

*This opinion is nonprecedential except as provided by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
A22-1194**

State of Minnesota,
Respondent,

vs.

Gerald Floyd Crain, Jr.,
Appellant.

**Filed July 31, 2023
Reversed and remanded
Wheelock, Judge**

Otter Tail County District Court
File No. 56-CR-20-1459

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, 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; Cochran, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

In this direct appeal from convictions for criminal sexual conduct, appellant raises three issues: (1) the prosecutor committed misconduct by misstating the presumption of innocence; (2) the district court abused its discretion by admitting evidence of prior bad

acts; and (3) the district court abused its discretion by allowing inadmissible expert testimony. He also raises five issues in his pro se supplemental brief. Because the prosecutor committed plain error prejudicing the appellant's substantial rights and the error impacts the fairness, integrity, and public reputation of judicial proceedings, we reverse and remand for a new trial.

FACTS

Respondent State of Minnesota charged appellant Gerald Floyd Crain Jr. with three counts of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a), (g), (h)(iii) (2018), and two counts of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(a), (g) (2018), following a report that he sexually abused his grandniece, M.W. The state later dismissed one count of first-degree criminal sexual conduct.

In June 2020, a family member told M.W.'s parents that Crain had touched M.W.'s cousin, K.G., on her genitals and buttocks. M.W.'s parents then asked M.W. if anything inappropriate had happened when Crain visited their family the previous March. M.W. stated that Crain had "touched [her] bottoms and licked." M.W.'s parents reported the abuse to law enforcement, and M.W. repeated the allegations in a forensic interview.

After the state filed criminal charges, the state sought to introduce evidence at trial of other alleged misconduct from court files in Anoka and Sibley Counties. Crain faced criminal charges in Anoka County based on K.G.'s allegations, and he previously had received a stay of adjudication in Sibley County based on allegations of criminal sexual conduct from 2005. Crain opposed the admission of this prior-bad-act evidence, also

referred to as “*Spreigl* evidence.”¹ The district court granted the state permission to present the evidence with specific limitations, including that the state not refer to certain incidents that were dissimilar to the alleged abuse of M.W.

Crain also filed a motion in limine to exclude or limit the expert testimony the state planned to introduce at trial, including that of expert witness Barbara Kern Pieh. Kern Pieh is a certified nurse-midwife and sexual-assault nurse examiner with more than 40 years of healthcare experience and was the first sexual-assault nurse examiner in Minnesota to specialize in child examinations. The district court determined that Kern Pieh’s testimony was admissible regarding “the matters of delayed reporting and alleged victims’ reasons for delaying any reporting” along with “any process of sexual abuse disclosure by alleged victims as well as characteristics of a sexually abused child,” and it denied Crain’s motion.

The state called K.G. as a witness at trial, who testified that Crain had touched her “crotch and butt.” The district court instructed the jury that this testimony was “offered for the limited purpose of assisting you in determining whether the defendant committed those acts with which the defendant is charged in the complaint”—the criminal sexual conduct against M.W. Jurors received instructions regarding the appropriate use of the evidence before K.G. testified and again before their deliberations.

The state also called Kern Pieh, whose testimony focused on her experience working with sexual-abuse victims, including her work with CornerHouse, a child-advocacy center

¹ Evidence of other crimes or bad acts is known in Minnesota as “*Spreigl* evidence.” *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (citing *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965)).

in Minneapolis. Kern Pieh answered questions about the types of responses a child M.W.'s age would be expected to give to a forensic interviewer. The state also asked Kern Pieh to explain the concept of grooming.

At the conclusion of the trial, the district court provided jury instructions, including the following instruction regarding the presumption of innocence:

The defendant is presumed innocent of the charge or charges made. This presumption remains with the defendant unless and until the defendant has been proven guilty beyond a reasonable doubt. . . . The burden of proving guilt is on the State. The defendant does not have to prove innocence.

The prosecutor then delivered the state's closing argument, in which he reviewed the elements of the charged offenses and spoke about the witnesses' credibility. During Crain's closing argument, his attorney advised the jury "not [to] waver from the law's demands upon the State to prove guilt beyond a reasonable doubt" and reminded the jury that Crain "retains the presumption of innocence" until the state meets its burden of proof.

