This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0394

State of Minnesota,
Respondent,

vs.

Brandon Charles Brown,
Appellant.

Filed February 12, 2024
Affirmed
Bjorkman, Judge

Cass County District Court
File No. 11-CR-21-1238

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

Benjamin T. Lindstrom, Cass County Attorney, Chelsea Langton, Assistant County Attorney, Walker, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ede, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges his convictions of aiding and abetting first-degree burglary and fifth-degree possession of a controlled substance following a jury trial, arguing that the

prosecutor committed misconduct by eliciting evidence of other crimes or bad acts without satisfying the requirements of Minn. R. Evid. 404(b)(2). Because any claimed misconduct did not affect appellant's substantial rights, we affirm.

FACTS

At approximately 3:00 a.m. on July 28, 2021, a sheriff's deputy responded to a report of an assault and burglary at a residence on Onigum Road in Cass County. Upon arriving at the scene, the deputy spoke with C.D. and his mother, C.A., with whom C.D. was living at the time of the assault. C.A. told the deputy that David James Whitebird Jr. and appellant Brandon Charles Brown assaulted C.D. in her home. The deputy observed and took photos of a cut and blood on the back of C.D.'s head, and the blood on the floor, wall, and bed in the back bedroom where C.D. was assaulted.

Later that morning, another officer found and arrested Brown, who had been walking on Onigum Road toward Walker. While booking Brown, the sergeant on duty found crushed pills in Brown's clothes. Testing revealed that the pills were Alprazolam, a schedule IV controlled substance. Respondent State of Minnesota charged Brown with aiding and abetting first-degree burglary and fifth-degree possession of a controlled substance.

The case proceeded to trial. C.A. testified on direct-examination that on the night of the offense, she had been asleep in a chair near the front door when she awoke to the sound of K.W., her personal-care attendant and C.D.'s girlfriend, screaming. C.A. recounted that she had heard her son "getting beat up" before she saw Whitebird hitting C.D. in the back bedroom. She described C.D. as a "bloody mess" and saw blood on the

comforter and the bedroom wall. C.A. found Brown "digging" in her closet. Brown proceeded to grab C.A. and slam her against the door. C.A. then punched Brown and pulled Whitebird off C.D. so that he could "jump up." C.A. managed to get Whitebird and Brown out of her home by "[y]elling and pushing them," and immediately called the police.

On cross-examination, C.A. testified that neither Whitebird nor Brown had permission to enter her house when "they came busting through the front door," breaking the lock. Defense counsel asked C.A. whether she "push[ed] [Whitebird and Brown] out [of her house] at the same time or [if she] push[ed] one and then [the other]." C.A. responded that Brown was "pretty much walking himself [be]cause he was cussing and swearing and saying that he was going to kill [them] and kill the whole family." Defense counsel instructed C.A. to only answer the questions he asked her. C.A. explained that the likely impetus for the incident was that Whitebird and K.W. had been in a relationship before Whitebird went to prison, at which point K.W. began a relationship with C.D.

On re-direct examination, the prosecutor asked C.A. "what kinds of things" Brown was saying as he was pushed out the door. C.A. responded that Brown said, "he was going to kill them. Kill the whole family. Burn [her] house down. Burn [her] daughter's house down." Defense counsel did not object to C.A.'s testimony. C.A. also testified that by the time she removed Brown and Whitebird from the house, her six-year-old granddaughter had picked up a spatula and a knife.

The defense called one witness, J.V., who lived near the location where the officer found and arrested Brown. On the morning of the incident, J.V. told the police that Brown

had left his house at approximately 4:00 a.m. that day. At trial, J.V. could not recall making this statement, explaining that his later Fentanyl overdose made his mind "pretty foggy."

During the state's closing argument, the prosecutor told the jury that C.A. testified that "Brown was threatening them and told them if they told the cops he would kill them all." During the defense's closing argument, defense counsel primarily attacked C.A.'s credibility. He suggested that C.A. had lied about the forced entry because she should have woken up when the men allegedly broke into the house—right next to her chair where she was sleeping—and that the deputy should have taken pictures of the broken door. And he stated that there was no evidence that Brown assisted, advised, counseled, or encouraged Whitebird to assault C.D. The jury found Brown guilty on both counts.

