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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1496**

State of Minnesota,
Respondent,

vs.

Richard Lee Peterson,
Appellant.

**Filed August 3, 2020
Affirmed
Jesson, Judge**

Douglas County District Court
File No. 21-CR-19-523

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

Thomas Jacobson, Alexandria City Attorney, Katelyn K. Steffel Spangrud, Assistant City Attorney, Swenson Lervick Syverson Trosvig Jacobson Cass, P.A., Alexandria, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Worke, Judge; and
Jesson, Judge.

UNPUBLISHED OPINION

JESSON, Judge

After an argument with his girlfriend became physical, a jury convicted appellant Richard Lee Peterson of misdemeanor domestic assault. Peterson challenges that

conviction, contending that the prosecutor committed misconduct and that the district court erroneously admitted an order for protection. Because neither of the alleged errors impacted Peterson's substantial rights, we affirm.

FACTS

In March 2019, S.P. and her boyfriend, appellant Richard Lee Peterson, began arguing about him messaging another woman. S.P. told Peterson that he was no longer welcome in her home, and Peterson was upset. The argument turned physical, involving some pushing and shoving from both parties. According to S.P.'s petition for an order for protection (OFP), she attempted to move Peterson's belongings closer to the door. Peterson then "put his hands on [her collarbone] and pushed [her] all the way to [the] other side of [the] living room."

Later that afternoon, Peterson returned to S.P.'s house, and the two began arguing about who owned a tire jack. As Peterson attempted to take the tire jack from the garage, S.P. entered the garage and closed the door behind her. Inside the garage, the argument continued. When Peterson tried to leave and S.P. resisted, the argument again turned physical. Both Peterson and S.P. were holding the tire jack and pushing each other. While holding the tire jack, Peterson shoved his body weight into S.P. But, according to S.P., she also used her shoulder to push Peterson. Peterson managed to open the door, and the two struggled over the tire jack outside. S.P. ended up on the ground. Eventually, S.P. called the police to have Peterson removed from her property.

Peterson was gone when police arrived. According to the officer, S.P. told him that she and Peterson were mutually struggling over the tire jack. But she also reported that

Peterson used his shoulder to push her off the tire jack, and “shouldered” her outside, causing her to fall into the mud. A man who witnessed the struggle told the officer that Peterson punched S.P. in the stomach. When the officer asked S.P. if Peterson punched her in the stomach, S.P. started crying. Although her demeanor indicated that Peterson may have punched her, she did not explicitly state this to the officer.

The next day, S.P. went to the doctor for bruises, body pains, and concern about her finger. She also filed a petition for an OFP. In the petition, S.P. alleged that Peterson pushed her across the living room. She also described the altercation over the tire jack, explaining that Peterson physically shoved his body weight into her, forced her to the ground, and “sw[ung at her] but missed.” But the handle of the tire jack made contact with her, S.P. stated, and she had some bruising and scratches. The district court granted S.P.’s request for an ex parte OFP. And police asked Peterson to come to the police station, where they arrested him.

The state charged Peterson with misdemeanor domestic assault. Before trial, the state filed a motion seeking to admit three of Peterson’s prior acts as domestic abuse evidence, including evidence that Peterson allegedly violated an OFP in 2018.¹ But the district court denied the state’s motion. With respect to the alleged OFP violation, the

¹ The other two prior acts included evidence that Peterson assaulted a family member in 2002 and evidence that Peterson engaged in criminal sexual conduct against a family or household member in 2017. The district court determined that the 2002 incident was too remote and that the potential for prejudice outweighed the probative value of the evidence. And it excluded the ongoing criminal-sexual-conduct case for the same reason it excluded the alleged OFP violation.

district court concluded it was an ongoing criminal case, and the district court did not want to violate Peterson's right to remain silent in that matter.²

The case then proceeded to trial. Before jury selection, the parties reviewed the evidence with the court, which included S.P.'s petition for an OFP and the ex parte OFP. The OFP petition contained a statement from S.P. that Peterson "ha[d] numerous past altercations along with a current OFP with [another woman] in Stearns County [and] a couple violations." And it was not redacted. The district court asked defense counsel if there was any stipulation regarding those two exhibits. Counsel responded, "[y]es." And defense counsel did not have any objections to the state offering the exhibits.

At trial, S.P. testified under subpoena as an unwilling witness. S.P. explained that Peterson was still her boyfriend, and the two lived together. Much of her testimony appeared to minimize what happened with Peterson. Indeed, S.P. testified that she only filled out a petition for an OFP because she "was told to" and that Peterson "did not do what everybody is claiming he did."

