STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1437

State of Minnesota,
Respondent,

vs.

Solomon Washington McIntyde,
Appellant.

Filed June 19, 2017
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Kandiyohi County District Court
File No. 34-CR-15-1057

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

Shane D. Baker, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Jesson, Judge; and Smith, John, 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

RODENBERG, Judge

Appellant challenges his convictions of both domestic assault and fifth-degree assault, arguing that the prosecutor committed misconduct during closing arguments and that the district court erred by formally adjudicating his guilt to the lesser-included offense of fifth-degree assault. We affirm in part, reverse in part, and remand.

FACTS

At trial, M.M.R. testified that appellant grabbed her by the neck, pushed her up against a refrigerator, and threatened to kill her. Appellant admitted that he grabbed M.M.R., but that he was intending to be affectionate. He acknowledged that his behavior may have seemed rough or obnoxious to M.M.R.

The jury was instructed on the elements of both domestic assault and fifth-degree assault. During the state's closing arguments, the prosecutor described appellant's aggressive behavior and then explained the elements of domestic assault, stating:

> To find [appellant] guilty of domestic assault you have to find that [appellant] assaulted [M.M.R.], and so it means an act done with intent to cause her to fear . . . immediate bodily harm or death. [M.M.R.] testified she was afraid that [appellant] was going to strike her. I believe she was also afraid that [appellant] was going to be further sexually aggressive with her.

The jury returned guilty verdicts on both counts. At the sentencing hearing, the state clarified that the charge of fifth-degree assault was a lesser-included offense of the charge of domestic assault. The district court announced that it would enter conviction on both counts, but would only sentence on the domestic-assault conviction.

D E C I S I O N

I. The state did not commit misconduct during its summation.

Appellant argues that the prosecutor committed misconduct during closing arguments by indicating that the intent element of domestic assault under Minn. Stat. § 609.2242, subd. 1(1) (2014), was satisfied by evidence of M.M.R.'s fear. Appellant did not object to the statements at trial.

We review unobjected-to allegations of prosecutorial misconduct under the modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). This standard requires appellant to establish that the prosecutor committed an error and that the error was plain. *Id.* "An error is plain if it was clear or obvious." *Id.* (quotations omitted). If appellant demonstrates that a plain error occurred, the burden shifts to the state to demonstrate that the error did not affect appellant's substantial rights. *Id.* "If the state fails to demonstrate that substantial rights were not affected, 'the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.'" *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (quoting *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). Ultimately, we will reverse a conviction "only if the [prosecutorial] misconduct, when considered in light of the whole trial, impaired [appellant's] right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

"A prosecutor engages in prosecutorial misconduct when he violates 'clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law.'" *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quoting *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007)). It is improper for a

prosecutor to misstate the law during closing arguments. *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002). While the prosecutor may "argue all reasonable inferences from evidence in the record," the prosecutor may not "intentionally . . . misstate the evidence or mislead the jury as to the inferences it may draw." *State v. Smith*, 876 N.W.2d 310, 335 (Minn. 2016) (quotations omitted). When assessing alleged prosecutorial misconduct during a closing argument, "we look to the closing argument as a whole, rather than to selected phrases and remarks." *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009) (quotation omitted).

"[A] finding of intent to cause fear in another of immediate bodily harm or death cannot be based solely on the effect the actor's behavior had on the victim." *In re Welfare of T.N.Y.*, 632 N.W.2d 765, 767 (Minn. App. 2001); *see also State v. Ott*, 291 Minn. 72, 75, 189 N.W.2d 377, 379 (1971) (noting for assault-fear, the intent of the actor "becomes the focal point for inquiry," as opposed to "the effect upon the victim"). Rather, a person's assaultive intent "must be determined from all the objective facts and circumstances, including the defendant's conduct and/or statements at the time of the act." *State v. Whisonant*, 331 N.W.2d 766, 768 (Minn. 1983); *see also Davis v. State*, 595 N.W.2d 520, 525-26 (Minn. 1999) (noting that intent may be proved from circumstantial evidence, including the defendant's conduct, the character of the assault, and the events occurring before and after the crime).

Appellant asserts that the prosecutor misrepresented to the jury that the intent element of assault-fear could be established solely on the basis of M.M.R.'s subjective fear. But the prosecutor did *not* say that M.M.R.'s fear alone was sufficient proof of intent. The

prosecutor discussed the elements of domestic assault and the evidence that supported each element. The prosecutor's statements about the intent element and supporting evidence were truncated, but the prosecutor did not misstate the law nor mislead the jury. Careful examination of the prosecutor's closing argument as a whole reveals that the prosecutor discussed the evidence in detail, including the status of appellant and M.M.R.'s relationship at the time of the incident, appellant's statements to M.M.R., his behavior, and M.M.R.'s reactions. Given the context of the entire closing argument, the prosecutor's statements to the jury were not plainly erroneous.

II. The district court erred when it entered convictions on both counts.

Appellant argues that the district court erred by making formal adjudications of guilt on both counts, because fifth-degree assault is a lesser-included offense of domestic assault. The state agrees that the conviction to fifth-degree assault should be vacated because it arose from the same behavioral incident as the domestic-assault conviction.

Minn. Stat. § 609.04, subd. 1 (2014), provides that a person "may be convicted of either the crime charged or an included offense, but not both." A conviction is the district court's formal adjudication of the verdict through the filing of the official judgment of conviction. *See State v. Hoelzel*, 639 N.W.2d 605, 609 (Minn. 2002) (instructing courts to include information contained in Minn. R. Crim. P. 27.03, subd. 7, in conviction orders); *State v. Pflepsen*, 590 N.W.2d 759, 767 (Minn. 1999) (directing courts to be "very clear" when issuing conviction orders of which offense the defendant is formally adjudicated guilty); *see also* Minn. Stat. § 609.02, subd. 5 (2014) (defining "conviction" as a guilty verdict that is "accepted and recorded by the court"). "When the defendant is convicted on

more than one charge for the same act the court is to adjudicate formally and impose sentence on one count only." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (alterations omitted) (quotation omitted).

An "included offense" is "[a] crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1(4). "An offense is 'necessarily included' in a greater offense if it is impossible to commit the greater offense without committing the lesser offense." *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). Fifth-degree assault, under Minn. Stat. § 609.224, subd. 1(1) (2014), is necessarily proved if domestic assault, under Minn. Stat. § 609.2242, subd. 1(1), is proved. A formal adjudication of guilt for fifth-degree assault, as a lesser-included offense of domestic assault, was error. We remand with instructions to the district court to vacate the formal adjudication of guilt on the fifth-degree assault charge, but to leave that guilty verdict in place. *See State v. Crockson*, 854 N.W.2d 244, 248 (Minn. App. 2014) (remanding to the district court with instructions to vacate erroneous conviction), *review denied* (Minn. Dec. 16, 2014).

Affirmed in part, reversed in part, and remanded.