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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2053

State of Minnesota,
Respondent,

vs.

James Willard Murray,
Appellant.

Filed December 26, 2017
Affirmed
Johnson, Judge

Mille Lacs County District Court
File No. 48-CR-14-1754

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Joe Walsh, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Klaphake, Judge.[*]

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

UNPUBLISHED OPINION

JOHNSON, Judge

A Mille Lacs County jury found James Willard Murray guilty of malicious punishment of a child based on evidence that his five-month-old son sustained a serious and permanent brain injury while in Murray's care. We conclude that the evidence is sufficient to support the conviction and that the prosecutor did not engage in misconduct during opening statements or closing arguments. Therefore, we affirm.

FACTS

In July 2014, Murray lived in a townhome in Onamia with his girlfriend, C.A.S.-P.; their five-month-old son, C.M.; and C.A.S.-P.'s two-year-old child from a prior relationship. C.A.S.-P. was employed; Murray cared for their baby while C.A.S.-P. was at work. C.A.S.-P. frequently took C.M. to a pediatrician for check-ups and for issues such as a respiratory infection, acid reflux, and pink eye, but C.M. essentially was a healthy baby, though he often was fussy.

During the morning of Monday, July 28, 2014, Murray was at home with C.A.S.-P. and C.M. A next-door neighbor and his three-year-old son visited. Murray and the neighbor played video games in Murray's home for a few hours before the neighbor left to allow his son to take a nap. At approximately noon, C.A.S.-P. put C.M. down for a nap on the couple's bed. At approximately 1:00 p.m., she went to work. Murray stayed home with C.M.

At approximately 2:00 p.m., a family friend who is C.M.'s godmother made a spontaneous visit to Murray's townhome. The godmother immediately saw Murray in a

state of panic, pacing back and forth with C.M. in his arms. Murray gave C.M. to the godmother. The baby was not breathing. The godmother left the townhome with C.M. and rushed him to the emergency room of a nearby hospital. Murray followed.

When C.M. arrived at the emergency room, he was "gasping" for air, his eyes were rolled back, and he was limp and lifeless. He was flown by helicopter to Children's Hospital in Minneapolis. Medical professionals there observed retinal hemorrhages in both of the baby's eyes and a subdural hematoma (*i.e.*, bleeding around the outside layer of the brain).

Investigators from the Mille Lacs County Sheriff's Office interviewed Murray four times between July 28 and August 29, 2014. In the first interview, on July 30, 2014, Murray said that he went upstairs to check on C.M. because he heard him fussing. He said that he changed C.M.'s diaper and brought him downstairs. On his way down the stairs, Murray said that C.M. "just went limp in [his] arms." Murray said that C.M.'s godmother then entered the townhome, and they took C.M. to the emergency room. In the second interview, on August 20, 2014, Murray maintained that nothing unusual happened before C.M. suddenly "stiffened up" and became limp as Murray brought him downstairs.

In the third interview, on August 29, 2014, Murray said that he earlier had "left a detail out." Murray said that when he brought C.M. downstairs, he placed him on his knee, sitting upright, and began to "bounce him pretty hard." Murray said that he became frustrated after C.M. would not stop crying and bounced C.M. even harder. Murray said, "I realized that I probably shook him too hard or something, and he was still crying so I just grabbed him and I started soothing him . . . to pat him on his back and he had a seizure."

In the fourth interview, approximately 20 minutes after the third, Murray reiterated that he bounced C.M. after getting frustrated with his crying.

The state charged Murray with five offenses: (1) first-degree assault by inflicting great bodily harm, in violation of Minn. Stat. § 609.221, subd. 1 (2012); (2) third-degree assault on a victim under the age of four, in violation of Minn. Stat. § 609.223, subd. 3 (2012); (3) domestic assault, in violation of Minn. Stat. § 609.2242, subd. 4 (2012); (4) malicious punishment of a child under the age of four years old, in violation of Minn. Stat. § 609.377, subd. 4 (2012); and (5) malicious punishment of a child by inflicting great bodily harm, in violation of Minn. Stat. § 609.377, subd. 6 (2012).

