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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0889**

State of Minnesota,
Respondent,

vs.

Donald Charles Ancke,
Appellant.

**Filed June 4, 2018
Affirmed in part, reversed in part, and remanded
Bratvold, Judge**

Washington County District Court
File No. 82-CR-15-1397

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

David M. Robbins, Special Assistant State Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Larkin, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant Donald Charles Ancke challenges his conviction of possession of a firearm by an ineligible person. He alleges that the errors during his trial warrant a new trial and that the handgun the state used to prove the offense should have been suppressed as the product of an illegal search. Respondent State of Minnesota did not file a brief and, in a letter, conceded that prosecutorial error requires a new trial; the state also ostensibly asserted that the search was legal without citing any authority or responding to Ancke's arguments. Moreover, the state represented that it will not retry the charge against Ancke because he has served the majority of his sentence and another trial is not supported by "the interests of justice" or to advance judicial economy. We affirm the district court's decision to deny Ancke's motion to suppress evidence. We reverse Ancke's conviction and remand because we conclude that the circumstances warrant a new trial; whether to pursue prosecution is the state's decision.

FACTS

On January 15, 2015, Deputy Pederson and his partner, Deputy Smestad, were looking for Ancke and Amberray Trinka, both of whom were the subject of arrest warrants. Informants told the deputies that Ancke and Trinka were staying at a hotel together. A hotel employee told the deputies that Ancke and Trinka were not registered as guests but were staying in a room, and gave them the room number and a key. The deputies knocked on the room door, received no answer, and entered the room using the key.

Inside, the deputies did not find the registered room guest, but found Ancke and Trinka and arrested them. During her arrest, Trinka asked the deputies to “gather all of her belongings and give them” to a third person, who also was in the room. As the deputies collected Trinka’s belongings, they opened a nightstand and found a pistol, which the deputies submitted for fingerprint and DNA tests. Testing did not reveal any fingerprints on the weapon, but uncovered DNA from two people. The “major DNA profile” matched Ancke, meaning that his DNA matched the majority of the DNA on the weapon.

The state charged Ancke with possessing a firearm having been previously convicted of a crime of violence in violation of Minn. Stat. § 624.713, subd. 1(2) (2014).¹ Before trial, Ancke moved to suppress the handgun, claiming that the deputies obtained it through an illegal search. After a contested omnibus hearing, the district court denied Ancke’s motion. At trial, a jury found Ancke guilty; the district court convicted him and sentenced him to 60 months. Ancke appeals.

D E C I S I O N

I. Prosecutorial misconduct deprived Ancke of a fair trial.

Ancke alleges that numerous errors, mostly prosecutorial misconduct, occurred at trial, some of which he objected to, some of which he did not. He argues that the collective impact of these errors undermined his right to a fair trial, requiring reversal. As mentioned, the state does not contest Ancke’s appeal regarding prosecutorial misconduct. We have an independent duty, however, to consider the merits of all issues raised in Ancke’s brief,

¹ The parties stipulated to Ancke’s previous conviction of a crime of violence.

despite the state's concession. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

First, we consider the objected-to errors and conclude that more than one instance of misconduct occurred because the prosecuting attorney repeatedly elicited evidence that was inadmissible under Minn. R. Evid. 404(b), referred to an uncalled witness, placed a bible on the counsel table in view of the jury for half of a day, and called attention to Ancke's decision not to testify. Second, we consider the unobjected-to error and reject Ancke's claim that the district court committed plain error when it allowed expert testimony about the "majority DNA profile." Lastly, we consider the prejudicial effect of the prosecuting attorney's misconduct and conclude that its cumulative effect warrants a new trial.

A. Objected-to Prosecutorial Misconduct

A prosecutor commits misconduct if she materially undermines the fairness of the trial by violating clear or established standards of conduct. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). This court will reverse a district court's determination regarding alleged prosecutorial misconduct "only when the misconduct, considered in the context of the trial as a whole, was so serious and prejudicial that the defendant's constitutional right to a fair trial was impaired." *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000).

