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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Terrance Robert LOVE, Appellant.

A19-1153

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Filed July 13, 2020

Hennepin County District Court, File No. 27-CR-17-11948

Attorneys and Law Firms

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Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and John P. Smith, Judge. *

UNPUBLISHED OPINION

JOHNSON, Judge

***1** A Hennepin County jury found Terrance Robert Love guilty of indecent exposure based on evidence that, while he was sitting next to a woman on a light-rail train, he exposed his penis and masturbated. We conclude that the district court did not err by preventing Love from cross-examining the woman about any benefits she may receive under the immigration laws as a result of her being a crime victim. We also conclude that Love is not entitled to a new trial due to prosecutorial misconduct. Therefore, we affirm.

FACTS

On May 13, 2017, R.G. boarded a bus in south Minneapolis to go to work at the Mall of America. A man, later identified as Love, boarded the bus and took the seat next to her. R.G. transferred to a light-rail train at the 38th Street station. Love followed her and again sat next to her. Love drew closer to R.G. and appeared to reach for her leg. She turned toward him and saw that his penis was exposed and that he was masturbating. R.G. immediately left her seat by climbing over the seat in front of her. She exited the train at the mall and reported the incident to a mall security officer, who called police. After Love arrived at the mall on a later train, R.G. identified him to a police officer, and Love was arrested.

The state charged Love with one count of indecent exposure, in violation of Minn. Stat. § 617.23, subdivision 2(2) (2016). The case was tried to a jury over three days in April 2019. The state called R.G. as a witness, and she testified to the facts stated above. The state introduced a surveillance video-recording of the inside of the train, which showed Love sitting next to R.G. The state also called two mall security officers and two Metro Transit Police officers, who testified about R.G.'s report of the incident and her identification of Love when he arrived at the mall.

At the beginning of Love's cross-examination of R.G., Love's trial attorney was allowed to conduct *voir dire* of R.G., outside the presence of the jury, concerning her knowledge of what is commonly known as a U-Visa, which may be granted to a person who is the victim of a crime. During *voir dire*, R.G. initially testified that she did not know about U-Visas or any special immigration status for crime victims. She later testified that she had discussed the issue with her immigration attorney. She eventually clarified that, at the time the incident occurred on the light-rail train, she did not know about U-Visas or any immigration benefits for crime victims. She testified that she had not discussed U-Visas with the prosecutor. Love argued to the district court that he should be permitted to cross-examine R.G. about the issue to prove that she is biased. The state argued in response that the probative value of R.G.'s testimony on the issue would be outweighed by the potential for prejudice. The district court ruled that the evidence is inadmissible.

Love did not testify or introduce any other evidence. The jury found him guilty. The district court sentenced him to 365 days in the workhouse. Love appeals.

DECISION

I. Evidence of Bias

***2** Love argues that the district court erred by preventing him from cross-examining R.G. on the subject of U-Visas.

Love contends that the district court's ruling violated his constitutional right to present a complete defense. The United States Supreme Court has held that a state's evidentiary rule may violate a defendant's constitutional right to present a complete defense if the evidentiary rule " 'infringes upon a weighty interest of the accused and is arbitrary or disproportionate to the purposes the rule is designed to serve.' " *State v. Pass*, 832 N.W.2d 836, 841-42 (Minn. 2013) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324-25, 126 S. Ct. 1727, 1731 (2006)) (alterations in original). But "evidentiary rules designed to permit the exclusion of unfairly prejudicial, confusing, or misleading evidence are unquestionably constitutional." *Id.* at 842 (quotations omitted). Love did not argue to the district court at trial that he had a constitutional right to present a complete defense. On appeal, Love has not developed an argument that any evidentiary rule of exclusion is arbitrary or disproportionate to its purpose. Love cites rules 401 and 616 of the rules of evidence. Accordingly, we construe Love's brief to argue that the district court erred in its application of the rules of evidence.

Rule 616 provides, "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible." Minn. R. Evid. 616. But the rule does not mean that evidence of a witness's bias always is admissible:

> We recognize however that "not everything tends to show bias, and courts may exclude evidence that is only marginally useful for this purpose. The evidence must not be so attenuated as to be unconvincing because then the evidence is prejudicial and fails to support the argument of the party invoking the bias impeachment method."

State v. Larson, 787 N.W.2d 592, 598 (Minn. 2010) (quoting *State v. Lanz-Terry*, 535 N.W.2d 635, 640 (Minn. 1995)).

