**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A11-801**

State of Minnesota,
Respondent,

vs.

Martin David Hutchins, Jr.,
Appellant.

**Filed March 26, 2012**
**Affirmed in part, reversed in part, and remanded**
**Stoneburner, Judge**

Hennepin County District Court
File No. 27CR1016332

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and Cleary, Judge.

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

**STONEBURNER**, Judge

Appellant challenges his convictions of third-degree criminal sexual conduct and first-degree burglary, arguing that prosecutorial misconduct affected the verdict, thereby

requiring a new trial. Alternatively, appellant urges this court to grant a new trial as an exercise of supervisory powers because of the blatant nature of the misconduct. Appellant also asserts that the upward sentencing departure for his conviction of third-degree criminal sexual conduct is invalid as a matter of law because it is based on an uncharged crime. Because the prosecutor's single inappropriate statement that the victim realized she was "in every woman's worst nightmare" did not prejudice appellant's substantial rights and does not warrant an exercise of supervisory authority by granting a new trial, we affirm the convictions. Because the upward sentencing departure was based on an uncharged offense, we reverse and remand for resentencing.

**FACTS**

T.B., who was sleeping on a couch in her sister's dining room on a hot night in September 2005, woke up to find that a stranger had entered through an open window, ejaculated on her thighs and vagina and was penetrating or attempting to penetrate her with his penis. DNA taken from swabs of T.B.'s vagina, perineum, and legs matched DNA supplied by appellant Martin David Hutchins, Jr.

Hutchins was charged with one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(d) (2004) (engaging in sexual penetration, knowing that the complainant is physically helpless), and one count of first-degree burglary involving an assault in violation of Minn. Stat. § 609.582, subd. 1(c) (2004).

At trial, during opening statements, the prosecutor told the jury that T.B. woke up to find herself "in every woman's worst nightmare." At the close of the prosecutor's opening statement, Hutchins objected to this comment outside of the jury's hearing. The

district court stated that the prosecutor "is well aware not to refer to the situation as a woman's worst nightmare, and we'll expect that he won't do it in closing." The prosecutor did not repeat the remark.

The jury found Hutchins guilty of both charges and found that Hutchins invaded T.B.'s zone of privacy in committing criminal sexual conduct. The district court sentenced Hutchins to 130 months in prison for his conviction of third-degree criminal sexual conduct, representing a 25-month upward departure from the presumptive guidelines sentence, based on invasion of the victim's zone of privacy. The district court sentenced Hutchins to a concurrent 105 months in prison for his conviction of first-degree burglary. This appeal followed.

## D E C I S I O N

### I. The prosecutor's misconduct in this case is not reversible error.

Despite Hutchins's objection to the prosecutor's comment at the close of opening statements, Hutchins argues that the applicable standard of review is "plain error," which applies to unobjected-to misconduct. *See State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006) (holding "that appellate courts should use the plain error doctrine when examining unobjected-to prosecutorial misconduct"). The plain-error doctrine requires that, before an appellate court reviews unobjected-to trial error, there must be (1) error, (2) that is plain, and (3) affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). But in the context of prosecutorial misconduct, when the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden shifts to the state to demonstrate that there is no reasonable likelihood that the absence of the

misconduct would have had a significant effect on the verdict. *Ramey*, 721 N.W.2d at 302.

Because Hutchins objected to the prosecutor's statement and the district court acknowledged that the comment was inappropriate and not to be repeated, we conclude that the applicable standard of review is harmless error. *Id.* at 298 (noting that the harmless-error standard described in *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974), has mainly been limited to cases involving objected-to prosecutorial misconduct). Whether error is harmless depends, in part, on the type of misconduct involved. *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007). "For cases involving claims of unusually serious prosecutorial misconduct, there must be certainty beyond a reasonable doubt that misconduct was harmless. . . . We review cases involving claims of less-serious prosecutorial misconduct to determine whether the misconduct likely played a substantial part in influencing the jury to convict." *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009) (internal citation omitted).

The state makes a tepid argument that the comment did not constitute misconduct, arguing that the comment was "improper only in form and not in content." *See State v. Bashire*, 606 N.W.2d 449, 453-54 (Minn. App. 2000) (stating that three similar unobjected-to comments made during a closing argument that urged jurors to put themselves in the shoes of the victim were improper only in form and not content, and were not part of a "theme" running throughout the argument), *review denied* (Minn. March 28, 2000). But the related holding in *Bashire* is that the "appellant waived any error resulting from the *prosecutor's improper remarks* in her final argument." *Id.* at

454-55 (emphasis added). And it is well-settled law that arguments asking jurors to step into the shoes of the victim are improper. *See State v. Johnson*, 324 N.W.2d 199, 202 (Minn. 1982) (stating that "[g]enerally, arguments that invite the jurors to put themselves in the shoes of the victim are considered improper," but also noting that the comment involved may have been improper in form but was not improper in content, and was not made in a way calculated to cause the jury to decide the case on the basis of passion rather than reason). We conclude that the statement in this case does constitute misconduct, but based on caselaw concerning similar isolated statements, we conclude that the statement constitutes "less serious" misconduct to be examined on review for the likelihood that it played a substantial part in influencing the jury to convict Hutchins.

