STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0858

State of Minnesota,
Respondent,

vs.

Tarrence Antwon Brown,
Appellant.

Filed November 30, 2020
Affirmed
Cochran, Judge

Hennepin County District Court
File No. 27-CR-18-24156

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

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Slieter, Presiding Judge; Bratvold, Judge; and Cochran, Judge.

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

COCHRAN, Judge

A jury found appellant guilty of first-degree assault, two counts of second-degree assault, first-degree aggravated robbery, attempted first-degree aggravated robbery, and

unlawful possession of a firearm. The district court entered convictions for all of the offenses except one of the two second-degree assault offenses.

In this direct appeal, appellant argues that he is entitled to a new trial because the district court abused its discretion by admitting evidence that he had recently been in prison and by admitting alleged vouching testimony. He also argues that he is entitled to a new trial on the grounds of prosecutorial misconduct. Alternatively, appellant contends that the case should be remanded to the district court to vacate his second-degree assault conviction because the district court erred by convicting him of both second-degree assault and first-degree aggravated robbery against the same victim. Because appellant has not demonstrated that he is entitled to a new trial and the district court did not err by entering the second-degree assault conviction, we affirm.

FACTS

This case began when a man approached D.C. and A.L. as they sat in a car talking one night in September 2018. D.C. later testified that he recognized the man and invited him over to the car. The man stood outside of the car conversing with D.C. for just over two minutes. The man then produced a pistol and pointed it at D.C., demanding that D.C. and A.L. give him "everything" they had. A.L. handed over her purse. D.C. tried to grab the gun. During the struggle, the gun fired and a bullet struck D.C. in his torso. The man fled, and A.L. drove D.C. to the nearest hospital.

On the way to the hospital, A.L. asked D.C. about the shooter. D.C. testified that he told A.L. that the shooter was named "Antwon." A.L. testified that D.C. identified the shooter as "Twon." The morning after bringing D.C. to the hospital, A.L. searched

Facebook for the name "Twon." She testified to finding the Facebook profile of a person who she recognized as the shooter. A.L. testified that she showed the profile to D.C., who also recognized the assailant.

Two days after the shooting, A.L. sent screen-shots of the Facebook profile to the police investigator assigned to the case. The investigator reviewed the profile, which bore the name "Twon Thomas" and included the individual's birthdate. The investigator linked the profile to appellant Tarrence Antwon Brown because jail records confirmed that Brown had the same birthdate, and tattoos on his hands matched those of the person depicted on Facebook.

The state charged Brown with two counts of first-degree aggravated robbery and one count of possession of a firearm by an ineligible person. The state later amended the complaint to add one count of first-degree assault and two counts of second-degree assault.

Before trial, the state moved to admit testimony that D.C. knew that Brown had been released from prison shortly before the incident and to admit records of deposits made into Brown's prison account by Brown's alibi witness and others. The state sought to admit the evidence to corroborate D.C.'s identification of Brown and to show the potential bias of Brown's alibi witness. The district court granted the motion.

At trial, A.L. testified that she "instantly" recognized Brown as the shooter when she saw his Facebook profile. D.C. testified that he recognized Brown because they had spent time together at the Mall of America. The investigator testified that he showed a photo of Brown to both victims. The photo was different than the Facebook photo. Both victims independently confirmed that Brown was the assailant. The investigator also

testified that D.C. mentioned the names of people who had deposited money into Brown's prison account. Similarly, D.C. testified that at one point he gave money to a third party to give to Brown in prison.

During the defense's case, Brown's girlfriend testified as an alibi witness. She testified that she and Brown have a child together and that Brown occasionally stayed at her home after he was released from prison in 2018. She further testified that, on the night of the shooting, Brown was at her home for the entire evening and stayed through the night. On direct examination, Brown's girlfriend also testified that she gave Brown money while he was in prison. On cross-examination, she acknowledged making numerous deposits in Brown's prison bank account as reflected in prison bank account records. After his girlfriend completed her testimony, Brown testified on his own behalf. He denied any involvement in the shooting. On cross-examination, Brown admitted that he told the investigator that he did not remember his whereabouts on the night of the shooting when interviewed shortly after the shooting.

After trial, the jury found Brown guilty on all six counts. The district court convicted Brown of five of the six counts, but did not adjudicate him guilty of one count of second-degree assault because it was a lesser-included offense of first-degree assault. This appeal follows.

