

*This opinion is nonprecedential except as provided by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
A23-0506**

State of Minnesota,
Respondent,

vs.

Cody Shawn Ash,
Appellant.

**Filed January 16, 2024
Affirmed
Connolly, Judge**

Freeborn County District Court
File No. 24-CR-21-1716

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

David J. Walker, Freeborn County Attorney, Albert Lea, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Reilly,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

On appeal from his conviction of second-degree sale of a controlled substance, appellant argues that (1) the prosecutor committed plain error during closing arguments by misstating the law on entrapment and shifting the burden of proof, and (2) his counsel was ineffective when he failed to object to the prosecutor's misconduct. We affirm.

FACTS

In 2021, law enforcement conducted the following four controlled drug buys involving a confidential informant (CI) and appellant Cody Ash: on September 9, 2021, the CI purchased 4.5 grams of cocaine from Ash; on September 21, 2021, the CI purchased 2.2 grams of methamphetamine from Ash; on October 1, 2021, the CI purchased 8.6 grams of methamphetamine from Ash; and on October 20, 2021, the CI arranged to buy 18 grams of cocaine from Ash. Although the CI arranged to buy the 18 grams of cocaine from Ash, the actual sale was handled by another individual and the amount purchased was 13.1 grams.

Respondent State of Minnesota charged Ash with one count of first-degree sale of a controlled substance, and one count of second-degree sale of a controlled substance. Ash subsequently filed notice of his intent to assert an entrapment defense pursuant to Minn. R. Crim. P. 9.02, subd. 1(6), claiming that he “would not have participated in the charged offense[s] but for the actions of [the CI].” The state responded by moving to preclude Ash from raising or presenting the entrapment defense to the jury.

The district court stated that it could not “determine if the ‘fair preponderance of the evidence’ standard has been met” and, therefore, it would “permit [Ash] to address the entrapment issue in his opening statement and during questioning of the State’s witnesses as he determines is necessary to meet his burden.” The district court concluded that it would “reserve the issue of what evidence the State can use to meet its burden of proof, if necessary, until the Court has sufficient time to review the proposed evidence.” The district court later clarified on the record before trial that it was allowing the entrapment defense “to be raised. If [Ash] meets the burden, then the burden shifts, and the State has to meet it by proof beyond a reasonable doubt.”

At trial, the state presented evidence related to the controlled buys involving Ash and the CI. Ash testified in his defense and claimed that, in September 2021, the CI approached him about buying drugs through his cousin. According to Ash, he responded by telling the CI that he did not want to get involved because it was “not [his] business.” But Ash claimed that, after several days of being harassed by the CI, he finally agreed to contact his cousin on the CI’s behalf. Ash also claimed that he finally relented because the CI kept “telling me it was important,” and because the CI was helping fix his car. Ash further testified that he ended up selling the CI the drugs because his “cousin never wanted to deal with [the CI].” And Ash claimed that the CI pressured him to sell the drugs involved in the prior transactions as well.

At the close of evidence, the district court

determined that, based on the evidence presented at trial, the defense has at least raised the [entrapment] issue sufficiently to permit it to go to the jury. By that finding, I’m not making

a ruling on whether or not the defense has - - is sufficient to lead to a “not guilty” finding; I’m simply saying it is an appropriate question to give to the jury.

The district court then instructed the jury on the entrapment defense.

The jury found Ash guilty of second-degree sale of a controlled substance, but not guilty of first-degree sale of a controlled substance. Ash was then sentenced to 98 months in prison. This appeal follows.

DECISION

I.

Ash argues that the prosecutor committed misconduct during closing and rebuttal arguments by misstating the law on entrapment and shifting the burden of proof. But appellant did not object to the prosecutor’s arguments at trial. This court reviews claims of unobjected-to prosecutorial misconduct using a modified plain-error test. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). Under the modified plain-error test, an appellant must show that there was an error that was plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). A plain error is one that is “clear or obvious.” *Id.* at 302. Once such an error is established, the burden then shifts to the state to show the plain error did not affect appellant’s substantial rights. *Id.* “An error affects a defendant’s substantial rights if there is a reasonable likelihood that the error actually impacted the verdict.” *McDaniel*, 777 N.W.2d at 749. If we determine that a plain error affected the defendant’s substantial rights, then we must assess “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Ramey*, 721 N.W.2d at 302.

