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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1364**

David Wayne Benolt, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 13, 2019
Affirmed
Rodenberg, Judge**

Isanti County District Court
File No. 30-CR-14-585

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Jeffrey R. Edblad, Isanti County Attorney, Cambridge, Minnesota; and

Scott A. Hersey, Special Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Rodenberg, Judge; and
Reilly, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this appeal from the district court's order denying his petition for postconviction relief, appellant argues that he is entitled to a new trial based on the prosecutor's plainly

erroneous misconduct during summation by referring to a witness statement that was not in the record. We affirm.

FACTS

Appellant went camping with an 11-year-old girl, O.M., who described appellant as being like an uncle to her. O.M. lived with her father in Missouri but was visiting her mother in Minnesota during the summer of 2014. O.M. and her half-sister, T.W., had planned to go on a camping trip with appellant but T.W. had to work, so O.M. and appellant went camping without T.W. Appellant picked O.M. up at her mother's house. O.M. testified that they stopped at a restaurant, a store, and a liquor store before arriving at the site where they would camp. After setting up camp, O.M. told appellant that she was thirsty and appellant prepared a drink for her. O.M. thought that the drink "tasted weird," and appellant told her it was sprite and alcohol. O.M. testified that "I got sick and I threw up." O.M. was tired and went to sleep in the tent.

O.M. testified at trial that she woke to find one of appellant's hands grabbing her breast underneath her bra, and appellant's other hand on her buttocks beneath her underwear. O.M. said that appellant unhooked her bra. O.M. moved away and, according to O.M., appellant said, "I'm sorry, I thought that's what you wanted." O.M. testified that she left the tent. Appellant left the tent and gave her a flashlight so she would not trip. O.M. said that she ran to the brightest house she could see and knocked on the door. K.P. and J.S. answered the door and O.M. described what had happened.

K.P. testified that O.M. appeared scared, and O.M. said that she was on a camping trip with someone "like an uncle" who started touching her inappropriately. K.P.'s mother,

L.P., spoke with O.M. and then called the police. L.P. testified that O.M. was without socks or shoes and appeared to be scared and confused. While waiting for the police to arrive, L.P. testified that O.M. was fidgeting with her back because appellant had unclasped her bra. Deputy Heiller arrived, and L.P., K.P., and J.S. stepped outside so that Deputy Heiller could talk to O.M. privately. O.M. told Deputy Heiller that she woke up in a tent with appellant's hands down her pants and under her bra. O.M. told Deputy Heiller that she got up to go the bathroom and then came to L.P.'s residence looking for help.

Deputy Heiller testified at trial that O.M. told him on the night of the occurrence that appellant gave her a drink with alcohol in it. O.M. told Deputy Heiller that the drink made her throw up. Deputy Heiller administered a breath test, which revealed no alcohol in O.M.'s system. Deputy Heiller testified that he was not surprised that there was no alcohol detected in O.M.'s system under the circumstances. After talking with O.M., Deputy Heiller left her with the homeowner. Deputy Heiller then left and found appellant walking down the road. Appellant told Deputy Heiller that he was camping with O.M. and was looking for her because she had left the campsite. Deputy Heiller read appellant his *Miranda* rights and placed him in custody. Deputy Heiller asked appellant about a sexual assault and appellant replied that O.M. was probably being dramatic. Appellant did not think it strange that he was camping with an 11-year-old girl, and he denied providing her any alcohol. Appellant said that there was an unattended fire at the campsite, so Deputy Heiller returned to the campsite with appellant. Deputy Heiller noticed the tent and a bottle of baby oil inside it, and noticed alcohol and O.M.'s shoes outside of the tent. Deputy Heiller took photographs for evidence.

Deputy Heiller then returned to the home where he had left O.M., with appellant in the back of his squad car. L.P. testified that O.M. appeared frightened when she heard Deputy Heiller say that appellant was in the car.

