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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0207**

State of Minnesota,
Respondent,

vs.

Jessica Katherine James,
Appellant.

**Filed February 22, 2021
Affirmed in part, reversed in part, and remanded
Hooten, Judge**

Otter Tail County District Court
File No. 56-CR-18-889

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney Generals, St. Paul, Minnesota; and

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

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Considered and decided by Frisch, Presiding Judge; Hooten, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this direct appeal from final judgments of conviction for first-degree criminal sexual conduct, appellant argues that she is entitled to a new trial because (1) the district court abused its discretion in admitting *Spreigl* evidence and (2) the prosecutor committed

reversible misconduct by (a) eliciting inadmissible evidence, (b) failing to prepare a witness, (c) vouching for the victim's credibility, (d) inviting the jury to stand in the victim's shoes, and (e) inflaming the passions and prejudices of the jury. Appellant alternatively argues that this court must reverse and remand for resentencing because she is entitled to resentencing with a correct criminal-history score and the district court erroneously entered judgment of conviction for a second count of first-degree criminal sexual conduct. We affirm in part, reverse in part, and remand for resentencing.

FACTS

Appellant Jessica Katherine James was charged with two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct. These charges were based on accusations made by appellant's son, who was born in 2003, that appellant had forced him to have sex with her on one occasion sometime between November of 2016 and June of 2017. At the time of the abuse, appellant's son lived with her and was her in care.

Prior to trial, the state provided notice of its intent to offer *Spreigl* evidence of past uncharged incidents of inappropriate sexual contact involving penetration between appellant and her brother that allegedly occurred when he was seven or eight years old and appellant was approximately fifteen. The district court held a hearing on the state's motion and issued an order granting the motion with the limitation that the evidence could only be used to rebut suggestions that her son had fabricated his accusations. Following trial, a jury found appellant guilty of all four charges. The district court entered judgments of

conviction on both counts of first-degree criminal sexual conduct and sentenced appellant on one of the counts. This appeal follows.

DECISION

Appellant argues that two errors require reversal of her conviction. First, appellant contends that the district court abused its discretion in allowing respondent to present *Spreigl* evidence. Second, appellant asserts that the prosecutor committed plainly erroneous misconduct that impacted her substantial rights. Alternatively, appellant claims that the case should be remanded for resentencing because her criminal-history score was incorrectly calculated and the district court erroneously entered a judgment of conviction on both first-degree criminal sexual conduct counts.

I. The district court did not abuse its discretion in permitting respondent to present *Spreigl* evidence.

Minnesota Rule of Evidence 404(b)(1) provides: “Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith.” The rule goes on to state that such evidence “may, however, be admissible for other purposes,” and provides a non-exhaustive list of such purposes including “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Minn. R. Evid. 404(b)(1). Finally, Minn. R. Evid. 404(b)(2) provides:

Such evidence shall not be admitted in a criminal prosecution unless (a) the proffered evidence is relevant to an identified material issue other than conduct conforming with a character trait; (b) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; and (c) the probative value of the evidence is not

outweighed by its potential for unfair prejudice to the defendant.

In Minnesota, evidence of past acts admitted in a criminal trial under rule 404(b) is typically referred to as *Spreigl* evidence after the Minnesota supreme court's decision in *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965). "A district court's decision to admit *Spreigl* evidence is reviewed for an abuse of discretion." *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016).

Here, the district court permitted respondent to present *Spreigl* evidence in the form of testimony by her brother that appellant had forced him to have sex with her when he was seven or eight and appellant was approximately fifteen. The district court permitted presentation of this evidence solely for the purpose of rebutting any argument by appellant that her son had fabricated his allegations against her.

Appellant argues that the district court abused its discretion in admitting this *Spreigl* evidence because the evidence was not admissible to rebut allegations of fabrication, two of the factual findings that the district court relied on in admitting her brother's testimony were unsupported by the record, and the district court erred in concluding that the probative value of the evidence outweighed the risk of unfair prejudice its presentation posed to appellant. Appellant maintains that there is a reasonable probability that the district court's error in admitting *Spreigl* evidence substantially affected the verdict, and that this error thus entitles her to a new trial. For the reasons that follow, appellant has failed to demonstrate that the district court's admission of *Spreigl* evidence entitles her to a new trial.