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.” *McDaniel*, 777 N.W.2d at 750 (quotation omitted). In determining whether a prosecutor misstated the law, this court reviews their arguments “as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence.” *State v. Carridine*, 812 N.W.2d 130, 148 (Minn. 2012) (quotation omitted).

Ash asserted the affirmative defense of entrapment. A defendant asserting such a defense must “establish by a fair preponderance of the evidence that the state induced the defendant to commit the offense by improper pressure, badgering, or persuasion.” *State v. Bauer*, 776 N.W.2d 462, 470 (Minn. App. 2009), *aff’d*, 792 N.W.2d 825 (Minn. 2011). It is not enough that the state merely solicited or provided an opportunity for the defendant to commit the crime. *State v. Olkon*, 299 N.W.2d 89, 107 (Minn. 1980). If the defendant establishes that he was induced to commit the crime, the “burden shifts to the state to prove beyond a reasonable doubt that the defendant was predisposed to commit the offense.” *Bauer*, 776 N.W.2d at 470; *see also State v. Vaughn*, 361 N.W.2d 54, 57 (Minn. 1985). “Predisposition may be established by (1): the defendant’s active solicitation to commit the crime; (2) the defendant’s prior criminal convictions; (3) the defendant’s prior criminal

activity not resulting in a conviction; (4) the defendant's criminal reputation; or (5) any other adequate means." *State v. Johnson*, 511 N.W.2d 753, 755 (Minn. App. 1994), *rev. denied* (Minn. Apr. 19, 1994).

Here, the district court instructed the jury on entrapment using the model jury instruction. The prosecutor then argued at length during closing and rebuttal arguments that Ash was not coerced, persuaded, or induced into committing the alleged offenses.

Ash contends that the prosecutor's argument misstated the law and shifted the burden of proof to Ash because Ash had already met his burden of production on the first prong of the entrapment analysis—that the state induced Ash to commit the offense. In other words, Ash argues that because the "district court ruled that Ash had satisfied his burden of production by a preponderance of the evidence that [the CI] had induced him into selling drugs," the burden then "shifted to the state to prove beyond a reasonable doubt that Ash was predisposed to selling drugs prior to being approached by [the CI]." But Ash contends that instead of focusing on the predisposition prong of the entrapment analysis during closing arguments, the prosecutor improperly focused on the inducement prong of the analysis. Thus, Ash contends that the prosecutor's closing and rebuttal arguments constituted plain error.

Ash's argument relies on the premise that, by instructing the jury on the defense of entrapment, the district court implicitly found that Ash had met his burden of production on the inducement prong of the entrapment analysis. But this argument was rejected in *Bauer*. See 776 N.W.2d at 470. In that case, this court noted that "[a] party is entitled to an instruction on his theory of the case if there is evidence to support it." *Id.* (quoting

State v. Ruud, 259 N.W.2d 567, 578 (Minn. 1977)). The court then stated: “[t]hat the district court instructed the jury on [the defendant’s] entrapment theory does not establish that the evidence is of sufficient weight to meet [the defendant’s] burden of proof on the inducement element. Rather, it merely indicates that some evidence exists in support of inducement.” *Id.*

Here, as in *Bauer*, the fact that the district court gave the entrapment instruction does not establish that Ash had satisfied his burden of proof on the inducement element; it simply means that there was some evidence to support the inducement element. *See id.* And the district court never found that the inducement element had been satisfied. Consequently, the state was free to argue to the jury that Ash was not induced into committing the alleged offenses. In fact, this court in *Bauer* specifically recognized that “[a] prosecutor may properly argue that a CI’s conduct did not constitute entrapment when, as here, an entrapment defense is raised.” *Id.* at 437.

In his reply brief, Ash argues that *Bauer* is not dispositive because, unlike the jury instruction in that case, “the instruction given to the jury in this case . . . said that the jury should decide only the second element of entrapment.” We disagree. Nowhere does the jury instruction state that the jury should decide only the predisposition element. Rather, the instruction provided to the jury begins by stating that

[a] person is entrapped when he commits an act or engages in conduct otherwise criminal if the criminal design does not originate with the person, but is conceived in the mind of a government agent, and the person is . . . by coercion, persuasion, deceitful representation or inducement, lured into committing an act . . . the person otherwise could not have committed.

