

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A22-1824**

State of Minnesota,  
Respondent,

vs.

Lamarr Lucky Smith,  
Appellant.

**Filed December 26, 2023  
Affirmed  
Wheelock, Judge**

Hennepin County District Court  
File No. 27-CR-22-5376

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

Mary F. Moriarty, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Segal, Chief Judge; and Wheelock, Judge.

**NONPRECEDENTIAL OPINION**

**WHEELOCK**, Judge

Following a jury trial, appellant was convicted of second-degree criminal sexual conduct. He asserts that he is entitled to reversal of his conviction and a new trial because the district court erred by admitting other-acts evidence. Because appellant has not shown

that there is a reasonable possibility that the challenged evidence significantly affected the verdict, we affirm.

## FACTS

On March 22, 2022, officers arrested appellant Lamarr Lucky Smith following two 911 calls. At 10:31 a.m., L.O. called 911 and reported that Smith was in her apartment attempting to sexually assault her. Officer J.W. and Officer S.K. responded to that call at 10:44 a.m. and found L.O. outside her apartment building. L.O. asked them to remove Smith from her apartment. As Officer J.W. walked up the stairs inside the building, he saw Smith exiting the apartment. Officer J.W. retrieved Smith's blue coat from inside the apartment and gave it to Smith before escorting him out of the building. Once outside, the officers ordered Smith to leave three times before he complied. The officers returned to their squad car in the parking lot of L.O.'s apartment building.

Shortly thereafter, Officer J.W. and Officer S.K. received a second 911 dispatch for a reported assault approximately two blocks away. At 11:12 a.m., T.B., the victim in this case, called 911 and reported that a man she did not know had just tried to assault her minutes earlier while she was walking down the street. She described his height and skin color and stated that he was wearing "army pants" and a blue coat. She told the dispatcher that the man had walked away but that she was concerned he would continue to follow her.

Officer J.W. and Officer S.K. arrived on the scene at 11:15 a.m. and spoke with T.B. for about 25 seconds. T.B. told the officers that a man had started following her while she was walking down the street, touched her "in places [she] didn't want to be touched," and

“went in [her] pants.” While speaking with T.B., Officer J.W. recognized Smith, who was less than a block away. Officer J.W. arrested Smith shortly thereafter.

While Officer J.W. and Officer S.K. were detaining Smith, Officer A.R. and Officer S.A. arrived on the scene. Officer A.R. interviewed T.B. T.B. described the incident to Officer A.R., explaining that the man who had assaulted her asked for her age and she responded that she was underage to scare him off, but he replied that he did not care. When she tried to get away from him and call her father, the man followed her, grabbed her arm, and put his hands in her pants. As she was trying to call her father, the man tried to take her cell phone and told her not to call 911. When Officer A.R. asked T.B. if the man put his hand through her pants and her underwear, T.B. responded in the affirmative. Officer A.R. asked if the man touched her vagina and whether he inserted his fingers, and T.B. replied that he “just touched it.”

Officer S.A. spoke with a woman, R.L., who had approached the officers during Smith’s arrest. During their conversation, Officer S.A. learned of a third incident involving Smith that occurred after Smith’s encounter with L.O. and before his encounter with T.B.— R.L. had encountered Smith around 11:00 a.m. outside a nearby apartment building. R.L. told Officer S.A. that the man the officers were arresting had approached her on the sidewalk outside the apartment building earlier that morning. R.L. told the officer that Smith followed her when she tried to get away from him, so she walked to an entrance to the apartment building to escape him. While locating her key, she yelled at Smith to stay back, then unlocked the door and quickly shut it while he was reaching for the door.

After speaking with the officers, T.B. went to the hospital, where she first talked with a nurse in the hospital's open triage area. The triage nurse's notes identified the reason for T.B.'s visit as an assault and stated that T.B. reported that she was grabbed on her shoulder by a stranger. The triage nurse's notes did not mention a sexual assault. T.B. next met with a resident doctor, who added a note to T.B.'s medical chart stating that T.B. "denies any sexual contact, denies any oral or vaginal penetration." Finally, T.B. saw the examining doctor, who was supervising and training the resident doctor, and T.B. reported to him that a man grabbed her shoulder and groin and that her shoulder was sore. T.B. did not see a forensic nurse examiner at the hospital.

