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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0513**

State of Minnesota,
Respondent,

vs.

Patricia Jean Ryerson,
Appellant.

**Filed December 18, 2017
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CR-16-25226

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Steven M. Tallen, Medina City Attorney, Tallen & Baertschi, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Jesson, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

On appeal from her conviction of disorderly conduct, appellant argues that (1) the district court committed plain error by admitting evidence of her prior behavior at a

restaurant and (2) the prosecutor committed prejudicial misconduct during closing arguments when he misstated the evidence. We affirm.

FACTS

Appellant Patricia Jean Ryerson was issued a citation for disorderly conduct, under Minn. Stat. § 609.72, subd. 1(3) (2016), after the operator of a restaurant complained to police that a customer had caused a disturbance. The owner contacted the police, but by the time officers arrived, the customer had left the restaurant in a taxi. An officer contacted the taxi company, but the company was unable to provide the officer with the name of the driver or passenger. The next day, the officer received appellant's address and name from an individual involved in an unrelated civil matter. The individual told the officer that he frequently gave appellant rides to the restaurant. The officer issued appellant a trespass notice and citation for disorderly contact. Appellant denied having been to the restaurant in three years. The officer noted that appellant matched the witnesses' descriptions of the customer who had caused the disturbance.

At trial, the owner of the restaurant identified appellant as the person at the restaurant on the day of the incident. She testified that appellant had yelled at one of her employees. She testified that she asked appellant to leave when she saw appellant taking too much Parmesan for her pizza slice. She testified that she had seen appellant at the restaurant approximately eight times and that appellant is "in the habit of emptying out all the Parmesan shakers in the place into her container of one pizza slice." The owner testified that appellant began yelling and swearing at her when she asked her to leave and that appellant also cursed at multiple customers. The owner testified that potential customers

left the restaurant during this time and other customers encouraged the woman to leave the restaurant.

The assistant manager also identified appellant at trial as the person who caused a disturbance at the restaurant. She testified that she has had six interactions with appellant, and that appellant used vulgar language during those interactions, complained about the food and cost, would “dump Parmesan” into her food container, and would arrive at the restaurant in a taxi. She testified that other employees had also witnessed appellant curse at them and take things while in the restaurant. She testified that, on the day of the incident, appellant entered the restaurant and complained about the food options and cost. She testified that appellant used the “F-word” and “B-word” and said “sh-t a few different times to a few . . . other customers.” She testified that she witnessed appellant have a confrontation with two different customers, one of whom had young children with her. She testified that appellant called the customer a “sh--ty mother” who “was being a b---h.”

A customer also testified during the trial. She identified appellant as the person with whom she interacted. She testified that she intervened when appellant called another customer a “piece of sh-t” and complained about the employees. She testified that appellant then called her “an ugly piece of sh-t.” The customer testified that the incident left her five-year-old son “flabbergasted” and that he talked about the incident for days afterward.

The district court instructed the jury that disorderly conduct includes conduct that is offensive, obscene, abusive, boisterous or noisy, or abusive language that qualifies as “fighting words.” During closing arguments, the state argued that appellant’s conduct

alone met the elements of disorderly conduct, but that appellant also used “fighting words” that caused an immediate breach of the peace. The state also discussed the evidence that identified appellant as the person who had caused a disturbance at the restaurant. The state referenced the witnesses’ identifications of appellant based on their past experiences with her and her pattern of behavior. The state also indicated that a taxi driver had repeatedly taken appellant to the restaurant. The jury returned a guilty verdict.

This appeal followed.

D E C I S I O N

I.

Appellant argues that the district court plainly erred by permitting the prosecutor to offer evidence of appellant’s prior visits and behavior at the restaurant without providing notice of its intent to offer the evidence under Minn. R. Evid. 404(b).

