This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0481

State of Minnesota,
Respondent,

vs.

Edbin Jose Coreas,
Appellant.

Filed May 2, 2022
Reversed and remanded
Slieter, Judge

Mower County District Court
File No. 50-CR-19-1128

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Slieter, Judge; and Rodenberg, Judge.[*]

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

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this direct appeal, appellant challenges his conviction as an ineligible person in possession of ammunition, arguing that his conviction was the result of inadmissible hearsay evidence. Because the introduction by the prosecutor of hearsay evidence constituted prosecutorial misconduct and defense counsel's failure to object constituted ineffective assistance of counsel, we reverse and remand.

FACTS

Appellant Edbin Jose Coreas was charged on June 3, 2019, with separate counts of illegal possession of a firearm and ammunition, in violation of Minn. Stat. § 624.713, subd. 1(2) (2018), in connection with an incident which occurred during the early morning hours of August 5, 2018. When two deputies from the Mower County Sheriff's Office arrived at a residence in Austin, Minnesota in response to a noise complaint, they saw Coreas and another man, C.O., sitting on the front steps of the house. As the deputies approached the front steps, Coreas stood up and walked around to the side of the house, from where the deputies heard "a loud clang, like, metal hitting metal." With the help of an Austin Police Department canine officer's dog, the deputies recovered a handgun from the overgrown vegetation near the side of the house where Coreas had gone.

On a step below where Coreas had been sitting and C.O. continued to sit, the deputies observed ammunition in a plastic organizer. C.O. informed them that the ammunition was not his. One of the deputies detained Coreas in the back of his squad car because Coreas refused to state his name and tried to walk away. C.O.'s mother, A.O., in

response to a question from the deputy about the ammunition, said it was not C.O.'s and that Coreas "brought it." The discussion with A.O. was recorded.

During the jury trial, the state presented the testimony of six witnesses: both deputies, the canine officer, two Bureau of Criminal Apprehension (BCA) experts, and C.O.'s mother, A.O. The state, through one of the deputies, also introduced the full audio recording of the discussion with A.O. After both deputies testified and the audio recording was played for the jury, A.O. testified that she "was sleeping" when Coreas was arrested, did not "know exactly what happened," did not "know where they come from and where they went," did not "recall that [she] called the police or deputy that somebody brought a gun or weapon in [her] house," and denied telling the deputy that Coreas "had" or "brought" the ammunition. Coreas' counsel did not cross-examine A.O.

The jury found Coreas guilty of illegally possessing ammunition but could not reach a unanimous verdict regarding the firearm-possession charge. The district court accepted a partial verdict and sentenced Coreas to 60 months' imprisonment.[1] Coreas appeals.

DECISION

"Appellate review of an evidentiary issue is forfeited when a defendant fails to object to the admission of evidence." *State v. Vasquez*, 912 N.W.2d 642, 649 (Minn. 2018). However, an appellate court may consider a forfeited evidentiary issue if there is "(1) error, (2) that is plain, and (3) the error affects the defendant's substantial rights." *State v. Vick*,

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[1] A district court "may accept a partial verdict if the jury has reached a verdict on fewer than all of the charges and is unable to reach a verdict on the rest." Minn. R. Crim. P. 26.03, subd. 20(7).

632 N.W.2d 676, 685 (Minn. 2001). Coreas argues his conviction must be reversed because C.O.'s and A.O.'s statements were hearsay, their presentation constituted prosecutorial misconduct, and his trial counsel's lack of objection to the evidence constitutes ineffective assistance of counsel.[2]

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by the Legislature." Minn. R. Evid. 802; *State v. DeRosier*, 695 N.W.2d 97, 104 (Minn. 2005). "The complexity and subtlety of the operation of the hearsay rule and its exceptions make it particularly important that a full discussion of admissibility be conducted at trial" to establish "a record of the [district] court's decision-making process." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006).