Accordingly, a district court may exclude evidence of bias for the reasons stated in rule 403 of the rules of evidence. *See id.* at 598-99 (citing Minn. R. Evid. 403). Under rule 403, a district court may exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403. This court applies an abuse-of-discretion standard of review to a district court's evidentiary rulings. *State v. Jenkins*, 782 N.W.2d 211, 229 (Minn. 2010).

The federal government describes the U-Visa program as follows:

> The U nonimmigrant status (U visa) is set aside for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity. Congress created the U nonimmigrant visa with the passage of the Victims of Trafficking and Violence Protection Act (including the Battered Immigrant Women's Protection Act) in October 2000. The legislation was intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes, while also protecting victims of crimes who have suffered substantial mental or physical abuse due to the crime and are willing to help law enforcement authorities in the investigation or prosecution of the criminal activity. The legislation also

> helps law enforcement agencies to better serve victims of crimes.

***3** United States Citizenship & Immigration Services, *Victims of Criminal Activity: U Nonimmigrant Status*, https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status (last visited July 7, 2020).

In this case, the district court expressly stated its reasons for excluding Love's proffered evidence of bias. The district court referred to rule 616 but reasoned that the probative value of the proffered evidence was limited because R.G. would testify that she did not know about U-Visas when she reported the incident, which was immediately after it occurred. The district court also referred to rule 403 and reasoned that, even if R.G.'s knowledge of U-Visas at the time of trial had some probative value, it was outweighed by its potential for prejudice. The district court did not expressly consider whether R.G. would be eligible for a U-Visa in light of the nature of Love's offense. For purposes of this opinion, we assume without deciding that R.G. was potentially eligible for U nonimmigrant status.

The district court's thorough analysis of the issue reflects a proper application of the rules of evidence. The evidence Love sought to introduce would have had limited probative value because, if believed, it would establish no more than that R.G. was aware of U-Visas at the time of trial. But R.G. would have testified that she was unaware of U-Visas on the day of the incident, when she immediately reported it to a mall security officer and to law enforcement. To show that R.G. was biased, Love would have needed to persuade the jury that she falsely testified that she was not aware of U-Visas on the day of the incident and that she intended to take advantage of the U-Visa program to improve her immigration status. But Love did not proffer any additional evidence that might have called R.G.'s testimony concerning U-Visas into question. Notably, he did not elicit any testimony during *voir dire* that R.G. had applied for a U-Visa or that she intended to do so. In addition, the district court reasonably considered the potential for "unfair prejudice, confusion of the issues, or misleading the jury." *See* Minn. R. Evid. 403.

This case is similar to *Larson*, in which the defendant sought to attack the credibility of a witness on the ground that he was "an illegal immigrant" who had had a deportation hearing. 787 N.W.2d at 598. The supreme court rejected that argument on the ground that the witness "was not given any consideration for his testimony, either at his deportation hearing" or otherwise. *Id.* at 599. The district court in this case had that same reason, as well as additional reasons, for excluding Love's proffered evidence. We also note that appellate courts in other states have affirmed the exclusion of evidence of the U-Visa program in cases in which a non-citizen witness was not aware of the program when the witness first reported a crime. *See, e.g.*, *State v. Streepy*, 400 P.3d 339, 344-45 (Wash. Ct. App. 2017); *State v. Buccheri-Bianca*, 312 P.3d 123, 127 (Ariz. Ct. App. 2013).

Thus, the district court did not abuse its discretion by excluding Love's proffered evidence concerning R.G.'s limited knowledge of the federal U-Visa program.

II. Claim of Prosecutorial Misconduct

***4** Love also argues that he is entitled to a new trial on the ground that the prosecutor engaged in four types of misconduct during the closing argument.

A.

The right to due process of law includes the right to a fair trial, and the right to a fair trial includes the absence of prosecutorial misconduct. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005); *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). Allegations of misconduct are analyzed according to a two-tiered approach. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (citing *State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974)). If "the case involves less serious prosecutorial misconduct, [the court examines] 'whether the misconduct likely played a substantial part in influencing the jury to convict.' " *Id.* (quoting *Caron*, 218 N.W.2d at 200). If the case involves more serious misconduct, courts will reverse "unless the misconduct is harmless beyond a reasonable doubt." *Id.* (citing *Caron*, 218 N.W.2d at 200).

If an appellant did not object at trial, this court applies a "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 initially must establish that there is an error and that the error is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* If there is a plain error, the burden shifts to the state, which must show that the plain error did not affect the appellant'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." *Id.* (quotation omitted). "If the state fails to demonstrate that substantial rights were not affected, 'the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.' " *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (quoting *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)).

B.

