STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1842

State of Minnesota,
Respondent,

vs.

Lester Corey Bates,
Appellant.

Filed September 24, 2018
Affirmed
Johnson, Judge

Lyon County District Court
File No. 42-CR-16-1208

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

Richard R. Maes, Lyon County Attorney, Abby Wikelius, Assistant County Attorney, Marshall Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Connolly, Judge; and Rodenberg, Judge.

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

JOHNSON, Judge

A Lyon County jury found Lester Corey Bates guilty of felony domestic assault. The jury's verdict is based on evidence that Bates threw a half-gallon plastic container of

milk at his girlfriend's head. We conclude that the prosecutor did not engage in prosecutorial misconduct, with the exception of two statements that did not affect Bates's substantial rights and, thus, are not reversible error. We also conclude that the district court did not err by imposing an upward durational departure from the presumptive sentencing guidelines range based on the aggravating factor of the presence of a child. Therefore, we affirm.

FACTS

On November 13, 2016, Bates's girlfriend, A.K., picked him up in her car to go to a movie. A.K.'s one-year-old son was in the back seat. After Bates got into A.K.'s car, the couple began to argue. They stopped at a gas station to buy milk. They continued to argue after they drove away from the gas station. A.K. eventually stopped the car to allow Bates to get out. The couple continued to argue. After Bates got out of the car, he threw a half-gallon plastic container of milk at A.K.'s head. The milk container struck A.K. on the right side of her jaw and burst, spilling milk on A.K. and splattering milk throughout her car. A.K.'s one-year-old son was awake and alert in the back seat when Bates threw the milk container.

A.K. called 911 and drove to the Marshall Law Enforcement Center. She met Corporal Rieke in the parking lot. She told Corporal Rieke that she and Bates had argued and that Bates had thrown a half-gallon container of milk at her, hitting her on the right side of her face and neck. She told Corporal Rieke that the impact of the milk container exacerbated pre-existing pain from recent dental work. Corporal Rieke observed that the right side of A.K.'s face and neck was red and that she was soaked with milk. Corporal

Rieke took photographs of the right side of A.K.'s face and neck. Corporal Rieke also inspected A.K.'s car and saw milk splattered throughout the interior and a broken plastic milk container inside the car.

The state charged Bates with one count of domestic assault with intent to cause fear of immediate bodily harm or death, in violation of Minn. Stat. § 609.2242, subd. 4 (2016), and one count of domestic assault by intentionally inflicting or attempting to inflict bodily harm, in violation of Minn. Stat. § 609.2242, subd. 4.

The case was tried to a jury on one day in May 2017. The state called two witnesses: A.K. and Corporal Rieke. Bates did not testify and did not introduce any other evidence. The jury found Bates not guilty on count 1 and guilty on count 2. The jury also found that Bates committed the offense charged in count 2 "in the actual presence of a child who saw or heard or otherwise perceived the offense."

At sentencing, the district court found substantial and compelling reasons for an upward durational departure from the presumptive sentencing guidelines range based on the jury's finding that Bates committed the offense in the presence of a child. The district court imposed a sentence of 36 months of imprisonment but stayed execution of the sentence and placed Bates on probation for five years. Bates appeals.

D E C I S I O N

I. Claim of Prosecutorial Misconduct

Bates first argues that the prosecutor committed misconduct in four ways in her opening statement, her closing argument, and her rebuttal closing argument.

A. Objected-to Statement

Bates argues that the prosecutor committed misconduct in her rebuttal closing argument by vouching for A.K.'s credibility. In the challenged statement, the prosecutor stated, "I'd submit to you that what [A.K.] told you today, while it may have been hard for her to come here and say it, it was . . . the truth." Bates objected on the ground that the prosecutor vouched for the witness's credibility, and he moved for a mistrial. The prosecutor suggested that the district court give the jury a curative instruction. The district court denied Bates's motion for a mistrial and determined that a curative instruction was unnecessary. After the jury's verdict, Bates moved for a new trial on the ground that the prosecutor had impermissibly vouched for A.K.'s credibility. The district court denied the motion on the ground that the prosecutor's statement was a comment on the evidence but not an expression of her personal opinion.

"[A] prosecutor should not . . . vouch for the veracity of any particular evidence." *State v. McArthur*, 730 N.W.2d 44, 53 (Minn. 2007). "Vouching occurs when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. App. 2006) (quotation omitted). Specifically, a prosecutor "may not interject his or her personal opinion so as to personally attach himself or herself to the cause which he or she represents." *Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (quotation omitted). This prohibition does not "prevent the prosecutor from arguing that particular witnesses were or were not credible." *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991).

