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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0247**

State of Minnesota,
Respondent,

vs.

Thomas Clifford Needham,
Appellant.

**Filed January 28, 2019
Affirmed
Florey, Judge**

Carlton County District Court
File No. 09-CR-17-134

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Thomas Pertler, Carlton County Attorney, Alexander W. Saumer, Assistant County Attorney, Carlton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Florey, Judge; and Kalitowski, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant challenges his convictions of first-degree burglary and fifth-degree assault, arguing that he is entitled to a new trial because the prosecutor committed prejudicial misconduct. We affirm.

FACTS

On November 6, 2016, appellant Thomas Clifford Needham and his girlfriend, T.S., broke into H.D.'s house and assaulted her. They reportedly entered her residence by kicking in H.D.'s side door, causing visible damage. Appellant and T.S. fled the scene in a white four-door Pontiac after H.D. stated that she was going to call the police.

Officer Dixon and Sergeant Barney of the Fond du Lac (FDL) police department arrived at H.D.'s house within 5-7 minutes of receiving the call of the reported assault. They testified that the reporting party, H.D., named "Mo Needham" as the perpetrator of the assault, and she reported that he fled the scene with a female in a white four-door Pontiac. Prior to the call, both officers were familiar with appellant and understood that he went by the name, "Mo Needham." They also knew appellant to drive a white four-door Pontiac Grand Prix.

Sergeant Barney was the first officer to arrive on scene. He observed visible damage to H.D.'s side door as well as redness and "slight bruising" on H.D.'s cheek. He described H.D. as "a little shaken up, a little distraught." In a recorded interview with Sergeant Barney, H.D. reported that she was in her basement when she heard her door being kicked

in.¹ She reported that “she observed Mo at the top of the stairs,” and that he “charged down the stairs at her . . . flinched at her and then ultimately slapped her.” H.D. reported that appellant grabbed her hair and “threw her on the ground.” She stated that she believed the bruising on her cheek was from being slapped by appellant.

H.D. reported to Sergeant Barney that “she had a little bit of trouble with [appellant] approximately a month ago but ha[d]n’t talked to him since, so she thought that was cleared up.” She reported that appellant told her she “didn’t make it right” and asked whether anyone else was in the house because “they could get knocked out also.”

When Officer Dixon arrived to the residence, Sergeant Barney was already speaking with H.D., so he took the role of photographing the scene and collecting evidence. He took multiple photographs of the damage to H.D.’s door as well as photographs of her injuries. At trial, Officer Dixon described H.D.’s demeanor as “startled” and testified that she had visible “redness on her left side of her cheek” as well as “slight swelling.” He also observed redness and water in her eyes. After taking photographs, and speaking with H.D., the officers continued the investigation, but they were unable to locate appellant or his vehicle that day.

Two days later, Sergeant Barney received a call that a vehicle “was being smashed up” near a softball field just minutes away from H.D.’s home. The vehicle belonged to

¹ Neither the audio recording nor a transcript of H.D.’s recorded interview with Sergeant Barney on the day of the incident was admitted into evidence. Thus, this summation derives from Sergeant Barney’s trial testimony of H.D.’s statements to him. Appellant did not object to Sergeant Barney’s testimony as hearsay, nor does appellant challenge the officer’s testimony on appeal.

appellant and matched H.D.'s description of the car that fled her residence. After officers located the vehicle, it was reported stolen by appellant's father. Appellant's father reported that it was appellant who informed him that the vehicle had been stolen.

Later that month, officers went to appellant's residence in an attempt to apprehend him. Appellant fled and could not be located, however, officers arrested T.S., who was present at that time. In January 2017, appellant was charged with first-degree burglary, in violation of Minn. Stat. § 609.582, subd. 1(c) (2016), and fifth-degree assault, in violation of Minn. Stat. § 609.224, subd. 1(2) (2016).

In May 2017, H.D. filed a notarized statement with the county attorney's office denying the allegations against appellant and T.S., and asking the court to drop all charges. When Officer Foldesi of the FDL police department met with H.D. to follow up on the November 6 incident, she declined to give a recorded statement. Officer Foldesi testified that H.D. told him that "she just wanted to be done" with the case.

A two-day jury trial was held in October 2017. The state called officers Dixon, Barney, and Foldesi, as well as H.D. to testify.² Prior to calling H.D. to the stand, the prosecutor stated that he "anticipate[d]" H.D. was "not going to be a cooperative witness" and that he intended to potentially impeach her. Appellant appeared pro se. He did not testify or put on a defense.