While she was still at the hospital, T.B. was interviewed by a sergeant with the Minneapolis Police Department sex-crimes unit. T.B. told the sergeant that the man followed her, asked how old she was, grabbed her upper arm, and put his hands in her pants. T.B.'s father was in the room for portions of the interview. While T.B.'s father was in the room, the sergeant asked where in her shorts, and T.B. motioned to her hip area. The sergeant confirmed with T.B. that T.B. meant the crease where her hip meets her thigh. The sergeant perceived that T.B. was hesitant to answer questions with her father in the room and asked T.B. if she wanted her father to leave the room. After T.B.'s father left, the sergeant asked T.B. if the man had touched her vagina, to which she responded, "Just a little bit."

The state charged Smith with second-degree criminal sexual conduct related to his assault of T.B. Before trial, the state moved for admission of evidence of Smith's encounters with L.O. and R.L. Smith argued that the evidence was inadmissible character

evidence under Minn. R. Evid. 404(b) and *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965), and the state argued that the evidence was admissible under the intrinsic-evidence exception. The district court ruled that the evidence was admissible because it involved “at least an allegation of some sexual intent” and “explains why the police were in the area and looking for [Smith].”

At trial, T.B. testified as follows. Smith followed her and asked her age. T.B. was 19 years old at the time but told Smith she was 16, which she thought would encourage him to leave her alone. Smith told T.B. he did not care about her age. T.B. turned the corner to get away from Smith and tried to call her father. Smith followed her, tried to take her phone, grabbed her arm, and put his hand down her shorts, touching her body under her shorts. T.B. tried to call her father again, but when he did not pick up, she called 911. The state’s attorney showed T.B. a diagram of a female body and asked her to circle the body parts Smith touched. She circled her right shoulder and upper arm as well as her groin.

The examining doctor testified about examining T.B. at the hospital and the triage nurse’s and resident doctor’s notes. Regarding the triage nurse’s notes, which indicated that T.B. had been grabbed on her shoulder but did not mention sexual assault, the examining doctor opined that triage notes are often “cryptic” because they are taken in an “open” waiting room in front of many other people. Regarding the resident doctor’s note that T.B. “denies any sexual contact, denies any oral or vaginal penetration,” the examining doctor explained that this was part of a broader assessment indicating that T.B. had been sexually assaulted but not in a penetrative manner.

Smith testified that he had a hostile interaction with T.B. after he asked to use her cell phone to call an Uber. He denied grabbing her shoulder, putting his hand down her pants, or touching her anywhere on her body. He admitted that he did not know T.B. prior to the incident and that she would not have a motive to lie about him touching her other than the fact that he had “cussed her out.”

The state introduced L.O.’s 911 calls and Officer J.W.’s testimony about the events surrounding the calls. Officer J.W. testified that he recognized and detained Smith quickly when responding to T.B.’s call because he was already familiar with Smith’s description from responding to L.O.’s 911 call. The state also introduced surveillance video, body-camera footage, and testimony from Officer S.A. and R.L. about R.L.’s encounter with Smith. Smith testified that when he left L.O.’s apartment building, he asked R.L. to use her cell phone to call an Uber, and R.L. became hostile. The district court issued cautionary instructions to the jury regarding the use of character evidence multiple times, including immediately before the state published L.O.’s 911 calls, immediately before R.L. testified, between the conclusion of the parties’ cases and closing arguments, and in its written instructions. Each time, the district court quoted the relevant model jury instructions nearly verbatim. Following trial, the jury found Smith guilty of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(d) (Supp. 2021).

Smith appeals.

## **DECISION**

Smith asserts that his conviction should be reversed and that he is entitled to a new trial because the district court abused its discretion in admitting evidence regarding his

encounters with L.O. and R.L.<sup>1</sup> He argues that the evidence was inadmissible character evidence that did not meet the intrinsic-evidence or immediate-episode exceptions to the rule against character evidence because there was no causal connection between the other encounters and his encounter with T.B. and the state did not need the evidence to tell a complete story of the charged offense. He further argues that the evidence significantly affected the verdict because the state's case was weak in that T.B.'s trial testimony was inconsistent with her prior statements, the district court's cautionary instructions exacerbated the prejudicial effect of the evidence, and the state's use of the evidence during its closing was "nothing more than a propensity argument."

