STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1009
A12-0946

State of Minnesota,
Respondent,

vs.

Douglas Eugene Bennett
Appellant.

Filed February 19, 2013
Affirmed
Stoneburner, Judge
Dissenting, Hudson, Judge

Martin County District Court
File No. 46-CR-08-897

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Terry W. Viesselman, Martin County Attorney, Fairmont, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rachel Foster Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and

Kirk, Judge.

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

STONEBURNER, Judge

In these consolidated appeals, appellant argues that his convictions of assault and burglary should be reversed because he met his burden of proving that he suffered from a mental illness at the time of the offenses and that denial of his postconviction petition for relief should be reversed on several grounds. Because the evidence, viewed in a light most favorable to the verdict, was sufficient to permit the jury to find that appellant had not proved his mental-illness defense, we affirm his convictions. And because the postconviction court did not abuse its discretion in denying postconviction relief, we affirm denial of appellant's postconviction petition.

FACTS

Appellant Douglas Eugene Bennett was charged with first- and third-degree assault, first-degree burglary, possession of a small amount of marijuana, and possession of drug paraphernalia after he entered a farm residence without consent in June 2008 and assaulted the occupants while suffering from a psychotic episode. Bennett asserted a mental-illness defense.

The district court bifurcated the proceedings, and Bennett submitted the issue of his guilt to the district court on stipulated facts. The district court found him guilty of all charges and the matter proceeded to a jury trial on the mental-illness defense.

A jury was unable to reach a unanimous verdict, and the district court declared a mistrial. On retrial, the expert witnesses for the state and Bennett agreed that, at the time Bennett committed the charged offenses, he was suffering from a psychotic episode.

Bennett's expert witness testified that the psychotic episode was caused by mental illness, and the state's expert witness testified that the psychotic episode was substance-induced and not caused by mental illness.

The jury heard voluminous testimony about Bennett's circumstances and conduct before and after the incident that led to the charges against him, including his self-medication with marijuana, use of the hormone HCG to lose weight, and self-medication with iodine. The jury heard about a second alleged psychotic episode approximately two months after the episode that gave rise to the charges, and about Bennett's hospitalizations at the Minnesota Security Hospital in St. Peter, including his treating psychiatrist's decision to stop all medication for approximately six months, in an effort to determine whether or not Bennett was suffering from mental illness. The jury heard that he was discharged from the state hospital with a diagnosis of "substance-induced mood and psychotic disorder with delusions with onset during intoxication," and the testimony of his treating psychiatrist at the state hospital that Bennett was "stone cold normal."

The state's expert witness, Dr. Shane Wernsing, a board certified forensic psychiatrist who first met Bennett when he was hospitalized at the state hospital in June 2008, testified about Bennett's use of marijuana and iodine, opining that marijuana alone, or in combination with other substances, can lead to substance-induced psychosis. Dr. Wernsing ruled out mental illness based on Bennett's rapid return to a normal baseline during his hospitalization after the incident and his later stability without any signs of mental illness when he was taking no medications or other substances. Dr. Wernsing testified that, during his hospitalization, Bennett asked a lot of questions

that led Dr. Wernsing to think that Bennett was trying to determine how he could be found not guilty by reason of mental illness without triggering an indeterminate commitment. Dr. Wernsing suspected that Bennett might have been malingering by intentionally claiming or exaggerating symptoms with respect to the alleged psychotic incident in September 2008.

Bennett's expert witness, Dr. Thomas Gratzer, also a board-certified forensic psychiatrist, opined in his testimony that Bennett's June 2008 psychosis was the result of mental illness, which he diagnosed as bipolar disorder Type I, a major mental illness analogous to schizophrenia. Dr. Gratzer found it significant to his opinion that Bennett suffered a psychotic episode in September 2008 when Bennett was not ingesting any of the substances identified by Dr. Wernsing as psychosis-producing.

The jury rejected Bennett's mental-illness defense. Bennett waived a sentencing jury on aggravating factors and agreed to an aggravated sentence of 130 months for first-degree assault and concurrent, shorter sentences for the convictions of burglary and third-degree assault.

