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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0589**

State of Minnesota,
Respondent,

vs.

Gabriel Miguel Mitchell,
Appellant.

**Filed March 29, 2021
Affirmed in part, reversed in part, and remanded
Hooten, Judge**

Washington County District Court
File No. 82-CR-18-3106

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

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Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this direct appeal from judgment of conviction for third-degree criminal sexual conduct, appellant argues (1) the district court erred in denying his for-cause challenge to a juror who expressed actual bias and was not rehabilitated; (2) the district court abused its

discretion in admitting *Spreigl* evidence; (3) the prosecutor committed misconduct by eliciting inadmissible evidence, failing to adequately prepare a witness, misstating evidence, and making improper arguments during closing; and (4) the cumulative effect of these errors denied appellant a fair trial. Alternatively, appellant argues (5) that his sentence must be reversed and the case remanded for resentencing because he is entitled to be sentenced with the benefit of the 2019 amendments to the sentencing guidelines. We affirm in part, reverse in part, and remand for resentencing.

FACTS

Respondent State of Minnesota charged appellant Gabriel Miguel Mitchell with third-degree criminal sexual conduct. This charge was based on an accusation made by the victim—appellant’s niece—that appellant had used force to engage in sexual contact involving penetration with her. Appellant claimed that his niece consented to the sexual contact. A jury trial was held over three days, and appellant was convicted. Following trial, the district court sentenced appellant based on a criminal history score of two. This appeal follows.

DECISION

I. The district court did not abuse its discretion in denying appellant’s challenge to Juror B.

The United States and Minnesota Constitutions guarantee a criminal defendant the right to a fair trial. U.S. Const. amends. VI, XIV; Minn. Const. art. 1, § 6; *Ristaino v. Ross*, 424 U.S. 589, 595 n.6, 96 S. Ct. 1017, 1020 (1976); *State v. Greer*, 635 N.W.2d 82, 87 (Minn. 2001). “The bias of a single juror violates the defendant’s right to a fair trial,

because the impartiality of the adjudicator goes to the very integrity of the legal system.” *State v. Fraga*, 864 N.W.2d 615, 623 (Minn. 2015) (quotation omitted). “Permitting a biased juror to serve is structural error requiring automatic reversal.” *Id.*

A juror may be challenged for cause when “[t]he juror’s state of mind—in reference to the case or to either party—satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the challenging party.” Minn. R. Crim. P. 26.02, subd. 5(1). “Put differently, the challenging party has the burden of proving that the juror expressed a state of mind demonstrating actual bias towards the case or either party.” *State v. Munt*, 831 N.W.2d 569, 577 (Minn. 2013) (quotations omitted). “To establish that the prospective juror expressed actual bias, the challenging party must identify more than the mere existence of any preconceived notion as to the guilt or innocence of an accused.” *Id.* (quotation omitted). “Rather, the challenging party must show that the juror exhibited strong and deep impressions that would prevent her from lay[ing] aside [her] impression or opinion and render[ing] a verdict based on the evidence presented in court.” *Id.* (quotations omitted).

Appellant made for-cause challenges to two jurors (Juror B and Juror K) based on their alleged actual bias. The district court denied those challenges and determined that both Juror B and Juror K were qualified to serve as jurors. Juror B was eventually chosen to serve on the jury, and appellant used a peremptory challenge to strike Juror K. Appellant now only appeals the district court’s denial of his for-cause challenge to Juror B.¹

¹ Although appellant initially argued in his brief that the district court had erred in denying his for-cause challenges to both Juror B and Juror K, he later withdrew his challenge to

“We review the district court’s denial of a challenge for cause for an abuse of discretion.” *Munt*, 831 N.W.2d at 576. “Our review of the district court’s determination of juror impartiality is especially deferential,” *id.*, because “[a]ctual bias is a question of fact which the district court is in the best [position] to evaluate.” *Fraga*, 864 N.W.2d at 623 (quotation omitted). We use a two-step process to determine whether the district court abused its discretion in denying a for-cause challenge based on alleged actual bias. *Id.* “We must first determine if the juror expressed actual bias.” *Id.* “To do so, we must view the juror’s voir dire answers in context.” *Id.* “If the juror expressed actual bias, we must then determine whether the juror was properly rehabilitated.” *Id.* “We consider a juror to be rehabilitated if he or she states unequivocally that he or she will follow the district court’s instructions and will set aside any preconceived notions and fairly evaluate the evidence.” *Id.* (quotation omitted).

