STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1779

Abraham Deng Woi, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 27, 2018
Affirmed
Florey, Judge

Olmsted County District Court
File No. 55-CR-14-7477

Cathryn Middlebrook, Chief Appellate Public Defender, Sean M. McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Assistant County Attorney, Rochester, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Ross, Judge; and Florey, Judge.

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

FLOREY, Judge

Appellant challenges the postconviction court's denial of relief from his conviction for domestic assault, arguing that the district court committed structural error when it dissuaded him from a court trial and the prosecutor committed misconduct during closing

arguments by misstating the burden of proof and asking the jury to find appellant guilty to protect appellant's nonvictim children from future harm. We affirm.

FACTS

Appellant Abraham Deng Woi was charged with domestic assault by strangulation, interference with a 911 call, and domestic assault (fear) after his wife, A.K., called police to report an assault and told the responding officer that appellant struck her on her face and body and strangled her when she called 911. The case proceeded to trial. Before the jury was brought to the courtroom on the first day of trial, appellant indicated his intent to waive a jury trial. The district court expressed frustration that appellant had waited until after a prospective jury had appeared, but indicated it was appellant's right to do so. The district court then stated, "Frankly, I don't particularly think it's a great decision to ever waive a jury trial but it's his right, he's consulted with [counsel] and that's what he wants to do . . . ."

Appellant's attorney questioned appellant about his waiver of his right to a jury trial. The district court then inquired further. The district court asked appellant if he understood that (1) by waiving a jury trial, the state would only need to convince one person of guilt, rather than 12; (2) the district court "may have reviewed things in the case that a jury would never see," such as statements made after the assault; (3) the district court's exposure to evidence that he ruled inadmissible, while not being used in a determination of guilt, "could certainly affect . . . [the district court's] thinking unconsciously or unintentionally"; (4) a jury, on the other hand, would not be exposed to evidence the district court ruled inadmissible; (5) a waiver would result in the district court making a decision

as to guilt and admissibility of evidence; and (6) although the district court would "separate those roles . . . to the best of [its] ability," it is "not the same as having the . . . admissible evidence only heard by a jury." After appellant confirmed his request to waive a jury trial, defense counsel requested additional time to "go over the finer points" of the district court's questioning. After conferring with defense counsel, appellant decided to exercise his right to a jury trial.

At trial, A.K. testified that she called the police because she was arguing with appellant and wanted him to leave. She testified that appellant did not hit her, and she did not recall telling police that he struck or strangled her. She testified that appellant did not place his hands around her neck or remove the phone from her hands when she called 911. She testified that blood on her chest was from biting her own lips. She denied telling the police that appellant had assaulted her every year and that she had not previously reported it because of their children.

The officer who responded to the 911 call indicated that dispatch received a call of an adult female being struck by a male, and the phone disconnected during the call. When he approached the apartment door, he could hear screaming, yelling, sounds of a scuffle, and a hysterical female. When the officer reached to open the door, the deadbolt turned and the door cracked open. The officer pushed the door open and observed an "extremely upset" female facing him with teeth stained red with blood and with red drool on her face. He observed appellant holding the woman by the shoulder and neck. The officer observed children in the room.

After being separated from appellant, A.K. demonstrated to the officer "the universal choking position" when asked by the officer to describe how appellant assaulted her. The officer testified that A.K. told him that appellant punched her in the face and all over her body. The officer photographed blood on A.K.'s chest and the floor.

Appellant testified in his defense that his wife was yelling at him about money, so he attempted to leave the house. He testified that when he tried to leave, she grabbed his shirt to hold him back and then called 911. Appellant denied choking or hitting A.K. that day or in the past.