At the start of H.D.'s direct examination, she testified consistently with statements she had given to FDL officers on the day of the offense. She described where she lived,

² T.S. was also a subpoenaed witness, but after her counsel advised her to invoke her Fifth Amendment right, the state declined to call her to testify.

the type of house she lived in, and how long she had lived there. She testified that she remembered calling the police on the day of the incident and speaking with a responding officer at her residence. When asked about what took place before she called the police, H.D. began to offer inconsistent testimony. She testified that an individual by the name of “Jeff Wise,” someone she was unfamiliar with at the time, came to her house with T.S., “one of [her] old friends.”

H.D. testified that she knew appellant, and identified him as going by the nickname, “Mo,” but she denied being afraid of him. After H.D. affirmed that she provided a recorded statement to Sergeant Barney on November 6, “just minutes after [she] called the police,” the prosecutor read a portion of H.D.’s transcribed interview into the record:

I was sitting downstairs in my room when I heard my door get kicked in. Um, I come to see who it was and Mo was standing up there and he come charging downstairs and I tried to grab my phone. . . . And he come at me and he grabbed me by my hair and his girlfriend [T.S.] come down. Him, um—he was just yelling something. Never making it right or whatever. Um, then he asked who was in the house and I told him I was gonna call the cops or whatever and they left.

H.D. affirmed that she made the statement to Sergeant Barney. The prosecutor then asked H.D. a series of questions about the incident, to which she denied or stated she could not recall:

State: Did Mr. Need—did—were you in the bedroom—did you see Mr. Needham from your downstairs up the stairs?

H.D. No.

State: Did Mr. Needham charge down the stairs at you, grab you by your hair and throw you to the ground?

H.D. (Pause.) I don't recall.

State: Okay. You don't recall whether or not that occurred?

H.D. Correct.

Pursuant to Minnesota Rule of Evidence 612, the prosecutor asked H.D. if it would refresh her recollection to review her transcribed statement to Sergeant Barney. H.D. acknowledged that it would.

After reviewing the statement, H.D. testified to the following facts: appellant was in her house and came downstairs on November 6; H.D. heard the sound of appellant entering her home; her door was locked at the time appellant entered and was damaged by appellant kicking it in; appellant drove a white Pontiac; and, on November 6, H.D. told officers that she wanted to press charges. Appellant did not cross-examine H.D., nor did he object to any of the prosecutor's questions or move to strike any of H.D.'s answers.

During the state's closing argument, the prosecutor stated: "I believe the evidence shows that [appellant] charged downstairs and he assaulted [H.D.]. He threw her down on the ground and he slapped her and he flinched at her." Focusing on H.D.'s inconsistent testimony, the prosecutor opined: "I think you'll find that eventually [H.D.] came clean. . . . And when she finally came clean, that, ladies and gentlemen, I argue to you, satisfies the evidence." Appellant did not object to the state's closing argument.

The jury found appellant guilty of both counts, and appellant was sentenced to an 88-month prison term. This appeal followed.

DECISION

Appellant argues that he is entitled to a new trial because the prosecutor committed prejudicial misconduct. He contends that the prosecutor committed prejudicial misconduct during H.D.'s direct examination by (1) introducing H.D.'s prior inconsistent statements under the guise of impeachment, thereby violating the so-called *Dexter* rule, and (2) "repeating the state's theory of the case each time he posed his questions to [H.D.]." Appellant argues that the prosecutor also committed prejudicial misconduct during his closing argument by (1) improperly endorsing the credibility of H.D.'s prior statement to Sergeant Barney and (2) "using portions of her prior statement as substantive evidence of [appellant's] guilt."

"A prosecutor engages in prosecutorial misconduct when the prosecutor 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) (quotations omitted). The standard of review depends on whether the defendant objected to the alleged misconduct at trial. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). When a defendant fails to object during trial, allegations of prosecutorial misconduct are reviewed under a modified plain-error standard. *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016).

Under this standard, the defendant bears the initial burden of establishing error that is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). A plain error is one that is

“clear or obvious.” *Id.* (quotation omitted). Once the defendant shows that the misconduct constitutes an error that is plain, the burden then shifts to the state to prove that any misconduct did not prejudice the defendant’s substantial rights. *Id.* at 300, 302. To meet this burden, the state must show that there is no reasonable likelihood that the absence of the misconduct would have had a significant impact on the jury’s verdict. *Id.* at 302. In determining whether the misconduct affected appellant’s substantial rights, we consider various factors, including: “(1) the strength of the evidence against [the defendant]; (2) the pervasiveness of the erroneous conduct; and (3) whether [the defendant] had an opportunity to rebut any improper remarks.” *Peltier*, 874 N.W.2d at 805-06; *see also State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017).

