STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1985

State of Minnesota,
Respondent,

vs.

Ronald James Lipe,
Appellant.

Filed September 30, 2019
Affirmed in part and remanded
Rodenberg, Judge

Carver County District Court
File No. 10-CR-17-706

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark Metz, Carver County Attorney, Christopher James Filipski, Assistant County Attorney, Chaska, Minnesota (for respondent)

Christina Zauhar, Marsh J. Halberg, Halberg Criminal Defense, Bloomington, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Rodenberg, Judge; and Kirk, 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

RODENBERG , Judge

In this direct appeal from his conviction for second-degree criminal sexual conduct, appellant Ronald Lipe argues that the district court abused its discretion by denying his pretrial continuance request, that the state committed a *Brady* violation, that the evidence is insufficient to prove the requisite sexual intent, that the district court abused its discretion by denying his motion to present character evidence, and that the prosecutor committed misconduct during summation. We affirm appellant's conviction based on the record as constituted, and remand to the district court to reconsider appellant's continuance motion using the proper legal standard and, if appropriate, to allow discovery concerning the late-disclosed evidence of arguably similar conduct involving the complainant. If additional admissible evidence is discovered, the district court on remand shall also determine if a new trial is required.

FACTS

In July 2017, seven-year old E.J.B. told her mother, J.B., that she "had a secret with" appellant. When appellant babysat her, he would touch her vagina. Following E.J.B.'s disclosure of the touching to a counselor and a later report to child protection services, the state charged appellant with eight counts of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(h)(iii) (2016), (count one) and Minn. Stat. § 609.343, subd. 1(a) (2016), (counts two through eight). The state dismissed counts three through eight before trial.

Appellant's trial was set to begin June 12, 2018. On June 7, the prosecutor notified appellant's attorneys that E.J.B. had been involved in another touching incident. The state's email notified counsel that "during a phone conversation with [J.B.], she stated that after this incident was reported and investigated, there was an incident where [E.J.B.] and a same aged friend engaged in touching." The email provided no further detail. The next day, five calendar days and two business days before trial, appellant requested that the district court continue the trial so that appellant could investigate the newly disclosed touching incident.

The district court reserved ruling on the continuance motion until trial. On the day trial was set to begin, the district court (a different judge than the one who had previously presided in the case) heard arguments on the continuance motion. Neither the state nor appellant presented further information concerning the newly disclosed touching at the hearing. The district court denied the motion to continue the trial. It reasoned that, because the other-touching evidence would be more prejudicial than probative, and would therefore be inadmissible at trial, there was no reason for further investigation.

At trial, E.J.B. testified that when she was at appellant's home, she would sit on the couch with appellant and her brother, A.B., and the three would watch "Justin Time," a television program. She testified that while they were on the couch, appellant would unbutton her pants and touch her vagina under her clothes. She explained that appellant touched her vagina more than once and that he touched her "breast" once.[1]

[1] The term "breast" was used both in the Complaint and in E.J.B.'s trail testimony, so we use it here.

Appellant also testified at trial. He admitted that he touched E.J.B., but testified that he touched E.J.B. because E.J.B. would grab his hand and force it down her pants.

Chaska Police Detective Personius also testified at trial. He testified that he attempted to speak with A.B. before trial. He explained that he was unable to get any information from A.B. because A.B. would not speak with him and was sucking his thumb during the entirety of the interaction. This unsuccessful attempt to speak with A.B. had not been disclosed before trial.

The jury found appellant guilty of both counts of second-degree criminal sexual conduct. Appellant moved for a new trial, arguing that seven aspects of the prosecutor's summation were misconduct and that the state committed a *Brady* violation by failing to disclose Detective Personius's attempted interview with A.B.

