STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1213

State of Minnesota,
Respondent,

vs.

Mowlid Abdi Ahmed,
Appellant.

Filed July 6, 2020
Affirmed
Reyes, Judge

Blue Earth County District Court
File No. 07-CR-18-659

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Patrick McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Reyes, Judge; and Slieter, Judge.

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

REYES, Judge

In this direct appeal from his judgment of conviction of fourth-degree criminal sexual conduct and two counts of interfering with an emergency call, appellant argues that the district court abused its discretion by (1) excluding a video and photograph he offered

to support his consent defense and (2) denying his motion for a new trial because (a) the state failed to disclose toxicology test results; (b) the toxicology test results constitute newly discovered evidence; and (c) the state engaged in prosecutorial misconduct in closing statements. He also argues that (3) the cumulative effect of these errors deprived him of a fair trial. We affirm.

FACTS

Respondent State of Minnesota charged appellant Mowlid Abdi Ahmed with third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(c) (2016); fourth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.345, subd. 1(c) (2016); and two counts of interfering with an emergency call, in violation of Minn. Stat. § 609.78, subd. 2(1) (2016), based on an incident that occurred on February 1, 2018.

Victim S.H. testified that appellant, whom she knew through his mother and sisters and who lived on the first floor of her apartment building, knocked on her apartment door in the early morning. Appellant entered when S.H. opened her door, but S.H. did not invite him in. The two sat on her couch and talked, and appellant gave S.H. what she thought was chewing gum. She put the gum in her mouth but got up to spit it out because it tasted "weird." S.H. then "got dizzy," told appellant to leave her apartment, and thought she heard appellant leave. She went back to the couch and "passed out."

S.H. next recalls waking up with appellant holding her tight from behind with his hand on her breast under her shirt. Her pants were down below her knees, and appellant's penis was in contact with her vagina. Because S.H. was a victim of female genital mutilation as a child, appellant's actions caused her pain. S.H. used her elbows to get away

and began yelling at appellant. She continued to yell at him, hit him with a mop, and ran to get her phone to call 911. Appellant threw her phone away from her when she attempted to call 911 and told her not to call 911. The Blue Earth 911 dispatch received an eight-second, inaudible call from S.H.'s cell phone. The 911 dispatcher returned the call and S.H. answered, stating that "he f**king raped me." S.H. continued talking with 911 dispatch over a series of calls, during which appellant left S.H.'s apartment. Officers arrived thereafter.

As this occurred, a neighbor across the hall called 911 to report a domestic dispute. The neighbor testified that she heard "really intense" arguing that she had not heard before from S.H.'s apartment. Multiple officers arrived. One officer testified that S.H. was "frantic, upset," "appeared to have been crying," and reported that appellant raped her. S.H. described the events to the officers and received a sexual-assault examination at the emergency room, where she reported that appellant's penis had touched the outside of her genitals. DNA testing of a swab from her perineum showed the presence of appellant's semen.

Prior to trial, the district court granted the state a continuance to obtain these DNA test results, which appellant requested to see as well. The Bureau of Criminal Apprehension (BCA) indicated that it also would send toxicology results from samples from S.H. by September 15, 2018, which would be after the trial. Neither party requested toxicology testing of S.H. or a continuance on this basis.

Appellant advanced a defense of consent. In support, he sought to admit a video and photograph that he claimed showed prior consensual sexual conduct with S.H. The district court excluded both the video and photograph.

After closing arguments, appellant's trial counsel stated that he wanted to "make a record" that, during rebuttal, the prosecutor engaged in "at least two" instances of "burden shifting" and "at least two instances of vouching" for the credibility of S.H. The district court stated that it did not hear what would "rise to [the] level of anything that—that led me to think anything close to a mistrial."

