STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1590

State of Minnesota,
Respondent,

vs.

Nicholas Sean Perkins,
Appellant

Filed September 24, 2018
Affirmed; motion granted
Smith, John, Judge[*]

Washington County District Court
File No. 82-CR-16-4122

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and Smith, John, Judge.

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

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

SMITH, JOHN, Judge

We affirm appellant Nicholas Sean Perkins's conviction of first-degree criminal sexual conduct because the district court did not abuse its discretion in admitting evidence, the prosecutor did not commit misconduct, and Perkins did not receive ineffective assistance of counsel.

FACTS

While staying at a hotel, S.A. and her husband, J.A., went out for dinner at a restaurant, where they met appellant Nicholas Sean Perkins and Kyle Kazle, who were sitting at a nearby table. Following some pleasant conversation, S.A. and J.A. invited Perkins and Kazle to come to the hotel to go swimming with them, and Perkins and Kazle accepted the invitation. In the hotel room, Perkins took some pills, which he identified as Xanax. Perkins asked S.A. and J.A. if they minded what he had done or were going to report him, and S.A. and J.A. responded that they did not do that but were not going to judge him.

The group brought alcoholic drinks down to the pool and swam and used the hot tub. After the group had been swimming for two or three hours, Perkins's girlfriend came to the hotel, and the two left together. Perkins returned alone a short time later, and the group continued swimming for about another hour. At that point, Kazle was making rude comments to S.A., and Perkins was acting "hyper." S.A. told Kazle and Perkins that they needed to leave. J.A. brought Kazle up to the room to get his belongings, and S.A. and Perkins remained in the hotel courtyard.

When J.A. and Kazle went up to the room, Perkins sat down next to S.A. on a bench in the courtyard and put his hand on her leg and squeezed. S.A. pushed his hand away and texted J.A. to hurry up and get back to the courtyard. Perkins then put his hand on S.A.'s chin, pulled her face into his, and kissed her. S.A. again pushed Perkins away. J.A. came out onto the balcony from the hotel room, which overlooked the courtyard, and asked about Perkins's backpack. S.A. said that it was in the pool area and told J.A. twice that he needed to hurry and get back to the courtyard. A room key was needed to enter the hotel from the courtyard, and S.A. did not have her room key with her. S.A. was concerned, but she thought she had made clear to Perkins that she was not interested in his advances.

When J.A. went back into the hotel room, Perkins pushed on S.A.'s neck and collarbone to get her head down toward the bench. S.A. sent a text message to 911 but received a response that she had to call 911. S.A. then texted J.A., but J.A.'s phone was charging, and he did not see the message. S.A. remembered that Perkins's girlfriend came from the back of the courtyard, so she shoved Perkins off of her and tried to find a way out of the courtyard.

Perkins came after S.A. and pushed her in the back, causing her to fall to her knees. S.A. tried to crawl toward the door, but Perkins shoved her back into the ground and pulled her hair. S.A. rolled over to try to get Perkins off of her, and he scratched her face. S.A. tried to crawl back toward the pool where it was lighted, hoping that J.A. might see her from the balcony. Perkins grabbed S.A. by the hips, pulled aside the bottom of her swimsuit, preventing her from escaping, and repeatedly penetrated her anally and vaginally.

The courtyard door opened, and Perkins "instantly" got off of S.A. As J.A. approached, he saw Perkins standing over S.A. with "[o]ne foot on each side of her, standing on her -- over her back, [near] her hips." Perkins claimed that S.A. had slipped and fallen. J.A. helped S.A. off the ground. S.A. was shaking and crying, and she told J.A. that Perkins had attacked her, raped her, and hurt her.

S.A. sat down in the courtyard, and Kazle sat next to her and said, "I'm sorry this happened to you. I knew this was going to happen. That's why we wanted to leave, but please, wait to call 9-1-1 until we leave. I know you're entitled to call 9-1-1, but wait." S.A. went to the hotel's front desk, and a clerk called 911. S.A.'s fingers were covered in dirt, and she had scratches and bruises on her arms.

