This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2016).

STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1275

State of Minnesota,
Respondent,

vs.

Deangelas Demoyne Cook,
Appellant.

Filed July 17, 2017
Reversed and remanded
Connolly, Judge

Blue Earth County District Court
File No. 07-CR-16-192

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

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his conviction of first-degree controlled sale of methamphetamine, arguing that he is entitled to a new trial because the prosecutor committed prejudicial misconduct during closing argument; he also challenges his sentence on the ground that the district court committed reversible error by admitting an exhibit into the *Blakely* phase of the trial. Because appellant was prejudiced by the prosecutor's misconduct and because the admission of the exhibit was reversible error, we reverse and remand for a new trial.

FACTS

In January 2016, appellant Deangelas Cook, who had a prior controlled-substance conviction, sold approximately 14 grams of methamphetamine to a confidential informant (CI) who had been searched, equipped with a body wire, and provided with $900 in buy fund money. When appellant was arrested after the sale, the $900 was found on him. He was charged with one count of first-degree and one count of second-degree controlled-substance crime; the complaint was later amended to add one count of second-degree controlled-substance crime.

During the first phase of appellant's trial, the CI testified that she had called appellant, told him she wanted to purchase some methamphetamine, asked him to meet her at a gas station because her car was not working, and, when he came to the gas station, paid him $900 in exchange for methamphetamine he placed in her car. The drug-task-force agent (DTFA) who worked with the CI provided corroborating testimony. Appellant did

not testify during this phase of the trial. The jury found him guilty of two counts of the sale of methamphetamine and not guilty of one count of possession of methamphetamine.

Because the state sought an upward durational sentencing departure on the ground that appellant had two or more prior convictions and was a danger to public safety, a second, or *Blakely* phase of the trial was held, at which appellant did testify. The jury determined that appellant was a danger to public safety. Appellant was sentenced to 250 months in prison.

On appeal, appellant argues that the prosecutor committed prejudicial misconduct during closing argument by characterizing the state's evidence as undisputed, and vouching for the state's witness. Appellant also argues that the district court committed reversible error by admitting an exhibit during the *Blakely* trial.[1]

D E C I S I O N

1. Prosecutorial Misconduct

"[A]ppellate courts should use the plain error doctrine when examining unobjected-to prosecutorial misconduct." *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). "[B]efore an appellate court reviews unobjected-to trial error, there must be (1) error,

---

[1] In light of our decision to reverse and remand for a new trial, we do not address appellant's arguments that his departure from the courtroom during the *Blakely* phase of the trial was an abuse of the district court's discretion and that his sentence should be calculated according to the 2016 Drug Sentencing Reform Act, the retroactivity of which is now pending before the supreme court. *See State v. Kirby*, No. A15-0117, 2016 WL 3884245, *review granted in part, denied in part* (Minn. Sept. 28, 2016); *State v. Otto*, No. A15-1454, 2016 WL 3884412, *review granted in part, denied in part* (Minn. Sept. 28, 2016). The issues in appellant's pro se brief, chiefly challenges to the veracity of the state's witnesses, are without merit.

(2) that is plain, and (3) affects substantial rights. If these three prongs are satisfied, the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* at 302 (citations omitted). "[T]he burden . . . continue[s] to be on the nonobjecting defendant to demonstrate both that error occurred and that the error was plain." *Id.* "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).

> [W]hen the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden . . . then shift[s] to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights. . . . [T]he state . . . need[s] to show that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.

Id. (quotation and citations omitted).

At trial, in closing argument, the prosecutor told the jury:

> Now if you find that all of those elements [of the crime have] been proven beyond a reasonable doubt and I believe that they have, there is no evidence frankly contradicting any of those elements that I just went over; the evidence in front of you covers every one of those elements and if you find those elements have been proved beyond a reasonable doubt, it is your duty to find the defendant guilty. If you don't think they have and I don't think that [with] the evidence that you heard today there is any doubt at all much less reasonable doubt that any of those elements have not [been] met you find [appellant] not guilty, but as I said to you there is no evidence to the contrary; all the evidence before you points to the defendant's guilt.
>
> . . . He is guilty beyond a reasonable doubt[,] folks, there is no evidence to the contrary [on] this. Now I told you at the beginning of this case that after the evidence was presented, I

> didn't believe that there would be any reasonable doubt and I don't believe that there is . . . .

Appellant's attorney did not object to this statement. We therefore must first determine whether the statement was error that was plain. *See id.* A prosecutor "commit[s] misconduct by alluding to [the defendant's] failure to contradict certain testimony." *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995). Here, the prosecutor repeatedly stated that there was no evidence contradicting the evidence the jury had heard, i.e., the testimony of the CI and the DTFA as to the CI's purchase of methamphetamine from appellant. The only possible source for contradictory evidence as to the CI's phone call to appellant and her meeting with appellant would have been appellant's testimony. But "[a] prosecutor may not comment on a defendant's failure . . . to contradict testimony." *Id.* (citation omitted). The prosecutor's repeated references to the fact that no evidence contradicting the testimony of the CI and the DTFA had been presented was implicitly if not explicitly a comment on appellant's failure to contradict their testimony and was plain error.

