STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1739

State of Minnesota,
Respondent,

vs.

Noe Roushbel Gonzalez,
Appellant.

Filed November 14, 2022
Affirmed
Larkin, Judge

Scott County District Court
File No. 70-CR-18-16958

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

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Andrew C. Wilson, Wilson & Clas, Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Reilly, Judge; and Florey, Judge.*

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

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges his convictions for first- and second-degree criminal sexual conduct. He argues that the district court abused its discretion by denying his motion for in camera review of a witness's school and therapy records. He also argues that his trial was not fair due to the cumulative effect of evidentiary errors and prosecutorial misconduct. We affirm.

FACTS

In September 2018, respondent State of Minnesota charged appellant Noe Roushbel Gonzalez with two counts of criminal sexual conduct. The complaint alleged that Gonzalez sexually assaulted JB on or about January 1, 2011, through December 31, 2012, when she was seven to ten years old. JB is the daughter of Gonzalez's former partner, FB.

Gonzalez and FB have one child in common, NG. In May 2018, NG alleged that she once had a sleepover with JB and their cousin KR at Gonzalez's house and that JB and KR woke up with their pants down. NG made the allegation after she was caught with marijuana at school.

In May 2018, the Midwest Children's Resource Center interviewed JB, and she alleged that when she was seven or eight, Gonzalez sexually assaulted her on several occasions at his house and at FB's house. In September 2018, law enforcement interviewed JB, and she alleged that Gonzalez sexually assaulted her on other occasions when she was nine or ten.

In 2018, Gonzalez was living in Texas with his current wife, SG. In May 2018, after JB's initial interview, the assigned investigator, Detective Miller, tried to contact Gonzalez. Upon learning that a detective in Minnesota was trying to contact him, Gonzalez went to his local police department in Texas, and an officer told him that he needed to contact the police in Minnesota. Gonzalez called Detective Miller. Miller told Gonzalez that he would talk to Gonzalez another day, but he did not mention the sexual-assault allegations. Detective Miller tried to call Gonzalez back, but Gonzalez never answered because SG had changed his phone number.

On September 26, 2018, the state filed the criminal-sexual-conduct charges against Gonzalez and obtained a warrant for his arrest. Detective Miller mistakenly thought that the warrant had been entered as a nationwide warrant, which would have authorized Gonzalez's arrest anywhere in the United States. In February 2020, when Detective Miller learned of the warrant entry error, he contacted the U.S. Marshals Warrant Squad, and they agreed to take the case. While the warrant was out for his arrest, Gonzalez and SG moved from Texas to Colorado to be with SG's mother. Shortly after Detective Miller contacted the U.S. Marshals, they arrested Gonzalez in Colorado.

In October 2020, Detective Miller spoke to KR. She alleged that Gonzalez sexually assaulted her when she was ten or eleven. The state amended its complaint against Gonzalez to include a third count of criminal sexual conduct, alleging that Gonzalez had sexually assaulted KR.

In May 2021, the case was tried to a jury. Prior to trial, Gonzalez moved for in camera review of NG's school and therapy records. The district court denied that motion.

At trial, the state called FB, JB, NG, KR, and Detective Miller to testify against Gonzalez. Gonzalez testified on his own behalf, called SG as a witness, and read a stipulated statement from KR's mother into the record.

The jury found Gonzalez guilty on all counts. The district court entered judgments of conviction for two counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. The district court sentenced Gonzalez to serve two consecutive 144-month prison terms.

Gonzalez appeals.

DECISION

I.

Gonzalez contends that the district court abused its discretion by denying his motion for in camera review of NG's school and therapy records.

Criminal defendants are afforded a broad right of discovery, but that right is not unlimited. *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012). If a defendant requests confidential records, the district court may screen the records in camera to balance the defendant's right to prepare and present a defense against a victim's right to privacy. *Id.* (citing *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987)). Generally, a crime victim's medical records are protected from disclosure by the physician-patient privilege. Minn. Stat. § 595.02, subd. 1(d), (g) (2020).

Because in camera review is a discovery option, and not a right, a defendant must make a "plausible showing" that the records sought will be both "material and favorable to his defense." *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (quotations omitted).