I. The prosecutor committed reversible misconduct by intentionally eliciting inadmissible hearsay statements.

Claims of unobjected-to prosecutorial misconduct are reviewed pursuant to a modified-plain-error standard which first requires the defendant to demonstrate "that the prosecutor's conduct constitutes an error that is plain," then the burden shifts to the state "to demonstrate lack of prejudice." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006); *see also State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010). "An error is plain if it is

[2] Coreas also argues the district court should have acted *sua sponte* to limit the impact of the hearsay statements. Because we conclude his conviction must be reversed and remanded for prosecutorial misconduct and ineffective assistance of counsel, we do not address this argument.

clear or obvious; usually this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct." *State v. Bustos*, 861 N.W.2d 655, 660-61 (Minn. 2015) (quotation omitted). An error is prejudicial if it affects the defendant's substantial rights. *Ramey*, 721 N.W.2d at 299. "Plain error affects a defendant's substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *Bustos*, 861 N.W.2d at 663 (quotation omitted).

"The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007) "A prosecutor engages in prosecutorial misconduct when the prosecutor violates clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *State v. Smith*, 876 N.W.2d 310, 334-35 (Minn. 2016). "[A]ttempting to elicit or actually eliciting clearly inadmissible evidence may constitute misconduct." *Fields*, 730 N.W.2d at 782 (citing *State v. Williams*, 525 N.W.2d 538, 544-45, 549 (Minn. 1994)). When a defendant proves that an error was plain and the state fails to demonstrate a lack of prejudice, "[a]ppellate courts should not hesitate in a suitable case to grant relief in the form of a new trial." *Ramey*, 721 N.W.2d at 303 (quotation omitted).

The supreme court has "said a number of times that a police officer testifying in a criminal case may not, under the guise of explaining how the investigation focused on defendant, relate hearsay statements of others." *Williams*, 525 N.W.2d at 544 (quoting *State v. Cermak*, 365 N.W.2d 243, 247 (Minn. 1985)). "The state has a duty to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements." *State v.*

McNeil, 658 N.W.2d 228, 232 (Minn. App. 2003) (citing *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978)). We are "much more likely to find prejudicial misconduct when the state intentionally elicits impermissible testimony." *Id.* (citing *State v. Richmond*, 214 N.W.2d 694, 695 (Minn. 1974)).

The prosecutor, with no objection by Coreas's trial counsel, played for the jury an audio recording, which included the following exchange between C.O.'s mother, A.O., and the deputy:

> DEPUTY: So tell me why there's handgun ammunition sitting out here on the [steps].
> A.O.: That guy in there in the car right now [Coreas].
> DEPUTY: He had it?
> A.O.: He got it taken.
> . . .
> DEPUTY: So [Coreas] had it?
> A.O.: [Coreas] had it. I don't know who had it. Maybe [Coreas] get it.

After playing the recording, the prosecutor examined the deputy regarding the events, during which the following exchange occurred:

> Q: And did you ask [A.O.] about the ammunition?
> A: I did.
> Q: Okay. What did she say?
> A: She told me that it was not [C.O.]'s and that she thought [Coreas] brought it.

The prosecutor later returned to this exchange, again asking the deputy:

> Q: What happened after that?
> A: After taking [Coreas] into custody?
> Q: Yeah. After taking him into custody and speaking with [A.O.].
> A: Okay. So I spoke with [A.O.] for a while, again, she told me that she believed that [Coreas] had brought the

> ammunition. And he'd only been there, approximately, for five minutes.

The prosecutor also asked the deputy about his unrecorded discussion with C.O.:

> Q: After you found that ammunition, what did you do?
> A: The ammunition -- I continued talking to [C.O.] for a brief while. I asked him about the ammunition. He looked down at it and said it was not his.

Later, after Coreas's counsel elicited testimony from the deputy which suggested that C.O. was sitting close enough to the ammunition to possess it, on redirect examination the prosecutor asked:

> Q: Did [C.O.] make any motion toward [the ammunition]?
> A: No, he remained very calm through the entire thing and said it wasn't his.

Coreas argues that "[a]ll of those out of court statements were hearsay which was plainly inadmissible under the Rules of Evidence" and require reversal because "the repeated inadmissible hearsay was by far the most compelling evidence that [he] possessed the ammunition." The state concedes that C.O.'s statements, which the prosecutor elicited from the deputy, were inadmissible and does not dispute that admitting these statements was plain error. The state argues that A.O.'s statements were admissible as present sense impressions and that neither A.O.'s statements nor C.O.'s statements prejudiced Coreas. For the reasons set forth below, A.O.'s statements were not present sense impressions and were, instead, hearsay.

