STATE OF MINNESOTA
IN COURT OF APPEALS
A11-590

State of Minnesota,
Respondent,

vs.

Geraldine Lee Garbow,
Appellant.

Filed March 5, 2012
Affirmed
Larkin, Judge

Mille Lacs County District Court
File No. 48-CR-08-2996

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

Janice S. Jude, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney, Milaca, Minnesota (for respondent)

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

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges her conviction of prohibited possession of a firearm, arguing that the district court abused its discretion by admitting evidence of the main witness's

prior inconsistent statements at trial. Appellant also argues that the prosecutor engaged in misconduct during his closing arguments. We affirm.

FACTS

On November 3, 2008, police officers from the Mille Lacs Tribal Police Department were dispatched to a residence in Onamia, Minnesota. Officer Charles Scott arrived on the scene and observed a parked vehicle with multiple broken windows. Appellant Geraldine L. Garbow's mother, Y.G., Y.G.'s adult son, Q.G., and Y.G.'s ten-year-old daughter, I.G., were at the scene. Y.G. told Officer Scott that appellant had taken cold medicine, become agitated, and broken the windows of her own car. Next, appellant entered the family's residence and obtained a firearm. Appellant stated that she planned to pawn the firearm to obtain funds to fix her car. Y.G. told Officer Scott that Q.G. took the firearm from appellant and provided it to Y.G, who secured the firearm in the trunk of a different vehicle. Y.G. also told Officer Scott that appellant ran into a wooded area behind the residence shortly before he arrived. Y.G. allowed Officer Scott to retrieve the firearm, a Winchester 30-30 rifle, from the trunk of the vehicle, and he secured it in his squad car. Officer Scott attempted to interview Q.G., but he refused to provide any information about the incident. Officer Scott did not attempt to interview ten-year-old I.G.

Officer Scott learned from dispatch that appellant is ineligible to possess a firearm because she has been adjudicated delinquent for unauthorized use of a motor vehicle. After Officer Scott was unable to locate appellant, he left the scene. Later that evening, appellant returned to the residence. Officer Scott arrived and arrested appellant based on

probable cause to believe that she had possessed a firearm in violation of statute. The following day, the state charged appellant with prohibited possession of a firearm. *See* Minn. Stat. § 624.713, subd. 1(2) (2008) (defining the crime of certain persons not to possess firearms). Officer Scott sent the firearm to the Bureau of Criminal Apprehension (BCA) for fingerprint and DNA analysis. No usable fingerprints or DNA samples were recovered.

Approximately eight months after appellant was charged, Officer Scott contacted Y.G. and questioned her about the incident. The conversation was recorded. Officer Scott asked Y.G. to clarify her previous statement regarding who held the firearm during the incident. Y.G. stated that appellant exited the residence with the firearm and that Q.G. took the firearm from her. Y.G. stated that appellant possessed the firearm for less than five minutes.

Almost two years after the incident, appellant's case came on for trial. Y.G. told defense counsel that her statements to Officer Scott were false, and defense counsel disclosed this information to the prosecutor. After hearing arguments from counsel, the district court ruled that Y.G.'s prior inconsistent statements to Officer Scott were admissible as substantive evidence. The prosecutor called Y.G. to testify. Y.G. testified that her previous statements to Officer Scott were false and that appellant never possessed the firearm. Y.G. instead claimed that Q.G. removed the firearm from the residence. Y.G. explained that she lied to Officer Scott to prevent Q.G., whom she knew to be ineligible to possess a firearm, from getting in trouble. Y.G. also testified that she was angry with appellant when she accused appellant of possessing the gun. During

Y.G.'s testimony, the prosecutor referred to Y.G.'s prior statements and offered Y.G.'s recorded statement as an exhibit.

The jury found appellant guilty as charged, and the district court sentenced her to serve a mandatory-minimum prison term of 60 months. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by allowing the state to call Y.G. as a witness and by admitting her out-of-court statements as substantive evidence. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

Appellant contends that the prosecution called Y.G. as a witness solely to impeach her with her prior inconsistent statements. Otherwise inadmissible hearsay[1] evidence cannot be introduced under the guise of impeachment. *State v. Dexter*, 269 N.W.2d 721, 721 (Minn. 1978). The supreme court has referred to this situation as "the *Dexter* problem." *Oliver v. State*, 502 N.W.2d 775, 778 (Minn. 1993). The *Dexter* problem occurs when

[1] Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by the Legislature." Minn. R. Evid. 802.

