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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0856**

State of Minnesota,
Respondent,

vs.

Anthony Ralph Mock,
Appellant.

**Filed April 2, 2018
Affirmed
Bratvold, Judge**

Marshall County District Court
File No. 45-CR-16-356

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St. Paul, Minnesota; and

Donald Aandal, Marshall County Attorney, Warren, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant
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Considered and decided by Larkin, Presiding Judge; Bratvold, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant challenges his conviction of fleeing a peace officer in a motor vehicle and
second-degree driving while impaired. He contends that the evidence was insufficient to

convict him of both crimes and that the prosecution committed prosecutorial misconduct. We conclude, however, that the jury heard sufficient evidence to convict appellant. And while the prosecutor committed prejudicial misconduct that amounted to plain error, the error did not affect appellant's substantial rights. As a result, we affirm.

FACTS

A little after midnight on November 3, 2016, Marshall County Sheriff's Deputy Mark Ellerbush and his partner, Deputy Adam Gast, were driving a marked squad pickup while on patrol near Warren, Minnesota. The deputies saw a black minivan that was traveling up to 103 miles per hour and "swerving back and forth, varying in speeds." They followed the van for two miles and saw the van cross the centerline and "kind of driv[e] a little erratically back and forth." The officers activated their emergency lights and siren, but the van did not pull over, travelled at least 20 miles, and crossed the border into North Dakota. After getting permission to cross the state line, the deputies remained "within a hundred yards [of the van] the whole time." Both Ellerbush and Gast testified that, while in pursuit, they were not able to identify the driver. Eventually, the van turned onto a gravel road, then onto a driveway that turned into "a prairie grass road." The van became stuck in mud and stopped. At this point, the deputies were "30 feet behind" the van.

With the headlights illuminating the van, Ellerbush saw appellant Anthony Ralph Mock exit the driver's side front door and run. Ellerbush pursued on foot, but eventually lost sight of Mock. Gast stayed with the two passengers who remained in the van, one in the front passenger seat and the other in the back seat. The van had "a couple of bucket

seats in the front and a bench seat in the back” and the middle two seats had been removed, so there was “plenty of room [in which] to move around.”

Ellerbush called for backup and two North Dakota police officers arrived with a police dog to track Mock. The dog led the officers, including Ellerbush, close to Mock, who surrendered. Ellerbush immediately recognized Mock and identified his clothing as the same worn by the person who exited the van. A North Dakota officer, David Stromberg, arrested Mock. Stromberg testified that Mock said he was drunk and had “eaten a large amount of methamphetamine and taken a large amount of pills.” Mock denied driving the van and said that he ran because he had outstanding arrest warrants.

While in custody, Mock refused a blood-alcohol test and was later convicted of test refusal in North Dakota. In Minnesota, Mock faced charges of fleeing a peace officer in a motor vehicle in violation of Minn. Stat. § 609.487, subd. 3 (2016), and second-degree driving while under the influence of alcohol in violation of Minn. Stat. § 169A.25, subd. 1(a) (2016).

In addition to the testimony summarized above, the state offered evidence that Mock’s girlfriend owned the van. Mock’s test-refusal conviction was admitted and the district court gave a limiting instruction that directed the jury to consider the conviction solely as evidence that Mock was the driver of the van. A jury found Mock guilty of both charges. The district court convicted him and imposed an executed sentence of 19 months for fleeing a peace officer in a motor vehicle and 365 days for second-degree driving while impaired to be served concurrently. Mock appeals.

DECISION

I. The evidence was sufficient to convict Mock of fleeing a peace officer in a motor vehicle and second-degree driving while impaired.

Usually, when a defendant challenges the sufficiency of the evidence, we “conduct[] ‘a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction,’ is sufficient to allow the jurors to reach a verdict of guilty.” *State v. Porte*, 832 N.W.2d 303, 307 (Minn. App. 2013) (quoting *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012)). But the parties agree that Mock’s conviction rests on circumstantial evidence, which we review under heightened scrutiny. *State v. Nelson*, 812 N.W.2d 184, 188 (Minn. App. 2012). In Minnesota, a two-part test evaluates the sufficiency of circumstantial evidence. *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017). First, we “identify the circumstances proved and independently consider the reasonable inferences that can be drawn from those circumstances, when viewed as a whole.” *Id.* In doing so, we defer to the jury’s decision to accept or reject evidence that is inconsistent with the circumstances proved, according to the applicable standard of review. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010).

