

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-0541**

State of Minnesota,  
Respondent,

vs.

Tyler Lee Gerard Glaser,  
Appellant.

**Filed March 25, 2019  
Affirmed  
Hooten, Judge**

Hennepin County District Court  
File No. 27-CR-17-3183

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

Michael O. Freeman, Hennepin County Attorney, Patrick Lofton, Assistant County  
Attorney, Minneapolis, Minnesota (for respondent)

Hillary Parsons, Joseph P. Tamburino, Caplan & Tamburino Law Firm P.A., Minneapolis,  
Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Reyes, Judge; and Cochran,  
Judge.

**UNPUBLISHED OPINION**

**HOOTEN, Judge**

Appellant was convicted of fifth-degree criminal sexual conduct and required to  
register as a sex offender because he had also been charged with third-degree criminal

sexual conduct for the same incident. He now challenges his conviction and his registration requirement. We affirm.

## **FACTS**

In January 2017, K.F. was at a VFW in Minneapolis. She was standing by the bar, leaning over it and speaking with a bartender, when a man came up behind her and stuck his hand up her skirt. K.F. told police that the assailant put his fingers in her vagina, pushing her underwear inside of her. She immediately turned around and hit him two times. The assailant then left the bar. Because he paid with a credit card before leaving, bartenders were able to identify the assailant as appellant Tyler Glaser. K.F. later identified Glaser in a photographic lineup, and surveillance footage was obtained from the VFW showing the entire incident.

The state initially charged Glaser with one count of fifth-degree criminal sexual conduct under Minn. Stat. § 609.3451, subd. 1(1) (2016). But the complaint was amended the next day to add a charge of third-degree criminal sexual conduct for sexually penetrating a victim who the defendant “knows or has reason to know . . . is mentally impaired, mentally incapacitated, or physically helpless.” Minn. Stat. § 609.344, subd. 1(d) (2016). Glaser moved to dismiss the third-degree charge and the district court granted the motion. The state again amended the complaint, this time adding a count of third-degree criminal sexual conduct for using “force or coercion to accomplish the penetration.” Minn. Stat. § 609.344, subd. 1(c) (2016). Glaser moved to dismiss the new third-degree count. The district court denied the motion, finding that there was probable cause “based on the complaint and the written arguments of counsel.”

Glaser had a jury trial in December 2017. K.F. testified at the trial and the surveillance video from the VFW was played for the jury. One of the other witnesses to testify was a lab analyst who looked for Glaser's DNA on swabs of the victim's right hand, her vagina, and the crotch of her underwear. Glaser's DNA was not found on any of the three swabs. During closing arguments, the prosecutor alluded to the fact that Glaser had not testified at trial. Glaser's trial counsel immediately objected and moved for a mistrial. The district court denied the motion for a mistrial and immediately gave the jury a curative instruction. The jury acquitted Glaser of the third-degree criminal sexual conduct charge, but convicted him of the fifth-degree criminal sexual conduct charge. Glaser was ordered to register as a predatory offender. This appeal follows.

## **D E C I S I O N**

### **I. Prosecutorial Misconduct**

Glaser first argues that his conviction for fifth-degree criminal sexual conduct should be reversed and he should be granted a new trial because the prosecutor committed misconduct during closing arguments. He specifically alleges that the prosecutor improperly alluded to his decision not to testify.

#### *i. Standard of Review*

When dealing with prosecutorial misconduct, there are two principal standards of review. When the misconduct is not objected to, we apply a modified plain-error test. *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007). When the misconduct is objected to, we apply the harmless-error test. *Id.* at 389–90. In this case, Glaser's trial counsel immediately objected to the alleged misconduct, so the latter test applies.

