STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0336

State of Minnesota,
Respondent,

vs.

Kyle James Itkonen,
Appellant.

Filed January 23, 2023
Affirmed
Kirk, Judge[*]

Ramsey County District Court
File No. 62-CR-21-5218

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, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Larson, Judge; and Kirk, Judge.

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

NONPRECEDENTIAL OPINION

KIRK, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that the prosecutor committed prejudicial misconduct by telling the jury that believing the alleged victim's testimony was enough on its own to find appellant guilty. Because there was no error, and no plain error, we affirm.

FACTS

Respondent State of Minnesota charged appellant Kyle Itkonen with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1a(e) (2020) (complainant under the age of 14 and the actor is more than 36 months older than the complainant). At trial, evidence was presented that A.N. was born in 2008, and that Itkonen was born in 1987. A.N. testified that, after meeting Itkonen, the two conversed and exchanged explicit photographs on the social media platform Snapchat. A.N. testified that a few weeks after meeting Itkonen he picked her up and the two drove around the Twin Cities. According to A.N., they ended up in a parking lot where she and Itkonen got in the backseat and had sex.

Itkonen waived his right to testify and did not present any evidence in his defense. During closing arguments, the prosecutor told the jury that solely believing A.N.'s testimony was enough to convict Itkonen. The jury found Itkonen guilty as charged and the district court sentenced Itkonen to 261 months in prison. This appeal follows.

DECISION

Itkonen argues that the prosecutor misstated the state's burden of proof during closing arguments by "telling the jury that it could convict . . . Itkonen solely based on

believing A.N.'s testimony." Itkonen contends that the misconduct was prejudicial and, therefore, he is entitled to a new trial.

Itkonen did not object to the alleged misconduct at trial. Generally, a defendant who fails to object to alleged prosecutorial misconduct at trial forfeits the right to appellate review of the issue. *State v. Darris*, 648 N.W.2d 232, 241 (Minn. 2002). But we may review unobjected-to prosecutorial error under the modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 296 (Minn. 2006). Under this standard, the appellant bears the burden of demonstrating "both that error occurred and that the error was plain." *Id.* at 302. "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotations omitted).

If an appellant has satisfied the first two prongs of the plain-error test, the burden shifts to the state "to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Ramey*, 721 N.W.2d at 302. The state can demonstrate lack of prejudice by showing that there is not "a reasonable likelihood that the error actually impacted the verdict." *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). If we conclude that any one of the plain-error prongs is not satisfied, we need not address the others. *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017). And if all three prongs of the plain-error test are satisfied, we then decide whether to "address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

We assess the "closing argument as a whole" to determine whether a prosecutor committed misconduct. *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009) (quotation omitted); *accord State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007); *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). But "[a] prosecutor's misstatement of the burden of proof is highly improper and constitutes misconduct." *State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009) (quotation omitted). This is true even if the district court states the correct burden in jury instructions. *State v. Strommen*, 648 N.W.2d 681, 689-90 (Minn. 2002).

Here, the prosecutor told the jury during closing statements that

> the law provides that the testimony of a single witness, if believed, can be enough to prove a crime beyond a reasonable doubt. And why is that? Why is the testimony of a single person if believed enough to convict someone of a crime[?] To hold them accountable. It's because the law recognizes that these types of crimes occur in situations that prevent corroboration. These crimes don't occur in the middle of a park in the middle of the day. . . . They occur at night. They occur behind closed doors. . . . That's where these crimes occur and that's what the law provides. That if you believe a single victim you can convict.
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> The law does not punish victims for this fact. The law recognizes that. So if you believe [A.N.], if you believe her . . . , that's enough to convict.

Itkonen argues that the prosecutor's argument "misstated the state's burden of proof" because it equated A.N.'s truthfulness with Itkonen's guilt. We disagree. When read in context, the prosecutor was explaining that the testimony of a victim need not be corroborated, which is the law in Minnesota. *See* Minn. Stat. § 609.347, subd. 1 (2020) (stating that "the testimony of a victim need not be corroborated"). In fact, Itkonen recognizes that a conviction can be supported by a single credible witness.

See State v. Bliss, 457 N.W.2d 385, 390 (Minn. 1990). The record reflects that A.N. provided direct testimony as to each element of the offense, and Itkonen fails to explain how, if the jurors believed A.N., they could still conclude that the state failed to meet its burden of proof. Moreover, the prosecutor repeatedly stated during his closing remarks that the state's burden was beyond a reasonable doubt. Therefore, the prosecutor did not engage in misconduct by arguing that A.N.'s testimony alone could satisfy the state's burden of proof. *See State v. Everett*, No. A20-1253, 2021 WL 3478422, at *4-5 (Minn. App. Aug. 9, 2021) (concluding that the prosecutor did not engage in misconduct by telling the jury during closing arguments that if they believed the victim, then the defendant was guilty); *see also State v. Rosendo Dominguez*, No. A19-0869, 2020 WL 3637928, at *4 (Minn. App. July 6, 2020) (concluding that there was no plain error when the prosecutor stated in closing arguments that: "If you believed the victim when she testified, this case is proven"), *rev. denied* (Minn. Oct. 1, 2020).[1]

Even if Itkonen can show that the prosecutor engaged in misconduct during closing arguments, Itkonen is unable to show that the error was plain. As stated above, "[a]n error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *Webster*, 894 N.W.2d at 787. But here, Itkonen fails to cite any precedential decision holding that the prosecutor cannot make an argument like the one made by the prosecutor in this case. Moreover, Minnesota law is clear that a conviction can be supported by a single credible witness. *See Bliss*, 457 N.W.2d at 390.

[1] We note that nonprecedential opinions are not binding but may have persuasive value. Minn. R. Civ. App. P. 136.01, subd. 1(c).

And there are two recent nonprecedential cases from this court concluding that it was not error for the prosecutor to make arguments almost identical to the argument made by the prosecutor in this case. *See Everett*, 2021 WL 3478422, at *4-5; *see also Rosendo Dominguez*, 2020 WL 3637928, at *4. Therefore, we conclude that because there was no error, and certainly no plain error, Itkonen is not entitled to a new trial.

Affirmed.