STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0026

State of Minnesota,
Respondent,

vs.

Romego Jewel Young,
Appellant.

Filed May 1, 2017
Reversed and remanded
Smith, Tracy M., Judge

St. Louis County District Court
File No. 69HI-CR-13-822

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

Mark S. Rubin, St. Louis County Attorney, Jeffrey M. Vlatkovich, Assistant County Attorney, Hibbing, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Reilly, Judge.

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

SMITH, TRACY M., Judge

In this appeal from his conviction of third-degree assault, appellant Romego Jewel Young asserts that the district court plainly erred in permitting respondent State of Minnesota to elicit testimony regarding the state's unsuccessful efforts to procure the presence at trial of the victim, a nontestifying witness. Because admitting such evidence was a plain error affecting Young's substantial rights, we reverse and remand.

FACTS

On the afternoon of October 25, 2013, a neighbor heard Young and his girlfriend, M.M., arguing outside their house. According to the neighbor, Young was trying to get away from M.M. while M.M. followed him in her car. M.M. eventually bumped Young with her car and quickly drove away. The neighbor called 911 and reported the incident.

Later that evening, M.M. came to the neighbor's house and pounded on the door. According to the neighbor, M.M. was crying and "hollering 'Help me, help me, he broke my arm.'" The neighbor saw Young walking through her yard as if he were following M.M., but he eventually turned and left. The neighbor brought M.M. inside her house. According to the neighbor, M.M. said Young had "grabbed her and slammed her onto the floor and then he choked her," then "took her arm and jammed it onto the floor" when she "tried getting loose." The neighbor testified that M.M. had red marks on her neck and what appeared to be a bite mark on her cheek, was holding one of her arms, and seemed to be in pain. The neighbor again called 911.

Hibbing Police Officer Daniel Mooers arrived at the neighbor's house. According to Officer Mooers's testimony, M.M. was crying hysterically and holding her elbow, and had red marks on her neck and some sort of mark on the side of her face.

An ambulance arrived and brought M.M. to a hospital. According to the doctor's testimony, M.M. told the doctor that she had been grabbed by her neck and bitten in her right temple, that her left elbow had been twisted behind her back, and that she had felt her arm break and had fallen on her arm. The doctor testified that M.M. had a mark on her neck that was consistent with having been grabbed by the neck. The doctor also testified that M.M. had a red mark on her temple, but she could not confirm that it was a bite mark, and that M.M. had a fractured left elbow.

A three-day jury trial was held. The district court permitted the neighbor to testify about what M.M. said had happened under the excited-utterance exception to the hearsay rule. *See* Minn. R. Evid. 803(2). The doctor was permitted to testify about what M.M. told her had happened under the medical-diagnosis hearsay exception. *See id.*, (4). The doctor testified that the fracture in M.M.'s elbow was consistent with someone "putting her arm behind her back and then her falling on it. She would have had to fall on this area to break it." The doctor further testified that a person could have received that kind of injury from falling to the side with her arm in a particular position if there was direct force to the elbow upon landing. The doctor also testified that the same type of fracture could result if another person grabbed her wrist and jammed her elbow down, if the person was strong enough and could get enough force.

M.M. was subpoenaed but did not appear at trial. On the Friday of trial, the state asked the district court to allow Officer Mooers to testify about a statement M.M. made to him, relying on the forfeiture-by-wrongdoing hearsay exception.[1] The district court decided to continue the trial until the following Monday, when, the court said, the state could present evidence that Young wrongfully procured M.M.'s unavailability. The district court further stated that, if M.M. did not appear on Monday, the trial would go forward and the state would be permitted to explain to the jury why M.M. was not testifying. The district court then told the jury that "one of the State's witnesses, who has been notified to be here, um, is not here and, ah, we don't know why and, ah, that's, um, [M.M.]."