Evidence is material only if there is a "reasonable probability" that disclosure would lead to a different result at trial. *State v. Wildenberg*, 573 N.W.2d 692, 697 (Minn. 1998) (quotation omitted). In addition, a request for in camera review must be reasonably specific. *State v. Lynch*, 443 N.W.2d 848, 852 (Minn. App. 1989), *rev. denied* (Minn. Sept. 15, 1989). "'Fishing expeditions' are never sufficient." *In re Hope Coal.*, 977 N.W.2d 651, 659 n.6 (Minn. 2022). A defendant does not meet his burden to show that records contain information that is material and favorable to his case if he offers "only argument and conjecture." *State v. Evans*, 756 N.W.2d 854, 873 (Minn. 2008).

This court reviews denial of a motion for in camera review for an abuse of discretion. *Hokanson*, 821 N.W.2d at 349. "A court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011).

School Records

On June 24, 2020, Gonzalez informed the court that he intended to move for in camera review of NG's school records. On July 7, 2020, he informed the district court that he had decided not to pursue that motion. Gonzalez later filed a motion for in camera review of NG's mental-health records, which did not mention NG's school records.

Even though Gonzalez informed the district court that he had decided not to request in camera review of NG's school records and his ensuing motion for in camera review did not mention NG's school records, on appeal he argues that the district court erred by not granting review of those records because "despite trial counsel's letter, the district court was aware that [his] request extended to include school records." As support, he points to

the district court's order on his motion and asserts that it "specifically addresses in camera review of [NG]'s school records." The record does not support that assertion. The district court's order did not address in camera review of the school records. At most, the district court's order referenced where NG attended school.

Generally, this court will not "decide issues which were not raised before the district court, including constitutional questions of criminal procedure." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Because Gonzalez informed the district court that he would not seek in camera review of NG's school records and did not include a request for that relief in his motion for in camera review, the issue is not properly before this court.

Mental-Health Records

Gonzalez's motion for in camera review sought review of NG's "mental health records . . . for the time period from September 1, 2013 to the present day." Gonzalez offered multiple theories regarding what those records might reveal, positing that NG's therapy records might give insight into the family dynamic and contain evidence of a "deterioration of the relationship between [NG] and her sister." As support for his request, Gonzalez offered an affidavit from his current wife, which stated that she had communicated with NG by telephone and that NG said that "she sees a psychiatrist."

In denying Gonzalez's motion for in camera review of NG's mental-health records, the district court reasoned that Gonzalez's request was not specific and that he was not even certain that the records existed. The district court also reasoned that Gonzalez did not adequately demonstrate that the requested records would have been material to his defense

because NG's mental-health records would not have been admissible as impeachment evidence against JB.

The district court did not abuse its discretion by ruling that Gonzalez's broad request for all of NG's confidential records from a seven-year period was inadequately specific. The district court reasoned that Gonzalez's request did not provide information regarding the identity of the therapeutic providers, when the therapy began, or the type of therapy that was provided. We appreciate that it is difficult for a defendant to be specific when requesting review of documents to which he does not have access, but the caselaw requires more than Gonzalez provided here. The district court appropriately refused to allow what appeared to have been a request for an impermissible fishing expedition. *See In re Hope Coal.*, 977 N.W.2d at 659 n.6 ("'Fishing expeditions' are never sufficient.").

Nor did the district court abuse its discretion by reasoning that Gonzalez did not adequately demonstrate that the requested records would have been material to his defense. Gonzalez argues that both "information related to the case" and "[h]elpful evidence" constitute "material and favorable evidence." But the relevant standard is clear: a defendant must make a "plausible showing" that the records sought will be both "material and favorable to his defense." *Hummel*, 483 N.W.2d at 72 (quotations omitted). And evidence is material if there is a "reasonable probability" that disclosure would lead to a different result at trial. *Wildenberg*, 573 N.W.2d at 697 (quotation omitted).

Gonzalez also argues that the district court misapplied the law by "conflating admissibility and discoverability" and by requiring him "to establish how the sought-after evidence would be admissible at trial if" it was disclosed after an in camera review.

