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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0224**

State of Minnesota,
Respondent,

vs.

Jason Edward Banks,
Appellant.

**Filed January 22, 2019
Affirmed
Cleary, Chief Judge**

Anoka County District Court
File No. 02-CR-13-8670

Keith M. Ellison, Attorney General, St. Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Gary R. Wolf, Wolf Law Office, Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Cleary, Chief Judge; and
Worke, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

Appellant Jason Edward Banks filed this direct appeal following the district court's entry of a judgment of conviction, arguing that he is entitled to a new trial because the

prosecutor committed misconduct by improperly injecting race into the trial. Because we conclude that the error did not affect Banks's substantial rights, we affirm.

FACTS

On a winter night, Banks was driving his taxi cab when he picked up a patron, L.G., from a bar at approximately 2:30 a.m. A security guard arranged for L.G. to be taken home and paid the cab fare with his own money. According to Banks, on the way to L.G.'s house, L.G. rubbed his shoulders and repeatedly asked him to have sex with her. He protested at first, but eventually, he pulled over and climbed into the backseat. Banks admitted that he digitally penetrated L.G. but alleged he was unable to have sexual intercourse because there was not enough room in the backseat and L.G. could not fully remove her clothes.

L.G., however, testified that she had been drinking alcohol earlier, and while she remembers the beginning of the trip, at some point she lost consciousness. When she woke up, they were in a wooded area and Banks was allegedly in the backseat, engaging in sexual intercourse with her. L.G. stated that she struggled and told Banks "no" but was unable to get away because Banks was holding her down and she suffers from a back disability following several surgeries on her spine. As a result of the struggle, L.G. suffered bruising on her arms and thigh, as well as injuries to her genitalia.

The following morning, L.G. relayed the incident to a friend who convinced her to go to the hospital. A sexual assault and forensic nurse examined L.G., documented her injuries, and took swabs of her genitals to test for DNA. Although L.G. initially declined to speak with the police, several days later she reported the event.

Banks was arrested and charged with multiple counts of criminal sexual conduct. In a statement he gave to police, Banks initially denied penetration. When asked to provide a DNA sample, Banks stated for the first time that he had ejaculated during the alleged consensual sexual encounter.

During the trial's opening statements, the prosecutor told the jury "[t]he only part of the cab ride [L.G.] remembered is waking up in the backseat of a cab helpless, her pants down to her knee boots, and a black man's penis in her vagina." Banks is a black man; L.G. is a white woman.

During its case-in-chief, the state presented numerous witnesses, including L.G., her friends and family members who spoke with her after the incident, the nurse, the investigating detectives, and the forensic scientists who tested L.G.'s blood and the swabs taken during the medical examination. Banks was the only witness for the defense. The jury found Banks guilty on all counts.

Banks filed this direct appeal from the judgment of conviction. We stayed the appeal so Banks could pursue postconviction relief. His postconviction petition was ultimately unsuccessful and we reinstated this appeal.¹

¹ The district court vacated Banks's convictions and granted his request for a new trial based on ineffective assistance of counsel (unrelated to the prosecutor's statement). The state appealed the district court's order. This court reversed the district court's postconviction order and reinstated Banks's convictions and sentence. *Banks v. State*, A17-0062, 2018 WL 817288, at *2, *5 (Minn. App. Feb. 12, 2018), review denied (Minn. Apr. 25, 2018).

DECISION

Banks argues that the prosecutor committed misconduct during his opening statement by stating that the only part of the cab ride L.G. remembers is “a black man’s penis in her vagina.” Defense counsel did not object to the statement and the district court did not intervene sua sponte.

Because Banks did not object to the statement in the district court, his prosecutorial misconduct claim is reviewed under the modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under the modified plain-error standard, the defendant must first establish (1) error, (2) that is plain. *Id.* “An error is ‘plain’ if it is clear or obvious.” *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016). “Typically, a ‘plain’ error contravenes case law, a rule, or a standard of conduct.” *Id.* The burden then shifts to the state to show that the misconduct did not affect the defendant’s substantial rights. *Ramey*, 721 N.W.2d at 302. If the state cannot do so, then the court may correct the error only if it seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Peltier*, 874 N.W.2d at 804.

The use of the phrase “a black man’s penis in her vagina” constitutes plain error without question. It is well established that a prosecutor may not inflame the jury’s passions and prejudices by injecting race into a trial when race is irrelevant. *State v. Jackson*, 714 N.W.2d 681, 694 (Minn. 2006). In this case, there was no permissible reason to inject race as identity was not at issue. By drawing attention to Banks’s race, the prosecutor suggested that the crime was more horrific because of the alleged perpetrator’s race. The prosecutor also invited the jury to consider racist ideas about the impropriety of

sex between a white woman and black man. This statement is highly inappropriate and likely to distract the jury from considering only the evidence presented at trial. *Cf. State v. Rogan*, 984 P.2d 1231, 1238-40 (Haw. 1999) (concluding the statement “some black, military guy on top of your daughter” is “every mother’s nightmare” was an impermissible appeal to racial prejudice).

