

*This opinion will be unpublished and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
A18-0613**

W. J. A.,
Respondent,

vs.

Patricia C. Johnson,
as the Personal Representative of the Estate of Terry M. Johnson, Deceased,
Appellant.

**Filed March 18, 2019
Affirmed
Reyes, Judge**

Hennepin County District Court
File No. 27-CV-16-5306

Michael Hall, III, Anju Suresh, Hall Law, P.A., St. Cloud, Minnesota (for respondent)

Michael D. Hutchens, Nicholas J. O'Connell, William M. Hart, Julia J. Nierengarten,
Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for appellant)

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

UNPUBLISHED OPINION

REYES, Judge

In this appeal from judgment following a jury trial on respondent's sexual-abuse claims, appellant argues that the district court erred in denying her motion for a new trial on the basis of (1) wrongfully admitted evidence and (2) attorney misconduct. We affirm.

FACTS

This case arises from the sexual abuse Terry Johnson inflicted on his stepdaughter, respondent W.J.A., approximately 40 years ago, when she was between 11 and 13 years old. From 1977 to 1979, Johnson intentionally touched respondent's breasts on multiple occasions. Johnson died in July 2015. In April 2016, respondent filed a complaint against appellant Patricia Johnson, as the personal representative of his estate, alleging sexual abuse and seeking damages for past and future emotional distress.

The district court held a jury trial from July 31 through August 4, 2017. At trial, appellant admitted that Johnson committed the abuse alleged. The jury therefore only had to determine the amount of damages for past and future emotional harm. The jury awarded a total of \$4 million to respondent.

Appellant brought a motion for a new trial, arguing that the district court erred in allowing testimony about a potential incident of abuse, referred to as the "bedroom incident;" that respondent presented evidence in violation of the district court's motion in limine rulings; that respondent's attorney made improper arguments, and that the jury awarded an excessive amount in damages. The district court denied the motion.

This appeal follows.

DECISION

Appellant argues that the district court abused its discretion in denying her motion for a new trial on two grounds: (1) the improper admission of testimony surrounding the bedroom incident and (2) respondent's attorney's misconduct. We are not persuaded.

A new trial may be granted to any party because of an “[i]rregularity in the proceedings of the court . . . or any order or abuse of discretion, whereby the moving party was deprived of a fair trial,” or because of “[e]rrors of law occurring at the trial.” Minn. R. Civ. P. 59.01. This court reviews a district court’s decision to deny a motion for a new trial for a clear abuse of discretion. *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 625 (Minn. 2012).

I. The district court did not abuse its discretion in admitting evidence concerning the bedroom incident.

Appellant argues that the district court abused its discretion by allowing in any testimony recounting the bedroom incident and that respondent did not follow the district court’s order forbidding speculation. We disagree.

This court reviews a district court’s evidentiary rulings for an abuse of discretion. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012). An improper evidentiary ruling resulting in the erroneous admission of evidence will require a new trial only if it results in prejudice. *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006). “An evidentiary error is prejudicial if it might reasonably have influenced the jury and changed the result of the trial.” *Id.*

The bedroom incident refers to respondent’s memory of an incident that occurred during the period of abuse. She recalls waking up in her bed after “passing out” in the middle of the day, with her legs hanging off the side of the bed, and feeling discomfort in her abdomen. Johnson was on her bed shaking her awake, asking if she was all right in a frantic voice. By this time, Johnson had been molesting respondent for about a year, and

she woke up scared and felt that something was not right. Respondent did not understand why, if Johnson was so concerned for her, he never told her mother. Respondent had no evidence that anything improper occurred, but has had anxiety and fear concerning the incident throughout her life.

A. The district court's order allowing a recounting of the bedroom incident

Appellant first argues that, by allowing a recounting of the facts surrounding the bedroom incident, the district court “permitted irrelevant and materially prejudicial evidence, which deprived the estate of a fair trial.” We are not persuaded.