Woodbury Police Officer Lucas Rogers talked to S.A. at the hotel. Rogers described S.A. as "very upset," "noticeably shaking," and "crying" with dirt and grass on her body. S.A. told Rogers she had been sexually assaulted by a male named Nick. Rogers called an ambulance for S.A.

At the hospital, S.A. was evaluated by Rebecca Richardson, a Sexual Assault Nurse Examiner. Richardson saw that S.A. had dirt on her neck and face and in her fingernails. S.A.'s face was covered with dirt, and S.A. had dirt in her mouth. S.A. was upset and cried periodically during the exam. Richardson noted abrasions, bruises, and scratches in numerous places on S.A.'s body. S.A.'s description of the sexual assault to Richardson was consistent with S.A.'s trial testimony. During the physical examination, Richardson observed bruising on one side of S.A.'s anal cavity.

The sexual assault evidence collection kit, S.A.'s swimsuit, and articles of Perkins's clothing were brought to the Minnesota Bureau of Criminal Apprehension for analysis. Semen was not found in the sexual assault evidence collection kit or S.A.'s swimsuit. But DNA that matched Perkins's was found on swabs taken from S.A.'s neck and S.A.'s left arm. DNA that matched S.A.'s was found inside the crotch area of Perkins's shorts.

The jury found Perkins guilty of first-degree criminal sexual conduct. The district court denied Perkins's new-trial motion.

D E C I S I O N

I.

Kazle made statements to S.A. shortly after Perkins assaulted her. Perkins objected to the admission of Kazle's statements as hearsay, not as a violation of his right to confront witnesses. "[W]hether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law," which this court reviews de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006). The supreme court has indicated that plain-error review may apply when a defendant at trial objects to evidence as hearsay but not as a violation of the Confrontation Clause. *State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010) (noting that "other state courts have held that a hearsay objection at trial is not sufficient to preserve a confrontation clause objection on appeal" but declining "to decide the effect, if any, of the hearsay objection on the appropriate standard of review on appeal" when both parties agreed that plain-error review applied (quotation omitted)); *see also* Minn. R. Evid. 103(a)(1) (stating that to preserve an objection to the admission of evidence, a defendant must "timely object[]" and "stat[e] the specific ground of objection,

if the specific ground was not apparent from the context"). Under the plain-error standard, a defendant must show that there is "(1) error, (2) that is plain, and (3) that affects substantial rights." *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007); *see also State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006) (stating that the defendant has the burden of showing that each of the three prongs is satisfied).

The Confrontation Clause provides a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; see also Minn. Const. art. I, § 6; *see also Hull*, 788 N.W.2d at 100 (stating that analysis of a Confrontation–Clause claim is the same under either the federal or Minnesota constitution). "A successful Confrontation Clause claim has three prerequisites: the statement in question was testimonial, the statement was admitted for the truth of the matter asserted, and the defendant was unable to cross-examine the declarant." *Andersen v. State*, 830 N.W.2d 1, 9 (Minn. 2013) (citing *Crawford v. Washington*, 541 U.S. 36, 59 & n.9, 124 S. Ct. 1354, 1369 & n.9 (2004)). "Statements made to nongovernment questioners, who are not acting in concert with or as an agent of the government, are considered nontestimonial." *State v. Ahmed*, 782 N.W.2d 253, 259 (Minn. App. 2010) (quotation omitted).

