STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0508

State of Minnesota,
Respondent,

vs.

Edmund Charles Roskoski,
Appellant.

Filed December 10, 2012
Affirmed in part, reversed in part, and remanded
Ross, Judge

St. Louis County District Court
File No. 69VI-CR-11-641

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James A. Borland, Sellman Law Office, Hibbing, Minnesota (for respondent)

Cynthia J. Vermeulen, Vermeulen Law office, P.A., Minnetonka, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

St. Louis County charged Edmund Roskoski with disorderly conduct and public nuisance after Roskoski provoked his German Shepherd to attack two small dogs being

walked by their owners. Roskoski appeals his disorderly conduct conviction and sentence. He argues that the district court abused its discretion by admitting improper character evidence, that the prosecutor's misconduct deprived him of a fair trial, that his attorney provided ineffective assistance, and that the district court issued an excessive sentence. Because the claimed trial errors either were not errors or did not prejudice Roskoski, we affirm in part. Because the claim of a sentencing error is valid and is conceded by the state on appeal, we reverse in part and remand for the district court to correct Roskoski's sentence.

FACTS

Mark Pucel and his girlfriend, Andrea Whiting, were walking two small dogs in Mountain Iron when they heard someone yell and saw a large black German Shepherd charging toward them. Pucel could not make out what was yelled, but Whiting heard, "Sic 'em!" The German Shepherd attacked Whiting's and Pucel's dogs, biting at them as Pucel tried to chase it away. Pucel saw Ed Roskoski standing nearby in some woods, so he screamed at him to call his dog off. Eventually the German Shepherd ran away, but not because Roskoski called him off—he never did. The small dogs escaped without injury, but Whiting was fearful and distressed.

Others witnessed the episode. RaeAnn Pratt and Vince Goerdt both work at a nearby group home. Pratt saw the German Shepherd running toward Whiting and Pucel and heard Pucel yelling at Ed Roskoski to call off his dog. Goerdt heard someone yell "Sic 'em!" and then saw a German Shepherd running toward Whiting and Pucel. Goerdt saw a man in the woods but not clearly enough to identify him.

Deputy Sheriff Adam Danielson investigated. He spoke with Pucel, Whiting, Pratt, and Goerdt, but he did not question Roskoski because Sergeant John Backman had instituted a policy requiring that, because of prior difficulties, he alone would interact with Roskoski. Sergeant Backman cited Roskoski for public nuisance under Minnesota Statutes section 609.74 (2010). He later amended the complaint to add the offense of disorderly conduct under section 609.72 (2010).

The state notified Roskoski before trial that it intended to introduce evidence of incidents in 2006 and 2009 involving the same German Shepherd. Roskoski consented to the admission of this evidence, but at trial the state also presented evidence about other prior acts of Roskoski, his son, and the German Shepherd. Roskoski did not object. The state also presented evidence about postattack safety policy changes made at the nearby group home. Roskoski objected, but the district court admitted the evidence as relevant to the disorderly conduct charge on the issue of alarm.

Roskoski rested his defense on evidence that both he and the dog were mistakenly identified. He offered his son's testimony of his own daily routine of taking the dog with him to work. And he offered the testimony of his wife and son that Roskoski had been home at the time of the incident and that Roskoski's son resembles and is often mistaken for him. He also offered evidence showing that other black dogs live in the neighborhood, including a different German Shepherd that he had observed and photographed after the attack.

The jury had no reasonable doubt that Roskoski and his dog were involved. It returned guilty verdicts on both counts. The district court dismissed the charge of public

nuisance and sentenced Roskoski only on the disorderly conduct conviction. The court found "overwhelming evidence to support the jury's verdict." It sentenced Roskoski to 90 days in jail, but it stayed the sentence conditioned on two years of probation. This appeal follows.

D E C I S I O N

Roskoski's appeal contests both his conviction and his sentence. He challenges his conviction on the ground that the district court improperly admitted evidence, that the prosecutor committed misconduct, and that his trial attorney rendered constitutionally deficient assistance. He challenges his sentence on the ground that the length of his probation exceeds the statutory limit. His sentencing challenge is persuasive; his fair trial challenge is not.

