STATE OF MINNESOTA
IN COURT OF APPEALS
A10-766

State of Minnesota,
Respondent,

vs.

Mamady Kalifa Keita,
Appellant.

Filed March 22, 2011
Affirmed in part, reversed in part, and remanded
Crippen, Judge[*]

Hennepin County District Court
File No. 27-CR-09-20793

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Klaphake, Presiding Judge; Larkin, Judge; and Crippen, 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

CRIPPEN, Judge

Appellant Mamady Keita disputes his conviction for two counts of first-degree criminal sexual conduct and one count of first-degree burglary, primarily contending that prosecutorial misconduct violated his right to a fair trial. Because the matter was fairly tried, and because there is no merit in other procedural issues addressed by appellant in his pro se brief, we affirm the convictions. We reverse and remand for resentencing that reflects the correction of appellant's criminal history score.

FACTS

On the morning of April 1, 2009, K.W. and her girlfriend had six people over to their apartment, including appellant and DeAngelo Madison. After everyone left, K.W. drove her girlfriend to work and returned to the apartment. Though she thought she was alone, appellant soon approached her. She testified that she repeatedly told appellant to leave and then struggled with him; according to K.W.'s account, appellant was joined in the struggle by Madison and both men subsequently raped her and then forced her to shower, took her clothes and cell phone, threatened her, and told her not to leave the apartment for 20 minutes. After 20 minutes, K.W. left the apartment, and the police were contacted. K.W. agreed to go to the hospital for a sexual assault examination, where her injuries were documented and DNA swabs were collected.

Appellant was arrested after K.W. identified him as her assailant in a photo array. He agreed to speak with an officer and repeatedly denied ever having sex with K.W., consensually or otherwise. At trial, appellant testified that he had consensual sex with

K.W. and that it was his friend, DeAngelo Madison, who raped her while appellant was in the shower. After a four-day trial, the jury convicted appellant on all three counts and he was subsequently sentenced to 281 months in prison.

D E C I S I O N

Appellant alleges that the prosecutor improperly inflamed the passions and sympathies of the jury and improperly disparaged the defense and the defendant. No objections were made to the statements at trial.

For an appellate court to review an unobjected-to trial error, there must be error that is plain and also affects the defendant's substantive rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The burden is on the nonobjecting appellant to show that an error occurred and that it was plain. *Id.* "An error is plain if it was 'clear' or 'obvious,'" *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (citation omitted), or "conduct the prosecutor should know is improper." *Ramey*, 721 N.W.2d at 300. In prosecutorial misconduct cases, if the appellant demonstrates that there was a plain error, then the burden shifts to the state "to 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.* at 302 (citation omitted).

When reviewing alleged prosecutorial misconduct in a closing argument, the court must view the statement in the context of the argument as a whole. *State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003). In cases where credibility is the central issue, the court must pay special attention to statements that may prejudice or inflame the jury. *State v.*

Porter, 526 N.W.2d 359, 363 (Minn. 1995). "Sexual-abuse cases inevitably evoke an emotional reaction, and any attempt by the prosecutor to exacerbate this natural reaction by making any emotive appeal to the jury is likely to be highly prejudicial." *State v. McNeil*, 658 N.W.2d 228, 234 (Minn. App. 2003) (quotations omitted). For the court to reverse a conviction for serious prosecutorial misconduct, the misconduct must be "inexcusable and so serious so as to deprive appellant of a fair trial." *Id.* at 236.

Appellant alleges that three statements made by the prosecutor improperly inflamed the passions of the jury and were prejudicial. First, the prosecutor stated that "[appellant] used [K.S.] as nothing more than a piece of meat. Quite literally, in his mind, she exists solely to satisfy his biological urges." Second, the prosecutor referenced K.W.'s testimony that she thought appellant had ejaculated by the look on his face and noted, "That's going to be a pleasant thought for her to carry with her for the rest of her life." Third, during his rebuttal, the prosecutor responded to defense counsel's hypothetical question "What is going through this girl's mind?" by stating "I can't answer that. I don't think—unless you've had another human being use you like a piece of meat, anybody in here can answer that question."

Appellant also argues that the prosecutor wrongfully disparaged the defense tactics and the defendant with four statements during closing arguments. First, the prosecutor referenced the lesser-included offenses and stated, "In as much as I feel those counts are insulting, I'm only going to address the three major counts." Second, during rebuttal, the prosecutor said "The last thing I would like to respond to is [defense counsel's] comment that what could his client possibly tell the officer. That's almost insulting in its

simplicity. The truth." Third, the prosecutor highlighted appellant's prior statement to a police officer that was to the effect of "He won't smack a woman unless she really deserved it . . . ." And finally, the prosecutor stated that appellant was even lying to himself while referencing statements he made when the officer had left the room during the same interview.

In *State v. Mayhorn*, the supreme court reversed a conviction for aiding and abetting first-degree murder based, in part, on prosecutorial misconduct. 720 N.W.2d 776, 792 (Minn. 2006). The court found that the state failed to provide a fair trial and that "[t]he prosecutor's misconduct was a pervasive force at trial." *Id.* at 791. The prosecutor:

> commented on the defendant's credibility, appealed to the passions of the jury, commented on [defendant]'s failure to call a witness, intentionally misstated evidence, asked a "were they lying?" question, referred to threats made by [defendant] not in evidence, aligned herself with the jury, improperly attacked [defendant]'s character, commented on [defendant]'s opportunity to tailor his testimony, and commented on the credibility of a witness.

