STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1601

State of Minnesota,
Respondent,

vs.

Dale Ryan Porter,
Appellant.

Filed September 16, 2013
Affirmed
Larkin, Judge

St. Louis County District Court
File No. 69DU-CR-11-373

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges his convictions of assault, terroristic threats, and carrying a pistol while under the influence of alcohol. He argues that the district court abused its discretion by admitting a recording of a 911 call as an excited utterance at his jury trial and that the prosecutor committed misconduct during closing arguments. We affirm.

FACTS

Respondent State of Minnesota charged appellant Dale Ryan Porter with second-degree assault, carrying a pistol while under the influence of alcohol, fifth-degree domestic assault, and two counts of terroristic threats. The charges were based on an incident that occurred between Porter and his fiancée, S.A.M., on February 7, 2011. The case was tried to a jury, and the following evidence was presented at trial.

Porter, S.A.M., and S.A.M.'s mother jointly owned an adult foster-care company. In early 2011, St. Louis County Social Services investigated allegations that the company's employees abused its patients. On February 7, Porter was upset because a company employee, A.J.M., had given an interview to social services. When Porter arrived at the condominium he shared with S.A.M. at around 5:30 p.m., he was intoxicated. S.A.M. and Porter began arguing about A.J.M.'s interview. During the argument, Porter became upset and pulled a pistol from his belt. He held the gun at his side while demanding to know who had given A.J.M. permission to speak with social services regarding the investigation. S.A.M. told Porter that she thought her mother had given permission, which further upset Porter.

Porter ordered S.A.M. to accompany him to her mother's house, but she refused. Porter pointed the gun at S.A.M., and she dropped to the floor. Porter pointed the gun at the back of S.A.M.'s head and ordered her to get onto the elevator. She refused. Porter then grabbed her left hand and twisted her wrist while holding the gun to the back of her head. S.A.M. again refused to get on the elevator, so Porter got on the elevator by himself and left the scene.

S.A.M. packed a bag, planning to leave the condominium. Next, she called her mother to warn her that Porter was upset and possibly on the way to her house. S.A.M. left the condominium, moved her car to the front door of the building, and then went back into her condominium to retrieve her belongings. As S.A.M. entered her condominium, Porter was standing near the doorway with a gun in each of his hands. He demanded information regarding A.J.M.'s interview with social services. S.A.M. said she did not know anything and attempted to leave, but Porter threw her to the ground. He put a gun to the back of her head and insisted that she accompany him to their bedroom. She refused, and he hit her on the side of her leg with the gun. She agreed to go into the bedroom, but when Porter let her stand up, she ran from the condominium to her car.

S.A.M. called A.J.M. and told him that Porter had held a gun to her head. She also said that Porter had threatened to shoot her and her mother. She asked A.J.M. to call his father, who is a police officer. A.J.M. agreed to call his father, but he also told S.A.M. to call the police. S.A.M. told A.J.M. that she did not want to call 911 because doing so might harm Porter's "political career." A.J.M. called his father and then called S.A.M. and told her to immediately call 911. He stressed the seriousness of the situation and told

her he would call the police if she did not. S.A.M. cried during her phone call with A.J.M.

After speaking with A.J.M., S.A.M. called 911. She reported that Porter was "very intoxicated and . . . held several loaded weapons to [her] head." S.A.M. said she "dropped to the ground when [Porter] pulled his gun and he put it to [her] head and then he put [her] in an arm bar." S.A.M. cried during the call and repeatedly mentioned that she did not want to get Porter in trouble. A recording of the 911 call was admitted into evidence pursuant to a pretrial ruling by the district court.

After S.A.M. called 911, the police responded to the condominium and arrested Porter. A breath test administered about two hours after Porter's arrest indicated that he had an alcohol concentration of .12.

