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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1035**

State of Minnesota,
Respondent,

vs.

Charles Earl Strother,
Appellant.

**Filed July 22, 2019
Affirmed
Bratvold, Judge**

Redwood County District Court
File No. 64-CR-17-616

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Jenna Peterson, Redwood County Attorney, Redwood Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Larkin, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this direct appeal from the judgment of multiple convictions of criminal sexual conduct, domestic abuse, witness tampering, and drug crimes, appellant Charles Strother

argues that the prosecution committed reversible misconduct by arguing during closing that the jury should render its verdict by (1) putting themselves in the victim's shoes; (2) sending a message to the defendant and the victim; and (3) considering broad social issues. Strother also argues, in a supplemental pro se brief, that his trial counsel provided ineffective assistance of counsel and that the district court erred by admitting certain evidence. The prosecutor's closing argument was plain error and it is a close call whether appellant's substantial rights were affected. Because we nonetheless conclude that the fairness and integrity of the judicial proceedings was not affected by the prosecutor's misconduct, we affirm.

FACTS

In July 2017, L.C. met Strother on an internet dating website. L.C. gave Strother her phone number and address, but did not meet him in person or invite him to her home. But in late July or early August, Strother showed up at L.C.'s home in Lamberton, Minnesota, where she lived with her two children, I.C., age 16, and E.C., age 13. L.C. did not recognize Strother, who told L.C. that he was "packing." She believed he meant that he had a gun. Strother told L.C. that they had met on the dating website, she remembered him, and let him into her house.

Strother stayed with L.C. for several days. During that time, Strother talked about starting a business and told L.C. to open a credit account, which he then used to purchase around \$2,000-\$3,000 in tools. L.C. described Strother as having frequent mood swings; he would yell, say mean things, and make "mean, nasty look[s]." L.C. testified that she did not contact law enforcement because she was scared that Strother would harm her and

her children. Strother told L.C. that “snitches get stitches and wind up in ditches,” and that if he was arrested, he would be out of jail within 48 hours and “get” her. Strother and L.C. had sex but L.C. told him to stop because she was in pain from a previous hysterectomy. Strother did not stop.

After four days, Strother took L.C.’s ex-husband’s truck, while leaving his own vehicle at L.C.’s home. He was gone for about three days and returned sometime in early August. Strother used drugs and alcohol in L.C.’s house. Strother told L.C. he had “bugged” her mobile phone, could trace her using GPS, and that he could “have anybody find [L.C.] and kill [her]” Strother also made L.C. take drugs and took L.C.’s keys to her vehicles and home.

During the afternoon of Saturday, August 12, Strother forced L.C. to engage in oral sex. Later that day, L.C. told Strother she wanted him to leave. Strother then grabbed her by the throat, held her against the wall, and called her a “b---h.” Strother also threatened to duct tape L.C. to a chair and beat her. L.C. called the police and told them that Strother would not leave. Police came to the house, Strother agreed to leave, left, and then returned several hours later.

Early on August 13, Strother became upset, complaining that L.C.’s children had damaged his car. Strother struck E.C. and told L.C. that she owed him \$4,000 for the damage and had to pay him the next day. He took the title to L.C.’s vehicle and said he would keep it until she paid him. L.C. became frightened that Strother would harm her or her children. L.C. then drove her children to a nearby park, where she thought they would

be safe. L.C. returned to her home because she believed that Strother could track her through her mobile phone. Upon her return, Strother forced L.C. to perform oral sex.

L.C. picked up her children from the park and drove outside Lamberton. L.C. answered a phone call from her mother, M.G., who later testified that L.C. sounded scared and was crying. L.C. told M.G. that her phone was “bugged and [Strother] knows where I’m at and what I’m doing.” L.C. also said that she couldn’t go to the police because he had “drugged” her. M.G.’s husband talked to L.C., while M.G. called the police. Eventually, L.C. pulled over on the side of the highway, flagged down a passing motorist, and asked for help.