Hutchins claims that the statement influenced the jury to ignore doubt that he asserts existed about whether penetration occurred. The record, however, does not support the assertion that any such doubt existed because the DNA analysis from fluids on the vaginal swabs taken from the victim matched Hutchins's DNA. And even if there was some doubt to be resolved, we conclude that there is no likelihood that the isolated improper remark in the prosecutor's opening statement substantially influenced the jury's resolution of such doubt.

Hutchins argues that this court should reverse his conviction and remand for a new trial in an exercise of supervisory powers, arguing that the prosecutor engaged in clearly proscribed conduct that requires an exercise of supervisory powers. While it is disturbing that the prosecutor engaged in conduct for which prosecutors have been admonished by this court and the supreme court, we conclude that the single remark in this case does not

require reversal as an exercise of supervisory authority. We note, however, that flagrant repetition of conduct previously held to have been misconduct has, in the past, resulted in a report to the Lawyers Professional Responsibility Board, and, if the misconduct raises sufficient doubt as to whether a defendant received a fair trial, can result in reversal and remand for a new trial. *See State v. Bradford*, 618 N.W.2d 782, 801-02 (Minn. 2000) (Stringer, J., dissenting) (noting that in *State v. Buggs*, 581 N.W. 2d 329 (Minn. 1998), a prosecutor's misconduct was so troubling that the supreme court "took the unusual step of calling the matter to the attention of the Lawyers Professional Responsibility Board, and opining that misconduct, committed by a prosecutor who had been recently admonished for the same misconduct, warranted such a report and, in that case, raised sufficient doubt about whether the defendant received a fair trial to warrant reversal and remand for a new trial).

## II. The district court erred by basing an upward sentencing departure on invasion of privacy, which is an element of the uncharged crime of burglary of a dwelling.

A district court must order the presumptive sentence specified in the sentencing guidelines unless there are "identifiable, substantial, and compelling circumstances" to warrant an upward departure from the presumptive sentence. Minn. Sent. Guidelines II.D. (2011). "Substantial and compelling circumstances are those showing that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the offense in question." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). Whether a particular reason for an upward departure is permissible is a

question of law, which is subject to de novo review. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

Hutchins argues that (1) he could have been charged with burglary of a dwelling in violation of Minn. Stat. § 609.582(a) (2004); (2) an element of burglary of a dwelling is the nonconsensual entry into an occupied dwelling, which constitutes invasion of the zone of privacy (*see State v. Jackson*, 749 N.W.2d 353, 358 (Minn. 2008)); and (3) with exceptions not applicable in this case, a fact that is an element of an uncharged crime cannot be used to enhance a sentence. *See State v. Weaver*, 796 N.W.2d 561, 570 (Minn. App. 2011), *review denied* (Minn. July 19, 2011).

We first address the state's argument that Hutchins has waived this argument by failing to assert it in the district court by noting that a defendant cannot waive a right to an appeal from an illegal sentence. *State v. Maley*, 714 N.W.2d 708, 714 (Minn. 2006) (rejecting the state's argument that the record demonstrated a knowing, intelligent, and voluntary waiver of the right to challenge a sentencing factor, and stating that even if the record established an intent to waive a sentencing challenge, "it would have no legal effect because a defendant's right to appeal an illegal sentence cannot be waived"). And we find no merit in the state's argument that, because T.B. was sleeping in the dining room of the dwelling, Hutchins "entered more than just the dwelling" and the implied argument that an upward departure is somehow justified under these circumstances. We conclude that the district court erred by departing from the guidelines sentence based on an element of an uncharged crime.

Hutchins argues that his sentence must be reversed and remanded to the district court for imposition of the presumptive sentence. The state argues that, in the event we conclude that the district court erred in departing from the sentencing guidelines based on invasion of the zone of privacy, the case should be remanded for resentencing with the district court having discretion to empanel a resentencing jury to determine if any other aggravating factor justifies an upward departure. We agree with the state. "Pre-*Blakely* when the reasons stated on the record for a departure were improper or inadequate, we independently examined the record to determine whether there was sufficient evidence 'to justify departure' for legitimate reasons [but] [p]ost-*Blakely*, unless waived by the defendant, the fact-finding function is performed by the jury." *Jackson*, 749 N.W.2d at 358 (citation omitted). In *Jackson*, having found that Jackson's enhanced sentence was based on impermissible departure factors, the supreme court reversed the enhanced sentence and remanded "for imposition of the presumptive sentence or, unless waived by Jackson, the empanelling of a resentencing jury to determine the existence of facts in support of legitimate aggravating factors for enhanced sentencing . . . ." *Id.* The circumstances are similar in this case. As the state points out, the record demonstrates that T.B. suffered "a great deal of emotional distress," which may constitute an aggravating factor justifying an upward departure. And, as noted in *Jackson*, because burglary is such a serious crime, "punishment is allowed for both the burglary and the crime committed in the dwelling." 749 N.W. 2d at 358. We reverse the enhanced sentence and remand for resentencing to the presumptive sentence, permissive

consecutive sentences, or the empaneling of a resentencing jury to determine the existence of whether there is a valid aggravating factor.

**Affirmed in part, reversed in part, and remanded.**