STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1077

State of Minnesota,
Respondent,

vs.

Shane Michael Brunner,
Appellant.

Filed June 18, 2012
Affirmed
Halbrooks, Judge

Stearns County District Court
File No. 73-CR-10-7613

Lori Swanson, Attorney General, Kimberly R. Parker, Jennifer Coates, Assistant Attorneys General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

William L. Davidson, Special Assistant Public Defender, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

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

HALBROOKS, Judge

Appellant challenges his conviction of terroristic threats under Minn. Stat. § 609.713, subd. 1 (2010), arguing that the district court erred in instructing the jury and that the prosecutor committed misconduct. We affirm.

FACTS

On August 28, 2010, appellant Shane Brunner and J.G. spent the evening in the bars in St. Cloud. After the bars closed, they met J.T.G. and B.S., and appellant invited everyone back to his house, where they talked and drank in the backyard. J.B. and A.M. were also out at the bars that night. While walking home to A.M.'s house, J.B. and A.M. got separated. In order to find each other, they started yelling to one another. Appellant and the others at his home could hear J.B. and A.M. approaching. Trial testimony differed as to the tone of the oral exchanges between the groups. J.G. testified that they yelled at J.B. and A.M. once. But J.B. testified that he and A.M. exchanged obscenities with appellant and his friends. A.M. conceded that he could see how appellant and his friends could have misinterpreted the initial yelling as trash talk directed at them.

To access the street, J.B. and A.M. followed a worn path by appellant's home. As J.B. and A.M. approached appellant's house, they had a confrontation with J.G. and appellant. There was conflicting trial testimony as to who instigated the confrontation and where it took place. J.B. and A.M. testified that appellant and J.G. confronted them in the middle of the street. That version was confirmed by J.T.G. B.S. testified that J.G. and appellant walked 20-30 feet to meet J.B. and A.M., close to or in the street. But J.G.

testified that J.B. and A.M. approached appellant's house and walked onto the property with their hands up like they wanted to fight, and appellant testified that J.B. and A.M. came into his yard and walked toward them in an aggressive manner, as if ready to fight. According to appellant, A.M. began struggling with J.G.

It is undisputed that, during the confrontation, appellant displayed a gun to J.B. and A.M. But the trial testimony differed as to the manner in which appellant used the gun. J.B. and A.M. testified that after appellant and J.G. confronted them, J.G. pulled on the chain that A.M. was wearing around his neck. A.M. testified that appellant had his hand near his waistband when A.M. noticed he had a gun. J.B. and A.M. both testified that appellant cocked the gun at some point. J.G. testified that after J.B. and A.M. walked onto the property, he was pinned between the fence and truck, and had appellant not pulled out the gun, the altercation would have escalated. According to J.G., appellant did not cock the gun, but this testimony contradicted an earlier statement that J.G. gave to the police that appellant had cocked the gun. Appellant testified that he felt threatened and panicked when J.B. and A.M. came onto his property. So he retrieved the gun from his truck and showed it to them, but did not cock it. J.T.G. and B.S. testified that they did not hear what happened and could not see very well because they were too far away.

After appellant displayed the gun, J.B. and A.M. turned around and walked away. When they arrived at A.M.'s house, they called the police, and appellant was subsequently arrested. Appellant was charged with one count of making a terroristic threat under Minn. Stat. § 609.713, subd. 1, and a jury found him guilty. This appeal follows.

D E C I S I O N

I.

Appellant contends that the district court abused its discretion when it refused to instruct the jury that he had no duty to retreat from the curtilage of his home. When the district court announced that it was not going to give a no-duty-to-retreat instruction, appellant did not object. This court reviews unobjected-to error for plain error. *State v. Kuhlmann*, 806 N.W.2d 844, 852 (Minn. 2011). Under plain error, we must determine whether there was error, that was plain, and that affected the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). During oral argument before this court, appellant acknowledged that the district court properly instructed the jury as to the current status of the law by refusing to instruct the jury that appellant had no duty to retreat from the curtilage. While appellant invites this court to extend the law, we decline to do so. *State v. Fitzpatrick*, 690 N.W.2d 387, 392 (Minn. App. 2004) ("The extension of existing law is the task of the supreme court or the legislature, not of this court."). Because the jury instructions properly stated the law, there was no error.