During the prosecutor's rebuttal summation, the prosecutor discussed his theme of the case: courage. He argued:

> [A.K.] told the police that she had been abused in the past by [appellant]. She told him that in the past when . . . these assaults occurred she never called the police. She didn't have the courage to do that. That changed on November 8, 2014. [A.K.] realized that this abuse occurring in front of her children at the hands of the defendant was wrong. She did the right thing and she called the police. . . . Unfortunately, that's where [A.K.]'s courage ends. She came in, she sat right here and just like I thought she would do, like I predicted to you that she would do, she recanted her statement that she gave on November 8, 2014. And just like I told you yesterday, this case really comes down to what version do you believe. Do you believe the statement that she made to police on November 8, 2014, or do you believe what she told you yesterday?
>
> . . . .
>
> There's an instruction in that jury packet about how you're supposed to evaluate the testimony and the believability. I think when you lay those factors out and compare them to the November statement, the testimony yesterday from [A.K.] and the defendant's testimony you're going to see that that scale tips—doesn't just tip, it tips over

> to believing the version that was given to police on November 8th, 2014.
>
> Real briefly. Briefly and in conclusion, [A.K.]'s period of courage is over. It's done. She doesn't have the courage anymore for her children to make sure this doesn't happen in the future. That torch, the courage, is being passed to you. I want you to discuss the evidence. I want you to analyze it. I want you to work together. I want you to ask each other questions in deliberation. And when you do all that I want you all to have the courage to come back into this room and find [appellant] guilty beyond a reasonable doubt of all charges.

After the jury began to deliberate, defense counsel objected to the state's characterization of the burden of proof in summation as "saying this case comes down to what version do you believe." The district court overruled the objection.

The jury acquitted appellant of domestic assault by strangulation and interference with a 911 call, but found him guilty of domestic assault. The district court convicted appellant of the domestic-assault charge and stayed imposition of sentence.

In April 2017, appellant petitioned for postconviction relief. He argued that the district court committed structural error by indicating that a court trial may be tainted by inadmissible evidence. Appellant also argued that the district court erred in admitting hearsay and that the prosecutor committed misconduct during trial and his closing argument. The postconviction court summarily denied relief on all claims except one claim of prosecutorial misconduct concerning whether the prosecutor erred in arguing that A.K. no longer had courage for her children and that the torch (of courage) was passed to the jury. After a hearing on that issue, the postconviction court denied relief, concluding that the children could be considered victims in the case because it can be "reasonably infer[ed]

that children are harmed by or suffer" from crimes committed in the home against their mother. Any error, the postconviction court indicated, was not plain because whether the argument was proper was "reasonably debatable."

This appeal followed.

D E C I S I O N

We review a denial of a postconviction petition for an abuse of discretion. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). We review the postconviction court's legal conclusions de novo, "but on factual issues our review is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings." *Id.* (quotation omitted). "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted).

I. The district court did not commit structural error.

Appellant claims the postconviction court erred in denying relief because the district court committed structural error when it interfered with his choice to waive a jury trial by indicating it might not be impartial in a court trial.

Structural errors are "defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards" because "[t]he entire conduct of the trial from beginning to end is obviously affected." *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 1265 (1991) (quotation omitted). Such errors "affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself" and "call[] into question the reliability and fairness of the trial." *Id.* at 310, 111 S. Ct. at 1265; *State*

v. Dalbec, 800 N.W.2d 624, 627 (Minn. 2011). Structural errors require automatic reversal. *Dalbec*, 800 N.W.2d at 627.

The Supreme Court has recognized that it is structural error for a defendant to be tried before a partial judge. *Fulminante*, 499 U.S. at 309, 111 S. Ct. at 1265 (citing *Tumey v. Ohio*, 273 U.S. 510, 531-532, 47 S. Ct. 437, 444 (1927) (holding due process is denied to defendants if the judge has a pecuniary interest in a finding of guilt)). Likewise, "[p]ermitting a biased juror to serve is structural error requiring automatic reversal." *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015). In *State v. Dorsey*, the supreme court held that it is structural error for a judge, acting as factfinder, to independently investigate a factual assertion made by a witness. 701 N.W.2d 238, 253 (Minn. 2005). The supreme court held that, by conducting its own research, the district court deprived the defendant of "a fair trial and an impartial finder of fact." *Id.*

