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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0514**

State of Minnesota,
Respondent,

vs.

Curtis Akeem Banks,
Appellant.

**Filed February 24, 2020
Affirmed
Segal, Judge**

Anoka County District Court
File No. 02-CR-18-2919

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

Anthony C. Palumbo, Anoka County Attorney, Robert I. Yount, Kelsey R. Kelley,
Assistant County Attorneys, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Cochran, Judge; and Segal,
Judge.

UNPUBLISHED OPINION

SEGAL, Judge

In this direct appeal from final judgments of conviction of two counts of first-degree controlled-substance crime, appellant argues that his convictions must be reversed and the case remanded for a new trial because of prosecutorial misconduct. Specifically, appellant claims that the prosecutor improperly belittled his defense theory. Because the prosecutor did not commit misconduct, we affirm.

FACTS

In October 2017, a confidential informant (CI) contacted a detective from the Washington County Drug Task Force with information that K.B. was selling narcotics. On December 11, 2017, the detective had the CI contact K.B. to set up a controlled buy of cocaine. Prior to the controlled buy, an undercover Washington County police officer met with the detective and the CI. The controlled buy was originally to take place in St. Paul, but the CI could not reach the person they planned to buy from, so the undercover officer directed the CI to again call K.B. K.B. told the CI to drive to a gas station in Blaine and meet a man named Curtis. The CI knew appellant Curtis Banks prior to the controlled buy, although he had not known him by name. The CI showed the undercover officer a social media photo of Banks so the officer would know who to look for at the gas station. The undercover officer and the CI then drove to the controlled-buy location.

A black Chevy Tahoe, owned by K.B., parked next to the officer's vehicle. The driver exited the Tahoe and entered the undercover officer's car. The man said his name was Curtis and gave the CI a baggie of cocaine. The undercover officer gave Curtis the

buy money. There was discussion about the price and about returning for a second buy to purchase more cocaine or heroin. Banks left the car and the undercover officer and the CI left the buy location. After the controlled buy, the detective showed both the CI and the undercover officer a publicly available photo of Banks. Both confirmed it was Banks who sold the cocaine.

On December 27, the detective contacted the CI to conduct a second controlled buy. This second controlled buy was conducted with the same undercover officer and the CI, and it was conducted at the same gas station. Banks arrived in a different vehicle owned by K.B. Banks again got in the undercover officer's car. The undercover officer recognized Banks from the first controlled buy. The CI and undercover officer purchased cocaine from Banks and again identified him from a photograph. Banks was charged with two counts of first-degree sale of a controlled substance in violation of, respectively, Minn. Stat. § 152.081, subds. 1(1), 3(a) and 3(c) (2016).

The case was tried to a jury and both parties presented closing arguments. During the state's rebuttal closing argument, the prosecutor told a childhood story about trying to tune in to a baseball game on a transistor radio and having difficulty hearing the "signal" through the "noise" of the static. The prosecutor went on to say, "The reason I tell that story is that's what I think is so critical in your role is what is the signal and what is the noise?" Banks did not object to the state's closing argument. The jury found Banks guilty of both counts. This appeal follows.

DECISION

Banks argues that the state committed prosecutorial misconduct by belittling the defense's theory of the case when the prosecutor included the following story in his rebuttal argument:

When I was young my family would go up north and camp and I was a big baseball fan and I was so frustrated because WCCO radio would not quite come in in those night games and I had to know how my team was doing. So a lot of you wouldn't even think of this now. We have satellite radio and everything is all—but I couldn't get the game to come in. I'd try so hard and I'd get it and there would be all sorts of static and all sorts of noise and I'd try to hear what's going on in the game. It would be hard. It would be hard to break through the noise and to get the actual signal of what was going on.

The reason I tell that story is that's what I think is so critical in your role is what is the signal and what is the noise? You heard a lot from [defense counsel] about evidence that the State does not have. And there may be times when you're deliberating when you ask yourself why doesn't the State have that evidence? There may be times in your deliberation where you conclude the State should have that evidence. I don't know, but you might. But your role is to determine whether or not the State has proven its case beyond a reasonable doubt with the evidence that you did hear. So at the end of the day it comes back to [the undercover officer] and [the CI's] identification of the defendant.

Banks argues that this rebuttal argument constitutes improper “belittling” by characterizing his defense theory as “noise” and that this was meant to “distract the jury from the ‘signal.’” Unobjected-to prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The defendant bears the burden of establishing that an error occurred and that it qualifies as a “plain error.”

Id. The burden then shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury’s verdict. *Id.* An error is plain if it is “clear or obvious.” *State v. Sanchez-Sanchez*, 879 N.W.2d 324, 330 (Minn. 2016) (quoting *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016)). “When reviewing claims of prosecutorial misconduct during closing argument, we consider the argument as a whole, rather than focusing on particular phrases or remarks that may be taken out of context or given undue prominence.” *State v. Jones*, 753 N.W.2d 677, 691(Minn. 2008) (quotations omitted).

The state may not disparage or belittle the defense theory of the case in the abstract. It is permissible, however, for the prosecution to argue there is no merit to the specific defense raised by the defendant. *State v. Waiters*, 929 N.W.2d 895, 902 (Minn. 2019). Improper belittlement occurs when the prosecution goes further and makes suggestions that a defendant is putting forth a particular defense because it is the only one that “might work” or encourages jurors to look at their own experience to show that a defense is not believable. *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994). It is also “belittling the defense” to tell the jurors they “would be ‘suckers’ if they believed the defense.” *State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000). However, it is not improper belittling when the prosecutor’s statements are designed to point out attempts by the defense to distract the jury from the issues at trial. *State v. Simion*, 745 N.W.2d 830, 844 (Minn. 2008). Nor is it belittling to remind the jury of their duty to base their decision on evidence and not on emotional appeals. *Waiters*, 929 N.W.2d at 902.

Here, the prosecutor did not belittle the defense theory in the abstract. Nor did the prosecutor make other improper suggestions to the jury. Moreover, just a few sentences after the “static and noise” story, the prosecutor accurately reminded the jury, “[Y]our role is to determine whether or not the state has proven its case beyond a reasonable doubt with the evidence that you did hear.” As the supreme court recently concluded in *Walters*, when “[c]onsidered in context,” the prosecutor’s argument did not improperly belittle the appellant’s claims; the argument “reminded the jury of its duty to decide the case based on the evidence” presented. *Id.* The state’s rebuttal argument thus did not improperly “distract the jury from its proper role of deciding whether the state has met its burden.” *State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997). While analogizing the defense’s closing argument to radio static may be colorful language, it does not constitute misconduct. A “prosecutor has considerable latitude and is not required to make a colorless argument.” *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998).

The prosecutor did not improperly belittle the defense’s theory of the case in its rebuttal argument and, consequently, did not commit misconduct.

Affirmed.