

*This opinion is nonprecedential except as provided by  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  
A21-1273**

State of Minnesota,  
Respondent,

vs.

Carlos Aaron Jimenez, Jr.,  
Appellant.

**Filed August 15, 2022  
Affirmed  
Connolly, Judge**

Kandiyohi County District Court  
File No. 34-CR-19-996

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

Shane D. Baker, Kandiyohi County Attorney, Julianna F. Passe, Assistant County Attorney, Willmar, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and Larkin, Judge.

**NONPRECEDENTIAL OPINION**

**CONNOLLY, Judge**

Appellant challenges his conviction for offering a forged check, arguing that the prosecutor committed plain error during closing argument. Because we see no error in the prosecutor's conduct, we affirm.

## FACTS

In June 2019, when appellant Carlos Jimenez applied for a temporary driver's license, he gave as his address his mother's residence on 25th Street in Willmar, MN, although he did not live at that address. Two days later, he gave the same address—as well as a P.O. box number, a copy of his ID, and his phone number—when he cashed a cashier's check for \$2,800 at Quick Funds (QF), a check-cashing business. He said the check was from his former employer, CNH, but the check did not indicate any connection with CNH. Appellant received \$2,770 in cash, the amount of the check minus the \$30 transaction fee.

The check was returned to QF as fraudulent. A QF employee sent a letter (the QF letter) via certified mail to the P.O. box appellant had provided to QF, telling him the check was fraudulent, demanding that he return the money he had received, and stating that a police report would be filed if he did not do so. The post office left two notices for appellant at the P.O. box. After receiving no response, the post office returned the QF letter to QF because it was unclaimed and could not be forwarded.

In October 2019, appellant was charged with one count of offering a forged check. At trial in June 2021, two years after the offense, he testified that: (1) he received a check that said Comerica by mail; (2) he believed the check was from CNH; (3) he cashed the check at QF; (4) he was then living at an address on 7th Avenue in Willmar, but receiving mail at a P.O. box; (5) he gave QF the 25th Street address because that was the address on his driver's license and he did not expect to stay at the 7th Avenue address; (6) the check did not indicate whom it was from; (7) with the check, he received a letter (the check letter); (8) he had not shown the check letter to his defense attorney; (9) he did not know where

the check letter was; (10) he had called a phone number on the check letter and spoken to someone who told him the check was a “good check”; (11) he did not remember whether the check letter said anything about CNH; and (12) he did not know the bank had returned the check to QF because he never received the QF letter.

In closing argument, the prosecutor said:

Do employers pay you in cashier’s checks? Do employers send you a bunch of cashier’s checks? [Appellant] says nope, there was this letter that was with it; [it] made it all seem legitimate. Well, where is this letter? Who has seen this letter? One person in this room has seen this letter.

The prosecutor also mentioned that appellant had not taken any remedial action in the two years between the offense and the trial. Appellant’s attorney said that appellant had made an honest mistake in assuming the forged check was real after being told on the phone that it was a “good check” and that he hadn’t kept the check letter because he did not think he would need it.

No objection was made to either the prosecutor’s closing argument or rebuttal argument. The jury found appellant guilty of offering a forged check. He challenges his conviction, arguing that he is entitled to a new trial because the prosecutor committed plain error in his closing argument and in his rebuttal argument.

## **DECISION**

Plain error is the appropriate standard of review when there has been no objection to alleged prosecutorial misconduct. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). The three-prong plain error test requires the defendant to (1) show an error (2) that is plain, and the state to show that (3) the error did not affect the defendant’s substantial rights. *Id.*

at 302. If the three prongs are met, an appellate court decides whether it “must address the error to ensure fairness and the integrity of the judicial proceedings.” *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (quotation omitted). “A plain error affects the substantial rights of the defendant when there is a reasonable likelihood that the error substantially affected the verdict.” *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011) (quotation omitted).

Appellant argues that the prosecutor committed misconduct five times, by (1) saying appellant failed to produce evidence, (2) saying appellant concocted his story about the check letter at trial, (3) commenting on appellant’s credibility, (4) disparaging the defense, and (5) misstating the evidence.

