STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1933

State of Minnesota,
Respondent,

vs.

Thomas James Horton, Jr.,
Appellant.

Filed December 16, 2024
Affirmed
Johnson, Judge

Olmsted County District Court
File No. 55-CR-23-3651

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bentley, Presiding Judge; Segal, Chief Judge; and Johnson, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

An Olmsted County jury found Thomas James Horton Jr. guilty of felony domestic assault based on evidence that he hit his former girlfriend in the nose. We conclude that the prosecutor did not engage in misconduct that requires a new trial. Therefore, we affirm.

FACTS

In the early morning hours of May 30, 2023, Horton and his former girlfriend, K.P., were parked at a Kwik Trip store in Rochester. A Kwik Trip employee, G.S., was sitting in his parked car nearby while on a break from work. G.S. heard a woman yelling inside Horton's car. He saw K.P. exit the car, yell "help me," and walk into the store. G.S. also saw a man, later identified as Horton, exit the car, follow K.P. for a short time, and then leave on foot.

G.S. entered the Kwik Trip store and saw that K.P.'s face was bloody and that she was crying. K.P. spoke to other store employees, one of whom called 911. Officer Bowron responded to the call. K.P. told the officer that she had an argument with her former boyfriend and that he had hit her in the nose. K.P. was crying, with tears "rolling down her face" and a bloody nose that was dripping blood onto her chest. A different police officer arrested Horton in a nearby park approximately one hour later.

The state charged Horton with felony domestic assault, in violation of Minn. Stat. § 609.2242, subd. 4 (2022). The case was tried to a jury on five days in July and August 2023. The state called eight witnesses, including G.S., Officer Bowron, and K.P. The state played for the jury excerpts of a videorecording made by Officer Bowron's body-worn camera. The videorecording shows that K.P. was upset and was crying, that she repeatedly wiped her nose with paper napkins, and that blood was visible on her upper chest. Officer Bowron asked K.P. numerous questions about the cause of her injuries and the surrounding circumstances, including her relationship with Horton. K.P. said, among other things, that Horton is "an evil person" and that "out of nowhere [he] decked me in the face." She later

clarified that Horton hit her "right in the nose." The state also introduced photographs depicting K.P.'s injuries, including her bloody nose.

K.P. testified that she had discontinued her romantic relationship with Horton before the incident at the Kwik Trip but met him that night so that she could return a car that he had lent her. Notably, K.P. testified that the statements she made to the Kwik Trip employees and to Officer Bowron inside the store were not true. She explained that she had a bloody nose that night because she reached for her purse in the back seat of Horton's car and when she pulled on the purse strap, it broke, causing her to hit herself in the face with her own hand. Horton did not testify and did not present any other form of evidence.

The jury found Horton guilty. The district court imposed a sentence of 33 months of imprisonment. Horton appeals.

DECISION

Horton argues that he was denied a fair trial because the prosecutor engaged in two types of misconduct. First, he argues that the prosecutor improperly elicited evidence that Horton had used methamphetamine on one prior occasion. Second, he argues that the prosecutor improperly aligned himself with jurors during closing argument by using the word "we" to refer to himself and the jurors.

The right to due process of law includes the right to a fair trial. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005); *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *rev. denied* (Minn. June 19, 2007). "Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial." *State v. Jones*, 753 N.W.2d 677, 686 (Minn.

2008) (quotation omitted). Consequently, prosecutorial misconduct may result in the denial of a fair trial. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006).

The parties agree that Horton did not object at trial to the alleged misconduct that he challenges on appeal. Accordingly, we apply the modified plain-error test. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail under the modified plain-error test, an appellant must establish that there is prosecutorial misconduct and that it is plain. *Ramey*, 721 N.W.2d at 302. "A prosecutor engages in prosecutorial misconduct when he violates 'clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law.'" *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quoting *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007)). Prosecutorial misconduct is plain if there is "conduct the prosecutor should know is improper." *Ramey*, 721 N.W.2d. at 300.

If a prosecutor engages in misconduct that is plain, the burden shifts to the state to show "that there is no reasonable likelihood that the absence of the misconduct in question would have a significant effect on the verdict of the jury." *Id.* at 302 (quotation omitted). If the state satisfies that burden, an appellate court then must determine whether the plain misconduct should result in a new trial to ensure the "fairness, integrity, or public reputation of judicial proceedings." *Pulczinski v. State*, 972 N.W.2d 347, 356 (Minn. 2022).

A.

