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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-0760**

State of Minnesota,
Respondent,

vs.

Yassin Ali Abdi,
Appellant.

**Filed July 9, 2018**
**Affirmed**
**Florey, Judge**

Olmsted County District Court
File No. 55-CR-15-16

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

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Associate County Attorney, James P. Spencer, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Eric L. Newmark, Newmark Storms Law Office, L.L.C., Minneapolis, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Florey, Judge.

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

**FLOREY**, Judge

In this direct appeal from a judgment of conviction, appellant argues that the prosecutor committed misconduct during his direct examination of a witness by implying

personal knowledge of the witness's truthfulness and in closing argument by arguing facts not in evidence concerning that witness's truthfulness. We affirm.

## FACTS

Appellant Yassin Ali Abdi picked up his brother A.A. from work on New Year's Eve 2014. Appellant became angry because he had to wait for A.A. to finish his shift as a cashier. He called A.A. and told him to "hurry up." When A.A. left work and got into the car with appellant, the two argued. Appellant began driving. At some point, appellant snatched a cigarette out of A.A.'s hand, and A.A. spat on appellant. Appellant stopped the car, and a physical altercation ensued.

Though it was dark outside, another driver observed parts of the altercation. She saw the driver "hitting someone in the car" with his fist. She then saw individuals get out of the car and one of the individuals being kicked while on the ground. The observer called 911, as did a second passerby. Law enforcement responded and interviewed A.A., who stated that appellant punched, kicked, and choked him, and tried to kill him. A.A. stated that he could not breathe "for two minutes." A.A. had injuries to his face and neck.

On January 2, 2015, appellant was charged with three counts: felony domestic assault by strangulation, under Minn. Stat. § 609.2247, subd. 2 (2014); misdemeanor domestic assault (bodily harm), under Minn. Stat. § 609.2242, subd. 1(2) (2014); and misdemeanor domestic assault (fear), under Minn. Stat. § 609.2242, subd. 1(1) (2014).

A jury trial was held on April 20 and 21, 2016. A.A. testified that appellant punched him and that he punched appellant back. He acknowledged that he told law enforcement that appellant tried to choke him, but qualified his prior statement by stating that he was

"so mad" and that he did not know what he had told police. He testified that he "was pretending [to be] a victim" and that appellant did not choke him.

During A.A.'s direct examination, the district court judge excused the jury after being informed of a potential issue in the courtroom gallery. After the jury was excused, the judge told the parties that a woman in the gallery was "making signals or actually talking to [A.A.]." The judge admitted that he had not seen all of the conduct but that a woman was observed making a signal with her hand. The judge told the woman to cease such conduct. The jury then returned, and the trial resumed.

The jury returned guilty verdicts on all three of the charged offenses. The district court convicted appellant of domestic assault by strangulation and sentenced him to 364 days in jail, which constituted a durational departure. The district court did not enter convictions on the lesser counts. This appeal followed.

**D E C I S I O N**

Appellant asserts that he is entitled to a new trial because of three instances of prosecutorial misconduct, one during the direct examination of A.A., and two during closing-argument rebuttal. Appellant did not object to the alleged misconduct.

"[B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). For unobjected-to prosecutorial misconduct, our review is under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). If an appellant establishes that the prosecutorial misconduct is plain error, then the burden shifts to the state to show that the misconduct did not affect the appellant's

substantial rights. *Id.* at 302. This requires a showing "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.* (quotations omitted). If all prongs of the modified plain-error test are met, an appellate court "then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.*

**I. Direct examination**

A.A.'s trial testimony differed from his statement to law enforcement on New Year's Eve 2014. The prosecutor challenged A.A.'s trial testimony. During the direct examination of A.A., the following exchange took place:

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|---|---|
| PROSECUTOR: | And in fact we did meet in March, specifically on March 9, 2016? |
| A.A.: | Yes. |
| PROSECUTOR: | A little over a month ago; is that right? |
| A.A.: | Yes. |
| PROSECUTOR: | And you at that time told me that your family was against you and angry at you. Didn't you tell me that? |
| A.A.: | I never say that. I don't know you, but the—you may misunderstand me or somehow, but I was saying my mom, she's not happy about the whole thing, how we started, but you maybe understand wrong way. |

Appellant asserts that this exchange evidences misconduct because the prosecutor implied that he had personal knowledge about whether A.A. was telling the truth at trial. We discern no plain-error misconduct in the exchange.