#### **1. Failure to produce evidence**

Appellant’s defense was that he relied on the check letter and on the phone call he made to the number in the check letter to decide that the check was valid and cash it. The prosecutor pointed out that appellant produced no evidence that the check letter existed or that the phone call was made. Appellant argues that this comment shifted the burden of proving appellant’s guilt from the state to appellant. But “a prosecutor’s comment on the lack of evidence supporting a defense theory does not improperly shift the burden.” *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010); *see also State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993) (“A remark by a prosecutor on the lack of evidence regarding the defense’s theory did not shift the burden of proof to the defense.”). This is particularly true when the defense’s argument rests on the absent evidence. *See, e.g., State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986) (when the defense’s theory was that a life raft had been

vandalized, “[t]he prosecutor’s remarks concerning the lack of, or paucity of, evidence of vandalism, then, is viewed as not shifting [the] burden to the defense, but rather as challenging one of the defense’s rebuttal theories”); *State v. Johnson*, 672 N.W.2d 235, 240 (Minn. App. 2003) (where defendant who relied on a disease as a defense to refusing to submit to a chemical test produced no medical evidence of the disease, “the prosecutor had a right to comment on [the defendant’s] failure to produce evidence in connection with the defense of reasonable refusal”), *rev. denied* (Minn. Mar. 16, 2004).

Appellant first mentioned the check letter at trial, saying he had made a phone call to a number in the check letter to ascertain the check’s validity. The prosecutor was permitted to arguments made by the defense and highlight the evidence, or lack thereof, supporting the defense’s theory of the case.

## **2. Not mentioning the check letter until trial**

Appellant’s attorney questioned him about the letter.

Q: And did anything else come with that check?

A: Yeah, there was a certified letter in there. It was a hard copy paper. I mean everything, the whole letter everything was legitimized. Like I--anybody [who] would see this would’ve thought it was a letter from the State or some government agency, you know. It was something that was--that you’d receive from the IRS, you know, like it was legit paper.

Q: Why do you say that?

A: Just of the fact that visually you could see, feel it, everything looked--you know it was [a] cashier check so I assumed, you know, everything was good. . . .

Q: Now, what steps did you take--what did you do after you received the check?

A: After I received it I did--there was a number on there that I did call. I had to look up and I did call. I talked--spoke to a person and he--I gave him the check number just to get it legitimized, you know, I wanted to make sure it was legit; that

it was an actual [check] I'd be able to cash. He confirmed that it was a good check, so that's when I went and I got [it cashed].

At the end of his direct examination, appellant said he thought the check "was for something with my work, you know, and I know there was a letter that did come with it, but I don't remember what was all in the letter but everything was like I said, sealed. Appeared to be a pretty legitimate check."

The prosecutor, having heard appellant say he relied on the check letter to establish the check's legitimacy, also questioned him about the check letter.

Q. Where is the letter that you said came with that check?

A. I don't remember any of that. It was--I thought everything (indiscernable)--it was right before I went in to see him [the QF employee who cashed the check]. Like I said, I had--I did do my part and just legitimize the check to make sure before I went--

Q. Where is the letter?

A. Oh, letter, I don't know where.

....

Q. Have you shown that letter to [your attorney]?

A. No.

....

Q. And you got a letter with it [the check] but you don't have that letter any more?

A. No.

Q. That letter didn't say anything about CNH, did it?

A. I can't--don't remember.

In rebuttal of appellant's closing argument, the prosecutor said:

[F]or the entire time this case has been pending, there was no mention of this [check] letter that [appellant] claims made it all legitimate. [Not e]ven to say, I am so sorry, I threw [the check letter] away, but . . . this [check] letter . . . made [the check]

look real to me. Do you know why [the check letter] just came up today? Because he just thought of it today. I leave it to your own common sense.

To argue that “[t]he prosecutor committed misconduct by arguing that [appellant] concocted his story about the letter[,]” appellant relies on *Laughnan v. State*, 404 N.W.2d 326 (Minn. 1987), *rev. denied* (Minn. June 9, 1987). *Laughnan* concerned a defendant who, with the help of an accomplice, stole checks made out to a business, opened an account in the name of that business, and withdrew funds from the account. As part of a plea bargain, the accomplice subsequently testified against the defendant, who was convicted and challenged his conviction on grounds of prosecutorial misconduct. *Laughnan* says in relevant part:

[A]ppellant objects to statements wherein the prosecutor called appellant a liar and suggested that he had concocted his entire alibi, referred to appellant as a “sugar daddy” and stated, “Well, we know the defendant certainly has an interest in the outcome of the case. You can imagine what’s going to happen to him if he’s found guilty.” These comments were clearly improper.

