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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0772**

State of Minnesota,
Respondent,

vs.

Alexander James Mueller,
Appellant.

**Filed May 1, 2023
Affirmed
Bratvold, Judge**

Hennepin County District Court
File No. 27-CR-21-1241

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

Mary F. Moriarty, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Johnson, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant challenges his conviction for second-degree assault with a dangerous weapon, arguing that the prosecuting attorney committed misconduct during closing argument. Because we conclude that most of the prosecuting attorney's arguments were

not plainly erroneous and that the state met its burden to show that any plain error did not prejudice appellant, we affirm.

FACTS

The following summarizes evidence received during the jury trial. On January 18, 2021, appellant Alexander James Mueller was in Minneapolis visiting his friends, P.V. and H.T., who lived together in a downtown Minneapolis apartment. Mueller and P.V. spent “most of the day” drinking at a bar. In the evening, H.T. and his girlfriend, A.A., met the pair at the bar. After a few drinks, the four friends returned to P.V. and H.T.’s apartment. Mueller was “pretty drunk” and required assistance walking but appeared to be “having a good time.”

The four friends went into P.V.’s bedroom to avoid disturbing a Bible study that was meeting in the living room. While in the bedroom, Mueller began to get “rambunctious, wanting to leave, and he started to get a little agitated.” The three friends tried to “calm [Mueller] down and just coax him into staying in that room because [they] only had a few minutes left till everyone [in the Bible study] left.”

Mueller became increasingly agitated and made threatening statements, such as, “I’m going to f--king kill you. I am going to bite your liver.” H.T. again tried to calm Mueller down. About 15-20 minutes later, the Bible study ended, and the four friends were alone in the apartment. Mueller left the bedroom. H.T. hid the kitchen knives because Mueller “was starting to get very odd.”

The group moved to the living room. Mueller fluctuated between saying “how much he loved” P.V. and H.T. and saying “he wanted to kill” P.V., H.T., and A.A. This went on for about eight minutes until the friends persuaded Mueller to sit on the couch.

A.A. brought Mueller his phone and placed it in front of him on the coffee table. Mueller lunged toward A.A., stating, “Get the f--k away from me. I am going to f--king kill you.” A.A. retreated to the bedroom while P.V. and H.T. attempted, again, to calm Mueller down. About one minute later, Mueller walked into the bedroom, did not talk to A.A., went directly to his jacket, unzipped a pocket, pulled out a gun, unholstered it, and pointed the gun at A.A.’s head. A.A. stood about a foot and a half in front of Mueller.

P.V. and H.T. had followed Mueller into the bedroom. H.T. grabbed Mueller’s shoulder as Mueller squeezed the trigger. Two shots fired, and A.A. ran out of the room uninjured. P.V. and H.T. tackled Mueller to the ground, and the gun fired several more times. The gun either jammed or ran out of bullets; P.V. and H.T. ran from the bedroom. P.V., H.T., and A.A. fled from the apartment to the lobby.

Sometime after the three friends left the apartment, Mueller dialed 911 and requested a “swat team” for an “armed robbery.” Mueller shouted expletives during the 911 call. A short time later, Mueller exited the elevator and stood in the lobby, waving and firing the gun. Police officers ordered Mueller to drop the gun and lie down on the ground. Mueller complied and was arrested.

On January 20, 2021, respondent State of Minnesota charged Mueller with three counts of second-degree assault with a dangerous weapon under Minn. Stat. § 609.222, subd. 1 (2020)—one count for each of the three friends—P.V., H.T., and A.A. Before trial,

Mueller moved for a jury instruction on the defense of voluntary intoxication. The state did not object.

During the jury trial in January 2022, the state called six witnesses: P.V., H.T., A.A., two police officers, and a forensic scientist. The forensic scientist testified that there were two bullet defects in the lobby and multiple bullet defects, casings, and fragments recovered from inside the apartment that matched the 9mm gun police took from Mueller. A recording of Mueller's 911 call and a surveillance video of Mueller exiting the elevator into the lobby while holding a gun were also admitted into evidence. After resting its case, the state moved to dismiss counts 2 and 3—the counts alleging assault against P.V. and H.T.

Mueller did not testify. Mueller offered expert testimony from a forensic toxicologist about common behaviors exhibited under various levels of intoxication, including “exaggerated emotions” and “hallucinat[ions]” at higher alcohol concentrations. During closing argument, Mueller's attorney contended Mueller was too intoxicated to form the specific intent required to be guilty of second-degree assault because “[i]t's clear he was hallucinating.” Mueller's attorney argued the state failed to prove that Mueller intended to cause A.A. fear of bodily harm or death when he pointed the gun at her head.