We conclude that the alleged prosecutorial misconduct did not affect appellant’s substantial rights. As a result, we decline to determine whether any prosecutorial misconduct actually occurred. That being said, the prosecutor’s form of questioning and his remarks in closing argument warrant some discussion. We first address appellant’s concern that the prosecutor introduced H.D.’s prior inconsistent statements under the guise of impeachment.

Minnesota Rule of Evidence 607 provides for impeachment of witnesses, including a party’s own witness. In *State v. Dexter*, the Minnesota Supreme Court construed rule 607, holding that the prosecutor’s attempt to impeach its witness with a prior inconsistent statement was an impermissible pursuit “to present, in the guise of impeachment, evidence which [was] not otherwise admissible.” 269 N.W.2d 721, 721 (Minn. 1978). Two years later, citing to *Dexter*, the supreme court explained that if a prosecutor “plan[s] from the

inception to call the witness for the purpose of introducing her prior statements, the prosecutor [is] guilty of misusing the rule to expose the jury to hearsay under the theory of impeachment.” *State v. Anderson*, 298 N.W.2d 63, 65 (Minn. 1980). Taking into consideration the fact that “the prosecutor was not sure the witness would deny defendant’s guilt when she took the stand,” the *Anderson* court held that the defendant was not prejudiced by the state’s impeachment of its witness. *Id.*; see also *State v. Thames*, 599 N.W.2d 122, 125-26 (Minn. 1999). Because there is no evidence that the prosecutor was certain H.D. was going to testify at trial inconsistently, we conclude there was no *Dexter* violation.

We next address the prosecutor’s manner in which he refreshed H.D.’s memory. Minnesota Rule of Evidence 612 governs the use of a writing to refresh a witness’s recollection. A writing should not be used to refresh a witness’s memory “unless it is first ascertained whether the witness can recall the events in question without resort to a memorandum.” *City of Minneapolis v. Price*, 159 N.W.2d 776, 781 (Minn. 1968). If the writing does not refresh the witness’s recollection, it may be read into evidence, under the recorded recollection exception to hearsay, provided certain requirements are met. See *State v. Stone*, 784 N.W.2d 367, 371 (Minn. 2010) (“A memorandum or record can only qualify as a recorded recollection if, upon a witness’s use of a writing to refresh memory for the purpose of testifying . . . a witness has an insufficient recollection to testify fully and accurately.” (quotation omitted)).

In order to be admitted as a recorded recollection under Minnesota Rule of Evidence 803(5), “the court must be satisfied, first, that the memorandum reflects the firsthand

knowledge of its author; second, that the recording was made while the facts were fairly fresh in his mind; third, that the record is a true and accurate account of what he perceived.” *Walker v. Larson*, 169 N.W.2d 737, 741-42 (Minn. 1969). In the present case, the prosecutor improperly read into the record a part of H.D.’s prior statement before either ascertaining whether H.D. needed to review the statement in order to testify to its content in her own words, or laying the proper foundation under rule 803(5).³

Furthermore, a number of the prosecutor’s questions, as well as remarks in his closing argument, assumed facts not in evidence. For example, the prosecutor asked H.D.: “Did Mr. Needham charge down the stairs at you, grab you by your hair and throw you to the ground?” H.D. responded: “I don’t recall.” The prosecutor asked H.D. whether reviewing her prior statement would refresh her recollection, and after H.D. stated that it would, and was given the opportunity, the following exchange took place:

State: Okay. Now, the question I had asked you prior to [your review of your statement] that I believe your response was that you didn’t remember was whether or not Mr. Needham grabbed you by the hair and threw you to the ground.

H.D. Yeah. Yes.

It is unclear whether H.D.’s affirmative answer is in response to the prosecutor’s inquiry of whether she remembers his previous question, or whether she is affirming that appellant

³ We note, however, that shortly after improperly reading a part of H.D.’s statement into the record, the prosecutor did, properly, inquire into whether it would refresh H.D.’s recollection to review it. H.D. acknowledged that it would and, thereafter, affirmed many of the accusations contained therein.

did, indeed, grab her by the hair and/or throw her to the ground. Despite this ambiguity, the prosecutor's subsequent questions assumed H.D. had affirmed the accusations:

State: Let me ask you another specific—a specific question. After Mr. Needham threw you—grabbed you by the hair and threw you to the ground, did he strike you?