Kazle made the statements to S.A. shortly after Perkins sexually assaulted her. S.A. was not acting in concert with or as a government agent, and the statement was made before she contacted law enforcement. A detective also testified about Kazle's statement, stating that S.A. said that Kazle said that he knew something bad was going to happen and asked her to wait to call 911. Even though the detective was a government agent, her testimony did not implicate the Confrontation Clause because the detective was testifying about

S.A.'s statement to her; Kazle did not make a statement to the detective, S.A. testified and was subject to cross-examination, and the detective's testimony did not add anything to S.A.'s testimony about Kazle's statement. The detective also testified that she listened to a statement that Kazle made to another officer, but the contents of that statement were not disclosed at trial. The fact that Kazle made a statement to a police officer, the contents of which were not disclosed at trial, does not make his statement to S.A. testimonial. Because Perkins has failed to show that Kazle's statement to S.A. was testimonial, we cannot conclude that the district court erred in admitting the testimony about the statement.

In his reply brief, Perkins argues that even if the admission of Kazle's statements did not violate the Confrontation Clause, he should be granted a new trial because the statements were inadmissible hearsay. We decline to address this issue. *See State v. Thompson*, 873 N.W.2d 873, 876 n.1 (Minn. App. 2015) ("Generally, issues not raised or argued in an appellant's principal brief cannot be revived in a reply brief."), *aff'd*, 886 N.W.2d 224 (Minn. 2016).

And we grant the state's motion to strike this argument from Perkins's reply brief. *See* Minn. R. Civ. App. P. 128.02, subd. 3; *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009) (granting motion to strike argument raised for the first time in appellant's reply brief).

II.

Perkins argues that the prosecutor committed misconduct by eliciting evidence that S.A. and J.A. did not engage in anal sex. Perkins did not object to the elicitation of the evidence at trial. Unobjected-to claims of prosecutorial misconduct are generally reviewed

under a modified plain-error analysis. *Ramey*, 721 N.W.2d at 302. The defendant continues to have the burden to "demonstrate both that error occurred and that the error was plain." *Id.* If the defendant meets this burden, the burden then shifts to the state to show that the misconduct did not affect the defendant's substantial rights. *Id.*

A prosecutor may not "knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury." *State v. White*, 203 N.W.2d 852, 857 (Minn. 1973). In a criminal-sexual-conduct case, "evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury" unless an enumerated exception applies and "the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature." Minn. Stat. § 609.347, subd. 3 (2016); Minn. R. Evid. 412. The rape-shield law applies to both the prosecution and defense. *State v. Wenthe*, 865 N.W.2d 293, 306-07 (Minn. 2015).

During her testimony, S.A. spontaneously stated that she and J.A. did not engage in anal sex. Later, the prosecutor asked J.A. if he and S.A. had engaged in anal sex, and J.A. said that they had never done that. Finally, the prosecutor asked the nurse examiner about the section of her report in which she asked S.A. for her physical and emotional reactions to the sexual assault. The nurse examiner testified that S.A. said, "I was in a lot of pain. I was very sore, and my bottom hurts so bad. I didn't even let my husband do that."

Although the evidence in this case does not come within an enumerated exception, the supreme court has stated that "[t]he rape-shield law serves to emphasize the general

irrelevance of a victim's sexual history, not to remove relevant evidence from the jury's consideration." *Wenthe*, 865 N.W.2d at 306 (quotation omitted); *see also State v. Crims*, 540 N.W.2d 860, 867 (Minn. App. 1995) (stating that the rape-shield law "serves to remind the bench that the victim's sexual history is normally irrelevant in a sexual assault prosecution"), *review denied* (Minn. Jan. 23, 1996). The evidence in this case was relevant to show that Perkins caused personal injury to S.A., which is an element of first-degree criminal sexual conduct. *See* Minn. Stat. § 609.342, subd. 1(e)(i) (2016). Thus, admission of the evidence was consistent with the purpose of the rape-shield law and the probative value outweighs any prejudice. Perkins, therefore, has failed to meet his burden of showing that plain error occurred. *See State v. Sanchez-Sanchez*, 879 N.W.2d 324, 330 (Minn. 2016) (stating that "[a] plain error is an error that is clear or obvious at the time of appeal," meaning that "it contravenes case law, a rule, or a standard of conduct" (quotations omitted)).[1]

III.