Gonzalez is correct that the standards for discoverability and admissibility are not the same. *Compare Lynch*, 443 N.W.2d at 852 (quotation and citation omitted) ("The rules of criminal procedure allow for broad discovery, but they require that the requested documents relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged."), *with* Minn. R. Evid. 401 ("'Relevant evidence' means evidence having 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."). But the district court did not inappropriately conflate those standards. Again, evidence is "material" for the purposes of granting an in camera review only if there is a "reasonable probability" that disclosure would lead to a different result at trial. *Wildenberg*, 573 N.W.2d at 697 (quotation omitted). Here, the district court simply questioned how the requested evidence could create a reasonable probability of a different result at trial if the evidence could not be used at trial. We discern no abuse of discretion in that approach.

In sum, the district court did not abuse its discretion in denying Gonzalez's request for in camera review of NG's mental-health records.

II.

Gonzalez contends that eight evidentiary errors occurred at trial, which rendered his trial unfair. "Evidentiary rulings rest within the sound discretion of the district court, and we will not reverse an evidentiary ruling absent a clear abuse of discretion." *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). "A district court abuses its discretion when its

decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted).

"Any error that does not affect substantial rights must be disregarded." Minn. R. Crim. P. 31.01. If an alleged error does not implicate a constitutional right, a new trial is required only if the error "substantially influenced the jury's verdict." *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). A defendant who claims evidentiary error "bears the burden of showing an error occurred and any resulting prejudice." *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016).

For the reasons that follow, we conclude that Gonzalez's eight assertions of evidentiary error fall into three categories: forfeited, no error, and harmless. We discuss each in turn.

Forfeiture

"Appellate review of an evidentiary issue is forfeited when a defendant fails to object to the admission of evidence." *State v. Vasquez*, 912 N.W.2d 642, 649 (Minn. 2018). "An objection must be specific as to the grounds for challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *rev. denied* (Minn. Oct. 19, 1993). "[E]videntiary objections should be renewed at trial when an in limine or other evidentiary ruling is not definitive but rather provisional or unclear, or when the context at trial differs materially from that at the time of the former ruling." *State v. Word*, 755 N.W.2d 776, 783 (Minn. App. 2008).

At trial, the state presented evidence that Gonzalez shut off NG's cell phone. Gonzalez explains that he shut off NG's phone after seeing a Snapchat video that allegedly

showed JB or NG making out with a boy on a couch and NG smoking marijuana.[1] Gonzalez asserts that he should have been permitted to present evidence regarding the contents of that Snapchat video. Gonzalez argues that the district court deprived the jury of context for his decision to shut off NG's cell phone and prevented him from rebutting the state's theory that he was "controlling" in doing so.

On December 21, 2020, Gonzalez objected to the state's motion in limine, which sought to prohibit evidence regarding NG's marijuana use. Gonzalez argued that the contents of the Snapchat video were relevant. But at a pretrial hearing on May 18, 2021, the district court expressed concern that Gonzalez wanted to offer the Snapchat video as evidence that JB was promiscuous, stating, "Okay. So that one is off the table. Thank you." Under Minnesota's rape-shield law, such evidence is generally inadmissible. *See* Minn. R. Evid. 412. Gonzalez did not object to the district court's ruling. In fact, his lawyer agreed to limit discussion about the contents of the video stating: "Well, not that she was promiscuous, but that the video happened, and, again, that there was behavior that he didn't approve of, and as a result he shut off a phone, and blah blah blah; but I don't have to talk about kissing on the couch." Subsequently, Gonzalez did not attempt to offer evidence regarding the content of the Snapchat video.

[1] At a pre-trial hearing, Gonzalez alleged that the video showed JB kissing a boy, but on appeal, Gonzalez alleges that the video shows NG kissing a boy. The Snapchat video is not in the record.

On this record, Gonzalez did not preserve a challenge to the district court's ruling regarding the contents of the Snapchat video. The issue is therefore forfeited. [2]

Gonzalez also asserts that he should have been permitted to ask NG about the reason for her discipline at school, which precipitated her sexual-assault allegations. Again, on December 21, 2020, Gonzalez objected to the state's motion in limine asking the district court to prohibit evidence regarding NG's marijuana use. But at trial, Gonzalez did not argue that he should be permitted to ask NG why she had been disciplined at school. In fact, Gonzalez's lawyer informed the district court:

> [NG] is the closest thing we have to a favorable witness here. The last thing we want to do is besmirch her. I would be comfortable with some kind of an Order from the Court that indicated we could say, "You got into trouble at school." I don't care about the drug use.

