STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0397

State of Minnesota,
Respondent,

vs.

Elizabeth Rose Osterbauer,
Appellant.

Filed February 18, 2020
Affirmed
Slieter, Judge

Hennepin County District Court
File No. 27-CR-16-32250

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

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Larkin, Judge; and Reyes, Judge.

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

SLIETER, Judge

In this direct appeal from final judgment, appellant Elizabeth Rose Osterbauer argues that her convictions for two counts of burglary must be reversed because the district

court abused its discretion by denying her motion to sever the two burglary counts for trial. Osterbauer also argues that the prosecutor committed prosecutorial misconduct in closing argument by making a personal attack on the defense attorney and by commenting on the fact that Osterbauer did not call a specific witness. Because the district court's decision not to sever the burglary charges was harmless error and the prosecutor's statements in closing argument did not affect Osterbauer's substantial rights, we affirm.

FACTS

Osterbauer and victim S.B. have been in an on-and-off relationship since 2008. Both worked with rescue animals and both fostered animals. Their relationship was somewhat one-sided, with Osterbauer "constantly profess[ing] her love" for S.B., but S.B. telling Osterbauer she did not feel the same.

The two had an argument over Osterbauer's feelings for S.B. on December 9, 2015. The next day, while S.B. was at work, S.B.'s friend went to S.B.'s house to check on her dogs. He noticed S.B.'s miniature pinscher, Ducky Mo-Mo, was missing. He texted S.B., and S.B. searched for Ducky, but to no avail. Due to their argument the night before, S.B. suspected Osterbauer, but S.B. did not contact the police.

In June 2016, S.B. moved to North Dakota but kept her Minneapolis home. On June 6, a friend of S.B.'s checked on S.B.'s Minneapolis home; the friend found cat litter and oil spread throughout the house and a clogged sink and toilet. Several possessions were also missing, including dog-food bowls, pet medication, two sweatshirts, and a Rapala fishing knife. S.B. called the police, but officers did not pursue an investigation at that time.

Later in June 2016, Osterbauer filed an order for protection (OFP) against S.B. S.B. did not object to the OFP because she hoped it would lead to Osterbauer leaving her alone. S.B. violated the OFP in August 2016 by contacting Osterbauer.

On November 2, 2016, a woman named M.M. messaged S.B. on Facebook. M.M., Osterbauer's friend, told S.B. that she had information about Ducky.

One month after talking to S.B., M.M. went to the police. The police reopened the investigation into the June burglary, and interviewed M.M. and several others with knowledge of Osterbauer's actions.

In December 2016, police executed a search warrant for Osterbauer's home. Police found S.B.'s sweatshirts and a fishing knife. The state charged Osterbauer with two counts of second-degree burglary (dwelling), in violation of Minn. Stat. § 609.582, subd. 2(a)(1) (2014), based on the December 2015 and June 2016 incidents. The state amended the complaint to add a count of mistreatment of animals (torture), in violation of Minn. Stat. § 343.21, subd. 1 (2014), and a count of stalking, in violation of Minn. Stat. § 609.749, subd. 5(a) (2014).

Prior to trial, Osterbauer moved to sever the two burglary offenses. The district court denied the motion to sever. The case proceeded to trial.

During trial, M.M. testified about the December 2015 burglary and described what happened to Ducky. M.M. testified that she drove Osterbauer to S.B.'s home, where Osterbauer stole Ducky. M.M. and Osterbauer then drove to a remote area, and Osterbauer kept Ducky in a pillowcase while she drowned him in a body of water. M.M. testified that after drowning Ducky, Osterbauer "was very much on top of the world" and bragged about

killing Ducky. M.M. also testified that Osterbauer gave her live updates about the June 2016 burglary, explaining that she took several of S.B.'s items, including sweatshirts, and spread cat litter and oil throughout the house.

Two other witnesses testified about Osterbauer's actions. A friend of M.M.'s, M.Z.-E. testified that Osterbauer told him about both burglaries, and that one of Osterbauer's brothers, helped with the June 2016 burglary. K.V. also testified about the June 2016 burglary stating that Osterbauer told him that she broke into S.B.'s home and "tore up the house and flooded the sink."

The jury convicted Osterbauer on all counts. The district court sentenced Osterbauer on the burglary counts to stayed execution of prison terms of 18 and 23 months. The district court did not impose sentence on the remaining counts.

This appeal follows.