1. The prosecuting attorney elicited testimony on Ancke's prior bad acts.

Ancke argues that the prosecuting attorney committed prosecutorial misconduct by referring to Ancke's prior bad acts. The supreme court has held that "attempting to elicit

or actually eliciting clearly inadmissible evidence may constitute misconduct.² *Fields*, 730 N.W.2d at 782; *see also State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994) (determining that eliciting inadmissible evidence was prosecutorial misconduct).

Generally, evidence of “another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith.” Minn. R. Evid. 404(b). Evidence of previous bad acts may be admissible for other purposes, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.* But in a criminal prosecution, the prior crime or wrong is not admissible unless (1) the prosecutor provides notice of intent to admit the evidence; (2) the prosecutor indicates what the evidence will be offered to prove; (3) the other crime or wrong is proven by clear and convincing evidence; (4) the evidence is relevant to the prosecutor’s case; and (5) the district court determines the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant. *See id.*; *see also* Minn. R. Crim. P. 7.02, subd. 1 (requiring notice to defendant in writing of any crime,

² In *Fields*, a prosecutor cross-examined the defendant about a prior, unrelated theft charge. 730 N.W.2d at 780. On appeal to this court, we held that the prosecutor committed misconduct by referring to the theft because the prosecutor did not comply with the applicable notice requirements under Minn. R. Evid. 404(b). *Id.* at 781-82 (summarizing the court of appeals decision). The supreme court reversed, not because this court erred in its analysis of the prosecutor’s failure to abide by rule 404(b)’s notice requirements, but because this court failed to properly analyze the state’s argument under Minn. R. Evid. 608(b), which allows evidence of specific instances of conduct to impeach witnesses’ character for truthfulness. *Id.* The supreme court noted that while failure to abide by notice requirements under rule 608(b) will not necessarily preclude the admission of evidence, failure to abide by notice requirements under rule 404(b) will preclude admission. *Id.* at 784. Because Ancke did not testify, rule 608(b) does not apply. We conclude, however, that it was prosecutorial misconduct to attempt to introduce this evidence without following rule 404(b)’s notice protocols.

wrong, or act that may be offered at trial under Minn. R. Evid. 404(b)). Evidence of prior crimes or wrongs is not admissible unless the prosecution provides the required notice. See *State v. Spreigl*, 272 Minn. 488, 496-97, 139 N.W.2d 167, 172-73 (1965). But no notice is required if the prior crime or wrong arose “out of the same occurrence or episode as the charged offense.” Minn. R. Crim. P. 7.02, subd. 1(c).

Ancke contends that on three separate occasions, the prosecuting attorney alluded to or elicited testimony about the arrest warrant that led the deputies to search for him. There was no record evidence regarding the crime for which the warrant was issued. While Ancke’s attorney objected each time the prosecution referred to the arrest warrant, the district court held off-the-record bench conferences after each objection; thus, it is not clear if the district court sustained or overruled Ancke’s objections. On none of these occasions, however, did the district court issue a curative instruction.

Referencing Ancke’s arrest warrant was an attempt to introduce a previous crime or bad act. But this evidence was not *clearly* inadmissible, and so the prosecuting attorney did not commit misconduct on this basis. The discussion regarding Ancke’s warrants could have fallen under an exception to rule 404(b), because evidence of an independent crime or bad act may be admissible if excluding that evidence “would present an incoherent or incomplete story of the charged crime.” *State v. Hollins*, 765 N.W.2d 125, 132 (Minn. App. 2009). Here, the arrest warrant explained why the deputies responded to a tip that Ancke was at the hotel; thus, the evidence was not clearly inadmissible. Accordingly, the prosecutor did not commit prosecutorial misconduct by eliciting *clearly* inadmissible testimony about Ancke’s arrest warrant.

Ancke also challenges two instances in which the prosecutor elicited testimony about Ancke's possession of drugs, a crime for which he was never charged. First, during direct examination, the prosecutor asked Pederson, "After you arrested [Ancke], what did you find on his person?" The deputy responded, "[a] clear baggie with a green leafy substance like marijuana." After Ancke's counsel objected, the district court held a bench conference off the record; accordingly, it is not clear if the district court sustained or overruled Ancke's objection. Following the bench conference, the district court did not give a curative instruction. Then, during direct examination of Smestad, the prosecutor entered into the following exchange:

PROSECUTION: When you first started the interview with Mr. Ancke, when did you ask him about the van?