> a prosecutor calls a witness who has given a prior statement implicating the defendant, but that witness has since retracted the statement and signified an intent to testify in defendant's favor if called by the prosecutor. If the prosecutor is permitted to call this witness and use the prior statement for impeachment purposes, there is a large risk that the jury, even if properly instructed, will consider the prior statement as substantive evidence.

State v. Ortlepp, 363 N.W.2d 39, 42-43 (Minn. 1985). But the *Dexter* problem arises only if the prior inconsistent statement is otherwise inadmissible. *Dexter*, 269 N.W.2d at 721 (observing that the state was "seeking . . . to present, in the guise of impeachment, evidence which is not otherwise admissible"). The *Dexter* problem is avoided if the impeachment evidence is admissible as substantive evidence under an exception to the hearsay rule. *Ortlepp*, 363 N.W.2d at 44.

The residual exception to the hearsay rules states that,

> [a] statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Minn. R. Evid. 807.

A court examines the totality of the circumstances when determining whether a hearsay statement has "circumstantial guarantees of trustworthiness." *State v. Keeton*, 589 N.W.2d 85, 90 (Minn. 1998). The court should look to "all relevant factors bearing on trustworthiness." *State v. Stallings*, 478 N.W.2d 491, 495 (Minn. 1991). For

example, in *State v. Ortlepp*, the supreme court relied on the following four factors in concluding that a recanting witness's prior inconsistent statement had circumstantial guarantees of trustworthiness: (1) the witness was available for cross-examination, (2) the witness admitted to making the statement, (3) the statement was against the witness's penal interest, and (4) the statement was consistent with other evidence introduced by the state. 363 N.W.2d at 44. When reviewing a district court's admission of statements under the residual exception, the reviewing court must bear in mind that a district court has "considerable discretion" in making this determination. *Stallings*, 478 N.W.2d at 495.

In ruling that Y.G.'s out-of-court statements were admissible as substantive evidence, the district court relied on rule 807.[2] The district court reasoned, "the statement to the police originally is consistent with the second statement that's taken; [Y.G.] is available for cross examination. It was made against an interest out of a relationship between mother and daughter and therefore my ruling is that it will be permitted."

The district court's reasoning is sound. Y.G. gave the police two statements: one at the time of the incident and a second one eight months later. The statements were consistent and both statements alleged that appellant possessed the firearm. When questioned by the prosecutor at trial, Y.G. admitted to making the statements, and she was available for cross-examination by the defense. Although Y.G.'s statements were not against her penal interest, they were against her personal and familial interests,

[2] The district court cited *State v. Williams*, No. A08-1401, 2009 WL 3426478, at *2-4 (Minn. App. Oct. 27, 2009), in which this court affirmed the admission of prior inconsistent statements under rule 807.

because the statements implicated her daughter in a crime and therefore could have damaged her parent-child relationship. *See State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004) (holding that the witness's statement satisfied one of the *Ortlepp* factors because it was against her interests in maintaining a relationship with the defendant), *review denied* (Minn. Sept. 29, 2004).

Appellant contends Y.G. did not know that her statement could result in criminal charges against appellant and that the statement therefore was not against her interest in maintaining a relationship with her daughter. Appellant also contends that Y.G. was protecting Q.G., who she knew to be ineligible to possess a firearm when she made the statement. We are not persuaded. First, Y.G. implicated Q.G. in both of her statements to the police: she twice told Officer Scott that Q.G. took the gun from appellant and thereby indicated that he possessed the firearm. Second, although Y.G. may not have realized that appellant's juvenile-delinquency record made her ineligible to possess a firearm and therefore subject to prosecution at the time of her first statement, appellant's charges had been pending for nine months at the time of Y.G.'s second statement. On this record, the district court correctly concluded that the statement was against Y.G.'s interest in maintaining a favorable relationship with her daughter.

Additionally, Y.G.'s out-of-court statements were consistent with each other and with other evidence. Y.G. told the officer that she placed the firearm in the trunk of a car after receiving it from Q.G. The officer testified that he retrieved the firearm from the trunk of a car. In sum, all of the *Ortlepp* factors show that the statements had circumstantial guarantees of trustworthiness. Having concluded that the threshold

showing under rule 807 was established, we next consider the district court's decision in light of the remaining requirements of the rule.

Y.G. twice told Officer Scott that appellant possessed a firearm, and these statements were offered as evidence of a material fact at trial: whether appellant possessed a firearm in violation of law. Y.G.'s statements that appellant possessed a firearm are more probative on this point than any other evidence the state could procure through reasonable efforts. The only other adult witness to the alleged offense, Q.G., refused to provide a statement, and the ten-year-old witness was not interviewed.