Bennett's direct appeal was stayed pending resolution of his motion for postconviction relief in which Bennett asserted that he is entitled to a new trial due to ineffective assistance of counsel, evidentiary errors, and prosecutorial misconduct. In the alternative, Bennett challenged his sentence arguing that the upward sentencing departure was not supported as a matter of law. The postconviction court denied Bennett's postconviction petition without a hearing. Bennett appealed denial of his postconviction petition and this court reinstated the direct appeal and consolidated the appeals.

D E C I S I O N

I. Sufficiency of evidence to support jury determination that Bennett did not prove his mental-illness defense

Bennett argues that the evidence established he was mentally ill at the time he committed the charged offenses.

> When reviewing the record to determine whether a defendant met his burden to prove mental illness, we conduct "a rigorous review of the record to determine whether the evidence . . . viewed most favorably to support a finding of guilt, was sufficient to permit the [fact finder] to reach its conclusion."

State v. Peterson, 764 N.W.2d 816, 822 (Minn. 2009) (quoting *State v. Mytych*, 292 Minn. 248, 252, 194 N.W.2d 276, 279 (1972)). "We have consistently held that the issue of legal mental illness is a question for the finder of fact, and we have granted the fact finder broad deference in assigning the weight to give to various testimony." *Id.* at 822-23.

In Minnesota, a defendant seeking to establish a mental-illness defense must meet the *M'Naghten* standard codified at Minn. Stat. § 611.026 (2008). *See Bruestle v. State*, 719 N.W.2d 698, 704 (Minn. 2006). "A defendant must prove mental illness at the time of committing the crime by a preponderance of the evidence." *Peterson*, 764 N.W.2d at 822. A defendant is required to show that "at the time of committing the alleged criminal act the person was laboring under such a defect of reason [caused by mental illness] as not to know the nature of the act, or that it was wrong." Minn. Stat. § 611.026. At issue in this case was the cause of Bennett's psychosis at the time he committed the charged offenses.

It was well within the purview of the jury to weigh the conflicting testimony of the expert witnesses regarding the cause of Bennett's psychosis at the time of the charged conduct. *See State v. Brom*, 463 N.W.2d 758, 764 (Minn. 1990) (stating that the court "grant[s] broad deference to the fact finder in determining the appropriate weight to assign expert psychiatric testimony"). Because we defer to the jury's weighing of the expert testimony, the evidence supports its determination that Bennett was not suffering from mental illness at the time he committed the charged crimes.

II. Challenge to denial of postconviction relief

A. Evidentiary rulings

Bennett argues that he is entitled to a new trial based on improper expert testimony by the state's expert witness. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

1. Availability of mental-illness defense for substance-induced psychosis

Bennett's first challenge is based on the following unobjected-to exchange concerning Dr. Wernsing's diagnosis of Bennett:

> [Dr. Wernsing]: . . . I see at the time it was the substance-induced mood disorder that I had diagnosed in the, this report here. Along with marijuana abuse and other substance abuse.
>
> [Prosecutor]: And so would that, would that diagnosis allow someone to use the insanity defense?
>
> [Dr. Wernsing]: Not being an attorney or a judge, I would say generally, in my opinion, no . . . because in all the cases I've seen, the substance was voluntarily ingested.

[Prosecutor]: And it wasn't, in your opinion at least in that report, you weren't finding that it was a mental illness that caused the psychotic break?
[Dr. Wernsing]: Correct.

If a party fails to object to the admission of evidence, this court's review is for plain error. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "If those three prongs are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotations omitted).

Relying on *State v. Provost*, 490 N.W.2d 93, 102 (Minn. 1992), Bennett asserts that, "[b]y telling the jury that [he] was legally ineligible for the insanity defense, Dr. Wernsing improperly acted as 'a thirteenth juror' and 'merely [told] the jury what result to reach.'" "[Expert] testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704. But opinions involving legal analysis or mixed questions of law and fact are not permissible. *Id.* 1977 comm. cmt. Bennett argues that this means that the "error" committed by the district court in not sua sponte striking Dr. Wernsing's comment was plain because "it is well-established in Minnesota law that medical experts may not provide legal conclusions."

