STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1752

State of Minnesota,
Respondent,

vs.

William Mcsho Hall, II,
Appellant.

Filed September 25, 2017
Affirmed
Florey, Judge
Concurring specially, Cleary, Chief Judge

Hennepin County District Court
File No. 27-CR-16-4303

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Kirk, Judge; and Florey, Judge.

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

FLOREY, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that the prosecutor committed prejudicial misconduct by (1) eliciting evidence that appellant is the author of a book of erotic fiction; (2) characterizing appellant's defense as

a "trick"; and (3) deliberately eliciting bad-act evidence that had previously been ruled inadmissible by the district court. Because the alleged prosecutorial misconduct did not affect appellant's substantial rights, we affirm.

FACTS

In August 2014, appellant William Hall moved to Minneapolis with his girlfriend J.H. and her three daughters, 16-year-old Sk., 14-year-old, C.H., and 11-year-old Sa. Appellant's relationship with J.H. eventually began to deteriorate, and by August 2015, the relationship was over and appellant had moved out of the house. Several months later, C.H. informed her mother and her therapist, M.B-K., that she had been sexually abused by appellant in December 2014. J.H. reported this information to law enforcement, and appellant was charged with two counts of first-degree criminal sexual conduct.

At trial, C.H. testified that during the evening of December 28, 2014, while J.H. was in Michigan attending her grandfather's funeral, appellant "hung out" with C.H. and her sisters and provided them with alcohol. According to C.H., appellant played games with the girls, and she drank "a glass" of "[r]um mixed with coke." At the end of the evening, appellant asked the girls if they wanted to sleep "upstairs" in the master bedroom. C.H. testified that Sk. "thought it was weird, so she went down to her room" in the basement. But C.H. and Sa. agreed to sleep with appellant in his king-sized bed.

C.H. testified that sometime during the night, she awoke to find appellant rubbing her stomach. According to C.H., appellant then "started moving his hand down . . . into [her] underwear" and began "rubbing" her vagina before putting "his finger inside [her] vagina." C.H. testified that when she "pulled his hand away," appellant "kind of sat up"

and told her to "meet him downstairs in a couple of minutes." After appellant left the room, C.H. went downstairs to "see what he want[ed]." Appellant told C.H. that he was a "bad person" and that "he shouldn't have done that," but then asked C.H. if he could "taste" her. C.H. testified that she understood appellant's inquiry to mean "oral sex," and that she told him "no" and then went to bed in her room.

Sk. testified that she awoke on December 29 to find C.H. sleeping in her bedroom. Sk. wondered what happened and went upstairs and saw appellant "sitting at the foot of the bed." According to Sk., appellant looked "troubled" and told her that he "messed up." Sk. testified that appellant first told her that he "woke up from a dream" and was "touching" C.H. But appellant then changed his story and told Sk. that "he woke up to [C.H.] touching him." Appellant also told Sk. not to "tell people." Later that day, Sk. asked C.H. if she had touched appellant. C.H. started crying and denied touching appellant.

M.B-K. testified that she met with C.H. on January 14, 2015. C.H. told M.B-K. that, while her mother was away attending a funeral, C.H. and her sisters drank with appellant and that she slept in the same bed as appellant that night. C.H. also told M.B-K. that "she woke up in the middle of the night" to find appellant "rubbing her stomach." M.B-K. testified that although C.H. was "very adamant" that nothing happened, M.B-K. suspected that C.H. was withholding information.

Appellant took the stand in his defense and acknowledged drinking alcohol with C.H. and Sk. on December 28, 2014. But according to appellant, it was Sa. and C.H. who asked to sleep with him in the master bedroom. Appellant also claimed that after he went to sleep, he woke up with C.H. "kind of half on my shoulder, half on my chest" and her

arm "over my stomach." Appellant stated that he "felt uncomfortable" because he thought he was having a dream that C.H. was "touching [his] penis." Appellant testified that he told C.H. that letting her sleep in his bed was a "mistake" and that he was "not mad at" her, but "that can't happen." Appellant denied touching C.H.'s vagina.

The jury found appellant guilty of the charged offenses. The district court then sentenced appellant to 144 months in prison. This appeal followed.

D E C I S I O N

Appellant argues that the prosecutor committed misconduct by (1) eliciting irrelevant and prejudicial evidence about a book appellant had authored; (2) disparaging the defense during closing arguments; and (3) introducing certain text messages during the cross-examination of appellant that had previously been ruled inadmissible. But appellant agrees that he did not object to the alleged prosecutorial misconduct. Accordingly, we apply a modified plain-error test. *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014). To prevail, appellant must establish that there was an error and that the error is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If such an error is established, the burden then shifts to the state to show that the plain error did not affect appellant's substantial rights. *Id.* "If all three prongs of the test are met, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) (quotations omitted).

I. Questions about appellant's book

Generally, "[a]ll relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." Minn. R. Evid. 402. But relevant evidence "may be excluded

if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403.