First, the evidence was admissible to rebut allegations of fabrication. Appellant argues that *Spreigl* evidence may only be admitted for that purpose where the evidence demonstrates the existence of a common scheme or plan linking the past acts and the conduct on which the present charges are based. Appellant contends that the district court found that the abuse of her brother did not reflect a plan or design but instead consisted of several impulsive and isolated incidents, and that the district court found that no common scheme or plan linked those past acts to the allegations in this case. On that basis, appellant argues that respondent's *Spreigl* evidence was inadmissible to rebut allegations of fabrication.

Appellant is correct that the district court found that appellant's abuse of her brother and son did not "support any inference that there was a preconceived design of any sort animating [appellant]'s conduct." The district court also found that "[appellant] appear[ed] to have acted impulsively during each incident." But the district court went on to state that "the existence of an actual plan is not the only basis upon which evidence of prior sexual abuse may be admitted under Rule 404(b)." The district court, quoting *State v. Ness*, 707 N.W.2d 676, 687–88 (Minn. 2006), concluded that rule 404(b) "embraces evidence of offenses which, because of their marked similarity in modus operandi to the charged offense, tend to corroborate evidence of the latter." Again quoting *Ness*, the district court concluded that "[a]ll that need be true for such evidence to be relevant is for the prior offense and the offense charged to be markedly similar 'in terms of time, place, or modus operandi.'" Finally, the district court found "a marked similarity between the events of the alleged offense and the prior uncharged offense," including the location of the abuse, the

existence of a familial relationship between appellant and each victim, appellant's position of authority over each victim at the time of abuse, and the actual, physical manner in which the abuse was perpetrated in both cases. On the basis of these findings and conclusions, the district court concluded that respondent's *Spreigl* evidence was admissible to rebut allegations of fabrication.

This conclusion was not an abuse of discretion. For *Spreigl* evidence to be admissible to rebut allegations of fabrication, the prior acts "must have a marked similarity in modus operandi to the charged offense." *Id.* The existence of a preconceived plan, in which the current offense is a further step, is not required. *See id.* at 687. As such, the district court's decision to admit *Spreigl* evidence was not based on an erroneous view of the law. Further, the district court's finding that there is "a marked similarity between the events of the alleged offense and the prior uncharged offense," is supported by the record. Both instances of abuse took place in appellant's bedroom; both victims were members of appellant's immediate family; both victims were male minors; appellant was in a position of authority over both victims, either as a babysitting elder sibling or a mother; and the physical manner in which both instances of abuse was perpetrated was strikingly similar: appellant would lie on her back and instruct the victim to place his penis inside her vagina. Appellant has failed to demonstrate that the district court abused its discretion by permitting respondent to present *Spreigl* evidence for the purpose of rebutting allegations of fabrication.

Second, appellant argues that the district court relied on two erroneous findings in concluding that respondent's *Spreigl* evidence was admissible. Specifically, appellant

contends that “[t]he district court erroneously found that [her brother]’s and [her son]’s accounts were independent,” because the account of her brother’s abuse that the district court relied on came from an interview conducted after the brother knew the details of her son’s abuse, and it could thus have been fabricated to match her son’s account. Appellant also asserts that “[t]he district court erroneously found that [appellant] did not have access to potential victims during the gap in time between the other act and the charged offense,” because “[n]othing in the three reports submitted by [respondent] in support of its *Spreigl* motion addresses the question of whether or when across the 18 to 19-year gap [appellant] resided with minor children.”

The district court’s finding that the accusations of appellant’s brother and son are independent is supported by the record. Appellant questions the credibility of her brother’s accusation of abuse, noting that he had already learned the details of her son’s abuse before giving the district court his account of abuse. But there is an additional account of her brother’s abuse in the record. This account is from 1998, chronologically proximate to appellant’s abuse of her brother, and it was included with respondent’s memorandum in support of its motion to present *Spreigl* evidence. This account contains substantially the same details as those from the interview conducted two decades later: Appellant and her brother “had sex” while appellant was babysitting him in their home, meaning the location, familial-relationship, position-of-authority, and physical-manner-of-abuse details are all substantially the same as those in her brother’s later account—and those in the first account that her son gave of his abuse.

