**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-2153**

State of Minnesota,
Respondent,

vs.

Charles Edwin Carpenter,
Appellant.

**Filed September 14, 2010**
**Affirmed**
**Wright, Judge**

Ramsey County District Court
File No. 62-K8-07-004434

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Lansing, Judge; and Collins, Judge.*

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

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

**WRIGHT**, Judge

Appellant challenges his conviction of aiding and abetting third-degree possession of a controlled substance, arguing that the prosecutor committed prejudicial misconduct by diluting the state's burden of proof during closing argument. We affirm.

## FACTS

On November 2, 2007, Ramsey County Deputy Sheriff Joel Leonard was providing off-duty security services at a nightclub. At approximately 2:00 a.m., Deputy Leonard was patrolling the nightclub parking lot in an unmarked squad car when the vehicle in front of him stopped next to a vehicle travelling in the opposite direction. The two drivers reached out of their windows and shook hands. After they talked with each other for 10 to 20 seconds, the two drivers reached out of their windows again. The driver of the vehicle coming toward Deputy Leonard, later identified as appellant Charles Edwin Carpenter, exchanged with the other driver what appeared to be currency for a plastic bag containing a light-colored substance.

Believing he had witnessed a hand-to-hand drug transaction, Deputy Leonard blocked Carpenter's vehicle with his squad car. The other vehicle left the parking lot. Based on the movements of Carpenter and his passenger, Deputy Leonard believed that the two exchanged something while seated in the vehicle. Ramsey County Deputy Sheriff Mark Koderick, who also was providing off-duty security services at the nightclub, arrived and assisted Deputy Leonard with removing Carpenter and the passenger from the vehicle. After arresting the passenger, Deputy Koderick observed a

plastic bag containing a light-colored substance on the ground in front of the passenger. Deputy Leonard observed that the bag's appearance was consistent with the one he saw exchanged between the two drivers.

Carpenter was charged with aiding and abetting third-degree possession of a controlled substance, Minn. Stat. §§ 152.023, subd. 2(1) (three grams or more of a substance containing cocaine), 609.05, subd. 1 (2006). Following a two-day trial, a jury found Carpenter guilty of the offense. This appeal followed.

**D E C I S I O N**

Carpenter argues for the first time on appeal that the prosecutor committed prejudicial misconduct by diminishing the state's burden of proof in closing argument.[1] Although a defendant who fails to object at trial ordinarily forfeits the right to appellate review, *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984), we have the discretion to review unobjected-to prosecutorial misconduct if plain error is established, Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). To establish plain error based on a claim of prosecutorial misconduct, (1) the prosecutor's unobjected-to argument must be erroneous, (2) the error must be plain, and (3) the error must affect the appellant's substantial rights. *Ramey*, 721 N.W.2d at 302 (citing *State v. Griller*, 583

[1] We have recognized a distinction between prosecutorial misconduct and prosecutorial error. *See State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009) (observing that prosecutorial error "suggests merely a mistake of some sort," while prosecutorial misconduct implies a deliberate violation of a rule or practice or a "grossly negligent transgression"), *review denied* (Minn. Mar. 17, 2009). The same standard for review applies to both prosecutorial misconduct and prosecutorial error. *Id*. Although Carpenter does not contend that the prosecutor's conduct was deliberate or grossly negligent, because Carpenter characterizes the conduct as misconduct, we will use that term throughout this opinion.

N.W.2d 736, 740 (Minn. 1998)). An error is plain if it is "clear" or "obvious," *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), or if it "contravenes case law, a rule, or a standard of conduct," *Ramey*, 721 N.W.2d at 302. If the three plain-error factors are established, we then consider whether the error seriously affected the fairness and integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740 (explaining that a court may exercise its discretion to correct a plain error only if such error seriously affected fairness, integrity, or public reputation of judicial proceedings). The burden rests with the appellant to demonstrate that plain error has occurred. *Ramey*, 721 N.W.2d at 302.

If plain error is established, the burden shifts to the state to demonstrate that the plain error did not affect the defendant's substantial rights. *Id*. An error affects substantial rights when it was "prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. If plain error affecting the defendant's substantial rights is established, we assess whether to address the error to ensure the fairness and integrity of the judicial proceedings. *Id.* at 740.