Investigator Carlson testified at trial that he collected an overnight bag that appellant had in the tent, and found three bottles of Cinnabon Roll liquor and two bottles of pink Kinky liquor, which he photographed. This evidence corroborated what O.M. had told him about vomiting after having a drink mixed with a pink liquid. In addition to the bottle of baby oil that Deputy Heiller observed inside the tent, Investigator Carlson found petroleum jelly and feminine hygiene wipes in appellant's bag. Investigator Carlson observed that there was one air mattress and two unzipped sleeping bags inside the tent, which corroborated O.M.'s account of not necessarily being in a sleeping bag but having covers.

O.M.'s mother, M.B. testified at trial. M.B. testified that appellant was a friend of her father and her father's girlfriend, D.B. After M.B.'s father passed away, appellant began to live with D.B. M.B. testified that she understood O.M. was going camping with T.W. and appellant, and that she would not have allowed O.M. to go camping if she had known T.W. was not going to be present.

D.B. testified at trial that appellant and O.M.'s half-sister, T.W., live with her. D.B. considers appellant to be like a son. D.B. was in a relationship with O.M.'s grandfather for 30 years and considers O.M. to be her grandchild. Appellant moved in with D.B. after O.M.'s grandfather passed away and helps D.B. maintain the house and assists her with errands. D.B. testified that she asked O.M. to look her in the eye and tell her what happened in the camping incident, but O.M. could not do it. When D.B. asked O.M. if appellant had

done something to her, O.M. said “oh, yeah, he did.” D.B. believes that O.M. was mad that appellant would not take her on rides at the Mall of America and accused appellant of improperly touching her to get revenge.

D.B. testified at trial that appellant never told her about what happened in the tent with O.M. The prosecutor then showed D.B. a summary of a pretrial conversation that D.B. had with the prosecutor. The written summary indicated that D.B. and appellant *had* discussed what happened in the tent. The prosecutor referenced the prior statement, claiming that D.B. had said that appellant told her O.M. got tired, went in the tent, and came back out to the fire about 15 to 20 minutes later to go the bathroom. The statement was used to refresh D.B.’s recollection. D.B. acknowledged the inconsistencies between her trial testimony and the written summary, but she insisted that she had not told the prosecutor what the summary stated. Instead, she testified that she did not get this information from appellant, but rather from speaking with another person. The summary was not admitted into evidence and no witness other than D.B. testified about this conversation with the prosecutor. As noted, D.B. testified that she *had not* told the prosecutor what the summary reported.

Appellant also testified at trial. Appellant testified that the camping trip as originally planned was to include O.M., T.W., and T.W.’s boyfriend. For sleeping arrangements, appellant stated that some people would have stayed indoors because they were camping outside of appellant’s friend’s home, to which appellant was welcome and had a key. Appellant testified that T.W. told him she could not go camping because she had to work. Appellant picked up O.M. from her mother’s house and the two of them

travelled together and set up camp. According to appellant, O.M. said she wanted to go to sleep at around 9:00 p.m., approximately two hours after they had arrived. Appellant said the two of them went in the tent and laid down, O.M. tried to get close to him, and he told her to “get the hell away” because he does not like being warm. Appellant testified that O.M. was watching videos on appellant’s phone for 20 to 30 minutes before falling asleep. Appellant said he decided to go outside and have a drink and light the fire. Appellant testified that he was outside for several hours and “consumed nearly a liter of brandy” before going back to the tent to get something. Appellant stated that, in addition to drinking the brandy, he put the Kinky liquor into his wine cooler. According to appellant, when he returned to the tent, O.M. was not there. He looked around the area and in the house, but could not find O.M. Appellant said he took a flashlight to go look for her and that is when he encountered Deputy Heiller.

Appellant denied having ever touched O.M. inappropriately. He also denied giving O.M. alcohol. On cross-examination, appellant denied having told D.B. that O.M. went into the tent, came out 15 to 20 minutes later to go the bathroom, got a flashlight from appellant, but never came back.

