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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-2006**

State of Minnesota,
Respondent,

vs.

Robert Allen Oliver,
Appellant.

**Filed November 19, 2018**
**Affirmed**
**Hooten, Judge**

Polk County District Court
File No. 60-CR-16-1470

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

## UNPUBLISHED OPINION

**HOOTEN**, Judge

Appellant argues that his conviction must be reversed because the state committed prosecutorial misconduct by misstating the evidence and by vouching for the credibility of the victim witness. We affirm.

## FACTS

On August 8, 2016, appellant Robert Allen Oliver went to the home of his third cousin, C.W., around 9:30 at night. Upset over his recent breakup, Oliver wanted to talk to C.W. He brought a bottle of vodka with him and continued to drink while the two talked in C.W.'s bedroom. Oliver became increasingly agitated throughout the evening. C.W. told Oliver he needed to calm down or he would have to leave, which angered Oliver even more. At 1:50 a.m., C.W. texted a friend, stating, "F---, Oliver is drunk." One minute later, she texted her friend again, "He kinda scarying me." Oliver told her he was not leaving without having sex. When she told him "no," he proceeded to grab her, throw her down on her bed, and penetrate her vaginally with his fingers. C.W. managed to kick him off, grab her phone, and flee from the room. She texted her friend again at 2:13 a.m., stating, "I need help to scared to call the cops he just tried to f--- me . can you call them for me and send them to my place please."

Notified by dispatch, Officer David Grabowski of the Crookston Police Department found Oliver inside C.W.'s home with his pants unzipped and his penis partially exposed. Oliver was arrested and charged with criminal sexual conduct in the second, third, and fourth degree and felony domestic assault. After trial, the jury found Oliver guilty on all

four charges and the district court entered a judgment of conviction of second-degree criminal sexual conduct and felony domestic assault. This appeal follows.

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

Oliver argues that the prosecutor committed prosecutorial misconduct on two occasions during closing arguments. We reverse a district court's determination regarding alleged prosecutorial misconduct "only when 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." *State v. Johnson*, 616 N.W.2d 720, 727–28 (Minn. 2000). We use a harmless-error test or a modified plain-error test depending on whether the alleged misconduct was objected to at trial. *State v. Dobbins*, 725 N.W.2d 492, 506 (Minn. 2006).

**Misstating the Evidence**

Oliver argues that during closing arguments, the prosecutor misstated evidence of Oliver's statements to the police by suggesting that Oliver called C.W. one of his "bitches." Officer Grabrowski testified that after his arrest and on the way to the jail, Oliver said "that he doesn't need to take bitches, bitches come to him." Once at the jail, Oliver referred to C.W. as one of his girls, but explained that he meant she was one of his friends. Oliver also alleged that C.W. made sexual advances towards him, but then contradicted his earlier statement. Finally, he said, "I got—I got women. If I want to call some girls tonight, I got girls I can call right now that'd come get me."

Oliver challenges the following remarks made by the prosecutor during closing:

> [T]he defendant's statements don't make sense unless you conclude that [C.W.] actually is his girl, that he's—she's one of his bitches, and that's she's the instigator of this sexual conduct. . . . And I would ask that you conclude that [C.W.] isn't, in fact, one of Mr. Oliver's bitches but is one of his victims.
>
> . . . .
>
> The question is do you believe [C.W.] or if what you find what the defendant told you—or told Officer Grabowski, excuse me, that night in those two statements makes sense—someone who says that she's one of his women, that she came onto him, that she wanted to sexually touch him, that bitches don't—he doesn't have—bitches—or he doesn't have to go to bitches, bitches come to him, or something to that effect?

Oliver objected to the alleged misstatements of the evidence. We review objected-to prosecutorial misconduct for harmless error under a two-tiered test based on the seriousness of the misconduct. *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). We review claims of unusually-serious prosecutorial misconduct for certainty beyond a reasonable doubt that the conduct was harmless, while we review less-serious claims of misconduct to determine if the misconduct likely played a substantial part in influencing the jury to convict. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009).[1]

During closing arguments, a prosecutor may present "all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence." *State v. Nissalke*, 801 N.W.2d 82, 105 (Minn. 2011) (quotation omitted). But a prosecutor may not argue facts not in evidence. *State v. Lehman*, 749 N.W.2d 76, 86 (Minn. App. 2008),

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[1] The supreme court has questioned whether this two-tiered approach is still good law, while declining to decide the question. *See State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010); *see also State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012).

