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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0846**

State of Minnesota,
Respondent,

vs.

Humberto Chavez, Jr.,
Appellant.

**Filed May 19, 2014
Affirmed
Smith, Judge**

Ramsey County District Court
File No. 62-CR-12-4881

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Peterson, Judge; and Crippen,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SMITH, Judge

We affirm appellant's convictions of first-degree burglary and theft of a motor vehicle, concluding that prosecutorial error did not occur during closing argument.

FACTS

Late one night, "some motion" outside N.V.'s kitchen window caught her eye. She looked out into her backyard and made eye contact with a man in light-colored clothing. The man, later identified as appellant Humberto Chavez, Jr., then approached N.V.'s door and asked her if someone by the name of Dan Johnson lived there. N.V. replied in the negative, and Chavez walked away. After the encounter, N.V. and a visiting neighborhood friend decided to "check on the security" of the friend's house. While they were out, they observed a "suspicious" minivan parked near some bushes. N.V. called the police and reported both the vehicle and the incident at her backdoor.

Shortly thereafter, N.V.'s neighbors, five houses down, were sitting in their living room when they heard the backdoor open. The husband quickly went outside to investigate; he observed footprints in his freshly seeded backyard, but he did not see or hear anyone. While the husband was outside, the wife called the police and the wife's mother realized that her purse was missing from the kitchen table.

Officer Colleen Rooney was en route to N.V.'s address when she was informed of the neighbors' call. She then responded to the neighbors' address, and a second officer responded to N.V.'s address. While Officer Rooney questioned the wife's mother about the contents of her missing purse, which included her cellular telephone and

approximately \$264, in specific denominations, the husband used a computer application to track the location of the stolen cell phone. Based on this information, officers were dispatched to an intersection approximately six miles away. At the intersection, officers confirmed the presence of the van reported by N.V. Officers watched from an unmarked police vehicle and, after approximately 10 minutes, observed Chavez approach the van, pause near the driver's door, and then open a door on the passenger's side. A marked police vehicle approached the van, and Chavez started to walk away.

Police apprehended Chavez and, on his person, found approximately \$273, in denominations nearly identical to the stolen bills, a key to the van, and a motel key. On the ground by the van, they also found the stolen purse; the purse was missing only its cash. In the squad car, Chavez claimed that he saw two Caucasian males throw the purse into the van, and he removed the purse to investigate the situation. He was also heard swearing and questioning aloud why he had not "dumped" the purse.

Following an investigation, police determined that Chavez had checked into the motel designated on the key, with a vehicle other than the van, that the van was registered to a leasing company and had been at an auto-repair shop approximately six blocks from the motel, and that the leasing company had not given anyone permission to drive the van.

The state charged Chavez with one count of first-degree burglary, in violation of Minn. Stat. § 609.582, subd. 1(a) (2010), and one count of theft of a motor vehicle, in violation of Minn. Stat. § 609.52, subd. 2(17) (2010). A jury found Chavez guilty as

charged, and the district court sentenced him to concurrent sentences of 51 months' imprisonment and 19 months' imprisonment.

DECISION

Chavez contends that, during closing argument, the prosecutor committed reversible error by denigrating the defense and shifting the burden of proof.¹ Chavez did not object to the claimed errors at trial. We review a claim of unobjected-to trial error under the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, the nonobjecting appellant must first show that an error occurred and that it was plain. *Id.*

Chavez challenges the following statements:

It had to have been Mr. Chavez, and for you to conclude otherwise, you would have to subscribe to what I call kind of a boogiemán defense. There's somebody out there that there's no evidence of, that no one's ever seen, heard of, who may have happened to be in that area, too, as isolated as it is, for no reason, at the exact same time, coincidentally, as Mr. Chavez was there.

.....

With this tight timeline, there is really not enough time for any imaginary suspect to have run with her purse and dropped it at a point for Mr. Chavez to find.

¹ Chavez characterizes the prosecutor's statements as prosecutorial "misconduct." However, "there is an important distinction . . . between prosecutorial misconduct and prosecutorial error." *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). Prosecutorial misconduct "implies a deliberate violation of a rule or practice, or perhaps a grossly negligent transgression," while prosecutorial error "suggests merely a mistake of some sort, a misstep of a type all trial lawyers make from time to time." *Id.* We apply the same standard to allegations of prosecutorial misconduct and prosecutorial error. *Id.* Because the prosecutor's statements do not suggest a deliberate violation or gross negligence, we use the term "prosecutorial error" in this opinion.

....

And because any thief wants that currency more than anything else, it's patently unreasonable on this timeline to believe that any imaginary suspect would have left that currency for Mr. Chavez to find.

....

You are all educated formally, a lot of life experience, good common sense, and you know that to find Mr. Chavez innocent or not guilty requires that we dream up somebody who there ain't no evidence of anywhere at any time.

We analyze these statements in the context of the argument as a whole. *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003).

Chavez first argues that, by referring to his defense as a "boogiemans defense" involving an "imaginary suspect," the prosecutor plainly erred by denigrating the defense. "It is well-settled that the state has a right to vigorously argue its case, but the state may not denigrate a particular type of defense." *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005) (citations omitted). Although the state "may not belittle the defense, either in the abstract or by suggesting that the defendant raised the defense because it was the only defense that may be successful," the state "may specifically argue that there is no merit to the particular defense." *Id.* "Further, the state's argument is not required to be colorless." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

The record demonstrates that Chavez denied taking the purse from the neighbors' house. Rather, he told police that he removed the purse from the van after observing two suspicious men. At trial, Chavez's counsel argued that the state had failed to prove how Chavez got the purse and urged the jury to conclude that Chavez was merely in the wrong

place at the wrong time. To counter this argument, the prosecutor highlighted testimony establishing Chavez was the only suspicious person near the neighbors' house and the only suspicious person near the parked van. In the context of the argument as a whole, the challenged statements were part of a specific argument regarding the merits of Chavez's particular defense. Therefore, the challenged statements did not denigrate the defense, and the prosecutor did not err.

Chavez next argues that the prosecutor plainly erred by shifting the burden of proof. Due process requires that the state prove each element of the charged crime beyond a reasonable doubt. *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). Misstatements of the burden of proof constitute prosecutorial error. *See State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). A prosecutor may not comment on a defendant's failure to contradict testimony; such a comment may suggest to the jury that the defendant bears some burden of proof. *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995).

Chavez asserts that the prosecutor's statements suggested "that, for [Chavez's] defense to be successful, he had a burden to present evidence about who the real thief was and because he did not meet that burden, the jury could not acquit him." Again, we consider the context of the argument as a whole. *See Powers*, 654 N.W.2d at 679. Our careful examination of the record establishes that rather than commenting on Chavez's failure to contradict the state's testimony, the challenged statements aimed to persuade the jury that the state's evidence in fact forms a sufficient basis to convict Chavez of the charged crimes. In other words, the state merely argued that it had met its burden to

prove each element beyond a reasonable doubt. Because the challenged statements did not shift the burden of proof, the prosecutor did not err.

In sum, Chavez has failed to establish any error, and therefore is not entitled to relief.

Affirmed.