The district court's finding that appellant lacked access to potential victims between her abuse of her brother in approximately 1998 and the abuse of her son in 2016 or 2017 is also supported by the record. The record indicates that appellant had access to other underage males, her younger twin brothers, between her abuse of her brother and son. But because appellant lived with her two younger twin brothers for the first four years of their lives before leaving her parents' home in 2001, the twins were not physically mature enough to be forced to have sex with her during that time. Also, her son, who lived with appellant between his birth and his abuse, was not physically mature enough to be forced to have sex with her for much of that time. There was no showing in the record that appellant had access to potential victims of sufficient maturity to be abused in the same manner as her brother and son for most of the 18 to 19 years between the two instances.

Third, appellant claims that the district court erred in concluding that the probative value of respondent's *Spreigl* evidence was not outweighed by the risk of unfair prejudice its presentation posed to appellant. Specifically, appellant contends that the district court "significantly miscalculated the probative value" of respondent's *Spreigl* evidence because such evidence was not relevant to rebut allegations of fabrication, because the district court erroneously concluded that appellant's brother and son's accounts were independent, and because the district court erroneously concluded that appellant lacked access to other potential victims during the period between the abuse of her brother and son. Appellant also asserts that "the district court miscalculated the potential for unfair prejudice" posed by respondent's *Spreigl* evidence because presentation of that evidence essentially

encouraged the factfinder to draw the forbidden propensity inference, given that the evidence was not—in appellant’s view—relevant to rebut allegations of fabrication.

The district court did not abuse its discretion in concluding that the probative value of respondent’s *Spreigl* evidence was not outweighed by its risk of unfair prejudice. As is discussed above, the district court’s factual findings are supported by the record, and the district court correctly concluded that the evidence was admissible to rebut allegations of fabrication, meaning the jury could use the evidence to draw inferences other than the forbidden propensity inference. Finally, while *Spreigl* evidence always poses a risk of unfair prejudice precisely because the factfinder may use it to draw a forbidden propensity inference—and while that risk is perhaps greatest in cases of alleged sexual abuse of children—the limitations imposed by the district court on the jury’s use of respondent’s *Spreigl* evidence ensured that any unfair prejudice that did result would be minimized.

II. The prosecutor did not commit misconduct requiring reversal.

Appellant argues that she “is entitled to a new trial because the prosecutor committed plainly erroneous misconduct that impacted [appellant]’s substantial rights.” Specifically, appellant contends that the prosecutor committed misconduct by “eliciting inadmissible evidence from [appellant] on cross-examination,” by failing to properly prepare a prosecution witness to prevent impermissible vouching testimony, by improperly vouching for the victim’s credibility during closing argument, by inviting the jury to stand in the victim’s shoes, and by inflaming the passions and prejudices of the jury. Appellant admits that she did not object to any of this alleged misconduct at trial, but she nonetheless

asserts that the prosecutor's unobjected-to misconduct constitutes plain error and that we must reverse her conviction to ensure the fairness and integrity of judicial proceedings.

When an appellant has failed to object during trial, we review allegations of prosecutorial misconduct under a modified plain error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, the appellant bears the burden of establishing an error that is plain. *Id.* An error is plain when it is "clear or obvious," as where the error "contravenes case law, a rule, or a standard of conduct." *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010). If the appellant establishes plain error, "the burden shifts to the [s]tate to demonstrate that the plain error did not affect the [appellant]'s substantial rights." *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). The state bears the burden of proving that "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Ramey*, 721 N.W.2d at 302 (quotations omitted). In deciding whether the misconduct significantly affected the jury's verdict, we consider such factors as "the pervasiveness of improper suggestions and the strength of evidence against the defendant." *Parker*, 901 N.W.2d at 926 (quotations omitted). If the state fails to demonstrate that the error did not affect the appellant's substantial rights, we then consider "whether the error should be addressed to ensure fairness and the integrity of judicial proceedings." *Id.*

First, appellant argues that the prosecutor elicited inadmissible evidence from her on cross-examination by asking her questions about who fathered her three children and about appellant's involvement with Child Protection Services (CPS). Appellant asserts

that this evidence was inadmissible because any probative value it had was substantially outweighed by the risk of unfair prejudice that its presentation posed to her.