Officer Micka of the Springfield Police Department found L.C. near her car, on the side of the road, more than 20 miles outside Lamberton. Micka testified that L.C. was crying, not wearing shoes, and appeared “very distressed.” L.C. told Micka that she had recently met Strother, he was staying at her home, he had hit her and forced her into sexual activities against her will, and that he told her “he owned everything.” Micka contacted Chief Hacker of the Lamberton Police Department. L.C. gave a similar statement to Hacker, adding that Strother had choked her, threatened to kill her and her children, and drugged her. L.C. was taken to the hospital.

At the hospital, L.C. underwent physical and sexual-assault examinations. L.C. was described as upset and fearful. Although no physical marks were observed, L.C.’s face was tender on one side. A nurse conducted sexual-assault testing, including oral and vaginal swabbing, which revealed semen in L.C.’s vagina. Subsequent testing matched the DNA

on the swabs to Strother's DNA. L.C.'s blood and urine were tested, which revealed the presence of methamphetamine.

Police, including Hacker, then went to L.C.'s home. Hacker testified that when he asked Strother "what happened earlier," Strother stated nothing had occurred, but later said that he and L.C. had a "small argument." Police arrested Strother and collected evidence, including L.C.'s bedsheet and Strother's backpack, which contained methamphetamine, a lightbulb (used for smoking methamphetamine), marijuana, and a marijuana pipe. The backpack also contained the title to L.C.'s vehicle, paperwork for a new credit card, and various keys belonging to L.C.

The state charged Strother with eleven counts: aggravated-first-degree witness tampering, in violation of Minn. Stat. § 609.498, subd. 1b(a)(4) (2016) (count 1); third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(c) (2016) (count 2); fourth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.345, subd. 1(c) (2016) (count 3) (for actions "on or about August 11"); fourth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.345, subd. 1(c) (count 4) (for actions "on or about August 13"); threats of violence, in violation of Minn. Stat. § 609.713, subd. 1 (2016) (count 5); domestic assault by strangulation, in violation of Minn. Stat. § 609.2247, subd. 2 (2016) (count 6); domestic assault (fear), in violation of Minn. Stat. § 609.2242, subd. 1(1) (2016) (count 7); domestic assault (harm), in violation of Minn. Stat. § 609.2242, subd. 1(2) (2016) (count 8); fifth-degree controlled substance crime, in violation of Minn. Stat. § 152.025, subd. 2(1) (2016) (count 9); possession of drug paraphernalia, in violation of Minn. Stat. § 152.092(a) (2016) (count 10); and possession

of a small amount of marijuana, in violation of Minn. Stat. § 152.027, subd. 4(a) (2016) (count 11).

At trial, L.C. testified to the events described above; I.C. and M.G. also testified for the state. Micka testified about L.C.'s frightened demeanor and her previous statements; Hacker testified about M.G.'s, L.C.'s and Strother's statements. Two nurses testified about L.C.'s fearful demeanor and L.C.'s statements about Strother striking her and forcing her to perform various sexual acts. The state also presented evidence of the contents of Strother's backpack, the semen collected from oral and vaginal swabs and the DNA test results, the semen from L.C.'s bedsheets and the DNA test results that matched Strother, and the test results for L.C.'s blood and urine. The state also presented expert testimony that described typical behavior by domestic violence victims.

Strother waived his Fifth Amendment right to remain silent and then testified. Strother stated, "[L.C.] wanted me to come over, she said that she had alcohol and stuff there . . . and that she just wanted to . . . [have] an intimate encounter," that "she was real adamant about me coming out there," and that any sex was "[a]bsolutely" consensual. Strother also testified that L.C. "said that she had . . . \$3,000.00 available . . . on a card . . . so that [they] could go there and get tools" and "a few days later, she put [his] name on the . . . account." Strother testified that L.C. knew he was taking her ex-husband's truck. Strother also testified that L.C. "said that she wanted to try [methamphetamine] with me" and that he "gave her a piece" which she then swallowed.

