STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0175

State of Minnesota,
Respondent,

vs.

Alex William Rosa,
Appellant.

Filed December 26, 2017
Reversed and remanded
Jesson, Judge

Redwood County District Court
File No. 64-CR-16-239

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

Jenna M. Peterson, Redwood County Attorney, Redwood Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Jesson, Judge; and Florey, Judge.

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

JESSON, Judge

During a traffic stop, police asked the appellant, Alex Rosa, if they could search his truck. Exercising his constitutional right not to consent to a warrantless search, Rosa refused, but the officers had probable cause to search without a warrant. During the search, police discovered methamphetamine and Rosa was charged with fifth-degree drug possession. At trial, the prosecutor asked the officers multiple questions about Rosa's refusal to let them search the truck. The prosecutor also emphasized Rosa's refusal during closing arguments. Ultimately, the jury found Rosa guilty. He appealed, arguing that the prosecutor's questions and comments about his refusal to consent to a warrantless search constitute prejudicial prosecutorial misconduct. We agree and reverse and remand.

FACTS

Late at night, Sergeant Matt Ledeboer drove his patrol car across a lone county road in Redwood County. Cars were using their brights to cut through the darkness, and as Sergeant Ledeboer met oncoming traffic, he noticed that one truck would not dim its lights. He swung his patrol car around, caught up to the truck, and initiated a traffic stop.

Sergeant Ledeboer walked toward the truck and made contact with the occupants, the driver, appellant Alex Rosa, and a front-seat passenger. As he spoke with Rosa, Sergeant Ledeboer smelled marijuana coming from the vehicle. He asked Rosa if he could search the truck. Rosa refused, but Sergeant Ledeboer believed he had probable cause to search based on the marijuana smell. Another officer arrived on the scene, Officer Frank Wortham, and the two began to search the truck.

As the search was underway, Officer Wortham noticed the front-seat passenger drop and kick what looked like a glass pipe out of eyesight. Officer Wortham went to investigate what the front-seat passenger was doing and during an inspection of the area, he found a baggie of marijuana nearby. The passenger was not arrested or charged with any crime related to this incident.

During Sergeant Ledeboer's search, he shifted his attention to the pouch behind the driver's seat. He peered inside and found a package of Camel-brand cigarettes nestled within. Opening the package, he saw a baggie scrunched up against a couple cigarettes left in the pack. He pulled out the baggie and saw shards of a crystalline substance he believed were methamphetamine, which later testing verified. Rosa was placed under arrest for possession of a controlled substance.

Rosa's case eventually went to a jury trial. There, the prosecutor asked the officers directly about Rosa's refusal to consent to the search of the truck and whether that refusal was concerning. Both officers agreed it was concerning, with Sergeant Ledeboer replying that some people refuse to consent because they might be nervous about what is inside the vehicle. Officer Wortham echoed this concern, telling the prosecutor that in his experience when someone does not consent to a search, this can lead to uncovering drugs or other contraband from the vehicle.

Rosa's defense theory was to shift suspicion to the front-seat passenger. Rosa stressed that the drugs were within reach of the passenger and were found in a Camel-brand cigarette package, the passenger's brand of choice. Rosa's theory made sure to note that

there were still some cigarettes lingering inside the package when the drugs were discovered, and that Rosa preferred Marlboro-brand cigarettes.

During closing arguments, the prosecutor narrated the events of the stop to the jury. This narration included a retelling of Sergeant Ledeboer's request to search and Rosa's refusal, which she described as a "red flag." Finally, in rebuttal argument, the prosecutor rhetorically asked the jury, "What else do we know?" and replied by telling the jury, again, that Rosa refused to consent to the search, describing this as a "red flag[]." Because this occurred on rebuttal argument, Rosa's attorney did not have a chance to respond.

The parties concede that throughout the trial, Rosa did not object to any of the prosecutor's questions or statements touching on his refusal to consent. Ultimately, the jury convicted Rosa of fifth-degree possession of a controlled substance and the district court stayed execution of his sentence to five years of probation. Rosa appealed.

D E C I S I O N

Rosa argues that the trial prosecutor committed reversible misconduct by pointedly and repeatedly referring to Rosa's refusal to consent to the search of the truck in front of the jury. The implication being that when the prosecutor discussed Rosa's refusal, this signaled that he was guilty and poisoned the jury against him. And while the details of our decision certainly focus on the legal architecture required to construct a prosecutorial misconduct claim, the fact that the prosecutor exploited Rosa's Fourth Amendment right to say "no" to the search looms large over our decision.