A prosecutor is not required to make a colorless closing argument and "has the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom." *State v. Williams*,

[1] The state argues that a defendant asserting that a prosecutor committed misconduct by offering inadmissible evidence "has imposed on himself a higher threshold than plain error," which would apply to a claim that the district court erred by failing to exclude unobjected-to evidence, and "must also show that the state had no good-faith basis to argue for admissibility and elicited the testimony knowing that it was inadmissible." *State v. Jackson*, 714 N.W.2d 681, 698 (Minn. 2006) (Hanson, J., concurring). Because Perkins is not entitled to reversal under the plain-error standard, we need not address this issue.

586 N.W.2d 123, 127 (Minn. 1998). A prosecutor may point to circumstances that cast doubt on a witness's credibility or that corroborate his or her testimony. *State v. Smith*, 825 N.W.2d 131, 139 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Mar. 19, 2013). It is not improper for a prosecutor "to analyze the evidence and argue that particular witnesses were or were not credible." *State v. Wright*, 719 N.W.2d 910, 918-19 (Minn. 2006). We consider a closing argument as a whole rather than focusing on particular statements in isolation. *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000).

Perkins objected at trial to two statements that occurred at the beginning of rebuttal. The rebuttal begins with the prosecutor saying, "Are you buying what he says? Because here's what he's saying to you: I didn't penetrate her." The district court overruled Perkins's objection, and the prosecutor continued:

> **PROSECUTOR**: Here's what he's telling us: I didn't penetrate her, but if you found out that I did, then it was consensual, and I didn't use force. That was the defense's argument. But now they're consent—now they're agreeing and conceding that there was penetration. Wait a minute. When did [Perkins] say that? He didn't. Expressly denied all sexual contact, but now they're admitting it, right? Now they're admitting it. Counsel said many things that were just flat-out inaccurate about what the evidence showed.
> **DEFENSE COUNSEL**: Objection, improper argument.
> **DISTRICT COURT**: Sustained.
> **PROSECUTOR**: [Defense Counsel] said that there were multiple anal penetrations. That's not the testimony. He penetrated her one time anally, five to ten times vaginally. That's just flat out wrong what he was saying. He also said that—also said that [S.A.] and her husband wouldn't concede to drinking. Absolutely they told you they were drinking. Absolutely. In fact, she said she poured stiff drinks, three-to-one—four-to-one, excuse me. And she did have a number of drinks, but they kept being taken from her, so she kept having

> to fill it back up. [J.A.] didn't deny drinking that night. He did tell you he was in more control than [Perkins] was.

Although the district court sustained an objection to the prosecutor's statement that Perkins's counsel said things that were "flat-out inaccurate about what the evidence showed," the prosecutor then gave two specific examples of Perkins's counsel misstating the evidence during closing argument. Read as a whole, this argument goes to Perkins's credibility and was not improper.

Perkins also argues that the prosecutor committed misconduct by "repeatedly referr[ing] to the victim's prior sexual conduct to bolster her credibility" and by referring to Kazle's statement that he "knew this was going to happen." Perkins did not object to this argument at trial, so it is reviewed under the modified plain-error test already discussed. *See Ramey*, 721 N.W.2d at 302. During closing argument, the prosecutor noted that the bruising in S.A.'s anus could not have been caused by J.A. and was consistent with S.A.'s account of the sexual assault. The prosecutor mentioned Kazle's statement only briefly.

Because admission of the evidence was not plain error, it was not plain error for the prosecutor to refer to it during closing argument. And any error in referring to the evidence did not affect Perkins's substantial rights. *See State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (stating that when determining whether a reasonable likelihood exists that prosecutorial misconduct had a significant effect on the verdict, appellate courts "consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the

improper suggestions"). The state's case was extremely strong, as already discussed; the references to the victim's sexual history and Kazle's statements were isolated and brief; and Perkins had the opportunity to respond to the argument.

IV.