The district court found two instances of prosecutorial misconduct, but determined that there was no reasonable likelihood that the two instances of prosecutorial misconduct substantially affected the verdict. It also found that the state's argument in summation that E.J.B. was "not acting out like this towards anyone else" was not misconduct because the other-touching evidence disclosed in the email on June 7 had not been admitted at trial. Concerning the claimed *Brady* violation, the district court determined that the state should have immediately disclosed its attempted interview with A.B., but also determined that appellant was not prejudiced because the information was not exculpatory, impeaching, or material, and the result of the trial would not have been different had the evidence been disclosed before trial.

The district court sentenced appellant to a 90-month prison term on count one. This appeal followed.

D E C I S I O N

Appellant argues (1) that the district court abused its discretion by denying his request for a continuance to conduct additional discovery, (2) that the state committed a *Brady* violation by not disclosing the attempted interview of A.B., (3) that the evidence presented at trial is insufficient to prove that he acted with sexual or aggressive intent, (4) that the district court erred in denying his motion to present character evidence, and (5) that the prosecutor committed misconduct during summation. Because the district court denied appellant's continuance motion using an improper legal standard which might, in turn, require reconsideration of the possible prosecutorial misconduct by referring to the absence of evidence of similar incidents, we first analyze the issues identified by appellant as issues (2), (3), and (4).

The state's failure to disclose Detective Personius's interaction with A.B. did not amount to a *Brady* violation.

The state must disclose evidence possessed by it that is favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 1196-97 (1963); *see* Minn. R. Crim. P. 9.01, subd. 1(6). To establish a *Brady* violation, an appellant must show: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or it is impeaching; (2) the evidence was willfully or inadvertently suppressed by the state; and (3) prejudice to the accused resulted. *Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005) (stating that rule 9.01 embodies the first two components of the test for alleged *Brady*

violations). We review a district court's denial of a motion for a new trial for an abuse of discretion, *State v. Green*, 747 N.W.2d 912, 917 (Minn. 2008), and a new trial is warranted upon a *Brady* violation only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, *Pederson*, 692 N.W.2d at 460.

Appellant argues that the prosecution's nondisclosure of Detective Personius's attempt to interview A.B. violated *Brady*. But Detective Personius's attempted interview with A.B. was unsuccessful and revealed no details about the facts of this case. Detective Personius testified that he attempted to speak with A.B. about a week before trial. He described A.B. as "tough to talk to" and testified that A.B. "really wouldn't talk" and he was sucking on his thumb. The detective further testified that his interaction with A.B. was brief, and described that A.B. "just kind of stared" while the detective attempted to talk to him.

This attempted interaction was helpful to neither the state nor appellant. The attempted interview revealed no information that would have been favorable to appellant. It therefore does not meet the first element needed to establish a *Brady* violation.

We agree with the district court that, although the state should have disclosed the attempted interview, on this record, it cannot be said either that the state failed to disclose evidence favorable to the defense or that, if A.B.'s incapacity had been disclosed (a fact already known to appellant), the result of the trial would have been different. The district court did not err in denying appellant's posttrial *Brady* motion.

The evidence presented at trial is sufficient to prove that appellant touched E.J.B. with sexual intent.

Appellant does not deny that he touched E.J.B.'s genital area, but instead argues that the state's evidence is insufficient to prove that he did so with sexual intent.

Because the record contains no direct evidence of appellant's sexual intent, we apply the circumstantial-evidence standard of review. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). When the state's proof of an element consists only of circumstantial evidence, we apply a two-step analysis to the sufficiency of the proof of that element, first determining the circumstances proved by resolving all questions of fact in favor of the verdict, and then determining whether a reasonable inference inconsistent with guilt can be drawn from those circumstances. *State v. Harris*, 895 N.W.2d 592, 600 (Minn. 2017). In applying this standard, we defer to the fact-finder's credibility determinations. *Id.*

Both charging statutes required that the state prove that appellant engaged in sexual contact. Minn. Stat. § 609.343, subd. 1(a), (h)(iii). The state was required to prove that appellant engaged in the "intentional touching by the actor of the complainant's intimate parts" and that he did so "with sexual or aggressive intent." Minn. Stat. § 609.341, subd. 11(a)(i) (2016). "[A]n act is committed with sexual intent when the actor perceives himself to be acting based on sexual desire or in pursuit of sexual gratification." *State v. Austin*, 788 N.W.2d 788, 792 (Minn. App. 2010), *review denied* (Minn. Dec. 14, 2010). A showing of sexual intent does not require direct evidence of the defendant's desires or gratification because a subjective sexual intent typically must be inferred from the nature of the conduct

itself. *Id.*; *see State v. Fardan*, 773 N.W.2d 303, 321 (Minn. 2009) (stating that intent is an inference drawn by the jury from the totality of the circumstances).

