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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0505**

State of Minnesota,
Respondent,

vs.

Benjamin Davis Fratzke,
Appellant.

**Filed March 2, 2020
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Winona County District Court
File No. 85-CR-18-1037

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

Christopher M. Hood, Winona City Attorney, Flaherty & Hood, P.A., Winona, Minnesota
(for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina Schulz, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Rodenberg,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

A jury heard evidence that Benjamin Fratzke drove his van repeatedly into a
parked car, stopped the van and sat in the back seat, appeared to police to be obviously

intoxicated, gave conflicting accounts of his actions, and offered a breath sample that revealed an alcohol concentration of 0.22. The jury found Fratzke guilty of two counts of gross-misdemeanor driving while impaired. Fratzke appeals from his resulting convictions. He argues that he is entitled to a new trial because the prosecutor elicited inadmissible vouching and prior-police-contacts testimony. And he argues that the district court erroneously entered two convictions when both arose from a single behavioral incident. We hold that no new trial is warranted because, even if the prosecutor committed misconduct, any error was harmless beyond a reasonable doubt. But because the district court erred by entering two convictions on the single incident, we reverse in part and remand for the district court to vacate one of the convictions.

FACTS

The state charged Benjamin Fratzke with two counts of driving while impaired: one count for driving, operating, or physically controlling a motor vehicle while under the influence of alcohol, and one count for driving, operating, or physically controlling a motor vehicle with an alcohol concentration of 0.08 or greater. *See* Minn. Stat. §§ 169A.20, subds. 1(1), (5), .25, subd. 1(a) (2016). Fratzke moved in limine to preclude testimony about his prior contacts with police and testimony regarding the credibility or reliability of his prior statements. The district court granted Fratzke’s motion “subject to what happens at the trial,” and Fratzke stipulated to two aggravating factors. The case proceeded to a jury trial.

A.M. (“Witness”) testified that she was having drinks outside the Hei N Low Bar in Winona when she watched a green minivan strike her parked car, over and over again. Witness called the police.

Winona Police Sergeant Eric Engrav also testified. He told the jury that he had located the van within ten minutes of Witness’s call. It was parked roadside a short distance from the bar with a lone occupant appearing to be sleeping in the back seat.

Officer Corey Leighton testified and explained what happened after he arrived on the scene. When the prosecutor asked Officer Leighton whether he identified the van’s driver and sole occupant, he said that Fratzke “had already been identified by his full name through [Witness,] who had reported it. And, then, I had personally dealt with [Fratzke] before” The prosecutor interrupted the testimony and apologized to the district court for the officer’s elaboration.

The jury learned that the officers directed Fratzke out of the van, that Fratzke’s movements were “slow and deliberate,” and that he swayed, smelled of an alcoholic beverage, and had bloodshot and watery eyes. The jury watched a video of the encounter recorded by Officer Leighton’s dash camera and heard Fratzke admit to running into Witness’s parked car. And they heard him claim that he had been sitting in the van for “five minutes,” during which period he drank three beers and discarded the empty beer cans in “the alley.” The prosecutor questioned Officer Leighton to cast doubt on Fratzke’s post-driving alcohol-consumption defense:

Q: What did you observe at the scene that le[d] you to believe that maybe this statement was not truthful?

A: I didn't see any beer cans in the vehicle and we were not in an alley. We were on a street.

The jury saw additional dash-camera footage, during which Fratzke gave Officer Leighton a different story, this time saying that he had stopped drinking "a couple hours ago" and that he had *not* been drinking in the five minutes he was seated in his van after the collisions. The prosecutor asked Officer Leighton about Fratzke's conflicting explanation:

Q: What did this contradiction tell you about his inebriation at the time?

A: That he was intoxicated and that he was lying to me or maybe didn't know when his last drink truly was.

Officer Leighton testified that Fratzke's performance on the horizontal- and vertical-gaze-nystagmus tests indicated Fratzke's intoxication. The jury also heard from the recording that Fratzke claimed he could not complete a walk-and-turn field sobriety test due to a physical injury:

OFF. LEIGHTON: [S]o the next test I'm going to have you do is the nine step walk and turn test, okay?

