STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1355

State of Minnesota,
Respondent,

vs.

Justin Allen Hanson, petitioner,
Appellant.

Filed May 8, 2017
Reversed and remanded
Jesson, Judge

Crow Wing County District Court
File No. 18-CR-12-4656

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

Donald F. Ryan, Crow Wing County Attorney, Candace Prigge, Assistant County Attorney, Brainerd, 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; Halbrooks, Judge; and Jesson, Judge.

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

JESSON, Judge

Appellant Justin Allen Hanson challenges his conviction of possession of a firearm by a prohibited person, arguing that the prosecutor committed misconduct in her opening

and closing statements. He also contends that there is insufficient evidence to sustain his conviction. Because the prosecutor misstated the evidence on the pivotal issue presented to the jury—when Hanson possessed the firearm—we reverse and remand for a new trial.

FACTS

On August 23, 2012, Hanson posted a Facebook video of himself at his family's cabin in Crosby firing a shotgun. In the video Hanson said, "This is Hideaway, and the next time you motherf---ers come out here this is what's going to happen." After the comment, the video shows Hanson discharging the shotgun into a tree. At the time the video posted—and at all times after April 2, 2012—Hanson was prohibited from possessing a firearm based on a controlled substance conviction. *See* Minn. Stat. § 624.713, subd. 1(2) (2010); Minn. Stat. § 624.712, subd. 5 (2010).

The August 23 Facebook video was brought to the attention of Woodbury police, who executed a search warrant at Hanson's home on August 28, but were unable to locate any firearms. One day later, Crow Wing County deputies executed a search warrant at the cabin and found a shotgun and various spent shotgun shell casings. While the deputies were searching the cabin, Detectives Michelle Frascone and Christopher Ployhart interviewed Hanson about the Facebook post at his Woodbury home.

The recorded interview lasted one and one-half hours. During the interview, Hanson maintained that the video was old and that he did not currently own any firearms. At one point in the interview, Hanson replied, in reference to the video, "I could just say that wasn't me, right? That wasn't me." Detective Frascone disagreed, offering to show

Hanson a recent Facebook photo to prove it was him. Hanson replied, "I don't need to see it."

While Hanson gave inconsistent and, at times, evasive answers during the interview, he never admitted to shooting a firearm after April 2, 2012, when he became ineligible. Toward the end of the interview the questioning turned to the subject of when Hanson last visited the Crosby cabin. At one point he said it was "before probation." At other points in the questioning he replied, "[o]ver a month ago" and before the Fourth of July.[1]

Hanson was charged with possession of a firearm by a prohibited person. Before his jury trial, Hanson stipulated to being prohibited from possessing a firearm after April 2, 2012. He did not dispute that he possessed a firearm in the Facebook video, but claimed that he filmed the video before 2012. Therefore, the sole issue presented to the jury was whether Hanson possessed the firearm after April 2, 2012.

In her opening statement, the prosecutor asserted that during Hanson's videotaped statement to police, he admitted to shooting a firearm in July 2012. The state then presented testimony from three officers: a Crow Wing County deputy sheriff who executed a search warrant of the cabin and the two detectives who had interviewed Hanson. Without objection, the state introduced Hanson's Facebook posts, the video of him firing a shotgun, and his recorded interview.

Detective Frascone testified that she believed the Facebook video was made after April 2, 2012 for four reasons: Hanson's summer attire; a friend's appearance based on

[1] One of the officers confirmed, during the interview, "It appears you haven't been [at the cabin] at least in a month and a half." Hanson agreed.

Frascone's prior contacts; the color of the leaves on the trees; and an incident involving Hanson's brother, which Frascone believed was a precipitating event. Frascone admitted, however, that police failed to conduct a forensic analysis of the Facebook video. Hanson testified unequivocally that he made the video in 2010 and that he was at the cabin only once in the summer of 2012. In her closing argument, the prosecutor again claimed that, during his recorded statement, Hanson admitted to shooting the firearm in July 2012.

