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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0272**

State of Minnesota,
Respondent,

vs.

Tavean Gregory McRelly,
Appellant.

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

Blue Earth County District Court
File No. 07-CR-17-4718

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

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County
Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

REYES, Judge

On appeal from a final judgment of conviction in a misdemeanor case, appellant
seeks a new trial, arguing that the prosecutor engaged in misconduct by failing to prepare

its witness to ensure compliance with the district court's order excluding references to appellant's prior misconduct, including the existence of an extraditable warrant. We affirm.

FACTS

In December 2017, appellant Tavean Gregory McRelly and B.M. were in an on-and-off romantic relationship. On December 4, 2017, B.M. drove to visit appellant at his mother's apartment. B.M., appellant, and appellant's younger brother smoked marijuana in B.M.'s car, then B.M. and appellant's younger brother returned to the apartment for dinner. Appellant remained in the car with B.M.'s cellphone and car keys. Appellant's and B.M.'s testimony provided conflicting accounts during the jury trial of the events that followed.

B.M. testified that appellant returned to the apartment visibly angry and ordered her to leave. As B.M. gathered her belongings, appellant grabbed her by her neck and carried her into the hallway. Appellant punched B.M. on the side of her face. The parties left the apartment in B.M.'s car, and appellant threw B.M.'s cellphone out of the car. In appellant's version of the events, when he returned to the apartment, he asked B.M. to leave and slid her phone to her across the kitchen counter. Appellant denied grabbing B.M. by the neck, carrying her out of the apartment, punching her, and throwing her cellphone out of the car. An officer responded to B.M.'s 911 call made from another apartment. He issued a citation to appellant and jailed him based on an active extraditable warrant for his arrest out of Missouri.

The district court set a date for trial, and appellant's counsel filed motions in limine, including one with a draft order to prevent the state from eliciting information about appellant's prior misconduct, including the extraditable warrant from Missouri. The district court granted this motion.

During cross-examination of the officer, defense counsel inquired as to the grounds for appellant's arrest:

- Q. Okay. [Officer], when [the prosecution] is asking you about probable cause. In this instance, you spoke with [B.M.], you took her at her word, and that was the basis of arresting [appellant]?
- A. There was probable cause for fifth degree domestic assault.
- Q. And that probable cause was based on her statement?
- A. That is correct.
- Q. That is correct.
- A. And nothing else?¹
- Q. At that time it was probable cause fifth degree domestic based on her statements and an extraditable war---

The district court interrupted the officer midsentence. During a bench conference, defense counsel stated that she sought testimony about the probable cause for the fifth-degree assault, not the probable cause for the arrest. The district court advised that it was "not going to even entertain [a] mistrial at this point," and offered to provide a curative instruction. Appellant declined. Neither party mentioned the extraditable warrant for the

¹ There appears to be an error in the transcript with respect to the last two answers and questions. While the phrase "[a]nd nothing else?" is designated as an answer in the trial transcript, the parties do not dispute that this phrase was a question from defense counsel, and the following statement was the officer's answer.

rest of the trial. The jury found appellant guilty of domestic assault with intent to inflict bodily harm. This appeal follows.

DECISION

Appellant argues that the district court abused its discretion in refusing to consider a motion for mistrial because the prosecutor failed to satisfy his absolute duty to prepare his witness to ensure that the witness's testimony complied with the court's order. We disagree.

When reviewing a claim of prosecutorial misconduct, the standard of review depends on whether the defendant made an objection at trial to the claimed misconduct. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). Here, we review the alleged misconduct under the standard for objected-to misconduct because, although appellant did not object at trial to the officer's statement, he brought motions in limine, including one to prevent the state from eliciting information about appellant's prior misconduct. Such a pretrial motion operates as a timely objection, precluding the need for further objection to preserve the issue for review. *State v. McNeil*, 658 N.W.2d 228, 232 n.1 (Minn. App. 2003).

