STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1198

State of Minnesota,
Respondent,

vs.

Antonio Armando Zepeda,
Appellant.

Filed July 15, 2013
Affirmed
Hooten, Judge

Dakota County District Court
File No. 19HA-CR-11-257

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

James Backstrom, Dakota County Attorney, M. Christine Misurek, Kevin J. Golden, Assistant County Attorneys, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hooten, Judge; and Willis, Judge.*

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

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

HOOTEN, Judge

Appellant argues that he was denied a fair trial because the prosecutor committed misconduct during closing argument by improperly shifting the burden of proof and misstating the law of defense of another. We affirm.

FACTS

In February 2012, appellant Antonio Armando Zepeda was convicted of second-degree assault stemming from his display of a knife during a January 2011 confrontation at a convenience store parking lot. He argued at trial that he was acting in defense of another.

Around 2:30 a.m. on January 23, 2011, two groups of people arrived at a PDQ convenience store in Burnsville. The majority of the first group, which included D.M., J.A., A.R., K.W., and the victim, entered the store just as the second group arrived. The second group, which included Zepeda, T.G., and Zepeda's daughter and her boyfriend, parked next to the first group's vehicle.

At trial, witnesses from the two groups offered conflicting testimony about what occurred. According to testimony from individuals in the first group, the victim and J.A. exited the store and had a loud conversation about performing fellatio as they walked back to their vehicle. Meanwhile, D.M., the first group's sober designated driver, was still inside the store when a man from Zepeda's group walked into the store and said that someone in the parking lot was making comments about performing fellatio for $25. D.M. testified that Zepeda become upset by the comments and walked outside to D.M.'s

vehicle, where the victim was sitting, and opened the vehicle door. According to the victim, when Zepeda opened the vehicle door, he asked if anyone was performing fellatio. The victim, who was unarmed, exited the vehicle and Zepeda then came toward him, threatened him, and made a gesture that made the victim believe that Zepeda was grabbing for a knife or had a knife. According to D.M., who saw the incident, Zepeda was reaching into his pocket as he said "I'll cut you" to the victim. At that point, T.G., who was with Zepeda's group, pushed Zepeda aside and came after the victim, jumping on him, grabbing his necklace, and tearing it off.

T.G., however, described a different version of the incident. She testified that as she walked into the store, one of the men in the other group yelled out to her, calling her "baby," and asking her to come over and perform fellatio. She told Zepeda, who approached the other group's vehicle and asked who was saying such things. Then the victim, who was sitting in his vehicle, got out of the vehicle and stood face-to-face with Zepeda, who responded that he did not want any problems. As Zepeda and T.G. were walking back toward their car, the victim told Zepeda "[y]ou better keep your b-tch on a leash." When T.G. heard this, she became so upset that she "turned around in anger and [she] started charging toward" the victim to slap him, but Zepeda stopped her. T.G. denied assaulting the victim and testified that during the incident, she did not see Zepeda with a knife.

After seeing the commotion in the parking lot, the PDQ clerk called 911. Responding law enforcement authorities stopped the vehicle in which Zepeda was a passenger and discovered a folding knife in the center console.

The state charged Zepeda with second-degree assault in violation of Minn. Stat. § 609.222, subd. 1 (2010), and aiding and abetting attempted first-degree robbery in violation of Minn. Stat. §§ 609.05, subd. 1 (2010); .245, subd. 1 (2010), relative to the grabbing of the victim's necklace by T.G. The case went to trial in February 2012. During closing arguments, Zepeda argued that he was acting in defense of T.G. In its rebuttal closing argument, the state contended that Zepeda was the aggressor and that the evidence did not support his defense theory. The jury found Zepeda guilty of second-degree assault and acquitted him of aiding and abetting attempted first-degree robbery. This appeal follows.

D E C I S I O N

Zepeda argues that he was denied a fair trial because the prosecutor committed misconduct during closing argument by improperly shifting the burden of proof and misstating the law of defense of another. "Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt." *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). A prosecutor's misstatement of the law may constitute misconduct. *See State v. Strommen*, 648 N.W.2d 681, 689−90 (Minn. 2002). "For claims of prosecutorial misconduct to which a defendant did not object, we apply a modified plain-error test." *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). Zepeda must first show "that the misconduct is error and that it is plain." *Id.* "The burden then shifts to the State to demonstrate that the error did not affect the defendant's substantial rights." *Id.* Because Zepeda concedes that he did not object to the prosecutor's comments, we apply a modified plain-error test. *See id.*

