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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0339

State of Minnesota,
Respondent,

vs.

Allison Elizabeth Gardner,
Appellant.

Filed January 13, 2020
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-16-10207

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

Jesse D. Berglund, Eden Prairie City Attorney, Gregerson, Rosow, Johnson, & Nilan, Ltd., Minneapolis, Minnesota (for respondent)

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Florey, Judge; and Klaphake, Judge.[*]

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

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

JOHNSON, Judge

A Hennepin County jury found Allison Elizabeth Gardner guilty of driving while impaired based on evidence that she appeared intoxicated after a minor collision and that a blood test revealed an alcohol concentration of 0.137. Gardner challenges her conviction in two ways. We conclude that the district court did not err by allowing the state to present the testimony of a rebuttal witness. We also conclude that, although the prosecutor engaged in misconduct by disparaging Gardner's expert witness in closing arguments, the misconduct is harmless. Therefore, we affirm.

FACTS

On April 14, 2016, at approximately 8:00 a.m., Gardner was involved in a minor three-vehicle accident on U.S. Highway 212 in the city of Eden Prairie. An investigating state trooper perceived that Gardner had bloodshot and watery eyes, that her speech was slurred, that she smelled of alcohol, and that she was unsteady on her feet. Gardner performed poorly on field sobriety tests. The trooper arrested her for driving while impaired and obtained a search warrant authorizing a blood draw. Gardner was transported to the Hennepin County Medical Center (HCMC), where a sample of her blood was drawn. A subsequent test of the blood sample revealed an alcohol concentration of 0.137.

The state charged Gardner with fourth-degree driving while impaired, in violation of Minn. Stat. § 169A.20, subd. 1(1) (2014), and fourth-degree driving while impaired due to an alcohol concentration of 0.08 or more, in violation of Minn. Stat. § 169A.20, subd. 1(5).

The case was tried to a jury on four days in January of 2019. The state called four witnesses in its case-in-chief: two state troopers, who investigated the collision and observed Gardner's behavior; a forensic scientist employed by the Minnesota Bureau of Criminal Apprehension (BCA), who tested Gardner's blood sample; and one of the other drivers involved in the collision. One of the state troopers testified that he provided an HCMC phlebotomist with a BCA-approved blood-draw kit. The BCA forensic scientist testified on cross-examination that she did not know the procedures used by the HCMC phlebotomist who drew Gardner's blood sample.

After the state rested its case, Gardner called only one witness, Thomas Burr, who was qualified as an expert witness on the subject of forensic toxicology. Burr questioned the circumstances and procedures of the blood draw, including the credentials of the HCMC phlebotomist who drew Gardner's blood and the equipment used, facts that Burr testified are "essential . . . to ensure that it's an accurate sample." Burr testified that he did not know whether the phlebotomist used an alcohol-based swab or an appropriate needle or whether the collection tubes were sterile and intact. He testified that the blood-test results could be inaccurate if the phlebotomist who drew the blood sample was not qualified, did not use an appropriate needle, used an alcohol-based swab, or used a compromised collection tube. He further testified that the blood-test result could be unreliable because the blood sample took six days to reach the BCA by mail.

After Gardner rested her case, the state called the phlebotomist as a rebuttal witness. Gardner objected, arguing that the phlebotomist's testimony was not proper rebuttal evidence and would be unfairly prejudicial. The prosecutor explained that the

phlebotomist's testimony would rebut Burr's expert testimony, which had emphasized the absence of testimony by the phlebotomist. The district court overruled Gardner's objection on the ground that rebuttal testimony was appropriate. The phlebotomist testified about her qualifications, the procedures she followed during the blood draw, and the equipment she used during the blood draw, including the fact that she used a non-alcohol-based swab and a needle smaller than that provided in the BCA-approved blood-draw kit.

In closing arguments, Gardner's trial attorney argued that the state did not satisfy its burden of proof, in part because of errors and "unknowns" surrounding the blood draw and blood test. In the state's rebuttal closing argument, the prosecutor responded as follows:

> Now, let's talk about Mr. Burr as [Gardner's trial attorney] brought him in as an expert. He had a respectable career, working for the St. Paul crime lab for 21 years, and now he's brought in as defense expert. Used to work for the State, testify on behalf of the State, now testifying for the defense. Essentially a mercenary.

Gardner's trial attorney objected, and the district court sustained the objection. The prosecutor then stated, "Essentially he's someone who is paid to provide answers." Gardner's trial attorney again objected, and the district court called counsel to the bench for a sidebar discussion. After the conclusion of closing arguments, outside the presence of the jury, Gardner's trial attorney presented arguments to the district court in support of three objections to the state's rebuttal closing argument, including his objection to the word "mercenary." The district court stated that "none of the arguments that were made, even

the ones that were improper, were so improper as in my opinion to compromise the fairness of the process."

