STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1506

State of Minnesota,
Respondent,

vs.

Corey Edward Fisherman,
Appellant.

Filed June 8, 2020
Affirmed
Worke, Judge

Chisago County District Court
File No. 13-CR-18-780

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

Janet Reiter, Chisago County Attorney, David M. Classen, Assistant County Attorney, Center City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Worke, Judge; and Jesson, Judge.

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

WORKE, Judge

Appellant challenges his third-degree assault conviction, arguing that the prosecutor committed misconduct during closing argument. We affirm.

FACTS

On June 18, 2018, S.H. and appellant Corey Edward Fisherman, both inmates at the Rush City prison, got into a disagreement over a food exchange. Fisherman "blindsided" S.H. and punched him in the face. S.H. suffered nasal and orbital fractures. Fisherman was charged with third-degree assault, infliction of substantial bodily harm.

In her opening statement at Fisherman's jury trial, Fisherman's attorney stated that the Rush City prison "may as well be planet Mars" because it has its "own code of conduct," "its own social mores," "its own ecosystem," and its own policies for holding inmates accountable for breaking rules. On cross-examination, Fisherman's attorney asked corrections officers who testified about the incident if the Rush City prison had any nicknames. Officers responded that the Rush City prison was nicknamed "gladiator school" and "fight club" because many assaults and altercations occur. In her closing argument, Fisherman's attorney reminded the jury that the Rush City prison is referred to as "gladiator school," and stated: "[W]e are here for a prison fight at gladiator school where it happens all of the time." In his rebuttal closing argument, the prosecutor stated:

> [The Rush City prison is] a place . . . where the law of the State of Minnesota applies. Right? Where it's against the law for a man to intentionally hit another man in the face and break the bones in his face.
>
> We need that law to apply, Ladies and Gentlemen. The guards need it in order to maintain order in that place for their own safety. We all need it. You might not care much for [S.H.] We all certainly don't care much for his criminal history. You know what? This case isn't really about him. It's about what [Fisherman] did on June 18 of 2018.
>
> So this case is really about law and order. The laws of the State of Minnesota apply in that facility. We need them to. All of us.

The jury found Fisherman guilty as charged. The district court sentenced Fisherman to 18 months in prison. This appeal followed.

D E C I S I O N

Fisherman argues that the prosecutor committed misconduct in rebuttal closing argument. Because Fisherman did not object at trial, we review his claim under a modified plain-error test. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (holding that appellate courts review unobjected-to prosecutorial misconduct under a modified plain-error test). Under this test, it is Fisherman's heavy burden to establish an error that is plain. *See id.* "An error is plain if it was clear or obvious." *Id.* (quotation omitted). Plain error "contravenes case law, a rule, or a standard of conduct." *Id.* If Fisherman demonstrates that the prosecutor committed plain error, the burden shifts to the state to demonstrate that the error was not prejudicial. *See id.* The state demonstrates a lack of prejudice by showing that "there is no reasonable likelihood that the absence of the misconduct . . . would have had a significant effect on the verdict." *Id.* (quotation omitted).

Fisherman claims that the prosecutor "explicitly told the jury that the case was not about [his] guilt or innocence," and instead, it was about "law and order in the prisons to protect prison guards." A "prosecutor must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). And a prosecutor is to refrain from making an argument that would divert the jury from deciding a case on the evidence by "injecting issues broader than a defendant's guilt or innocence." *State v. Dobbins*, 725 N.W.2d 492, 512 (Minn. 2006). A prosecutor's closing

argument should be based on the evidence and the reasonable inferences drawn from the evidence. *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990).

Fisherman cites caselaw in support of his argument that the prosecutor's argument was improper. *See State v. Threinen*, 328 N.W.2d 154, 157 (Minn. 1983) (argued misconduct for prosecutor to suggest that "jury represented the people of the community and that their verdict would determine what kind of conduct would be tolerated on the streets"); *State v. Clark*, 296 N.W.2d 372, 377 (Minn. 1980) (argued misconduct for prosecutor to suggest that jury "should convict the defendant because of the crime problem in general, as opposed to his individual guilt based on the evidence"); *State v. Clark*, 189 N.W.2d 167, 169-70 (Minn. 1971) (argued misconduct for prosecutor to refer to "breakdown of law and order, with the apparent implication that defendants thought they were a law unto themselves").

But in each of those cases, while noting that the challenged comments are discouraged, the supreme court determined that there was no prejudice. *See Threinen*, 328 N.W.2d at 157 (concluding no prejudice because district court sustained objection to the comment and gave curative instruction, the comment was an isolated instance, and evidence of guilt was strong); *Clark*, 296 N.W.2d at 377 (concluding record as a whole showed that comment did not play a substantial part in influencing the jury); *Clark*, 189 N.W.2d at 170 (concluding law-and-order comment, within context of defendants' conduct, not "grossly inflammatory").

Here, Fisherman's attorney stated in her closing argument that because the prison is a "gladiator school," a "fight club," and a "dangerous place" where fights happen all the

time, the jury should find Fisherman not guilty. But the prosecutor countered that, even if the prison has a different culture, Minnesota law applies. The prosecutor commented that the laws had to apply in the prison in order to protect everyone. We conclude that Fisherman fails to establish that these comments constitute plain error because the prosecutor's argument did not stray from the evidence. And the prosecutor argued that the case was about Fisherman's guilt or innocence when he stated that the case was about what Fisherman did.

Finally, even if we were to consider prejudice, it does not exist in this case. Fisherman claims that the prosecutor's comments were prejudicial because there were newspaper articles published in 2018 about prisoners assaulting and killing prison guards. But these articles are not part of the district court record, and there is nothing in the record showing that jurors read the articles or were aware of the attacks. And this case is about an inmate assaulting another inmate, not about an assault of a prison guard. Moreover, Fisherman has failed to meet his burden to establish plain error; thus, we do not need to consider prejudice.

Affirmed.