The jury found Strother guilty of eight counts and acquitted him of three counts.¹ The district court entered judgment of conviction and imposed an executed sentence of 86 months for count 1 (aggravated first-degree witness tampering) with a consecutive 48 months for count 2, third-degree criminal sexual conduct. The district court did not formally adjudicate Strother's guilt on counts 5 and 7-11, but preserved the findings of guilt. This appeal follows.

DECISION

I. Strother did not waive plain error review of the prosecutor's statements during closing argument.

The state argues that "Strother expressly waived any objection to the prosecutor's closing argument." Waiver is "the intentional relinquishment or abandonment of a known right"; on the other hand "forfeiture is the failure to make the timely assertion of a right." *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015) (citing *United States v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 1777 (1993)). A defendant's attorney may forfeit nonfundamental rights such as "decisions pertaining to the conduct of trial, . . . what arguments to pursue, [and] what evidentiary objections to raise." *State v. Halseth*, 653 N.W.2d 782, 786 (Minn. App. 2002).

In *State v. Ramey*, the Minnesota Supreme Court "reemphasize[d]" that defendants may strategically and deliberately fail to object to prosecutorial misconduct, but nevertheless concluded that a modified plain-error review was appropriate. 721 N.W.2d

¹ Strother was acquitted on counts 3 (fourth-degree criminal sexual conduct), 4 (fourth-degree criminal sexual conduct), and 6 (domestic assault by strangulation).

294, 299, 301-02 (Minn. 2006). Under the modified plain-error standard, an appellant must first show the prosecutorial misconduct was plain error; the burden then shifts to the state to demonstrate that the plain error did not affect the appellant's substantial rights. *Id.* at 302. The supreme court added, however, that if a defendant does not object to prosecutorial misconduct during closing argument and instead responds to the misconduct in their own closing argument, "the defendant forfeits consideration of the issue on appeal." *Id.* at 299 n.3. If an appellant shows error that was plain and the state cannot demonstrate that the error did not impact the appellant's substantial rights, "the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Ramey*, 721 N.W.2d at 302.

Here, the district court, outside the presence of the jury, asked both attorneys to approach "to make any objections you think proper on the other side's closing statement." In response, Strother's counsel stated "Nothing, Your Honor." The state cites *State v. Mohomoud (Mohomoud I)*, 788 N.W.2d 152 (Minn. App. 2010), *review granted and remanded* (Minn. Nov. 23, 2010). But the state's analysis of *Mohomoud I* fails to discuss the complete procedural history, which does not support the state's position.

In *Mohomoud I*, this court considered whether an appellant had waived plain-error review of an exhibit's admission because appellant's counsel did not object when the district court inquired. *Id.* at 157-59. *Mohomoud I* decided that plain-error review does not apply "when a party intentionally and expressly gives up a known right." *Id.* at 158. The supreme court granted appellant's petition for review and, in a written order, vacated our opinion on the waiver issue and remanded the case to this court for reconsideration of

whether Mohomoud waived any challenge to the admissibility of the exhibit. *State v. Mohomoud*, A09-1969, (Minn. Nov. 23, 2010) (mem.).

On remand, *Mohomoud II* noted that the supreme court’s order “implicitly reject[ed] the holding that Mohomoud waived this claim of error.” *State v. Mohomoud (Mohomoud II)*, A09-1969, 2011 WL 1743733, at *2, n.1 (Minn. App. May 9, 2011), *review denied* (Minn. July 19, 2011); *see also State v. Noor*, 907 N.W.2d 646, 649 n.4 (Minn. App. 2018), *review denied* (Apr. 25, 2018) (discussing *Mohomoud*’s procedural history). *Mohomoud II* then reviewed the exhibit’s admission under the plain-error standard, found plain error, concluded the error affected appellant’s substantial rights on one count, evaluated the error’s impact on the fairness and integrity of the proceedings, and reversed one conviction while affirming two other convictions. *Mohomoud II*, 2011 WL 1743733, at *2-4.

With a full and accurate understanding of *Mohomoud I* and *II*, we reject the state’s contention that Strother waived his challenge to prosecutorial misconduct. Instead, we proceed under the modified plain-error standard of review outlined in *Ramey*. 721 N.W.2d at 301-02.

