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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0259**

State of Minnesota,  
Respondent,

vs.

Joseph Michael Arend,  
Appellant.

**Filed January 22, 2013  
Affirmed  
Chutich, Judge**

Hennepin County District Court  
File No. 27-CR-10-58849

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth A. Roosevelt Johnston,  
Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Charles F. Clippert, Clippert Law Firm, P.L.L.C., St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Hudson, Judge; and Worke,  
Judge.

**UNPUBLISHED OPINION**

**CHUTICH**, Judge

Appellant Joseph Arend challenges his conviction of third-degree criminal sexual  
conduct, contending that the prosecutor engaged in misconduct by improperly shifting the

burden of proof to Arend to show that the victim was physically helpless. Arend also argues in his pro se brief that the state improperly failed to retain and introduce evidence that would have been favorable to his defense. Because no prosecutorial misconduct occurred and because the state did not err in collecting and retaining evidence, we affirm.

## **FACTS**

Arend's conviction arose from events that occurred in the evening of July 24 and the early-morning hours of July 25, 2010. On July 24, the victim, 28-year-old J.K., and several friends met at her friend S.R.'s house in south Minneapolis and went to an uptown bar. While at the bar, the women ran into Arend, who was a friend of S.R. J.K. had met Arend once, about six months before, but did not know him well. Besides offering Arend a piece of gum, J.K. did not speak to him while at the bar or have any other interactions with him. J.K. and her friends left the bar around 1:30 a.m. and went back to S.R.'s house. Arend also ended up at S.R.'s house that night.

J.K. and her friend C.J. had planned to spend the night at S.R.'s house, and the two women set up an inflatable bed in S.R.'s living room around 2:30 a.m. J.K. borrowed clothing from S.R. to wear to bed, and laid down in the bed next to C.J. She testified that she borrowed "yoga pants" from S.R., which she described as tight-fitting, lycra leggings.

After J.K. and C.J. laid down in the bed, Arend came into the living room, stripped to his boxers and t-shirt, and tried to lie on the bed between the two women. J.K. told him "[n]o, you're sleeping over there," and pointed at a love seat at the foot of the bed. Arend went to the love seat, and soon began grabbing J.K.'s leg. J.K. left the room and

reported to S.R. that Arend was “being a little creepy,” but S.R. laughed her off. J.K. went back to the living room, and eventually fell asleep around 3:30 a.m.

J.K. awoke shortly before 5:00 a.m. to Arend penetrating her vagina with his fingers. Her pants were pulled down below her hips, “enough to get access.” Alarmed, she pushed Arend’s hand back, got up, and went into the bathroom. She noticed that her tampon had been removed, and found it on the bed. She immediately woke up C.J., deflated the bed, and they left S.R.’s house.

J.K. went straight to the hospital, where a nurse performed a sexual-assault examination, finding no injuries. Although the nurse collected J.K.’s underwear, she did not collect the yoga pants as evidence because there was no “compelling reason” to do so. The police also interviewed J.K. while she was at the hospital, and she reported what happened. Officers collected DNA evidence from Arend, which showed the presence of J.K.’s DNA on both of Arend’s hands.

The state charged Arend with third-degree criminal sexual conduct. At trial, J.K. testified that she was asleep the whole time, she never consented to Arend touching her, and she felt violated by the penetration. Arend testified in his own defense. He did not deny digitally penetrating J.K., but claimed that J.K. was awake. He claimed that she consented to the contact because she was responding positively and moving her legs so that he could touch her. After he felt her hand near her genitals, he presumed that J.K. was no longer interested so he rolled over and went to sleep. He was awakened hours later by the police banging at S.R.’s door.

The jury found Arend guilty of third-degree criminal sexual conduct. Three days after the trial ended, one of the jurors e-mailed a letter to the district court and to the attorneys regarding Arend's case. The juror wrote that she stood by her decision of guilt, but expressed her belief that, had the jury been presented with more information, they may have found Arend not guilty.

The district court denied Arend's motion for a new trial and Arend now appeals.

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

Minnesota law provides that a defendant is guilty of third-degree criminal sexual conduct if he engages in sexual penetration with another person, and "knows or has reason to know that the complainant is . . . physically helpless." Minn. Stat. § 609.344, subd. 1(d) (2010). A person is physically helpless if he or she is "asleep or not conscious." Minn. Stat. § 609.341, subd. 9 (2010). The central issue at trial was whether Arend knew or had reason to know that J.K. was asleep or unconscious when he digitally penetrated her vagina.

### **I. Prosecutorial Misconduct**

Arend claims that the district court should have granted him a new trial because the prosecutor engaged in misconduct during his closing arguments by improperly shifting the burden of proof. Specifically, Arend contends that the prosecutor's closing comments suggested to the jury that Arend had the burden of proving that J.K. was awake or conscious when the penetration occurred.