The Fourth Amendment's protection against unreasonable searches and seizures insulates every person from unreasonable government needling into our privacy. *State v.*

Schrupp, 625 N.W.2d 844, 846 (Minn. App. 2001) (citing *Terry v. Ohio*, 392 U.S. 1, 9, 88 S. Ct. 1868, 1873 (1968)), *review denied* (Minn. July 24, 2001). This is an important protection that upholds what courts sometimes refer to as the individual's right to be left alone. *State v. Larsen*, 650 N.W.2d 144, 148 (Minn. 2002) (quoting *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 572 (1928) (Brandeis, J., dissenting)); *United States v. Place*, 462 U.S. 696, 706-07, 103 S. Ct. 2637, 2644 (1983) (stating that the Fourth Amendment protects individuals from "unreasonable government intrusions into their legitimate expectations of privacy").

Rosa exercised his right to be left alone by refusing to give police consent to search his truck. And though an officer has every right to ask for permission to search, the individual has just as much right to say no. *State v. George*, 557 N.W.2d 575, 579 (Minn. 1997). For the prosecutor to punish Rosa for doing what the law plainly allows—implying to the jury that his refusal was somehow linked to guilt—is a due process violation of the most basic sort. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 668 (1978). It would be patently unconstitutional for the prosecutor to penalize Rosa's reliance on his legal rights. *Id.*

Rosa's argument falls under the umbrella of a prosecutorial misconduct claim. Because Rosa failed to object to these comments at trial, we analyze this claim through the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006). Under this standard, an error is "plain" if three things occur:

- there is error,
- that error is plain, and

- that error affects the defendant's substantial rights.

Id. If all three of these elements are present, then the court must determine whether the error must be addressed to ensure "fairness and the integrity of the judicial proceedings." *Id*. at 302. In this type of prosecutorial misconduct case, the burden is on the defendant to prove the first two elements—that is, there was error and that error was plain. *Id.* at 299-300. If the defendant succeeds, then the burden shifts to the state to disprove the third element: that the plain error did not affect the defendant's substantial rights. *Id*. We examine each factor of the analysis below.

Discussing Rosa's refusal to consent to a warrantless search was an error.

The Minnesota Supreme Court addressed a prosecutor's decision to bring up a defendant's refusal to consent to a warrantless search in *State v. Jones*, 753 N.W.2d 677 (Minn. 2008). *Jones* involved a prosecutor showcasing a defendant's refusal to give police permission to take DNA samples at a jury trial. *Id.* at 686. While the supreme court ultimately affirmed the conviction, it analyzed the case through a federal rule holding that it is an error and a due process violation when a prosecutor comments on a defendant's refusal to give consent to a warrantless search. *Id.* at 687 (citing *United States v. Runyan*, 290 F.3d 223, 249 (5th Cir. 2002)).

Rosa's prosecutor brought up his refusal to consent to a warrantless search six times—a concerning fact to begin with. The state offers two arguments to counter this concern. First, it argues that the references to Rosa's refusal were only indirect references that do not require us to reverse his conviction. Second, the state argues that even if the references were direct, the prosecutor did not *knowingly* elicit the error-riddled statements.

To its first point, the state is correct that when a prosecutor comments on a defendant's refusal to consent to a warrantless search, there is a divide between direct and indirect evidence of that refusal. It is misconduct for a prosecutor to present *direct* evidence that a defendant declined to consent to a warrantless search. *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011). But it is not misconduct for the prosecutor to craft a string of questions whose logical endpoint may be an *inference* that a defendant refused to consent. *Id.* (citing *Jones*, 753 N.W.2d at 687).

The state argues that the references and questions about Rosa's refusal were only indirect comments, but this is contradicted by the record. The prosecutor both elicited testimony from police and made comments that put the spotlight directly on Rosa's failure to consent. For instance, the prosecutor pointedly asked both officers if Rosa consented to the search. When the officers responded that Rosa had not consented, the prosecutor asked if that refusal concerned them. Both agreed it was concerning. During rebuttal argument, the prosecutor described Rosa's refusal as a "red flag" and echoed the officers' concerns and suspicions. These comments and questions were not speculative or inferential leaps from otherwise benign questioning; they were designed to draw direct attention to Rosa's refusal. This was direct evidence meant to transform Rosa's Fourth Amendment right to say "no" into a shadow of guilt, a tactic in direct violation of the directive in *Jones*. 753 N.W.2d at 687.

