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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0110

State of Minnesota,
Respondent,

vs.

Hussen Hassan Hussen,
Appellant.

Filed November 18, 2019
Affirmed
Connolly, Judge

Olmsted County District Court
File No. 55-CR-17-3654

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Stauber, 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UNPUBLISHED OPINION

CONNOLLY, Judge

In a direct appeal from his conviction of fifth-degree criminal sexual conduct, appellant argues that he is entitled to a new trial because the prosecutor committed plain error in closing argument by (1) shifting the burden of proof, (2) misstating the law on consent, and (3) violating the presumption of innocence. Because there was no plain error, we affirm.

FACTS

In February 2018, following trial, a jury found appellant guilty of fifth-degree criminal sexual conduct—nonconsensual sexual contact in violation of Minn. Stat. § 609.3451, subd. 1(1) (2016). According to trial testimony, in February 2017, appellant Hussen Hassan Hussen, then 25, and his 20-year-old victim, A.B., arranged to "hang out" at A.B.'s home. A.B.'s grandmother was at the home, but not with the pair when the incident occurred. A.B. testified that, as she was playing a game on her cell phone, appellant kissed her without invitation or permission. She said she physically backed away, but appellant then grabbed her breast area between layers of clothing. She tried to get away from appellant by "pushing him and trying to back up," but appellant continued to touch her breast after she told him to stop. A.B. said that, despite her telling him to stop repeatedly, appellant pulled her by her hair towards his genital area; she then backed away and ran to her grandmother's room. A.B.'s grandmother testified that A.B. was sobbing, shaking, and upset after the incident. When asked if she remembered consenting to any kind of contact, A.B. testified she "did not consent to any of it."

An investigator testified that appellant said he went to A.B.'s home "wanting physical contact, wanting sex," and, after A.B. stopped him, he told her, "I don't want to be here then, I don't want to watch a movie, you know, I'm not here for that." According to the investigator, appellant admitted to kissing A.B. and touching her breast, but said both acts were consensual. Appellant did not testify at trial.

Before closing arguments, the district court instructed the jury that: (1) a defendant is presumed innocent of the charges made unless and until he has been proven guilty beyond a reasonable doubt; (2) the burden of proving guilt beyond a reasonable doubt is on the state, and a defendant does not need to prove his innocence; (3) it is the judge's duty to give the jury the rules of law to use in finding a verdict; (4) "the attorneys may discuss their understanding of the applicable law;" and (5) "if an attorney's argument contains any statement of the law that differs from the law that I give you, you are to disregard their statement." The district court also instructed the jury on each element of the crime, including defining consent as "a person's words or overt actions that indicate a freely given present agreement to perform a particular sexual act with the defendant." For a third time, the district court noted that, if the jury finds each element proved beyond a reasonable doubt, the defendant is guilty and, if not, the defendant is not guilty. Appellant did not object to any jury instructions.

In closing argument, the prosecutor directed the jury to consider the judge's explanation of consent and repeated, "it means a person's words or overt actions that indicate a freely given present agreement to perform a particular sexual act with the

defendant." While applying the definition of consent to the evidence, the prosecutor told the jury:

> [W]hen you read the definition of consent and you look at the evidence and you recall her testimony*, the issue is not when did she say no*, did she say no only after he started touching her breasts. *That's not the issue. The real issue is when did she say yes, when did she overtly agree to sexual contact*. And the record is void of that. She never, through words or any overt action, consented to this defendant touching her breasts that day. *There is no such thing as a presumption of consent until you are rebuked. That's not the law.* And this defendant touched her intimate parts without an overt present agreement to do so. That's what the evidence shows.

(Emphasis added). Appellant did not object to this portion of the closing argument. The jury found appellant guilty of fifth-degree criminal sexual conduct.