The jury found Mueller guilty of second-degree assault with a dangerous weapon. The district court sentenced Mueller to 36 months in prison.

Mueller appeals.

DECISION

Mueller argues that the prosecuting attorney committed misconduct during closing argument. Mueller did not object to the arguments during trial. Appellate courts review unobjected-to error for plain error affecting a defendant's substantial rights. Minn. R. Crim. P. 31.02. An appellate court reviews unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). Under the modified plain-error standard, the defendant must show that (1) there was error, and (2) the error was plain. *Id.* at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). "An error is plain if it was clear or obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotation omitted). This is usually shown when the error "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302.

Once plain error is established, the burden shifts to the state to show a lack of prejudice to the defendant. *Id.* To do so, "the state would need to 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.* (quotation omitted).

If an appellate court determines that any one of the three factors is not satisfied, it need not address the other two factors. *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017). If all three factors are satisfied, the appellate court "then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Ramey*, 721 N.W.2d at 302. We first address whether there was error that was plain, then we analyze whether the state showed the absence of prejudice.

“When evaluating prosecutorial misconduct during a closing argument, [an appellate court] look[s] to the closing argument as a whole, rather than to selected phrases or remarks.” *State v. Smith*, 876 N.W.2d 310, 335 (Minn. 2016) (quotation omitted). Prosecuting attorneys have “considerable latitude in closing argument” and are not “required to make a colorless argument.” *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). “In closing arguments, counsel has the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom.” *Id.*

Mueller contends the prosecuting attorney made three types of improper statements during closing argument and that each statement was plain error. Mueller identifies these three types of statements: misstating the law, inflaming the jury, and shifting the burden of proof. We address each type of statement in turn.

A. Misstating the Law

A prosecuting attorney may not misstate the law in closing arguments. *Strommen*, 648 N.W.2d at 689. Mueller contends that the prosecuting attorney’s argument that Mueller did not show voluntary intoxication as a defense misstated the law by stating that intoxication “cannot be a legal defense,” intoxication did not “actually appl[y]” to this case, and intoxication does “nothing for the analysis” of Mueller’s intent. A criminal defendant may raise intoxication as a defense “when a particular intent or other state of mind is a necessary element to constitute a particular crime.” Minn. Stat. § 609.075 (2020). To prove assault, the state must establish beyond a reasonable doubt that Mueller acted “with *intent*

to cause fear in another of immediate bodily harm or death.” Minn. Stat. § 609.02, subd. 10(1) (2020) (emphasis added).

Mueller relies on *Strommen*, 648 N.W.2d at 689, arguing it shows a similar instance of a prosecuting attorney misstating the law. The state tried Strommen for attempted robbery, and he argued that he had voluntarily abandoned the attempt. *Strommen*, 648 N.W.2d at 684. During closing arguments, the prosecuting attorney stated, “As soon as they walked in the store with that mask on, with the intent to commit a crime, boom, the crime is committed. It doesn’t matter what happened after that.” *Id.* at 685. Defense counsel objected, and the district court gave a curative instruction to the jury. *Id.* The supreme court determined that “it was improper for the prosecutor to state, during his closing argument, that it did not matter what happened after Strommen walked into the store.” *Id.* at 689. The supreme court reasoned that what happened after Strommen walked into the store “was critical to whether the jury could properly convict Strommen of attempted robbery.” *Id.* The supreme court reversed Strommen’s conviction based on evidentiary errors as well as prosecutorial misconduct. *Id.* at 690.

Mueller argues that the prosecuting attorney’s arguments are analogous to the improper arguments made in *Strommen* and thus were plain error. Mueller argues that because his intoxication negated the intent element of the charged offense, the prosecuting attorney’s argument “that the intoxication defense did not ‘apply’ to the facts of this case” misstated the law. The state argues that Mueller “takes the prosecutor’s comments out of context” and that the prosecuting attorney prefaced his comment by “referencing the jury instruction that the court had just provided.”