A prosecutor may not interject personal opinion, become an unsworn witness, or "personally attach[] himself or herself to the cause which he or she represents." *State v.*

*Everett*, 472 N.W.2d 864, 870 (Minn. 1991). In the challenged exchange, there is no such conduct that constitutes a clear or obvious error.

The prosecutor asked leading questions. Leading questions generally should not be used on direct examination. Minn. R. Evid. 611(c). However, the unobjected-to leading questions did not render the exchange plainly erroneous. Whether to permit leading questions on direct examination depends on the circumstances of each case, and it is an issue best left to the discretion of the district court. *State v. Axilrod*, 248 Minn. 204, 209, 79 N.W.2d 677, 681 (1956). The prosecutor's limited use of unobjected-to leading questions did not violate "clear or established standards of conduct." *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted).

The questions concerned a prior conversation between the prosecutor and A.A. Appellant fails to offer caselaw indicating that a prosecutor's reference to a prior conversation with a witness during the examination of that witness constitutes misconduct. The prosecutor did not insert his personal opinion or challenge the veracity of A.A.'s response. We discern no plain error.

Appellant cites one case, *State v. Richardson*, 514 N.W.2d 573 (Minn. App. 1994), to support his assertion that "[i]t is improper for a prosecutor to imply he or she has personal knowledge [about] whether a witness is telling the truth." In *Richardson*, a case pervaded with misconduct, the prosecutor asked a lawyer-witness at trial if he was aware that lawyers cannot ethically call witnesses who are going to commit perjury. 514 N.W.2d at 578. This court determined that the question was misconduct because it "implied to the jury that the witnesses called by the prosecution to prove the state's case were telling the truth" and

"implied that the prosecutor had personal knowledge that [a witness] was telling the truth." *Id.* This case is distinguishable from *Richardson*, in which the prosecutor was effectively vouching for the state's witnesses. Here, the prosecutor offered no personal opinion about the veracity of A.A's testimony. He merely presented A.A. with a question concerning family pressures and allowed A.A. to freely answer.

Even if the exchange constituted plain error, appellant's substantial rights were not affected. In determining whether substantial rights were affected, appellate courts "consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

To the degree that the limited exchange concerned the credibility of A.A.'s trial testimony, other more illustrative evidence indicated that A.A.'s trial testimony was less credible than his prior statement. A.A. testified that appellant did not choke him, but photographs admitted into evidence showed injuries to A.A.'s neck. The photos corroborate the version of events relayed to law enforcement directly after the assault. The prosecutor focused on this corroborating evidence during closing arguments. Additionally, at trial, appellant characterized his altercation with appellant as back and forth "boxing," but a passerby testified that she observed someone being kicked while on the ground, which is more consistent with A.A.'s statement to law enforcement. It is not reasonably likely that the verdict would have been different had the limited exchange not occurred.

## II. Closing argument

During closing-argument rebuttal, the prosecutor stated that it was a "reasonable inference to conclude" that the difference between A.A.'s trial testimony and his statement to law enforcement on New Year's Eve 2014 was "a result of family pressure." Appellant contends that there was insufficient evidence to support this assertion.

During closing argument, prosecutors may "argue all reasonable inferences from evidence in the record." *State v. Smith*, 876 N.W.2d 310, 335 (Minn. 2016) (quotation omitted). It is misconduct for a prosecutor to intentionally "misstate the evidence or mislead the jury as to the inferences it may draw." *Id.* (quotation omitted).

The prosecutor's statement in closing argument regarding family pressure was not plain-error misconduct. Evidence in the record indicates that A.A. got into an altercation with his brother, appellant. At the time of the altercation, A.A. was living with appellant. Immediately after the altercation, A.A. told police that his brother had choked him and tried to kill him. At trial, he retracted his previous allegations. The record indicates that A.A. was maintaining contact with his brother after the altercation, and it was A.A. who bailed appellant out of jail. It is therefore reasonable to infer from the record that A.A. changed his story because of "family pressures" or compassion for his brother. The prosecutor's statement did not constitute plain error because it was a reasonable inference based upon evidence in the record.