At trial, the state bears the burden of proving each element of an offense beyond a reasonable doubt; the prosecutor shall not shift the burden to a defendant to prove his or her innocence. *Strommen*, 648 N.W.2d at 690. A prosecutor's misstatement of the burden of proof is "highly improper" and, if demonstrated, constitutes prosecutorial misconduct. *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985). When we review a prosecutor's statements to determine whether prosecutorial misconduct has occurred, we examine the prosecutor's arguments as a whole, rather than examining selective phrases

that may be taken out of context or given exaggerated prominence on appeal. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Carpenter alleges that the prosecutor erroneously diluted the state's burden of proof in two ways: (1) by stating that the burden could be met "if the jury 'felt' or 'believed' that certain facts were shown," and (2) by equating proof beyond a reasonable doubt with a lesser burden of sufficiency of the evidence. We examine each argument in turn.

**I.**

Carpenter cites the following four statements that the prosecutor made during closing arguments in which he used the terms "felt" or "believed":

> (1) "I want you to understand that aiding and abetting possession of a controlled substance, and what that means. What it means is that if you felt, based upon the evidence, that the Defendant is guilty of Possession of Cocaine, . . . you can find him guilty."
>
> (2) "If you feel that [the passenger] possessed the Cocaine . . . and the Defendant helped him, aided him by completing the transaction . . . then you can find him guilty, as well."
>
> (3) "Aiding and abetting, as I said, if you believe that he possessed the Cocaine . . . that's enough."
>
> (4) "But, aiding and abetting is broad, and what's a lie? If you feel it was [the passenger] who possessed the Cocaine, and that what the Defendant did was simply aiding or advising him, . . . then you can find him guilty, as well."

Carpenter contends that, by using the words "feel" and "believe," the prosecutor urged the jury to apply a diminished burden of proof. We look to the plain meaning of these

terms to address Carpenter's argument. The definition of "believe" includes "[t]o accept as true or real," and "[t]o credit with veracity." *The American Heritage Dictionary* 169 (3d ed. 1992). The definition of "feel" includes "[t]o believe; think." *The American Heritage Dictionary* 669 (3d ed. 1992). Although another definition of "feel" includes a less cognitive means of determining the facts, *see id*. (defining to "feel" as "[t]o be persuaded of (something) on the basis of intuition, emotion, or other indefinite grounds"), the prosecutor here used the terms "feel" and "believe" in the context of evaluating the case based on the evidence. In doing so, the prosecutor's usage of the term "feel" is synonymous with the term "believe." When considered in the context of the prosecutor's argument as a whole, the prosecutor used the words "feel" and "believe" to argue that, if the jury accepted as true that Carpenter possessed cocaine or aided and abetted the possession of cocaine, the jury could find him guilty of the charged offense. This construction of the terms "feel" and "believe" did not improperly diminish the state's burden of proof.

Moreover, the terms "believe" and "feel" were used in the context of a case that largely turned on the credibility of testimony offered by numerous witnesses. The district court instructed the jury that, "[i]n deciding the believability and weight to be given the testimony of a witness, you may consider" several relevant factors. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (stating that weight and believability of witness testimony are issues for factfinder); *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) (same), *review denied* (Minn. July 15, 2003). Because the only evidence as to whether Carpenter possessed cocaine as alleged was witness testimony, the jury's

determination on the ultimate issue necessarily depended on whether the jury *believed* the state's witnesses or Carpenter's witnesses. In this context, the prosecutor's references to whether the jury believed or felt that Carpenter possessed the cocaine were apposite. *See The American Heritage Dictionary* 669 (3d ed. 1992) (defining "feel," in part, as "[t]o believe"). We nevertheless discourage the use of the term "feel" in this context because it shares an alternate connotation of decision-making based on emotion rather than evidence and logic. Based on this record and the context in which the challenged statements were made, however, the prosecutor's use of the terms "feel" and "believe" was not an improper dilution of the state's burden of proof. Therefore, the use of these terms in this particular context does not constitute plain error.

**II.**

Carpenter also contends that the prosecutor erroneously diluted the state's burden of proof by equating proof beyond a reasonable doubt with a lesser evidentiary standard of sufficiency of the evidence. Whether evidence is sufficient to support a conviction is a judicial determination. *State v. Thaggard*, 527 N.W.2d 804, 812 (Minn. 1995). By contrast, a jury must determine whether the evidence proves beyond a reasonable doubt that the defendant is guilty before it can return a guilty verdict. *Id*. "[I]t is not enough that the jury determines in some dispassionate way that the evidence 'supports' a conviction." *Id*. During closing argument, the prosecutor responded to questions Carpenter raised throughout the trial regarding failure of the investigators to obtain fingerprint evidence, DNA evidence, and surveillance videotapes from the parking lot. After describing possible reasons for not obtaining such evidence, the prosecutor stated

that "there is sufficient evidence to find this Defendant guilty of Violation of Controlled Substance Law in the 3rd degree."