Second, the state argues that it did not commit error because that would require the prosecutor to "knowingly" elicit the inadmissible evidence. There are two problems with this argument. First, the precedent the state uses to support this "knowing" requirement is

not applicable. The state claims that this requirement is grounded in *State v. White*, 295 Minn. 217, 223, 203 N.W.2d 852, 857 (1973). But we do not read nor find this requirement in the case. *White* involved improper trial questions from a prosecutor. *Id.* The state defended these questions as fair game since the defense used its own improper tactics. *Id.* The Minnesota Supreme Court rejected this tit-for-tat reasoning by citing to an American Bar Association standard outlining that it is always unprofessional conduct for either side to knowingly make impermissible comments in front of the jury. *Id.* It is this language the state highlights in Rosa's case as evidence of a "knowing" requirement in prosecutorial misconduct law. But in context, this language was not a newly forged element of law. Rather, it was a stark reminder to both sides of the aisle that an attorney's ethical obligations should always adhere to the highest standards of professionalism.

The second problem with the state's lack-of-knowledge argument is that the record shows otherwise. Rosa's prosecutor directly asked Sergeant Ledeboer twice if police searched Rosa's truck without consent. The prosecutor also asked both officers if Rosa's refusal to consent was suspicious or concerning. Both officers used the prosecutor's question as an opening to give their opinions about why refusing to consent can lead police to finding illegal contraband. During closing arguments, the prosecutor told jurors that not consenting is a "red flag," something police are—and should be—suspicious about. And during a telling sidebar conversation, the prosecutor told the district court judge that she wanted to probe deeper into Rosa's refusal because the lack of consent was meaningful to the officers and was a "red flag." These were not minor missteps that unwittingly escaped into the open under the pressures of trial. These were targeted questions and comments

engineered to paint Rosa's constitutional right to say "no" as a stain of guilt—a due process violation of the most basic sort. *Bordenkircher*, 434 U.S. at 363, 98 S. Ct. at 668. Persistently highlighting Rosa's refusal to consent to the search in front of the jury was an error under *Jones*.

Discussing Rosa's refusal to consent to a warrantless search was plain error.

An error is considered "plain" if it was clear or obvious. *Ramey*, 721 N.W.2d at 302. And here, we find that *Jones*'s directive forbidding commenting on a defendant's refusal to consent to a warrantless search has been law for nearly a decade. *Jones*, 753 N.W.2d at 687. *Jones* is hardly an outlier. Its prohibition against the state using rights against a person has been scrutinized and applied in Minnesota in cases since it was decided. *See Hill*, 801 N.W.2d at 654; *State v. Price*, No. A15-1754, 2017 WL 878684, at *5 (Minn. App. Mar. 6, 2017); *State v. Wilkes*, A15-1499, 2016 WL 4262874, at *2 (Minn. App. Aug. 15, 2016), *review denied* (Minn. Oct. 18, 2016).[1] And it is clear that the prosecutor commented on, elicited testimony about, and emphasized Rosa's refusal in violation of *Jones*. Because the law on this matter is long-settled and the prosecutor's comments and questions conflicted with this clear and obvious law, the prosecutor's error was plain.

[1] We recognize that unpublished opinions have limited worth, only serving for persuasive value at best. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993). We cite to these unpublished opinions only because they persuasively show that this court has analyzed the holding in *Jones* on multiple occasions since it was decided.

Discussing Rosa's refusal to consent to a warrantless search affected his substantial rights.

Having determined that the prosecutor committed plain error, we turn to whether the state demonstrated that its error did not affect Rosa's substantial rights. This means that if we take the misconduct out of the case, is there a reasonable chance the jury would have come to a different result? *See Hill*, 801 N.W.2d at 654 (stating that a defendant's substantial rights are not violated if 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"). To assess this, we consider three factors:

- The strength of the evidence against Rosa,
- The pervasiveness of the improper conduct, and
- Whether Rosa had an opportunity to rebut the prosecutor's improper suggestions.

Id. We examine each factor below.

There is no magic threshold of evidence to address the first factor—the strength of the evidence against Rosa. Rather, this determination is based on a case-by-case approach. For instance, in *State v. Jones*, the evidence was considered strong for multiple reasons: damaging inconsistencies in the defendant's own statements, the defendant's admission to perjury, credible DNA evidence, and the fact that the defendant's alternate perpetrator had an alibi. 753 N.W.2d at 685, 693. Similarly, in *State v. Hill*, the evidence was sufficiently strong where eyewitness testimony implicated the defendant in the crime, forensics eroded the defendant's self-defense argument, and testimony revealed that the defendant lied to investigators. 801 N.W.2d at 655-56. But *Jones* and *Hill* involved serious crimes where

there was a robust body of evidence. Rosa's case for fifth-degree possession was significantly slimmer in comparison.

