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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0824**

State of Minnesota,
Respondent,

vs.

Joseph Stevie Lewis,
Appellant

**Filed May 7, 2018
Affirmed in part, reversed in part, and remanded
Worke, Judge**

Hennepin County District Court
File No. 27-CR-16-18404

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Peterson, Judge; and Ross, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that he is entitled to a new trial because the state committed prosecutorial misconduct during closing argument. He also argues that the district court

incorrectly calculated his criminal-history score and erroneously convicted him of multiple crimes arising from a single behavioral incident. We affirm in part, reverse in part, and remand.

FACTS

In the early morning of December 17, 2015, police responded to a call from J.I. reporting a sexual assault. J.I. identified her attacker as Joe Miller and described him and his vehicle. She told police that Miller pinned her against a wall, then placed her in a chair and inserted his penis into her vagina. J.I. told police that she repeatedly communicated her lack of consent and told Miller to stop.

Police transported J.I. to the hospital where a nurse conducted a sexual-assault examination. During the examination, J.I. appeared tearful, tense, anxious, and was wringing her hands. The nurse observed bruising on J.I.'s wrist, an abrasion to her mouth, and vaginal tearing.

In the early morning of December 20, J.I. called the police when Miller returned to her home. Police identified Joe Miller as appellant Joseph Stevie Lewis. Lewis was charged with one count each of first- and third-degree criminal sexual conduct.

At his trial, Lewis testified that he and J.I. engaged in consensual, "fairly aggressive" sex. He also admitted to telling multiple lies during his interaction with J.I. and the subsequent investigation. The jury found Lewis guilty on both counts. The district court sentenced Lewis to 156 months in prison based on a criminal-history score of one. Lewis did not contest his criminal-history score, which was based on a 2008 conviction for domestic battery from Illinois. The only documentation of that conviction was Lewis's

presentence investigation (PSI) and sentencing worksheet. The district court did not sentence Lewis for third-degree criminal sexual conduct, but the warrant of commitment indicates that Lewis was convicted of both first- and third-degree criminal sexual conduct. This appeal followed.

DECISION

Prosecutorial misconduct

Lewis argues that the state committed pervasive, serious misconduct in closing argument. A prosecutor commits prosecutorial misconduct when she “violates clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state’s case law.” *State v. Smith*, 876 N.W.2d 310, 334-35 (Minn. 2016) (quotation omitted). To determine whether a prosecutor engaged in misconduct during closing argument, this court looks at the closing argument “as a whole, rather than to selected phrases or remarks.” *Id.* at 335 (quotation omitted).

Because Lewis did not object to the alleged prosecutorial misconduct, this court applies a modified plain-error standard. *See State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). Under this standard, the appellant must demonstrate that the misconduct constituted error and that the error was plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error is plain if it “contravenes case law, a rule, or a standard of conduct.” *Id.* If the appellant satisfies these first two elements, the burden shifts to the state to show that the error did not affect the appellant’s substantial rights. *Carridine*, 812 N.W.2d at 146. To satisfy that burden, “the state would need to show that there is no reasonable likelihood

that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *Ramey*, 721 N.W.2d at 302 (quotation omitted).

Error

After careful review of the record and arguments, we conclude that the state committed misconduct by (1) vouching for the truth of J.I.’s testimony and suggesting that Lewis was trying to fool the jury, (2) commenting on social issues outside of Lewis’s guilt or innocence, (3) encouraging jurors to place themselves in J.I.’s shoes, and (4) aligning the jury with the state. See *Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (stating that although a prosecutor may argue a witness’s credibility, she may not interject her personal opinion so as to attach herself to the cause she represents); *State v. Coleman*, 560 N.W.2d 717, 721 (Minn. App. 1997) (stating that it is misconduct for a prosecutor to characterize the defendant as “deliberately attempting to ‘mislead’ the jury”); *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000) (stating that it is misconduct for a prosecutor to “make statements urging the jury to protect society or to send a message with its verdict”), *review denied* (Minn. May 16, 2000); *State v. Thompson*, 578 N.W.2d 734, 742 (Minn. 1998) (stating that arguments inviting the jurors to put themselves in the victim’s shoes are generally improper); *Nunn v. State*, 753 N.W.2d 657, 663 (Minn. 2008) (stating that it is misconduct for a prosecutor to use the term “we” to describe the prosecutor and jury as members of a group that excludes the defendant). Lewis also argues that the state misstated the evidence and disparaged the defense.