The state responds by stating that Bennett "fails to identify any controlling appellate authority or binding precedent that would have compelled the trial court in the

particular circumstances of the present case to strike Dr. Wernsing's testimony in the absence of any objection," so there is no indication that any error was plain. *See State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008) (holding that, "[b]ecause neither this court nor the federal courts have conclusively resolved this issue, we cannot say that the prosecutor contravened case law, a rule, or a standard of conduct") (quotation and alteration omitted).

The state also argues that this exchange does not constitute error because Bennett "opened the door" to this testimony in his opening statement while summarizing Dr. Wernsing's expected testimony: "Because [Bennett] doesn't have a relapse, Dr. Wernsing opines that the psychotic episode was thus caused by the marijuana, HCG and iodine. He says that's a substance-induced psychotic state, and therefore it doesn't qualify for a mental illness defense." Additionally, before Dr. Wernsing testified, Dr. Gratzer testified that if Bennett's psychosis was drug-induced and it was voluntary, he would not qualify for the insanity defense. We agree with the state that, because Bennett initially introduced evidence that voluntary substance-induced psychosis does not qualify for the mental-illness defense, the defense opened the door to Dr. Wernsing's later testimony on the same issue and the admission of that testimony did not constitute error.

Bennett's challenge goes beyond the objection to an expert witness testifying about a legal matter: Bennett argues that the testimony represents a "mistaken understanding of the law" that "permeated the trial." But the statutory language is plain, the case law is well established, and the expert witnesses in this case agree that in

Minnesota a defendant's insanity caused by voluntary intoxication is not a defense. *See State v. Martin*, 591 N.W.2d 481, 486 (Minn. 1999) ("[W]e have consistently held that mental illness caused by voluntary intoxication is not a defense.").

The issues Bennett raises on appeal about involuntary intoxication or pathological intoxication are not consistent with his defense at trial that his psychosis was caused by mental illness. At trial the jury was well informed that although Bennett sought an opinion about involuntary intoxication, his expert witness did not support that theory and Bennett was not defending on that theory. The testimony about the legal consequences of voluntary substance abuse to the mental-illness defense as it relates to Bennett's circumstances was accurate and Bennett's claim on appeal that a misunderstanding of the law on the mental-illness defense permeated the trial is without merit.

2. Objected-to testimony about malingering

A reversal of the district court's ruling on objected-to evidence requires Bennett to prove that the ruling was "erroneous and prejudicial." *State v. Davis*, 820 N.W.2d 525, 536 (Minn. 2012). "An error is prejudicial if the error substantially influenced the jury's decision." *Id.* (quotation omitted).

Dr. Wernsing testified that he "got the sense that [Bennett] was trying to determine how he could be found not guilty by reason of mental illness." Bennett objected to this testimony, arguing that it was speculative. The district court overruled the objection. Bennett now argues that the testimony constituted improper commentary on Bennett's credibility. "An objection must be specific as to the grounds for challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19,

1993). Because Bennett objected on the grounds of speculation and not as improperly challenging another witness's credibility, he did not make this argument to the district court and it is waived on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that this court will generally not consider issues not argued to and considered by the district court).

B. Claim of prosecutorial misconduct

Bennett also argues that he is entitled to a new trial based on four incidents of what he identifies as prosecutorial misconduct: (1) questioning Dr. Wernsing regarding whether Bennett met the standard for a mental-illness defense; (2) misstating the law about the mental-illness defense; (3) misstating Bennett's burden of proof; and (4) disparaging the mental-illness defense. Because no objection was made regarding any of these instances, review is for plain error. *See State v. Ramey*, 721 N.W.2d 294, 297-99 (Minn. 2006).

1. Question to Dr. Wernsing and alleged misstatement of law

After Dr. Wernsing opined that Bennett's mood disorder was substance induced, the prosecutor asked Dr. Wernsing if a substance-induced mood disorder would "allow someone to use the insanity defense." Dr. Wernsing, after noting that he is not an attorney or a judge, responded that it was his understanding that it would not. As discussed above, we conclude that this entire exchange, including the prosecutor's question, did not constitute plain error that would entitle Bennett to a new trial. Even if the unobjected-to question was improper, it was predicted by the defense in opening statement, and it did not elicit a misstatement of the law regarding the defense of mental

illness as applied to the facts of this case, in which Bennett's defense was not based on a claim of pathological or involuntary intoxication.

