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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0169**

State of Minnesota,
Respondent,

vs.

Terry Lovell Arrington,
Appellant.

**Filed January 28, 2019
Affirmed
Slieter, Judge**

Ramsey County District Court
File No. 62-CR-17-2612

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Frederick J. Goetz, Goetz & Eckland P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Ross, Judge; and
Slieter, Judge.

UNPUBLISHED OPINION

SLIETER, Judge

Appellant challenges his convictions of two counts of first-degree criminal sexual conduct, arguing that (1) the prosecutor committed reversible misconduct, (2) the district court abused its discretion by admitting evidence of possible witness tampering and by

denying his mistrial motion, and (3) the cumulative effect of trial errors deprived him of a fair trial. We affirm.

FACTS

St. Paul police received a report on February 20, 2017, from the Midwest Children's Resource Center (MCRC), that 11-year-old T.A. had been sexually assaulted by her father, appellant Terry Lovell Arrington. T.A. had told her mother, J.H., of the abuse in response to her mother's questions about the sleeping arrangements at a family reunion held at a hotel on February 19. In response to a question about whether she had been touched inappropriately by any of her young male relatives, T.A. stated that none of them had touched her, but that Arrington had touched her in the past and told her to keep it a secret.

J.H. drove T.A. directly to MCRC, where T.A. participated in a recorded interview with a sexual-assault nurse examiner, which was later admitted at trial. T.A. was also examined by an MCRC doctor; the examination revealed no physical injuries. Arrington was ultimately charged with two counts of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(h)(iii) (2016), for conduct that occurred between July 5, 2013 and October 31, 2016.

During Arrington's jury trial, T.A. testified that Arrington touched her "ten times or less" and described specific sex acts that first occurred when she was in kindergarten and continued at various times until she reached the sixth grade. She stated that on different occasions Arrington rubbed her privates with his hands, placed his penis "by my butt" or "open[ed] up my legs a little bit and lay it down on my legs and it felt like I peed on myself," "push[ed]" his penis in "either my butt in like the middle or my butt hole," and

said she “could feel something long with lines in the middle and wetness.” She also described Arrington placing his penis in her mouth on several occasions and ejaculating. She testified that Arrington told her that if she told anyone what had occurred, he could go to jail and she could be placed in a foster home. T.A.’s descriptions of Arrington’s conduct were consistent with her statements to her mother, grandmother, and MCRC medical staff.

J.H.’s mother, M.P., testified that T.A. had described the sexual assaults to her. During M.P.’s testimony, she stated that after news of the assault allegations became known, she did not want to be at J.H.’s residence because she was “scared” that Arrington or his family or friends “would come and do something to us” because Arrington was “from the streets.” On the morning after M.P. testified, the district court judge disclosed that a juror had contacted her and “indicated that the jurors were concerned that either the defendant or the defense would have their addresses.” Defense counsel moved for a mistrial on the ground of jury bias. The district court denied the motion and instructed the jury that their addresses were not public, their names would be called only when they rendered a verdict, the likelihood that anyone was interested in their names was “low,” and they should base their decision on evidence offered at trial.

G.C., J.H.’s “cousin” and a distant relative by marriage, testified that she lived with J.H.’s family from 2015 to 2017 and was also recently involved in a romantic relationship with Arrington’s brother, J.A., who lived with the family occasionally. She testified that J.A. contacted her by phone the night before she was to testify, asked if she was going to testify for the state, and kept yelling that question until she hung up. The district court

cautioned the jury that evidence of J.A.'s conduct was admissible only to establish his credibility if he later decided to testify.¹

Arrington testified in his own defense and suggested that J.H. influenced T.A. to falsely accuse him of sexual assault after they had a relationship-ending argument. He stated that on the evening of February 19, he and J.H. had a "real, real heated" argument and "all hell broke loose." She was extremely critical of him, and he "got real tired of it and . . . told her how [he] really felt," which included that he "hate[d] her" and believed that she did not have "long to live."² Arrington testified that he was "done . . . with her" "at that moment." Arrington stated that, contrary to their usual practice of riding together on errands, J.H. refused to let him ride in her car to pick up their children from the hotel the next morning, almost hit him with her car, and it was obvious to him that their relationship was truly over. Two or three hours later, he learned of T.A.'s sexual-assault allegations.

The jury found Arrington guilty of both counts, and the district court imposed an executed 280-month sentence on one count. Arrington appeals, arguing that some of the prosecutor's statements constituted misconduct and denied him a fair trial. He also argues that the district court abused its discretion by admitting evidence that J.A. attempted to tamper with G.C. before she testified at trial, that the district court abused its discretion by

¹ J.A. did later testify for the defense at trial. J.A. described J.H. as "untruthful" and "violent," and the relationship between J.H. and Arrington as "not good" and "scary," because they argued "every day." J.A. also testified to hearing J.H. and Arrington arguing on the morning of February 20 and said that both individuals "appeared still mad" when J.H. left the house.