*Id.* at 331. Appellant does not contradict the prosecutor’s statements that appellant did not mention receiving the check letter for two years after he allegedly received it, although he was on trial for cashing a fraudulent check, and appellant admitted that he had lied about his address. Unlike the prosecutor in *Laughnan*, the prosecutor here did not refer to appellant with a derogatory term or ask the jurors to speculate on what would happen to appellant if they found him guilty. The prosecutor’s allegation that appellant concocted the check letter at or shortly before trial was not plain error.

### **3. Commenting on appellant's credibility**

In closing argument, appellant's attorney told the jury:

[A]gain, proof beyond a reasonable doubt. You have to be convinced beyond [a reasonable doubt] that [appellant] is lying to you. Outright lying. Not I think he's lying, or he might be lying. You must be convinced, convinced he is lying to you. And I propose to you that there's simply no reason to believe that.

In rebuttal, the prosecutor replied:

[Appellant's attorney] is right. You have to be convinced that [appellant] is lying. But I think you have reason to be convinced that he is lying. He either lied today about where he was living at that time, or he lied to the Department of Public Safety when he applied for that temporary license.

In telling the jury that it had no reason to believe appellant lied, appellant's attorney opened the door for the prosecutor to contradict that view. And appellant himself had already admitted giving an incorrect address on his license application, casting doubt on his credibility. Moreover, a "prosecutor ha[s] a right to analyze the evidence and vigorously argue that the state's witnesses [are] worthy of credibility whereas [the] defendant and his witnesses [are] not." *State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977).

### **4. Disparaging the defense**

Appellant's defense was that he called the number on the check letter to see if the check was valid before he cashed it. The prosecutor challenged this defense only by stating that no supporting evidence for it had been presented and that the check letter had never been mentioned in the two years since the offense occurred. A prosecutor is "fully free to

specifically argue that there [is] no merit to the defense . . . in view of the evidence [or lack thereof].” *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994); *but see id.* (“[the prosecutor] was not free to belittle the defense . . . in the abstract or . . . to suggest that the defendant raised it because that was the only defense that “might work”). The prosecutor here did no more than argue that the lack of evidence supporting the defense showed that it was without merit. This argument was not plain error.

## **5. Misstating the evidence**

Appellant argues that the prosecutor misstated the evidence by saying that appellant had lied either when he put down his mother’s 25th Street address as his own on his license application and gave it to QF or when he testified that he was living at the 7th Avenue address at the time of the application because appellant “clarified” on redirect that he considered the 7th Avenue address temporary and for work purposes, and he believed he would eventually be moving back to his mother’s residence on 25th Street. But the prosecutor stated the evidence accurately: appellant had told the Department of Public Safety, and subsequently QF, that he was living at one place when he was living at another. And appellant’s trial testimony reflected this point.

Even assuming some of what the prosecutor said was plain error, i.e., that appellant had not mentioned the check letter because he hadn’t thought of it until then, or that the jury had reason to be convinced appellant was lying, these errors did not affect appellant’s substantial rights by altering the outcome of the trial. *See Ramey*, 721 N.W.2d at 302 (stating that the third prong of the plain-error test is that the error must affect substantial rights). The jury heard appellant say that: (1) he had received the check letter and used the

phone number in it to call someone; (2) he remembered what that person said but not who they were or for whom they worked; (3) he had relied on the check letter to establish the authenticity of the check but he did not show the check letter to the attorney defending him on a charge of offering a forged check; and (4) he did not indicate that he showed the check letter to QF when he went to cash the check, he did not keep the check letter, and he did not remember what the check letter said.

*Laughnan* concluded that the prosecutorial misconduct was harmless because the appellant “failed to object or seek curative instructions” and there was “substantial evidence against him.” 404 N.W.2d at 331. Here, appellant also failed to object or to ask for curative instructions, and the jury heard substantial evidence that appellant had cashed a forged check and no evidence except appellant’s own unsupported testimony that his doing so was not intentional. Even if the prosecutor did commit misconduct, and we conclude that there was no misconduct, it did not alter the outcome of appellant’s case.

**Affirmed.**