On June 14, 2018, the day the jury began its deliberations, the BCA sent the state toxicology results indicating the presence of methamphetamine and amphetamine in S.H.'s urine sample. The state disclosed these results to appellant. That day, the jury returned a verdict of guilty on the fourth-degree criminal-sexual-conduct charge and both counts of interference with a 911 call, and it found appellant not guilty on the third-degree criminal-sexual-conduct charge. Appellant filed a motion for a new trial, arguing that the state failed to disclose S.H.'s toxicology test results, in violation of his *Brady*[1] rights, the results constituted newly discovered evidence, and the state improperly shifted the burden in its rebuttal closing arguments. The district court denied the motion. This appeal follows.

[1] Under *Brady v. Maryland*, "the suppression by the prosecution of evidence favorable to an accused" may violate due process, "irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963).

D E C I S I O N

Appellant argues that the district court abused its discretion by (1) excluding the video and photograph and (2) denying a new trial based on (a) the state's failure to disclose the toxicology test results as required by *Brady*; (b) the toxicology test results constituting newly discovered evidence; and (c) prosecutorial misconduct in closing statements that (i) misstated and shifted the burden of proof; (ii) expressed a personal opinion on witness credibility; and (iii) disparaged the defense. He also argues that (3) the cumulative effect of these errors deprived him of a fair trial. We address each issue in turn.

I. The district court did not abuse its discretion by excluding the video and photograph appellant offered to support his consent defense.

Appellant argues that the district court deprived him of his constitutional right to a meaningful opportunity to present a complete defense by excluding a video that he claimed showed S.H. performing oral sex on him and a photograph of S.H. shirtless. We disagree.

We review the district court's factual findings for clear error. *See Tscheu v. State*, 829 N.W.2d 400, 403 (Minn. 2013). We review its evidentiary rulings for an abuse of discretion. *See State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). If the district court abused its discretion and the exclusion deprived a defendant of the constitutional right to present a complete defense, "we reverse only if the exclusion was not harmless beyond a reasonable doubt." *See State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). "An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the error complained of may have contributed to the conviction." *Id.* (quotation omitted).

In a criminal-sexual-conduct prosecution, a defendant may offer "evidence of the victim's previous sexual conduct with the [defendant]" if the district court, after a hearing, finds that the probative value of the evidence "is not substantially outweighed by its inflammatory or prejudicial nature." Minn. R. Evid. 412(1)(A)(ii), (2)(C). It "must find that the evidence is sufficient to support a finding that the facts set out in the accused's offer of proof are true," Minn. Stat. § 609.347, subd. 3 (2018), and that it meets "a threshold finding of veracity" before admitting the evidence. *State v. Davis*, 546 N.W.2d 30, 35 (Minn. App. 1996), *review denied* (Minn. May 21, 1996). Further, evidence must be authenticated to be admissible. Minn. R. Evid. 901(a). We give the district court "considerable discretion . . . in deciding whether evidence has been adequately authenticated." *See State v. Dulak*, 348 N.W.2d 342, 344 (Minn. 1984).

A. Admissibility of the video

Appellant argues that the district court abused its discretion by determining that his testimony at the evidentiary hearing failed to authenticate the video.

At the hearing, appellant testified that he took the video January 31, 2018, the evening before the incident. But the phone that stored the video indicated a creation date of February 9, 2018, at 12:07 a.m. Appellant testified that he transferred the video from the phone on which he recorded it to his current phone, but he could not provide information on the original phone. In excluding the video, the district court found that appellant did not demonstrate a sufficient chain of custody. It further found that neither appellant nor S.H. are identifiable in the video and that the video lacks characteristics that corroborate appellant's claims about its content. The record supports these findings.

Appellant could not explain the discrepancy between the video creation date and his testimony, and the video contains only unidentifiable silhouettes.

