STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0489

State of Minnesota,
Respondent,

vs.

Jon Lorne Lindberg,
Appellant.

Filed August 12, 2008
Affirmed
Minge, Judge

Anoka County District Court
File No. K3-05-12145

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

Robert M.A. Johnson, Anoka County Attorney, Kristin C. Larson, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303-5025 (for respondent)

Stephen V. Grigsby, 30260 118th Street Northwest, Princeton, MN 55371 (for appellant)

Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Wright, Judge.

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

MINGE, Judge

Appellant challenges his conviction of first-degree burglary, claiming that the prosecutor committed misconduct by knowingly presenting false testimony, disparaging the defense theory during closing argument, and improperly commenting on defense counsel's closing statements during rebuttal. Because we conclude that the prosecutor did not commit misconduct or knowingly elicit false testimony, we affirm.

FACTS

Two men committed a burglary at a residence in Circle Pines in November 2005. The next month, police encountered appellant Jon Lorne Lindberg on an unrelated matter. A search of Lindberg led to the discovery of a social security card stolen during the November 2005 burglary, and Lindberg was subsequently charged with the offense. Following a two-day jury trial, Lindberg was found guilty of first-degree burglary, assault with intent to cause fear, and interference with an emergency call. The district court vacated Lindberg's conviction of interference with an emergency call and sentenced him to 88 months. This appeal followed. Lindberg requested that the appeal be stayed to allow the district court to correct his sentence. The stay was granted, Lindberg was resentenced to 78 months, and the appeal has now been reinstated.

D E C I S I O N

The issues on appeal are whether Lindberg's conviction should be reversed for various incidents of alleged prosecutorial misconduct. If alleged misconduct was not objected to at trial, this court reviews pursuant to the plain-error analysis. *State v. Ramey*,

721 N.W.2d 294, 299 (Minn. 2006). That analysis is: (1) whether error is present; (2) whether the error is plain; and (3) whether the error affected the defendant's substantial rights. *Id*. at 298. Error affects a defendant's substantial rights if there is a reasonable likelihood that the misconduct had a significant effect on the verdict of the jury. *Id*. at 302.

By contrast, where an objection to alleged misconduct has been raised, this court will reverse unless the misconduct was harmless beyond a reasonable doubt, or, stated differently, the verdict is surely unattributable to the misconduct. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006).

I.

The first question is whether the state committed prosecutorial misconduct by disparaging Lindberg's defense theory during closing argument. Lindberg's counsel objected to the challenged statements at issue here. Accordingly, we examine whether misconduct occurred and, if so, whether the guilty verdict was surely unattributable to the challenged conduct. *Mayhorn*, 720 N.W.2d at 785.

When evaluating a claim of prosecutorial misconduct, this court examines the closing argument "as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). A prosecutor is free to argue that there is no merit to a particular defense in view of the evidence or no merit to a particular argument. *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). Prosecutors may also make arguments that reasonably anticipate points the defense counsel will make in closing argument. *Id*.; *see also State v.*

Ashby, 567 N.W.2d 21, 28 (Minn. 1997) (holding as proper a comment that a defendant's allegations are easily made, but that the jury must look at the evidence). However, it is improper for prosecutors to use their closing argument to disparage the defense. *See State v. Griese*, 565 N.W.2d 419, 427 (Minn. 1997). "Disparaging the defense" is usually defined as a prosecutor's effort to belittle a defense in the abstract, for example, by implying that the offered defense is one that defendants raise when nothing else will work. *See Salitros*, 499 N.W.2d at 818; *see also State v. Bettin*, 309 Minn. 578, 579, 244 N.W.2d 652, 654 (1976) (holding that the prosecutor improperly commented that an insanity defense is a "pushbutton" defense that defendants raise when they "cannot think of anything" else).