Juror B was questioned, along with the rest of the jury pool, on the second day of voir dire. The district court asked the jury pool whether any of them knew people in law enforcement, and Juror B raised her hand. Juror B then stated, in response to questions by the district court, that her husband and brother-in-law worked in law enforcement. When asked whether these relationships “ma[d]e it more difficult for [her] to have an open mind

Juror K via a letter to this court, which was filed before respondent submitted its responsive brief. Consistent with this procedural history, neither party addressed the issue of whether the district court had abused its discretion in denying appellant’s for-cause challenge to Juror K at the oral argument of this appeal. Given appellant’s withdrawal of his appeal relative to Juror K and the parties’ failure to address the issues regarding Juror K at oral argument, we now consider only whether the district court abused its discretion in denying appellant’s for-cause challenge to Juror B.

about the believability of any testimony [she] might hear from a peace officer,” she answered, “No,” but when asked whether her relationships might “make it difficult for [her] to have a more open mind when it comes to any testimony [she] might hear . . . from people who aren’t police officers,” she answered, “Potentially.” When asked whether she had “strong views about people who have been arrested and charged with crimes that would lead [her] to have less of an open mind about events,” Juror B responded that it “[was] a possibility.” But when asked whether “the fact that Mr. Mitchell [was] charged with a crime makes him somehow guilty in any way,” she answered, “Not necessarily.” Finally, when asked whether she would “keep [her] mind open and listen to all of the facts and apply the law,” she answered, “Yes.”

Appellant’s trial counsel later asked Juror B several questions. When asked whether she would be more likely to believe someone in law enforcement than someone else, she responded, “No, not necessarily,” before going on to clarify that she “would probably be swayed more by the defendant, the crime itself.” Defense counsel asked whether she was “talking about emotionally swayed,” to which Juror B responded, “Yes.” When defense counsel asked whether she thought that “when [she was] evaluating the facts of the case, the emotions [she felt were] going to be a big part of [her] decision making,” Juror B responded “Yes, they could be.” When defense counsel asked whether she would be “able to look at the case and look at facts just as facts,” or whether she thought she would “always look at them with an emotional bias toward them,” Juror B responded, “I [will] try to look at just the facts. I’m not sure if I could be successful at that.” Finally, when defense counsel asked, “So you are unable to state unequivocally that you are able to look at the facts just

as facts and let go of your own emotional bias to whatever those facts are?” Juror B responded, “Correct.”

When Juror B’s responses to questions asked by the district court and appellant’s trial counsel are viewed in context, the district court did not clearly err in determining that Juror B did not exhibit actual bias. Juror B did not express “strong and deep impressions that would prevent her from lay[ing] aside [her] impression or opinion and render[ing] a verdict based on the evidence presented in court.” See *Munt*, 831 N.W.2d at 577 (quotations omitted). Instead, Juror B made several equivocal statements about the possibility that her relationships with law enforcement officials, or her emotions, might impact her consideration of the case. When asked directly by the court whether she would “keep [her] mind open and listen to all of the facts and apply the law as I give it to you?” Juror B unequivocally responded “Yes.” In light of this unequivocal response to the district court’s inquiry, we conclude that the district court did not abuse its discretion in denying appellant’s for-cause challenge to Juror B.

II. The district court did not commit reversible error in admitting *Spreigl* evidence.

Appellant was convicted of third-degree criminal sexual conduct in 2002. This conviction was based on an incident in which appellant—then 22—provided a 13-year-old family friend with alcohol and engaged in sexual contact involving penetration with her at his residence. It appears that appellant was also charged with criminal sexual conduct based on an incident that allegedly occurred in 2000, but that case did not proceed to trial because the victim was unwilling to testify.

Pending trial in the present matter, respondent filed a motion to admit evidence of appellant's 2002 conviction in order to impeach appellant if he chose to testify. Respondent also filed a motion to admit evidence of both the incident in 2000 and the incident that led to the 2002 conviction in order to show that appellant's behavior in the present case was part of a common scheme or plan. Appellant filed motions in limine seeking exclusion of all of this proposed evidence.