When appealing the admission of other-acts evidence, a defendant has the burden to show that the district court abused its discretion by admitting the other-acts evidence and that the admission was prejudicial. *State v. Riddley*, 776 N.W.2d 419, 424 (Minn. 2009). "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." Minn. R. Evid. 404(b).

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<sup>1</sup> Smith raises several additional challenges in his pro se supplemental brief. We do not consider pro se claims on appeal that are unsupported by argument or legal authority "unless prejudicial error is obvious on mere inspection." *State v. Taylor*, 869 N.W.2d 1, 22 (Minn. 2015) (quotation omitted). Smith asserts that (1) officers lacked probable cause to arrest him; (2) he was never positively identified before or during trial; (3) the state lacked probable cause to charge him; (4) he received ineffective assistance of counsel because his attorney allowed him to testify, did not allow him to "testify properly," and did not impeach T.B. with prior inconsistent statements; (5) his right to be present at trial was violated when he failed to appear; (6) his right to a speedy trial was violated; (7) the state violated his right to confront L.O. as a witness; and (8) the state committed prosecutorial misconduct during discovery, direct examination of T.B., cross-examination of Smith, and closing arguments. Each of Smith's pro se claims is unsupported by argument, facts in the record, or both, and our review revealed no obvious prejudicial error. Thus, we consider Smith's pro se claims waived.

“Minnesota has long adhered to the common-law rule excluding evidence of prior bad acts except where the evidence fits within a specific exception.” *Riddley*, 776 N.W.2d at 424; *Spreigl*, 139 N.W.2d at 169. One such exception is evidence of other bad acts that are part of the “immediate episode” of the charged crime. *State v. Fardan*, 773 N.W.2d 303, 315-16 (Minn. 2009); *Spreigl*, 139 N.W.2d at 173.<sup>2</sup> In this case, however, we need not decide whether admitting the evidence was an abuse of discretion because the error, if any, was harmless. *See State v. Thao*, 875 N.W.2d 834, 839 (Minn. 2016) (declining to analyze whether other-acts evidence was admissible where the defendant had not demonstrated that the admission was harmful).

To obtain reversal of a conviction based on the erroneous admission of other-acts evidence, a defendant must “demonstrate that the erroneous admission of evidence created ‘a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.’” *Riddley*, 776 N.W.2d at 427 (quoting *State v. Ness*, 707 N.W.2d 676, 691 (Minn. 2006)). We examine the entire record to determine whether wrongfully admitted evidence significantly affected the verdict. *State v. Jaros*, 932 N.W.2d 466, 474 (Minn. 2019). Erroneously admitted other-acts evidence “is not of such weight as to tip the balance

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<sup>2</sup> Here, the district court determined that the other-acts evidence was admissible under the “intrinsic-evidence” exception. Smith questions whether there is a meaningful difference between the intrinsic-evidence exception, as it is identified in *State v. Hollins*, 765 N.W.2d 125, 131-32 (Minn. App. 2009), and the immediate-episode exception and asks this court to hold that they are the same. It is worth noting that when the parties argued the state’s motion in limine before trial, they referred to the challenged evidence as intrinsic evidence but cited cases interpreting the immediate-episode exception. However, because we conclude that there is no reasonable possibility that the challenged evidence significantly impacted the verdict, we need not address the difference, if any, between the two exceptions.



toward reversal” if it merely bolsters another witness’s credible testimony; rather, it must be “the critical push beyond a reasonable doubt.” *Ness*, 707 N.W.2d at 691; *see also Jaros*, 932 N.W.2d at 474 (citing this aspect of *Ness*). Appellate courts have considered the following factors when conducting this analysis: (1) whether the state presented other evidence on the issue for which the other-acts evidence was offered, (2) whether the district court issued cautionary instructions, (3) whether the state relied on the inadmissible evidence in its closing argument, and (4) whether other evidence of guilt was overwhelming. *Riddley*, 776 N.W.2d at 428. We apply these factors here.

