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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2262**

State of Minnesota,
Respondent,

vs.

Charles Morgan Bolton,
Appellant.

**Filed September 17, 2012
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-11-4075

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

Susan L. Segal, Minneapolis City Attorney, Paula J. Kruchowski, Assistant City
Attorney, Minneapolis, Minnesota (for respondent)

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Considered and decided by Bjorkman, Presiding Judge; Johnson, Chief Judge; and
Huspeni, Judge.*

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

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his conviction of misdemeanor violation of a harassment restraining order (HRO), arguing that (1) the district court abused its discretion by denying his motion for a mistrial following testimony as to evidence previously ruled inadmissible, (2) the district court abused its discretion by denying his request for a jury instruction on intent, and (3) the prosecutor committed serious misconduct. We affirm.

FACTS

Appellant Charles Bolton met P.P. while she was working as a bartender at Rick's Cabaret, a nightclub in downtown Minneapolis, and the two began a romantic relationship in 2006. Bolton objected to P.P. working at Rick's, so she quit by mid-2007. After their relationship ended in mid-2009, P.P. went back to work at Rick's.

On April 1, 2010, P.P. obtained an HRO against Bolton. The HRO prohibited Bolton from harassing P.P. by (1) “[a]ny repeated, intrusive, or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of [P.P.],” or (2) having “any contact with [P.P.] in person, by telephone, or by other means or persons.”

Bolton was charged with violating the HRO after an incident on February 10, 2011. P.P. finished her shift at Rick's around 3:00 a.m. and walked to the nearby parking lot where she had parked her car. The only other vehicle in the lot was a black SUV, which was angled toward her car with its lights on. P.P. drove out of the parking lot onto Third Street. A vehicle approached quickly beside her, then slowed down. P.P. looked

over and saw Bolton driving the black SUV. Bolton stared at her and “gave [her] a dirty look,” which scared her. Bolton then accelerated, pulled in front of her, and slowed down, causing her to slam on her brakes. They both stopped at a red light. When the light turned green, Bolton sped away. P.P. drove home and called the police.

Before trial,¹ the district court ruled that evidence pertaining to a prior criminal case involving Bolton’s prohibited contact with P.P. was inadmissible. Notwithstanding that ruling, P.P. referenced the prior case in her testimony. The prosecutor asked P.P. why she believed that Bolton knew where she was employed in February 2011; P.P. responded that Bolton “was on probation.” The district court sustained Bolton’s objection, and Bolton moved for a mistrial. The district court denied the motion and Bolton’s request for “a very detailed, formal curative instruction” as to both the series of questions and P.P.’s responses, reasoning that the question was not improper, only the answer. The district court therefore instructed the jury to disregard P.P.’s answer.

Bolton also testified. He acknowledged that the HRO was in effect and that he saw P.P. in downtown Minneapolis on the night in question. Bolton testified that he happened to park in the same lot as P.P. at 3:00 a.m. because he had a gastro-esophageal-reflux attack while on his way home from another nightclub and stopped in the parking lot to “work [it] out.” He also testified that he did not realize at first that he drove past P.P.’s car, then recognized her behind him while he was stopped at the light, but immediately drove away to avoid contact.

¹ Bolton’s first jury trial resulted in a mistrial due to prosecutorial misconduct.

At the close of the evidence, Bolton asked the district court to instruct the jury on intent. The district court denied the request, instead giving the standard instruction on the elements of misdemeanor violation of a restraining order. The jury found Bolton guilty. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by denying Bolton’s mistrial motion.

“[A] mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred.” *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (alteration in original) (quotation omitted). We review the district court’s denial of a motion for a mistrial for abuse of discretion, considering the entirety of the trial, including the mitigating effects of a curative instruction. *Id.*

Evidence that a defendant is on probation generally is inadmissible. *See* Minn. R. Evid. 404(b) (providing that evidence of other crimes or bad acts is inadmissible to prove character and action in conformity); *State v. Hjerstrom*, 287 N.W.2d 625, 627 (Minn. 1979) (discussing impropriety of admitting evidence of defendant’s prior criminal record). And a prosecutor has a duty to prepare witnesses to avoid introducing inadmissible evidence. *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). But the erroneous admission of inadmissible evidence generally does not warrant a new trial when it is “of a passing nature, or [when] the evidence of guilt is overwhelming.” *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (quotations omitted). Striking the

evidence from the record and instructing the jury to disregard the evidence also help to cure the erroneous admission of such evidence. *State v. Johnson*, 291 Minn. 407, 415, 192 N.W.2d 87, 92 (1971).