Ruling from the bench, the district court excluded evidence of the incident of sexual assault in 2000 that did not result in a conviction and ordered respondent not to use evidence of appellant's 2002 conviction for impeachment purposes. The district court did, however, permit respondent to present evidence of the incident that resulted in a conviction in 2002 by having a detective with the Oakdale Police Department read the complaint in the presence of the jury.

Appellant argues that allowing this presentation of evidence was reversible error for two reasons. First, appellant contends that the district court "abused its discretion when it admitted as evidence of a 'common scheme or plan' evidence that, over 17 years earlier, [appellant] had committed a sexual offense against a minor that involved no force, coercion, or threat of violence." Second, appellant asserts that the district court "plainly erred by admitting as *Spreigl* evidence statements in a criminal complaint."

A. Purpose

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.” Evidence offered for a permissible purpose 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). “The use of *Spreigl* evidence to show a common scheme or plan has been endorsed repeatedly, despite the particular risk it poses for unfair prejudice.” *State v. Ness*, 707 N.W.2d 676, 687 (Minn. 2006). “[T]he common scheme or plan exception includes evidence only of offenses that have a marked similarity in modus operandi to the charged offense.” *Id.* at 688 (quotation omitted).

Minnesota courts employ a five-step process to determine whether to admit *Spreigl* evidence. *Id.* at 685–86. For *Spreigl* evidence to be admitted, the state must give notice of its intent to admit the evidence; the state must clearly indicate what the evidence will be offered to prove; there must be clear and convincing evidence that the defendant participated in the prior act; the evidence must be relevant and material to the state’s case; and the probative value of the evidence must not be outweighed by its potential prejudice to the defendant. *Id.* at 686.

The district court permitted respondent to present *Spreigl* evidence of the prior instance of criminal sexual conduct for which appellant was convicted. Respondent provided notice of its intent to offer this evidence, indicating in its motion that the evidence would be presented for the purpose of showing that appellant’s behavior in the present case was part of a common scheme or plan. Specifically, respondent indicated that the evidence would be presented “to show that [appellant] has a history of using his position of authority

and age to manipulate females much younger than him to engage in sexual contact with him.” Respondent argued in its motion that showing such a common scheme or plan would “help prove that the victim in this case did not consent.”

The district court found that there was clear and convincing evidence that appellant previously committed criminal sexual conduct, as he was eventually convicted for it. The district court also stated:

[T]he analysis comes down to the balancing process of time, place, modus operandi. The case law seems to indicate that the age of the incident is only part of the equation. You have to look at the similarity of the incident, the modus operandi part of it. And you also need to look at the similarity of the incidents. I think the incidents are reasonably similar in terms of, kind of, the dynamics.

The district court did not, however, specifically identify on the record any disputed fact to which the evidence would be relevant.

We review the district court’s decision to admit *Spreigl* evidence for an abuse of discretion. *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016). In doing so, we review the district court’s resolution of questions of law de novo. *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016). We will only set aside the district court’s findings of fact if they are clearly erroneous, that is, if we are “left with the definite and firm conviction that a mistake has been made.” *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (quotation omitted). “A defendant who claims the trial court erred in admitting evidence bears the burden of showing the error and any resulting prejudice.” *Ness*, 707 N.W.2d at 685 (quotation omitted).

Appellant argues that the district court abused its discretion in admitting respondent's *Spreigl* evidence for three reasons. First, appellant contends that this "evidence was not relevant to any proper purpose and the district court identified no 'precise disputed fact' to which it was relevant." "In assessing the probative value and need for the evidence, the district court must identify the precise disputed fact to which the *Spreigl* evidence would be relevant." *Id.* at 686 (quotation omitted). "This entails isolating the consequential fact for which the evidence is offered, and then determining the relationship of the offered evidence to that fact and the relationship of the consequential fact to the disputed issues in the case." *Id.*

Appellant has failed to show that the district court abused its discretion by admitting *Spreigl* evidence that "was not relevant to any proper purpose." Contrary to appellant's argument, respondent's *Spreigl* evidence was relevant to a permissible purpose under Minn. R. Evid. 404(b), namely, to rebut appellant's claim that his niece consented to the sexual conduct by establishing the modus operandi by which appellant perpetrated acts of criminal sexual conduct in both the present case and the *Spreigl* incident. *See id.* at 687–88. While the district court did not specifically indicate what permissible purpose was served by the admission of this evidence, it may be inferred from the district court's ruling that it admitted the evidence for this purpose, the only purpose for which it was offered.