A. Shifting the burden of proof

Zepeda first argues that the prosecutor improperly shifted the burden of proof because the prosecutor's closing argument repeatedly indicated that Zepeda was claiming that he acted in defense of another, thereby insinuating that the burden of proof was upon Zepeda, rather than the state. "Misstatements of the burden of proof . . . constitute prosecutorial misconduct." *State v. Fields*, 730 N.W.2d 777, 786 (Minn. 2007). "Prosecutors improperly shift the burden of proof when they imply that a defendant has the burden of proving his innocence." *State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009). "However, a prosecutor's comment on the lack of evidence supporting a defense theory does not improperly shift the burden." *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010). Once a defendant comes forward with evidence supporting a claim of self-defense, "the state has the burden of disproving one or more of these elements beyond a reasonable doubt." *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). "The state has a right to vigorously argue its case, and it may argue in individual cases that the evidence does not support particular defenses." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

Zepeda contends that the "major theme" of the prosecutor's rebuttal argument attempted to discredit his defense that he had acted in defense of another. He argues that this was improper because "the manner in which the prosecutor made the argument in this case constituted multiple forms of misconduct that worked in concert to distort the jury's perception of how to properly reach a verdict." Zepeda specifically challenges two

paragraphs of the prosecutor's closing argument in which the prosecutor uses the word "claim," or a form of it, three times.

But the statements that Zepeda challenges must be put into context. "When reviewing claims of prosecutorial misconduct arising out of closing arguments, we consider the closing argument as a whole rather than focusing on particular 'phrases or remarks that may be taken out of context or given undue prominence.'" *State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005) (quoting *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993)). Viewed in context, the state argued as follows:

> And you have to ask yourself why did he have a knife out. Because the defendant is trying to apparently argue that he had to defend somebody. And who he's claiming that he was defended [sic] was [T.G.].
>
> And I want you to think about [T.G.]'s testimony, because at no time did she ever say she was threatened. Did she? She never said that she was threatened by anyone or anything.
>
> And the defense is claiming that he pulled her back with a knife drawn. And why did he pull her back? What did she tell you she was doing when he pulled her back? She was going forward to slap [the victim]. A person who is an aggressor does not get to claim self-defense. You don't get to take a stab at somebody and then say it's in self-defense.

The prosecutor later added, "How is he protecting [T.G.] when she's the one charging at [the victim]? How is he protecting her with a knife?"

When viewed as a whole, the prosecutor's statements amount to a vigorous contention that the evidence does not support Zepeda's defense that he was acting in defense of T.G. The statements highlight that T.G. did not testify that she was

threatened, but instead testified that she turned around in anger and was charging at the victim. Such vigorous argument is allowed. *See Davis*, 735 N.W.2d at 682. Furthermore, the prosecutor told the jury "that the State has proven every element of the offenses beyond a reasonable doubt" and to "pay close attention" to the district court's instructions. In its instructions to the jury regarding acting in the defense of another, the district court reiterated that the state "has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense." "We presume that the jury followed the court's instruction . . . ." *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002).

Because the prosecutor did not improperly shift the burden of proof, Zepeda has shown no plain error. Thus, we will not analyze appellant's argument that his substantial rights were affected. *See Yang*, 774 N.W.2d at 559.

B. Misstating the law of defense of another

Zepeda also argues that the prosecutor misstated the law of defense of another, specifically pointing to three portions of the closing arguments. First, he claims that the prosecutor "advanced the erroneous proposition that the law of self-defense was not 'available'" to Zepeda by making the following statement:

> A person who is an aggressor does not get to claim self-defense. You don't get to take a stab at somebody and then say it's in self-defense.
>
> Self-defense is only available if you're not the aggressor. That's the only time it's available.

Zepeda argues that these statements were error because the district court had agreed to give a self-defense instruction, which made the defense "available" to him. The state

argues that the statement was not plain error because it is consistent with the first element of self-defense as outlined in *State v. McKissic*, 415 N.W.2d 341 (Minn. App. 1987). In *McKissic*, this court outlined the elements of self-defense as:

> (1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm and that the action taken was necessary to avert that danger; (3) the existence of reasonable grounds for that belief; and (4) the absence of a reasonable possibility of retreat to avoid the danger.

Id. at 344. Again, the prosecutor's remarks must be read as a whole. *See Leake*, 699 N.W.2d at 327.

Here, the prosecutor argued:

> And the defense is claiming that he pulled her back with a knife drawn. And why did he pull her back? What did she tell you she was doing when he pulled her back? She was going forward to slap [the victim]. A person who is an aggressor does not get to claim self-defense. You don't get to take a stab at somebody and then say it's in self-defense.
>
> Self-defense is only available if you're not the aggressor. That's the only time it's available. That's just the threshold, because even if you are not the aggressor, there has to be a threat of serious bodily harm or death and then you have to take reasonable steps to oppose that.
>
> And by "reasonable," it means what an ordinary reasonable person in the same circumstances would think. Would you think it was reasonable to pull a knife if somebody is cussing at you? That's the question.
>
> And then there also has to be no opportunity of retreat; that you had to use a dangerous weapon 'cause there is no retreat.