D E C I S I O N

I. The district court's decision to admit evidence relating to D.C.'s knowledge that Brown had been in prison does not require a new trial because Brown has not demonstrated any resulting prejudice.

Brown first argues that the district court abused its discretion by allowing the state to introduce evidence relating to D.C.'s knowledge that Brown had been in prison prior to the shooting. Brown contends that a new trial is required because he was prejudiced by the admission of the evidence. The state argues that the evidence was properly admitted and that, even if it was not, Brown has not suffered any prejudice. We conclude that the admission of the evidence does not require reversal because Brown has not demonstrated any resulting prejudice.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Carridine*, 812 N.W.2d 130, 141 (Minn. 2012) (quotation omitted). Moreover, even when improper evidence is admitted, we generally will not require a new trial "unless there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Jaros*, 932 N.W.2d 466, 472 (Minn. 2019) (quotation omitted). Under this standard of review, Brown bears the burden of proving both that the district court abused its discretion by admitting the challenged evidence and that he was prejudiced as a result. *State v. Swinger*, 800 N.W.2d 833, 838 (Minn. App. 2011). To demonstrate prejudice, Brown must show "a reasonable possibility that the jury would have reached a different verdict had the wrongfully admitted testimony not come in." *Jaros*, 932 N.W.2d at 472.

Prior to trial, the state moved to introduce evidence that D.C. knew that Brown was previously incarcerated. The state also sought to introduce evidence regarding Brown's prison bank account because it anticipated showing that D.C. put money in Brown's account through a third party. The state sought to introduce this evidence to corroborate D.C.'s identification of Brown. Brown's counsel objected to the introduction of the evidence, arguing it was prejudicial. The district court ruled the evidence was admissible. The district court recognized the evidence could be prejudicial but concluded that "the probative value substantially outweighs the danger of the unfair prejudice." The district court explained: "It is important for the jury to consider the evidence as they determine whether [d]efendant is the person who committed these crimes."

The district court also addressed the state's request to cross-examine Brown's alibi witness with evidence that she had put money in Brown's bank account. The district court ruled that such evidence was "relevant as it goes to the potential bias of a witness and is admissible under Rule 616."

At trial, the state elicited testimony from both D.C. and the police investigator regarding D.C.'s knowledge that Brown was previously incarcerated. And the state elicited testimony about D.C.'s payments to Brown's bank account via a third person while Brown was in prison. The state also cross-examined Brown's alibi witness about her payments to Brown while he was in prison—payments that she acknowledged in her own direct testimony.

Brown now argues that the district court abused its discretion by allowing the state to introduce evidence showing that D.C. knew that Brown was in prison and evidence

relating to payments that D.C. allegedly made to Brown while in prison. Brown argues that the district court abused its discretion because the probative value of the evidence was substantially outweighed by its prejudicial nature. And Brown maintains that he was prejudiced as a result because the jury could have concluded, based on his past incarceration, that he was more likely to have committed the crimes involved in this case.

We need not decide whether the district court abused its discretion by admitting the challenged evidence because we conclude that Brown has not demonstrated that he was prejudiced by its admission. *See State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015) (holding it was "unnecessary to decide whether the district court abused its discretion" in excluding evidence because even if it did, "the error was harmless and does not warrant reversal"). We reach this conclusion because the jury would have learned that Brown was in prison even if the challenged evidence had not been admitted. On appeal, Brown does not challenge the district court's ruling that the state could cross-examine Brown's alibi witness with evidence that she had put money in Brown's prison bank account. And at trial, Brown's alibi witness testified to putting money in Brown's prison account both on cross-examination and in her direct testimony. She also testified that Brown occasionally stayed with her after being released from prison in 2018. Thus, even if the district court had sustained Brown's objection to the evidence introduced by the state during its case in chief, the jury would still have learned that Brown was in prison through proper cross-examination of his alibi witness as well as through her own direct testimony. Accordingly, there is not a reasonable possibility that the jury would have reached a different verdict had the challenged evidence not been admitted. With no resulting

prejudice to Brown, there is no basis for reversing the district court's decision to admit the challenged testimony. *See Carridine*, 812 N.W.2d at 141 (stating that an appellate court will not reverse a district court's evidentiary ruling "unless the error substantially influenced the jury's verdict").

II. The district court's decision to admit the police investigator's alleged vouching testimony does not require a new trial.

