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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1953

State of Minnesota,
Respondent,

vs.

Layne Allen Gerhardson,
Appellant.

Filed October 29, 2018
Affirmed
Reilly, Judge

Kandiyohi County District Court
File No. 34-CR-17-150

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Shane Baker, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

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

Considered and decided by Tracy M. Smith, Presiding Judge; Reilly, Judge; and John Smith, Judge.[*]

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

REILLY, Judge

On appeal from his convictions of attempted aggravated robbery and assault, appellant Layne Allen Gerhardson argues that (1) the prosecutor's misconduct deprived him of his constitutional right to a fair trial; and (2) the district court abused its discretion by denying his *Schwartz*-hearing request. Because appellant is not entitled to relief on his prosecutorial-misconduct claims and the district court did not abuse its discretion by denying appellant's request for a *Schwartz* hearing, we affirm.

FACTS

Appellant was convicted of attempted first-degree aggravated robbery with a dangerous weapon and assault for entering the victim's home on February 9, 2017, brandishing a tire iron, grabbing the victim by the throat, throwing him against the refrigerator, and demanding money. At trial, appellant denied the charges and testified that he was at home with his friend, K.P., at the time of the incident. The jury found appellant guilty. The district court denied appellant's motion for judgment of acquittal or for a new trial. At sentencing, the district court granted appellant's request for a downward-durational departure from the presumptive sentence and imposed a 21-month prison sentence for attempted first-degree aggravated robbery with a dangerous weapon. The state appealed, arguing that the district court abused its discretion by granting appellant's downward-durational-departure request. *State v. Gerhardson*, No. A17-1742, 2018 WL 2090855, at *1 (Minn. App. May 7, 2018). We affirmed the district court's sentencing decision. *Id.* Appellant now challenges his convictions.

D E C I S I O N

I. Appellant Is Not Entitled to a New Trial on the Basis of Prosecutorial Misconduct

Appellant argues that he is entitled to a new trial on the basis of prosecutorial misconduct. To warrant reversal for a new trial, the prosecutor's misconduct, placed into the context of the entire trial, must be so serious and prejudicial as to impair the defendant's constitutional right to a fair trial. *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000). Our standard of review on a claim of prosecutorial misconduct depends on whether the defense objected to the claimed misconduct at trial. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). Appellant argues that both classes of error are present here, and we address each argument in turn.

a. Appellant Is Not Entitled to Relief on His Claim of Objected-to Prosecutorial Misconduct

Appellant filed a post-trial motion claiming that the prosecutor committed misconduct during closing argument by advancing a personal opinion on appellant's guilt. The district court denied the motion. We review a district court's denial of a post-trial motion for a new trial based on prosecutorial misconduct for an abuse of discretion. *State v. Smith*, 464 N.W.2d 730, 734 (Minn. App. 1991), *aff'd*, 476 N.W.2d 511 (Minn. 1991). We apply a two-tiered harmless-error test for objected-to prosecutorial misconduct, "the application of which varies based on the severity of the misconduct." *State v. Wren*, 738 N.W.2d 378, 389-390 (Minn. 2007). In cases involving "unusually serious prosecutorial misconduct," we consider whether it is certain beyond a reasonable doubt that the misconduct was harmless. *State v. Carridine*, 812 N.W.2d 130, 150 (Minn. 2012). In cases

involving less serious prosecutorial misconduct, we ask whether the misconduct "likely played a substantial part in influencing the jury to convict." *Id.* Here, the prosecutor's conduct is harmless even under the stricter standard of review.

Appellant claims that the prosecutor committed misconduct during closing argument by interjecting his personal opinion in closing remarks as follows:

> [Y]ou are the finders of fact. You are the ones who decide, this is what happened that day. Now I have argued the state's position on what happened that day and I strongly believe the facts support that at every point. But it's up to you to decide what happened that day and then once you've decided what happened, to apply the law that the judge has given you precisely as the judge gives it to you.

In his post-trial motion, appellant argued that this statement amounted to an improper personal opinion of appellant's guilt. The district court disagreed, reasoning that the prosecutor's comment of personal opinion was "minor" and unlikely to have influenced the verdict in light of the record as a whole.