Second, appellant argues that respondent's *Spreigl* evidence "was irrelevant because it was too remote in time and was not 'markedly similar to' the charged offense." Evidence of a *Spreigl* incident is only admissible under the common scheme or plan exception if the prior incident has "a marked similarity in modus operandi to the charged offense." *Id.* at

688 (quotation omitted). The Minnesota Supreme Court has declined to adopt a bright-line rule for determining when *Spreigl* evidence is inadmissible because of a gap in time between the *Spreigl* incident and the charged conduct. *Id.* But “the more distant the *Spreigl* act is in terms of time, the greater the similarities as to place and modus operandi must be to retain relevance.” *State v. Washington*, 693 N.W.2d 195, 202 (Minn. 2005). *Spreigl* evidence that is separated from the charged conduct by a significant gap in time is more likely to be admissible if “the defendant spent a significant part of that time incarcerated and was thus incapacitated from committing crimes,” if “there are intervening acts that show a repeating or ongoing pattern of very similar conduct,” or if “the defendant was actually convicted of a crime based on the prior bad act, thus reducing the prejudice of having to defend against claims of acts that occurred years before.” *Ness*, 707 N.W.2d at 689.

Appellant has failed to show that the district court abused its discretion by admitting *Spreigl* evidence that “was irrelevant because it was too remote in time and was not ‘markedly similar to’ the charged offense.” It is true that 17 years is a substantial intervening period of time between the *Spreigl* incident and the charged conduct. Appellant did not spend a significant part of that time incarcerated, and there is no evidence that he perpetrated “intervening acts that show a repeating or ongoing pattern of very similar conduct.” *See id.* at 689. Appellant also argues that there was no use of force alleged in the *Spreigl* incident, which distinguishes it from the incident alleged here.

Nevertheless, there are marked similarities between the two incidents. In both cases, appellant and the victim were previously known to each other, with appellant being either

a friend of the victim's family or related to the victim. In both cases, appellant and the victim spent time alone together in appellant's residence immediately prior to the assault. In both cases, the victims were in their teens and there was a significant difference between the ages of appellant and the victims. And in both cases, appellant supplied the victims—both of whom were under the legal drinking age—with alcohol. While there is no showing that appellant used force against his victim in the *Spreigl* incident, that fact is not particularly relevant given that the *Spreigl* incident involved a minor who was too young to legally consent to sex. On this record, the district court's implicit finding that the two incidents are sufficiently similar to retain their relevance despite the gap in time between them is not clearly erroneous.

Third, appellant argues that “any minimal relevancy” that respondent's *Spreigl* evidence possessed “was outweighed by the clear danger for unfair prejudice” that presentation of the evidence posed. In order for *Spreigl* evidence to be admissible, “the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.” *Id.* at 686. Admission of *Spreigl* evidence under the common scheme or plan exception poses a particular risk of unfair prejudice to the defendant, *id.* at 687, because the presentation of such evidence “come[s] perilously close to putting the defendant's character and record in issue.” *Spreigl*, 139 N.W.2d at 171.

Appellant has failed to demonstrate that the district court abused its discretion in admitting *Spreigl* evidence, the probative value of which was outweighed by its potential prejudice to appellant. As is discussed above, there are marked similarities between the *Spreigl* incident and the charged conduct; these similarities render respondent's *Spreigl*

evidence highly probative of the existence of a modus operandi common to both offenses. It is true, as appellant contends, that the risk of unfair prejudice posed by the presentation of *Spreigl* evidence is perhaps greatest in cases of criminal sexual conduct perpetrated upon minor victims. See *Ness*, 707 N.W.2d at 689 (stating that “allegations of child sexual abuse” are “inherently prejudicial”); *State v. Nutt*, 381 N.W.2d 480, 485 (Minn. App. 1986) (stating that evidence of “sexual misconduct with young boys” risks having an “extreme prejudicial impact”). But this potential for unfair prejudice was no greater in this case than it is in any other criminal sexual conduct case, and in fact, the risk was mitigated by the limiting instructions that the district court gave, both immediately before the evidence was presented and again during jury instruction. On this record, the district court’s implicit finding that the probative value of respondent’s *Spreigl* evidence was not outweighed by its potential prejudice to appellant is not clearly erroneous.