Moreover, the purposes of the rules of evidence and the interests of justice were best served by allowing the jury to hear evidence regarding Y.G.'s prior inconsistent statements to Officer Scott. One of the purposes of the rules of evidence is to ascertain the truth. *See* Minn. R. Evid. 102 (stating that the rules shall be construed "to the end that the truth may be ascertained"). Likewise, one of the purposes of a trial is to ascertain the truth. *See State v. Master*, 312 Minn. 596, 597, 252 N.W.2d 859, 860 (1977) (discussing whether certain evidence was relevant as to the "truth-seeking process" of a trial). Consistent with the truth-seeking purpose, it was proper for the jury to evaluate Y.G.'s testimony in light of her prior inconsistent statements to determine where the truth lay.

> The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be

> decided only in accordance with the truth of words uttered under oath in court.

Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925).

In summary, the district court's ruling reflects a proper application of rule 807, and the district court did not abuse its discretion by admitting Y.G.'s prior inconsistent statements as substantive evidence. And because Y.G.'s statement was admissible as substantive evidence, there was no *Dexter* problem.

II.

Appellant argues that she is entitled to a new trial because three purported instances of prosecutorial misconduct during closing and rebuttal arguments denied her a fair trial. The defense objected to one instance but did not object to the others. This court considers closing arguments in their entirety in determining whether prosecutorial misconduct occurred. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). Our standard of review depends on whether the defendant objected to the alleged misconduct. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009).

Objected-to arguments

The supreme court has previously utilized a two-tier approach for review of prosecutorial-misconduct claims. *See State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974) (outlining a test for unusually-serious misconduct and a different test for less-serious misconduct). In cases involving unusually serious prosecutorial misconduct, the court will reverse unless the misconduct is harmless beyond a reasonable doubt. *Id.* In cases involving less-serious prosecutorial misconduct

the court considers "whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.* at 128, 218 N.W.2d at 200.

Appellant argues that the prosecutor committed unusually serious misconduct when he argued that he had successfully prosecuted a case that was similar to appellant's case. Specifically, appellant contends the following italicized portion of the prosecutor's closing argument was improper.

> [T]he law doesn't require that we have the firearm, let alone DNA or fingerprint evidence. The law allows you to find the defendant guilty beyond a reasonable doubt without ever actually having the firearm and relying solely on a witness statement saying that they saw defendant with a firearm. *And I know that in particular because I prosecuted that exact case here in Mille Lacs County. So we don't need to get wrapped up in the DNA evidence or the fingerprint evidence*.

Appellant's attorney objected to the prosecutor's argument, and the district court ordered the jury to "disregard that now."

"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). It is misconduct for a prosecutor to refer to facts that were not admitted as evidence. *State v. Mayhorn*, 720 N.W.2d 776, 788-89 (Minn. 2006). The prosecutor's statement regarding his ability to obtain a conviction in another case referenced facts that were not in evidence and that were wholly irrelevant. The jury was required to determine appellant's guilt based on the facts of this case, not on the outcome of another, unrelated case. Moreover, the statement improperly injected the prosecutor's personal experience and opinion for the jury's consideration. *See State v. Dobbins*, 725

N.W.2d 492, 512 (Minn. 2006) (stating that a prosecutor cannot exploit the influence of his office by using personal opinions to argue for a conviction). For these reasons, we agree that the prosecutor's argument was improper.

The supreme court has held that a prosecutor commits serious misconduct by making statements that are not based on evidence at trial, by impinging juror independence, and by intentionally inflaming the jury's passions and prejudices. *State v. Porter*, 526 N.W.2d 359, 364-65 (Minn. 1995). And because the viability of the two-tier standard of review is in question, we will give appellant the benefit of the doubt and apply the heightened standard of review that applies to unusually serious misconduct. *See State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (stating that the continued viability of the two-tiered *Caron* approach has not yet been decided).

The Minnesota Supreme Court has found instances of prosecutorial misconduct to be harmless beyond a reasonable doubt where the district court timely sustained an objection to the misconduct, where the state's case was strong, and where the misconduct only constituted a small portion of the entire argument. *See Dobbins*, 725 N.W.2d at 508 (holding that the misconduct did not necessitate a reversal because "the district court timely sustained [appellant's] objections and, in doing so, significantly reduced the impact of the state's improper questions on the jury verdict," and because "the evidence in this case overwhelmingly indicates that [appellant] shot and killed [the victim]"); *see also Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004) (*Ture II*) (holding that the misconduct did not require a reversal because "the closing argument was two and a half hours long,

summarized a complicated murder trial, and the misconduct appeared to have been inadvertent").

