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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2193**

Rahbi Lee Byrd,
petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed September 23, 2008
Affirmed
Hudson, Judge**

Hennepin County District Court
File No. 06028088

Lawrence Hammerling, Chief Appellate Public Defender, Marie Wolf, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, Minneapolis, Minnesota 55487 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HUDSON, Judge

Following a jury trial in July 2006, appellant Rahbi Lee Byrd was convicted of felony fifth-degree controlled substance crime (possession of cocaine) and misdemeanor fleeing a peace officer but acquitted of misdemeanor obstructing legal process. Minn. Stat. §§ 152.025, subs. 2(1), 3(a); 609.487, subd. 6; 609.50, subs. 1(1), (2), 2(3) (2004 & Supp. 2005). No direct appeal was taken.

In September 2007, appellant filed a petition for postconviction relief claiming that he is entitled to a new trial due to prosecutorial misconduct. The postconviction court denied his petition, and this appeal follows. When we consider the prosecutor's closing argument as a whole and do not take her statements out of context, we conclude that the prosecutor did not improperly shift the burden of proof or impermissibly vouch for the state's witnesses. We, therefore, affirm the denial of appellant's petition for postconviction relief.

FACTS

On April 25, 2006, appellant was arrested during the execution of a search warrant of an apartment in Minneapolis. Three police officers testified at trial. The officers testified that after knocking and announcing themselves as police, they entered the apartment. A woman was in the kitchen and appellant was in the living room.

The first officer testified that he entered through the back door and saw appellant run out the open front door. By the time the officer entered the living room, appellant was coming back into the apartment followed by a second officer.

The first officer testified that when appellant refused to get on the ground, he pushed appellant's head down and hit him in the face several times to subdue him. Appellant was handcuffed and searched; the officer testified that he found an unwrapped rock of what he suspected was crack cocaine in appellant's right shoe. A chemist who testified at trial confirmed that the substance was cocaine.

The second officer testified that when appellant ran down the front stairs, he pointed his gun at appellant and told him to stop, but that appellant turned around and ran back up the stairs. The officer testified that he grabbed appellant by the back of the shirt and pushed him. When appellant fell to the floor, the officer thought that he might be retrieving or hiding something under the couch, so the officer testified that he hit appellant on the head and pulled him away from the couch by his belt. The officer testified that appellant continued to resist and that he was only able to handcuff appellant with the help of another officer.

The third officer testified that he was stationed at the front door with a "bunker" shield. The officer testified that he pointed his gun at appellant as appellant was running through the door, yelled at appellant to get down to the ground, and used his bunker to push appellant to the ground. The officer testified that he held appellant down while other officers tried to handcuff him and that when appellant continued to resist, he was struck in the face until he was handcuffed. The third officer testified that he saw the first

officer remove appellant's shoe, reach inside, and retrieve what looked like a rock of crack cocaine.

Appellant testified that he had just moved to Minneapolis. He claimed that he did not know the residents and that a friend had told him that the residents would pay appellant if he helped them move. He testified that he had been in the apartment for about an hour, had helped the residents move some furniture into their car, and was waiting for them to return when the police arrived.

Appellant denied running out of the apartment and denied resisting arrest. Appellant testified that he was ordered to get on the ground, which he did, and that one of the officers hit him five or six times; appellant claimed that he was hit even after he was handcuffed. Appellant then testified that he was taken into the bathroom, where the officers opened his mouth, took off his shoes and socks, and told him to pull down his pants and bend over. Appellant testified that one officer stated "I found something" and pretended to pull something out of appellant's pocket, which was later identified as a piece of crack cocaine. Appellant denied possessing crack cocaine.

D E C I S I O N

"The denial of a new trial by a postconviction court will not be disturbed absent an abuse of discretion and review is limited to whether there is sufficient evidence to sustain the postconviction court's findings." *State v. Hooper*, 620 N.W.2d 31, 40 (Minn. 2000). When, as here, no direct appeal has been taken, a postconviction proceeding can take the place of a direct appeal and can raise issues that could have been raised on direct appeal. *See State v. Knaffla*, 309 Minn. 246, 251–52, 243 N.W.2d 737, 740–41 (1976) (stating

that a defendant is entitled to at least one review of conviction by appellate or postconviction court).

Prosecutorial misconduct that was not objected to is analyzed under the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). That standard requires a showing of (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If a defendant establishes the first two prongs, the burden shifts to the state to show that there was a lack of prejudice and that the misconduct did not affect the outcome of the case; 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. *Ramey*, 721 N.W.2d at 302.

Appellant argues that the prosecutor committed plain error by misstating the burden of proof and by vouching for the state's witnesses during her closing argument. "When reviewing claims of prosecutorial misconduct during closing argument, we consider the argument as a whole, rather than focusing on particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Jones*, ___ N.W.2d ___, ___ (Minn. 2008) (quotations omitted). Thus, in order to adequately analyze these issues, the statements made by both counsel must be considered in context.

At the end of his closing argument, defense counsel stated:

Now, as an officer of the court, I'm not suppose[d] to, nor is the county attorney suppose[d] to say that one person is lying or another is lying. . . . We are suppose[d] to follow the instructions and use the criteria that the Judge gives you in evaluating this, these, the testimony, to find out what you believe and not what you don't believe. But it's actually more complicated than who do you believe or not, or who

don't you believe and that is that for you to convict Mr. Byrd you essentially have to believe whichever version of the State's testimony, you have to believe that beyond a reasonable doubt. So it's not like when you have your kids or something like that and you say what happened and you got one story and then another story and you sit back and say, gee, what happened, who do I believe. So it's not just a matter of that.