Brown appeals.

DECISION

Brown argues that the prosecutor committed misconduct by eliciting inadmissible evidence of other crimes or bad acts. Because Brown did not object to any of the challenged statements at trial, we apply a modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* If Brown shows plain error, "[t]he burden then shifts to the State to demonstrate that the error did not affect the defendant's substantial rights." *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). The state meets this burden if it shows "that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010) (quotation omitted). If the state fails to meet its burden, we consider "whether

the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* But we need not decide whether plain error occurred if any error did not affect the defendant's substantial rights. *See State v. Manley*, 664 N.W.2d 275, 283 (Minn. 2003) (noting that while "[n]ormally, we would consider each prong of the plain-error test in order," the court is not required to do so when the claimed error did not affect the defendant's substantial rights).

Evidence of a person's other crimes or bad acts is not admissible to prove the defendant's character for purposes of showing that he acted in conformity with that character. Minn. R. Evid. 404(b)(1); *State v. Ness*, 707 N.W.2d 676, 684 (Minn. 2006) (referring to evidence of other crimes or bad acts as "*Spreigl* evidence," based on *State v. Spreigl*, 139 N.W.2d 167, 169 (Minn. 1965)). But it may be admissible for other limited purposes. Minn. R. Evid. 404(b)(1). A prosecutor has a duty to prepare their witnesses to avoid improper testimony. *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). If a prosecutor attempts to elicit or elicits inadmissible evidence, they may have engaged in misconduct. *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007).

Brown asserts that the prosecutor did just that by eliciting *Spreigl* evidence from C.A. without satisfying the conditions under Minn. R. Evid. 404(b)(2) (listing requirements for admitting *Spreigl* evidence). He contends that his statements that "he was going to kill them. Kill the whole family. Burn [C.A.'s] house down. Burn [her] daughter's house down," are bad acts because they (1) constitute threats of violence and (2) frightened a six-year-old witness. *See State v. McLeod*, 705 N.W.2d 776, 788 (Minn. 2005) (noting *Spreigl* evidence encompasses bad acts in general; "the prior bad act need not constitute a crime").

The state does not dispute Brown's contentions, but asserts that *Spreigl* does not apply because C.A.'s testimony is admissible as either immediate-episode evidence or as intrinsic evidence. *See State v. Fardan*, 773 N.W.2d 303, 315-16 (Minn. 2009) (recognizing the admissibility of "evidence which relates to offenses that were part of the immediate episode for which [a] defendant is being tried" (quotation omitted)); *State v. Hollins*, 765 N.W.2d 125, 131 (Minn. App. 2009) (concluding that "a rule 404(b) analysis is unnecessary if the evidence of another crime is intrinsic to the crime charged"). And the state argues that the challenged testimony did not affect Brown's substantial rights. We agree with the state's second argument.

When deciding whether the state has met its burden 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," *Ramey*, 721 N.W.2d at 302 (quotation omitted), we consider "(1) the strength of the evidence against the defendant; (2) the pervasiveness of the improper conduct; and (3) whether the defendant had an opportunity (or made efforts) to rebut the prosecutor's improper suggestions," *State v. Hill*, 801 N.W.2d 646, 654-55 (Minn. 2011). Analysis of these considerations convinces us that the state met its burden.

First, the evidence against Brown is strong. Both C.A. and C.D. identified Brown in the courtroom and gave the same account of the incident: Whitebird and Brown entered their home without permission; Whitebird and Brown assaulted C.D. in the back bedroom of their home; C.A. pulled Whitebird and Brown off C.D.; C.D. sustained an injury to the back of the head that left blood on his person, on the bed, and on the wall of the back

bedroom; C.A. pushed Whitebird and Brown out of their home; and afterward, C.A. called the police. Their testimony was corroborated by the deputy's testimony and the photos he took of C.D.'s head injury and the blood in the bedroom.

