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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0122**

State of Minnesota,
Respondent,

vs.

Jermaine Deangelo Jefferson,
Appellant.

**Filed February 25, 2019
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-17-9268

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

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Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of and sentence for first-degree arson, arguing that the district court violated his right to a speedy trial, that the prosecutor engaged in misconduct by eliciting inadmissible testimony, and that the record does not support an upward sentencing departure. We affirm appellant's conviction but reverse and remand for resentencing.

FACTS

Respondent State of Minnesota charged appellant Jermaine Deangelo Jefferson with one count of first-degree arson. The complaint alleged that on April 7, 2017, Jefferson started a fire in the stairwell of an apartment building where he had lived with his ex-girlfriend and her mother.

Pretrial Proceedings

On April 17, 2017, Jefferson made his first appearance on the charge. An omnibus hearing was held on May 15, 2017, and Jefferson demanded a speedy trial at that hearing. On June 19, 2017, the parties appeared for trial. The state requested a continuance for two reasons. First, Jefferson had provided notice of an alibi defense four days earlier, and the state said it needed time "to track down that information." Second, the state was waiting for DNA test results that would not be ready until August. Jefferson opposed a continuance, but his attorney did not. The district court granted the continuance and scheduled the case for trial on September 11.

On September 11, the parties once again appeared for trial. Jefferson stated that he was ready to proceed to trial, but he asked for more time to consider the state's recent plea offer, which called for a guilty plea to attempted first-degree arson and an executed prison sentence of 47 and a half months. Jefferson informed the district court that his reluctance to accept the state's offer was because "there's not a guarantee that the victim's . . . even going to show up in court."

Jury selection began that afternoon and continued into the next day. During a break, the state informed the district court that there were "a few witnesses that [the state has] been unfortunately unable to get in contact with, just in the last 24 hours." The state requested that, after completion of jury selection, the district court continue the trial until the next morning, so the state could locate its witnesses. Jefferson objected based on his right to a speedy trial, noting that jury selection had begun on the 119th day after he made his speedy-trial demand. The district court granted the state's request. After the jury members had been selected, the district court excused them until the next morning. On September 13, the jury was sworn and the trial began.

Trial Testimony

The evidence at trial showed that on April 7, 2017, the Bloomington Fire Department responded to a fire alarm at a three-story apartment building in Bloomington. The fire originated in a stairwell to the building's underground parking garage. When the firefighters arrived, the fire had already been extinguished by the building's sprinkler system.

The building's maintenance technician heard the alarm go off and went to the stairwell. He discovered "a sprinkler head that was going off" on the "very lower level [of the stairwell] going down into the garage." A portion the stairwell beneath that sprinkler was "charred" and "burned."

Fire inspectors from Bloomington investigated and concluded that the fire had been set intentionally. Laboratory analysis on carpet and floorboard samples from the fire indicated the presence of a liquid commonly found in charcoal lighter fluid.

Sergeant Cullan McHarg of the Bloomington Police Department testified that he reviewed video surveillance footage from the building that showed Jefferson entering the apartment building around the time that the fire started and "exiting at some point into the underground garage area . . . just steps away from . . . where the fire took place." Sergeant McHarg also testified that Jefferson appeared to have something in his hands when he entered the building but not when he left. When the detective and fire inspectors reviewed the video, they observed that Jefferson was the only person who entered or exited the stairwell around the time the fire was set. A fire inspector testified that the video showed Jefferson leaving the building less than two minutes after he entered.

S.M., Jefferson's ex-girlfriend, had lived in the apartment building with her mother, T.M., but she moved to Arkansas shortly before the fire. On the day of the fire, Detective McHarg spoke with S.M. by telephone. During that conversation, S.M. received a call from Jefferson. S.M. accepted the call while Detective McHarg was on the line, and the detective listened to the ensuing conversation. S.M. asked Jefferson "how he could do such a thing, start a fire in a large building with children there." Jefferson responded, "[I]f

I'm going to get put out, they're going to get put out." D.M., S.M.'s brother, testified that, shortly after the fire was set, S.M. called D.M. while she was on the phone with Jefferson. D.M. heard Jefferson say, "I told you, if I don't have nowhere else to go, ain't nobody else is going to have nowhere to go, and they can't prove I did anything." S.M. did not testify at trial.