In this case, the prosecutor did not express a personal opinion about A.K. or her testimony. Rather, the prosecutor argued that A.K.'s testimony was credible. The prosecutor's statement concerning A.K.'s testimony is similar to the argument in *Everett*, in which the prosecutor called attention to the "mild manner" of a state's witness and invited the jury to "[j]udge his demeanor." *Id.* The supreme court concluded that the prosecutor's argument was not improper because "the statements were not in the form of personal opinions." *Id.*

Thus, the prosecutor did not improperly vouch for A.K.'s credibility in her rebuttal closing argument.

B. Unobjected-to Statements

Bates also argues that the prosecutor committed misconduct on three other occasions. But Bates did not object at trial to the three other instances of alleged misconduct. Accordingly, this court applies "a modified plain-error test." *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail under the modified plain-error test with respect to any particular instance of alleged misconduct, Bates must establish that there is an error and that the error is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* If Bates were to establish a plain error, the state would have the burden of showing that the error did not affect Bates's substantial rights, *i.e.*, "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 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)).

1.

Bates argues that the prosecutor committed misconduct in her opening statement by making a statement that inflamed the passions and prejudices of the jury. In the challenged statement, the prosecutor stated:

> Now, while these facts today might seem simple and concrete, in a case of domestic assault, when emotions of the victim are involved, the case [becomes] anything but that. Today, [A.K.] will be asked to do the impossible. She will be asked to answer personal questions about her sex life, questions about her relation—her past relationship, and confront her former boyfriend and relive a traumatic experience. These are things that would be difficult for any of us under any circumstances, let alone in an open courtroom in front of twelve strangers.

An opening statement need not be "colorless," but it must be confined to a description or outline of the facts a party expects to prove. *State v. Bolstad*, 686 N.W.2d 531, 544 (Minn. 2004); *Tucker v. State*, 245 N.W.2d 199, 202 (Minn. 1976); *State v. Montgomery*, 707 N.W.2d 392, 399 (Minn. App. 2005). In describing the anticipated evidence, the prosecutor must not use language that may inflame the passions and prejudices of the jury. *Montgomery*, 707 N.W.2d at 399-400. Here, the challenged statement does not appear to have been designed to inflame the passions and prejudices of the jury and likely did not do so. The statement appears reasonably related to evidence the state intended to introduce and, thus, information the jury would perceive during the

evidentiary phase of trial. In light of its relatively innocuous nature, the prosecutor's statement is not plainly misconduct.

2.

Bates also argues that the prosecutor committed misconduct in her closing argument by making a statement that inflamed the passions and prejudices of the jury. In the challenged statement, the prosecutor said to the jury, "with your verdict of guilty, I'd ask that you convey to [A.K.] and to [A.K.'s child] someday, that this type of behavior and what [A.K.] experienced is against the law."

The state's closing argument must be based on the evidence introduced at trial or reasonable inferences from the evidence. *State v. Morton*, 701 N.W.2d 225, 237 (Minn. 2005); *State v. Crane*, 766 N.W.2d 68, 74 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009). "It is improper for the prosecutor to make statements urging the jury to . . . send a message with its verdict." *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). The prosecutor should not do so because

> the jury's role is not to enforce the law or teach defendants lessons or make statements to the public or to 'let the word go forth'; its role is limited to deciding dispassionately whether the state has met its burden in the case at hand of proving the defendant guilty beyond a reasonable doubt.

State v. Salitros, 499 N.W.2d 815, 819 (Minn. 1993). Here, the prosecutor used language that essentially asked the jury to "send a message." The prosecutor's statement plainly is misconduct.

3.

Bates also argues that the prosecutor committed misconduct in her rebuttal closing argument by making a statement that shifted the burden of proof to Bates. In the challenged statement, the prosecutor said, "I'd submit to you that there [was] nothing that [A.K.] testified to today that was contradicted by the Defense."

"A prosecutor may not comment on a defendant's failure to . . . contradict testimony." *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995). Such a comment "may suggest to the jury that the defendant bears some burden of proof." *Id.* In *Porter*, the supreme court determined that the prosecutor engaged in misconduct by arguing that the defense failed to impeach the state's witness because the argument tended to shift the burden of proof to the defense. *Id.* at 364-65. Here, the prosecutor did exactly what *Porter* prohibits: she stated that Bates did not contradict the state's evidence. The prosecutor's statement plainly is misconduct.