A defendant has a constitutional right to a jury trial, and this is the "normal and preferable mode of disposing of issues of fact in criminal cases," but no such right to a court trial exists. *Singer v. United States*, 380 U.S. 24, 34-36, 85 S. Ct. 783, 790 (1965); *see State v. Kilburn*, 304 Minn. 217, 225, 231 N.W.2d 61, 65 (1975). Under Minn. R. Crim. P. 26.01, subd. 1(2)(a), a defendant may waive a jury trial on the issue of guilt "with the approval of the court" after being advised by the court of his rights and after an opportunity to consult with counsel. The defendant's waiver must be knowing, intelligent and voluntary, and the district court "must be satisfied that the defendant was informed of his rights and that the waiver was voluntary." *State v. Ross*, 472 N.W.2d 651, 653 (Minn. 1991) (quotation omitted). Whether to accept a defendant's waiver of the right to a jury

trial is within the district court's discretion. *State v. Linder*, 304 N.W.2d 902, 905 (Minn. 1981). A district court may deny a waiver of a jury trial if there is a "legitimate concern for [the] defendant's right to a fair trial." *Id.* For example, in *Linder*, the district court was within its discretion to deny a request for a court trial when every judge in the district had been involved in the defendant's case, including with suppressed confessions and issues surrounding the defendant's mental health, an issue to be determined in the second phase of trial. *Id.*

We are convinced that the district court did not commit structural error in questioning appellant about his understanding of the protections afforded by a jury trial. A district court is required to inquire into whether the waiver is intelligently made, and such inquiry may vary with the circumstances of the case. The district court is permitted to deny a waiver and require a jury trial if there is a risk that the defendant will be denied a fair trial because of the district court's involvement in pretrial decisions. *See id.* Bringing these considerations to the defendant's attention when inquiring into the intelligence of the defendant's waiver, therefore, does not impinge any of his constitutional rights or deprive him of his constitutional right to a fair trial—particularly in light of the fact that he availed himself of that right by rescinding the waiver. Here, no error in the trial mechanism permeated the trial from start to finish such that we should declare the district court's inquiry structural error.

II. Appellant is not entitled to a new trial for prosecutorial misconduct.

Appellant argues that the postconviction court erred in denying his petition for relief because the prosecutor misstated the burden of proof and made an improper argument concerning his and A.K.'s nonvictim children.

"A prosecutor engages in prosecutorial misconduct when the prosecutor 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. Smith*, 876 N.W.2d 310, 334-35 (Minn. 2016) (quotations omitted). When reviewing closing arguments for possible prosecutorial misconduct, this court considers "the argument as a whole, rather than focusing on particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008) (quotation omitted).

A. Misstatement of the burden of proof

Appellant argues that the prosecutor misstated the burden of proof when he argued to the jury that resolution of the case would come down to "what version do you believe."

Appellate courts apply two harmless-error standards for objected-to prosecutorial misconduct. *State v. Nissalke*, 801 N.W.2d 82, 105 (Minn. 2011). For "less serious prosecutorial misconduct," we determine "whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.* (quotation omitted). When reviewing "unusually serious" misconduct, we ask "whether the alleged misconduct was harmless beyond a reasonable doubt." *Id.* (quotation omitted). "We will find an error to be harmless beyond a reasonable doubt only if the verdict rendered was 'surely unattributable to the error.'" *Id.* at 105-06 (quoting *State v. McCray*, 753 N.W.2d 746, 751

(Minn. 2008)). A new trial will only be granted based on objected-to prosecutorial misconduct if the misconduct, "viewed in the light of the whole record, appears to be inexcusable and so serious and prejudicial that the defendant's right to a fair trial was denied." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005) (quotation omitted).

"[M]isstatements of the burden of proof are highly improper and constitute prosecutorial misconduct." *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985). But a "prosecutor may pose rhetorical questions to the jury, asking it to use common sense to determine whether the defense presented is reasonable." *State v. Bauer*, 776 N.W.2d 462, 474 (Minn. App. 2009), *aff'd*, 792 N.W.2d 825 (Minn. 2011).