As the state prepared to rest its case, Jefferson requested a continuance to retain a different attorney. The district court denied his request.

Verdict and Sentencing

The jury found Jefferson guilty as charged. Because the state had provided notice that it intended to move for an upward sentencing departure under the career-offender statute, the jury was provided a special verdict form instructing it to determine whether Jefferson had five or more prior felony convictions and whether "the present offense is a felony that was committed as part of a pattern of criminal conduct." The state submitted certified copies of the registers of actions for six of Jefferson's prior felony convictions, as well as certified copies of guilty plea petitions for five of the six convictions. The state argued that the record established a pattern of criminal conduct. Jefferson conceded that he had five or more felony convictions, but he argued that the evidence did not prove a pattern of criminal conduct.

The jury found that Jefferson had five or more prior felony convictions and that the arson was committed as part of a pattern of criminal conduct. The district court entered judgment of conviction for the arson offense and sentenced Jefferson to serve 192 months

in prison, an upward durational departure based on the jury's pattern-of-criminal-conduct findings. Jefferson appeals.

DECISION

I.

Jefferson contends that his constitutional right to a speedy trial was violated. The United States and Minnesota Constitutions guarantee a criminal defendant the right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. In determining whether a defendant's right to a speedy trial has been violated, Minnesota courts apply the four-factor balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972). *State v. Widell*, 258 N.W.2d 795, 796 (Minn. 1977). The four factors are “(1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his or her right to a speedy trial; and (4) whether the delay prejudiced the defendant.” *State v. Windish*, 590 N.W.2d 311, 315 (Minn. 1999) (citing *Barker*, 407 U.S. at 530-33, 92 S. Ct. at 2192-93). “None of the factors is either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *Id.* (quotation omitted).

A speedy-trial determination involves “a difficult and sensitive balancing process.” *Barker*, 407 U.S. at 533, 92 S. Ct. at 2193. “Whether a defendant has been denied a speedy trial is a constitutional question subject to de novo review.” *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017). We address each of the *Barker* factors in turn.

The Length of the Delay

“The length of the delay is a ‘triggering mechanism’ which determines whether further review is necessary.” *Windish*, 590 N.W.2d at 315 (quoting *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192). “Where the length of the delay is ‘presumptively prejudicial’ there is a necessity for inquiry into the remaining factors of the test.” *Id.* (quoting *Barker*, 407 U.S. at 530, 92 S. Ct. at 2192). “In Minnesota, delays beyond 60 days from the date of demand raise a presumption that a violation has occurred.” *Id.* at 315-16; see Minn. R. Crim. P. 11.09(b) (“On demand of any party . . . trial must start within 60 days unless the court finds good cause for a later trial date.”).

Here, the delay between Jefferson’s speedy-trial demand on May 15, 2017, and the beginning of his trial on September 11, 2017, was 119 days. This delay is presumptively prejudicial and sufficient to trigger further inquiry into the remaining factors.

The Reason for the Delay

The second *Barker* factor is the reason for the delay, “including whether it is attributable to [the defendant] or the state.” *State v. Sistrunk*, 429 N.W.2d 280, 282 (Minn. App. 1988), *review denied* (Minn. Nov. 23, 1988). “A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government.” *Barker*, 407 U.S. at 531, 92 S. Ct. at 2192. “A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Id.*

The state requested the first continuance because Jefferson provided notice of an alibi defense four days before trial was scheduled to begin and because the state's DNA testing had not been completed. The state requested a shorter overnight continuance to locate certain witnesses. Jefferson argues that the delay attributable to the state's need to complete DNA testing was the primary reason for the delay and that this factor should weigh in his favor. Assuming that the delay was primarily due to the state's need to complete DNA testing, this factor weighs against the state, although not heavily because there is no indication it was a "deliberate attempt to delay the trial in order to hamper the defense." *Id.*

Whether Jefferson Asserted His Right to a Speedy Trial

"The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Id.* at 531-32, 92 S. Ct. at 2192-93. The frequency and force of the demand is relevant when assessing this factor. *Id.* at 528-29, 92 S. Ct. at 2191.