Generally, all relevant evidence is admissible. Minn. R. Evid. 402. Evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. Even when relevant, a district court may exclude evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” Minn. R. Evid. 403.

Here, the district court expressed concern about the danger of prejudice that testimony surrounding the bedroom incident could cause to appellant. However, the district court balanced this concern with the need to allow respondent, a victim of sexual abuse, to testify about how she felt living in the home with her abuser. The district court allowed respondent to testify only about what actually happened during the bedroom incident: the fact that she woke up in the middle of the day, under unusual circumstances, and has felt recurring anxiety about the incident ever since. The district court stated that

no speculation concerning the possibility that Johnson raped respondent would be permitted.

In denying appellant's motion for a new trial on this issue, the district court held that "[e]vidence of what [respondent] heard and saw is not speculative and [respondent's] testimony that the bedroom incident caused her recurring and persistent anxiety is relevant. The bedroom incident highlighted [respondent's] fears and anxiety of living with her abuser."

Respondent's testimony is relevant because it goes to her state of mind at the time, and the feelings of anxiety that resulted from living with her abuser. And the weighing of probative value versus prejudice is soundly within the discretion of the district court, and "in close cases the court may properly exercise its discretion in favor of allowing relevant evidence." *Myers v. Hearth Techs., Inc.*, 621 N.W.2d 787, 791 (Minn. App. 2001). The district court carefully weighed the competing interests here and found that the danger of prejudice did not substantially outweigh the probative value.

We conclude that the district court did not abuse its discretion by allowing respondent to testify as to what she personally experienced during the bedroom incident while rejecting any testimony in the form of speculation or conclusions on what might have happened.

B. Testimony concerning the bedroom incident at trial

Appellant also argues that she is entitled to a new trial because respondent violated the district court's order by introducing at trial "inflammatory speculation" about what

happened during the bedroom incident, which had a prejudicial effect on the outcome of the trial. We disagree.

There were at least two clear violations of the district court's order at trial. First, respondent's friend, C.F., testified that respondent told her about an incident in which "she was drugged" by Johnson. The district court immediately struck that comment from the record. Second, M.S., an ex-boyfriend of respondent, testified that she had told him about an incident in which she woke up and "she felt like something had been inside her." Respondent's counsel immediately ceased that line of questioning, and the district court struck that testimony from the record as well.

Less clear were respondent's consistent allusions to the bedroom incident in which her testimony, and that of her therapist, made it known that she thought she had been raped. Respondent testified that, "after thinking about it all these years—because it's been going over my mind—I see it over and over again, and trying to think what happened that day. What did he do to me? Because whatever he did was not right." She stated that, "I see it over and over again. Whenever there's any peace . . . I replay it. I can see him sitting there. And it makes me wonder."

The district court stated that "[t]he testimony presented . . . made it clear that [respondent] believed she was raped. The question is whether this testimony was materially prejudicial to [appellant]." In deciding that appellant was not materially prejudiced, the district court cited the curative instruction it gave to the jury at the end of the trial, which stated:

You have heard some evidence concerning an incident in which [respondent] has described Terry Johnson as trying to wake her up. She has testified that she does not know what happened. You are not to assume that anything sexual took place.

The [respondent's] testimony that she is concerned that something sexual happened does not mean that anything sexual did happen.

The jury is not to consider any evidence ordered stricken on this topic.

Jurors are presumed to follow the instructions they are given, including curative instructions. *Frazier*, 811 N.W.2d at 630.

Here, the district court issued a careful curative instruction for the jury, drafted by appellant's attorney, designed specifically to address any speculation that may have arisen from the testimony concerning the bedroom incident. While some of the testimony violated the district court's order and made clear that respondent believed Johnson raped her, the district court struck the limited testimony from the record and provided a curative instruction, thereby curing any error. See *Oltmans v. Orthopaedic & Fracture Clinic, P.A.*, 278 N.W.2d 538, 541 (Minn. 1979) (holding that instructing jury to disregard improper testimony cured any error); *Wild v. Rarig*, 234 N.W.2d 775, 785-86 (Minn. 1975) (stating that "[i]f the [district] court instructed the jury to disregard the improper remarks or arguments, a new trial will rarely be granted by [an appellate court].").

