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# Without a Doubt, A Sharp and Radical Departure: The Minnesota Supreme Court's Decision to Change Plain Error Review of Unobjected-To Prosecutorial Error in State v. Ramsey

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# Without a Doubt, A Sharp and Radical Departure: The Minnesota Supreme Court's Decision to Change Plain Error Review of Unobjected-To Prosecutorial Error in *State v. Ramsey*

## **Keywords**

Preservation of issues for appeal (Law), Judicial error, Objections (Evidence)

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DEPARTURE: THE MINNESOTA SUPREME COURT’S  
DECISION TO CHANGE PLAIN ERROR REVIEW OF  
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STATE V. RAMEY**

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DEPARTURE: THE MINNESOTA SUPREME COURT'S  
DECISION TO CHANGE PLAIN ERROR REVIEW OF  
UNOBJECTED-TO PROSECUTORIAL ERROR IN  
STATE V. RAMEY**

*James A. Morrow and Joshua R. Larson*<sup>1</sup>

In other men we faults can spy,  
And blame the mote that dims their eye,  
Each little speck and blemish find,  
To our own [plain] errors blind.<sup>2</sup>

### I. INTRODUCTION

To err is human, and to err in a courtroom is inevitable. Prosecutorial error is an unfortunate aspect of the criminal justice system. Prosecutors are obligated to ensure that criminal defendants receive fair trials<sup>3</sup> and are expected to be aware of and comply with case law which clearly and consistently outlines the rules that guarantee defendants a fair trial.<sup>4</sup> At the same time, defense attorneys are obligated to object to prosecutorial error when it occurs and seek corrective action by the trial court.<sup>5</sup> Ideally, a prosecutor would never err, but, if he or she did err, the defense attorney would object and the trial court would remedy any prejudicial effect or grant a mistrial if the error could not be cured.

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<sup>1</sup> Jim Morrow is a Senior Fellow and Professor of Law at Hamline University School of Law and a senior Minnesota district court judge. Joshua Larson received his Juris Doctor from Hamline University School of Law, May 2008, and is a law clerk for the Minnesota Court of Appeals during the 2008-2009 term. The authors wish to thank Rachel Morrison, Staff Attorney for the 10th Judicial District, Minn.; Mark Metz, Assistant Carver County Attorney (Minn.); Chief Judge Bill Johnson for the 3rd Judicial District, Minn.; Professors Peter Thompson, Marie Failingler, Joe Daly, Mary Jane Morrison, and Edwin Butterfoss, Professors at Hamline University School of Law; and the *Hamline Law Review* staff for their assistance. This article exchanges the word "error" for the word "misconduct" in all but direct quotations. The readers should know, however, that courts in Minnesota at this time use the word "misconduct" to refer to any errors committed by a prosecutor, regardless of how slight or unintentional. *See infra* Part II.D.

<sup>2</sup> John Gay, *The Turkey and the Ant*, in *FABLES: WITH A MEMOIR BY AUSTIN DOBSON* 98, 98 (Kessinger Publ'g 2007) (1727).

<sup>3</sup> *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006) (citing *State v. Henderson*, 620 N.W.2d 688, 701-02 (Minn. 2001) and *State v. Sha*, 193 N.W.2d 829, 831 (Minn. 1972)). Note, however, that "the Constitution guarantees a fair trial - not a perfect or error-free trial." *State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) (citing *State v. Greenleaf*, 591 N.W.2d 488, 505 (Minn. 1999)); *see also* *State v. Martin*, 723 N.W.2d 613, 626 (Minn. 2006).

<sup>4</sup> *Ramey*, 721 N.W.2d at 301.

<sup>5</sup> *Id.* at 303.

When a defense attorney does not make a specific and timely objection<sup>6</sup> to a prosecutor's error, her failure to object implies that the error was not prejudicial,<sup>7</sup> and she "generally forfeits the right to have [the error] considered on appeal."<sup>8</sup> The defendant still may appeal based on that error;<sup>9</sup> however, if the appellate court opts to review the claim, the standard generally used to review claims of unobjected-to prosecutorial error, namely "plain error review," has a high threshold of persuasion that makes it difficult for defendants to prevail on appeal.<sup>10</sup> Under plain error review, if a prosecutor commits an error at trial and the defendant does not object to it, the defendant later may ask the appellate court to order a new trial, but the court will do so only if the error was *plain*, the error affected the defendant's substantial rights,<sup>11</sup> i.e., the right to a fair trial,<sup>12</sup> and the court determines that "it should address the error to ensure fairness and the integrity of the judicial proceedings."<sup>13</sup> Furthermore, until recently, Minnesota courts handled the

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<sup>6</sup> MINN. R. EVID. 103(a)(1).

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection*. In case the ruling is one admitting evidence a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . .

*Id.*

<sup>7</sup> See, e.g., *State v. Parker*, 353 N.W.2d 122, 128 (Minn. 1984) (finding defendant's "failure to object to the prosecutor's statements implies that the comments were not prejudicial.").

<sup>8</sup> *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005) (citing *State v. Sanders*, 598 N.W.2d 650, 656 (Minn. 1999)); see also MINN. R. EVID. 103(d) (stating that, without a proper objection, the court may take notice of only "errors in fundamental law or of plain errors affecting substantial rights").

<sup>9</sup> *State v. Ramey*, 721 N.W.2d 294, 297-98 (Minn. 2006).

<sup>10</sup> *Id.* at 298-99; see also *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999).

This is a standard with a *high threshold* of persuasion: the trial error must have been so clear under applicable law at the time of conviction, and so prejudicial to the defendant's right to a fair trial, that the defendant's failure to object - and thereby present the trial court with an opportunity to avoid prejudice - should not forfeit his right to a remedy.

*Id.* (citing *Rairdon v. State*, 557 N.W.2d 318, 323 (Minn. 1996)) (emphasis added).

<sup>11</sup> See *Ramey*, 721 N.W.2d at 300 (describing the test for reviewing unobjected-to prosecutorial misconduct); see also *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003) (identifying, based on the seriousness of the prosecutorial misconduct, two distinct standards for reviewing whether the defendant's right to a fair trial was impaired); *State v. Wahlberg*, 296 N.W.2d 408, 420 (Minn. 1980) (observing that reversal is warranted only where misconduct, "viewed in the light of the whole record, appears to be inexcusable and so serious and prejudicial" that the defendant was denied the right to a fair trial).

<sup>12</sup> See *Ramey*, 721 N.W.2d at 300. The court uses the phrase "the defendant's substantial rights" but explains the meaning of that concept by stating that "[t]he overarching concern is that [prosecutorial] misconduct may deny the defendant's right to a fair trial." *Id.*

<sup>13</sup> *Id.* at 298 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The court normally described the plain error test as having "three prongs," in that "there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." See *id.* To date, the

burden of proof on claims of unobjected-to prosecutorial error in the same way federal and most state courts around the country handle it, by placing the entire burden of proof on the defendant.<sup>14</sup> Federal courts apply Federal Rule of Criminal Procedure 52(b)<sup>15</sup> when addressing claims of unobjected-to prosecutorial error.<sup>16</sup> The majority of state courts which apply plain error

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court has not explained whether the plain error test is better characterized as a four-prong test, with the fourth prong being a requirement that the appellate court find a reason to “address the error to ensure fairness and the integrity of the judicial proceedings.” *See id*; *see also* State v. Dobbins, 725 N.W.2d 492, 508 (Minn. 2006).

If the three prongs of the plain error test are met, we will then assess whether we should address the error to ensure fairness and the integrity of the judicial proceedings. “We will correct the error only if the fairness, integrity, or public reputation of the judicial proceedings is seriously affected.”

*Id.* (citing State v. Morton, 701 N.W.2d 225, 234 (Minn. 2005)).

<sup>14</sup> *See, e.g.*, People v. Washington, No. 03CA1895, 2007 WL 1557923, at \*16 (Colo. App. May 31, 2007) (stating that defendant has the burden of establishing plain error through the following factors: “the severity and frequency of the misconduct, any curative measures taken to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to [the] defendant’s conviction”); State v. D’Haity, 914 A.2d 570, 578-79 (Conn. App. Ct. 2007) (holding that the defendant has the burden and that “the touchstone for appellate review of claims of [unobjected-to] prosecutorial misconduct is a determination of whether the defendant was deprived of his right to a fair trial”); People v. Sullivan, 853 N.E.2d 754, 769 (Ill. App. Ct. 2006) (applying plain error, stating that the defendant must establish that prosecutorial misconduct “resulted in substantial prejudice to the accused and, absent the remarks, the verdict would have been different”); People v. Benoit, No. 246512, 2004 WL 915084, at \*2 (Mich. Ct. App. Apr. 29, 2004) (stating the defendant must show unobjected-to prosecutorial misconduct was plain error affecting the defendant’s substantial rights); State v. Barnett, 980 S.W.2d 297, 306 (Mo. 1998) (implying that the reviewing court will only partake in a plain error review if the defendant demonstrates that the prosecutor’s statements resulted in “manifest injustice”); Hernandez v. State, 50 P.3d 1100, 1108-09 (Nev. 2002) (stating that the court may review a claim of prosecutorial misconduct if the defendant can show it was plain error that affected the defendant’s substantial rights); State v. Muhle, 737 N.W.2d 647, 657 (N.D. 2007) (stating the defendant has the burden of establishing the existence of a plain error by establishing that there was an “(1) error, (2) that is plain, and (3) affects substantial rights”); State v. Jones, 744 N.E.2d 1163, 1182 (Ohio 2001) (holding that where the defendant fails to object to prosecutorial misconduct, the defendant waives all but plain error and cannot prevail unless the defendant demonstrates that but for the prosecutor’s misconduct the outcome of trial would have been different); State v. Bolen, 632 S.E.2d 922, 928 (W. Va. 2006) (stating that with regard to unobjected-to errors, the defendant must establish that the error was plain and affected the defendant’s substantial rights); Lancaster v. State, 43 P.3d 80, 94 (Wyo. 2002) (applying plain error rule, stating that the defendant has the burden of showing that the “record clearly reflects an error that transgressed a clear and unequivocal rule of law, and that such error materially prejudiced a substantial right”).

<sup>15</sup> FED. R. CRIM. P. 52(b) (“Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”).

<sup>16</sup> *See, e.g.*, United States v. Morris, 498 F.3d 634, 642 (7th Cir. 2007) (stating that, for reversal, there first must be “(1) ‘error,’ (2) that is ‘plain,’ and (3) that ‘affect[s] substantial rights’”) (quoting Johnson v. United States, 520 U.S. 461, 467 (1997)); United States v. Fields, 483 F.3d 313, 358 (5th Cir. 2007) (“Improper prosecutorial comments constitute reversible error only where the defendant’s right to a fair trial is substantially affected.”); United States v. O’Keefe, 461 F.3d 1338, 1350 (11th Cir. 2006) (“We will reverse

require the defendant to show that the error was plain—or “clearly contrary to the law”<sup>17</sup>—and that the error was so prejudicial that it denied the defendant his or her right to a fair trial.<sup>18</sup>

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a defendant’s conviction on the basis of prosecutorial misconduct only where the prosecutor’s ‘remarks (1) were improper and (2) prejudiced the defendant’s substantive rights.’”) (quoting *United States v. Hernandez*, 145 F.3d 1433, 1438 (11th Cir. 1998)); *United States v. Combs*, 379 F.3d 564, 568 (9th Cir. 2004) (stating that, under the plain error standard, a defendant must prove (1) there was error; (2) the error was plain; and (3) the error affected substantial rights); *United States v. Venable*, 269 F.3d 1086, 1089-90 (D.C. Cir. 2001) (applying plain error doctrine under Federal Rule of Criminal Procedure 52(b) to claim on unobjected-to prosecutorial misconduct, placing the burden of persuasion for each element on the defendant); *United States v. Emuegbunam*, 268 F.3d 377, 406 (6th Cir. 2001) (applying plain error doctrine under Federal Rule of Criminal Procedure 52(b) to claim on unobjected-to prosecutorial misconduct, placing the burden of persuasion for each element on the defendant); *Johnson v. Gibson*, 169 F.3d 1239, 1250 (10th Cir. 1999) (stating that the court reviews allegedly improper prosecutorial misconduct to determine whether it “so infected the trial with unfairness as to make the resulting conviction a denial of due process”) (citation omitted); *United States v. Hopkins*, No. 94-1337, 1995 WL 70162, at \*3 (1st Cir. Feb. 22, 1995) (applying the plain error standard of review to unobjected-to prosecutorial misconduct and stating that the court “will reverse only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings, or where a miscarriage of justice has occurred”); *United States v. Karam*, 37 F.3d 1280, 1289 (8th Cir. 1994) (“In evaluating allegations of prosecutorial misconduct alleging improper statements during closing argument, this court asks: (1) whether the prosecutor’s comments were improper; and (2) if so, did such remarks prejudicially affect the defendant’s substantial rights in obtaining a fair trial.”); *United States v. Moore*, 11 F.3d 475, 481 (3d Cir. 1993) (applying plain error to unobjected-to prosecutorial misconduct, finding that, though the prosecutor’s description of the defendants as “liars” was plain, reversal was not required since defendant failed to establish that his substantial rights were affected); *United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1983) (stating that one factor the court looks to when examining claims of prosecutorial misconduct is the degree to which the prosecutor’s remarks have a tendency to mislead the jury and to prejudice the accused).

<sup>17</sup> *State v. Johnson*, 699 N.W.2d 335, 340 (Minn. Ct. App. 2005) (quoting *Johnson v. United States*, 520 U.S. 461, 466-67 (1997)); *see also State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) (stating an error is plain if it is “clearly contrary to the law”).

<sup>18</sup> *See, e.g., Ward v. State*, 765 So. 2d 299, 301 (Fla. Dist. Ct. App. 2000) (holding that where the defendant fails to object to prosecutorial error the court must determine whether fundamental error occurred); *State v. Iuli*, 65 P.3d 143, 151 (Haw. 2003) (stating that where a defendant fails to object to a prosecutor’s statement during closing argument, appellate review is limited to a determination of whether the prosecutor’s alleged misconduct amounted to plain error that affected the substantial rights of the defendant); *State v. Sheahan*, 77 P.3d 956, 969 (Idaho 2003) (stating that a conviction will be set aside for prosecutorial misconduct only when the conduct results in fundamental error such that the conduct was “calculated to inflame the minds of jurors and arouse passion or prejudice against the defendant, or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence”); *State v. Broyles*, 36 P.3d 259, 264 (Kan. 2001) (stating that the court’s standard of review of prosecutorial misconduct, whether objected-to or unobjected-to, is whether the claimed error is determined to have implicated the defendant’s right to a fair trial); *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003) (stating that if the defendant fails to object to prosecutorial misconduct at trial, the defendant forfeits the right to have the issue heard on appeal unless “the error is sufficient”); *State v. Barfield*, 723 N.W.2d 303, 312 (Neb. 2006) (applying plain error review of unobjected-to prosecutorial misconduct, and finding plain error when the error “prejudicially affects a litigant’s substantial rights”); *State v.*



However, in September 2006, the Minnesota Supreme Court altered the test used to review claims of unobjected-to prosecutorial error in *State v. Ramey*.<sup>19</sup> The majority in *Ramey* chose to alter the test to “better allow substantive [appellate] review of conduct that prosecutors should know is clearly forbidden and to put the onus on the prosecution to defend against the prejudicial effect of its own misconduct.”<sup>20</sup> Specifically, the majority shifted the burden of proof with regard to claims of unobjected-to prosecutorial error by holding that the defendant need only establish plain error. The state can avoid retrial only by proving a negative, that the error did not affect the defendant’s right to a fair trial.<sup>21</sup>

The shifting of this burden of proof prompted sharp criticism from concurring Justices Paul Anderson, G. Barry Anderson and Lorie Gildea<sup>22</sup> and made *Ramey* a controversial case among practitioners. There are several serious problems with *Ramey*, and this article will address four of them.

First, the majority in *Ramey* relied on an erroneous assumption, namely that the Minnesota Supreme Court cases defining prosecutorial error are clear and obvious.<sup>23</sup> Under the majority’s reasoning, the increased threat of reversal would compel prosecutors to follow the court’s rules, and, thus, presumably, prosecutors would reduce their incidents of error.<sup>24</sup> A review of Minnesota Supreme Court precedent—at least with regard to prosecutorial vouching in closing argument, the error that seemed to raise the majority’s ire in *Ramey*—shows a confusing, contradictory jurisprudence.

Second, despite holding that the trial court is in the best position to “attempt to remedy the effects of [prosecutorial error],”<sup>25</sup> the majority has jeopardized the ability of trial courts to remedy unfair prejudice when it

Gonzales, 817 P.2d 1186, 1192 (N.M. 1991) (holding that unobjected-to prosecutorial misconduct is reviewed for fundamental error and will be deemed harmless only if there is no reasonable probability that the misconduct did not contribute to the conviction); Powell v. State, 995 P.2d 510, 536-39 (Okla. Crim. App. 2000) (holding that unobjected-to prosecutorial misconduct is reviewed for plain error and whether the error had a substantial influence on the outcome of trial); *State v. Humphrey*, Nos. 53155-7-I, 53065-8-I, 2004 WL 2526545, at \*6 (Wash. Ct. App. Nov. 8, 2004) (“A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so flagrant and ill intentioned that it caused enduring and resulting prejudice that a curative instruction could not have remedied.”).

<sup>19</sup> *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 296.

<sup>22</sup> See *id.* at 303 (P. Anderson, J., concurring); *id.* at 304-07 (Gildea, J., concurring, joined by G.B. Anderson, J.).

<sup>23</sup> See *infra* Part III.A; see also *Ramey*, 721 N.W.2d at 299-300, 301-02 (majority opinion). The *Ramey* Court “expect[s] that prosecutors . . . are aware of [its] case law proscribing particular conduct as well as the standards of conduct prescribed by the ABA,” and, with its decision in *Ramey*, aimed to prevent “conduct that prosecutors *should know is clearly forbidden*.” *Id.* (emphasis added). “An error is plain if it was ‘clear’ or ‘obvious.’” *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002).

<sup>24</sup> *State v. Ramey*, 721 N.W.2d 294, 301-03 (Minn. 2006).

<sup>25</sup> *Id.* at 299.

occurs by providing an incentive to defense attorneys to remain silent when prosecutors commit prosecutorial error.<sup>26</sup> Typically, jurors view their trial judge with great deference, and a judge’s influence over jurors provides the judge with a remarkable ability to remedy unfair prejudice.<sup>27</sup> The *Ramey* holding diminishes the contemporaneous objection rule, which states that a failure to make a specific and timely objection to an error forfeits consideration of the error on appeal.<sup>28</sup> *Ramey* also affects the neutrality of trial court judges, who now must second-guess omitted objections by defense counsel. As a result, it seems likely that appellate courts will hear more appeals based on unobjected-to error. Such a result runs counter to the Minnesota Rules of Evidence and the fundamental principles of the jury system.

Third, *Ramey* contradicts the ideals of judicial restraint.<sup>29</sup> The majority’s decision to abandon precedent and shift the crucial burden of proof in the plain error test from the defendant to the prosecutor was made without the benefit of any briefs on the issue, any oral arguments on the issue, or any model from any other jurisdictions.

