STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1411

State of Minnesota,
Respondent,

vs.

Kyle Grayling Tweed,
Appellant.

Filed August 6, 2018
Affirmed
Halbrooks, Judge

Dakota County District Court
File No. 19HA-CR-17-119

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

James C. Backstrom, Dakota County Attorney, Jackie Warner, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

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

HALBROOKS, Judge

Appellant challenges his convictions of domestic assault (strangulation), domestic assault (harm), domestic assault (fear), child endangerment, and third-degree driving while

impaired (DWI) on the grounds that his substantial rights were violated during a bench trial because (1) the prosecutor elicited improper testimony referencing his time in prison and (2) the district court did not sanitize his two prior third-degree criminal-sexual-conduct convictions. We affirm.

FACTS

Appellant Kyle Tweed and J.S. had an on-and-off relationship for approximately seven years. Between 2015 and 2016, Tweed and J.S. lived together, started a trucking business together, and were engaged to be married. In February 2016, J.S. became pregnant with Tweed's child.

In May 2016, J.S. noticed that Tweed was expensing purchases that were not business-related, which strained their relationship. When J.S. discovered that Tweed was seeing other women, she cancelled the engagement, and in August 2016, J.S. moved out of Tweed's house. Tweed subsequently visited J.S. at her home on weekdays. After J.S. gave birth to their child in November 2016, she and Tweed continued to have what J.S. described as a "casual" relationship for their child's sake.

On January 5, 2017, J.S. and her female friend, D.P., invited Tweed over to J.S.'s home for a sexual threesome. After Tweed arrived around 8:30 p.m., the three started drinking alcoholic beverages. Later, they went upstairs to the master bedroom. Tweed and J.S.'s child was sleeping inside a crib in the master bedroom, while another child of J.S. was sleeping in another bedroom.

Initially, Tweed watched as D.P. and J.S. kissed and groped each other. D.P. then began playfully hitting and slapping Tweed. After D.P. and Tweed unsuccessfully attempted intercourse, D.P. went to take a shower.

The encounter then turned violent. While D.P. was in the shower, J.S. and Tweed began arguing. Tweed put his hand around J.S.'s throat and started choking her. Tweed eventually let go. J.S. threatened to call the police and to take their child away with her. Tweed responded that he would not let her do so.

When D.P. returned to the bedroom, she could tell that J.S. was upset. But because D.P. perceived J.S. to be the aggressor in the situation, D.P. picked up the child from his crib in an effort to protect him. In response, J.S. slapped D.P. in the face and D.P. put the child back in the crib. Tweed again grabbed J.S. by the throat and pushed her into a closet as he continued to choke her.

J.S. got free, ran out of the master bedroom, and hid in another bathroom. She eventually opened the bathroom door and tried to run downstairs to find her cell phone. But Tweed got down the stairs first. When J.S. reached the bottom of the stairs, she turned and tried to run back up. In the process, Tweed grabbed her by the leg and pulled her back down. As she was being pulled down the stairs, J.S. grabbed a bannister post, which broke. J.S. swung it, hitting Tweed in the back of the head. He then began choking her again and slammed her head into the floor.

At this point in time, D.P. came downstairs and saw Tweed standing over J.S. J.S. eventually freed herself, stood up, and ran outside to a neighbor's house. The neighbor

called the police. A police officer arrived and took a statement from J.S. She was subsequently taken to the hospital where she was treated for her injuries.

Before law enforcement arrived at J.S.'s house, Tweed and D.P. took Tweed and J.S.'s child and drove away. An Eagan police officer later located Tweed's car, initiated a traffic stop, and arrested him for DWI after a breath test of Tweed revealed an alcohol concentration of 0.14. During the traffic stop and arrest, two officers observed a child sitting unsecured in a car seat.

The state charged Tweed with (1) domestic assault (strangulation) under Minn. Stat. § 609.2247, subd. 2 (2016); (2) domestic assault (harm) under Minn. Stat. § 609.2242, subd. 4 (2016); (3) domestic assault (fear) under Minn. Stat. § 609.2242, subd. 4; (4) fourth-degree DWI under Minn. Stat. §§ 169A.20, subd. 1(1), .27, subd. 1 (2016); (5) fourth-degree DWI (.08 or more) under Minn. Stat. §§ 169A.20, subd. 1(5), .27, subd. 1 (2016); (6) third-degree assault (harm) under Minn. Stat. § 609.223, subd. 1 (2016); (7) child endangerment under Minn. Stat. § 609.378, subd. 1(b)(1) (2016); (8) interference with an emergency call under Minn. Stat. § 609.78, subd. 2(1) (2016); (9) third-degree DWI (aggravating factor) under Minn. Stat. § 169A.26, subd. 1(a) (2016); and (10) third-degree DWI (aggravating factor) under Minn. Stat. § 169A.26, subd. 1(a). The state later dismissed the third-degree-assault charge.

