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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1469**

State of Minnesota,
Respondent,

vs.

Trent Alexander Crumble,
Appellant.

**Filed October 28, 2008
Affirmed
Klaphake, Judge**

Ramsey County District Court
File No. K5-06-3442

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

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Lawrence Hammerling, Chief Appellate Public Defender, Michael F. Cromett, Assistant State Public Defender, 540 Fairview Ave N., #300, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Trent Alexander Crumble was convicted by a jury of possession of a firearm by an ineligible person. Appellant argues that the conviction should be vacated

or reversed based on (1) the prosecutor's misconduct during closing argument in referring to witnesses' out-of-court statements that were contrary to their trial testimony and credibility inferences to be drawn from such contradictions, and (2) insufficient evidence to support the verdict. Because the state's closing argument did not constitute misconduct and because the verdict is supported by sufficient evidence, we affirm.

D E C I S I O N

I. Plain Error

“Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial.” *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008) (quotation omitted). However, a party's failure to object to a trial error generally precludes this court's authority to consider the issue. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). An unobjected-to error, including one involving prosecutorial misconduct, can be reviewed by this court only if it constitutes plain error affecting substantial rights. Minn. R. Crim. P. 31.02; *Jones*, 753 N.W.2d at 686; *Ramey*, 721 N.W.2d at 297.

“The plain error standard requires that the defendant show: (1) error; (2) that was plain;¹ and (3) that affected substantial rights. If those three prongs are met, [this court] may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Strommen*, 648 N.W.2d at 686 (citations and quotations omitted). The defendant has the burden of proof on the first two prongs, and

¹ An error is plain if it is clearly or obviously contrary to case law, a rule, or a standard of conduct. *Ramey*, 721 N.W.2d at 302; *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002).

once those are met, the state must prove that the error was not prejudicial by showing that the misconduct did not affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 301-02.²

Prosecutorial misconduct includes a violation of “clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state’s case law. When assessing alleged prosecutorial misconduct during a closing argument, we look to the closing argument as a whole, rather than to selected phrases and remarks.” *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (citations and quotations omitted). Appellant argues that the prosecutor committed misconduct by asking the jury to use evidence admitted for impeachment as substantive evidence, contrary to law and the district court’s instructions. The prosecutor suggested in his closing argument that witnesses’ trial testimony was untruthful. These witnesses testified that they did not see appellant’s gun in the car in which they were riding with appellant when the car was stopped by police. This was contrary to their pretrial statements. The prosecutor then suggested that if their trial testimony was a lie, then the jury should infer that the witnesses saw the gun in the car. It is this suggested inference that appellant claims constitutes prosecutorial misconduct.

We conclude that the prosecutor’s statements were not misconduct. He neither repeated the out-of-court statements in his closing argument nor suggested that the jury should believe the truth of those statements. He directed the jury to use the out-of-court

² Substantial rights are affected when the misconduct “would have had a significant effect on the verdict of the jury.” *Ramey*, 721 N.W.2d at 301-02 (quotation omitted).

statements only to determine whether the witnesses were telling the truth on the stand, which is permissible. He then suggested that these inconsistent statements, coupled with the witnesses' demeanor on the stand, showed that they had lied on the stand. And, if the witnesses were lying on the stand, then that would imply that they saw the gun in the car. As trier of facts, the jury was free to infer from this testimony that the witnesses were not credible and that no inferences should be drawn from their testimony, or that they were credible but that only one version of the facts should be given credence. *See State v. Bolstad*, 686 N.W.2d 531, 544 (Minn. 2004) (ruling that the state has a right to present all legitimate arguments on the evidence, including all proper inferences to be drawn from the evidence). For these reasons, we conclude that the prosecutor's statements in closing argument did not constitute misconduct; no error occurred at trial; and appellant failed to meet his burden of proof to show plain error. *See State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003) (ruling prosecutor did not commit misconduct by analyzing the evidence and "argu[ing] that particular witnesses were or were not credible").

II. Sufficiency of Evidence

Appellant next argues that the evidence was insufficient to prove he possessed a firearm. This court reviews a claim of insufficient evidence to determine whether a jury could reasonably find from the facts in the record and any legitimate inferences that can be drawn from those facts that the defendant was guilty. *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003). And when a conviction is based on circumstantial evidence, it will be upheld if reasonable inferences from that evidence are consistent with defendant's guilt and inconsistent with any rational hypothesis except that of guilt. *State v. Race*, 383

N.W.2d 656, 661 (Minn. 1986). It is appellant's burden to establish a claim consistent with a rational hypothesis other than guilt. *Id.* at 662. But the evidence need not exclude all possibility that the defendant is innocent; it must only make such a "theory seem unreasonable." *State v. Anderson*, 379 N.W.2d 70, 78 (Minn. 1985). Despite the stricter standard of review used when a conviction is based on circumstantial evidence, we must defer to a jury's verdict because the jury is in the best position to evaluate the circumstantial evidence surrounding a conviction. *Id.* at 75.

Appellant claims that circumstantial evidence of his DNA profile found on the gun can be explained by his physical presence in the car near to where the gun was found. Appellant suggests the possibility that his DNA could have transferred to the gun without his ever having held or touched the gun. The only evidence presented to the jury to support this theory was from a BCA forensic scientist who testified that DNA could fall through the air and drop on something in *small amounts*. She was never asked directly, nor did she testify, whether it was likely or reasonable that the quantity of appellant's DNA found on the gun, which made it the predominant profile found on the gun, could have "migrated" to the gun by falling through the air. Appellant also claimed that because the gun had been placed on the seat of the car moments after his hands had touched this seat, the DNA could have transferred to the gun from where it had been on the seat. There was no testimony concerning the likelihood of this, either. There was also testimony showing that appellant's hands were tucked into his coat sleeves and had not touched the car seat.

An alternative theory will not justify a new trial if it is not plausible or supported by the evidence, nor will this court overturn a conviction on the basis of mere conjecture. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). We conclude that appellant's theory is unreasonable in the context of all of the evidence admitted at trial. The DNA evidence was not the only evidence of guilt. Evidence of appellant's position in the car and the position of the gun in the seat pocket in front of him showed the likelihood that the gun was under his control. The witnesses who testified that appellant did not have a gun were impeached with their prior inconsistent statements, demeanor, and their relationship to appellant. Appellant has not met his burden of establishing a claim consistent with a rational hypothesis other than guilt.

Appellant also claims that even if the circumstantial evidence showed that he touched the gun, this evidence, at most could have established only his fleeting possession of the gun, which he asserts is insufficient to sustain a conviction for possession of a firearm by an ineligible person, citing *State v. Houston*, 654 N.W.2d 727 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003). Appellant further argues that no evidence explained the presence of his DNA on the gun. Appellant suggests that he had only innocent and fleeting contact with the gun and this claim is consistent with a rational hypothesis other than guilt. We also reject these arguments. Minnesota has not adopted the proposition that fleeting control of a weapon does not qualify as possession of the weapon for purposes of criminal culpability. *Id.* at 734. Moreover, the statute prohibiting persons convicted of crimes of violence from possessing firearms does not distinguish between possession and fleeting possession. Minn. Stat. § 624.713, subd. 1

(2004). This court cannot add to a statute “what the legislature purposely omits or inadvertently overlooks.” *Ullom v. Indep. Sch. Dist. No. 112*, 515 N.W.2d 615, 617 (Minn. App. 1994) (quotation omitted). Therefore, giving the jury verdict due deference, the record includes sufficient evidence to sustain appellant’s conviction.

Affirmed.