DEPUTY: Early on in the interview. He said that they were traveling around in the van.

PROSECUTION: Okay and that looks like it's page 2 of his transcript I just had you review, correct?

DEPUTY: Correct.

PROSECUTION: Okay. I want you to look through pages 3, 4, and then 5 where on line 18 he talks about the van again. Tell me when you are done. Are you finished?

DEPUTY: Yes.

PROSECUTION: Okay. After you initially discussed the van, and to the point where he responds on page 5, where in the van; are you consistently talking about the van?

DEPUTY: *Yes. Because we—I found some narcotics in the van.*

(Emphasis added.) The prosecutor asked for this response to be stricken,³ and the court instructed the jury to disregard the deputy's comment.

³ The prosecutor asked for the deputy's response to be stricken, and so Ancke's attorney did not object to this exchange. Under other circumstances, we would analyze this comment under the plain-error standard of review, but because we determine the collective

Here, the prosecutor elicited clearly inadmissible *Spreigl* evidence that was unrelated to the firearm possession charge the state had filed against Ancke. There is no indication in the record that the prosecutor provided notice under rule 404(b). Moreover, before trial, Ancke moved to exclude photos depicting the marijuana and paraphernalia that the deputies found in the hotel room. The district court granted the motion and barred the state from introducing the photos. Based on this ruling, the prosecuting attorney was required to prepare the state's witnesses by notifying them of the court's ruling and instructing them not to refer to Ancke's drug possession.⁴ *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003) ("Minnesota law is crystal clear" that the prosecutor "has an absolute duty to prepare its witnesses to ensure that they are aware of the limits of permissible testimony.").

Yet, the prosecuting attorney elicited testimony about Ancke's drug possession. On this basis, the prosecuting attorney committed misconduct. And, while the district court

impact of the trial errors deprived Ancke of his right to a fair trial, and because the references to Ancke's drug possession also likely would amount to plain error, we discuss the drug possession references together for ease of analysis. *See State v. Richardson*, 514 N.W.2d 573, 579 (Minn. App. 1994) (analyzing objected-to and unobjected-to errors together because the collective effect of the errors "constitute[d] plain error").

⁴ During trial, the prosecuting attorney argued to the judge that she instructed the state's witnesses not to refer to Ancke "as a felon in possession," or to mention Ancke's prior convictions. The prosecuting attorney did not, however, assert that she instructed the state's witnesses not to refer to Ancke's possession of drugs.

gave a curative instruction for one of the references to Ancke's drug possession, this does not affect our conclusion that the prosecutor engaged in misconduct.⁵

2. The prosecuting attorney referred to an uncalled witness.

During trial, the following exchange occurred while the defense cross-examined Smestad:

DEFENSE: And you asked Amberray Trinka if she brought [personal belongings] into the room?

DEPUTY: I don't recall if I asked her that or not.

DEFENSE: And specifically, you asked her how she could have missed seeing the gun if she brought that stuff in the room?

PROSECUTOR: Objection, hearsay.

DEFENSE: The question is the question, Your Honor. Hearsay is only statements. It's his question.

PROSECUTOR: He's offering it for the truth of the matter asserted. *He could have called her to testify and he did not.*

(Emphasis added.)

Ancke contends that the prosecutor committed prejudicial misconduct by referring to an uncalled witness—Trinka. Ancke did not immediately object to this exchange. But shortly after the exchange, and once the jury was excused for lunch, Ancke moved for a mistrial based on this alleged misconduct and the other misconduct that had occurred at trial. The judge denied the motion and issued no curative instruction specifically on the basis of the prosecuting attorney's reference to an uncalled witness.

⁵ Ancke also alleges the prosecutor elicited evidence of Ancke's prior bad acts when the prosecutor asked Smestad, "[d]id you submit charges for each person that was involved?" To which the deputy replied, "[a]s far as the gun aspect of it?" While it is possible to infer from the deputy's comment that the police could have charged Ancke with other criminal offenses, this exchange is not sufficiently clear to amount to prosecutorial misconduct.