When viewed in isolation, the prosecutor's statement appears to improperly imply that the state need only prove that the evidence is sufficient to support a conviction rather than prove Carpenter's guilt beyond a reasonable doubt. *See id.* (addressing prosecutor's improper argument that jury should "determine if the evidence was sufficient to convict" (emphasis omitted)). But when the prosecutor's argument in this case is considered in its entirety, it is distinguishable from the improper argument in *Thaggard* in three significant respects. First, the prosecutor in *Thaggard* repeatedly stated throughout the closing argument that the jury must look to the sufficiency of the evidence. *Id*. Indeed, the *Thaggard* court characterized the argument as a "constant refrain." *Id*. Here, the prosecutor's brief statement that there is "sufficient evidence to find this Defendant guilty" constitutes one sentence in a closing argument that comprises 20 transcript pages. It was not a "constant refrain."

Second, the prosecutor in *Thaggard* argued to the jury that its role was "to determine if the evidence was sufficient." *Id*. (emphasis omitted). In doing so, the prosecutor incorrectly instructed the jury that the state's burden was less than proof beyond a reasonable doubt. Here, the prosecutor's statement that the evidence was sufficient to find Carpenter guilty of the charge was in response to the defense theory that there was insufficient evidence to convict Carpenter because law-enforcement officers did not obtain fingerprints, DNA, trace evidence, or surveillance videos. Unlike the

prosecutor's argument in *Thaggard*, the prosecutor's reference to the sufficiency of the evidence in this case was not directly linked to the state's burden of proof.

Finally, the *Thaggard* prosecutor's final admonition to the jury was, "find him guilty you must do because the evidence supports it." *Id.* This final statement emphasized the prosecutor's repeated arguments that the jury should return a guilty verdict if it determined that the evidence was sufficient to convict. By contrast, the prosecutor here began his closing argument with a lengthy discussion about the state's burden to prove Carpenter's guilt beyond a reasonable doubt. The prosecutor also emphasized the correct burden of proof during the state's rebuttal argument, accurately addressing the burden of proof throughout the transcript's last full page of the rebuttal argument. The prosecutor's last statement to the jury was, "I ask you . . . to find this Defendant guilty beyond a reasonable doubt[.]" When reviewing a prosecutor's closing arguments, we examine them "as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *Walsh*, 495 N.W.2d at 607. Although the prosecutor on one occasion stated that "there is sufficient evidence to find this Defendant guilty" of the charged offense, when this statement is examined in the context of the prosecutor's entire argument, the prosecutor did not commit plain error by improperly diluting the state's burden of proof.

Even if the prosecutor's statements constituted error, the plain-error standard would not be met because Carpenter's substantial rights were not affected. *See Ramey*, 721 N.W.2d at 302 (articulating plain-error standard). When assessing whether the state has met its burden to demonstrate that the error did not affect a defendant's substantial

rights, we consider the strength of the evidence against the defendant, the pervasiveness of the improper conduct, and whether the defendant had an opportunity, or made any efforts, to rebut the improper conduct. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). Here, the evidence in support of Carpenter's conviction was strong. It included eyewitness testimony from Deputy Leonard about his observation of Carpenter exchanging money for a small plastic bag that contained a light-colored substance and appeared to be the same small plastic bag of cocaine that Deputy Koderick found near the passenger after he left the vehicle. As addressed, the prosecutor's statement regarding sufficiency of the evidence was very brief, comprising only one sentence in a lengthy closing argument. The prosecutor otherwise emphasized the state's burden of proving guilt beyond a reasonable doubt. And importantly, the district court properly instructed the jury as to the burden of proof. *See State v. Buggs*, 581 N.W.2d 329, 342 (Minn. 1998) (stating that any error in prosecutor's questions regarding burden of proof was "nonprejudicial and harmless in light of the [district] court's clear and thorough instructions that the appellant had no burden of proof or duty to produce evidence"). In addition, the district court instructed the jury to disregard either attorney's statement of law if it differed from that of the district court. We presume that the jurors followed the district court's instructions. *State v. Shoen*, 578 N.W.2d 708, 718 (Minn. 1998). Based on the record in its entirety, even if the prosecutor's single reference to the sufficiency of the evidence diminished the burden of proof, we conclude that Carpenter's substantial rights were not affected.

**Affirmed.**