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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0893**

State of Minnesota,
Respondent,

vs.

Howard B. Simmons,
Appellant.

**Filed August 12, 2008
Affirmed
Willis, Judge**

Hennepin County District Court
File No. 06064747

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

Mike Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Willis, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

WILLIS, Judge

Appellant challenges his conviction of felony domestic assault, arguing that the district court abused its discretion by allowing certain testimony and that the prosecutor committed misconduct. We affirm.

FACTS

In September 2006, Bloomington Police Officer Kristin Molstad and her partner responded to a report of a domestic assault at a home on York Avenue South. On their way to that address, the officers received a dispatch that the man allegedly involved in the domestic assault, appellant Howard B. Simmons, was at a different address in Bloomington. The officers went to the second address, picked up Simmons, briefly interviewed him, and took him to the home on York Avenue South, which belonged to Simmons's girlfriend, K.F. During the interview, the officers saw a cut above Simmons's eye, which Simmons attributed to K.F.

When the officers reached K.F.'s house, they saw her spitting, coughing, vomiting, and rubbing her neck. Officer Molstad noticed that K.F.'s voice was "extremely raspy" and that she was "very, very upset." Initially, K.F. refused to speak with Officer Molstad and stated only that she did not want Simmons to go to jail. Shortly thereafter, K.F. told Officer Molstad that she and Simmons had argued, Simmons had choked her, and she had hit Simmons. Officer Molstad saw a "long, red blotchy area" on one side of K.F.'s neck and a small cut on the other side, but K.F. refused to provide a taped statement or to allow officers to photograph the injuries.

Simmons was charged with domestic assault by strangulation, in violation of Minn. Stat. § 609.2247, subd. 2 (2006). At trial, K.F. testified that (1) Simmons had not choked her; (2) she had lied to police on the day of the incident because she thought that she was going to be arrested for assaulting Simmons; and (3) her coughing and throat pain were the results of a lung disease. Officer Molstad testified that she arrested Simmons because she determined that he was the “primary aggressor” in the incident. The state also introduced the tape recordings of two phone calls to K.F. that Simmons made while he was in jail, both of which inculpated Simmons. The jury found Simmons guilty, and he was sentenced to 30 months’ imprisonment. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by allowing Officer Molstad to testify that Simmons was the primary aggressor.

Simmons contends first that he is entitled to a new trial because the district court failed to exclude “improper opinion testimony from a police officer that weighed the credibility of the witnesses.” An appellant who challenges an evidentiary ruling has the burden of establishing that the district court’s ruling was an abuse of discretion and that the appellant was thereby prejudiced.¹ *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). A defendant is prejudiced when an evidentiary error “significantly affected the verdict.” *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995). An evidentiary error

¹ Simmons claims that under *State v. Robinson* the appropriate standard of review here is de novo. See 718 N.W.2d 400, 409 (Minn. 2006). But *Robinson* involved a purely legal question—the interpretation of a United States Supreme Court decision—and the *Robinson* court determined that a district court had incorrectly interpreted that decision. Unlike *Robinson*, this case involves the district court’s discretion to admit evidence.

significantly affects the verdict when there is a “reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted.”

Id.

Simmons argues that Officer Molstad “interfered with the jury’s province by testifying that, in her opinion, [he] was the aggressor.” Because witness credibility is for the jury to determine, one witness cannot vouch for or against the credibility of another witness. *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995) (concluding that it was improper for a police officer to testify that “I had no doubt whatsoever that I was taking a truthful statement”); *see also State v. Ellert*, 301 N.W.2d 320, 323 (Minn. 1981) (holding that a district court improperly admitted a police officer’s testimony that it was his opinion that the defendant had lied to him).

At trial, the prosecutor asked Officer Molstad why she had not arrested K.F., and Officer Molstad responded that she did not arrest K.F. because she is trained to determine who the “primary aggressor” is in “domestic assault situations” and that she determined that K.F. was “not the primary aggressor.”

We conclude that Officer Molstad’s testimony was not improper vouching. Improper vouching occurs when a witness testifies that another witness is telling the truth or that the witness believed the other witness. *See State v. Ferguson*, 581 N.W.2d 824, 836 (Minn. 1998). Officer Molstad did neither of those things; she merely recounted her observations of the scene of the crime and explained why she arrested Simmons but not K.F. And Officer Molstad’s conclusion that Simmons was the primary aggressor was not testimony that she believed one party and disbelieved another.