B. Form

At trial, the district court allowed respondent to present evidence of the *Spreigl* incident by admitting the criminal complaint from that matter into evidence and calling as a witness a detective with the Oakdale Police Department, who read the complaint in the presence of the jury. Appellant admits that he did not object to this presentation of evidence at trial, and his failure to object in the face of repeated statements by the prosecutor that she intended to present evidence of the incident in this manner might even be treated as a tacit agreement to such a presentation. Nevertheless, appellant now contends that this presentation of evidence constituted plain error requiring reversal of his conviction.

“This court generally will not decide issues which were not raised before the district court” *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But we will consider an issue not raised before the district court if it constitutes plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “The United States Supreme Court has established a three-prong test for plain error, requiring that before an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights.” *Id.* “If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.” *Id.* But if any of the three prongs is not met, any error that may have been made does not require reversal. *See id.*

“With respect to the substantial-rights requirement, [the defendant] bears the burden of establishing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict.” *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). In evaluating whether there is a reasonable likelihood that the erroneously admitted evidence significantly affected the verdict, we consider “the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether the defense effectively countered it.” *Townsend v. State*, 646 N.W.2d 218, 223 (Minn. 2002).

Here, there is not a reasonable likelihood that the admission or the manner of the admission of respondent’s *Spreigl* evidence significantly affected the verdict. The manner in which the evidence was presented likely diminished its prejudicial impact. Rather than submitting evidence of the conviction, a police detective simply read the complaint in the

presence of the jury. In contrast to a case in which the jury is advised of a conviction or is presented with testimony from a *Spreigl* incident victim, this presentation of evidence was far less likely to stir the passions and prejudices of the jury. The prosecutor did mention the *Spreigl* evidence in her closing argument, and again in her rebuttal, but she did so only twice in a closing argument and rebuttal that spanned 29 pages, and she explicitly stated to the jury that they were “not to convict [appellant] of that offense,” and that the *Spreigl* incident was “not what this trial is about.” The district court also instructed the jury on the proper use of the *Spreigl* evidence, both immediately before it was presented and again during jury instruction.

Finally, and most importantly, respondent’s case against appellant was strong. The victim testified at length about the assault. The victim’s aunt testified about statements that the victim had made the day after the offense that were consistent with the victim’s testimony at trial. And a nurse who examined the victim shortly after the offense testified about statements that the victim had made that were consistent with her testimony as well as injuries that the victim sustained that were consistent with her allegation that the sexual contact was nonconsensual. On this record, there is not a reasonable likelihood that the admission of respondent’s *Spreigl* evidence significantly affected the verdict. Because we conclude that appellant has failed to demonstrate that the admission or the manner of admission of the criminal complaint was plain error, we need not consider whether we should reverse appellant’s conviction in order to ensure fairness and the integrity of the judicial proceedings. See *Griller*, 583 N.W.2d at 740.

III. The prosecutor did not commit misconduct requiring reversal.

Different standards apply to alleged prosecutorial misconduct depending on whether an appellant did, or did not, object at trial. Objected-to prosecutorial misconduct is reviewed for harmless error. *State v. Hunt*, 615 N.W.2d 294, 301–02 (Minn. 2000). The standard for determining whether an error was harmless varies based upon the severity of the misconduct. *Id.* at 302. “For serious prosecutorial misconduct, the misconduct is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error.” *Id.* “For less serious misconduct, the test is whether the misconduct likely played a substantial part in influencing the jury to convict.” *Id.*

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 state, which must 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 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.*

Appellant argues that the prosecutor committed reversible misconduct of three varieties. First, appellant argues that the prosecutor committed reversible misconduct by misstating evidence during her closing argument. "While the state's argument need not be colorless, it must be based on the evidence produced at trial, or the reasonable inferences from that evidence." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995) (quotation omitted). "A prosecutor may argue all reasonable inferences from the evidence in the record but may not mischaracterize the evidence so as to mislead the jury." *In re Welfare of D.D.R.*, 713 N.W.2d 891, 901 (Minn. App. 2006). Unintentionally misstating evidence is not prosecutorial misconduct. *See State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006). But this court may conclude that a misstatement was intentional if the prosecutor should have been familiar with the substance of the evidence. *See id.*