*review denied* (Minn. Aug. 5, 2008). A prosecutor may not intentionally misstate evidence or advance arguments calculated to inflame the jury's passions. *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993).

Contrary to Oliver's arguments, the prosecutor did not misstate the evidence of Oliver's statements to the police. The prosecutor did not expressly state that Oliver called C.W. one of his "bitches." Instead, the prosecutor alluded to Oliver's statement that "bitches come to him" and his accusation (which he then retracted) that C.W. initiated the sexual conduct. As in *State v. Rose*, the prosecutor made a "fair comment on [the] evidence." 353 N.W.2d 565, 569 (Minn. App. 1984), *review denied* (Minn. Sept. 12, 1984). The prosecutor used Oliver's statement referring to his lack of want for "bitches," tied with Oliver's accusation that C.W. initiated sex with him, to argue that C.W. was not one of his "bitches" but one of his victims. This is a reasonable comment based on the cumulative nature of his statements to the police. We conclude that the prosecutor did not misstate the evidence.

Oliver further argues that the prosecutor's statement about Oliver's "bitches" was calculated to prejudice the jury against him, evoking an emotional rather than dispassionate review of the evidence. In *State v. Porter*, the supreme court found prosecutorial misconduct because the state's closing argument was "a blatant attempt to impinge on juror independence" by referencing "the James Porter School of Sex Education" where no such school existed in a criminal sexual conduct case involving a victim under the age of 16. 526 N.W.2d 359, 364 (Minn. 1995). The supreme court considered these statements "could only have been intended to inflame the jury's passions and prejudices . . . and were not

based on evidence produced at the trial." *Id.* The prosecutor's statements that C.W. was not one of Oliver's "bitches" do not constitute a blatant attempt to impinge on jury independence or distort the testimony.

The statement was also not intended or calculated to cause an emotional response. In *State v. Mayhorn*, the supreme court found prosecutorial misconduct when the state *intentionally* misstated the evidence. 720 N.W.2d 776, 787–88 (Minn. 2006). The witness testified that her brother told her he had been shot at before, but the prosecutor added to her testimony that "she knew of a shootout that [defendant] and her brother were in in Kokomo." *Id.* Because the prosecutor had earlier argued about the admissibility of evidence regarding these facts, the prosecutor should have been sufficiently familiar with the testimony to "avoid inadvertently misstating it." *Id.* at 788. Again, there is nothing to show, and Oliver does not argue, how the prosecutor's statements about Oliver's "bitches" in any way were intentional misstatements of the evidence or that the prosecutor should have avoided potentially misstating it. Earlier in his closing argument, the prosecutor referred to the statements made by Oliver:

> Did [C.W.] make sexual advances towards him? He was asked that question by the officer. He said, "Yes." . . . What did he say? "All women do." But what did he do then? Then he denied that she did anything to him. Now, does that make any sense to you? "Yeah, she touched him tonight—or she wanted to touch him. Of course, she made sexual advances towards him. All women do." What else did he tell the officer when he's being transported? "He doesn't need to take bitches, bitches come to him." . . . The question is, who do you believe?

The prosecutor clearly understood that these statements were made separately, and in no way misled the jury by stating that Oliver called C.W. one of his "bitches."

We conclude that the prosecutor did not commit prosecutorial misconduct by misstating the evidence, intentionally or unintentionally. We therefore need not address the seriousness of the statements, as no misconduct occurred.

But even if misconduct occurred, the statements were harmless beyond a reasonable doubt because the weight of evidence against Oliver far surpassed the prosecutor's reference to his statement about bitches. In *State v. Caulfield*, the supreme court noted several factors relevant to the harmless-error-beyond-a-reasonable-doubt standard for more serious misconduct. 722 N.W.2d 304, 317 (Minn. 2006). We look to how the evidence was presented, whether the state emphasized it, whether the evidence was highly persuasive or circumstantial, and whether the defendant countered it. *State v. Wren*, 738 N.W.2d 378, 394 (Minn. 2007) (applying the factors in *Caulfield* in the context of prosecutorial misconduct).

The prosecutor's statements were brief; he did not emphasize or dwell on Oliver's comment about bitches. The prosecution referenced Oliver's statements to the officer in closing and concluded his argument by asking the jury to find that C.W. was not one of Oliver's bitches. It would not be any more persuasive had the prosecutor, in actuality, told the jury that Oliver said that C.W. was one of his bitches. The jury reasonably could infer that Oliver considered C.W. one of his bitches. Further, Oliver did not counter the prosecution's statements in his closing statement. We conclude that the jury's verdict was surely not attributable to the prosecution's reference to Oliver's statement in closing given the weight of evidence against Oliver.