"In felony cases, a defendant may plead guilty as early as the Rule 8 hearing. The defendant cannot enter any other plea until the Omnibus hearing under Rule 11." Minn. R. Crim. P. 5.08. "If the defendant enters a plea other than guilty, a trial date must be set." Minn. R. Crim. P. 11.09(a). "A defendant must be tried as soon as possible after entry of a plea other than guilty. *On demand of any party after entry of such plea*, the trial must start within 60 days unless the court finds good cause for a later trial date." Minn. R. Crim. P. 11.09(b) (emphasis added).

Jefferson demanded a speedy trial at his omnibus hearing on May 15, 2017. He asserts that he also demanded a speedy trial at his first appearance on April 17. The record does not reflect a speedy-trial demand on that date, and in any event, Jefferson could not demand a trial within the deadlines set forth in the rules until after entry of his not guilty plea at the omnibus hearing. *See* Minn. R. Crim. P. 5.08, 11.09(b). Moreover, although Jefferson made multiple demands for a speedy trial, on the day of trial, he asked for more time to consider the state's plea offer. And after the state rested its case, Jefferson requested a continuance so he could retain a different attorney. In sum, Jefferson asserted his right to a speedy trial, but not forcefully.

Whether the Delay Prejudiced Jefferson

We next consider the prejudice factor. “[U]nreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the accused’s defense will be impaired by dimming memories and loss of exculpatory evidence.” *Doggett v. United States*, 505 U.S. 647, 654, 112 S. Ct. 2686, 2692 (1992) (quotation omitted). “Of these forms of prejudice, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Id.* (quotation omitted). Jefferson claims all three forms of prejudice.

As to oppressive pretrial incarceration, Jefferson’s trial began 119 days after he made his speedy-trial demand. The rules of criminal procedure do not mandate a defendant’s release from custody for failure to comply with a speedy-trial demand until 120 days from the date of the demand. The relevant rule provides, “Unless exigent

circumstances exist, if trial does not start within 120 days from the date . . . the demand is made, the defendant must be released under any nonmonetary conditions the court orders”). Minn. R. Crim. P. 11.09(b). Given that the trial started within the time period set forth in rule 11.09(b), we are hard-pressed to find oppressive pretrial incarceration.

As to harm stemming from pretrial anxiety and concern, the “stress, anxiety and inconvenience experienced by anyone who is involved in a trial” is insufficient to demonstrate prejudice. *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989). Jefferson asserts that he was unable to be with his daughter while he was incarcerated and that he experienced “anxiety and concern” over her “brain surgery.” However, Jefferson does not provide any details regarding how his absence impacted either his daughter or himself. On this record, Jefferson has not identified any heightened pretrial anxiety or concern that suggests a constitutional violation.

The third type of prejudice, impairment of the defense, is the most serious and may be either specific or presumptive. *Doggett*, 505 U.S. at 654-56, 112 S. Ct. at 2692-93. Specific prejudice involves an “affirmative showing that the delay weakened [the defendant’s] ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence.” *Id.* at 655, 112 S. Ct. at 2692. Presumptive prejudice does not require any particular showing of harm but results only from “excessive delay.” *Id.* at 655, 112 S. Ct. at 2693.

Jefferson argues that, due to the continuance, “[t]he state’s case proceeded without the testimony of two key witnesses,” S.M. and S.M.’s brother, R.M. At trial, T.M. testified that S.M. had told her that Jefferson was upset about the breakup. D.M. testified that R.M.

and Jefferson had a dispute over money and R.M. told him about an incident where Jefferson was beating on R.M.'s apartment door. Jefferson argues that he "was forced to defend against the hearsay statements of those witnesses, without being able to cross-examine them." However, Jefferson does not claim that testimony from S.M. and R.M. would have benefitted his case. Nor does Jefferson claim that the trial delay compromised his ability to prepare his case. In sum, Jefferson has not established specific prejudice.