Appellant relies on *In re Welfare of S.A.M*, 570 N.W.2d 162, 164 (Minn. App. 1997), to argue that the "'conventional method' to authenticate a video or photograph is with 'testimony of [a] witness with knowledge' that a matter is what it is claimed to be." He argues that if the jury credited his testimony, it would establish the video's authenticity. But appellant could not verify himself and S.H. as the persons in the video or show its chain of custody, failing to meet the threshold veracity requirement. *See Davis*, 546 N.W.2d at 35. Because appellant could not authenticate the video, the district court properly excluded it.

B. Admissibility of the photograph

Appellant argues that the record does not support the district court's findings on and exclusion of the photograph because he testified that he took it "while engaging in sexual contact with [S.H.]."

The district court excluded the photograph based on its determination that the photograph's inflammatory or prejudicial nature substantially outweighs its probative value. It found that "[t]he photograph does not contain any image of sexual conduct between the alleged victim and [d]efendant" and that appellant neither demonstrated "[t]he date, time, and context of the photograph" nor offered context "to suggest that the photograph was a precursor to consensual sexual contact." The record supports these findings, which limit the photograph's probative value.

Appellant relies on the 1989 committee comment to Minn. R. Evid. 412 and *State v. Cermak*, 365 N.W.2d 243, 246-47 (Minn. 1985), for the photograph's admissibility and to show that the state regularly introduces sexually explicit photographs. But these authorities do not support appellant's argument that the photograph has high probative value given his inability to establish the date and time at which the photograph was taken, who took the photograph, or that the photograph is connected to a history of consensual sexual contact between himself and S.H. The district court did not abuse its "considerable discretion" by excluding the photograph. *See Dulak*, 348 N.W.2d at 344.

II. The district court did not abuse its discretion by denying appellant a new trial.

Appellant argues that he is entitled to a new trial because the state failed to disclose S.H's toxicology test results, the toxicology test results constitute newly discovered evidence, and the state engaged in prosecutorial misconduct in closing statements. We address each argument in turn.

A. The state timely disclosed the toxicology test results.

Appellant argues that the state failed to timely disclose toxicology test results that showed the presence of methamphetamine and amphetamine in S.H.'s urine, violating his due-process rights under *Brady* and requiring a new trial. We are not persuaded.

"[W]e review the denial of a new-trial motion for an abuse of discretion." *State v. DeLaCruz*, 884 N.W.2d 878, 883 (Minn. App. 2016). Whether the district court should grant a new trial due to prosecutorial misconduct "is governed by no fixed rules but rests within the discretion of the [district court], who is in the best position to appraise its effect." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005) (quotation omitted). The state

violates *Brady* if (1) the evidence at issue is favorable to the defendant; (2) the state "either willfully or inadvertently" suppressed the evidence; and (3) the suppression prejudiced the defendant. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005). We review de novo whether a *Brady* violation occurred. *See Palubicki*, 700 N.W.2d at 489.

The district court appears to have denied appellant a new trial based on its determination that appellant did not meet the second factor. The district court found that the state sent the swab and urine samples from S.H. to the BCA with a written request for DNA testing, but not toxicology testing, and that appellant received a copy of this request. It found that, when the state first learned on June 6, 2018, that the BCA would conduct toxicology testing and complete it in September 2018, it promptly disclosed this information to appellant. It further found that the BCA completed the testing on June 12, 2018, but due to an illness of the responsible forensic scientist at the BCA, she did not send the results to the state until June 14, 2018, which it immediately disclosed to appellant. The record supports these findings.

Appellant nonetheless argues that the state suppressed the results because it has a "continuing duty of disclosure" under Minn. R. Crim. P. 9.03, subd. 2(b)-(c) and a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case," under *Kyles v. Whitley*, 514 U.S. 419, 437-38, 115 S. Ct. 1555, 1567-68 (1995). But appellant does not show that this duty extends to a duty to learn of and disclose preliminary, unconfirmed test results in this situation. He also analogizes to *State v. Hunt*, in which the supreme court remanded for a new trial because the state did not disclose an examination classifying a critical state witness as incompetent to stand trial. 615 N.W.2d

294, 300-01 (Minn. 2000). But appellant has not shown that the state at any point failed to provide him with prompt updates on all completed testing. Appellant does not show that the state willfully or inadvertently suppressed the evidence. The district court did not abuse its discretion by denying appellant a new trial. *See Palubicki*, 700 N.W.2d at 489.

