STATE OF MINNESOTA

IN SUPREME COURT

A19-1626

Court of Appeals — Chutich, J.

State of Minnesota,

Respondent,

vs.

Filed: September 15, 2021
Office of Appellate Courts

Melvin DeVaughn Epps,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

Appellant is not entitled to relief under the modified plain error doctrine because the prosecutor's statement during the State's closing argument did not affect his substantial rights.

Affirmed.

O P I N I O N

CHUTICH, Justice.

Appellant Melvin DeVaughn Epps asks us to apply the modified plain error doctrine to determine whether a statement made by the prosecutor during the jury trial warrants a reversal of his first-degree criminal sexual conduct conviction and a new trial. Specifically, the prosecutor told the jury during the State's closing argument that a unanimous verdict on one element of the offense—whether Epps acted with force or with coercion to accomplish the act of sexual penetration—was not required. Epps failed to object to the prosecutor's statement. The jury found him guilty. On appeal, Epps argued that the prosecutor misstated the law. In a precedential opinion, the court of appeals determined that the statutory phrase "force or coercion" in the first-degree criminal sexual conduct statute, Minnesota Statutes section 609.342, subdivision 1(e)(i) (2018), sets forth alternative means for completing the sexual penetration element of the offense; accordingly, a unanimous jury verdict on whether Epps used force or used coercion is not required. We granted Epps's petition for review. Because we conclude that the modified plain error doctrine is not satisfied in this case, we affirm.

FACTS

In 2019, Epps was charged in Hennepin County with first-degree criminal sexual conduct under section 609.342, subdivision 1(e)(i). The State alleged that Epps sexually assaulted an adult female, E.P., in his car after he offered to give her a ride back to her motel from a Super Bowl party in downtown Minneapolis.

The case proceeded to a jury trial. During the trial, E.P. testified that she traveled with a friend from her home in Seattle to Minnesota to attend a Super Bowl party in downtown Minneapolis. E.P. explained to the jury that she was worried about returning to her motel in the suburbs after the party when Epps started a conversation with her and offered to give her a ride. E.P. testified that Epps drove her to an unknown motel in the suburbs, parked his vehicle in a dark back area of the parking lot, and started kissing her. When E.P. said no and pushed him away, she testified that Epps climbed on top of her, pinned her down in the front passenger seat, and sexually assaulted her. E.P. testified that she begged Epps to stop and tried to fight back, but he became aggressive and angry. E.P. became fearful, thinking that Epps might kill her to cover up his sexual assault. When Epps finished the assault and climbed back into the driver's seat of his vehicle, E.P. unbuckled her seatbelt and fled. E.P. was interviewed by the police and agreed to immediately go to the hospital for a sexual assault examination.

The State also presented testimony from E.P.'s friend, the law enforcement officers who responded to the 911 call, the sexual assault nurse who examined E.P., and a law enforcement investigator who subsequently interviewed Epps. One law enforcement officer testified about the visible bruising on E.P.'s arms that looked like someone had forcibly held onto her. The sexual assault nurse also testified that E.P. had bruises on her wrist and arm that were consistent with someone forcibly holding onto her. Photographs from the sexual assault examination, as well as photographs that E.P. later took herself, show contusions on the outsides of E.P's knees, scratches on her back, a contusion around

her right shoulder blade, a hematoma near the cervical and thoracic regions of her spine, bruising around her spine and her pelvic bones, and bruising around her wrists.

Epps testified and told the jury that he had consensual sexual intercourse with E.P. twice, the first time in the lobby bathroom of a nearby apartment building and the second time in the front seat of his car. Epps denied sexually assaulting E.P. During cross-examination, Epps was unable to explain how E.P. sustained her extensive injuries.

Before closing arguments, the district court instructed the jury according to standard jury instructions. *See* 10 Minn. Dist. Judges Ass'n, *Minnesota Practice—Jury Instruction Guides, Criminal*, CRIMJIG 12.01, 12.03 (6th ed. 2019). The district court instructed the jury on the use of the verdict form:

> If you find the defendant guilty you will have an additional issue to decide, and the issue will be put to you in the form of questions on the verdict form. The questions are: Did the defendant use force in the commission of the offense? Did the defendant use coercion in the commission of the offense? Did the defendant use both force and coercion in the commission of the offense?

The district court cautioned the jury: "If an attorney's argument contains any statement of the law that differs from the law I give you, disregard the statement." Finally, the district court told the jury that "to return a verdict, whether guilty or not guilty, each juror must agree with that verdict" because it "must be unanimous." Epps did not object to any of the jury instructions.