Jefferson also argues that he suffered presumptive prejudice due to excessive trial delay. But as noted above, Jefferson's in-custody trial began within the 120-day time period provided for in rule 11.09(b). This record does not show excessive delay resulting in presumptive prejudice.

In sum, Jefferson did not suffer from oppressive pretrial incarceration, unusual anxiety or concern, or an impaired defense as a result of the trial delay in this case. The prejudice factor therefore weighs against finding a speedy-trial violation.

Balancing of the Factors

Jefferson demanded a speedy trial under the rules of criminal procedure at his first opportunity. The start of Jefferson's trial more than 60 days from the date of his demand raises a presumption that a speedy-trial violation occurred. The state is primarily responsible for the delay, the majority of which resulted from its request for more time to complete DNA testing. However, Jefferson's in-custody trial began within the 120-day period mandated by rule 11.09(b). Most importantly, Jefferson has not shown any prejudice resulting from the delay.

The supreme court has previously held that even though the first three *Barker* factors weighed in a defendant's favor, the defendant's right to a speedy trial had not been violated because he had not suffered any unfair prejudice as a result of the delay. *State v. Jones*, 392 N.W.2d 224, 234-36 (Minn. 1986). We reach the same conclusion here. On balance, this record does not establish a violation of Jefferson's constitutional right to a speedy trial.

II.

Jefferson contends that the state committed prosecutorial misconduct by eliciting inadmissible evidence. "It is improper for a prosecutor to ask questions that are calculated to elicit or insinuate an inadmissible and highly prejudicial answer." *State v. Brown*, 739 N.W.2d 716, 723 (Minn. 2007) (quotation omitted). Jefferson asserts that the prosecutor engaged in misconduct by eliciting inadmissible hearsay and character evidence. See Minn. R. Evid. 802 (stating that generally, hearsay is inadmissible); Minn. R. Evid. 404(a) (stating that generally, character evidence is inadmissible).

Specifically, Jefferson assigns error to the prosecutor's solicitation of evidence regarding threats Jefferson allegedly made, Jefferson's feelings about his breakup with S.M., and Jefferson's dispute with one of S.M.'s brothers over money. Jefferson argues that this evidence was inadmissible hearsay or based on inadmissible hearsay. Jefferson objected to some, but not all, of that evidence, and the district court sustained some of Jefferson's objections.

Jefferson argues, "It is misconduct for the prosecutor to elicit evidence that is *clearly* inadmissible." (Emphasis added.) Jefferson is correct. Caselaw establishes that a prosecutor engages in misconduct when he intentionally attempts to solicit information that

he knows is inadmissible. For example, in *Brown*, “because of the difficulty in connecting bloody footprints found at the crime scene with footwear found during the criminal investigation,” the parties reached an understanding that “shoes and footprints would not be placed in issue.” 739 N.W.2d at 723. However, when cross-examining the defendant, “the prosecutor attempted to connect the crime-scene footprints to boots allegedly purchased” by the defendant. *Id.* The district court “sustained defense counsel’s objection, ordered that the questions and answers regarding boots be stricken, and instructed the jury to disregard that inquiry.” *Id.* The supreme court held that the prosecutor’s questions were improper. *Id.*

In *State v. Mahkuk*, the district court specifically limited the scope of a police officer’s testimony, prohibiting him from testifying about a gang’s possession of guns. 736 N.W.2d 675, 689 (Minn. 2007). In response to defense counsel’s request for clarification, the district court explained that its ruling meant that the officer could not mention guns. *Id.* Nonetheless, in response to the prosecutor’s questions regarding defendant’s gang affiliation and the gang’s activities, the officer testified that defendant told him “about possession of firearms.” *Id.* On appeal, the supreme court affirmed the district court’s denial of a mistrial. *Id.* However, the supreme court said that whether the violation of the district court’s order was intentional or not, “it was misconduct attributable to the prosecutor.” *Id.*

Here, the district court did not expressly rule that the challenged evidence was inadmissible or that any particular line of questioning was impermissible.¹ In fact, the district court overruled Jefferson’s objections to questions regarding threats that Jefferson had made. Thus, this case is unlike *Brown* and *Mahkuk*, in which the prosecutor knew that the solicited evidence was inadmissible based on a district court ruling or an agreement between the parties. Instead, this case involves a prosecutor’s attempt to present evidence that *might* be inadmissible under the rules of evidence.