The prosecutor made the following statements during her closing argument:

I mean, he said it himself before he saw her that night that he planned to f-ck his niece. I mean, he said it himself. She looks like her aunt which you all saw. Clearly, this was something in his head that he was going to get. This wasn't, "Hey, buddy, you know, I've been hanging out with my niece and something is going on here and, you know, I think I'm going to -- something is going to happen with her," no, "I'm going to go f-ck her. I'm going to take it from her."

. . . .

First of all, the recording itself. That was the defendant's voice. That was before he sexually assaulted his niece. And like I said

he was planning to go f-ck her. He was going to take it from her.

These statements appear to refer to a phone conversation between appellant and a third party, a recording of which was played for the jury. That conversation contained the following exchange:

APPELLANT: I'm a, I'm over here at Junior house n-gga full (inaudible) n-gga, Jones n-gga see what's up with him real quick before I go to her house and f-ck my niece probably.

THIRD PARTY: Alright so they ain't mad at ya?

APPELLANT: N-gga, it's coming through later I'm a tell you that right now like a (Inaudible).

THIRD PARTY: Oh (Inaudible).

APPELLANT: Dropping her little boyfriend off and then come and smoke and get me, get me some bread for real this time.

THIRD PARTY: (Laughter).

APPELLANT: For real n-gga, for real.

Based upon this record, we conclude that appellant has failed to show that the prosecutor intentionally misstated the substance of appellant's recorded phone conversation. Appellant did not object to these alleged misstatements, so they are reviewed under a modified plain error standard. *Ramey*, 721 N.W.2d at 302. Reading the allegedly improper statements in context, it is far from "clear or obvious" that the prosecutor was intentionally misquoting appellant and thereby misstating the evidence. *See Cao*, 788 N.W.2d at 715. Instead, the prosecutor appears to have been arguing that the jury should

draw an inference about appellant's intent on the night of the assault from the recorded conversation. Doing so was not misconduct. See *D.D.R.*, 713 N.W.2d at 901.

Second, appellant argues that the prosecutor committed misconduct by failing to prepare a witness so that he would not provide inadmissible testimony. “[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).

Prior to trial, appellant moved the district court for an order “prohibiting the state from referring to anyone as a ‘victim’ and for an order that the state instruct its witnesses not to refer to anyone as a ‘victim’.” The prosecutor agreed not to use the word “victim.” There is no indication in the record that the district court issued an order granting appellant's motion. A police detective referred to “the victim” while testifying at trial. A bench conference was held, and appellant's trial counsel later stated—on the record but outside the presence of the jury—that he objected to the detective referring to “the victim” in the presence of the jury.

Prior to trial, appellant also moved the district court for an order prohibiting the prosecutor from eliciting vouching testimony and directing the prosecutor to admonish all witnesses to refrain from volunteering vouching testimony. The prosecutor stated that she “would not allow” vouching testimony. The same police detective had the following exchange with the prosecutor:

Q. When you -- did you interview [the victim's aunt]?

A. I did.

Q. Okay. And what did you learn from her?

A. I learned that she believed her niece about the --

Appellant's trial counsel objected to this statement, the district court sustained the objection, and the prosecutor rephrased her question. The prosecutor later admitted that she had not spoken to the detective prior to trial about not giving vouching testimony.

The prosecutor did not commit reversible misconduct by failing to prepare the witness. First, the prosecutor did not commit reversible misconduct by failing to admonish the witness not to use the word "victim." Appellant cites no authority in support of his contention that the detective's use of the word "victim" was improper, and the district court does not appear to have issued an order barring the use of the word. While the prosecutor did agree not to use the word herself, there is no indication that she agreed to admonish prosecution witnesses not to use it. And indeed, the prosecutor may have instructed the detective not to use the word "victim," only to have him do so when he took the stand.