Because S.P.'s testimony was often inconsistent with her statements in her petition for an OFP, the state asked S.P. to read her statements from the petition, which she did. But, according to S.P., Peterson only pushed her during their argument in the living room to calm her down and de-escalate the situation. And S.P. characterized the struggle over the tire jack as a mutual struggle, though she testified that Peterson shoved his body weight against her. S.P. explained that she lost her footing and fell because her driveway was

² After the district court denied the state's motion, the state sought to add an additional charge of domestic assault against Peterson, which the district court allowed.

muddy and slick. She denied that Peterson shoved her. When asked if Peterson attempted to punch her, S.P. testified that “[i]t could contemplate looking like a swing,” but Peterson was really readjusting his grip on the tire jack. During cross-examination, S.P. reiterated that Peterson was not trying to hurt her and that she was not afraid of him.

In addition to S.P.’s testimony, the man who saw the altercation testified. The man was at his uncle’s house nearby, with a clear view of the struggle. The “yelling and screaming” caught his attention. He then saw S.P. and Peterson fighting over what looked like a big pipe. Then, according to the man, Peterson punched S.P. “in the gut” causing her to fall to the ground. When asked if he saw Peterson make contact with S.P., the man testified that Peterson “had to have” because S.P. fell down.

The officer who responded to S.P.’s 911 call also testified. When he arrived, S.P. was crying, visibly shaking, and “very worked up,” the officer explained. S.P. told him that Peterson put his shoulder into her to get her off the tire jack and “shouldered” her outside, causing her to fall in the mud. The officer also testified that when he asked S.P. if Peterson punched her in the stomach, she started crying and sort of nodded. In addition to the officer’s testimony, the state submitted footage from his body camera.³

At the close of the state’s case, Peterson recalled S.P. to the stand. S.P. testified that when the officer asked her about the stomach punch, she was on the phone with an organization that assists victims of domestic violence. Her emotional expression and

³ The state also presented testimony from the nurse who treated S.P. after the incident. The nurse explained that S.P. said she was in an altercation with someone and had bruises and body aches. S.P. reported that she was pushed around, pushed down, and that something may have happened to her hand.

shaking her head, she explained, was in response to the phone conversation, not the officer's question.

The jury found Peterson guilty of domestic assault which caused harm, but not guilty of domestic assault in which a person attempts to inflict harm. The district court sentenced Peterson to 90 days in jail, with 80 days stayed for two years. Peterson appeals.

D E C I S I O N

Peterson argues that two alleged errors warrant reversal of his conviction and a new trial. First, he contends that the prosecutor committed misconduct by introducing S.P.'s petition for an OFP, which contained a reference to an alleged prior OFP violation that the district court previously excluded. Second, he maintains that the district court erroneously admitted the ex parte OFP because it contained a prejudicial determination that S.P. needed protection from him. We review each argument in turn.

I. Introducing the unredacted petition for an OFP constituted prosecutorial misconduct, but such misconduct did not affect Peterson's substantial rights.

Peterson first contends that by introducing S.P.'s petition for an OFP, which referenced prior altercations with another woman who had an OFP against him and "a couple violations" of that OFP, the prosecutor committed misconduct. This action, according to Peterson, violated the district court's earlier evidentiary ruling excluding evidence of the pending charge against Peterson for violating an OFP.

Peterson did not object to the admission of the petition at trial. We review unobjected-to claims of prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, Peterson must

establish error that is plain. *Id.* Upon such a showing, the burden shifts to the state to demonstrate “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.” *Id.* (quotations omitted). If the state fails to establish that the misconduct did not affect Peterson’s substantial rights, we then consider whether to address the error “to ensure fairness and the integrity of judicial proceedings.” *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017).

Plain Error

We first consider whether the prosecutor committed misconduct amounting to plain error by introducing S.P.’s petition for an OFP. Before trial, the district court ruled that the state could not introduce evidence related to Peterson’s alleged 2018 violation of an OFP obtained by a different woman. But S.P.’s petition for an OFP contained a statement describing Peterson’s history of abuse. Her petition read that Peterson “has numerous past altercations along with a current OFP with [another woman] in Stearns County [and] a couple violations.” And the petition was not redacted. Rather, it was admitted—without objection—into evidence containing the statement referencing “past altercations” and a potential prior violation of an OFP.