**Vouching for the Credibility of the Witness**

Oliver next argues that the prosecutor endorsed C.W.'s credibility. At trial, C.W. testified that three weeks prior to the incident with Oliver, her husband had strangled her, and was subsequently convicted and incarcerated. Oliver challenges the prosecutor's following statements in closing:

> What's [C.W.'s] motive to make this up other than she'd been the victim of a sexual assault? And what's her motive to make it up? Well, [defense counsel] asked lots of questions of her of this incident that occurred three weeks before this. It's totally unrelated. It really has nothing to do with this case. But what does she do there? She reported her husband for doing what? Assaulting her and strangling her. You know there was this other individual that the same thing happened to, the mother of his child, and he was on top of when she came downstairs. Something coincidentally she reported to the cops and coincidentally the gentleman was convicted of. Does this seem like someone that makes up stories to get people in trouble? And why she tells, at least a truthful story with respect to her husband, why would you conclude that she's any less truthful with respect to her cousin?

Oliver contends that the prosecutor implied that because she told the truth about her husband, which led to his conviction, the jury should find that C.W. told the truth about Oliver and should convict him. Oliver did not object to these statements at trial.

We review unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The burden is on Oliver to show that there was plain error. *Id.* An error is plain when the prosecutor's conduct "contravenes case law, a rule, or a standard of conduct." *Id.* If Oliver is able to show that the misconduct constituted plain error, then the burden shifts to the state to show that the "misconduct did not prejudice [his] substantial rights." *Id.* at 300. If Oliver's substantial

rights were affected, then we must decide whether "fairness and the integrity of the judicial proceedings" require a reversal. *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010).

A prosecutor may not personally vouch for the credibility of a witness. *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006). A prosecutor vouches for a witness "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." *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted). But a prosecutor is permitted to argue that particular witnesses are or are not credible. *State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007). The supreme court distinguished permissibly addressing witness credibility and impermissibly vouching for a witness in *Swanson*. 707 N.W.2d at 656. A prosecutor may discuss "factors affecting the credibility of the witnesses" but may not imply the state endorses a witness's credibility. *State v. Rucker*, 752 N.W.2d 538, 552 (Minn. App. 2008) (quoting *Swanson*, 707 N.W.2d at 656), *review denied* (Minn. Sept. 23, 2008). Here, the prosecutor addressed C.W.'s husband's conviction in response to defense counsel's cross-examination regarding the incident three weeks prior, indicating "it [was] totally unrelated." The prosecutor did not personally opine that C.W. was credible, and the prosecutor did not imply that the state guaranteed her truthfulness. Instead, the statements address a factor for the jury to use in determining the weight of her credibility in response to defense counsel's line of questioning. The prosecution's statements do not amount to plain error.

Even if the prosecutor did plainly err, the error did not affect Oliver's substantial rights. To determine if Oliver's substantial rights were affected, we consider the strength

of evidence, the pervasiveness of the erroneous conduct, and whether Oliver had an opportunity to rebut any improper remarks. *State v. Peltier*, 874 N.W.2d 792, 806 (Minn. 2016). First, after reviewing the record, we conclude that the evidence against Oliver was strong. C.W.'s testimony, corroborated by the text-message exchange with her friend throughout the evening and the testimony of the officer who found Oliver in C.W.'s home with his pants down and his penis partially exposed, exhibiting signs of intoxication and being aggressive with the officers, shows that the jury's decision was supported by ample evidence. Second, the prosecution's statement regarding C.W.'s ex-husband was not pervasive, especially in light of the prosecution's extensive analysis of the credibility factors. Third, Oliver had the ability to refute the prosecution's statements, but did not address the state's reference to the prior convictions of C.W.'s husband in closing arguments.

**Cumulative Error**

Oliver argues that the cumulative effect of the alleged errors was prejudicial and warrants a new trial. When "the number of errors and the seriousness of some of them" render this court "unable to determine whether the jury based its verdict on the admissible evidence and the reasonable inferences derived therefrom," we may determine that a defendant was deprived of a procedurally fair trial. *Mayhorn*, 720 N.W.2d at 792. To find cumulative error, we must find multiple errors that, when combined, tip the scales to operate as prejudice against the defendant. *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn.

2006). Because we conclude that there was no prosecutorial misconduct, we determine that Oliver was not denied a fair trial.

**Affirmed.**