Appellant also argues that respondent's counsel injected conjecture about the bedroom incident every time a witness testified, which violated the district court's order and amounted to attorney misconduct. Specifically, appellant takes issue with respondent's

counsel's remarks during closing arguments, when he told the jury that "we don't have to know" what happened during the bedroom incident. However, in context, respondent's counsel also told the jury that "we do not know what happened while she was passed out. We don't know what he did; we don't know what he didn't do." This does not rise to the level of speculation that the district court prohibited in its order. Furthermore, the district court instructed the jurors that "[n]othing the attorneys say during the trial, including opening statement and closing argument, is evidence," and any error "may be rendered harmless where the court instructs the jury to disregard remarks of counsel." *Johnson v. O'Brien*, 105 N.W.2d 244, 248 (Minn. 1960).

The district court held that, given appellant's admission at trial that Johnson abused respondent, it could not say "that [respondent's] fears that she was abused on one more occasion is materially prejudicial." The district court, being present at the time of the trial, is in the best position to determine whether prejudice occurred. *Ellingson v. Burlington N. R.R. Co.*, 412 N.W.2d 401, 405 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987). And notably, respondent repeatedly testified that she did not know what happened during the bedroom incident. We conclude that the district court did not abuse its discretion in denying appellant's motion for a new trial on the basis of testimony concerning the bedroom incident.

II. The district court did not abuse its discretion by denying appellant's motion for a new trial on the basis of attorney misconduct.

Appellant further argues that the district court abused its discretion by denying its motion for a new trial based on the alleged misconduct by respondent's attorney during opening statements and closing argument. Appellant's arguments lack merit.

Under Minn. R. Civ. P. 59.01(b), a district court may grant a new trial based on "[m]isconduct of the . . . prevailing party." The determination of whether to grant a new trial because of attorney misconduct "is not governed by fixed rules, but instead rests wholly within the discretion of the [district] court." *Johnson v. Washington County*, 518 N.W.2d 594, 600 (Minn. 1994). We review the district court's decision whether to grant a new trial because of attorney misconduct for an abuse of discretion. *Wild*, 234 N.W.2d 775 at 785. "The primary consideration in determining whether to grant a new trial is prejudice." *Id.* at 786. The conduct must be "so prejudicial that it would be unjust to allow the result to stand." *Ellingson*, 412 N.W.2d at 403 (quoting *Jack Frost, Inc. v. Engineered Components Co., Inc.*, 304 N.W.2d 346, 352 (Minn. 1981)).

Appellant argues that respondent's attorney committed misconduct in three ways: (1) improperly calling on the jury to be the "conscience of the community" and to send a message about sexual abuse; (2) impugning appellant's character; and (3) disregarding the district's court's order regarding the bedroom incident.¹ Relevant portions of the closing argument are included below:

You're going to do what jurors have done for hundreds of years, and your goal is justice, right? To take a wrong and set

¹ This argument has already been addressed in section I.

it right. That's what your charge is. You render a verdict. You really all are speaking as the conscience of our community on this issue on what happened to [respondent]. . . . So please remember why we're suing. All right? We're suing because a man broke the law, a law that's meant to protect our little kids. He sexually molested a little girl. . . . So, you know, \$10 million, \$12 million, \$7 million, \$5 million— what is it about sex abuse cases that requires these kinds of huge numbers? Why does it take massive numbers like that for jurors to recognize and respect these harms that we're talking about? Why? I think it's because of the harm. I think it's because of these harms that come up in sex abuse cases. I think that when a jury puts a number on these kind of cases, it says something about our morals and our priorities as a group and as a society. And I think that it's true; that our juries are really our conscience of our communities. And if you think about it, when our juries speak, they're forming our ongoing reality about what's acceptable and what's not acceptable and what's absolutely, absolutely not acceptable to touch a little girl. They form our realities about what's not a big deal and what— yeah, that's a big deal. This is what juries do.

