

*This opinion is nonprecedential except as provided by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
A22-1183**

State of Minnesota,
Respondent,

vs.

Arlando Demtrious Brown,
Appellant.

**Filed July 3, 2023
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge**

Ramsey County District Court
File No. 62-CR-21-5542

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Reyes,
Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges his convictions for unlawful possession of a firearm and
unlawful possession of ammunition following a jury trial, arguing that the prosecutor

committed misconduct by misstating the burden of proof and interjecting his personal opinion during opening statement and closing argument, and that the district court erred by convicting him of both offenses. Because the prosecutor did not commit prejudicial misconduct, we affirm in part. But because the offenses arose from the same behavioral incident, we reverse in part, and remand.

FACTS

At approximately 5:00 p.m. on September 29, 2021, two St. Paul Police Department officers were on patrol heading northbound on Rice Street. Near the intersection with Litchfield Avenue, one of the officers saw a man sitting inside a bus shelter across the street who “appeared to be snorting something out of a dollar bill.” The officers made a U-turn, parked near the bus shelter, and approached the man.

After identifying himself as appellant Arlando Demtrious Brown, Brown admitted that he was snorting cocaine out of the dollar bill. He denied having any other drugs or weapons. When told he would be pat-searched, Brown took off running and both officers gave chase. Before Brown was even halfway across Rice Street, both officers saw a handgun fall from Brown’s body and land on the street. The first officer heard the sound of metal “clanging” onto the pavement but continued running after Brown. The second officer immediately stopped to secure the gun, a .32 caliber revolver with six rounds of ammunition. The first officer caught Brown in the backyard of a residence approximately

one block away from the bus shelter. Brown was arrested and charged with one count each of unlawful possession of a firearm and unlawful possession of ammunition.¹

The case proceeded to trial. The prosecutor began his brief opening statement by telling the jury, “This is what we call an open-and-shut case. The evidence shall speak for itself.” He then highlighted the evidence he planned to introduce, telling the jurors that he would ask them to find Brown guilty on both counts. In his opening statement, Brown’s attorney told the jury he “agree[d] with the State” that “[w]hat you’re going to see is captured on video.” But he urged the jury to reject the state’s argument that the gun fell from Brown as he ran from police, instead suggesting—among other things—that the gun had been in the street the whole time and that Brown was merely “the closest Black man in proximity to that gun.” He concluded by telling the jurors to “use your common sense, to look closely at that video, because that says it all, and find my client not guilty.”

During the state’s case in chief, both officers testified consistent with the facts as described above and stated that they did not see a gun in the street before the loaded revolver fell from Brown’s body. Body-worn camera video (video) from the first officer was admitted, showing the interaction between Brown and the officers from the time the officers exited their squad car until Brown was apprehended. The video corroborates the officers’ accounts.

Brown’s only witness testified that she saw Brown during the morning of the day in question. The witness did not think Brown owned a gun, did not see one that morning, and

¹ Brown was not eligible to possess either due to a 2016 terroristic-threats conviction.

did not feel anything resembling a gun when they hugged goodbye. She did not see Brown after 7:00 a.m. that day.

During closing argument, the prosecutor again told the jury that “the evidence speaks for itself,” and replayed a short video clip. When the video concluded, the prosecutor said, “That’s your whole case right there.” He then reviewed the state’s evidence and the offense elements, and reminded the jury that the state had the burden to “prove its case beyond a reasonable doubt.” The prosecutor concluded by stating, “Ladies and gentlemen of the jury, it’s what we call an open-and-shut case.”

Brown’s attorney began his closing argument by quoting Martin Luther King, Jr., and imploring the jury to “think about” Rosa Parks, Cesar Chavez, and Fred Korematsu while considering “the burden of proof and what it means to have proof beyond a reasonable doubt.” He suggested that the police “ma[d]e a conclusion [about Brown] perhaps based on their own implicit bias,” and that the jurors should find Brown was merely “the closest Black man there committing a crime, doing drugs.” Counsel asked the jury to watch the video again and to conclude that the gun was already in the street and the item depicted in the video is a bandana that was hanging from Brown’s pocket—not a gun falling to the ground.

In rebuttal, the prosecutor stated, “I agree with [the] defense. . . . It is the State’s responsibility to prove that the defendant is guilty beyond a reasonable doubt. This is the highest standard of proof we have in the legal system.” He again asked the jury to consider the officers’ testimony and watch the video, stating, “I promise you, your eyes will not lie

to you. Your ears are not lying to you. You saw what you saw and you[] heard what you heard.”