“[A]ttempting to elicit or actually eliciting clearly inadmissible evidence may constitute [prosecutorial] misconduct.” *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Under Minnesota Rule of Evidence 403, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Accordingly, eliciting evidence, the probative value of which is substantially outweighed by the risk of unfair prejudice its presentation poses, may constitute prosecutorial misconduct. *See* Minn. R. Evid. 403; *see also Fields*, 730 N.W.2d at 782.

Sometime after the sexual abuse, CPS placed appellant’s son and his siblings with appellant’s cousin after it was reported that they were being physically abused by appellant’s then-husband. Appellant claimed that her son fabricated his allegation of sexual abuse after his placement so that he would not have to return to appellant’s home.

The prosecutor and appellant had the following exchange about the fathers of her children:

Q. Miss James, first off, you talked about your children. I just want to talk about—you talked about raising them. Were the fathers in their lives ever?

A. [One father] was in [his child]’s life throughout when we were together for 10 years. He was around. But after that it was whenever he wanted to be.

Q. So that’s [one child]’s father?

A. Correct.

Q. And [that child]’s father now has no rights, no custody?

A. No rights, no custody, but he still gets to see [the child].

Q. Okay. And what about [your other child]'s father; who is [that child's] father?

A. [Other father]. But he is—he's seen [the child] one day of [the child's] life and has never seen [the child].

Q. And now also doesn't—I mean he's not in [the child's] life as far as—

A. As far as I know, no.

Q. And what about [your son who alleged abuse] then; who—

A. [That son] has never met his father. His father is in prison at the moment.

Q. And what about when he was younger; was he also there or somewhere else?

A. No, he was never there, never supported; never financial support. [One child]'s dad never helped with financial support. And I did get financial support from [another child's father], but it was \$50 a month.

Q. And you talked about [your current husband], and he is a husband to you now. But you said you just married—was it two years ago?

A. We were married June 9th of 2017, but we are currently separated. Not legally separated but we've been separated since January 4th and going through a divorce process.

Q. Living kind of on and off or separately since January of this year?

A. We've been separate since January.

Q. But before that—so from about July 2017 to that time—

A. To January 4th we were together, yes.

The limited risk of unfair prejudice that this exchange posed does not so clearly outweigh its probative value as to render the prosecutor's questioning plainly erroneous misconduct. The questioning provided background on appellant and her son's home life and was thus relevant to rebut the defense theory that her son fabricated the allegations against appellant in order to avoid living with her and instead live with her cousin. This exchange posed some risk of unfair prejudice to appellant by potentially leading the jury to view her as "uncaring, sexually promiscuous, and/or lacking in judgment," as appellant contends. These risks, however, were not so great as to clearly outweigh the probative value of the evidence.

The prosecutor and appellant also had the following exchange about appellant's prior involvement with CPS:

Q. Miss James, I mean you talked about the children were placed in—in approximately July 2017; thereabouts?

A. Correct.

Q. Before that had you worked with Child Protection as well?

A. Yes.

Q. And that ended at some point?

A. After my children were placed, yes.

Q. That you worked. But before that you had been working with them for a period, and then there was kind of a break.

A. Yup. There was a time—like when I was pregnant with [one of my children] I was smoking marijuana. My doctor knew about it, and I had quit. And when they tested [the child], [the child] was—had marijuana in [the child's] system so they had

CPS involved. And I did random UA's, and I was clean; so they dropped the case.

Q. Okay.

A. They would do home checks, and they didn't see anything.

The limited risk of unfair prejudice that this exchange posed does not so clearly outweigh its probative value as to render the prosecutor's questioning plainly erroneous misconduct. The questioning provided context for the allegations of appellant's son against her, as those allegations came to light after he was placed by CPS. The questioning also clarified the testimony that appellant had given on direct examination about the placement of her children with her cousin by CPS after her current husband had physically abused them. The exchange did pose some risk of prejudicing the jury against appellant, particularly because she revealed that she had used marijuana while pregnant. But the prosecutor did not ask appellant whether she had used marijuana while pregnant; appellant volunteered this information in response to an open-ended question.

Second, appellant argues that the prosecutor committed plainly erroneous misconduct by failing to prepare a prosecution witness. Specifically, appellant contends that the prosecutor committed misconduct by failing to prevent the forensic investigator who interviewed her son from improperly vouching for her son's credibility. Appellant asserts that the prosecutor is responsible for this impermissible vouching and that it establishes the prosecutor's failure to adequately prepare the witness.

