STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1714

Jesse Chase, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 8, 2010
Affirmed
Worke, Judge

Ramsey County District Court
File No. 62-K3-06-2144

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

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

Gerald T. Hendrickson, Interim St. Paul City Attorney, Heidi L. Braunwarth, Assistant City Attorney, St. Paul, Minnesota (for respondent)

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

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges the district court's denial of his postconviction-relief petition, arguing that (1) he was denied due process when a prospective juror stated

during voir dire that he believed that he had "been drinking with [appellant] before," and the district court refused to excuse the prospective panel that was exposed to the comment and (2) the prosecutor committed prejudicial misconduct during closing argument by vouching for the state's only witness and characterizing the state's evidence as "undisputed." We affirm.

D E C I S I O N

Appellant Jesse Chase argues that the district court should have granted his petition for postconviction relief and reversed his two driving-while-impaired (DWI) convictions from 2007. A petitioner seeking postconviction relief must prove the facts in a petition by a "fair preponderance of the evidence." Minn. Stat. § 590.04, subd. 3 (2008). To meet that burden, the petition "must be supported by more than mere argumentative assertions that lack factual support." *Henderson v. State*, 675 N.W.2d 318, 322 (Minn. 2004). This court reviews a postconviction court's decision for an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). We review findings of fact to determine whether the evidence is sufficient to sustain them, and review issues of law de novo. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003).

Impartial Jury

Appellant first argues that he was denied his right to an impartial jury because, during voir dire, a prospective juror stated that he may know appellant from "drinking with him." The prospective juror was dismissed. But the entire jury panel exposed to the statement was not excused, and then had to determine whether appellant was guilty of alcohol-related offenses.

A jury's exposure to potentially prejudicial material raises constitutional questions "because it deprives a defendant of the right to an impartial jury and the right to confront and cross-examine the source of the material." *State v. Cox*, 322 N.W.2d 555, 558 (Minn. 1982) (citing *Parker v. Gladden*, 385 U.S. 363, 364, 87 S. Ct. 468, 470 (1966)). A "private communication" with a juror carries a presumption of prejudice, which is rebuttable by the record on appeal. *State v. Fields*, 529 N.W.2d 353, 357 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995). "[I]f it can be shown beyond a reasonable doubt that the improper influence did not contribute to the verdict," then any error is harmless. *State v. Halvorson*, 506 N.W.2d 331, 336 (Minn. App. 1993). Whether a potentially prejudicial statement contributed to a jury's verdict requires us to conduct "an independent evaluation of the verdict," considering (1) "the nature and source of the prejudicial matter"; (2) "the number of jurors exposed to the influence"; (3) "the weight of evidence properly before the jury"; and (4) "the likelihood that curative measures were effective in reducing the prejudice." *Cox*, 322 N.W.2d at 559.

During the defendant's trial in *Halvorson*, the kidnapping and sexual-conduct victim yelled from the gallery: "You are a liar. . . . You hurt me, just like you hurt all of them []. How can you sit there and lie? I didn't ask to be tied up and put a needle through my breast." 506 N.W.2d at 334-35. Halvorson argued that he was denied a fair trial because the jury was exposed to the victim's outburst. *Id.* at 336. This court considered the four factors set out in *Cox*, and determined that the exposure did not deny the defendant's right to a fair trial. *Id.* This court considered, among other things, that

the comment was brief and vague and that the weight of the evidence against Halvorson was strong. *Id.*

Here, during voir dire, the following colloquy occurred between the district court and a prospective juror:

> THE COURT: Did you have a question?
> JUROR: Yeah. I think I might know [appellant].
> THE COURT: You think you may?
> JUROR: Yeah.
> THE COURT: We'll ask you about that right now.
> JUROR: Okay.
> THE COURT: How do you think you know him?
> JUROR: I think I know him. I used to really be in the bar scene for quite awhile, like about five years straight. I haven't gone to bars for like three years now.
> THE COURT: So just tell me this, do you think –
> JUROR: I think I've been drinking with him before.
> THE COURT: You think you may have?
> JUROR: Yeah.
> THE COURT: All right.
> JUROR: He looks very familiar to me —
> THE COURT: Okay.
> JUROR: — when I walked in and —
> THE COURT: Okay. All right.
> JUROR: — I was trying to picture where I might know him but he just looks familiar to me.

Appellant's attorney moved to dismiss the jury panel. The district court denied the motion, finding that the statements were "so tenuous in terms of their connection to [appellant] as to not cause any undue prejudice." Appellant's attorney agreed to the district court's suggestion to excuse the prospective juror, but stated that he did not want to have a curative instruction. The district court, however, told the jury panel that a panel member had been excused and that they should draw no inference or speculate as to why that happened.

