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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0509**

State of Minnesota,
Respondent,

vs.

Shanell Kelley Prince,
Appellant.

**Filed February 24, 2014
Affirmed
Cleary, Chief Judge**

Hennepin County District Court
File No. 27-CR-12-18309

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth R. Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Johnson, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

Following a court trial, appellant was convicted of and sentenced for fourth-degree assault for transferring bodily fluids onto a peace officer. Appellant challenges her

conviction, arguing that the prosecutor committed prejudicial misconduct during her closing argument when she said that two of the state's witnesses testified credibly. Appellant also challenges her sentence, arguing that the district court abused its discretion by refusing to grant a downward departure from the presumptive guideline sentence based upon her intoxication at the time of the offense. We affirm.

FACTS

On June 9, 2012, Deputy Emily Miller of the Hennepin County Sheriff's Office was assisting with booking appellant Shanell Kelley Prince into the Hennepin County jail. According to Deputy Miller, appellant appeared to be intoxicated and became agitated and argumentative. Deputy Miller determined that appellant was too intoxicated and was behaving too disruptively to complete the booking process and that she needed to be temporarily confined in a single cell until she could be booked. Deputy Joshua Dais assisted Deputy Miller in escorting appellant to a cell. Appellant yelled and resisted being escorted, and the deputies struggled to maintain control of her and push her into the cell. According to Deputy Miller, before the door of the cell was closed, appellant spit on Deputy Miller, with saliva landing on the left side of her face "around [her] eye-mouth-cheek area." Deputy Dais "heard what sounded like someone spitting," but did not actually see appellant spit or see saliva on Deputy Miller. Deputy Dais asked whether she had been spit on, and Deputy Miller stated that she had and then went to wash her face. When appellant was later interviewed by a detective with the Hennepin County Sheriff's Office, she stated that she did not remember the incident or spitting on anyone.

Appellant was charged with felony fourth-degree assault for transferring bodily fluids onto a peace officer, in violation of Minn. Stat. § 609.2231, subd. 1 (2010). Appellant waived her right to a jury trial, and a court trial was held, during which Deputies Miller and Dais testified. During closing arguments, the prosecutor stated that “Deputy Miller testified very credibly.” The prosecutor further stated, “And you have Deputy Miller testifying credibly and you have Deputy Dais testifying very credibly, too.” Defense counsel did not object to these statements. The district court subsequently issued an order stating that it found appellant guilty of the charged offense.

During the sentencing hearing, appellant asked the district court to depart from the presumptive sentence under the Minnesota Sentencing Guidelines, treat her felony conviction as a gross misdemeanor, and sentence her to one year stayed. Appellant contended that her intoxication at the time of the offense justified being granted leniency. The state requested that appellant receive the presumptive guideline sentence of 13 months stayed. The district court refused to depart from the sentencing guidelines, and appellant received a sentence of 13 months stayed for three years. This appeal follows.

D E C I S I O N

I. The prosecutor did not commit misconduct during her closing argument by stating that the deputies testified credibly.

Appellant argues that the prosecutor committed prejudicial misconduct when she stated during her closing argument that Deputies Miller and Dais testified credibly. Appellant did not object to the prosecutor’s statements during trial. “On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial

rights.” *State v. Ramey*, 721 N.W.2d 294, 297-99 (Minn. 2006) (citing Minn. R. Crim. P. 31.02 and applying plain-error analysis to an allegation of unobjected-to prosecutorial misconduct). An error is “plain” if it is “clear or obvious” in that it “contravenes case law, a rule, or a standard of conduct.” *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008). When prosecutorial misconduct reaches the level of plain error, the state bears the burden of demonstrating that the misconduct did not affect the defendant’s substantial rights. *Ramey*, 721 N.W.2d at 299-300. An error affects substantial rights “if the error was prejudicial and affected the outcome of the case.” *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

“A prosecutor may not personally endorse the credibility of a witness or impliedly guarantee a witness’s truthfulness.” *State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006). However, “the state may argue that particular witnesses were or were not credible.” *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003); *see also State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977) (stating that “the prosecutor had a right to analyze the evidence and vigorously argue that the state’s witnesses were worthy of credibility whereas defendant and his witnesses were not”). In this case, the prosecutor stated that “Deputy Miller testified very credibly,” and further stated, “And you have Deputy Miller testifying credibly and you have Deputy Dais testifying very credibly, too.” The prosecutor did not assert that she or the state endorsed or believed the testimony of the deputies, but averred only that the deputies testified credibly. These statements were permissible and did not constitute prosecutorial misconduct. Because the prosecutor did not commit error, we need not go further with the plain-error analysis.

II. The district court did not abuse its discretion by refusing to grant a departure from the presumptive guideline sentence based upon appellant's voluntary intoxication at the time of the offense.

Appellant argues that the district court abused its discretion by refusing to depart from the presumptive guideline sentence and to treat her felony conviction as a gross misdemeanor. *See* Minn. Stat. § 609.13, subd. 1 (2010) (permitting a felony conviction to be deemed a gross misdemeanor if a gross-misdemeanor sentence is imposed). She contends that her voluntary intoxication at the time of the offense mitigates her culpability and justifies a departure. A district court has broad discretion to determine whether to depart from a presumptive guideline sentence. *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993). “This court will not generally review a district court’s exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range.” *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). Only in a “rare case” should an appellate court reverse a district court’s refusal to depart and its imposition of the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

The guideline sentences are presumed to be appropriate for every case, and departures may be made only in the small number of cases where substantial and compelling circumstances exist to support sentences outside of the presumptive ranges. Minn. Sent. Guidelines II.D & cmt. II.D.01 (2010). “Substantial and compelling circumstances are those demonstrating that the defendant’s conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008)

(quotation and emphasis omitted). As part of a nonexclusive list of factors that may be used as reasons for downward departure, the sentencing guidelines state: “The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.” Minn. Sent. Guidelines II.D.2.a.(3) (2010); *see also State v. Cizl*, 304 N.W.2d 632, 634 (Minn. 1981) (stating that a defendant’s voluntary intoxication at the time of the offense may not be relied upon as a mitigating factor to justify a downward departure); *State v. Dick*, 638 N.W.2d 486, 493 (Minn. App. 2002) (rejecting a defendant’s argument that his extreme intoxication at the time of the offenses mitigated their seriousness), *review denied* (Minn. Apr. 16, 2002).

Appellant’s contention that her voluntary intoxication at the time of the offense provides a substantial and compelling circumstance and justifies a sentencing departure is directly contradicted by the sentencing guidelines and caselaw. The district court did not abuse its discretion by refusing to depart from the presumptive guideline sentence.

Affirmed.