The harmless-error test is broken down into two tiers. When the misconduct is “unusually serious,” we must be convinced *beyond a reasonable doubt* that the misconduct was harmless. *Id.* at 390 n.8 (quoting *State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974)) (emphasis added). But when the misconduct is “less serious,” we must determine “whether the misconduct likely played a *substantial part* in influencing the jury to convict.” *Id.* (quoting *Caron*, 218 N.W.2d at 200) (emphasis added). The caselaw does not provide guidance on what constitutes “unusually serious” or “less serious” conduct. And the Minnesota Supreme Court itself seems to have expressed some hesitation over whether this two-tiered approach is appropriate. *State v. Ramey*, 721 N.W.2d 294, 299 n.4 (Minn. 2006) (“We leave for another day the question of whether the *Caron* two-tiered approach should continue to apply to cases involving objected-to prosecutorial misconduct.”).

But it is unnecessary for us to decide whether the misconduct at issue in this case is “unusually serious” or “less serious.” In *United States v. Triplett*, the Eighth Circuit explained that remarks which “the jury would naturally and necessarily have understood . . . as comments on [the defendant’s] failure to testify” are a violation of the self-incrimination clause of the Fifth Amendment. 195 F.3d 990, 996 (8th Cir. 1999). And the *Triplett* court laid out the appropriate standard of review when it stated that the “law is well settled that the jury’s guilty verdict will not be set aside if this type of constitutional error was harmless *beyond a reasonable doubt*.” *Id.* at 996 (citing *Chapman v. California*, 386 U.S. 18, 22–24, 87 S. Ct. 824, 827–28 (1967)) (emphasis added). This standard comes from the Supreme Court’s decision in *Chapman v. California*, which examined a prosecutor’s repeated comments to the jury about two defendants’ failure to testify and

held that the harmless-beyond-a-reasonable-doubt standard applies. 386 U.S. at 24, 87 S. Ct. at 828. Because the Fifth Amendment applies to the states through the Fourteenth Amendment, *State v. Booker*, 770 N.W.2d 161, 166 (Minn. App. 2009), and because “the protection we afford cannot be less than that afforded by the Federal Constitution,” *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987), the federal standard articulated in *Chapman* applies to our review of this prosecutorial misconduct rather than the two-tiered *Caron* approach.<sup>1</sup> Moreover, such an approach is supported by other Minnesota Supreme Court cases that sidestep any discussion of the *Caron* approach when dealing with prosecutorial allusions to a defendant’s decision not to testify. See *State v. DeRosier*, 695 N.W.2d 97, 107–08 (Minn. 2005) (applying harmless-beyond-a-reasonable-doubt standard and citing to *Triplett* in doing so); see also *State v. Zornes*, 880 N.W.2d 363, 372 (Minn. 2016).

The unusual nuances to the standard of review for this kind of misconduct do not end there however. Minnesota caselaw provides constitutional protection that goes beyond the language of *Triplett* and *Chapman*. It requires that an appellate court determine whether the misconduct was reversible per se before even engaging in a harmless-error analysis. See *Zornes*, 880 N.W.2d at 372. We begin our analysis there.

ii. *Reversible Per Se*

Glaser asserts that the prosecutor’s misconduct was reversible per se. But before determining if the misconduct is reversible per se, we must determine whether the

---

<sup>1</sup> Further undercutting the two-tiered *Caron* approach is the principle that errors implicating constitutional rights trigger harmless-beyond-a-reasonable-doubt review. *State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012).

prosecutor's statements constitute misconduct in the first place. "Indirect references to a defendant's choice not to testify constitute misconduct if they (1) manifest the prosecutor's intention to call attention to the defendant's failure to testify, or (2) are such that the jury would naturally have understood them as a comment on the defendant's failure to testify."

*Id.* (quotation omitted). The statement at issue was:

Members of the jury, he's a guy at the bar doing what guys at the bar do. He's looking at women, he's trying to talk to them, and he decides that [K.F.] might be an easy target.

Now, what does that tell you about his intent? It tells you what's going through his mind before he decides to do this, before he goes up and stands behind her at the chair with his hand on the chair and thinks about what he's going to do. But what I don't want you to go back there and say is, "Well, we didn't hear from him. We don't know what he was thinking."