The jury returned a guilty verdict on both counts. The district court convicted Brown of both offenses but imposed a 60-month prison sentence on only the firearm-possession offense “because the Court is finding that it is the same behavioral incident.”

Brown appeals.

DECISION

I. The prosecutor did not commit prejudicial misconduct.

Brown argues that the prosecutor committed misconduct by misstating the burden of proof and improperly interjecting his personal opinions. Because he did not object to any of the challenged statements at trial, we review under the modified plain-error test. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (citing *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)). Under this test, Brown must show error that was plain. *Id.* An error is plain if it “contravenes case law, a rule, or a standard of conduct.” *Ramey*, 721 N.W.2d at 302. If Brown makes this showing, “[t]he burden then shifts to the State to demonstrate that the error did not affect [Brown’s] substantial rights.” *Carridine*, 812 N.W.2d at 146. The state meets this burden if it shows “that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict.” *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010) (quotation omitted). If the state does not meet its burden, we consider “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Ramey*, 721 N.W.2d at 302. We will not disturb a conviction unless the prosecutor’s “misconduct,

viewed in light of the entire record, was so inexcusable, serious, and prejudicial that the defendant's right to a fair trial was denied." *State v. Henderson*, 620 N.W.2d 688, 702 (Minn. 2001).

Burden of Proof

Prosecutors 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). They have "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.* But a prosecutor may not misstate the law. *State v. Strommen*, 648 N.W.2d 681, 689 (Minn. 2002). Comments that misstate or dilute the state's burden of proof are "highly improper and constitute[] prosecutorial misconduct." *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010) (quotation omitted). In determining whether a prosecutor misstated the law, we review their arguments "as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *Carridine*, 812 N.W.2d at 148 (quotation omitted).

Brown argues that the prosecutor's reference to an "open-and-shut" case impermissibly "impl[ied] that the state's burden was less than beyond a reasonable doubt." And he contends that the prosecutor's argument treated the video as conclusive evidence

of guilt and “totally disregarded the other elements of the offense, such as venue or Brown’s ineligibility status.”² We are not persuaded.

Brown cites three cases to support his assertion that the prosecutor’s comments regarding the strength of the video evidence misstated the burden of proof. In *Strommen*, the prosecutor told the jury, “When we have difficult cases like this, sometimes the only way to deal with [such cases] is just to weigh the story in each hand and decide which one is most reasonable, which one makes the most sense.” 648 N.W.2d at 685. The supreme court reversed Strommen’s conviction due, in part, to prosecutorial misconduct, concluding that this comment misstated the state’s burden to prove each element of the crime charged beyond a reasonable doubt. *Id.* at 690.

The second case involved a prosecutor who, in their opening statement, described the DNA probability evidence and posed the rhetorical question, “Is that proof beyond a reasonable doubt?” *State v. Bailey*, 677 N.W.2d 380, 402-03 (Minn. 2004). While not the basis for reversing, the supreme court cautioned prosecutors to avoid making such comparisons and stated that “the prosecutor’s statements were improper and should be avoided in a new trial.” *Id.* at 403.

In the third case, the supreme court declined to review this court’s decision that prosecutorial misconduct was not prejudicial. *State v. Bohlson*, 526 N.W.2d 49, 49 (Minn. 1994). But the court again cautioned prosecutors against making arguments about the

² Brown’s contention that the prosecutor ignored the venue and eligibility elements of the offenses is directly contradicted by the record, which shows that the prosecutor presented evidence on each element and argued proof of each to the jury.

presumption of innocence that, in effect, assume guilt, and encouraged them to adhere to “the normal statement of the presumption.” *Id.* at 49-50 (quotation omitted).

None of these cases involve the type of statements at issue here. The prosecutor argued that the evidence—most notably, the video—was strong evidence that Brown possessed a loaded gun at the time of the incident. Defense counsel agreed the video was impactful, encouraging the jurors to watch the video again because it “says it all.” The prosecutor’s focus on the video evidence neither shifted nor diminished the burden of proof. And the prosecutor repeatedly advised the jury that it could only find Brown guilty if the state met its burden of proof, which the prosecutor described as the “highest standard of proof we have in the legal system.”