Appellant relies on *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002), to argue that the prosecutor committed misconduct by reducing the entire case to two versions and directing the jury to believe one or the other. In *Strommen*, the prosecutor told the jury to "weigh the story in each hand and decide which one is most reasonable, which one makes the most sense." 648 N.W.2d at 690. The supreme court held that the statement was a misstatement of the state's burden of proof, and in the context of that trial, may have played a role in the guilty verdict. *Id.*

While it is true that the prosecutor argued to the jury that there were two versions of events presented during trial, he did not argue that the jury need only decide which version is the "most reasonable," like in *Strommen*. Rather, the prosecutor discussed the requirement of proof beyond a reasonable doubt in both his initial closing and in his rebuttal. He also discussed the evidence that would support his theory of the case at length. In doing so, he pointed out the credibility issues in appellant's version of events. He then

asked the jury to consider whether that version was believable in light of all of the state's evidence supporting its version of events. The prosecutor essentially asked the jury to decide if appellant's version was reasonable in comparison to the state's version.

Further, while we do not find that the prosecutor erred, even if he had, it was harmless in the context of this case. First, the jury ultimately rejected the prosecutor's claims that the case came down to two versions of events—either A.K.'s statement to police or A.K.'s testimony—because the jury rejected large portions of both in acquitting appellant of strangulation and interference with a 911 call, and in finding him guilty of assault.

Second, "the prejudicial effect of misconduct can be cured by proper instructions to the jury." *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016); *see State v. Trimble*, 371 N.W.2d 921, 926-27 (Minn. App. 1985) (concluding that "the prosecutor's misstatement of the standard [did] not require reversal because the [district] court fully instructed the jury on [the] presumption of innocence"), *review denied* (Minn. Oct. 11, 1985).[1] Similarly, the risk of prejudice is reduced if appellant addresses the misstatement of the burden during closing arguments. *See Trimble*, 371 N.W.2d at 926-27. Here, defense counsel argued at length about the prosecutor's burden of proof beyond a reasonable doubt and what that meant in the context of the case.

[1] In *Strommen*, the supreme court indicated that proper instructions by the district court were not sufficient to correct the burden-of-proof error. *See* 648 N.W.2d at 690. But that trial suffered from a variety of reversible errors, and the prosecutorial-misconduct claim was only considered as part of a directive to the district court on remand for a new trial. *See id.*

B. Reference to nonvictim children

Appellant argues that the prosecutor committed reversible misconduct by directing the jury to return a guilty verdict to protect A.K. and appellant's nonvictim children from future harm.

When, as here, an appellant claims prosecutorial misconduct based on unobjected-to conduct, this court applies a modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). The test requires that appellant establish that the misconduct was error and that the error was plain. *Id.* at 302. The burden then shifts to the state to show that there is no reasonable likelihood that the misconduct significantly affected the jury's verdict. *Id.* Finally, this court determines "whether to address the error to ensure fairness and integrity in judicial proceedings." *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010).

The prosecutor is permitted to present "all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence in . . . closing argument." *Nissalke*, 801 N.W.2d at 105 (quotation omitted). But, a prosecutor may not seek a conviction at any price. *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993). "The prosecutor's closing arguments must not distract the jury from its proper role of deciding whether the state has met its burden." *State v. Duncan*, 608 N.W.2d 551, 555 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. May 16, 2000). And the prosecutor must avoid inflaming the jury's passions and prejudices against the defendant. *State v. Morgan*, 235 Minn. 388, 391, 51 N.W.2d 61, 63 (1952). This court will pay special attention to statements that may inflame or prejudice the jury when credibility is a central issue. *See State v. Turnbull*, 267 Minn. 428, 435, 127 N.W.2d 157, 162 (1964).

Appellant argues that the prosecutor violated three rules: (1) he directed the jury to step out of the fact-finding role in order to prevent future harm; (2) he asked the jury to protect nonvictims from harm; and (3) he referenced children solely to inflame the passions of the jury.