H.D. I don't remember.

....

State: Okay. But after Mr. Needham threw you to the ground, you say it's hard to remember if he slapped you?

H.D. It's hard to remember the whole incident. Like, it was a long time ago. Um, and I have, like, problems with, like, memory. My memory.

State: Did you tell Sergeant Barney that Mr. Needham, after he threw you to the ground, flinched at you and then slapped you?

H.D. That's what was said—that's what he said.

State: Do you recall that happening?

H.D. I don't—like I said, I don't remember.

....

State: Did Mr. Needham say anything to you after he threw you to the ground?

H.D. (Pause.) I don't remember.

.....

State: Did you have any thought in your mind as to why Mr. Needham had kicked in your door, charged

down your stairs, thrown you to the ground and hit you?

H.D. No.

....

State: You told ‘em you were gonna call the police. After Mr. Needham threw you to the ground, slapped you, did they leave?

H.D. Yeah, they left.

In his closing argument, the prosecutor opined: “I believe the evidence shows that [appellant] charged downstairs and he assaulted [H.D.]. He threw her down on the ground and he slapped her and he flinched at her.” He also argued:

I think you’ll find that eventually [H.D.] came clean. She gave good answers. She—no, Mr. Needham wasn’t there. No, it was someone named Jeff Wise. Eventually, yes, Mr. Needham was there. Yes, he charged down the stairs. Yes, the redness on my face was from his assault. Yes, he kicked in the door. Yes, he did the damage.

While we affirm appellant’s convictions, our decision should be construed as neither an endorsement of the prosecutor’s manner in which he examined H.D., nor an approval of his remarks in closing argument. However, because we conclude that appellant’s substantial rights were not prejudiced, we need not determine whether the prosecutor’s conduct reached the level of plain error.

First, the evidence against appellant was strong. Both of the responding officers testified at trial. They described the visible damage to H.D.’s door, as well as H.D.’s demeanor and physical appearance within minutes of her call to 9-1-1. The officers’

unobjected-to testimony was admitted as substantive evidence of appellant's guilt, as were photographs of H.D.'s door and the visible injuries to her face.

Further, the jury heard testimony about appellant's car—details of which implicated appellant to the charged burglary and assault. The jury learned that appellant's car matched H.D.'s description of the vehicle that fled her residence, that his car was later found severely damaged just a few minutes from H.D.'s home, and that appellant's father had reported the vehicle stolen because that is what appellant told him. The jury also heard from Officer Foldesi who testified that H.D. told him "she just wanted to be done" with the case.

And finally, the jury heard from H.D., who affirmed she made the statements in the transcribed interview with Sergeant Barney, and testified that it was, in fact, appellant who entered her home, without consent, and came downstairs on November 6; that her door had been locked and was damaged by appellant kicking it in; that appellant was driving a white Pontiac at the time; and that she called the police, spoke with officers, and wished to press charges on the day of the offense.

Second, the pervasiveness of the alleged prosecutorial misconduct did not prejudice appellant. In addition to H.D.'s testimony, the jury heard from officers Dixon and Barney, both of whom corroborated H.D.'s prior statements. The jury was also instructed on what constituted evidence, as well as on its role and responsibility as factfinder. *See State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) ("The trial court's instructions to the jury are also relevant in determining whether the jury was unduly influenced by the improper comments."). The court instructed the jury that neither H.D.'s prior statements, nor the

statements of the prosecutor, constituted evidence. The court, and the prosecutor himself, instructed the jurors that they were the “sole judges of whether a witness is to be believed and of the weight to be given a witness’s testimony.” These instructions were sufficient to protect against any prejudice that may have resulted from the prosecutor’s conduct. *See In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. App. 2006) (holding that the jury instructions “were sufficient to negate . . . any prejudice that may have occurred as a result of misconduct”).

Third, appellant was not denied the opportunity to rebut any allegedly improper statements. Although appellant appeared pro se, the record shows that he was advised many times throughout the course of the proceedings to reconsider representing himself. The record also shows that appellant was appointed advisory counsel and that he discharged his advisory counsel before trial. Because the alleged prosecutorial misconduct did not affect appellant’s substantial rights, appellant is not entitled to a new trial.

Affirmed.