STATE OF MINNESOTA
IN COURT OF APPEALS
A10-451

State of Minnesota,
Respondent,

vs.

Patrick Bryan Scott, Jr.,
Appellant.

Filed March 29, 2011
Affirmed
Kalitowski, Judge

Polk County District Court
File No. 60-CR-08-2797

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

Melissa Sheridan, Assistant State Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Stauber, Judge; and Randall, Judge.*

* 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

KALITOWSKI, Judge

Appellant Patrick Bryan Scott Jr. challenges his convictions of first-degree criminal sexual conduct and kidnapping, arguing that several of the prosecutor's statements constituted misconduct and deprived him of a fair trial. Because we conclude that the statements were either not improper or do not require reversal and that appellant's claims in his pro se supplemental brief do not warrant relief, we affirm.

D E C I S I O N

I.

A jury found appellant guilty of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2008) (using force or coercion and causing personal injury), and kidnapping, in violation of Minn. Stat. § 609.25, subds. 1, 2(2) (2008) (causing great bodily harm). Appellant does not challenge the sufficiency of the evidence to sustain his convictions but instead argues that unobjected-to comments by the prosecutor in his opening and closing statements improperly inflamed the passions of the jury and that the prosecutor improperly stated the law, depriving him of a fair trial.

Evidence at trial established that in the early hours of October 12, 2009, appellant followed T.D. several blocks from a bar to her cousin's house, where she was staying that night. Appellant pulled T.D. from the house's front door into a wooded area, where he punched her several times and sexually penetrated her without her consent. Appellant then took T.D. back toward the bar and let her go. In connection with the kidnapping

charge, the jury found that T.D. was released in a safe place but suffered great bodily harm.

We review for plain error appellant's claim that statements he did not object to at trial amounted to prosecutorial misconduct. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). A plain error occurs when: (1) there was error; (2) it was plain; and (3) it affected the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1989). An error is plain if it is "clear or obvious," typically by contravening caselaw, a rule, or a standard of conduct. *Ramey*, 721 N.W.2d at 302 (quotations omitted). The burden is on the defendant to show that the prosecutor's conduct constituted an error that was plain. *Id.* The state then bears the burden of proving that the conduct did not affect the defendant's substantial rights. *Id.* If all three prongs are met we determine whether we should address the error to ensure fairness and the integrity of the judicial proceedings. *State v. Leake*, 699 N.W. 2d 312, 327 (Minn. 2005).

Impassioning the Jury

"Prosecutors may not make arguments that are not supported by evidence or that are designed to inflame the passions and prejudices of the jury." *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009). But a prosecutor may present to the jury all legitimate arguments on the evidence, analyze and explain the evidence, and present all proper inferences to be drawn from the evidence in closing argument. *State v. Starkey*, 516 N.W.2d 918, 927 (Minn. 1994). Courts must pay special attention to statements that may prejudice or inflame the jury in cases where credibility is a central issue. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). Sexual-abuse cases inevitably evoke an emotional

reaction, and "any emotive appeal to the jurors is likely to be highly prejudicial." *State v. Danielson*, 377 N.W.2d 59, 61 (Minn. App. 1985) (quotation omitted). To determine whether the prosecutor committed misconduct warranting a new trial, reviewing courts must look at the closing argument as a whole, rather than to selected phrases and remarks. *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004).

Although the state's argument need not be "colorless," it must be based on the evidence produced at trial, or the reasonable inferences from that evidence. *State v. Morton*, 701 N.W.2d 225, 237 (Minn. 2005). "It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw." *Bobo*, 770 N.W.2d at 142 (quotation omitted).

Appellant contends that in his closing argument the prosecutor improperly "stoked the jury's emotions by sensationalizing the elements" of the charge when he stated that first-degree criminal sexual conduct used to be known as rape, described the acts that constituted sexual penetration under the law, and said that "[c]riminal [s]exual [c]onduct in the [f]irst [d]egree, has very little to do with sex. It has to do with violence[;] it has to do with anger, rage, power, control." Although the prosecutor was speaking in general terms rather than about appellant specifically, the evidence introduced at trial supported the inference that appellant was acting on impulses of violence, rage, power, and control. T.D. testified that appellant hit her repeatedly, called her profane names, injured her during the course of the sexual assault despite her plea to stop hurting her, told her he wanted to take her home and for her to have his baby, and punched her again when she laughed after this comment. This evidence supports the prosecutor's statement about

appellant's motivation for the assault. *See State v. Matthews*, 779 N.W.2d 543, 551-52 (Minn. 2010) (concluding that prosecutor's statement referring to appellant's "insatiable rage," "ambush" of the victim, and "powerful blow" to the victim's face were reasonable inferences from the evidence); *State v. MacLennan*, 702 N.W.2d 219, 235-36 (Minn. 2005) (holding that prosecutor's description of crime as "premeditated ambush execution" was "dramatic characterization[]" but did not constitute error).