We first consider whether the state presented other evidence on every issue for which the state offered the other-acts evidence, and we conclude that the state did so. Regarding identity, the state presented evidence that included T.B.’s testimony describing Smith’s appearance and the clothes he was wearing on the date of the offense, which matched the description she gave the 911 dispatcher. And in his testimony, Smith admitted that he had an altercation with T.B. on the date of the offense. Regarding sexual or aggressive intent, the state presented evidence that included T.B.’s testimony and prior consistent statements that Smith touched her body under her shorts and underwear on her vagina. *See Ness*, 707 N.W.2d at 687 (stating that “sexual or aggressive intent can readily be inferred from the contacts themselves”). Regarding the reason the officers identified and detained Smith quickly, the state presented evidence that the officers had T.B.’s description of Smith’s appearance from T.B.’s 911 call, saw him less than a block away while they were speaking with T.B., and arrested him based on her report of sexual assault.

Second, we consider whether the district court issued cautionary instructions, and we conclude that it did. The record shows that the district court issued cautionary instructions three times during trial and included the same instruction in the written jury instructions. Although Smith argues that the instructions to the jury heightened the potential prejudicial effect of the other-acts evidence, we presume that the jury followed the district court's instructions. *State v. Matthews*, 779 N.W.2d 543, 550 (Minn. 2010); *Riddley*, 776 N.W.2d at 428.

Third, we consider whether the state relied on the challenged evidence in its closing argument, and we conclude that, although the state's use of the other-acts evidence during closing arguments here was not insignificant, it was not improper, and the state relied primarily on the other evidence it presented. During its closing argument, the state emphasized the evidence that was not other-acts evidence by discussing it in detail. And the state stressed the importance of the district court's cautionary instructions to the jury by explaining that the jury should be cautious about how it used the other-acts evidence, stating that "[w]e don't just convict people because they've done bad stuff before" and reiterating that the jury should not use the other-acts evidence to convict Smith.

Finally, we consider whether the evidence of Smith's guilt was overwhelming without the challenged evidence, and we conclude that it was. The other evidence must be strong, but it need not be conclusive. *State v. Bolte*, 530 N.W.2d 191, 198 n.6 (Minn. 1995). On this factor, Smith argues that the state's case was weak because T.B.'s statements from the date of the offense were inconsistent. Smith points to the following alleged inconsistencies: T.B. did not tell the 911 dispatcher that she had been assaulted,

only that a man had “tried” to assault her; T.B. did not tell the triage nurse that she had been sexually assaulted, only that the man grabbed her shoulder; the resident doctor’s note states that T.B. denied sexual contact; and T.B. did not initially volunteer exactly where she was touched in her interview with the sergeant.

The state presented overwhelming evidence that T.B.’s testimony was credible and consistent, and it refuted or explained the purported inconsistencies. For example, the state presented T.B.’s video-recorded statements in which T.B. described the incident consistently in her responses to the officers and the sergeant, confirming each time that Smith had touched T.B. under her clothing on her groin. The examining doctor testified that T.B. told him she was touched on her groin, explained that triage notes are often “cryptic” because they are taken in front of other people, and clarified that the resident doctor’s note that T.B. denied sexual contact was specific to oral or vaginal penetration. The sergeant testified that it is very common for people not to want to use the word “vagina” and that in this case, T.B. was especially hesitant because her father was in the room for portions of the interview. The sergeant also testified that when she asked T.B. if Smith touched her vagina, T.B. responded, “A little bit.” All of this testimony and evidence corroborates T.B.’s testimony at trial.

Furthermore, Smith’s testimony corroborated key points of the state’s case. Smith testified that he had a hostile interaction with T.B. that day involving a cell phone, resolving any doubt about identity. Smith initially blamed the hostile interaction on T.B. but then admitted that he became hostile first. He also admitted that he and T.B. did not know each

other and that T.B. should not have had any motivation to lie. And Smith did not present any other evidence undermining T.B.'s credibility.

Based on our examination of the entire record, these factors weigh in favor of a conclusion that no reasonable possibility exists that the challenged other-acts evidence was the critical push beyond reasonable doubt here. We are therefore persuaded that even if the district court abused its discretion by admitting the other-acts evidence, Smith failed to demonstrate that the alleged erroneous admission of Smith's encounters with L.O. and R.L. significantly affected the verdict. Thus, Smith is not entitled to reversal of his conviction or a new trial.

**Affirmed.**