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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-0934**

State of Minnesota,
Respondent,

vs.

Roger Vernon Henderson,
Appellant.

**Filed August 6, 2012
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-09-57909

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

Susan L. Segal, Minneapolis City Attorney, Zenaida Chico, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his convictions, arguing that the prosecutor engaged in repeated misconduct, which deprived him of a fair trial. We affirm.

DECISION

Following remand of the state's pretrial appeal, a jury found appellant Roger Vernon Henderson guilty of interfering with an emergency call, disorderly conduct, two counts of domestic assault against his wife, and two counts of domestic assault against his stepson. Appellant argues that his convictions must be reversed because the prosecutor engaged in repeated misconduct, the cumulative effect of which deprived him of a fair trial.

A prosecutor engages in prejudicial misconduct by violating rules, laws, court orders, or this state's caselaw, or engaging in conduct that materially undermines the fairness of a trial. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). A 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).

We review allegations of misconduct using two approaches depending on whether appellant objected at trial. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). There are two harmless-error standards under which to review objected-to misconduct. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (citing *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974)). We review claims of less-serious misconduct to determine "whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.* We review claims of "more serious" misconduct to determine whether the alleged misconduct was "harmless beyond a reasonable doubt." *Id.* This court "will find an error to be harmless beyond a reasonable doubt only if the verdict rendered was

‘surely unattributable to the error.’” *State v. Nissalke*, 801 N.W.2d 82, 105-06 (Minn. 2011) (quoting *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008)).

We apply a modified plain-error analysis to review claims of unobjected-to misconduct. *Yang*, 774 N.W.2d at 559. Under this approach, there must be (1) error; (2) that is plain; and (3) that affected substantial rights. *Id.* If appellant shows plain error, the state must then show that the error did not affect appellant’s substantial rights, “that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). If plain error is established, we will reverse only if the error seriously affected the integrity and fairness of the proceedings. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Appellant argues that the prosecutor committed misconduct by (1) presenting a theme that someone hid evidence in order to hinder the state from doing its job of protecting the victims; (2) attempting to introduce matters previously ruled inadmissible; (3) vouching for the arresting officer’s testimony and offering her personal opinion on witness credibility; (4) belittling the defense and aligning herself with the jury; and (5) making inappropriate facial expressions. We address each allegation in turn.

Improper theme

Appellant argues that the prosecutor implied that someone hid evidence in order to hinder the state from doing its job of protecting the victims, which inflamed the passions and prejudices of the jury. “[A] prosecutor may not seek a conviction at any price.” *State v. Porter*, 526 N.W.2d 359, 362-63 (Minn. 1995). “The prosecutor must avoid

inflaming the jury's passions and prejudices against the defendant." *Id.* at 363. A prosecutor improperly appeals to a jury's passions and prejudices by encouraging a conviction that is based on sympathy for a victim, rather than the evidence. *Rairdon v. State*, 557 N.W.2d 318, 323 (Minn. 1996). But a prosecutor has the prerogative to present an argument that is "not devoid of color." *Id.* at 323 n.5.

Objected-to alleged misconduct

Appellant challenges the prosecutor's reference in her opening statement to a "scapegoat." The prosecutor stated, "I want to tell you that a scapegoat is being used to hide the facts of a crime." She then stated that the jury would hear evidence regarding what appellant's wife, D.H., initially reported to the police and then how "as time passed, [she] changed her story." The district court overruled appellant's objection.