Before trial, Tweed moved in limine, requesting that the district court exclude evidence of two prior felony third-degree criminal-sexual-conduct convictions and prohibit the prosecutor from using the convictions for impeachment purposes. In the alternative,

Tweed asked the district court to prohibit the prosecutor from referring to the specific nature of the convictions. The district court did not rule on the motion.

On the first day of trial, Tweed waived his right to a jury and stipulated to more than 60 exhibits. Tweed also stipulated to the two prior felony convictions for third-degree criminal sexual conduct that had occurred within the last ten years, which, under Minn. Stat. §§ 609.02, subd. 16, .2242, subd. 4 (2016), enhanced Tweed's domestic-violence charge to a felony.

During the state's case, the prosecutor elicited the following testimony from J.S.:

> Q: And when did [your relationship] change?
> A: He ended up being convicted of his first felonies, and I have no idea what happened to him at that point.
> . . . .
> Q: And then did he eventually become able to see you outside of confinement?
> A: Yes, he did.

Tweed did not object during this line of questioning.

Tweed testified on the second day of trial. The prosecutor impeached him with the two prior felony convictions. Again, Tweed did not object. With respect to the current incident, Tweed testified that the fight occurred between J.S. and D.P. and that he did not hurt J.S. Tweed admitted that he had consumed alcohol but claimed that he was not impaired.

The district court issued its findings of fact and conclusions of law. The district court found Tweed guilty and convicted him of felony domestic assault (strangulation); felony domestic assault (harm); felony domestic assault (fear); child endangerment; and third-degree DWI. The district court found Tweed guilty but did not enter convictions on

the counts of fourth-degree DWI; fourth-degree DWI (.08 or more); and third-degree DWI (aggravating factor). The district court found Tweed not guilty of interfering with an emergency call. The district court sentenced Tweed to 24 months' imprisonment for his domestic-assault (strangulation) conviction, and 365 days of imprisonment for his third-degree DWI conviction, to be served concurrently. This appeal follows.

D E C I S I O N

I.

Tweed argues that the district court erred because it allowed the prosecutor to elicit testimony that he was incarcerated for his prior convictions, reasoning that "[b]y telling the trier of fact that [he] had been to prison, it provided *Spreigl*-type details of his offense because his previous crimes required a prison commit." Generally, we review evidentiary rulings for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). But because Tweed did not object to these claimed errors, our standard of review is for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Under the plain-error standard, the defendant must show: (1) error; (2) that the error was plain; and (3) that it affected the defendant's substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). An error is plain if it is "clear or obvious," which is usually shown "if the error contravenes case law, a rule, or a standard of conduct." *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007) (quotation omitted). Plain error is "determined at the time of appellate review." *State v. Kelley*, 855 N.W.2d 269, 275 (Minn. 2014). Concerning the third prong, the defendant has the burden to establish that "there is a reasonable likelihood that the absence of the error would have had a significant effect on

the jury's verdict." *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). If the defendant establishes all three prongs, this court may correct the error if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Strommen*, 648 N.W.2d at 686 (quotation omitted).

Tweed's argument is more akin to a prosecutorial-misconduct claim. The supreme court has recognized that the state has a duty to caution its witnesses against prejudicial testimony. *State v. Underwood*, 281 N.W.2d 337, 342 (Minn. 1979). "Minnesota law is crystal clear on this issue—the state has an absolute duty to prepare its witnesses to ensure that they are aware of the limits of permissible testimony." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). For prosecutorial-misconduct claims, the plain-error standard is modified. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under the modified plain-error test, the burden on the third prong shifts to the state to demonstrate that the error did not affect Tweed's substantial rights. *Id.*

Tweed contends that J.S.'s trial testimony that referred to his incarceration constituted improper *Spreigl* evidence and is therefore plain error. We disagree. It is true that "[e]vidence 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). It is also true that J.S. mentioned Tweed's prior confinement. But the evidence was not elicited to prove Tweed's character in order to show "action in conformity therewith." Minn. R. Evid. 404(b). Rather, the testimony came in response to a question about how J.S.'s relationship with Tweed changed over time. On this record, Tweed has not demonstrated that the prosecutor committed plain error.

But even if the prosecutor arguably committed plain error by failing to adequately prepare J.S. for her testimony, the state satisfied its burden to establish that Tweed's substantial rights were not affected by this isolated statement. First, when there is an overwhelming amount of evidence to support a conviction, we are less inclined to conclude that a defendant's substantial rights were affected by prosecutorial misconduct. *McNeil*, 658 N.W.2d at 232-33. And here, there is an overwhelming amount of evidence demonstrating Tweed's guilt.

