

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A20-0144**

State of Minnesota,  
Respondent,

vs.

Alexander James Ray,  
Appellant.

**Filed February 8, 2021  
Affirmed  
Smith, Tracy M., Judge**

Hennepin County District Court  
File No. 27-CR-19-4820

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

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Frisch, Judge.

**NONPRECEDENTIAL OPINION**

**SMITH, TRACY M., Judge**

In this direct appeal from the judgment of conviction for first-degree criminal sexual conduct, appellant Alexander James Ray argues that the prosecutor committed misconduct

during closing arguments by misstating the evidence—specifically, by attributing statements to Ray that Ray did not make. We affirm.

## **FACTS**

The following facts were established at trial. Ray and C.M. met in 2016 when C.M. was a college student in North Dakota and Ray was living in Minnesota. They began an on-and-off-again relationship. About six months after they met, Ray introduced C.M. to cocaine, and their relationship began to “revolve[] around drugs.” Their relationship deteriorated. Ray would become angry and would take his frustration out on C.M.; he “became physical” with her, including pushing her and grabbing her by the neck.

At the end of January 2019, C.M. moved out of state to start a new job. On February 22, 2019, she flew back to Minnesota to spend the weekend with Ray. She did not notify her family that she was returning for a visit. C.M. arrived late at night. Ray picked her up at the airport, and they went straight to a bar and started drinking. During the night, Ray became angry with C.M. for wanting to sleep, so she used cocaine to stay awake. Ray and C.M. went to Ray’s apartment, drank alcohol, and hung out with friends. They stayed up all night, partying.

The following day, C.M. rented a room at a hotel with a pool because Ray wanted to go swimming. After checking in, Ray and C.M. went out drinking. They eventually returned to the hotel in the early hours of February 24, along with three of Ray’s friends, including A.K. They hung out, drank, and used drugs.

Ray decided to go swimming, and his friends followed him downstairs. C.M. remained in the room to change into her swimsuit and to call her sister. It was around

6:00 a.m. Because her sister's phone was broken, C.M. had to call her sister's boyfriend. Ray returned to the room and became angry that C.M. was talking to another male. Ray took C.M.'s phone and sent a text message to the number she was calling. Ray then left the hotel room, and C.M. went looking for him. She was told that Ray had gone back to the room, so she returned, along with Ray's friend, A.K. C.M. told Ray that one of his friends had messaged her, and he "freaked out." Ray was "really angry" and called C.M. a "whore" and a "slut," said that he would "bang" C.M.'s sister, and broke a vase. After about half an hour, A.K. left the hotel room to go to work. At trial, A.K. testified to these events in the hotel room.

C.M. began packing her items to leave the hotel. Ray followed her into the bathroom, grabbed her neck, "slamm[ed]" her against the wall, and told her he that hoped she became sick and died. Ray held her against the wall for approximately thirty seconds using one hand, making it difficult for her to breathe. After Ray released her, C.M. sat down and tried to talk to him. He slapped her. C.M. again tried to pack her clothing, while Ray was watching her. During this time, C.M. made at least five phone calls, trying to reach someone. She connected with her mother and her sister. She told her mother that Ray "hit" and "strangl[ed]" her; her mother told her to get out of there. Her mother testified that C.M. called her, hysterical and crying, and said that Ray was hitting and choking her and that she (C.M.) thought she was going to die. C.M.'s sister testified that C.M. called her, said she needed help, and then hung up the phone.

C.M. tried to call one of Ray's friends. Ray took her phone, brought it into the bathroom, and threatened to submerge it in the already-filled bathtub. In the bathroom, Ray

told C.M. to perform oral sex on him, but C.M. refused. Ray told C.M. to take off her shirt, but she refused. Ray lowered her phone toward the water, so she took off her shirt. Ray told her to get on her knees, and she did. She started performing oral sex. C.M. believed that Ray would continue to hurt her or would destroy her phone if she did not comply with his demand to perform oral sex.

C.M. told Ray that her knees hurt, and Ray took C.M.'s arm and moved her to the couch. C.M. again told Ray that she did not want to engage in oral sex, but Ray told her that "if [she was] going to act like a slut" he was "going to treat [her] like [one]." She began performing oral sex. When she tried to stop, Ray grabbed the back of her head and forced her head down to continue. C.M. stopped again, and Ray became "really angry" and pushed her to the ground. He put his hand around C.M.'s neck and told her that he was going to kill her. Ray then got on top of C.M., squeezing her neck and yelling at her. C.M. testified that her eyes became blurry, she had trouble breathing, and she believed that Ray was going to kill her.

Ray then wanted C.M. to go to the bed, where they then went and where C.M. continued to perform oral sex on him. Without C.M.'s knowledge, Ray used her phone, which he had previously taken from her, to record C.M. performing oral sex on him. Ray ended this encounter, telling C.M. she "suck[ed] at" oral sex. He took her phone into the bathroom. He then returned, laughing, and gave the phone back to C.M., telling her that he had recorded her and that he was going to send the videos to her parents and upload them to a porn site.

C.M. left the hotel room and told the front-desk employee that Ray had “trashed” the room, and the employee responded that he would have to call the police. C.M. asked the employee not to, because Ray would “kill” her. C.M. learned that her sister had called the police, so, because she did not want Ray to get in trouble, she returned to the room and helped Ray pack.

When C.M. was leaving the hotel, she encountered the police. C.M. told the officers what had happened. Responding Officer Timothy Erickson testified that C.M. was “very upset” and looked like she had been crying. He observed redness around C.M.’s neck. Officers took photos of C.M., which depicted red marks on her neck, as well as photos of the room. Later that day, C.M. noticed a cut above her eye and photographed it. C.M. later found the videos that Ray had taken on her phone, and she provided them to the police.