Here, the circumstances proved that are consistent with the jury's verdict include that appellant unbuttoned E.J.B.'s pants and touched her vagina under her clothing, that appellant touched E.J.B.'s breast with his hand, that appellant's hand was moving when he touched E.J.B.'s vagina and breast, that E.J.B. never asked appellant to touch her vagina or breast, and that E.J.B. did not grab appellant's hand. Appellant testified at trial, but the jury's verdict reflects that it concluded beyond a reasonable doubt that appellant's version of the events was untrue. Our review of the circumstances proved readily leads to the reasonable inference that appellant acted with sexual intent when he touched E.J.B.'s vagina and breast.

The second step of our analysis requires that we determine whether the circumstances proved support any reasonable hypothesis inconsistent with guilt. *State v. Petersen*, 910 N.W.2d 1, 7 (Minn. 2018). Appellant argues that the circumstances proved are consistent with a rational hypothesis that the touching was innocent. But appellant's alternative hypothesis relies on his own testimony, which was rejected by the jury.[2]

[2] We have held in several cases, including a recent unpublished decision, that when considering on appeal the circumstances proved at trial, the circumstances proved do not include the testimony of a defendant who has been found guilty by the finder of fact. *See, e.g.*, *State v. Bradley*, No. A17-1659, 2019 WL 3412314, at *6-7 (Minn. App. Jul. 29, 2019). Although unpublished opinions are not precedential under Minn. Stat. § 480A.08, subd. 3 (2018), they may be of persuasive value. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993). To the extent that we consider a convicted defendant's testimony at all, we consider only that the finder of fact *rejected* the testimony inconsistent with guilt. Put another way, the circumstances proved in a case such as this include that

Because the jury concluded, beyond a reasonable doubt, that appellant's proposed theory was not believable, and there is no reasonable inference from the facts proved that is inconsistent with appellant's guilt, the evidence is sufficient to support the jury's verdict.

The district court acted within its discretion by denying appellant's pretrial motion to introduce evidence of his character for truthfulness.

Evidentiary rulings lie within the district court's discretion and "will not be reversed absent a clear abuse of discretion," and the appellant has the burden of showing that he was prejudiced by such an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The general rule governing character evidence is that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Minn. R. Evid. 404(a). Under Minn. R. Evid. 608(a), "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation," provided that the evidence refers to the witness's character for truthfulness or untruthfulness and the witness's character for truthfulness has been attacked by reputation or opinion evidence.

Before trial, the district court informed the parties that it would allow appellant to present evidence of his character for truthfulness if the state attacked his character.

Appellant argues that the state's cross-examination questions attacked his character for truthfulness and he therefore should have been allowed to introduce evidence on the issue. The complained-of questioning included challenging whether appellant agreed that

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the finder of fact concluded beyond all reasonable doubt that the defendant's testimony was untrue.

"if he touched [E.J.B.'s] vagina with sexual intent, that would be a crime" and whether "people that perpetrate sexual assaults on children don't generally run around telling people about it." Appellant neither moved the district court to revisit its pretrial ruling nor objected to the state's line of questioning.[3]

These questions, asked during the state's cross-examination of appellant, do not attack appellant's character for truthfulness. There is no error. We are unaware of any authority for the notion that cross-examination of this type amounts to a sufficient basis for the admission of character evidence of truthfulness.

The district court acted within its discretion by denying appellant's pretrial motion to admit evidence of his truthful character.