Misstating evidence

Lewis argues that the prosecutor repeatedly misstated the evidence during closing argument. Prosecutors may “argue all reasonable inferences from evidence in the record.” *Smith*, 876 N.W.2d at 335 (quotation omitted). However, it is misconduct for a prosecutor to intentionally “misstate the evidence or mislead the jury as to the inferences it may draw.” *Id.* (quotation omitted).

First, Lewis argues that the prosecutor incorrectly asserted that Lewis knew that he gave J.I. a false phone number and also that Lewis never explained why he returned to J.I.’s home on December 20. During closing argument, the prosecutor asserted that J.I. could not have called Lewis on December 20 because he gave her a false phone number. On direct examination, Lewis admitted that he gave J.I. a fake number, but he also asserted that she already had his real phone number because they had exchanged numbers at the bar. The record reveals that the prosecutor’s assertion was based on the assumption that Lewis’s testimony was not credible. The prosecutor asserted that Lewis’s version of events was “not true” and that “there is no way [J.I.] called him.” The prosecutor did not misstate the evidence in the record, but instead argued a reasonable inference from Lewis’s testimony. Similarly, although the prosecutor asserted that Lewis “didn’t tell” the jury “why he actually went back [to J.I.’s home] on 12/20,” when read in context, this statement was also premised upon the inference that Lewis’s testimony was not credible. The prosecutor argued that, because Lewis’s explanation for returning to the home was not true, it was not clear from the record why he returned.

Second, Lewis argues that the prosecutor misstated the evidence in the record when she asserted that J.I. was comfortable with short-term sexual relationships and role playing. The prosecutor asked J.I. about her conversation with Lewis about sex. J.I. testified that Lewis told her that he “like[d] forcible sex” and that she “wanted to know what he meant by that.” She also testified that she assumed that Lewis was “probably going to tell [her] . . . he like[d] role playing, something like that.” The prosecutor asserted in closing argument that “[t]his isn’t a boyfriend done wrong. There is no basis for her to make up a rape accusation. . . . There is no hurt pride. [J.I.] is not a woman who would be ashamed about having a sexual relationship with somebody; she is up there talking about role playing.”

J.I. did not specifically testify that she was comfortable with short-term sexual relationships or role-playing. However, the prosecutor’s statements could have been based on J.I.’s demeanor while describing her conversation with Lewis. On this record, we cannot conclude that the prosecutor’s statements constitute misconduct.

Disparaging the defense

Lewis argues that the prosecutor disparaged the defense and defense counsel. “The [s]tate has a right to vigorously argue its case and it can argue that the evidence does not support particular defenses.” *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009) (quotation omitted). “A prosecutor may [also] argue that there is no merit to a particular defense.” *State v. Martin*, 773 N.W.2d 89, 108 (Minn. 2009). However, the state may not “belittle the defense, either in the abstract or by suggesting that the defense was raised because it was the only defense that might succeed.” *Id.*

Here, the prosecutor stated, “The only thing counsel has got, she didn’t get to go to Denny’s. She didn’t [get] to go to Denny’s so she fabricated a sexual assault. She manufactured a vaginal tear.” Immediately after making this statement, the prosecutor argued that, based on J.I.’s testimony, there was no merit to the argument that J.I. fabricated the sexual assault. The prosecutor asked the jury to consider the implications of that argument: “Think about it, contriving a serious criminal sexual conduct charge. Tearing her own vagina, is that what she did?” The prosecutor did not disparage the defense or defense counsel. Rather, the prosecutor permissibly argued that, based on the evidence in the record, there was no merit to Lewis’s defense.

Lewis asserts that the prosecutor also committed misconduct by commenting on the defense’s failure to call an expert witness to testify about mixing alcohol with J.I.’s medications. “In general, it is improper for a prosecutor to comment on a defendant’s failure to call a witness or contradict testimony.” *State v. Johnson*, 672 N.W.2d 235, 240 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004).