"[T]he state has a duty to properly prepare its own witnesses prior to trial." *State v. Underwood*, 281 N.W.2d 337, 342 (Minn. 1979). Presenting testimony by a third party

that a complainant is telling the truth in making specific accusations against the accused is improper. *State v. Maurer*, 491 N.W.2d 661, 662 (Minn. 1992). Accordingly, failing to instruct a witness not to give vouching testimony may constitute prosecutorial misconduct. *See id*; *Underwood*, 281 N.W.2d at 342.

Here, the prosecutor asked the investigator on direct examination if there was anything else about her interview with appellant's son that was significant to her, to which the investigator replied: "I think what kind of stood out for me was just I—I felt that all of these things, taken together, that [appellant's son] did a very what I would call a credible interview. I just—I felt [her son's] interview was very credible."

This testimony does not establish that the prosecutor committed plain error by failing to prepare the investigator. It is true that the investigator improperly vouched for appellant's son's credibility. But it is not "clear or obvious" that the investigator's testimony was given as a result of the prosecutor's failure to prepare her. Indeed, the prosecutor may have repeatedly instructed the investigator not to vouch for the victim's credibility. Further, the prosecutor did not follow up on the investigator's vouching but instead began a different line of questioning immediately. And crucially, appellant cites no precedent for the proposition that we must infer the prosecutor's failure to prepare the witness from the fact that the witness gave unprovoked vouching testimony.

Third, appellant argues that the prosecutor committed plainly erroneous misconduct by improperly vouching for the credibility of appellant's son during closing argument.

In evaluating alleged misconduct in a closing argument, this court looks at the closing argument as a whole. *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006).

“While a prosecutor must not personally endorse a witness’s credibility, the State may, in closing argument, argue that a witness was or was not credible.” *State v. Jackson*, 773 N.W.2d 111, 123 (Minn. 2009).

The prosecutor made the following statements during closing argument:

So, ladies and gentlemen, I want you to think about reasonableness because that’s one of the instructions. And is it reasonable as well if the defense argument is that [appellant’s son] made this up? Because, really, all the facts, I want you to think about, that [appellant’s son] talked about and came through other evidence in the case, through Detective [] and [Investigator] through that interview, and other pieces, even through the defendant’s interviews, are consistent. There isn’t a detail that [appellant’s son] told in his interview that isn’t true.

. . . .

[Appellant’s son] gained nothing by telling about this. And he was already in trouble. He didn’t need to make anything up. Play the victim? If anything I saw with [appellant’s son] in here yesterday, through what you heard him tell everybody, he has not played the victim once.

These statements were not improper vouching. In making the above statements, the prosecutor was not stating that she believed appellant’s son was telling the truth. Instead, the prosecutor was merely arguing that his testimony was objectively credible and that he had not “played the victim.” While appellant argues that the prosecutor’s use of the pronoun “I” makes her statements personal vouching, the above statements were merely assertions that the evidence demonstrated that appellant’s son was an objectively credible witness, not that the prosecutor personally believed him to be credible.

Fourth, appellant argues that the prosecutor committed plainly erroneous misconduct by inviting the jury to stand in the victim's shoes.

“It is improper to request that the jurors put themselves in the shoes of the victim.” *State v. Jones*, 753 N.W.2d 677, 692 (Minn. 2008) (quotation omitted). Such a request or invitation is improper because it may “cause the jury to decide the case on the basis of passion rather than reason.” See *State v. Johnson*, 324 N.W.2d 199, 202 (Minn. 1982). This risk is particularly great where the prosecutor invites the jury to imagine a sensory experience of the victim or witness. See, e.g., *State v. Thompson*, 578 N.W.2d 734, 742 (Minn. 1998) (holding that the prosecutor's statement that the victim was “awakened to probably one of the most terrible sights that any mother can see . . . your own daughter being killed right before your eyes,” was an improper invitation to stand in a witness's shoes); *State v. Bashire*, 606 N.W.2d 449, 453–54 (Minn. App. 2000) (holding that the prosecutor's invitation to “take a moment to think about . . . [w]hat it must have been like to be in that stairway with your head being held by one person while another assaulted you in that way,” was an improper invitation to stand in the victim's shoes). By contrast, it is not improper to ask the jury to consider whether a witness's testimony made sense in light of the jury's experience and common sense. *Jones*, 753 N.W.2d at 692. A prosecutor is also free to argue that there is no merit to a particular defense in view of the evidence. *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994).