The prosecutor's statement regarding a scapegoat was not improper because when the prosecutor introduced this theme, it was unclear to whom or what she was referring. The prosecutor could have been referring to: D.H. because she reported a domestic assault and then recanted her statement; appellant's developmentally disabled stepson, M.K., who was also a victim in this matter, but was unable to testify because he was ruled to be incompetent; or D.H.'s daughter who assisted D.H. in obtaining an order for protection (OFP) that was later dismissed at D.H.'s request. It is also possible that the scapegoat was the judicial process. The state appealed the district court's pretrial evidentiary rulings.¹ The prosecutor, in stating that the jury would not hear all of the

¹ See *State v. Henderson*, No. A10-224, 2010 WL 3463701 (Minn. App. Sept. 7, 2010) (affirming the district court's decision to exclude statements made by appellant's stepson

evidence, may have been referring to a perceived trial deficiency. In fact, the prosecutor's argument was so unclear at one point that the district court stated, "I don't know who the scapegoat [is]. I'm beginning to feel like I'm the scapegoat." The prosecutor's scapegoat references may not have been artful, but they were not misconduct because it is unlikely that they played a substantial part in influencing the jury to convict. *See McDaniel*, 777 N.W.2d at 749.

Appellant next argues that the prosecutor's repeatedly asking D.H. about her daughter's telephone number constituted misconduct. D.H.'s daughter assisted D.H. in petitioning for an OFP against appellant. D.H.'s trial testimony contradicted the facts in the OFP petition, and she explained this discrepancy by stating that her daughter wrote the facts in the petition. D.H.'s daughter did not testify. The prosecutor questioned D.H. regarding her daughter's whereabouts and whether D.H. had her telephone number. The prosecutor attempted to impeach D.H. with these questions. While the prosecutor's questions were repetitive and likely argumentative, they did not violate any rules of evidence, nor were they prejudicial to appellant. Such questions were unlikely to have played a substantial part in influencing the jury to convict. *See id.*

Appellant also argues that it was misconduct for the prosecutor to comment during closing argument about D.H.'s courtroom "antics" and to imply that the jury should find appellant guilty not based on the evidence, but in order to protect the victims. In evaluating alleged prosecutorial misconduct during closing argument, this court focuses

during the 911 call, but reversing the district court's decision to exclude statements appellant's wife made to police when they responded to the 911 call).

on the argument as a whole, rather than on “particular phrases or remarks that may be taken out of context or given undue prominence.” *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008) (quotation omitted). The prosecutor’s argument does not need to be perfect, but only proper, as mistakes or inarticulate statements are inevitable. *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996).

The prosecutor’s statements regarding D.H.’s “antics” were made in the context of discussing witness credibility. The prosecutor suggested that despite D.H.’s inconsistent statements and her efforts to recant prior accusations and minimize or change her initial version of events, she was still the victim of a crime. *See State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990) (stating that a prosecutor’s closing argument should be based on evidence presented at trial and “inferences reasonably drawn from that evidence”). These comments were not misconduct because, given the totality of the record, they referenced inferences that could be drawn from D.H.’s testimony. These statements could not have played a substantial part in influencing the jury to convict. *See McDaniel*, 777 N.W.2d at 749.

Unobjected-to alleged misconduct

Appellant argues that the prosecutor persisted with the “scapegoat” or hidden-evidence theme when she questioned the 911 operator. Before trial, the district court suppressed much of appellant’s stepson’s 911 call. This court affirmed that decision, ruling that “[w]ith the exception of the last portion of the 911 call” M.K.’s statements were inadmissible. *Henderson*, 2010 WL 3463701, at *6. During direct examination of the 911 operator, the prosecutor stated, “There are certain things I’m not going to ask you

about for reasons having nothing to do with you, but for rulings in this case so far.” Appellant seems to suggest that the prosecutor’s statement to the witness was improper because it insinuated to the jury that it would not hear the complete story. But the prosecutor completed the statement by instructing the witness, “so, please listen to my question carefully before you answer.” Rather than impermissibly directing attention to prior rulings excluding evidence, the prosecutor was apparently attempting to carefully guide the witness through the line of questioning to avoid causing the witness to offer inadmissible testimony. This does not constitute misconduct.

Appellant also argues that the prosecutor committed misconduct during closing argument by identifying D.H.’s children as scapegoats. We disagree. D.H. testified that M.K. instigated an argument with appellant, but this testimony contradicted D.H.’s statement to the arresting police officer. D.H. also testified that the facts alleged in the OFP petition were supplied by her daughter, but this testimony contradicted D.H.’s placing her own initials on the OFP petition. As the prosecutor’s “scapegoat” references challenged D.H.’s credibility, they were not improper. *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).