We discern no abuse of discretion in the district court's decision. "With respect to claims of prosecutorial misconduct arising out of closing argument, we consider the closing argument as a whole rather than focus on particular 'phrases or remarks that may be taken out of context or given undue prominence.'" *Johnson*, 616 N.W.2d at 728 (quoting *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993)). Although a prosecutor may point to facts that cast doubt on a witnesses' veracity, the prosecutor may not inject a personal opinion of the defendant's credibility into the proceedings. *State v. Duncan*, 608 N.W.2d 551, 555 (Minn. App. 2000), *review denied* (Minn. May 16, 2000).

The use of the first-person pronoun "I" during closing argument may indicate that the prosecutor injected his or her personal opinion into the proceedings. *Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004). But personal-opinion statements do not always rise to the level of reversible misconduct. *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005). Here, even assuming the prosecutor's statement constituted misconduct, it was harmless beyond a reasonable doubt. *Carridine*, 812 N.W.2d at 150. We review closing arguments in their entirety when determining whether prosecutorial misconduct occurred. *State v. Vue*, 797 N.W.2d 5, 15 (Minn. 2011); *see also State v. Jackson*, 714 N.W.2d 681, 694 (Minn. 2006) (instructing court to consider "the closing argument as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence" (quotations omitted)). The prosecutor's comment was a brief statement when the closing argument is viewed as a whole, amounting to a single phrase in the prosecutor's eighteen-page closing argument. And the prosecutor acknowledged several times within the same paragraph that the jurors were "the finders of fact" and "the ones who decide" the matter of appellant's guilt. Accordingly, we determine that the prosecutor's comment, when considered in light of the closing argument as a whole, does not entitle appellant to relief.

b. Appellant Is Not Entitled to Relief on His Claims of Unobjected-to Prosecutorial Misconduct

Appellant failed to object to his remaining claims of prosecutorial misconduct at trial. Generally, if a defendant fails to object to misconduct at trial, he "forfeits the right to have the issue considered on appeal." *State v. Powers*, 654 N.W.2d 667, 678 (Minn.

2003). But we may address the issue under a modified plain-error test. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011). On review, appellant must demonstrate that there was an error and that it was plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Plain error is shown if the error "contravenes case law, a rule, or a standard of conduct." *Id.* If an appellant shows plain error, the burden shifts to the state to show that the error did not affect appellant's substantial rights. *Id.* An error affects appellant's substantial rights if there is prejudice and the error affected the outcome of the case. *State v. Barrientos-Quintana*, 787 N.W.2d 603, 611 (Minn. 2010). An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the verdict. *Id.* If the three prongs are satisfied, we may order a new trial only if doing so is necessary to ensure fairness and the integrity of the judicial proceedings. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001). But if the claimed error did not affect an appellant's substantial rights, we need not consider the other plain-error factors. *Montanaro*, 802 N.W.2d at 732.

i. Witness Credibility

Appellant argues that the prosecutor committed misconduct in closing argument by suggesting that appellant lied in his trial testimony. Appellant testified that he did not assault the victim and was at home with his friend, K.P. The victim was assaulted at about 10:00 p.m. Appellant initially told a police officer that he was with K.P. from 3:30 p.m. to 11:30 p.m. But at trial, appellant testified that he was only with K.P. until 9:45 p.m. Appellant explained the discrepancies in his statements by claiming that his clocks were fast and he had difficulty remembering the exact time. K.P. testified that he was with

appellant until 9:40 p.m. During closing, the prosecutor addressed the inconsistencies in appellant's testimony regarding the timeline as follows:

> If the defendant was never there [at the victim's home] and didn't commit the crime, why is he lying about where he was and the timeline of events? Because we know he's lying about that. He's not telling you the truth about where he was and when he was there. We know that because his alibi makes no sense.
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> What time did the defendant tell [the officer] he brought [K.P.] home? Was it 11:00 or 11:30 or today, 9:45, 9:50? Even assuming we stick with the 11:00, 11:30, it doesn't matter that there's doubt about that. Why? Because it's a lie. It's made up. There should be doubt about that. It's not true.