Lindberg claims that the following statements represent prosecutorial misconduct:

> PROSECUTOR: [T]he defense argues . . . that [the victim] made this up because she . . . wanted to pin whoever did it—unknown at the time—with a more serious level of assault. As you heard [the victim] testify[,] she didn't . . . know about the various levels of burglary. She doesn't have any legal training. She works with special education students. But beyond that, the objective evidence, she reported it as a robbery not a burglary. She didn't even know what a burglary was.
>
> *So, what is the point? Why raise that? Why does the defense raise that? Well, that's what they got. They use what they got.*
>
> DEFENSE COUNSEL: Objection, Your Honor. That is a disparag[e]ment of the defense and that is improper argument.
>
> THE COURT: Thank you. Next point please.
>
> PROSECUTOR: Next, the Mace. They say the Mace was never found . . . .

Lindberg argues that these comments represent prosecutorial misconduct because the statements (1) "suggest[] to the jury that the only reason that the defense raised the issue

. . . was because that is the kind of defense defendant[]s opportunistically raise in order to win trials"; (2) "improper[ly] comment on the fact that [Lindberg] has no burden to produce evidence"; and (3) "also improperly comment[] on the exercise of the right to trial . . . [because] [t]elling the jury the defense theory is an opportunistic response to the prosecution[']s evidence . . . suggests that the trial itself is merely a platform for guilty defendants to search for any argument at any cost to avoid admitting their guilt."

The state concedes that the statement "they use what they got" may have been unartful. However, as noted previously, prosecutors are allowed to argue that a defense theory has no merit or is implausible based on the evidence produced at trial. *Salitros*, 499 N.W.2d at 818. During the trial, Lindberg suggested during cross-examination that the victim was exaggerating the seriousness of the burglary and assault because she wanted stiffer penalties for the perpetrators. The prosecutor challenged the plausibility of this suggestion during closing argument by noting that the victim had no legal knowledge of the state's burden relative to the differing degrees of burglary or assault. Examining the entirety of the transcript, it is apparent that the prosecutor's primary motivations were to respond to credibility attacks made against the victim during the trial and address Lindberg's anticipated closing argument.

Moreover, even if misconduct occurred, we must determine whether it was harmless beyond a reasonable doubt. Lindberg promptly objected to the comment "[t]hey use what they got," the district court immediately directed the state to reach its next point, and the prosecutor quickly moved on. To prove beyond a reasonable doubt that Lindberg entered the victim's home without consent and, once inside, committed an

act with intent to cause fear of immediate bodily harm or death, the state presented extensive testimony from the victim, the investigating police, and Lindberg's own half-brother. The remark Lindberg challenges on appeal followed an attempt by the prosecutor to respond to credibility attacks against the victim. Even if the comment was inappropriate, the prosecutor's comment was a fleeting statement within the context of the entire closing argument.

Accordingly, we conclude that, based on our examination of the trial record and the closing argument as a whole, the challenged statements do not rise to the level of prosecutorial misconduct and, regardless of whether they constituted misconduct, they did not contribute to Lindberg's conviction.

II.

Second, Lindberg contends that it was misconduct for the prosecutor to argue "[that Lindberg's] closing argument invoked the flag in order to avoid confronting the facts." Lindberg did not object to the challenged statements, and we therefore consider this claim of misconduct under the *Ramey* plain-error test.

During closing argument, Lindberg's counsel stated that "jurors have sat and heard cases for about 700 years. There have been about 220 years approximately that they have done so in courtrooms in which that flag has presided over us." In the state's subsequent rebuttal closing, the prosecutor began his remarks as follows:

> First of all, the defense spent almost half the closing argument going on and on about history and the flag and the country and proof beyond a reasonable doubt . . . instead of really focusing on the facts. And those things are obviously very important. But what it comes down to is reasonableness.

