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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1012**

State of Minnesota,
Respondent,

vs.

Amber Lynn Flash,
Appellant.

**Filed March 23, 2020
Affirmed
Bjorkman, Judge**

Crow Wing County District Court
File No. 18-CR-18-1867

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

Donald F. Ryan, Crow Wing County Attorney, Candace Prigge, Assistant County
Attorney, Brainerd, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Jesson, Judge; and Kirk,
Judge.*

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

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges her convictions of offering a forged check, arguing that the prosecutor committed misconduct during closing argument by shifting the burden of proof. We affirm.

FACTS

Appellant Amber Flash worked for P.N.'s cabin remodeling and repair company. P.N. paid his employees by the hour, issuing weekly paychecks from a QuickBooks program. Flash and P.N. shared an office, and Flash had access to his computer and blank checks while he was out of the office.

In early April 2018, P.N. was reconciling his books and noticed that Flash had received two paychecks during one pay period. Further review revealed five suspicious checks, totaling \$1,712.30, issued to and deposited by Flash between January and March. The checks were not recorded in QuickBooks, as they would have been if he had issued them. And the signature on the checks was "just scribbled," unlike his own. P.N. noticed that the check dated January 3 bore a higher check number than had been issued to him at that time. Another reflected payment for a week that Flash had not worked.

P.N. advised Flash by text message that she should not report for work; he did not state a reason. Flash may have called the following day to confirm whether she was supposed to work, but she made no further contact with him after that. P.N. reported the checks to his bank as fraudulent, and the funds were removed from Flash's account, leaving her with a negative balance.

Police investigated the reported checks, and Flash acknowledged endorsing and depositing them. Flash was charged with five counts of offering a forged check. A jury found her guilty on all counts. Flash appeals.

DECISION

When, as here, defense counsel objected to alleged prosecutorial misconduct at trial, we determine whether the prosecutor committed misconduct and, if so, whether it was harmless. *State v. Jackson*, 773 N.W.2d 111, 121 (Minn. 2009). For claims of misconduct during closing argument, we consider the argument “as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence.” *State v. McDaniel*, 777 N.W.2d 739, 751 (Minn. 2010) (quotation omitted). If the argument was improper, we apply a “two-tiered harmless-error analysis,” depending on the seriousness of the misconduct. *Jackson*, 773 N.W.2d at 121.

Flash argues that the prosecutor committed misconduct during closing argument by shifting the burden of proof. “It is highly improper for a prosecutor to shift the burden of proof to the defendant during closing arguments.” *State v. Nissalke*, 801 N.W.2d 82, 106 (Minn. 2011) (quotation omitted). A prosecutor shifts the burden of proof if she implies that the defendant has the burden of proving her innocence. *State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009).

Flash asserts that the prosecutor implied such a burden by pointing out that she did not contact P.N. to ask why he terminated her employment or why more than \$1,700 had been removed from her bank account. And she points to the prosecutor’s use of rhetorical questions:

And you need to look, as the Judge said, use your reason and common sense. Would a person that had received checks and they were then taken out of their account contact their employer if they felt that they were legitimate checks and ask about them? Why aren't these in my checking, what happened with these? And the evidence is that she didn't contact him at all. So again, that goes to whether she knew that they were not legitimate checks, and whether she—and so whether she intended to offer these forged checks.

Flash contends this argument suggested that she should have come forward with “a reasonable explanation for why she did not call her employer, as an innocent person would have done, under the same circumstances.” We are not persuaded.

A prosecutor does not improperly shift the burden of proof by commenting on “the lack of evidence supporting a defense theory.” *McDaniel*, 777 N.W.2d at 750. And a prosecutor may “pose rhetorical questions to the jury, asking it to use common sense to determine whether the defense presented is reasonable.” *State v. Bauer*, 776 N.W.2d 462, 474 (Minn. App. 2009), *aff'd*, 792 N.W.2d 825 (Minn. 2011). That is what occurred here.

The challenged statements fairly countered the defense theory that P.N. mistakenly issued the checks and Flash had no reason to believe she was not entitled to the money. The prosecutor pointed to specific evidence in the record and asked the jury to apply common sense to assess Flash's actions and inactions. She did not argue that Flash failed to prove her innocence by not testifying or otherwise explaining her actions. Rather, the prosecutor cited Flash's failure to act in response to being fired and having money removed from her bank account as evidence that she offered the checks “with intent to defraud.” See Minn. Stat. § 609.631, subd. 3 (2016). And the prosecutor followed the challenged

argument by acknowledging the state's burden to prove its case beyond a reasonable doubt.

On this record, we discern no error in the prosecutor's argument.

Affirmed.