2. Alleged misstatement of burden of proof

"A defendant must prove mental illness at the time of committing the crime by a preponderance of the evidence." *Peterson*, 764 N.W.2d at 822. A misstatement of the burden of proof in the context of a criminal trial is improper. *Strommen*, 648 N.W.2d at 690. Bennett cites four instances in which the prosecutor, during closing argument, told the jury that if it was not "sure" or "can't decide" a question, then Bennett failed to prove a mental-illness defense. The prosecutor initially told the jury that Bennett

> needs to prove by a greater weight of the evidence that he didn't know that his acts were wrong, or know the nature of what he was doing from a defect of reasoning caused by a mental illness. So, if [Bennett] doesn't prove all of this, you need to find him guilty. This means that after listening to the testimony and deliberating, if you're unsure or not convinced that he's proven by a greater weight of the evidence, then he's guilty.

The state asserts that the prosecutor's further use of "sure" was merely stating that if the weight of the evidence is equal on an issue, Bennett failed to meet his burden to prove the defense by the greater weight of the evidence. But by stating that the jury must be "sure," the prosecutor may have implied a higher burden of proof than proof by the greater weight of the evidence. Because there was no objection, it appears that the defense and the district court did not consider, given the context of the statements, that the prosecutor had plainly misstated the burden of proof. We conclude that the prosecutor's use of "sure" in this case was error, but given the context, did not rise to the

level of plain error. The prosecutor plainly stated the appropriate burden of proof in closing argument, the defense specifically told the jury that it "ha[d] to show you 51 percent versus [the prosecution's] 49" to meet the preponderance-of-the-evidence burden, and the district court properly instructed the jury on Bennett's burden of proof and instructed the jury that if an "attorney's argument contained any statement of the law that differs from the law as I give it, you should disregard their statement." *See State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000) (declining to find the prosecutor's analogy, the substance of which implied an erroneous burden of proof, rose to the level of plain error where the prosecutor and the district court properly stated the burden of proof and the court told the jury to disregard any statements of the attorneys to the contrary).

3. Alleged disparagement of mental-illness defense

A prosecutor may not "improperly invite[] the jurors to speculate with respect to the motivation behind defendant's decision to try the case as [he] did," nor may the prosecutor make an argument "similar to the 'that's the sort of defense that defendants raise when nothing else will work' argument." *State v. Griese*, 565 N.W.2d 419, 428 (Minn. 1997) (alteration omitted) (quoting *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994)). Bennett argues that the prosecutor improperly disparaged the defense by stating that "when [intoxication] doesn't work, the defendant claims mental illness, trying to find a defense, and gets Dr. Gratzer to put together a mental illness diagnosis." This statement was made in the following context:

> Now, there's also talk about this September incident, and Dr. Wernsing also had some concerns that the defendant was perhaps malingering. And Dr. Gratzer said it doesn't

> make any sense because the defendant was invested in an intoxication defense.
>
> But when he was committed in September of 2008, the defendant doesn't talk about [how] intoxication was the problem. The defendant says he had some sort of physical problem that was causing his psychotic breaks, his mental illness symptoms. Umm, bleeding on his brain, mold, allergies, fever. And exhibits that you'll get from when he was in the hospital of September of 2008 show that he's blaming these psychotic, the psychotic behavior on a physical condition.
>
> Now, after the commitment is discharged on June 1st of 2009 and he talked about the affidavit that he signed, he says he was just told to sign it, but sign the affidavit that he signed, true and correct. According to what he signed that he thought it was true and correct anyway when he signed it. And that is where they started talking about intoxication, after the commitment is already over.
>
> Now, when that doesn't work, the defendant claims mental illness, trying to find a defense, and gets Dr. Gratzer to put together a mental illness diagnosis, and Dr. Gratzer does this by ignoring key facts. Completely ignores the possibility that it was psyche – that it was a substance-induced psychosis in September of 2008. He doesn't even consider the possibility that it could have been substances, even though, as Dr. Wernsing testified, for a year after you stop taking these types of substances, you can still have psychotic symptoms.
>
> Bottom line is Dr. Gratzer's testimony doesn't prove the defendant was mentally ill on June 10th, and that a defect in reasoning for mental illness caused him not to know the nature of his crimes.

