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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1440**

Paul Miguel Engen, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 19, 2018
Affirmed
Rodenberg, Judge**

Hennepin County District Court
File No. 27-CR-14-8289

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Bjorkman, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Paul Miguel Engen appeals from the district court's denial of his petition for postconviction relief. Appellant argues that the prosecutor committed misconduct by

improperly shifting the burden of proof during rebuttal argument and, because of that, he should have a new trial. We affirm the district court's denial of appellant's petition.

FACTS

N.G.'s car was parked on a city street while she visited a relative. While N.G. stood on the sidewalk talking to her brother, she heard a vehicle accelerate and then heard a crash. A Chevrolet Tahoe had slammed into her car. N.G. saw a man, later identified as appellant, exit the driver's side of the Tahoe. She saw another man exit from the passenger's side. Appellant apologized to N.G. and asked that she not call the police, but N.G.'s brother called the police. When police arrived, appellant first told them that the other man was driving. When that man became upset, appellant admitted that he had been the driver. Appellant's breath registered a 0.216 alcohol concentration on a preliminary breath test. Appellant had poor balance, slow and slurred speech, and an odor of alcohol on his breath. Appellant was arrested and taken to the police station where, after being read the Minnesota Implied Consent Advisory, he refused to take a breath test. The state charged appellant with one count of felony driving while impaired (DWI) and one count of felony refusal to submit to a chemical test.

At trial to a jury, appellant testified that he was not driving the Tahoe when it crashed. He claimed that he had exited via the driver's side door because the passenger's side door was inoperable after the crash. Appellant had said nothing of this on the night of the crash, and instead had admitted shortly after the crash that he had been driving. In rebuttal argument, the prosecutor mentioned that the only evidence of the passenger's side door having been jammed was appellant's trial testimony. The prosecutor said:

It would have been nice, admittedly, to have some work done on his truck, have some photographs of the accident. I wish we had them. But keep in mind the first time anyone from the State of Minnesota heard that story about [appellant] crawling over because the passenger door wouldn't open was the same time you all heard it and this accident took place last February.

Defense counsel moved for a mistrial, claiming that the prosecutor's statements improperly shifted the burden of proof to appellant by implying that appellant was responsible for proving that the passenger's side door was inoperable. The trial court denied appellant's motion for a mistrial. The jury acquitted appellant of the DWI, but found him guilty of felony test refusal. The district court sentenced appellant to 36 months in prison.

Appellant filed a petition for postconviction relief, seeking a new trial, on account of prosecutorial misconduct.¹ The postconviction court denied appellant's petition.

This appeal followed.

DECISION

We review denial of a postconviction petition for abuse of discretion. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). We review the postconviction court's legal conclusions de novo, "but on factual issues our review is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings." *Id.* (quotation omitted). "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley*

¹ Appellant did not file a direct appeal from his conviction. Therefore, the issues that appellant could have raised on direct appeal are available by postconviction petition. See *Deegan v. State*, 711 N.W.2d 89, 94 (Minn. 2006) (stating that a postconviction petitioner can raise "nearly the same breadth" of issues in a postconviction proceeding that could have been brought in a direct appeal).

v. State, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted). A postconviction court also abuses its discretion by acting in an arbitrary or capricious manner. *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010).

Appellant argues that he is entitled to a new trial because the prosecutor committed prejudicial misconduct by improperly shifting the burden of proof during closing argument. We disagree. The prosecutor's rebuttal argument was not misconduct and was, in any event, harmless beyond a reasonable doubt.

Prosecutors have "considerable latitude" during closing arguments and are "not required to make a colorless argument." *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998). Prosecutors also have "the right to fairly meet the arguments of the defendant." *State v. Martin*, 773 N.W.2d 89, 106 (Minn. 2009). But a prosecutor's "misstatements of the burden of proof are highly improper and constitute prosecutorial misconduct." *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985).