Hanson was convicted of possession of a firearm by a prohibited person and sentenced to 60 months in prison. He filed a postconviction petition in March 2016, arguing that the prosecutor had committed misconduct by falsely claiming that he admitted to possessing the gun after he was ineligible and that the evidence was insufficient to sustain his conviction. The postconviction court denied his petition. This appeal follows.

D E C I S I O N

We review a postconviction court's decision to deny a petition, including its decision to deny the petition without granting an evidentiary hearing, for an abuse of discretion. *Quick v. State*, 757 N.W.2d 278, 281 (Minn. 2008). In determining whether the postconviction court abused its discretion, we review the court's factual findings for clear error and its legal conclusions de novo. *Williams v. State*, 869 N.W.2d 316, 318 (Minn. 2015).

Hanson argues that the postconviction court erred in denying his petition because the prosecutor committed misconduct when she made two false statements during opening statements and closing arguments. First, during her opening statement at trial, the prosecutor informed the jury that in Hanson's interview with police, he "actually seems to

concede" that he shot the firearm sometime in July. Hanson did not object to these statements. Second, in closing arguments, the prosecutor highlighted Hanson's inconsistent responses to interview questions about when he possessed a firearm. The prosecutor then told the jury that in the interview, Hanson "narrow[ed] it down to July . . . when he shot this weapon." Hanson did not object.

We review unobjected-to claims of prosecutorial misconduct under a modified plain-error analysis. *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016). Error is plain if it contravenes caselaw, a rule, or a standard of conduct. *State v. Brown*, 792 N.W.2d 815, 823 (Minn. 2011). Upon a showing of plain error, the burden shifts to the state to show that the error did not affect the defendant's substantial rights. *State v. Ramsey*, 721 N.W.2d 294, 302 (Minn. 2006). To meet this test, the state must show that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict. *Id.* If the state fails to meet this burden, we determine whether the error should be addressed to ensure fairness and integrity in judicial proceedings. *Id.* at 303.

Here, we conclude that the prosecutor committed plain error when she made statements, unsupported by the record, that Hanson conceded the central issue in the case: whether he shot the firearm after April 2012 when he became ineligible to possess it. Because the prosecutor's misconduct affected Hanson's substantial rights and must be addressed to ensure fairness and integrity in our judicial proceedings, we reverse.

I. The prosecutor's misstatements of the evidence constitute error that is plain.

In opening statements, prosecutors must generally confine their statements to a brief outline of the facts that they intend to prove. *State v. Montgomery*, 707 N.W.2d 392, 399 (Minn. App. 2005). Prosecutors must also refrain from referencing evidence without a good-faith basis to believe that it is admissible. *State v. Milton*, 821 N.W.2d 789, 804 (Minn. 2012). But in closing arguments, prosecutors may argue all reasonable inferences that may be drawn from the evidence. *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009). They have no obligation to give a colorless argument. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). However, prosecutors may not obtain a conviction at any price, for example, by intentionally misstating the evidence or misleading the jury about the inferences to be drawn from the evidence. *Peltier*, 874 N.W.2d at 805.

The postconviction court determined that "there may have been prosecutorial error with the exact words spoken by the prosecutor." We agree that the prosecutor committed error. A close review of the videotaped interview reveals that Hanson never admitted that he possessed a firearm after April 2012. At one point during the interview, he denied owning or possessing a firearm. At another point in the interview, Hanson maintained that he possessed the firearm before probation. While it is true that Hanson gave various inconsistent answers about when he possessed a firearm and when he was at the cabin, these responses do not rise to the level of conceding or admitting that he possessed the firearm after April 2012.

The prosecutor had no good faith basis to claim in her opening statement that Hanson admitted to possessing a firearm after April 2012 because no evidence supported

that assertion. Prosecutors must confine their opening statements to evidence they believe will be admissible and may not misstate the anticipated evidence. *Montgomery*, 707 N.W.2d at 399-400, *see also Bobo*, 770 N.W.2d at 142. By stating that Hanson "actually seems to concede" that he shot the gun in July, the prosecutor misstated the content of the videotaped interview, which was anticipated evidence.