Jefferson has not cited authority holding that a prosecutor engages in misconduct by asking questions calculated to elicit evidence that might be inadmissible. This court has assumed without deciding that it was misconduct for a prosecutor to elicit the fact that a defendant’s alias was “Hitler,” stating, “Given the negative associations and irrelevance of the name ‘Hitler,’ the reference likely was inadmissible.” *State v. Valentine*, 787 N.W.2d 630, 642 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). But the complained-of evidence in this case is not as damaging as the evidence in *Valentine*, and we therefore do not assume misconduct here.

¹ Jefferson argues that, in at least two instances, the prosecutor continued certain lines of questioning even though the district court had sustained objections to the questioning. But in those instances, the prosecutor reframed his questions in response to the ruling, and there was no further objection. To the extent the prosecutor continued questioning regarding a topic to which an objection had been sustained, he modified the questioning in a way that did not prompt another sustained objection, indicating that he was not persisting in violation of the district court’s ruling. See *State v. Henderson*, 620 N.W.2d 688, 702 (Minn. 2001) (“As there is no indication the prosecutor persisted in trying to elicit testimony the court had ruled inadmissible, the district court did not abuse its discretion in finding that there was no prosecutorial misconduct.”).

Moreover, the supreme court has stated:

The number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the [district] court's decision-making process in either admitting or excluding a given statement. The complexity and subtlety of the operation of the hearsay rule and its exceptions make it particularly important that a full discussion of admissibility be conducted at trial.

State v. Manthey, 711 N.W.2d 498, 504 (Minn. 2006). In sum, it is difficult to conclude that any of the alleged hearsay evidence was clearly inadmissible.

Jefferson also assigns error to the prosecutor's presentation of evidence that T.M. disliked the way Jefferson treated S.M. and that Jefferson failed to attend a job interview that D.M. had arranged. Jefferson argues that this evidence was inadmissible character evidence and complains that the prosecutor did not provide notice of intent to offer the evidence.² Jefferson did not object to this evidence.

As to the alleged character evidence, the relevant rule provides:

(1) 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. . . .

² Although Jefferson asserts that the prosecutor elicited inadmissible character evidence, he does not cite or discuss specific authority establishing that the challenged evidence was inadmissible. In fact, even though Jefferson's brief repeatedly assigns error to the prosecutor's elicitation of inadmissible character evidence and complains that such evidence was "intentionally elicited by the prosecutor, without any pretrial prior-bad-acts-evidence notice" and without "notice of an intent to introduce prior-bad-acts evidence," Jefferson disavows reliance on Minn. R. Evid. 404(b). Because Jefferson does not identify the authority on which he relies, we apply the rule and caselaw that generally govern the admissibility of character evidence. See *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017) ("[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's . . . failure to specify issues or to cite relevant authorities.") (second alteration in original) (quotation omitted).

(2) In a criminal prosecution, such evidence shall not be admitted unless the prosecutor, consistent with the rules of criminal procedure, gives notice of its intent to offer the evidence.

Minn. R. Evid. 404(b).³ Evidence of a defendant's bad character, particularly evidence of prior bad acts or crimes, improperly suggests to the jury that he has a propensity to commit crime or is a proper candidate for punishment based on the prior acts. *State v. Fardan*, 773 N.W.2d 303, 315 (Minn. 2009).