During the State's closing argument, the prosecutor discussed the fourth element of first-degree criminal sexual conduct:

> The fourth element is that the defendant used force or coercion to accomplish the [sexual] penetration. And in this case, you have both, and if you find the

> defendant guilty, you're going to be asked specifically to break that down, force versus coercion.
>
> . . .
>
> Once again, let's talk about unanimity. So you don't all need to agree that there was either force or coercion in order for this element to be met. So six of you could say: Yep, I think there was force. Six of you could say: There was coercion but not force. That element is still met in that situation. The piece where you have to break it down is if you find the defendant guilty. Then you're asked an additional question: Was there force, was there coercion, or was there both? In those questions, you need to all agree, 12 of you need to agree. But that's only after you've decided whether the State has met that element.

Epps did not object during the prosecutor's closing argument.

The jury found Epps guilty. On the verdict form, the jury responded affirmatively when asked if Epps used both force and coercion:

> Did the defendant use *force* in the commission of the offense? Answer: Yes. Did the defendant use *coercion* in the commission of the offense? Answer: Yes. Did the defendant use *both force and coercion* in the commission of the offense? Answer: Yes.

(Emphasis added.) The district court imposed the presumptive sentence of 156 months in prison.

On appeal, Epps argued that the prosecutor committed a reversible error during the State's closing argument by misstating the law regarding whether the jury must unanimously agree that he accomplished the sexual penetration with force or with coercion. Epps acknowledged that he did not object during the State's closing argument, but asserted that the prosecutor's statement was plain error. He contended that the plain error impacted his substantial rights because the testimony presented to the jury regarding the nature of

the sexual contact was conflicting. Epps asked the court of appeals to reverse his conviction and remand for a new trial to ensure the fairness and integrity of the proceeding.

In a precedential decision, the court of appeals affirmed Epps's conviction. *State v. Epps*, 949 N.W.2d 474, 478 (Minn. App. 2020). Interpreting the plain language of section 609.342, subdivision 1(e)(i),[1] the court concluded that the phrase "force or coercion" presents alternative means for committing the sexual penetration element of the offense and the jury does not need to unanimously agree on which of the two possible means was used by the defendant. *Id.* at 483–84. Applying this interpretation to the facts, the court of appeals determined that the prosecutor did not misstate the law when he suggested that the jury need not reach a unanimous verdict regarding whether Epps used force or used coercion.[2] *Id.* at 486. Accordingly, based on the lack of an error by the prosecutor, the court of appeals found that Epps was not entitled to relief under the modified plain error doctrine.[3]

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[1] During the 2021 special session, the Legislature amended the statute by separating "force or coercion" into different subsections. *See* Act of June 30, 2021, ch. 11, art. 4, § 16.

[2] In a footnote, the court of appeals noted that even if the first-degree criminal sexual conduct statute required a jury to reach a unanimous verdict on whether the defendant acted with force or with coercion, Epps would still not be entitled to a new trial because the jury stated on the special verdict form that Epps used both force *and* coercion. 949 N.W.2d at 486 n.3. Thus, any error in the prosecutor's statement was harmless and did not affect Epps's substantial rights. *Id.*

[3] The court of appeals also concluded that the evidence was sufficient to support Epps's conviction for first-degree criminal sexual conduct. 949 N.W.2d at 487. The court of appeals remanded the case to the district court, however, to allow that court to consider Epps's sentence in light of *State v. Robinette*, 944 N.W.2d 242 (Minn. App. 2020), *aff'd*, ___ N.W.2d ___, 2021 WL 3745545 (Minn. Aug. 25, 2021). 949 N.W.2d at 488.

We granted Epps's petition for review.

ANALYSIS

Ordinarily, a defendant's failure to object to an error during the trial forfeits appellate consideration of the issue. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006); *see also State v. Smith*, 932 N.W.2d 257, 271 (Minn. 2019) ("When a defendant fails to object at trial, the forfeiture doctrine generally precludes appellate relief." (citation omitted) (internal quotation marks omitted)); *State v. Beaulieu*, 859 N.W.2d 275, 278–79 (Minn. 2015). But we have the discretionary power to grant relief when a particularly egregious error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings" even if a party fails to object to the error below. *State v. Huber*, 877 N.W.2d 519, 528 (Minn. 2016) (citation omitted) (internal quotation marks omitted); *see also* Minn. R. Crim. P. 31.02. To invoke this discretionary power, the plain error doctrine must be satisfied.

In *State v. Griller*, we clarified the proper analysis to use when applying the plain error doctrine:

> [B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure the fairness and the integrity of the judicial proceedings.