Similarly, in her closing argument, the prosecutor committed error when she claimed that Hanson had admitted to possessing the firearm in July. At that time, all the evidence had been introduced. And Hanson unequivocally testified that the video was made two years earlier. Nonetheless, the prosecutor misstated Hanson's interview responses by telling the jury that he had narrowed down the time he shot the gun to July 2012. *Cf. State v. Yang*, 627 N.W.2d 666, 679 (Minn. App. 2001) (stating that it was error for prosecutor to claim that five people identified defendant in closing argument, when only three witnesses identified the defendant), *review denied* (Minn. July 24, 2001). We conclude that the prosecutor's misstatements constituted error that was plain because it violated the settled principles governing prosecutorial conduct described above.

II. The state failed to demonstrate that the prosecutor's misconduct did not have a significant effect on the verdict, and reversal is required to protect the fairness and integrity of judicial proceedings.

Because we conclude that the prosecutor committed misconduct, the burden shifts to the state to demonstrate that the error did not affect Hanson's substantial rights. *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010). To do so, the state must show that there is no reasonable likelihood that the misconduct significantly affected the jury's verdict. *Id.* In determining whether the misconduct had a significant effect on the verdict, we consider

the strength of the state's evidence, the pervasiveness of the misconduct, and whether Hanson had an opportunity to rebut any improper remarks. *Peltier*, 874 N.W.2d at 805-06.

The postconviction court found that, while the prosecutor may have committed error, the statements were harmless. To reach that conclusion, the postconviction court concluded that the improper statements did not significantly affect Hanson's substantial rights because the statements were isolated and the jury was properly instructed that arguments of attorneys are not evidence. We disagree.

Reviewing the strength of the evidence, we note that the state did not present any eyewitness who saw Hanson possess the shotgun. While the state introduced evidence that the shotgun was found at the cabin and that Hanson had admitted to being at the cabin, there was no direct evidence to prove he possessed the firearm after April 2. Hanson never admitted to possessing the firearm while he was ineligible. No forensic analysis of Hanson's computer, revealing the date that the video was created, was introduced into evidence. Beyond the date that the video was posted on Facebook and the investigator's general testimony about Hanson's summer attire, a friend's appearance, and the foliage in the video,[2] the state's only evidence regarding Hanson's possession was his statements to police officers in the one-and-one-half hour long interview. In summary, the state's

[2] While the foliage in the video makes it clear that the video was recorded during the spring or summer, the state failed to introduce evidence which establishes the month or year when it was recorded. Similarly, the state argued that Hanson made the video in response to the incident between his brother and a group of people at the cabin in the summer. But the state failed to introduce evidence to establish when this dispute actually occurred.

evidence tying Hanson to possession of the shotgun after April 2, 2012, was tenuous at best.[3]

Further, the prosecutor's misstatements were pervasive. The improper statements focused on the pivotal issue presented to the jury—when Hanson possessed the firearm. *Cf. State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (concluding that prosecutor's passing remarks about defendant's criminal history did not warrant a new trial). The misconduct constituted approximately one page of a four-page opening statement and one page of a seven-page closing argument. *Cf. Peltier*, 874 N.W.2d at 806 (determining that prosecutorial misconduct did not affect substantial rights, in part, because the misconduct comprised only one page of a 39-page closing argument); *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (concluding that prosecutor's misstatements did not affect substantial rights when prosecutor's improper questions covered less than one page of 64 pages of