The district court erred by employing an admissibility analysis when it denied appellant's motion for a trial continuance.

Appellant argues that the district court erred when it denied his continuance motion. The district court conducted an admissibility analysis

We review a district court's decision to grant or deny a motion for a continuance for abuse of discretion. *State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987). We consider the circumstances that existed in the district court when it made its continuance decision. *State v. Turnipseed*, 297 N.W.2d 308, 311 (Minn. 1980). We will not reverse a conviction unless the appellant shows that the denial of the requested continuance materially affected the trial's outcome. *State v. Barnes*, 713 N.W.2d 325, 333 (Minn. 2006).

[3] Although the questions may have been argumentative, appellant did not object at trial and does not argue on appeal that the state's argumentative questions entitle him to appellate relief.

Two business days before trial, on June 7, the state informed appellant's attorneys that "during a phone conversation with [J.B.], she stated that after this incident was reported and investigated, there was an incident where [E.J.B.] and a same aged friend engaged in touching." The next day, appellant moved to continue the trial to conduct discovery concerning the other-touching evidence or, in the alternative, for the court to examine the material in camera under *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987).

The district court reserved ruling on the motion until trial and heard argument on the motion on the morning trial was set to begin. A different district court judge, who had not previously presided in the case, heard the motion.[4] The district court acknowledged that appellant was seeking time to conduct discovery, but engaged in an admissibility analysis under the rape-shield statute and rule in denying the motion.

The district court reasoned that, because a child of E.J.B.'s age could not effectively consent to sexual contact, and because there was no evidence of fabrication or of semen, the evidence would be inadmissible under Minn. R. Evid. 412 and Minn. Stat. § 609.347 (2016). The district court further reasoned that, because the other-touching evidence occurred after the incident leading to the charges in this case, the evidence would be more prejudicial than probative.

This admissibility analysis was error. The only information that the district court and the parties had at the time of the motion was a one-sentence email stating that "[E.J.B.]

[4] At oral argument, appellant's counsel indicated that the change in district court judges was attributed to the district court judge assigned to the case not having sufficient time to hear the continuance motion before trial.

and a same-aged friend had engaged in touching" and that this other touching had been "after this incident [involving appellant] was reported and investigated." But this information is insufficient to determine whether this evidence or additional evidence resulting from further *discovery* would be precluded under the rape-shield statute and rule. With such little information, there is an inadequate basis on which to determine whether E.J.B.'s other conduct was different than or similar to the conduct of E.J.B. that appellant alleged had occurred.

Appellant was seeking a continuance for discovery or, in the alternative, for in camera review of the evidence. The rules of criminal procedure allow for broad discovery, Minn. R. Crim. P. 9.01, and provide that all material and information to which a party is entitled "must be disclosed in time to afford counsel the opportunity to make beneficial use of it." Minn. R. Crim. P. 9.03, subd. 2(a).

The state argues that any error was harmless. Had the district court given appellant the opportunity to further investigate the other-touching evidence, or had it reviewed the existing information in chambers—which would result in the evidence becoming part of the record available to us upon review—we would be able to evaluate the state's harmlessness argument. But because the record does not reveal of what the other touching consisted, we are unable to assess the state's argument.

Similarly, appellant argues that we should reverse and remand for a new trial. That, too, would be improper on this record—on appeal, appellant must demonstrate both error and prejudice. *See State v. Tate*, 682 N.W.2d 169, 175 (Minn. App. 2004) (stating that "[o]rdinarily, a criminal defendant seeking a new trial bears the burden of proving not only

that error occurred but also that it was prejudicial"), *review denied* (Minn. Sept. 29, 2004). Appellant has demonstrated the former but, because of the lack of information, he cannot on this record demonstrate the latter.