The case was tried on seven days in June 2016. The state called 11 witnesses. C.A.S.-P. testified that C.M. had not experienced any traumatic events immediately before July 28, 2014. The neighbor testified that when he left Murray's townhome, C.M. was fussy but otherwise normal. Jason Gallion, an investigator with the Mille Lacs County Sheriff's Office, testified that, based on his interviews of Murray, C.A.S.-P., and the neighbor, he determined that C.M. was uninjured when C.A.S.-P. left for work at approximately 1:00 p.m. and that Murray was alone with C.M. until C.M.'s godmother arrived. During Gallion's testimony, the state played for the jury the four audio-recorded interviews of Murray. C.M.'s godmother testified that when she arrived at the townhome, she noticed that the infant was not breathing, that his legs were blotchy red, and that his arms were limp. On cross-examination, she explained that while C.M. was being airlifted, C.M.'s breathing tube slipped out of his throat and medical personnel administered cardiopulmonary resuscitation (CPR).

The state also presented the testimony of four medical professionals who treated C.M. and one medical professional who testified as an expert witness. Erik Rivers, who was employed as a physician's assistant in the Mille Lacs emergency room on July 28, 2014, and saw C.M. immediately upon his arrival, testified that C.M. was unconscious and having difficulty breathing and that the medical professionals in the trauma bay used a bag mask to pump oxygen into his lungs. Rivers explained that "trauma" occurs "when the body has suffered some form of insult, external to the body," such as a "fall, physical abuse like a fist fight or . . . an accident."

Dr. Richard Patterson, a pediatric radiologist at Children's Hospital who specializes in neuro-imaging, testified that C.M.'s brain scans showed bleeding around the brain, which initially raised suspicion of abusive head trauma because such trauma is a leading cause of subdural hematoma in infants. Dr. Patterson testified that an expansion of fluid around the brain typically occurs in the first day after the injury. Dr. Patterson also testified that C.M. did not show signs of a skull fracture or scalp swelling, which would indicate an external force. Rather, C.M.'s injuries were "intracranial," which suggests "abusive trauma," which he defined as "neuro-trauma injury to the brain, its coverings, the spinal cord" as "a result of . . . physical maltreatment." On cross-examination, Dr. Patterson testified that C.M.'s injuries were similar but not identical to injuries caused by suffocation or drowning, which involves a lack of oxygen.

Dr. Michael Vespasiano, a pediatric critical-care physician at Children's Hospital, testified that he referred C.M. to the Midwest Children's Resource Center (MCRC) due to his concern about possible child abuse. Dr. Vespasiano testified that C.M.'s injuries were

"non-accidental in nature" because there was no report of a fall, car accident, or other injury and because C.M.'s condition developed in a short period of time.

Laurel Edinburgh, a nurse and assistant clinical director of the MCRC, testified that she examined C.M. on July 29, 2014, and concluded that his injuries were "strongly concerning for child physical abuse." Edinburgh determined that C.M.'s injuries were caused by "significant head trauma" because retinal hemorrhages do not occur as a result of a "tiny fall" and because C.M. lacked any medical history that would indicate any other significant incident, such as a motor-vehicle accident.

During its case-in-chief, the state introduced evidence to refute the anticipated defense theory that C.M.'s injuries were caused by a lack of oxygen when the breathing tube was dislodged during the flight from Onamia to Minneapolis. Dr. Vespasiano testified that C.M.'s injuries could not have been caused by the intubation issues that occurred during C.M.'s transport from Mille Lacs to Children's Hospital. Rivers testified that a lack of oxygen might cause damage to a child but would not cause the severe head trauma that C.M. sustained. Dr. Mark Hudson, who was qualified as an expert witness, testified that, based on C.M.'s age, immobility, and lack of medical history of trauma, the cause of his injuries was "abuse." Dr. Hudson explained that C.M.'s retinal hemorrhages and bleeding on the brain were "highly suggestive" of severe trauma. He explained that, because a five-month-old infant is non-mobile, "it is almost impossible for an infant to have trauma where a caregiver does not know about it." Dr. Hudson further testified that C.M.'s injuries occurred "prior to medical intervention" and could not have been caused by a lack of oxygen.