The challenged testimony was as follows. When the prosecutor asked T.M. whether she liked Jefferson, T.M. responded, "Yes. I just don't like his ways." After the prosecutor asked T.M. to elaborate, she said, "He has some nasty way. He come in your house, he didn't speak to you. He talked to my daughter any kind of way and talk about her." D.M. testified that he arranged a job interview for Jefferson at McDonald's, but Jefferson "never showed up for the interview. [D.M.] had him the job, he never showed up."

Although a defendant's prior acts "need not be criminal convictions for the limitations" of rule 404(b) to apply, they must have "the potential to prejudice the defense by suggesting to the jury that he acted in conformity with that conduct." *State v. Coonrod*, 652 N.W.2d 715, 719-20 (Minn. App. 2002), *review denied* (Minn. Jan. 21, 2003). In *Coonrod*, we held that notice was required where the defendant was charged with soliciting a child to engage in sexual conduct on the internet and the state offered prior-bad-act

³ Following Jefferson's 2017 trial, the Minnesota Supreme Court amended Minn. R. Evid. 404. *Order Promulgating Amendments to the Rules of Evidence*, No. ADM10-8047 (Minn. Nov. 16, 2018). Because the amendment is immaterial to this appeal, we apply the amended version of the rule.

evidence indicating that he had created files on his computer regarding other juvenile females that he had contacted. *Id.* at 717, 719. This court reasoned that the evidence regarding the creation of computer files had the potential to suggest to the jury that the defendant acted in conformity with that conduct in committing the charged offense. *Id.* at 719-20. The same cannot be said here. Evidence that T.M. did not like the way Jefferson spoke to S.M. and that Jefferson failed to attend a job interview does not suggest that he set fire to an apartment building. This is not to say that the evidence was relevant and otherwise admissible, but simply to question whether it is appropriately categorized as evidence of another “crime, wrong, or act” under rule 404(b).

Moreover, rule 404(b), like the rules regarding hearsay, contains several exceptions allowing the admission of evidence of other crimes, wrongs, or acts. *See* Minn. R. Evid. 404(b) (providing for admission of such evidence “as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”). These exceptions provide additional reason to question whether the challenged evidence was clearly inadmissible under the rule.

In sum, it is not clear that testimony regarding how Jefferson spoke to S.M. and whether Jefferson failed to attend a job interview falls within the purview of rule 404(b) such that the prosecutor knew such evidence was inadmissible.

Jefferson cites *Brown* for the proposition that “a prosecutor should seek [district] court guidance before ‘making an inquiry of doubtful propriety.’” 739 N.W.2d at 723. *Brown* in turn cites *State v. McRae*, 494 N.W.2d 252, 259 (Minn. 1992), as support for that proposition. *Id.* In *McRae*, the supreme court said, “Any time a prosecutor desires to make

an inquiry of doubtful propriety, the prosecutor should seek permission from the [district] court in chambers before asking the question.” 494 N.W.2d at 259. However, the supreme court’s statement regarded a prosecutor’s solicitation of evidence in violation of a district court ruling. *See id.* (“If the prosecutor believed that despite its earlier ruling, the [district] court might allow him to use [the] defendant’s statement to impeach [the] defendant on cross-examination, the prosecutor first should have sought permission from the [district] court to do so.”). Again, this case is distinguishable because the prosecutor’s questions did not solicit evidence that the district court had ruled inadmissible. The prosecutor therefore was not required to seek permission from the district court before pursuing the challenged lines of questioning.

This record does not establish that the prosecutor engaged in misconduct by eliciting hearsay or character evidence that was clearly inadmissible. But even if the prosecutor had erred, Jefferson would not be entitled to relief absent prejudice. We therefore consider the prejudicial impact of the alleged misconduct.