Prosecutors generally may not refer to uncalled witnesses. *See State v. Shupe*, 293 Minn. 395, 396-97, 196 N.W.2d 127, 128 (1972). When Ancke’s counsel referred to Trinkka while questioning Smestad, he did so to establish reasonable doubt about whether Ancke possessed the firearm. The prosecuting attorney’s hearsay objection may have had some merit. The prosecuting attorney’s comment about the whereabouts of an uncalled witness, however, was clearly improper. Also, the comment attempted to shift the burden of proof to the defense to prove reasonable doubt. *See Richardson*, 514 N.W.2d at 578. This was prosecutorial misconduct. *See Shupe*, 293 Minn. at 396-97, 196 N.W.2d at 128.

3. The prosecuting attorney displayed a bible.

For half a day at trial, and in full view of the jury, the prosecutor displayed a bible on the counsel table. While the jury deliberated, Ancke’s attorney moved for a mistrial based on the presence of the bible, as well as the other instances of misconduct that occurred at trial.⁶ The district court had already instructed the prosecuting attorney to remove the bible, but otherwise denied the motion and did not provide any curative instruction to the jury with regard to the bible.

The supreme court has held that references to religious authority in closing argument are “highly prejudicial” and constitute prosecutorial misconduct. *See State v. Wangberg*, 272 Minn. 204, 206-07, 136 N.W.2d 853, 855 (1965). Similarly, a witness’s beliefs or opinions on religious matters is generally inadmissible evidence. Minn. R. Evid. 610 (“Evidence of the beliefs or opinions of a witness on matters of religion is not

⁶ Ancke’s brief to this court alleges this error was unobjected to, but the record reflects otherwise.

admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.”). Based on our review of the record, there was no reason for the prosecuting attorney to display the bible to the jury. Thus, we conclude that the prosecutor violated a clear standard of conduct and committed prosecutorial misconduct.

4. The prosecuting attorney referred to Ancke's right to remain silent.

At trial, the following exchange occurred during cross-examination of Smestad:

DEFENSE: Now, when you were speaking with my client, you asked him if he would be willing to provide a DNA test?

SMESTED: Voluntarily, yes.

DEFENSE: And he did?

SMESTED: Correct.

DEFENSE: And you asked if he would be willing to—

PROSECUTION: Objection, this is hearsay.

DEFENSE: This is legally operative evidence. My client agreed to do this thing and then he did it.

PROSECUTION: *This basically removes the defendant from taking the stand if he asks—*

(Emphasis added.) The defense interrupted the state by stating, “[w]ell, Your Honor, may we approach?” The district court held an off-the-record conference at the bench, during which it appears that the defense objected to the prosecuting attorney's comment. On the record, the district court instructed the jury to “disregard any testimony as to whether or not the defendant does or does not take the stand. Of course, the defendant does not have to prove his innocence in the trial. The burden is on the state.”

Generally, prosecutors may not allude “in argument to the defendant's exercise of the right not to testify.” *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). An indirect reference to a “defendant's choice not to testify” is misconduct if it “(1) manifest[s] the

prosecutor’s intention to call attention to the defendant’s failure to testify, or (2) [is] such that the jury would naturally have understood [it] as a comment on the defendant’s failure to testify.” *Zornes v. State*, 880 N.W.2d 363, 372 (Minn. 2016).

Here, the jury “would naturally have understood” the prosecutor’s comments as calling attention to Ancke’s decision not to testify. *See id.* For this reason, the prosecutor engaged in prosecutorial misconduct.

B. Unobjected-to Error: the State’s Expert Testimony was Properly Received.

Ancke did not object to another alleged error at trial. Accordingly, this court reviews these claims under the plain-error test. *See* Minn. R. Crim. P. 31.02; *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010). Under the plain-error test, “the defendant has the burden of proving (1) an error, (2) that is plain, and (3) affects substantial rights.” *Sontoya*, 788 N.W.2d at 872. A plain error is one that is “clear or obvious.” *Id.*

Ancke alleges that the district court plainly erred by allowing expert testimony that “improperly opined on the ultimate question of possession” by testifying that a majority DNA profile—such as Ancke’s DNA on the weapon in this case—could not be present on the weapon through a secondary transfer of DNA. A secondary transfer of DNA occurs when a person’s DNA is transferred to an object by way of an intermediary.⁷

⁷ For example, a secondary transfer occurs when Person A transfers DNA to Person B by shaking hands, Person B touches an object, and Person A’s DNA is transferred to the object.