[3] While the state's evidence tying Hanson to possession of the shotgun after April 2012 is far from overwhelming, we do not find it so legally insufficient that "the only just remedy is the direction of a judgment of acquittal." *State v. Clark*, 755 N.W.2d 241, 256, 258 (Minn. 2008) (quotations omitted) (concluding that remand for new trial due to plain error was appropriate and did not trigger double jeopardy clause because there was sufficient evidence to support the jury's verdict). *Id*. at 258. Here, it is undisputed that the video shows Hanson shooting the gun at the cabin. Hanson admits he was at the cabin one time in the summer of 2012. And Detective Frascone testified that, based upon her familiarity with surroundings and the appearance of Hanson's friend, she believed the video was made in the summer of 2012. And we must assume that the jury believed Frascone and disbelieved all the evidence that contradicted her testimony. *State v. Nissalke*, 801 N.W.2d 82, 108 (Minn. 2011). Viewing the evidence in the light most favorable to the verdict, we conclude that the state presented sufficient evidence for a jury to find Hanson guilty of possession of a firearm by an ineligible person. *See State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012) (noting that sufficient evidence exists to sustain a conviction based on circumstantial evidence if the circumstances are inconsistent with any rational theory of innocence). Therefore, the appropriate remedy is to reverse Hanson's convictions and to remand to the district court for a new trial on the charges.

defendant's cross-examination). Nor were these misstatements buried in the opening and closing arguments. The prosecutor's opening statement concludes with the mischaracterization that, during the interview, Hanson admitted shooting the gun sometime in July. And toward the end of the closing argument, the prosecutor again mischaracterized the interview, saying that Hanson "narrowed down when he shot this weapon" to July 2012.

Hanson did have the opportunity to rebut this characterization in closing argument, and his counsel did so, stating, "the statements that he made in the video are not the same as the statements that the State wants you to believe that he made." But this opportunity does not end our analysis. We still must weigh this opportunity for rebuttal together with the strength of the evidence against Hanson and the extent of the misconduct which, given its repetition and focus on the central issue at trial, was pervasive. *Peltier* at 805-06 (setting out three factors for consideration). When we conduct this analysis, we conclude that the prosecutorial misconduct here did affect Hanson's substantial rights. [4]

The state argues that the misconduct had no effect on the verdict because the jury could rely on other evidence to reach its guilty verdict and because the court instructed the jury that statements by the attorneys are not evidence. Neither argument prevails. As we

[4] We note that, in *State v. Whisonant*, 331 N.W.2d 766, 769 (Minn. 1983), the Minnesota Supreme Court held that defense counsel forfeits a claim of unobjected-to prosecutorial misconduct on appeal if he fails to object, and, instead, chooses to respond in closing arguments. But *Whisonant* was decided before the closing argument rules were changed. 1999 Minn. Laws ch. 72, § 1, at 197 (granting prosecutors rebuttal in closing arguments); Minn. Stat. § 631.07 (2014). Further, in *State v. Peltier*, the supreme court characterized the opportunity to rebut as one of three factors to consider when deciding whether a party's substantial rights were affected. 874 N.W.2d at 805-06. We apply the *Peltier* analysis, as set out above.

previously discussed, the state's evidence was not "overwhelming, considerable, or ample" so as to overcome the prejudice caused by the prosecutor's errors. *Cf. State v. Huber*, 877 N.W.2d 519, 527 (Minn. 2016). And while it is true that the court instructed the jury that arguments of counsel are not evidence, this does not alter the prosecutor's duty to not intentionally misstate the evidence or mislead the jury.

Finally, in considering whether a new trial is warranted, we inquire whether doing so is necessary to protect the fairness, integrity, and public reputation of judicial proceedings. *Peltier*, 874 N.W.2d at 804. Minnesota courts have declined to reverse when a new trial would be "an exercise in futility and a waste of judicial resources." *State v. Little*, 851 N.W.2d 878, 886 (Minn. 2014) (quotation omitted). But that is not the case here, given the limited evidence tying Hanson to the shotgun while he was ineligible. And we are mindful of the Minnesota Supreme Court's directive in *State v. Ramey*, which placed the burden of persuasion regarding the third prong of the plain error doctrine on the state in prosecutorial misconduct cases, that appellate courts should "not hesitate in a suitable case to grant relief in the form of a new trial." 721 N.W.2d at 303 (quotation omitted). When a prosecutor inaccurately claims that the defendant admitted to the central issue presented to the jury, this is a "suitable case" where fairness and integrity require a new trial. The postconviction court abused its discretion when it denied Hanson's petition for postconviction relief.

Reversed and remanded.