Second, we must determine whether “the reasonable inferences that can be drawn from the circumstances proved as a whole [are] consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *State v. Fox*, 868 N.W.2d 206, 223 (Minn. 2015). Speculation or conjecture cannot be the basis for a rational hypothesis inconsistent with guilt. *Al-Naseer*, 788 N.W.2d at 480.

To convict Mock of fleeing a peace officer in a motor vehicle, the state needed to prove the following elements: (1) Mock fled or attempted to flee peace officers using a motor vehicle, (2) the peace officers were lawfully discharging official duties, (3) Mock knew or should have reasonably known that he was fleeing peace officers, and (4) Mock's act took place on or about November 3, 2016, in Marshall County, Minnesota. *See* Minn. Stat. § 609.487, subd. 3; 10A *Minnesota Practice*, CRIMJIG 24.17 (2015). To convict Mock of second-degree driving while impaired, the state needed to prove the following elements: (1) Mock drove or was in physical control of a motor vehicle, (2) while he was under the influence of alcohol, and (3) Mock's act took place on or about November 3, 2016 in Marshall County, Minnesota.¹ *See* Minn. Stat. § 169A.25, subd. 1(a) (referring to Minn. Stat. § 169A.20, subd. 1, 1a, 1b, or 1c (2016)); 10A *Minnesota Practice*, CRIMJIG 29.02 (2015). Mock argues that the evidence was insufficient to prove that he was driving the van, an element necessary to both offenses. *See* Minn. Stat. § 609.487, subd. 3; Minn. Stat. § 169A.25, subd. 1(a).

The state proved the following circumstances. (1) Early in the morning of November 3, 2016, Ellerbush and Gast were on patrol in a marked squad pickup around Warren, Minnesota, when they saw a black minivan swerve over the centerline at high

¹ In addition to these elements, second-degree driving while impaired requires proving the existence of two or more "aggregating factors." Minn. Stat. § 169A.25, subd. 1(a). Aggravating factors include "qualified impaired driving incident" within ten years of the offense at issue. Minn. Stat. § 169A.03, subd. 3(1) (2016). A qualified impaired driving incident is a "prior impaired driving convictions." Minn. Stat. § 169A.03, subd. 22 (2016). The parties stipulated that Mock was previously convicted of two qualified impaired driving incidents within the last ten years.

speed. (2) The deputies followed the van and remained within one hundred yards for approximately 20 miles, but could not identify the driver. (3) Eventually, the van turned onto a gravel road where it became stuck in mud. (4) Mock exited the driver's door and started running away. (5) In the van, two passengers remained, one in the front passenger seat and the other in the back seat. (6) Police found Mock hiding nearby and arrested him. (7) Mock's girlfriend owed the van. (8) Mock said he ran because of his outstanding arrest warrants. (9) Mock told police that he was drunk, had ingested methamphetamine, and he that he did not drive the van. (10) Mock refused chemical testing and was subsequently convicted in North Dakota for test refusal related to these events.

Mock argues that these circumstances support a reasonable hypothesis inconsistent with his guilt: one of the van's other passengers was driving the van as they fled police. As the van stopped, Mock switched seats with the driver and exited the van through the driver's door. He fled the police on foot because he believed he was the subject of active warrants or because he either possessed or ingested methamphetamine.

Mock's hypothesis is unreasonable for three reasons. First, it is illogical to believe that Mock would have agreed to the switch with the driver—taking on additional culpability—if he already feared police capture for warrants and/or drug possession. Second, if Mock did not switch so he could pretend to be the driver, then it is unreasonable to conclude that Mock would have exited from the driver's door when every second he remained in the van increased his chances of apprehension. Third, Mock's refusal to take a chemical test is inconsistent with the alternative hypothesis that he was not the driver.