In ruling on Banks’s postconviction petition, the district court concluded that the injection of race by the prosecutor was unintentional. While an “intentional” use of racist language is highly objectionable, so is the “unintentional” use of such language. The prosecutor had an affirmative obligation to assure that Banks received a fair trial, free from improper racial considerations. *See State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007) (“The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions.”). Additionally, Minnesota courts are firmly committed to removing racial bias from the courtroom, and the issue must be addressed whenever improperly raised. *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005). As officers of the court, prosecutors must demonstrate the same commitment and avoid any appearance of racial bias. A failure to do so—intentional or not—can have a serious effect on the integrity and public reputation of the judicial proceedings. All members of the judicial branch have an obligation to maintain the integrity of the court by requiring attorneys to refrain from manifesting bias or prejudice during proceedings before the court. Minn. Code Jud. Conduct Rule 2.3(C).

Having concluded that there is plain error, we must now determine if the state has shown that the error did not affect Banks’s substantial rights. “A plain error affects a

defendant's substantial rights if it was prejudicial and affected the outcome of the case.” *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017) (quotation omitted). “An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the jury’s verdict.” *Id.* (quotation omitted). When evaluating the effect on substantial rights, the court considers the pervasiveness of improper suggestions, the strength of the evidence against the defendant, and whether the defendant had the opportunity to rebut any improper remarks. *Peltier*, 874 N.W.2d at 805-06.

We believe that the nature of the prosecutor’s comment makes the issue of substantial rights a close call, as there is always a serious concern that racial comments can factor into a jury’s decision. *See State v. Varner*, 643 N.W.2d 298, 305 (Minn. 2002). And “the improper injection of race ‘can affect a juror’s impartiality and must be removed from courtroom proceedings to the fullest extent possible.’” *Cabrera*, 700 N.W.2d at 475 (quoting *Varner*, 643 N.W.2d at 304).

Nevertheless, after considering the factors outlined by the supreme court, we conclude that there is no reasonable likelihood that the error had a significant effect on the jury. The error was not pervasive. It was a single sentence in a six and a half page opening statement that kicked off a trial where testimony was taken for three days. *See Peltier*, 874 N.W.2d at 806 (concluding there was no effect on the defendant’s substantial rights when the “incidents of alleged misconduct were isolated, together comprising approximately one page of a 39-page closing argument”); *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (holding prosecutor’s misconduct did not affect defendant’s substantial rights where misconduct covered one of 64 pages of testimony); *State v. Powers*, 654 N.W.2d 667, 679

(Minn. 2003) (concluding two improper sentences in a closing argument that amounted to over 20 transcribed pages did not deprive the defendant of a fair trial). This is the only statement that Banks alleges was misconduct, and the prosecutor did not dwell on, emphasize, or repeat the statement. *See State v. Wren*, 738 N.W.2d, 378, 392 (Minn. 2007) (determining there was no prosecutorial misconduct where the prosecutor did not emphasize or dwell on the objectionable statements).

Additionally, as we held in Banks's postconviction appeal, the state presented substantial evidence of Banks's guilt. *See Banks*, 2018 WL 817288, at *8. L.G. testified as to the alleged assault, and her testimony was consistent with the statement she gave to the nurse and the police. The nurse testified that during her examination of L.G. after the assault, she found several injuries to L.G.'s external and internal genitalia that were consistent with L.G.'s version of the incident and with forced penetration or attempted forced penetration. By contrast, Banks's version of the events repeatedly changed and was inconsistent with the testimony of other witnesses. And although Banks claimed that he was unable to have sexual intercourse with L.G., semen found on L.G.'s cervix was consistent with Banks's DNA.

Finally, the prosecutor's comment was made during opening statements which gave Banks ample opportunity to respond. Indeed, defense counsel later interjected race in an attempt to undermine the victim's credibility. As this court has previously stated, misconduct in opening statements is less likely to play a substantial role in influencing the jury. *State v. Montgomery*, 707 N.W.2d 392, 400 (Minn. App. 2005). Having carefully reviewed the record, as appalled as we are by the prosecutor's statement, we conclude that

based on the considerations outlined in *Peltier*, the error did not affect Banks’s substantial rights.²

Affirmed.

² The supreme court has reserved to itself “the [supervisory] authority in the appropriate case to reverse [based on prosecutorial misconduct] . . . without regard to whether the defendant was prejudiced.” *Ramey*, 721 N.W.2d at 303. Given the incendiary and graphic nature of the prosecutor’s racial remark, which, intentionally made or not, essentially invited the jury to accept that a white rape victim suffers an especially aggravated injury when her rapist is black—a strikingly classic reminder of the dark history of race-based jury poisoning—this may be such a case.