This language indicates that the inducement question was presented to the jury for it to decide. The instruction discusses the second prong of the entrapment analysis and states that the “State must prove beyond a reasonable doubt that the defendant had the ready willingness to commit the act.” As such, Ash’s attempt to distinguish *Bauer* from this case fails.¹

Ash further argues that the prosecutor committed plain error by providing the jury with the wrong definition of “inducement” as it relates to entrapment, and by asserting that the CI’s repeated attempts to convince Ash to sell him drugs did not amount to persuasion. These arguments are unpersuasive. As to the element of inducement, “the evidence must show that the state did something more than merely solicit the commission of a crime”—conduct more akin to “persuasion, badgering, or pressure” must occur. *Olkon*, 299 N.W.2d at 107. Merely supplying a defendant with the opportunity to commit a crime is not enough to establish that the government actor induced the crime. *Vaughn*, 361 N.W.2d at 57.

In his closing argument, the prosecutor argued that the CI was not “deceitful,” did not threaten Ash, and did not coerce him. He also argued that the CI’s repeated requests did not amount to persuasion because “[r]epeating the question is not persuasion . . . , it is

¹ Ash also argues in his reply brief that “if [the state] is correct and the jury is supposed to decide both prongs of the entrapment defense, then the jury instruction is erroneous.” But a “reply brief must be confined to new matters raised in the brief of the respondent.” Minn. R. Civ. App. P. 128.02, subd. 3. If an argument is raised in a reply brief but not raised in an appellant’s main brief, and it exceeds the scope of the respondent’s brief, it is not properly before this court and may be stricken from the reply brief. *Berg v. State*, 557 N.W.2d 593, 596 (Minn. App. 1996). Because Ash’s challenge to the jury instruction was made for the first time in his reply brief, the argument is not properly before us.

just repetition” and does not amount to persuasion. The prosecutor’s argument that the CI’s conduct did not amount to persuasion is not a misstatement of the law. Rather, it was a factual argument that, under the evidence presented at trial, the CI’s conduct does not fit within the purview of “badgering or pressure” because the CI was merely supplying Ash with the opportunity to commit the offense.

Similarly, the prosecutor’s statement to the jury that “[i]nducement could be something like offering to pay extra money” was not erroneous. Rather, when read in the context of the prosecutor’s closing argument as a whole, the prosecutor was explaining that the CI was not attempting to induce Ash to purchase the drugs by offering more money than “market value.” Instead, the prosecutor argued that the CI was attempting to negotiate a reasonable purchase price for the drugs. In other words, the prosecutor was arguing that, under the facts of the case, the CI’s conduct did not amount to improper inducement. Because the jury was the finder of fact in deciding whether Ash was entrapped, the prosecutor’s arguments relating to the facts of the case were not improper. Ash, therefore, cannot show that the prosecutor’s statements during closing and rebuttal arguments are inconsistent with the law.

In sum, this court’s analysis in *Bauer*, when applied to this case, demonstrates that the prosecutor did not shift the burden of proof in his closing and rebuttal arguments. And the prosecutor’s closing and rebuttal arguments, when read as a whole, did not misstate the law. Ash, therefore, cannot establish error, much less plain error. *See Ramey*, 721 N.W.2d at 302 (stating that an error is plain if it “contravenes case law, a rule, or a standard of conduct”).

II.

Ash also contends that he was denied the effective assistance of counsel because his trial counsel failed to object to the prosecutor's closing and rebuttal arguments. We analyze a claim of ineffective assistance of counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020). To prevail on a claim of ineffective assistance of counsel, the appellant must show that (1) "counsel's performance fell below an objective standard of reasonableness"; and (2) "there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Id.* (quotation omitted) (relying on *Strickland*, 466 U.S. at 694). "Application of the *Strickland* test involves a mixed question of law and fact, which we review de novo." *State v. Mouelle*, 922 N.W.2d 706, 715 (Minn. 2019). We need not address both prongs of the test if one prong is determinative. *Id.*

Here, Ash is unable to satisfy the first prong of the *Strickland* test. As addressed above, the prosecutor did not misstate the law or shift the burden of proof in his closing arguments. As such, Ash's trial counsel's failure to object to the closing arguments was not objectively unreasonable. Moreover, "[d]ecisions about objections at trial are matters of trial strategy." *Leake v. State*, 737 N.W.2d 531, 542 (Minn. 2007). Appellate courts generally do not review for competence the decisions of counsel that are based on trial strategy. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). Because Ash's ineffective-assistance-of-counsel argument relates to counsel's failure to object, it is a matter of trial

strategy that is not reviewable. Therefore, Ash cannot establish that he was denied the effective assistance of counsel.

Affirmed.