FRATZKE: I can't do that.

OFF. LEIGHTON: Why not?

FRATZKE: Because of my concussions.

OFF. LEIGHTON: Did you have one recently[?]

FRATZKE: Yeah.

OFF. LEIGHTON: When was that?

FRATZKE: It's -- well, like a couple years ago but you know I -- I get vertigo.

The prosecutor asked the officer what Fratzke's inconsistent recollection about the timing of his concussions "indicate[d]" about Fratzke's impairment. The officer responded, "That he was impaired or was trying to avoid taking the test."

Officer Leighton arrested Fratzke and drove him to jail. Fratzke told the officer that his keys were in the van's center console, leading Sergeant Engrav to find Fratzke's keys and a nearly empty bottle of liquor in the van. Fratzke agreed to provide a sample of his breath for a chemical test, revealing an alcohol concentration of 0.22.

Fratzke did not testify. His attorney argued in closing that Fratzke had not driven while impaired, was not in control of the van while impaired, and consumed alcohol after he stopped the van. The jury was not persuaded. It rejected Fratzke's post-driving-consumption defense and found him guilty on both counts. The district court's written sentencing order indicated convictions on both counts. Fratzke appeals.

D E C I S I O N

Fratzke argues that he is entitled to a new trial because the prosecutor improperly elicited vouching and prior-police-contacts testimony. He alternatively argues that the district court should not have entered judgments of conviction on both counts. The second argument prevails.

I

Fratzke argues that the prosecutor committed misconduct by eliciting impermissible vouching testimony and prior-police-contacts testimony. "[O]ne witness cannot vouch for or against the credibility of another witness." *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). This includes the credibility of out-of-court statements. *See, e.g., State v.*

Ellert, 301 N.W.2d 320, 323 (Minn. 1981) (holding that officer's testimony that he believed defendant lied in statement to him was improper); *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995) (recognizing that officer's testimony that confession appeared "truthful" was problematic). The parties dispute whether we should apply a plain-error or harmless-error review standard as we address the prosecutor's framing of the question implying that Fratzke was "not truthful" and the officer's responses that he knew Fratzke from prior contacts, that Fratzke was either intoxicated or lying, and that Fratzke was either impaired or attempting to avoid sobriety testing. We need not answer this dispute because we are satisfied that, under either standard, Fratzke is not entitled to a new trial.

This is because, even if we assume prosecutorial misconduct occurred, the state has shown that the misconduct was not so prejudicial as to justify a new trial. Under the harmless-error framework, serious misconduct warrants reversal unless it is harmless beyond a reasonable doubt, while less serious misconduct warrants reversal if it "likely played a substantial part in influencing the jury to convict." *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (quotation omitted). We need not distinguish between more or less severe misconduct if it is harmless under the more stringent standard. See *State v. Carridine*, 812 N.W.2d 130, 150 (Minn. 2012). Under the modified plain-error framework, misconduct does not require reversal if the state demonstrates 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." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotations omitted). The state meets that burden here.

The state convincingly argues that the alleged errors were not so prejudicial as to require a new trial. The prejudice element of a plain-error analysis equates to a harmless-error inquiry. *State v. Reed*, 737 N.W.2d 572, 584 n.4 (Minn. 2007). Assessing the prejudice of prosecutorial misconduct, we may consider how the allegedly improper evidence was presented, how persuasive the evidence was, whether the state emphasized the evidence, whether the defendant was able to rebut it, and the strength of the state's other evidence. *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016) (applying harmless-error analysis to prosecutorial misconduct); *State v. Hill*, 801 N.W.2d 646, 655 (Minn. 2011) (applying modified plain-error analysis to prosecutorial misconduct).

First, the manner in which the state presented the testimony does not favor reversal. The alleged vouching testimony and prior-police-contacts testimony was incidental in nature and limited to a few lines of approximately 60 pages of Officer Leighton's trial testimony. The emphasis was not on the officer's vouching but on inconsistencies in Fratzke's statements.