Lindberg provides little argument to support a conclusion that this statement represented plain error. *See Ramey*, 721 N.W.2d at 302. Although the rhetorical riposte was gratuitous, the challenged statement, viewed in light of the entire closing, is not so prejudicial as to warrant a new trial. *See Griese*, 565 N.W.2d at 428 (noting that failure to object or seek a curative instruction weighs heavily against granting the remedy of a new trial and concluding that any improper conduct by the prosecutor was not so prejudicial that the defendant was denied a fair trial). Here, the prosecutor acknowledged that Lindberg's topics were important before moving on to present his remaining points.

In sum, we conclude that Lindberg fails to show that the challenged statement represented plain error and denied him a fair trial.

III.

Finally, Lindberg contends that the state committed prosecutorial misconduct and violated his due process rights by knowingly presenting false testimony. Lindberg argues that, because two state witnesses presented contradictory accounts, the state must have known that one of the witnesses was lying. At trial, Lindberg did not object to the testimony or raise an issue of prosecutorial impropriety. Rather, Lindberg used the contradictory testimony in an attempt to weaken the credibility of the state's primary witness. Accordingly, we again review the unobjected-to conduct under the *Ramey* plain-error analysis.

"[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v.*

Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177 (1959). "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 766 (1972) (quotation omitted). The same result follows when the state, although not soliciting false evidence, allows such evidence to go uncorrected when it appears. *Id.* (citing *Napue*, 360 U.S. at 269, 79 S. Ct. at 1177.) A new trial is required if false testimony could in any reasonable likelihood have affected the judgment of the jury. *Napue*, 360 U.S. at 271, 79 S. Ct. at 1178.

Here, the state called two witnesses who ultimately provided conflicting testimony. To prove burglary in the first degree, assault with intent to cause fear, the state needed to show, in part, that Lindberg entered a building or remained in the building without the consent of the person in lawful possession of the premises. *See* Minn. Stat. § 609.582, subd. 1 (2004). The victim, the state's primary witness, testified that "[t]wo men pushed in—kicked in my door and came in the house screaming."

The state later called A.S., Lindberg's half brother, who accompanied Lindberg during commission of the offense. Before A.S. testified, the district court discussed the nature of his testimony with the parties outside the presence of the jury. In previous discussions with the state, A.S. had apparently agreed that, in exchange for his truthful testimony about the offense, the state would consider allowing him to plead to a lesser charge. The district court asked the prosecutor whether the agreement "compels [A.S.] to testify today or in this trial at least?" The prosecutor replied, "[w]e will see. I haven't had any significant contact [with A.S.] since [the statement was given]."

On the witness stand, A.S. stated that he and his brother "knocked on the door" and the victim "stepped to the side with plenty of room as to offer us entry, and we stepped in." A.S. denied that his demeanor had been overly aggressive. This testimony appeared to take the state by surprise. The prosecutor attempted to impeach A.S. with his earlier statement, but the district court sustained an objection to the impeachment as an improper attempt to refresh memory.

During closing argument, the prosecutor stated that the jury had to be wondering why the state called A.S. to the stand. The prosecutor explained:

> He didn't help very much. But think about it in this way. The state called [A.S.] because even in his position, his brother, his own brother is on trial for this serious crime. He's been charged with the same crime. Even in that position, he corroborates much of what [the victim] testified to. And if he's willing to go that far under his circumstances, you know [the victim] is telling the truth.

Based on our review of the record, we conclude that the state hoped, but was not entirely sure, that A.S.'s testimony would follow the content of the earlier statement provided to the state in exchange for the possibility of a reduced charge. Instead, A.S.'s testimony departed from his prior statement and he contradicted parts of the victim's account of the burglary. This testimony surprised the prosecution, but it does not show that the prosecutor knowingly presented testimony it knew to be false.

In sum, because there is no evidence that the state knew it would be presenting false testimony, no evidence that the prosecutor attempted to deliberately deceive the

jury, and no indication that any evidence came to light that needed to be corrected, we conclude that the record does not support a finding of error.

Affirmed.

Dated: