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**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1566**

State of Minnesota,
Respondent,

vs.

Barbara Denise Harris,
Appellant.

**Filed January 15, 2008
Affirmed in part, reversed in part
Willis, Judge**

Washington County District Court
File No. K3-04-5721

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

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respondent)

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Considered and decided by Peterson, Presiding Judge; Willis, Judge; and Wright,
Judge.

UNPUBLISHED OPINION

WILLIS, Judge

Appellant challenges her convictions of driving without a valid license and first-degree driving while impaired, arguing that the state failed to prove an essential element of driving without a valid license and that the prosecutor committed misconduct by vouching for witnesses during closing argument. Because we conclude that the state failed to prove an essential element of the crime of driving without a valid license but that the prosecutor's statements during closing argument did not constitute plain error, we affirm in part and reverse in part.

FACTS

In September 2004, appellant Barbara Denise Harris was charged with driving without a valid license, in violation of Minn. Stat. § 171.24, subd. 5 (2004); and first-degree driving while impaired, in violation of Minn. Stat. § 169A.24 (2004). Prior to a jury trial in March 2006, Harris stipulated to two of the state's allegations: (1) that at the time of the charged offenses, her license had been cancelled as inimical to public safety and (2) that her alcohol concentration was above the legal limit at the time she was arrested. The only question presented to the jury at trial was whether Harris operated or was in physical control of a motor vehicle before her arrest.

At trial, two Oakdale police officers testified that they saw Harris's car pull into her driveway and stop, and as they approached the vehicle they saw Harris sitting in the driver's seat with the car's engine still running. The defense presented a witness who

testified that he, not Harris, was driving the car. Harris was convicted of both charges, and she appeals.

D E C I S I O N

I. The evidence was insufficient to convict Harris of driving without a valid license.

Harris argues that the evidence at trial was insufficient to support her conviction of driving without a valid license because the state failed to prove an essential element of that crime. The state must prove beyond a reasonable doubt “the existence of every element of the crime charged.” *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). One of the elements of driving without a valid license is that the accused “has been given notice of or reasonably should know” that her license has been cancelled. Minn. Stat. § 171.24, subd. 5(2). Harris contends that there is no record evidence establishing this element. The state agrees, conceding that the conviction should be reversed. We therefore reverse Harris’s conviction of driving without a valid license.

II. The prosecutor’s conduct was not plain error.

Harris argues that she is entitled to a new trial on the charge of first-degree driving while impaired because the prosecutor committed misconduct by vouching for the state’s witnesses during closing argument. Harris did not object to the argument at trial. In reviewing a claim of prosecutorial misconduct that was not objected to at trial, appellate courts analyze whether the conduct amounted to “plain error [that] affected the defendant’s substantial rights.” *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). If an appellant establishes that the prosecutor’s conduct amounted to plain error, the state

“bear[s] the burden of demonstrating that [the] misconduct did not prejudice the defendant’s substantial rights.” *Id.* at 299-300. But the conviction will be reversed “only if the misconduct, when considered in light of the whole trial, impaired the defendant’s right to a fair trial.” *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003).

Harris contends that the prosecutor committed plain error by impermissibly vouching for the state’s witnesses when the prosecutor stated, during her closing argument, that the testimony of the Oakdale police officers “was the truth.” A prosecutor may not personally endorse the credibility of witnesses. *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995). But the prosecutor may analyze the evidence and “vigorously argue that the state’s witnesses were worthy of credibility.” *State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977). Accordingly, “[w]e look . . . at the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence,” to determine whether plain error occurred. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993); *see also Powers*, 654 N.W.2d at 679 (holding that a two-sentence statement seeming to express opinion on witness credibility was not misconduct “when viewed in context of the closing argument taken as a whole”).

Here, most of the prosecutor’s closing argument was an analysis of the evidence presented at trial, focusing on the credibility of the witnesses. She argued that the testimony of the defense witnesses was inconsistent and improbable, and that the defense’s theory of the case involved a sequence of events that was factually impossible. She argued that, if the officers’ testimony were false, they would have had to fabricate an elaborate plot to frame Harris. She repeatedly argued that the defense theory “doesn’t

make sense” and concluded by arguing that the officers’ testimony “was the truth.” The prosecutor did not express her personal opinion of the officers’ credibility but rather argued that their testimony was the more credible version of events. In the context of her closing argument as a whole, the prosecutor’s statement that the officers’ testimony “was the truth” was not plain error. Accordingly, we affirm Harris’s conviction of first-degree driving while impaired.

Affirmed in part, reversed in part.