This argument lacks merit because Ancke cannot show admission of the evidence was error, much less plain error.⁸ The supreme court has stated that “[o]pinion testimony is not objectionable merely because it embraces an ultimate issue to be decided by the jury.” *Sontoya*, 788 N.W.2d at 872. Instead, the trial court must evaluate the testimony to determine if “the expert is qualified to express the opinion, and whether the opinion is helpful.” *Id.*; *see also* Minn. R. Evid. 702 (allowing expert testimony if expert is qualified and testimony “will assist the trier of fact”). While the state’s expert testimony may have functionally embraced the ultimate issue at trial, Ancke does not contend that the expert was unqualified or that the opinion was unhelpful to the jury.

Instead, Ancke argues that admission of the expert testimony was error because it addressed an “issue of fact and law.” *See State v. Chambers*, 507 N.W.2d 237, 238-39 (Minn. 1993) (holding that expert testimony as to defendant’s intent was mixed question of law and fact). But the cases Ancke cites to support his position involve expert testimony about the defendant’s mens rea. *See id.*; *State v. Provost*, 490 N.W.2d 93, 101-02 (Minn. 1992). In contrast, the expert in this case testified regarding physical evidence, specifically, how and when DNA is transferred to an object. The expert did not testify about Ancke’s subjective motivations. *Chambers* specifically held that experts may testify regarding

⁸ Ancke also moved for a new trial in a posttrial motion, alleging that he did not receive proper notice that this expert would provide this testimony. The district court rejected his motion. In his appellate brief fact section, Ancke alleges that he did not receive proper notice of the testimony, but does not appear to argue for a new trial on the basis of insufficient notice. If an argument is not supported by argument or authorities, it is deemed waived and will not be considered on appeal unless prejudicial error is obvious. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997).

physical evidence and observable patterns, such as “the number and extent of the wounds, the amount of bleeding, whether the wounds were caused by a knife or a blunt instrument, whether a gunshot wound is a contact wound, [and] whether the wounds could or could not have been the result of an accident.” 507 N.W.2d at 239. Because the challenged expert testimony referred to physical evidence, we conclude that admitting the expert’s testimony was not error.

C. Cumulative Effect of the Errors

We “are mindful that the constitution guarantees a fair trial—not a perfect or error-free trial.” *State v. Mayhorn*, 720 N.W.2d 776, 792 (Minn. 2006). While prosecutorial misconduct at Ancke’s trial was frequent, we must determine if it was sufficiently serious to warrant a new trial. We employ two distinct standards for evaluating objected-to prosecutorial misconduct. *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). If the misconduct was “less serious,” then “the standard is whether the misconduct likely played a substantial part in influencing the jury to convict.” *Id.* (quotation omitted). “If the misconduct was serious,” a defendant is entitled to a new trial unless “the misconduct is harmless beyond a reasonable doubt,” which is the case “if the verdict rendered was surely unattributable to the error.” *Id.* To determine whether prosecutorial misconduct was harmless beyond a reasonable doubt, courts evaluate “how the improper evidence was presented, whether the State emphasized it, whether it was highly persuasive, and whether the defendant countered it.” *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016). Additionally, “[t]he strength of the other evidence supporting the verdict is also a factor in

the analysis, but it is not dispositive” and prejudicial misconduct “can be cured by proper instructions to the jury.” *Id.*

First, we determine that on several occasions the prosecutor’s misconduct undermined Ancke’s right to a fair trial. These occasions include the prosecuting attorney’s references to Ancke’s prior bad acts. The supreme court has stated that “[q]uestions by a prosecutor calculated to elicit or insinuate inadmissible and highly prejudicial character evidence and which are asked in the face of a clear trial court prohibition are not tolerable.” *State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994). On this basis, we conclude that the prosecuting attorney’s references to Ancke’s bad acts were “serious” misconduct and were not “harmless beyond a reasonable doubt.” *Powers*, 654 N.W.2d at 678. The references were repeated, persuasive, and likely not assuaged by the single curative instruction. *See State v. Reardon*, 245 Minn. 509, 513, 73 N.W.2d 192, 194-95 (1955) (stating a curative instruction may not always assuage prejudice that improper remarks may cause).

