

*This opinion is nonprecedential except as provided by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
A22-0491**

State of Minnesota,
Respondent,

vs.

Franchel Delmar Davis,
Appellant.

**Filed February 13, 2023
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-CR-20-1234

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

Mary F. Moriarty, Hennepin County Attorney, Peter R. Marker, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Reyes, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this direct appeal from the judgment of conviction for third-degree criminal sexual conduct, appellant argues (1) he was denied his right to a jury panel composed of a fair cross-section of the community, (2) the district court erred in admitting testimony

concerning a witness's fear of appellant's "people," and (3) the prosecutor committed misconduct by commenting on appellant's invocation of his right to remain silent. Because appellant failed to make a *prima facie* showing that the jury panel failed to reflect a fair cross-section of the community, the district court acted within its discretion to admit evidence of bias, and the prosecutor's misconduct did not prejudice appellant, we affirm.

FACTS

K.G. (the victim) had been homeless for three years and had been staying at homeless encampments or at friends' homes during that time. On the night of November 8, 2019, the victim stayed at M.H.'s home. After falling asleep around midnight, the victim woke up to someone "on top" of her and "squeezing" her. She realized it was appellant Franchel Delmar Davis, whom the victim knew was M.H.'s friend. The victim "pushed him off" and said, "What the f--k are you doing laying on top of me? What are you doing here? Why are you laying with me?"

The victim "ran" to M.H.'s room, woke M.H. up, and asked why Davis was on the couch with her. At that moment, the victim realized that she was not wearing pants though she went to bed wearing "three pairs," which was typical for her during that time of year. The victim began "yelling and screaming," and then noticed that it was "wet" "around [her] vaginal area" and it "didn't feel right down there."

Later that day, the victim went to North Memorial Hospital where she received a sexual-assault exam. The victim reported the assault to the hospital's forensic nurse examiner and a Minneapolis police officer. There were no signs of genital injuries

commonly associated with sexual assault, and the victim did not feel or see Davis penetrate her. The DNA recovered during the sexual-assault exam matched Davis's DNA.

Respondent State of Minnesota charged Davis with third-degree criminal sexual conduct. During jury selection, Davis's trial counsel orally objected to the jury make-up because only one of the 24 people in the jury panel was Black.¹ Davis moved for "a new panel, for a new 24." The district court denied Davis's motion.

The jury found Davis guilty of third-degree criminal sexual conduct. The district court sentenced Davis to 117 months in prison with ten years of conditional release. Davis appeals.

DECISION

I. Davis failed to make a *prima facie* showing that the jury panel did not reflect a fair cross-section of the community.

We review an appellant's fair-cross-section claim *de novo*. *State v. Brown*, 937 N.W.2d 146, 158 (Minn. App. 2019), *rev. denied* (Minn. Feb. 18, 2020). The United States and Minnesota Constitutions require "that the jury [panel]² . . . reflect a fair cross-section of the community." *State v. Griffin*, 846 N.W.2d 93, 99 (Minn. App. 2014) (quotation omitted), *rev. denied* (Minn. Aug. 5, 2014). But "The Sixth Amendment does not

¹ Davis identifies as Black.

² Our court has used the terms jury venire and jury panel interchangeably. *See State v. Griffin*, 846 N.W.2d 93, 101 (Minn. App. 2014), *rev. denied* (Minn. Aug. 5, 2014); *see also* Minn. R. Crim. P. 26.02, subd. 2 (describing the "jury panel" as prospective jurors selected from the "jury list"); *Black's Law Dictionary* 1869 (11th ed. 2019) (defining "venire" as "[a] panel of persons selected for jury duty and from among whom the jurors are to be chosen"). For consistency, we use the term "jury panel."

guarantee a criminal defendant a jury of a particular composition or one that mirrors the community.” *State v. Williams*, 525 N.W.2d 538, 542 (Minn. 1994).