The state also offered evidence of the after-effects of C.M.'s injuries. Dr. Karilyn Avery, a pediatrician in Little Falls, testified that she examined C.M. on five occasions, beginning when he was nine months old. Dr. Avery testified that, at nine months, C.M. was unable to sit up, to focus his eyes, to move his arms, and to vocalize as would be expected of a nine-month-old child. Dr. Avery further testified that, during her last examination, when C.M. was almost two years old, he "was not interacting like a normally developing almost 2 year old." She explained that C.M. should have been able to interact, to speak a few simple words, to respond to commands, to walk, and to learn, but that he was not demonstrating any of those normal two-year-old behaviors.

The defense re-called C.A.S.-P. and also called two expert witnesses. Dr. Thomas Young, a clinical and forensic pathologist, testified that C.M.'s injuries could not have been caused by bouncing an infant on a person's knee three times. Dr. Young testified that C.M.'s injuries likely were caused by oxygen deprivation when "the breathing tube stopped functioning." Dr. John Plunkett, a pathologist, testified that C.M.'s brain injury was caused by a lack of oxygen when his breathing tube became plugged or dislodged.

The jury found Murray guilty on counts 4 and 5. The jury was unable to reach verdicts on counts 1, 2, and 3. The district court imposed a sentence of 68 months of imprisonment on count 5, the charge of malicious punishment of a child by inflicting great bodily harm. Murray appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Murray argues that the evidence is insufficient to support his conviction. His argument has two parts. First, he argues that the evidence is insufficient to prove beyond a reasonable doubt that he engaged in discipline or punishment. Second, he argues that the evidence is insufficient to prove beyond a reasonable doubt that he caused the bodily harm that C.M. suffered.

When reviewing whether there is sufficient evidence to support a conviction, this court undertakes a "painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient" to support the conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). We "will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

The statute setting forth the offense of conviction provides as follows: "A parent, legal guardian, or caretaker who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of malicious punishment of a child . . . ." Minn. Stat. § 609.377, subd. 1. The offense is a felony "[i]f the punishment is to a child under the age of four and

causes bodily harm to the head, eyes, neck, or otherwise causes multiple bruises to the body," *id.*, subd. 4, or "[i]f the punishment results in great bodily harm," *id.*, subd. 6. In this case, the state charged Murray in counts 4 and 5 with the felony offenses authorized by subdivisions 4 and 6. The jury found Murray guilty of both offenses, and the district court sentenced him on count 5.

A. Whether Murray Disciplined C.M.

Murray first argues that the evidence is insufficient to prove beyond a reasonable doubt that he engaged in discipline or punishment, which he contends is necessary to satisfy the statutory definition of the offense. He elaborates by asserting that his pre-trial statements, which were admitted into evidence, "showed that he was not punishing C.M. but was trying to soothe and calm him."

Murray's argument is based on the statutory requirement that he engaged in "unreasonable force or cruel discipline." *See* Minn. Stat. § 609.377, subd. 1. The two terms — "unreasonable force" and "cruel discipline" — are alternatives. *State v. Broten*, 836 N.W.2d 573, 577 (Minn. App. 2013), *review denied* (Minn. Nov. 12, 2013). Accordingly, the evidence wo.uld be sufficient if it showed that Murray's actions constituted either "unreasonable force" or "cruel discipline." *See* Minn. Stat. § 609.377, subd. 1; *Broten*, 836 N.W.2d at 577.

To the extent that Murray's argument assumes that the state must prove "discipline," his argument is based on an incorrect premise. As a matter of law, proof of "discipline" is unnecessary if there is proof of "unreasonable force." *See* Minn. Stat. § 609.377, subd. 1;

Broten, 836 N.W.2d at 577. Murray does not contend that the evidence is insufficient to prove that his actions constitute "unreasonable force."