M.M. did not appear on Monday—the third and final day of trial. The state did not pursue the forfeiture-by-wrongdoing issue. With the permission of the district court, however, the state called a police officer to testify that he had served a subpoena on M.M. by leaving it with M.M.'s mother at M.M.'s residence. The state also called an employee of the county attorney's office whose job involves helping prosecutors to get witnesses into court. She testified that she and the police had made several unsuccessful attempts to contact and find M.M. after she did not appear for trial. Young's trial attorney did not object.

[1] Under the forfeiture-by-wrongdoing exception, a hearsay statement may be admitted against a party who wrongfully caused the declarant's unavailability with the intent to prevent the declarant from testifying. *See* Minn. R. Evid. 804(b)(6).

The defense called the mother of one of Young's children, who testified about two instances in August and September 2013 in which she and M.M. got into physical altercations because M.M. was angry about the woman's relationship with Young. The woman testified that she became pregnant with Young's child while Young was in a relationship with and living with M.M.

Young testified that M.M. was hurt and embarrassed when she found out in August 2013 that Young might be the father of another woman's child. Young testified that, earlier on the day of the alleged assault, he and M.M. had arguments about the other woman's child and whether Young was the father. Young testified that the argument escalated as they reached their house, where Young exited the car and M.M. sped away with the door ajar. But shortly thereafter, M.M. returned to the house and hit Young with the car. Young testified that he fell asleep in the house and awoke to the sound of M.M. banging on the door, yelling, screaming, and entering the house. Young testified that he did not grab M.M.'s neck, twist her arm behind her back, slam her arm on the ground, or bite her. Young speculated that M.M. might have hurt her arm when she was trying to push through the door. In a police-interview recording that the state played at trial, Young stated that M.M. sometimes engages in self-harm and that what others described as a bite mark on M.M.'s face actually resulted from M.M. hitting herself.

In closing arguments, the state did not mention M.M.'s absence or its attempts to get her to testify. Young's trial counsel explained that it is up to the jury to assess the credibility of witnesses but that "we don't get to make any of those assessments about [M.M.]" because she did not appear at trial. Young's trial counsel also noted that no one

had the opportunity to ask M.M. about the inconsistencies between her statements to the neighbor and to the doctor, or to ask for more details. Young's trial counsel stated to the jury, "The problem is that you guys don't get to assess any of that and when it comes down to it, Mr. Young has the benefit of the doubt."

The jury found the defendant guilty of third-degree assault and misdemeanor domestic assault, and not guilty of domestic assault by strangulation. The district court imposed the presumptive sentence of 24 months in prison for the third-degree assault.

Young appeals.

D E C I S I O N

In the absence of an objection at trial, we review the admission of evidence for plain error. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). Under the plain-error test, the defendant must show (1) error (2) that is plain and (3) that affected the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); Minn. R. Crim. P. 31.02. "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) (quotation omitted). An error affects the defendant's substantial rights if the prejudice "forms the basis for a reasonable likelihood the error substantially affected the verdict." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). If the defendant shows all three elements of the plain-error test, we assess whether reversal is necessary "to ensure

fairness and the integrity of the judicial proceedings." *State v. Prtine*, 784 N.W.2d 303, 314 (Minn. 2010).[2]

I. Allowing the state to introduce testimony about its attempts to secure M.M.'s testimony was a plain error.

Young argues that the district court plainly erred in allowing the state to introduce evidence of its efforts to procure the presence and testimony of M.M. Rule 403 of the Minnesota Rules of Evidence requires the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Rulings on evidentiary matters are within the district court's discretion and will be overturned on appeal only if the district court abused its discretion. *Griller*, 583 N.W.2d at 742-43.

It is well established that "[i]t 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). In *State v. Shupe*, the state commented in its closing argument that it did not call several of the witnesses it mentioned during its opening statement due to unexpected illness. 293 Minn. 395, 396, 196 N.W.2d 127, 128 (1972). The Minnesota Supreme Court held that commenting on witnesses who had not been called was prejudicial error, reasoning that it could not "assume that the jury was not influenced

[2] The plain-error test for evidentiary errors, under which the burden lies with the defendant to show all three elements of the test, is the standard Young uses on appeal. The state, on the other hand, refers to the plain-error test for prosecutorial misconduct, under which the burden shifts to the state to prove that a plain error did not affect the defendant's substantial rights. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Because the asserted error is that the district court admitted inadmissible evidence, we use the evidentiary plain-error test. Even under this standard, which is less favorable to appellant, appellant has met his burden of demonstrating that the error affected his substantial rights.