The Minnesota Rules of Criminal Procedure provide that the “jury list” is “composed of persons randomly selected from a fair cross-section of qualified county residents,” and requires that “[t]he jury must be drawn from the jury list.” Minn. R. Crim. P. 26.02, subd. 1. The “jury panel” is comprised of prospective jurors and is selected from the “jury list.” Minn. R. Crim. P. 26.02, subd. 2; *see also* Minn. R. Crim. P. 26.02, subd. 4 (providing for selection of the jury from the jury panel). The rules provide that “[a]ny party may challenge the *jury panel* if a material departure from law has occurred in drawing or summoning jurors.” Minn. R. Crim. P. 26.02, subd. 3 (emphasis added).³

To make a *prima facie* showing that the jury panel fails to reflect a fair cross-section of the community, a defendant must show that: (1) the “group allegedly excluded is a distinctive group in the community,” (2) the “group in question was not fairly represented in the [jury panel],” and (3) the “underrepresentation was the result of a systematic exclusion of the group in question from the jury selection process.” *Id.* (quotation omitted). After a defendant has made “a *prima facie* showing of a violation, the government may rebut the showing by establishing that the system used manifestly and primarily advances a significant state interest that is incompatible with the fair cross-section requirement.” *Id.*

³ The rule also provides that “[t]he challenge must be made in writing and before the court swears in the jury. The challenge must specify grounds. The court must conduct a hearing to determine the sufficiency of the challenge.” Minn. R. Crim. P. 26.02, subd. 3. The record shows that the challenge was not in writing, though the state did not object to the district court, nor challenge the lack of written motion on appeal.

Distinctive Group

The parties agree that the district court correctly concluded that “Davis has satisfied the first element, persons identifying as Black or African American are a distinctive group in the community.” This element has indeed been satisfied. *See Griffin*, 846 N.W.2d at 100 (concluding that when “parties agree that persons self-identifying as [B]lack are a distinctive group in the community . . . the first element of the *Williams* test” has been satisfied).

Fair Representation

To satisfy the second element of the *Williams* test, Davis must show “that the group in question was not fairly represented in the [jury panel].” 525 N.W.2d at 542. In an attempt to satisfy this element, the defendant in *Griffin* presented evidence of “demographic data from the 2010 United States census concerning Olmsted County” and “demographic data regarding the composition of juries in Olmsted County from 2010 through the first half of 2012.” 846 N.W.2d at 97. Our court concluded that such generalized demographic information was insufficient to make a *prima facie* showing of unfair representation on the jury panel. *Id.* at 100-01.

Davis presented no demographic data to the district court. In district court, Davis solely pointed to the fact that only one of the 24 people in the jury panel was Black. This does not satisfy the second element, as we concluded in *Griffin*. *Id.* Therefore, Davis has not presented *prima facie* evidence “that the group in question was not fairly represented in the [jury panel].” *See Williams*, 525 N.W.2d at 542.

On appeal, Davis presents census data for the first time. This data indicates that the “Black population of Hennepin County is 14.2%,” which is greater than the 4.2% of a 24-person jury panel one Black juror represents.

“The general rule is that this court will not consider evidence outside the record.” *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001). “The record on appeal consists of the documents filed *in the district court*, the offered exhibits, and the transcript of the proceedings, if any.” Minn. R. Crim. P. 28.02, subd. 8 (emphasis added). “A reviewing court cannot base its decision on matters outside the record on appeal and any matters not part of the record must be stricken.” *Breaux*, 620 N.W.2d at 334 (quotation omitted).

This census data is plainly offered as evidence to establish facts not contained in the district court record. Although we may occasionally consider “documentary evidence of a conclusive nature” to fill gaps in the record, “such evidence is never allowed in an appellate court for the purpose of reversing a judgment.” *State v. Anderson*, 733 N.W.2d 128, 139 n.4 (Minn. 2007) (quotation omitted). Davis asks us to reverse his judgment on the basis of this newly presented evidence. Therefore, we do not consider this evidence. *Id.*

But even if we were to consider the evidence, the data provided by Davis is analytically unhelpful. As our court explained in *Griffin*, this is because the census “does not consider the eligibility requirements for jury service” including age, citizenship status, and English proficiency. 846 N.W.2d at 100. In other words, the population data must have “some statistical relevance concerning the percentage of [B]lack persons in [Hennepin] County who are eligible for jury service.” *See id.* at 101. Davis presented no such data. Therefore, Davis has not satisfied the second element.

Because a defendant must satisfy all three elements of the *Williams* test to make a *prima facie* showing that the jury panel fails to reflect a fair cross-section of the community, and Davis has not satisfied the second element, we need not address the third element. 525 N.W.2d at 542.

II. The district court acted within its discretion to admit bias evidence.

During trial, a Minneapolis police department investigator testified regarding M.H.'s statement, made during an interview, that she was "scared" of Davis's "people." The district court allowed this testimony over Davis's objection, because the statement "[g]oes to bias." Davis argues that this testimony is inadmissible hearsay.