In context, we conclude that the challenged statement does not disparage the mental-illness defense; rather, the prosecutor attempts to undermine Bennett's expert's opinion based on other evidence in the record. We find no merit in Bennett's challenge to this argument.

C. Ineffective-assistance-of-counsel claim

Bennett argues that he is entitled to a new trial due to ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, Bennett "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). As discussed below, the postconviction court did not abuse its discretion by concluding that Bennett failed to prove ineffective assistance of counsel.

Bennett specifically claims that counsel was ineffective by (1) failing to object to the prosecutor's question and Dr. Wernsing's answer about the availability of the mental-illness defense in a situation diagnosed as substance-induced mood disorder; (2) failing to object to the state's argument on that issue; and (3) failing to request an instruction that "would have clarified the law" on that issue.

1. Failure to object

"What evidence to present to the jury, what witnesses to call, and whether to object are part of an attorney's trial strategy which lie within the proper discretion of trial counsel and will generally not be reviewed later for competence." *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). "Under the prejudice prong, a defendant must show that his counsel's errors so prejudiced the defendant at trial that a different outcome would have resulted but for the error." *Id.* (citing *Strickland*, 466 U.S. at 694, 104 S. Ct. at

2068). As discussed above at various points, Dr. Wernsing's testimony, if it was error, was not so prejudicial as to affect the outcome of the trial. Bennett points to nothing that shows that any error in failing to object to either Dr. Wernsing's testimony or the state's argument on whether substance-induced mood disorder qualifies for a mental-illness defense so prejudiced Bennett at trial that a different outcome would have resulted but for the error. *See id.*

2. Failure to request jury instruction

As with the failure to object, "[t]he decision not to request an instruction is a matter of trial strategy." *McCollum v. State*, 640 N.W.2d 610, 617 (Minn. 2002). Bennett argues that his trial counsel's failure to request an instruction that "the insanity defense is available to a defendant who became psychotic after consuming lawful substances, to defendants who are 'pathologically intoxicated,' or defendants whose psychosis persists even after the intoxicating effects of the substance subside" was so prejudicial that it affected the outcome of the trial. This argument lacks merit.

Bennett's trial strategy was that he suffered from bipolar disorder, not that he was intoxicated. Because his trial strategy was that he suffered from a mental illness, the failure to request an instruction or set of instructions on intoxication does not fall below an objective standard of reasonableness and does not constitute an "unprofessional error" that reasonably changed the result of the trial.

III. Sentencing

Bennett's alternative argument is that he did not validly waive his right to a jury trial and that the factors on which the district court based its upward durational departure during sentencing "were insufficient as a matter of law to support the departure."[1]

A. Waiver of *Blakely* jury trial

Bennett argues that he did not validly waive his right to a jury trial on the aggravating factors for sentencing. Where, as here, a defendant does not object to the waiver of his *Blakely* rights, this court reviews the waiver under a plain-error standard. *See State v. Kuhlmann*, 806 N.W.2d 844, 852 (Minn. 2011) ("The plain error analysis allows an appellate court to consider an unobjected-to error that affects a criminal defendant's substantial rights.").

> Where the prosecutor seeks an aggravated sentence, the defendant, with the approval of the court, may waive a jury trial on the facts in support of an aggravated sentence provided the defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to a trial by jury, and after having had an opportunity to consult with counsel.

Minn. R. Crim. P. 26.01, subd. 1(2)(b). "[A] defendant's waiver of the right to a jury determination of aggravating sentencing factors must be made knowingly, voluntarily, and intelligently." *State v. Thompson*, 720 N.W.2d 820, 827 (Minn. 2006). A waiver is knowing, voluntary, and intelligent if (1) the defendant is informed of *Blakely* and of his

[1] Bennett also argues, and the state does not dispute, that his purported waiver of any sentencing appeal is unenforceable. *See Spann v. State*, 704 N.W.2d 486, 494-95 (Minn. 2005) (holding that public policy and due-process considerations render a defendant's purported waiver of appeal rights under a stipulated sentencing agreement invalid and unenforceable).