Also, the prosecuting attorney’s display of a bible at the counsel table for “half a day,” in view of the jury, undermined Ancke’s right to a fair trial. Minnesota courts have not determined which standard of review applies to religious references for impermissible purposes. But given the highly prejudicial effect religious references may have and the absence of any justification for this misconduct, we apply the harmless-error-beyond-a-reasonable-doubt standard of review. *See Wangberg*, 727 Minn. at 206-07, 136 N.W.2d at 855. While the prosecuting attorney did not comment or otherwise draw attention to the bible, the attorney prominently displayed the bible in the jury’s view for “half a day.”

Additionally, no curative instruction was given. We determine this misconduct was not harmless beyond a reasonable doubt.

We also consider whether the remaining objected-to errors require reversal. The prosecuting attorney's reference to an uncalled witness did not, by itself, undermine Ancke's right to a fair trial. The supreme court has stated that referring to an uncalled witness is "less serious" misconduct and has applied the lower standard of review. *See State v. Parker*, 417 N.W.2d 643, 647-48 (Minn. 1988); *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200-01 (1974), *abrogated on other grounds by Ramey*, 721 N.W.2d at 297-99. Given that the prosecuting attorney only briefly mentioned Ancke's decision to not call Trinkka, it is unlikely that this misconduct played a substantial role in the jury's decision to find Ancke guilty.

Next, we conclude that the prosecuting attorney's reference to Ancke's decision not to testify was not reversible error on its own. The supreme court has held that referring to the defendant's right not to testify is "per se reversible error if the comments are extensive, the comments stress to the jury that an inference of guilt from silence is a basis for conviction, and evidence exists that could have supported acquittal." *Zornes*, 880 N.W.2d at 372. Other references, not rising to this level of seriousness, receive harmless-error review. *Id.* We determine the reference to Ancke's decision not to testify did not rise to the level of per se reversible error because the comment was not extensive, it did not stress an inference of guilt, and the evidence against Ancke was strong. Further, the error was likely harmless beyond a reasonable doubt, given the context of the statement and the strength of the state's case.

Lastly, we consider the collective impact of the prosecutorial misconduct. The supreme court has held that the effect of multiple errors, even ones that by themselves would not warrant reversal, may accumulate so as to deny a defendant a fair trial. *See State v. Underwood*, 281 N.W.2d 337, 344 (Minn. 1979). The supreme court has also held that a defendant's right to a fair trial may be undermined by cumulative errors regardless of the strength of the state's evidence. *See Mayhorn*, 720 N.W.2d at 791-92 (“[E]ven the strongest evidence of guilt does not eliminate a defendant's right to a fair trial.”). Here, prosecutorial misconduct was frequent and serious. The prosecuting attorney disregarded clear standards of professional conduct, as well as statutory and constitutional safeguards designed to protect a defendant's right to a fair trial. Given the circumstances, we cannot be certain Ancke received the fair trial to which he was entitled, regardless of the strength of the evidence against him. As a result, we reverse Ancke's conviction and remand to the district court because the circumstances warrant a new trial. We recognize the prosecuting authority retains discretion regarding whether to pursue a new trial.

II. The district court correctly determined that the handgun was not the product of an illegal search.

The United States Constitution protects against unreasonable searches and seizures. U.S. Const. amend. IV; *see also State v. Stavish*, 868 N.W.2d 670, 674-75 (Minn. 2015). A search is presumptively unreasonable when police do not have a warrant. *Stavish*, 868 N.W.2d at 675. A warrantless search is reasonable only if it falls within an exception to the warrant requirement. *Id.* Evidence obtained through an illegal search may be excluded. *See State v. Lindquist*, 869 N.W.2d 863, 868-69 (Minn. 2015).