Plain Error

A statement which "describ[es] or explain[s] an event or condition *made while the declarant was perceiving the event or condition or immediately thereafter*" is not hearsay,

and therefore admissible, if the declarant testifies at trial and is subject to cross examination. Minn. R. Evid. 801(d)(1)(D) (emphasis added). Such statements, commonly referred to as present sense impressions, are not hearsay because the immediacy of the statements indicates "that there [was] little time to consciously fabricate a story." *State v. Pieschke*, 295 N.W.2d 580, 583 (Minn. 1980). The supreme court in *Pieschke* acknowledged the difficulty of determining whether the statements qualified as present sense impressions because defense counsel did not object to admission on this ground and the district court did not have an opportunity to fully evaluate whether the exclusion applied. *Id.* at 583-84. However, *Pieschke* concluded that, on the record before it, the statements "probably made within a few minutes" of the event were present sense impressions. *Id.* at 584.

The record does not reveal when or how A.O. perceived that Coreas "brought" or "had" the ammunition. The deputy never asked A.O. about the basis of her statements. Additionally, the record reveals that the only reference to the timing of Coreas's arrival is A.O.'s statement to the deputy that "the people" arrived five minutes ago. She made this statement nearly seven and one-half minutes into the audio recording, which did not begin when the deputy first arrived. Thus, it is not clear when Coreas arrived at A.O.'s house. In sum, the record is devoid of any basis to suggest that A.O.'s statements were made while "perceiving the event . . . or immediately thereafter." Minn. R. Evid. 801(d)(1)(D). Therefore, it was error to elicit this hearsay evidence.

The inadmissible nature of A.O.'s statements was also plain. "The complexity and subtlety of the operation of the hearsay rule and its exceptions" is well-known, but the

violation here was neither subtle nor complex. *Manthey*, 711 N.W.2d at 504. Because the statements elicited by the prosecutor from the deputy and presented to the jury via the recording were hearsay, the error is plain. Minn. R. Evid. 801(c).[3]

Substantial Rights

The state argues that, even if we conclude Coreas meets his burden to show plain error, it has demonstrated that the error did not prejudice Coreas. *Ramey*, 721 N.W.2d at 302. The state claims the hearsay evidence was neither pervasive nor persuasive to the jury in reaching its verdict. The record compels our disagreement.

The state must "show that there is *no reasonable likelihood* that the absence of the misconduct in question would have had *a significant effect* on the verdict of the jury." *Id.* (emphasis added) (quotation omitted).

The prosecutor informed the jury during his opening statement that a key piece of evidence was that A.O. "informed [the deputy] that Mr. Coreas had brought the ammunition." Both C.O.'s and A.O.'s statements were repeated by the deputy during the prosecutor's direct examination, and A.O.'s statement was repeated via the audio recording, emphasizing their importance to the jury. The only phase of the trial during which the prosecutor did not reference the hearsay statements was during closing argument.

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[3] We note that it is preferable in cases like this, when a party desires to admit evidence which is likely hearsay though possibly admissible pursuant to a hearsay exclusion or exception, to present a pre-trial motion to the district court for its consideration and ruling. *See* Minn. R. Crim. P. 11 cmt. (encouraging early resolution of pretrial evidentiary motions to promote "more efficient handing of criminal cases at subsequent stages"). The state did not do so here.

Absent the hearsay statements, the only evidence presented by the state that Coreas possessed the ammunition was that he stood up from the step near where it was located and, before being detained in the squad car, shouted "Grab it, grab it, grab it!" when the deputy pointed out that there was ammunition on the steps. No fingerprint or DNA evidence tied Coreas to the ammunition. A.O.'s testimony was, at most, inconclusive and conflicting. As noted above, she testified that she "was sleeping" when Coreas was arrested, did not "know exactly what happened," did not "know where they come from and where they went," did not "recall that [she] called the police or deputy that somebody brought a gun or weapon in [her] house," and denied telling the deputy that Coreas "had" or "brought" the ammunition. The properly admitted evidence simply demonstrated his proximity to the ammunition when it was on the steps.