B. The toxicology test results are not newly discovered evidence that entitles appellant to a new trial.

Appellant argues that he is entitled to a new trial because the toxicology test results are newly discovered evidence. We disagree.

To obtain a new trial based on newly discovered evidence, a defendant must prove that (1) the defendant or defendant's counsel did not know of the evidence at the time of trial; "(2) the failure to learn of the evidence prior to trial was not because of a lack of diligence; (3) the evidence is material, not merely impeaching, cumulative, or doubtful; and (4) the evidence would probably produce either an acquittal or a more favorable result." *Miles v. State*, 840 N.W.2d 195, 201 (Minn. 2013). The defendant must prove all four factors "by a fair preponderance of the evidence." *Id.*

Here, the district court determined that the test results were not newly discovered evidence because they were "impeachment evidence—nothing more" under the third factor and would not "probably produce an acquittal or a more favorable result," under the fourth factor.

Regarding the third factor, appellant argues that he would not use the toxicology results only to impeach S.H., but also to support his claim of consensual sex. Appellant relies on a quote from *State v. Frank* that, while evidence of intoxication usually bears on

capacity to observe and recollect events, "*[i]n this case* the evidence [of intoxication] also bore on the issue of whether the complainant consented, as the defendant's attorney contended." 364 N.W.2d 398, 399-400 (Minn. 1985) (emphasis added). But *Frank* does not stand for the general proposition that the intoxication of a victim supports a defendant's consent defense. Rather, *Frank* held that a criminal defendant does not have an absolute right to present expert testimony on a victim's intoxication "as it relates to her ability to withhold consent." *Id.* at 400. Further, appellant does not argue that the presence of methamphetamine and amphetamine affected S.H.'s ability to withhold consent, as the defendant in *Frank* did of alcohol. He simply concludes that the evidence supports his claim of consensual sex. Moreover, he stated during trial as well as in his motion for a new trial that the toxicology results would impeach S.H. and "go[] to her credibility, her memory, and her perception of the events," not that they would show consent. Because appellant provides only conclusory arguments that the test results support his consent defense, he has not proved that the evidence is material and not merely impeaching. He therefore does not meet the third element.

Regarding the fourth element, appellant argues that the evidence would "provide additional support for [his] consent defense and additional different reasons to doubt SH's reliability." Appellant's arguments on this element regarding consent suffer from the same lack of relevant authority as does the third element. In addition, if he introduced the toxicology test results, the state would be able to argue that S.H. became dizzy because of the gum appellant provided to her. Appellant has not proved by "a fair preponderance of

the evidence" that the test results "would probably produce either an acquittal or a more favorable result." *Miles*, 840 N.W.2d at 201.

C. Appellant is not entitled to a new trial based on the prosecutor's closing arguments.

Appellant argues that the prosecutor (1) misstated the burden of proof; (2) shifted the burden of proof; (3) expressed a personal opinion on witness credibility; and (4) disparaged the defense during closing arguments, entitling him to a new trial. We disagree.

Appellant did not contemporaneously object to the state's closing arguments or seek curative instructions. "A defendant generally waives the right to appellate review of a prosecutor's inappropriate final argument unless he objects or seeks cautionary instructions." *State v. Outlaw*, 748 N.W.2d 349, 357 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). We review unobjected-to error under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, the defendant has the burden of demonstrating (1) error (2) that is plain. *Id.* If the appellant establishes plain error, then (3) the state must prove "that the error did not affect the defendant's substantial rights." *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). An error is plain "if it is 'clear' or 'obvious'" by "'contraven[ing] case law, a rule, or a standard of conduct.'" *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quoting *Ramey*, 721 N.W.2d at 302). A prosecutor's comments amount to "prosecutorial misconduct only in extreme circumstances, and not when [the] comments are merely likely to confuse." *State v. McDaniel*, 777 N.W.2d 739, 752 (Minn. 2010).