The jury found Gardner guilty of both of the offenses charged. The district court sentenced Gardner to 30 days in the workhouse but stayed 28 days for two years. Gardner appeals.

D E C I S I O N

I. Rebuttal Evidence

Gardner first argues that the district court erred by allowing the state to call the phlebotomist as a rebuttal witness.

The subject of rebuttal evidence is governed by a rule of criminal procedure: "The prosecutor may rebut the defense evidence, and the defense may rebut the prosecutor's evidence." Minn. R. Crim. P. 26.03, subd. 12(g). Rebuttal evidence offered by the state is defined as evidence that "explains, contradicts, or refutes the defendant's evidence." *State v. Swaney*, 787 N.W.2d 541, 563 (Minn. 2010) (quotation omitted). This court applies an abuse-of-discretion standard of review to a district court's decision to admit rebuttal evidence. *Id.* at 562.

Gardner contends that the district court erred on the ground that the state generally may present rebuttal evidence "only after [a defendant has] presented unexpected testimony in his or her case." Gardner cites two opinions in support of this contention. *See State v. Eling*, 355 N.W.2d 286, 291-92 (Minn. 1984); *State v. Anderson*, 405 N.W.2d 527, 531 (Minn. App. 1987), *review denied* (Minn. July 22, 1987). In response, the state contends that the cited opinions do not support Gardner's contention and that there is no

requirement in the applicable caselaw that the defendant's evidence that the state wishes to rebut must have been unexpected. We agree with the state's interpretation of the caselaw. There is no such requirement in the opinions cited by Gardner, and we are not aware of any other caselaw that imposes such a requirement. Furthermore, there is no such requirement in the applicable rule of criminal procedure. *See* Minn. R. Crim. P. 26.03, subd. 12(g). As stated above, rebuttal evidence is proper if it "explains, contradicts, or refutes the defendant's evidence." *Swaney*, 787 N.W.2d at 563. That test may be satisfied if the defendant's evidence was expected or was unexpected.

Gardner also contends that the district court erred on the ground that, as a general matter, the purpose of rebuttal evidence "is to cut down the defendant's case and not merely to confirm the case in chief through restatement or new facts." *See State v. Walker*, 235 N.W.2d 810, 815 (Minn. 1975). In this case, the state's rebuttal evidence did not merely confirm the evidence introduced in the state's case-in-chief. The phlebotomist's testimony concerning her training and the procedures she used during the blood draw had not been introduced in the state's case-in-chief. Because there was no such evidence, Gardner introduced expert evidence to cast doubt on the accuracy and reliability of the blood-test result. Gardner's expert evidence prompted the state to introduce the evidence that her expert witness had said was lacking. In that way, the state's rebuttal evidence was responsive to Gardner's evidence.

Gardner further contends that the state did not have a "good reason" to withhold the testimony of the phlebotomist during its case-in-chief and that the state attempted to "game the order of trial in order to gain a strategic advantage." She further contends that her trial

attorney, when developing trial strategy, relied on the state's decision not to call the phlebotomist in its case-in-chief. These contentions appear to assume that the state has an obligation to introduce all of the evidence it possesses during its case-in-chief, or that the state has an obligation to foresee or predict the evidence that a defendant will introduce during the defense case. To the contrary, the rule and the caselaw allow the state to listen to the defendant's evidence and assess its persuasiveness and then consider offering rebuttal evidence. The key question is whether the state's proffered rebuttal evidence "explains, contradicts, or refutes the defendant's evidence." *Swaney*, 787 N.W.2d at 563. In this case, the state's rebuttal evidence satisfies that test. We also note that the state included the phlebotomist on its witness list, which made clear to Gardner that the phlebotomist might be called as a witness at some point during the trial.

Thus, the district court did not err by allowing the state to call the phlebotomist as a rebuttal witness.

II. Prosecutorial Misconduct

Gardner also argues that the prosecutor engaged in misconduct by disparaging her expert witness during closing arguments. Gardner's argument is based on the prosecutor's statements that Burr is "[e]ssentially a mercenary" and that he is "paid to provide answers."

The right to due process of law includes the right to a fair trial, and the right to a fair trial includes the absence of prosecutorial misconduct. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005); *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). In general, a prosecutor's closing argument must be based on the evidence introduced at trial and the 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 inappropriate for a prosecutor to disparage the defense in closing arguments. *State v. Griese*, 565 N.W.2d 419, 427 (Minn. 1997); *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993).