We review a district court's evidentiary rulings, including a determination that a statement meets the requirements of a hearsay exception, for an abuse of discretion. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019); *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Hallmark*, 927 N.W.2d at 291 (quotation omitted). "For a reversal of a district court's evidentiary ruling, [a defendant] must prove that the admission of evidence was erroneous and prejudicial." *State v. Loving*, 775 N.W.2d 872, 879 (Minn. 2009). Appellate courts "will reverse the district court's ruling if the error substantially influenced the jury's decision." *Id.*

To analyze this issue, we first summarize the two interviews law enforcement had with M.H. and follow with a summary of her trial testimony.

First M.H. Interview

In November 2019, in her initial interview with law enforcement, M.H. largely corroborated the victim's account and stated that the victim had been sleeping on her couch, and that Davis showed up that night because his state ID had been mailed to M.H.'s home. M.H. said that she spoke with Davis until she went to bed and then was awoken by the victim with no pants on, yelling that Davis had been on top of her.

Second M.H. Interview

In January 2020, M.H. provided a second statement to law enforcement in which she changed her account of the incident to one that is more favorable to Davis. M.H. stated that all three of them, M.H., the victim, and Davis, "were all up and that they were all talking and that [M.H.] and Mr. Davis had gone into [M.H.'s] room and talked for some time [and] that [the victim] had been up talking with them."

M.H. Testimony

At trial, M.H. testified consistently with her second statement. When asked by the prosecutor about what she remembered about her first statement, M.H. explained that she did not recall well the events during her first statement because she "was coming off of methamphetamine and Xanax," and she was "very, very high that day." When asked by the prosecutor whether she was telling the truth during her first statement, M.H. testified, "Probably -- probably not, probably yes, you know, a little bit of both" But M.H. then testified that she "knew [the victim] was lying" after the victim purportedly said that "she was going to do to [M.H.'s] boyfriend what she did to [Davis]."

During the subsequent testimony of the investigator who interviewed M.H., the prosecutor inquired about M.H.'s "inconsistency" in her statements as follows:

Q: What did [M.H.] tell you [during the second interview] about the events of November 9th of 2019?

A: She said that they were all up and that they were all talking and that her and Mr. Davis had gone into her room and talked for some time but that [the victim] had been up talking with them.

Q: Was this story that she gave you [during her second interview] on January 31st different from what she had told you [during her first interview]?

A: Yes.

Q: In what way?

A: She had told me when I had talked to her in November that [the victim] was sleeping on the couch. She didn't feel well.

Q: Okay. And so how was this story different?

A: Because she said this time that [the victim] was up and talking with them.

Q: Did you confront her about that inconsistency?

A: Yes.

Q: When you confronted her, did she give you an idea of her state of mind?

A: Yes.

Q: Tell me sort of how that confrontation went.

A: She said that -- she started saying things that weren't very nice about [the victim] at that time.

Q: Okay.

A: And she was angry with [the victim].

Q: Okay. When you say she was “saying things that weren’t very nice about [the victim],” was that sort of a change in tone from what she was saying back [during her first interview] in November?

A: Yes.

Q: What was her attitude or disposition toward [the victim] back [during her first interview] in November?

A: She seemed very supportive of [the victim] in November.

....

Q: Okay. What did she say when you confronted her about the difference in the statement?

A: She really just said, he’s family, and at that point I asked if she was scared of him.

Q: And what did she say?

A: She said that she was scared of his people.

“For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.” Minn. R. Evid. 616. “Bias may be induced by a witness’ like, dislike, *or fear* of a party, or by the witness’ self-interest.” *State v. Clifton*, 701 N.W.2d 793, 797 (Minn. 2005) (emphasis added) (quoting *United States v. Abel*, 469 U.S. 45, 52 (1984)). “Evidence of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” *Id.* (quotation omitted). Bias is not a collateral matter and

can be established with extrinsic evidence. Minn. R. Evid. 616 1989 comm. cmt. Extrinsic evidence is “[e]vidence that is calculated to impeach a witness’s credibility, adduced by means other than cross-examination of the witness,” such as “the testimony of other witnesses.” *Black’s, supra*, at 700.

The district court acted within its discretion to allow the jury to hear the statement of M.H. as an explanation as to why she changed her account of the incident. Minn. R. Evid. 616.

III. The prosecutorial misconduct did not prejudice Davis.

Davis argues that the prosecutor committed misconduct when the prosecutor, during her closing argument, commented on the decision by Davis to end the interrogation by the investigator and invoke his right to remain silent pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Davis did not object to this alleged misconduct.