Here, the prosecutor made the following statements during closing argument:

Why would [appellant's son] just say it happened then? You already were in trouble, ladies and gentlemen. And then the humiliation of talking about it. And, really, I want you to just

really grasp that for a second. Think about the fact of this boy at the time of his disclosure talking about having sex with his mother. And how difficult that would be and why you would do that if it didn't happen. And I want you to really think about the fact that there's no evidence of bad feelings about her; because that's important. If you're going to get somebody in trouble—we talked about in voir dire about kids making up lies and, “Yes, I stole the cookies”; but the trail is, you know, across the floor. Think about those examples of children, and it's easy to catch them in a lie. You don't lie about sexual abuse. Because all—think of all the things that come with it.

. . . .

Why would you care if you're just making it up? Why would you care what anybody thinks? You wouldn't. But you care because it happened to you. You have all those sick emotions going inside about what happened with your mother; and the weird, the gross, but it also felt good. And you are so confused about that.

. . . .

And you certainly, ladies and gentlemen, could say it happened more than one time. And you could say it happened when we lived in Fergus Falls; we lived in Pelican Rapids; and it happened when we were in a tent; we shared a tent together. But you didn't. Because that's not what happened. And you didn't because you have a memory as a child, who was sexually abused, of every detail about that because it's in your head. And you know it happened because it happened to you and your body. And you have memories about how it felt. You have memories about how you were lying down on the bed; and how you were asked to come in that bedroom; and how you smoked marijuana. And how it felt gross and good at the same time. And how you almost ejaculated with your own mom. And you know how confusing and weird that was that you don't forget it. And so you know it's your mom, and it isn't anybody else. So, ladies and gentlemen, it happened one time. If you're really out to get your mom, and you're going to make sure this happened so you get—you don't ever have to go home, then just say it happened about a hundred times, ten times, five times. But you didn't. It happened one time in that bedroom.

These statements were not an improper invitation for the jury to stand in the shoes of appellant's son. Instead, the prosecutor was inviting the jury to consider whether the defense theory that appellant's son had fabricated the allegations in order to avoid living with appellant made sense in light of the jury's experience and common sense. Appellant argues that the prosecutor's use of the pronoun "you" in the above statements makes those statements improper. It is true that both the Minnesota Supreme Court and this court have identified various "you" statements as improper invitations for the jury to stand in the victim's shoes. *See, e.g., Thompson*, 578 N.W.2d at 742 (described above); *Bashire*, 606 N.W.2d at 453–54 (same). This case is distinguishable, however, because here the prosecutor did not invite the jurors to imagine the sensory experience of appellant's son. Instead, the prosecutor was inviting the jury to consider whether it would make sense for him to fabricate the specific allegations that he made, given the facts in evidence and the jurors' common sense and life experiences. This was not an impermissible invitation to stand in the victim's shoes.

Fifth, appellant argues that the prosecutor committed plainly erroneous misconduct by inflaming the passions and prejudices of the jury.

"A prosecutor must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Morton*, 701 N.W.2d 225, 236 (Minn. 2005) (quotation omitted). "When credibility is a central issue, we pay special attention to statements that may inflame or prejudice the jury." *Id.*

Here, the prosecutor made the following statements during closing argument:

What we're here, because [appellant's son] was sexually assaulted by his mother; and that is the defendant. He was violated of the sanctity of trust in his own home, a very precious thing to us all that we should be able to be safe; maybe not on the streets of New York or Minneapolis, but we darn well should be safe in our own home, with our own mother, to feel that somebody won't violate and take away those things that should be our first, that we choose, when we choose. But that didn't happen here for [appellant's son] at the age of 13 or 14 years old.

. . . .

But [appellant's son] won't . . . get those moments back that—those sexual moments are supposed to be the things we enjoy and the moments—but, no, [appellant's son] from this day on will always have to think in a sexual moment that he might get some day again that it's with somebody he loves and is not somebody that was supposed to protect him.