We agree with Bolton that P.P.'s reference to Bolton being on probation was improper. But we conclude that this testimony was not prejudicial. First, the district court sustained Bolton's timely objection and instructed the jury to disregard the testimony. We presume the jury followed that instruction. *State v. Gatson*, 801 N.W.2d 134, 151 (Minn. 2011). Second, P.P.'s reference to Bolton's probationary status was the only such comment, was brief, and was made in passing. Third, the state's evidence was undisputed as to most of the elements of the charged offense. With strong evidence of guilt, it is extremely unlikely that the jury's verdict was affected by the improper reference. On this record, we conclude that the district court did not abuse its discretion by denying Bolton's mistrial motion.

II. The district court did not abuse its discretion by refusing to give the intent instruction Bolton requested.

A district court is afforded "considerable latitude" in fashioning jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). We review instructions "in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). The refusal to give a requested jury instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996).

Bolton requested an intent instruction pursuant to 10 *Minnesota Practice*, CRIMJIG 7.10 (Supp. 2011), which defines “know,” “[h]ad reason to know,” “[i]ntentionally,” “[w]ith intent,” and “[r]ecklessly.” The district court denied the request and gave the standard instruction, advising the jury that the elements of a violation of an HRO are: “First, there was an existing court order restraining defendant from harassing [P.P.]; second, the defendant violated a term or condition of the order; third, the defendant knew of the order; fourth, the defendant’s act took place on February 10th, 2011 in Hennepin County.” *See* 10 *Minnesota Practice*, CRIMJIG 13.54 (2006).

Bolton argues that the district court abused its discretion by declining to include an instruction on intent. We disagree. The plain language of Minn. Stat. § 609.748, subd. 6(b) (2010), does not require the state to prove intent to violate an HRO. Rather, the misdemeanor-level violation of an HRO, like the misdemeanor-level violation of an order for protection, “requires only that the defendant ‘know of’ the order and then violate it.” *See State v. Colvin*, 629 N.W.2d 135, 138 (Minn. App. 2001) (construing order-for-protection statute), *rev’d on other grounds*, 645 N.W.2d 449 (Minn. 2002); *Anderson v. Lake*, 536 N.W.2d 909, 911 (Minn. App. 1995) (stating that order-for-protection statute and HRO statute “are sufficiently similar so that we may recognize caselaw construing the former as applicable to the latter”). The district court’s instruction accurately states the elements of the offense, including the requirement that the defendant have knowledge of the HRO. *See State v. Gunderson*, 812 N.W.2d 156, 160 (Minn. App. 2012) (stating that CRIMJIG 13.54 “directly reflect[s] the statutory language used in describing a

misdemeanor-level violation”). We conclude that the district court did not abuse its discretion by denying Bolton’s request for an instruction on intent.

Bolton also argues that insofar as Minn. Stat. § 609.748, subd. 6(b), does not require an intentional violation of the HRO, it is unconstitutionally vague, restricts his right to travel, and is inconsistent with the requirement in other states that an HRO violation be knowing. Bolton did not present these arguments to the district court. The constitutionality of a statute cannot be challenged for the first time on appeal from a criminal conviction. *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980). Bolton could have raised these arguments in support of his request for an intent instruction, or when the district court denied that request, but he failed to do so. On this record, we conclude that Bolton has waived his constitutional arguments, and we decline to address them.

III. The prosecutor did not commit prejudicial misconduct.

Bolton argues that the prosecutor committed several instances of misconduct during closing argument. We consider closing arguments in their entirety in determining whether prejudicial misconduct occurred. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). But the standard of review depends on whether the defendant objected at trial. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009).

A. Objected-to arguments

We review objected-to errors or misconduct under a two-tiered harmless-error test: “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.” *Id.* (citing *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974)); *see also State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (stating that the continued applicability of the two-tiered *Caron* approach has not yet been decided). For this court to reverse a conviction for serious prosecutorial misconduct, the misconduct must be “inexcusable and so serious so as to deprive appellant of a fair trial.” *McNeil*, 658 N.W.2d at 236.

Bolton argues that the prosecutor committed serious misconduct during closing argument by (1) shifting the burden of proof, (2) appealing to the passions of the jury, (3) vouching for the credibility of the state’s witness, and (4) belittling the defense. We consider each argument in turn.

Shifting the burden of proof

Misstatements of the burden of proof constitute prosecutorial error. *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). Prosecutors commit error “when they imply that a defendant has the burden of proving his innocence.” *See State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009).

Bolton contends the following argument impermissibly shifted the burden of proof: “How many free passes do we give Mr. Bolton, how many? If the Court was serious when it issued the order, and presumably the Court was serious, Mr. Bolton should go out of his way to avoid any potential appearance of impropriety. The burden will ultimately be on him—.” The district court sustained defense counsel’s objection and instructed the jury to disregard the “comment about burden.”

The prosecutor then continued:

Mr. Bolton should do everything in his power to follow [the HRO] and not put himself in a situation like what happened to [P.P.]. He had control of all these events, and especially the timing. You have a right to factor that in when you evaluate whether what one tells you is credible as an excuse.