Appellate courts review “objected-to prosecutorial misconduct to determine whether the misconduct is harmless beyond a reasonable doubt.” *State v. Dobbins*, 725 N.W.2d 492, 506 (Minn. 2006) (quotation omitted). Unobjected-to prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 297-300 (Minn. 2006); *see State v. Parker*, 901 N.W.2d 917, 925-26 (Minn. 2017) (reiterating the standard). A plain-error claim based on prosecutorial misconduct has three requirements: (1) the prosecutor’s unobjected-to act must constitute error, (2) the error must be plain, and (3) the error must affect the defendant’s substantial rights. *Ramey*, 721

N.W.2d at 302. If plain error is established, the burden shifts to the state to show that the error did not affect the defendant's substantial rights. *Id.* Appellate courts must address the cumulative effect of all errors. *See State v. Bustos*, 861 N.W.2d 655, 663 (Minn. 2015) (considering unobjected-to errors in a cumulative-error analysis); *State v. Mayhorn*, 720 N.W.2d 776, 792 (Minn. 2006) (considering objected-to evidentiary errors and unobjected-to prosecutorial misconduct in a cumulative-error analysis).

An appellate court's "analysis under the third prong of the plain error test is the equivalent of a harmless error analysis." *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011). Jefferson notes that he "is not arguing that the objected-to hearsay evidence by itself warrants a new trial, but rather that the cumulative effect of the misconduct violated his substantial rights." Given the similarity of the harmless-error standard and the third part of the plain-error test, as well as Jefferson's statement that his request for relief is based on the cumulative effect of the alleged prosecutorial misconduct, we do not distinguish between the objected-to and unobjected-to alleged prosecutorial misconduct in our analysis.

As a general rule, an error is less likely to be prejudicial where the evidence of guilt is strong. *State v. Dillon*, 532 N.W.2d 558, 558 (Minn. 1995). Jefferson was captured on video entering and exiting the building when the fire was set. Jefferson made statements suggesting he had a motive to set the fire, such as, "if I'm going to get put out, they're going to get put out," and "I told you, if I don't have nowhere else to go, ain't nobody else is going to have nowhere to go, and they can't prove I did anything." Jefferson also

admitted that he had recently been in a relationship with S.M., who had lived in the apartment building with her mother. In sum, the evidence of guilt was strong.

Jefferson argues that the state's evidence of motive was based on hearsay, stating, "In the absence of evidence tying [him] to an accelerant, that made the state's evidence of motive critical." That argument would be more compelling if Jefferson had not made the statements above, which tend to establish motive and suggest guilt. Given those statements and the video evidence, the alleged hearsay evidence establishing motive is not as critical as Jefferson suggests.

Lastly, Jefferson asserts that "the character evidence improperly elicited was particularly damaging." The supreme court has said that, if prior-bad-act evidence "did not tend to show that [the] defendant was guilty of another crime, the chance of it creating unfair prejudice was less than is ordinarily the case when evidence is admitted under Rule 404(b)." *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn. 1984); see *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999) (stating the same). Because the prior-bad-act evidence in this case is not comparable to the charged conduct, it is less likely to have caused the jury to inappropriately conclude that Jefferson was guilty. See *Kutchara*, 350 N.W.2d at 926; *State v. Morrow*, 834 N.W.2d 715, 728 (Minn. 2013) (holding that testimony that defendant was truant and had sworn at a teacher in high school was not prejudicial in a trial for murder and attempted murder).

In sum, the video evidence and Jefferson’s own statements provided strong evidence of guilt. Thus, the alleged prosecutorial misconduct was not cumulatively prejudicial, and it does not provide a basis for relief.⁴

III.

We now turn to Jefferson’s sentencing challenge. Generally, a district court must order the presumptive sentence specified in the sentencing guidelines unless there are “identifiable, substantial, and compelling circumstances” to warrant an upward departure from the presumptive sentence. Minn. Sent. Guidelines 2.D.1 (2016). Substantial and compelling circumstances demonstrate “that the defendant’s conduct was significantly more or less serious than that typically involved in the commission of the offense in question.” *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). Other than a prior conviction, any fact that increases the penalty for a crime beyond the presumptive sentence prescribed by the Minnesota Sentencing Guidelines must be submitted to a jury and proved beyond a reasonable doubt. *State v. Shattuck*, 704 N.W.2d 131, 135, 141 (Minn. 2005).