² J.H. is chronically ill.

denying his mistrial motion, and that cumulative trial errors were not harmless and also denied him a fair trial.

DECISION

I. Prosecutorial Misconduct

Prosecutorial misconduct occurs when “the prosecutor’s acts have the effect of materially undermining the fairness of a trial.” *State v. Smith*, 876 N.W.2d 310, 334 (Minn. 2016) (quotation omitted). When a party does not object to alleged prosecutorial misconduct, the reviewing court applies a modified plain-error test. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017); *State v. Longo*, 909 N.W.2d 599, 609 (Minn. App. 2018).

Under this modified test, the defendant has the burden to prove the existence of an error that is plain. If the defendant establishes error that is plain, the burden shifts to the State to demonstrate that the plain error did not affect the defendant’s substantial rights. A plain error affects a defendant’s substantial rights if it was prejudicial and affected the outcome of the case. An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the jury’s verdict. To evaluate the effect on substantial rights, we consider various factors, including the pervasiveness of improper suggestions and the strength of evidence against the defendant. If the State fails to demonstrate that the alleged error did not affect the defendant’s substantial rights, we consider whether the error should be addressed to ensure fairness and the integrity of judicial proceedings. On the other hand, if the State meets its burden, we need not decide whether the prosecutor committed an error that was plain.

Parker, 901 N.W.2d at 926 (quotations omitted). “To warrant reversal for a new trial, the prosecutor’s misconduct—placed into the context of the entire trial—must be so serious and prejudicial that it impairs a person’s constitutional right to a fair trial.” *State v. Banks*, 875 N.W.2d 338, 348 (Minn. App. 2016), *review denied* (Minn. Sept. 28, 2016).

Arrington submits that “[p]rosecutorial misconduct occurred when the prosecutor inflamed the passions and prejudices of the jurors, personally endorsed the credibility of witnesses, argued the consequences of the jury’s verdict, disparaged the defendant, and brought inadmissible matters to the attention of the jury.” These allegations encompass the following conduct by the prosecutor: (1) eliciting testimony from G.C. about how J.H.’s life changed for the better after T.A. disclosed the abuse; (2) suggesting to G.C. that she could not have observed any sexual abuse of T.A. because it occurred at night; (3) eliciting testimony from the nurse examiner that continuing contact between T.A. and an offender would not be safe for her; (4) disparaging Arrington during cross-examination by suggesting that she “missed the tears” that he purportedly shed upon viewing T.A.’s recorded interview at trial; (5) declaring in her closing argument her opinion on the truthfulness of the state’s witnesses; and (6) stating in closing argument that T.A. “is safe, safe from her biological father, who will never, ever, ever be able to touch her again.” We pay “special attention” to statements that may inflame or prejudice the jury when credibility is a central trial issue, as it is in this case. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995); see *State v. Jahnke*, 353 N.W.2d 606, 611 (Minn. App. 1984) (“Prosecutors in sexual abuse cases must abide by the highest behavior.”).

Although we are mindful of the serious allegations of misconduct in this case, we decline to consider or analyze them individually because, under the third prong of the plain-error test, we conclude that any misconduct by the prosecutor could not have affected Arrington’s substantial rights. All three prongs of the plain-error test must be satisfied to merit reversal of a conviction, and if an appellate court “find[s] that any one of the

requirements is not satisfied, [it] need not address any of the others.” *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011); see *Parker*, 901 N.W.2d at 926. Whether an alleged trial error affects a defendant’s substantial rights merits consideration of “(1) the strength of the state’s evidence; (2) the pervasiveness of the erroneous conduct; and (3) whether the defendant had an opportunity to rebut any improper remarks.” *Longo*, 909 N.W.2d at 609 (quotations omitted).

As Arrington concedes to this court, the evidence against him was strong. T.A. provided consistent, unwavering, and precise trial testimony and statements to her mother, grandmother, and medical staff about Arrington’s sexual assaults. The alleged instances of prosecutorial misconduct were also not pervasive and many were ameliorated by the district court’s curative instructions. See *State v. Budreau*, 641 N.W.2d 919, 926 (Minn. 2002) (stating that the jury is presumed to follow the district court’s curative instructions). For example, the prosecutor’s closing arguments and rebuttal included 67 pages of transcription, and any improper statements constituted only a very small portion of her argument. Moreover, Arrington’s attorney did rebut some of the prosecutor’s statements.