“When reviewing a pretrial order on a motion to suppress evidence, we review the district court’s factual findings under a clearly erroneous standard and its legal determinations de novo.” *State v. deLottinville*, 890 N.W.2d 116, 119 (Minn. 2017). Factual determinations are not clearly erroneous “if there is reasonable evidence to support them.” *State v. Dahn*, 516 N.W.2d 539, 544 (Minn. 1994).

Before trial, Ancke moved to suppress the handgun as the product of an illegal search, but the district court denied his motion.⁹ On appeal, Ancke argues that the district court erred for two reasons. First, Ancke argues that the deputies violated his Fourth Amendment rights by entering the hotel room without a warrant. Second, he contends that the deputies violated his Fourth Amendment rights by searching the room and nightstand drawer because they did not have a warrant to do so and no exception to the warrant requirement applied. We consider these arguments in turn.

A. The entry into the hotel room did not violate Ancke’s Fourth Amendment rights.

When the deputies entered the hotel room, they did so uninvited and without a search warrant,¹⁰ although they did have arrest warrants for Ancke and Trinkka. In *deLottinville*, the supreme court held that officers did not violate the Fourth Amendment

⁹ Preliminarily, the district court found Ancke was a social guest in the room with “standing to raise” Fourth Amendment claims. See *In re Welfare of B.R.K.*, 658 N.W.2d 565, 576 (Minn. 2003) (recognizing the reasonable privacy interest of “short-term social guest[s]”).

¹⁰ The record of the omnibus hearing does not include evidence that the deputies did *not* have a search warrant. Because Ancke challenged the entry as an illegal search, and the state presented no evidence of a warrant, we accept that no search warrant permitted entry.

by entering a third party's house to arrest a guest for whom the officers had an arrest warrant, despite not having a search warrant to enter and search the house. 890 N.W.2d at 120. The district court in this case applied *deLottinville* to hold that the deputies did not need a search warrant to enter the hotel room because they had arrest warrants for Ancke and Trinka. We agree with the district court's conclusion.

Ancke argues that *deLottinville* is distinguishable because the officers saw deLottinville through a window in the house before they entered. *Id.* at 119. Ancke asks us to limit the supreme court's holding to this precise factual scenario. But nothing in *deLottinville* suggests that the case is limited to instances when the police see the subject of an arrest warrant before entering a third-party's house. The United States Supreme Court has held that police do not need a search warrant to enter the home of someone for whom they have an arrest warrant. *See Payton v. New York*, 445 U.S. 573, 602-03, 100 S. Ct. 1371, 1388 (1980). And *deLottinville* applied *Payton* to conclude that "the subject of an arrest warrant enjoys no greater protection as a guest in another's home" than in his own home.¹¹ *deLottinville*, 890 N.W.2d at 120.

No Minnesota precedent establishes what standard of belief police must possess to enter a third-party's home to arrest a guest subject to an arrest warrant; the two obvious

¹¹ Moreover, *deLottinville* pointed out that a majority of the federal circuits have held that officers do not need a search warrant to enter a third-party's home to arrest the subject of an arrest warrant. 890 N.W.2d at 120-21. In several of the federal cases the supreme court cited as persuasive, the police did not see the suspect in the third party's home. *See, e.g., United States v. Bohannon*, 824 F.3d 242, 245-46 (2d Cir. 2016); *United States v. Jackson*, 576 F.3d 465, 467 (7th Cir. 2009).

alternatives are reasonable belief and probable cause. Federal circuits have addressed this question and determined the police must have “reason to believe the suspect is within,” but disagree about the definition of “reason to believe.” ¹² *Jackson*, 576 F.3d at 469. Some federal courts have held that a reason to believe is a lesser standard than probable cause, while others hold that the two standards are the same. *Id.*

We do not need to decide this issue, however, because the deputies in Ancke’s case had probable cause—the higher potential standard—to enter the hotel room and arrest Ancke. Probable cause exists when “the objective facts are such that under the circumstances a person of ordinary care and prudence (would) entertain an honest and strong suspicion that a [specified fact exists].” *State v. Camp*, 590 N.W.2d 115, 118 (Minn. 1999) (quotation omitted). Here, the district court found that the deputies had received information “‘from the street’ that the van [that Ancke] was driving was located at the motel” and that the deputies “confirmed with the hotel owner that [Ancke] was present in room 222.” The record supports these findings. Based on these findings of fact, we conclude that a person of ordinary care would entertain a strong suspicion that Ancke was in the hotel room.