Fourth, the *Ramey* majority’s use of the term “prosecutorial misconduct” is problematic and misleading.<sup>30</sup> Following the sound reasoning of the Connecticut Supreme Court,<sup>31</sup> many other state courts,<sup>32</sup> and a proposal by the Minnesota County Attorneys Association,<sup>33</sup> this article recommends that the court reserve the term “prosecutorial misconduct” to refer only to improper acts that are intentional and deliberate and that the court use the term “prosecutorial error” for those errors that are unintentional or innocuous. To flesh out the distinction between error and misconduct, this article refers to several Minnesota Supreme Court cases from 1921 to 1966 that exemplify prosecutorial misconduct during closing argument.

The article concludes by stating that the Minnesota Supreme Court should reinstate the *State v. Griller* test for unobjected-to prosecutorial error,<sup>34</sup> placing the burden solely on the defendant, consistent with prior Minnesota precedent, most of the other state courts, the Federal Circuits, and the United States Supreme Court.<sup>35</sup> Assuming *Ramey* remains the law, a

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<sup>26</sup> See *infra* Part III.B.  
<sup>27</sup> Judge Morrow has found this to be true in his more than twenty-four years of experience on the bench and as an educator of new and experienced trial judges.  
<sup>28</sup> See *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001); see also MINN. R. EVID. 103.  
<sup>29</sup> See *infra* Part III.C.  
<sup>30</sup> See *infra* Part III.D.  
<sup>31</sup> See *State v. Fauci*, 917 A.2d 978, 982 n.2 (Conn. 2007).  
<sup>32</sup> See *infra* note 293 and accompanying text.  
<sup>33</sup> John Kingrey, Minnesota County Attorneys Assoc., Memorandum on Prosecutorial Error Recommendation (Apr. 25, 2007), <http://www.mcaa-mn.org/docs/2007/Prosecutorial%20Error%20Memo5-17-07.doc>.  
<sup>34</sup> See *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).  
<sup>35</sup> See *infra* Part V.

better way for the court to reduce prosecutorial error is to use its opinions to develop clearer distinctions between improper and proper argument.<sup>36</sup>

## II. SUMMARY OF *STATE V. RAMEY*

### *A. Facts*

In February 2003, Sherry Smith obtained an order for protection against the defendant, Scott Ramey, as a result of the defendant's multiple unwanted attempts to contact her.<sup>37</sup> On April 8, 2003, Ramey entered Smith's bedroom and awakened her by kissing her.<sup>38</sup> Smith phoned the police to report the incident and was informed that Ramey had not yet been served with the order.<sup>39</sup> Ramey returned to Smith's residence again that evening, and Smith phoned 911.<sup>40</sup> The police arrived and served Ramey with the order for protection, which advised Ramey that he was prohibited from contacting Smith in any way.<sup>41</sup> Later that same day, Smith received a phone call from Ramey at her workplace.<sup>42</sup> After a few seconds, Smith hung up and phoned the police, and Ramey was arrested.<sup>43</sup>

Ramey was charged with felony violation of an order for protection under Minnesota Statute § 518B.01, subdivision 14(d)(1) due to previous convictions related to domestic violence.<sup>44</sup> At trial, Smith testified about the call and identified the defendant as the caller.<sup>45</sup> Ramey did not testify.<sup>46</sup> The jury convicted Ramey of violating the order for protection.<sup>47</sup> The district court sentenced Ramey to "a stayed commitment of 21 months and a partially stayed \$3000 fine, plus completion of a domestic abuse or anger management program."<sup>48</sup> Ramey appealed his conviction to the Minnesota Court of Appeals.<sup>49</sup>

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<sup>36</sup> See *infra* Part V.

<sup>37</sup> *State v. Ramey*, No. A04-1056, 2005 WL 832054, at \*1 (Minn. Ct. App. Apr. 12, 2005), *rev'd*, 721 N.W.2d 294 (Minn. 2006).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *State v. Ramey*, No. A04-1056, 2005 WL 832054, at \*1 (Minn. Ct. App. Apr. 12, 2005), *rev'd*, 721 N.W.2d 294 (Minn. 2006).

<sup>44</sup> *Id.*; MINN. STAT. § 518B.01, subd. 14(d)(1) (2003).

<sup>45</sup> *Ramey*, 2005 WL 832054, at \*1.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

### B. The First Minnesota Court of Appeals Decision

The defendant raised two issues on appeal.<sup>50</sup> First, he claimed that the trial court committed plain error when it instructed the jury that it should not draw any adverse inference from the defendant's decision not to testify without first obtaining the defendant's request or consent.<sup>51</sup> Second, the defendant claimed that the prosecutor committed "prosecutorial misconduct"<sup>52</sup> when the prosecutor made four statements in closing argument<sup>53</sup> that, according to the defendant, "improperly interjected the state's opinion and improperly vouched for witnesses."<sup>54</sup> The statements were as follows:

(1) The State charged Mr. Ramey, entered this trial believing he's guilty.

(2) That would be a big coincidence if it wasn't the defendant, and the State believes that would be too big of a coincidence. The State believes that's too big of a bridge to jump.

(3) The State believes [the victim's] testimony is credible. The officer[s'] testimony is credible and you should believe what they told you.

(4) We suggest there [is] no evidence that you can find that [the victim] was somehow affected, that she couldn't have - couldn't have accurately identified Ramey's voice.<sup>55</sup>

The defense attorney did not object to any of these statements at trial.<sup>56</sup>

The Minnesota Court of Appeals reversed the conviction, holding that the defendant was denied a fair trial because the no-adverse-inference instruction was plain error and the prosecutor's comments were error that worked in concert with the erroneous instruction to "substantially influence [] the jury to convict."<sup>57</sup> In reviewing the alleged prosecutorial error, the

<sup>50</sup> *Id.* at \*\*1-2; *see also* State v. Ramey, 721 N.W.2d 294, 297 n.1 (Minn. 2006).

<sup>51</sup> State v. Ramey, No. A04-1056, 2005 WL 832054, at \*1 (Minn. Ct. App. Apr. 12, 2005), *rev'd*, 721 N.W.2d 294 (Minn. 2006). The judge received the defense counsel's consent, but the judge did not obtain the defendant's personal consent on the record. *Id.* Minnesota law states that it is error to give the instruction without the defendant's consent. *Id.* (citing State v. Darris, 648 N.W.2d 232, 240 (Minn. 2002); McCollum v. State, 640 N.W.2d 610, 617 (Minn. 2002); MINN. STAT. § 611.11 (2002)).

<sup>52</sup> *Id.*

<sup>53</sup> *See* Ramey, 721 N.W.2d at 297 n.1. Subsequent to its 2005 decision and the Minnesota Supreme Court's 2006 Ramey decision, the court of appeals determined that the first of these four statements had been made in the State's opening statement—not the closing argument. *See* State v. Ramey, No. A04-1056, 2007 WL 1247145, at \*3 (Minn. Ct. App. May 1, 2007).

<sup>54</sup> State v. Ramey, No. A04-1056, 2005 WL 832054, at \*1 (Minn. Ct. App. Apr. 12, 2005), *rev'd*, 721 N.W.2d 294 (Minn. 2006).

<sup>55</sup> Ramey, 721 N.W.2d at 297 n.1.

<sup>56</sup> Ramey, 2005 WL 832054, at \*2.

<sup>57</sup> *Id.* at \*3.

court of appeals applied a two-tiered approach that the Minnesota Supreme Court created in *State v. Caron*.<sup>58</sup> *Caron* stated:

The test of determining whether prosecutorial misconduct was harmless depends partly upon the type of misconduct with which we are dealing. That is, the more serious the misconduct, the more certain of its effect this court has felt that it should be before labeling the error harmless. Thus, in cases involving unusually serious prosecutorial misconduct this court has required certainty beyond a reasonable doubt that the misconduct was harmless before affirming. . . . On the other hand, in cases involving less serious prosecutorial misconduct this court has applied the test of whether the misconduct likely played a substantial part in influencing the jury to convict.<sup>59</sup>

The court of appeals in *Ramey* determined that the alleged “prosecutorial misconduct” was “less serious” but did not clarify whether the prosecutor’s statements alone would have demanded reversal.<sup>60</sup> The court held only that a new trial was necessary because the conviction was substantially influenced by the erroneous jury instruction and improper statements.<sup>61</sup>

The State petitioned the Minnesota Supreme Court for review, claiming the court of appeals erred in applying the two-tiered *Caron* analysis to *Ramey*’s claim of prosecutorial error because *Ramey* had not objected to the alleged error.<sup>62</sup> The State argued that, in applying *Caron*’s “substantial influence on the conviction” test, the court of appeals failed to review the alleged unobjected-to error according to Minnesota Supreme Court precedent, which demanded the “plain error” standard of review.<sup>63</sup>

### C. The Minnesota Supreme Court Decision

#### 1. The Majority Opinion

The Minnesota Supreme Court agreed to review the case to clarify “(1) whether the plain error doctrine applies to unobjected-to prosecutorial misconduct,” and (2) what legal standard should be applied to determine whether the alleged error is prejudicial.<sup>64</sup> The State asked the court to apply the plain error test, which had been applied to most claims of unobjected-to prosecutorial error since the court established the *Griller* test in 1998.<sup>65</sup> On

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<sup>58</sup> *Id.* at \*2; see also *State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974).

<sup>59</sup> *Caron*, 218 N.W.2d at 200.

<sup>60</sup> *Ramey*, 2005 WL 832054, at \*2-3.

<sup>61</sup> See *id.* at \*3.

<sup>62</sup> *State v. Ramey*, 721 N.W.2d 294, 296 (Minn. 2006).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 301.

the other hand, the defendant asked the court to apply a harmless-beyond-a-reasonable-doubt standard when assessing prejudice.<sup>66</sup> It is surprising, considering the court's ultimate ruling, that neither party briefed the idea of shifting the burden in the plain error test to the state<sup>67</sup> and that neither of the parties nor any of the justices raised the issue of shifting the burden or proposed such a remedy at oral argument.<sup>68</sup>

Since the 1980s, the Minnesota Supreme Court has not applied a consistent standard for analyzing claims of unobjected-to prosecutorial error.<sup>69</sup> The *Ramey* majority stated that the court oscillated between plain-error review and the two-tiered "*Caron* standard," sometimes applying one and sometimes applying the other,<sup>70</sup> and apparently settled on plain-error review within the previous eight years.<sup>71</sup> After weighing the merits of the different standards, the majority went on to hold that, in cases involving unobjected-to prosecutorial error, the *Caron* standard would be abandoned<sup>72</sup> in favor of the plain-error doctrine, which requires reversal only when there is a clear or obvious error that affects the defendant's right to a fair trial.<sup>73</sup> According to the court, plain error review is useful because it strikes a suitable balance between encouraging defendants to object at trial<sup>74</sup> and

<sup>66</sup> *Id.*

<sup>67</sup> See Appellant's Brief and Appendix, *State v. Ramey*, 721 N.W.2d 294 (Minn. 2006) (No. A04-1056), 2005 WL 4829521 (arguing in favor of applying the *Griller* plain-error test for unobjected-to prosecutorial error without suggesting or addressing the possibility of shifting the burden of proof); Respondent's Brief, *State v. Ramey*, 721 N.W.2d 294 (Minn. 2006) (No. A04-1056), 2005 WL 4859274 (asking the court to reject plain-error analysis and apply a harmless-beyond-a-reasonable-doubt standard); *Ramey*, 721 N.W.2d at 303 (P. Anderson, J., concurring).

<sup>68</sup> See Minnesota Supreme Court Oral Arguments - Videos, <http://www.tpt.org/courts/> (search for case "A04-1056," follow "State v. Ramey" hyperlink).

<sup>69</sup> *Ramey*, 721 N.W.2d at 298. The *Caron* standard requires that in cases involving unusually serious prosecutorial misconduct, the Court [had to find] certainty beyond a reasonable doubt that the misconduct was harmless before affirming . . . [and], in cases involving less serious prosecutorial misconduct [the] court [had to find that] . . . the misconduct likely played a substantial part in influencing the jury to convict.

*Id.* (citing *State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974)). For cases of unobjected-to prosecutorial error, the *Caron* standard made it difficult for a defendant to succeed on appeal because the court held that a defendant's "failure to object to the prosecutor's statements implies that the comments were not prejudicial." See, e.g., *State v. Parker*, 353 N.W.2d 122, 128 (Minn. 1984).

<sup>70</sup> *Id.* at 298; see, e.g., *State v. Griller*, 583 N.W.2d 736, 740-41 (Minn. 1998) (clarifying *State v. Brown*, 348 N.W.2d 743, 747 (Minn. 1984), which applied the *Caron* standard); *State v. Atkins*, 355 N.W.2d 410, 411 (Minn. 1984) (discussing the plain error doctrine); *State v. Bland*, 337 N.W.2d 378, 384 (Minn. 1983) (discussing the plain error doctrine).

<sup>71</sup> *State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006).

<sup>72</sup> *Id.* at 300.

<sup>73</sup> *Id.* at 299.

<sup>74</sup> *Id.* at 298-99 ("When a defendant does not make a contemporaneous objection, the district court does not have the opportunity to rule on the misconduct or make a determination as to whether a corrective instruction is required or appropriate.").

“tempers the blow of a rigid application of the contemporaneous-objection requirement.”<sup>75</sup> Plain error review also has a basis in the Minnesota Rules of Criminal Procedure<sup>76</sup> and is designed to carefully balance the desire to police “obvious injustice” against the “need to encourage all trial participants to seek a fair and accurate trial the first time.”<sup>77</sup>

After describing the plain error doctrine as defined by *Griller*,<sup>78</sup> the majority noted that it did not wish to follow *Griller* completely when examining prosecutorial error.<sup>79</sup> Under *Griller*, the defendant bears the entire burden of proving that (1) there was error, (2) the error was plain, and (3) the defendant’s substantial rights were prejudiced.<sup>80</sup> The court decided that since prosecutorial error recently had become significantly more troubling, defendants should not be forced to bear the entire burden of proof when raising claims of unobjected-to prosecutorial error.<sup>81</sup> Instead, the court held that if a defendant’s claim is related to unobjected-to prosecutorial error, the defendant must demonstrate only that the prosecutor committed an error and that the error was plain, clear or obvious.<sup>82</sup> If the defendant is successful in demonstrating plain error, the burden—apparently a heavy burden—shifts to the state to prove a negative, that the error did not affect his substantial rights.<sup>83</sup>

<sup>75</sup> *Id.* at 299 (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)).

<sup>76</sup> *Id.* at 297 (citing MINN. R. CRIM. P. 31.02, which states, “Plain errors or defects affecting substantial rights may be considered . . . on appeal although they were not brought to the attention of the trial court.”).

<sup>77</sup> *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006) (quoting *United States v. Frady*, 456 U.S. 152, 163 (1982)).

<sup>78</sup> *Id.* at 298-99 (citing *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998)).

<sup>79</sup> *Id.* at 299-300.

<sup>80</sup> *Id.* at 300 (citing *Griller*, 583 N.W.2d at 741).

<sup>81</sup> *Id.* Apparently, the court felt that it was more troubling that other types of unobjected-to error receive standard plain error review. *See, e.g., Griller*, 583 N.W.2d at 740 (improper jury instructions); *State v. Martin*, 695 N.W.2d 578, 582-83 (Minn. 2005) (hearsay); *Bernhardt v. State*, 684 N.W.2d 465, 475-76 (Minn. 2004) (Confrontation Clause violations); *State v. Manley*, 664 N.W.2d 275, 283 (Minn. 2003) (failure to provide a limited instruction); *State v. Asfeld*, 662 N.W.2d 534, 540 (Minn. 2003) (references to past domestic abuse); *State v. Budreau*, 641 N.W.2d 919, 925 (Minn. 2002) (references to past murders); *State v. Lee*, 645 N.W.2d 459, 466-67 (Minn. 2002) (improper admission of evidence regarding relationship with victim); *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001) (improper *Spreigl* testimony); *State v. Bauer*, 598 N.W.2d 352, 363 (Minn. 1999) (improper expert testimony); *State v. Patterson*, 587 N.W.2d 45, 52 (Minn. 1998) (narrative testimony).

<sup>82</sup> *Ramey*, 721 N.W.2d at 302; *see also State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (“An error is plain if it was ‘clear’ or ‘obvious.’”).

<sup>83</sup> *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006) (“[W]hen prosecutorial misconduct reaches the level of plain or obvious error - conduct the prosecutor should know is improper - the prosecution should bear the burden of demonstrating that its misconduct did not prejudice the defendant’s substantial rights.”). The court explained that the state would meet its burden if it could show 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.* at 302. Previously, the court has characterized the third prong as a “heavy burden” to satisfy, *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998), with a “high threshold of persuasion,” *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999).

To understand the majority's reasoning, it is important to note that the majority dedicated most of its opinion to addressing the frequency of cases involving alleged prosecutorial error.<sup>84</sup> Starting with a laundry list of eight types of improper prosecutorial conduct that the court reviewed since 1984,<sup>85</sup> the majority explained that, from its perspective, prosecutors repeatedly and knowingly engage in conduct that is obviously impermissible<sup>86</sup> despite the fact that they are "officer[s] of the court" and "minister[s] of justice," charged with the affirmative obligation to attain justice.<sup>87</sup> According to the majority, such impermissible conduct from prosecutors is intolerable because the court's jurisprudence provides prosecutors the clear opportunity to know when their actions are improper.<sup>88</sup> The court concluded that plain error review under *Griller* lacks a sufficient intimidating effect to keep prosecutors from violating the law and that changing the appellate standard of review was necessary to restore and protect the "fairness, integrity, or public reputation of judicial proceedings."<sup>89</sup>

In contrast to the court's lengthy discussion of prosecutorial error, the court spent very little time citing case law that compelled its decision to shift the burden of proof.<sup>90</sup> In fact, the majority's opinion surprisingly cited only three cases, all from other jurisdictions, to justify and support its holding.<sup>91</sup> The majority cited *California v. Chapman*, a case in which the United States Supreme Court held that constitutional error can be harmless.<sup>92</sup> In *Chapman*, the Court placed the burden on "the beneficiary of the error

<sup>84</sup> *Ramey*, 721 N.W.2d at 301.

<sup>85</sup> *Id.* at 300.

We have identified numerous kinds of trial conduct that are improper for prosecutors. Some examples are: eliciting inadmissible evidence; alluding in argument to the defendant's exercise of the right not to testify, or to the defendant's failure to call witnesses; misstating the presumption of innocence, or the burden of proof; interjecting the prosecutor's personal opinion about the veracity of witnesses; inflaming the passions and prejudices of the jury; disparaging the defendant's defense to the charges; and injecting race into the case when race is not relevant.

*Id.* at 300 (citations omitted).

<sup>86</sup> *Id.* at 299-300, 302.

<sup>87</sup> *Id.* at 300; *see also* State v. Henderson, 620 N.W.2d 688, 701-02 (Minn. 2001) (providing prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial).

<sup>88</sup> *Ramey*, 721 N.W.2d at 299-302. The *Ramey* court "expect[s] that prosecutors . . . are aware of [its] case law proscribing particular conduct as well as the standards of conduct prescribed by the ABA," and, with its decision in *Ramey*, aimed to prevent "conduct that prosecutors *should know is clearly forbidden*." *Id.* at 301-02 (emphasis added).

<sup>89</sup> *See id.* at 302 (stating that, even when all three prongs of the plain error test are satisfied, the court makes a fourth determination, namely, whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings); *see also* State v. MacLennan, 702 N.W.2d 219, 235 (Minn. 2005).

<sup>90</sup> *See* State v. Ramey, 721 N.W.2d 294 (Minn. 2006).