Brown next argues that the district court abused its discretion by allowing the prosecutor to elicit vouching testimony from the police investigator over Brown's objection. The state argues that the testimony in question was properly admitted and that Brown did not suffer any prejudice from its admission. We agree with the state that Brown did not suffer prejudice from the challenged testimony and consequently conclude that a new trial is not required based on its admission.

As discussed above, we review a district court's admission of evidence for a clear abuse of discretion. *Id.* A district court abuses its discretion when it admits testimony by one witness that expresses an opinion about the credibility of another, commonly known as vouching testimony. *See State v. Ellert*, 301 N.W.2d 320, 323 (Minn. 1981) (holding that the district court abused its discretion by admitting testimony from a police officer opining that the defendant lied to him). To receive a new trial based on the admission of vouching testimony, Brown must also show that he was prejudiced as a result of the admission of the challenged testimony. *See Van Buren v. State*, 556 N.W.2d 548, 549-50 (Minn. 1996) (reversing for a new trial because the defendant was prejudiced by the admission of vouching testimony). Prejudice exists where there is "a reasonable possibility

that the jury would have reached a different verdict had the wrongfully admitted testimony not come in." *Jaros*, 932 N.W.2d at 472.

At trial, the prosecutor asked the police investigator a series of questions about his discussion with D.C. while D.C. was in the hospital. The investigator testified that he spoke with D.C. about the shooting, about whether D.C. knew the shooter, and about D.C.'s prior interactions with the shooter. The prosecutor then asked the investigator: "At that time, were you satisfied that [D.C.] knew—knew this person?" Brown objected to the question on the basis of vouching. The district court overruled the objection and the investigator went on to testify that he "believe[d] that [D.C.] did know this person, yes."

On appeal, Brown contends that the district court abused its discretion by overruling his objection to the question "were you satisfied that [D.C.] knew—knew this person," and allowing the investigator's response to be admitted. Brown argues that the testimony amounts to impermissible vouching testimony. The state maintains that the question and the investigator's response were intended to explain the course of the investigation into the shooting, not to vouch for D.C.'s credibility.

One witness cannot vouch for the credibility of another witness because "the credibility of a witness is for the jury to decide." *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) (quoting *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995)). The admission of improper vouching testimony in a case that turns on witness credibility can deprive a defendant of a fair trial. *Van Buren*, 556 N.W.2d at 551-52. But reversal is not required where the admission of vouching testimony is not prejudicial. *See Ellert*,

301 N.W.2d at 323 (holding that the district court abused its discretion by admitting vouching testimony, but the error was harmless under the circumstances).

Here, we do not need to decide whether the district court abused its discretion by admitting this testimony because there is no reasonable possibility that the jury would have reached a different verdict absent the investigator's statement. We reach this conclusion for several reasons. First, both D.C. and A.L. provided strong, credible testimony supporting their identification of Brown as the assailant. D.C. and A.L. both testified that the assailant approached them in their vehicle, that they had a good opportunity to see his face, and that Brown was the assailant. In addition, both victims' testimony about the general sequence of events is confirmed by the available surveillance video. And D.C. testified that he knew Brown from prior interactions.

Second, the challenged statement by the investigator was made in the context of the investigator's description of his discussion with D.C. at the hospital and consists of only a single line out of 37 transcribed pages of testimony. And, on redirect, the investigator explained that whether a victim knows the assailant can impact investigatory decisions such as whether the investigator uses "a sequential photo lineup or a confirmatory photograph." Here, the investigator decided to use a confirmatory photograph.

Third, the state did not rely on the investigator's statement in its closing argument. Instead, the state argued that the identification of Brown by D.C. and A.L. was credible based on the strength of their testimony and the corroborating evidence.

Given the persuasive nature of the victims' testimony and the limited nature of the challenged statement, there is not a reasonable possibility that the jury would have returned

a different verdict had the district court sustained his objection. Because there was no resulting prejudice, the admission of the investigator's statement does not require a new trial.

III. The alleged prosecutorial misconduct does not require a new trial.

Brown further claims that the prosecutor committed misconduct during the state's closing argument requiring a new trial. The state counters that the prosecutor did not commit misconduct and that, even assuming there was misconduct, Brown's substantial rights were not affected. We agree with the state.

Brown alleges that the prosecutor committed misconduct by (1) inflaming the jury's passions against him, (2) personally vouching against the credibility of his alibi witness, and (3) disparaging his defense. Brown did not object to any of the alleged prosecutorial misconduct at trial.