Inadmissible evidence

Appellant argues that the prosecutor committed misconduct by attempting to introduce evidence that had been ruled inadmissible. It is misconduct for a prosecutor to knowingly offer suppressed evidence in an attempt to bring the evidence to the jury’s attention. *State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994). It is also misconduct for a

prosecutor to persist in attempting to inject matters known to have already been ruled inadmissible. *State v. Jahnke*, 353 N.W.2d 606, 611 (Minn. App. 1984). “However[,] asking a question to which an objection is sustained is not by itself evidence of prosecutorial misconduct.” *State v. Steward*, 645 N.W.2d 115, 122 (Minn. 2002).

Objected-to alleged misconduct

Appellant argues that the prosecutor committed misconduct by eliciting testimony from the 911 operator that M.K. reported that he was locked in the basement. This court affirmed the district court’s pretrial ruling that this portion of the 911 call was inadmissible. *Henderson*, 2010 WL 3463701, at *6. The prosecutor asked the 911 operator, “Do you recall anything about the status of the caller at the time the call was being made to you?” The operator replied, “The caller told me that he had been locked in the basement by the suspect in that call.” Appellant objected, and the district court excused the jury. The parties then stipulated that the operator would testify that M.K. placed the call and provided information that caused the operator to dispatch officers. In order to lay foundation to admit the last part of the call, the prosecutor was allowed to ask the operator, “At the end of that conversation . . . did you overhear another male’s voice, a struggle and the phone line then become disconnected?” The operator replied, “I did.” Appellant’s attorney declined the district court’s offer to give a curative instruction concerning the testimony that M.K. reported that he was locked in the basement.

Even though the 911 operator stated that M.K. reported being locked in the basement, in reading the district court’s prior ruling, the portion of the 911 call that appellant argued was prejudicial was M.K.’s report from the basement that appellant was

upstairs “beating up” M.K.’s mother. The 911 operator did not refer to that statement. It is unlikely that the operator’s statement that appellant locked M.K. in the basement played a substantial part in influencing the jury to convict. This is especially true when the 911 operator was allowed to state that at the end of the conversation she overheard another male’s voice, a struggle, and the phone line disconnecting. This statement is more damaging than stating that appellant locked M.K. in the basement. In reaching this decision, we weigh appellant’s attorney’s failure to accept the district court’s offer to give a curative instruction that might have ameliorated any effect of an improper reference. *See State v. McDaniel*, 534 N.W.2d 290, 293 (Minn. App. 1995) (stating that failure to seek a curative instruction weighs heavily in determining whether to reverse a conviction based on prosecutorial misconduct because the district court might have been able to ameliorate the effect of improper conduct), *review denied* (Minn. Sept. 20, 1995).

Appellant also argues that the prosecutor committed misconduct by attempting to admit evidence of D.H.’s OFP petition and related affidavit. The district court conducted a hearsay analysis and determined that this evidence could be used for impeachment purposes. Appellant claims that it was misconduct for the prosecutor to attempt “to get the court to either change its mind about that ruling or to inject that evidence into the case by argument.” Even if the prosecutor improperly sought to admit this as substantive evidence, this discussion between counsel and the district court occurred outside the presence of the jury; thus, there is no prejudice.

The prosecutor questioned D.H. regarding the OFP petition and affidavit, and D.H. denied including the facts in the petition, claiming that it was her daughter who filled out

the petition. The prosecutor then attempted to show that D.H. adopted the facts in the petition by initialing it. The prosecutor asked about the initials three additional times, and each time, the district court sustained appellant's attorney's objection. Appellant mischaracterizes this as misconduct, because the record shows that the prosecutor merely used the evidence to impeach D.H. It is unlikely that this questioning played a substantial part in influencing the jury to convict. *See McDaniel*, 777 N.W.2d at 749.