<sup>91</sup> *Id.* at 302 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

<sup>92</sup> *Id.*



either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.”<sup>93</sup> The majority also cited court of appeals cases from Alabama<sup>94</sup> and Wisconsin<sup>95</sup> that placed the burden on the prosecution to show that prosecutorial error did not have a constitutionally impermissible effect on the defendant’s rights.<sup>96</sup> None of these three cases was discussed by the *Ramey* parties in their briefs, and the court provided the parties no opportunity to address them in oral argument.<sup>97</sup>

As for the majority’s ultimate justification for its decision, it shied away from claiming that its holding was compelled by legal precedent and, instead, simply referenced its duty to supervise the trial courts and its desire to regulate “impermissible practices.”<sup>98</sup> The majority wrote:

When there is no objection and the misconduct is plain, placing the burden on the prosecution to show lack of prejudice will allow for more effective *appellate* regulation of impermissible practices. Appellate Courts should “not hesitate in a suitable case to grant relief in the form of a new trial.” For our part, we retain the authority in the appropriate case to reverse under our supervisory powers, without regard to whether the defendant was prejudiced. Therefore, we reverse and remand to the court of appeals to determine whether the prosecutor’s conduct constituted plain error and to place the burden on the prosecution to show lack of prejudice.<sup>99</sup>

The majority provided very little explanation of how it saw its new standard of review actually improving the conduct of prosecutors.<sup>100</sup> By requiring the state to show that the defendant’s substantial rights were not affected by any prosecutorial plain errors, the court suggested only that it would “put the onus on the prosecutor” and remind prosecutors that “[r]educing the incidence of prosecutorial misconduct is [their] shared obligation.”<sup>101</sup> Ultimately, according to the court, such pressure could curb

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<sup>93</sup> *Id.* (quoting *Chapman*, 386 U.S. at 24).

<sup>94</sup> *Wilson v. State*, 874 So. 2d 1155, 1159 (Ala. Crim. App. 2003) (holding state must establish that prosecutorial error did not injuriously affect defendant’s substantial rights).

<sup>95</sup> *State v. King*, 555 N.W.2d 189, 194 (Wis. Ct. App. 1996) (holding that, under the state’s plain-error rule, burden is on the prosecution to prove that plain error is harmless); *see also State v. Mayo*, 734 N.W.2d 115, 123 (Wis. 2007) (citing *King*, 555 N.W.2d at 194) (“The burden is on the State to prove that [a] plain error is harmless beyond a reasonable doubt.”).

<sup>96</sup> *See State v. Ramey*, 721 N.W.2d 294, 303 (Minn. 2006).

<sup>97</sup> *See Appellant’s Brief and Appendix, Ramey*, 721 N.W.2d 294 (No. A04-1056), 2005 WL 4829521; *Respondent’s Brief, Ramey*, 721 N.W.2d 294 (No. A04-1056), 2005 WL 4859274; Minnesota Supreme Court Oral Arguments - Videos, *supra* note 68.

<sup>98</sup> *See Ramey*, 721 N.W.2d at 303.

<sup>99</sup> *Id.* (emphasis added) (quoting *State v. Glaze*, 452 N.W.2d 655, 662 (Minn. 1990).

<sup>100</sup> *See id.* at 301-03.

<sup>101</sup> *Id.* at 302-03.

what the court saw as prosecutors' unrelenting engagement in "clearly prohibited conduct" in the face of decades of judicial effort to prevent such injustice.<sup>102</sup>

## 2. *The Concurring Opinions*

*Ramey* was technically a 7-0 decision because all seven justices agreed that the court of appeals applied the wrong standard of review to the alleged prosecutorial error. However, only four justices signed the majority opinion, and three justices sharply criticized the majority's holding in two concurring opinions written by Justices Paul Anderson and Lorie Gildea respectively.

Justice Lorie Gildea, with Justice G. Barry Anderson joining her, confronted the majority on multiple fronts.<sup>103</sup> Justice Gildea's first criticism concerned the majority's assault on *stare decisis*.<sup>104</sup> Justice Gildea emphasized that *stare decisis* is a fundamental principle of Minnesota Supreme Court doctrine<sup>105</sup> that provides stability in the law and is "not to be abandoned on a whim."<sup>106</sup> She quoted the Minnesota Supreme Court's 1956 decision in *Foster v. Naftalin*, in which the court stated:

Government by law instead of by man, which is the main bulwark to our democratic form of government, demands a decent respect for the rule of *stare decisis* in order that citizens of this state will be assured that decisions of the court are good for more than "one trip and one day only."<sup>107</sup>

She noted that, though the court should not be completely inflexible, the court should be "extremely reluctant to overrule [its] precedent"<sup>108</sup> and is supposed to "require . . . a 'compelling reason' to overrule [its] precedent."<sup>109</sup> She then explained that "the majority's new plain error formulation . . .

<sup>102</sup> *Id.* at 301.

Our new approach of shifting the burden to the prosecution to show lack of prejudice in prosecutorial misconduct cases best serves policy concerns. The benefits of this approach are to better allow substantive review of conduct that prosecutors should know is clearly forbidden and to put the onus on the prosecution to defend against the prejudicial effect of its own misconduct. A further benefit of this approach is to provide more scrutinizing review by the court of appeals, where a large majority of prosecutorial misconduct appeals are decided.

*Id.* at 302.

<sup>103</sup> *Id.* at 304-07 (Gildea, J., concurring).

<sup>104</sup> *State v. Ramey*, 721 N.W.2d 294, 304 (Minn. 2006) (Gildea, J., concurring).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (quoting *Zettler v. Ventura*, 649 N.W.2d 846, 852 (Minn. 2002) (R. Anderson, J., dissenting)) (noting that "[w]hile the doctrine of *stare decisis* is not inflexible, it is not to be abandoned on a whim; its purpose is to provide stability in the law . . .").

<sup>107</sup> *Id.* (citing *State ex rel. Foster v. Naftalin*, 74 N.W.2d 249, 264 (Minn. 1956)).

<sup>108</sup> *Id.* (quoting *State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005)).

<sup>109</sup> *Id.* (quoting *Onanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000)).

ignores the doctrine of stare decisis and creates unprecedented new law without compelling reason.”<sup>110</sup> Justice Gildea stated:

The majority’s decision abandons our doctrine of stare decisis, creates instability in the law, rewrites our court rule, and overrules recent cases, all without compelling reason to do so. . . . Just how placing the burden on the prosecution will deter misconduct the majority does not say. In any event, the majority’s speculative hoped-for outcome does not constitute a compelling reason to depart from precedent.<sup>111</sup>

Justice Gildea did agree with the majority that “prosecutorial error is a serious issue.”<sup>112</sup> Nevertheless, Justice Gildea disagreed that this was a compelling reason to change the law.<sup>113</sup>

Justice Gildea’s second criticism was that the majority’s approach is “at odds” with the Minnesota Rules of Criminal Procedure.<sup>114</sup> Rule 31 of the Minnesota Rules of Criminal Procedure contains language identical to the language in Rule 52 of the Federal Rules of Criminal Procedure.<sup>115</sup> It forms the procedural basis for both harmless error and plain error analysis.<sup>116</sup> In regard to plain error, Rule 31.02 states, “[p]lain errors or defects affecting substantial rights *may* be considered by the court upon motions for new trial, post-trial motions, and on appeal although they were not brought to the attention of the trial court.”<sup>117</sup> Justice Gildea pointed out that when the United States Supreme Court analyzed this language in the “identical” Federal Rule in *United States v. Olano*,<sup>118</sup> the Court determined that under the plain error analysis the defendant *must* bear the burden of proof because the rule authorizes a remedy only if the error affects substantial rights.<sup>119</sup> Justice Gildea explained:

Because Rule 31.02 permits an appellate court to consider unpreserved error only if the error does affect substantial

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<sup>110</sup> *State v. Ramey*, 721 N.W.2d 294, 304 (Minn. 2006) (Gildea, J., concurring).

<sup>111</sup> *Id.* at 304-06.

<sup>112</sup> *Id.* at 306.

<sup>113</sup> *Id.* Justice Gildea stated that the “problem of prosecutorial misconduct is better dealt with through the efforts of the Office of Lawyers Professional Responsibility than through a rejection of our precedent.” *Id.*

<sup>114</sup> *Id.* at 304.

<sup>115</sup> *United States v. Olano*, 507 U.S. 725, 734-35 (1993) (citing FED. R. CRIM. P. 52); *see also Ramey*, 721 N.W.2d at 304 (“Our Rule 31.02 contains the identical language and indeed our rule is based on the federal rule.”).

<sup>116</sup> MINN. R. CRIM. P. 31.

<sup>117</sup> *Id.* at 31.02 (emphasis added to show that, under the rule, the court may exercise its discretion to not consider an unobjected-to plain error). Contrast this language with Rule 31.01, which states in regard to harmless error, “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” *Id.* at 31.01.

<sup>118</sup> FED. R. CRIM. P. 52(b).

<sup>119</sup> *State v. Ramey*, 721 N.W.2d 294, 304-07 (Gildea, J., concurring) (citing *Olano*, 507 U.S. at 734-35).

rights, it is logical to place the burden of persuasion on the defendant to show the error did affect substantial rights - and not on the state to prove the negative. This is the approach we have taken in our cases since the development of the plain error doctrine in Minnesota.

In essence, the majority's result rewrites Rule 31.02. In my view, we should not rewrite our court rules in specific cases, as the majority does here, especially when the issue was not briefed. We have a process for revision of court rules, and that process should be followed before rules are changed.<sup>120</sup>

Justice Gildea concluded that the court should have retained its original *Griller* formulation for plain error in cases of unobjected-to prosecutorial error.<sup>121</sup>

Justice Gildea's third criticism is that the cases cited by the majority to support its holding are "inapposite within the context of the plain error analysis."<sup>122</sup> Justice Gildea noted that two cases cited by the majority place the burden on the state in the context of a harmless error analysis,<sup>123</sup> which, as the Minnesota Rules of Criminal Procedure illustrate and Justice Gildea explained, is inapplicable to plain error analysis.<sup>124</sup> Justice Gildea criticized the majority's reliance on the third case, *State v. King*, with equal force, noting that, in *King*, the Wisconsin Court of Appeals explicitly rejected the U.S. Supreme Court's formulation of the plain error doctrine.<sup>125</sup> "The same authority that Wisconsin rejects is the very foundation for [the Minnesota Supreme Court's] formulation of the plain error doctrine in Minnesota."<sup>126</sup>

Justice Paul Anderson also criticized the majority opinion. His first criticism touched on the court's "imprudent . . . burden-shifting change" and

<sup>120</sup> *Id.* at 305 & n.7 (original emphasis omitted) (emphasis added).

<sup>121</sup> *Id.* at 307.

<sup>122</sup> *Id.* at 306.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *State v. Ramey*, 721 N.W.2d 294, 306 (Minn. 2006) (Gildea, J., concurring).

The majority also cites a Wisconsin case, which appears to use a harmless error analysis "in determining whether to invoke the plain error doctrine," and places the burden on the state to show that the error was harmless. *State v. King*, 205 Wis.2d 81, 555 N.W.2d 189, 194 (1996) ("[W]hen constitutional errors are involved and plain error is alleged, the state has the burden to show that the error was harmless beyond a reasonable doubt."). That case explicitly recognizes that its holding is inconsistent with the relevant United States Supreme Court authority on the issue. *Id.* ("This conclusion is inconsistent with *Olano*, in which the Supreme Court concluded that under the plain error doctrine, 'It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.'").

*Id.*

<sup>126</sup> *Id.*; see also *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

abandonment of precedent.<sup>127</sup> Justice Anderson characterized *Ramey* by stating that, “[w]ithout a doubt, the majority’s holding represents a sharp and radical departure - a 180 degree turn - from our court’s and the United States Supreme Court’s jurisprudence as to the burden of persuasion on the third prong of the plain error test.”<sup>128</sup> Justice Anderson stated that the court should have “adhered to well-established precedent and the guidance provided by the United States Supreme Court.”<sup>129</sup>

Justice Anderson’s second criticism focused on the majority’s judicial philosophy, or, as he put it, “how we as an appellate court go about doing our business.”<sup>130</sup> Justice Anderson wrote:

I am concerned with our court making such a sharp departure from precedent when the concept of shifting the burden of persuasion was not *fully developed*<sup>131</sup> in the parties’ briefs or orally argued before our court, and does not have well-developed case law to support it. . . . I would much prefer an approach whereby, in the context of this issue in this case, we adhere to our well-established precedent, but in the majority or by concurrence or dissent signal that we invite arguments in the future that specifically address this issue. Under such circumstances, we would have the benefit of well-developed arguments, could properly evaluate the merits of each side’s argument, and could then decide this issue.<sup>132</sup>

### III. ANALYSIS

#### *A. The Rules Defining Prosecutorial Vouching Are Not Clear*

The *Ramey* majority’s decision is based on an opinion that prosecutors have received clear instruction from the court on what constitutes impermissible conduct.<sup>133</sup> The specific type of prosecutorial error at issue in *Ramey* is prosecutorial vouching.<sup>134</sup> Vouching occurs when the prosecutor personally endorses the credibility of the state’s witnesses in closing argument.<sup>135</sup> The defendant’s appeal and the court of appeals’

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<sup>127</sup> *Ramey*, 721 N.W.2d at 303-304 (P. Anderson, J., concurring).

<sup>128</sup> *Id.* at 303.

<sup>129</sup> *Id.* at 304.

<sup>130</sup> *Id.* at 303.

<sup>131</sup> *Id.* (emphasis added). Justice Paul Anderson’s statement that neither party “fully developed” the concept of burden-shifting implies that one of the parties at least mentioned the issue. However, the authors’ careful review of the appellate briefs and oral arguments reveals that the concept was not briefed or argued orally.

<sup>132</sup> *Id.* at 303-04.

<sup>133</sup> *State v. Ramey*, 721 N.W.2d 294, 300-01 (Minn. 2006) (majority opinion).

<sup>134</sup> *Id.* at 297 n.1.

<sup>135</sup> See *infra* Part III.A.1.b.

reversal were based in part on the notion that the prosecutor improperly vouched for the credibility of the State's witnesses.<sup>136</sup> Additionally, the Minnesota Supreme Court's opinion in *Ramey* was provoked by the defendant's vouching claim.<sup>137</sup> It was the alleged vouching in *Ramey*—taken in the context of the court's perceived prosecutorial error epidemic—that led the majority to establish higher appellate scrutiny in cases of unobjected-to prosecutorial error.<sup>138</sup> It seems helpful, then, to review the court's jurisprudence related to vouching.<sup>139</sup>

Certainly, there are multiple secondary sources<sup>140</sup> and primary case law from other jurisdictions<sup>141</sup> that discuss vouching. However, no source is more authoritative or important to Minnesota's jurisprudence than the court's own words.<sup>142</sup> The fundamental question is: Has the Minnesota Supreme Court clearly defined improper prosecutorial vouching to the degree suggested by the majority in *Ramey*?

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<sup>136</sup> *Ramey*, 721 N.W.2d at 297.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 299-302.

<sup>139</sup> Focusing on vouching also seems appropriate because, as every experienced trial attorney knows, cases usually rise and fall on the credibility of witnesses; this is why most closing arguments focus on witness credibility.

<sup>140</sup> See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION, Standard 3-5.8(b) (1993), available at [http://www.abanet.org/crimjust/standards/pfunc\\_toc.html](http://www.abanet.org/crimjust/standards/pfunc_toc.html) ("The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant."); Phil Carruthers et al., Prosecutorial Misconduct (Sept. 14, 2006), <http://www.mcaa-mn.org/docs/2007/ProsecError-Phil-9-14-06.pdf>; William B. Johnson, Annotation, *Propriety and Prejudicial Effect of Comments by Counsel Vouching for Credibility of Witnesses*, 45 A.L.R.4th 602 (1986); James H. Kaster, *Prosecutorial Misconduct in Closing Argument: Part I*, MINN. TRIAL LAW., Jan.-Feb. 1984, at 12, 15; JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT § 9.19 (3d ed. 2003); Henry Blaine Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J. CRIM. L. & CRIMINOLOGY 22, 33-35 (1973).

<sup>141</sup> See, e.g., *United States v. Garcia-Guizar*, 160 F.3d 511, 520-21 (9th Cir. 1998); *United States v. Molina-Guevara*, 96 F.3d 698, 704 (3d Cir. 1996); *United States v. Manning*, 23 F.3d 570, 575 (1st Cir. 1994); *Hance v. Zant*, 696 F.2d 940, 951 (11th Cir. 1983); *United States v. Modica*, 663 F.2d 1173, 1178-80 (2d Cir. 1981); *United States v. Bess*, 593 F.2d 749, 756-57 (6th Cir. 1979); *United States v. Ludwig*, 508 F.2d 140, 142-43 (10th Cir. 1974); *Grady v. United States*, 373 F.2d 706, 709-11 (5th Cir. 1967). It is common for sources from different jurisdictions to contradict one another on this issue. Compare, e.g., *State v. Draize*, 276 N.W.2d 784, 789 (Wis. 1979) ("The prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors") (quotations omitted) (emphasis added), with *Modica*, 663 F.2d at 1178 (explaining why prosecutors are proscribed from stating their personal opinions).

<sup>142</sup> See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 140, at Standard 3-1.1.

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

### 1. *The Basic Distinction Between “Vigorously Arguing Credibility” and Vouching*

Although the trial court instructs jurors that they are the sole judges of the credibility of witnesses,<sup>143</sup> a prosecutor has an opportunity to face the jurors during closing argument and “may argue that particular witnesses were or were not credible.”<sup>144</sup> Moreover, a prosecutor has a right to argue that the state’s witnesses were *worthy* of credibility.<sup>145</sup> In addition, in *State v. Googins*, the court held that a prosecutor has “a right to analyze the evidence and *vigorously argue* that the state’s witnesses were worthy of credibility whereas [the] defendant and his witnesses were not.”<sup>146</sup> The court has held that, “[i]n closing arguments, counsel has the right to present to the jury all legitimate arguments on the evidence [and] to analyze and explain the evidence.”<sup>147</sup> The court also has held that “prosecutors are given considerable latitude during final argument and that they are not required to make a colorless argument.”<sup>148</sup> The court is supposed to look at a closing argument “as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence.”<sup>149</sup>

At the same time, Minnesota Supreme Court precedent also establishes that prosecutors cannot personally endorse the credibility of the state’s witnesses, express personal opinions as to the credibility of witnesses,

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<sup>143</sup> 10 MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES - CRIMINAL 3.12 (5th ed. 2006) (instructing jurors that they are the sole judges of whether witnesses are to be believed and informing them about what factors they make take into consideration when judging credibility). Jurors are told that they may take into consideration a witness’s credibility based on several factors, including (1) interest or lack of interest in the outcome of the case; (2) relationship to the parties; (3) ability and opportunity to know, remember, and relate the facts; (4) manner; (5) age and experience; (6) frankness and sincerity or lack thereof; (7) reasonableness of their testimony in light of all the other evidence in the case; (8) any impeachment of the witness’s testimony; and (9) and any other factors that bear on believability and weight. *Id.*

<sup>144</sup> See *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003).

<sup>145</sup> *State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977); see also *State v. Yang*, 627 N.W.2d 666, 679 (Minn. Ct. App. 2001).