II.

Appellant asserts that the prosecutor committed prosecutorial misconduct during closing argument by: (1) appealing to the greater societal good; (2) mischaracterizing appellant's self-defense argument; (3) introducing a new argument during rebuttal closing argument; and (4) erroneously stating that appellant was not entitled to defend his property. This court will reverse a defendant's guilty verdict and order a new trial only when the prosecutorial misconduct, considered in the context of the trial as a whole, "was

so serious and prejudicial that the defendant's constitutional right to a fair trial was impaired." *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000). When prosecutorial misconduct during closing argument is alleged, our focus is 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). During closing argument, the prosecutor 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). We review the propriety of a prosecutor's closing argument for an abuse of discretion. *State v. Ray*, 659 N.W.2d 736, 746 (Minn. 2003). Because appellant objected at trial to some, but not all, of the instances he now alleges to be misconduct, we will discuss them separately.

A. Objected-to allegations of prosecutorial misconduct

This court reviews a claim of prosecutorial misconduct that was objected to at trial under a two-tiered harmless-error test. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). For unusually serious prosecutorial misconduct, this court must be certain beyond a reasonable doubt that the misconduct was harmless. *Id.* But for claims of less-serious prosecutorial misconduct, we "determine whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.*

1. Greater societal good

Appellant contends that the prosecutor committed prosecutorial misconduct by referring to what appellant characterizes as the "greater societal good." The prosecutor stated, "Pulling a gun in that situation is not reasonable force. It is not reasonable force.

And, ladies and gentlemen, we cannot have people in that situation—" at which time appellant objected.

"It is improper for the prosecutor to make statements urging the jury to protect society or to send a message with its verdict." *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). In this instance, appellant objected to the prosecutor's alleged appeal to the greater societal good before the prosecutor completed his sentence. And the district court sustained the objection. Because the statement was incomplete, any improper impact that it might have had on the jury was diminished. Furthermore, the reference to the greater societal good represented less than one line of the transcript in the total context of the prosecutor's 20-page closing argument and an additional five pages for his rebuttal closing argument. The prosecutor never attempted to further develop this point following appellant's objection. Because we conclude that this partial statement, when considered in the full context of the prosecutor's closing argument, did not influence the jury to convict appellant, any error by the prosecutor was harmless.

2. Mischaracterizing self-defense argument

Appellant contends that in his rebuttal closing argument, the prosecutor mischaracterized appellant's self-defense argument as a defense of his property rather than defense of his person. Parties must base their closing arguments on the evidence produced at trial or the reasonable inferences from that evidence. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). Here, appellant's attorney made statements during his closing argument that appellant was protecting, among other things, his property.

Appellant's attorney argued, in part, that "[appellant] was scared for himself, his buddies, his home, his property." When appellant objected on the ground that the prosecutor had mischaracterized his closing argument, the district court instructed the jurors to rely on their own memories as to appellant's argument. We presume that a jury follows a district court's instruction. *State v. James*, 520 N.W.2d 399, 405 (Minn. 1994). Because the record supports the prosecutor's argument that appellant was, in part, acting to protect his property, there was no misconduct.

3. New argument on rebuttal

Appellant asserts that the prosecutor erred in his rebuttal closing argument by exceeding the scope of appellant's closing argument. During rebuttal argument, the prosecutor is "limited to a direct response to the defendant's closing argument." Minn. R. Crim. P. 26.03, subd. 12j. Because the district court has the grave responsibility of overseeing and regulating the courtroom conduct and procedures during trial, this court reviews matters of courtroom procedure for an abuse of discretion. *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006).

Appellant argues that because he never addressed the reaction of the alleged victims, the prosecutor exceeded the scope of his closing argument by commenting on the police officer's testimony that the victims, J.B. and A.M., were visibly shaken by this incident. But during closing arguments, appellant's attorney stated:

> [J.G.]'s testimony was that they came with fists raised. We do know that they were engaged, [J.G.] and [A.M.]. [A.M.] said that. [J.G.] was trying to pull [A.M.'s] chain. We don't know if that's true or not, but they were engaged. And there was some pushing and shoving. . . . There were abusive

> words and there was already an engagement going on, physical. . . .
>
> [J.G.] said that as they got closer and closer [A.M. and J.B.] got agitated and more violent.

