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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1068**

State of Minnesota,
Respondent,

vs.

Portia Renee Glover,
Appellant.

**Filed June 15, 2020
Affirmed in part, reversed in part, and remanded
Reilly, Judge**

Hennepin County District Court
File No. 27-CR-18-20360

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

Erik Nilsson, Acting Minneapolis City Attorney, Rebekah M. Murphy, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Reilly, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant challenges her convictions for fifth-degree assault arguing that (1) the prosecutor committed misconduct, (2) the district court abused its discretion by denying

her jury-instruction request, (3) the district court abused its discretion in its evidentiary rulings, and (4) the district court erred in entering judgments of conviction for two counts of fifth-degree assault from different sections of the same criminal statute. We determine that the prosecutor did not commit misconduct and the district court did not abuse its discretion in its rulings about the jury instructions or the admission of evidence. However, we reverse and remand for correction of the warrant of commitment.

FACTS

In 2018, appellant Portia Renee Glover hit the victim, J.G., in the face during a karaoke competition at a Minneapolis nightclub.¹ Appellant, appellant's friend, and J.G. were standing in the club's dressing room. While J.G. and appellant's friend were talking, appellant hit J.G. J.G. fell into a table and landed on the cement floor. Appellant and her friend ran from the room and out of the club.

Another karaoke competitor, S.G.-M., walked into the dressing room and witnessed a portion of the assault. S.G.-M. saw appellant "make one punch," and saw J.G. "being pushed over a table onto the floor." S.G.-M. ran out of the dressing room and alerted security. C.E., a security guard, ran toward the dressing room. C.E. saw two females run past him from the direction of the dressing room and out into the street. In the dressing room, C.E. saw a few tables and chairs knocked over and "a female [lying] on the ground" with "a good amount of blood all over the place." C.E. stated that J.G. appeared "very scared and very frightened." Security guard G.J. also ran toward the dressing room. As

¹ The facts are based on witness testimony from the trial.

he approached the dressing room, G.J. saw appellant “running past” him and “pushing her friend to leave very quickly.” G.J. saw J.G. crying and lying “on the ground with . . . blood coming out of her nose.”

Respondent State of Minnesota charged appellant with fifth-degree assault (harm) under Minn. Stat. § 609.224, subd. 1(2) (2016); fifth-degree assault (fear) under Minn. Stat. § 609.224, subd. 1(1) (2016); and disorderly conduct under Minn. Stat. § 609.72, subd. 1(3) (2016). The district court held a two-day jury trial, at which the jury heard testimony from the victim J.G., security guards C.E. and G.J., eyewitness S.G.-M., and the paramedic who transported J.G. to the hospital. Appellant did not testify. The jury found appellant guilty of fifth-degree assault (harm) and fifth-degree assault (fear), but not guilty of disorderly conduct. The district court entered convictions on both assault counts and imposed sentence.

This appeal follows.

DECISION

I. The prosecutor did not commit misconduct during closing argument.

Appellant claims that the prosecutor committed misconduct by vouching for the credibility of the state’s witnesses during closing argument. A prosecutor engages in prosecutorial misconduct by violating “clear or established standards of conduct” such as “rules, laws, orders by a district court, or clear commands in this state’s case law.” *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008). The district court has broad discretion to determine the propriety of a prosecutor’s statements during closing argument. *Id.* at 751-52. When, as here, the appellant does not object at trial, we apply a modified plain-error

test. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Appellant must show that the misconduct constitutes error and that the error was plain. *Id.* Appellant may establish plain error by demonstrating that the misconduct violates case law, a rule, or a standard of conduct. *Id.* If appellant establishes plain error, the burden shifts to the state to prove that the error did not affect appellant’s substantial rights. *Id.* If all three prongs are satisfied, we may correct the error “only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) (citation and quotations omitted). Generally, reversal is warranted only if the misconduct is so prejudicial that it impaired appellant’s right to a fair trial. *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000). A prosecutor may not “personally endorse a witness’s credibility” in closing arguments. *State v. Jackson*, 773 N.W.2d 111, 123 (Minn. 2009) (citation omitted). That said, the prosecutor may “argue that a witness was or was not credible.” *Id.* Statements that a witness is “very sincere” or “very frank” do not constitute impermissible vouching. *State v. Smith*, 825 N.W.2d 131, 139 (Minn. App. 2012), *review denied* (Minn. Mar. 19, 2013).

The prosecutor made these statements during closing argument:

You heard from . . . [S.G.-M.] that [appellant] appeared - - and he was honest with you. He wasn’t certain. But, in that moment, what he saw - - that it was [appellant] who appeared to be the aggressor. That is consistent with [J.G.’s] testimony - - that [she] did nothing to provoke this.