So if you go back into the jury room and you sit down and you look at each other and you said, well, you know, who is telling you the truth, who do you believe. It's a little bit more than that. So unless you can say to yourself I believe that the State, the testimony from the State, I believe that beyond a reasonable doubt, then you have to return a verdict of not guilty. Thanks.

The prosecutor then made the following statements in rebuttal:

Who is telling the truth? Who do you believe? That's what defense counsel just said to you. You will have to decide who is telling the truth and who do you believe. We have three officers who have testified under oath regarding their years of experience, the many narcotics investigations they have been involved in, tell you what happened. Keep in mind, ladies and gentlemen, that during the process of executing a search warrant it's pretty chaotic. All the officers are not going to see everything the same way. They are not going to see, they won't see the same things, they won't see it in the same way. There is several, at least five or six officers coming up the back, two officers coming up the front. So if you can imagine all of these officers coming inside of this apartment, it's pretty chaotic. Especially with the fact that the Defendant is running and resisting arrest and all this commotion is going on. Defense counsel would have you focus a lot on what someone saw or didn't see, everyone saw something different. They testified to what they saw.

Now, who do you believe? The Defendant said he didn't run. Three officers saw him running. And even by the Defendant's own testimony he said that he was afraid, he was scared. He saw all these guns drawn. So we don't know why he ran out the front and then ran back into the apartment, but under that chaotic circumstances with a lot going on and being afraid and being scared, don't know why he was

running and which way he was running. And maybe he didn't believe he would get past the two officers in the front and maybe there was no other way but back into the apartment. *So who do you believe.*

Thank you.

(Emphasis added.)

Shifting burden of proof

At trial, the state bears the burden of proving all the elements of an offense beyond a reasonable doubt and the prosecutor is prohibited from shifting the burden of proof to a defendant to prove his innocence. *See State v. Strommen*, 648 N.W.2d 681, 690 (Minn. 2002). Misstatements of the burden of proof are “highly improper” and, if demonstrated, constitute prosecutorial misconduct. *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985). A prosecutor misstates the burden of proof when he or she tells a jury to “weigh the story in each hand and decide which one is most reasonable, which one makes the most sense.” *Strommen*, 648 N.W.2d at 690.

Appellant argues that the above italicized statements made by the prosecutor improperly shifted the burden of proof because the prosecutor “twisted” defense counsel’s argument in order to minimize the state’s burden. While the prosecutor was, in part, responding to defense counsel’s “Who do you believe?” statements, we agree that the prosecutor’s statements come close to misstating the burden of proof.

But when the prosecutor’s closing argument is considered as a whole, it is fairly clear that the prosecutor properly stated the state’s burden of proof and did not suggest that the jury’s task involved a simple weighing of witness credibility. As the postconviction court noted, “the prosecutor informed the jury on multiple occasions, and

made it abundantly clear to the jury, as to the [s]tate's burden of proving each element of each crime charged in the case beyond a reasonable doubt." After examining the record and considering the closing arguments and instructions as a whole, the postconviction court concluded that the prosecutor's "very brief rebuttal argument . . . in which she directed the attention of the jury to the conflict in the testimony, and to resolve the credibility issue," did not constitute plain error. We agree with the postconviction court's analysis and conclude that the prosecutor's closing argument did not improperly shift or misstate the burden of proof.

Vouching

A prosecutor's statements become improper vouching when he "implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted). While it is improper for a prosecutor to express a personal opinion regarding witness credibility, it is not improper for a prosecutor to analyze the evidence and argue that particular witnesses were or were not credible. *State v. Wright*, 719 N.W.2d 910, 918–19 (Minn. 2006).

Appellant argues that the prosecutor committed misconduct by "impliedly" vouching for the state's witnesses when she reminded the jury that the officers had taken an oath before testifying. But we do not believe that the prosecutor's statements rise to the level of improper vouching. *See e.g., State v. Mayhorn*, 720 N.W.2d 776, 786 (Minn. 2006) (holding that the prosecutor's statement during cross-examination, "You wouldn't know the truth if it hit you in the face, would you?" required a new trial); *State v.*

Duncan, 608 N.W.2d 551, 555 (Minn. App. 2000) (reversing and ordering a new trial when prosecutor twice stated during closing argument that the defendant was “lying”), *review denied* (Minn. May 16, 2000). In referring to the officers’ years of experience and the many narcotics investigations they had been involved in, the prosecutor was merely reviewing background testimony that the officers had provided during their testimony. And the prosecutor’s reference to the officers’ testimony as being “under oath” does not rise to the level of the vouching that was “clearly improper” in *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984) (concluding that prosecutor committed misconduct by characterizing state’s witnesses as “honest,” “a woman of integrity,” “honest detectives,” “honest police officers,” and not the “kind of officers who are going to get up here, take the stand, take the oath and tell you something if it isn’t true”).

The postconviction court concluded that the prosecutor’s statements did not amount to impermissible vouching:

The record in this case does not indicate that the prosecutor endorsed the credibility of the testifying police officers. There is nothing in this record that the court could find in which the prosecutor guaranteed a witness’s truthfulness, expressed a personal opinion on the truth of the police officers’ testimony, or in any way carried an inference of knowledge outside the scope of the trial. With respect to the vouching argument, the defendant has failed to meet his burden to demonstrate both that error occurred and that the error was plain.

We agree with the postconviction court’s analysis on this issue.

Because no plain error was committed by the prosecutor during her closing argument, we affirm the denial of appellant's petition for postconviction relief.

Affirmed.