In his rebuttal closing, the prosecutor responded directly to appellant's description of the reactions of A.M. and J.B. when he referred to the officer's testimony that A.M. and J.B. were visibly shaken after the encounter. Because the prosecutor's rebuttal argument was a direct response to appellant's closing, it did not constitute prosecutorial misconduct.

B. Unobjected-to allegations of prosecutorial misconduct

Appellant contends that the prosecutor erred by stating during his closing argument that appellant was not entitled to defend his property with reasonable force. He identifies the following statement by the prosecutor during rebuttal closing argument as constituting plain error:

> Ladies and gentlemen, I'm looking through these jury instructions. I'm looking through the jury instructions and looking in the self-defense portion and I'm looking for a provision that says it's okay to threaten to defend your property. It's not in there, folks. It's not in there.
>
> . . . It's not in there because the law doesn't allow you to do that. The law does not allow you to pull a gun in that—

Appellant objected, but did so on the ground that the prosecutor mischaracterized his self-defense argument as one of property instead of person, which we discussed above. But where appellant asserts in section II.A.2 that the prosecutor erroneously characterized his defense of person argument with this same passage, appellant now claims, for the first

time on appeal, that the proper analysis is a defense of property, for which the prosecutor misstated the law and committed reversible error. We note that throughout the arguments at the district court and in this appeal, both parties conflate the defenses of property and person, often blending their arguments with overlapping analysis. In section I, we ruled that there was no error when the district court refused to instruct the jury that there was no duty to retreat from the curtilage, so it is not a misstatement for the prosecutor to state that force cannot be used to defend the curtilage. Therefore, our analysis examines whether it was a misstatement of law as it relates to the defense of person, which appellant claims was his intended argument and was the focus at the district court.

A defendant fails to preserve an objection for appeal if the grounds for objecting at trial differ from those argued on appeal. *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993); *see also State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989) (stating that appellate courts generally will not decide issues raised for the first time on appeal). We therefore treat this as an unobjected-to allegation of prosecutorial misconduct and review it under the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). The standard requires (1) error, (2) that is plain, and (3) that affects substantial rights. *Griller*, 583 N.W.2d at 740. If appellant establishes the first two prongs of the standard, the burden shifts to the state to establish a lack of prejudice and that the misconduct did not affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302. If all three prongs are satisfied, the appellate court then assesses whether "fairness and the integrity of the judicial proceedings" require addressing the error. *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010).

We agree that the prosecutor misstated the law. Because this misstatement satisfies the first two prongs of *Griller*, we assess whether the state has met its burden to establish that the misstatement did not affect appellant's substantial rights.

The state satisfies its burden of demonstrating that the error did not affect appellant's substantial rights if there was no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Ramey*, 721 N.W.2d at 302. First, the statement must be placed in its proper context. The prosecutor made the statement in his rebuttal closing argument. In his primary closing argument, the prosecutor correctly stated, "First, the defendant is not guilty of a crime if the defendant used reasonable force against another to resist an offense against the person."

Despite the fact that the prosecutor made the incorrect statement during his rebuttal closing, the prosecutor proceeded to address the degree of force that appellant used and whether it was reasonable in that situation, using terms of reasonableness and making arguments that it was excessive. Looking at the whole context, we conclude that the objected-to statement was an isolated error. The prosecutor correctly stated the law at the beginning of his primary closing argument and then used the correct standard in his argument after making the erroneous statement. The prosecutor does not need to be perfect, as mistakes or inarticulate statements are inevitable. *Atkins*, 543 N.W.2d at 648. Furthermore, the district court correctly instructed the jury on this issue, stating that "[t]he defendant is not guilty of a crime if the defendant used reasonable force against [J.B.] or [A.M.] to resist an offense against the person and such an offense was being committed or the defendant reasonably believed that it was."

Because the prosecutor's misstatement was an isolated error when considered in the full context of his closing argument and because the district court properly instructed the jury, we conclude that the misstatement did not affect the jury's verdict and did not affect appellant's substantial rights.

Affirmed.