Because Brown did not object at trial, we apply a modified plain-error standard of review. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this modified standard, Brown must show (1) an error that (2) is plain. *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016). "An error is plain if it was clear or obvious." *Ramey*, 721 N.W.2d at 302 (quotation omitted). "Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *Id.* If Brown shows an error that is plain, the burden shifts to the state to show that the error did not affect his substantial rights. *Peltier*, 847 N.W.2d at 803. An error affects a defendant's substantial rights if there is a reasonable likelihood that the error significantly influenced the jury's verdict. *Montanaro v. State*, 802 N.W.2d 726, 734 (Minn. 2011). Finally, if the state fails to meet its burden, we will order a new trial

only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Peltier*, 874 N.W.2d at 804 (quotation omitted).

We address each instance of alleged prosecutorial misconduct in turn to determine whether the conduct amounts to an error that is plain, and then consider whether Brown's substantial rights were affected by any error. Because we discern no plain error affecting Brown's substantial rights, we do not reach the question of whether any error warrants a new trial.

A. Inflaming the Jury's Passions

First, Brown argues that the prosecutor inflamed the jury's passions against him by asking the jury to hold Brown "accountable." We are not persuaded.

A prosecutor has a duty to avoid inflaming the jury's passions against the defendant. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). Inflammatory statements are carefully scrutinized where, as here, credibility is a central issue at trial. *Id.* (citing *State v. Turnbull*, 127 N.W.2d 157, 162 (Minn. 1964)). Yet a prosecutor does not inflame the jury's passions by arguing that society benefits from holding people accountable for their actions. *See State v. Gates*, 615 N.W.2d 331, 341 (Minn. 2000), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

In *Gates*, the supreme court held that the prosecutor did not commit misconduct by stating "[e]veryone loses if the persons responsible are not held accountable." *Id.* The supreme court explained that the statement did not rise to the level of improper argument. *Id.* Here, Brown alleges that the prosecutor inflamed the jury against him by stating "everyone loses if the person responsible is not held accountable." This language is nearly

identical to the language at issue in *Gates*, which was found to be permissible. Accordingly, consistent with *Gates*, we conclude that the prosecutor's statement at issue here does not amount to misconduct.

B. Prosecutorial Vouching

Second, Brown argues that the prosecutor committed misconduct by personally vouching against the credibility of his alibi witness during the state's closing argument. The state counters that the prosecutor did not vouch against the credibility of Brown's alibi witness, but rather argued that the evidence did not support her testimony. We agree that the prosecutor did not vouch against Brown's witness.

A prosecutor vouches for or against the credibility of a witness by "express[ing] a personal opinion as to a witness's credibility." *State v. Smith*, 825 N.W.2d 131, 139 (Minn. 2012) (quotation omitted). A prosecutor does not express a personal opinion as to a witness's credibility by analyzing the evidence and arguing that a witness is not credible on that basis. *State v. Wright*, 719 N.W.2d 910, 918-19 (Minn. 2006).

Brown claims that the prosecutor personally vouched against his alibi witness during the prosecutor's closing argument when the prosecutor stated, "[s]he's not telling the truth." But the record reveals that the prosecutor made this statement in the context of analyzing the evidence. Before making the statement, the prosecutor highlighted that the witness's alibi was uncorroborated, noted that the witness was interested in the outcome of the case, and emphasized that the witness did not come forward to police with the alibi until several months after Brown was charged. After walking through this evidence, the prosecutor asserted that the alibi witness was not telling the truth. Because the prosecutor

was arguing credibility based on evidence in the record, the prosecutor's statement does not constitute impermissible vouching. *See id.* (holding that the prosecutor did not commit misconduct by analyzing the evidence and arguing that it did not support the defendant's version of events).

C. Disparaging the Defense

Third, Brown argues that the prosecutor disparaged his defense by characterizing his alibi as "weak" and suggesting that Brown's alibi witness "pitched" his defense for him. The state counters that the challenged statements were not misconduct because the prosecutor was arguing that the evidence did not support Brown's alibi.