To the extent that Murray's argument assumes that, to satisfy the applicable statute, the state must prove "punishment," his argument is based on another incorrect premise. As a matter of law, proof of "punishment" is unnecessary because it is not included in the operative language of the statute. *See* Minn. Stat. § 609.377, subd. 1. Murray relies on a pattern jury instruction, which defines "unreasonable force" to mean "such force used in the course of *punishment* as would appear to a reasonable person to be excessive under the circumstances." *See* 10 Minnesota Dist. Judges' Ass'n, *Minnesota Practice—Jury Instruction Guides*, § 13.85, at 655 (Thomson Reuters 6th ed. 2015) (emphasis added). The pattern jury instruction on which Murray relies is among the pattern jury instructions published by the Minnesota District Judges' Association and is a resource for district court judges and attorneys. *See Minnesota Practice—Jury Instruction Guides*, *supra*, at iii-v; *Rowe v. Munye*, 702 N.W.2d 729, 734 n.1 (Minn. 2005). The pattern jury instructions "express the opinion of the Minnesota District Judges Association Committee on Criminal Jury Instruction Guides." *State v. Broulik*, 606 N.W.2d 64, 70 (Minn. 2000). The pattern jury instructions are not, in and of themselves, binding law. *See State v. Peterson*, 673 N.W.2d 482, 484 n.1 (Minn. 2004); *Rowe*, 702 N.W.2d at 734 n.1; *Broulik*, 606 N.W.2d at 70. Furthermore, it is irrelevant that the term "punishment" is used in the caption of the statute. The legislature has expressly instructed the courts to disregard the captions of statutes: "The headnotes printed in boldface type before sections and subdivisions in editions of Minnesota Statutes are mere catchwords to indicate the contents of the section

or subdivision and are not part of the statute." Minn. Stat. § 645.49 (2016); *see also Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 303 n.23 (Minn. 2000) (stating that "revisor's headnotes are not part of the statute and thus do not determine its scope or meaning"). The plain language of section 609.377, subdivision 1, does not require the state to prove that Murray "punished" C.M.

Thus, the evidence is sufficient to prove that Murray engaged in the conduct required by the statute, "unreasonable force or cruel discipline," because the evidence is sufficient to prove that he used unreasonable force. *See* Minn. Stat. § 609.377, subd. 1.

B. Whether Murray Caused C.M.'s Bodily Harm

Murray next argues that the evidence is insufficient to prove beyond a reasonable doubt that he caused bodily harm to C.M. He elaborates by asserting that "[t]he state specifically argued to the jury that appellant committed malicious punishment of a child by bouncing C.M. on his lap" and that such conduct "caused bodily harm" but that "the state's theory was not supported by the testimony of the state's medical experts," who testified that C.M.'s injuries were caused by "abusive head trauma."

Murray's argument is based on the premise that the jury found him guilty because of his own pre-trial statements, in which he admitted that he bounced C.M. on his knee too vigorously. That is an incorrect premise, for two reasons. First, the prosecutor did not limit her argument to the evidence of Murray's pre-trial statements. The prosecutor did mention Murray's pre-trial statements when discussing counts 4 and 5. But she also referred to the evidence provided by the medical professionals who testified that C.M.'s injuries were the result of "non-accidental abusive head trauma," which she previously had

described in greater detail. Second, even if the prosecutor's closing argument had relied solely on Murray's pre-trial statements about bouncing C.M. too hard, our appellate review would not be limited to the scope of the prosecutor's argument. Our duty is to determine whether the evidence is sufficient to satisfy the requirements of the applicable law, and we are obligated to review the entire evidentiary record, not just the evidence that the prosecutor chose to highlight in closing argument.

In its responsive brief, the state relies on evidence other than Murray's pre-trial statements. For example, the state notes that "[m]ultiple doctors and other medical professionals involved in C.M.'s treatment testified that severe head trauma causes the combination of injuries seen in C.M.; namely, retinal hemorrhages and subdural hematoma." The state's reliance on the testimony of its medical witnesses indicates that it seeks to establish causation with circumstantial evidence. Accordingly, we must apply the standard of review that is appropriate for convictions based on circumstantial evidence. *See State v. Horst*, 880 N.W.2d 24, 39-40 (Minn. 2016); *State v. Salyers*, 858 N.W.2d 156, 160-61 (Minn. 2015); *State v. Flowers*, 788 N.W.2d 120, 133 n.2 (Minn. 2010).