I

We reject Roskoski's argument that the district court committed reversible error by admitting supposed character evidence. Evidence of other crimes or bad acts, commonly known as *Spreigl* evidence, is inadmissible to prove that a defendant acted in conformity with his character. Minn. R. Evid. 404(b); *State v. Spreigl*, 272 Minn. 488, 490, 139 N.W.2d 167, 169 (1965). But *Spreigl* evidence may be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident. *Id.* The supreme court has developed a five-element test to determine whether *Spreigl* evidence should be admitted:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and

> convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

State v. Ness, 707 N.W.2d 676, 685–86 (Minn. 2006). We review a district court's decision to admit *Spreigl* evidence for an abuse of discretion. *Id.* at 685. We will reverse a verdict if the district court erroneously admitted the bad-acts evidence and the erroneously admitted evidence significantly affected the verdict. *Id.* at 691.

Roskoski's argument focuses on evidence of three acts for which the state gave pretrial notice: a September 2006 incident when the dog was on private property, a June 2009 incident when Roskoski had his dog off its leash, and a July 2011 incident when Roskoski was seen taking pictures of other dogs in the neighborhood. Roskoski's trial counsel stipulated to the admissibility of the first two incidents. The district court did not abuse its discretion by admitting evidence that was stipulated to. And the challenge about the July 2011 photography incident chases its own tail; the photographs were taken and entered into evidence by Roskoski himself. Having engaged in neighborhood photography to create trial evidence that he would offer, Roskoski cannot reasonably complain when the state introduces evidence that he engaged in photography to create trial evidence. Anyway, the evidence of Roskoski taking pictures of other dogs could not significantly influence the jury to find that he is guilty of the offenses charged here.

Roskoski also focuses on evidence of several of his past acts that the state allegedly presented as character evidence and for which the prosecutor gave no notice. Four of the challenges cited by Roskoski merit no review because they involve only the

prior acts of the dog, not Roskoski. The remaining challenged evidence includes Whiting's testimony that she saw Roskoski hiding behind trees when the German Shepherd had previously run toward her; testimony that Roskoski stalked Whiting after the attack; and Sergeant Backman's reference to previous incidents involving the dog and Roskoski as "several complaints of Mr. Roskoski's dog being walked off the leash [and] - being walked on people's property on and off the leash, [when] he has been told he can't trespass on that property." Roskoski did not object to any of this evidence at trial. Because Roskoski failed to object, we review only under the plain error standard. The plain error standard requires the defendant to show error that was plain and that affected his substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). When these elements are met, we may correct the error if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.*

It was not plain error for the district court to admit this evidence. Even if any of the evidence was inadmissible, none of it substantially impacted Roskoski's rights or the verdict. Roskoski based his defense on the theory that he was not at the attack scene and that the attacking dog was not his. Evidence of his supposed bad character could not have led to conviction if the jury believed his double alibi. And evidence of his presence was overwhelming, established by three of the four eyewitnesses.

II

Roskoski also does not persuade us that his conviction should be reversed based on prosecutorial misconduct. A prosecutor engages in misconduct by saying and doing something that materially undermines the fairness of a trial, or by violating rules, laws, or

court orders. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). We review prosecutorial misconduct claims under different standards depending on whether the conduct was objected to at trial.

Objected-To Alleged Prosecutorial Misconduct

The state presented evidence of changes to the group home's safety policy, drawing an objection. This did not constitute prosecutorial misconduct. We review this objected-to alleged misconduct under a two-tiered harmless-error test. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). We first consider whether misconduct occurred and, if so, we consider whether the misconduct played a substantial part in the jury's verdict. *Id.* The district court found this evidence relevant to one of the elements of disorderly conduct—proof that the behavior reasonably caused alarm. *See* Minn. Stat. § 609.72, subd. 1(3) (2010). It is not prosecutorial misconduct to present admissible relevant evidence.