The state has a right to vigorously argue its case. *Carridine*, 812 N.W.2d at 149. The state may vigorously prosecute its case by arguing that the evidence does not support a given defense, but it crosses the line into misconduct by suggesting that the defense itself was raised as a last resort. *Peltier*, 874 N.W.2d at 804. In reviewing alleged misconduct, we "view the prosecutor's statements as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence to determine whether reversible error has occurred." *State v. Waiters*, 929 N.W.2d 895, 901 (Minn. 2019) (quotation omitted).

Here, Brown contends that, taken together, the two challenged statements invited the jury to speculate that he raised his alibi defense as a last resort. The state maintains that the prosecutor was simply arguing, based on the evidence, that Brown had not presented a solid defense. The state's position is supported by the record. During the state's closing argument, the prosecutor asserted that Brown's alibi was "weak" because it

arose late in the investigation, was testified to by a witness with a personal stake in the litigation, and was not independently corroborated. The prosecutor's characterization of the alibi as "weak" was directly tied to the evidence in the record. We acknowledge, however, that the prosecutor's assertion that Brown's girlfriend "pitched" the defense is at least on the line between misconduct and vigorous prosecution because it is unrelated to any particular item of evidence. Viewed in isolation, the prosecutor's use of the word "pitched" is troubling, but viewed in the context of the whole argument it is clear that the state was arguing that the evidence did not support Brown's alibi defense. Thus, while Brown has identified a statement that approaches misconduct, we conclude that he has not shown that the prosecutor committed error when the statement is considered in the context of the closing argument as a whole.

D. Substantial Rights

As discussed above, the record demonstrates that the challenged conduct does not rise to the level of error that was plain. But, even assuming any or all of the alleged misconduct rose to that level, it would not require a new trial because the state has shown that there is no reasonable likelihood that the absence of the challenged statements would have had a substantial effect on the verdict. *See Montanaro*, 802 N.W.2d at 734 (stating that an error affects a defendant's substantial rights if there is a reasonable likelihood that the error significantly influenced the jury's verdict). We reach this conclusion because the challenged statements carry little weight relative to the strong evidence of Brown's guilt. Both victims identified Brown as the assailant, their testimony was interlocking and reinforcing, and their testimony was corroborated by the available surveillance video. In

addition, D.C. knew Brown prior to the incident, lending support to his identification of Brown. In sum, the record includes strong evidence to support the identification of Brown as the assailant. In addition, the challenged statements constituted only a few lines out of a very lengthy closing argument, making it unlikely that the statements had a real effect on the verdict. On this record, the alleged prosecutorial misconduct provides no basis for reversal. *See id.* (concluding that alleged prosecutorial misconduct "did not have a significant effect on the jury's verdict and thus did not affect [appellant's] substantial rights").

IV. The district court did not err by convicting Brown of both second-degree assault and first-degree aggravated robbery against the same victim.

Lastly, Brown claims that the district court erred by convicting him of two offenses against the same victim—second-degree assault and first-degree aggravated robbery. He argues that the district court could not properly convict him of both offenses because second-degree assault is a lesser-included offense of first-degree aggravated robbery. We disagree with Brown's view of the law.

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2018). One type of "included offense" is "a crime necessarily proved if the crime charged were proved." *Id.*, subd. 1(4). Whether an offense is necessarily proved by proof of another offense is a question of law which we review de novo. *State v. Degroot*, 946 N.W.2d 354, 364 (Minn. 2020).

Relying on *State v. Bobo*, 414 N.W.2d 490 (Minn. App. 1987), *review denied* (Minn. Dec. 22, 1987), Brown contends that his second-degree assault offense was necessarily proved when the state proved the first-degree aggravated robbery offense against the same victim. In *Bobo*, the appellant argued that his two second-degree assault offenses were lesser-included offenses of an aggravated robbery offense. *Id.* at 494. We agreed but did not provide any legal analysis to support our conclusion. *Id.*

More recently, we have clarified that "second-degree assault is not a lesser-included offense of first-degree aggravated robbery" because "it is possible to commit first-degree robbery without also committing second-degree assault." *State v. Brown*, 597 N.W.2d 299, 304 (Minn. App. 1999), *review denied* (Minn. Sept. 14, 1999). We explained that "[i]n determining whether an offense is a necessarily included offense, a reviewing court looks at the elements of the offense" rather than facts of a specific case. *Id.* And, we explicitly declined to follow *Bobo*. *Id.* Consistent with our more recent precedent, we conclude that the district court did not err when it convicted Brown of both second-degree assault and first-degree aggravated robbery.

Affirmed.