On this record, Arrington’s substantial rights were not affected by any improper statements made by the prosecutor. See *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2008) (rejecting a claim of prosecutorial misconduct when the evidence of defendant’s guilt was strong and the prosecutor’s misconduct isolated); *State v. Ture*, 353 N.W.2d 503, 517 (Minn. 1984) (noting that even when a prosecutor improperly commented on a defendant’s guilt or the truthfulness of a witness’s testimony, the appellate court will affirm

the conviction if the district court cautioned the jury, evidence of guilt was strong, and “the prosecutor’s argument was otherwise proper”).

II. Evidentiary Rulings

Arrington argues that the district court abused its discretion by allowing G.C. to testify about the phone conversation she had with J.A. just before she testified for the state. G.C. testified that when J.A. discovered that she would testify, J.A. repeatedly yelled at her “was [she] a witness” until she hung up. The district court instructed the jury to consider this evidence only if J.A. testified, and only as bearing on his propensity for truthfulness. When asked by defense counsel on cross-examination whether she had “any reason to believe” that J.A.’s emotional response to the case originated with Arrington, she answered, “No.” She also described J.A. as “conflicted” about the case.

A district court may exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Minn. R. Evid. 403. “Evidentiary . . . rulings generally rest within the district court’s discretion and will not be reversed absent a clear abuse of discretion.” *Holt v. State*, 772 N.W.2d 470, 481 (Minn. 2009) (quotation omitted). J.A.’s conversation with G.C. could demonstrate his bias, and such evidence is admissible under Minn. R. Evid. 616. We observe no abuse of discretion in the district court’s admission of the testimony, particularly given the district court’s limiting instruction.

III. Mistrial Motion

An appellate court “review[s] a district court’s decision to deny a mistrial for an abuse of discretion” and should grant such a motion only if “there is a reasonable

probability that the outcome of the trial would be different.” *State v. Chavez-Nelson*, 882 N.W.2d 579, 590 (Minn. 2016) (quotation omitted). “[T]he district court is in the best position to evaluate the prejudicial impact, if any, of an event occurring during the trial.” *State v. Bahtuoh*, 840 N.W.2d 804, 819 (Minn. 2013).

Before the second day of trial, following a juror’s disclosure “that the jurors were concerned that either the defendant or the defense would have their addresses,” defense counsel moved for a mistrial, arguing that the jury was biased against Arrington. The district court denied the motion, stating, “There is no indication, based on the concern that the jurors have about their addresses being public, that it is based on some sort of fear of Mr. Arrington.” The district court then informed the jury that their addresses were not public, their names would not be called until they rendered a verdict, and the parties or others were unlikely to recall their names after trial. The district court also reminded the jury that they were to base their decision only on the evidence received at trial.

We observe no abuse of discretion in the district court’s denial of the mistrial motion. As noted, the evidence against Arrington was strong, and there is no reasonable likelihood that the jury’s verdict was due to their fear of reprisal from Arrington or his family. *See id.* at 819-20 (evaluating the strength of the state’s case in denying a mistrial motion); *State v. Mitchell*, 881 N.W.2d 558, 562 (Minn. App. 2016) (deferring to the district court’s “evaluation of prejudicial impact” in denying mistrial motion), *review*

denied (Minn. Aug. 23, 2016). Again, the jury is presumed to have followed the district court’s curative instructions. *See Budreau*, 641 N.W.2d at 926.³

IV. Cumulative Effect of Trial Errors

Arrington argues that all of the trial errors, including “[m]ultiple instances of prosecutorial misconduct together with multiple evidentiary errors,” deprived him of a fair trial. *See State v. Davis*, 820 N.W.2d 525, 538-39 (Minn. 2012). “Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant’s prejudice by producing a biased jury.” *Colbert v. State*, 870 N.W.2d 616, 627 n.10 (Minn. 2015) (quotation omitted). The supreme court recently noted that it has applied this rule rarely in cases involving multiple trial errors and in factually “close” cases when even a small error may prejudice the defendant. *Davis*, 820 N.W.2d at 538-39. As we have noted, this is not a factually “close” case. To the extent there were any defects in Arrington’s trial, he has not shown that he was denied a fair trial because of their cumulative effect.

Affirmed.

³ Arrington also argues that the district court failed to apply the correct prejudice-to-the-defendant standard for evaluating the mistrial motion and instead applied the “manifest necessity” standard for mistrials declared without the defendant’s consent. *See State v. Long*, 562 N.W.2d 292, 296 (Minn. 1997) (stating that when a mistrial is ordered without the defendant’s consent, the mistrial must be necessitated by “the ends of public justice,” or “manifest necessity” (quotations omitted)). Because the district court clearly evaluated the prejudicial impact to Arrington in reaching its decision, this characterization of the district court’s actions is inaccurate.