D E C I S I O N

I. The district court did not reversibly err by denying the motion to sever.

Osterbauer argues that the district court erroneously failed to sever the burglary charges. Minnesota Rule of Criminal Procedure 17.03, subdivision 3(1), governs severance of joined criminal offenses.

> On motion of the prosecutor or the defendant, the court must sever offenses or charges if:
>
> (a) the offenses or charges are not related;
>
> (b) before trial, the court determines severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense or charge; or
>
> (c) during trial, with the defendant's consent or on a finding of manifest necessity, the court determines severance

> is necessary to fairly determinate the defendant's guilt or innocence of each offense or charge.

Minn. R. Crim. P. 17.03(1).

"Rule 17.03, subdivision 3(1)(a), requires severance of offenses that are 'not related,' and Rule 17.03, subdivision 3(1)(b) and (c), require severance of related offenses under some circumstances." *State v. Ross*, 732 N.W.2d 274, 278 (Minn. 2007). Presuming, without deciding, that the district court erred by not severing the burglary offenses, *see id.* (applying the single-behavioral-incident test to address whether offenses are related for severance), we conclude that any error was harmless.[1]

The supreme court has "held that improper joinder of two offenses was not prejudicial when evidence of either offense could have been properly admitted as *Spreigl* evidence[2] in the trial of the other offense." *Id.* at 280. "Evidence of other crimes, wrongs, or bad acts, while not admissible to show the defendant's bad character, may be admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

[1] Osterbauer argues that the failure to sever the burglary charges prejudiced her because it precluded her from testifying. In part, Osterbauer asserts the decision not to sever the offense would have allowed the state to impeach her with a withdrawn plea agreement, if she had chosen to testify. Osterbauer's claim is not accurate. *See State v. Blom*, 682 N.W.2d 578, 616 (Minn. 2004) (recognizing that Minn. R. Evid. 410's "plain language gives a district court little discretion to admit a defendant's statement if the statement is made in connection with a plea or plea offer") (quotation marks omitted).

[2] In Minnesota, courts often refer to other-crime evidence as *Spreigl* evidence after the supreme court's decision in *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965), disallowing the use of other-crime evidence except under certain circumstances. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998).

mistake or accident." *Id.* at 282. In order for *Spreigl* evidence to be admissible, the following conditions must be met:

> (1) the state must give notice of its intent to admit the evidence; (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

Id. (quotation omitted). When analyzing "whether prejudice resulted from improper joinder, [appellate courts] focus on the third, fourth, and fifth conditions." *See id.*

There was clear-and-convincing evidence that Osterbauer committed the June 2016 incident. Several witness testified that Osterbauer detailed the burglaries to them, and a search warrant uncovered S.B.'s missing sweatshirts. Police also discovered a fishing knife, though S.B. was unable to positively identify it as hers.

The evidence of each burglary offense is relevant and material to the other burglary offense. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Evidence connecting Osterbauer to either burglary makes her involvement in the other burglary more probable "by shedding light not only on [her] intent and participation, but also on [her] knowledge, opportunity, and preparation, as well as the common plan used in each offense." *See Ross*, 732 N.W.2d at 282.

And finally, the probative value of the evidence is outweighed by its potential prejudice. The burglaries are connected to each other and are probative of Osterbauer's scheme to terrorize S.B.

In sum, because the burglary offenses are admissible as *Spreigl* evidence and would have been admissible even if the burglary offenses had been severed for trial, any error that the district court committed by denying Osterbauer's request to sever was harmless.

II. The prosecutor did not commit prosecutorial misconduct warranting a new trial.

Osterbauer contends that the prosecutor committed two instances of misconduct. Osterbauer objected to one instance but not the other. Because the standard of review depends on whether the appellant objected to the misconduct, each is addressed in turn.

A. Objected-to misconduct

When reviewing objected-to prosecutorial misconduct, appellate courts utilize a harmless-error test—known as the *Caron* test—"the application of which varies based on the severity of the misconduct." *See State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007); *see also State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974). The supreme court has expressed skepticism of the *Caron* test, but it has not overturned it as it relates to objected-to misconduct. *See State v. Ramey*, 721 N.W.2d 294, 299 n. 4 (Minn. 2006) ("Our decision today leads us to conclude that the *Caron* two-tiered standard is no longer applicable to cases involving unobjected-to prosecutorial misconduct. . . . We leave for another day the question of whether the *Caron* two-tiered approach should continue to apply to cases involving objected-to prosecutorial misconduct."). Because Osterbauer's claim fails under

the "enhanced harmless-error standard," the uncertainty of the *Caron* test does not affect our analysis. *See id.* at 301.