We typically review a district court’s admission of evidence of a defendant’s prior bad acts for an abuse of discretion. *Ture v. State*, 681 N.W.2d 9, 15 (Minn. 2004). But because appellant did not object to admission of the evidence on rule 404(b) grounds during the trial, we apply a plain-error standard of review on appeal. See Minn. R. Crim. P. 31.02 (permitting appellate review of issues not raised to the district court for “[p]lain error affecting a substantial right”); *State v. Word*, 755 N.W.2d 776, 781 (Minn. App. 2008).

Under the plain-error standard, the defendant must establish (1) an error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “An error is plain if it is clear or obvious, and usually this is shown if the error contravenes case law, a rule, or a standard of conduct.” *State v. Davis*, 735 N.W.2d 674,

681 (Minn. 2007) (quotation omitted). If the three prongs of the plain-error test are satisfied, we will reverse if it is necessary to ensure the fairness and integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740.

Minn. R. Evid. 404(b) prohibits the use of evidence of another crime, wrong, or act “to prove the character of a person in order to show action in conformity therewith.” Such evidence, commonly known as *Spreigl* evidence in Minnesota, is generally excluded because “it might . . . suggest[] that the defendant has a propensity to commit the crime or that the defendant is a proper candidate for punishment for his or her past acts.” *State v. Fardan*, 773 N.W.2d 303, 315 (Minn. 2009) (quotations omitted); see *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965) (providing the common-law exclusionary rule regarding prior crimes). But evidence of another crime, wrong, or act is admissible for limited purposes, including, among others, proof of motive, opportunity, intent, or identity. Minn. R. Evid. 404(b). The state must give notice of its intent to offer such evidence, explain its relevance, support the offer with clear and convincing evidence, and demonstrate that the evidence’s probative value outweighs its prejudicial effect. *Id.*; *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006).

Appellant argues that the evidence should have been excluded at trial because the state did not follow the procedures for the admission of *Spreigl* evidence. The state argues that appellant’s behavior at the restaurant on previous occasions was not criminal in nature and was not offered to prove that appellant had a propensity “to swear and behave badly.” The state argues that the evidence was relevant to demonstrate that the employees knew

and recognized appellant on the day of the incident, since appellant claimed she had not been at the restaurant for three years.

To be excluded under rule 404(b), an “act” need not constitute a crime. *State v. McLeod*, 705 N.W.2d 776, 787-88 (Minn. 2005). Rather, the act is required to have been a “bad” act. *Id.* The supreme court has established that evidence is not *Spreigl* evidence if “there is nothing per se wrong” with the act. *See Ture*, 681 N.W.2d at 17 (concluding that evidence of the defendant’s collection of personal information about women was not bad-act evidence because there was nothing per se wrong with the habit).

The challenged evidence established that appellant frequented the restaurant and complained, used vulgar language, and took excessive amounts of Parmesan while there. But there is nothing intrinsically wrong with these acts. The employees’ descriptions did not suggest that on prior occasions her behavior had escalated to the point of yelling and engaging in abusive and obscene language directed at multiple customers within the restaurant. Because we are not persuaded that the prior behavior was a bad act, the state was not required to comply with rule 404(b)’s procedural requirements before offering the evidence.

Even if appellant’s prior behavior qualified as bad acts under rule 404(b), appellant has not satisfied her burden of establishing that her substantial rights were affected. “An error affects substantial rights if there is a reasonable likelihood that it substantially affected the verdict.” *State v. Rossberg*, 851 N.W.2d 609, 618 (Minn. 2014) (quotation omitted). We consider three factors when determining if erroneously admitted rule 404(b) evidence significantly affected a verdict: (1) whether other evidence was presented on the issue for

which rule 404(b) evidence was offered; (2) whether the court gave a limiting instruction; and (3) whether the state dwelled on the evidence in its closing argument. *Fardan*, 773 N.W.2d at 320.