Unobjected-To Alleged Prosecutorial Misconduct

We see either no misconduct and no prejudice in the alleged unobjected-to prosecutorial misconduct. We again apply the plain error test. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Roskoski's first claim of unobjected-to error has some merit. He complains that the prosecutor disparaged his defense by introducing facts not in evidence during closing argument by suggesting that Roskoski had intimidated his family to lie to the jury and by asserting that his wife's testimony was really a "cry for help." A prosecutor commits misconduct when he bases an argument on facts not in evidence. *State v. Salitros*, 499

N.W.2d 815, 817 (Minn. 1993). A prosecutor may argue that a defendant's witnesses lack credibility, but he may not rely on facts not in evidence to do so. *State v. Johnson*, 359 N.W.2d 698, 701–02 (Minn. App. 1984). The record contains no evidence of Roskoski's family fearing him or of Roskoski intimidating his family to lie on his behalf. The prosecutor's argument suggesting these facts was therefore improper. But this is no basis to reverse the conviction because there is no reasonable likelihood that the prosecutor's errant comments affected the verdict. Roskoski was convicted primarily on evidence of four separate eyewitnesses, three who identified him and two who heard him urge his dog to attack. All four witnessed Roskoski taking no action to recall the German Shepherd, ignoring Pucel's pleas. Because the overwhelming evidence contradicted the testimony of Roskoski's family members, the prosecutor's impermissible statements about their credibility had no likely effect on the verdict.

Roskoski's second unobjected-to alleged error is the accumulation of statements injecting the personal opinion of the prosecutor throughout the trial. Roskoski cites more than twenty instances of the prosecutor supposedly adding his personal opinion. For example, during closing arguments, the prosecutor stated, "I wouldn't let him [the German Shepherd] around my kids" and "I'm not going to pay too much attention to it because I've already told you I think they are lying about it." The state concedes that the prosecutor offered his personal opinion during jury selection and in his closing argument. It is improper for a prosecutor to interject his personal opinion about the veracity of witnesses. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). But even cumulatively, the challenged statements could not have influenced the verdict. The objectionable

statements were brief, and they were insignificant given the overwhelming and mostly uncontested evidence that Roskoski was present and engaged in the offending conduct. The prosecutor relied heavily on the four witnesses, not on personal opinion, when arguing for conviction. We hold that the prosecutor's injecting his personal opinion, though improper, did not affect Roskoski's substantial rights or prejudice the verdict.

Roskoski similarly argues that the prosecutor inflamed the passions of the jury by appealing to law and order. He points, for example, to the prosecutor's statement, "I don't know what more I could have done to put this case outside the realm of reasonable doubt." A prosecutor should never appeal to the passions of the jury. *State v. Mayhorn*, 720 N.W.2d 776, 786–87 (Minn. 2006). If credibility is a central issue in the trial, the district court should pay close attention to this type of misconduct. *Id.* But again, misconduct in the prosecutor's comments must be viewed against the overwhelming evidence of Roskoski's guilt. *See Rairdon v. State*, 557 N.W.2d 318, 324 (Minn. 1996). And the prosecutor relied substantially (and against little challenge) on the detailed testimony of the four eyewitnesses. The alleged inflaming was also slight; so even if the prosecutor's conduct rose to the level of plain error, we would not reverse because the challenged statements did not prejudice Roskoski's substantial rights.

III

We also see no reason to reverse based on Roskoski's claim that he was denied the effective assistance of counsel. The United States and Minnesota Constitutions guarantee criminal defendants the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. This right includes the right to effective assistance. *Strickland v.*

Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). To prevail on an ineffective-assistance-of-counsel claim, the defendant must establish that his counsel's performance was objectively deficient and that the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). We won't address both prongs if one is determinative. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

We conclude that Roskoski's counsel's performance did not prejudice the defense. Roskoski argues broadly about an array of alleged errors made at trial by his counsel. But he makes no argument and points to no evidence that the outcome of his case would have been different without these errors. He merely asserts that there is more than a reasonable probability that the outcome of the trial would have been different but for his attorney's negligence. But he never attempts to explain why this is so. In similar fashion, we simply reject his assertion: there is no reasonable probability that the result of the trial would have been different without counsel's alleged errors, none of which appears to have been significant.

IV

Roskoski correctly challenges the district court's disorderly conduct sentence of two years of probation. The sentence is not authorized by law because a disorderly conduct conviction carries a maximum probationary period of one year. Minn. Stat. §§ 609.135, subd. 2(e), 609.72, subd. 1 (2010). The district court lacks "inherent authority to impose terms or conditions of sentences for criminal acts" and is bound to sentence only within the limits of its statutory authority. *State v. Brist*, 799 N.W.2d 238,

242 (Minn. App. 2011), *aff'd*, 812 N.W.2d 51 (Minn. 2012). The state also has conceded this point in its brief and in oral argument. We therefore remand the case to the district court to impose a sentence within the statutory limits.

Affirmed in part, reversed in part, and remanded.