We review the district court's denial of a new-trial motion for an abuse of discretion. *State v. Hooper*, 620 N.W.2d 31, 40 (Minn. 2000). In a criminal prosecution,

the state has the burden of proving each element of the crime beyond a reasonable doubt. See *State v. Bowles*, 530 N.W.2d 521, 529 (Minn. 1995). A prosecutor engages in misconduct if he or she makes arguments that shift the burden to the defendant to prove his or her innocence. *State v. Carridine*, 812 N.W.2d 130, 148 (Minn. 2012). To determine whether a prosecutor committed misconduct in his closing argument, we look at the argument as a whole, “rather than just selective phrases or remarks that may be taken out of context or given undue prominence.” *Id.* (quoting *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993)).

Arend contends that the prosecutor improperly shifted the burden of proof at two points in his closing argument. In the first instance, the prosecutor stated: “I would submit to you that the defendant’s testimony is not credible when you look at all of the other evidence. Nothing he said on the stand should lead you to believe that back at [S.R.]’s house [J.K.] gave him permission to do what he did.” Arend also points to a portion of the prosecutor’s rebuttal argument, in which the prosecutor argued that “[e]ven if she’s moving around in her sleep, [Arend] had reason to know she was asleep. So don’t let the focus be solely on [J.K.]. Remember who is on trial here. He’s on trial.”

Read in the context of the entire closing argument, we conclude that the prosecutor’s statements did not erroneously shift the burden of proof to Arend. The prosecutor never affirmatively stated that Arend failed to present credible *evidence* that J.K. was awake, as Arend contends. Rather, the theme of the closing argument was that Arend’s *testimony* was less credible than J.K.’s testimony, and that the jury should disbelieve Arend’s claims that J.K. was awake during the sexual contact. This argument

is permissible, because “the [s]tate may, in closing argument, argue that a witness was or was not credible.” *State v. Jackson*, 773 N.W.2d 111, 123 (Minn. 2009).

Arend’s theory of the case was that both he and J.K. were drunk that night and made bad decisions, and that J.K. was awake during the sexual contact. The prosecutor’s closing argument suggested that this theory was not credible based on the testimony and evidence presented. This argument is appropriate and does not amount to burden shifting. *See State v. Ashby*, 567 N.W.2d 21, 28 (Minn. 1997) (stating that “the prosecutor is free to argue that there is no merit to a particular defense or argument”).

Arend points to the post-trial letter from the juror, who expressed her belief that the jury should have been presented with additional evidence, in support of his argument that the prosecutor’s comments shifted the burden of proof. We cannot consider this letter, however, because the rules of evidence clearly prohibit the admission of such evidence. Minn. R. Evid. 606(b) (prohibiting juror testimony, affidavit, or evidence of any statement by a juror “[u]pon inquiry into the validity of a verdict . . . as to any matter or statement occurring during the course of the jury’s deliberation or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror’s mental processes in connection therewith”); *see also State v. Hanke*, 712 N.W.2d 211, 214 (Minn. App. 2006) (“In reviewing the jury verdict, the court may not scrutinize the jury’s deliberations, which are protected under Minn. R. Evid. 606(b).”). Thus, the letter from the juror in Arend’s case is not admissible for the purpose of inquiring into whether the prosecutor’s

statements shifted the burden of proof to Arend and, therefore, had an effect on the verdict.

In sum, we conclude that the prosecutor did not engage in misconduct.<sup>1</sup> Accordingly, the district court did not abuse its discretion in denying Arend's motion for a new trial.

## **II. Failure to Introduce Evidence**

In his pro se brief, Arend appears to argue that the state failed to obtain and introduce certain pieces of evidence that would have cast reasonable doubt on J.K.'s version of events. Particularly, Arend contends that the police should have obtained, and the state should have offered at trial, the "yoga pants" or "exercise leggings" that J.K. was wearing on the night of the incident.

Our review of the record shows that the state never collected the pants from J.K. after the incident, and Arend does not provide any support for his assertion that the state had the pants in its possession. The state therefore had no duty to preserve the pants, disclose them to Arend, or introduce them at trial. Minn. R. Crim. P. 9.01, subd. 1(6) (requiring the state to disclose "[m]aterial or information *within [its] possession and control* that tends to negate or reduce the defendant's guilt" (emphasis added)); *see also State v. Jenkins*, 782 N.W.2d 211, 235 (Minn. 2010). Further, Arend could have, but did not, inquire about the pants before or even during trial. Because no error occurred

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<sup>1</sup> Our careful review of the record, including the trial testimony and the district court's instructions to the jury, lead us to conclude that even if the prosecutor's comments amounted to misconduct, any error was harmless.

concerning the state's preservation and disclosure of evidence, we conclude that Arend's pro se arguments are meritless.

**Affirmed.**