The prosecutor also did not commit reversible misconduct by failing to instruct the witness not to give vouching testimony. As a preliminary matter, the detective did not give vouching testimony. Vouching testimony is defined as "testimony by a third party that a complainant is telling the truth in making specific accusations against the accused." See *Maurer*, 491 N.W.2d at 662. The detective's testimony indicated that the victim's aunt believed her accusations, not that he himself believed that the accusations were true. This was not impermissible vouching.

As importantly, there is no indication in the record that the district court issued an order requiring the prosecutor to admonish witnesses not to give vouching testimony, and the prosecutor does not appear to have agreed to do so. Instead, the prosecutor stated that she would “not allow” vouching testimony, and she does not appear to have allowed it; after the detective made the objected-to statement, the prosecutor changed her line of questioning. While the prosecutor did admit that she had not spoken to the detective about avoiding vouching testimony, the law requires the prosecutor to properly prepare witnesses, not to instruct them to avoid giving every type of inadmissible testimony. See *Underwood*, 281 N.W.2d at 342. The prosecutor appears to have misjudged the likelihood that the detective would give the testimony at issue. But by relying on the detective’s experience with testifying and his knowledge of the bounds of permissible evidence, the prosecutor did not fail to properly prepare him.

Third, appellant argues that the prosecutor committed reversible misconduct by “violating a pretrial order, disparaging the defense, and injecting broad social issues into the case.” “This court has repeatedly warned prosecutors that it is improper to disparage the defense in closing arguments or to suggest that a defense offered is some sort of standard defense offered by defendants when nothing else will work.” *State v. Griesse*, 565 N.W.2d 419, 427 (Minn. 1997) (quotation omitted). But at the same time, “[w]e have made it clear that the prosecutor is free to specifically argue that there is no merit to a particular defense in view of the evidence or no merit to a particular argument.” *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). Finally, “[w]e have held that the state should refrain from asking questions or making arguments that would divert the jury from its duty to

decide a case on the evidence by injecting issues broader than a defendant's guilt or innocence into the trial." *State v. Dobbins*, 725 N.W.2d 492, 512 (Minn. 2006).

The prosecutor made the following statement during rebuttal:

All he's going [sic] is blaming the victim. That's what he's doing. That's what the defense counsel meant [sic] he said that 13-year-old -- 13-year-old -- came to his house and he brought her in and gave a 13-year-old alcohol, 6th or 7th-grader, and had sex with her, she must have wanted it because she came over there? So he's blaming the child.

....

It's consistent with what he's doing here. Again they're blaming the victim. Because you wear a short skirt to a bar doesn't mean you want to get raped. Because you hang out with your uncle, whom you trust, and have talk [sic] to him and have some drinks with him, does not mean you want to have sex with him.

Appellant's trial counsel objected to this statement. Accordingly, it is reviewed under the two-tiered harmless error standard. *Hunt*, 615 N.W.2d at 302.

The prosecutor did not commit reversible prosecutorial misconduct by making the above statement. First, while the prosecutor agreed prior to trial not to use the word "victim" in referring to appellant's niece, there is no indication in the record that the district court ever issued an order granting appellant's motion to bar use of the word. Furthermore, appellant cites no authority as support for the proposition that the prosecutor's use of the term "victim" when referring to a victim in a prior *Spreigl* incident constitutes misconduct.

The above statement also did not impermissibly disparage the defense. In cases where the prosecutor was found to have impermissibly disparaged the defense, the prosecutor had made statements that the type of defense offered was without merit, *see*

State v. Williams, 525 N.W.2d 538, 548–49 (Minn. 1994), or that the defense theory is one that is commonly used in cases of the type before the jury. See *Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). Here, the prosecutor did neither.

Finally, the above statement did not divert the jury from its duty to decide the case on the evidence by injecting broader social issues into the trial. The prosecutor did draw a comparison between appellant’s defense theory and the so-called “victim blaming” argument that a person’s manner of dress invites sexual assault. But contrary to appellant’s contention, and unlike in other cases where a prosecutor’s statement was said to have impermissibly diverted the jury’s attention, *e.g.*, *Dobbins*, 725 N.W.2d at 512, this comparison bore a factual connection to the present case: appellant had argued in his closing that the victim’s actions immediately prior to the assault indicated her consent to have sex with appellant. The prosecutor’s statement appears to have been a response to this argument, and making such a statement was not misconduct.