During the prosecutor's cross-examination of appellant, the prosecutor elicited testimony from appellant about statements contained in a book of erotic fiction authored by appellant and titled *A Taste of Distraction*. Appellant argues that it was misconduct for the prosecutor to elicit this testimony because the evidence was irrelevant and was used to improperly attack his character.

We disagree. During cross-examination of appellant, the prosecutor asked appellant to read an excerpt from his book in which he "refers to oral sex on a woman as tasting her." This evidence is relevant because C.H. testified that after the alleged digital penetration, appellant asked her if he could "taste" her. The excerpts from appellant's book establish that appellant used that language when referring to oral sex, and they supported C.H.'s odd statement about oral sex. *See State v. Holscher*, 417 N.W.2d 698, 702-03 (Minn. App. 1988) (holding sex toys seized from the scene of a sexual assault were relevant and admissible even though they were not used against the victim); *review denied* (Minn. Mar. 18, 1988). Therefore, it was not plain error for the prosecutor to question appellant about the contents of his book.

II. Closing arguments

It is well settled that the prosecution has the right to vigorously argue its case. *Peltier*, 874 N.W.2d at 804. A prosecutor also has latitude to respond to the defendant's arguments. *State v. Jackson*, 773 N.W.2d 111, 123 (Minn. 2009). But a prosecutor is not permitted to "disparage" or "belittle" a defense. *Peltier*, 874 N.W.2d at 804. This court

reviews closing arguments in their entirety when determining whether prosecutorial misconduct occurred. *State v. Vue*, 797 N.W.2d 5, 15 (Minn. 2011); *see State v. Jackson*, 714 N.W.2d 681, 694 (Minn. 2006) (noting that this court should "consider the closing argument as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence" (quotations omitted)).

During closing arguments, the prosecutor argued that

> If [the state's witnesses] all got up there and told the exact same story with all the exact same details, well then you'd know they're lying because you'd know they put it together. But know the reality is we're talking about something that happened two years ago, a traumatic event. And we have witnesses that only experienced various portions of it. So don't fall for that trick.

Appellant argues that the prosecutor engaged in misconduct during closing arguments by "represent[ing] to the jury that [appellant's] defense was . . . a trick." We agree. In *State v. Jones*, the supreme court concluded that the prosecutor's "reference to the defense strategy as an 'old trick' was an error that was plain." 753 N.W.2d 677, 692 (Minn. 2008); *see also State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993) (stating that it is "clearly improper for a prosecutor to suggest that the arguments of defense counsel are part of some sort of syndrome of standard arguments that one finds defense counsel making in cases of this sort"). Therefore, we conclude that under *Jones*, the prosecutor's reference to appellant's defense as a "trick" was plain error.

III. Admission of text messages

A prosecutor may not seek a conviction at any cost. *See Salitros*, 499 N.W.2d at 817. Rather, a prosecutor "is a minister of justice whose obligation is to guard the rights

of the accused as well as to enforce the rights of the public," and to ensure that a defendant receives a fair trial. *Ramey*, 721 N.W.2d at 300 (quotation omitted). Violations of established standards of conduct, including "orders by a district court" and "attempting to elicit or actually eliciting clearly inadmissible evidence may constitute [prosecutorial] misconduct." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007).

Prior to trial, the state sought to introduce several text messages sent to J.H. by appellant. The district court admitted some of the text messages and excluded others. But during cross-examination of appellant, the prosecutor asked appellant if he "ever threaten[ed] to kill [J.H.]?" After appellant replied, "No," the prosecutor asked appellant to read the following text message that had previously been ruled inadmissible, in which appellant told J.H.: "F-ck another d-ck and don't get paid, I will f-cking kill you. I'm not joking." The prosecutor then asked appellant to read another text message he sent to J.H. in which he stated: "If you f-ck him, you better bring me some money, at least a hundred."

Appellant argues that the prosecutor's reference to these text messages was misconduct because the prosecutor was "well-aware" that the messages had been ruled inadmissible, and the evidence was improperly used to attack his character by accusing appellant of being a pimp. Conversely, the state argues that the reference to the text messages was not error because appellant "effectively opened the door to the questioning about his threat to kill J.H." when he answered "no" to the prosecutor's question on cross examination if had ever threated to kill J.H.

> Opening the door occurs when one party by introducing certain material creates in the opponent a right to respond with material that would otherwise have been inadmissible. The

> doctrine is essentially one of fairness and common sense, based on the proposition that one party should not have an unfair advantage and that the factfinder should not be presented with a misleading or distorted representation of reality.

State v. Bailey, 732 N.W.2d 612, 622 (Minn. 2007) (citations and quotations omitted).