Appellant next argues that the prosecutor was "playing on the jury's own fears" when he stated that Polk County is not "immune" from "horrific crimes" committed for "virtually no reason." Appellant's defense at trial was consent. Consequently, the prosecutor argued that the jury should believe T.D.'s testimony over appellant's statements to the police. The prosecutor's statements urged the jury not to believe appellant's account of consensual sexual contact simply because members of the jury could not understand why appellant would do what he did or because they believed that this type of crime did not occur in their community. The evidence supported the reasonable inference that a violent crime, without an obvious motive, took place in Polk County.

Appellant contends that the prosecutor improperly argued beyond the evidence when he suggested that appellant dragged T.D. back toward the bar in order to "rape her again," to allow his friends to sexually assault her, or "to haul her somewhere and kill her," adding, "You don't want to leave a witness behind. . . ." T.D. testified that she thought appellant was taking her back to the bar so that the friends she had seen him with earlier could assault her, and she told the police that she thought appellant was going to

kill her in the course of the assault. Because the prosecutor should have confined his statements to this evidence and refrained from speculating generally as to appellant's intentions, we conclude that the prosecutor's comments were improper.

Finally, appellant points to the prosecutor's opening and closing statements, in which he said that the case was about "a woman's worst nightmare" being realized. And he argues that the prosecutor urged the jury to put themselves into T.D.'s shoes by saying:

> what this case really, really boils down to is a bad door. It could happen to anybody. You're visiting a friend, visiting a relative, spending the night. They don't tell you about the door that doesn't work. And if that door opens, none of this happens.

"Generally, arguments that invite the jurors to put themselves in the shoes of the victim are considered improper." *State v. Johnson*, 324 N.W.2d 199, 202 (Minn. 1982). Thus, we agree that the statements here were improper. The comments were not specific to how T.D. may have felt or her account of what happened, but instead were formulated to urge the members of the jury to think about how they would feel in T.D.'s position and to believe that the same crime could happen to them. *See id.* (holding that asking jurors to consider whether they would be in fear if someone followed them at night and shot at them was in error); *State v. Bashire*, 606 N.W.2d 449, 454 (Minn. App. 2000) (concluding that asking the jury to imagine what it would be like to have "your" head held during multiple assaults, and stating that "every one of us" has put ourselves in risky positions was improper), *review denied* (Minn. Mar. 28, 2000).

Because we conclude that the prosecutor's statements speculating as to appellant's intentions when he took T.D. back toward the bar and urging the jury to put themselves in T.D.'s shoes were in error, we must determine whether these errors require reversal. A 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. *Griller*, 583 N.W.2d at 741. We consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to rebut the improper suggestions. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

Our review of the record leads us to conclude that these errors did not affect appellant's substantial rights. The evidence against appellant was strong. T.D. identified appellant from a photo array on the afternoon of October 12, 2009. Photographs of her injuries were consistent with her account. The sexual-assault examiner testified that in her 32 years of experience as a nurse she had never seen a torn perineum result from consensual sexual intercourse. T.D.'s prompt reporting and emotional condition corroborated her testimony. *See State v. DeBaere*, 356 N.W.2d 301, 304 (Minn. 1984) (holding that complainant's prompt reporting and distraught condition corroborated her account of sexual assault). The jury also heard police investigators' interview with appellant, in which he initially denied any sexual contact with T.D. but, after being confronted with evidence implicating him, admitted engaging in sexual contact, claimed that T.D. consented, but had no explanation for T.D.'s physical injuries.

In addition, the prosecutor's improper statements were not pervasive. His closing argument spanned 34 pages, plus 7 pages of rebuttal. In his argument he emphasized the

physical evidence corroborating T.D.'s account, not the need for the jurors to put themselves in T.D.'s place. Later in his argument, the prosecutor returned to the kidnapping charge and argued that appellant's action in dragging T.D. approximately 150 feet to the location of the sexual assault or approximately 650 feet back toward the bar supported the charge and that it was the jury's "call[] to make" as to "[appellant]'s reason for doing this," refraining from improper speculation. *See, e.g.*, *Bobo*, 770 N.W.2d at 143 (noting that the allegedly improper comments were "brief in comparison to the rest of the closing argument" and "were not pervasive").

Additionally, the defense countered the prosecutor's description of the case as an example of a woman's worst nightmare by describing being falsely accused of rape as appellant's nightmare. These competing characterizations of the case diminish any improper effect the prosecutor's comments may have had. Moreover, the district court also instructed the jury to "put aside any sympathy, prejudice, or bias for or against either party of this case. Sympathy, prejudice, and bias lead to unfairness, and you must be absolutely fair. . . ." We presume that the jury followed the district court's instructions. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). And the district court's instructions further mitigated the effect of the prosecutor's comments. *See Matthews*, 779 N.W.2d at 552 (concluding that defendant was not prejudiced in part because district court correctly instructed jury on arguments of counsel); *State v. Jones*, 753 N.W.2d 677, 693 (Minn. 2008) (concluding that defendant was not prejudiced in part because district court correctly instructed jury on burden of proof, presumption of innocence, witness credibility, and difference between evidence and arguments of counsel).