The state's evidence against Rosa was circumstantial. Only three witnesses were called: the two officers who arrested Rosa and a forensics expert who confirmed the substance was methamphetamine. The drug baggie was found inside a cigarette pack hidden within the back pocket of the driver's seat. While Rosa was the one driving, both he and the front-seat passenger could easily reach the drugs. Under cross-examination, the officers admitted that the drugs were not found on anyone's person. In fact, Officer Wortham testified that Rosa was only arrested because he owned the truck and because the drugs were found behind his seat. Rosa did give a post-arrest interview where he admitted he was a drug addict, but denied that the drugs were his.

And the state's main theory linking Rosa to the cigarette package containing the methamphetamine is not ironclad. The drugs were discovered in a Camel-brand cigarette pack with cigarettes still inside. The record shows that Rosa claimed to smoke Marlboro-brand cigarettes—the front-seat passenger smoked Camels. But neither the cigarette package nor the drug baggie was tested for DNA or fingerprints, injecting some doubt about the baggie's ownership into the case.

Reviewing the record, we conclude that the evidence against Rosa was not particularly strong. Neither officer observed Rosa reaching for the baggie, the baggie itself was easily accessible to both men in the truck, and the mere fact that Rosa owned the truck is not convincing that he must have possessed the drugs. Considering that the baggie and cigarette package were not forensically tested, this left the case against Rosa largely

circumstantial. For these reasons, we conclude the strength of the evidence analysis cuts slightly in Rosa's favor.

We next turn to the pervasiveness of the misconduct. Pervasiveness is a somewhat amorphous concept, but Minnesota precedent serves as a guidepost. For instance, in *State v. Davis*, a prosecutor's improper questions on cross-examination were not pervasive where any implication was not repeated during closing arguments and the improper subject only spanned less than one page of 64 total pages of transcript. 735 N.W.2d 674, 682 (Minn. 2007). Likewise in *State v. Valentine*, this court found that less than seven improper questions and answers at trial were not pervasive enough to affect the defendant's substantial rights. 787 N.W.2d 630, 642 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). By contrast, a prosecutor's improper questions were pervasive in *State v. Mayhorn* where at least 20 transcript pages of the state's 80-page cross-examination covered improper matters. 720 N.W.2d 776, 791 (Minn. 2006).

Looking at Rosa's trial transcript, we see that the misconduct does not occur as frequently as in *Mayhorn*. From the opening arguments to closing arguments, the trial transcript is approximately 104 total pages. Of those, references to Rosa's refusal run about nine pages. But determining the pervasiveness of prosecutorial misconduct is not an arithmetic problem. There is no golden ratio of misconduct to non-misconduct that decisively tips the scales into pervasiveness territory; other considerations play an important role. For instance, the length of Rosa's trial was merely one day, so the misconduct did not have time to dissipate from the jurors' minds like it would over a longer

period of time. More important is strategy; as we see in the record, the prosecutor's trial strategy was designed from the start to tie Rosa's refusal to his guilt.

The first time the prosecutor fleshes out Rosa's refusal to consent is during direct examination of Sergeant Ledeboer. The prosecutor asks, "Did [Rosa] give you consent to search the vehicle?" Sergeant Ledeboer replies, "No, [be]cause that was denied." The prosecutor follows, "The fact that [Rosa] told you there were no drugs and he refused [to consent], were those concerning to you?" "Yes," Sergeant Ledeboer answers, continuing, "it's always concerning when people refuse a consent search um, some people refuse just for the sake of refusing, others refuse because they are nervous about what may or may not be in there." A few questions later, the prosecutor again asks if Sergeant Ledeboer searched Rosa's truck without consent. "Yes," he says. And on redirect, the prosecutor asks if the refusal was suspicious.

The topic resurfaces during Officer Wortham's testimony. The prosecutor asks Officer Wortham to describe Rosa's refusal and Officer Wortham replies,

> A: Uh, Sergeant Ledeboer informed that he could smell the marijuana and then asked for consent to search the vehicle.
> Q: Asked who?
> A: The Defendant, Alex Rosa.
> Q: Okay and what was his response?
> A: No.
> Q: Okay. Was his response concerning to you?
> A: Yes.
> Q: Why is that?
> A: Um, based off of my past experiences and trainings, generally when somebody says no to searching a vehicle that can lead to more drugs or contraband in the vehicle that something that is illegal that they shouldn't have in the vehicle that they don't want you to find.