Mock argues that two cases support his position. In *Al-Naseer*, the supreme court reversed a conviction after determining that the proven circumstances supported a reasonable hypothesis other than guilt. 788 N.W.2d at 478, 481. While driving, Al-Naseer hit a person on the side of the road. *Id.* at 476. To convict him of leaving the scene of a criminal vehicular homicide, the state had to prove that Al-Naseer knew that an accident had occurred. *Id.* at 475. The supreme court determined that the circumstances proved supported Al-Naseer's alternative hypothesis that he was asleep or otherwise unconscious at the time he hit the bystander and did not know an accident had occurred until after he had left the scene. *Id.* at 478.

But *Al-Naseer* is distinguishable from Mock's case for two reasons. First, in *Al-Naseer*, no evidence established that Al-Naseer was aware of the collision. *See id.* at 478. In contrast, the state proved that Mock exited the van from the driver's door, which suggests that he was driving the van while fleeing the police. *See id.* at 478-79. Second, there was evidence in the record supporting *Al-Naseer's* alternative hypothesis. After the collision, "Al-Naseer's vehicle did not react to either the noise or jolt of the impact; it did not swerve, brake, or accelerate, but rather drifted past [the victim's] vehicle along the shoulder of the road for another 150 feet, and then gradually returned to the highway." *Id.* at 479. In Mock's case, there was no record evidence supporting his alternative hypothesis, besides the presence of other people in the van.

Next, Mock argues that *State v. Sam* supports his position because this court reversed a drug-possession conviction based on circumstantial evidence. 859 N.W.2d 825, 835-36 (Minn. App. 2015). In that case, police searched a car that Sam and another

passenger occupied. *Id.* at 828-29. Among other contraband, officers found methamphetamine in the glove compartment. *Id.* at 829. *Sam* reasoned that the circumstances proved supported the alternative hypothesis that the methamphetamine belonged to the car's other occupant or the owner. *Id.* at 835-36.

Sam is also distinguishable from *Mock*'s case. In *Sam*, this court noted that "no direct evidence tied [Sam] to possession of the contraband." *Id.* at 835. Instead, record evidence implicated *Sam*'s passenger: police saw the passenger moving "toward the center of the car" while *Sam* "made no movements towards the center of the car," and police found methamphetamine on the passenger's person. *Id.* at 834-35. In contrast, in *Mock*'s case, there was evidence directly linking him with the necessary element: officers saw him exit the van from the driver's door, he refused a chemical test even though he denied driving the van, and the van was registered to *Mock*'s girlfriend. Further, there was no evidence that either of the other two van passengers drove.

We conclude that *Mock*'s alternative hypothesis that he was not driving the van is unreasonable. We also conclude that the evidence was sufficient to convict him of fleeing a peace officer in a motor vehicle and second-degree driving while impaired.

II. Any prosecutorial misconduct did not affect *Mock*'s substantial rights.

Mock argues that the prosecutor committed prosecutorial misconduct by eliciting testimony from *Ellerbush* about the state's efforts to subpoena the two van passengers, neither of whom were present at trial. The state responds that the prosecutor's questions were not plain error, and even if they were, they did not affect the jury's verdict and thus did not affect *Mock*'s substantial rights.

Before trial, Mock successfully moved to exclude the passengers' statements to police investigators, as well as any related questions; both statements suggested that Mock was driving the van. The district court granted the motion because neither passenger was available to testify. The district court agreed with Mock's argument that allowing the statements would violate *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 (2004).

During opening statements, defense counsel suggested that one of the other two passengers was driving the van. Later, the prosecutor entered into the following exchange with Ellerbush:

PROSECUTOR: What happened with [the two passengers,] Mr. Dale Mock and Ms. Nicole Vondal?

DEPUTY: They were brought back to their residence by another Marshall County deputy.

PROSECUTOR: Have you been attempting to serve Mr. Dale Mock with a subpoena?

DEPUTY: Yes we have. I tried three times and I know another deputy tried two or three times and we could not locate him.

PROSECUTOR: Is Ms. Vondal in the area any longer?

DEPUTY: She is not.

The prosecutor made no further mention of subpoenaing the passengers in the van.

On cross-examination of Ellerbush, defense counsel asked the following questions:

DEFENSE: And the whereabouts, at least as far as you know, of the other two folks are not known at this time?