At trial, S.A.M. testified that her allegations regarding Porter's conduct on February 7 were false. She claimed that she made the false allegations because she hoped A.J.M. and his father would speak with Porter about his drinking. She testified that after A.J.M. threatened to call the police, she called 911 because she "didn't want to get caught in [her] lie." She also testified that she told her mother that Porter threatened to shoot her so her mother would take the situation seriously.

The jury found Porter guilty of all of the charged offenses, including an additional fifth-degree assault charge that was added during trial. The district court denied Porter's motion for a new trial, and this appeal follows.

D E C I S I O N

I.

Prior to trial, the state filed a motion in limine seeking admission of the 911 recording as substantive evidence. The evidentiary record submitted in support of the motion included a police report regarding the incident, deposition testimony from A.J.M., and a copy of the 911 recording. The district court concluded that the 911 recording was admissible as an excited utterance. Porter assigns error to the ruling, arguing that "the alleged victim had the opportunity to reflect upon the event and was not under stress from the alleged event when she placed the call."

"Evidentiary rulings generally rest within the district court's discretion and will not be reversed absent an abuse of that discretion." *State v. Hogetvedt*, 623 N.W.2d 909, 912 (Minn. App. 2001), *review denied* (Minn. May 29, 2001). "On appeal, the party claiming error in the district court's ruling has the burden of demonstrating both the error and the prejudice resulting from the error and a reversal is warranted only when the error substantially influences the jury to convict." *Id.* (quotation omitted).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Although generally inadmissible under the rules of evidence, hearsay statements may be admissible under one of several exceptions, including the excited-utterance exception. Minn. R. Evid. 803(2). The excited-utterance exception allows admission of a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* The

rationale for the excited-utterance exception stems from the belief that excitement caused by startling events eliminates the possibility of fabrication and ensures trustworthiness. *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986). But "[t]he lapse of time between the startling event and the out-of-court statement is not always determinative." *Hogetvedt*, 623 N.W.2d at 913. Relevant factors to consider include "the length of time elapsed, the nature of the event, the physical condition of the declarant, and any possible motive to falsify." *Id.* (quotation omitted).

The district court considered each of the relevant factors and concluded that the first three factors favored admission of the recording. The district court found that "[t]he elapsed time between the startling event and the 911 call [was] approximately a half hour or less" and noted that "[a]ppellate courts have upheld admissibility under [r]ule 803(2) for considerably longer periods of time." *See id.* (three hours); *see also Daniels*, 380 N.W.2d at 783 (one hour); *State v. Berrisford*, 361 N.W.2d 846, 850 (Minn. 1985) (90 minutes). The district court also found that "[t]he nature of the event was an intense argument that included multiple threats with handguns."

As to S.A.M.'s physical condition, the district court noted A.J.M.'s deposition testimony that "S.A.M. was crying when they spoke on the phone." The district court judge also explained that he had listened to the entire 911 call and that "S.A.M. is emotional and appears to be crying during several portions of the extended conversation with the dispatcher. S.A.M. is not hysterical or sobbing, but does sound as though she is still under stress from the events."

But the district court found that the fourth factor, any possible motive to falsify, weighed against admission because S.A.M. "specifically stated that she had a motive to falsify and [that she] in fact, did so." Nonetheless, the district court concluded that the 911 call was admissible because the court was "convinced that S.A.M. was still under the stress of the incident when she placed the call to 911." The district court reasoned that "[t]here are sufficient indicia of reliability to allow this evidence to go to the jury," and that "[u]ltimately, it is the jury who must evaluate S.A.M.'s credibility and determine whether her initial statements or the subsequent recantations are the truth."

The record before us demonstrates that the district court appropriately exercised its discretion. It carefully considered the relevant factors, and we discern no reversible error in its analysis. Even though Porter offers several arguments that might support a different conclusion, the decision to admit the 911 recording as an excited utterance was ultimately discretionary. *See State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992) ("It is for the [district] court, in the exercise of its discretion in making evidentiary rulings, to determine whether the declarant was sufficiently under the aura of excitement.") (quotation omitted). The record before us does not establish a basis to overturn that discretionary ruling. *See State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989) (stating that appellate courts "will not lightly overturn a [district] court's evidentiary ruling").

