STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1532

State of Minnesota,
Respondent,

vs.

Lemar Tyree Green,
Appellant.

Filed October 1, 2012
Affirmed in part, reversed in part
Hooten, Judge

Hennepin County District Court
File No. 27-CR-10-26851

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

HOOTEN, Judge

Appellant challenges his conviction and sentence for two counts of first-degree criminal sexual conduct, arguing that he had ineffective assistance of counsel and that the

district court erred by (1) denying his motion to admit evidence that the victim was gang raped prior to his alleged criminal sexual conduct as an alternative explanation for her nervous breakdown, depression, anxiety and post-traumatic stress disorder; (2) permitting the state to admit evidence that appellant had assaulted the victim; and (3) imposing sentences on both counts in violation of Minn. Stat. § 609.035, subd. 1 (2010). Appellant also filed a pro se supplemental brief raising additional issues, including a claim of prosecutorial misconduct. We affirm appellant's convictions, but reverse the imposition of sentence on count one.

FACTS

Appellant's biological daughter, K.B., alleged that appellant sexually abused her between March 2009 and October 17, 2009, when she was fifteen years old. K.B. alleged that appellant coerced her into having anal intercourse on more than five occasions and oral sex and vaginal intercourse on more than ten occasions. The abuse took place at her home in Crystal, Minnesota, where she lived with appellant, his girlfriend, and their two young sons.

K.B. did not disclose these incidents until October 2009 when a friend questioned her about what appeared to be a bloodshot eye. K.B. told her friend that, because she was receiving poor grades, appellant hit her, knocked her to the ground, held her by her neck, and banged her head against the wall with his thumb in her eye. K.B. also told her friend that appellant sexually abused her, but indicated she did not want anyone else to know because she did not want to break up her "happy family."

On October 28, 2009, when questioned by a peer mentor at school about her poor grades, truancy, and attitude towards teachers, K.B. informed her that appellant sexually abused her. The mentor then told the principal about K.B.'s allegations of sexual abuse, and the principal referred K.B. to the school counselor for consultation. After K.B. related details about the sexual abuse to the school counselor, the matter was referred to the Crystal Police Department.

Later that same day, K.B. accompanied law enforcement agents to her residence to execute a warrant. At the residence, K.B. identified where the sexual abuse occurred and where appellant ejaculated. Police retrieved various items for DNA analysis, including a comforter and pairs of K.B.'s underwear. DNA testing of most of the items did not directly support the state's case. A semen sample found on K.B.'s underwear was too small for DNA analysis. However, as to a sample found on the comforter that consisted of a mixture of semen and a non-sperm fraction of three or more people, the state's expert testified that appellant's girlfriend and 97.49% of the population were excluded as contributors, but that appellant and K.B. could not be excluded as contributors.

At trial, K.B.'s school counselor testified that K.B. returned to school a few days after disclosing the sexual abuse, but she experienced anxiety, paranoid thoughts that appellant was "after [her], because of everything [that] was going on," and blackouts when she thought appellant was coming to "get [her]" from school. K.B. eventually ran away from school because she thought she saw appellant pull up in a car at the school. When police located K.B., she appeared "catatonic." K.B. was transported to a children's

hospital on a health and welfare hold. After she was released from the hospital, she moved out of state to live with her mother.

Dr. William Hosfield, a psychiatrist who performed a structured diagnostic interview with K.B., testified that she had "lost touch with her reality," exhibited panic symptoms associated with thoughts of appellant, and heard voices commanding her to kill herself. Dr. Hosfield described her condition as a "dissociative phenomenon," in which "a person loses orientation to person place and time and acts without knowledge for matters of minutes or seconds or days." According to Dr. Hosfield, this condition is usually associated with trauma. His initial diagnoses included post-traumatic stress disorder, major depressive disorder, generalized anxiety disorder, as well as marijuana and alcohol abuse. K.B. also described a history of "oppositional defiant behaviors," dating to a time before she left her mother to live with appellant in Minnesota.

Appellant's trial attorney questioned K.B.'s credibility and inquired whether her psychological problems were caused by appellant's alleged sexual abuse. Appellant and K.B.'s mother lived together until K.B. was ten years of age. After their separation, K.B. lived with her mother in another state. Prior to moving to Minnesota, K.B. complained to appellant that she was not getting along with her mother, that she needed money for clothing and food, and that she was having problems at school and wanted a new start. In the fall of 2008, upon K.B.'s request, K.B.'s mother sent her to live with appellant in Minnesota. This arrangement initially went well; K.B. was an average student, had only minimal issues at school, and felt comfortable enough with appellant that she publicly revealed to him for the first time that she was a lesbian.

However, appellant's girlfriend testified that soon after K.B. moved to Minnesota, K.B. exhibited an attitude in response to punishment, had problems with truancy, and was upset when instructed to follow their rules. Appellant's girlfriend indicated that she was always present in the small apartment, that she had sex with appellant throughout her pregnancy, and that K.B. wanted to be independent from supervision. Appellant's trial attorney noted that K.B.'s notebooks, which contained poetry and song lyrics, did not mention any abuse. Rather, the notebooks mentioned how appellant's girlfriend made her feel isolated from the family and how she was upset about having to follow rules. K.B. claimed that she had other notebooks about the sexual abuse which were missing.