Horton first argues that the prosecutor engaged in misconduct by wrongfully eliciting evidence that Horton had used methamphetamine on one prior occasion. This

issue arose during the testimony of a police officer who was called to testify about the relationship between Horton and K.P. *See* Minn. Stat. § 634.20 (2022). The officer testified that, in May 2021, he was dispatched to K.P.'s home because of a report that Horton and K.P. were engaged in a domestic disturbance. The officer testified that, when he arrived at K.P.'s home, K.P. was upset and had a bloody, swollen lip. The officer testified that Horton said that he and K.P. had argued and that Horton admitted that he "might have" struck K.P.'s face. The prosecutor followed up by asking the officer additional questions about a subsequent conversation with Horton:

> Q: Now, is it true that you also spoke with [Horton] a little bit later that day as well?
>
> A: Correct. At the hospital.
>
> Q: Now, when you say at the hospital, I want to be clear. Was he at the hospital for like an injury?
>
> A: No. *He informed officers on scene, if I'm not mistaken, that he ingested methamphetamine prior to our arrest.*
>
> Q: Okay. So, I want to ask you about what he told you at the hospital. And how long was that conversation?
>
> A: 10 seconds.
>
> Q: What was the topic of that conversation?
>
> A: Just casual talk. I wasn't asking him anything in relation to the case at all. I just said, "Hey, Tom, where are you living at nowadays," and he told me where he was. Then I asked, "Is [K.P.] living there too, as well," and he said—he nodded. He didn't say yes or no, he just nodded yes. (Emphasis added.)

Horton contends that the prosecutor engaged in misconduct by eliciting *Spreigl* evidence that was unnoticed, inadmissible, and highly prejudicial. Horton cites rule 404(b) of the rules of evidence and *Fields*. In *Fields*, however, the supreme court rejected the appellant's argument on the ground that the challenged evidence was admissible under rule 608. 730 N.W.2d at 783-84. Horton also cites *State v. Harris*, 521 N.W.2d 348 (Minn. 1994). In that case, the supreme court reversed a conviction on multiple grounds, including the fact that the prosecutor intentionally and repeatedly elicited multiple forms of inadmissible evidence. *Id.* at 351-55.

In response, the state acknowledges caselaw stating that a prosecutor "has some responsibility for preparing his witnesses in such a way that they will not blurt out anything that might be inadmissible and prejudicial." *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978). But the state also cites caselaw stating that "unintended responses under unplanned circumstances ordinarily do not require a new trial." *State v. Hagen*, 361 N.W.2d 407, 413 (Minn. App. 1985), *rev. denied* (Minn. Apr. 18, 1985).

"It is generally misconduct for a prosecutor to 'knowingly offer inadmissible evidence for the purpose of bringing it to the jury's attention.'" *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014) (quoting *State v. Milton*, 821 N.W.2d 789, 804 (Minn. 2012)). If a prosecutor intentionally elicits inadmissible evidence from a state's witness, a new trial may be appropriate if the inadmissible evidence was prejudicial in the sense that it "played a substantial part in influencing the jury to convict." *See State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (quotation omitted); *see also State v. McNeil*, 658 N.W.2d 228, 231-32 (Minn. App. 2003). If a prosecutor *un*intentionally elicits

inadmissible evidence, a defendant is entitled to a new trial only if the inadmissible evidence "prejudiced the defendant's case." *State v. Richmond*, 214 N.W.2d 694, 695 (Minn. 1974). The admission of inadmissible evidence is not reversible error if the prosecutor did not intentionally elicit the testimony, the statement at issue was merely a "passing" reference, and the evidence supporting guilt was "overwhelming." *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978).

In this case, it appears that the prosecutor did not intend to elicit testimony about Horton's prior drug use. The transcript indicates that the prosecutor asked the police officer a yes-or-no question about whether Horton was at the hospital because of an injury. The officer could have simply answered that question in the negative and then stopped. Instead, the officer gratuitously expanded on his negative answer by testifying that Horton had said that he "ingested methamphetamine." The prosecutor did not ask any additional questions about methamphetamine but, rather, asked the officer about Horton and K.P.'s relationship, which was the reason why the officer was called. The prosecutor did not mention Horton's drug use in closing argument.

The prejudicial effect of the evidence of Horton's prior drug use must be determined in light of the strength of the state's evidence of guilt. *See id.* The state introduced strong evidence of guilt, including the testimony of Officer Bowron and a body-worn-camera videorecording made shortly after the 911 call, in which K.P. states that Horton hit her. In addition, the state called G.S., the Kwik Trip employee who heard K.P. yell while in Horton's car, saw her walk from the car to the store, and also heard her say, shortly after the incident, that Horton hit her. Granted, K.P. testified that her statements in the Kwik

Trip store were untrue. But that testimony is unpersuasive in light of the contemporaneous videorecording of her statements and the visual evidence of her injuries. In the videorecording, K.P. clearly states that Horton hit her, and she describes the incident while upset and while crying, with blood dripping from her nose onto her chest. Her answers to the officer's numerous questions indicate that she and Horton had a troublesome relationship. In addition, a purse is easily visible in front of her body, and both purse straps—a long strap and a short strap—appear to be unbroken.

Because the prosecutor did not intentionally elicit the inadmissible evidence, because the challenged evidence was merely a "passing" reference, and because the evidence supporting guilt was "overwhelming," this case is like *Haglund*, in which the supreme court concluded that there was no reversible error. *See id.*; *see also Hagen*, 361 N.W.2d at 413 (concluding that prosecutor did not intentionally offer inadmissible evidence because witness's answer was "an unintended and unexpected explanatory answer to a question calling for a yes or no response").