You heard from [J.G.] that her head hit the floor. She was honest with you. She couldn’t say with certainty whether [appellant] punched her while she was on the floor or whether her head just hit the floor, but [S.G.-M.] knew what happened

because he saw it. He wasn't on the floor. He told you that [appellant] . . . struck [J.G.'s] head on the cement floor.

You can also look at a guilty conscience. [Appellant] ran away. You heard from . . . the security guards . . . that [appellant] ran away that night. They didn't see the assault that night. They couldn't say [with] certainty that [appellant] was the assaulter - - was the person who assaulted. But they were honest with you, and they told you that they did see [appellant] and her friend running.

. . . .

Now, [J.G.] was honest with you. She said she did not know what [appellant] was even saying when she was being rambunctious [during the competition]. But [J.G.] testified that she remembered it was [appellant] who was being rambunctious earlier in the contest, and it was the same person in the dressing room.

. . . .

[Security guard G.J.] did not testify that he saw the assault. He admitted to you that he could not say who the assailant was. That's not a lack of identification. That's him being honest with you. He did say, however, that he saw [appellant] leave the room; and that's exactly what the video shows.

We discern no error in these statements. A statement that a witness is "very believable" does not constitute a direct endorsement when the prosecutor does not directly vouch for the witness and when the statements are "made within a discussion of factors affecting the credibility of the witnesses." *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006)²; *see also State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977) (stating that

² The prosecutor made several statements during closing argument related to witness credibility. *Id.* at 656. The prosecutor stated, "[Witness 1], very believable. Very believable witness." *Id.* The prosecutor also stated, "The believability of [Witness 2]. The state believes she is very believable, primarily because her case is done." *Id.* The

prosecution has right to analyze evidence and “vigorously argue” state’s witnesses are worthy of credibility).

Here, the prosecutor did not express a personal opinion about the credibility of the witnesses. Instead, the prosecutor’s statements addressed the factors a jury may consider in determining the weight to accord to the witness statements. In each instance, the prosecutor noted that the witnesses acknowledged that they could not remember portions of the evening, or could not say with certainty what occurred at various times in the dressing room. The prosecutor suggested that these statements lent credibility to the witnesses’ accounts of the evening.

While the prosecutor’s statements may have been “inartful,” they do not constitute misconduct. *State v. Fields*, 730 N.W.2d 777, 786 (Minn. 2007) (“[P]rosecutor’s argument, though inartful, did not constitute misconduct and instead made permissible arguments . . . and reasonable inferences based on the evidence.”). Because appellant failed to show that an error occurred, we do not address the remaining plain-error factors. See *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017) (recognizing that if “any one of the requirements” of the plain-error test is not satisfied, we “need not address any of the others”). Appellant is not entitled to reversal based on prosecutorial misconduct.

prosecutor also stated, “[Witness 2] is very believable.” *Id.* The *Swanson* court held that the statement, “[t]he state believes [Witness 2] is very believable” amounted to impermissible vouching on its face because the state directly endorsed the credibility of that witness, but that the error was not sufficiently prejudicial. *Id.* It did not conclude that the other statements constituted impermissible vouching. *Id.*

II. The district court did not abuse its discretion by denying appellant's request for a jury instruction.

Appellant challenges the district court's denial of her jury-instruction request. The district court has "considerable latitude in selecting jury instructions, including the specific language of those instructions." *Peltier*, 874 N.W.2d at 797. The refusal to give a requested instruction lies within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). A district court abuses its discretion when it refuses to give a requested instruction that the evidence warrants. *Turnage v. State*, 708 N.W.2d 535, 546 (Minn. 2006).

Before trial started, appellant asserted that issues "related to race and sexuality could possibly come up" and requested a jury instruction for implicit bias. Appellant did not provide any Minnesota authority for the proposed implicit-bias instruction, and the district court denied the request. Appellant bears the burden of proving that the district court abused its discretion by denying her request for a jury instruction and that the abuse prejudiced the outcome of the case. *State v. Huber*, 877 N.W.2d 519, 525 (Minn. 2016).

Appellant has not satisfied that burden. Before trial, the district court addressed the prospective jurors and advised them that appellant was "presumed innocent of the charges made." The district court recognized that jurors "bring certain attitudes and viewpoints into any setting, including the courtroom," and explained that the jury-selection process permitted the court "to determine whether there is any reason to be concerned about whether a prior life experience or viewpoint could interfere with [a juror's] ability to be an impartial juror in this case." A close review of the record reveals that each juror was then

questioned by both the prosecutor and defense counsel. The jurors selected for the jury panel agreed to listen carefully to the testimony of all the witnesses as they deliberated to reach a verdict. After the district court empaneled the jury, it again advised the jurors that appellant was “presumed innocent of the charges made.” The district court specifically instructed the jury to evaluate the testimony of the witnesses carefully, and identified a number of factors bearing on the believability and weight of a witness’s testimony. Given this record, we conclude that the district court did not abuse its discretion by declining to give appellant’s proposed jury instruction.