When reviewing a conviction based on circumstantial evidence, this court applies a two-step analysis to determine the sufficiency of the evidence. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, we "identify the circumstances proved." *Id.* (citing *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010)). "In identifying the circumstances proved, we assume that the jury resolved any factual disputes in a manner that is consistent with the jury's verdict." *Id.* (citing *Andersen*, 784 N.W.2d at 329). Second, we "examine independently the reasonableness of the inferences that might be drawn from the

circumstances proved" and "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotations omitted). We must consider the evidence as a whole and not examine each piece of evidence in isolation. *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). "To sustain a conviction based on circumstantial evidence, the reasonable inferences that can be drawn from the circumstances proved as a whole must be consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *State v. Harris*, 895 N.W.2d 592, 598 (Minn. 2017) (internal quotation omitted).

At the first step of the circumstantial-evidence analysis, we must identify the circumstances proved that are relevant to the question whether Murray caused C.M.'s bodily injuries. *See Moore*, 846 N.W.2d at 88. The relevant circumstances are as follows: Murray is the father of C.M. On July 28, 2014, Murray was caring for C.M., who was five months old at the time. A neighbor visited Murray's townhome that morning, and C.M. was normal when the neighbor left. C.A.S.-P. placed C.M. down for a nap at noon. The infant was uninjured when C.A.S.-P. left for work at approximately 1:00 p.m. C.M.'s godmother visited the townhome an hour later and saw Murray holding C.M., who was limp. The godmother immediately brought C.M. to a nearby hospital emergency room. C.M. was unconscious and having difficulty breathing. C.M. was flown from Onamia to Minneapolis. Medical professionals in Minneapolis diagnosed C.M. with retinal hemorrhages and a subdural hematoma. C.M. had no history of a prior trauma. C.M. did not sustain any bruising, fractures, or broken bones on his skull. C.M.'s brain injuries are consistent with non-accidental abusive trauma.

At the second step of the analysis, we must "examine independently the reasonableness of the inferences that might be drawn from the circumstances proved" and "determine whether the circumstances proved are consistent with guilt." *See id.* (quotations omitted). In light of the circumstances proved, one inference is that Murray caused C.M.'s bodily injuries by a means other than bouncing the baby on his knee, such as by shaking the baby violently. This is a reasonable inference in light of the medical evidence about the nature of C.M.'s injuries, the evidence that other causes are impossible or implausible, the evidence that C.M.'s injuries were sustained shortly before he arrived at the emergency room, the evidence that C.M. was uninjured only two hours before he arrived at the emergency room, and the evidence that Murray was the only other person with C.M. before the symptoms appeared.

At the second step of the analysis, we also must determine whether the circumstances proved are "inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted). Murray cites evidence that C.M.'s injuries may have been caused by a lack of oxygen due to the failure of the breathing tube during the airlift to Minneapolis or by the use of CPR to revive him when he stopped breathing. Either hypothesis is too implausible to be rational given the testimony of multiple medical professionals that C.M.'s injuries were severe and were inconsistent with an injury caused by a lack of oxygen. The overwhelming evidence shows that non-accidental abusive head trauma is the only rational hypothesis concerning the cause of C.M.'s injuries, and that hypothesis is consistent with Murray's guilt.

Thus, the circumstantial evidence is sufficient to support Murray's conviction of malicious punishment of a child.

II. Prosecutorial Misconduct

Murray argues that he is entitled to a new trial on the ground that the prosecutor committed misconduct in three ways during trial: (1) by stating in opening statements that the defense likely would call two expert witnesses, (2) by referring to the defense's expert witnesses in both opening statements and closing arguments as paid consultants, and (3) by suggesting in closing arguments that jurors rely on the philosophical rule of Occam's razor when considering the evidence.

A. Burden of Proof

Prosecutorial misconduct may deprive a defendant of a fair trial and, thus, may require a new trial. *State v. Porter*, 526 N.W.2d 359, 365-66 (Minn. 1995). Whether an objected-to error deprived the defendant of a fair trial is determined according to a two-tiered approach. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (citing *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974)). If "the case involves less serious prosecutorial misconduct, [the court examines] 'whether the misconduct likely played a substantial part in influencing the jury to convict.'" *Id.* (quoting *Caron*, 300 Minn. at 128, 218 N.W.2d at 200). If the case involves more serious misconduct, courts will reverse "unless the misconduct is harmless beyond a reasonable doubt." *Id.* (citing *Caron*, 300 Minn. at 127, 218 N.W.2d at 200).