583 N.W.2d 736, 740 (Minn. 1998) (footnotes omitted). In *Ramey*, we extended the plain error doctrine to unobjected-to claims of prosecutorial error or misconduct[4] but modified

[4] Prosecutorial error and prosecutorial misconduct are separate contentions but the modified plain error standard applies to both. *See State v. Leutschaft*, 759 N.W.2d 414,

the *Griller* analysis to shift the burden of proof between the defendant and the State. 721 N.W.2d at 302. Under this approach, the defendant must establish the existence of an error that was plain, and then the burden shifts to the State to establish that the plain error *did not* affect the defendant's substantial rights. *Id.*

Notably, a negative answer to any one of the three parts of the plain error doctrine may end our analysis and a defendant's quest for relief. *See, e.g.*, *State v. Coleman*, 957 N.W.2d 72, 83 (Minn. 2021) (concluding that the defendant's claim of error was not viable because it could not have affected his substantial rights); *State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008) (granting no relief for the defendant because the alleged error could not have been plain); *State v. Ihle*, 640 N.W.2d 910, 917–19 (Minn. 2002) (analyzing the underlying legal questions and finding no error).

Here, Epps argues that an error occurred, the error was plain, and that plain error affected his substantial rights because the core issue during the jury trial was whether he used force or coercion to accomplish sexual penetration. He contends that the prosecutor's statement during the State's closing argument allowed the jury to "cobble together their findings" rather than unanimously decide whether he used force or coercion. The State counters that the prosecutor's statement during the closing argument was not erroneous because force or coercion are alternative means for completing the offense. But even if the

418 (Minn. App. 2009) (discussing the distinction between prosecutorial misconduct and prosecutorial error but applying the modified plain error standard of review regardless of the characterization), *rev. denied* (Minn. Mar. 17, 2009).

statute is interpreted differently, the State argues that Epps suffered no prejudice because the answers on the verdict form confirm that the jury's verdict was unanimous.

We conclude that the modified plain error doctrine cannot provide relief to Epps because the State has established that his substantial rights were not affected by the alleged error. First, and most importantly, there is an obvious lack of prejudice to Epps. The record, when read as a whole, refutes Epps's claim that the prosecutor's statement caused a lack of jury unanimity. *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (stating that we review a challenge to a prosecutor's statement in closing argument "as a whole"). Epps challenges the following portion of the prosecutor's closing argument:

> So you don't all need to agree that there was either force or coercion in order for this element to be met. So six of you could say: Yep, I think there was force. Six of you could say: There was coercion but not force. That element is still met in that situation. The piece where you have to break it down is if you find the defendant guilty . . . .

Immediately after the above passage, the prosecutor continued:

> Then you're asked an additional question: Was there force, was there coercion, or was there both? In those questions, *you need to all agree, 12 of you need to agree.* But that's only after you've decided whether the State has met that element.

This second portion of the prosecutor's statement—which was omitted in Epps's brief to our court—clearly refers to the verdict form. The district court explicitly instructed the jury as much, stating: "If you find the defendant guilty you will have an additional issue to decide and the issue will be put to you *in the form of questions on the verdict form*." The verdict form lists questions that squarely match up with the second half of the prosecutor's statement. On the verdict form, the jury answered "yes" to each of the

questions. And at the end of the trial, the court polled each of the jury members individually, asking whether the verdict form reflected their "true and correct verdict." Each member of the jury, being duly sworn by the district court, answered in the affirmative. Considering the full context of the prosecutor's statement, the district court's instructions, the verdict form, and the jury polling, it is undisputed that the jury unanimously found that Epps used force, coercion, and both force and coercion to sexually assault E.P. Consequently, Epps's theory of prejudice is completely refuted by the record.

In addition, the State had a strong case against Epps. The evidence at trial almost universally undermined Epps's defense that the sexual intercourse with E.P. was consensual. Specifically, the State introduced pictures of E.P's injuries, as well as testimony from a nurse who explained that the bruises on E.P.'s arms were consistent with being held down under someone's "bodyweight," and her injuries were consistent with a forcible sexual encounter. *See Troxel v. State*, 875 N.W.2d 302, 311 (Minn. 2016) (noting that "fresh-appearing bruises" and abrasions on the victim's thighs were "inconsistent with consensual sexual activity").

Finally, the prosecutor's statement during the State's closing argument was brief and not repeated. The statement consisted of only four sentences in the 28 pages of transcript that comprised the closing argument. *Cf. State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016) (noting that improperly admitted testimony "occupie[d] just three lines in the transcript, while [the witness's] full testimony [ran] to 69 pages"). Because the State has met its burden to establish the third part of the modified plain error doctrine, that Epps's

substantial rights were not affected by the alleged error, we agree with the court of appeals that no relief is warranted in this case.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.