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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0726**

State of Minnesota,
Respondent,

vs.

Joshua Daniel Luten,
Appellant.

**Filed April 20, 2020
Affirmed
Bryan, Judge**

Hennepin County District Court
File No. 27-CR-17-22361

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

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Senior Assistant
County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Cochran, Judge; and Bryan,
Judge.

UNPUBLISHED OPINION

BRYAN, Judge

Appellant argues that the prosecutor committed misconduct during closing
argument by misstating the burden and standard of proof. We affirm because the

prosecutor's argument does not amount to plain error and because the prosecutor's argument did not affect appellant's substantial rights.

FACTS

In June 2017, appellant began staying with his sister, T.H., and her 14-year-old daughter, K.H.W., at their studio apartment in Minneapolis. Sometime between then and August 15, 2017, appellant put his hand down K.H.W.'s pants while she was sleeping. K.H.W. moved his hand away and went back to sleep because she thought she was dreaming. On August 15, 2017, K.H.W. told T.H. about the incident. T.H. then confronted appellant about the incident. Both K.H.W. and T.H. testified that appellant did not appear shocked or surprised when confronted, and K.H.W. testified that appellant replied "your uncle is sorry." K.H.W. had no further contact with appellant. A few days later, K.H.W. had a forensic interview at CornerHouse. During the interview, K.H.W. stated that appellant touched her "inside" her "body" and that it still hurt on the "inside" the next day. A medical doctor at CornerHouse also examined K.H.W. and testified that K.H.W. also told her that appellant touched and caused pain to her genital area. The doctor stated that she did not find any physical injury to K.H.W. Appellant did not testify at trial.

Before the commencement of trial and before closing arguments, the district court instructed the jury on the standard and burden of proof. For example, the district court stated, "[t]he State must convince you by evidence beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant has no obligation to prove innocence." Immediately before closing arguments, the district court stated, "[i]f you find that each of these elements is proven beyond a reasonable doubt, the defendant is guilty.

If you find any element has not been proven beyond a reasonable doubt, the defendant is not guilty.”

In her closing argument, the prosecutor stated:

Yesterday morning [K.H.W.] took this witness stand and she told you what happened on that summer night in 2017. It’s been 18 months, almost everything about her life has changed in the meantime, but she came here in front of dozens of strangers, lawyers, a judge, an unfamiliar environment, with the man who did this once again staring at her from across the room, and she told you what she experienced. *And if you believed her, ladies and gentlemen, this case is proven.* And that is the best evidence you are ever going to have of an act like this. The victim who experienced it telling you what she experienced. *If you believed her, he is guilty.*

(Emphasis added). Appellant did not object to this statement. The prosecutor then reminded the jurors that appellant is presumed innocent, that it is the state’s burden to prove each element of the charged offense, and that they, the jury, are the fact finders. The jury found appellant guilty of first-degree criminal sexual conduct in violation of Minnesota Statutes, section 609.342, subdivision 1(g) (2016).

D E C I S I O N

Appellant argues that the prosecutor committed misconduct during closing argument. Specifically, appellant argues that the prosecutor misstated the burden and standard of proof when the prosecutor told the jury that if they believed K.H.W., then appellant was guilty. In addition, appellant argues that these comments suggested that the jury could reach a guilty verdict based on a preponderance of the evidence. We conclude that the prosecutor did not misstate the burden or standard of proof during the closing argument.

In a criminal trial, misstatements about the burden or standard of proof are highly improper. *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). Such prosecutorial misconduct may deny a defendant’s right to a fair trial. See *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). “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). Because appellant failed to object to the prosecutor’s statement during trial, we review this allegation of prosecutorial misconduct under a modified plain-error standard. See *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Appellant bears the burden of establishing an error occurred and that the error is “clear or obvious,” which usually “means an error that violates or contradicts case law, a rule, or an applicable standard of conduct.” *State v. Bustos*, 861 N.W.2d 655, 660–61 (Minn. 2015); see also, e.g., *Ramey*, 721 N.W.2d at 302. If the appellant demonstrates an error that is plain, then the state has the burden to show that the misconduct did not affect the appellant’s substantial rights. *Ramey*, 721 N.W.2d at 302.

I. Absence of Clear and Obvious Error

Appellant relies on the holding in *State v. Strommen* to establish that a clear and obvious error was made during the prosecutor’s closing argument.¹ In *State v. Strommen*,

¹ Appellant also relies on *United States v. Vargas*, 583 F.2d 380, 387-88 (7th Cir. 1978) (reversing conviction for prosecutorial misconduct in closing argument) and *United States v. Stanfield*, 521 F.2d 1122, 1126-27 (9th Cir. 1975). Appellant correctly observes that neither case is binding on this court. See *Minneapolis Grand, LLC v. Galt Funding*

the prosecutor stated during closing: “When we have difficult cases like this, sometimes the only way to deal with [difficult cases] is just to weigh the story in each hand and decide which one is most reasonable, which one makes the most sense.” 648 N.W.2d 681, 685 (Minn. 2002). The Minnesota Supreme Court held that the prosecutor in *Strommen* misstated the state’s burden to prove each element of the crime charged beyond a reasonable doubt. *Id.* at 690. By asking the jury to weigh which story was more “reasonable,” the prosecutor in *Strommen* misstated the standard of proof, implying that the jury could reach a guilty verdict based only on a preponderance of the evidence. *See id.* at 685. In addition, these comments suggest that the defendant has the burden to prove a “reasonable story” or to disprove the state’s “story.” *See id.* at 685.

