STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1656

State of Minnesota,
Respondent,

vs.

Sarah Jean Solien,
Appellant.

Filed September 18, 2023
Affirmed
Kirk, Judge[*]

Yellow Medicine County District Court
File No. 87-CR-21-162

Keith Ellison, Attorney General, Lisa Lodin, Assistant Attorney General, St. Paul, Minnesota; and

Mark Gruenes, Yellow Medicine County Attorney, Granite Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrew J. Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Johnson, Judge; and Kirk, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

KIRK, Judge

On appeal from her conviction of first-degree criminal damage to property, appellant argues that the prosecutor committed prejudicial misconduct by failing to prepare a witness to avoid testifying about evidence that the district court had determined to be inadmissible. We affirm.

FACTS

In April 2021, respondent State of Minnesota charged appellant Sarah Solien with first-degree criminal damage to property under Minn. Stat. § 609.595, subd. 1(4) (2020). The complaint alleged that Solien damaged several machines at a laundromat while attempting to "gain access into the locked coin holding locations." Prior to trial, Solien moved to prohibit any testimony related to allegations that she shoplifted from a casino earlier in the day of the alleged offense. The district court granted the motion.

At trial, the owner of a laundromat in Granite Falls testified that, on the morning of the alleged offense, he stopped by the laundromat to reload the coin machines and did not observe any damage to the machines. The caretaker of the laundromat testified that he arrived at the laundromat at approximately 9:00 p.m. and observed that the automatic lights inside the laundromat were off, but there was a vehicle parked outside. The caretaker entered the laundromat and saw a "short" and "heavier set" woman wearing a "COVID mask" and stocking cap "nose deep into the office maintenance door chiselin' away" with a screwdriver. The caretaker also testified that he noticed a broken screwdriver on the floor

in front of the maintenance door. The maintenance door opens to a back room where employees can access the back of the coin-fed laundry machines to load quarters.

The caretaker testified that he confronted the woman, who then ran over to a dryer and told him that she was looking for a ring that she lost. After the caretaker threatened to call the police, the woman left the laundromat in the vehicle that was parked in the front of the laundromat. Although the caretaker failed in his attempt to follow the woman, he wrote down the license plate of her vehicle. He then returned to the laundromat, where he noticed that the deadbolt of the maintenance door had been chiseled away and the coin boxes on several of the laundry machines had been damaged.

The caretaker contacted law enforcement and provided the license plate number he had written down to the responding officer. The license plate number indicated that the registered owner of the vehicle was Solien, and her description on her driver's license matched the description of the woman as provided by the caretaker. The officer sent out an "attempt to locate" Solien to local law enforcement agencies, and went to the laundromat where he observed the damage. He later received a copy of the video surveillance footage of the laundromat that was admitted into evidence.

The surveillance video footage depicts an individual, matching the description provided by the caretaker, enter the laundromat and, for the next few hours, "monkey[] around" with the coin slots on the laundry machines and detergent dispenser. In addition, still photographs from the surveillance footage were admitted into evidence showing the individual standing in front of some the laundry machines. Photographs were also admitted that showed the damage to the laundry machines and the maintenance door. And evidence

was presented establishing that the cost to replace the damaged door was $347.34, and that the cost to repair the damaged laundry machines was $1,085.33.

A local deputy responded to the "attempt to locate" Solien. The deputy then went to Solien's house, where Solien agreed to speak with the deputy. During the deputy's testimony, the prosecutor asked the deputy what Solien told him. The deputy replied:

> That she was at the casino, which I'm assuming is the one just down the road. She was the only one in that vehicle through that day. She had taken a bag, she didn't describe the bag, but she—she did take the bag from the casino without paying for it and when she left the casino, she became ill and threw up on her shirt, so she went to the laundromat here in Granite Falls. While at the laundromat, she lost a ring that she has . . .

Defense counsel objected on the grounds of "Narrative," and the district court overruled the objection. The deputy then continued: "So, she—she has this ring and she dropped it while alone at the laundromat and she was searching for this ring."

When the deputy finished his sentence, defense counsel asked for a bench conference where counsel explained that he did not object to the deputy's reference to the inadmissible evidence because he "didn't want to draw [the jury's] attention to it." But defense counsel requested that the prosecutor talk to the deputy to ensure that "he doesn't mention it again." The prosecutor agreed, and the district court paused the record to allow the prosecutor to speak with the deputy. When the prosecutor's examination of the deputy resumed, the deputy testified that Solien admitted to being at the laundromat but denied destroying or stealing anything.

The jury found Solien guilty as charged. The district court subsequently stayed imposition of the guidelines sentence and placed Solien on probation for five years. Solien was also ordered to pay $1,432.67 in restitution. This appeal follows.