In a pro se supplemental brief, Perkins makes additional claims of prosecutorial misconduct. Perkins argues that the prosecutor disparaged the defense by noting that S.A. broke down after defense counsel asked her the same question numerous times. The district court sustained an objection to that remark and instructed the jury to disregard it. Jurors are "presumed to have followed the district court's instruction to disregard statements as to which an objection has been sustained." *State v. Bauer*, 776 N.W.2d 462, 472 (Minn. App. 2009), *aff'd.* 792 N.W.2d 825 (Minn. Jan. 5, 2011).

Perkins also argues that the prosecutor erred by using the words "monster" and "sinister" to describe him. The prosecutor discussed S.A. and J.A. being trusting and perhaps naïve to explain why they would invite Perkins and Kazle back to the hotel to go swimming with them. The prosecutor noted that, at first, S.A. and J.A. were having fun with Perkins and Kazle and then Perkins's behavior changed as the evening progressed, ending with Perkins sexually assaulting S.A. The prosecutor described Perkins as a man who "turned out to be a monster." When addressing the details of the sexual assault, the prosecutor described Perkins's motive in pushing S.A. to the ground as "sinister." When read in context, the prosecutor's description of Perkins showed how he deceived S.A. and J.A. Perkins did not object to this argument at trial, and any impropriety in it did not affect Perkins's substantial rights.

Perkins argues that the prosecutor examined the detective in a way that "distorted . . . reality" by implying that scratches on Perkins neck were defensive wounds. Perkins does not explain how the questioning distorted reality or implied that Perkins's injuries were defensive or why that would have been improper. This court will not consider pro se claims unsupported by argument or legal authority. *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008).

When multiple trial errors are alleged, an appellant is entitled to a new trial if the cumulative effect of the errors effectively denied him a fair trial. *Jackson*, 714 N.W.2d at 698. "Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006) (quotation omitted)). A new trial is only awarded "in rare cases." *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017). A reviewing court is "more inclined to order a new trial for cumulative errors in very close factual cases." *Id.* at 279.

To the extent that any errors occurred, they were few, minor, and isolated. The state's case was extremely strong. Perkins received a fair trial.

Finally, in his pro se brief, Perkins argues that he received ineffective assistance of counsel because there was a mistake in the PowerPoint presentation counsel used during closing argument and because counsel made an unauthorized admission of guilt. Whether trial counsel was ineffective presents a mixed question of law and fact, and is therefore reviewed de novo. *Griffin v. State*, 883 N.W.2d 282, 287 (Minn. 2016). Counsel's performance presumably falls "within a wide range of reasonable representation." *Evans*

v. State, 788 N.W.2d 38, 45 (Minn. 2010). "Which witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of the trial counsel. Such trial tactics should not be reviewed by an appellate court, which, unlike [trial] counsel, has the benefit of hindsight." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Defense counsel is ineffective if counsel "admits a defendant's guilt without permission or acquiescence." *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991). A defendant acquiesces to an admission of guilt by counsel if the admission is an "understandable" trial strategy, the defendant was present when the admission was made, the defendant understood that guilt was being conceded, and the defendant did not object. *State v. Prtine*, 784 N.W.2d 303, 318 (Minn. 2010).

Defense counsel stated during closing argument:

> The question is whether or not there was penetration without consent, causing personal injury, using force or coercion. I put the green up there to show the part that has been proven. Penetration, however slight, is considered penetration. The rest of it, I argue to you now and I will continue arguing to you, that the government hasn't proved it.

The PowerPoint presentation is not in the record, but it appears that defense counsel was conceding slight penetration. As the state argues, it would have been difficult to credibly argue otherwise when S.A.'s DNA was inside the crotch area of Perkins's shorts.

Defense counsel argued mainly that the state failed to prove that Perkins engaged in nonconsensual and forceful or coercive sex with S.A. Given the evidence, this was a reasonable trial strategy, and Perkins did not object to the apparent and limited concession during trial.

Affirmed; motion granted.