II.

Porter next argues that he "was deprived of a fair trial where the prosecutor committed misconduct during closing arguments by misstating the elements of a charged

offense, shifting the burden of proof, and misstating facts in evidence." Porter did not object to those alleged errors at trial.

Generally, "the failure to object to a prosecutor's statement forfeits a defendant's right to have the issue considered on appeal." *State v. Atkins*, 543 N.W.2d 642, 647 (Minn. 1996). However, this court has discretion to review unobjected-to prosecutorial misconduct if plain error is established. Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). To establish plain error based on a claim of prosecutorial misconduct, the prosecutor's unobjected-to argument must constitute error, the error must be plain, and the error must affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The burden rests with the defendant to demonstrate that a plain error has occurred. *Id.* If a plain error is established, the burden shifts to the state to demonstrate that the error did not affect the defendant's substantial rights. *Id.*

An error affects substantial rights when it was "prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. If a plain error affecting substantial rights is established, this court assesses whether to address the error to ensure the fairness and integrity of the judicial proceedings. *See id.* at 740, 742 (stating that a court may exercise discretion to correct a plain error only if such error seriously affected the fairness or integrity of judicial proceedings). "Generally, the defendant will not be granted a new trial if it can fairly be said that the misconduct was harmless beyond a reasonable doubt." *Atkins*, 543 N.W.2d at 648.

Misstating the Elements of a Charged Offense

Porter argues that "[t]he prosecutor misstated the critical element of the offense of carrying a pistol while under the influence of alcohol." A prosecutor "may reference the law during trial" so long as the prosecutor does not misstate the law. *State v. Cao*, 788 N.W.2d 710, 716 (Minn. 2010); *see also State v. Jolley*, 508 N.W.2d 770, 773 (Minn. 1993) ("Any time a prosecutor makes . . . a misstatement of law, the defense is free to object and ask for a curative instruction.").

Porter was charged under Minn. Stat. § 624.7142, subd. 1(4) (2010), which provides that "[a] person may not carry a pistol on or about the person's clothes or person in a public place . . . when the person is under the influence of alcohol." The district court instructed the jury that the state had the burden to show that Porter was "under the influence of alcohol so that it affected [his] nervous system, brain or muscles so as to impair [his] clearness of intellect or physical control."[1]

During closing argument, the prosecutor stated: "You heard testimony that Mr. Porter was under the influence of alcohol, there was an intoxilyzer test, the result was a .12. He's clearly intoxicated, too intoxicated to carry that gun and still be within the rules and regulations of being able to carry that gun." Porter contends that the prosecutor committed misconduct because

> the fact that Porter had a blood-alcohol content of .12 is neither relevant to the offense, nor the standard by which the jury was instructed to determine his guilt with regard to this offense . . . . [namely] that he was "under the influence of

[1] This language is contained in the standard jury instruction regarding the offense. 10A *Minnesota Practice*, CRIMJIG 32.46 (2010).

> alcohol so that it affected [his] nervous system, brain or muscles so as to impair [his] clearness of intellect or physical control."

We disagree that the prosecutor misstated the law. The prosecutor's statement regarding Porter's alcohol concentration merely directed the jury's attention to evidence that tended to show that Porter was under the influence of alcohol, which is an element of the charged offense. Porter's alcohol concentration was relevant to the jury's determination of whether he was under the influence of alcohol. *See* Minn. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Because the prosecutor simply highlighted relevant evidence tending to prove one of the elements of the charged offense, his argument does not constitute error. *See State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996) ("[C]ounsel has the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom.").