B.

Horton also argues that the prosecutor engaged in misconduct by repeatedly using the word "we" in closing argument, thereby improperly aligning himself with jurors.

In his principal brief, Horton quotes the following excerpts from the transcript of the prosecutor's closing argument:

> There can be an emotional temptation to think, well, if [K.P.] doesn't want [Horton] to get in trouble, then why should *we*? Why should *we* care?
>
> . . . .

> And when *we* continue with that, let's talk about what is to be believed. Do *we* believe what originally happened that night or do *we* believe the recantation that you heard on the stand this week.
>
> . . . .
>
> Consider as she sat here today [K.P.'s] interest. She wanted to protect Mr. Horton. *We* know that because from the very beginning she was saying she didn't want him to get in trouble. *We* know that because of everything about her—about her behavior about everything that happened this week. *We* know that she has an interest in the outcome of the case.
>
> . . . .
>
> Another thing I'd like you to consider that *we* haven't talked about a whole lot but *we* know it's true, what about Mr. Horton hiding in the woods?
>
> . . . .
>
> The second point I'd like to make that I'll make only briefly is *we* don't know. *We* have no reason to believe [K.P.] talked to this EmPower employee.
>
> . . . .
>
> I'm only presenting my argument for what I advocate that you look at here. But what *we* see here, this purse clearly has a long strap for when you wear it over your shoulder and it has a short strap for when you carry it in your hand at your side. (Emphasis added.)

Horton relies on *State v. Mayhorn*, 720 N.W.2d 776 (Minn. 2006), in which the supreme court recognized that "a prosecutor is not a member of the jury" and, thus, may not "describe herself and the jury as a group of which the defendant is not a part." *Id.* at 790. Specifically, the supreme court stated in *Mayhorn* that "to use 'we' and 'us' is

inappropriate and may be an effort to appeal to the jury's passions." *Id.* The state contends that *Mayhorn* is distinguishable because the prosecutor in that case used the word "we" along with other tactics to "highlight cultural differences between the predominantly white jury and the [African American] defendant." *Id*. at 789. The state also responds by citing *Nunn v. State*, 753 N.W.2d 657 (Minn. 2008), in which the supreme court explained that using the word "we" does not constitute prosecutorial misconduct *per se* and that the word does not necessarily align the prosecutor with jurors if the word could reasonably be interpreted to "refer to everybody who was in court when the evidence was presented." *Id.* at 663.

In this case, the prosecutor's use of the word "we" does not appear to be "an effort to appeal to the jury's passions," which is expressly forbidden by *Mayhorn*. 720 N.W.2d at 790. To the contrary, it appears that the prosecutor used the word in a dispassionate way. Arguably a prosecutor is forbidden from using the word "we" in a dispassionate way if the prosecutor does so to improperly align himself or herself with jurors. *Cf. id.* On some occasions, the prosecutor used the word as an innocuous rhetorical device, in a manner similar to the word "one" or "a person." On other occasions, the prosecutor used the word in a way that encompassed everyone in the courtroom, including Horton, which is expressly permitted by *Nunn*. 753 N.W.2d at 663. But a few of the prosecutor's "we" statements are more difficult to reconcile with *Nunn* because they appear to assume that the prosecutor and jurors will share the same point of view with respect to disputed factual issues. For purposes of this nonprecedential opinion, we assume without deciding that the prosecutor engaged in misconduct and that the misconduct is plain.

We next turn to the question of whether the state satisfied its burden of showing that the misconduct did not affect Horton's substantial rights, *i.e.*, "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." *See Ramey*, 721 N.W.2d at 302 (quotation omitted). "When reviewing claims of prosecutorial misconduct during closing argument, we consider the argument as a whole, rather than focusing on particular phrases or remarks that may be taken out of context or given undue prominence." *Jones*, 753 N.W.2d at 691 (quotation omitted).

We believe that there is no reasonable likelihood that the prosecutor's occasional use of the word "we" significantly affected the jury's verdict. The 13 challenged instances of "we" must be considered in the context of a relatively long closing argument, which comprises over 16 pages of transcript. In addition, the prosecutor expressly stated to jurors that they should make their decision based on intellect and reason rather than emotion. Most importantly, the jury likely decided the case based on the state's evidence, which was strong. As stated above, the state introduced the testimony of Officer Bowron and a body-worn-camera videorecording in which K.P. says, while upset and crying and bloody, that Horton hit her in the nose. The state also called G.S., the Kwik Trip employee who was present nearby during the incident and heard K.P. say, shortly after the incident, that Horton hit her. The videorecording depicts a purse with two unbroken straps, which undermines K.P.'s testimony that she injured her nose when she broke a purse strap. Consequently, even if the prosecutor engaged in plain misconduct, the state has shown that the misconduct did not affect Horton's substantial rights.

In sum, Horton is not entitled to a new trial on the ground of prosecutorial misconduct.

Affirmed.