In her rebuttal, the prosecutor stated, “Counsel talked about mixing alcohol and medication. You heard no expert testimony about what effect, if any, mixing [J.I.’s] alcohol with the medications she is on had. So why talk about it? Well, one, it makes her look bad, doesn’t it?” Although the prosecutor commented on the absence of expert testimony, she did not specifically state that the defense failed to call an expert witness. Rather, she stated that the jury had heard no evidence about how alcohol and J.I.’s medications interact. Furthermore, the prosecutor only addressed the absence of expert testimony after defense counsel asked, in his closing argument,

Are there some questions about [J.I.'s] story? Could she be wrong? Could her memory be wrong about what happened, given the fact she is on alcohol and medication? . . . What happens when you are on – drinking alcohol and on pain medication? There are things that you normally wouldn't do and you regret what happened because you feel the consequence of what happened.

A prosecutor “is free to argue that there is no merit to a particular defense or argument.” *State v. Ashby*, 567 N.W.2d 21, 28 (Minn. 1997). Also, it is not misconduct to highlight the lack of evidence supporting the defense's theory. *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993). Here, given that Lewis raised the issue of alcohol interacting with medication and asked the jury to consider how that interaction could play a role in J.I.'s memory, we conclude that the prosecutor did not commit misconduct.

The errors were plain

To determine whether an error was plain, this court looks to the law in existence at the time of appellate review. *State v. Kelley*, 855 N.W.2d 269, 277 (Minn. 2014). The law with regard to the four instances of misconduct identified earlier in this opinion was plain at the time of appellate review. Therefore, Lewis has satisfied the first two steps of the modified plain-error test.

Prejudice

We must now decide whether the state has met its burden in establishing that the misconduct did not affect Lewis's substantial rights. *See Carridine*, 812 N.W.2d at 146. To decide whether a plain error affected an appellant's substantial rights, this court considers three factors: “(1) the strength of the evidence against the defendant; (2) the pervasiveness of the improper conduct; and (3) whether the defendant had an opportunity

(or made efforts) to rebut the prosecutor’s improper suggestions.” *State v. Hill*, 801 N.W.2d 646, 654-55 (Minn. 2011).

First, the evidence against Lewis was strong. J.I. testified that Lewis touched her breasts over her clothing and that she slapped his hands away and told him “I’m not having sex with you.” J.I. testified that Lewis pushed her against a wall and started kissing her “to where it felt like he was trying to shove his tongue down [her] throat.” Then, Lewis started kissing J.I. more forcefully, creating soreness from her dentures and cutting the inside of her lip. J.I. “tr[ie]d to tell [Lewis] no.” J.I. testified that Lewis “kind of whipped [her] around and threw [her] into [a] chair.” She ended up with her head “crunched into the side of the chair.” J.I. testified that this hurt, she was scared, and she tried to fight Lewis by pushing him away. J.I. testified that Lewis put his penis inside her and that it “felt like he was ripping [her] apart.”

An officer who responded to J.I.’s 911 call testified that J.I. was “upset, distraught, [and] emotional” and she “would just randomly start to cry” when reporting the assault. J.I. reported that she had been grabbed by the wrists, and the officer testified that he observed a small bruise on her wrist.

A sexual assault nurse examiner (SANE) testified that, during her examination, J.I. was tearful, tense, anxious, and wringing her hands. The SANE testified that J.I. identified the assailant as someone she had met at a bar that night. The SANE testified that J.I. had bruising on her right inner wrist, an abrasion on the corner of her mouth, and a tear to the “inner fold of her labia into the labia minora and the labia majora.” The SANE testified that J.I.’s vaginal injury could be consistent with forced penetration.

Lewis testified in his own defense, but he admitted to lying numerous times, including: giving J.I. a false name; telling J.I. he was not married; telling J.I. he had no children; giving J.I. a fake phone number; telling J.I. he thought he could start a relationship with her; initially telling the police that he never touched J.I.; telling the police that his semen would be nowhere in J.I.'s home; and telling the police on a separate occasion that he ejaculated on J.I.'s breasts but did not sexually penetrate her. This evidence, taken together, weighs heavily against the conclusion that Lewis was prejudiced by the prosecutorial misconduct in closing argument.