Because the evidence against appellant was strong, the comments inviting jurors to step into T.D.'s shoes and to speculate as to appellant's intentions after the assault were isolated, and because appellant countered these comments, we conclude that appellant's substantial rights were not affected by the prosecutor's improper statements and therefore reversal is not required.

Improperly Stating the Law of Corroboration

Appellant argues that the prosecutor committed misconduct when he said, "[W]hen you look at the [c]ourt's instructions, corroboration of [T.D.'s] testimony is not essential to convicting the defendant, but in this case you have lots of physical evidence corroborating what she said happened." Appellant contends that (1) the prosecutor was not allowed to instruct the jury on the need for corroboration and (2) the prosecutor misstated the law.

This issue is controlled by the Minnesota Supreme Court's recent opinion in *State v. Cao*, 788 N.W.2d 710 (Minn. 2010). Cao argued that the prosecutor committed misconduct by stating, "The law in this state does not require corroboration. You can find a person guilty of criminal sexual conduct just on a victim's testimony alone. But there was plenty of corroboration in this case." *Cao*, 788 N.W.2d at 715. The court rejected this argument, concluding that the prosecutor did not violate a rule by making this statement to the jury and that the statement was "merely rhetorical" because it was a "springboard for a discussion on the strength of the corroborative evidence in the case." *Id.* at 715-16. Here, the prosecutor's statement and its purpose are nearly identical to

those of the prosecutor in *Cao*. And in *Cao*, the court concluded that, given its purpose, the prosecutor's statement was not tantamount to a jury instruction. *Id.* at 716.

Finally, the supreme court in *Cao* concluded that the prosecutor's statement that corroboration was unnecessary did not constitute plain error because "there is no conclusive statement in [supreme court] case law prohibiting a prosecutor from stating that a victim's testimony need not be corroborated in a criminal sexual conduct case. It cannot be said that the prosecutor plainly erred by contravening settled law." *Id.* at 717. Applying *Cao*, the prosecutor here did not commit plain error by telling the jury that corroboration of T.D.'s testimony was not required to convict appellant.

II.

In his pro se supplemental brief, appellant raises several additional claims, which we conclude are without merit. Appellant asserts that he sent a letter to the Polk County "Public [Attorney]'s Office" after his first trial, stating that he wanted to "fire" his attorney and that the "head of the [Attorney]'s Office" called appellant and told him that he could not. But appellant did not raise dissatisfaction with his attorney to the attention of the district court before the trial. Thus, the district court did not advise appellant of his rights with respect to substituting counsel or proceeding pro se and there is no statement or ruling for this court to review.

Next, appellant argues that he was deprived of a fair trial because the jury was comprised of nearly all women. This claim essentially alleges ineffective assistance of counsel for failure to strike allegedly biased jurors. To prevail on an ineffective-assistance claim, the defendant must affirmatively prove that his counsel's representation

‘“fell below an objective standard of reasonableness’” and ‘“that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). “In an appeal based on juror bias, an appellant must show that the challenged juror was subject to challenge for cause, that actual prejudice resulted from the failure to dismiss, and that appropriate objection was made by appellant.” *State v. Stufflebean*, 329 N.W.2d 314, 317 (Minn. 1983). Appellant points only to the jurors’ gender and his guilty verdict as evidence of bias. A juror’s gender alone does not make a juror subject to a challenge for cause. Minn. R. Crim. P. 26.02, subd. 5(1) (requiring the existence of a juror’s state of mind indicating partiality and prejudice). Also, appellant’s guilty verdict alone is insufficient evidence of actual prejudice. *See State v. Blais*, 379 N.W.2d 236, 238 (Minn. App. 1985), *review denied* (Minn. Feb. 14, 1986). Because appellant has not shown that the female jurors were subject to challenges for cause or were prejudiced against him, he cannot demonstrate that his counsel’s representation fell below an objective standard of reasonableness.

Finally, appellant argues that the prosecutor “was making this matter personal” and claims that the prosecutor inappropriately focused on his changed story to police investigators and his suicide attempts, and ignored inconsistencies in T.D.’s account. The state may not seek convictions at any price. *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993). But the conduct challenged by appellant was proper. The prosecution may argue that a witness was or was not credible. *State v. Jackson*, 714 N.W.2d 681, 696

(Minn. 2006). And the admission of evidence of a defendant's suicide attempt following a charged offense has been upheld because the evidence is relevant to show consciousness of guilt. *See, e.g., State v. Ackerman*, 380 N.W.2d 922, 924-25 (Minn. App. 1986).

Affirmed.