STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1639

State of Minnesota,
Respondent,

vs.

Douglas G. Ibberson,
Appellant.

Filed January 8, 2008
Affirmed
Kalitowski, Judge

Brown County District Court
File No. K3-03-173

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James R. Olson, Brown County Attorney, 519 Center Street, P.O. Box 428, New Ulm, MN 56073 (for respondent)

John M. Stuart, State Public Defender, Leslie J. Rosenberg, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Randall, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

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

KALITOWSKI, Judge

Appellant Douglas G. Ibberson challenges his sentence for first-degree test refusal, arguing that (1) the district court erred in failing to apply the rules of evidence to the

sentencing-jury proceedings; (2) the prosecutor committed misconduct; and (3) the district court erred in instructing the jury on "amenability to probation." We affirm.

D E C I S I O N

I.

Appellant argues that the district court inappropriately admitted hearsay and opinion testimony during the sentencing proceeding to determine whether appellant's offense involved aggravating factors. Because the rules of evidence do not apply to sentencing-jury proceedings, we disagree.

Minn. R. Evid. 1101(b)(3) provides that the rules "do not apply in . . . sentencing." The supreme court has not changed the rule in light of recent decisions of the United States Supreme Court. Accordingly, we conclude that the district court did not abuse its discretion by allowing the admission of hearsay and opinion testimony at appellant's sentencing proceeding.

II.

Appellant claims that the prosecutor committed reversible misconduct by giving his opinion of appellant's character. Because appellant did not object to the prosecutor's statements at trial, and because the statements did not amount to plain error affecting his substantial rights, we disagree.

This court "will reverse a conviction if prosecutorial error, considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Washington*, 725 N.W.2d 125, 133 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007). Minnesota appellate courts have indicated that "district courts are in the best position to monitor the

conduct of prosecutors and assess the impact, if any, of alleged misconduct." *State v. Haynes*, 725 N.W.2d 524, 529 (Minn. 2007).

Reviewing courts use the plain-error doctrine when examining unobjected-to prosecutorial misconduct. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). The plain-error doctrine requires that there be "(1) error; (2) that is plain; and (3) affects substantial rights." *Id.* at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)).

A prosecutor may not give a personal assessment of the evidence. *Washington*, 725 N.W.2d at 134. Also, use of the first-person pronoun "I" may constitute misconduct. *Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004). But a prosecutor is nonetheless permitted to "draw reasonable inferences from the evidence presented at trial." *State v. Ashby*, 567 N.W.2d 21, 28 (Minn. 1997).

Here, we conclude that the prosecutor's statements were not misconduct. The statements were not the prosecutor's personal assessment of the evidence, but rather, logical inferences from the testimony of appellant's probation officers, who testified concerning appellant's attitude and history of blaming others for his problems. Moreover, even if some of the statements were improper, they did not unfairly prejudice appellant because the jury had already heard similar accounts from appellant's probation officers. Accordingly, we conclude that appellant is not entitled to a new trial.

III.

Appellant argues that the district court's jury instruction defining "unamenability to probation" was erroneous. We disagree.

The district court has significant discretion in crafting jury instructions. *State v. Broulik*, 606 N.W.2d 64, 68 (Minn. 2000). A jury "instruction is error if it materially misstates the law." *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

Appellant argues that the district court committed plain error in failing to instruct the jury on the element of intent. But because appellant's only suggested change to the jury instruction proposed at trial was adopted by the district court, appellant has waived this issue subject to our review for plain error. *Griller*, 583 N.W.2d at 740.

Appellant argues that the district court's instruction defining amenability to probation as the likelihood that appellant would comply with the conditions of probation was erroneous. At trial, defense counsel objected to the court's proposed instruction and requested that the court define amenability to probation as "the ability and willingness to comply with conditions of probation." And the instruction given at the close of trial incorporated the language proposed by defense counsel. After defining amenability to probation as the likelihood that appellant would comply, the court went on to say: "In other words, [appellant] is not amenable to probation, if, by his words or actions, he has shown that he is unable or unwilling to conform his actions to the requirements of probation."

We note that there is now a standard instruction for "unamenability to probation." *See* 10 *Minnesota Practice*, CRIMJIG 8, app. A (Supp. 2007). But none was available

when this instruction was given. On this record, we conclude that the jury instructions fairly and adequately explained the law applicable to the case and did not materially misstate the law. Accordingly, the district court did not commit plain error in instructing the jury.

Affirmed.