We conclude that the prosecutor's use of the text-messages during cross-examination of appellant is very troubling and constitutes misconduct because the prosecutor never asked the district court if appellant had opened the door and if the text messages could be used to impeach appellant. It was not for the prosecutor to determine whether appellant "opened the door" so that the text messages, which had previously been ruled inadmissible, could be used as impeachment evidence. Instead, that was a decision that rested exclusively with the district court. If the prosecutor felt that appellant had "opened the door" when he answered "no" to the prosecutor's question as to whether appellant had "ever threaten[ed] to kill [J.H.]," then it was the prosecutor's duty to request permission of the district court to impeach appellant with a statement that the court had previously ruled inadmissible. This could have easily been accomplished through a motion to the district court out of the jury's presence, requesting permission to use the statement for impeachment based on the claim that appellant had "opened the door." But by proceeding in the manner that he did, the prosecutor did not give the district court that opportunity. Had the district court been given that opportunity, the court might have denied the request to impeach with that statement. After all, the alleged inconsistent statement was elicited by the prosecutor during cross-examination when the prosecutor knew that the proof of inconsistency had already been ruled inadmissible.

Alternatively, the district court might have found that the door had been opened as to the threat to kill, but that the other information in the text that J.H. "f-cked another d-ck and [did not] get paid for it" was inadmissible because it was unrelated to the threat to kill and unfairly prejudicial. Again, by proceeding as he did, the prosecutor deprived the district court of that opportunity.

Moreover, the record reflects that the method of impeachment was improper. Rather than directly questioning appellant about the threat to kill in the text message, thereby giving appellant an opportunity to admit or deny the statement, the prosecutor had appellant read the entirety of the previously ruled inadmissible message. By doing this, the jury heard not only the impeaching portion of the message, but also inadmissible character evidence suggesting that appellant was a pimp. Only if appellant had denied sending the text should he have been asked to read the text, or at least those portions of the text that the district court might have allowed. And finally, the record reflects that in addition to improperly referencing the text messages, the prosecutor followed up by improperly attacking appellant's character by accusing appellant of being a pimp. Under these circumstances, the prosecutor's conduct clearly constitutes prosecutorial misconduct.

IV. Prejudice

Appellant argues that he is entitled to a new trial because the alleged prosecutorial misconduct affected his substantial rights. In addressing this question, we consider (1) the strength of the state's evidence; (2) "the pervasiveness of the erroneous conduct"; and (3) whether the defendant "had an opportunity to rebut any improper remarks." *Peltier*, 874 N.W.2d at 805-06.

The record reflects that the alleged erroneous conduct was not pervasive. The prosecutor briefly questioned appellant about the inadmissible text messages and did not mention them during closing arguments. Moreover, the content of the text messages was not central to the state's case. *See id.* at 806 (concluding that prosecutorial misconduct did not affect substantial rights when the "prosecutor did not unduly emphasize, or repeat" any of the improper remarks, and none of the misconduct "was central to the State's case"). And the use of the word "trick" during closing arguments was an isolated incident, comprising only one word in the prosecutor's entire closing argument. *See Jones*, 753 N.W.2d at 692-93 (concluding that the prosecutor's plain error of referencing the defense strategy as an "old trick" was not prejudicial because it was "not a significant part of the State's closing argument," the evidence against the defendant "was very strong," and the defense had the opportunity to correct the prosecutor's comments in his own closing argument).

The record also reflects that appellant had the opportunity to rebut the alleged misconduct, and did so by briefly acknowledging that "nasty text messages"[1] were sent, but imploring the jury to consider their context. Moreover, the evidence against appellant was compelling. C.H.'s testimony was consistent and corroborated by J.H., Sk., and M.B-K. Finally, none of the alleged misconduct was particularly relevant to the state's case, and there is no reasonable likelihood that the outcome of the case would have been different in the absence of the alleged misconduct. *See Ramey*, 721 N.W.2d at 302 (stating that an

[1] Notably, there were several text messages between appellant and J.H. that were admitted into evidence.

error is prejudicial if there is a reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the outcome of the case). Accordingly, appellant is not entitled to a new trial.

Affirmed.

CLEARY, Chief Judge (concurring specially)

While I agree with the majority that appellant is not entitled to a new trial, I write separately to underline and emphasize how the prosecutor's misconduct in this case needlessly jeopardized the state's case and, if the evidence against appellant wasn't so compelling, would likely have resulted in a new trial.

The text-messages at issue had been ruled inadmissible. Period. Those highly inflammatory messages, one in particular, remained inadmissible unless and until the court decided otherwise. The court never got the chance. The prosecutor took it upon himself to plow ahead without a court ruling because the prosecutor had determined that the appellant had "opened the door" to such questions. (A sidebar occurred *after* the jury had heard the damaging character evidence that had been ruled inadmissible.) As the majority suggests, this use of these text-messages is "very troubling." It is not clear why the defense did not object to this line of questioning at the start, or why the court did not get involved when one text message, previously ruled inadmissible, was read in its entirety to the jury, both the impeaching portion of the message as well as the irrelevant and highly inflammatory inadmissible character evidence. This type of sleight of hand and overkill is deeply offensive to our justice system and could very well have resulted in a mistrial.

I vote with the majority to affirm because of the strength of the state's evidence; because the inadmissible text messages were not mentioned in closing argument; and because the appellant had the opportunity, such as it was, to respond to the misconduct. This was a close call only because the prosecutor endangered the conviction with his misconduct.