In *Duncan*, this court indicated that it is misconduct for a prosecutor to direct a jury to return a guilty verdict to protect others from future harm. 608 N.W.2d at 556; *see also State v. Friend*, 385 N.W.2d 313, 322 (Minn. App. 1986) (holding it was misconduct for a prosecutor to refer to the jurors as "protectors of young girls" when the alleged victims were four young girls, and to ask during voir dire whether the jurors had heard of cases in which a defendant was charged, acquitted, and then subsequently committed additional crimes). Likewise, arguments indicating the jury should return a guilty verdict to convey a message to society or other individuals may constitute misconduct because they divert the jury's attention from the fact-finding role. *State v. Peterson*, 530 N.W.2d 843, 848 (Minn. App. 1995) (concluding a prosecutor's remarks about multiple child victims, when the defendant was only charged with assaulting one victim, were improper); *see also State v. Hoppe*, 641 N.W.2d 315, 320 (Minn. App. 2002). However, it is not misconduct for a prosecutor to discuss the victim's suffering. *Nunn v. State*, 753 N.W.2d 657, 662 (Minn. 2008).

The prosecutor's final argument to the jury encouraged the jury to "have courage" and return a guilty verdict because A.K. "doesn't have the courage anymore for her children to make sure this doesn't happen in the future." The argument of the prosecutor is clearly directed at encouraging the jury to find appellant guilty, not on the basis of the evidence,

but in order to protect the children from future harm or from growing up in a home with violence. The postconviction court reasoned that the argument was not error because the children could be construed as victims of the assault under a dictionary definition of the term "victim." We disagree. The prosecutor's ethical or moral directive to protect A.K.'s children from "future harm," when there is no evidence in the record that they were victims of appellant's violent behavior, is contrary to established Minnesota precedent that a prosecutor should not make arguments encouraging the jury to find guilt to protect others, as to do so may inflame the passions of the jury and divert the jury from the role of determining whether the state satisfied its burden of proving guilt beyond a reasonable doubt. *See Saltiros*, 499 N.W.2d at 819; *Duncan*, 608 N.W.2d at 556; *see also State v. Myrland*, 681 N.W.2d 415, 421 (Minn. App. 2004) (concluding the prosecutor committed misconduct by arguing that a victim of child pornography is revictimized every time the pornography is viewed because it was a distraction from the issue of guilt), *review denied* (Minn. Aug. 25, 2004). The prosecutor's comments were plainly intended to inflame the passions of the jury, and thus were plain error under established Minnesota law. *See State v. Kelley*, 855 N.W.2d 269, 277 (Minn. 2014) (indicating that this court looks to the law as it exists at the time of appellate review when considering whether an error is plain).

We next turn to the impact the statements had on the fairness of appellant's trial. The state, in its brief to this court, made no effort at carrying its burden of showing that the error had no significant impact on the jury's verdict, instead calling appellant's assertion of error "a bit baffling" and resting on the postconviction court's conclusion that the error

was "not 'plain' enough." We must assume that the state thus concedes that the error was prejudicial.

We must therefore assess "whether to address the error to ensure fairness and integrity in judicial proceedings." *Cao*, 788 N.W.2d at 715. "A new trial based on prosecutorial misconduct will only be granted if 'the misconduct, considered in the context of the trial as a whole, was so serious and prejudicial that the defendant's constitutional right to a fair trial was impaired.'" *Myrland*, 681 N.W.2d at 421 (quoting *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000)). Examining the misconduct in the context of the whole trial, we cannot agree that we must reverse for a new trial. The misconduct in this case was limited to two sentences, the impact of which is questionable. The jury's passions were obviously not so inflamed as to convict appellant of all of the charges heard at trial—he was acquitted of two charges. The jury was therefore not distracted from its role of determining guilt. The only guilty verdict the jury did return was supported by the strongest evidence—the physical result of force exerted onto A.K.'s mouth which caused red-stained drool to smear across her face and blood to drip upon her chest and the floor. On the basis of the record as a whole, we decline to reverse appellant's conviction.

Affirmed.