In contrast, Brown's alibi witness, J.V.—who initially told police that he was with Brown at the time of the crime—repeatedly stated that he could not recall the events of July 28, 2021, and was unsure of when Brown left his home because his later Fentanyl overdose clouded his memory.

Second, we are not persuaded that the claimed error was pervasive simply because the state referenced the challenged evidence during re-direct-examination of C.A. and during closing argument. We first note that it was defense counsel who initially elicited C.A.'s testimony that Brown was "pretty much walking himself [be]cause he was cussing and swearing and saying that he was going to kill [them] and kill the whole family." On re-direct-examination, the prosecutor asked what kinds of things Brown said, and C.A. recounted the specifics. While it may have been improper for the prosecutor to further pursue this line of questioning, the jury had already heard C.A. testify to the events of the burglary, which strengthened the case against Brown. The fact C.A. was the first of seven witnesses to testify—none of whom were asked about Brown's threats—further supports a conclusion that the challenged evidence was not so pervasive as to taint what was otherwise a fair trial.

Nor are we convinced that the claimed error was pervasive because the prosecutor misstated C.A.'s testimony in closing argument by stating that C.A. testified that Brown "told [her] if they told the cops he would kill them all." We agree that "[a] prosecutor

commits misconduct by intentionally misstating evidence." *State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006). But we review a prosecutor's alleged misconduct during a closing argument "as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *Carridine*, 812 N.W.2d at 148 (quotation omitted).

Although the prosecutor partially misstated C.A.'s testimony, that portion pertained only to Brown's motive for making the threats: that he would kill them if they called the police. The jury was told at the beginning and at the end of trial that the arguments or remarks of attorneys are not evidence. And we presume that juries follow the district court's instructions. *State v. Forcier*, 420 N.W.2d 884, 885 n.1 (Minn. 1988). On this record, we are not persuaded that the prosecutor's minor departure from the record during closing argument mandates reversal. *See Carridine*, 812 N.W.2d at 148 (explaining we must not give select phrases made during closing argument "undue prominence" (quotation omitted)).

Third, Brown's contention that responding to the prosecutor's misstatement would have "spotlighted the inadmissible evidence and risked compounding its prejudicial effect" is unavailing. Brown cites *State v. Bartel*, No. A19-0022, 2020 WL 614242, at *5 (Minn. App. Feb. 10, 2020), for the proposition that he had no real opportunity to rebut the prosecutor's misstatements because obtaining a curative instruction would have amplified the effect of the improper statements. *Bartel* is neither binding nor persuasive. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c). In *Bartel*, we concluded that the state failed to meet its burden of showing that evidence of Bartel's involvement in a prior robbery did not affect his substantial rights because the evidence of his guilt was not overwhelming, the evidence

was "highly prejudicial," and the district court's limiting instruction aggravated the effect of the improper evidence. 2020 WL 614242, at *5. *Bartel* is readily distinguishable from this case.

As noted above, the evidence against Brown is strong. The jury heard consistent testimony from victims C.A. and C.D. and C.A.'s personal-care attendant regarding the events in question. Unlike in *Bartel*, the district court did not highlight the challenged testimony by giving a limiting instruction. Defense counsel could have but chose not to point out the prosecutor's misstatement during the defense closing. Instead, defense counsel cited C.A.'s challenged testimony as evidence that she was lying when she said her granddaughter grabbed a knife during the incident.

Finally, Brown argues that the prosecutor's claimed misconduct was prejudicial because no limiting instruction was given to the jury. This argument is unavailing, as "the failure to provide limiting instructions absent a request is not reversible error." *State v. Williams*, 593 N.W.2d 227, 237 (Minn. 1999); *see also State v. Johnson*, 616 N.W.2d 720, 729 (Minn. 2000) (reasoning that the defendant's failure to request a limiting instruction weighed against prejudice). Brown did not request a limiting instruction.

In sum, we conclude on this record that a new trial is not warranted because the prosecutor's elicitation of the challenged evidence did not affect Brown's substantial rights.

Affirmed.