"right to a jury trial on sentencing enhancement factors," (2) the defendant is asked on the record if he has "any questions about the *Blakely* issue" and answers in the negative, and (3) the defendant is asked if he understands he has a right to a jury trial on the aggravating sentencing factors and that he is waiving that right, and he responds in the affirmative. *Id.* at 827-28. An on-the-record waiver of a right to have a jury determine the existence of aggravating factors to support an upward sentencing departure is valid. *Id.*

The colloquy that took place after the jury verdict and Bennett's agreement to waive his rights to a jury trial on the *Blakely* factors consisted of:

> THE COURT: And knowing that you know you have a right for the jury to come in and to render a special verdict on whether there are aggravating factors that could permit the Court to make a departure?
>
> [BENNETT]: Yes, I do.

Bennett was not asked to and did not acknowledge or personally waive his rights to testify at trial, have prosecution witnesses testify in open court with him present, question the prosecution's witnesses, and call his own witnesses. *See* Minn. R. Crim. P. 26.01, subd. 3. This was plain error, but we conclude that the error did not impact Bennett's substantial rights. Bennett's trial on the mental-illness defense had just concluded, and there is no indication that Bennett did not understand that a jury trial on the *Blakely* factors would involve his right to testify, confront witnesses against him, and call his own witnesses. Bennett had previously waived his rights to a jury trial on the issue of guilt, and, while this is not sufficient to constitute a waiver of his right to a jury trial on the

Blakely factors, *see* Minn. R. Crim. P. 26.01, subd. 3(c), this waiver indicates that he understood the specific rights involved in such a waiver. Bennett makes no argument in his brief that his substantial rights were impacted by the invalid waiver, and there is nothing in the record that indicates that they were.

B. Findings on aggravating factors

"We review a sentencing court's departure from the sentencing guidelines for abuse of discretion," *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003), but "substantial and compelling circumstances" must exist in the record to justify departure, *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996). The issue of whether a stated reason for departure is proper is a legal question reviewed de novo. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 10, 2010).

Bennett argues that the district court failed to make specific findings on the aggravating factors. At the time Bennett waived his right to a *Blakely* trial on the aggravating factors, the prosecutor asked Bennett whether he "underst[ood] that there are aggravating factors in this case, specifically that the crimes took place in the zone [of] privacy of [the victims]? . . . [a]nd that because of their age, both [victims] would be unable to fight back . . . and be able to have escaped from you?" Bennett answered both questions affirmatively. Then the prosecutor asked: "And you would agree that based on those aggravating factors, that the [district c]ourt could do an upward departure and give you the sentence of 130 months . . . ?" Bennett agreed. At sentencing, the district court sentenced Bennett to 130 months for the first-degree assault conviction, stating that it was doing so "by reason of the agreement on the *Blakely* factors." Because the record plainly

discloses aggravating factors Bennett admitted to, we conclude that the district court's adoption of the agreed-upon *Blakely* factors constitutes a sufficient finding on the record of the aggravating factors. *See* Minn. Sent. Guidelines II.D. (2007) (stating that "in exercising the discretion to depart from a presumptive sentence, the judge must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence").

C. Validity of the aggravating factors

Bennett argues that because the experts agreed that Bennett did not know the nature of his acts or that they were morally wrong, the aggravating factors cited by the court (the age and vulnerability of the victims and the zone of privacy) cannot support a departure in this case. Minn. Sent. Guidelines II.D.2.b(1) (2007) states that an aggravating factor for sentencing exists when "[t]he victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender." Bennett argues that this is unavailable in this case because "[t]here is absolutely no evidence that [he], either before entering the [house] or at any time during the offense, became aware that [the victims] were not demons, let alone that they were elderly and particularly vulnerable due to their age." But, as the state points out, simply because the experts agreed that Bennett did not know the nature of his actions or did not know that they were wrong does not mean that he did not know, nor should he have known, that his victims were vulnerable due to their ages. We agree and conclude that this aggravating factor can be used in this case. Because only one aggravating factor is necessary to justify an upward durational departure, *see State v.*

O'Brien, 369 N.W.2d 525, 527 (Minn. 1985), it is not necessary to address Bennett's challenge to the zone-of-privacy factor as being based on uncharged conduct.

Affirmed.

