STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1859

State of Minnesota,
Respondent,

vs.

Steven Bernard Edwards,
Appellant.

Filed September 25, 2017
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-15-6336

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Stan Keillor, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Kalitowski, 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

SCHELLHAS, Judge

Appellant challenges his conviction of, and sentence for, first-degree arson, arguing that (1) the district court abused its discretion by allowing certain expert testimony; (2) the prosecutor committed misconduct; and (3) the district court abused its discretion by denying appellant's motion for a downward dispositional departure. We affirm.

FACTS

Just after midnight on an August evening in 2014, police and firefighters responded to a fire in a Minneapolis home where appellant Steven Edwards resided with his girlfriend, D.F.; their two minor children; and D.F.'s daughter. D.F. and the children were not in the home when the fire started, but one of the children saw Edwards leaving the house as it was burning. Respondent State of Minnesota charged Edwards with one count of first-degree arson in violation of Minn. Stat. § 609.561, subd.1 (2014). A jury found Edwards guilty as charged and the district court sentenced him to 78 months' imprisonment.

This appeal follows.

D E C I S I O N

I

Minnesota Rule of Evidence 702 governs the admissibility of expert testimony. Under rule 702, "expert testimony is admissible if: (1) the witness is qualified as an expert; (2) the expert's opinion has foundational reliability; (3) the expert testimony is helpful to the jury; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye-Mack* standard." *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011). We review the

admission of expert testimony for an abuse of discretion. *State v. Mosley*, 853 N.W.2d 789, 798–99 (Minn. 2014). "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

In a written pretrial order, the district court found that Mark Bishop, a licensed fire investigator, qualified as an expert in fire investigations, and that his expert opinion about the origin and cause of the fire (combustibles coming into contact with the energized burner) would assist the jury and had foundational reliability.[1] But the court granted Edwards's motion to exclude Bishop's opinions that (1) "the first fuel was brought into contact with the energized burner by human intervention," and (2) "the starting of the fire was a deliberate act." Edwards argues on appeal that the court abused its discretion by allowing Bishop to testify because his testimony lacked adequate foundation. But Edwards did not make this general argument about Bishop's qualifications in the district court and therefore has forfeited the argument. *See State v. Beaulieu*, 859 N.W.2d 275, 278 & n.3 (Minn. 2015) (explaining that, "[a] constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the

[1] Because neither party argued to the district court, or to this court, that the disputed testimony involves novel scientific theory, the district court did not address nor do we address the *Frye-Mack* standard.

right before a tribunal having jurisdiction to determine it"). We decline to address this argument.

Edwards also argues that the district court abused its discretion by admitting Bishop's testimony about the first fuel ignited because it was based on untested speculation.

In the challenged testimony, Bishop described what he found in the kitchen debris and explained that he ruled out unattended cooking because he did not find any evidence of cooking activity, such as grease in a pan. Bishop then testified that, at the bottom of the debris pile in the kitchen, he found charred "envelopes, pieces of paper, things that have clearly either been in an envelope or were the envelope themselves." Bishop opined that this finding was significant because "if these things were at the bottom, this is the first stuff that came off the top of the range." Bishop then described how the pile was built during the firefighters' efforts to extinguish the fire after which the following colloquy occurred, in relevant part, about the cause of the fire:

> THE STATE: Are you able to exclude or eliminate any other potential combustibles that were in the kitchen?
> BISHOP: I am able to say that I couldn't come up with anything else that was a competent first fuel, the first thing that this hot burner could ignite. The contents of all of the cabinets were in that pile on the floor. Boxes of pasta and, I mean, all the things people have in their kitchens, and they were quite recognizable as boxes of pasta and all the other things. So, there was really a lack of any other fuel, but I think once I got to the -- I don't have cooking. I was bothered by the idea that the burner was on. Realistically, you can turn a range burner on, and it will never ignite the cabinets above it or to the side of it. It can't get them that hot. So, there had to be an introduction of something to get enough fire to get these

> cabinets burning and to do the damage that's reflected in my photographs.
>
> . . . .
>
> THE STATE: Were you able to hypothesize a natural way by which the combustible would have gotten to that burner?
> BISHOP: I considered the possibility that, you know, by opening a door or window or whatever, that these things could have blown over there, and there was just no way that I could convince myself that that would have worked.
>
> . . . .
>
> THE STATE: Can you hypothesize or were you able to hypothesize a mechanism other than a person or a human that would have gotten the combustible to the burner?
> BISHOP: I was not. It's the only way I could see it happening . . . .