Because the record is insufficient to determine whether appellant is entitled to a new trial, we remand this issue to the district court. *State v. Lynch*, 392 N.W.2d 700, 706 (Minn. App. 1986). On remand, the district court shall receive evidence and argument concerning the other-touching incident and evaluate whether appellant should have been granted a continuance to conduct further investigation and discovery. If the district court determines that, using the proper standard, additional discovery should have been permitted, it must then consider the parties' arguments concerning whether appellant is entitled to a new trial. Additionally, and as discussed below, the district court shall reconsider appellant's prosecutorial-misconduct arguments in light of the disposition of the reconsidered continuance request.

We do not by this disposition and remand suggest that the other-touching evidence should have resulted in a continuance or that there will ultimately be any other evidence that would have been admissible at trial. But because the district court used an improper legal standard to analyze the continuance motion, resulting in the record being insufficient for us to review the issue on appeal, remand is the only appropriate disposition.[5]

[5] Appellant might have been better served by bringing this issue to the district court's attention via a petition for postconviction relief, but we take the appeal as it comes to us. It would make little sense to require appellant to file a separate postconviction petition now that the issue has been raised and argued on appeal. *See* Minn. R. Crim. P. 28.02, subd. 4(4) (permitting a stay-and-remand procedure if a postconviction petition is filed after a direct appeal has been perfected).

The prosecutor committed misconduct during summation, and the district court, on remand, should address whether, in light of the reconsidered continuance motion, the misconduct had an effect on the jury's verdict.

Finally, appellant alleges prosecutorial misconduct during summation. Because appellant raised these arguments to the district court in a posttrial motion, we review the alleged misconduct under the harmless-error standard of review. *State v. Banks*, 875 N.W.2d 338, 348 (Minn. App. 2016), *review denied* (Minn. Sept. 28, 2016). For objected-to prosecutorial misconduct, we apply a two-tiered harmless-error test, the application of which varies based upon the severity of the misconduct.[6] *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010). Serious misconduct is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error, while less serious misconduct is harmless unless the misconduct likely played a substantial part in influencing the jury. *Id.*

A prosecutor engages in misconduct when she violates clear or established standards of conduct, i.e. rules, laws, orders by a district court, or clear commands in this state's caselaw. *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008). When reviewing claims of prosecutorial misconduct during summation, we consider the summation as a whole. *Id.* Determination of the propriety of a prosecutor's summation is within the district court's discretion. *Id.* at 751-52

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[6] The supreme court has questioned the viability of this two-tiered test but has not overruled it. *See State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (noting unsettled state of law, but declining to decide whether the two-tiered *Caron* standard should apply to cases of objected-to prosecutorial misconduct); *see also State v. Tayari-Garrett*, 841 N.W.2d 644, 651 (Minn. App. 2014), *review denied* (Minn. Mar. 26, 2014).

Appellant moved the district court for a new trial on the basis that the prosecutor committed misconduct seven times during summation. The district court thoroughly addressed each claim of misconduct and determined that the prosecutor committed misconduct in two instances, but that the misconduct in those two instances did not substantially influence the jury's decision.

We first address appellant's arguments concerning the misconduct allegations that the district court found to be unsupported by the record.

Personal Opinion

During summation, the prosecutor argued that "[i]t's impossible for both [appellant's] version and [E.J.B.'s] version of what happened at [appellant's] house to be true" and that it is "not believable that [appellant] would not notice or be able to stop this child before she not only got her hand over, but also under two separate layers of clothing and onto her vaginal area." The prosecutor continued that "[i]t's also not rational to believe that she grabbed [appellant]'s hand numerous times and forced or tried to force it to her vagina and that he didn't tell anyone." Appellant alleges that this amounted to improper expression of personal opinion.

During summation, it is improper for a prosecutor to give her own opinion about the defendant's credibility. *State v. Wright*, 719 N.W.2d 910, 918 (Minn. 2006). But prosecutors are permitted to analyze the evidence and argue that particular witnesses were or were not credible. *Id.* at 918-19.

We agree with the district court that the prosecutor's statements in this instance were not misconduct. The prosecutor was not personally vouching for the credibility of a

witness. The prosecutor properly argued from the evidence that appellant's testimony was not credible.