Even assuming the prosecutor plainly erred, the state has demonstrated 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 (quotation omitted). In assessing prejudice, we consider (1) the strength of the evidence against appellant, (2) the pervasiveness of the erroneous conduct, and (3) whether appellant had a chance to rebut any improper remarks. *State v. Peltier*, 874 N.W.2d 792, 805-06 (Minn. 2016). The state satisfies these factors. First, the state's case against appellant was strong. Both the victim and his girlfriend, who were present during the crime, testified that appellant entered the home, threatened the victim, and demanded money. Appellant's alibi witness, K.P., testified that he was with appellant until 9:40 p.m. The crime occurred at 10:00 p.m. Evidence of appellant's guilt, as presented at trial, was strong. Second, the prosecutor's misconduct was not pervasive. The prosecutor's statement accounted for only

a few brief phrases in an eighteen-page transcription. *See State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (holding prosecutor's misconduct did not affect defendant's substantial rights where misconduct was not pervasive). Lastly, the defense had an opportunity to rebut the argument in its closing. Given these circumstances, we determine that the state demonstrated that there is no reasonable likelihood that the prosecutor's misconduct, if any, significantly affected the jury's verdict.

ii. Tailored Testimony

Appellant argues that the prosecutor erred by insinuating that appellant changed his story after hearing the state's evidence. A prosecutor's repeated suggestions that a defendant tailored his testimony after reviewing the state's evidence may be an improper comment on a defendant's right to exercise his right of confrontation. *State v. Mayhorn*, 720 N.W.2d 776, 790 (Minn. 2006). A prosecutor "cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case." *State v. Swanson*, 707 N.W.2d 645, 657-58 (Minn. 2006). *Swanson* requires "specific evidence of tailoring." *Id.* at 658. Sufficient evidence of tailoring exists when a defendant's account of events changes significantly after the defendant learns of the state's evidence. *State v. Ferguson*, 729 N.W.2d 604, 616-17 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).

During his closing remarks, the prosecutor stated, "Now up until today the defendant had maintained that he was at his house with [K.P.] from 3:30 until 11:00 at night. Well, he changed all that today after he's heard all the evidence that shows that

that's not true." Even assuming the prosecutor's statement was plainly erroneous, we determine that it did not affect appellant's substantial rights. The evidence against appellant was strong, this portion of the closing argument was brief - amounting to a single phrase in an eighteen-page transcription, and appellant had chance to rebut these remarks. *See Peltier*, 874 N.W.2d at 805-06 (considering three factors). Even if the statement was plainly erroneous, we hold that the state met its burden of establishing that any misconduct did not affect appellant's substantial rights.

iii. Confusing the Jury

Appellant argues that the prosecutor plainly erred by telling the jury that appellant intended to confuse the jury. It is improper to disparage the defense during closing argument by belittling the defense's arguments. *State v. Griese*, 565 N.W.2d 419, 427 (Minn. 1997). However, a "prosecutor is free to specifically argue that there is no merit to a particular defense in view of the evidence or no merit to a particular argument." *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993).

Here, the prosecutor stated in rebuttal:

> [The defense attorney] would make a long list . . . of all the inconsistencies with [the victim's statements]. . . . Not one of them was about an element of the crime. What did I say? Pay attention to where the reasonable doubt is. . . . Not one of those [inconsistencies] is an element of the crime. Even about the crowbar, whether you hold it up or whether you swing it, did anyone say he didn't hold up? You hold that up as a threat. That's what it takes to meet the elements of the crime. Do you believe beyond a reasonable doubt that that occurred? Each and every single one of those things does not address an element of the crime. That's to confuse you. That's to make you worry about things you don't need to worry about.

Appellant has not demonstrated that the prosecutor committed an error. *Ramey*, 721 N.W.2d at 302 (placing burden on appellant to demonstrate error). The prosecutor urged the jury to focus on the elements of the crime. The prosecutor's comments "were an attempt to counter specific statements or arguments previously made by appellant's counsel" and, as such, do not constitute misconduct. *State v. Lasnetski*, 696 N.W.2d 387, 397-98 (Minn. App. 2005) (holding prosecutor did not improperly disparage defense counsel by arguing that defense presented evidence meant to "hid[e] the ball," and urging jury not to be distracted); *see also State v. Ashby*, 567 N.W.2d 21, 28 (Minn. 1997) (holding it was not improper for prosecutor to direct jury to "keep its eyes on the prize" of truth and look at the evidence). The prosecutor did not err by stating during closing that the defense arguments lacked merit.

iv. Credibility of Police Officer

Appellant argues that he was prejudiced by the prosecutor's comment that the police officer was credible. During rebuttal, the prosecutor argued that the defense attorney was trying to "testify for [appellant]" in her closing by suggesting that the victim could not identify appellant. The prosecutor continued:

> [The defense attorney is] attempting to argue that somehow [the victim] didn't identify who assaulted [him] from the very beginning. She keeps going back to that well. But what did [the officer] tell you was on the 911 dispatch report. During the 911 call, before [the officer] even got there, [the victim] identified [appellant] as the person who assaulted him. Just saying it a whole bunch of times that he didn't know who it was at first doesn't make it true when you've got an officer telling you what it says in black and white.

