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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1956**

State of Minnesota,
Respondent,

vs.

Anthony Raymond Kreuter, Jr.,
Appellant.

**Filed September 3, 2013
Affirmed
Larkin, Judge**

Stearns County District Court
File No. 73-CR-11-6942

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

Janelle Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County
Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi Axelson, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his convictions of three fifth-degree controlled-substance crimes, arguing that he was denied his right to a fair trial because the prosecutor improperly vouched for the credibility of the state's main witness during closing argument. Because the alleged, unobjected-to misconduct did not affect appellant's substantial rights, we affirm.

FACTS

Respondent State of Minnesota charged appellant Anthony Raymond Kreuter Jr. with three fifth-degree controlled-substance crimes, and a jury found appellant guilty of each offense. The charges arose from the following circumstances.

On May 23, 2011, an officer of the Eden Valley Police Department met with B.H., a confidential informant, to set up a controlled buy of marijuana from appellant at his home. The officer patted B.H. down and provided him with \$40 in buy money. The officer did not fully search B.H.'s pockets, and after dropping B.H. off a block and a half from appellant's home, the officer briefly lost sight of B.H. At appellant's jury trial, B.H. testified that when he arrived at appellant's home, he gave appellant \$40 and that appellant provided him with \$40 worth of marijuana. The officer testified that he picked B.H. up after the controlled buy and that B.H. provided him with the marijuana he had purchased.

The officer arranged a second controlled buy between B.H. and appellant on May 24. The officer patted B.H. down and provided him with \$120 in buy money and a

tape recorder. The officer dropped B.H. off a block and a half from appellant's home and watched him walk to the home. B.H. testified that when he arrived at appellant's home, he gave appellant \$120 and that appellant weighed and provided him with \$120 worth of marijuana. B.H. recorded his conversation with appellant during the controlled buy, and the recording was played for the jury. The officer testified that he picked B.H. up after the controlled buy and that B.H. provided him with the marijuana he had purchased and the tape recorder. B.H. told the officer that the marijuana was stored under a china cabinet in appellant's bedroom.

On May 25, the officer executed a search warrant at appellant's home. The officer found 43.9 grams of marijuana and items that could be used for smoking or selling marijuana. The officer found the largest amount of marijuana under the china cabinet in appellant's bedroom, consistent with B.H.'s report. Most of the other items were found in appellant's bedroom.

D E C I S I O N

Appellant argues that he was denied his right to a fair trial because the prosecutor committed misconduct by vouching for the credibility of B.H. Near the end of his closing argument, the prosecutor discussed the district court's instructions regarding the circumstances the jury could consider when assessing the credibility of a witness. Specifically, the prosecutor stated:

Again, the last thing I will leave you here with, the Court talked about what you can use to determine weight and credibility of a witness. . . . Their frankness and sincerity or lack thereof. Ladies and gentlemen, you heard [B.H.] testify. I think he was very sincere. He . . . testified exactly the way

it happened. He was frank. He was sincere. He answered the questions. I think you can certainly use that when you're evaluating his testimony.

Appellant did not object to that argument.

“A prosecutor may not personally endorse the credibility of witnesses.” *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006). But a defendant who fails to object to alleged prosecutorial misconduct ordinarily forfeits the right to appellate review of the purported misconduct. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). This court has discretion to review unobjected-to prosecutorial misconduct if plain error is shown. Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). To establish plain error based on a claim of prosecutorial misconduct, the prosecutor's unobjected-to act must constitute error, the error must be plain, and the error must affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302. The burden rests with the defendant to demonstrate error that is plain. *Id.* If the defendant satisfies his burden, the burden shifts to the state to demonstrate that the error did not affect the defendant's substantial rights. *Id.* The state must show that the error was not prejudicial and did not affect the outcome of the case. *See State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998) (“The third prong, requiring that the error affect substantial rights, is satisfied if the error was prejudicial and affected the outcome of the case.”). “If these three prongs are satisfied, [this] court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Ramey*, 721 N.W.2d at 302.

The state argues that the prosecutor's statement was permissible argument regarding B.H.'s credibility and not impermissible vouching. The state therefore

contends that no plain error occurred. *See State v. Wright*, 719 N.W.2d 910, 918-19 (Minn. 2006) (stating that “it is not misconduct for the state to analyze the evidence and argue that particular witnesses were or were not credible”); *State v. Smith*, 825 N.W.2d 131, 139 (Minn. App. 2012) (holding that a prosecutor’s statements that a particular witness was “very sincere” and “very frank in his testimony” were arguments regarding the witness’s credibility that did not constitute improper vouching), *review denied* (Minn. Mar. 19, 2013). *But see State v. Gail*, 713 N.W.2d 851, 866 (Minn. 2006) (stating that vouching occurs “when the government implies a guarantee of a witness’s truthfulness . . . or expresses a personal opinion as to a witness’s credibility” (quotation omitted)); *Swanson*, 707 N.W.2d at 656 (“We hold, however, that the statement ‘the state believes [a witness] is very believable’ is impermissible vouching on its face because the state directly endorsed the credibility of [the] witness . . .”).

We need not decide whether the prosecutor’s statement, “I think he was very sincere,” constitutes error because we conclude that the statement did not affect appellant’s substantial rights. *See State v. Pearson*, 775 N.W.2d 155, 163-64 (Minn. 2009) (holding that a new trial was not necessary based on the third prong of the plain-error test without analyzing the first two prongs). There is sufficient other evidence in the record to corroborate B.H.’s testimony and to establish his credibility without reliance on the prosecutor’s statement. *See Swanson*, 707 N.W.2d at 656 (“Given the strength of the evidence against Swanson and given that the impermissible vouching constituted only a small part of the prosecutor’s closing argument, we hold the statements, while plain error, were not sufficiently prejudicial to warrant a new trial.”). For example, the jury

heard the audio recording of the second controlled buy and the police officer's testimony that the largest amount of marijuana was found under the china cabinet in appellant's bedroom, exactly where B.H. said it would be found. Moreover, the alleged vouching constituted a small portion of the entire closing argument. *See id.*

In sum, the alleged misconduct did not affect appellant's substantial rights and does not necessitate reversal.

Affirmed.