Nonetheless, the prosecutor engaged in multiple, separate instances of misconduct during closing argument. Lewis compares this case to *State v. Mayhorn*, in which the supreme court reversed the appellant's conviction, despite the state's "strong case against [him]," because "[t]he prosecutor's misconduct was a pervasive force at trial." 720 N.W.2d 776, 791 (Minn. 2006). The supreme court noted that the prosecutor

commented on the defendant's credibility, appealed to the passions of the jury, commented on [the defendant]'s failure to call a witness, intentionally misstated evidence, asked a "were they lying" question, referred to threats made by [the defendant] not in evidence, aligned herself with the jury, improperly attacked [the defendant]'s character, commented on [the defendant]'s opportunity to tailor his testimony, and commented on the credibility of a witness.

Id. Due to the number of errors and the seriousness of some of them, the supreme court concluded that it could not determine whether the jury's verdict was based on admissible evidence and reasonable inferences, or if it was based on the state's "pervasive misconduct." *Id.* at 792. Although Lewis correctly points to select phrases or remarks

made during closing argument that contravene Minnesota law, we must look at the closing argument as a whole. *Smith*, 876 N.W.2d at 335. Comparing *Mayhorn* to this case, we conclude that the misconduct here does not rise to the level of “pervasive misconduct” that would necessitate reversal and a new trial. *See* 720 N.W.2d at 792.

Defense counsel also addressed much of the prosecutor’s misconduct during his own closing argument. Defense counsel argued that “it’s clear that [the prosecutor] is relying on a whole lot of sympathy on your heart for [J.I.]” He also stated that “it sounded like [the prosecutor] was starting to get into questions about women’s rights and how women are mistreated and how women are not believed.” Defense counsel also explained that “[t]his case isn’t about any of that. This case is about these two individuals and how they made a decision that affects my client’s life.”

Additionally, the district court’s jury instructions lessened any prejudice that resulted from the misconduct. The district court’s jury instructions are relevant to determining whether the jury was unduly influenced by prosecutorial misconduct. *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994). Here, the district court instructed the jury that “the arguments or other remarks of an attorney are not evidence.” The district court also instructed the jury that “[e]vidence is what the witnesses say and also any exhibits that may be submitted to you.” These instructions helped to negate prejudice that may have occurred as a result of the prosecutor’s misconduct. *See In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. App. 2006) (“Overall, the instructions were sufficient to negate . . . any prejudice that may have occurred as a result of misconduct.”).

Finally, Lewis argues that the prosecutorial misconduct was particularly prejudicial because the case hinged on the jury's assessment of J.I.'s and Lewis's credibility. When "credibility is the central issue, . . . special attention should be paid to statements that may prejudice or inflame the jury." *State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008), review denied (Minn. Sept. 23, 2008). "Prosecutors in sexual abuse cases must abide by the highest behavior." *State v. Danielson*, 377 N.W.2d 59, 61 (Minn. App. 1985) (quotation omitted). "Because sexual-abuse cases generally evoke emotional reactions, an attempt by the prosecutor to exacerbate such reactions by making any emotive appeal to the jury is likely to be highly prejudicial." *Rucker*, 752 N.W.2d at 551 (quotations omitted).

Credibility was an important issue in this case, given that there were no witnesses to the sexual contact other than J.I. and Lewis. However, J.I.'s testimony was corroborated by physical evidence, including DNA. Additionally, multiple witnesses testified that after J.I. called the police, she appeared to be emotional and highly upset. Lewis also admitted to lying to the police on multiple occasions during the investigation.

Because the evidence against Lewis was strong, the prosecutor's misconduct was not pervasive, defense counsel countered much of the misconduct, and the district court properly instructed the jury, we conclude that the state met its burden of establishing that the prosecutorial misconduct did not affect Lewis's substantial rights. Lewis is not entitled to a new trial.