II. Although prosecutorial statements during closing argument were plain error, the fairness and integrity of judicial proceedings were not affected, and Strother is not entitled to a new trial.

The state concedes that parts of the prosecutor’s closing argument were error. However, the state argues that these errors were not plain, and that even if plain, the errors did not affect Strother’s substantial rights. The state also contends that “review of the alleged plain error is not necessary to ensure fairness and integrity of judicial proceedings.”

As mentioned above, Strother did not object to the state’s closing arguments during trial. This court reviews unobjected-to prosecutorial misconduct under a modified plain-error standard, which we have already described. *See Ramey*, 721 N.W.2d at 302. When reviewing a prosecutor’s closing arguments, this court “review[s] the closing argument as a whole.” *State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010); *see also State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) (noting that courts look at the state’s argument “as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence”). “A prosecutor is not required to make a colorless closing argument.” *State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). But a prosecutor may not seek to convict a defendant “at any price.” *State v. Porter*, 526 N.W.2d 359, 366 (Minn. 1995). Prosecutors have a duty not to divert a jury from their limited role of deciding guilt or innocence based on the evidence. *See State v. Salitros*, 499 N.W.2d 815, 817-19 (Minn. 1993). A prosecutor may, however, “present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences that the jury may draw from it.” *Rucker*, 752 N.W.2d at 551 (quotation omitted).

Strother identifies the following statements from the prosecutor’s closing argument and rebuttal as prosecutorial misconduct:

[L.C.] came into this courtroom and had to talk about the details of this experience in front of you, a bunch of strangers she’s never met. Do you think that was easy for her? Can you imagine how she felt sitting there in that witness stand. She was talking about things that no one should ever have to talk about. How would . . . anyone feel in that situation? And she did all of that knowing full well she had to walk into this courtroom

and do it in front of him. The man who raped her. Sitting just twenty, less than twenty feet away. Can you imagine how hard it would be for anyone to testify in that situation? . . . *Take a moment and recall a sexual experience of your own. Now, imagine walking into a room and having to describe that experience in detail to a room filled with strangers. Now, imagine that you weren't a willing participant in that experience and that you had to tell everyone about it. Now, imagine that when you're telling that story, the person who did it . . . to you is sitting right in front of you. That's the experience she had when she came in front of all of you.* What more could she have done, then come into a court of law, take [an] oath, and tell you what happened to her. Think about that as you begin your deliberations. . . . Can . . . you imagine how she feels now about putting herself in that situation where she was raped? Can you imagine how she feels knowing that she put her boys in danger by letting that man into their house? Can you imagine the guilt she might feel thinking somehow, she's responsible for what happened to her, that this is her fault?

(Emphasis added). In rebuttal, the prosecutor argued:

[Strother] thought he picked the perfect victim. He was counting on you not believing her. Maybe he thought he'd get away with it, because she's not perfect. Thought she wouldn't have the guts to report it. *He was counting on the victim being too afraid, too ashamed, too humiliated to come back here and testify in front of all of you.* Maybe he thought to himself, they'll never believe her over me. *Tell him by your verdict that he was wrong to count on that. Tell him no means no. Tell him that no matter what a victim does, what [L.C.] did in those two weeks, that does not give him the right to rape her and physically assault her. Her word is enough.*

(Emphasis added). Strother argues that these statements were plain error because the prosecutor argued the jury should render its verdict by: (1) putting themselves in the victim's shoes, (2) sending a message to the defendant and to the victim, and (3) addressing broad social issues of domestic sexual assault and acquaintance rape. As noted above, the state concedes these statements are erroneous.