DEPUTY: No. We could not—we could not locate them.

During closing arguments, defense counsel made the following statements: "Who was driving? Well, funny, we didn't hear the state call for testimony from the other two

saying Mr. Mock was driving, it wasn't us. Where are they? They're gone. So it's just as possible that one of the other two was the driver."

Mock did not object to the prosecutor's questions at trial. As a result, we evaluate the questions under the modified plain-error test, which requires the appellant to prove (1) that there was error and (2) that the error was plain. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). If the appellant proves these two prongs, then the burden shifts to the state to "demonstrate lack of prejudice; that is, the misconduct did not affect [the defendant's] substantial rights." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). In effect, 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 of the jury." *Id.* (quotations omitted). Finally, if the state is unable to show that the "alleged error did not affect the defendant's substantial rights, [we consider] whether the error should be addressed to ensure fairness and the integrity of judicial proceedings." *Parker*, 901 N.W.2d at 926.

A. The prosecutor committed plain error.

A prosecutor engages in misconduct if his acts "materially undermin[e] the fairness of [the] trial." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). This may occur when the prosecutor "violates 'clear or established standards of conduct.'" *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quoting *Fields*, 730 N.W.2d at 782). Generally, it is plain error for the state to refer to an uncalled witness.² See *State v. Shupe*, 293 Minn. 395, 396-

² There are exceptions to this general rule, but none apply here. For example, the state may refer to uncalled witnesses if they would merely "support the testimony of other witnesses."

97, 196 N.W.2d 127, 128 (Minn. 1972); *State v. Page*, 386 N.W.2d 330, 336 (Minn. App. 1986), *review denied* (Minn. June 30, 1986). Here, the prosecutor elicited testimony about the van’s two passengers, neither of whom testified at Mock’s trial. Precedent establishes that this was plain error.³

In *Shupe*, the prosecutor argued during closing, “I was going to call a series of witnesses. Several of the witnesses I did not call . . . due to unexpected illness and hospitalization so it’s unfortunate that this supplementary testimony could not come in, but things like that happen.” 293 Minn. at 396, 196 N.W.2d at 128. The supreme court reversed and granted a new trial, concluding that the jury may have been “influenced by the prosecutor’s reference to the asserted fact that there was other testimony bearing upon [the] defendant’s guilt which he was prevented from submitting.” *Id.* In *Page*, the prosecutor argued in closing that the defendant was not charged with robbery because the victim “was unavailable to testify because he live[d] in Switzerland.” 386 N.W.2d at 336. This court reversed and granted a new trial, concluding that the prosecutor’s statements, in conjunction with “the wrongful admission of hearsay evidence,” were grounds for a new

State v. Thomas, 305 Minn. 513, 515-16, 232 N.W.2d 766, 768 (Minn. 1975). But the state does not allege that the van’s two passengers would have provided duplicative testimony.

³ Mock also argues that two unpublished decision from this court support his position. But unpublished cases are not precedential. Minn. Stat. § 480A.08, subd. 3 (2016); *State v. Ellis-Strong*, 899 N.W.2d 531, 537 (Minn. App. 2017).

trial. *Id.* We cannot meaningfully distinguish the prosecutor’s conduct in *Shupe* or *Page* from the prosecutor’s conduct here.⁴

The state attempts to distinguish *Shupe* and *Page* by arguing that the prosecutor’s questions properly responded to Mock’s suggestion that the witnesses’ absence implies their testimony would have been unfavorable to the state. It points to three cases in which a court has allowed a prosecutor to ask otherwise impermissible questions, or make otherwise impermissible statements, to preempt an argument from the defense.