In closing argument, the prosecutor referenced and relied on D.B.’s prior statement, arguing:

[D.B.] I asked her some pretty specific questions about a statement that she had given a few weeks back at which she now disagreed with, but in that initial statement and what I asked her was what the [appellant] first told her, and what she had provided was that [appellant] told [D.B. that] [O.M.] was tired and went in the tent, 15 to 20 minutes later she comes out of the tent, says I have to go to the bathroom, he says, take a

lantern or a light and she never comes back. That's not even close to what he told Deputy Heiller. We're talking about 15 to 20 minutes verses an hour to an hour and a half. We're talking about [O.M.] saying this is what I'm going to do in the version of [D.B.] versus in the version of Deputy Heiller, I left and she was gone. Now, [D.B.] yesterday told you guys that well, only the beginning and the end of what I originally told you is true, the rest came from [T.W.'s boyfriend], which kind of came out of nowhere, but that ultimately the [appellant] simply said, I don't know why I'm being charged, I don't know what's going on, which, again, is not true.

Appellant did not object or request a curative instruction concerning this argument.

The jury found appellant guilty of two counts of second-degree criminal sexual conduct. Appellant petitioned for postconviction relief, arguing that his convictions were based upon prosecutorial misconduct and other trial errors. Appellant did not request an evidentiary hearing. The postconviction court denied appellant's petition.

This appeal followed, challenging only the prosecutorial-misconduct issue.

D E C I S I O N

Appellant argues on appeal that the state committed prosecutorial misconduct during summation by referring to D.B.'s prior statement, a statement that D.B. denied making (as to the relevant details) and that was not admitted in evidence.

To warrant reversal for a new trial, a prosecutor's misconduct, placed into the context of the entire trial, must be so serious as to impair the defendant's constitutional right to a fair trial. *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000).

Generally, a defendant forfeits the right to raise an issue concerning the prosecutor's closing argument if the defendant fails to object or seek a cautionary instruction at trial. *State v. Steward*, 645 N.W.2d 115, 121 (Minn. 2002). When the defendant fails to object

during trial, prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007). The defendant must first demonstrate error that is plain; upon doing so, the burden shifts to the state to prove that the error did not affect the defendant's substantial rights. *Id.* at 393. Stated differently, the state must show that there is no reasonable likelihood that the misconduct had a significant effect on the verdict. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). In evaluating the effect of an error on substantial rights, an appellate court considers various factors, including the pervasiveness of improper suggestions and the strength of the other evidence against the defendant. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). "If the State fails to demonstrate 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." *Id.*

The postconviction court determined the prosecutor's summation included error that is plain. We agree.

An error is plain if it is clear or obvious. *State v. Vue*, 797 N.W.2d 5, 13 (Minn. 2011). "Typically, a plain error contravenes case law, a rule, or a standard of conduct." *Id.* "A statement not given under oath is not admissible substantively, but may be admitted under Rule 607 for impeachment purposes." *State v. Thames*, 599 N.W.2d 122, 125 (Minn. 1999).

As discussed, the prosecutor's summation referenced D.B.'s pretrial conversation with the prosecutor, and the prosecutor argued that the pretrial conversation was inconsistent with D.B.'s trial testimony.

The state argues on appeal that the manner in which the state presented D.B.'s prior statement comported with the rules of evidence. Specifically, the state argues that the prosecutor successfully impeached D.B. with a prior statement, and therefore, it was not error to reference the statement in summation. The state also argues that evidence of the prior statement was admissible under the residual exception to the hearsay rule.

The state misconstrues both what transpired at trial and the applicable law. The state did *not* successfully impeach D.B., who denied having told the prosecutor anything inconsistent with her trial testimony. The residual exception to the hearsay rule has no application to statements that were neither offered nor received into evidence. And the prosecutor's reference in summation to matters not in evidence was improper and plainly so.