For objected-to misconduct, *State v. Caron* provides a two-tier harmless-error standard of review. 218 N.W.2d 197, 200 (Minn. 1974).² For unusually serious

² The supreme court has called into doubt the viability of *Caron*'s two-tiered approach for objected-to prosecutorial misconduct, but it has yet to decide this issue. See e.g., *State v. Whitson*, 876 N.W.2d 297, 304 n.2 (Minn. 2016); *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (applying standard for "unusually serious" misconduct without deciding the continued applicability of the *Caron* test).

misconduct, the reviewing court must determine whether the error was harmless beyond a reasonable doubt. *State v. Nissalke*, 801 N.W.2d 82, 105 (Minn. 2011) (quotation omitted). For less-serious misconduct, we must ask whether the misconduct likely played a substantial part in influencing the jury to find the defendant guilty. *Id.* (quotation omitted). While courts continue to use *Caron*'s two-tier harmless-error test, caselaw is silent as to how to distinguish between "unusually serious" and "less serious" objected-to misconduct. Instead, courts generally default to analyzing any objected-to misconduct under the higher, "unusually serious" standard. See *State v. Wren*, 738 N.W.2d 378, 394 (Minn. 2007) (utilizing higher standard).

When applying this higher standard, several factors are relevant to the analysis. *Id.* These factors include (1) how the improper evidence was presented; (2) whether the state emphasized it during trial; (3) whether the defendant effectively countered it; (4) the strength of the evidence against defendant; and (5) whether the evidence was highly persuasive or circumstantial. *Id.* A new trial will be granted based on objected-to misconduct only if, when viewed in the light of the whole record, the error appears to be so inexcusable, serious, and prejudicial that it denied defendant the right to a fair trial. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005).

With regard to the first factor, unlike most cases of prosecutorial misconduct, here defense counsel elicited the testimony. Defense counsel asked an open-ended question, "[a]nd nothing else?," which prompted the officer to volunteer both grounds for appellant's arrest; B.M.'s statements and the extraditable warrant. The district court noted during the bench conference, and we agree, that the officer would have provided inaccurate testimony

had he answered differently. Further, the improper testimony was not presented to establish a critical element of the offense. *Cf. State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006) (finding that erroneously admitted lab report impacted verdict because state presented report as definitive evidence of an element of the offense). Because defense counsel elicited the improper, non-critical testimony, this factor weighs strongly in favor of the state.

On the second factor, neither party referred to the testimony for the remainder of the trial. Therefore, the second factor weighs in favor of the state.

With regard to the third factor, defense counsel did not counter the improper evidence because it did not get raised again, and defense counsel declined a curative instruction by the district court. The third factor is neutral.

As to the fourth factor, overwhelming evidence against an appellant may be enough to establish that the jury's exposure to prejudicial testimony did not substantially affect its decision. *McNeil*, 658 N.W.2d at 233. In cases that are factually close, it is possible that any error might have prejudicially influenced the jury and warrant a new trial. *State v. Blasus*, 445 N.W.2d 535, 541 (Minn. 1989). Here, the state did not present an overwhelming amount of evidence. The only physical evidence introduced at trial included a transcript and audio of B.M.'s 911 call, the purchase contract of B.M.'s cell phone, and four indiscernible photographs of B.M.'s alleged injuries. This case is not squarely a factually close one either because the outcome ultimately depended on the relative credibility of appellant's and B.M.'s testimony. Therefore, this factor is neutral.

With regard to the fifth factor, we conclude that the improper evidence was not highly persuasive. Testimony by a law-enforcement officer is recognized as having the potential to unduly influence the jury. *State v. Hogetvedt*, 623 N.W.2d. 909, 915 (Minn. App. 2001), *review denied* (Minn. May 29, 2001). However, the improper testimony elicited from the officer was not a complete statement because the jury did not hear the word ‘warrant’ in its entirety. Therefore, any allegations of resulting prejudice would be speculative because it is uncertain whether the jury understood the context of the incomplete statement or even what an extraditable warrant is. For these reasons, we conclude that factor five weighs slightly in favor of the state.

Based on the analysis of the *Wren* factors and the record in its entirety, we conclude that any alleged error is harmless beyond a reasonable doubt. Because the higher harmless-error standard is met, we need not undertake the analysis of the lesser harmless-error standard.

Affirmed.