The statement "we didn't hear from him" is the kind of statement a jury would naturally understand as a comment on Glaser's failure to testify. Accordingly, we conclude that the prosecutor's statement constituted misconduct.<sup>2</sup>

Having determined that the prosecutor's statement was misconduct, we analyze whether it is reversible per se. A prosecutor's error in commenting on a defendant's decision to not testify is reversible per se if: (1) "the comments are extensive"; (2) "the comments stress to the jury that an inference of guilt from silence is a basis for conviction";

---

<sup>2</sup> The state argues in a footnote that this statement was not misconduct because it was simply an "unintentional error." The state's position is based on a misreading of *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009). In *Leutschaft*, this court indeed acknowledged that there is distinction between prosecutorial misconduct and "prosecutorial error." *Id.* But we also noted that the standard for prosecutorial misconduct "would seem equally applicable to prosecutorial error." *Id.* So, even if the prosecutor's statement were "error" rather than "misconduct," the analysis would not change.

and (3) “evidence exists that could have supported acquittal.” *Id.* First, as the state notes, the problematic statement is only two sentences long; it is not extensive. Second, while the comments do touch on one of the elements of fifth-degree criminal sexual conduct—intent—they do not stress “an inference of guilt from silence.” And third, there is evidence in the record supporting acquittal—there was no DNA found on the crotch of the victim’s underwear and the surveillance video is ambiguous as to whether Glaser penetrated the victim’s vagina. Since only one of the three factors is met, we conclude that the misconduct was not reversible per se.

iii. *Harmless Beyond a Reasonable Doubt*

Having determined that the prosecutorial misconduct is not reversible per se, we must now decide whether the misconduct was harmless beyond a reasonable doubt. This tasks us with determining whether, absent the misconduct, it is “clear beyond a reasonable doubt that the jury would have returned a verdict of guilty.” *DeRosier*, 695 N.W.2d at 108 (quoting *Triplett*, 195 F.3d at 996).

Glaser was convicted under Minn. Stat. § 609.3451, subd. 1(1). Under this statute, a defendant is guilty of fifth-degree criminal sexual conduct if he “engages in nonconsensual sexual contact.” Minn. Stat. § 609.3451, subd. 1(1). Sexual contact is defined many ways in the fifth-degree criminal sexual conduct statute. *Id.* (referring to Minn. Stat. § 609.341, subd. 11(a)(i), (iv), (v) (2016) as well as creating its own definitions). One of those definitions, which the state argued at trial and which the district court instructed the jury on, is “the nonconsensual touching by the complainant of the actor’s intimate parts, effected by the actor, if the action is performed with sexual or

aggressive intent.” *Id.* “[T]he intentional touching of the clothing covering the immediate area of the buttocks” is not sexual contact however. *Id.*

We are therefore tasked with assessing whether it is clear beyond a reasonable doubt that, absent the prosecutor’s two-sentence misconduct, the jury would have convicted Glaser of nonconsensually touching the victim’s intimate parts (though not her clothed buttocks) with sexual or aggressive intent. The following relevant evidence was presented at trial. The victim testified that Glaser sexually assaulted her by putting his fingers in her vagina when she was at the bar. The state presented video evidence from the bar showing the incident. The video evidence shows a man placing his hand under the victim’s skirt, moving his hand forward, and the victim turning around and slapping the man twice. There was testimony from an expert who tested for DNA. She testified that no DNA linked to Glaser was found on the victim’s vaginal swabs or the swabs of her right hand. She also tested a swab of the outside crotch of the victim’s underwear, but found no DNA linked to Glaser. But she explained that “it’s not unusual to not develop an interpretable profile or not leave detectable amounts of DNA behind from limited touch contact.”

Glaser asserts that the lack of DNA evidence and the video evidence support his claim that he did not touch the victim’s vagina, making the state’s case weak and making it likely that he was prejudiced by the misconduct. The lack of DNA evidence supports Glaser’s position to the extent that it does not definitively demonstrate guilt. But it cannot be said to demonstrate innocence either since the expert testified that it is not unusual for a person to touch another and not leave a detectable amount of DNA behind. In that sense, the DNA expert’s testimony is neutral. The video evidence also does not help Glaser’s

position. While the video does not show where precisely Glaser touched the victim, it does not mean that this evidence demonstrates his innocence. And it is certainly possible to conclude from the video footage that when Glaser moved his hand, he touched the victim's vagina. We are therefore not convinced that either piece of evidence supports Glaser's claim that he is innocent.