Based on Minnesota precedent, we conclude that the prosecutor erred in making the above three arguments. An error is plain if the error contravenes caselaw at the time of the appeal. *State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006). Caselaw is settled that prosecutors may not ask jurors to put themselves in the victim’s place. *State v. Thompson*, 578 N.W.2d 734, 742 (Minn. 1998). Similarly, caselaw is settled that prosecutors may not argue that jurors should send a message by convicting a defendant. *Salitros*, 499 N.W.2d at 819-820. And caselaw is settled that prosecutors may not inject “issues broader than a defendant’s guilt or innocence into the trial.” *Dobbins*, 725 N.W.2d. at 512. Because Minnesota precedent is clear and well-established, we conclude that the prosecutor’s errors were plain in making the statements challenged by Strother.

Next, we examine whether the prosecutor’s plain errors, individually or cumulatively, affected Strother’s substantial rights. *See State v. Bustos*, 861 N.W.2d 655, 663 (Minn. 2015). A plain error affects a defendant’s substantial rights if “the error was prejudicial and affected the outcome of the case.” *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). “An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the proceeding.” *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014). In making this determination, courts consider various factors including, but not limited to, whether the defendant had an opportunity to rebut any improper remarks, *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007), the pervasiveness of the error in proceedings, *State v. Matthews*, 779 N.W.2d 543, 552 (Minn. 2010), and the strength of the evidence against defendant, *Cao*, 788 N.W.2d at 717. We consider each factor in turn.

First, we are deeply troubled that Strother had no opportunity to rebut some of the prosecutor's improper remarks. *Davis*, 735 N.W.2d at 682. The prosecutor's improper argument that the jury should send a message by convicting Strother ("Tell him by your verdict") took place at the very end of the state's rebuttal. Strother therefore had no opportunity to respond to that improper remark. In contrast, Strother had an opportunity to respond to the prosecutor's improper argument that the jury should put themselves in L.C.'s position, which occurred during the prosecutor's initial closing argument. *See State v. Buggs*, 581 N.W.2d 329, 341 (Minn. 1998) (stating that "the defense had an opportunity to rehabilitate the appellant on re-direct and to respond to the remarks in closing argument, clearly lessening the possibility that the remarks contributed to the verdict"); *see also State v. Longo*, 909 N.W.2d 599, 609 (Minn. App. 2018) (noting that "Longo had the opportunity to rebut the misconduct in his closing argument but did not").

Next, we consider whether the prosecutor's improper arguments were "pervasive." *See Davis*, 735 N.W.2d at 682. In *State v. Peltier*, the supreme court concluded that the prosecutor's improper remarks had no effect on the defendant's substantial rights because, in part, the "incidents of alleged misconduct were isolated, together comprising approximately one page of a 39-page closing argument." 874 N.W.2d 792, 806 (Minn. 2016). Similarly, a prosecutor's improper remarks were determined to not prejudice a defendant's substantial rights when the improper comments were present in only four out of 45 pages transcribing a closing argument. *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994).

Here, the prosecutor's improper remarks occurred over about two pages of an approximately 13-page closing argument and rebuttal. Thus, the prosecutor's improper remarks are proportionally greater than the improper comments discussed in *Peltier* and *Washington*. See *Peltier*, 874 N.W.2d at 806; *Washington*, 521 N.W.2d at 40. Despite the prosecutor's troubling emphasis in this case, we do not consider the prosecutor's improper arguments to be pervasive. In *State v. Mayhorn*, the supreme court reversed and remanded for a new trial based on the "unprecedented" scope of the prosecutor's misconduct, which was "a pervasive force at trial" because "[a]t least 20 pages of the prosecutor's 80-page cross-examination of the defendant evince[d] prosecutorial misconduct." 720 N.W.2d 776, 791-92 (Minn. 2006) (emphasis added). In Strother's case, on the other hand, the prosecutor's remarks were not central to her argument, which was otherwise based on the evidence presented at trial. Moreover, Strother was acquitted on three counts, specifically two charges of fourth-degree criminal-sexual conduct and one count of domestic assault by strangulation, "undercutting the alleged inflammatory effect of the argument." *State v. Bobo*, 770 N.W.2d 129, 142-43 (Minn. 2009) ("Bobo was not convicted of first-degree premeditated murder, the most serious charged crime, undercutting the alleged inflammatory effect of the argument.").