<sup>146</sup> *Googins*, 255 N.W.2d at 806 (emphasis added); see also *State v. Booker*, 348 N.W.2d 753, 755 (Minn. 1984) (stating “the prosecutor had a right to urge the jury to consider defendant’s interest in the outcome in assessing his credibility”) (citing *City of St. Paul v. Willier*, 231 N.W.2d 488 (Minn. 1975)).

<sup>147</sup> *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996) (citing *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980)); see also *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000) (holding that a prosecutor may offer an interpretation of the evidence but may not offer a personal opinion as to the defendant’s guilt).

<sup>148</sup> *State v. Ives*, 568 N.W.2d 710, 714 n.1 (Minn. 1997) (citing *Smith*, 541 N.W.2d at 589); *State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996).

<sup>149</sup> *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) (citing *Booker*, 348 N.W.2d at 755).

or even impliedly guarantee the truthfulness of witnesses.<sup>150</sup> These impermissible practices are generally referred to as “vouching.”<sup>151</sup> For over fifty years, the court has stated that a prosecutor’s personal opinion regarding the credibility of particular witnesses is unacceptable and that a prosecutor “may not throw onto the scales of credibility the weight of his own personal opinion.”<sup>152</sup> Therefore, while an attorney may argue a particular witness’s credibility, the attorney may not interject his or her personal opinion so as to “personally attach’ . . . himself or herself to the cause which he or she represents.”<sup>153</sup> The prosecutor may “offer . . . an interpretation of the evidence [but not] a personal opinion as to guilt.”<sup>154</sup> The Minnesota Supreme Court has found that this “personal opinion rule” helps prevent “exploitation of the influence of the prosecutor’s office.”<sup>155</sup>

These rules imply that there is a group of permissible practices called “arguing credibility” or “interpreting the evidence” and that there is a group of impermissible practices called “vouching” or “providing personal opinions.” Yet, without consistent, clear examples of each group, even a diligent prosecutor, in preparing for or in the heat of final argument, could err in arguing credibility. A review of Minnesota Supreme Court cases should at least put prosecutors on notice of what they can and cannot do when addressing jurors in closing argument. Ultimately, the cases fail to do this.

### *a. Cases Exemplifying “Vigorously Arguing Credibility”*

The court has identified when a prosecutor is “arguing credibility.” For example, in *State v. Jackson*, the court held that the prosecutor did not engage in impermissible vouching when he said:

You must ask yourselves what had Alaiena Charlton and Alonna Charlton or even Michael McCaskel or Stephens Wilburn to gain by testifying here. They know what a snitch is. They know what happens to snitches. They know how blood [sic] gang members deal with snitches . . . . Make no

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<sup>150</sup> See *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998); *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995).

<sup>151</sup> See, e.g., *Patterson*, 577 N.W.2d at 497.

<sup>152</sup> *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984); see also *State v. Schwartz*, 122 N.W.2d 769 (Minn. 1963) (reversed where prosecutor asserted that *he* was “satisfied beyond a reasonable doubt” by the evidence); *State v. Cole*, 59 N.W.2d 919, 922 (Minn. 1953); *State v. Gulbrandsen*, 57 N.W.2d 419, 622 (Minn. 1953).

<sup>153</sup> *Ture v. State*, 681 N.W.2d 9 (Minn. 2004) (quoting *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991)).

<sup>154</sup> *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000) (holding that the prosecutor did not improperly offer her personal opinion when she stated: “I submit to you [Overall] was killed by her partner . . .”).

<sup>155</sup> *Everett*, 472 N.W.2d at 870 (citing ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION § 3-5.8(b) and Commentary (1979)).



mistake, members of the jury, what interest do they have in the outcome of this case? By testifying they have absolutely nothing to gain.<sup>156</sup>

Ten years earlier in *State v. Smith*, the court held that the prosecutor was merely trying to establish the credibility of the State's witnesses when the prosecutor stated:

Mr. White [who was a witness for the state] is in prison. Do you know what happens to people who testify against other people in prison? . . . But for some reason each of them found a level of humanity in their hearts which allowed them, in some small way, to sacrifice their own personal well-being for what they considered to be a larger issue.<sup>157</sup>

Earlier yet in *State v. Everett*, the court held that the prosecutor did not vouch for a state's witness when the prosecutor told the jury:

You saw him, as he testified in this courtroom, his mild manner, his voice so low that you could barely hear it. Judge his demeanor, he is not a cold blooded executioner, he was in that cab, he saw what happened and he told you what happened when he came into this courtroom and testified.<sup>158</sup>

The court found the prosecutors' closing arguments in these cases were permissible. A reasonable conclusion to draw from these cases is that a prosecutor may discuss the evidence that makes a person worthy or unworthy of credibility, including the person's demeanor in the witness box, as long as the prosecutor avoids suggesting that the evidence convinces her as the prosecutor to believe certain opinions, or that the prosecutor's opinion is relevant to the jury's determination of the credibility of particular witnesses.

### *b. Cases Exemplifying "Vouching" in Closing Argument*

The court has also dealt with cases in which the prosecutor interjected his or her personal opinion about a witness's credibility. In the 1973 *State v. Williams* case, the prosecutor improperly interjected his personal opinion into closing arguments when the prosecutor stated:

All right, we then spent some time and used up some of your time in attempting to show that Mrs. Williams - and I'm sorry. As I say, I have been making final arguments for 16 years, and I can't remember ever using this word before in a final argument - lied. She lied to you. She said about all her efforts to give a statement. Why? I don't know what the purpose of it is, or was. That she tried to give a statement. But she lied when she said it. We called before you the

<sup>156</sup> *State v. Jackson*, 714 N.W.2d 681, 695-96 (Minn. 2006).

<sup>157</sup> *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996) ("While this court frowns upon such closing statements, they are permissible.").

<sup>158</sup> *Everett*, 472 N.W.2d at 870 (Minn. 1991).

witnesses, and I had to even call each and every secretary in my office. Is there any question that she lied to you when she said that?<sup>159</sup>

Similarly, in the 1994 *State v. Starkey* case, the prosecutor asserted his personal opinion regarding the credibility of the defendant by stating, "I mean, I find that impossible to believe that, if that is in fact the fact."<sup>160</sup> The court found the statement "inappropriate [vouching]" though ultimately not prejudicial.<sup>161</sup>

In the 2006 *State v. Swanson* case, the court found that the prosecutor, by stating "The state believes she is very believable," committed "impermissible vouching on its face."<sup>162</sup> The court reviewed the following portion of the prosecutor's argument:

Candice Hansen, very believable. Very believable witness . . .  
 . The believability of Karol House. *The state believes she is very believable*, primarily because her case is done . . .  
 [Karol House] is very believable. Same thing for . . .  
 Schaak.<sup>163</sup>

The *Swanson* court did not take issue with the phrases "Candice Hansen, very believable. Very believable witness" or "[Karol House] is very believable;" however, the court refused to overlook the one occasion when the prosecutor said that "[t]he state believes [Karol House] is very believable."<sup>164</sup> That statement, "the state believes," regardless of its context, was impermissible vouching on its face.<sup>165</sup> However, the court affirmed the conviction because the prosecutor's statements "were not sufficiently prejudicial to warrant a new trial."<sup>166</sup>

The 1984 *State v. Ture* case provides another example of vouching.<sup>167</sup> In that case, in closing argument, the prosecutor commented on the credibility of several of the state's witnesses "by characterizing various witnesses as being 'honest,' 'a woman of integrity,' 'honest detectives,' and 'honest police officers.'"<sup>168</sup> The prosecutor also "extolled the police officers as 'not the kind of officers who are going to get up here, take the stand, take the oath and tell you something if it isn't true.'"<sup>169</sup> The prosecutor then

<sup>159</sup> *State v. Williams*, 210 N.W.2d 21, 24-25 (Minn. 1973).

<sup>160</sup> *State v. Starkey*, 516 N.W.2d 918, 928 (Minn. 1994).

<sup>161</sup> *Id.* The authors of this article do not believe that the court drew a distinction between the terms "inappropriate" and "improper" in *Starkey*.

<sup>162</sup> *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006) (finding prosecutorial error but affirming the conviction because the prosecutor's statements "were not sufficiently prejudicial to warrant a new trial").

<sup>163</sup> *Id.* (emphasis added). The court found the statement to be "impermissible vouching on its face because the state directly endorsed the credibility of witness." *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

contrasted the state's witnesses to the defendant by referring to the defendant as a "rapist and murderer" and as a "predator" and characterizing the defendant's testimony as "[i]ncredible," "a lot of nonsense" and as a "joke."<sup>170</sup> The prosecutor also stated, "I suggest to you that Mr. Ture is not only wrong, but not exactly telling the truth on the stand."<sup>171</sup> The court evaluated the prosecutor's arguments in the following terms:

Both those portions of the final argument of the prosecutor endorsing the credibility of the state's witnesses and injecting personal opinion as to defendant's credibility were clearly improper. The credibility of a witness is to be determined by the jury. An advocate may indeed point to circumstances which cast doubt on a witness' [sic] veracity or which corroborates his or her testimony, but he may not throw onto the scales of credibility the weight of his own personal opinion. Such conduct is expressly prohibited by the Minnesota Code of Professional Responsibility, DR 7-106(C)(4), and the ABA Standards for Criminal Justice, § 3-5.8(b) (2nd ed. 1980). . . . [T]hose parts of the prosecutor's final argument were clearly improper . . . .<sup>172</sup>

If one attempts to extrapolate a common meaning from cases such as *Williams*, *Starkey*, *Swanson*, *Ture*, and others,<sup>173</sup> it appears that it is impermissible for a prosecutor to state in his or her closing argument any conclusion the prosecutor has about the believability of a particular witness or particular piece of evidence. Error may take place by mere mention of the words "the state believes" or "honest witness."

## 2. *Cases That Blur the Line Between "Vigorously Arguing Credibility" and "Vouching"*

The previously-cited cases assume that there is a clear line between "vigorously arguing credibility" and improperly vouching for a witness's credibility. This line is increasingly difficult to draw upon reading additional Minnesota Supreme Court cases. In at least three contexts, it appears that the court has been unclear when defining the propriety of a prosecutor's

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See *State v. James*, 520 N.W.2d 399, 405 (Minn. 1994) (finding the prosecutor committed misconduct by "informing the jury of his personal opinion of James' credibility and character and the credibility of Juanita Gatlin, by disparaging the theories defense counsel would likely advance in closing argument, and by misleading the jury as to the state's burden of proof;" however, the court found that such comments were harmless); *State v. Schultz*, 262 N.W.2d 411, 411 (Minn. 1978) (finding that, while the prosecutor expressed his personal opinion of defendant's guilt, the comments did not prejudice the defendant); *State v. O'Geay*, 216 N.W.2d 636, 636 (Minn. 1974) (holding it was error for prosecutor to state his personal opinion that the defendant was guilty, but it was not reversible error).

credibility arguments. First, the court has not been clear about whether referring to witnesses with positive or negative epithets such as “believable person” is improper.<sup>174</sup> Second, the court has not been clear about whether a prosecutor’s direct statement that a witness is lying or telling the truth is improper.<sup>175</sup> Third, the court has not been clear when determining whether a prosecutor’s use of “I” statements in closing argument is improper.<sup>176</sup>

*a. The “Believable Person” Context*

The court has stated that “prosecutors tread on dangerous grounds . . . when they resort to epithets to drive home the falsity of defense evidence.”<sup>177</sup> However, in a number of other cases, the court has permitted the prosecutor to refer to witnesses by using synonyms that connote credibility, even though the court previously barred use of phrases such as “honest detectives” and “woman of integrity.”<sup>178</sup> These contradictions in court holdings do not provide clarity to prosecutors.

For example, in 2006, the court held in *State v. Gail* that it was not improper for the prosecutor to refer to a witness as a “believable person” or state that the witness was “frank and sincere.”<sup>179</sup> The court held that the state was “merely arguing that [the witness] was credible.”<sup>180</sup> The *Gail* court stated that vouching occurs only “when the government implies a guarantee of a witness’s truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness’s credibility.”<sup>181</sup> The *Gail* holding is reasonable, but the court did not dwell on its direct contradiction of the 1984 *Ture* decision, where using epithets such as “honest detectives” or “woman of integrity” was improper, regardless of the context.<sup>182</sup> The *Swanson* court in 2006 also appears to have overlooked statements such as “Candice Hansen, very believable. Very believable witness,” while at the same time finding the phrase “The state believes she is very believable” to be improper vouching.<sup>183</sup>

Then, later in 2006, in an apparent diversion from the rule stated in *Gail*, the court in *State v. Mayhorn* reverted to *Ture*’s blanket restriction on prosecutors using a synonym to connote the credibility of a witness, even if

<sup>174</sup> See *infra* Part III.A.2.a.

<sup>175</sup> See *infra* Part III.A.2.b.

<sup>176</sup> See *infra* Part III.A.2.c.

<sup>177</sup> *State v. Booker*, 348 N.W.2d 753, 755 (Minn. 1984) (citation omitted).

<sup>178</sup> See *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984).

<sup>179</sup> *State v. Gail*, 713 N.W.2d 851, 866 (Minn. 2006).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (citing *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003)).

<sup>182</sup> See *Ture*, 353 N.W.2d at 516.

<sup>183</sup> *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006).

the prosecutor avoids explicitly stating an opinion.<sup>184</sup> The court in *Mayhorn* stated:

[D]uring her rebuttal to Mayhorn's closing argument, the prosecutor commented that "Lyra" was an appropriate name for Lyra Robinson, who corroborated Mayhorn's testimony. Mayhorn did not object. We understand this comment to suggest that Lyra Robinson was a liar. . . . It is improper for a prosecutor to give her own opinion about the credibility of a witness in closing argument. . . . This comment constituted prosecutorial misconduct.<sup>185</sup>

Can *Gail*, *Swanson*, and *Mayhorn* be reconciled? If a prosecutor's reference to a witness as "believable" and "frank and sincere" can be proper within the context of an argument about the witness's credibility,<sup>186</sup> why would a prosecutor, defense attorney, or trial judge think that a prosecutor's veiled allusion to a witness's incredibility would be prosecutorial error?<sup>187</sup>

In another seeming contradiction of the *Ture* decision, the court in *State v. Smith* determined that it was not error when the prosecutor told jurors about the danger of a police officer's work and declared that the officers "deserved a great deal of credit."<sup>188</sup> In some cases, statements that

<sup>184</sup> *State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn. 2006) (citing *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995)).

<sup>185</sup> *Id.*

<sup>186</sup> *See, e.g., State v. Cox*, No. A06-555, 2007 WL 2034214, at \*5 (Minn. Ct. App. July 17, 2007). In *Cox*, the court of appeals found that the prosecutor did not err when the prosecutor told the jury in closing argument: "[A.R.] has been consistent throughout the whole ordeal. She has been truthful. She is believable and she is a credible witness." *Id.* The court held that the prosecutor's statements were proper because "the prosecutor analyzed the evidence and referred only to the evidence and proper inferences to be drawn to argue that A.R. was a credible witness, without expressing a personal opinion as to credibility." *Id.*

<sup>187</sup> *See State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977) (holding that a prosecutor has "a right to analyze the evidence and vigorously argue that the state's witnesses were worthy of credibility whereas [the] defendant and his witnesses were not"); *see also, e.g., State v. Carruthers*, No. A06-1763, 2007 WL 92668, at \*5 (Minn. Ct. App. Jan. 16, 2007). In *Carruthers*, the court of appeals found that the prosecutor did not commit plain error when the prosecutor told the jury in closing argument that the evidence indicated that the defendant was a liar:

[Dr. Carr's photographs and report] totally support[] the State's position that this man was not acting in self-defense, was not cut wide open the way he said, was not stabbed the way he told police, and was not the victim. The ultimate big lie. He wants you to believe that he is the victim here. Please do not be suckered in by his testimony that you heard here today. Carefully evaluate everything you hear.

*Id.* The court held that, although the statement may have constituted error, it did not constitute plain error because the argument was "at least within or near the range of appropriate argument[] regarding a defendant's veracity." *Id.* The holding in *Carruthers* is reasonable because the prosecutor directed the jury's attention to the evidence that contradicted the defendant's testimony, told the jury to evaluate the evidence, and did not express a personal opinion as to credibility. However, would the *Mayhorn* court disagree?

<sup>188</sup> *State v. Smith*, 476 N.W.2d 511, 517 (Minn. 1991) ("This bordered on the improper, but here again the trial court, who was there, found no prejudice and we agree.").

encourage the jury to revere the state's witnesses are permissible.<sup>189</sup> For example, the court in *State v. Burgess* found no impropriety when the prosecutor indirectly vouched for the credibility of a witness:

*Now, I submit to you that in my opinion this young man is entitled to some degree of credit for getting out of bed, determining where the crash sounds were coming from, and then taking the time and the trouble and effort to report it. Needless to say, too many would be inclined to go back to bed and say, 'Well, forget it, because it doesn't involve me.' But he did not. He did his civic duty by reporting to the police . . . . He told you what he saw. He told you what he did about it, and for that he is entitled to some credit.*<sup>190</sup>

The court found that giving a witness "credit for doing his civic duty is not equivalent to expressing a personal opinion that the witness is entitled to credence."<sup>191</sup> Yet, under *Ture*, it is impermissible to state that the state's police witnesses are "not the kind of officers who are going to get up here, take the stand, take the oath and tell you something if it isn't true."<sup>192</sup>

It is possible, upon reading the transcripts of the closing arguments in all of these cases, that the court's determinations would appear less contradictory; however, when faced with only the words in its opinions, the court should not claim that there is a clear rule about the prosecutor's use of these sorts of statements. Further, the court has not clarified why a phrase such as "the state believes [the witness] is believable" is more egregious than plainly referring to a witness as "believable."<sup>193</sup> Though the court seems to believe that there is a wide gulf between the two statements,<sup>194</sup> without further explanation, it seems implausible that the phrases would affect jurors differently.

To go one step further, arguendo, a reasonable court could find that the phrase "the state believes that the witness is believable" is even more acceptable than a phrase that discreetly glues the epithet "believable" to a witness's name. It is worth noting that, in a typical jury trial, the judge's instructions to the jury at the beginning<sup>195</sup> and the end<sup>196</sup> of the trial include

<sup>189</sup> See, e.g., *State v. Burgess*, 185 N.W.2d 537, 539 (Minn. 1971) (giving a witness "credit for doing his civic duty is not equivalent to expressing a personal opinion that the witness is entitled to credence").

<sup>190</sup> *Id.* (emphasis added).

<sup>191</sup> *Id.*

<sup>192</sup> See *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984).

<sup>193</sup> *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006).

<sup>194</sup> *Id.*

<sup>195</sup> See 10 MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES - CRIMINAL 1.02A (5th ed. 2006) (instruction at beginning of trial).

This trial is about to begin. During the trial you are going to hear the testimony of several witnesses. *You will have to make judgments about the credibility and weight of their testimony.* Be patient, and listen carefully to the testimony of all the witnesses. Keep it all in mind until you have heard all the evidence. As you listen to the witnesses, you

an explanation to jurors that any statements or arguments made by the attorneys are not evidence. At least when a prosecutor identifies her opinion and explains the evidentiary basis for the opinion, the prosecutor can focus the jury's attention solely on the evidence. Several cases from Wisconsin illustrate the point.<sup>197</sup> For example, in the 2003 *State v. Smith* case, the Wisconsin Court of Appeals noted:

The line between permissible and impermissible final argument is not easy to follow and is charted by the peculiar circumstances of each trial. Whether the prosecutor's conduct during closing argument affected the fairness of the trial is determined by viewing the statements in the context of the total trial. The line of demarcation to which we refer is thus drawn where the prosecutor *goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering*

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should take note of such matters as the witnesses' interest or lack of interest in the outcome of the case; ability and opportunity to know, remember, and tell the facts; their experience, frankness, and sincerity, or the lack thereof; the reasonableness or unreasonableness of their testimony in light of all the other evidence; and any other factors that bear on the question of believability and credibility. In the last analysis, you should rely on your own experience, judgment, and common sense. . . . You should keep an open mind about all the evidence until the end of the trial, until you have heard the final arguments of the attorneys, and until I have instructed you in the law. *Evidence is what the witnesses say and any exhibits submitted to you. What the attorneys say is not evidence. However, you should listen attentively to any statements the attorneys make. Those statements are made so that you can better understand the testimony.*

*Id.* (emphasis added).