Minn. Stat. § 609.1095, subd. 4 (2016), authorizes increased sentences for offenders when the crime for which the sentence is imposed is a felony and the jury determines that “the offender has five or more prior felony convictions” and that “the present offense is a

⁴ In the alternative, Jefferson argues that “the prosecutor’s unusual elicitation of character evidence, and relentless pursuit of evidence based on hearsay, was so egregious as to warrant reversal in the interests of justice without regard to the effect on the verdict.” Although the supreme court has the authority to reverse a conviction for prosecutorial misconduct under its supervisory powers, *Ramey*, 721 N.W.2d at 303, this court is not authorized to grant such relief. See *Thole v. Comm’r of Pub. Safety*, 831 N.W.2d 17, 21 (Minn. App. 2013) (“Supervisory authority is vested solely in the Minnesota Supreme Court.”), *review denied* (Minn. July 16, 2013).

felony that was committed as part of a pattern of criminal conduct.” A “‘pattern of criminal conduct’ may be demonstrated by proof of criminal conduct similar, but not identical, in motive, purpose, results, participants, victims or other shared characteristics.” *State v. Gorman*, 546 N.W.2d 5, 9 (Minn. 1996).

Jefferson contends that the “evidence was insufficient to prove a ‘pattern of criminal conduct’ so as to support an upward departure.” This court reviews the sufficiency of the evidence for sentencing based on a “pattern of criminal conduct” in the same manner as we review the sufficiency of the evidence to sustain a conviction, *State v. Gundy*, 915 N.W.2d 757, 767 (Minn. App. 2018), *review denied* (Minn. Aug. 7, 2018), by carefully analyzing “the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the” jury to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

Jefferson argues that the evidence was insufficient to establish a pattern of criminal conduct due to a “[l]ack of documentation of underlying facts” and “[l]ack of similarity” in the prior felony convictions. At oral argument to this court, the state conceded that the record does not support a finding that Jefferson’s prior convictions establish a pattern of criminal conduct and agreed that we should reverse and remand Jefferson’s sentence for imposition of a presumptive sentence. We are not bound by the state’s concession. *State v. Werner*, 725 N.W.2d 767, 770 n.1 (Minn. App. 2007). We must “decide cases in accordance with [the] law.” *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). We therefore address Jefferson’s argument on the merits.

At trial, the state submitted evidence that Jefferson had six felony convictions as follows: (1) fifth-degree controlled-substance offense, (2) first-degree tampering with a witness, (3) attempted first-degree burglary, (4) violation of an order for protection, (5) violation of a no-contact order and violation of an order for protection, and (6) aiding and abetting a drive-by shooting. The state's evidence consisted of registers of actions, guilty-plea petitions, two warrants of commitment, one arrest warrant, and a domestic abuse no-contact order. These documents contained little or no information regarding the facts of the underlying offenses. Moreover, although the jury found that Jefferson had five or more prior felony convictions, it was not asked to specify which five or whether it found more than five. Without that specification, and given the lack of information regarding the underlying offenses, it is difficult to determine the basis for the jury's finding that the arson offense was committed as part of a pattern of criminal conduct.

Unlike other cases in which departures were based on a pattern of criminal conduct, there is no common thread that connects Jefferson's prior convictions with the charged offense. See *Gorman*, 546 N.W.2d at 9-10 (finding pattern of criminal conduct for convictions that "involved assaultive behavior"); *State v. McClenton*, 781 N.W.2d 181, 195 (Minn. App. 2010), *review denied* (Minn. June 29, 2010) (finding pattern of criminal conduct for crimes committed to support defendant's illegal drug habit); *State v. Outlaw*, 748 N.W.2d 349, 357 (Minn. App. 2008), *review denied* (Minn. July 15, 2008) (finding pattern of criminal conduct in defendant's seven prior burglary convictions). We therefore conclude that the evidence was insufficient to prove that Jefferson's first-degree arson was committed as part of a pattern of criminal conduct. We reverse Jefferson's sentence and

remand for imposition of a presumptive sentence under the Minnesota Sentencing Guidelines.

Affirmed in part, reversed in part, and remanded.