Finally, we consider the strength of the evidence of Strother's guilt. See *Cao*, 788 N.W.2d at 717-18. The state did not rely solely on L.C.'s testimony and credibility. Rather, the state presented very strong evidence corroborating L.C.'s testimony and proving Strother's guilt. See *Dobbins*, 725 N.W.2d at 513 (noting that "the state's case against Dobbins was very strong, and the evidence, both in the form of witness testimony

and forensic evidence, overwhelmingly indicates that Dobbins shot and killed Lavender”). The jury heard testimony from L.C., during which she described Strother’s sexual assaults and criminal behavior over a roughly two-week period. L.C.’s testimony, although unclear on specific dates, was consistent on the major events that she recounted. The jury also heard testimony from I.C. and M.G., both of whom corroborated L.C.’s testimony. Police officers and medical witnesses testified that L.C. appeared very distraught and was crying on the highway and at the hospital.

The state also introduced corroborating physical evidence. L.C.’s testimony about Strother forcing her to engage in unwanted sexual activities was supported by the presence of his semen in her mouth, vagina, and on the bedsheet, as L.C. described. Similarly, the state introduced L.C.’s blood and urine tests which indicated the presence of methamphetamine, consistent with L.C.’s account that Strother forced her to take drugs. The state also introduced the contents of Strother’s backpack which included the title to L.C.’s vehicle, her keys, the paperwork for a credit card, drugs, and drug paraphernalia, all of which corroborated L.C.’s testimony.

It is a close call whether Strother’s substantial rights were affected by the prosecutor’s plain errors. On the one hand, the prosecutor’s misconduct was not pervasive, the state presented very strong evidence of Strother’s guilt, and he was acquitted of three significant charges. On the other hand, some of the prosecutor’s improper closing arguments were made with no opportunity for rebuttal and were inappropriately emphasized. Even if we assume, without deciding, that Strother’s substantial rights were

affected, we would, nevertheless, conclude that reversal is unwarranted under the final step of the modified plain-error analysis.

The fourth step in our analysis is whether the prosecutor's misconduct seriously affected the fairness and integrity of the judicial proceedings and, therefore, requires reversal. *Ramey*, 721 N.W.2d at 302. In *State v. Little*, the supreme court held that reversal was required "when there is a reasonable likelihood that but for the district court's error [the defendant] would not have waived his constitutional right to a jury trial" which in turn would "adversely affect the public's confidence in the fairness and integrity of judicial proceedings." 851 N.W.2d 878, 886 (Minn. 2014). Here, Strother was "afforded a complete adversarial trial" and presented his defense and theory of the case. *Griller*, 583 N.W.2d at 742. As the supreme court noted in *Griller*, "[t]he jury considered and rejected [a] far-fetched version of events," and granting "a new trial under these circumstances would be an exercise in futility and a waste of judicial resources." 583 N.W.2d at 742. As we noted above, Strother was also partially successful in presenting his defense. Accordingly, we conclude that the fairness and integrity of the judicial proceedings do not require a new trial.

III. Strother's pro se supplemental arguments do not entitle him to a new trial.

Strother also filed a pro se supplemental brief.² In this brief, Strother makes three main arguments: (1) his trial counsel was constitutionally ineffective; (2) the district court

² Strother filed a supplemental pro se brief and supplemental addendum, which contained L.C.'s confidential medical information and otherwise included documents outside of the appellate record. The state moved to strike Strother's supplemental addendum, arguing that the medical records should be sealed and the remaining addendum should be stricken as it

erred by admitting testimony from various individuals, and (3) admission of M.G.'s recorded statement to Hacker violated the Confrontation Clause.

a. Ineffective assistance of counsel

“An ineffective assistance of counsel claim is an alleged violation of the right to reasonably effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.” *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). To succeed on such a claim, an appellant must show that: (1) his counsel’s representation fell below an objective standard of reasonableness and (2) there is “a reasonable probability that, but for his counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *see also State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). An appellate court “need not address both the performance and prejudice prongs if one is determinative.” *Rhodes*, 657 N.W.2d at 842.