D E C I S I O N

Because appellant did not object to the prosecutor's discussion of consent at trial, the alleged prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Appellant bears the burden of showing that the prosecutor committed an error that was plain. *Id.* A "plain" error is one that is clear or obvious and typically contravenes caselaw, a rule, or a standard of conduct. *Id.* If a defendant shows plain error, the burden shifts to the state to prove that there is no reasonable likelihood that the alleged error affected the defendant's substantial rights. *Id.* We consider "various factors, including the pervasiveness of improper suggestions and the strength of evidence against the defendant," to determine whether a defendant's substantial rights were affected. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017) (quotations

omitted). We also evaluate a defendant's opportunity to rebut alleged misconduct in closing arguments. *State v. Peltier*, 874 N.W.2d 792, 805-06 (Minn. 2016).

Appellant contends that two statements in the prosecutor's closing argument, "The issue is not when did she say no . . . the real issue is when did she say yes, when did she overtly agree to sexual contact" and "There is no such thing as a presumption of consent until you are rebuked. That's not the law[,]" constituted plain error and affected appellant's substantial rights. In his closing argument, the prosecutor explained each element of the charge, provided the proper definition of consent, and directed the jury to review the district court's instructions. As explained by the district court, the elements of fifth-degree criminal sexual conduct are (1) the defendant's intentional touching of intimate parts or clothing over the immediate area of intimate parts, (2) without consent, (3) with sexual or aggressive intent, (4) in Minnesota. 10 *Minnesota Practice*, CRIMJIG 12.52 (2016); *see also* Minn. Stat. § 609.3451, subd. 1(1). Because the victim's nonconsent is a major element of fifth-degree criminal sexual conduct, the prosecutor spent significant time discussing consent. *See* Minn. Stat. § 609.341, subd. 4(a) (2016) (definition of consent). Appellant argues that the two statements were plain error because they shifted the burden of proof, misstated the law, and violated the presumption of innocence. The state contends that these statements were not plain error because they occurred in the context of explaining the evidence and were a de minimis portion of the closing argument as a whole.

In closing argument, a prosecutor is allowed "considerable latitude and is not required to make a colorless argument." *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998). Specific remarks in a prosecutor's closing argument may be "inartful" without

constituting misconduct. *State v. Fields*, 730 N.W.2d 777, 786 (Minn. 2007). Ultimately, it is within a prosecutor's "right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom." *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). Given this latitude, a prosecutor's closing argument may constitute plain error if the prosecutor contravened caselaw, a rule, or a standard of conduct. *Ramey*, 721 N.W.2d at 302. In evaluating alleged misconduct, we look to the closing argument as a whole, rather than evaluating specific "phrases or remarks that may be taken out of context or given undue prominence." *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (quotation and citations omitted).

1. Prosecutor Did Not Shift the Burden of Proof

Appellant claims the prosecutor shifted the burden of proof by telling the jury that (1) "the issue is not when did [A.B.] say no . . . . The real issue is when did she say yes, when did she overtly agree to sexual contact" and (2) "there is no . . . presumption of consent until you are rebuked. That's not the law." Appellant's theory is that these statements told the jury that appellant had to prove A.B. affirmatively consented, rather than that the state had to prove that A.B. did not consent. We disagree.

Appellant is correct that misstatements about the burden of proof are highly improper. *See State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985). The state, rather than appellant, needed to prove lack of A.B.'s consent beyond a reasonable doubt. *See Finnegan v. State*, 764 N.W.2d 856, 864 (Minn. App. 2009), *aff'd*, 784 N.W.2d 243 (Minn. 2010). But, the prosecutor's statements do not clearly or obviously shift the burden of proof; cases finding a shift in the burden are distinguishable. *See, e.g.*, *State v. Strommen*,

648 N.W.2d 681, 690 (Minn. 2002) (telling the jury to "weigh the story in each hand and decide which one is most reasonable, which one makes the most sense"); *State v. Jensen*, 242 N.W.2d 109, 111 (Minn. 1976) (saying that the presumption of innocence is a shield for the innocent but not a cloak for the guilty); *State v. Trimble*, 371 N.W.2d 921, 926 (Minn. App. 1985) (saying that the presumption of innocence is something that disappears gradually and, after a large amount of evidence is presented, disappears completely), *review denied* (Minn. Oct. 11, 1985). Moreover, statements regarding the lack of evidence for the defense's theory generally do not shift the burden of proof. *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993).