Murray contends that the prosecutor engaged in misconduct during her opening statement by making the following statement to the jury: "You're also likely going to hear

from some doctors that have been hired by Defense Counsel to come in and review [C.M.'s] medical records." Murray's counsel objected, saying, "Your Honor, we're going to object to that. . . . [T]he Defense has no obligation to present any evidence and for the State to comment on potential witnesses we may or may not call is inappropriate." The district court sustained the objection. Murray's counsel did not request a curative instruction and did not move for a mistrial. *See State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006) (stating that "the district court is in the best position to attempt to remedy the effects of the misconduct, and it should be given this opportunity in the first instance").

On appeal, Murray contends that the prosecutor's statement is misconduct because she implied that the defense bore a burden of proof. Murray relies on cases in which prosecutors, in *closing* arguments, commented on the lack of evidence offered by the defense, which implied that the defense had a burden to introduce evidence and failed to do so. *See, e.g.*, *State v. Coleman*, 373 N.W.2d 777, 782-83 (Minn. 1985). Murray has not cited any caselaw stating that a prosecutor engages in misconduct by stating in *opening* statements that the defense is likely to call certain witnesses. Murray had included expert witnesses on his witness list before trial. In these circumstances, we do not perceive any prosecutorial misconduct.

Even if the prosecutor's statement was improper, it is apparent that the statement did not have any effect on the verdict. Murray's trial counsel made a detailed objection, and the district court sustained the objection, which likely clarified for the jury that the defense did not bear a burden of proof. *See State v. Dobbins*, 725 N.W.2d 492, 507-08 (Minn. 2006). Also, Murray did in fact call expert witnesses to testify, which effectively

prevented the harm that the caselaw seeks to avoid. *See State v. Mayhorn*, 720 N.W.2d 776, 787 (Minn. 2006); *Coleman*, 373 N.W.2d at 782. In addition, the district court instructed the jury on the burden of proof, both in its preliminary instructions and in its final instructions. *See, e.g.*, *State v. Bauer*, 776 N.W.2d 462, 471-72, 474-75 (Minn. App. 2009) (reasoning that jury is presumed to follow instructions if prosecutor makes improper statement), *aff'd*, 792 N.W.2d 825 (Minn. 2011).

Thus, the prosecutor did not engage in misconduct in opening statements by stating that the defense likely would call expert witnesses, and even if she did, Murray is not entitled to a new trial because of the statement.

B. Comments on Defense Experts

Murray contends that the prosecutor engaged in misconduct by making three comments to the jury concerning his expert witnesses, one during opening statement and two during closing argument. Murray contends that the prosecutor's comments disparaged the experts and impugned their integrity.

The first statement is the same statement at issue above: "You're also likely going to hear from some doctors that have been hired by Defense Counsel to come in and review [C.M.'s] medical records." The second statement is as follows:

> Another relationship that's important to consider would be the relationship that some of the defense experts have to the opinion they're brought in to give. They are here as consultants. They were brought in for a specific reason to say a specific thing. And that's a relationship that you have to consider. There's a money relationship there.

The third statement is that the defense experts "haven't seen a live client in nearly 10 years and perform only consulting work at the request of someone for potentially a court trial or something else."

Murray's trial counsel did not object to these statements. Accordingly, this court applies a modified plain-error test. *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014). To prevail, Murray must establish that there was an error and that the error is plain. *See Ramey*, 721 N.W.2d at 302. If Murray can establish a plain error, the burden would shift to the state to show that the plain error did not affect his 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) (alteration in original) (quotations omitted).

