *See also State v. Valentine*, 787 N.W.2d 630, 640 (Minn. App. 2010). When considering the effect on the jury's verdict, the court "consider[s] the strength of

[4] Although *Thomas* involved a statement by a prosecutor concerning absent witnesses in final argument, the court's instruction is applicable to opening statements as well because it relies on a standard of conduct for prosecutors not to argue or refer to facts outside the record. ABA Standards for Criminal Justice, *The Prosecution Function and Defense Function* Standards 3-5.5, 3-5.9 (3rd ed. 1993).

the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *Davis*, 735 N.W.2d at 682.

The first factor the court considers is the strength of the evidence against appellant. Although there is some evidence that appellant had possession of the gun, it is almost entirely circumstantial. The only direct evidence that appellant had the gun is the out-of-court statements made by LaRose. Deputy Wolske was only able to testify that appellant was running bent over as if he was trying to secure something. Deputy Conner saw appellant make a throwing motion toward the area where the gun was eventually recovered. Deputy Wolske saw appellant flee when he came upon the scene, which might have been evidence of guilt, but LaRose also tried to flee after appellant was detained and handcuffed. Neither deputy actually saw appellant or LaRose with the gun. Evidence presented by one witness indicated that appellant and LaRose were both in the vicinity when the shots were fired, but the witness did not see either one of the men with a gun. The implication that LaRose would have been a favorable witness for the prosecution slants all of the circumstantial evidence toward appellant having possessed the gun.

In other cases where the third prong of plain error review was not met, evidence of the defendant's guilt was much stronger. *See Davis*, 735 N.W.2d at 682 ("[T]he evidence against Davis was substantial and compelling and included his admission that he had shot Allan and Morocho during an attempt to rob them."); *Dobbins*, 725 N.W.2d at 513 ("[T]he state's case against Dobbins was very strong, and the evidence, both in the form

of witness testimony and forensic evidence, overwhelmingly indicates that Dobbins shot and killed Lavender."); *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006) ("[T]he state's case was very strong. Hansen and House both testified that they saw Swanson shoot Schultz. DNA evidence linked both Swanson and Combs to a cigarette butt found at the Schultz residence, and also linked Swanson and Schultz to a blood stain . . .").

In the present case, the forensic evidence is inconclusive. The fingerprints and DNA did not match either appellant or LaRose. There was no live testimony from any witness who saw appellant with the gun. The evidence is weak without the implication that LaRose's testimony would have been favorable to respondent.

The second factor analyzed when determining whether appellant's substantial rights were affected is the pervasiveness of the misconduct. Here, the improper suggestion was a few sentences in the prosecutor's opening statement. The prosecutor said, in reference to LaRose:

> You're not going to hear from Anthony LaRose. Anthony LaRose is not going to testify in this trial. He is the alleged victim. He is the one who said to Deputy Wolske in response to Deputy Wolske's question, "Is there a weapon?" "Yes." And then as he's being handcuffed, he said to Deputy Conner, "He shot at me."
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> And then you'll see the evidence of the gunshots, the markings in the ground and the spent bullets, but you're not going to hear from Anthony LaRose. We couldn't find him. We tried to subpoena him. He's not here. He's not going to be a witness in this case.

Although the prosecutor did not mention LaRose's absence again after the opening statement, the damage was already done.

Respondent argues that these improper words do not make the prosecutor's misconduct pervasive. Other cases have found improper statements to not be pervasive when they consist of a few words in a lengthy trial. *See Davis*, 735 N.W.2d at 682 ("[T]he prosecutor's improper suggestions were not pervasive, covering less than one of the 64 pages of the transcript containing Davis's testimony."); *Swanson*, 707 N.W.2d at 658 ("Here, the impermissible questions and comments were confined to roughly two pages of transcript of a record compromising over 1,200 pages."); *but see State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn. 2006) ("At least 20 pages of the prosecutor's 80-page cross-examination of the defendant evince prosecutorial misconduct. The scope of the misconduct in this case is unprecedented in this court's memory. . . ."). But the suggestion in the present case is unique because it informs the jury's opinion about every other witness's testimony. Again, LaRose was the only person other than appellant present where the gun was found, so the implication that he is a favorable witness to the prosecution leads to the conclusion that he did not have the gun and appellant did. The single reference in this case necessarily slanted all circumstantial evidence against appellant.

Finally, the third factor to analyze is whether appellant had an opportunity or made an effort to rebut the improper suggestion by the prosecutor. In this situation, appellant did not object to the prosecutor's statement. Besides not objecting to the statement, appellant's counsel did not address the comment at any point during the trial.

Analyzing all three of these factors together, respondent did not meet its burden to show that appellant's substantial rights were not affected. LaRose's role in the incident

bears heavily on whether appellant possessed the gun. If the jury infers that his testimony would have been favorable to respondent, it is logical to conclude that LaRose did not possess the gun and appellant did. We conclude that the implication that LaRose was a helpful witness to respondent had a significant effect on the jury because LaRose was the only other person likely to have possessed the gun.[5]

Fairness and Integrity of Judicial Proceedings

When the three prongs of plain error review are met, "[T]he court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Ramey*, 721 N.W.2d at 302. "Appellate courts should not hesitate in a suitable case to grant relief in the form of a new trial." *Id.* at 303 (quotation omitted). All three prongs of plain error review are met in this case. Error was committed because the prosecutor improperly commented on a witness who would not be called to testify at trial. This improper comment constituted plain error because it contravened caselaw that prohibits statements implying that an uncalled witness would have given testimony inculpating a defendant. Respondent did not meet its burden to show that the misconduct did not affect the substantial rights of appellant. Since the three prongs of the plain error review are met, this court will reverse the conviction and remand to the district court to ensure a fair trial for appellant.

[5] We are not unmindful of the fact that this decision places an additional burden on the trial judge where, as here, the prosecutor has not discussed the statement in advance with the court and there has been no objection or motion for a mistrial after the prosecutor's improper statement. However, the prosecutor should adhere to the standard set out in *Thomas* and allow the court to exercise its discretion before the statement is made to relieve the district court of this burden and to avoid possible reversal.

Reversed and remanded.