Unobjected-to alleged misconduct

Appellant argues that the prosecutor impermissibly persisted in attempting to lay foundation for the admission of the 911 call. This court ruled that the last portion of the 911 call was admissible. While the parties stipulated to the admission of the last portion of the 911 call, the record shows that what was included in the stipulation was unclear. The prosecutor sought clarification. Appellant fails to show that the prosecutor plainly erred in attempting to lay proper foundation for the admission of the 911 call. *See Ramey*, 721 N.W.2d at 302.

Appellant also argues that it was misconduct for the prosecutor to seek to bring in a rebuttal witness. The prosecutor did not bring in this witness. Appellant fails to show that the prosecutor plainly erred in seeking to call a rebuttal witness and then abiding by the district court's determination to disallow this witness. *See id.*

Vouching and credibility

Appellant next argues that the prosecutor committed misconduct by vouching for the arresting officer's testimony and by offering her opinion on appellant's guilt and witness credibility. The jury determines the credibility of witnesses. *State v. Koskela*,

536 N.W.2d 625, 630 (Minn. 1995). Therefore, it is misconduct for a prosecutor to imply “a guarantee of a witness’s truthfulness,” or to express “a personal opinion as to a witness’s credibility.” *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted). But a prosecutor may, in closing argument, argue that a witness was or was not credible. *Jackson*, 714 N.W.2d at 696.

Objected-to alleged misconduct

Appellant argues that it was misconduct for the prosecutor to ask the arresting officer whether a domestic assault had occurred. The officer testified that he felt that the elements of the offense were met. In *State v. Hogetvedt*, this court determined that it was impermissible for an officer to offer an opinion regarding guilt. 623 N.W.2d 909, 915 (Minn. App. 2001), *review denied* (Minn. May 29, 2001). Therefore, the prosecutor committed misconduct by eliciting from the officer his belief that the elements of the offense were met.

Appellant also argues that it was misconduct for the prosecutor to state during closing argument that she did not believe appellant or D.H. But a prosecutor does not commit misconduct by arguing that a witness was not credible. *See Jackson*, 714 N.W.2d at 696. And if anything was amiss in the prosecutor’s argument, it was alleviated by the district court’s curative instruction that the jury disregard any statements by the attorneys that reflected their personal beliefs on witness credibility or appellant’s guilt or innocence. *See State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998) (stating that we presume that a jury follows a district court’s instructions). Therefore, it is unlikely that

the prosecutor's statement played a substantial part in influencing the jury to convict. *See McDaniel*, 777 N.W.2d at 749.

Appellant further argues that it was misconduct for the prosecutor to challenge D.H.'s credibility during closing argument by stating that D.H. testified as she did to protect appellant. But as previously stated it is not misconduct for the prosecutor to state during closing argument that a witness was not credible. *See Jackson*, 714 N.W.2d at 696. Therefore, it is unlikely that the prosecutor's statement played a substantial part in influencing the jury to convict. *See McDaniel*, 777 N.W.2d at 749.

Unobjected-to alleged misconduct

Appellant argues that the prosecutor committed misconduct during closing argument by stating that (1) she believed that she proved the elements of an offense, (2) the evidence supported the charges, (3) she did not approve of appellant's conduct of pushing his stepson, and (4) she believed the officer's testimony that D.H.'s initial statement was truthful. *See Jones*, 753 N.W.2d at 691 (stating that in reviewing alleged misconduct in closing argument we focus on the argument as a whole); *see also Atkins*, 543 N.W.2d at 648 (stating that a closing argument need not be perfect, but only proper).

Stating that she believed that the state had met its burden of proof is not a misstatement of the burden of proof, which is misconduct. *See State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). Further, commenting on the officer's testimony regarding the truthfulness of D.H.'s original statement is not misconduct, because the prosecutor is allowed to comment on witness credibility in closing argument. *See Jackson*, 714 N.W.2d at 696. Finally, it was improper for the prosecutor to state her

personal opinions. *See State v. Prettyman*, 293 Minn. 493, 495, 198 N.W.2d 156, 158 (1972) (stating that prosecutor’s expressing personal opinions is impermissible, but determining that the frequent use of the phrase “I think” may suggest cliché language rather than a deliberate expression of personal opinion). But, as noted earlier, because the district court instructed the jury to disregard comments regarding counsels’ personal beliefs, there is no showing of plain error. *See Ramey*, 721 N.W.2d at 302.