> The defendant's car is right there. His daughter is in the driver's seat. The engine is running. There is nothing preventing them from leaving. Yet, he decides he's going to draw a knife. That doesn't make any sense at all. It doesn't make any sense as self-defense. How is he protecting [T.G.] when she's the one charging at [the victim]? How is he protecting her with a knife?

When read in context, the use of the term "available" is mentioned only twice as the prosecutor referred to the elements of self-defense as outlined in *McKissic* and focused on the evidence in the case to support its burden of proving beyond a reasonable doubt that Zepeda did not act in defense of another. At oral argument, the state agreed that the prosecutor's use of the word "available" is somewhat troubling, but argued that the prosecutor's closing argument, considered in its entirety, merely emphasized that the evidence did not support the elements of Zepeda's defense-of-another claim. Because we consider the argument as a whole to avoid giving remarks undue prominence, we agree that there was no error. *See Leake*, 699 N.W.2d at 327.

Next, Zepeda argues that the prosecutor falsely argued that he had an absolute duty to retreat before he could act in defense of another by stating:

> And then there also has to be no opportunity of retreat; that you had to use a dangerous weapon 'cause there is no retreat.

When read in context, the prosecutor is arguing that Zepeda's actions are not those that a reasonable person would have taken and is again referring to the elements of self-defense as outlined in *McKissic*. *See* 415 N.W.2d at 344. Thus, the prosecutor's statement amounts to a robust contention that the evidence does not support Zepeda's defense that

he was acting reasonably in defense of T.G. Such vigorous argument is allowed. *See Davis*, 735 N.W.2d at 682.

Moreover, we presume that the jury followed the district court's instruction that the standard is what a reasonable person would believe to be necessary. *See Taylor*, 650 N.W.2d at 207. There was no instruction from the district court that Zepeda had a duty to retreat. Rather, the district court gave an instruction in accord with the authorized-use-of-force statute and instructed the jury that "[t]he kind and degree of force a person may lawfully use in self-defense is limited by what a reasonable person in the same situation would believe to be. Any use of force beyond that is regarded by the law as excessive." Additionally, the prosecutor reminded the jury to "pay close attention" to the district court's instructions. Under these circumstances, there was no error.

Finally, Zepeda contends that the prosecutor's closing argument constituted plain error in that it incorrectly represented the legal standard for the level of fear required for him to act in defense of another. An error is plain if it is clear, obvious, or contravenes a rule, case law, or standard of conduct, or disregards a well-established and longstanding legal principle. *State v. Brown*, 792 N.W.2d 815, 823 (Minn. 2011). During his closing argument, the prosecutor argued that "there has to be a threat of serious bodily harm or death" before Zepeda had a right of self-defense. Zepeda claims that this statement misstated the law in that a threat or fear of serious bodily harm or death is what is required to support a justifiable taking of a life and in this case, there was no taking of a life. However, in an assault case involving a claim of self-defense by the defendant, we have declared as an element of self-defense is "the defendant's actual and honest belief

that he or she was in imminent danger of death or *great bodily* harm and that the action taken was necessary to avert that danger." *McKissic*, 415 N.W.2d at 344 (emphasis added). We further provided that "the amount of force used in self-defense must be limited to that which would appear to be necessary to a reasonable person under similar circumstances." *Id*. at 344. Additionally, the pattern jury instruction for self-defense not resulting in death includes a definition of assault as "an act done with intent to cause fear of *immediate* bodily harm or death in another." *See* 10 *Minnesota Practice*, CRIMJIG 7.06 (Supp. 2012) (emphasis added). Under these circumstances, where the prosecutor used the word "serious" instead of "immediate" and there is case law supporting the prosecutor's statement that a threat or fear of serious bodily harm or death as an element of self-defense, we do not find that the prosecutor's arguments constituted plain error. Furthermore, the district court's instructions for self-defense included the verbatim definitions of assault as provided in CRIMJIG 7.06 and the jury is presumed to follow instructions. *See Taylor*, 650 N.W.2d at 207.

In sum, Zepeda has failed to establish that the prosecutor's closing arguments constituted plain error. Because Zepeda is not able to show that there was any plain error, there is no need to analyze Zepeda's argument that his substantial rights were affected. *See Yang*, 774 N.W.2d at 559.

Affirmed.