In its closing and rebuttal arguments, the prosecutor echoes these statements, first by painting the scene for the jury: "Sergeant Ledeboer's still kind of suspicious, asks [Rosa] if he would allow the officers to search the vehicle. [Rosa] refuses to allow officers to search the vehicle." Then shortly after, the prosecutor describes this refusal as a "red flag." And on rebuttal argument, the prosecutor circles back to the refusal and tells the jury, "What else do we know? [Rosa] refused to consent to the search, told the officers on the scene there were no drugs in the vehicle and from our two law enforcement officers, those are red flags. Those are signs that something's going on here."

In all six instances, the prosecutor's questions or comments imply that Rosa's refusal was suspicious and cause for concern. These were not unwitting slips of the tongue or inadvertent missteps. In light of the repeated questions and the comments during closing arguments in a relatively brief trial, we conclude the misconduct was pervasive and this factor also cuts in favor of determining that Rosa's substantial rights were violated.

We finally look to whether Rosa had an opportunity to rebut the prosecutor's improper suggestions. On one occasion, Rosa did try to explain his refusal. During cross-examination, Sergeant Ledeboer admitted that Rosa was not required to grant permission to search, but this was the only time Rosa offered an explanation. For the most part, Rosa did not object to questions or comments.

Rosa argues that any meaningful rebuttal was impossible because bringing up the issue would only call attention to it in the jurors' minds. This may be true, but the Minnesota Supreme Court did not seem troubled by this in *Hill*, 801 N.W.2d at 656. The *Hill* court determined that a similar implication did not affect the defendant's substantial

rights because the defendant chose not to explain the refusal during cross-examination, by calling his own witnesses, or during closing arguments. *Id.*

One significant difference between *Hill* and the current case is the prosecutor's comment during rebuttal argument. Rebuttal gives the final word to the state before handing the case off to the jury and there is usually no opportunity for the defense to respond. This means that when the prosecutor in Rosa's case told the jury that the officers believed Rosa's refusal was a "red flag," Rosa could not neutralize or explain this comment. This alone is problematic, since it was one of the final impressions the jury took back into deliberations. So while Rosa could have done more to counteract the misconduct during cross-examination, it was not possible to address the issue after rebuttal. All together, we conclude that this factor is neutral for Rosa's case.

Weighing all the factors, we determine that the case against Rosa was not particularly strong, the prosecutor's comments suggesting Rosa was guilty because he refused consent were pervasive, and Rosa had some opportunities to rebut the prosecutor's improper implications, which he took advantage of once, though he could not have counteracted the implication from rebuttal argument. Ultimately, it was the prosecutor's burden to prove that Rosa possessed the drugs beyond a reasonable doubt. Our justice system does not clear a path for that burden by turning the accused's constitutional rights against him. In light of the legal factors and these overarching principles, we conclude that the prosecutor's comments and questions affected Rosa's substantial rights.

A new trial is required to ensure fairness and the integrity of judicial proceedings.

Having met all three factors of the plain-error analysis, we turn to whether a new trial is required to ensure fairness and the integrity of the judicial proceedings. In examining this factor, the supreme court has noted that a prosecutor is a "minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public." *Ramey*, 721 N.W.2d at 300 (quotation omitted). This means that a prosecutor "may not seek a conviction at any price," but instead, is obligated to ensure that a defendant receives a fair trial, regardless of how strong the evidence against the defendant might be. *Id*.

The prosecutor's error in this case was implying that Rosa was guilty of the crime simply because Rosa exercised his constitutional right to decline a search. This was a serious error. It was an error that placed a conviction over Rosa's right to the fair trial and the rights of the public at large. This system entrusts a large amount of discretion and power in the hands of prosecutors, and in this case, that power was wielded improperly. Fairness and the integrity of our judicial proceedings require a new trial.

In summary, Rosa had every right—including a constitutional right—to tell Sergeant Ledeboer "no" that night, but the prosecutor transformed that "no" into a weapon against Rosa. These questions and comments were not excusable slips, instead, they seem designed to forge a meaningful implication that Rosa had something to hide. This is a troubling tactic and one that requires a strong remedy. Because the statements were error

affecting Rosa's substantial rights, we conclude they were plain error requiring reversal.[2] We remand for a new trial.

Reversed and remanded.

[2] Because our conclusion on the prosecutorial misconduct issue is dispositive of this case, we do not address Rosa's other claims in this appeal.