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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-833**

State of Minnesota,
Respondent,

vs.

Jeffrey Jamie Early,
Appellant.

**Filed April 23, 2012
Affirmed
Collins, Judge***

Ramsey County District Court
File No. 62-CR-10-7877

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

John Choi, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Kalitowski, 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UNPUBLISHED OPINION

COLLINS, Judge

Appellant challenges his conviction of possession of a firearm by an ineligible person, arguing that the prosecutor committed misconduct during closing argument by making a statement that (1) shifted the burden of proof, and (2) alluded to appellant's decision not to testify. We affirm.

FACTS

Appellant Jeffrey Early was tried for an incident that occurred outside of a St. Paul convenience store sometime after midnight on September 19, 2010. According to L.B., the state's principal fact witness, as he was leaving the store, Early and another young man blocked his way. L.B. said "excuse me," and Early's companion struck L.B. in the face. L.B. removed his jacket and prepared to fight. Early pulled out a pistol, pointed it at L.B., and then passed the pistol to his companion. The companion pointed the pistol at L.B. as well, saying, "oh, my bad. My bad. It ain't even like that," and the two ran off. When L.B. challenged them to come back, Early's companion turned and fired the pistol in L.B.'s direction, missing him. L.B. ran into the convenience store and called the police. Early and his companion subsequently were arrested.

At trial, Early waived his right to testify. And preferring "not [to] draw attention" to his decision not to testify, Early declined a jury instruction explaining this right.

During closing argument, referring to L.B.'s testimony when Early produced the pistol and passed it to his companion, the prosecutor stated:

Now, if you stop the action right there on the testimony of [L.B.], the defendant Mr. Early is guilty. His testimony proves that [Early] possessed that firearm. And there's nothing to contradict that, whatsoever. He was an eye witness to the act. He was there. He perceived it. He knew it. And he's always been consistent about that.

There was no objection.

The jury found Early guilty of possession of a firearm by an ineligible person, in violation of Minn. Stat. § 624.713, subd. 1(2) (2010), and the district court sentenced Early to 60 months' imprisonment. This appeal followed.

DECISION

Whoever has been convicted or adjudicated delinquent for committing a crime of violence and who possesses a firearm is guilty of a crime of possession of a firearm by an ineligible person. Minn. Stat. § 624.713, subd. 1(2). Early stipulated that he was ineligible to possess a firearm. Thus the sole issue for trial was whether Early possessed a firearm.

Early contends that by stating in closing argument that there was “nothing to contradict” L.B.’s testimony, the prosecutor committed misconduct by improperly shifting the burden of proof and alluding to Early’s decision not to testify.¹ Early did not object to the prosecutor’s argument at trial.

¹ Early characterizes the prosecutor’s statement as prosecutorial “misconduct.” “[T]here is an important distinction . . . between prosecutorial misconduct and prosecutorial error.” *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). Prosecutorial misconduct “implies a deliberate violation of a rule or practice, or perhaps a grossly negligent transgression,” while prosecutorial error “suggests merely a mistake of some sort, a misstep of a type all trial lawyers make from time to time.” *Id.* We apply the same standard to allegations of prosecutorial misconduct and prosecutorial

We review a claim of unobjected-to trial error under the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). This standard requires (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the three plain-error elements are established, we then consider the need to remedy the error to ensure fairness and the integrity of the judicial proceedings. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002); *see also Griller, id.* at 740.

The burden is on the nonobjecting appellant to show that an error occurred and that it was plain. *See Ramey*, 721 N.W.2d at 302. “An error is plain if it was ‘clear’ or ‘obvious.’ Usually this is shown if the error contravenes case law, a rule, or a standard of conduct.” *Id.* (quotation and citation omitted). In the context of prosecutorial error, if the appellant establishes plain error, the burden shifts to the state to demonstrate that the error did not affect the appellant’s substantial rights. *Id.* In such event, this standard is met by showing that there is no reasonable likelihood that the misconduct had a significant effect on the jury’s verdict. *Id.* On review, we analyze the challenged statement in the context of the argument as a whole. *State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003); *Leutschaft*, 759 N.W.2d at 418.

Early argues that the prosecutor’s statement shifted the burden of proof. Due process requires that the state prove every element of the charged offense beyond a reasonable doubt. *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). Misstatements of this burden of proof constitute prosecutorial error. *See State v. Hunt*,

error. *Id.* Because this does not appear to be an instance of deliberate violation or gross negligence on the part of the prosecutor, we adopt the term “prosecutorial error.”

615 N.W.2d 294, 302 (Minn. 2000). Under Minnesota law, a prosecutor may not comment on a defendant's failure to contradict testimony; such a comment may suggest to the jury that the defendant bears some burden of proof. *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995). Also, it is prosecutorial error to allude in argument to a defendant's waiver of the right to testify in his or her own defense. *See Ramey*, 721 N.W.2d at 300. We conclude that, here, the prosecutor plainly erred by stating to the jury that "there's nothing to contradict" L.B.'s testimony that Early possessed a firearm.

Having found plain error, we turn to whether the error affected Early's substantial rights. We consider the strength of the evidence against Early, the pervasiveness of the improper suggestions, and whether Early had an opportunity, or made efforts, to rebut the improper suggestions. *See State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). We will reverse only if, in light of the entire record, the prosecutorial error is of such a serious and prejudicial nature that Early's constitutional right to a fair trial was impaired. *See State v. Haynes*, 725 N.W.2d 524, 529 (Minn. 2007).

The evidence against Early is strong. L.B. offered direct testimony and several witnesses provided substantive and corroborating circumstantial evidence. The improper suggestions are not pervasive; the improper statement is in a single line within the prosecutor's closing argument of nearly 11 transcribed pages. Early declined a jury instruction on his right not to testify. The district court properly instructed the jury and, in closing arguments, the prosecutor and Early's trial counsel each reinforced the instruction on the correct burden of proof. In light of the entire record, we conclude that it is not reasonably likely that the error had a significant effect on the jury's verdict or

that the prosecutor's conduct impaired Early's right to a fair trial. Because the error did not affect Early's substantial rights, Early is not entitled to a new trial.²

Affirmed.

² Because Early fails to establish the third element of plain error, we do not reach the question of whether a remedy is necessary to ensure fairness and the integrity of the judicial proceedings. *See Griller*, 583 N.W.2d at 740 (stating that remedy to ensure fairness and integrity of judicial proceedings considered only after three plain-error factors are established).