These statements improperly inflamed the jury's passions and prejudices against appellant. While the statements are not specifically focused on appellant, as they would be if they charged her with violating her son's trust, robbing him of a sense of safety, or impairing his ability to have healthy sexual relationships in the future, the jury could easily infer that appellant was the cause of those losses. Importantly, the statements also drew attention to his loss of virginity. In *State v. McNeil*, this court held that commenting on a victim's loss of virginity in a criminal sexual conduct case may improperly inflame the passion and prejudices of the jury. 658 N.W.2d 228, 234–35 (Minn. App. 2003). Here, the prosecutor's comments did just that.

When an appellant establishes prosecutorial misconduct rising to the level of plain error, the burden shifts to the state to prove “that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of

the jury.” *Ramey*, 721 N.W.2d at 302 (quotations omitted). In considering whether the misconduct significantly affected the jury’s verdict, we consider such factors as “the pervasiveness of improper suggestions and the strength of evidence against the defendant.” *Parker*, 901 N.W.2d at 926 (quotations omitted). We also consider whether appellant had the opportunity to rebut any improper argument the prosecutor made. *State v. Peltier*, 874 N.W.2d 792, 806 (Minn. 2016).

There is no reasonable likelihood that the limited misconduct in this case had a significant effect on the jury’s verdict. First, respondent’s case against appellant was strong: Appellant’s son testified in detail about the abuse he suffered, and this testimony was corroborated by prior consistent statements he made during a forensic interview. Importantly, appellant also admitted to being involved in “an incident” with her brother, and appellant’s brother gave detailed testimony about sexual abuse that appellant had perpetrated upon him and that closely matched the abuse that her son suffered. Second, the alleged misconduct was not pervasive; the prosecutor’s improper statements consist of a few, isolated statements in a trial transcript of almost 700 pages and a 35-page closing argument and rebuttal. Third, appellant had an opportunity to respond to the prosecutor’s improper statements in her own closing argument. In sum, there is no reasonable likelihood that the absence of the limited prosecutorial misconduct that did occur would have had a significant effect on the jury’s verdict. As such, appellant’s substantial rights were not affected, and we need not reverse her conviction.

III. The case must be remanded for resentencing.

Finally, appellant argues that even if her conviction is not reversed, the case must still be remanded for resentencing. Specifically, appellant contends that her criminal-history score was incorrectly calculated and that the district court erroneously entered a conviction on count II.

“We afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014) (quotation omitted). For the reasons that follow, the case must be remanded for resentencing.

First, the district court abused its discretion in calculating appellant’s criminal-history score. An offender’s criminal-history score and the severity level of the offense are “the two dimensions most important in sentencing decisions,” together supplying a presumptive sentencing range for a given offense under Minnesota’s sentencing guidelines. Minn. Sent. Guidelines 2 (2016). “An offender’s criminal history score is the sum of points from eligible . . . prior felonies[,] custody status at the time of the offense[,] prior misdemeanors and gross misdemeanors[,] and prior juvenile adjudications.” Minn. Sent. Guidelines 2.B. A custody-status point may only be assigned when the offender was under a qualifying custody status—including probation—at the time of the current offense. Minn. Sent. Guidelines 2.B.2.a.(1). This custody status must follow the entry of a guilty plea, a guilty verdict, or a conviction. Minn. Sent. Guidelines 2.B.2.a.(2). Finally, the offender’s qualifying custody status must be for a qualifying offense: a felony; an extended jurisdiction juvenile (EJJ) conviction; a non-traffic gross misdemeanor; a gross

misdemeanor for driving while impaired, refusal to submit to a chemical test, or reckless driving; or a targeted misdemeanor listed in Minn. Stat. § 299C.10, subd. 1(e) (2016). Minn. Sent. Guidelines 2.B.2.a.(3) & cmt. 205. We review the district court’s calculation of a defendant’s criminal-history score for an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

The presentence investigation report (PSI) in this case indicated that appellant’s criminal-history score was one. This calculation was based on the assignment of one custody-status point and one half of one felony point.¹ The custody-status point type was probation, meaning appellant was found to have been on probation, or within the original term of probation, for a qualifying offense at the time of the commission of the present offense. *See* Minn. Sent. Guidelines 2.B.2.a. The district court did not hear any other evidence concerning appellant’s criminal history and therefore presumably relied on the calculation of that score included in the PSI when sentencing appellant.