Id. The court found that "[a]t least 20 pages of the prosecutor's 80-page cross-examination of the defendant evince prosecutorial misconduct." *Id.* The court concluded that "the cumulative effect of the prosecutorial misconduct and evidentiary errors in this case denied [defendant] the right to a fair trial." *Id.* at 792.

At the least, twice stating that the defendant treated the victim as a "piece of meat" and referencing the lesser-included offenses as "insulting" is knowingly improper

conduct. The statements also are not related to the elements of the charges or to the evidence at trial and play on the sympathies and passions of the jury.

Still, serious and inexcusable misconduct is not enough to demand a new trial. *See McNeil*, 658 N.W.2d at 236 (finding statements about a child victim's virginity during closing arguments of a criminal-sexual-misconduct trial improper but not enough to warrant a new trial). The statements at issue in this case were not as pervasive and did not rise to the level of the misconduct in *Mayhorn*. Appellant points to seven short statements as misconduct within a 17-page closing and rebuttal argument by the prosecutor. Despite the error, the comments were isolated remarks. *See State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (noting that the court will "consider the closing argument as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence" (quotation and citation omitted)).

The evidence at trial also undercuts appellant's claim that the remarks were so severe as to deprive him of his right to a fair trial. The record includes DNA evidence implicating appellant, K.W.'s testimony reaffirming her prior identification of appellant as one of her attackers, and appellant's changing versions of what happened. In light of the argument as a whole, evidence adduced at trial, and existing caselaw, the statements by the prosecutor do not rise to the level of serious misconduct so as to deny appellant his right to a fair trial.

During sentencing, the district court first imposed the sentence for burglary and then used that conviction to augment appellant's criminal history score before sentencing on the two counts of criminal sexual conduct. The state concedes that this was improper.

See Minn. Sent. Guidelines II.B.1.c (2008). The only question at issue is whether this court should reduce the sentence or remand for resentencing not to exceed the sentence that now must be set aside. *See State v. Wallace*, 327 N.W.2d 85, 88 (Minn. 1982) (stating that on remand the district court may not impose a more severe sentence than the one set aside on appeal).

With the improperly increased criminal history score, the district court had the option to sentence appellant to consecutive sentences of approximately 259 months or concurrent sentences with a maximum of 281 months. The district court chose the longer concurrent sentence. But with the proper criminal history score, concurrent sentences would only permit a maximum sentence of 202 months.

Appellant cites *State v. Hartfield* for the proposition that this court should reduce his sentence without remand. 459 N.W.2d 668 (Minn. 1990). In *Hartfield*, the supreme court reduced the appellant's sentence without remand after a similar error in computing the criminal history score was made. *Id.* at 671. But in that case, the district court had imposed an upward departure and doubled the presumptive sentence. *Id.* The supreme court simply maintained the upward departure with the new criminal history score and resentenced. *Id.* A remand of that case could not have resulted in a longer sentence than that imposed by the supreme court.

That is not the case here. With the correct criminal history score, the question remains whether appellant should be sentenced to consecutive sentences or concurrent sentences; consecutive sentences would result in a longer prison term than the 202 months requested by appellant. This court can remand cases for the district court to

resentence after an error has been found in assigning criminal history points. *See, e.g.*, *State v. Johnson*, 770 N.W.2d 564, 566 (Minn. App. 2009). There is no compelling reason in this case to reverse without remanding for exercise of the district court's discretion.

Finally, appellant makes four pro se arguments, though none have merit. First, he argues that he was prejudiced because one of the jurors knew defense counsel from a previous job. But appellant alleges no facts to indicate that the juror in question was prejudiced, that prejudice resulted from the failure to dismiss the juror, or that an appropriate objection was made. *See State v. Roan*, 532 N.W.2d 563, 568 (Minn. 1995).

Second, appellant argues that his Sixth Amendment confrontation rights were violated by the state choosing not to call several potential witnesses. That argument fails because the state, or any other party, is under no duty, constitutional or otherwise, to call any particular witnesses. Appellant's Sixth Amendment right to confront witnesses against him has not been violated. *See United States v. Bond*, 552 F.3d 1092, 1097 (9th Cir. 2009) (noting that "it is elementary that litigants are not required to call every witness identified on their witness lists").

Third, appellant argues that his conviction should be reversed because of inconsistent statements made by K.W. and a defense witness. But inconsistent statements by witnesses do not warrant the reversal of a jury verdict. *State v. Lloyd*, 345 N.W.2d 240, 245 (Minn. 1984) ("The resolution of conflicting testimony is the exclusive function of the jury because it has the opportunity to observe the demeanor of witnesses and weigh

their credibility. . . . Even inconsistencies in the state's case will not require a reversal of the jury verdict." (citation omitted)).

Finally, appellant argues that his defense counsel was ineffective in withholding objections. The claim regards two items that are argued with no suggestion that they seriously affected appellant's defense. They do not rise to the level of error necessary to create a reasonable probability "that the outcome would have been different but for counsel's errors." *See State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (citations omitted).

Because there is no merit either in the claim of plain prosecutorial error or in other assertions of error by appellant, we affirm the convictions. We reverse and remand for resentencing with the corrected criminal history score.

Affirmed in part, reversed in part, and remanded.