Appellant also challenges statements made by the prosecutor during closing-argument rebuttal concerning A.A. being coached by his family during his testimony. The prosecutor stated as follows:

> In the courtroom today while he was testifying there were gestures being made from the front row toward [A.A.] as he was testifying. Okay. So it is a reasonable inference and easily explains to you folks why there was a change here. The change isn't because he's under oath, the change is because there is pressure and loyalty to the family which has prevented [A.A.] from telling you what actually happened on New Year's Eve 2014.

The prosecutor later stated that A.A.'s trial testimony should be viewed "in the context of the folks sitting in the front row and making gestures towards [A.A.] as he was testifying" and "[t]he presence of the family in the courtroom can't be ignored and you've seen what's gone on here."

These statements constitute plain-error misconduct. Prosecutorial misconduct can occur when the prosecutor argues facts not in evidence. *State v. Peltier*, 874 N.W.2d 792, 804-05 (Minn. 2016). It can also occur when inadmissible evidence is referred to in an effort to have jurors draw inferences from it. *State v. Mayhorn*, 720 N.W.2d 776, 788-89 (Minn. 2006). "When credibility is a central issue, this court pays special attention to statements that may inflame or prejudice the jury." *Id.* at 787.

The gestures from the gallery were not part of the evidence before the jury. It is not clear from the record that the gestures were readily apparent to the jury. The jury was deliberately excluded by the district court from discussions regarding those gestures. The prosecutor therefore argued facts not in evidence and asked the jury to draw negative inferences from those facts, thereby undermining the fairness of the trial. *See State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007) ("Generally, a prosecutor's acts may constitute misconduct if they have the effect of materially undermining the fairness of a trial.").

This court examined a similar scenario in *State v. Lehman*, a case in which a defendant attacked his attorney in open court. 749 N.W.2d 76, 78 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008). The prosecutor referenced the attack in closing argument. *Id.* at 86. We concluded that the prosecutor's statements did not constitute misconduct. *Id.* at 87. However, in *Lehman*, the assault, which involved the defendant punching his attorney repeatedly in the face, occurred in front of the jury, and the defendant referred to the attack during his testimony "by apologizing to the jury." *Id.* at 79, 87. In this case, it is not clear that the gestures were apparent to the jury, and unlike *Lehman*, there was no testimony concerning the gestures. This case is therefore distinguishable.

In *State v. Bobo*, a drive-by-shooting murder case, a key witness refused to testify. 770 N.W.2d 129, 133, 135 (Minn. 2009). The prosecutor stated in closing argument that the jury could consider whether the refusal to testify was a result of intimidation by a "sea of people, people who had never been here at any other time in the trial and haven't been here since," stating that "[t]hey filed in before his testimony, [and] they filed out after he refused to testify." *Id.* at 142. The supreme court concluded that the prosecutor's statements did not constitute misconduct because there was admitted evidence showing intimidation of the witness. *Id.* Again, this case is distinguishable. Here, there was no evidence indicating that A.A. was intimidated or pressured by individuals in the gallery. And unlike *Bobo*, which involved a "sea of people," it is unclear that the jury observed the gestures. Although the prosecutor in this case stated that the gestures were "being made from the front row toward [A.A.]," the record suggests that the prosecutor never actually saw the gestures, as the judge stated to the attorneys outside of the jury's presence "you

couldn't have seen it, your backs [were] to it." The prosecutor's request that the jury draw negative inferences about A.A.'s trial testimony based upon gestures from the gallery constituted plain-error misconduct.

Having determined that plain-error misconduct occurred, the burden shifts to the state to show that appellant's substantial rights were not affected. *Ramey*, 721 N.W.2d at 302. The state points to the evidence in this case, characterizing it as extensive and compelling. As previously discussed, A.A.'s detailed statement to law enforcement on New Year's Eve 2014 was corroborated by other evidence, including photographs showing injuries to his neck, and testimony from a passerby, whose observations align with A.A.'s statement to police.

The state also asserts that the statements were not pervasive. Indeed, the statements at issue were not a substantial part of the prosecutor's closing arguments. And while appellant did not have a chance to rebut the statements, the jury was instructed by the district court that things said by the attorneys during closing arguments are not evidence. *See State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002) (noting that we presume a jury follows a district court's instructions). Though plain-error prosecutorial misconduct occurred, the state met its burden of establishing that appellant's substantial rights were not affected.

**Affirmed.**