Under Minn. R. Evid. 613(b), on which the state relies, "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded a prior opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Minn. R. Evid. 613(b). The comment to the rule explains that, where a prior inconsistent statement is offered for impeachment purposes by means of extrinsic evidence, a party need not prove the prior inconsistent statement by extrinsic evidence if the witness admits making the inconsistent statement. Minn. R. Evid. 613(b) 1977 comm. cmt.

Here, D.B. denied having made the statement in question—that she learned about what happened at the campsite from appellant. D.B. acknowledged that this is what the summary of her prior statements said, but was adamant that the information came from

sources other than appellant. No evidence was admitted at trial tending to prove that D.B. talked to appellant about what happened at the campsite.

As appellant argues, the state would be able to, at most, use D.B.'s prior statement to argue that D.B. was not credible. But the state used the contents of D.B.'s prior statement, which was not admitted as evidence, to counter appellant's testimony about what happened at the campsite. This contradicts the clear rule that a prosecutor cannot refer to evidence outside of the record in closing argument, *State v. Morton*, 701 N.W.2d 225, 237 (Minn. 2005), and cannot use impeachment evidence as substantive evidence in closing, *State v. Radke*, 821 N.W.2d 316, 329 (Minn. 2012). Consequently, the postconviction court properly determined that the prosecutor's statement regarding D.B.'s prior statement was plain error.

We next consider whether the state has demonstrated that the error did not affect 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." *State v. Peltier*, 874 N.W.2d 792, 805-06 (Minn. 2016). We agree with the postconviction court that the record demonstrates that the error did not affect appellant's substantial rights.

Appellant argues that the misconduct had a serious effect on the jury's verdict because the prosecutor used the content of D.B.'s statement to argue that appellant had made changing or contradictory statements over time, and that this inference was important to a trial that hinged on credibility.

We agree that the error related to appellant's credibility, and that credibility was important to this trial. But the prosecutor's improper argument was but a small part of the state's case. And the state's case was otherwise strong. O.M. testified unequivocally about the alleged assault and gave consistent statements to several other people—the residents at the home to which she fled, her mother, Deputy Heiller, and Investigator Carlson. O.M. left a campsite at night, without shoes on, to seek help from strangers at the nearest bright house, which corroborates her version of events. And the error, while plain, amounted to a few comments in the context of a summation spanning 26 pages of transcript, at the end of a three-day trial. *Cf. Peltier*, 874 N.W.2d at 806 (prosecutor's improper remarks did not affect defendant's substantial rights because evidence of guilt was overwhelming, incidents of misconduct were isolated, and state did not emphasize or repeat points). Also analogous to *Peltier*, the state here did not unduly emphasize or repeat the improper content, and it was not in any way central to the state's case. *Id.* Finally, appellant had an opportunity to rebut the prosecutor's remarks in his own summation. We conclude that the prosecutor's error in referencing D.B.'s prior out-of-court statement did not significantly affect the verdict.

Appellant also filed a pro se supplemental brief, arguing that there was collusion between his attorney and the prosecution. Specifically, appellant argues that his counsel was ineffective because his public defender violated rules of professional conduct by refusing to accommodate appellant's desired trial strategy. Additionally, appellant raises constitutional concerns about the seizure of his property from the crime scene. Lastly, appellant argues that his attorney committed a federal crime by willfully depriving him, or

conspiring to deprive him, of a constitutionally protected right. Appellant does not indicate which constitutional right this might be.

Appellant's arguments are based primarily on assertions outside of the record. Although perhaps an evidentiary hearing would have developed the record on these issues, appellant did not request an evidentiary hearing. Appellant's arguments also lack a proper legal basis, other than his Fourth Amendment argument concerning the seizure of evidence from the campsite. And appellant's argument concerning the seizure of evidence was not raised either to the district court or in his postconviction petition. Because each of appellant's pro se arguments are either premised on assertions outside the record, are not adequately briefed, or were not raised to the district court or postconviction court, appellant's pro se brief does not provide grounds for relief. See *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), review denied (Minn. Aug. 5, 1997); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (stating that the court of appeals declines to address allegations unsupported by legal analysis or citation).

Affirmed.