Inflaming the Passions of the Jury; Evoking Sympathy for the Victim

Appellant asserts that the prosecutor inflamed the jury's passions and improperly evoked sympathy for the victim. The prosecutor stated that "[Appellant's] testimony was that he wanted to have a conversation with [J.B.] about [E.J.B.'s grabbing his hand to touch her], so it seems more likely that it would be a conversation that you would want to have privately with [J.B.]." Appellant also takes issue with the prosecutor's surrebuttal argument that "If you ask a child what did he touch it with? A seven-year-old child is going to have no idea what it is that you're talking about."

It is improper for a prosecutor to evoke sympathy for a victim. *State v. McNeil*, 658 N.W.2d 228, 236 (Minn. App. 2003). Nor may a prosecutor "appeal to the passions and prejudices of the jury or otherwise seek to distract the jury from its proper role of deciding whether the state has met its burden of proof." *State v. Jackson*, 714 N.W.2d 681, 694 (Minn. 2006).

The district court concluded that these statements appear to be rhetorical references to general understanding and not specific references to E.J.B. It is not improper to ask the jury to consider whether trial testimony makes sense in light of their collective experience and common sense. The prosecutor's statements in this instance were not misconduct.

Appellant also argues that the prosecutor sought to evoke sympathy for E.J.B. by commenting, "This is a child that loves [appellant]. She has no reason to want to get him in trouble, to want to say anything bad about him, to want anything bad to happen to him."

The prosecutor also told the jury that, "you heard she is sad that she doesn't get to see [appellant]."

We agree with the district court's determination that the "clear purpose for these statements was to bolster the credibility of the victim's testimony." The prosecutor was arguing that the evidence revealed no motive for E.J.B. to lie. And the record reveals no such motive. These statements were not misconduct.

Misstating the Law—Shifting the Burden

Prosecutors improperly shift the burden of proof by implying that a defendant has the burden of proving innocence, and a misstatement of this burden is highly improper and is misconduct. *McDaniel*, 777 N.W.2d at 750. But a prosecutor's comment on the lack of evidence supporting a defense theory does not impermissibly shift the burden. *Id.*

Appellant first takes issue with the prosecutor's statement that "[i]t's in [appellant's] best interest to get up with this version now that there was no sexual or aggressive intent. And there's no corroboration of any of his statements." Appellant argues that these statements imply that appellant is required to prove and corroborate the absence of sexual intent in touching E.J.B.

Here, the prosecutor appears to have been commenting on appellant's "[i]nterest or lack of interest in the outcome of the case," something Minnesota has long recognized as proper, and which is part of the standard jury instruction concerning the evaluation of testimony. 10 *Minnesota Practice*, CRIMJIG 3.12 (2015). We also agree with the district court that any resulting prejudice was remediated because appellant's counsel addressed

the argument in closing. Even if this fleeting argument in summation could be considered improper, the verdict was surely unaffected by it.

Next, appellant challenges the propriety of the prosecutor's comment concerning reasonable doubt, that "when you make those decisions, you never have all the information or all the answers that you can possibly have. You base those decisions on what you know, and what you feel, and what you think." These statements concern the meaning of proof beyond reasonable doubt. And the district court's reasonable-doubt instruction was proper and is unchallenged. This brief snippet of argument was not misconduct.

Appellant also argues that the prosecutor's surrebuttal statement that "[i]f you believe [E.J.B.], that is enough for proof beyond a reasonable doubt. That is the only evidence that you need to convict [appellant]" and that, "[i]f you believe [E.J.B.], find [appellant] guilty of both counts." These statements did not misstate the law. The state was arguing, and correctly so, that a conviction can rest on the uncorroborated testimony of a single witness. *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004).

Tailoring Testimony

Where there is no evidence that the defendant actually tailored his testimony to fit the evidence previously presented at trial, the prosecution cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony. *State v. Mayhorn*, 720 N.W.2d 776, 790 (Minn. 2006). "Without specific evidence of tailoring, such questions and comments by the prosecution imply that all defendants are less believable simply as a result of exercising the right of confrontation." *Id.* (quotation omitted).