The first case does not support the state’s position. In *State v. Dickson*, the prosecutor mentioned the codefendant, who did not testify, and suggested that the defendant would question the veracity of the charges because the state did not call the codefendant to testify. 309 Minn. 463, 468-70, 244 N.W.2d 738, 742-43 (1976). The prosecutor then implied that the codefendant would refuse to testify because he would not want to incriminate himself. *Id.* at 467-68, 244 N.W.2d at 741-42 (“You think for one minute [the codefendant] is going to take that stand? For one minute?”). The supreme court declined to grant a new trial after characterizing the prosecutor’s comments as anticipating “an argument from defense counsel regarding the prosecution’s failure to call a witness,” and attempting “to minimize to the jury the importance of speculating on what the witness

⁴ The state argues that *Page* is distinguishable because the reversal was based on “the cumulative effect of multiple errors.” It is true that *Page* granted a new trial based on more than one error, but it did not rule out granting a new trial solely on the basis of prosecutorial misconduct. *Id.* The state cites an unpublished case suggesting otherwise, but unpublished cases are not precedent. See Minn. Stat. § 480A.08, subd. 3; *Ellis-Strong*, 899 N.W.2d at 537. Moreover, *Shupe* granted a new trial solely based on the prosecution’s reference to an uncalled witness. 293 Minn. at 396-97, 196 N.W.2d at 128.

might state.” 309 Minn. at 470, 244 N.W.2d at 742-43. The supreme court did not conclude, however, that the prosecutor’s statements were not in error. Rather, the supreme court determined that the statements were “not so prejudicial as to require a new trial.” *Id.*, 244 N.W.2d at 743. Because *Dickson* focuses on prejudicial effect and not error, it does not persuade us that the prosecutor’s questions in Mock’s case were proper.

The state’s other cases are distinguishable. *State v. Cermak* and *State v. Banks* held that the prosecutors did not err by making otherwise impermissible statements because they did so to directly rebut the defendant’s arguments. *State v. Cermak*, 365 N.W.2d 243, 247-48 (Minn. 1985); *State v. Banks*, 875 N.W.2d 338, 349 (Minn. App. 2016), *review denied* (Minn. Sept. 28, 2016). But in both cases, the defense signaled its intent to make the argument that the prosecutor was rebutting. See *Cermak*, 365 N.W.2d at 247 (allowing questions about convictions of accomplices but only after Cermak “made an issue of the adequacy of the investigation”); *Banks*, 875 N.W.2d at 349 (allowing statements about race, but only after Banks raised the issue of race “throughout trial”). In Mock’s case, defense counsel did not mention the absence of uncalled witnesses until closing argument.⁵ We determine that Mock did not signal his intent to argue that the uncalled witnesses’ testimony would have been unfavorable to the state.

⁵ As previously mentioned, Mock successfully moved to exclude the passengers’ out-of-court statements to police. In opening statements, defense counsel argued that one of the passengers was driving, but he did not refer to their absence. Mock cross-examined Ellerbush about the uncalled witnesses only after the prosecutor had asked his impermissible questions.

Moreover, we note that in *Cermak* and *Banks*, the prosecutors did not mention the absence of uncalled witnesses; rather, the prosecutor offered evidence about witnesses that were not called. *Cermak*, 365 N.W.2d at 247; *Banks*, 875 N.W.2d at 348-49. *Shupe* and *Page* are founded on the concern that in most cases, the state could argue that it needs to mention the whereabouts of uncalled witnesses to rebut the defense argument that the missing witnesses would have offered exculpatory testimony. In other words, the exception proposed by the state would swallow the rule. We conclude that the prosecutor plainly erred by eliciting testimony about the whereabouts of the van's two passengers.

B. The plain error did not affect Mock's substantial rights.

When considering if prosecutorial misconduct substantially affected the appellant's rights, we consider "the pervasiveness of improper suggestions and the strength of evidence against the defendant." *Parker*, 901 N.W.2d at 926 (quotation omitted). We may also consider "whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010).

The plain error did not affect Mock's substantial rights for three reasons. First, the state's evidence against Mock was strong. The jury heard testimony from officer Ellerbush that Mock exited the driver's door when he ran from the police. This is strong evidence that Mock drove the van. Second, the misconduct was not pervasive. The alleged misconduct took up 11 lines of a 116 page trial transcript. Third, defense counsel asked follow-up questions of the deputy about the uncalled witnesses and then, at closing, argued that the absence of the other two occupants of the van generated reasonable doubt. Accordingly, the state has shown that any error did not affect Mock's substantial rights.

Because the state has successfully shown that any error did not affect Mock's substantial rights, we do not address the fourth prong of the modified plain-error test.

Affirmed.