Although Bishop did not opine that the fire started because a human placed the first fuel ignited on the burner or that the fire started because of a deliberate act, such an inference would be reasonable based on his testimony. But Bishop acknowledged during cross-examination that he was not certain what combustible was the first fuel ignited:

> DEFENSE: And you don't know which one of those things was the first fuel ignited. You can't tell [be]cause they were all burned in some way and were competent combustibles, correct?
> BISHOP: Correct.
> DEFENSE: And previously, you testified that you got a little too excited about the letters because of your conversation with [D.F.], correct?
> BISHOP: Yes.

We conclude that Edwards's argument that the district court abused its discretion by admitting Bishop's testimony about the first fuel ignited because it was based on untested speculation lacks merit.

But Edwards is correct that Bishop's testimony exceeded the scope of the pretrial order when he said that "my construct is that there's a pile of letters. They're just kind of dumped on top of the range, the burner is turned on and off it goes." Construct, as a noun, means "an image, idea, or theory, especially a complex one formed from a number of simpler elements." *Dictionary.com*, http://www.dictionary.com/browse/construct (last visited August 25, 2017). Because "construct" means the same thing as "opinion," the district court abused its discretion by admitting Bishop's above-noted testimony because it violated the court's pretrial order.

But, even though the district court erred by admitting Bishop's above-noted testimony, Edwards must establish that he was prejudiced by the error. *See Amos*, 658 N.W.2d at 203; s*ee also State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997) (stating that, "[r]eversal is warranted only when the error substantially influences the jury's decision"). "The defendant bears the burden on appeal of showing both the abuse of discretion and the prejudice justifying reversal." *State v. Jackson*, 770 N.W.2d 470, 482 (Minn. 2009). Here, after the court admitted the testimony, the court read the following curative instruction to the jury twice:

> To the extent that you understood the last witness, Mr. Bishop, to express an opinion that the first fuel was brought into contact with the burner by human intervention or that the starting of the fire was a deliberate act, you should disregard that opinion, and it should play no part in your deliberations.

Minnesota courts "presume that juries follow instructions given by the court." *State v. Matthews*, 779 N.W.2d 543, 550 (Minn. 2010). Because the district court gave a curative instruction to the jury, we conclude that Edwards has not met his burden of establishing

that he was prejudiced by the erroneous testimony. *See State v. Swanson*, 307 Minn. 412, 422, 240 N.W.2d 822, 828 (1976) (holding that the error of admitting "irrelevant and possibly harmful" evidence about unrelated criminal conduct was nonprejudicial because of the cautionary instruction).

II

Edwards argues that the prosecutor committed misconduct during closing argument and rebuttal by stating facts not in evidence and by attempting to shift the burden of proof. We are not persuaded. Edwards concedes that he did not object to the prosecutor's alleged misconduct at the time it occurred. For unobjected-to prosecutorial misconduct, this court applies a modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 299–300 (Minn. 2006). To prevail, Edwards must establish that there was an error and that the error is plain. *Id.* at 302. An error is plain "if the error contravenes case law, a rule, or a standard of conduct." *State v. Wren*, 738 N.W.2d 378, 393 (Minn. 2007) (quotation omitted). If Edwards can establish a plain error, the burden shifts to the state to show that the plain error did not affect Edwards's substantial rights. *Ramey*, 721 N.W.2d at 302. "If all three parts of the test are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) (quotation omitted).