During summation in this case, the prosecutor referred to appellant's version of events as his "now version." The prosecutor stated that appellant's testimony was "a different version" and that he "got up on the stand and told [the jury] after a year's worth of time when he's had time to think about what his testimony would be, and what the best story to get up and tell . . . would be." The prosecutor continued, that when appellant "got up and testified before [the jury], he knew what everyone had said. He had time to evaluate everyone else's—."

The district court concluded, and we agree, that the argument that appellant changed his story was not misconduct. Pointing out inconsistency between prior statements and trial testimony is entirely proper. As to the second portion, that appellant had heard and evaluated the other trial testimony, the district court determined that the prosecutor's argument was improper and amounted to an unsupported assertion of tailoring We agree with the district court that this was misconduct.

Belittling the Defense

A prosecutor may argue that there is no merit to a particular defense, but may not belittle the defense, either in the abstract or by suggesting that the defense was raised because it was the only defense that might succeed. *State v. Waiters*, 929 N.W.2d 895, 902 (Minn. 2019). Examples of such misconduct include labeling a defense "soddy" or suggesting that jurors would be "suckers" if they believed the defense. *State v. Davis*, 735 N.W.2d 674, 683 (Minn. 2007); *State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000).

Appellant argues that the prosecutor's argument—that appellant's "only option" was to "tell [the jury] that he didn't have sexual or aggressive intent"—was misconduct.

Specifically, appellant takes issue with the prosecutor's statement that appellant "can't get up here and tell [the jury] that it didn't happen, because he already acknowledged and admitted that it happened in the text messages. It's in his best interest to get up with this version now that there was no sexual or aggressive intent."

The district court found, and the trial transcript supports, that the prosecutor suggested that appellant's defense was raised because it was the only defense that could succeed. We again agree with the district court that these statements were misconduct.

The district court determined that these two instances of misconduct—belittling the defense and suggesting in summation, without record support, that appellant's testimony was tailored—surely had no effect on the jury's verdict. We see no error in that determination. The misconduct was only a small part of summation consisting of 14 pages of trial transcript. *Cf. State v. Matthews*, 779 N.W.2d 543, 552 (Minn. 2010) (concluding that the alleged misconduct did not permeate the entire argument because it was "limited to a few lines in a 48–page closing argument"). Appellant had and availed himself of the opportunity to rebut the statements, which were not severe or pervasive and surely had no effect on the jury's verdict. *Cf. State v. Wren*, 738 N.W.2d 378, 394 (Minn. 2007) (stating that whether a defendant countered the misconduct is one factor relevant to the harmless-error-beyond-a-reasonable-doubt standard).

Misstating the Evidence

While we agree with the district court's conclusions concerning the above-discussed misconduct, we cannot on this record affirm the district court's determination that the

prosecutor's argument in summation that E.J.B. was "not acting out like this towards anyone else" was proper.

During summation, the prosecutor argued that E.J.B. was "not acting out like this towards anyone else. She's not grabbing other people's hands and making them touch her vagina, so why would she be doing this with [appellant] and no one else?"

It is true, as the district court concluded, that, at the time it was made, this was an accurate statement of the record as constituted. But, as discussed above, the record is incomplete and insufficient for us to review the question of whether appellant should have been afforded more time to investigate reports of E.J.B.'s involvement in other touching incidents. The state, having opposed appellant's pretrial efforts to conduct further discovery concerning it, by this comment drew conspicuous attention to the absence of any similar conduct. And the district court, applying an incorrect legal standard, had previously denied appellant's continuance request. Against that background, we cannot affirm the propriety of this argument in summation. If there existed admissible evidence making the prosecution's summation on this point inaccurate, then the district court must also determine whether, in that light, this argument was improper and requires a new trial.

On remand, and after reconsideration of the continuance issue consistent with our foregoing instructions, the district court shall reconsider whether this portion of the prosecutor's summation was misconduct and, if so, whether a new trial is warranted.

Affirmed in part and remanded.