We now consider the (1) nature and source of the statements, (2) number of jurors exposed, (3) weight of the evidence, and (4) likelihood that curative measures were effective in reducing any prejudice. *Cox*, 322 N.W.2d at 559. Here, the statement was made by a prospective juror. It was not made by a person in authority and it did not involve an opinion on the question of guilt or innocence. And, as the district court found in denying postconviction relief, the statements were "tenuous" and it is unknown whether the prospective juror actually remembered appellant or if he had him confused with someone else. Further, the prospective juror talked only about his own participation in the "bar scene," made no comment about how much alcohol appellant consumed or appellant's driving habits after consuming alcohol. Any prejudice was minimal because the statement was not sworn testimony and concerned a separate incident that may have occurred three years ago. And the fact that all of the jurors were exposed to the statement is not determinative. *See id.* at 559 n.2.

The evidence against appellant was strong. State trooper Richard Wegner testified that he was dispatched to investigate a stalled vehicle on a highway. When he arrived, he observed a car stopped in a lane of traffic and appellant standing alongside the car. After moving the vehicle off of the highway, the trooper talked to appellant and detected the odor of alcohol on appellant's breath, noticed that his speech was slurred and mumbled, and that his eyes were bloodshot and watery. The trooper administered field sobriety tests, which appellant failed. And chemical testing indicated that appellant's blood-alcohol concentration was .09. The trooper's testimony and the chemical-test results are strong evidence supporting the convictions. Finally, appellant did not request a curative

instruction, the court did tell the jury panel not to draw any inference or speculate as to why the prospective juror was dismissed. *See State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002) (stating that it is presumed that a jury follows a district court's instructions). This evaluation shows that the statement did not contribute to the jury's verdict; therefore, appellant received a fair trial and the district court did not abuse its discretion in denying postconviction relief.

Prosecutorial Misconduct

Appellant next argues that he is entitled to relief because the prosecutor committed prejudicial misconduct in closing argument. Appellant failed to object to the prosecutor's argument during trial. A defendant's failure to object at trial generally forfeits his right to object on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But this court can exercise its discretion to consider unobjected-to errors using the plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The plain-error standard requires appellant to establish: (1) error; (2) that was plain; and (3) that affected substantial rights. *Id.* An error is "plain" when it is "clear" or "obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). Plain error "contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d. 294, 302 (Minn. 2006). If appellant establishes plain error, the burden shifts to the state to prove that the plain error did not affect the defendant's substantial rights. *Id.* An error affects substantial rights if it is prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741. To determine whether the state has satisfied its burden, we consider the strength of the evidence, the pervasiveness of the improper conduct, and whether the defendant had an opportunity to,

or made efforts to, rebut the improper conduct. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). Even if the three-prong test is satisfied, we will reverse only "if the fairness, integrity, or public reputation of the judicial proceeding is seriously affected." *State v. Jones*, 678 N.W.2d 1, 18 (Minn. 2004).

Appellant argues that the prosecutor's misconduct occurred in the following statement: "Here we have the testimony of a very reliable trooper who did his job properly, who testified to the facts of the matter and they are undisputed." This statement is one sentence in an argument extending eight transcribed pages. *See State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) (stating that whether prosecutorial misconduct occurred during closing argument requires examination of "the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence).

Vouching

Appellant first claims that it was improper for the prosecutor to vouch for the trooper's testimony by stating that he was reliable and did his job properly. Prosecutorial misconduct occurs "when the [prosecutor] implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998). But while a prosecutor must not personally endorse a witness's credibility, the prosecutor may argue in closing argument that a witness was or was not credible. *State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006). And a prosecutor is allowed to draw "reasonable inferences from the [evidence] presented at trial." *State v. Young*, 710 N.W.2d 272, 280 (Minn. 2006);

State v. Wright, 719 N.W.2d 910, 918-19 (Minn. 2006) (stating that it is not misconduct for the prosecutor to analyze the evidence and argue that a particular witness was credible).

But the prosecutor did not state that the trooper's testimony was reliable, only that he is reliable. And the prosecutor did not imply that the trooper's testimony was truthful or express a personal opinion about his credibility. The prosecutor merely stated that the trooper was reliable and did his job properly. Because the prosecutor was permitted to analyze the evidence and argue reasonable inferences from that evidence, including whether the witness was credible, the prosecutor did not commit prejudicial misconduct.

Undisputed Facts

Appellant also claims that it was improper for the prosecutor to state that the facts are "undisputed." The use of "undisputed" may amount to prejudicial misconduct when the usage suggests that the defendant had any obligation to call witnesses or testify. *State v. DeVere*, 261 N.W.2d 604, 606 (Minn. 1977). But the prosecutor did not imply that appellant should have contradicted the state's evidence. And the prosecutor used the word "undisputed" only once. *Compare State v. Stephani*, 369 N.W.2d 540, 547 (Minn. App. 1985) (holding that the fact that the prosecutor referred twice to certain "uncontroverted" evidence did not result in prejudice), *review denied* (Minn. Aug. 20, 1985) *with State v. Streeter*, 377 N.W.2d 498, 501 (Minn. App. 1985) (emphasizing repetition of references to evidence being "undisputed" or "uncontradicted" in concluding that misconduct was prejudicial). Thus, no prosecutorial misconduct occurred here.

Affirmed.