The prosecutor also reiterated that, “[o]f course the burden is on the State to prove the case. It’s never on the defendant to prove a case.”

Viewed as a whole, the prosecutor’s argument plainly was not intended to and did not have the effect of shifting the burden of proof. Rather, the prosecutor argued that the HRO made it Bolton’s responsibility to stay away from P.P. and that his claim to have done so (or to have tried to do so) was not credible. Moreover, the objected-to argument was brief, the district court told the jury to disregard it, the prosecutor reiterated multiple times that the burden of proof is on the state, and the district court instructed the jury that the state has the burden of proof. On this record, we discern no prejudicial error.

Appealing to the passions of the jury and vouching

“A prosecutor must not appeal to the passions of the jury.” *State v. Mayhorn*, 720 N.W.2d 776, 786-87 (Minn. 2006). It also is improper for a prosecutor to offer a personal opinion as to any witness’s credibility. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984).

Bolton challenges the following portion of the prosecutor’s argument:

Now, is it reasonable to you to believe that if they show up on April the 1st in court on [P.P.]’s restraining order and the judge issues the order, the final order, there must have been some smoke to the fire. Why would they show up at a hearing and [P.P.] doesn’t even have a lawyer?

Bolton contends that this argument appealed to the jury's passions and improperly vouched for P.P.'s credibility because it portrayed her "as an un-counseled underdog that must be telling the truth because she didn't have a lawyer." We disagree. First, while the argument may not have addressed the elements of the offense, it accurately summarized the evidence presented at trial regarding the HRO proceeding. The "smoke to the fire" reference is not directed at P.P.'s testimony regarding the February 2011 incident and does not imply anything about the prosecutor's personal opinion of P.P.'s credibility. Second, the prosecutor followed the district court's directive to move on, concluding the reference to the prior hearing by arguing that the HRO effectively "drew a line in the sand . . . from this day forward [P.P] is off limits." Based on our careful review of the record, we conclude that the prosecutor's argument about what happened at the HRO proceeding did improperly appeal to the passions of the jury or vouch for P.P.'s testimony about the alleged offense.

Belittling the defense

A prosecutor is entitled to vigorously argue the state's case. *Rairdon v. State*, 557 N.W.2d 318, 324 (Minn. 1996). But a prosecutor "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." *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005).

Bolton argues that the prosecutor belittled his defense by characterizing his testimony about the events of February 10, 2011, as an "excuse." We disagree.

Examination of the prosecutor's argument reveals that she was explaining why the jury should discredit Bolton's testimony, not belittling that defense theory. *See Carridine*, 812 N.W.2d at 148-49 (concluding argument that defendant "threw the Hail, Mary of criminal defenses" was argument about the merits of his self-defense claim, and was not belittling). The prosecutor argued that Bolton "puts himself kind of at the scene but with an excuse. But guess who gets to decide whether or not the excuse makes sense or not? You do." She then explained why Bolton's version of the facts was "odd" and why his claim to have coincidentally wound up in the same parking lot and on the same street as P.P. at 3:00 a.m., and not noticed or tried to interact with her, was not credible. On this record, we conclude that the prosecutor did not belittle Bolton's defense.

B. Unobjected-to argument

Bolton also asserts that the prosecutor committed unobjected-to misconduct by asking the jury to hold him accountable. We review such claims under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 299-300, 302 (Minn. 2006); *see also* Minn. R. Crim. P. 31.02. Under this standard, an appellant must demonstrate that the prosecutor's unobjected-to argument was erroneous and the error was plain. *Ramey*, 721 N.W.2d at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The burden then shifts to the state to prove that the error did not affect the appellant's substantial rights. *Id.*

A prosecutor may talk about accountability but "should not emphasize accountability to such an extent as to divert the jury's attention from its true role of deciding whether the state has met its burden of proving [the] defendant guilty beyond a

reasonable doubt.” *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985). No such argument occurred here. The prosecutor argued:

I’ve proven that what he’s told you is just not credible, even if he did have a gastro esophageal attack. And because I have, he’s not entitled under the law to a free pass. You see, in the instructions you don’t have any extra instruction about a free pass; it doesn’t exist, just those four elements. There is no excuse JIG. He’s to be held accountable, and I’m expecting you to do so by coming back with a verdict of guilty to violating the court’s restraining order.

This reference to accountability, viewed in context, was addressed to Bolton’s argument that he was not responsible for being in the same place as P.P. in the early morning hours of February 10, 2011. As such, it was not improper. Moreover, it was the prosecutor’s only reference to accountability. We conclude that this single reference did not impair Bolton’s substantial rights and does not entitle him to a new trial.²

Affirmed.

² Bolton also argues that even if none of the asserted errors individually require reversal, the cumulative effect of the errors requires a new trial. *See State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006). Because Bolton has not established any substantial errors, there is nothing to aggregate.