The prosecutor responded to this point in the state's rebuttal argument:

As far as the presumption of innocence is concerned, as soon as the State starts putting on witnesses and offering evidence into—into the court record, that presumption of innocence goes away. After the State rests its case, that presumption of innocence, gone. When [M.W.] sat up here and testified that [Crain] licked her bottom, presumption of innocence is gone. If you believe her . . . you have to find the defendant guilty.

Crain did not object to these statements.

The jury found Crain guilty of all four counts. The district court sentenced him to 160 months in prison on one count of first-degree criminal sexual conduct.

Crain appeals.

DECISION

Crain argues that the prosecutor committed plain misconduct warranting a new trial and that the district court abused its discretion by admitting *Spreigl* evidence and expert-witness testimony about the common behaviors of child-sexual-abuse perpetrators. The state argues that the prosecutor's plain error did not affect Crain's substantial rights and that the district court did not abuse its discretion by admitting the *Spreigl* evidence and the challenged expert-witness testimony. We agree with Crain's prosecutorial-error claim and address it first.

Crain did not object to the prosecutor's statements during the state's rebuttal closing argument. Appellate courts review unobjected-to prosecutorial error under a modified plain-error test. *State v. Martin*, 773 N.W.2d 89, 104 (Minn. 2009) (citing *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)). The appellant bears the burden of satisfying the first two prongs of the test to show that "an error was made that was plain." *Id.* Subsequently, "the burden shifts to the [state] to demonstrate that the error did not affect substantial rights." *Id.* If a plain error affected the appellant's substantial rights, then we assess "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.*; see also *Pulczynski v. State*, 972 N.W.2d 347, 356 (Minn. 2022) ("When the [appellant] satisfies these requirements [of the plain-error doctrine], an appellate court may correct the error *only* when it seriously affects the fairness, integrity, or public reputation of judicial proceedings.").

A. The prosecutor’s statements regarding the presumption of innocence constituted plain error.

We first assess whether Crain demonstrated a plain error. *See Martin*, 773 N.W.2d at 104. “An error is plain if it was ‘clear’ or ‘obvious,’” and plain error may be demonstrated “if the error contravenes case law, a rule, or a standard of conduct.” *Ramey*, 721 N.W.2d at 302 (quoting *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002)). Crain argues that the prosecutor misstated the presumption of innocence multiple times during his rebuttal closing argument. In its brief, the state concedes that the prosecutor committed plain error, citing *Moore v. State*, 945 N.W.2d 421, 434 (Minn. App. 2020) (concluding that it was plain error for the prosecutor to state to the jury that “now that all of the evidence is in, and as you begin deliberations, [the defendant’s] no longer entitled to that presumption” of innocence), *rev. denied* (Minn. Aug. 11, 2020), but it does not concede that the prosecutor engaged in misconduct.²

Few concepts are more central to our criminal-justice system than the presumption of innocence. Our caselaw establishes that “[t]he presumption of innocence is a basic component of the fundamental right to a fair trial.” *State v. Bowles*, 530 N.W.2d 521, 529 (Minn. 1995). Therefore, a misstatement of the presumption of innocence in a closing argument is improper. *See, e.g., State v. Bohlsen*, 526 N.W.2d 49, 49-50 (Minn. 1994);

² The state further asserts that because the modified plain-error standard applies to both prosecutorial error and misconduct, *State v. Epps*, 964 N.W.2d 419, 423 n.4 (Minn. 2021), the characterization of whether the prosecutor here engaged in error or misconduct is immaterial to our resolution of the issue. We agree. Within the modified plain-error framework, the question is whether the misconduct constitutes error that is “clearly contrary to the law at the time of appeal.” *State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

State v. Jensen, 242 N.W.2d 109, 111 (Minn. 1976); *Moore*, 945 N.W.2d at 433-34; *Finnegan v. State*, 764 N.W.2d 856, 863 (Minn. App. 2009), *aff'd on other grounds*, 784 N.W.2d 243 (Minn. 2010); *see also State v. Thomas*, 239 N.W.2d 455, 456-57 (Minn. 1976) (discussing the critical role of the presumption of innocence and the burden of proof).