The prosecutor, however, did not misstate the standard of proof or shift the burden of proof to the defendant. In this case, unlike the prosecutor in *Strommen*, the prosecutor did not suggest that the jury must convict if the state’s evidence is “reasonable,” or if the

LLC, 791 N.W.2d 549, 556 (Minn. App. 2010). We observe that even if *Vargas* carried precedential weight, it would not apply to the prosecutor’s statements here. The Seventh Circuit has since distinguished *Vargas* because the prosecutor’s argument there presented a false biconditional statement, which is not the case in our record. *See United States v. Common*, 818 F.3d 323, 332 (7th Cir. 2016) (distinguishing *Vargas* and *United States v. Cornett*, 232 F.3d 570, 573-74 (7th Cir. 2000)). Therefore, we decline to apply *Vargas*.

We also conclude that the conduct of the trial court in *Stanfield* renders that case inapplicable to the facts before us. In *Stanfield*, the Ninth Circuit reversed the conviction because the trial judge “undertook to deviate from the traditional trial format” and, over appropriate objections, made opening statements to the jury on behalf of the parties. 521 F.2d at 1126-27. In his “opening statements,” the trial judge placed the government and the defendant on equal footing, instructing the jury that they will “be called upon . . . to judge which is right and which is wrong,” and to determine “what you will think in your own mind is the truthful version.” *Id.* at 1125, n.1. No such conduct occurred here and the appellant does not allege that the district court misstated the burden or standard of proof. Therefore, we also decline to apply *Stanfield*.

jury weighs two competing theories and concludes “one makes the most sense.” The prosecutor in this case, argued that the testimony of a single witness, K.H.W., was sufficient to establish the elements of the offense: “And if you believed her, ladies and gentlemen, this case is proven. And that is the best evidence you are ever going to have of an act like this. The victim who experienced it telling you what she experienced. If you believed her, he is guilty.” It would have been preferable for the prosecutor to have stated “And if you believed her, *beyond a reasonable doubt*, ladies and gentlemen, this case is proven.” Failure to insert the standard of proof at that point in the argument however, does not result in error, given that K.H.W.’s testimony constituted direct evidence of the elements of the offense.²

In addition, any error was not plain because after making the statements in question, the prosecutor reminded the jurors that appellant is presumed innocent and that it is the state’s burden to prove each element of the charged offense beyond a reasonable doubt. The prosecutor’s comments did not suggest a reduced standard of proof or imply that appellant had a burden of proof. We conclude that the closing argument does not constitute prosecutorial misconduct. Therefore, appellant did not establish that a plain error occurred in this case.

II. Appellant’s Substantial Rights

Because we conclude that the prosecutor’s statement did not constitute plain error, we are not required to also analyze appellant’s argument that this statement affected his

² A conviction for criminal sexual conduct can be based on the testimony of a single credible witness. Minn. Stat. § 609.347, subd. 1 (2016).

substantial rights. Nevertheless, we have considered appellant's argument and conclude that even if a plain error occurred, it did not affect appellant's substantial rights.

To determine the impact on appellant's substantial rights, we look to the pervasiveness of the misconduct, the strength of the evidence against appellant, and whether a criminal defendant had the opportunity, or made efforts, to rebut the prosecutor's improper suggestions. *State v. Hill*, 801 N.W.2d 646, 654–55 (Minn. 2011). In this case, application of each of the three factors supports a conclusion that the prosecutor's conduct did not affect appellant's substantial rights.

First, the conduct was not pervasive. The prosecutor's statements came at the beginning of her closing argument, were brief, and occurred in only one short paragraph of the state's seventeen-page closing argument transcript. The prosecutor and the district court both told the jurors that appellant had no burden to prove innocence and that it was the state's burden to prove each element of the charged offense beyond a reasonable doubt. Second, the state also presented strong evidence against appellant, including testimony from K.H.W., T.H., a medical doctor, and the forensic interviewer. In addition, the state presented evidence of appellant's reaction when confronted with the accusations: he did not appear shocked or surprised and replied "your uncle is sorry." Third, through his counsel, appellant made the most of the opportunity afforded to him to rebut the prosecutor's arguments, telling the jury that the prosecutor was wrong and directing them to the written jury instructions. Considering each of the *Hill* factors, we conclude that even if the prosecutor committed error, and even if the error was plain, the plain error did not affect appellant's substantial rights.

III. Appellant's pro se supplemental brief.

Finally, appellant raises four additional claims of error in his pro se supplemental brief. As best as we can determine from that brief, he asserts that: (1) the jury selection was prejudicial because of the “me too” movement and certain prospective jurors were victims of sexual assault; (2) he received ineffective assistance of counsel because his counsel did not adequately prepare for the expert witness testimony and did not object to the prosecutor's inappropriate tactics; (3) the prosecutor committed additional misconduct by eliciting hearsay, implying appellant's guilt through the police officer's and the doctor's testimony, and violating the rules of discovery by coaching K.H.W. and T.H. without notifying the defense; and (4) the judge improperly admitted the CornerHouse video because it confused the jury.

Each of these assertions lacks either an argument to support it or citations to legal authority or both. As such, we deem these claims waived, and we will not consider them unless “prejudicial error is obvious on mere inspection.” *See State v. Palmer*, 803 N.W.2d 727, 741 (Minn. 2011) (“Claims contained in a pro se supplemental brief with no argument or citation to legal authority in support of the allegations are deemed waived”) (quotation omitted); *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008) (“We will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority”).

Affirmed.