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." *Id.* Because it is unfairly prejudicial for a prosecutor to imply that an absent witness would have provided evidence bearing on guilt, it is error for a district court to admit testimony about a witness's absence for that purpose. Minn. R. Evid. 403; *see also State v. Henderson*, 620 N.W.2d 688, 702 (Minn. 2001) ("It is improper for a prosecutor to ask questions that are calculated to elicit or insinuate an inadmissible and highly prejudicial answer.").

The state argues that *Shupe* does not apply because the state did not suggest that M.M.'s testimony would have aided the state's case. The prosecutor noted in his opening statement that M.M. "changes her story" and that she told police that she fabricated the allegations. The prosecutor also said in his opening statement that there are "reasons to believe what [M.M.] said initially is what happened," and that "at the end of this, you're going to have to decide whether or not what [M.M.] told officers and [the neighbor] on October 25th is what happened, or did she manufacture all the evidence." The jury did not receive any evidence that M.M. recanted; the jury only heard about M.M. changing her story from the prosecutor's comments during opening statements. The prosecutor's reference to M.M.'s conflicting stories does not negate the prejudicial effect of the evidence regarding the state's efforts to obtain her testimony. Calling two witnesses solely to testify about the state's efforts to procure M.M.'s testimony carries an implication that the state believed M.M.'s testimony would have supplemented evidence of guilt and bolstered the state's case. *See Shupe*, 293 Minn. at 396, 196 N.W.2d at 128. In conjunction with the hearsay statements admitted through other witnesses, the evidence of the state's efforts to

subpoena M.M. created the impression that a prosecution witness with direct knowledge of the crime would have inculpated Young had she testified.

The state also attempts to distinguish *Shupe* because here the prosecutor did not mention M.M.'s absence in his closing argument and, moreover, Young's trial counsel did. We do not agree that the prosecutor's decision not to bring up the witness's absence again during closing argument negates the prejudice of testimony on the subject from two witnesses. Furthermore, defense counsel's decision to remind the jury that it had no opportunity to evaluate M.M.'s credibility was a reasonable defensive strategy after the jury heard incriminating hearsay statements attributed to M.M. and heard state witnesses emphasizing that the state tried hard to get M.M. to testify. Defense counsel's comment about M.M.'s credibility has no bearing on whether it was erroneous to allow the state to present evidence of its attempts to get her to testify.

The state also cites *State v. Thomas* to argue that the admission of the evidence was not plain error. 305 Minn. 513, 232 N.W.2d 766 (1975). In *Thomas*, the supreme court concluded that the prosecutor's statement in closing argument—that he tried to avoid duplication in calling witnesses—did not require reversal because the statement did not contain a "prejudicial inference of supplementary evidence of guilt." *Id.* at 517, 232 N.W.2d 769. Here, however, there is no indication that M.M.'s first-hand account of what happened would have been duplicative of other evidence, and the state did not suggest as much to the jury when it offered the evidence.

It may be permissible to present evidence explaining a witness's absence for certain purposes. For example, a court might review evidence of the state's failed efforts to

produce a witness to determine whether that witness was "unavailable" for purposes of the confrontation clause and hearsay exceptions. *See State v. King*, 622 N.W.2d 800, 807-08 (Minn. 2001). But the state has not demonstrated a permissible purpose here. The state apparently intended to explain to the jury why a witness the jury expected to hear from was not there, but *Shupe* makes it clear that explaining the absence of a witness mentioned in opening statements is not a sufficient reason for the state to comment on a witness's absence. *See Shupe*, 293 Minn. at 396, 196 N.W.2d at 128.