As an initial matter, appellant argues that the less-stringent objected-to-error test should apply because he raised an issue with the prosecutor's statements in time for the district court to take curative action, even though he did not object when the prosecutor made the statements. But, as he concedes, he rejected the district court's offer of a curative instruction. He stated he only wanted to make a record about the statements "in case there are convictions." Because appellant did not object contemporaneously, *see Ramey*, 721 N.W.2d at 298-99, or seek curative instructions, *see Outlaw*, 748 N.W.2d at 357, we apply the modified plain-error standard for unobjected-to error.

We review each of appellant's claims of prosecutorial misconduct in turn. In doing so, we look at the entire closing argument and not "just selective phrases or remarks that may be taken out of context or given undue prominence." *Carridine*, 812 N.W.2d at 148 (quotation omitted).

i. The state's burden of proof

Appellant argues that the prosecutor misstated the state's burden of proof by framing the issue as whether the jury believed appellant or S.H.

"Misstatements of the burden of proof are highly improper" in criminal trials. *Hunt*, 615 N.W.2d at 302. But the state may "emphasiz[e] the central question in th[e] case," *Carridine*, 812 N.W.2d at 147-48, "argue that there is no merit to a particular defense or argument, and . . . anticipate arguments defense counsel will make," *State v. Ashby*, 567 N.W.2d 21, 28 (Minn. 1997).

Here, the prosecutor stated,

> I'm gonna cut to the chase and talk about what this case is about, and that's credibility. Whose version of the events do you believe?
>
> Let's start with the defendant's version. And while we talk about that, I want you to recall when we talked about, at the beginning of this case, your common sense. Now, the State has the burden to prove beyond a reasonable doubt what happened on the morning of February lst and that's a high burden. It's not an impossible burden. I don't have to prove to you beyond all doubt.

He went on to discuss appellant's defenses and the evidence that supports S.H.'s version of events.

Appellant relies on *State v. Strommen*, in which the supreme court held that a prosecutor misstated the state's burden by telling the jury to "weigh the story in each hand and decide which one is most reasonable, which one makes the most sense." 648 N.W.2d 681, 690 (Minn. 2002). Even though the district court provided a jury instruction on the state's proper burden of proof, the supreme court concluded "that the misstatement, in the context of this trial, presented a source of confusion for the jury and may have played a role in the decision to convict." *Id.*

While the statements here are similar to those in *Strommen*, there is no indication there, unlike here, that the prosecutor also stated the correct burden of proof. Here, the prosecutor referenced the state's burden of proof right after his statement that the case is all about credibility. Further, his arguments ultimately centered on the evidence that supported S.H.'s version of events and contradicted appellant's. His statement in the context of the closing arguments as a whole is not plain error.

ii. Shifting the burden of proof

Appellant argues that the prosecutor shifted the burden of proof onto him in the state's rebuttal closing.

"It is highly improper for a prosecutor to shift the burden of proof to the defendant during closing arguments." *State v. Nissalke*, 801 N.W.2d 82, 106 (Minn. 2011) (quotation omitted). A prosecutor shifts the burden of proof by implying that the defendant has the burden of proving innocence. *State v. Jackson*, 773 N.W.2d 111, 122 (Minn. 2009). "A prosecutor may not comment on a defendant's failure to . . . contradict testimony." *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995). But a prosecutor does not shift the burden by commenting "on the lack of evidence supporting a defense theory." *McDaniel*, 777 N.W.2d at 751.

Here, the prosecutor began his rebuttal arguments by stating that

> [t]here are four things that I want to leave you with. The first is when your defendant, when your client, doesn't have a good story as to why he did not commit the crime what do you do? You try to poke holes at the investigation, take shots at the investigators. They didn't test the pants. They didn't test the shirt. That was a call made by our office, not by the officers.