Given the sparse and ambiguous admissible evidence indicating Coreas possessed the ammunition, it is reasonably likely the jury relied significantly on the hearsay statements of C.O. and A.O. in reaching its verdict. Accordingly, these plain errors affected Coreas's substantial rights.

As officers of the court, "[p]rosecutors have an affirmative obligation to ensure that a defendant receives a fair trial" and an obligation "to guard the rights of the accused as well as to enforce the rights of the public." *Ramey*, 721 N.W.2d at 300 (quotation omitted). The prosecutor did not meet these obligations here, and, therefore, we reverse Coreas's conviction and remand for a new trial.

II. Coreas's trial counsel was ineffective.

Though our analysis in the previous section resolves this appeal, we believe it important to also consider the ineffective-assistance-of-counsel argument, which was fully briefed by the parties. *See Ramey*, 721 N.W.2d at 300 n.5 (noting that "the problem of trial misconduct is not limited to the prosecution"). When an ineffective-assistance-of-counsel claim is properly raised in a direct appeal, we examine the claim pursuant to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (citing *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013)). Pursuant to the *Strickland* test, a defendant "must demonstrate that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Andersen*, 830 N.W.2d at 10. We are generally reluctant to question counsel's strategic decisions, including whether to object to introduction of hearsay evidence. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004); *Leake v. State*, 737 N.W.2d 531, 542 (Minn. 2007) (concluding that "there were sound strategic reasons for Leake's counsel not to object to the admission of the hearsay").

Coreas argues he received ineffective assistance of counsel because his privately retained trial counsel failed to object to violations of "perhaps the best-known evidentiary rule in law," which were "particularly egregious and inexplicable given that counsel relied on a defense strategy of arguing the ammunition may have belonged to [C.O.], not Coreas." The record supports his argument.

Although Coreas's trial counsel was made aware of the state's intention to present this evidence and filed a pretrial motion to address other evidentiary issues, no motion to suppress hearsay testimony or the audio recording was raised. During trial, Coreas's counsel did not object when the state, on multiple occasions, introduced A.O.'s hearsay statements that Coreas "had" or "brought" the ammunition. Counsel did not object when the deputy testified that C.O., who had been seated on the steps next to Coreas one step above the ammunition, "said [the ammunition] was not his."

The state argues that counsel's failure to object was a trial strategy and, therefore, not an indication of ineffective assistance of counsel. We can discern no basis from the record that the lack of an objection was based upon effective trial strategy.

It is true that we generally defer to trial counsel's determination of what might be an effective strategy in a particular case. *See State v. Rhodes*, 657 N.W.2d 823, 840 (Minn. 2003). However, "[a]lthough [appellate] scrutiny of defense attorneys is, and must continue to be, highly deferential, [this] deference has limits." *State v. Beecroft*, 813 N.W.2d 814, 855 (Minn. 2012) (Anderson, G. Barry, J., concurring) (quotation and citation omitted). "[D]eference is unwarranted if an attorney's unreasonable error 'was not based on strategy' but was instead the result of . . . an inexcusable oversight." *Id.* (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986)).

During closing argument, Coreas's trial counsel emphasized that "the ammunition was found at the home of another person on a stoop where someone else was, actually, sitting." This reflects a reasonable defense strategy that Coreas was not the most likely possessor of the ammunition. Given this apparent and reasonable strategy, trial counsel's

failure to object to the only evidence that Coreas brought the ammunition with him was "an inexcusable oversight." *Id.*

The state also renews its argument that Coreas was not prejudiced by his trial counsel's ineffective assistance. For the reasons discussed in section I, *supra*, there is a reasonable probability that the outcome would have been different if the hearsay had not been admitted. We also find it notable that the jury did not reach a verdict as to whether Coreas possessed the handgun, which similarly was presented by the state with circumstantial evidence, though without the hearsay statements the jury received regarding possession of the ammunition. Because there is a reasonable probability the outcome would have been different absent trial counsel's errors, we reverse and remand for a new trial.

Reversed and remanded.