The district court abused its discretion in calculating appellant’s criminal-history score by erroneously assigning her one custody-status point. Of the ten offenses that appear in the criminal-history section of appellant’s PSI, only one is a felony. But appellant was discharged from probation for that offense in 2008, long before the present offense. Only one of the remaining nine offenses is a qualifying offense: appellant’s fifth-degree assault conviction. *See* Minn. Stat. § 299C.10, subd. 1(e). Appellant appears to have been convicted of fifth-degree assault in 2004 and to have received a five-day jail sentence that

¹ Under Minn. Sent. Guidelines 2.B.1.i., if the total felony points value results in a partial point, “the point value must be rounded down to the nearest whole number.”

was stayed for one year. This conviction could not have served as a proper basis for assigning appellant one probation-type custody-status point, because her custody status expired long before the present offense. See Minn. Sent. Guidelines 2.B.2.a. Accordingly, nothing in appellant’s criminal history contained in the PSI could support the assignment of a probation-type custody-status point to her.

Respondent argues that because “[a]ppellant did not object to her criminal history score or the inclusion of a custody status point” at sentencing, “the [s]tate should be permitted to further develop the record concerning Appellant’s criminal history score and custody status.” Respondent is correct. In *State v. Strobel*, we remanded “with instructions permitting the state to develop the record regarding” appellant’s criminal-history score, because the district court had made an unobjected-to error in calculating the appellant’s criminal-history score. 921 N.W.2d 563, 577 (Minn. App. 2018), *aff’d*, 932 N.W.2d 303 (Minn. 2019). Similarly, in *State v. Outlaw*, we remanded with instructions that the state be “permitted to further develop the sentencing record so that the district court [could] appropriately make its determination” as to appellant’s criminal-history score, for the same reasons. 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. Mar. 30, 2010). The proper remedy is the same here. Appellant failed to object to the calculation of her criminal-history score at sentencing and appears even to have acquiesced in that calculation. Accordingly, we remand the matter with instructions that the state be permitted to develop the sentencing record so that the district court can properly determine whether appellant should be assigned one custody-status point.

Second, appellant is entitled to have the district court enter a judgment of conviction on only one of the first-degree criminal sexual conduct counts. Minn. Stat. § 609.04, subd. 1 (2016), “bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Chavarria-Cruz*, 839 N.W.2d 515, 523 (Minn. 2013) (quotation omitted). Because of this, “a defendant may not be convicted of two counts of criminal sexual conduct (different sections of the statute or different subsections) on the basis of the same act or unitary course of conduct.” *State v. Folley*, 438 N.W.2d 372, 373 (Minn. 1989). If a defendant is convicted of more than one charge on the basis of the same act, the district court should enter judgment of conviction on one count only and leave the remaining guilty verdict intact but with no adjudication. *State v. LaTourelle*, 343 N.W.2d 277, 284. (Minn. 1984).

Where the facts are undisputed, we review de novo whether two offenses are part of the same behavioral incident. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). Whether the district court erred in entering multiple judgments of conviction is likewise a question of law that we review de novo. *State v. Ferguson*, 729 N.W.2d 604, 618 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).

Here, the district court entered judgments of conviction on Counts I and II and sentenced appellant on Count I. Count I was a charge of first-degree criminal sexual conduct involving penetration perpetrated by a person in a position of authority over the victim charged under Minn. Stat. § 609.342, subd. 1(b) (2016). Count II was a charge of first-degree criminal sexual conduct involving penetration perpetrated by a person with a significant relationship to the victim charged under Minn. Stat. § 609.342, subd. 1(g)

(2016). It is undisputed that these charges were based on the same act, as appellant was only accused of perpetrating one act of criminal sexual conduct upon her son. Accordingly, the district court erred in entering judgments of conviction on both counts, and the judgment of conviction under Count II must be vacated. It should be noted, however, that vacating appellant's judgment of conviction under Count II does not overturn the jury's guilty verdict on that count, as "a jury's verdict is unaffected when a conviction on the verdict is vacated." *State v. Cox*, 820 N.W.2d 540, 553 (Minn. 2012).

Affirmed in part, reversed in part, and remanded.