STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0816

State of Minnesota,
Respondent,

vs.

Kevon Dorsey,
Appellant.

Filed May 19, 2025
Affirmed
Klaphake, Judge[*]

Hennepin County District Court
File No. 27-CR-22-1042

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

Mary F. Moriarty, Hennepin County Attorney, Mark V. Griffin, 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 Bond, Presiding Judge; Reyes, Judge; and Klaphake, Judge.

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

NONPRECEDENTIAL OPINION

KLAPHAKE, Judge

Appellant challenges his convictions of second-degree assault and domestic assault, arguing that the prosecutor committed plain, reversible misconduct by (1) eliciting vouching testimony, (2) advancing speculative arguments, and (3) misstating the evidence. We affirm.

DECISION

Appellant Kevon Dorsey argues that the prosecutor committed misconduct at trial. Because Dorsey did not object to the alleged misconduct, we review his claims under a modified plain-error test. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under that standard, Dorsey bears the initial burden to establish that the prosecutor's misconduct was plain error. *Id.* "An error is plain if it . . . contravenes case law, a rule or a standard of conduct." *Id.* (quotation omitted). If Dorsey meets that burden, the burden shifts to the state to establish that the error did not affect Dorsey's substantial rights. *See id.* 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 of the jury." *Id.* (quotation omitted) If the state cannot meet this burden, this court assesses "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.*

Vouching Testimony

Dorsey argues that the prosecutor elicited improper vouching testimony from a state witness. Improper vouching occurs when one witness testifies that another witness is

telling the truth or is more believable than another witness. *See State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) ("[O]ne witness cannot vouch for or against the credibility of another witness."). "Prosecutors may not elicit credibility-vouching testimony from trial witnesses." *State v. Robideau*, 783 N.W.2d 390, 400 (Minn. App. 2010), *rev'd on other grounds*, 796 N.W.2d 147 (Minn. 2011).

Dorsey challenges this exchange between the prosecutor and Sergeant D.K.:

> PROSECUTOR: Did you ever take any action against [D.W.] for filing a false police report?
>
> WITNESS: No, I did not.
>
> PROSECUTOR: And is that based on your review of the evidence in this case?
>
> WITNESS: Yes.

Dorsey argues that this exchange constitutes vouching because it "clearly conveyed to the jury that [the witness] and . . . the prosecutor believed" D.W.'s version of events. But vouching typically occurs when one witness makes an explicit statement about the credibility of another witness. *See e.g., State v . Koskela*, 536 N.W.2d 625, 630 (Minn. 1995) (police officer's testimony that he "had no doubt" a witness was truthful raised concerns of vouching); *Van Buren v. State*, 556 N.W.2d 548, 550-551 (Minn. 1996) (police officer testimony that victim told him that defendant's wife believed the victim's story constituted vouching). Here, the prosecutor asked Sergeant D.K. if he based his decision on the "*evidence in this case,*" not on whether he believed D.W. or found her credible. Because the difference was clear and distinct in the prosecutor's questions, there was no explicit or implied vouching for D.W.'s credibility.

Speculative argument

Dorsey next argues that the prosecutor plainly erred in their closing argument by presenting arguments that were not supported by the evidence.

In a closing argument, the state may present "all legitimate arguments on the evidence and may draw reasonable inferences from the evidence." *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017) (quotation omitted). But the state may not "speculate without a factual basis." *State v. Pearson*, 775 N.W.2d 155, 163 (Minn. 2009). In determining whether the state committed plain error in a closing argument, this court considers "the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

In closing argument, the prosecutor addressed D.W.'s and A.S.'s reluctance to speak with police after they were assaulted:

> [D.W.] had to think to herself, "Do I say what happened even if nobody wants me to? If I don't tell anyone, my friend could get hurt. But if I do tell someone, I could lose that friend forever."
>
> [A.S.] had to be thinking, "Even though he hurt me, even though he did this to me, I have to keep this secret. And I have to do it for my boyfriend, this person that I love and care about."

Dorsey contends that the prosecutor's argument was speculative because the state presented no evidence as to what D.W. or A.S. were thinking during or after the assault, and no expert testimony about thought processes common among assault victims. Relying

on *State v. Peltier*, Dorsey characterizes the prosecutor's arguments as "psychological hypotheses." *See* 874 N.W.2d 792, 805 (Minn. 2016).

But *Peltier* is distinguishable. In *Peltier*, the prosecutor argued in closing argument that the defendant learned abusive behaviors from an ex-boyfriend and exhibited a trait common to child abusers when she blamed her victim. *Id.* at 804. The court determined that these arguments were improper because they were not supported by the facts in evidence or expert testimony. *Id.* at 805.

Here, the prosecutor did not assert that D.W. or A.S. exhibited a trait common to assault victims. Moreover, the prosecutor's arguments were supported by the evidence. At trial, the prosecutor asked D.W. "[w]hat was going through [her] mind" during the assault, and she stated that she "just wanted [A.S.] to be safe." She further testified that she stopped talking to police because she "didn't want to make [A.S.] mad." And the state's evidence included a text message from D.W. to A.S. that read: "[The police are] talking to me. . . . I don't know what to do." This evidence supports the prosecutor's argument that D.W. weighed the consequences of reporting Dorsey.

Similarly, the evidence supports the argument that A.S. acted to protect Dorsey based on their relationship. A.S. testified that she and Dorsey lived together and were romantically involved. She conceded at trial that, in order to protect Dorsey, she lied to police about whether he had a gun. And two eyewitnesses contradicted her claim that Dorsey did not assault her. Based on that evidence, it was a reasonable inference that A.S. was motivated by her feelings to protect Dorsey.

Dorsey also contends that the prosecutor advanced a speculative argument when he told the jury that it "makes sense" that assault victims sometimes tell police that "nothing happened," because "even if [they]'re getting hurt, even if [they]'re being injured, those feelings don't just go away." We discern no error here because the prosecutor did not reference facts outside the record, nor did he assert, as a fact, that abuse victims in general are motivated to lie based on their feelings. Rather, the prosecutor appealed to the jury's common sense, arguing that it "makes sense" that a person would lie to protect someone that they care about. *See State v. Bauer*, 776 N.W.2d 462, 475 (Minn. App. 2009), ("[A]ppeals to common sense are permitted."), *aff'd*, 792 N.W.2d 825 (Minn. 2011); *State v. Outlaw*, 748 N.W.2d 349, 359 (Minn. App. 2008), ("[A]ppeals to common sense . . . do not constitute facts not in evidence."), *rev. denied* (Minn. July 15, 2008).

Misstatement

Finally, Dorsey argues that the prosecutor intentionally misstated Sergeant D.K.'s testimony. "It is unprofessional conduct for the prosecutor to intentionally misstate the evidence or mislead the jury as to the inferences it may draw." *Peltier*, 874 N.W.2d at 805 (quotation omitted).

On redirect-examination, Sergeant D.K. affirmed that sometimes "victims refuse to talk to [him]." During closing argument, the prosecutor rephrased Sergeant D.K.'s testimony as: "sometimes victims just say that nothing happened." Even if we agreed that the prosecutor's misstatement was intentional, we conclude that there is no reasonable likelihood that a misstatement so slight had a substantial effect on the jury's verdict.

Based on the record before us, we conclude that no plain error occurred.

Affirmed.