Appellate courts “[w]ill not review an ineffective assistance of counsel claim based on trial strategy.” *State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014). Trial counsel is presumed to have provided reasonable representation and “we give particular deference to trial strategy.” *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007). “What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney’s decision regarding trial tactics which lie within the proper discretion

consisted of documents outside the record. This court, in a special-term order, directed that Strother’s entire pro se addendum be stricken from the record, and denied as unnecessary the state’s motion to seal L.C.’s medical records.

of trial counsel and will not be reviewed later for competence.” *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). Importantly, “[t]he extent of [trial] counsel’s investigation is considered a part of trial strategy.” *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004)

Strother argues that his trial counsel was ineffective because trial counsel failed to adequately investigate and failed to present certain pieces of evidence to the jury. Strother’s argument fails because his trial counsel’s decisions regarding what evidence to present, which witnesses to call, and the extent of his investigation are “part of trial strategy.” See *Opsahl*, 677 N.W.2d at 421. Because Strother cannot satisfy the first prong of the *Strickland* test, we do not address the second prong. See *Rhodes*, 657 N.W.2d at 842. We conclude that Strother’s trial counsel was not constitutionally ineffective.

b. Admissibility of evidence

District courts have broad discretion over evidentiary matters, and should not be reversed absent an abuse of that discretion. *Doe 136 v. Liebsch*, 872 N.W.2d 875, 879 (Minn. 2015). When a defendant fails to object to an evidentiary ruling at trial, the defendant forfeits his right to appellate review of that ruling. *State v. Vasquez*, 912 N.W.2d 642, 649 (Minn. 2018). We review forfeited assignments of error for plain error. *Id.* at 650. Appellant bears the burden of persuasion on the plain error prongs. See *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016) (“In order to meet the plain error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant’s substantial rights.”).

i. Prior consistent statements

Strother challenges the admission of a number of prior consistent statements.³ At trial, Strother objected to testimony by M.G. concerning L.C.’s prior consistent statements, but he did not object to the admission of other prior consistent statements by L.C. to Hacker and Micka.

At a pretrial hearing, the state sought to introduce L.C.’s statements to M.G. and Micka as an excited utterance or, alternatively, as a “then-existing mental, emotional, or physical condition.” The district court, in a pretrial order, deferred a decision on the state’s motion. The district court did conclude that if L.C. testified before M.G. and Micka, then her prior statements would be admissible and not hearsay as provided in Minn. R. Evid. 801(d)(1). At trial, Strother objected to M.G.’s testimony about L.C.’s prior statements, and the district court concluded that “under Rule 801, . . . subdivision D, 1, this is not hearsay” because L.C. already “testified and it’ll be helpful to the trier of fact in evaluating [L.C.’s] testimony, so I’m going to allow the questions.”

First, we are not persuaded that the district court plainly erred by admitting unobjected-to testimony about L.C.’s prior consistent statements to Hacker and Micka. In *State v. Manthey*, the supreme court considered the application of the plain-error review to hearsay evidence. 711 N.W.2d 498, 504-05 (Minn. 2006). The supreme court noted that:

³ Strother also challenges the admission of testimony by multiple individuals including I.C., the nurses who treated L.C. at the hospital, and several analysts from the BCA. However, Strother does not identify what the alleged errors were or provide sufficient argument and we do not address these claims further. See *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (“Where a defendant asserts error, but fails to address the error in his appellate brief, the issue is deemed waived.”), *review denied* (Minn. Aug. 5, 1997).

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 trial 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.

Id. at 504. As result, the supreme court concluded in *Manthey* that six hearsay statements were not clearly or obviously inadmissible hearsay. *Id.* at 504-05.