4.

Because we have concluded that two of the challenged statements by the prosecutor were plainly misconduct, we must proceed to the third step of the modified plain-error test, at which the state has the burden of showing that the plain error did not affect Bates's substantial rights, *i.e.*, "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." *Ramey*, 721 N.W.2d at 302 (quotations omitted). Here, the prosecutor's erroneous statements were very brief. *See State v. Johnson*, 915 N.W.2d 740, 746 (Minn. 2018); *State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003); *State v. Washington*, 521 N.W.2d 35, 40

(Minn. 1994). The district court instructed the jury that counsel's arguments were not evidence and that the jurors were "the sole judges of whether a witness is to be believed and of the weight to be given a witness's testimony." *See Johnson*, 915 N.W.2d at 747; *Washington*, 521 N.W.2d at 40. The district court also instructed the jury on the elements of the offenses and that the state had the burden of proof. In addition, the jury acquitted Bates of one count of domestic assault, which tends to show that the jury understood that the state had the burden of proof. *See State v. DeWald*, 463 N.W.2d 741, 745 (Minn. 1990). Furthermore, the evidence of Bates's guilt is overwhelming. A.K. testified in detail about the incident, and her testimony was corroborated by Corporal Rieke's testimony. Moreover, the evidence included photographs of A.K.'s red face and jaw and of the interior of her car. One photograph depicted a broken plastic milk container and splattered milk. Thus, the prosecutor's plainly erroneous statements did not affect Bates's substantial rights.

II. Upward Durational Departure

Bates also argues that the district court erred at sentencing by imposing an upward durational departure on the ground that a child was present when he committed the offense.

The Minnesota Sentencing Guidelines specify a presumptive sentence for a felony offense. Minn. Sent. Guidelines 2.C (2016). The presumptive sentence is "presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics." Minn. Sent. Guidelines 1.B.13 (2016). Accordingly, a district court "must pronounce a sentence . . . within the applicable [presumptive] range unless there exist identifiable, substantial, and compelling circumstances to support a departure." Minn. Sent. Guidelines 2.D.1 (2016); *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

"Substantial and compelling circumstances are those demonstrating that the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotation omitted). The guidelines provide a non-exclusive list of aggravating factors that may justify a departure. Minn. Sent. Guidelines 2.D.3.b (2016).

In this case, the district court relied on one of the aggravating factors in the guidelines' non-exclusive list: "The offense was committed in the presence of a child." Minn. Sent. Guidelines 2.D.3.b.(13) (2016); *State v. Vance*, 765 N.W.2d 390, 393 (Minn. 2009). An offense is committed in the presence of a child only if "the child sees, hears, or otherwise witnesses some portion of the commission of the offense in question." *State v. Robideau*, 796 N.W.2d 147, 152 (Minn. 2011).

Bates contends that the presence-of-a-child aggravating factor does not apply in this case on the ground that the presence of A.K.'s one-year-old child did not make his conduct "particularly outrageous" because it "did not heighten, significantly or otherwise, the seriousness of [his] conduct." We can resolve Bates's contention without considering the particular facts of this case. Under the sentencing guidelines, the presence of a child, by itself, is a sufficient basis for an upward durational departure. *See* Minn. Sent. Guidelines 2.D.3.b.(13) (2016); *Vance*, 765 N.W.2d at 393. There is no additional requirement. The district court need not find that other circumstances surrounding the commission of the offense are "substantial and compelling circumstances to support a departure," Minn. Sent. Guidelines 2.D.1 (2016), or that "the defendant's conduct in the offense of conviction was

significantly more . . . serious than that typically involved" for reasons other than simply the presence of a child, *Hicks*, 864 N.W.2d at 157.

Bates also contends that the evidence is insufficient to establish that A.K.'s one-year-old son actually saw, heard, or otherwise perceived some portion of the commission of the offense. *See Robideau*, 796 N.W.2d at 152. Contrary to Bates's contention, A.K. testified that her son was awake and alert in the back seat while A.K. and Bates were arguing and when Bates threw the milk container at her. Although it is unclear whether the child was facing forward or backward, the evidence allows an inference that, at the least, the child heard the sounds of Bates's criminal conduct.

Thus, the district court did not err by imposing an upward durational departure from the presumptive sentencing guidelines range.

Affirmed.