Gonzalez's lawyer also stated: "I would say that she got into trouble at school and the cops came and then the disclosures came."

On this record, Gonzalez did not preserve a challenge to the district court's ruling excluding evidence that NG was disciplined at school for possession of marijuana. The issue is therefore forfeited.[3]

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[2] An appellate court has discretion to review an unobjected-to error under the plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Generally, "to meet the plain error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights." *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). Because Gonzalez has the burden to prove that he is entitled to relief under the plain-error standard and he does not request or address such relief on appeal, he has not met his burden.

[3] Again, Gonzalez does not request relief under the plain-error standard.

No Error

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. But even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403.

Gonzalez asserts that the district court erred by excluding evidence that his former partner, FB, had an abortion shortly after NG was born, which he proffered to provide context for the state's evidence that he punched a hole in the wall of FB's trailer home. The district court reasoned that evidence of FB's alleged abortion was not relevant because it occurred years before the alleged sexual assaults. In addition, the state presented evidence that Gonzalez had punched holes in the wall more than once. The district court did not abuse its discretion in concluding that evidence of FB's alleged abortion did not have any tendency to make the existence of any fact at issue more or less probable.

Gonzalez also asserts that the district court abused its discretion by barring any witness from referencing a DNA test that FB allegedly obtained. Specifically, Gonzalez wanted to elicit testimony that FB told NG that FB had taken a DNA test that verified that NG had been sexually abused. Gonzalez argues that the DNA test would have supported his theory that FB orchestrated the allegations against him and would have provided a complete description of NG's version of events. The district court reasoned that such

evidence would have been confusing. We agree. NG was not the victim in the charged offenses. Evidence regarding a purported DNA test to determine if NG had been abused would have been confusing. The district court properly exercised its discretion by barring reference to the DNA test at trial.

Gonzalez further asserts that the district court abused its discretion by barring testimony that FB physically attacked his current wife in 2012. Gonzalez argues that such evidence would have supported his theory that FB fabricated and orchestrated the claims against him. The district court reasoned that the alleged assault was irrelevant because it occurred six years before FB learned about the sexual assault allegations. Given that timing, the district court did not abuse its discretion in determining that the alleged attack was not relevant.

Finally, Gonzalez asserts that the district court erred by ruling that RD could not testify. RD was JB's and NG's neighborhood friend. RD had reported that Gonzalez sexually assaulted her and that she had witnessed Gonzalez sexually assaulting JB. Initially, the state provided notice of its intent to call RD as a witness to provide evidence of a common scheme or plan. Gonzalez objected. Ultimately, the state did not call RD as a witness at trial. Gonzalez then informed the district court that he wanted to call RD as a witness. As support, Gonzalez argued that RD's testimony might demonstrate inconsistencies between the victims' allegations supporting the charges against him.

"Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b)(1). "The danger in admitting such evidence is that the jury may convict because of those other

crimes or misconduct, not because the defendant's guilt of the charged crime is proved." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). However, such evidence may be admissible if relevant for another purpose, such as proving a common scheme or plan. Minn. R. Evid. 404(b)(1).

The district court reasoned that RD's testimony would have been confusing and that it was more prejudicial than probative. On this record, we are not persuaded that the district court abused its discretion in prohibiting RD's testimony as confusing and more prejudicial than probative.

Harmless Error

Having concluded that Gonzalez failed to preserve two of the alleged evidentiary errors for review and failed to establish four of the alleged evidentiary errors, we turn to the last category of asserted error: harmless error.

Gonzalez asserts that the district court erred by allowing evidence of his alleged flight at trial. In November 2020, the state filed a motion in limine, requesting an order allowing the state to introduce evidence of Gonzalez's alleged flight. Gonzalez objected.