Criminal-history score

Lewis next challenges the criminal-history score used to determine his sentence. We review the district court's determination of a defendant's criminal-history score for an abuse of discretion. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006).

The district court may not use out-of-state convictions in calculating a defendant's criminal-history score unless the state lays proper foundation to do so. *Id.* The state must establish the facts necessary to justify consideration of out-of-state convictions to determine a criminal-history score. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983). Specifically, the state must prove by a preponderance of the evidence “that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota.” *Maley*, 714 N.W.2d at 711. Minnesota Rule of Evidence 1005 identifies the appropriate standard to document a conviction:

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Minn. R. Evid. 1005; *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983). The state may also use oral testimony to prove the contents of official records. *Maley*, 714 N.W.2d at 712.

In *State v. Outlaw*, the appellant challenged the calculation of his criminal-history score even though he had not previously objected to the district court's determination that

some of his out-of-state convictions were felonies. 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). Although this court concluded that the state had not proved that several of the appellant's prior convictions were felonies under Minnesota law, this court clarified that the state "is permitted to further develop the sentencing record so that the district court can appropriately make its determination." *Id.*

Here, the only documentation in the record supporting Lewis's criminal-history score is the PSI and Lewis's sentencing worksheet. The PSI indicates that Lewis was convicted of "[d]omestic [b]attery" and sentenced to supervised probation for two years. Neither the PSI nor the sentencing worksheet indicate the statute under which Lewis was convicted. Like *Outlaw*, the state has not proved that Lewis's conviction is a felony under Minnesota law. Because Lewis did not previously challenge the calculation of his criminal-history score, we reverse Lewis's sentence and remand to the district court, where the state may further develop the sentencing record so that the district court can appropriately determine whether Lewis's prior conviction would constitute a felony in Minnesota. *See id.*

Lesser-included offense

Lewis argues that his conviction for third-degree criminal sexual conduct must be vacated because it is an included offense of first-degree criminal sexual conduct. Minn. Stat. § 609.04, subd. 1 (2016) provides that "[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." When a defendant is found guilty on multiple charges for the same act, the district court should formally adjudicate and impose sentence on only one count. *State v. LaTourelle*, 343

N.W.2d 277, 284 (Minn. 1984). The other guilty verdicts should not be formally adjudicated at that time. *Id.* “If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated [guilty verdicts], one of [them] can then be formally adjudicated and sentence imposed” *Id.* This court “look[s] to the official judgment of conviction in the district court file as conclusive evidence of whether an offense has been formally adjudicated.” *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quotations omitted).

Lewis was convicted of first- and third-degree criminal sexual conduct. “[T]hird degree criminal sexual conduct is an included offense of first degree criminal sexual conduct.” *State v. Hart*, 477 N.W.2d 732, 737 (Minn. App. 1991), *review denied* (Minn. Jan. 16, 1992). Therefore, we reverse in part and remand to the district court with instructions to vacate the conviction for third-degree criminal sexual conduct.

Pro se supplemental brief

Lewis raises numerous arguments in his pro se supplemental brief, including: (1) deprivation of an evidentiary hearing; (2) sufficiency of the evidence; (3) prosecutorial misconduct; (4) ineffective assistance of counsel; (5) evidentiary violations; and (6) sentencing violations. Lewis also raises “additional argumentative points,” which appears to be a list of statements made at trial that Lewis claims are false. Finally, Lewis raises a list of “plain and harmful errors,” in which he appears to argue that the district court made numerous evidentiary errors and his Sixth Amendment rights were violated.

Lewis cites statutes, rules, and caselaw, but it is not clear from his brief how they apply to his case. This court does “not consider pro se claims on appeal that are

unsupported by either arguments or citations to legal authority.” *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008). “An assignment of error based on mere assertion and not supported by any argument or authorities . . . is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.” *Id.* at 23 (quoting *Louden v. Louden*, 221 Minn. 338, 339, 22 N.W.2d 164, 166 (1946)).

Although Lewis cites a great deal of legal authority, he has not adequately argued how those legal authorities entitle him to relief. We conclude that Lewis forfeited these pro se claims.

Affirmed in part, reversed in part, and remanded.