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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-1052**

Joseph Paul Myers, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed January 16, 2018  
Affirmed  
Halbrooks, Judge**

Anoka County District Court  
File No. 02-CR-14-5468

Cathryn Middlebrook, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Sarah M. Kimball, Allison T. Mehawej, Newquist & Kimball Law Offices, P.C., Fridley, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Kirk,  
Judge.

## **UNPUBLISHED OPINION**

**HALBROOKS**, Judge

Appellant challenges the postconviction court's denial of his petition seeking a new trial following his conviction of misdemeanor theft. Because we conclude that the postconviction court acted within its discretion, we affirm.

### **FACTS**

When appellant Joseph Paul Myers entered a Walmart store, two loss-prevention officers, G.P. and C.J., noticed that he was carrying an empty shopping bag. G.P. and C.J. followed Myers and saw him walk into two aisles, pick up two sets of curtains, and walk out of the view of the security cameras. G.P. and C.J. continued to follow Meyers as he walked away and watched him put both sets of curtains into his empty bag. Myers then went to the customer service desk, presented a receipt from an earlier purchase, and sought to return the curtains that he had just taken off the shelves. The customer service representative accepted the return, and Myers received \$36.42 in cash for the curtains.

G.P., C.J., and another employee approached Myers as he left and asked him to return to the store because they had witnessed him commit theft. After Myers refused to cooperate, G.P. and C.J. called law enforcement. Officer Bridget McBride arrived and detained Myers, and G.P. and C.J. recounted the details of the incident for Officer McBride. Officer McBride questioned Myers and discovered that he had cash in the front pocket of his pants. Officer McBride retrieved the money from Myers and issued him a theft citation before releasing him.

Myers was charged with misdemeanor theft in violation of Minn. Stat. § 609.52, subd. 2(1) (2014). Myers waived a jury trial and opted for a court trial. During trial, the prosecutor called C.J., G.P., and Officer McBride as witnesses and introduced into evidence a surveillance video clip showing Myers's movements in the store and photos of the cash and curtains. The district court convicted Myers of misdemeanor theft. Myers petitioned for postconviction relief, requesting a new trial based on prosecutorial misconduct. Myers argued that the prosecutor committed two instances of misconduct by (1) failing to adequately prepare G.P. and by eliciting testimony from G.P. that referred to past incidents of appellant's suspected shoplifting and (2) impermissibly expressing her personal opinion about Myers's credibility during closing argument. The postconviction court denied Myers's postconviction petition. This appeal follows.

## **D E C I S I O N**

### **I.**

We review a postconviction court's denial of a petition for postconviction relief for an abuse of discretion. *Erickson v. State*, 842 N.W.2d 314, 318 (Minn. 2014). "A postconviction court abuses its discretion when it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (quotation omitted).

Myers did not object at trial to the prosecutor's alleged misconduct. Consequently, we review this claim under the modified plain-error standard articulated in *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Myers has the burden to establish that the prosecutor

committed an error that contravenes caselaw, a rule, or a standard of conduct, or is otherwise plain. *Id.* If Myers demonstrates plain error, the burden shifts to the state to demonstrate that its misconduct did not affect Myers’s substantial rights. *Id.* Misconduct does not affect a defendant’s substantial rights if “there [is] no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict.” *Id.* (quotation omitted). If all three prongs are satisfied, we then assess “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.* at 302.

### **G.P.’s Testimony**

Myers contends that the prosecutor engaged in misconduct during her direct examination of G.P. The prosecutor questioned G.P. about the reasons that he noticed Myers when Myers entered the store. The following exchange occurred:

Q: And did a certain person come to your attention at that point?

A: Yes, this male (indicating). He had an empty bag. I think it was a Walgreens bag.

Q: Okay. And anything else?

A: We just had some previous incidents with him. We had suspected him of shoplifting prior to that and then with him having that empty Walgreens bag backed our suspicion.

Myers argues that G.P.’s reference to “some previous incidents” constitutes *Spreigl* evidence and that the prosecutor intentionally elicited inadmissible character evidence without following proper *Spreigl* procedures or failed to adequately prepare G.P. to testify. A prosecutor has a duty to prepare her witness prior to testifying in order to avoid inadmissible statements and to define the acceptable limits of permissible testimony for the

witness. *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). It is “improper for a prosecutor to intentionally elicit inadmissible and highly prejudicial testimony.” *State v. Jackson*, 714 N.W.2d 681, 690 (Minn. 2006). The postconviction court concluded that the prosecutor did not intentionally elicit G.P.’s testimony about Myers’s previous conduct. We agree.

Although G.P. volunteered an improper comment on Myers’s involvement in prior shoplifting incidents, we do not conclude, based on this record, that the prosecutor intentionally elicited this testimony by asking G.P. an open-ended question: whether there was “anything else” that drew his initial attention to Myers. Nor does the record support Myers’s claim that the prosecutor failed to adequately prepare G.P. simply because G.P. made one improper comment. Myers has not met his burden of establishing plain error.

But even assuming, alternatively, that the reference in G.P.’s testimony to Myers’s previous incidents was arguably improper, as the postconviction court did, the postconviction court determined that the prosecutor’s conduct did not affect Myers’s substantial rights. Again, we agree. This was a court trial, and the district court heard testimony from G.P., C.J., and Myers and made credibility findings in its post-verdict order. The district court found G.P. and C.J.’s testimony to be credible and Myers’s testimony to be not credible. The district court also viewed the surveillance video that captured Myers picking up two sets of curtains, walking out of the range of the security camera, and presenting an old receipt to the customer-service desk to return the unpaid-for curtains.

## **Prosecutor's Closing Argument**

Myers also contends that the prosecutor engaged in misconduct by expressing her personal opinion of Myers's credibility by stating in her closing argument, "I don't think [Myers's] testimony is credible." A prosecutor engages in misconduct by expressing her personal opinion on the defendant's credibility. *State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003). The postconviction court determined that Myers met his burden to demonstrate that the prosecutor plainly erred by expressing her personal opinion of Myers's credibility.

But the postconviction court further determined that the state demonstrated that the verdict was not significantly affected by the prosecutor's comment. Although Myers argues that the prosecutor's comment prevented the district court from fairly analyzing his credibility at trial, as the postconviction court noted, "The written verdict sets forth the [district court's] reasoning in reaching its verdict, and that reasoning indicated that the [district court] did not base its verdict solely or substantially on the improper testimony or the prosecutor's opinion about [Myers's] credibility."

The postconviction court cited *State v. Ture* in which the supreme court held that the prosecutor's expression of a personal opinion of the accused's guilt or the veracity of witnesses was harmless when the district court "cautioned the jury that it should consider only the evidence and that counsel's final argument statements were not evidence, where the evidence of guilt was adequate, and where the prosecutor's argument was otherwise proper." 353 N.W.2d 502, 517 (Minn. 1984). The postconviction court noted that this was

a bench trial, whereas *Ture* involved a jury trial. But the postconviction court applied the *Ture* analysis to a bench trial, stating:

In a bench trial, improper remarks and testimony have less effect than in a trial by jury, as the [district court] is itself the fact finder and can determine what evidence is admissible and which comments are proper and determine the weight of such comments without the necessity of curative instructions.

And similar to *Ture*, the other evidence in the record adequately supports Myers's conviction. We agree with the postconviction court that Myers's conviction was not significantly affected by the prosecutor's improper expression of her personal opinion.

We conclude that the postconviction court properly exercised its discretion in denying Myers's petition for a new trial.

**Affirmed.**