Evidence of "flight before arrest may be considered by the jury" because it is "suggestive of a consciousness of guilt." *State v. McTague*, 252 N.W. 446, 448 (Minn. 1934). The state presented the following evidence of flight at trial: (1) after learning of the allegations, FB called Gonzalez and confronted him, and Gonzalez denied the allegations; (2) Detective Miller spoke with Gonzalez once by phone; (3) Detective Miller asked local Texas police for help because Gonzalez was not answering his calls; (4) Gonzalez's current wife had changed his phone number; (5) when local police visited Gonzalez's two listed

addresses, one place was abandoned and the other had new tenants; (6) police did not locate Gonzalez for two years; (7) during that time, Detective Miller learned that Gonzalez had crossed the border into Mexico; and (8) when police located Gonzalez, he had moved from Texas and was living in Colorado.

We need not decide if the evidence of alleged flight was erroneously admitted because it was harmless. *See State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016) (concluding that challenged evidence was harmless without deciding whether the evidence was erroneously admitted). "Under the harmless error standard, a defendant who alleges an error that does not implicate a constitutional right must prove there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Matthews*, 800 N.W.2d 629, 633 (Minn. 2011) (quotations omitted). When determining whether testimony significantly affected a verdict we consider the following factors: "(1) the manner in which the State presented the testimony; (2) whether the testimony was highly persuasive; (3) whether the State used the testimony in closing argument; and (4) whether the defense effectively countered the testimony." *Peltier*, 874 N.W.2d at 802.

At trial, Gonzalez explained and rebutted the state's evidence of flight. Gonzalez testified that his current wife changed his phone number because FB kept calling him and that he moved to Colorado to be with his current wife's mother. In addition, evidence indicated that Gonzalez crossed the border into Mexico and returned to the United States, which seems inconsistent with an intent to flee and avoid prosecution. Given that Gonzalez initially contacted the police and returned to the United States from Mexico, the evidence of flight was not highly persuasive and Gonzalez effectively countered it. Thus, we are not

persuaded that the outcome at trial would have been different if the evidence of flight had been excluded. The alleged error was therefore harmless.

Gonzalez also asserts that the district court erred by sustaining the state's speculation objection when the defense asked Detective Miller, "Do you know any reason why [FB] would encourage [NG] to believe her dad was guilty of something." Gonzalez argues: "Asking whether Detective Miller *knows* why [FB] would encourage [NG] to believe Appellant was guilty of something does not call for speculation. The defense inquired whether he *knew* something, not whether he *thought* or *believed* something."

We fail to see how testimony that Detective Miller "knew something" could significantly affect the verdict absent further testimony explaining what he knew. *See Matthews*, 800 N.W.2d at 633 ("Under the harmless error standard, a defendant . . . must prove there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." (quotations omitted)). In addition, Gonzalez was allowed to ask questions about his strained relationship with FB. In sum, even if the district court abused its discretion in sustaining the objection, the error was harmless.

In sum, none of the eight alleged evidentiary errors provides a basis for relief.

III.

Gonzalez contends that the prosecutor engaged in misconduct throughout trial by referring to the alleged victims as "little girls" and "little gals." Gonzalez further contends that the prosecutor improperly inflamed the jury's passions by making the following statement in closing: "You heard over the course of the last several days from those little

girls about that secret that they kept, . . . now that you have this information what are you going to do about it?"

"A prosecutor must not appeal to the passions of the jury." *State v. Mayhorn*, 720 N.W.2d 776, 786-87 (Minn. 2006). If credibility is a central issue in a case, an appellate court "pays special attention to statements that may inflame or prejudice the jury." *Id.* at 787.

Gonzalez did not object to the alleged misconduct at trial. If a defendant fails to object to alleged prosecutorial misconduct during trial, that misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Generally, "to meet the plain error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights." *Myhre*, 875 N.W.2d at 804 (Minn. 2016). Under the modified plain-error standard, if the defendant establishes error that is plain, the burden shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have significantly affected the jury's verdict. *Ramey*, 721 N.W.2d at 302. Even if the first three requirements are met, "an appellate court may correct the error *only* when it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Pulczinski v. State*, 972 N.W.2d 347, 356 (Minn. 2022).

"If an appellate court concludes that any requirement of the plain-error test is not satisfied, the appellate court need not consider the other requirements." *State v. Moore*, 863 N.W.2d 111, 119 (Minn. App. 2015), *rev. denied* (Minn. July 21, 2015). Thus, we need not determine if the prosecutor's remarks in closing argument constituted error that

was plain if the state shows that the alleged error did not affect Gonzalez's substantial rights. As to the substantial-rights factor, the state must 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). To determine whether the alleged prosecutorial misconduct significantly impacted the jury's verdict, we consider "the pervasiveness of improper suggestions and the strength of evidence against the defendant." *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017) (quotation omitted).