<sup>196</sup> 10 MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES - CRIMINAL 3.11 (5th ed. 2006) (instructions at end of trial).

Attorneys are officers of the court. It is their duty to make objections they think proper and to argue their client's cause. However, *the arguments or other remarks of an attorney are not evidence. If the attorneys or I have made or should make any statement as to what the evidence is, which differs from your recollection of the evidence, you should disregard the statement and rely solely on your own memory. If an attorney's argument contains any statement of the law that differs from the law I give you, disregard the statement.*

*Id.* (emphasis added).

<sup>197</sup> See *State v. Draize*, 276 N.W.2d 784, 789 (Wis. 1979); *State v. Cydzik*, 211 N.W.2d 421, 428-29 (Wis. 1973); *Embry v. State*, 174 N.W.2d 521, 526-27 (Wis. 1970); *State v. Murphy*, No. 00-1283-CR, 2001 WL 1093004, at \*1 (Wis. Ct. App. Sept. 19, 2001); *State v. Hinojosa*, No. 98-2857-CR, 2000 WL 523753, at \*1 (Wis. Ct. App. May 2, 2000); *State v. Lallaman*, No. 00-0529-CR, 2000 WL 1579519, at \*1 (Wis. Ct. App. Oct. 24, 2000); see also *State v. Smith*, 671 N.W.2d 854, 858-60 (Wis. Ct. App. 2003) (noting that the line between proper and improper closing argument is whether the prosecutor has an evidentiary basis for the statements he makes to the jury).

*factors other than the evidence.* Argument on matters not in evidence is improper.<sup>198</sup>

*b. The "He Lied" or "She Told the Truth" Context*

In some cases, the court determined that it is permissible for a prosecutor to directly state that a witness is lying or telling the truth.<sup>199</sup> For example, in *State v. Booker*, a 1984 case, the defendant was on trial for criminal sexual conduct and claimed that the victim consented to sex and lied when she testified.<sup>200</sup> The court found that it was not improper for the prosecutor to state that it was the defendant, not the victim, who lied during his testimony, nor was it clearly improper for the prosecutor to repeatedly refer to the crime of perjury in closing arguments.<sup>201</sup> The court revealed its ambivalence over its decision when it said that "[t]he prosecutor's statement, at worst, was a statement on the borderline between being proper and improper comment and it clearly was not so serious and prejudicial a misstatement as to deny defendant his right to a fair trial."<sup>202</sup> However, the court also stated, "[a]n argument such as that made in this case . . . could affect the jury's ability to weigh the evidence dispassionately. In an appropriate case, we will not hesitate to reverse on this ground."<sup>203</sup> The court did not explain what an "appropriate case" might look like.<sup>204</sup> The decision in *Booker* turned ultimately on a "he said-she said" issue, yet even then the prosecutor's references to the witness lying were not found to be improper. Given the court's rulings in other cases and the importance of the credibility of the witnesses, it is unclear why the prosecutor's statements in *Booker* would not be considered improper.<sup>205</sup>

In another case from 1984, *State v. Parker*, the court found no impropriety when the prosecutor, in essence, told the jury that he thought the State's witnesses told the truth because, if they were not telling the truth, the entire case against the defendant must be fraudulent.<sup>206</sup> The prosecutor stated:

But there is an even more persuasive reason, *I think, they are telling the truth* . . . That is why I say to you that if you think that these witnesses are lying, you can only come to that conclusion if you come to the conclusion that this whole thing is a phony and stinks from top to bottom and stem to

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<sup>198</sup> *Smith*, 671 N.W.2d at 858-60 (quotations and citations omitted) (emphasis added).

<sup>199</sup> *See, e.g., State v. Booker*, 348 N.W.2d 753, 754 (Minn. 1984).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 755.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* (citation omitted).

<sup>204</sup> *See id.*

<sup>205</sup> *See Booker*, 348 N.W.2d at 754.

<sup>206</sup> *State v. Parker*, 353 N.W.2d 122, 128 (Minn. 1984).



stern. *But I do tell you these witnesses couldn't have done it by themselves, make up a big lie and tell it.*<sup>207</sup>

Similar to the prosecutor's "borderline" statements in *Booker*, it is unclear why an argument like this one in *Parker* could be proper when the obvious goal is to rely on the jurors' confidence in "the system" to convince them to find the state's witnesses are credible. The comments in *Parker*—even if they are read as a mere subtle reference to the government's role in the prosecution of the defendant—seem to offend the plain language of the court's definition of vouching in the 2003 *State v. Lopez-Rios* case; in that case, the court stated that improper vouching included situations in which "the government [only] *implies* a guarantee of a witness's truthfulness [or] refers to facts outside the record."<sup>208</sup> Yet, it does not appear that the court has rejected *Parker*'s precedential value, since it was cited in the 2003 *State v. Ray* case when the court explained that "[t]he propriety of a prosecutor's final argument is a matter within the sound discretion of the trial court,"<sup>209</sup> and the Minnesota Court of Appeals used *Parker* as recently as 2006 to *define* prosecutorial vouching.<sup>210</sup>

If the court believes that there is an important distinction between the phrase "I think [the witnesses] are telling the truth" and "the state believes the witnesses are credible," it has yet to provide an explanation. Such an explanation, along with a review of cases such as *Booker* and *Parker*, would help prosecutors understand how they are supposed to discuss the factors relevant to a witness's credibility and vigorously argue credibility without saying something that, upon appellate review of the trial transcript, would be considered an interjection of a personal opinion.

### c. The "I Think" Context

The court has examined a number of cases in which a prosecutor has used the phrase "I think" and its analogies in closing argument. The court has permitted the use of certain "I" phrases, e.g., the phrase "I submit to you," in the context of explaining evidence.<sup>211</sup> However, the court has been less clear with phrases such as "I think." For example, in the 1972 *State v. Prettyman* case, the court found that the prosecutor acted impermissibly when he frequently began sentences with "'I think you'll find that . . .'" or "I think you

<sup>207</sup> *Id.* (emphasis added).

<sup>208</sup> *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003) (quoting *State v. Patterson*, 577 N.W.2d 603, 614 (Minn. 1998)) (emphasis added).

<sup>209</sup> *State v. Ray*, 659 N.W.2d 736, 746 (Minn. 2003) (quoting *Parker*, 353 N.W.2d at 127).

<sup>210</sup> *In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. 2006) (quoting *Parker*, 353 N.W.2d at 128) ("It is improper to 'personally [endorse] the credibility of the state's witnesses [or to inject] personal opinion . . .'").

<sup>211</sup> See *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000). *But see infra* note 225.

will be able to find that . . . even when they are followed by reference to evidence on an issue or a permissible inference that could be made.”<sup>212</sup>

Similarly, in the 2004 decision of *Ture v. State*, the court determined that it was improper for the prosecutor to repeatedly preface his statements regarding the evidence with the phrase, “I wanted you to see.”<sup>213</sup> The court succinctly concluded that “[any] use of the first-person pronoun ‘I’ during closing argument . . . was an improper interjection of personal opinion.”<sup>214</sup>

The 2005 *State v. Blanche* court stated that “[a] prosecutor’s use of phrases such as ‘I suggest to you’ and ‘I think’ to interject personal opinion into a closing argument is improper.”<sup>215</sup> The *Blanche* opinion, however, is prone to confuse the reader because the court states that it did not find “plain error” when the “prosecutor prefaced approximately 18 statements in closing argument with phrases such as ‘I suggest to you,’ ‘I think,’ ‘I ask you,’ and ‘I submit to you.’”<sup>216</sup> The court referenced the trial court’s characterization of the prosecutor’s comments as “inadvertent” and “rooted in the prosecutor’s rhetorical idiosyncrasies” and determined that, “under the facts and circumstances of this case,” the prosecutor’s “poorly chosen” statements were not plain error.<sup>217</sup> The court’s holding is reasonable, but, by finding that the prosecutor did not commit “plain error,” did the court mean that the prosecutor’s statements were not “clearly contrary to the law,” perhaps because the prosecutor’s argument was based on the evidence? Or, did the court mean only that the statements did not meet all of the prongs of the plain error test, perhaps because the statements did not prejudice the defendant?

To add to the seeming confusion, the court after *Blanche* has excused or overlooked phrases by prosecutors in closing argument that, according to Minnesota Supreme Court precedent, appear to be statements of personal opinion on material issues. For example, in *Gail*, a felony-murder case, the prosecutor suggested his personal opinion that the defendant was guilty of the underlying felonies when he explained that the jury could find the defendant guilty even if the defendant had *not* completed the underlying felonies:

[Y]ou might decide that in looking at this that while the defendant had not completed the aggravated robbery or had

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<sup>212</sup> *State v. Prettyman*, 198 N.W.2d 156, 158 (Minn. 1972) (“The frequency and context of the use of these words suggests to us that they were perhaps more idle cliché than deliberate expression of personal opinion, and the absence of objection by the defense counsel who actually heard them adds to this impression. They are, nevertheless, impermissible.”).

<sup>213</sup> *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004).

<sup>214</sup> *Id.* at 20. To its credit, the court agreed with the post-conviction court in finding that the alleged error was harmless beyond a reasonable doubt when it was made within the context of a two and a half hour long closing argument that summarized a complicated murder trial. *Id.*

<sup>215</sup> *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005) (citing *Ture*, 681 N.W.2d at 20).

<sup>216</sup> *Id.* at 374-75.

<sup>217</sup> *Id.*

not completed the drug sale, *although I suggest to you that he had done both of those*, you may decide he hadn't, and you may decide to look at this as to whether it's an attempt or not.<sup>218</sup>

The court determined that there was "no misconduct by the state" because he was "merely telling the jury that Gail could be found guilty [of felony-murder] if the jury found that Gail had attempted, rather than completed, the underlying felonies."<sup>219</sup> The court's holding is reasonable because the prosecutor seems only to have been arguing the facts and the law to the jury; however, the court could have been clearer by distinguishing the "I suggest" statement from similar statements barred in the *Blanche* and 2004 *Ture* case.

In a 2007 case, *State v. McArthur*, the court twice excused or overlooked a prosecutor's statement of opinion:

Do you think by [the witness] naming the defendant, things were going to make-be made any easier for [the witness] given the fact she had a child by the defendant's brother? *I don't think so*. She had fear because of that as to what could happen, what the repercussions would be for her, not only her own safety but the situation with her child. . . .

. . . .

When [the witnesses] took that witness stand, did they appear to be enjoying this? Did little [witness] appear to be enjoying this when she cried several times? Did [another witness] seem to be enjoying this being hauled in here after being arrested for not honoring her subpoena? *I don't think so*. Were they getting anything out of this? Nothing. Again, there's no motive for them to fabricate anything or engage in a conspiracy with each other. They were afraid to get involved. *They were taking a risk, a safety risk.*<sup>220</sup>

One would be hard-pressed to claim that the prosecutor did not state an opinion in *McArthur*; yet, the court stated that "although the prosecutor perhaps should have prefaced his statement about risk with 'the witnesses believe,' it was apparent, given the context, that the prosecutor was speaking from the witnesses' perspective[]" and thus the prosecutor did not err.<sup>221</sup> The court's current view of these sorts of phrases is certainly unclear.

One may wonder why the court would hold that a prosecutor does not commit vouching when stating "I submit to you that the witness is credible" but does commit vouching when stating "I think that the witness is credible." Perhaps, the real issue underlying vouching should not be the prosecutor's words at all but whether the prosecutor's argument is based on the evidence. Recently, in *State v. Fauci*, the Connecticut Supreme Court

<sup>218</sup> *State v. Gail*, 713 N.W.2d 851, 866 (Minn. 2006) (emphasis added).

<sup>219</sup> *Id.*

<sup>220</sup> *State v. McArthur*, 730 N.W.2d 44, 53-54 (Minn. 2007) (emphasis added).

<sup>221</sup> *Id.* at 54.

characterized vouching as “a form of unsworn and unchecked testimony” and clarified that the proper review of a vouching claim is not focused on the use of the pronoun “I” but rather on whether the prosecutor’s statement was based on the evidence presented at trial.<sup>222</sup> The *Fauci* court stated:

As we previously have noted, “[w]e must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade [it] to draw inferences in the state’s favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand.” In other words, a prosecutor’s remarks are not improper when they underscore an inference, on the basis of the evidence presented at trial, that the jury could have drawn on its own.<sup>223</sup>

In 1995, the Michigan Supreme Court in *People v. Reed* explained that a review of the propriety of a prosecutor’s closing argument should not turn on the prosecutor’s use of “magic words” but instead on whether the prosecutor’s words express an attempt at bolstering the state’s case with information other than the evidence admitted at trial:

A statement cannot be taken out of context. Just as jury instructions must be read as a whole, so must the remarks of the prosecutor. The prosecutor’s remarks must be evaluated in light of the relationship or lack of relationship they bear to the evidence admitted at trial.

The propriety of the prosecutor’s comments “does not turn on whether or not any magic words are used.” The crucial inquiry is not whether the prosecutor said “We know” or “I know” or “I believe,” but rather whether the prosecutor was attempting to vouch for the defendant’s guilt.

Read as a whole, and in the context of this case, the prosecutor’s use of “we know” does not show an attempt to place the credibility of his office behind the case or a suggestion that he possessed extrajudicial information on which defendant should be convicted. Rather, the prosecutor was asserting that “we know,” on the basis of the evidence presented at trial and inferences drawn from that evidence, that the propositions advanced had been established.<sup>224</sup>

If the Minnesota Supreme Court explained itself similarly in cases such as *Blanche*, *Gail*, and *McArthur*, the opinions would not only be clearer, they

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<sup>222</sup> *State v. Fauci*, 917 A.2d 978, 988 (Conn. 2007) (citing *State v. Thompson*, 832 A.2d 626, 643 (Conn. 2003)).

<sup>223</sup> *Id.* at 992-93 (citations omitted).

<sup>224</sup> *People v. Reed*, 535 N.W.2d 496, 508 (Mich. 1995) (citing and quoting *People v. Cowell*, 205 N.W.2d 600, 603 (Mich. 1973)).

could help prosecutors, defense attorneys, and trial court judges identify prosecutorial vouching in the future.<sup>225</sup>

### 3. Conclusion on the Clarity of What Constitutes Vouching

Based on the above discussion, it is reasonable to conclude that, contrary to the *Ramey* majority's assertion that its prior rulings are clear,<sup>226</sup> the Minnesota Supreme Court's cases defining prosecutorial vouching are confusing and contradictory. Arguments about credibility are indispensable to a prosecutor's case because a crucial aspect of a prosecutor's function is to help jurors perform their roles as the judges of credibility.<sup>227</sup> As the court explained, prosecutors have a right to "vigorously argue" witness credibility.<sup>228</sup> Further, criminal defendants are unnecessarily harmed when defense attorneys and trial courts cannot easily ascertain when prosecutors act improperly.

Reasonable prosecutors understand that they share the obligation to reduce incidents of prosecutorial error,<sup>229</sup> and that they have an "affirmative

<sup>225</sup> Compare *Reed*, 536 N.W.2d at 508, with *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000). *Bradford*'s economical but vague analysis of the propriety of the statement, "I submit to you that [Overall] was killed by her partner . . ." was:

Bradford argues that the prosecutor improperly offered her personal opinion when she stated: "I submit to you [Overall] was killed by her partner . . ." A prosecutor may not offer a personal opinion as to the defendant's guilt. However, in this case the state was offering an interpretation of the evidence rather than a personal opinion as to guilt. Therefore, we conclude that this statement does not constitute prosecutorial misconduct.

*Bradford*, 618 N.W.2d at 799 (citation omitted). Because the prosecutor was discussing the evidence, the *Bradford* court's holding seems reasonable, but *Bradford*'s analysis does nothing to explain why the phrase "I submit to you" is more proper than phrases such as "I believe" when the prosecutor is arguing about the evidence and fails to explain why the prosecutor was merely offering an interpretation of the evidence rather than vouching. See *id.*

<sup>226</sup> *State v. Ramey*, 721 N.W.2d 294, 299-302 (Minn. 2006). The *Ramey* court "expect[s] that prosecutors . . . are aware of [its] case law proscribing particular conduct as well as the standards of conduct prescribed by the ABA," and, with its decision in *Ramey*, aimed to prevent "conduct that prosecutors *should know is clearly forbidden*." *Id.* at 301-02 (emphasis added).

<sup>227</sup> See 10 MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES - CRIMINAL 3.12 (5th ed. 2006) (instructing jurors that they are the sole judges of whether witnesses are to be believed and informing them about what factors they may take into consideration when judging credibility). Jurors are told that they may take into consideration a witness's credibility based on several factors, including (1) interest or lack of interest in the outcome of the case; (2) relationship to the parties; (3) ability and opportunity to know, remember, and relate the facts; (4) manner; (5) age and experience; (6) frankness and sincerity, or lack thereof; (7) reasonableness of their testimony in light of all the other evidence in the case; (8) any impeachment of the witness's testimony; and (9) any other factors that bear on believability and weight. *Id.*

<sup>228</sup> *State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977) (emphasis added).

<sup>229</sup> See *Ramey*, 721 N.W.2d at 303.

obligation to ensure that a defendant receives a fair trial.”<sup>230</sup> To help prosecutors fulfill their ethical obligations,<sup>231</sup> the court should be clearer in defining “prescribed standards of conduct”<sup>232</sup> than it has been in the past. For example, in *United States v. Bess*, a Sixth Circuit case from thirty years ago, the court distinguished between proper and improper uses of the phrase “I believe” in an impressively straightforward way:

[T]he statement made here “based on the evidence that has been presented to you in this trial, I believe beyond a reasonable doubt that the defendant unlawfully took or concealed the metal or ammunition,” is unquestionably a statement of personal belief.

We realize that oftentimes it will be a close question whether a prosecutor oversteps. Illustrative of the problem is use of the words “I believe.” The Fifth Circuit has done a good job in drawing the line between permissible and impermissible argument: “Thus, an attorney properly may state, ‘I believe that the evidence has shown the defendant’s guilt,’ but he may not state, ‘I believe that the defendant is guilty.’ Similarly, an attorney properly may state, ‘No conflict exists in the testimony of the prosecution’s witnesses,’ but he may not state, ‘The prosecution’s witnesses are telling the truth,’ or ‘I believe that the prosecution’s witnesses are telling the truth.’”

We reiterate that under many circumstances, this type of prosecutorial error will not be prejudicial. We write to draw the line as clearly as possible to encourage proper argument and alert both opposing counsel and trial judges so that corrective measures can be taken on the spot.<sup>233</sup>

*Bess*,<sup>234</sup> *Fauci*,<sup>235</sup> and *Reed*<sup>236</sup> are good models for any court to use when seeking to distinguish between proper and improper conduct because they are both informative and helpful for practitioners.