While use of the phrase “open-and-shut case” or suggestion that a particular piece of evidence is “the whole case,” may, in some circumstances, constitute misconduct, it does not under the circumstances of this case. The parties agree that the video is compelling evidence; Brown’s attorney went so far as to say the video “says it all.” The prosecutor discussed the video in the context of the other evidence, including the officers’ testimony, and reiterated that the state had the burden of proof. And we note the broader context in which the prosecutor made the challenged statements. Brown’s attorney suggested to the jury from the beginning of the trial that the officers may have framed Brown due to racial bias, and that the jurors should consider broader social issues, including George Floyd’s murder. When viewed in this context, the prosecutor’s emphasis on the strength of the video evidence was not improper. *See State v. Jackson*, 773 N.W.2d

111, 123 (Minn. 2009) (“The prosecutor has the right to fairly meet the arguments of the defendant.”).³

Even if the prosecutor’s statements crossed the line, the record persuades us that no prejudice resulted. The district court instructed the jury multiple times on the state’s burden of proof. Prior to opening statements, the district court explained to the jury that “the entire burden of proof rests with the State” and that the state was required to prove each of the “essential elements” of the charges against Brown “beyond a reasonable doubt.” At the conclusion of the trial, the court again instructed the jury on the presumption of innocence and proof beyond a reasonable doubt. We presume that juries follow the court’s instructions. *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). The evidence of guilt was strong. And Brown was afforded a complete trial in which he presented his defense—that the gun was already in the street, and the video instead depicted his bandana hanging from his back pocket. On this record, we discern no prejudice flowing from the claimed misconduct.⁴

³ The state urges us to admonish Brown’s trial attorney for misconduct. We decline to do so. But we note our supreme court expects both prosecutors and defense counsel to be mindful of “case law proscribing particular conduct as well as the standards of conduct prescribed by the ABA.” *Ramey*, 721 N.W.2d at 301; *see also State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (noting that “defense counsel is neither a mouthpiece nor an ordinary agent, but a professional advocate governed by rules of professional ethics and decorum”).

⁴ Brown asserts that we should reverse prophylactically even in the absence of prejudice. But the power to do so derives from the supreme court’s “power to supervise the trial courts.” *Salitros*, 499 N.W.2d at 820. We have no such power. *State v. Gilmartin*, 535 N.W.2d 650, 653 (Minn. App. 1995), *rev. denied* (Minn. Sept. 20, 1995).

Personal Opinion

To “prevent exploitation of the influence of the prosecutor’s office,” prosecutors are prohibited from interjecting their personal opinions into a case. *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005) (quotation omitted). “[P]ersonal assessments of the evidence” may amount to prosecutorial misconduct. *State v. Washington*, 725 N.W.2d 125, 134 (Minn. App. 2006), *rev. denied* (Minn. Mar. 20, 2007).

Brown argues that the prosecutor interjected his personal opinion when he told the jury, in reference to the video, “I promise you, your eyes will not lie to you. Your ears are not lying to you. You saw what you saw and you[] heard what you heard.” He cites *Blanche*, where the prosecutor prefaced approximately 18 statements with “phrases such as ‘I suggest to you’ and ‘I think.’” 696 N.W.2d at 375. There, the supreme court concluded that “the [prosecutor’s] language, while poorly chosen, was not, under the facts and circumstances of this case, plain error.” *Id.* Here, the prosecutor’s stated promise did not interject his personal assessment of the evidence. To the contrary, the promise was that the jurors could and should draw their own conclusion from the evidence. As such, the challenged statements were not the prosecutor’s “evaluation of the validity of the evidence,” *Washington*, 725 N.W.2d at 134, and were not otherwise improper.⁵

II. The district court erred by convicting Brown of both offenses.

Minnesota law generally prohibits multiple convictions and sentences if the defendant’s criminal conduct is part of the same behavioral incident. Minn. Stat.

⁵ Even if the prosecutor committed plain error, we discern no prejudice for the reasons stated above.

§§ 609.035, subd. 1, .04 (2020). Brown and the state agree that the district court erred by entering convictions on both unlawful-possession charges. We also agree. A defendant charged with both unlawful possession of a firearm and unlawful possession of ammunition as a result of possessing a loaded gun may only be convicted and sentenced for one of those counts—not both. *State v. Nowels*, 941 N.W.2d 430, 443 (Minn. App. 2020), *rev. denied* (Minn. June 16, 2020). Accordingly, we reverse and remand for the district court to vacate one of Brown’s convictions.

Affirmed in part, reversed in part, and remanded.