Accordingly, the deputies did not violate Ancke’s Fourth Amendment rights by entering the hotel room without a search warrant.

¹² Federal courts derived the “reason to believe” standard from the United States Supreme Court’s decision in *Payton*, which held that officers must have “reason to believe the suspect is within” his home in order for an arrest warrant to be sufficient justification for entering a suspect’s home when no search warrant has been issued. *Jackson*, 576 F.3d at 469 (quoting *Payton*, 445 U.S. at 602-03, 100 S. Ct. at 1388).

B. The deputies' search of the room and nightstand drawer did not violate Ancke's Fourth Amendment rights.

Once the deputies were in the hotel room and had arrested Trinka, she asked them to “gather her belongings.” As the deputies did so, they opened the nightstand drawer and found the handgun which later provided the basis for Ancke’s conviction. The district court found that Trinka had authority to consent to a search of the hotel room and did so when she asked the deputies to collect her belongings. On appeal, Ancke contends that the district court erred, arguing that Trinka lacked authority to consent and that Trinka did not consent to the search.

Consent is an exception to the warrant requirement. *In re Welfare of D.A.G.*, 484 N.W.2d 787, 789 (Minn. 1992). Further, “a third party having common authority over premises or effects may consent to a search even though the [other] person . . . does not consent.” *Id.* This court has held that a third party may consent to a search of the premises by “generally having joint access or control for most purposes” and that co-tenants “have assumed the risk that one of their number might permit the common area to be searched.” *State v. Thomas*, 598 N.W.2d 389, 392 (Minn. App. 1999) (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7, 94 S. Ct. 988, 993 n.7 (1974)), *review denied* (Minn. Sept. 28, 1999).

First, we consider whether Trinka had authority to consent to a search of the hotel room. In *Thomas*, this court determined that a visitor in another person’s hotel room had authority to consent to a search of the room because the visitor had appeared with the registered room guest, requested a room change, possessed a key to the room, and told

police she was “staying in the room.” 598 N.W.2d at 392. Here, the district court found that Ancke and Trinka “were free to enter the room at will.” Also, the district court found that Ancke and Trinka stayed overnight in the room and “had their belongings inside the room.” The record supports the district court’s conclusion that Trinka had authority to consent to a search of the hotel room.

Second, we consider whether Trinka had authority to consent to a search of the nightstand where the deputies found the firearm. It is true that consent to search may be limited, and specific places may be outside the scope of the consent if one person had a greater claim to privacy than the person giving consent. For example, in *Thomas*, a visitor in another person’s hotel room did not have the authority to consent to a search of the registered guest’s locked safe because the registered guest possessed the only key to the safe. *Id.* Here, however, the record supports the district court’s determination that Trinka had the same expectation of privacy in the nightstand drawer as Ancke since they were both guests in the room.

Third, we consider whether Trinka consented to the search of the room, including the nightstand. While Trinka did not explicitly tell the deputies they could search the room or the nightstand, she asked them to “gather her belongings” and did not specify which belongings. Consent to a search may be implied. *See State v. Powell*, 357 N.W.2d 146, 148-49 (Minn. App. 1984) (holding mother consented to search by inviting police officer into house to “speak with” son), *review denied* (Minn. Jan. 15, 1985). Here, the deputies could not have gathered Trinka’s belongings without searching the room, including the nightstand.

In sum, the deputies' entry of the hotel room was supported by a valid warrant for the arrest of its occupants, and the deputies' subsequent search of the nightstand fell under the consent exception to the warrant requirement. Thus, the district court correctly determined there was no violation of Ancke's Fourth Amendment rights and denied the motion to suppress evidence.

Affirmed in part, reversed in part, and remanded.