Respondent State of Minnesota charged Ray with one count each of first- and third-degree criminal sexual conduct, in violation of Minn. Stat. §§ 609.342, subd. 1(e)(i), .344, subd. 1(c) (2018). Following a jury trial, Ray was found guilty, and the district court convicted and sentenced him for the first-degree offense, imposing an executed sentence of 90 months, which was a downward durational departure, and to 10 years of conditional release.<sup>1</sup>

This appeal follows.

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<sup>1</sup> Ray was also found guilty of domestic assault by strangulation, in violation of Minn. Stat. § 609.2247, subd. 2 (2018), and threats of violence, in violation of Minn. Stat. § 609.713, subd. 1 (2018). Those crimes are not at issue in this appeal.

## DECISION

Ray contends that the prosecutor engaged in misconduct during closing arguments by misstating the evidence and falsely attributing statements to Ray. Ray did not object to the prosecutor's statements at trial.

Because Ray failed to object during trial, his claim of prosecutorial misconduct is reviewed under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under that standard, Ray bears the burden of establishing an error that is plain. *See State v. Waiters*, 929 N.W.2d 895, 901 (Minn. 2019). If Ray establishes plain error, the state then has the burden to show that Ray's substantial rights were not affected, meaning that there is "no reasonable likelihood" the misconduct significantly affected the verdict. *Ramey*, 721 N.W.2d at 302 (quotation omitted). If the state fails to meet its burden, we will order a new trial only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Peltier*, 874 N.W.2d 792, 799 (Minn. 2016) (quotation omitted).

Ray's argument centers on the following portion of the state's closing argument:

He's threatening to throw this phone in the tub that's still full of water, and *he tells her she's not getting out of there unless she takes her shirt off and gives him a blow job. . . .* Through violence and threats, he forced her to take his penis into her mouth at the last time she would want to do that.

She complies because she told you she didn't think she would get out of that hotel room if she didn't. He's in a rage. He's already shown her what he's willing to do to her. *And he says, you do this or you're not leaving.* And she took him seriously. *She took him at his word.*

(Emphasis added.)

Ray argues that the prosecutor’s statements constituted plain error because neither C.M. nor any other witness testified that Ray said those words. The state argues that the statements were not plain error because, while the prosecutor may have “slightly misstated” the testimony, the statements fairly summarized C.M.’s account of what happened and were not intentionally misleading, particularly in light of the absence of a trial transcript at the time of argument.

We need not determine whether the prosecutor’s statements constituted plain error if the state has satisfied its burden of establishing that there is no reasonable likelihood that those statements substantially affected the verdict. We turn to that question.

Ray argues that the prosecutor’s statements went to the critical issues of whether C.M. consented to the sex act and whether Ray used force or coercion to accomplish sexual penetration—an element of both charges of criminal sexual conduct. *See* Minn. Stat. §§ 609.342, subd. 1(e)(i) (first-degree criminal sexual conduct), .344, subd. 1(c) (third-degree criminal sexual conduct). *See also* Minn. Stat. § 609.341, subd. 12 (2018) (defining “sexual penetration” as any of several acts “committed without the complainant’s consent”). Ray acknowledges that lack of consent and force and coercion could have been found based on other evidence, but he argues that the statements by the prosecutor “relieved the jury of having to consider the other evidence” because, according to the prosecutor, Ray twice verbalized a direct threat to C.M. unless she submitted to his demands. Thus, he contends, the state failed to carry its burden to show that Ray’s substantial rights were not affected. We are not persuaded.

To determine whether plain error affected a defendant's substantial rights, appellate courts consider the strength of the state's evidence, the pervasiveness of the alleged misconduct, and whether the defendant had an opportunity to rebut any improper remarks. *See Peltier*, 874 N.W.2d at 805-06. We evaluate each consideration.

First, the state presented ample evidence to support Ray's conviction of both first- and third-degree criminal sexual conduct. C.M. provided extensive testimony that Ray used both force and coercion as means to make her perform oral sex. C.M. testified that he took her phone away and threatened to throw it in the bathtub. He ignored her statements that she did not want to perform oral sex. When she complied with his demands and then stopped, he physically forced her to continue. He slapped her, choked her, and threw her to the floor. C.M. testified, and other witnesses confirmed, that C.M. called other people for help, recounted Ray's actions to them, and told them that she thought she was going to die. Finally, Officer Erickson noted that C.M.'s neck was red when he spoke with her immediately after the incident. In sum, the state presented strong evidence of C.M.'s lack of consent and Ray's use of force and coercion.

Second, the incident of alleged misconduct was not pervasive. The statements constitute a few phrases out of the state's 21-page closing argument, and they were not repeated in the state's rebuttal.<sup>2</sup> The prosecutor's closing argument described the history of C.M. and Ray's relationship, a detailed account of events in the hotel room, and an

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<sup>2</sup> In opening statements, the state did say: "He says, you're not leaving here. . . . He says, you are not leaving here until you give me a blow job. . . . [H]e says, you're not leaving here 'til you give me a blow job. . . . She took him at his word." This constitutes almost four sentences out of the prosecutor's 11½-page opening statement.



element-by-element summary of the relevant evidence, focusing on the physical force that Ray used.

Finally, Ray had the opportunity to rebut the statements in his closing argument, but he did not do so.

Considering all three factors, we conclude that the statements in the state's closing argument did not affect Ray's substantial rights.

**Affirmed.**