If an error “contravenes case law, a rule, or a standard of conduct,” then it is plain. *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). In general, it is “misconduct for a prosecutor to knowingly offer inadmissible evidence for the purpose of bringing it to the jury’s attention.” *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014) (quotation omitted). Further, prosecutors must follow a district court’s evidentiary rulings. *See State v. Jahnke*, 353 N.W.2d 606, 611 (Minn. App. 1984). And the Minnesota Rules

of Evidence outline strict guidelines for admitting evidence of a defendant's prior bad acts. *See* Minn. R. Evid. 404(b).

Here, S.P.'s petition clearly suggests that Peterson may have previously violated an OFP, a topic that the district court ruled inadmissible. Submitting the petition without redacting the previously excluded, potentially prejudicial information violated the district court's earlier evidentiary ruling. Despite the state's claim that the introduction of the excluded evidence was inadvertent, the state intentionally introduced the petition. As such, introducing the unredacted petition referencing excluded evidence was misconduct amounting to plain error.⁴ *See generally State v. Flowers*, 261 N.W.2d 88, 89 (Minn. 1977) (granting a new trial where the state referred to an incident excluded by a pretrial order during the trial, and the district court overruled objections to the statements and denied the defendant's motion for a mistrial).

Substantial Rights

Because Peterson established prosecutorial misconduct amounting to plain error, the burden shifts to the state to demonstrate that such error did not affect Peterson's substantial rights. *See Ramey*, 721 N.W.2d at 302. When evaluating the effect of

⁴ In support of its argument to the contrary, the state asserts that the admission of a single reference to Peterson's past conduct was inadvertent. But if the state did not know the petition contained such a statement, it at least *should have* known. Indeed, this is not a case where a witness gave unexpected, inadmissible testimony. *See State v. Henriksen*, 522 N.W.2d 928, 929-30 (Minn. 1994) (concluding that a defendant was not entitled to a new trial where the prosecutor unintentionally elicited suppressed evidence). Rather, the statement at issue here was written down in an exhibit offered by the state. *See State v. Huffstutler*, 130 N.W.2d 347, 348 (Minn. 1964) (stating that "the prosecution is entirely responsible for [the inadmissible evidence's] presence in the record").

misconduct on a defendant's substantial rights, we evaluate "various factors, including the pervasiveness of improper suggestions and the strength of evidence against the defendant." *Parker*, 901 N.W.2d at 926 (quotations omitted). We also consider a defendant's opportunity to rebut the improper evidence. *Mosley*, 853 N.W.2d at 803.

The state argues that any misconduct was not pervasive and that the evidence of Peterson's guilt was strong. We agree. Beginning with the pervasiveness of improper suggestions, the state did *not* reference Peterson's alleged prior violation of an OFP during the trial. Additionally, the state did not question S.P. about that particular statement in her petition. Although the prosecutor asked S.P. one question about the portion of the petition including the allegations of Peterson's prior OFP violations, the prosecutor stopped S.P. before she read the prior-bad-acts statement aloud for the jury.

Nor did the state refer to the statement about the alleged OFP violations during its opening or closing argument. Peterson argues that the state emphasized the believability of the petition and referenced it generally during opening and closing arguments. But the prosecutor was not prohibited from referring to statements in the petition describing what happened that did not allude to any prior bad acts committed by Peterson. In short, the misconduct was not pervasive.

Next, we turn to the strength of the evidence against Peterson. *Parker*, 901 N.W.2d at 926. The state presented sufficient—if not significant—evidence of Peterson's guilt. Although S.P.'s testimony downplayed Peterson's actions, an eyewitness testified that Peterson and S.P. were struggling and that Peterson punched S.P. in the stomach. Additionally, the police officer who responded to S.P.'s call testified that she told him that

Peterson used his shoulder to push against her, causing her to fall. And the state presented S.P.'s 911 call and portions of the officer's body camera footage for the jury to review. Finally, the petition for the OFP contained several other admissible statements from S.P. describing the incident the day after it happened. Peterson's argument that the evidence against him was not strong—and his description of the case as a “he-said/she-said situation”—ignores this evidence. Given the strength of the evidence of Peterson's guilt, the single statement in the petition for the OFP did not affect Peterson's substantial rights.⁵

In sum, because the misconduct was not pervasive and the state's evidence against Peterson was significant, the introduction of the OFP petition referencing Peterson's alleged prior OFP violations did not affect Peterson's substantial rights. As a result, reversal of his conviction on this ground is not warranted.⁶

⁵ Peterson also maintains that he did not have a meaningful opportunity to rebut the statement contained in the petition. This argument is not persuasive. As the state notes, the admission of the OFP petition was not a surprise. The parties discussed all of the exhibits with the court before jury selection. And Peterson appeared to stipulate to at least the foundation of the petition. Nothing in the record indicates that Peterson ever sought to correct the document or have it redacted, which he could have done outside the presence of the jury. Peterson also called S.P. as a witness and could have questioned her about the statement in the petition. Though the need for Peterson to rebut the statement appears low—given that the state never referenced it—Peterson had an adequate opportunity to do so.