The district court denied appellant's motion for a new trial on the basis of attorney misconduct, holding that: "when read in totality and given the arguments of [appellant], the closing statement of [respondent's] attorney seeks compensation for the damages suffered by [respondent] and is not improper." The district court further explained that "[e]ven if improper, [appellant] did not make an objection and the misconduct was not so severe as to warrant the Court to offer a curative instruction sua sponte." In analyzing closing arguments for misconduct, we must "look to the closing argument as a whole, rather than to selected phrases and remarks." *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004).

Appellant first argues that the "conscience of the community" argument impermissibly amounted to instructing the jury to punish appellant by awarding a

“massive” sum of money. In *Johnson v. Washington County*, plaintiff’s counsel made statements during closing argument about the “despicable,” “indecent,” and “borders on the criminal” actions of the defendant. 506 N.W.2d 632, 639 (Minn. App. 1993). Counsel also stated that if the jury awarded a figure like \$1.5 million, “people might start listening to jurors who hear despicable cases like this.” *Id.* We stated that these statements “come very close to the level of misconduct that warrants granting a new trial. In particular, the remarks seem to focus on punishing the [defendant] for its outrageous and reckless conduct; such punishment is not proper.” *Id.* at 640. However, we ultimately held that, because the district court issued a curative instruction, it “properly exercised its discretion” by denying the motion for a new trial. *Id.*

Here, respondent’s counsel’s closing argument obliquely referenced dealing with sexual abuse as a society. However, when looking at the argument as a whole, respondent’s attorney repeatedly maintained that the focus was on compensating respondent for the harm she suffered. Furthermore, appellant has provided no authority for the assertion that it is improper to instruct the jury that they are the “conscience of the community.”² And given that the standard jury instruction specifically states “[a] just and proper verdict contributes to the administration of justice,” 4 *Minnesota Practice*, CIVJIG 10.45 (2018), stating that jurors are the “conscience of the community” does not seem wholly improper or inflammatory.

² In fact, such arguments have been found permissible in other jurisdictions, including the 8th Circuit. See *U.S. v. Lewis*, 547 F.2d 1030, 1037 (8th Cir. 1976) (“Unless calculated to inflame, an appeal to the jury to act as the conscience of the community is not impermissible . . .”).

Second, appellant argues that respondent's counsel committed further misconduct by "impugning the estate" in its closing argument. Appellant argues that this occurred by "wrongly taking advantage of the inflammatory nature of [respondent's] claims." Appellant primarily seems to take issue with respondent's counsel's assertions that appellant "refuses to take responsibility" and they "know that they did wrong and deny that it happened." However, these statements reference the fact that appellant did initially deny that any misconduct occurred and that the denial of wrongdoing has also been a source of emotional harm to respondent.

In sum, given the "wide latitude" attorneys have to make their arguments to the jury, respondent's counsel did not commit any misconduct. *Stroncek v. Berkshire Life Ins. Co.*, 193 N.W.2d 286, 290 (Minn. 1971). Furthermore, appellant cannot show prejudice, particularly since appellant did not object to respondent's counsel's statements during closing argument. "A party is not permitted to remain silent, gamble on the outcome, and, having lost, then for the first time claim misconduct in opposing counsel's argument." *Patton v. Minneapolis St. Ry. Co.*, 77 N.W.2d 433, 438 (Minn. 1956). And the conduct here cannot be said to have been "so flagrant as to require the trial court to act on its own motion." *Id.* Given this latitude, the district court did not abuse its discretion when it denied appellant's motion for a new trial on the basis of attorney misconduct.

Affirmed.