Minnesota case law is clear that a prosecutor may not comment on a witness who is not called except in limited circumstances not present here. *Shupe*, 293 Minn. at 396, 196 N.W.2d at 128; *Page*, 386 N.W.2d at 336. Although the issue generally arises in the context of prosecutorial misconduct rather than evidentiary rulings, we see no reason to conclude that introducing witness testimony regarding a state's efforts to find a nontestifying witness is any less improper than a prosecutor mentioning the same information in closing argument. We therefore conclude that the district court abused its discretion and plainly erred by allowing the prosecutor to introduce evidence of the state's efforts to secure M.M.'s presence at trial. *Griller*, 583 N.W.2d at 740.

II. The plain error affected Young's substantial rights.

Substantial rights are affected if the error was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741. Plain error is prejudicial if there is a "reasonable likelihood" that the absence of the error would have had a significant impact on the jury's verdict. *Id.* When evaluating the effect on the verdict, we consider "the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether

the defendant had the opportunity to (or made efforts to) rebut the improper suggestions." *Davis*, 735 N.W.2d at 682.

The state argues that Young's rights were not affected because the evidence of Young's guilt was "overwhelming." The Minnesota Supreme Court in *Davis* concluded that the state met its burden to show that the prosecutor's comments did not affect the defendant's substantial rights where the state's evidence was "substantial and compelling and included [the defendant's] admission" that he had shot the victims while attempting to rob them. *Id*. Similarly, in *State v. Dobbins*, the court concluded that the state met its burden to show that the prosecutor's statements were not prejudicial because witness testimony and forensic evidence "overwhelmingly" indicated that the defendant committed the charged crime. 725 N.W.2d 492, 513 (Minn. 2006).

The evidence that M.M. was injured may be "overwhelming," but the evidence that it was Young who inflicted the injuries is not. Unlike in *Davis* and *Dobbins*, in this case there is no admission or forensic evidence tying Young to M.M.'s injuries. The evidence supporting the state's case consists of photos of the injuries, testimony that M.M. appeared to be injured and in pain, testimony that M.M. said Young inflicted the injuries, and testimony that M.M. and Young had been arguing.

The state's case heavily relied on the neighbor's testimony and the 911 call, which were based on what M.M. allegedly told the neighbor after the incident. The hearsay statements presented by the neighbor and the doctor described somewhat inconsistent stories. According to the neighbor, M.M. said Young "took her arm and jammed it onto the floor"; but the doctor testified that M.M. told her Young twisted her arm behind her

back and then she fell on her elbow. These inconsistent accounts of what happened from a nontestifying declarant do not amount to overwhelming evidence of guilt. Furthermore, the record is not devoid of exculpatory evidence. The record contains evidence that M.M. was angry with Young and therefore may have been motivated to fabricate the allegations against him, evidence that M.M. has a history of self-harm and therefore may have caused her own injuries, and Young's testimony that he did not cause the injuries.

Even though there may have been enough evidence to support the guilty verdict, the evidence was not overwhelming, and there is a reasonable likelihood that the state's implications about the potential testimony of M.M., a key missing witness, had a substantial effect on the verdict. *See Manthey*, 711 N.W.2d at 504. We therefore conclude that allowing the state to present evidence of its efforts to get M.M. to testify was plain error affecting Young's substantial rights.

III. The error should be addressed to ensure fairness and the integrity of the judicial proceedings.

When plain error affecting substantial rights is shown, "the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740. By calling witnesses to testify about the significant efforts the state expended attempting to procure M.M.'s presence and testimony at trial, the state improperly gave the jury the impression that M.M. would have testified to additional evidence of guilt and strengthened the state's case against Young. The district court's plainly erroneous decision to allow the state to present such evidence compromised the fairness and integrity of the proceedings. We conclude that in order to

ensure fairness and the integrity of the proceedings, it is necessary to reverse the conviction and remand so Young may be granted a new trial. *Id.*

Reversed and remanded.