DECISION

Solien argues that she is entitled to a new trial because the prosecutor committed prejudicial misconduct by eliciting testimony from a witness about inadmissible evidence. Because Solien's pretrial motion to prohibit the admission of evidence about her conduct at the casino serves as a timely objection, we review the alleged prosecutorial misconduct under a two-tiered harmless-error test.[1] *See* Minn. R. Evid. 103(a) ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error."); *see also State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974) (stating that appellate courts review objected-to prosecutorial misconduct under a two-tiered harmless-error test). For a claim alleging less serious misconduct, we consider "whether the misconduct likely played a substantial part in influencing the jury to convict." *Caron*, 218 N.W.2d at 200 (quotation omitted). But for a claim alleging "unusually serious misconduct," we consider "whether the alleged misconduct was harmless beyond a reasonable doubt." *Id.* (quotation omitted).

[1] The supreme court has questioned whether this two-tiered approach is still good law, while declining to decide the question. *See, e.g.*, *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010); *see also State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012).

A prosecutor engages in misconduct when they violate clear or established standards of conduct, including rules, laws, or orders by a district court. *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008). Attempting to elicit *or actually* eliciting inadmissible evidence may constitute prosecutorial misconduct. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). "Minnesota law is crystal clear . . . [that] the state has an absolute duty to prepare its witnesses to ensure that they are aware of the limits of permissible testimony." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). The state must prepare its witnesses so they "will not blurt out anything that might be inadmissible and prejudicial." *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978).

Solien argues that the prosecutor committed misconduct "by failing to prepare his witnesses to prevent them from testifying about inadmissible evidence." The state does not dispute that the deputy "volunteered evidence [that was] previously ruled inadmissible." But the state asserts that "prosecutorial misconduct and prosecutorial error are separate contentions."[2] The state contends that, at most, the prosecutor made a mistake, constituting prosecutorial error, because "[n]othing in the record establishes that the prosecutor intentionally elicited th[e] testimony; the witness simply gave the answer in

[2] This court in *State v. Leutschaft*, stated that "there is an important distinction . . . between prosecutorial misconduct and prosecutorial error." 759 N.W.2d 414, 418 (Minn. App. 2009), *rev. denied* (Minn. Mar. 17, 2009). Misconduct "implies a deliberate violation of a rule or practice, or perhaps a grossly negligent transgression," while error "suggests merely a mistake . . . [or] misstep of a type all trial lawyers make from time to time." *Id.* The supreme court has also recently noted that "[p]rosecutorial error and prosecutorial misconduct are separate contentions." *State v. Epps*, 964 N.W.2d 419, 423 n.4 (Minn. 2021) (citing *Leutschaft*, 759 N.W.2d at 418).

response to the open-ended question." And the state argues that, even if the prosecutor committed misconduct, appellant is not entitled to a new trial.

We acknowledge that there is nothing in the record to suggest that the prosecutor intentionally elicited the inadmissible testimony. But even assuming, without deciding, that the prosecutor committed misconduct, and that the stricter harmless-beyond-a-reasonable-doubt standard is applicable, we conclude that the state is able to show that Solien is not entitled to relief.

Under the stricter harmless-beyond-a-reasonable-doubt standard, prosecutorial misconduct is harmless if the jury's verdict was "surely unattributable" to the misconduct. *State v. Nissalke*, 801 N.W.2d 82, 106 (Minn. 2011). Factors relevant to the determination of whether prosecutorial misconduct is harmless beyond a reasonable doubt include how the improper evidence was presented, whether the state emphasized it, whether it was highly persuasive, and whether the defendant countered it. *State v. Wren*, 738 N.W.2d 378, 394 (Minn. 2007). The strength of the other evidence supporting the verdict is also a factor in the analysis, but it is not dispositive. *Id.*

Here, the error involved a single comment by the deputy related to Solien taking a bag at a casino without paying for it. The inadmissible evidence was not overly persuasive. In addition, the inadmissible evidence was never emphasized by the state and, in fact, was never again mentioned during the trial. And, by objecting on narrative grounds, and then requesting a bench conference outside the presence of the jury, defense counsel was able to address the error without bringing it to the attention of the jury.

Moreover, the record reflects that the state's evidence was overwhelming. Surveillance video of the laundromat was admitted into evidence that depicted a woman of Solien's stature entering the laundromat, staying for over three hours, and standing in front of various machines for extended periods of time with her arms at the same level and position of the locked coin boxes. In addition, the caretaker testified that he entered the laundromat and saw a woman "nose deep into the office maintenance door chiselin' away" with a screwdriver. The caretaker identified Solien as the woman he saw at the laundromat, and photographs of the damaged machines and damaged maintenance door were admitted into evidence. Although the caretaker admitted on cross examination that his identification of Solien was based on her being "short" and "heavier set" because she was wearing a mask and hat, Solien admitted to the deputy that she was at the laundromat. Therefore, any error by the prosecutor in eliciting the inadmissible evidence was harmless beyond a reasonable doubt.

Affirmed.