As stated above, Love contends that the prosecutor engaged in four types of misconduct during the closing argument. First, Love contends that the prosecutor "[a]sked the jury to put itself in R.G.'s shoes." This contention is based on this part of the prosecutor's closing argument:

> Now, just imagine if you are riding a bus next to a total stranger, you get off, you get on a train, you know, there's a waiting period, and then that same person, a man who's much larger than you, comes and sits down again right next to you on the train. I would not do that. That ... just seems like a sense of oddness to it. I'd be worried ....

Love objected, and the district court sustained the objection. The prosecutor later asked the jury to "consider being as brave as Ms. [G.], who stood up to this man and told him that this was wrong." Love did not object to the latter comment. Love cites caselaw stating that "arguments that ask jurors to put themselves in the shoes of the victim are generally improper." *State v. Costello*, 646 N.W.2d 204, 210 (Minn. 2002).

Second, Love contends the prosecutor "[a]sked the jury to consider issues broader than guilt or innocence." This contention is based on the prosecutor's statement that the jury should "tell the defendant that ... his behavior was wrong and it can't happen again, and that in Minnesota, this is a crime." The prosecutor made a similar statement in the rebuttal argument. Love did not object to either comment. Love cites caselaw stating that a prosecutor may not ask a jury to consider issues broader than guilt or innocence because "the jury's role is not to enforce the law or teach defendants lessons or make statements to the public." *State v. Salitros*, 499 N.W.2d 815, 819 (Minn. 1993).

***5** Third, Love contends that the prosecutor "[i]nterjected his personal opinion." This contention is based on the prosecutor's statement that "if you look at this and you hear the testimony of Ms. [G.] and you come to any other conclusion that he was not sitting there masturbating next to her, then I think you've thrown common sense out the window." Love contends that the prosecutor repeated the mistake when he stated, "I will put to you that she gave very credible and important testimony," and "I told you that this was a case about a bully—about a sexual bully, and that's exactly what I believe it was." Love objected to the former statement, but the district court overruled the objection. Love did not object to the latter statement. Love cites caselaw stating that a prosecutor "may not interject his or her personal opinion so as to personally attach himself or herself to the cause which he or she represents." *Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (quotation omitted).

Fourth and finally, Love contends that the prosecutor "[s]hifted the burden of proof" when he stated that "at no point was [R.G.'s] testimony contradicted." Love did not object to the statement. Love cites caselaw stating a prosecutor may not say that the state's evidence is uncontradicted because such a statement distorts the state's burden of proof. *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995).

C.

In response, the state argues primarily that, even if the prosecutor engaged in misconduct, a new trial is not required on the ground that, regardless of the scope of review, the verdict was not brought about by the misconduct.

For purposes of this opinion, we will assume without deciding that the prosecutor engaged in misconduct and will analyze whether Love is entitled to a new trial. We also will assume, for purposes of this opinion, that the misconduct is of the more serious variety. *See State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016). Accordingly, with respect to the misconduct to which Love objected, we will reverse "unless the misconduct is harmless beyond a reasonable doubt." *McDaniel*, 777 N.W.2d at 749. With respect to the misconduct to which Love did not object, we will reverse unless the state has shown 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." *Ramey*, 721 N.W.2d at 302 (quotation omitted).

In determining whether prosecutorial misconduct during closing argument is harmless beyond a reasonable doubt, the supreme court has considered the brevity of the objectionable statements, the emphasis that the prosecutor placed on the statements, the persuasiveness of the statements, and the strength of the state's evidence. *See State v. Wren*, 738 N.W.2d 378, 394 (Minn. 2007). Our review of the prosecutor's closing argument reveals that the improper comments were not the main points of emphasis and were not particularly persuasive. But the most significant factor in this case is that the evidence against Love was very strong, if not overwhelming. The video-recording shows Love sitting next to R.G. on the train. It shows Love's right arm moving in a repetitive motion while his right hand and lap are hidden from view behind a backpack that was resting on his knees and leaning against the seat back in front of him. Shortly thereafter the video-recording shows R.G. escape from her seat by climbing over the seat in front of her. R.G. reported the incident to law enforcement as soon as her train arrived at the mall, and she visually identified Love minutes later. Her testimony was corroborated by the testimony of two mall security officers and two police officers. At trial, Love's attorney had little to say in closing argument except that the video-recording is unclear, that "[w]e don't know exactly what happened there," and that R.G.'s testimony "was a little confusing." After reviewing the trial record, we conclude that the prosecutor's misconduct is "harmless beyond a reasonable doubt," *McDaniel*, 777 N.W.2d at 749, and 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," *Ramey*, 721 N.W.2d at 302 (quotation omitted).

***6** Thus, Love is not entitled to a new trial on the ground of prosecutorial misconduct.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2020 WL 3957240

Footnotes

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