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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2033**

State of Minnesota,
Respondent,

vs.

Jami Tjernagel,
Appellant.

**Filed October 29, 2012
Affirmed
Bjorkman, Judge**

Stearns County District Court
File No. 73-CR-10-4276

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

Janelle P. Kendall, Stearns County Attorney, Carl Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his convictions of driving while impaired (DWI) and driving after cancellation of his driver's license, arguing that the prosecutor committed

misconduct in closing argument by shifting the burden of proof and commenting on appellant's decision not to testify. We affirm.

FACTS

During the afternoon of May 15, 2010, Stearns County Sheriff's Deputy Chad Meemken was patrolling in St. Cloud when he observed a vehicle with expired license-plate tabs. Deputy Meemken recognized the driver as appellant Jami Tjernagel but lost sight of the vehicle before he could effectuate a traffic stop. Deputy Meemken ran the vehicle's license plate on his computer and went to the residence of the registered owner, Margaret Johannes. Deputy Meemken talked to Johannes about the expired tabs, but the vehicle was not at her residence. Deputy Meemken then checked the status of Tjernagel's driver's license and discovered that Tjernagel's driving privileges were cancelled.

Shortly thereafter, Deputy Meemken saw Johannes's vehicle traveling down the alley behind her residence. When the vehicle stopped, Deputy Meemken observed Tjernagel exiting the driver's seat. Deputy Meemken spoke with Tjernagel about his cancelled driver's license and noticed an odor of alcohol coming from him. Deputy Meemken asked Tjernagel to perform field sobriety tests; he agreed. After administering the field sobriety tests, Deputy Meemken believed Tjernagel was under the influence of alcohol and arrested him. Subsequent testing indicated that Tjernagel had an alcohol concentration of .13.

Tjernagel was charged with two counts of felony DWI and one count of gross-misdemeanor driving after cancellation of his driver's license. At trial, Tjernagel's friend

Nathan Cheeseman testified that he, not Tjernagel, was driving Johannes's vehicle on the afternoon in question. Deputy Meemken testified that he was confident he saw Tjernagel driving the vehicle and that Tjernagel never denied driving or questioned why he was being asked to perform field sobriety tests. Tjernagel elected not to testify.

During closing arguments, the prosecutor stated:

[Y]ou don't hear anything from the Defendant or from anyone else at that time that, hey, I wasn't driving. What the heck are we doing here? Why am I taking tests? Why am I following this pen around back and forth, back and forth, to determine whether or not I was driving while under the influence if I wasn't driving, if another individual, my friend, my good friend, who had just ran off with the woman who allows me to live at this house's (sic) keys to the car, that he supposedly was able to use to go get cigarettes. We didn't hear anything about that. And the reason we didn't hear anything about that is because Deputy Meemken's testimony is what happened. Deputy Meemken's testimony is more reliable and more believable. And that's up to you to decide, to make that determination.

Defense counsel did not object during the argument. After the jury was excused to deliberate, defense counsel objected that the prosecutor "shifte[ed] the burden in his closing by stating you didn't hear anything from the Defendant." The district court denied the objection as untimely but also observed that the prosecutor's argument was not improper.

The jury found Tjernagel guilty on all three counts, and the district court sentenced Tjernagel to 60 months' imprisonment. This appeal follows.

DECISION

We review claims of prosecutorial misconduct based on unobjected-to arguments under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 299-300, 302 (Minn. 2006); *see also* Minn. R. Crim. P. 31.02. Under this standard, an appellant must demonstrate that the prosecutor's unobjected-to argument was erroneous and the error was plain. *Ramey*, 721 N.W.2d at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The burden then shifts to the state to prove that the error did not affect the appellant's substantial rights. *Id.* We consider closing arguments in their entirety to determine whether prejudicial misconduct occurred. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

It is improper for a prosecutor to "imply that a defendant has the burden of proving his innocence." *State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009). It also is error for a prosecutor to "allude to the defendant's failure to testify." *State v. Whittaker*, 568 N.W.2d 440, 451 (Minn. 1997) (citing *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233 (1965)). Tjernagel contends that the prosecutor committed both errors by arguing, "[Y]ou don't hear anything from the Defendant or from anyone else at that time that, hey, I wasn't driving," and "We didn't hear anything about that." We disagree.

First, when read in context, the challenged comments clearly relate to Deputy Meemken's testimony that Tjernagel did not *on May 15, 2010*, deny driving or question why he was being asked to perform field sobriety tests. Not only is this interpretation plain from our thorough review of the prosecutor's argument as a whole, but all contemporaneous reactions to the comments are consistent with this interpretation.

Defense counsel not only failed to contemporaneously object to the comments but he responded with an argument that indicated he understood the prosecutor's statements related to Tjernagel's conduct on May 15, 2010, rather than his decision not to testify at trial. Likewise, the district court stated that the prosecutor's comments referred only to Tjernagel's conduct "at the scene."

Second, the prosecutor's argument about Tjernagel's failure to deny *on May 15, 2010*, that he was driving does not shift the burden of proof or comment on Tjernagel's decision not to testify. Rather, it asks the jury to consider the credibility of Cheeseman's testimony, and by extension the viability of Tjernagel's defense that he was not the driver, in light of Deputy Meemken's testimony that Tjernagel never denied driving. This is well within the scope of proper argument for the prosecutor. *See State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006) (stating that a prosecutor may, in closing argument, argue that a witness was or was not credible); *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005) (stating that prosecutor may argue that a particular defense lacks merit). On this record, we conclude that the prosecutor did not commit misconduct.

Affirmed.