The challenged statements were made in response to appellant's trial testimony and argument that he climbed out of the driver's door because the passenger's side door was jammed. The prosecutor pointed out that the only evidence that the passenger's side door was jammed was appellant's testimony. This claim had never been mentioned before trial and was inconsistent with appellant's own on-the-scene confession that he had been driving the Tahoe. A prosecutor can fairly comment on a witness's interest in the case. The district court properly instructed the jury that it could properly consider each "witness's interest or lack of interest in the outcome of the case." *See 10 Minnesota Practice*, CRIMJIG 3.12 (2015). Prosecutors may also properly comment on a defendant's trial testimony that is

inconsistent with earlier statements to law enforcement. *State v. Dupay*, 405 N.W.2d 444, 450 (Minn. App. 1987). A prosecutor's comment concerning the absence of evidence supporting a defendant's theory of the case does not necessarily amount to burden shifting. *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986).

Here, the prosecutor noted that it would have been "nice to have" pictures of the truck. But the prosecutor did not attribute this lack of evidence to appellant; instead, he merely noted that there was no evidence about the condition of the passenger's side door apart from appellant's testimony, and explained the absence of evidence in the state's case concerning the passenger's side door because, until trial, no question had been raised by anyone about that issue. This argument does not constitute misconduct.

Even assuming that the prosecutor's statements constitute misconduct, appellant would not be entitled to a new trial in any event, because there is no possibility that this isolated comment made any difference. We apply two harmless-error standards of review for objected-to prosecutorial misconduct. *State v. Nissalke*, 801 N.W.2d 82, 105 (Minn. 2011). For "less serious prosecutorial misconduct," we determine "whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.* (quotation omitted). When reviewing "unusually serious" misconduct, we ask "whether the alleged misconduct was harmless beyond a reasonable doubt." *Id.* (quotation omitted). "We will find an error to be harmless beyond a reasonable doubt only if the verdict rendered was 'surely unattributable to the error.'" *Id.* at 105-06 (quoting *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008)). However, "the prejudicial effect of misconduct can be cured by proper instructions to the jury." *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016).

If we were to apply the stricter test for serious misconduct, we would consider whether the challenged statements are harmless beyond a reasonable doubt. *Nissalke*, 801 N.W.2d at 105-06. Here, the district court properly instructed the jury both before the alleged misconduct and after it, curing any potential prejudice. Appellant does not claim any error whatsoever in the jury instructions. Before closing arguments, the district court told the jury that “neither the arguments nor the remarks of the attorneys are evidence in this case.” After closing arguments and appellant’s objection to the prosecutor’s rebuttal statements, the district court repeated this instruction and instructed the jury to disregard the attorneys’ statements to the extent that they differ from the court’s instructions. The district court further instructed the jury that appellant is presumed to be not guilty, that the burden is on the state to prove his guilt beyond a reasonable doubt, and that appellant “has no obligation” to present evidence or prove his innocence. These instructions came after the alleged misconduct and before jury deliberations. While appellant argues that cautionary instructions do not eliminate the prejudicial effect of improper statements, “[w]e presume that jurors follow the trial court’s instructions.” *State v. Martin*, 614 N.W.2d 214, 227 (Minn. 2000).

We also observe that the challenged argument consists of only a few lines of argument in a trial that involved overwhelming evidence that appellant crashed the Tahoe into N.G.’s car. N.G. saw appellant exit the driver’s side door. Appellant admitted to the police that he was driving. The prosecutor made but fleeting reference to the absence of evidence other than appellant’s testimony supporting his theory that he was not the driver—this was surely harmless. Moreover, the jury acquitted appellant of the offense that

required proof of his having been the driver of the Tahoe. It convicted him of the test-refusal charge, requiring only that police have probable cause to believe he was the driver. Minn. Stat. §§ 169A.20, subd. 2, .51, subd. 1(b) (2016). The prosecutor's statement did not have the effect that appellant claims it had. The comment was harmless beyond any reasonable doubt.

Because we see no prosecutorial misconduct, and because any misconduct that can even be theorized was harmless beyond a reasonable doubt, the postconviction court did not abuse its discretion in denying appellant's petition.

Affirmed.