Shifting the Burden of Proof

Porter next argues that "[t]he prosecutor shifted the burden of proof concerning the element of intent to [him]." "The state bears the burden of proving all the elements of an offense beyond a reasonable doubt, and the prosecutor is prohibited from shifting the burden of proof to a defendant to prove his innocence." *Finnegan v. State*, 764 N.W.2d 856, 864 (Minn. App. 2009), *aff'd*, 784 N.W.2d 243 (Minn. 2010). "Misstatements of the

burden of proof are highly improper and, if demonstrated, constitute prosecutorial misconduct." *Id.* (quotation omitted).

In this case, Porter claimed intoxication as a defense. Under statute:

> An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

Minn. Stat. § 609.075 (2010). "The burden of establishing intoxication by a fair preponderance of the evidence is on the defendant." *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980). "[A]lthough the burden rests on the defendant to present evidence of intoxication, the ultimate burden of proving intent remains with the [s]tate." *Id.* at 419.

In closing argument, the prosecutor stated:

> So if a crime says you need to form intent, you need to make up your mind to do this, then you consider, Ladies and Gentlemen, whether Mr. Porter was intoxicated and whether that intoxication precluded or stopped him from forming that intent.
>
> And here's what you have to decide: You can consider whether or not the Defendant was intoxicated and the [s]tate agrees, that clearly was shown already. *But you also have to look at whether the Defendant was capable of forming the required intent and that burden is on the Defendant, not on the [s]tate.* You heard Mr. Porter's taped statement. . . . Did that look like somebody who wasn't capable of deciding to do something? The [s]tate submits no. Those things negate intoxication. Those things say he was not too drunk to be able to—to have it affect whether or not he could decide to do something. It's just not proven here.

(Emphasis added.)

The italicized language is a misstatement of the burden of proof regarding intent. *See id.* Thus, the first two prongs of the plain-error standard are satisfied. *See Ramey*, 721 N.W.2d at 302 (stating that to establish plain error based on a claim of prosecutorial misconduct, the prosecutor's unobjected-to argument must constitute error, the error must be plain, and the error must affect the appellant's substantial rights and that an error is plain if it "contravenes case law, a rule, or a standard of conduct"). But for the following reasons, we conclude that the error did not affect Porter's substantial rights.

First, the district court properly instructed the jury regarding intent, stating that "the [s]tate must prove beyond a reasonable doubt that [Porter] had the required intent." *See State v. McDonough*, 631 N.W.2d 373, 389 n.2 (Minn. 2001) ("[A] prosecutor's attempts to shift the burden of proof are often nonprejudicial and harmless where, as here, the district court clearly and thoroughly instructed the jury regarding the burden of proof."). The district court also told the jury to disregard "any statement of the law that differs from the law I give you now," and juries are presumed to follow the district court's instructions. *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005). Second, defense counsel informed the jury several times during his closing argument that the state had the burden of proving intent. For example, defense counsel argued that "the [s]tate has to prove the element of intent beyond a reasonable doubt." Thus, the district court's instructions and defense counsel's argument correctly set forth the burden of proof and were adequate to overcome the prosecutor's misstatement.

Moreover, the evidence strongly supports the conclusion that Porter acted with specific intent when he pointed a gun at S.A.M.'s head and made multiple threats. Porter

ordered S.A.M. to accompany him to her mother's house, but she refused. Porter pointed the gun at the back of S.A.M.'s head and ordered her to get onto the elevator. She refused. Porter then grabbed S.A.M.'s left hand and twisted her wrist while still holding the gun to the back of her head. S.A.M. again refused to get on the elevator, so Porter got on by himself and left. After returning to the condominium, Porter again demanded information regarding A.J.M.'s interview with social services. S.A.M. said she did not know and attempted to leave, but Porter threw her to the ground. He then put a gun to the back of her head and insisted she accompany him to their bedroom. She refused, and he hit her on the side of her leg with the gun. Porter's behavior can only be construed as purposeful, and it provides strong evidence of intent.