With *Strommen* in mind, we examine each of the three statements Mueller challenges. First, Mueller challenges the prosecuting attorney’s argument that intoxication “is not, and it cannot be a legal defense.” We conclude that this statement paraphrased the jury instruction on the defense of voluntary intoxication, which began, “The defendant has asserted a defense of intoxication. It is generally not a defense to a crime that the defendant was intoxicated at the time of the act if the defendant voluntarily became intoxicated.” Here, the prosecuting attorney referred to the jury instructions just before commenting that intoxication “is not, and it cannot be a legal defense.” Shortly after making this statement, the prosecuting attorney added, “The instructions say you can consider intoxication when determining whether the defendant could form the requisite intent” Based on this context, we conclude that the prosecuting attorney’s statement was referring to voluntary intoxication generally and not arguing that intoxication is not a defense to the intent element in this case. In contrast, the improper statement in *Strommen* was not clarified by its context.

Second, Mueller challenges the prosecuting attorney’s argument that the intoxication instruction “might apply” in another case but did not “actually appl[y]” to this case. We conclude that this statement conveys a hypothetical scenario as an example of when the intoxication defense “might apply.” The prosecuting attorney distinguished between the hypothetical scenario and the evidence in Mueller’s case. Thus, we conclude the second statement did not misstate the law.

Third, Mueller challenges the prosecuting attorney’s argument that “extreme intoxication” does “nothing for the analysis of what [Mueller’s] intent was.” We conclude

this statement must be viewed in context. Mueller's defense theory throughout the case was that Mueller could not have formed the necessary intent because "he was hallucinating." During closing argument, the prosecuting attorney stated, "However, hallucinations, even if they are authentic, do nothing for the analysis of what his intent was. Hallucination and/or extreme intoxication were the motive for his drunken rage." Mueller's brief to this court inaccurately paraphrases the prosecuting attorney's argument. The prosecuting attorney was addressing the hallucination theory and not stating that Mueller's intoxication does not weigh into the analysis of the intent element. Thus, the prosecuting attorney was arguing the jury should reject the defense attorney's argument, which is not a misstatement of the law.

When we review the challenged statements in context, we conclude that the prosecuting attorney was distinguishing the facts of this case from other instances of voluntary intoxication. Thus, the prosecuting attorney did not misstate the law.

B. Inflaming the Jury

"The prosecutor must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). We have stated that it is "improper for a prosecutor to urge the jury to protect society with its verdict." *State v. Hoppe*, 641 N.W.2d 315, 320 (Minn. App. 2002), *rev. denied* (Minn. May 14, 2002). A prosecuting attorney must not "distract the jury from its proper role of deciding whether the state has met its burden." *State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997).

Mueller argues that the prosecuting attorney committed plain error by "inflam[ing] the jury's passions and prejudices" and making statements "that the jury should convict

Mueller to protect society.” In his brief to this court, Mueller contends that the prosecuting attorney’s statements “could be construed as asking the jury to send a message, via guilty verdict, to Mueller specifically and to ‘criminals’ generally that they cannot escape criminal liability by ‘get[ting] really drunk before [they] commit a crime.’” The state responds that the arguments were not improper.

Mueller’s challenge focuses on these two passages from the prosecuting attorney’s closing argument:

[1] You think there aren’t enough criminals out there who can’t handle their alcohol without legally encouraging them just to make sure you get really drunk before you commit a crime?

. . . .

[2] If the defendant had shot and killed [A.A.], would anyone seriously consider the argument that he didn’t intend to kill her? Intentional murder is a specific-intent crime. “Oh, but I was really drunk.” Would you consider that? Why should it be any different just because he was tackled prior to firing the gun several times, and the answer is it is not.

We agree with Mueller that the first statement was plain error because it could reasonably be understood as urging the jury to protect society by emphasizing the negative consequences of “legally encouraging” intoxication before engaging in criminal conduct. The prosecuting attorney committed misconduct by arguing about the societal implications of acquitting defendants who assert voluntary intoxication as a defense, which was plain error. *See, e.g., Hoppe*, 641 N.W.2d at 320-22 (reversing and remanding after determining prosecuting attorney’s statements implied the jury should protect their “loved ones” from drunk driving).

The second statement, however, was a valid way to frame a hypothetical argument about Mueller's intent. Witness testimony supports the prosecuting attorney's hypothetical scenario, in which A.A. was struck and killed by a bullet because P.V. and H.T. did not intervene in time. The second statement is not inflammatory because the hypothetical scenario is supported by evidence.

C. Shifting the Burden of Proof

A misstatement of the burden of proof is "highly improper and constitutes prosecutorial misconduct." *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010) (quotation omitted). A prosecuting attorney improperly shifts the burden of proof "when they imply that the defendant has the burden of proving his innocence." *Id.* (quotation omitted). "But 'a prosecutor's comment on a lack of evidence supporting a defense theory does not improperly shift the burden.'" *State v. Nissalke*, 801 N.W.2d 82, 106 (Minn. 2011) (quoting *McDaniel*, 777 N.W.2d at 750).