The prosecutor did not state a personal opinion as to the officer's veracity or "personally attach[ ] himself" to the cause. *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991) (noting that the "personal opinion rule" is designed to prevent a prosecutor "from becoming an unsworn witness and otherwise personally attaching himself or herself to the cause which he or she represents"). Instead, the prosecutor identified evidence in the record supporting the state's case. It is not improper for a prosecutor to argue during closing that a particular witness was or was not credible based upon their demeanor during testimony or the evidence presented. *Id.*; *see also State v. Stephani*, 369 N.W.2d 540, 547 (Minn. App. 1985) (concluding that prosecutor's statement that a witness "told you what happened" was not misconduct), *review denied* (Minn. Aug. 20, 1985). Appellant has not made a threshold showing that the prosecutor erred by directing the jury's attention to the officer's statements.

v. Direct Examination of Police Officers

Appellant argues that the prosecutor committed misconduct during his questioning of the police officers. First, appellant argues that the prosecutor committed misconduct by eliciting testimony from an officer that appellant had an outstanding arrest warrant. The state filed a complaint warrant on February 15, 2017. Two days later, appellant turned himself in to law enforcement. At trial, the officer testified that appellant "turned himself in on a warrant." Appellant seems to suggest that the officer's testimony referred to an outstanding warrant in an unrelated case. But the record does not support this argument. Evidence of outstanding arrest warrants for unrelated crimes is generally inadmissible. *State v. Bobo*, 414 N.W.2d 490, 492 (Minn. App. 1987), *review denied* (Minn. Dec. 22,

1987). But the warrant referenced by the officer appears to be the February 15 complaint in the present case. Appellant has not shown that the prosecutor erred by eliciting testimony that appellant had an arrest warrant in the present case.

Second, appellant argues that he was prejudiced by the officer's testimony that the officer had previous experience with appellant. The prosecutor asked the officer if he had "experience dealing with Mr. Gerhardson" before this case. The witness answered, "I think possibly on and off over the years I dealt with Mr. Gerhardson before. I knew who he was." When a defendant's identity is not at issue in a case, a prosecutor may not draw an officer to reveal that he knows the defendant from prior contacts. *State v. Valentine*, 787 N.W.2d 630, 641 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). It is also improper for a prosecutor to ask questions calculated to elicit or insinuate inadmissible and unfairly prejudicial answers. *State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994). Here, the identity of the assailant *was* at issue. Appellant denied that he was involved in the crime and stated that he was not at the victim's home. Further, the officer testified that he had "dealt with" appellant before and "knew who he was." The officer did not make any reference to prior criminal activity, and the prosecutor did not ask the officer to elaborate about the nature of his experience with appellant. The prosecutor did not plainly err by eliciting testimony that the officer knew appellant.

Third, appellant argues that he was prejudiced by the officer's testimony that K.P. told the officer that appellant had an outstanding warrant on an unrelated case. During the course of the investigation, the officer spoke to K.P. about the February 9 crimes. The prosecutor asked the officer if K.P. "seem[ed] to know much about what was going on as

far as the allegations" against appellant. The officer responded, "[K.P.] did. He was under the impression that it had to—that [appellant's] arrest had to do with an assault possibly on a female. That's what the warrant was for, he was told." The prosecutor clarified, "Okay. But that wasn't the case, was it?" The officer responded, "No." The prosecutor did not ask any further questions about the unrelated event.

A prosecutor commits misconduct "by means of insinuations and innuendoes which plant in the minds of the jury a prejudicial belief in the existence of evidence which is otherwise inadmissible." *State ex rel. Black v. Tahash*, 158 N.W.2d 504, 506 (Minn. 1968). Here, the prosecutor did precisely the opposite—when the officer stated that K.P. believed appellant was arrested for assaulting a female, the prosecutor clarified, "[b]ut that wasn't the case, was it?" The officer responded, "No." The prosecutor's question did not seek to introduce or elicit inadmissible evidence. Instead, the prosecutor asked whether a witness in the case knew "much about what was going on."