IV. The cumulative effect of any errors that occurred did not deprive appellant of a fair trial.

We may reverse a conviction if multiple trial errors, when combined, “seriously affected the fairness, integrity or public reputation of the judicial proceedings.” See *State v. Bustos*, 861 N.W.2d 655, 665 (Minn. 2015). Said another way, we may reverse a conviction if, because of the combined effect of trial errors, “we are unable to determine whether the jury based its verdict on the admissible evidence and the reasonable inferences derived therefrom, or on the state’s pervasive misconduct and the consideration of evidence that should have been excluded.” *Mayhorn*, 720 N.W.2d at 792 (Minn. 2006). But as is

discussed above, appellant has failed to demonstrate that any error was committed in this case. Accordingly, appellant's conviction need not be reversed.

V. Appellant's sentence must be reversed and the case remanded for resentencing.

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 (2019). "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. Custody status points are assigned when the offender was under a qualifying custody status—including probation—at the time he committed the offense for which he is being sentenced. Minn. Sent. Guidelines 2.B.2.a.(1).

The Minnesota Sentencing Guidelines Commission made a number of changes to Minnesota's sentencing guidelines in 2019; two are relevant here. First, an offender who is on probation for a gross misdemeanor offense when he commits a new offense now receives one-half custody status point, rather than a full custody status point as had been the case under the guidelines prior to their amendment. Minn. Sent. Guidelines 2.B.2.a (2017); Minn. Sent. Guidelines 2.B.2.a (2019). In *State v. Robinette*, we held that this modification to section 2.B.2 applies to cases that were not final as of August 1, 2019. See 944 N.W.2d 242, 249, 251 (Minn. App. 2020), *review granted in part* (Minn. June 30, 2020).

Second, a prior felony sentence that was never executed is now said to decay—meaning it is no longer counted in calculating an offender’s criminal history—when 15 years have passed since the date of sentencing, rather than after 15 years have passed from the date of discharge from probation as had been the case under the guidelines prior to their amendment. Minn. Sent. Guidelines 2.B.1.c (2017); Minn. Sent. Guidelines 2.B.1.c (2019). In *State v. Woods*, we held that this modification to section 2.B.1.c applies to cases that were not final as of August 1, 2019. 945 N.W.2d 414, 417 (Minn. App. 2020).

Appellant was sentenced on January 17, 2020, meaning that this case was not final as of August 1, 2019. Appellant’s sentence was calculated using the 2017 guidelines because the offense was committed on July 11, 2018, before the 2018 guidelines became effective on August 1, 2018. See Minn. Sent. Guidelines 2.B.2.a (2018). Because his case was not final on August 1, 2019, the 2019 amendments apply to the calculation of appellant’s custody status and criminal history scores. *Robinette*, 944 N.W.2d at 249, 251; *Woods*, 945 N.W.2d at 417. When a sentence is based on an incorrect criminal history score, the case must be remanded for resentencing. *State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017). The interpretation of the sentencing guidelines is a question of law that we review de novo. *State v. Strobel*, 932 N.W.2d 303, 306 (Minn. 2019).

This case must be remanded for resentencing. Because it was calculated using the 2017 sentencing guidelines, appellant’s sentence was based on a criminal history score of two. This criminal history score was, in turn, calculated based on the assignment to appellant of one custody status point because he was on probation for gross misdemeanor DWI at the time of the offense in the present case and the assignment to appellant of one

felony point because he was discharged from probation for his 2002 criminal sexual conduct conviction in 2009, less than 15 years before the date of the offense in the present case.

But appellant would only receive one-half custody status point under the 2019 amendment to Minn. Sent. Guidelines 2.B.2.a, because he was on probation for a single gross misdemeanor conviction at the time of the offense in the present case. *See* Minn. Sent. Guidelines 2.B.2.a, 2.B.3 & cmt. 2.B.301 (2019). And appellant would not receive a felony point for his 2002 conviction under the 2019 amendment to Minn. Sent. Guidelines 2.B.1.c, because he was sentenced for that conviction on February 27, 2002, his sentence was never executed, and the sentence therefore decayed in 2017, before he committed the present offense. *See* Minn. Sent. Guidelines 2.B.1.c (2019). Accordingly, appellant is entitled to have his sentence recalculated using a correct criminal history score.

Affirmed in part, reversed in part, and remanded.