### ***B. Ramey Jeopardizes the Trial Court’s Ability to Remedy the Effects of Prosecutorial Error***

Experienced trial judges and trial attorneys know that when an attorney objects to an error as it occurs, the trial court has great capacity to

<sup>230</sup> *Id.* at 300 (citing *State v. Henderson*, 620 N.W.2d 688, 701-02 (Minn. 2001); *State v. Sha*, 193 N.W.2d 829, 831 (Minn. 1972)).

<sup>231</sup> See generally ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION, *supra* note 140.

<sup>232</sup> *State v. Ramey*, 721 N.W.2d 294, 303 (Minn. 2006).

<sup>233</sup> *United States v. Bess*, 593 F.2d 749, 757 n.10 (6th Cir. 1978).

<sup>234</sup> *Id.*

<sup>235</sup> *State v. Fauci*, 917 A.2d 978, 988 (Conn. 2007).

<sup>236</sup> *People v. Reed*, 535 N.W.2d 496, 508 (Mich. 1995).

remedy any unfairly prejudicial effects of the error on the spot. In fact, the Minnesota Supreme Court has noted that the trial court, not the appellate court, is in the best position to evaluate the prejudicial nature of a closing argument,<sup>237</sup> and the trial court is in the best position to “attempt to remedy the effects of [prosecutor error].”<sup>238</sup> A proper objection is potent because it provides an opportunity for the trial court to issue an immediate verbal reprimand to the prosecutor and an immediate verbal curative instruction to the jury. Without question, a fundamental presumption of the jury system is that jurors follow the trial court’s instructions.<sup>239</sup> Consequently, parties should be encouraged to object when appropriate. Unfortunately, the majority in *Ramey* seems to have encouraged defense attorneys to *not* object to prosecutorial errors. The majority’s opinion does this by marginalizing the contemporaneous objection rule and by making it easier for claims of unobjected-to prosecutorial error to succeed on appeal.<sup>240</sup> In doing so, *Ramey* slights a fundamental aspect of the jury trial system, namely the ability of the trial court to remedy errors with curative instructions to ensure that the defendant receives a fair trial the first time.<sup>241</sup>

The majority grants that a trial judge is in a unique position to determine what actions constitute prosecutorial error.<sup>242</sup> The *Ramey* majority explained that, through “[c]arefully worded instructions,” a trial judge can “prevent,” “ameliorate,” or “cure” the effect of improper prosecutorial argument.<sup>243</sup> Because the majority acknowledged that a trial judge has the unique opportunity, is in the best position, and has an affirmative duty to

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<sup>237</sup> See *State v. Mayhorn*, 720 N.W.2d 776, 783 (Minn. 2006); see also *State v. Parker*, 353 N.W.2d 122, 127 (Minn. 1984) (citing *State v. Fossen*, 282 N.W.2d 496, 503 (Minn. 1979)) (“The propriety of a prosecutor’s final argument is a matter within the sound discretion of the trial court.”).

<sup>238</sup> *Ramey*, 721 N.W.2d at 299.

<sup>239</sup> See *Richardson v. Marsh*, 481 U.S. 200, 206, 211 (1987) (“[T]he almost invariable assumption of the law that jurors follow their instructions . . . is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.”); see also *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005) (noting that this presumption may be rebutted if the effect of a prosecutor’s improper statements “impart substantial prejudicial evidence into the case”); *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002); *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998); *State v. Forcier*, 420 N.W.2d 884, 885 n.1 (Minn. 1988); *State v. Burns*, 929 A.2d 1041, 1054 (N.J. 2007).

<sup>240</sup> *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006) (failing to explain when the contemporaneous-objection rule applies to instances of unobjected-to prosecutorial error and shifting the burden of proof to the state on the third prong of the plain error test for instances of unobjected-to prosecutorial error).

<sup>241</sup> *Id.* at 299. Note that “the Constitution guarantees a fair trial-not a perfect or error-free trial.” *State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) (citing *State v. Greenleaf*, 591 N.W.2d 488, 505 (Minn. 1999)).

<sup>242</sup> *Ramey*, 721 N.W.2d at 298 (citing *State v. Steward*, 645 N.W.2d 115, 121 (Minn. 2002)).

<sup>243</sup> *Id.* (citing *State v. Brown*, 348 N.W.2d 743, 747 (Minn. 1984)).

intervene and caution prosecutors in appropriate circumstances,<sup>244</sup> the majority—in dicta—tried to *encourage* defense attorneys to “seek corrective action by the trial court when misconduct occurs.”<sup>245</sup> However, attorneys are influenced far more by the law than by encouragement in dicta, and it is more likely that because of *Ramey*, defense attorneys will not object to incidents of prosecutorial error.

The *Ramey* majority cautioned defense attorneys that “the failure to object to improper closing argument may waive any claim of prosecutorial misconduct on appeal.”<sup>246</sup> However, the *Ramey* majority never explained *when* the failure to object would act as a waiver. In fact, the majority never described *any* situations involving prosecutorial error when the defense attorney’s failure to object to prosecutorial error forfeits the defendant’s right to appeal.<sup>247</sup> The majority instead explained that unobjected-to prosecutorial error should be reviewed for plain error and placed the burden of proving a negative in the third prong of the plain error test on prosecutors.<sup>248</sup> Under *Ramey*, this apparently means that no claims of unobjected-to prosecutorial error are waived due to the contemporaneous objection rule.

If claims of prosecutorial error are never or rarely barred by the defense attorney’s failure to object, the strategies behind a defense attorney’s decision whether to object will change. It is reasonable to predict that a defense attorney would not object if she believed her case was going badly and the appellate court would award a new trial on appeal. Minnesota defense attorneys apparently already make these calculations and decide to not object to incidents of error, as claims of unobjected-to error have become widespread in the past few years.<sup>249</sup>

Consider *In re D.D.R.*, a juvenile case involving charges of criminal sexual conduct where the defendant alleged numerous trial court errors and several unobjected-to prosecutorial errors.<sup>250</sup> The court of appeals analyzed

<sup>244</sup> *Id.* at 303 (quoting *State v. Glaze*, 452 N.W.2d 655, 662 (Minn. 1990)).

<sup>245</sup> *Id.* at 299, 303 (emphasis added).

<sup>246</sup> *Id.* at 299 (quoting *State v. Ray*, 659 N.W.2d 736, 747 n.4 (Minn. 2003)).

<sup>247</sup> *Id.*

<sup>248</sup> *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The authors wonder whether, by shifting the burden of proof to the state in the third prong of the plain error test, the court also has prevented the use of the defendant’s failure to object as a factor in determining whether the alleged error was prejudicial enough to jeopardize his right to a fair trial. *Contra State v. Fauci*, 917 A.2d 978, 995 (Conn. 2007).

In determining whether the prosecutorial impropriety was severe, this court considers it highly significant that defense counsel failed to object to the improper remark, to request curative instructions, or to move for a mistrial. A failure to object demonstrates that defense counsel presumably did not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant’s right to a fair trial.

*Id.* (citations and quotations omitted).

<sup>249</sup> Kingrey, *supra* note 33; see also *infra* notes 253-257 and accompanying text.

<sup>250</sup> *In re Welfare of D.D.R.*, 713 N.W.2d 891, 897-907 (Minn. Ct. App. 2006) (reviewing several alleged trial errors and finding that, “[a]lthough . . . no one individual error . . . requires a new trial, the cumulative effect of trial error requires a new trial”). The



each alleged error separately and found that no error was significant enough on its own to justify reversal; however, the court ordered a new trial, holding that “the cumulative effect of trial error require[d] a new trial.”<sup>251</sup> *In re D.D.R.*, a complex case involving several contested evidentiary issues that are typically ripe for appeal, illustrates how a defense attorney might choose to not object to prosecutorial error as part of a strategy to improve the defendant’s appellate case.<sup>252</sup>

A recent review of Minnesota appellate decisions found that, during the last twenty years, the appellate courts’ willingness to review claims of unobjected-to trial errors for plain error has increased dramatically.<sup>253</sup> In other words, when the courts have had a choice between substantively reviewing an unobjected-to error or barring review of the claim because of the defendant’s failure to object, the appellate courts are now far more willing to substantively review the error.<sup>254</sup> Twenty years ago, Minnesota

defendant alleged errors in the trial court’s denial of his motion to suppress evidence due to purported discovery violations, several of the trial court’s evidentiary decisions, the trial court’s instruction to the jury that the victim’s testimony need not be corroborated, and several instances of unobjected-to prosecutorial error. *Id.*

<sup>251</sup> *Id.* at 907.

<sup>252</sup> *In re D.D.R.* also illustrates that the court of appeals has difficulty in determining whether a prosecutor has vouched for a witness’s credibility or vigorously argued for the witness’s credibility. The defendant in *In re D.D.R.* alleged that the prosecutor vouched for the victim’s credibility when the prosecutor argued in closing argument:

And why, if [the victim] made it all up, is she able to tell the same details of the rape over and over and over again? Why does she tell the same details of the assault to her friend? Why does she tell the same details of the assault to her mom? Why does she tell the same details of the assault to police officers, the medical staff at North Memorial and to you? . . . It’s difficult to say and keep the exact same facts in order over and over and over again. A 12-year old girl can’t do that. She can’t keep straight things that aren’t true . . . You all know it’s easier to keep the truth straight than it ever could be to keep the details of a lie straight.

*Id.* at 900. In a 2-1 decision, the court of appeals held that the “prosecutor improperly vouched for the credibility of the witnesses by *essentially guaranteeing that the victim cannot have testified untruthfully based on her age and consistency.*” *Id.* (emphasis added). In dissent, Judge Lansing disagreed with the majority opinion, arguing that “it is not plain error for the prosecutor to argue the credibility of [the victim’s] testimony. The state is allowed to make reasonable and vigorous arguments on credibility.” *Id.* at 908-09 (Lansing, J., dissenting) (citation omitted). The majority never explains how the prosecutor “essentially guarantee[d]” the victim’s credibility by highlighting the victim’s prior consistent statements. *See id.* Based on the case law cited in this article, the prosecutor’s argument in *In re D.D.R.* seems perfectly valid and appropriate, and the majority’s discussion of this issue did little to help prosecutors, defense attorneys, and trial judges understand the law.

<sup>253</sup> *See* Kingrey, *supra* note 33 (referencing data compiled by the Hennepin County Attorneys Office Appellate Section).

<sup>254</sup> *See, e.g.,* State v. Vick, 632 N.W.2d 676, 684-85 (Minn. 2001) (“Failure to object to the . . . evidence generally constitutes waiver of the right to appeal on that basis. However, an appellate court may consider a waived issue if there is (1) error, (2) that is plain, and (3) the error affects the defendant’s substantial rights.”) (citations omitted); State v. Schneider, 597 N.W.2d 889, 894 (Minn. 1999) (“We note that because Schneider’s counsel did not object to the admissibility of the DNA evidence, any objection to its admission was

appellate courts reviewed for plain error only 37% of defendants' claims of unobjected-to error.<sup>255</sup> Ten years ago, that rate was 50%.<sup>256</sup> From January 2004 to October 2005, Minnesota appellate courts reviewed 92% of all defendants' claims of unobjected-to errors.<sup>257</sup> Furthermore, now that the *Ramey* majority has shifted the burden of proof to the state, there is reason to believe that defense attorneys will increasingly choose to take their chances on appeal rather than object at trial because the new standard should make it easier for defendants to win their appeals.<sup>258</sup>

Perhaps because the *Ramey* majority knew that its holding would encourage defense attorneys to not object, the court, quoting *State v. Glaze*, told trial courts that they "have a duty to intervene and caution the prosecutor, even in the absence of objection, in appropriate circumstances."<sup>259</sup> It is noteworthy that in *Glaze*, the appropriate circumstances were unmistakably prejudicial. In *Glaze*, the defendant was charged with three counts of first degree murder.<sup>260</sup> In the prosecutor's closing argument, the prosecutor made three improper statements: (1) "The crimes that [the defendant] did, actually [a conviction by the jury] will never be enough;" (2) "This defendant has got far better representation than he deserved for what he did;" and (3) "[W]hen I think about this case, I'm just

knowingly waived."); *Schneider*, 597 N.W.2d at 896 (Page, J., dissenting) (arguing that "[w]hile failure to object . . . generally constitutes waiver of the issue on appeal, we do consider plain errors affecting substantial rights if the error had the effect of denying the defendant a fair trial"); *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) ("Although Griller did not object to the jury instructions at trial, we have the discretion to consider this issue on appeal if it is plain error affecting substantial rights."); *State v. Beard*, 288 N.W.2d 717, 718 (Minn. 1980) (holding that "because [the] defendant failed to object at trial to the circumstances of his arrest or to the trial court's admission of police testimony of statements he made following receipt of a Miranda warning during postarrest [sic] interrogation, he forfeited his right to have such issues considered on appeal.").

<sup>255</sup> Kingrey, *supra* note 33.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *But see infra* note 327 (showing that post-*Ramey* cases do not suggest an increase in reversals due to prosecutorial error). Possibly, the court does not know how to handle the change in the third-prong of the plain error test, i.e., is it a heavy burden? Is it a high threshold? How does the state prove a negative satisfactorily? This possible confusion may be why appellate courts after *Ramey* appear to emphasize that even if all three prongs of the plain error test are satisfied, reversal is not warranted unless "the fairness, integrity, or public reputation of the judicial proceeding is seriously affected." *See, e.g., State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006); *State v. Sivixay*, No. A05-2416, 2007 WL 1120566, at \*1 (Minn. Ct. App. Feb. 6, 2007) (citing *Dobbins*, 725 N.W.2d at 508).

If the three prongs of the plain error test are met, we will "then assess whether [we] should address the error to ensure fairness and the integrity of the judicial proceedings." We will correct the error only if the fairness, integrity, or public reputation of the judicial proceedings is seriously affected.

*Dobbins*, 725 N.W.2d at 508 (quoting *State v. Morton*, 701 N.W.2d 225, 234 (Minn. 2005)).

<sup>259</sup> *State v. Ramey*, 721 N.W.2d 294, 303 (Minn. 2006) (quoting *State v. Glaze*, 452 N.W.2d 655, 662 (Minn. 1990)).

<sup>260</sup> *Glaze*, 452 N.W.2d at 656.

outraged.”<sup>261</sup> Most trial judges would intervene if the prosecutor made these improper and prejudicial statements.

However, experience suggests that trial judges do not believe that it is wise to intervene a great deal in criminal trials, and this likely means that the *Ramey* majority’s directive is unlikely to change the behavior of trial judges, who must maintain absolute impartiality at trial.<sup>262</sup> In practice, most judges will not intervene *sua sponte* unless *serious* issues arise—situations in which unfair prejudice is obvious. Rule 2.02(c) and Rule 2.02(d) of the Minnesota General Rules of Practice for the District Courts state:

(c) Impartiality. During the presentation of the case, the judge shall maintain absolute impartiality, and shall neither by word or sign indicate favor to any party to the litigation. The judge shall be impersonal in addressing the lawyers, litigants and other officers of the court.

(d) Intervention. The judge should generally refrain from intervening in the examination of witnesses or *argument of counsel*; however, the court shall intervene upon its own initiative to prevent a miscarriage of justice or obvious error of law.<sup>263</sup>

The typical judge would not intervene if she heard a prosecutor say, “the State believes the witness is credible.” The judge might look up at the defense attorney in an effort to prompt an objection, but, in such a case, the judge likely would not find the statement so unfairly prejudicial that it required judicial intervention, especially considering the fact that the judge typically tells jurors at the beginning and end of the trial that they are the sole judges of credibility and that anything that the attorneys say is not evidence.<sup>264</sup> Additionally, a trial judge is unlikely to intervene immediately because the judge has to wait to consider the entire context of the argument so she can make a proper evaluation without unnecessarily interrupting the argument.<sup>265</sup> The duty to object in such a case falls directly upon the defense attorney’s shoulders, not on the neutral trial court.

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<sup>261</sup> *Id.* at 661-62.

<sup>262</sup> See MINN. CODE OF JUDICIAL CONDUCT, Canon 3 (2006) (“A Judge Shall Perform the Duties of the Office Impartially and Diligently”). One also may recall the famous quote attributed to Socrates: “Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.” See *Etzel v. Rosenbloom*, 189 P.2d 848, 852 (Cal. Dist. Ct. App. 1948); *Commonwealth v. King*, 839 A.2d 237, 243 (Pa. 2003).

<sup>263</sup> MINN. GEN. R. PRAC. DIST. CT. 2.02(c)-(d) (2006) (emphasis added). “These rules shall apply in all trial courts of the state.” *Id.* at 1.01.

<sup>264</sup> MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES - CRIMINAL 1.02A (5th ed. 2006) (instruction at beginning of trial); *id.* at 3.06 (referring to rulings on objections to evidence); *id.* at 3.11 (referring to statements of judge and attorneys); *id.* at 3.12 (instructing jurors that they are the sole judges of credibility).

<sup>265</sup> In contrast, on appeal, appellate courts see the statements more glaringly in isolation, although they do attempt to consider the statements in context.

On the other hand, if the defense attorney objects during closing argument, the trial court will act.<sup>266</sup> In all but the most serious incidents of error, the trial judge can make it possible for the defendant to receive a fair trial. Assuming the trial court knows the law, if the defense attorney's objection is proper, the court would sustain the objection and issue a strong verbal admonition to the prosecutor and the jury. If the trial court sustains the objection, the jury is presumed to disregard the evidence.<sup>267</sup> For example, the judge would state in a stern voice:

The objection is sustained. Jurors, the prosecutor's statement was improper. As I've told you previously, the attorneys' statements are not evidence. You should consider only the evidence. You should *disregard* the prosecutor's statement. The statement *should not* play any part in your deliberations. You, the jurors, are the sole judges of credibility.

Experienced prosecutors, defense attorneys, and trial judges know that a strong admonition by the bench hurts the prosecutor's credibility and thus her case—and is consequently extremely effective. In fact, one of the justices at the *Ramey* oral argument stated:

It takes but once during a final argument for a judge to shut down a lawyer in the midst of argument for the lawyer to get the message. Why shouldn't our standard of review reflect that? I mean, after all, the battle is at the . . . trial level. We're reading words here.<sup>268</sup>

The jury will follow the judge's instructions, and the prosecutor is unlikely to risk making the same mistake in that courtroom again. All effective trial attorneys know that their credibility with the court and the jury is crucial. It is neither "naïve" nor "fiction" to think that a judicial admonition is incapable of correcting the effects of prosecutorial error.<sup>269</sup> Trial judges

<sup>266</sup> See MINN. R. EVID. 103(b).

<sup>267</sup> *State v. Steward*, 645 N.W.2d 115, 122 (Minn. 2002); see also MINNESOTA PRACTICE, JURY INSTRUCTIONS GUIDES - CRIMINAL 3.06 (5th ed. 2006) (referring to rulings on objections to evidence).

<sup>268</sup> See Minnesota Supreme Court Oral Arguments - Videos, *supra* note 68.