Osterbauer contends that the prosecutor committed misconduct by making a remark about defense counsel. "[T]he [s]tate has the right to vigorously argue its case. But a prosecutor is not permitted to disparage the defense in closing argument." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) (citation omitted).

During closing arguments, the prosecutor said, "[I have] [k]nown [the defense attorney] for a lot of years. Obviously, he's very good at what he does. I don't believe for one second he's proud of the cross-examination of those three kids you saw who had the guts to get up there." The defense objected, and the court instructed the jury that, "To the extent that there were comments that could be considered personal attacks, you are to disregard those comments." The district court also reminded the jury that the "evidence is what the witnesses tell you under oath. . . . What is not evidence is anything that the attorneys are telling you in opening or closing arguments."

Presuming, without deciding, that this statement constitutes misconduct, we conclude it is harmless beyond a reasonable doubt. Ample evidence supports the jury's conviction. M.M. testified about the December 2015 burglary and Osterbauer's killing of Ducky. M.M. also testified that Osterbauer gave her live updates of her actions in the June 2016 burglary. M.Z.-E. testified that Osterbauer told him about both the December 2015 burglary of S.B.'s home and killing of Ducky, and the June 2016 burglary. K.V. testified that Osterbauer told him about the 2016 burglary.

Even accepting Osterbauer's assertion that the prosecutor's statement constitutes misconduct, the prosecutor did not belabor the point and the evidence points strongly to Osterbauer's guilt. This behavior is insufficient to warrant reversal.

B. Unobjected-to misconduct

With unobjected-to prosecutorial misconduct, we apply a modified plain-error test. *See Ramey*, 721 N.W.2d at 302. Under this test, the defendant must establish that (1) misconduct constitutes error, and (2) that the error was plain. *Id.* The defendant generally shows the error was plain "if the error contravenes case law, a rule, or a standard of conduct." *Id.* If plain error is shown, the burden then shifts to the state to demonstrate that the error did not affect the defendant's substantial rights. *Id.* "If the three prongs of the plain error test are met, [the reviewing court] will then [assess] whether [it] should address the error to ensure fairness and the integrity of the judicial proceedings." *See State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006) (second alteration in original) (quotations omitted). "[The reviewing court] will correct the error only if the fairness, integrity, or public reputation of the judicial proceeding is seriously affected." *See id.* (quotation omitted).

Osterbauer claims that the prosecutor committed misconduct during closing argument by suggesting the defense failed to call a key witness. "A prosecutor commits misconduct by commenting on a defendant's failure to call a witness, because such a comment suggests that the defendant has some sort of burden of proof." *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010).

During the closing argument, the prosecutor stated:

> There was all this talk about they have proven—the defense had no burden to proven [sic] anything. Let's get that straight. They don't have to prove anything and they didn't. They brought . . . one of the four siblings that the defendant has. I'm not being flippant about this. He was a cute kid . . . I don't think he's lying. But who's the sibling that counts in this case, [Osterbauer's other brother].

Even if we accept that Osterbauer has shown that the prosecutor's comment was plain error, it is not reversible if the state shows that it did not affect Osterbauer's substantial rights. To meet this burden, "the state would need to show that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Ramey*, 721 N.W.2d at 302 (quotation omitted). We conclude the state met its burden.

The state argues that any error here did not affect Osterbauer's substantial rights because the district court instructed the jury about the burden of proof and the prosecutor's comments were not pervasive throughout closing. We agree. First, "[f]ailure to object or to seek a curative instruction weighs heavily against granting the remedy of a new trial." *State v. Griese*, 565 N.W.2d 419, 428 (Minn. 1997). Osterbauer did neither here. Second, the prosecutor's asserted misconduct did not "permeate[] the entire closing." *Id.* (quotation omitted). The purported misconduct was an isolated statement, and the district court reminded the jury that the opening and closing statements were not evidence. Third, there was ample evidence supporting Osterbauer's conviction, including several witnesses who testified about Osterbauer's involvement in the burglaries, and police discovered S.B.'s missing sweatshirts in a search of Osterbauer's home. Finally, the district court reminded

the jury that the state bears the burden; moreover, the prosecutor also reminded the jury that the state bore the burden immediately before making the statement.

Considering the entirety of the closing argument, the prosecutor's statement did not affect Osterbauer's substantial rights, and reversal is not required.

Affirmed.