HUDSON, Judge (dissenting)

Although I concur with the majority's conclusion that the prosecutor committed error by misstating the burden of proof, I disagree with the majority's conclusion that the error did not rise to the level of plain error. Because the prosecutor's conduct did constitute plain error and affected appellant's substantial rights, I respectfully dissent and conclude that appellant is entitled to a new trial.

"A defendant must prove mental illness at the time of committing the crime by a preponderance of the evidence." *State v. Peterson*, 764 N.W.2d 816, 822 (Minn. 2009). "In the context of a criminal trial, misstatements of the burden of proof are highly improper." *State v. Strommen*, 648 N.W.2d 681, 690 (Minn. 2002) (quotation omitted). "Misstatements of the burden of proof also constitute prosecutorial misconduct." *State v. Fields*, 730 N.W.2d 777, 786 (Minn. 2007). A preponderance of the evidence requires "[t]he greater weight of the evidence." Black's Law Dictionary 1301 (9th ed. 2009). But here, the prosecutor strongly implied that Bennett had a higher burden of proof than proof by the "greater weight of the evidence," by *repeatedly* telling the jury during closing argument that it should reject Bennett's mental-illness defense if it was unsure or simply could not decide either way. The prosecutor stated: (1) "And even if you're not sure whether or not he knew what he was doing, or that it was morally wrong, if you're not sure, if you can't decide, he's still guilty"; (2) "[I]f you think he had a psychosis that day, and if you're not sure whether it was the drugs or whether it was mental illness, then he's guilty"; (3) "Really, I mean but even if you, if you're not sure, they have—they haven't proven their case, and they haven't shown mental illness"; and (4) "If you're not sure

because there's been a lot of testimony from a lot of different people, a lot of opinions, then you need to find him guilty. The two hurdles he has to clear, if you think he cleared one, but not the other, he's guilty. If you think he cleared one and you're not sure about the other, he's still guilty."

The prosecutor's statements were highly improper. The quantum of evidence Bennett had to introduce was a fair preponderance, meaning 51%. The jury did not need to be "sure," which, as Bennett correctly notes, is more akin to certainty beyond a reasonable doubt. Indeed, the jury could have been "unsure," meaning not entirely certain, but still conclude that it was at least 51% likely that Bennett's psychosis was caused by mental illness. Furthermore, the prosecutor's statements were especially prejudicial given the posture and facts of this case.

Specifically, the expert witnesses for the state and Bennett agreed that at the time Bennett committed the charged offenses, he was suffering from a psychotic episode. Thus, the sole issue for the jury was whether that psychotic episode was in fact caused by mental illness or whether the psychotic episode was substance-induced. If it was the latter, Bennett's mental-illness defense failed. Moreover, this was a close case, as evidenced by the fact that the first jury was unable to reach a unanimous verdict on the mental-illness defense and the district court declared a mistrial. In addition, the instant jury heard voluminous, often conflicting, expert medical testimony. The case was also emotionally-charged given the serious injuries Bennett randomly inflicted upon the elderly victims. Thus, the prosecutor's repeated statements that the jury should convict

Bennett even if they were "not sure," in effect improperly elevated the burden of proof on the pivotal issue, in a hotly contested, emotionally-charged case.

The majority correctly notes that the prosecutor did state the burden of proof correctly on one occasion and that the district court properly instructed the jury on Bennett's burden of proof. And indeed, we have frequently upheld convictions in the face of any number of errors occurring during trial where the district court has corrected the error and/or taken other curative measures. But it is also true that the supreme court has sanctioned the reversal of an appellant's conviction in the face of serious prosecutorial misconduct, even though the district court properly instructed the jury. *See Strommen*, 648 N.W.2d at 689–90 (reversing conviction on other grounds, but observing that, despite district court's proper instruction, appellant was denied a fair trial where prosecutor misstated the law and the state's burden of proof).

Had the error here involved an isolated statement or simply an inartful choice of words, the district court's instructions might have been sufficient to mitigate the harm. But on this record, it is impossible to say with any certainty that the prosecutor's misstatements did not play a role in the jury's decision to convict. As in *Strommen*, there are some errors that are so serious in the context of a particular trial, they defy corrective measures. That is the case here, and preservation of the fairness and integrity of judicial proceedings dictate that we reverse Bennett's convictions and afford him a new trial.

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Judge Natalie E. Hudson