Claims of unobjected-to prosecutorial misconduct are reviewed pursuant to a modified-plain-error standard which first requires the defendant to demonstrate “that the prosecutor’s conduct constitutes an error that is plain,” and then the burden shifts “to the state to demonstrate lack of prejudice.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006); *see also State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010). “An error is plain if it is clear or obvious; usually this 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) (quotation omitted). An error is prejudicial if it affects the defendant’s substantial rights. *Ramey*, 721 N.W.2d at 299. “Plain error affects a defendant’s

substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *Bustos*, 861 N.W.2d at 663 (quotation omitted).

"The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007) "A prosecutor engages in prosecutorial misconduct when the prosecutor violates clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *State v. Smith*, 876 N.W.2d 310, 334-35 (Minn. 2016) (quotation omitted). When a defendant proves that an error was plain and the state fails to demonstrate a lack of prejudice, "[a]ppellate courts should not hesitate in a suitable case to grant relief in the form of a new trial." *Ramey*, 721 N.W.2d at 303 (quotation omitted).

During her closing argument, the prosecutor quoted Davis telling the investigator during a custodial interrogation that he was done answering any further questions.

"[I]t has long been recognized that a defendant's decision to exercise his constitutional rights to silence and to counsel may not be used against him at trial." *State v. Litzau*, 650 N.W.2d 177, 185 (Minn. 2002). "This is so because a jury would be likely to infer from the testimony that the defendant was concealing his guilt." *Id.* (quotation omitted); *see also State v. Juarez*, 572 N.W.2d 286, 290-91 (Minn. 1997) (holding that it was error for a jury to be informed of a defendant's request for counsel because the jury may have treated the request as a "badge of guilt").

Thus, the prosecutor committed misconduct by making reference to Davis's invocation of his right to silence, and Davis has demonstrated that the prosecutor committed plain error.

We must next address whether the state demonstrated a lack of prejudice due to this misconduct. *Ramey*, 721 N.W.2d at 302. The state must “show that there is *no reasonable likelihood* that the absence of the misconduct in question would have had *a significant effect* on the verdict of the jury.” *Id.* (emphasis added) (quotation omitted).

Our analysis is informed by *State v. Hall*, 764 N.W.2d 837, 841-42 (Minn. 2009), in which the prosecuting attorney offered into evidence the defendant's invocation, during a custodial interrogation, of his right to counsel, but the supreme court concluded that it was harmless error. First, the supreme court noted that “the evidence at issue was presented very briefly as part of the State's examination of the interrogating officer,” and “[t]he State did not focus on [the defendant]'s question about a lawyer during its presentation of evidence or during closing argument.” *Id.* at 842. Second, the supreme court found significant that the defendant's “request for a lawyer was not persuasive evidence of [his] guilt under the circumstances, as it came during an interview in which he admitted nothing.” *Id.* Third, the supreme court concluded that “[t]he lack of probativeness of guilt is confirmed by the fact that [the defendant] himself referenced several times in his trial testimony that the reason he did not respond to . . . the officer's questions was because he did not have a lawyer with him during the interrogation.” *Id.* Fourth, the supreme court reviewed the evidence of guilt and concluded that it was strong. *Id.*

The prosecutor, during her closing statement, made only a brief reference to Davis's decision to stop answering questions. Out of the 659 total lines of the prosecutor's closing argument, less than two lines were dedicated to Davis's invocation of silence. Moreover, like the defendant in *Hall*, Davis "admitted nothing" during his custodial statement, which had previously been submitted to the jury via the audio recording and transcript with no objection by Davis. *Id.* This supports that Davis's statement lacked "probativeness of guilt." *Id.*

Davis argues that, because this trial involved a credibility determination between him and the victim and, because the evidence to support his guilty verdict "was not so overwhelming as to make the prosecutor's repeated plain misconduct harmless," the reference to his invocation of his right to silence "tilted the scales in the state's favor." We disagree.

The evidence showing Davis's guilt is significant. Davis was found guilty of third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(d) (Supp. 2019), which requires that the defendant knew or had reason to know that the victim was "mentally impaired, mentally incapacitated, or physically helpless." The jury heard the victim testify that she was asleep and woke up to find that Davis was on top of her. Also, the jury heard the victim's account of the sexual assault described consistently through several witnesses including the forensic nurse and two law enforcement officers. M.H.'s first statement to law enforcement, which the jury heard, was also consistent with the victim's testimony. Lastly, Davis's DNA was recovered from the victim during the sexual-assault exam.

Thus, the state showed that “there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *Ramey*, 721 N.W.2d at 302 (quotation omitted). Therefore, the prosecutorial misconduct did not prejudice Davis.

Affirmed.