Mueller argues that the prosecuting attorney's rebuttal argument improperly shifted the burden of proof by stating that Mueller must affirmatively disprove the element of intent. The state responds that no error occurred because the prosecuting attorney was responding to an argument made during Mueller's closing argument.

The prosecuting attorney stated, during rebuttal:

[Defense] counsel says I ignored intent. What I said was what other intent could you have when you point a loaded weapon at somebody's face. Did you hear him come up with an answer? I didn't hear it. Maybe you guys can come up with one.

Again, we examine the context. During closing argument, Mueller’s attorney contended that the state failed to prove the intent element beyond a reasonable doubt. The challenged statement by the prosecuting attorney asked the jury what other intent there possibly could be when you point a gun at someone’s head: “Did you hear him come up with an answer? I didn’t hear it.”

This question is reasonably understood to mean that it is Mueller’s responsibility to produce evidence of an alternative intent, which improperly shifts the state’s burden to prove intent beyond a reasonable doubt. *See, e.g., Porter*, 526 N.W.2d at 364-65 (reversing and remanding after determining prosecuting attorney’s statements implied the defense failed to impeach a state witness). For that reason, the prosecuting attorney’s rhetorical question was plain error.

D. State’s Burden to Prove Absence of Prejudice

Because two of the prosecuting attorney’s statements were plainly erroneous, the state bears the burden to 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.” *Ramey*, 721 N.W.2d at 302 (quotations omitted). To evaluate whether the prosecuting attorney’s statements affected Mueller’s substantial rights, an appellate court considers (1) the strength of the evidence against Mueller, (2) the pervasiveness of the erroneous conduct, and (3) whether Mueller had an opportunity to rebut improper remarks. *State v. Peltier*, 874 N.W.2d 792, 805-06 (Minn. 2016).

Mueller argues that the state cannot show that the prosecutorial misconduct did not affect his substantial rights because “whether the state met its burden of proving Mueller

intended to cause A.A. to fear immediate bodily harm or death” was the “critical issue” in this case. We disagree because the three factors discussed in *Peltier* weigh in the state’s favor.

First, ample record evidence shows that Mueller intended to cause A.A. fear of imminent harm or death: (1) A.A. testified that, right before pointing the gun at her head, Mueller had threatened to kill her, and she felt that his agitation was directed at her specifically; (2) immediately after Mueller threatened A.A., Mueller followed A.A. into the bedroom and was “completely quiet”; (3) Mueller “walked directly toward his coat,” retrieved his gun from the coat pocket, pointed it at A.A.’s face, and pulled the trigger; (4) when in the apartment lobby, Mueller readily complied with police-officer commands to drop his gun and lie on his stomach; and (5) Mueller asked police officers if “the guys are okay” on the morning after the shooting. All of these facts supported the state’s burden to prove that, despite Mueller’s intoxication, he understood that pointing a gun at A.A.’s head would cause fear of imminent bodily harm or death, and Mueller intended to cause that fear.

Second, the plainly erroneous remarks were brief and not pervasive. *See State v. Prtine*, 784 N.W.2d 303, 315-16 (Minn. 2010) (determining the prosecuting attorney’s improper statements were brief and did not affect appellant’s substantial rights). Taken together, all of the contested arguments by the prosecuting attorney amount to five brief statements, which—as Mueller points out—appear “on just six transcript pages” and “during [a] brief argument.”

Third, Mueller had an opportunity to rebut some of the prosecuting attorney's improper remarks. During closing arguments, Mueller's attorney stated:

Without intent the state can't prove guilt because they have chosen to charge assault, and assault has a specific definition.

. . . .

Your job is not to punish Mr. Mueller. Your job is not to ensure that moving forward this doesn't happen again. It's not to ensure he receives treatment or anything like that. Your job is to determine whether the state has proven the crime that they chose to charge Mr. Mueller with, and that is a specific crime. That is assault, and assault requires intent. If the state has not proven intent, they have failed to prove their case, they have failed to . . . prove their case beyond a reasonable doubt.

In sum, Mueller's substantial rights were not affected by the prosecuting attorney's improper statements during closing arguments. Even though two statements were plainly erroneous, Mueller is not entitled to reversal of his conviction for second-degree assault with a deadly weapon because the state met its burden to prove there is no reasonable likelihood that the lack of these statements would have made an impact on the jury verdict. *See Ramey*, 721 N.W.2d at 302.

Affirmed.