This principle extends to a defendant's expert witness. In *State v. Wahlberg*, 296 N.W.2d 408 (Minn. 1980), a prosecutor commented in closing argument that a defense expert was "paid to give a diagnosis favorable" to the defendant. *Id.* at 419. The supreme court concluded that the prosecutor's remarks were "improper." *Id.* at 420. In *State v. Bailey*, 677 N.W.2d 380 (Minn. 2004), a prosecutor commented in the opening statement that a defense expert "continues to walk around the country advocating" for a particular theory "because he gets paid for it," and the prosecutor reiterated in closing argument that "in fact, all he is, is a paid witness by the Defense in criminal cases." *Id.* at 404. The supreme court reasoned that "it was improper for the prosecutor to go beyond the testimony of the expert witness by making these references to the witness's character." *Id.*

Gardner contends that the prosecutor's statements in this case were improper. In response, the state contends that the prosecutor's statements were not improper because they were based on evidence introduced at trial, because the state is permitted to argue that a witness is not credible, and because closing argument need not be "colorless." These contentions do not justify the pejorative use of the word "mercenary." Also, the state has not attempted to distinguish the supreme court opinions in *Wahlberg* and *Bailey*, which Gardner cited in her brief, which make clear that a prosecutor may not suggest that the testimony of a defendant's expert witness is attributable to a payment of money. In light

of the applicable caselaw, we conclude that both of the prosecutor's statements concerning Gardner's expert witness were improper and, thus, that the prosecutor engaged in misconduct.

We next must consider whether the misconduct requires a new trial. Because Gardner objected at trial to the statements at issue on appeal, we must consider the seriousness of the misconduct. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (citing *State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974)). If misconduct is deemed "less serious," we examine "'whether the misconduct likely played a substantial part in influencing the jury to convict.'" *Id.* (quoting *Caron*, 218 N.W.2d at 200). If misconduct is deemed "more serious," we reverse "unless the misconduct is harmless beyond a reasonable doubt." *Id.* (citing *Caron*, 218 N.W.2d at 200). For purposes of this opinion, we assume without deciding that the misconduct is of the "more serious" variety and, thus, that reversal is required "unless the misconduct is harmless beyond a reasonable doubt." *See id.* Prosecutorial misconduct is harmless beyond a reasonable doubt "only if the verdict rendered was surely unattributable" to the misconduct. *State v. Nissalke*, 801 N.W.2d 82, 105-06 (Minn. 2011) (quotation omitted).

Gardner contends that the prosecutor's misconduct is not harmless because the "validity, accuracy, and reliability of the blood test was the most contested issue at trial." Gardner also contends that the prosecutor's misconduct undercut her expert's testimony concerning retrograde extrapolation (*i.e.*, whether Gardner's alcohol concentration at the time she drove her vehicle could be accurately determined based on her alcohol concentration at the time of the blood draw). In response, the state contends that the

misconduct is harmless because the evidence strongly supports a finding that Gardner was impaired while driving because her blood-alcohol concentration exceeded 0.08 by a considerable degree and because she did not have an opportunity to consume any alcoholic drinks between the collision and the blood draw. The state also contends that Gardner's expert evidence concerning the blood draw is relevant only to the second count, which requires evidence of an alcohol concentration of 0.08 or more, and that Gardner's guilt on the first count, which simply requires evidence of impairment, was proved by the testimony of the two state troopers, who observed Gardner's appearance and behavior between the collision and the blood draw.

The state's evidence of Gardner's guilt was strong. The blood-test result showed that Gardner was quite impaired, and the state's rebuttal evidence apparently allayed concerns about the accuracy and reliability of the blood test. Also, two state troopers testified that, based on their observations of Gardner, she appeared to be intoxicated. Gardner's trial attorney made several arguments to the jury that did not rely on her expert witness, such as the argument that Gardner might have had bloodshot eyes because she had been crying and might have failed the field sobriety tests because she had a leg injury. In addition, the prosecutor's improper comments were an isolated instance in the state's closing arguments, which spanned a total of approximately 24 pages of trial transcript. Furthermore, the district court stated that "none of the arguments that were made, even the ones that were improper, were so improper as in my opinion to compromise the fairness of the process." All of these circumstances cause us to conclude that the jury's verdict was "surely unattributable" to the misconduct. *See Nissalke*, 801 N.W.2d at 106.

Thus, although the prosecutor engaged in misconduct by disparaging Gardner's expert witness during closing arguments, the misconduct is harmless beyond a reasonable doubt.

Affirmed.