By framing the issue as whether A.B. "overtly agree[d] to sexual contact," the prosecutor highlighted the state's evidence of nonconsent, which suggests that A.B. did not overtly agree to sexual contact. Contrary to appellant's assertion, the prosecutor never told the jury that appellant had to prove A.B. consented.

Appellant further argues that the prosecutor told the jury "there was no 'presumption' that [the nonconsent] element *was not satisfied*" (emphasis in original). But, appellant takes the prosecutor's comment out of context and conflates the separate concepts of presumption of innocence and consent to sexual contact. The prosecutor's remarks were within his "right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inference to be drawn therefrom." *Smith*, 541 N.W.2d at 589. Therefore, the prosecutor did not clearly or obviously shift the burden of proof.

2. Prosecutor Did Not Misstate the Law

Appellant argues the prosecutor misstated the law because his "real issue" statement removed the nonconsent element and "improperly told the jury that non-consent was not an element the state had to prove." For this argument, appellant relies on *Strommen*, 648 N.W.2d 681, 689-90 (holding that a prosecutor plainly erred when he clearly and directly contradicted the statute at issue). But, *Strommen* is distinguishable: neither the prosecutor's "real issue" statement nor his "presumption of consent" statement clearly or directly contradicts the law.

As the state notes, the "real issue" statement was a juxtaposition of the district court's definition of consent with the evidence that A.B. did not say "yes" and did not consent. When the prosecutor's closing argument is viewed as a whole, *see Swanson*, 707 N.W.2d at 656, it is clear that the prosecutor correctly outlined each element of the crime and spent a significant amount of time on the consent element.

3. Prosecutor Did Not Violate the Presumption of Innocence

Appellant argues that the "presumption of consent" statement violated the presumption of innocence, claiming that the prosecutor told "the jury to disregard the presumption of innocence as to the non-consent element." For this argument, appellant relies on *State v. DeVere*, 261 N.W.2d 604, 606 (Minn. 1977) (noting that a prosecutor "should try to adhere as closely as possible to the normal statement of presumption" when talking about the presumption of innocence). But, *DeVere* is distinguishable: the prosecutor's statement there referred to the presumption of innocence and did not warrant

reversal, although it was considered "misleading." *Id.* Here, the prosecutor's statement referring to the "presumption of consent" did not concern the presumption of innocence.

Appellant conflates two separate ideas based on their use of the shared word "presumption." The prosecutor's point was that no legal standard allows an actor to assume that a person consents to sexual contact unless and until that person rejects the actor. The prosecutor even restated the "presumption of consent" remark: "[Appellant] doesn't have the legal opportunity to make a pass at a woman until she has rebuked. That's not the law. It has to be a present overt agreement for sexual contact, and the record is void of that." These comments can be understood as a general statement about consent to sexual contact, which is a matter entirely separate from the presumption-of-innocence standard in criminal proceedings. While the prosecutor may have "inartfully" used a key word that typically attaches to a legal standard (i.e. "presumption" attaches to "of innocence"), it was not a clear or obvious error that contravened caselaw, a rule, or a standard of conduct. *See Fields*, 730 N.W.2d at 786 ("[P]rosecutor's argument, though inartful, did not constitute misconduct and instead made permissible arguments . . . and reasonable inferences based on the evidence.").

In conclusion, the prosecutor did not commit plain error in his closing argument by shifting the burden of proof, misstating the law, or violating the presumption of innocence.

Affirmed.