Here, the prosecutor misstated the presumption of innocence and the state's burden of proof. Crain identifies specific statements the prosecutor made that contravene law, including that "as soon as the State starts putting on witnesses and offering evidence . . . [the] presumption of innocence goes away." Although prosecutors have "considerable latitude" in making a closing argument and the argument is not required to be "colorless," *State v. Williams*, 586 N.W.2d 123, 127 (Minn. 1998), "[m]isstatements of the burden of proof are highly improper and would, if demonstrated, constitute prosecutorial misconduct," *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). We agree with the parties that the prosecutor's misstatements of the presumption of innocence and the state's burden of proof constitute plain error.

B. The plain error affected Crain's substantial rights.

We next assess whether the state has shown that the plain error did not affect Crain's substantial rights. *See Martin*, 773 N.W.2d at 104. An error affects an appellant's substantial rights if "there is a reasonable likelihood that the error had a significant effect on the jury's verdict" and the error "affected the outcome of the case." *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017) (quotations omitted). The state's burden is therefore "to show that there is no reasonable likelihood that the absence of the misconduct in

question would have had a significant effect on the jury.” *Ramey*, 721 N.W.2d at 302 (quotations omitted).

We consider three factors when determining whether prosecutorial error affected an appellant’s substantial rights: “(1) the strength of the evidence against [the appellant]; (2) the pervasiveness of the erroneous conduct; and (3) whether [the appellant] had an opportunity to rebut any improper remarks” at trial. *State v. Peltier*, 874 N.W.2d 792, 805-06 (Minn. 2016) (citing *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007)).

The state contends that when we view the record in its entirety, as we must, it is clear that the prosecutor’s closing argument only urged the jury to assess M.W.’s credibility to find Crain guilty. The state argues that the misstatement was brief, the district court’s jury instructions were sufficient to protect Crain from any risk of prejudice, and the evidence of Crain’s guilt was overwhelming. Crain contends that the error was prejudicial because the presumption of innocence is fundamental, particularly in a case in which the jury must make credibility determinations as between witnesses testifying to different versions of what occurred. Crain posits that the question was not just whether the jury believed M.W. or believed Crain, but whether the jury believed M.W. with the degree of confidence necessary to overcome the presumption that Crain was innocent.

We are required to “consider the closing arguments in their entirety in determining whether prosecutorial misconduct occurred,” *State v. Vue*, 797 N.W.2d 5, 15 (Minn. 2011), and here, the content and context of the misstatements are concerning. The prosecutor made misstatements about the presumption of innocence three times for emphasis: “As far as the presumption of innocence is concerned, as soon as the State starts putting on

witnesses and offering evidence into—into the court record, that presumption of innocence goes away”; “After the State rests its case, that presumption of innocence, gone”; “When [M.W.] sat up here and testified that [Crain] licked her bottom, presumption of innocence is gone. If you believe her if you believe [another witness] if you believe [M.W.], you have to find the defendant guilty.” It is notable that these misstatements were made in rebuttal, immediately before jury deliberations, when Crain would have had to move the court for an opportunity to respond³ and that the jury did not receive any corrective instruction about the law after hearing the prosecutor’s misstatements. Thus, the last thing the jury heard before deliberating was that the “presumption of innocence [was] gone” and that if the jury believed the victim, “[it had] to find the defendant guilty”—which is the prosecutor asking the jury to find the appellant guilty because he was no longer presumed innocent. This is the backdrop against which we consider the substantial-rights factors identified above.