Edwards argues that the prosecutor committed misconduct by "embellish[ing] the testimony of both Bishop and [L.E.], adding details that neither witness had testified to," and "argu[ing] in rebuttal that [Edward]'s theory of the case was 'evil,' and impl[ying] that [Edwards] needed to show that the victim, D.F. was 'evil.'" D.F. testified that she ended

her 12-year relationship with Edwards on the morning of August 14, 2014, and that Edwards was drunk and angry with her that evening because she went to a bar with a friend. Edwards told D.F. that he would do something to her house if she did not come home. D.F. did not go home, and L.E., one of Edwards's children, testified that on the day that the fire started, Edwards said that he "*was going to*" burn down the house. (Emphasis added.) On cross-examination, L.E. initially testified that he saw smoke as he and Edwards walked away from the house, which, Edwards argues, suggested that the house was not on fire. But L.E. later testified that the house was on fire, or at least smoking, when he left it. The prosecutor told the jury that "[L.E.] did correct himself a number of times."

The prosecutor began her closing argument as follows:

> Ladies and gentlemen, the defendant said he was going to do it and then he did it. He gave [D.F.] an ultimatum. If you don't come home right now, I'm going to do something to your house, and he was perfectly clear with his intentions and when she did not comply, he followed through on his terms.
>
> He turned on a burner, grabbed some mail, whatever else he could find, put it on top of the ignited burner, and he did it because he was drunk and he was angry and he wanted to hurt [D.F.].

We conclude that the prosecutor's statement was not clearly erroneous because the record supports the assertion that L.E. corrected himself a number of times and because Edwards admitted on direct examination that he had been drinking, and that he turned on a stove burner. He thereby implicitly conceded that the prosecutor's inference was reasonable by acknowledging that "the prosecutor, based on Bishop's observations, descriptions and photographs, may have been able to *argue* that the letters were placed on the burner by human hands and then fell to the kitchen floor."

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). In closing arguments, prosecutors may argue all reasonable inferences that may be drawn from the evidence. *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009). Prosecutors have no obligation to give a colorless argument. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). But prosecutors may not obtain a conviction at any price, for example, by intentionally misstating the evidence or misleading the jury about the inferences to be drawn from the evidence. *Peltier*, 874 N.W.2d at 805. This court must look "at the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). "Even if an argument is in some respects out-of-bounds, it is normally regarded as harmless error unless the misconduct played a substantial part in influencing the jury to convict the defendant." *Id.*

Here, the prosecutor's statement set forth her theory of the case and our review of the record confirms that it was based on reasonable inferences from the totality of the evidence. We therefore conclude that Edwards's prosecutorial-misconduct argument fails.

Edwards also argues that the prosecutor committed misconduct during her rebuttal argument by arguing that by his testimony, Edwards was asking the jury to believe that D.F. had gotten both her daughter and son to lie and implying that to avoid a guilty verdict, Edwards had to show that D.F. was "evil" by prompting her children to lie. Edwards argues that the prosecutor wrongfully shifted the burden of proof to the defense to discredit the state's witnesses and that he was thereby prejudiced. We disagree. Our review of the record

suggests that the prosecutor was merely arguing that the testimony and other evidence did not support the defense's theory of the case. Rather than "shifting the burden to defense" to discredit the witnesses, the state was simply asking the jurors to reconcile the state's version of the events with the demeanor of D.F. and the totality of the evidence.

We conclude that Edwards has failed to meet his burden of proving that the prosecutor made an error that was plain during her closing statement. We therefore need not analyze whether any error was prejudicial. And even if the prosecutor did err, any error was unlikely to have changed the jury's decision because the record evidence about the sequence of events on that night when the fire started, who said what to whom before the fire started, and whether Edwards told L.E. that he planned to burn the house down is conflicting. The jury was required to resolve the conflicts in the evidence in arriving at its verdict.

III

Finally, Edwards argues that the district court abused its discretion by denying his motion for a downward dispositional departure. We disagree. This court "afford[s] the [district] court great discretion in the imposition of sentences' and reverse[s] sentencing decisions only for an abuse of that discretion." *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014) (quotation and footnote omitted). The Minnesota Sentencing Guidelines provide sentencing ranges that are "presumed to be appropriate for the crimes to which they apply." Minn. Sent. Guidelines 2.D.1 (Supp. 2015). "[A] court must impose the presumptive sentence—that is, a sentence within the applicable disposition and range—'unless there exist identifiable, substantial, and compelling circumstances to support a

departure.'" *State v. Fleming*, 883 N.W.2d 790, 795 (Minn. 2016) (quoting Minn. Sent. Guidelines 2.D.1). "Substantial and compelling circumstances for a durational departure are those which demonstrate that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017) (quotations omitted).