In support of his argument, Simmons cites *State v. Hogetvedt*, in which a police officer offered opinion testimony that had already been ruled inadmissible about the ultimate fact at issue in an assault trial. 623 N.W.2d 909, 914 (Minn. App. 2001), *review denied* (Minn. May 29, 2001). But *Hogetvedt* is distinguishable. There, under circumstances that this court characterized as “egregious,” this court ordered a new trial, stating that “either [the officer] intentionally ignored the [district] court’s instruction, or the state’s attorney failed to follow the [district] court’s specific instruction.” *Id.* at 915. Here, unlike in *Hogetvedt*, Officer Molstad’s testimony had not been ruled inadmissible and did not go to the ultimate fact at issue.

Even if we were to decide that the testimony was improper, we conclude that it did not prejudice Simmons. First, the evidence of Simmons’s guilt was strong. *See Bolte*, 530 N.W.2d at 199 (stating that “overwhelming evidence” of a defendant’s guilt is a relevant consideration in determining whether there is a reasonable possibility that an evidentiary error significantly affected a verdict). Officer Molstad testified that K.F. told her on the date of the incident that K.F. had been choked. Additionally, Officer Molstad testified that K.F. was vomiting, coughing, and having difficulty breathing and that she had noticed red marks and a cut on K.F.’s neck. And a nurse testified regarding the symptoms of strangulation, which were consistent with Officer Molstad’s observations. The state also introduced the tape-recorded statement that K.F. made to a detective on the day after the attack, in which K.F. said that Simmons had choked her, and the state played the tape recordings of two phone calls that Simmons made to K.F. from jail, in which K.F. said that Simmons had strangled her. Finally, Officer Molstad’s statement

was limited, comprising only a few lines of testimony out of a trial transcript more than 100 pages long. *Cf. State v. Haynes*, 725 N.W.2d 524, 530 (Minn. 2007) (concluding, in the context of prosecutorial misconduct, that the isolated nature of a statement decreased the effect that it had on the jury).

II. The prosecutor did not commit misconduct by referring to domestic-abuse themes during closing argument.

Simmons contends next that the prosecutor committed misconduct amounting to plain error during her closing argument by “referring to prejudicial domestic abuse themes that were not presented at trial.” Simmons did not object to these statements at trial. Prosecutorial misconduct that was not objected to is analyzed under the plain-error standard, which requires that a defendant establish that an error occurred and that the error was plain. *State v. Ramey*, 721 N.W.2d 294, 299, 302 (Minn. 2006). If the defendant does so, the burden shifts to the state to establish that the misconduct did not prejudice the defendant’s substantial rights. *Id.* at 300. The state meets this burden if it can show that there is no reasonable likelihood that the misconduct had a significant effect on the jury’s verdict. *Id.* at 302.

It is error for a prosecutor to refer to facts outside the record. *State v. Bailey*, 677 N.W.2d 380, 404 (Minn. 2004). But a prosecutor has considerable latitude during closing argument and has the “right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom.” *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). Additionally, a prosecutor “is free to argue that particular witnesses were or were not credible.” *State v.*

Fields, 730 N.W.2d 777, 785 (Minn. 2007) (citing *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003)).

Simmons claims that the prosecutor improperly told the jury that (1) he and K.F. had an “unhealthy relationship”; (2) K.F. was afraid of “retaliation”; and (3) K.F. stayed with Simmons despite the abuse. Simmons identifies the following portion of the prosecutor’s closing argument as relying on information not presented at trial, and therefore, amounting to plain error:

Lying. We talked about it during jury selection and all of you said that people lie and one of the reasons that people lie is to protect someone else.

...

And we talked during jury selection about people who are in unhealthy relationships, people who are in relationships that they know aren’t good for them, but yet they stay. And we talked a little bit about the reasons why people stay, why people put up with the abuse, even though they know they shouldn’t – reasons like retaliation, reasons like the fear of being alone or having children with that person – that for whatever reason they stay and they put up with the abuse and they cover up for the abuse of that person that perpetrates.

We find Simmons’s argument unpersuasive. First, the charged offense—“domestic assault by strangulation”—makes it difficult for Simmons to argue that the prosecutor’s discussion of domestic-abuse themes was error. The jury was aware, by virtue of the charge, that this was a domestic-assault case. Second, Simmons’s argument fails because the prosecutor’s statements are supported by evidence in the record. The record contains evidence that (1) strongly suggested that Simmons pressured K.F. to recant her statements to police and lie at trial; (2) K.F. feared retaliation and did not want Simmons to be arrested because his family “would hate her, they would be mad at her for

that”; and (3) K.F. and Simmons had a physically abusive relationship and that she nevertheless stayed with him. Because the statements were based on evidence in the record, we conclude that the prosecutor did not commit misconduct.

Affirmed.