⁶ In his reply brief, Peterson asserts that the district court did not instruct the jury on prior-bad-acts evidence. But Peterson never asked for such a jury instruction. And the absence of a prior-bad-acts jury instruction does not indicate that the misconduct affected Peterson's substantial rights.

II. Any error in admitting the ex parte OFP against Peterson did not affect Peterson’s substantial rights.

Second, Peterson argues that the district court erred by admitting the ex parte OFP S.P. obtained against Peterson. Peterson now maintains that the OFP was prejudicial because the jury could have interpreted it as a judicial finding that domestic abuse occurred and S.P. needed protection from him. Peterson did not object to the admission of the OFP. Accordingly, we review the admission of the OFP for plain error.⁷ *See State v. Vasquez*, 912 N.W.2d 642, 650 (Minn. 2018). Under the plain-error standard of review, Peterson must demonstrate plain error that affects his substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). And if each of those prongs are met, this court must assess whether to “address the error to ensure fairness and the integrity of the judicial proceedings.” *Id.*

Here, we need not decide whether the district court plainly erred by admitting the OFP because Peterson has not demonstrated that its admission affected his substantial rights. *See Vasquez*, 912 N.W.2d at 650 (declining to decide whether the district court plainly erred by admitting the challenged evidence where the appellant failed to establish that the alleged error impacted his substantial rights). Peterson bears the burden of showing “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)

⁷ Peterson asks us to apply an abuse-of-discretion standard of review. But his lack of objection to the admission of the OFP indicates that the appropriate standard of review is the plain-error standard. *See State v. Vasquez*, 912 N.W.2d 642, 649-50 (Minn. 2018) (explaining that plain-error review applies when a defendant forfeits an issue, as is the case when a defendant does not object to admission of evidence by the state).

(quotation omitted). And our analysis under this prong “is the equivalent of [a] harmless error analysis.” *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011). “Erroneously introduced evidence affects the defendant’s substantial rights if it significantly influences the verdict by going to a critical issue at the trial or is central to the prosecution’s case.” *Vasquez*, 912 N.W.2d at 650.

The ex parte OFP was of limited persuasive value. It did not contain any findings that domestic abuse had occurred. In presenting the OFP to the jury, the state did not suggest that domestic abuse had occurred simply because S.P. had an OFP. Rather, the state referenced the OFP in passing during its opening and closing arguments. And it primarily used the ex parte OFP to counter S.P.’s testimony that the OFP was dismissed right away and she did not think a judge even signed it. Additionally, S.P.’s testimony—including that she did not think an OFP made sense—further diminished the persuasive value of the OFP.

Peterson argues that the judge’s findings in the OFP could easily be misinterpreted by the jury as a judicial finding that domestic abuse occurred. But the state did not argue the case in such a way. And the OFP does not contain such findings. Peterson also contends that the state repeatedly referred to the *petition* during its case. But the *petition* for an OFP is a different piece of evidence than the OFP itself. As such, the state’s references to the petition are not relevant to the question of whether the admission of the OFP prejudiced Peterson. Finally, Peterson points to the fact that the district court did not give a limiting instruction regarding the OFP, as the court did in *State v. Goelz*, 743 N.W.2d 249, 257 (Minn. 2007). But Peterson did not propose or request such an

instruction. Accordingly, we conclude that any error in admitting the OFP was harmless and did not have a significant impact on the jury's verdict.⁸

Because neither of Peterson's alleged errors affected his substantial rights, reversal of his conviction is not required, and a new trial is not warranted.

Affirmed.

⁸ Peterson contends that if neither alleged error alone is sufficient to warrant reversal, the cumulative effect of the two alleged errors requires a new trial. "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. Johnson*, 441 N.W.2d 460, 466 (Minn. 1989) (quotation omitted). Although we do not decide that multiple errors occurred, we are satisfied that even if both of Peterson's alleged errors were, in fact, errors, they did not produce a biased jury.