In this case, the inappropriate statement was brief, consisting of two sentences of a closing and rebuttal closing argument that spanned approximately 20 pages of transcribed argument. And the judge promptly instructed the jury to disregard the statement. A jury is presumed to have followed the district court's instruction to disregard statements. *State v. Bauer*, 776 N.W.2d 462, 472 (Minn. App. 2009), *aff'd on other grounds*, 792 N.W.2d 825 (Minn. 2011). The district court also instructed the jury, prior to closing arguments, that arguments and other remarks from an attorney are not evidence and that it was to disregard evidence that the judge ordered stricken or had told them to disregard. Although the state's case depended on Y.G.'s out-of-court statements, the evidence corroborated her statements (e.g., the gun was located where she said it would be) and there were legitimate reasons for the jury to credit Y.G.'s contemporaneous and recorded statements to Officer Scott instead of her sworn testimony. In sum, the brevity of the prosecutor's improper statement, the district court's immediate instruction that the jury disregard it, and the strength of the case against appellant lead us to conclude, beyond a reasonable doubt, that the misconduct was harmless and does not necessitate reversal.

Unobjected-to arguments

Appellant contends that the prosecutor committed misconduct by expressing his personal opinion about Y.G.'s credibility and by denigrating the defense. Appellant did not object to these arguments at trial. 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 has discretion to review unobjected-to prosecutorial misconduct if plain error is established. Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). To establish plain error based on a claim of prosecutorial misconduct, the prosecutor's unobjected-to argument must be erroneous, the error must be plain, and the error must affect the appellant's substantial rights. *Ramey*, 721 N.W.2d at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The burden rests with the appellant to demonstrate that plain error has occurred. *Id.* If plain error is established, the burden shifts to the state to demonstrate that the plain error did not affect the defendant's substantial rights. *Id.*

An error affects substantial rights when it was "prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. If plain error affecting substantial rights is established, this court assesses whether to address the error to ensure the fairness and integrity of the judicial proceedings. *See id.* at 740, 742 (stating that a court may exercise discretion to correct a plain error only if such error seriously affected the fairness or integrity of judicial proceedings). "Generally, the defendant will not be granted a new trial if it can fairly be said that the misconduct was harmless beyond a reasonable doubt." *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996).

Appellant contends that the prosecutor engaged in misconduct when he stated,

> if I'm left with two basically identical statements from [Y.G.] taken months apart from each other and then I have to deal with the testimony she gave yesterday, I'll take those two statements and all of the facts surrounding it and using our good judgment and common sense, that's enough to convict.

Appellant argues that this statement constituted a personal opinion about the credibility of a witness and was plain error. "An attorney may argue a particular witness's credibility, but may not interject his or her personal opinion so as to 'personally attach himself or herself to the cause which he or she represents.'" *Ture II*, 681 N.W.2d at 20. But a prosecutor may illustrate circumstances that cast doubt on a witness's veracity or corroborates their testimony. *Ture*, 353 N.W.2d at 516.

Appellant next contends that the prosecutor engaged in misconduct when he argued, "[d]efense [c]ounsel's job is to get you focused on all of these other things so that you're not focusing on the facts that show that the defendant is guilty." While a prosecutor may not belittle the defense in the abstract, they may argue that a particular defense has no merit. *State v. Simion*, 745 N.W.2d 830, 844 (Minn. 2008). And "[t]he prosecutor has the right to fairly meet the arguments of the defendant." *State v. Jackson*, 773 N.W.2d 111, 123 (Minn. 2009).

Even if we were to assume that the prosecutor's unobjected-to arguments were plain error, we would nonetheless conclude that the arguments did not affect appellant's substantial rights. *See State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007) (deciding that reversal was not necessary based on the third prong of the plain-error test without reviewing the other prongs). Like the objected-to improper argument, the unobjected-to statements constituted a small portion of the entire closing argument. *See Walsh*, 495 N.W.2d at 607 (stating that a reviewing court looks "at the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence"). Further, appellant's failure to object suggests that appellant did not

consider the arguments prejudicial. *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997) (stating that a defendant's failure to object to statements implies that the comments were not prejudicial). In sum, the alleged, unobjected-to misconduct did not affect the outcome of the case and does not necessitate reversal, alone, or in conjunction with the objected-to misconduct.

Affirmed.

Dated:

Judge Michelle A. Larkin