<sup>269</sup> See Respondent's Brief at 15, *State v. Ramey*, 721 N.W.2d 294 (Minn. 2006) (No. A04-1056), 2005 WL 4859274 ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.") (quoting *State v. Caldwell*, 322 N.W.2d 574, 590-91 (Minn. 1982)); see also Minnesota Supreme Court Oral Arguments - Videos, *supra* note 68 (arguing, on behalf of the defendant, that *Caldwell* states that a curative instruction can be counterproductive and that the ability of a curative instruction to overcome prejudice is an "unmitigated fiction" for practicing attorneys). It is noteworthy that the "naive assumption" quote, originally authored in 1949 by United States Supreme Court Justice Robert H. Jackson, seems to be a misappropriation. See *Krulewitsch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). Justice Jackson used the language when discussing the challenges facing a trial court judge when hearing a case involving conspiracy charges. *Id.* Justice Jackson wrote:

When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and

should remedy prosecutorial error if the defense attorney objects or grant a mistrial if the error cannot be cured.

The system of managing prosecutorial error described in the preceding paragraph hinges on the trial judge knowing what is clearly contrary to the law and on defense attorneys objecting to prosecutorial error when it arises. Because the Minnesota Supreme Court holds that trial judges are in the best position to identify and remedy prosecutorial error,<sup>270</sup> it seems that the majority should have allowed trial courts to do just that. For example, the court could have applied the *Griller* plain error standard, voiced support for the ability of trial judges to handle *prejudicial* error, and encouraged defense attorneys to object to error. Instead of doing that, however, the court mandated “more scrutinizing review”<sup>271</sup> of claims of unobjected-to prosecutorial error by *appellate* courts and gave defense attorneys much less incentive to object at trial.<sup>272</sup> *Ramey* actually places an extra burden on trial courts, who now apparently must abandon their impartiality and substitute their own judgment for that of the defense attorney.

### C. *Ramey* Contradicts the Ideals of Judicial Restraint

As the concurring justices point out, the majority opinion in *Ramey* violated the ideals of judicial restraint.<sup>273</sup> Above and beyond any concerns the concurring justices had about the majority’s views on prosecutorial error,

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declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.

*Id.* (citations omitted). Except for its dramatic hyperbole, it is unclear why Justice Jackson’s language has been used to discredit the effectiveness of a trial court’s use of direct, immediate verbal admonitions in open court to remedy improper statements made by attorneys in closing argument.

<sup>270</sup> See, e.g., *Ramey*, 721 N.W.2d at 294; *State v. Mayhorn*, 720 N.W.2d 776, 783 (Minn. 2006); *State v. Parker*, 353 N.W.2d 122 (Minn. 1984) (“The propriety of a prosecutor’s final argument is a matter within the sound discretion of the trial court.”) (citing *State v. Fossen*, 282 N.W.2d 496, 503 (Minn. 1979)).

<sup>271</sup> See *Ramey*, 721 N.W.2d at 303.

<sup>272</sup> *Id.* at 299 (sensing the possibility of encouraging defense attorneys to fail to object by stating, “We would be concerned if defense counsel were deliberately passing on such an objection with the hope of securing reversible error for appeal and, as a result, getting two chances at a jury trial.”).

<sup>273</sup> See *id.* at 303-04 (P. Anderson, J., concurring); *id.* at 304-07 (Gildea, J., concurring).

the true focus of their concern was the majority's lack of judicial restraint.<sup>274</sup> The concurring justices' criticisms are reasonable. As mentioned above, the majority formulated the notion of shifting the burden of proof within the plain error context completely on its own.<sup>275</sup> No one briefed the issue. No one mentioned the idea at oral argument, and no one asked the court to take the steps it took. Further, when the majority formulated its decision, no other jurisdiction represented a model for it to follow.<sup>276</sup> Yet, the court resolved to shift the burden of proof anyway, for reasons that had little to do with the parties themselves.<sup>277</sup>

To understand the majority's decision, it is important to understand the specific controversy that was in front of the court. The controversy involved whether the court should apply the plain error doctrine when reviewing claims of unobjected-to prosecutorial error.<sup>278</sup> The majority stated that recent case law made it clear that the plain error doctrine applies to claims of unobjected-to prosecutorial error.<sup>279</sup> It was also clear that the plain error analysis, as defined by *Griller*, places the burden of proof on the *defendant* to show prejudice in all cases of unobjected-to error.<sup>280</sup> To illustrate, the court places the burden of proof on the defendant in cases involving unobjected-to errors related to jury instructions, hearsay, the

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<sup>274</sup> See, e.g., *id.* at 303-04 (P. Anderson, J., concurring) ("In essence, this case is about how we as an appellate court go about doing our business. . . . [Without briefs and well-developed arguments from the parties,] I believe it is imprudent for us to adopt the burden-shifting change adopted by the majority.")

<sup>275</sup> See *supra* notes 122-126 and accompanying text.

<sup>276</sup> See *State v. Ramey*, 721 N.W.2d 294, 306 (Minn. 2006) (Gildea, J., concurring).

<sup>277</sup> See *id.* at 301-02 (majority opinion).

Our new approach of shifting the burden to the prosecution to show lack of prejudice in prosecutorial misconduct cases best serves policy concerns. The benefits of this approach are to better allow substantive review of conduct that prosecutors should know is clearly forbidden and to put the onus on the prosecution to defend against the prejudicial effect of its own misconduct.

*Id.*

<sup>278</sup> *Id.* at 296.

<sup>279</sup> See *id.* at 301; see also Appellant's Brief and Appendix at \*5, \*17-18, *State v. Ramey*, 721 N.W.2d 294 (Minn. 2006) (No. A04-1056), 2005 WL 4829521.

<sup>280</sup> See *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); see also *State v. Martin*, 695 N.W.2d 578, 582-83 (Minn. 2005) (hearsay); *Bernhardt v. State*, 684 N.W.2d 534, 465, 475 (Minn. 2004) (Confrontation Clause violations); *State v. Asfeld*, 662 N.W.2d 534, 540-42 (Minn. 2003) (references to past domestic abuse); *State v. Manley*, 664 N.W.2d 275, 283 (Minn. 2003) (failure to provide a limited instruction regarding the use of certain evidence); *State v. Budreau*, 641 N.W.2d 919, 925 (Minn. 2002) (references to past murders); *State v. Lee*, 645 N.W.2d 459, 466-67 (Minn. 2002) (admission of evidence pertaining to relationship between defendant and homicide victim); *State v. Vick*, 632 N.W.2d 676, 685-87 (Minn. 2001) (*Spreigl* testimony); *State v. Bauer*, 598 N.W.2d 352, 363 (Minn. 1999) (improper expert testimony); *State v. Patterson*, 587 N.W.2d 45, 52 (Minn. 1998) (narrative testimony); cf. Appellant's Brief and Appendix at \*10-14, *State v. Ramey*, 721 N.W.2d 294 (Minn. 2006) (No. A04-1056), 2005 WL 4829521.

Confrontation Clause, expert testimony, *Spreigl* testimony, references to past murders, past domestic abuse, instructions that limited consideration of evidence, narrative testimony, and relationship evidence.<sup>281</sup> The defendant, represented by the Minnesota State Public Defender, admitted the court had used plain error analysis since the court decided *Griller*,<sup>282</sup> but he asked the court to abandon the plain error test.<sup>283</sup> The defendant asked the court to find that when a defendant fails to object to prosecutorial error, the appellate court must grant a new trial unless the error's effect on the jury was harmless beyond a reasonable doubt.<sup>284</sup>

The fact pattern in *Ramey* is remarkably straightforward. The prosecutor's statements in *Ramey*, albeit poorly chosen and improper, do not shock the conscience. The details of the case do not touch any hot-button social issues of the day, e.g., racial bias or cultural stereotyping,<sup>285</sup> that could cause great prejudice. For these reasons, Justice Gildea responded quite reasonably to the majority opinion by arguing that there was nothing compelling about the case that should have inspired an abandonment of the principle of stare decisis.<sup>286</sup> Furthermore, Justice Paul Anderson responded quite reasonably when he rejected the *Ramey* majority's opinion in favor of his view of judicial restraint, which envisions a process by which the court adheres to precedent, sends signals to practitioners in dicta that invite arguments in the future on the issue, and then waits patiently until those issues arise within actual controversies.<sup>287</sup>

#### ***D. The Minnesota Supreme Court Should Adopt the Term "Prosecutorial Error"***

With only one exception,<sup>288</sup> the Minnesota Supreme Court uses the term "prosecutorial misconduct" to refer to all errors committed by the prosecutor, from intentional misconduct that may "shock the conscience" to unintentional slips of the tongue. As others have stated, the term

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<sup>281</sup> See *supra* note 280 (citing cases in which the court applied plain error analysis to alleged unobjected-to error).

<sup>282</sup> Respondent's Brief, *State v. Ramey* at \*10, 721 N.W.2d 294 (Minn. 2006) (No. A04-1056), 2005 WL 4859274.

<sup>283</sup> *Id.* at \*6.

<sup>284</sup> *Id.*

<sup>285</sup> See generally William E. Martin & Peter N. Thompson, *Judicial Toleration of Racial Bias in the Minnesota Justice System*, 25 *HAMLIN L. REV.* 236, 269 (2002).

<sup>286</sup> *Ramey*, 721 N.W.2d at 304 (Gildea, J., concurring) ("[T]he majority's new plain error formulation . . . ignores the doctrine of stare decisis and creates unprecedented law without compelling reason.").

<sup>287</sup> *Id.* at 303-04 (P. Anderson, J., concurring).

<sup>288</sup> See *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005) (one use of the term "prosecutorial error" accompanying discussion of "prosecutorial misconduct"); see also *State v. Washington*, 725 N.W.2d 125, 133 (Minn. Ct. App. 2006) (using the term "prosecutorial error" within discussion of "prosecutorial misconduct").

“prosecutorial misconduct” as a legal term-of-art seems to overstate the case.”<sup>289</sup> As the Connecticut Supreme Court explained in April 2007:

Prosecutors make countless discretionary decisions under the stress and pressure of trial. A judgment call that we later determine on appeal to have been made improperly should not be called “misconduct” simply because it was made by a prosecutor. To label what is merely improper as misconduct is a harsh result that brands a prosecutor with a mark of malfeasance when his or her actions may be a harmless and honest mistake.<sup>290</sup>

The authors recommend using the term “prosecutorial misconduct” only in situations in which the prosecutor’s conduct can be described as “intentional or wanton wrongful . . . behavior” or “deliberate or wanton violation of the standards of conduct by a government official.”<sup>291</sup> In situations where the prosecutor’s conduct may be harmless or an honest mistake, which includes many of the “prosecutorial misconduct” cases previously cited in this article, the term “error” seems more appropriate. Shifting away from the term “prosecutorial misconduct” is not unprecedented.

In the 2007 *Fauci* case, the Connecticut Supreme Court abandoned the term “prosecutorial misconduct” and opted for the term “prosecutorial impropriety” to refer to all incidents of violative behavior by prosecutors.<sup>292</sup> Many other courts throughout the country use the term “prosecutorial error” or another term—sometimes interchangeably with the term “misconduct”—to refer to conduct that Minnesota courts would label as “misconduct.”<sup>293</sup> For

<sup>289</sup> See Kingrey, *supra* note 33.

<sup>290</sup> State v. Fauci, 917 A.2d 978, 982 n.2 (Conn. 2007).

<sup>291</sup> Dictionary.com, Misconduct, <http://dictionary.reference.com/browse/misconduct> (last visited Feb. 9, 2008).

<sup>292</sup> See *Fauci*, 917 A.2d at 982 n.2.

<sup>293</sup> See, e.g., *Ferguson v. State*, 814 So. 2d 925, 946 (Ala. Crim. App. 2000) (using term “prosecutorial error”); *State v. Hughes*, 969 P.2d 1184 (Ariz. 1998) (using terms “prosecutorial misconduct” and “prosecutorial impropriety” interchangeably); *People v. Hill*, 952 P.2d 673, 684 n.1 (Cal. 1998) (using term “prosecutorial error” because “the term prosecutorial ‘misconduct’ is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind”); *Simpson v. United States*, 877 A.2d 1045, 1048 (D.C. 2005) (holding that prosecutor’s improper introduction of fact not in evidence was “prosecutorial error”); *Garcia v. State*, 622 So. 2d 1325, 1331-32 (Fla. 1993) (using terms “prosecutorial misconduct” and “prosecutorial impropriety” interchangeably); *People v. Nevitt*, 553 N.E.2d 368, 380 (Ill. 1990) (using term “prosecutorial error”); *Stephenson v. State*, 742 N.E.2d 463, 482-85 (Ind. 2001) (using terms “prosecutorial impropriety” and “prosecutorial misconduct” interchangeably); *State v. White*, 109 P.3d 1199, 1210 (Kan. 2005) (holding that prosecutor’s misstatements of law during closing argument was “prosecutorial error”); *Epperson v. Commonwealth*, 197 S.W.3d 46, 61 (Ky. 2006) (holding that alleged improper statements by prosecutor did not constitute “prosecutorial error”); *State v. Hampton*, 750 So. 2d 867, 877-78 (La. 1999) (using term “prosecutorial error” to describe prosecutor’s misstatement of law to jury); *State v. Lemar*, 483 A.2d 702, 704 (Me. 1984) (using term “prosecutorial error”); *Giddins v. State*, 878 A.2d 687 (Md. 2005), *aff’d*, 899 A.2d 139 (Md. 2006) (using term “prosecutorial error”); *Commonwealth v. Coren*, 774 N.E.2d 623,



example, in 1980, the Wisconsin Supreme Court referred to a prosecutor's misstatement, "made in the exercise of good faith and professional judgment," as "prosecutorial error."<sup>294</sup> The term "prosecutorial error" is a preferable label for most improper prosecutorial conduct because it is a conceptual analogy to "judicial error." As for the term "prosecutorial misconduct," it is reasonable to retain the term but to use it only for especially egregious instances of deliberate wrongdoing.<sup>295</sup>

*State v. Mayhorn* is a good illustration of why the court needs to adopt the term "prosecutorial error" for unintentional errors.<sup>296</sup> In *Mayhorn*, coincidentally a case decided two weeks before *Ramey*, the trial court erroneously admitted evidence that the defendant had engaged in a prior gunfight.<sup>297</sup> During the prosecutor's closing argument, the prosecutor referred to the gunfight several times.<sup>298</sup> Upon review, the Minnesota Supreme Court ruled that it was *error* for the trial judge to have admitted the

630 (Mass. 2002) (referring to improper statements during prosecutor's closing argument as "prosecutorial error"); *State v. Crews*, 923 S.W.2d 477, 482 (Mo. Ct. App. 1996) (holding that prosecutor's remark that defense counsel acted like "magician" in distracting jury from facts did not rise to level of "prosecutorial impropriety"); *Rowland v. State*, 39 P.3d 114, 119 (Nev. 2002) (prosecutor committed "prosecutorial error" when he vouched for witness); *State v. Little*, 645 A.2d 665 (N.H. 1994) (using term "prosecutorial error"); *State v. Bey*, 610 A.2d 814, 847 (N.J. 1992) (prosecutor committed "prosecutorial error" when he improperly downplayed significance of age as mitigating factor in death penalty case); *State v. Mitchell*, 543 S.E.2d 830, 841 (N.C. 2001) (referring to improper statements by prosecutor as "prosecutorial error"); *State v. Williams*, 794 N.E.2d 27, 52 (Ohio 2003) (using term "prosecutorial error" to describe prosecutor's injection of most emotional aspects of crime into closing arguments); *Commonwealth v. Rizzuto*, 777 A.2d 1069 (Pa. 2001) (using terms "prosecutorial error" and prosecutorial "misconduct" interchangeably); *State v. Beltre*, 764 A.2d 190, 191 (R.I. 2000) (using terms "prosecutorial error" and "prosecutorial misconduct" interchangeably); *State v. Big Head*, 363 N.W.2d 556, 563 (S.D. 1985) (using term "prosecutorial error" to describe prosecutor's misstatement while examining witness); *Stahl v. State*, 749 S.W.2d 826 (Tex. Crim. App. 1988) (using term "prosecutorial misconduct"); *State v. Archuleta*, 850 P.2d 1232, 1242 (Utah 1993) (referring to prosecutor's inadvertent but improper presentation of testimony as "prosecutorial error"); *In re Personal Restraint of Pirtle*, 965 P.2d 593, 603-04 (Wash. 1998) (using terms "prosecutorial misconduct" and "prosecutorial error" interchangeably); *State v. Jenich*, 288 N.W.2d 114, 122 (Wis. 1980) (referring to prosecutor's misstatement, made in good faith, as "prosecutorial error"), *modified on other grounds*, 292 N.W.2d 348 (Wis. 1980); *Dice v. State*, 825 P.2d 379, 384-85 (Wyo. 1992) (using term prosecutorial "error" to describe improper comments by prosecutor).

<sup>294</sup> *Jenich*, 288 N.W.2d at 122. In *Jenich*, the Wisconsin court distinguished the concepts of "prosecutorial misconduct" and "prosecutorial error." *Id.*

<sup>295</sup> *See, e.g., State v. Harris*, 521 N.W.2d 348 (Minn. 1994) (reviewing conduct of prosecutor who improperly exploited evidence that several prosecution witnesses had been placed in county's witness protection program because they feared defendant and elicited inadmissible character evidence that defendant planned to beat his wife with a baseball bat); *see also Jenich*, 288 N.W.2d at 122 (referring to prosecutorial misconduct as conduct motivated by bad faith or a desire to harass or prejudice the defendant).

<sup>296</sup> *See State v. Mayhorn*, 720 N.W.2d 776 (Minn. 2006).

<sup>297</sup> *Id.* at 783.

<sup>298</sup> *Id.* at 786.

evidence,<sup>299</sup> but the court determined that it was *misconduct* for the prosecutor to have referred to the same evidence admitted by the trial court because the prosecutor's statement "capitalized on and compounded the court's error" and "appears to have been intended to inflame the passions and prejudices of the jury."<sup>300</sup> There is no reason why a trial judge's good faith decision should be mere error but the prosecutor's good faith decision should be misconduct. Such terminology is especially disparaging to prosecutors when the prosecutor was doing exactly what the trial judge permitted the prosecutor to do.

Unlike the *Ramey* majority, which does not discuss the wide range of impact that different types of improper conduct can have on a trial, the authors believe that there is a significant difference between relatively innocuous errors, e.g., an incidental one-line vouching statement such as "the State believes X is credible," and serious, deliberate, intentional misconduct in closing argument. The following excerpts represent statements prosecutors have made in closing argument that should constitute "prosecutorial misconduct":

- But is there any doubt in your mind as to what Dr. Hagberg's opinion was, as to what caused that tear? There's no doubt in my mind it was caused by sexual intercourse at a time when she wasn't emotionally prepared, namely at a time when she was unconscious. . . . Dr. Hagberg has an opinion . . . . And I have an opinion. And I am sure that you have an opinion as to what caused that tear . . . . And that . . . satisfies me beyond any reasonable doubt that [the alleged victim] had been raped.<sup>301</sup>
- None of us are safe until we take care of these people who will rob, who kill, murder, steal. . . . You people work. You work at your jobs. You raise your family. . . . Perry - he doesn't work. He prowls at night like he was doing - downtown drinking from early afternoon until late in the night; carrying this gun; target practicing in his house. . . . When Arthur Robert Walters was lying on that pavement dying . . . [h]e went up to Elmer's and started to consume some more liquor and pursued his

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<sup>299</sup> *Id.* at 783.

<sup>300</sup> *Id.* at 786; *see also id.* at 785 ("The fact that the prosecutor made repeated references to the shoot-out is important to our conclusion that the combination of evidentiary errors and prosecutorial misconduct rendered the trial unfair.") In addition to this error, the court in *Mayhorn* discussed other, more egregious examples of prosecutorial error. Considering that *Mayhorn* had been decided just two weeks before *Ramey*, the authors of this article suspect that the *Ramey* majority still had *Mayhorn* on its mind when it criticized the "prosecutors [who] persist in clearly proscribed conduct." *See State v. Ramey*, 721 N.W.2d 294, 301 (Minn. 2006).