The district court then interrupted, asked counsel to approach, and cautioned the prosecutor against placing the burden on appellant. The prosecutor continued:

> As I said, what they do is attack the investigators because they have a story from their client that doesn't make any sense. The second thing is, recall specifically what [S.H.] told you. . . . Third, what is her motive to lie? Defense can't give you a motive. They said, well, people lie for all kinds of reasons. The defendant tries to give you a motive that she's upset because they couldn't have sex. Well, there really isn't a motive. . . . The final thing that I want you to remember is, what did the

> defendant do when she said she was gonna call the police? He tried to stop her, told her not to do. Then he left the scene. Then he fled. Then he got out of there. That's consciousness of guilt. He knew he'd done something wrong and he didn't want to face up to it.

Appellant focuses on the prosecutor's statements that appellant's explanation of the incident "doesn't make any sense" and that he "can't give [the jury] a motive" for why S.H. would lie. He relies on *Porter* to argue that these statements were improper. 526 N.W.2d at 365. But the *Porter* court reversed because the "misconduct permeated the entire closing argument." *Id.* The prosecutor stated that its witness testified "without impeachment by any cross-examination," which the supreme court concluded placed the burden of proof on the defendant. *Id.* *Porter* also included misconduct due to misstatements of the evidence and extensive statements about the consequences of the jury's verdict, including that the jurors would be "suckers" if they acquitted the defendant. *Id.*

Even if we assume, without deciding, that the prosecutor's comments shifted the burden and constitute error that is plain, the state has met its burden of showing that the comments did not affect appellant's substantial rights. A prosecutor's improper comments may not affect a defendant's substantial rights if the prosecutor also properly explains the presumption of innocence and standard of proof, the district court provides jury instructions on both, *see, e.g.*, *Carridine*, 812 N.W.2d at 148; *State v. Whittaker*, 568 N.W.2d 440, 452 (Minn. 1997), and the comments "were not extensive," *see State v. Schneider*, 249 N.W.2d 720, 721-22 (Minn. 1977). All three of these circumstances are present here. These limited statements do not require a new trial.

iii. Personal opinions about witness credibility

Appellant argues that the prosecutor improperly injected his personal opinion by stating "I think" regarding appellant's and S.H.'s credibility.

"It is improper for a prosecutor in closing argument to personally endorse the credibility of witnesses." *Porter*, 526 N.W.2d at 364. It is also improper for a prosecutor to use the first-person pronoun "I" to interject personal opinion into a closing argument. *Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004); *see also State v. Prettyman*, 198 N.W.2d 156, 158 (Minn. 1972). But such statements are "not always prejudicial." *Prettyman*, 198 N.W.2d at 158; *see also Ture*, 198 N.W.2d at 20.

The prosecutor here stated, "And the judge has instructed you that what you need to look at when you're determining credibility is what motive would a person have to lie. [Appellant] has the motive here to lie. . . . And *I think* when you listen to his story it's clear that's exactly what he was doing." (Emphasis added.) He later stated, "*I think* her credibility, while she sat here, while she went through the emotions of reliving that event, is very strong." (Emphasis added.)

These two instances of "I think" are improper under *Ture* and constitute plain error. *See* 681 N.W.2d at 20. However, these comments were not pervasive. The prosecutor went on to discuss evidence that corroborated S.H.'s version of events. The district court also instructed the jury that it is its responsibility to determine issues of credibility and the weight of evidence. Further, as the state argues, its evidence is strong. The DNA test results from S.H., her prior consistent statements and immediate disclosure, and the 911 calls she and her neighbor made all support the state's case. The prosecutor's closing

arguments as a whole and the strength of the state's evidence show that this plain error did not affect appellant's substantial rights. *See id.*; *see also Ramey*, 721 N.W.2d at 302.

iv. Disparaging the defense

Finally, appellant argues that the prosecutor disparaged his defense in the abstract by arguing that "tak[ing] shots" at the investigators is "what [defense attorneys] do" when their client's story "doesn't make any sense."