III. The district court did not abuse its discretion in its evidentiary rulings.

Appellant argues that the district court abused its discretion by permitting the witnesses to identify appellant as one of the two people captured on the security videotape in the nightclub. “Evidentiary rulings rest within the sound discretion of the district court, and we will not reverse an evidentiary ruling absent a clear abuse of discretion.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). Because appellant did not object to admission of this evidence at trial, we review for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (describing plain-error test for evaluating an assertion of error not raised before the district court). Appellant must show that there was an error, that the error was plain, and that the error affected her substantial rights. *Id.* If the first three elements are satisfied, we will reverse if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Here, a security camera in the hallway outside the dressing room showed two women running down the hallway away from the dressing room. At trial, three witnesses

testified that appellant was one of the two women depicted on the surveillance video. S.G.-M. personally witnessed the assault and saw appellant hit J.G. He watched the surveillance video and identified one of the women in the footage as appellant, the same person who punched J.G. Security guard C.E. also viewed the security footage and testified that the women in the video were the same women who ran past him out of the dressing room. Security guard G.J. testified that he saw appellant run out of the dressing room and out of the club. G.J. identified appellant as one of the two women in the video running away from the dressing room.

Appellant argues that the testimony from S.G.-M., C.E., and G.J. amounts to inadmissible opinion testimony because the jury could view the video and determine for itself whether appellant appeared in the video. We have upheld the use of lay opinion testimony when it is “(a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge [under rule 702].” Minn. R. Evid. 701. “Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Minn. R. Evid. 704. To determine whether opinion testimony is helpful to the jury, “a distinction should be made between opinions as to factual matters,” which are helpful, “and opinions involving a legal analysis or mixed questions of law and fact,” which are unhelpful. *Id.*, 1977 comm. cmt.

Here, each witness personally saw appellant in the dressing room or in the hallway immediately outside the dressing room. Each witness identified appellant as the person

they saw. When the jury watched the video, the witnesses explained who was in the video and what was occurring. This testimony assisted the jury by giving context for what was happening in the video, explaining the layout of the nightclub and the location of the dressing room, and in assessing appellant's role in the incident. *See State v. Pak*, 787 N.W.2d 623, 629 (Minn. App. 2010) ("A lay witness's opinion or inference testimony may help the jury by illustrating the witness's perception in a way that the mere recitation of objective observations cannot."). The witnesses each testified about their personal observations. And the witness testimony involved factual matters rather than opinions involving a legal analysis. Appellant has not established that an error occurred.³ Because appellant has not shown that an error occurred, we do not consider the remaining factors. *See State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012) (noting that if an appellate court determines that any prong of the plain-error analysis is not satisfied, it need not consider the remaining prongs).⁴

IV. The district court erred by entering judgments on both fifth-degree assault counts.

Appellant argues that the district court erred by entering judgment and imposing sentence on both fifth-degree assault counts. We agree. A criminal defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat.

³ Appellant argues that the district court's actions were inconsistent with federal caselaw interpreting the federal rules of evidence. The cases cited by appellant are not binding on this court, *Swanson*, 707 N.W.2d at 654, and appellant has not cited to relevant Minnesota authority.

⁴ Appellant argues that the cumulative effect of the errors deprived her of a fair trial. Because we determine that there were no errors, we reject this argument.

§ 609.04, subd. 1 (2018). Section 609.04 also “bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). Application of section 609.04 is a question of law reviewed de novo. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 522 (Minn. 2013).

The state charged appellant with fifth-degree assault (fear) under Minn. Stat. § 609.224, subd. 1(1), and fifth-degree assault (harm) under Minn. Stat. § 609.224, subd. 1(2). A conviction of fifth-degree assault (fear) requires the state to prove that the defendant committed “an act with intent to cause fear in another of immediate bodily harm or death.” *Id.*, subd. 1(1). A conviction of fifth-degree assault (harm) requires a showing that the defendant “intentionally inflict[ed] or attempt[ed] to inflict bodily harm upon another.” *Id.*, subd. 1(2). Because assault (harm) and assault (fear) are different sections of the same criminal statute, the district court erred by formally adjudicating convictions on both counts. *See State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992) (holding that section 609.04 forbids “multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident” (quotations omitted)). For these reasons, we remand to the district court to vacate one of the domestic-assault convictions and correct the warrant of commitment, leaving the jury’s finding of guilt on the vacated count in place.

Affirmed in part, reversed in part, and remanded.