Murray relies on three cases in which the supreme court concluded that prosecutors made inappropriate comments about defense experts. Each of those cases is distinguishable from this case. In *State v. Wahlberg*, 296 N.W.2d 408 (Minn. 1980), the prosecutor commented in closing argument that a defense expert was paid to give a diagnosis favorable to the defendant. *Id.* at 419-20. The supreme court reasoned that the prosecutor's remarks "were improper" because "[t]hey were not justified by the evidence." *Id.* at 420. In *State v. Bailey*, 677 N.W.2d 380 (Minn. 2004), the prosecutor commented in opening statements that a defense expert "continues to walk around the country advocating" for a particular theory "because he gets paid for it" and reiterated in closing arguments that "in fact, all he is, is a paid witness by the Defense in criminal cases." *Id.* at 404. The supreme court reasoned that "it was improper for the prosecutor to go beyond

the testimony of the expert witness by making these references to the witness's character." *Id.* Likewise, in *State v. Griese*, 565 N.W.2d 419 (Minn. 1997), the prosecutor described a defense expert with inflammatory language and suggested that the defense had improper motives in hiring the expert. *Id.* at 426-28. In this case, the prosecutor's opening statement was a simple statement of fact, and the prosecutor's closing argument was appropriately focused on the jury's task of assessing the credibility of witnesses. Furthermore, the prosecutor's comments were much less inflammatory and more respectful and did not go beyond the evidentiary record. In fact, the prosecutor's comments in closing argument were based on evidence that she had elicited from the defense experts during cross-examination.

Thus, the prosecutor did not engage in misconduct by making disparaging comments about the defense experts.

C. Reference to Occam's Razor

Murray contends that the prosecutor engaged in misconduct during closing argument by referring to the principle known as Occam's razor. The relevant part of the prosecutor's closing argument is as follows:

> [T]he simplest answer is often the most likely. The solution that requires the least amount of assumptions to get there and the most factual representations to get there is the correct or most likely one. . . . Let's say that 2 trees fall down on a windy evening. . . . [O]ne explanation would be well, it's a windy evening, the wind knocked them over. Another explanation would be it's possible that a meteorite came down and hit one tree just right so that it fell into the other tree just right and the other tree then fell down just right and both trees fell down on the same windy evening. . . . The idea of Occam's razor is that common sense tells us that the wind explanation is more

> reasonable. We didn't have to assume very much to get there; it was a windy evening, both trees blew over, the wind knocked them over. There's no need to assume all that stuff in the middle. Just because something is possible or remotely likely, doesn't mean that it's reasonable.

Murray contends that this part of the prosecutor's closing argument is improper because it tends to dilute the state's burden of proof. Murray relies on *State v. Strommen*, 648 N.W.2d 681 (Minn. 2002), in which the prosecutor urged the jury to "weigh the story in each hand and decide which one is most reasonable, which one makes the most sense." *Id.* at 690. The supreme court in *Strommen* reasoned that the prosecutor made "a misstatement of the state's burden to prove each element of the crime charged beyond a reasonable doubt," which "may have played a role in the decision to convict." *Id.*

The state contends that the reference to Occam's razor is not equivalent to the misstatement in *Strommen*, which was necessarily inconsistent with the state's burden of proof. We agree with the state that the prosecutor's reference to Occam's razor is different from the misstatement in *Strommen*. The prosecutor did not make a statement that is contrary to the state's burden of proof or contrary to the jury's task of weighing conflicting evidence. Both before and after the comment at issue, the prosecutor properly stated that the state bears the burden of proving each element of the charged offenses beyond a reasonable doubt. In addition, the district court instructed the jury on the state's burden to prove each element beyond a reasonable doubt.

Thus, the prosecutor did not engage in misconduct by referring to the principle of Occam's razor.[1]

Affirmed.

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[1]We note that our conclusion is consistent with the conclusions reached by other panels of this court that have considered similar challenges to similar closing arguments. *See State v. Tabaka*, No. A05-1899, 2007 WL 1120523, *8 (Minn. App. Apr. 17, 2007) (concluding that prosecutor's reference to Occam's razor was "crude but accurate description on how to draw an inference from circumstantial evidence"), *review denied* (Minn. June 27, 2007); *State v. Tykwinski*, No. C3-99-1608, 2000 WL 1051919, *4 (Minn. App. Aug. 1, 2000) (concluding that prosecutor's reference to Occam's razor was harmless error because burden of proof was correctly stated three other times during trial), *review denied* (Minn. Sept. 27, 2000). We also note that unpublished opinions of this court are not precedential. *See* Minn. Stat. § 480A.08, subd. 3(c) (2016); *Vlahos v. R&I Constr., Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004); *State v. Porte*, 832 N.W.2d 303, 312 n.1 (Minn. App. 2013).