As a result of the delayed report of sexual assault in this case and law enforcement's inability to locate Gonzalez, approximately ten years passed between the time of the assault and the trial. Thus, although the victims were approximately 7 to 11 years old at the time of the sexual abuse, they were approximately 17 and 19 years old when they testified at trial. The state argues that referring to the victims as little girls was simply a way of emphasizing that the abuse occurred years earlier, when the victims were much younger. Given the circumstances, there is some justification for describing the victims as they were at the time of the offenses. In addition, the evidence against Gonzalez was strong. Each of the alleged victims, JB and KR, testified at trial and were cross-examined by Gonzalez. NG also testified at trial, and Gonzalez cross-examined her about her allegations. Under the circumstances, the state has shown that there is no reasonable likelihood that the absence of the alleged misconduct would have significantly affected the jury's verdict. It is therefore unnecessary to determine whether the prosecutor's remarks constituted error that was plain.

Moreover, the supreme court has recently emphasized the importance of the fourth factor of the plain error standard of review, stating that "an appellate court may correct the error *only* when it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Pulczinski*, 972 N.W.2d at 356. Even if the statements had affected Gonzalez's substantial rights, we doubt that the prosecutor's approach would cause the public to seriously question the fairness, integrity, or public reputation of the judicial proceedings. Indeed, Gonzalez does not explain why the fourth part of the test is satisfied in this case.

In sum, Gonzalez is not entitled to relief under the modified plain-error standard.

IV.

Gonzalez contends that the cumulative effect of the alleged evidentiary errors and prosecutorial misconduct denied him a fair trial.

"An appellant is entitled to a new trial if . . . errors, when taken cumulatively, had the effect of denying appellant a fair trial." *State v. Jackson*, 714 N.W.2d 681, 698 (Minn. 2006) (quotation omitted)). When determining whether the cumulative effects of the errors denied a defendant a fair trial, "reviewing courts balance the *egregiousness* of the errors against the weight of *proof* against the defendant." *State v. Swinger*, 800 N.W.2d 833, 841 (Minn. App. 2011) (emphasis added), *rev. denied* (Minn. Sept. 28, 2011).

In *Mayhorn*, the supreme court found that the prosecutor committed misconduct by (1) commenting on the defendant's credibility as a witness, (2) inflaming the passions of the jury, (3) commenting on the defendant's failure to call a particular witness, (4) intentionally misstating evidence, (5) using a "were they lying" question, (6) referring to

threats not in evidence, (7) aligning herself with the jury, (8) improperly attacking the defendant's character, (9) commenting on the defendant's opportunity to tailor his testimony, and (10) commenting on the credibility of a witness. 720 N.W.2d at 786-91. The supreme court found further evidentiary errors, including the admission of evidence regarding an irrelevant phone call and the admission of evidence regarding a prior bad act. *Id.* at 782-85. The supreme court determined that even though the state's case was strong, "the cumulative effect of the prosecutorial misconduct and evidentiary errors" denied Mayhorn a fair trial. *Id.* at 792.

As to the alleged evidentiary errors in this case, we have concluded that two were not preserved for appeal, four were not errors, and two were harmless. As to the alleged prosecutorial misconduct, we have concluded that Gonzalez is not entitled to relief under the modified plain-error standard. Even if the district court had erred by allowing evidence of flight, by sustaining the speculation objection, and by not sua sponte addressing the alleged prosecutorial misconduct, the effect of these alleged errors did not deprive Gonzalez of a fair trial. The alleged errors in this case were not egregious compared to those in *Mayhorn*. And the evidence against Gonzalez was strong given the jury's first-hand opportunity to hear and observe the direct and cross-examination of the reporting party, the victims, and Gonzalez.

In conclusion, "a defendant is entitled to a fair trial, not a perfect trial." *Danforth v. State*, 761 N.W.2d 493, 499 (Minn. 2009). Gonzalez's trial may not have been perfect, but it was not an unfair trial requiring reversal.

Affirmed.