The remaining important piece of evidence was the victim's testimony, and she testified that she felt Glaser's fingers go into her vagina. This testimony went directly to the question that the DNA and camera evidence could not resolve on their own—whether Glaser had touched the victim's clothed buttocks or touched her vagina. And since she was the one actually touched by Glaser, her testimony was significant to this case. Her testimony was also important because it gave context for the video evidence. On its own, the video evidence was not conclusive as to guilt or innocence, but when considered in conjunction with the victim's testimony, it strengthened the state's case. Considering the evidence as a whole, we conclude that the case against Glaser was strong.

The district court's curative instruction also weighs into our analysis. We presume that juries follow instructions, including curative instructions, given by district courts. *State v. Gatson*, 801 N.W.2d 134, 151 (Minn. 2011). And the curative instructions here were given almost immediately after the district court sustained Glaser's objection to the prosecutor's misconduct. This reminded the jury that they should not draw any inferences from the fact that Glaser did not testify. Because the misconduct was brief and immediately addressed by a curative instruction, and because there was strong evidence against Glaser, we conclude that the misconduct was harmless beyond a reasonable doubt.

## II. Sex Offender Registration

Glaser also challenges the district court's requirement that he register as a predatory offender. Predatory-offender registration is governed by Minn. Stat. § 243.166 (2016). The statute requires a defendant to register as a predatory offender if he was charged with third-degree criminal sexual conduct and was "convicted of . . . that offense or another offense arising out of the same set of circumstances." Minn. Stat § 243.166, subd. 1b(a)(1). If the defendant is convicted of "another offense arising out of the same set of circumstances," then the qualifying offense for which he was not convicted must nonetheless be supported by probable cause. *See State v. Lopez*, 778 N.W.2d 700, 705 (Minn. 2010); *see also State v. Haukos*, 847 N.W.2d 270, 274 (Minn. App. 2014).

Glaser does not appear to challenge that the fifth-degree charge for which he was convicted arose out of the same set of circumstances as the third-degree charge. Therefore, the only question is whether the third-degree charge is supported by probable cause. "Probable cause exists where the facts would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person under consideration is guilty of a crime." *Haukos*, 847 N.W.2d at 274 (quotation omitted). This standard only requires "a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* (quotation omitted).

Glaser asks us to make this probable-cause determination by looking to the evidence presented at trial—the same evidence which led to his acquittal on the third-degree charge. The state asks us to confine our review to the criminal complaint and the facts alleged within it. The caselaw does not provide much guidance on the question, but we need not

resolve the issue since the result is the same whether we confine our review to the complaint or consider the evidence at trial.

The four elements for the third-degree criminal sexual conduct charge were: (1) intentional sexual penetration; (2) a lack of consent; (3) force was used, meaning the infliction of bodily harm—i.e., physical pain; and (4) the act took place on January 19, 2017 in Hennepin County. As to the first element, both the complaint and the victim’s testimony allege that Glaser sexually penetrated her by putting his fingers in her vagina. As to the second element, both the complaint and the victim’s testimony establish a lack of consent. As to the third element, the complaint specifically alleges that the victim felt pain in her vagina until the next day, and she testified that it hurt when Glaser put his fingers in her vagina. And as to the fourth element, both the complaint and the trial transcript indicate that the act took place on January 19, 2017 in Hennepin County.

The allegations in the complaint and the testimony at trial presented fact and credibility questions for the jury. And “if the facts before the district court present a fact question for the jury’s determination on each element of the crime charged, the charge will not be dismissed for lack of probable cause.” *Lopez*, 778 N.W.2d at 704 (quotation omitted). We therefore conclude that there was probable cause supporting the third-degree criminal sexual conduct charge, and that the district court did not err in requiring that Glaser register as a predatory offender.

**Affirmed.**