On the first factor—the strength of the evidence against Crain—the state’s evidence was not especially strong; the case rested entirely on witness credibility as to multiple witnesses’ testimonies. The presumption of innocence is particularly important when credibility is in question because it is the jury’s responsibility to make credibility determinations. *See State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009) (“Assessing witness credibility and the weight given to witness testimony is exclusively the province of the jury.”); *State v. Trimble*, 371 N.W.2d 921, 926 (Minn. App. 1985) (“The legal

³ Minnesota Rule of Criminal Procedure 26.03(k) provides that “[o]n motion, the court may allow a defense rebuttal if the court finds the prosecution made a misstatement of law or fact or an inflammatory or prejudicial statement in rebuttal.” Crain did not object to the misstatements or move for a defense rebuttal, and the misstatements went uncorrected.

standard for conviction is proof beyond a reasonable doubt, and that standard . . . depends completely on the jury's evaluation of whatever [evidence] is presented.”), *rev. denied* (Minn. Oct. 11, 1985). Therefore, this factor suggests the error affected Crain's substantial rights.

On the second factor—the pervasiveness of the erroneous conduct—the prosecutor misstated the presumption-of-innocence principle multiple times during his rebuttal argument, and these misstatements were among the last things the jury heard before deliberation. Although the misstatements appear in a small percentage of the closing argument and rebuttal, the timing of the statements is problematic—giving them more significance than if they had occurred early in the closing argument—and the district court did not provide corrective jury instructions after rebuttal that accurately stated the presumption. In light of caselaw measuring the pervasiveness of misconduct by comparing the amount of the error in a closing argument to the total length of the argument, *see, e.g., Epps*, 964 N.W.2d at 424 (considering that prosecutor's error comprised only four sentences of 28 pages of closing-argument transcript), we conclude that this factor does not weigh in favor of or against the error affecting Crain's substantial rights.

As to the final factor—whether Crain had the opportunity to rebut any improper remarks at trial—Crain did not automatically have an opportunity to rebut the prosecutor's misstatements because they occurred during the state's rebuttal closing argument. *Cf. State v. Cao*, 788 N.W.2d 710, 718 (Minn. 2010) (reasoning that this factor weighed in favor of a conclusion that prosecutorial error did not affect appellant's substantial rights in part because appellant rebutted the state's claims in closing argument). As noted above, Crain

would have had to move for an opportunity to respond and did not; as a result, the misstatements regarding the presumption of innocence went un rebutted. Thus, this factor weighs heavily in favor of a conclusion that the error affected Crain’s substantial rights.

For the foregoing reasons, we conclude that the state did not carry its burden to show that there is no reasonable likelihood that the prosecutor’s plain-error misstatements about the presumption of innocence did not affect the jury’s verdict. Therefore, the error affected Crain’s substantial rights.

C. Crain is entitled to a new trial to ensure the fairness and integrity of judicial proceedings.

When we determine that an appellant’s substantial rights were affected, we must decide whether to reverse. And we reverse when “failing to correct the error would have an impact beyond the current case by causing the public to seriously question whether our court system has integrity and generally offers accused persons a fair trial.” *Pulczynski*, 972 N.W.2d at 356 (citing *State v. Bustos*, 861 N.W.2d 655, 663-64 (Minn. 2015) (“A plain error affecting substantial rights warrants reversal only if the error must be addressed to ensure the fairness, integrity, or public reputation of the judicial proceedings.”)).

Here, the error relates to the presumption of innocence, and that presumption—alongside the requirement to prove guilt beyond a reasonable doubt—is central to our judicial system. *State v. Peterson*, 673 N.W.2d 482, 486-87 (Minn. 2004). The timing of the misstatements and the lack of rebuttal or any corrective instruction afterwards show that the error is more than a “passing misdescription,” as the state argues. Rather, the error here directly impacts the fairness, integrity, and public reputation of the judicial system.

Because the presumption of innocence is a cornerstone of our criminal-justice system, failure to reverse based on prejudicial misstatements of the presumption simply because the error was not preserved at trial would undermine the fairness and integrity of judicial proceedings.

In sum, we conclude that the state's misstatements in its rebuttal closing argument regarding the presumption of innocence prejudiced Crain and affected his substantial rights and that the fairness and integrity of judicial proceedings are implicated by the error. We therefore reverse Crain's convictions and remand to the district court for a new trial. Because we are reversing and remanding for a new trial, we do not reach appellant's other arguments for relief.

Reversed and remanded.