Having established plain error, we ask whether the state can meet its burden of showing that this plain error did not affect appellant's substantial rights, i.e., that there is no reasonable likelihood that the error actually impacted the jury's verdict. *See Ramey*, 721 N.W.2d at 299. We conclude that the state cannot meet that burden. The jury was *asked* by appellant's attorney to consider whether appellant was guilty beyond a reasonable doubt, but it was *told* by the prosecutor that there was no doubt at all, "much less reasonable doubt," that appellant was guilty because there was no evidence to the contrary. The state has not shown that there is no likelihood the prosecutor's statement in closing argument

would have had an effect on the jury's answer to whether appellant was guilty beyond a reasonable doubt.[2]

Appellant also argues that the prosecutor committed misconduct by vouching for CI's credibility, stating to the jury, "the fact that [CI] didn't [say she saw the drugs in appellant's hand] tells you that she is telling the truth" and "[the CI] testified truthfully [saying] no I didn't see [the drugs] in his hands; that goes to [show] how credible she was." No objection was made to these statements, so the modified plain-error standard of review applies. *See id.*

"It is improper for a prosecutor to personally endorse the credibility of witnesses." *Porter*, 526 N.W.2d at 364 (citation omitted). Telling the jury that the CI was "telling the truth" and "testified truthfully" was vouching for her credibility and was plain error. Again, we cannot say that there is no likelihood that these statements had an impact on the jury's decisions to believe the CI's testimony and find appellant guilty.[3]

---

[2] In rebuttal closing argument, the prosecutor told the jury, "[T]here is no corroboration for the idea that [appellant] didn't sell drugs to the CI." Appellant's attorney objected, "I think we are getting close to the shifting of the burden[.]" Appellant argues that the prosecutor's statement was objected-to misconduct and should be reviewed using the two-tiered harmless-error test. *See State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003) (holding that serious misconduct is "harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error," while less serious misconduct is error only if it "likely played a substantial part in influencing the jury to convict"). But the district court properly overruled appellant's attorney's objection to the prosecutor's statement because "a prosecutor's comment on the lack of evidence supporting a defense theory does not improperly shift the burden [of proof]." *State v. Nissalke*, 801 N.W.2d 82, 106 (Minn. 2011). Therefore, this statement was not misconduct.

[3] Appellant also argues that the prosecutor impermissibly disparaged him by saying in rebuttal closing argument that the defense "seems to be throw[ing] a bunch of mud at the wall and see[ing] what sticks." But a prosecutor has considerable latitude in closing argument and is not "required to make a colorless argument." *State v. Smith*, 541 N.W.2d

Based on the prosecutor's repeated implications that appellant had the burden of proof and failed to meet it because no evidence was presented to contradict the state's witnesses and on the vouching for the credibility of the state's chief witness, we conclude that appellant is entitled to a new trial.

2. Sentence

Because appellant had at least two prior convictions of violent crimes, the state sought to sentence him under Minn. Stat. § 609.1095, subd. 2 (2016) (providing that, if a person convicted of a violent crime that is a felony has two or more prior convictions for violent crimes and a fact-finder determines that the person is a danger to public safety, based in part on the offender's past criminal behavior, the district court may impose an aggravated durational departure from the presumptive sentence up to the statutory maximum sentence). The determination that a person is a danger to public safety may be based on "the offender's past criminal behavior, such as the offender's high frequency rate of criminal activity or juvenile adjudications, or long involvement in criminal activity including juvenile adjudications." Minn. Stat. § 609.1095, subd. 2(2)(i).

At the trial held to determine whether appellant was a danger to public safety, a probation officer read the jury the list of appellant's 14 previous convictions. The following dialog then occurred. (AA = appellant's attorney; P = prosecutor; DC = the district court; PO = the probation officer.)

584, 589 (Minn. 1996) (citation omitted). Using the metaphor of throwing mud at a wall was merely colorful imagery; it was not reversible misconduct that would entitle appellant to a new trial.

P: I am showing you a binder packet of material and cover sheet . . . [that] lists all the convictions that you just went over and then if you look at it there are court records; register of actions and *actual certified court copies of convictions of the defendant* and would you agree that this is what . . . is contained in Exhibit # 9?

PO: May I open this?

P: Yes.

. . . .

PO: Yup these are accurate.

P: Would you agree that those reflect the court documents of the prior convictions of the defendant?

PO: Yes. Yes I do.

P: Your Honor, at this time the State would offer Exhibit # 9 which consists of a cover sheet showing the listing of the defendant's convictions *along with the certified copies* and register of actions with it denoting each conviction.

(Emphasis added.) The jury found that appellant was a danger to public safety, and he was sentenced under Minn. Stat. § 609.1095, subd. 2, to 250 months.

Appellant challenges the district court's admission of Exhibit 9. "A defendant who claims the [district court] erred in admitting evidence [of the defendant's prior bad acts] bears the burden of showing the error and any resulting prejudice." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). If the district court has erred in admitting evidence, the reviewing court determines whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Id.*

The parties agree that no substantive objection was made to the admission of Exhibit 9 at trial and that the plain-error standard of review is therefore appropriate.[4] Minn. R. Crim P. 31.02; *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (noting that the standard requires an error that is plain and that affected substantial rights, and that, if those three prongs are met, a reviewing court may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.)

Although the prosecutor stated twice that Exhibit 9 included certified copies of appellant's convictions, our examination of the exhibit reveals that it does not contain them. Certified copies of appellant's prior convictions would have been both necessary and sufficient to inform the jury of appellant's "past criminal behavior" history.

Instead, Exhibit 9 provided numerous other documents, including but not limited to registers of actions, complaints, notices of evidence and identification procedures, warrants of commitment, transcripts, petitions, sentencing orders, judgments, and orders of detention. Appellant argues that Exhibit 9 "contains records that were inadmissible hearsay, were irrelevant, and [were] highly prejudicial." We agree: "[T]he Minnesota Rules of Evidence apply in jury sentencing trials." *State v. Rodriguez*, 754 N.W.2d 672, 684 (Minn. 2008). The jury's consideration of appellant's past criminal behavior should have been restricted to his convictions, and the exhibit should have been restricted to certified copies of those convictions.

Reversed and remanded.

---

[4] Appellant's attorney did object that the full contents of the exhibit had not been disclosed in advance; that objection was implicitly overruled when the exhibit was admitted.