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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1277**

State of Minnesota,
Respondent,

vs.

Trajion Terrance Conner,
Appellant.

**Filed July 22, 2019
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27-CR-18-2239

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Peterson, Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Judge

A Hennepin County jury found Trajion Terrance Conner guilty of being an ineligible person in possession of a firearm. On appeal, Conner argues that the prosecutor engaged in misconduct in closing argument by making misleading statements about the state's DNA evidence. The state concedes that there is an error and that the error is plain but argues that the plain error did not affect Conner's substantial rights. We agree and, therefore, affirm.

FACTS

On September 22, 2017, Officer Schroeder of the Minneapolis Police Department stopped a Chevrolet Blazer after observing that the driver was not wearing a seatbelt and had not stopped at a stop sign. There were five men in the vehicle, two in the front seat and three in the back seat. Conner was sitting in the back seat on the left side, directly behind the driver. As Officer Schroeder approached the vehicle, he smelled marijuana emanating from it. To facilitate an investigation, he instructed the driver to put his hands on the steering wheel and instructed Conner to put his hands on the driver's headrest. When Conner did not immediately comply, Officer Schroeder grabbed Conner's left wrist and placed it on the back of the headrest.

Additional police officers arrived at the scene to provide back-up assistance. During a search of the vehicle, Officer Nelson found marijuana inside a backpack that was located in the area of the front passenger seat. Officer Schroeder found a loaded handgun in the seat-back pocket of the driver's seat, which was directly in front of where Conner had been

sitting. Officer Schroeder later testified that he “moved [his] finger [into the pocket] and opened it up a little bit and [the handgun] was clearly sticking right out” but that he did not touch the handgun with his bare hand. Officer Schroeder also testified that the driver’s seat was positioned “far back” so that “Conner’s knees were pretty much touching the seat pocket” and the handgun “was, in a sense, in between his legs.”

All five occupants of the vehicle were arrested. Conner and two other men were placed in the back seat of Officer Schroeder’s squad car. Conner and another man had a conversation, which was recorded by the squad car’s recording equipment. Conner said to the other man, “[T]hat better be yours.” Officer Schroeder understood Conner’s comment to be a reference to the handgun in the seat-back pocket. All five occupants of the vehicle provided DNA samples.

The state charged Conner with possession of a firearm by an ineligible person, in violation of Minn. Stat. § 624.713, subd. 1(2) (2016). The case was tried to a jury on three days in April 2018. The state presented the testimony of five witnesses. A forensic scientist testified that a swab of the handgun revealed a DNA mixture from at least four persons and that the partial major profile matched Conner’s DNA and did not match any of the other four occupants of the vehicle. The forensic scientist further testified that “the probability of selecting an unrelated individual at random from the general population whose profile would match this partial major profile from the mixture is approximately 1 in 848,000.” On cross-examination, the forensic scientist acknowledged that it is possible for DNA to be transferred from a person to an object even if that person did not

touch the object, which is known as secondary transfer. Conner did not present any evidence in his defense.

After the parties rested, the district court read the jury instructions. The district court instructed the jury, in part, as follows:

[T]he arguments or other remarks of an attorney are not evidence. If the attorneys or I have made or should make any statement as to what the evidence is which differs from your recollection of the evidence, you should disregard the statement and rely solely on your own memory. If an attorney's argument contains any statement of the law that differs from the law I give you, disregard the statement.

In his closing argument, the prosecutor discussed the state's DNA evidence as follows:

So when you're looking at the evidence, what it is with 100 percent certainty is this defendant's profile. His DNA is on that firearm. And none of the other people, their DNA is not on that firearm. Hundred percent, zero percent chance.

. . . .

The DNA in and of itself can allow you to find that he's in actual [possession of] that firearm. It's a match. It's a DNA match. Doesn't get better than that.

Conner's attorney did not object to these statements. But he began his closing argument as follows:

Ladies and gentlemen, this sounds like a slam dunk. Sounds like [the prosecutor has] got it all wrapped up in a neat little bow for you. Nobody else's DNA is on that gun, only his. That is a prime example, ladies and gentlemen, of what the judge told you. What we say isn't evidence in the case. The evidence in the case is what you heard from the witness stand.

The jury found Conner guilty. The district court imposed a sentence of 60 months of imprisonment. Conner appeals.