Applying the *Manthey* rationale to this case, we reach the same conclusion. If Strother had objected to the admission of L.C.'s statements to Hacker and Micka, L.C.'s prior statements could have been admitted with proper foundation establishing hearsay exceptions. See Minn R. Evid. 801(d)(1) (prior consistent statement by a witness not hearsay), 803(2) (excited utterance exception), 803(3) (then-existing mental, emotional, or physical condition exception). Strother's failure to object to the admission of L.C.'s prior statements deprived the prosecutor of "the opportunity to establish" the admissibility of L.C.'s prior consistent statements. See *Manthey*, 711 N.W.2d at 504. We therefore conclude it was not plainly erroneous for the district court to admit testimony concerning L.C.'s prior consistent statements to Hacker and Micka.

Similarly, we conclude that the district court did not err in admitting the objected-to testimony by M.G. about L.C.'s prior consistent statements. The district court concluded that the prior consistent statements would be helpful to the jury in evaluating L.C.'s credibility. The Minnesota Rules of Evidence provide that "a witness's prior statement that is consistent with his trial testimony is admissible as nonhearsay evidence if the statement is helpful to the trier of fact in evaluating the witness's credibility, and if the witness

testifies at trial and is subject to cross-examination about the statement.” *State v. Bakken*, 604 N.W.2d 106, 108-09 (Minn. App. 2000) (citing the Minnesota Rules of Evidence), *review denied* (Minn. Feb. 24, 2000); *see* Minn. R. Evid. 801(d)(1)(B). Before a prior consistent statement is admissible as non-hearsay evidence, “the witness’ credibility must have been challenged, and the statement must bolster the witness’ credibility with respect to that aspect of the witness’ credibility that was challenged.” *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997). Here, before M.G. testified, Strother repeatedly attacked L.C.’s credibility regarding Strother’s conduct. *See Nunn*, 561 N.W.2d at 909. Accordingly, we conclude that district court did not err by admitting L.C.’s prior consistent statement through M.G.’s testimony.

ii. Expert witness testimony

Strother also challenges testimony by the state’s expert witness, which he claims assigned a statistical probability to the likelihood that L.C. was lying. In response to questioning by Strother’s counsel, the expert testified that current FBI statistics indicated that three percent of domestic assault reports were false. The expert then agreed that “[o]n occasion . . . people . . . do not tell the truth.” We conclude that the expert witness did not assign a statistical likelihood that L.C. was lying or telling the truth. Rather, Strother’s counsel elicited testimony from the expert about relevant facts, the expert acknowledged that false accusations do occur, and did not opine whether L.C. was truthful. Strother’s argument is premised on a factually incorrect reading of the testimony and we do not address this argument any further.

iii. M.G.'s recorded statement

Under the United States Constitution, a criminal defendant has the right to confront witnesses against that defendant. U.S. Const. amend. VI. “Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004). “No precise definition of ‘testimonial’ appears in *Crawford*, but the [United States Supreme] Court said that an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010) (quotation omitted). “We review de novo whether the Confrontation Clause was violated.” *State v. Brist*, 799 N.W.2d 238, 240 (Minn. App. 2011), *aff’d*, 812 N.W.2d 51 (Minn. 2012).

Strother contends that the district court erred by admitting Hacker’s recorded interview of M.G., which was disclosed to the defense before trial. Strother argues that admission of this interview violates the Confrontation Clause. M.G. testified at trial before the district court admitted the recorded interview. Strother’s counsel declined to cross-examine M.G. The state then presented Hacker’s testimony and offered into evidence a recorded statement that Hacker took from M.G. Strother’s counsel cross-examined Hacker.

As the Minnesota Supreme Court explained, “Under *Crawford*, the Confrontation Clause prohibits the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *State v. Rodriguez*, 754 N.W.2d 672, 681 (Minn. 2008) (quotation

omitted). Here, both M.G. and Hacker testified at trial and were subject to cross-examination. It is irrelevant that Strother's counsel declined to cross-examine M.G. when the opportunity arose because M.G.'s recorded statement was disclosed to the defense before trial. *See Crawford*, 541 U.S. at 53-54, 124 S. Ct. at 1365-66; *Rodriguez*, 754 N.W.2d at 681-82. We conclude that the Confrontation Clause was not violated.

Affirmed.