In sum, the prosecutor's misstatement of the burden of proof regarding intent did not affect Porter's substantial rights and therefore does not provide a basis to reverse. *See State v. Morton*, 701 N.W.2d 225, 236 (Minn. 2005) (affirming appellant's conviction despite prosecutorial misconduct because appellant's "substantial rights were not affected" when "there was no reasonable likelihood that the jury's verdict" would have been different if the prosecutor had not engaged in the misconduct).

Misstating Facts in Evidence

Porter's last prosecutorial-misconduct argument is that "[t]he prosecutor misstated facts in evidence." A prosecutor may make arguments based on the evidence and legitimate inferences arising from the evidence. *State v. Salitros*, 499 N.W.2d 815, 816-17 (Minn. 1993). But "[a] prosecutor commits misconduct by intentionally misstating

evidence." *State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006). Porter claims that the following argument misstates the evidence:

> And here's the other thing with the firearms I don't understand and common sense I think has to—has to come in here. Mr. Porter carries the Walther P22 on his hip at all times. He gets home at about 5:30 that night, according to [S.A.M.'s] testimony here at the trial. This happens, I think police are called roughly an hour later, little bit over an hour. So he came home, has the gun in his hip still and then he puts another one in his pocket? Why two guns when you're inside of your apartment? It doesn't make sense. . . . Makes no common sense . . . that you come home from work, you have one on your hip and you grab another one just to be in your apartment with your [fiancée].

Porter contends that "the actual testimony shows that the police were not called until nearly 7:00 p.m., which is 90 minutes after Porter arrived home" and that "there is no testimony with regard to exactly when Porter put the second handgun in his pocket."

We disagree that the prosecutor intentionally misstated the facts in evidence. First, record evidence supports an inference that the police were called "roughly an hour later, little bit over an hour" after "this happens," "this" referring to the domestic dispute. Porter arrived home around 5:30, the dispute occurred, and S.A.M. called the police around 7:00. Thus, the dispute occurred sometime around 5:30, which was a "little bit over an hour" before S.A.M. called police at 7:00. Second, in a recorded interview admitted into evidence, Porter stated that he only had one gun on his person when he initially argued with S.A.M., making it reasonable for the prosecutor to infer that Porter obtained the second gun after he returned home from work. *See Salitros*, 499 N.W.2d at

816 (a prosecutor may make arguments based on the evidence and legitimate inferences arising from the evidence). In sum, the prosecutor's argument does not constitute error.

Moreover, "[a] closing argument must be proper, not perfect. Unartful statements inevitably occur in the midst of a heated and impassioned closing argument, even among the best of orators." *Atkins*, 543 N.W.2d at 648. And Porter concedes that the alleged misrepresentation alone would not support a new trial. We therefore conclude that even if the argument contained misstatements of fact, it did not affect Porter's substantial rights and therefore does not provide a basis to reverse.

III.

Lastly, Porter argues that "when taken cumulatively, the error in admitting the recording of the 911 call, along with the prosecutor's discovery violation[2] and misconduct during closing arguments, was not harmless and deprived [him] of a fair trial." In some cases, although identified errors might not individually warrant reversal, their cumulative effect may warrant a new trial. *State v. Erickson*, 610 N.W.2d 335, 340 (Minn. 2000). Porter's cumulative-error argument is unavailing because the only error

[2] The discovery violation regards disclosure of a conversation between the prosecutor and S.A.M.'s mother. The prosecutor indicated that she had disclosed the conversation in an e-mail to Porter's attorney months before trial, but defense counsel did not recall receiving the e-mail. The prosecutor was unable to locate the e-mail during a five-minute recess during trial, so the district court agreed to strike the testimony of S.A.M.'s mother. Porter argues that it is "highly implausible . . . that all twelve jurors did not consider . . . [the] stricken testimony." But he does not set forth any argument to explain how he was prejudiced by the testimony. We therefore do not consider the discovery violation as a basis for reversal. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that an assignment of error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

that he has clearly established is the prosecutor's single, inaccurate statement regarding the burden of proof, which did not prejudice Porter's substantial rights.

Affirmed.