DECISION

Conner argues that the prosecutor engaged in prosecutorial misconduct by making misleading statements to the jury in closing argument about the state's DNA evidence. He contends that he is entitled to a new trial.

Conner did not object at trial to the statements that he now contends are misconduct. Accordingly, we apply “a modified plain-error test.” *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail under the modified plain-error test, an appellant must establish that there is an error and that the error is 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 establishes plain error, the state has the burden of showing that the plain error did not affect the defendant's substantial rights, *i.e.*, “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). “If the state fails to demonstrate that substantial rights were not affected, ‘the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.’” *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (quoting *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). “To warrant reversal for a new trial, the prosecutor's misconduct—placed into the context of the entire trial—must be so serious and prejudicial that it impairs a person's constitutional right to a fair trial.” *State v. Banks*, 875 N.W.2d 338, 348 (Minn. App. 2016), *review denied* (Minn. Sept. 28, 2016).

Conner contends that the prosecutor mischaracterized the state's DNA evidence by stating that there is "100 percent certainty" that his DNA was found on the handgun. The state concedes the first two requirements of the modified plain-error test, stating, "Respondent agrees that the prosecutor's closing statements regarding DNA evidence were plain error." We accept the concession. The supreme court has cautioned that evidence of statistical probabilities based on DNA analysis must be described with precision so as not to mislead the jury. *See, e.g., State v. Roman Nose*, 667 N.W.2d 386, 397 (Minn. 2003). In *State v. Bailey*, 677 N.W.2d 380 (Minn. 2004), the supreme court stated that a prosecutor engaged in misconduct in an opening statement by equating a high probability of a DNA match with proof beyond a reasonable doubt. *Id.* at 402-03. In this case, the prosecutor plainly overstated the DNA evidence by arguing that there was a "100 percent certainty" that Conner's DNA was on the handgun.

With respect to the third requirement of the modified plain-error test, the state argues that the plain error did not affect Conner's substantial rights. In assessing that question, it is appropriate for this court to consider various factors, including (1) the strength of the evidence against the defendant, (2) the pervasiveness of the misconduct, and (3) whether the defendant had an opportunity to respond to the misconduct. *See State v. Peltier*, 874 N.W.2d 792, 805-06 (Minn. 2016).

With respect to the first of these factors, the state's evidence of guilt was strong, with or without the prosecutor's mischaracterization of the DNA evidence. The handgun was found in a seat-back pocket directly in front of where Conner was sitting. The state's DNA evidence suggested a very high probability that Conner had possessed the handgun,

even if not a probability of 100%. If the DNA evidence had been presented in a fair and accurate way in closing argument, the jury still would have had a good reason to believe that it supported a finding of guilt. Conner contends that the state's DNA evidence was weakened by his secondary-transfer theory. He contends that his DNA could have been transferred to the handgun because Officer Schroeder grabbed his wrist, then touched latex gloves as he put them on his hands, and then handled the handgun with his gloved hands. The forensic scientist acknowledged that secondary transfer is possible, but Conner's theory is even more attenuated than usual because it assumes more than one secondary transfer of his DNA. In addition, the jury was instructed on the law of both actual possession and constructive possession and both exclusive possession and joint possession, and the prosecutor urged the jury to find Conner guilty under multiple theories.

With respect to the second factor, the prosecutor's misconduct was not pervasive. The misleading statements occurred only in closing argument. They consist of only a few sentences in a closing argument that takes up 16 pages of the trial transcript. See *State v. Johnson*, 915 N.W.2d 740, 746-47 (Minn. 2018); *State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003); *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994). Also, the misstatements are limited to the state's DNA evidence, which is directly relevant to the state's actual-possession theory but not necessary to its constructive possession theory.

With respect to the third factor, Conner's attorney took advantage of the opportunity to respond to the prosecutor's misleading statements about the DNA evidence. At the beginning of his closing argument, Conner's attorney directly addressed the prosecutor's arguments concerning the DNA evidence. Conner's attorney also capitalized on the jury

instruction that stated that the prosecutor's remarks in closing argument are not evidence and that the jury should disregard any statements that differ from the evidence.

Each of these factors weighs in favor of the state's responsive argument. We conclude that the state has satisfied its burden of proving that the prosecutor's misconduct did not affect Conner's substantial rights.

Affirmed.