"[T]he presence of mitigating factors does 'not obligate the court to place a defendant on probation or impose a shorter term than the presumptive term.'" *Wells v. State*, 839 N.W.2d 775, 781 (Minn. App. 2013) (quoting *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)), *review denied* (Minn. Feb. 18, 2014). If one or more mitigating factors is shown, "[w]hether to depart [downward] from the sentencing guidelines rests within the district court's discretion, and the district court will not be reversed absent an abuse of that discretion." *State v. Pegel*, 795 N.W.2d 251, 253–54 (Minn. App. 2011) (citing *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999)). "Only in a rare case will a reviewing court reverse the imposition of a presumptive sentence." *Id.* at 253 (citing *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981)). But "[i]f the district court has discretion to depart from a presumptive sentence, it must exercise that discretion by deliberately considering circumstances for and against departure." *Id.* (quotation omitted). "When the record demonstrates that an exercise of discretion has not occurred, the case must be remanded for a hearing on sentencing and for consideration of the departure issue." *Id.*

Edwards asked the district court for a downward dispositional departure from the presumptive executed sentence to probation based on his alleged amenability to probation. He argued that the *Trog* factors support probation in this case. "[A] defendant's particular

amenability to individualized treatment in a probationary setting will justify departure in the form of a stay of execution of a presumptively executed sentence." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). "Numerous factors, including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting." *Id.*

In *Soto*, the Minnesota Supreme Court clarified that it had "never said that merely being amenable to probation—as opposed to being *particularly* amenable to probation—can justify staying a presumptively executed sentence." 855 N.W.2d at 308. The court explained the distinction as follows: "Our consistent use of the words 'particular' and 'particularly' in this context is not accidental." *Id.* at 309. "'Particular' means 'exceptional' or 'distinctive among others of the same group,' and 'particularly' means 'especially' or 'specifically.'" *Id.* "By requiring a defendant to be *particularly* amenable to probation, therefore, we ensure that the defendant's amenability to probation distinguishes the defendant from most others and truly presents the 'substantial[] and compelling circumstances' that are necessary to justify a departure." *Id.* "At the same time, insisting on particular amenability to probation limits the number of departures and thus fosters uniformity in sentencing, which is a primary purpose of the Sentencing Guidelines." *Id.*

When the district court denied Edwards's departure motion, it explained that:

> I don't find that you are particularly amenable to probation. And the word particularly means especially, more so than other people. I don't find that the arguments in favor of your amenability to probation provide a substantial and compelling

> reason to depart downwards in your case. So I don't find a basis to depart.

Edwards argues that the court's explanation was insufficient because it does not reflect that the court exercised its sentencing discretion. Edwards does not cite to any authority for the proposition that a court must make specific findings in these circumstances nor are we aware of any. His argument fails.

Edwards also argues that the district court erred in sentencing him because "the prosecutor's oral response [at sentencing] was full of legal errors," and the court did not correct the prosecutor's misleading arguments about Edwards's intoxication at the time of the offense and subsequent remorse. The state argued that "remorse was not a valid mitigating factor unless it 'related back' to the offense," and "although intoxication at the time of the offense is not a valid departure factor, a defendant's chemical dependency may be considered." But Edwards's argument fails because he challenges only the court's denial of a dispositional departure and the prosecutor made the statements now challenged in response to Edwards's request for a downward durational departure.

Finally, Edwards argues that the district court erred in denying his departure motion because he "presented a strong case that his offense was less-serious than the typical first-degree arson." This argument also fails because, even if there are mitigating factors, the district court has discretion to impose the presumptive sentence. *See Wells*, 839 N.W.2d at 781. And although Edwards's crime may not have been *more* serious than a typical arson, no record evidence establishes that his crime was *less* serious than the typical arson.

Affirmed.