Second, the challenged testimony was not particularly persuasive given the lack of credibility in Fratzke's on-scene deflections even without the officer's testimony. Any reasonable jury would have noticed the obvious implausibility of Fratzke's post-collision, beer-consumption story and his conflicting, "a couple hours ago" version of events well before the officer's editorial comments about truthfulness. Three beers consumed in five minutes? No beer cans in or near the van? The officer's proper testimony rendered his allegedly improper vouching testimony inconsequential.

Third, the prosecutor did not emphasize the alleged vouching testimony during examination. He did, however, call attention to it during closing arguments. He said, “There are many reasons not to buy into Mr. Fratzke’s stories. Of course, Officer Leighton doesn’t buy into any of them.” Fratzke correctly argues that any prejudicial effect was exacerbated by this remark. But again, the prosecutor was needlessly pressing for a credibility finding that every juror would have certainly already made. On this record, no reasonable juror could have believed Fratzke’s on-scene contradictory and infeasible stories, so the fact that the prosecutor emphasized the officer’s doubts did not affect the verdict.

Fourth, although Fratzke did not testify, he did pursue his post-driving-consumption defense and no-physical-control theory during his cross-examination of the officers. He attempted to draw attention to inconsistencies about where his keys were located, his supposed lack of control over the van, and the officers’ failure to search nearby alleys for beer cans. To the limited extent jurors had any basis to find Fratzke’s on-scene statements credible, his attorney made the best case for the finding to counterbalance any weight the jury might have given the vouching testimony.

Even if the first four factors supported Fratzke, the fifth and final one would defeat his appeal. The state presented overwhelming—if not irrefutable—evidence that Fratzke had driven his vehicle while under the influence of alcohol or with an alcohol concentration of 0.08 or greater. The jury knew about his striking a *parked* car—*over and over again*—and it knew about his driving away and getting into the back seat of his van within five minutes after his collisions, either falling asleep or feigning having fallen asleep. The jury

also knew about his 0.22 alcohol concentration, which was measured within two hours of Fratzke colliding with a parked car and encountering police minutes later. The notion that he increased his alcohol concentration from 0.07 to three times that level by drinking beer in that brief period would presumably seem physiologically implausible to a reasonable juror. Among one of his various versions of events, Fratzke explicitly *denied* drinking after he stopped his van and stated that it was before he “got pulled over” that he “had some beers.” Fratzke’s version on appeal assumes an implausible sequence: after hitting Witness’s car, he drove a short distance, parked, consumed three beers, left his van to dispose of the cans by tossing them in some alley, returned to his van, and curled up to sleep in the back seat—all within minutes. On this record, we cannot imagine that any jury could have acquitted him.

The state also presented overwhelming evidence to support the alternative theory that Fratzke was in physical control of his vehicle while under the influence of alcohol or with an alcohol concentration of at least 0.08. Fratzke, the sole occupant of his operable van, had been driving the van minutes earlier and told the officers they could find his keys in the center console. The numerous factors relevant to determining a defendant’s physical control over a vehicle—his proximity to the vehicle, whether he drove the vehicle, his ownership of the vehicle, the location of the vehicle’s keys, and the vehicle’s operability—surely establish Fratzke’s physical control of the van. *See State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010). Fratzke’s passing assertion that “[a]rguably, the evidence would be insufficient as a matter of law to find physical control” because his van was his home and he was in the back seat is unconvincing because he could have easily resumed driving.

See State v. Starfield, 481 N.W.2d 834, 837 (Minn. 1992) (observing that “physical control” is intended to apply when an inebriated person might convert a parked car into danger).

The assumed instances of prosecutorial misconduct were harmless beyond a reasonable doubt and did not affect Fratzke’s substantial rights. We will not order a new trial.

II

The district court at sentencing orally ordered only one conviction on the jury’s two guilty verdicts. But its sentencing order indicated convictions on both counts. Fratzke argues that this was error under Minnesota Statutes section 609.04, subdivision 1 (2016), which prohibits multiple convictions under different sections of a criminal statute for conduct that comprises a single behavioral incident. *See also State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985) (interpreting section 609.04). The state rightly concedes the point. “[T]he proper procedure to be followed by the trial court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only.” *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). We therefore reverse in part and remand the case for the district court to vacate one conviction while leaving the jury’s two guilty verdicts intact.

Affirmed in part, reversed in part, and remanded.