<sup>301</sup> *State v. Schwartz*, 122 N.W.2d 769, 773 (Minn. 1963).

particular indulgence at that time. This is not the class-A citizen who is deserving of any consideration from people on the jury.<sup>302</sup>

- If she is not guilty, why does the State not know that and why do they prosecute?

Now, there is also another question there, how actually does the State feel about this. We think it is a very, very important case, and if we didn't think it was a very important case we wouldn't be here on this trial. *We feel we know she is guilty.* We spent considerable money. We sent police and sheriffs to Chicago. McDowell said they went to every town between here and Chicago trying to look for that money. It has cost a lot of money to try this case, and *don't you think for one second that we don't know she is guilty or that money wouldn't be spent.*<sup>303</sup>

- [J]ust as surely as she has killed her husband in cold blood, that same thing will happen to her son, or someone else if she is released. So, ladies and gentlemen, I submit to you that we have an additional responsibility in this case, not the usual responsibility to save society from this woman, but we have a responsibility to that little boy you saw testify in this courtroom, and . . . I feel as I have never felt before, that the only way you can adequately discharge that responsibility is to find this defendant guilty of murder in the first degree.<sup>304</sup>
- I say to you, gentlemen of the jury, that I have a right, if a man's story is improbable, to say that he is lying. Now I might make a wishy-washy argument here and say he is mistaken, but that is not what I believe, gentlemen, that is not what is established, for I know, by God, this man Crumley sat there and told you a deliberate framed-up falsehood . . . I say it now and I would say it if I live to be a hundred years old. . . . I am telling you, gentlemen, really from the bottom of my heart these things about these detectives, because I knew, because I felt, not as an experienced prosecuting attorney, because I have only been such since last May, not as an experienced criminal lawyer, because I have never been

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<sup>302</sup> State v. Perry, 142 N.W.2d 573, 579 (Minn. 1966).

<sup>303</sup> State v. Gulbrandsen, 57 N.W.2d 419, 421-22 (Minn. 1953).

<sup>304</sup> State v. Schabert, 15 N.W.2d 585, 589 (Minn. 1944).

such, but because I claim to be a man of some small intelligence.<sup>305</sup>

Admittedly, these quotations have been cherry-picked to demonstrate a contrast and are isolated from their contexts, but they reveal a species of argument that is obviously more egregious than the statements found in recent cases such as *Ramey*. It only seems fair to distinguish the two types using two different terms: “prosecutorial error” and “prosecutorial misconduct.”

#### IV. A REPRIS: THE REMANDED RAMEY

The Minnesota Supreme Court remanded *Ramey* to the court of appeals to determine whether the prosecutor’s conduct constituted plain error and to follow the new plain error standard it had established.<sup>306</sup> On May 1, 2007, the Minnesota Court of Appeals separately considered the four statements noted in *Ramey*.<sup>307</sup> First, the court determined that the prosecutor did not commit misconduct when he stated, “[t]hat would be a big coincidence if it wasn’t the defendant, and the State believes that would be too big of a coincidence. The State believes that’s too big of a bridge to jump.”<sup>308</sup> Citing to *Blanche*, the court agreed with the State that “the ‘State believes’ phrasing was a verbal tic that did not convey the prosecutor’s personal opinion to the jury.”<sup>309</sup> Second, the court found no misconduct when the prosecutor stated in rebuttal, “[w]e suggest there [is] no evidence that you can find that [Sherry Smith] was somehow affected, that she couldn’t have - couldn’t have accurately identified Ramey’s voice.”<sup>310</sup> Citing to *State v. Bradford*, the court held that the statement was “clearly not an injection of personal opinion.”<sup>311</sup> Third, without explicitly noting whether the statement was plain error, the court determined that the statement, “the State charged Mr. Ramey, enter[ing] the trial believing he’s guilty,” which was made during the prosecutor’s opening statement,<sup>312</sup> was not improper because the State showed there was “no reasonable likelihood that the

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<sup>305</sup> *State v. Bernstein*, 181 N.W. 947, 948 (Minn. 1921).

<sup>306</sup> *State v. Ramey*, 721 N.W.2d 294, 303 (Minn. 2006).

<sup>307</sup> *State v. Ramey*, No. A04-1056, 2007 WL 1247145, at \*2 (Minn. Ct. App. May 1, 2007); see also *Ramey*, 721 N.W.2d at 297 n.1.

<sup>308</sup> *Ramey*, 2007 WL 1247145, at \*2.

<sup>309</sup> *Id.* (citing to and summarizing *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005), as “rejecting [the] argument that phrases such as ‘I suggest to you’ and ‘I think’ were improper personal opinion, and quoting the district court’s conclusion that these were ‘rhetorical idiosyncrasies’”).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at \*3 (citing to and summarizing *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000), as “holding that ‘I submit to you’ argument was not a statement of personal opinion”).

<sup>312</sup> See *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006) (suggesting that this statement was made during the state’s closing argument).

absence of this statement would have had a significant effect on the verdict.”<sup>313</sup>

As for the fourth statement, however, the court did find prosecutorial misconduct when the prosecutor said, “The State believes [the victim’s] testimony is credible. The officer’s testimony is credible, and you should believe what they told you.”<sup>314</sup> The court determined that there was misconduct because the jury could have interpreted the prosecutor’s statement as vouching for the reliability of the witness’s identification of the defendant’s voice and for the credibility of the police officers who testified at the trial.<sup>315</sup> The court explained:

In a very short trial in which the reliability of one witness’s testimony is the critical issue, a prosecutor’s argument vouching for the credibility of that testimony must be assumed to have had some impact . . . . Given the brevity of the phone call, S.S.’s identification of the caller was certainly less than overwhelming evidence . . . . If the call had lasted significantly longer, and included references to the relationship . . . or if it had been traced . . . then the evidence would have been “overwhelming,” depriving the misconduct of any significant effect on the verdict. As it is, however, the state’s evidence was not so strong as to diminish the impact of the prosecutor’s vouching statements.<sup>316</sup>

The court then reversed the conviction and ordered a new trial for Ramey.<sup>317</sup>

This court of appeals’ opinion is unpublished, and, as such, the court is expected to apply the law without needing to provide a lengthy discussion of the law.<sup>318</sup> The Minnesota Supreme Court traditionally is the proper court to define and clarify the law, and “[u]npublished opinions of the Court of Appeals are not precedential.”<sup>319</sup> The 2007 *Ramey* opinion provided a well-reasoned and helpful explanation for why the prosecutor’s fourth statement constituted reversible plain error; yet, the court’s opinion would have been more helpful had the court explained in more depth when the phrase “[t]he State believes” is only a “verbal tic” versus when it is improper vouching.<sup>320</sup> Further, the court’s discussion of the prosecutor’s first and second allegedly

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<sup>313</sup> *Ramey*, 2007 WL 1247145, at \*3.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at \*4 (citation omitted).

<sup>317</sup> *Id.*

<sup>318</sup> See MINN. STAT. § 480A.08, subd. 3(c) (2006) (describing the factors the Minnesota Court of Appeals may consider when determining whether to publish a particular case).

<sup>319</sup> *Id.* Of course, published court of appeals opinions can and often do establish new law. See *id.*

<sup>320</sup> See *United States v. Bess*, 593 F.2d 749, 756-57 n.10 (6th Cir. 1979) (distinguishing proper and improper uses of the words “I believe”).

improper statements would have been more helpful had the court distinguished statements such as “the State believes” and “we suggest to you” from those found in *Prettyman*, *Ture* (2004), and *Blanche*, where the Minnesota Supreme Court suggested that a prosecutor’s use of phrases such as “I think,” “I wanted you to see,” and “I suggest to you” were error.<sup>321</sup> In the future, Minnesota appellate courts should distinguish proper uses of the phrase “[t]he State believes” from improper uses of the phrase so that trial judges, prosecutors, and defense attorneys know how to conduct themselves. *Bess*, *Fauci*, and *Reed* are good models for any court to use when seeking to distinguish between proper and improper conduct because they are both informative and helpful for practitioners.<sup>322</sup>

## V. CONCLUSION

In *Ramey*, the Minnesota Supreme Court’s frustration over issues related to prosecutorial error reached a breaking point, and a majority of justices decided to do something bold about it. Collectively, all of the justices were upset over the court’s prior lack of success in reducing the frequency of prosecutorial error at the trial level.<sup>323</sup> The court had dealt with issues of prosecutorial error many times before, and the justices felt that prosecutors—or at least the “prosecutors [who] persist in clearly proscribed conduct”—were not listening to them.<sup>324</sup> Under these circumstances, the

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<sup>321</sup> See *supra* Part III.A.2.c.

<sup>322</sup> See *supra* notes 222-235 and accompanying text.

<sup>323</sup> See Minnesota Supreme Court Oral Arguments - Videos, *supra* note 68. Justice

Paul Anderson appears to have spoken for the court during the *Ramey* oral argument when he stated:

[Y]ou can take a look at a series of cases out of our court going back well before *Salitros*. *Salitros* was kind of an expression of frustration on our court, *Porter* a little bit, too, as to . . . The court had said in cases before, ‘We’ve seen a number of repeated instances of prosecutorial misconduct. We said don’t do it. No reversal. Don’t do it. No reversal. And the behavior continues. . . . Why shouldn’t [we], when we see it, apply the highest standard and if . . . we do . . . grant a reversal? Cause that’s when it will stop. Because . . . if you look at cases out of this court over the past few years, there have been some repeated instances of prosecutorial misconduct and the court has expressed its frustration to don’t do it but then has been reluctant to reverse. But if it is so limited, why shouldn’t we have the highest standard and reverse? Because then obviously it will end. Our frustration will end because we’ll be applying that high standard.

*Id.* Not only can one sense the court’s frustration in Justice Paul Anderson’s words but also its desire to take a stand against prosecutorial error. *But see infra* note 324.

<sup>324</sup> *State v. Ramey*, 721 N.W.2d 294, 301 (Minn. 2006). The court in *State v. Ray*, 659 N.W.2d 736, 746-47 (Minn. 2003), identified one particular prosecutor from Hennepin County who faced three separate appellate challenges for statements he made in closing argument that highlighted the fact that the defendant came from a “different world” than the jurors. See also *State v. Robinson*, 604 N.W.2d 355, 362-63 (Minn. 2000); *State v. Brown*, No. C7-99-1711, 2000 WL 978756, at \*1 (Minn. Ct. App. July 18, 2000). By identifying this specific prosecutor, the court seems to have been attempting to imply that the same prosecutor

majority in *Ramey* resolved to appropriate the plain error test, a doctrine originally intended as a limited safeguard against obvious injustice, to fix the systematic problems for which it felt prosecutors were responsible.<sup>325</sup>

This article has focused on a number of *Ramey*'s problems. The majority's decision was weakly justified because it relied on inapposite case law and the mistaken notion that prosecutors have received clear guidance by the court on what constitutes permissible and impermissible conduct. It was not helpful to trial courts because it discourages defense attorneys from objecting to prosecutorial error, and it violated the ideals of judicial restraint because it broke from the *Griller* precedent without a compelling reason to do so and with no input from the parties.<sup>326</sup> In addition, now that *Ramey* has become the law, the new standard has not improved the court's ability to identify and define prosecutorial error.<sup>327</sup> For these reasons, the Minnesota

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had made the improper argument in *Ray* after being warned twice by the appellate courts to avoid the rhetorical device. See *Ray*, 659 N.W.2d at 746-47; see also Beth Hawkins, *Trial By Color*, CITY PAGES, June 4, 2003, available at <http://citypages.com/databank/24/1174/article11286.asp>. A glance at the trial dates in *Ray* and *Robinson*, however, indicates that the trials of the two defendants concluded before any of these three opinions was released. See Margaret Zack, *St. Paul Man Convicted of Drug-Related Murder*, STAR TRIB., June 19, 1998, at 2B (reporting that Dameion Robinson was convicted of first degree murder during an aggravated robbery on June 18, 1998); Margaret Zack, *20-Year-Old Guilty of First-Degree Murder*, STAR TRIB., Nov. 11, 1999, at 3B (reporting that Secundus Ray was convicted of aiding and abetting first degree murder on November 10, 1999). Further, the court actually found no misconduct in the prosecutor's statement in *Robinson* and, in 2007, used *Robinson* to exemplify proper prosecutorial conduct. See *State v. Wren*, 738 N.W.2d 378, 392 (Minn. 2007) (juxtaposing the proper comments found in *Robinson* and the improper comments found in *Ray*). Thus, based on these three cases, any implication that this particular prosecutor had been "persist[ing] in clearly proscribed conduct" would be wrong.

<sup>325</sup> See *Ramey*, 721 N.W.2d at 303.

<sup>326</sup> This article does not discuss the inevitable social, financial, and emotional costs of *Ramey*, but significant burdens arise when the court orders a second trial, not the least of which are the burdens placed on victims and other witnesses who must spend time, money, and emotional capital preparing for, waiting for, and testifying at a second trial. Of course, prosecutors, defense attorneys, and trial judges also bear responsibility for trying the case a second time.

<sup>327</sup> See, e.g., *State v. Dobbins*, 725 N.W.2d 492, 511 (Minn. 2006) (finding that the prosecutor did not commit plain error when the state asked a series of "Are they lying" type questions when referring to the testimony of witnesses during cross-examination of a defendant who "holds the issue of the credibility of the state's witnesses in central focus"). In *Dobbins*, four justices found that the prosecutor's conduct was acceptable because the credibility of the witnesses was in "central focus," *id.*, whereas three dissenting justices adamantly disagreed, finding that "[a]sking one witness to opine on the veracity of another witness calls for impermissible speculation, lacks foundation and is, at best, argumentative" and that the conduct violates Rules 401 (excluding irrelevant evidence), 403 (excluding relevant evidence whose probative value is substantially outweighed by the possibility of unfair prejudice or confusion), 602 (requiring that a witness testify only about matters shown to be within her personal knowledge), 701 (restricting opinion evidence by lay witnesses), and 702 (requiring foundation for expert opinion evidence) of the Minnesota Rules of Evidence, *id.* at 514-15 (Hanson, J., dissenting). *Dobbins* illustrates that the justices also have been struggling to identify prosecutorial error as well. See generally *State v. Wren*, 738 N.W.2d 378, 393 (Minn. 2007) (holding that while prosecutor engaged in misconduct, the defendant

Supreme Court should overturn the *Ramey* decision and return to the *Griller* plain error test when reviewing instances of unobjected-to prosecutorial error. Regardless of whether the court retains or overturns *Ramey*, the court should spend more time clarifying what constitutes prosecutorial error because this will assist prosecutors in avoiding, defense attorneys in identifying, and trial courts in remedying incidents of prosecutorial error.

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did not meet his burden to show plain error); *State v. Davis*, 735 N.W.2d 674, 681-82 (Minn. 2007) (finding prosecutorial misconduct did not affect defendant's substantial rights); *State v. Fields*, 730 N.W.2d 777, 786 (Minn. 2007) (finding no misconduct); *State v. McArthur*, 730 N.W.2d 44, 54 (Minn. 2007) (finding no misconduct); *State v. Haynes*, 725 N.W.2d 524, 530 (Minn. 2007) (finding no plain error); *State v. Broden*, No. A05-1584, 2007 WL 2601425, at \*1 (Minn. Ct. App. Sept. 11, 2007) (holding prosecutorial misconduct was plain error and that state established the misconduct did not have a significant effect on the outcome of the case); *State v. Alameda*, No. A06-1085, 2007 WL 2473489, at \*1 (Minn. Ct. App. Sept. 4, 2007) (finding no misconduct); *State v. Lorenzo*, No. A06-521, 2007 WL 2244902, at \*1 (Minn. Ct. App. Aug. 7, 2007) (finding no plain error); *State v. Dickson*, No. A05-2460, 2007 WL 152086, at \*1 (Minn. Ct. App. July 23, 2007) (finding no plain error); *State v. Cox*, No. A06-555, 2007 WL 2034214, at \*1 (Minn. Ct. App. July 17, 2007) (finding no misconduct); *State v. Olayiwola*, No. A06-417, 2007 WL 2034161, at \*1 (Minn. Ct. App. July 17, 2007) (finding no plain error); *State v. Opelt*, No. A06-996, 2007 WL 1599022, at \*1 (Minn. Ct. App. June 5, 2007) (holding prosecutor did not engage in prejudicial misconduct and that prosecutor's statements did not prejudice the jury verdict or deprive defendant a fair trial); *State v. Sivixay*, No. A05-2416, 2007 WL 1120566, at \*1 (Minn. Ct. App. Apr. 17, 2007) (finding no plain error); *State v. Tabaka*, No. A05-1899, 2007 WL 1120523, at \*1 (Minn. Ct. App. Apr. 17, 2007) (holding there was no reasonable likelihood that prejudicial misconduct had a significant effect on the jury's verdict); *State v. White*, No. A05-1828, 2007 WL 446606, at \*1 (Minn. Ct. App. Feb. 13, 2007) (holding misconduct was not plain error, and even if plain error, there was no significant effect on the case); *State v. Simons*, No. A05-2121, 2007 WL 329137, at \*1 (Minn. Ct. App. Feb. 6, 2007) (finding no misconduct); *State v. Carruthers*, No. A05-1763, 2007 WL 92668, at \*1 (Minn. Ct. App. Jan. 16, 2007) (finding no plain error); *State v. Giishig*, No. A05-2199, 2007 WL 92699, at \*1 (Minn. Ct. App. Jan. 16, 2007) (holding misconduct was improper but not unduly prejudicial); *State v. Griffith*, No. A05-2326, 2007 WL 92733, at \*1 (Minn. Ct. App. Jan. 16, 2007) (finding no plain error); *State v. Johnson*, No. A05-2238, 2007 WL 3514, at \*1 (Minn. Ct. App. Jan. 2, 2007) (holding the state met its burden of showing prosecutorial misconduct did not cause prejudice to defendant); *In re Welfare of B.U.P.*, No. A05-2443, 2006 WL 3593040, at \*1 (Minn. Ct. App. Dec. 12, 2006) (holding there was no misconduct and no plain error); *State v. Denzer*, No. A05-2024, 2006 WL 3593021, at \*1 (Minn. Ct. App. Dec. 12, 2006) (finding no plain error); *State v. Weidell*, No. A05-1536, 2006 WL 3198904, at \*1 (Minn. Ct. App. Nov. 7, 2006) (holding plain error was non-prejudicial and did not warrant reversal).

The court of appeals has reversed one case due to unobjected-to prosecutorial error after *Ramey*; however, in that case, the judges strongly disagreed about whether the state met its burden in the third prong of the plain error test. See *State v. Campbell*, No. A06-250, 2007 WL 1470116, at \*1 (Minn. Ct. App. May 22, 2007) (reversing, in a 2-1 decision, for prejudicial error, finding that "[t]he prosecutorial misconduct, which the state [failed] to demonstrate did not effect appellant's substantial rights, required reversal for a new trial in the administration of justice") (footnote omitted); see *contra id.* at 6 (Dietzen, J., dissenting) (maintaining that the prosecutor's statements during closing argument, although plain error, were not prejudicial because "the state [met] its burden of establishing that [its] conduct did not materially undermine the fairness of the trial") (citing *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007)).