J.S. testified that Tweed strangled her multiple times, pulled her down the stairs, and slammed her head into the floor. The district court found J.S. credible. The doctor who examined J.S. at the hospital testified that he observed ruptured blood vessels and petechial hemorrhaging in J.S.'s eyes and signs of blunt-force trauma, which he stated are consistent with strangulation. The doctor also testified that he noticed abrasions and excoriations on J.S.'s neck that were consistent with strangulation. And the doctor testified that he observed bruising on the left side of J.S.'s head and around her eye, forehead, and nose. The district court determined that the doctor testified credibly.

In addition, D.P. testified that she saw Tweed pull J.S. down the stairs and that she asked Tweed to stop strangling J.S. The district court determined that D.P. testified credibly. Contrastingly, the district court determined that Tweed's testimony was not credible, reasoning that "Tweed's explanation of events is inconsistent with the evidence from the scene, the statements from the parties that night, the injuries to [J.S.], the injuries to Tweed himself, and the testimony at trial."

Second, this was a court trial. The Minnesota Supreme Court has determined that there is an important distinction between the potential for prejudice in a jury trial versus a bench trial. In *State v. Burrell*, the Minnesota Supreme Court concluded that a district court did not abuse its discretion by admitting bad-acts evidence during a bench trial, reasoning that "there is comparatively less risk that the district court judge, as compared to a jury of laypersons, would use the evidence for an improper purpose or have his sense of reason overcome by emotion." 772 N.W.2d 459, 467 (Minn. 2009). The supreme court explained that "excluding relevant evidence at a bench trial on the grounds of unfair prejudice is in a sense ridiculous" because "it is the district court judge who is called upon in the first instance to rule on the admissibility of the evidence." *Id.* (quotation omitted).

Here, the district court's factual findings and legal conclusions do not reference the allegedly inadmissible evidence. *See State v. Mosley*, 853 N.W.2d 789, 803 (Minn. 2014) (stating that when the district court made detailed findings of fact with significant evidence pointing to the defendant's guilt and did not include references to the inadmissible evidence, there was no reasonable likelihood that the inadmissible evidence had a significant effect on the judge's conclusion). Although district court judges are not immune from "emotional appeals or the temptation to misuse evidence," when considering the district court judge's experience and familiarity with the rules of evidence, "the risk of unfair prejudice is lessened." *Burrell*, 772 N.W.2d at 467; *see also Irwin v. State*, 400 N.W.2d 783, 786 (Minn. App. 1987) (determining that *Spreigl* evidence was properly admitted, reasoning that "the probative value outweighed its prejudicial effect, particularly

where the trial was to the *court* rather than a *jury*" (emphasis added)), *review denied* (Minn. Mar. 25, 1987).

Because there is an overwhelming amount of record evidence that supports Tweed's convictions, because it was a court trial with a low risk of unfair prejudice, and because the potentially impermissible evidence was not relied on by the district court, we conclude that there is no reasonable likelihood that any error had a significant effect on the guilty verdicts.

II.

Tweed contends that the district court erred by failing to sanitize his two prior third-degree criminal-sexual-conduct convictions. A district court's ruling on the impeachment of a witness by a prior conviction is reviewed under an abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998). And, again, because Tweed did not object, we review this claim for plain error. *Griller*, 583 N.W.2d at 740.

After Tweed waived his right to a jury trial, he and the prosecutor stipulated to two prior felony convictions that occurred within the previous ten years. When Tweed took the stand on the second day of trial, the prosecutor impeached him with his two prior felony convictions.

Evidence of a conviction punishable by imprisonment beyond one year may be admitted to attack a witness's credibility if the district court determines that the probative value of admitting the evidence outweighs its prejudicial effect. Minn. R. Evid. 609(a)(1). In doing so, a district court normally considers what are known as the *Jones* factors:

> "(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue."

State v. Swanson, 707 N.W.2d 645, 654 (Minn. 2006) (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)). The district court may also allow a party to impeach a witness with an unspecified felony conviction if it finds that the prejudicial effect of disclosing the nature of a felony conviction outweighs its probative value. *State v. Hill*, 801 N.W.2d 646, 652-53 (Minn. 2011). Even if a defendant stipulates to a prior conviction, the prosecutor may still impeach him with it. *State v. Davidson*, 351 N.W.2d 8, 11 (Minn. 1984).

Here, the district court did not conduct a *Jones* analysis or articulate whether the prejudicial effect of disclosing the nature of the felony convictions outweighed its probative value. But, significantly, the district court knew the details of Tweed's prior convictions. Therefore, sanitizing them would have been a distinction without a difference. Because this was a court trial, not a jury trial, the district court did not err by not engaging in a *Jones* analysis or by failing to sanitize the convictions. *Burrell*, 772 N.W.2d at 467.

Affirmed.