Belittling defense and aligning with jury

Appellant next argues that the prosecutor committed misconduct in closing argument by belittling the defense and by aligning herself with the jury. Appellant failed to object to these alleged errors. A prosecutor may argue that there is no merit to a particular defense in view of the evidence, or no merit to a particular argument, but a prosecutor cannot belittle a defense. *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). Additionally, a prosecutor may not align herself with a jury by using “we” and “us” because it may be an appeal to the passions of the jury. *State v. Mayhorn*, 720 N.W.2d 776, 790 (Minn. 2006).

The prosecutor stated that even if the jury believed appellant’s version of events—that the parties’ argument was so heated that one of them had to leave the home—then the prosecutor could get the jury to believe that appellant’s conduct went even further than his version of the facts. The prosecutor also stated that it was difficult to believe appellant’s and D.H.’s testimonies that M.K. voluntarily went to the basement because M.K. pounded on the door after it locked behind him. The prosecutor further stated that it was perplexing that M.K. called 911 from the basement while appellant was

purportedly on the main level of the home, but at the end of the 911 call a male voice other than M.K.'s can be clearly heard. Finally, the prosecutor stated to the jury, "But that's just my issue. Maybe you didn't have that issue."

A review of the entire closing argument indicates that the prosecutor argued that appellant's version of events was inaccurate and inconsistent. *See Jones*, 753 N.W.2d at 691 (stating that we review the argument as a whole, rather than focusing on particular remarks that may be taken out of context or given undue prominence); *Atkins*, 543 N.W.2d at 648 (stating that a closing argument need not be perfect, only proper). It is not improper for the prosecutor to argue that a version of events is meritless in light of the evidence. *Salitros*, 499 N.W.2d at 818. Additionally, the prosecutor did not align herself with the jury, by using words such as "we" and "us." *See Mayhorn*, 720 N.W.2d at 790. In fact, she did the opposite by stating that she may have had an issue with the evidence not supporting appellant's version of events, but that it might have not been an issue for the jury. Appellant fails to show plain error in the prosecutor's statements. *See Ramey*, 721 N.W.2d at 302.

Facial expressions

Appellant next argues that the prosecutor used inappropriate facial expressions at trial. In *State v. Buggs*, the supreme court addressed a claim of misconduct stemming from the prosecutors' body language and disgusted facial expressions in response to adverse rulings by the district court. 581 N.W.2d 329, 343 (Minn. 1998). The supreme court determined that the defendant was not prejudiced by "the prosecutors' amateur displays." *Id.*

Here, it was the prosecutor who first addressed this issue, stating that she was uncomfortable with appellant directing displays of animosity towards her. She claimed that appellant was “glaring” at her. The district court also expressed concern about appellant’s expressions because he rolled his eyes and appeared to be gloating when he approved of witness testimony. Appellant’s attorney responded that emoting is appellant’s natural reaction, but stated that he noticed that the prosecutor shook her head or “looked at the jury after getting an answer and rais[ed] her eyebrows or ma[de] some sort of facial gesture.” The prosecutor’s conduct may not have been professional, but appellant fails to show plain error.

We conclude that while the prosecutor committed misconduct by eliciting testimony from the arresting officer that he believed that a crime had been committed, this alone is insufficient to reverse appellant’s convictions.

Pro se supplemental brief

In his pro se supplemental brief, appellant claims only that he is innocent of the offenses of which he was convicted. He presents neither argument nor citations to legal authority; thus, his claim is deemed waived. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (stating that if a brief contains no argument or citation to legal authority in support of its allegations, the allegations are waived).

Affirmed.