Even assuming that the prosecutor committed an error by eliciting testimony from the officer and that the error was plain, the state has satisfied its burden of 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." *Ramey*, 721 N.W.2d at 302 (quotation omitted). To determine the effect of the error, we 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. Hohenwald*, 815 N.W.2d 823, 835 (Minn. 2012) (quoting *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007)). We will reverse only when the alleged prosecutorial

misconduct, "viewed in light of the entire record, is of such serious and prejudicial nature that appellant's constitutional right to a fair trial was impaired." *State v. Haynes*, 725 N.W.2d 524, 529 (Minn. 2007) (quotation omitted). Here, the prosecutor's errors, if any, were not of such a serious and prejudicial nature as to impair appellant's right to a fair trial. The record contained sufficient evidence of appellant's guilt, the alleged errors make up only minimal portions of the trial, and the defense had an opportunity to rebut any improper suggestions. The state satisfied its burden of demonstrating that the plain errors, if any, did not affect appellant's substantial rights. *See Ramey*, 721 N.W.2d at 302.

II. Appellant Is Not Entitled to a *Schwartz* Hearing

A defendant may request a hearing to impeach the verdict based on juror misconduct. *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301, 303 (Minn. 1960). The purpose of the hearing, commonly known as a *Schwartz* hearing, "is to determine whether a jury verdict is the product of misconduct." *State v. Greer*, 635 N.W.2d 82, 93 (Minn. 2001). *Schwartz* hearings should be liberally granted. *Quinn v. Winkel's, Inc.*, 279 N.W.2d 65, 69 (Minn. 1979). Before a *Schwartz* hearing will be granted, the defendant must make a prima facie showing of juror misconduct. *State v. Pederson*, 614 N.W.2d 724, 730 (Minn. 2000); *State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979) (noting that the rule "implicitly requires [a] defendant to establish a prima facie case of jury misconduct before a *Schwartz* hearing is mandated"). To make a prima facie showing, "a defendant must submit sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *Larson*, 281 N.W.2d at 484. We review

the denial of a *Schwartz* hearing for an abuse of discretion. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004).

Appellant argues that the district court abused its discretion by denying his request for a *Schwartz* hearing. After the jury returned its verdict, the district court polled the jurors. Each juror agreed with the verdict. However, one juror asked, "Can I say people have beds to go home to?" The district court stated, "I'm asking you if the verdict read is yours?" The juror responded, "Yes." Defense counsel did not object to the juror's response or request further clarification. In his post-trial motion, appellant argued that the verdict was subject to impeachment because one of the jurors did not agree with the verdict. Appellant argued that defense counsel contacted the juror, who stated that she did not agree with the guilty finding as to the robbery and theft charges. The district court denied appellant's request, determining that "the juror's final response was an unequivocal agreement with the verdicts since she answered that she agreed with the verdict when the Court requested clarification." The district court further found that appellant "failed to submit any evidence to indicate jury misconduct occurred" and, accordingly, there was no justification for a *Schwartz* hearing.

We agree. The United States Constitution guarantees criminal defendants the right to a unanimous verdict. *Andres v. United States*, 333 U.S. 740, 748, 68 S. Ct. 880, 884 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."); *Burns v. State*, 621 N.W.2d 55, 61-62 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001). A corollary to the right to a unanimous verdict is the right to have the jury polled. *Burns*, 621 N.W.2d at 61-62. "The purpose of jury polling is to ensure that each

of the jurors approves of the verdict as returned [and] that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Id.* at 62 (quotation omitted). Here, one of the jurors said, "Can I say people have beds to go home to?" The juror's response was followed by a "short laugh," which the court construed as "laughter caused by the juror's nervousness." When confusion arises during polling on whether a particular juror approves of the verdict as returned, the trial court may question the juror to clarify the confusion. *State v. Ware*, 498 N.W.2d 454, 459 (Minn. 1993). "The decision to question a juror is discretionary and turns on the degree to which the juror's answer to the poll was reluctant, equivocal, or conditional." *Burns*, 621 N.W.2d at 62. Here, the district court clarified the juror's answer by inquiring, "I'm asking you if the verdict read is yours?" The juror responded, "Yes." Given the juror's unequivocal statement when polled after returning the verdict that she agreed with the verdict, a *Schwartz* hearing was not warranted. The district court did not abuse its discretion by denying appellant's request for a *Schwartz* hearing.

Affirmed.