"[A] prosecutor may not belittle the defense, either in the abstract or by suggesting that the defense was raised because it was the only defense that might succeed." *McDaniel*, 777 N.W.2d at 752 (quotation omitted). But a prosecutor can argue that a specific defense or argument lacks merit in view of the evidence. *Id.* For example, it is not error for a prosecutor to make comments about the defense "designed to draw the jury's attention to [the defendant]'s attempt to distract from the criminal issues." *State v. Simion*, 745 N.W.2d 830, 844 (Minn. 2008).

Here, the prosecutor stated that "when your client[] doesn't have a good story as to why he did not commit the crime what do you do? You try to poke holes at the investigation, take shots at the investigators." The district court thereafter cautioned counsel.

Even if we assume, without deciding, that these comments constitute error that is plain, the state has shown that the comments did not affect appellant's substantial rights. Comments about the defense that constitute plain error may not affect a defendant's substantial rights if little evidence supports the particular defense. *See State v. Bettin*, 244 N.W.2d 652, 654 (Minn. 1976). But extensive comments that are plain error about defense

arguments in general may require reversal. *See State v. Salitros*, 499 N.W.2d 815, 818-19 (Minn. 1993). First, the prosecutor's comments were not extensive. The district court quickly cautioned him, and he went on to specify why certain arguments appellant raised lacked merit. These comments were far less extensive than those that warranted reversal in *Salitros*. *See id.* at 818-20. Second, although the prosecutor phrased his comment about the defense "tak[ing] shots" at investigators in general terms, they were in response to appellant's closing argument, in which appellant emphasized various items that police did not investigate. Third, the district court correctly instructed the jury that the state must prove each element of the charged offenses beyond a reasonable doubt, that appellant "is presumed innocent, and that he "does not have to prove innocence." The prosecutor's comments about appellant's defense therefore do not entitle him to a new trial.

Although we conclude under these particular facts that the prosecutor's closing statements did not affect appellant's substantial rights, on different facts, comments similar to these may result in reversal. We reiterate that the "prosecutor is a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public." *State v. Penkaty*, 708 N.W.2d 185, 196 (Minn. 2006) (quotation omitted). The "prosecutor may not seek a conviction at any price." *Porter*, 526 N.W.2d at 366.

III. Appellant is not entitled to a new trial on the basis that cumulative errors deprived him of a fair trial.

Appellant argues that the cumulative effect of each of the claimed errors deprived him of his right to a fair trial. He argues that this is a close case that relied upon S.H.'s credibility, to which multiple errors related. We disagree.

A defendant is entitled to a new trial when we cannot conclude that the cumulative effect of errors, any of which alone may not have affected the verdict, is harmless beyond a reasonable doubt. *See Penkaty*, 708 N.W.2d at 206. We reach this conclusion only "in rare cases." *See State v. Davis*, 820 N.W.2d 525, 538 (Minn. 2012). In reviewing a cumulative-error claim, we "balance the egregiousness of the errors against the weight of proof against the defendant." *State v. Swinger*, 800 N.W.2d 833, 841 (Minn. App. 2011).

Appellant has shown at most three errors in the prosecutor's closing statements. But these errors were not a "pervasive force" either at trial or within the context of the state's closing arguments. *See State v. Mayhorn*, 720 N.W.2d 776, 791-92 (Minn. 2006) (concluding two evidentiary errors and ten instances of prosecutorial misconduct that were "pervasive force at trial" constituted cumulative error). The errors here are not egregious. While S.H.'s testimony is a critical part of the state's case, the DNA test results and 911 calls supported her version of events and contradicted appellant's version. The cumulative effect of any errors therefore did not deprive appellant of his right to a fair trial.

Affirmed.