Here, the evidence was offered to demonstrate that the witnesses were familiar with appellant on the day of the incident and could adequately identify her at the trial. Even without evidence of appellant's prior behavior, three eyewitnesses identified appellant at trial as the person who had caused a disturbance at the restaurant. The state did not dwell on the evidence during closing arguments, only stating that the prior cheese behavior and complaints were "very unique, very memorable" to the employees. The district court did not provide, *sua sponte*, a limiting instruction. But the supreme court has previously stated that a district court's failure to *sua sponte* instruct the jury is not reversible error. *State v. Vick*, 632 N.W.2d 676, 687 (Minn. 2001). On the record as a whole, there is no reasonable possibility that the challenged evidence substantially influenced the jury's verdict.

II.

The next issue raised by appellant is whether the prosecutor engaged in prejudicial misconduct. Appellant argues that the prosecutor misstated the evidence when he argued, "[T]here was a statement from an iHail taxi driver that [the officer] spoke with and yeah, there was repeatedly taking this person to [the restaurant]. . . . [A]n iHail taxi was the vehicle that the defendant came in, so it all really adds up very neatly."

The right to due process of law includes the right to a fair trial, and the right to a fair trial includes the absence of prosecutorial misconduct. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005); *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *review*

denied (Minn. June 19, 2007). A prosecutor engages in misconduct if he or she intentionally misstates the evidence during closing argument. *State v. McArthur*, 730 N.W.2d 44, 53 (Minn. 2007).

Appellant did not object to the prosecutor's alleged misstatement. Accordingly, we apply a modified plain-error test. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail, appellant must establish that there was an error and that the error is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If appellant establishes plain error, the burden shifts to the state to show that the plain error did not affect appellant's substantial rights. *Id.* "If all three prongs of the test are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) (quotation omitted). We will reverse a conviction "only if the [prosecutorial] misconduct, when considered in light of the whole trial, impaired [appellant's] right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). In reviewing allegations of prosecutorial misconduct during a closing argument, "we look to the closing argument as a whole, rather than to selected phrases and remarks." *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009) (quotation omitted).

The prosecutor's comments do appear to misstate the evidence. The officer testified that an individual gave him appellant's first name and address "and told [him] that he frequently gave her rides to [the restaurant]." The officer did not testify that the individual was an iHail taxi driver. But nothing in the record indicates that the prosecutor *intentionally* misstated the record. For example, in *State v. Mayhorn*, the supreme court considered whether a prosecutor intentionally misstated evidence during the cross-

examination of the defendant. 720 N.W.2d 776, 787-88 (Minn. 2006). The supreme court concluded that the prosecutor intentionally misstated a witness's testimony because the admissibility of the subject of the testimony had been previously argued to the district court, and therefore the prosecutor should have been sufficiently familiar with the testimony. *Id.* at 788.

But even if the comments were improper, they do not require reversal. *Cf. State v. Yang*, 627 N.W.2d 666, 679, 683 (Minn. App. 2001) (concluding that the prosecutor misstated the evidence during closing arguments, but “minor misstatements of evidence . . . do not warrant reversal”), *review denied* (Minn. July 24, 2001). When determining whether the state has met its burden of establishing that the error did not affect the defendant's substantial rights, “we consider: (1) the strength of the evidence against [appellant]; (2) the pervasiveness of the erroneous conduct; and (3) whether [appellant] had an opportunity to rebut any improper remarks.” *Peltier*, 874 N.W.2d 805-06.

The state argues that there is overwhelming evidence identifying appellant as the person who caused the disturbance. We agree. Three eyewitnesses identified appellant as the person at the restaurant, and the officer testified that appellant matched the description that the witnesses had given him, despite vigorous questioning about discrepancies in appellant's appearance. The misstatement was not pervasive. It was a brief comment during the prosecutor's discussion of all of the evidence that proved identity. Moreover, the misstatement upon which appellant relies was rebutted by defense counsel during closing arguments when counsel drew attention to the inconsistency and argued that the officer should have investigated the issue more thoroughly.

Based on the record before us, we conclude that the prosecutor's misstatements did not deny appellant her right to a fair trial.

Affirmed.