On cross-examination of appellant's girlfriend, the state asked whether appellant paid child support and lied to her about his age and marital status. She testified that she did not believe that appellant paid child support, but that he sent money if needed. She denied that appellant lied about his age. She claimed that appellant told her he was divorced a couple of years before they met in 2004, but also claimed that she telephoned K.B.'s mother and found out that he had only been divorced one year before they met. To rebut this testimony, the state called K.B.'s mother. She testified that appellant's girlfriend telephoned her in 2006 and advised her that appellant had told her that he was 26 years old, when he was really 36 years old, and that he was not married. K.B.'s mother testified that these representations to his girlfriend were not true and that she and appellant were still married.

The jury found appellant guilty of two counts of criminal sexual conduct and the district court imposed concurrent prison sentences of 144 months for count one and 180

months for count two. Appellant was also ordered to a conditional release and lifetime registration as a predatory offender. Appellant appeals from his convictions and sentences.

D E C I S I O N

1. Evidence Relating to Alleged Gang Rape

During the course of the trial, K.B. indicated that she wrote a letter to her mother explaining why she wanted to leave Alabama and live with appellant. Appellant offered the letter into evidence. During voir dire addressing the letter's foundation, K.B. stated that she "wrote this letter right when I had got in trouble. It was an incident that happened that I got in trouble, and I wrote this letter right when I had got in trouble." The letter itself, which was admitted into evidence, provides: "I'm not mad and this is not because of the incident. But because of all the incidents."

Appellant argues that the district court erred by denying his motion to admit evidence that the incident referenced by K.B. in her testimony and letter was an occasion on which she was gang raped in Alabama. Appellant contends that this evidence was important because it presented an alternative explanation for her nervous breakdown, depression, anxiety and post-traumatic stress disorder.

It is well settled that "[e]videntiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The appealing party has the burden of establishing that the district court abused its discretion. *Id.* "A court abuses its discretion when it acts

arbitrarily, without justification, or in contravention of the law." *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

"In a prosecution for acts of criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct, evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury." Minn. R. Evid. 412(1). The rape shield statute, Minn. Stat. § 609.347 (2010), emphasizes "the general irrelevance of a victim's sexual history." *State v. Crims*, 540 N.W.2d 860, 867 (Minn. App. 1996), *review denied* (Minn. Jan. 23, 1996). Such evidence is "admissible only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature" and only if consent of the victim is a defense in the case, or "[w]hen the prosecution's case includes evidence of semen, pregnancy or disease at the time of the incident or, in the case of pregnancy, between the time of the incident and trial, evidence of specific instances of the victim's previous sexual conduct, to show the source of the semen, pregnancy or disease." Minn. R. Evid. 412(1)(A)–(B).

The district court did not err in denying appellant's motion to admit evidence of the alleged gang rape. First, appellant provided an insufficient and speculative offer of proof alleging that the incident referenced in K.B.'s letter and testimony was an alleged gang rape. Appellant failed to submit details as to who was involved in the alleged gang rape, where and when it occurred, whether K.B. exhibited psychological problems prior to or after the gang rape, or whether any such psychological problems, if they did exist, were caused by the gang rape. *See Woodruff v. State*, 608 N.W.2d 881, 885 (Minn. 2000)

(affirming the exclusion of reverse-*Spreigl* evidence because of an insufficient offer of proof); *State v. Richards*, 495 N.W.2d 187, 195 (Minn. 1992) (noting that the district court has discretion to regulate the presentation of witnesses); *State v. Anderson*, 395 N.W.2d 83, 85 (Minn. App. 1986) (holding that the issue of the exclusion of evidence is not properly preserved for review when the offer of proof is insufficient).

Second, appellant cites no authority or case law supporting his contention that K.B.'s emotional and psychological problems exhibited upon disclosure of the allegations constituted a "disease" under the exception set forth in Minn. R. Evid. 412(1)(B). This exception allows evidence of the victim's previous sexual conduct "[w]hen the prosecution's case includes evidence of semen, pregnancy or disease at the time of the incident . . . to show the source of the semen, pregnancy or disease." Minn. R. Evid. 412(1)(B). "Disease" is defined as "[a] pathological condition in an organism resulting from infection or genetic defect, for example, and characterized by identifiable symptoms." *The American Heritage College Dictionary* 405 (4th ed. 2002). The plain meaning of the word "disease" does not include psychological issues. *See State v. Carpenter*, 459 N.W.2d 121, 126 (Minn. 1990) (rejecting assumption that a torn hymen would be classified as an injury which could be deemed analogous to a disease for purposes of the rape shield law given exclusion of the word "injury" from the law).

Third, appellant has failed to show good cause for his failure to comply with the procedures for the submission of evidence regarding the previous sexual conduct of a victim. *See* Minn. R. Evid. 412(2); Minn. Stat. § 609.347, subd. 4(a) ("A motion shall be made by the accused at least three business days prior to trial, unless later for good cause

shown, setting out with particularity the offer of proof of the evidence that the accused intends to offer, relative to the previous sexual conduct of the victim."). Here, appellant's counsel did not raise the issue of the alleged gang rape until the cross-examination of K.B. after offering into evidence K.B.'s letter to her mother referencing an "incident." Appellant claims that this "incident" refers to the gang rape of K.B. Under these circumstances, where appellant raised the issue of the "incident" through his own evidentiary submissions, there is no merit to his claim that addressing an "incident" referenced in K.B.'s letter was unexpected.

Finally, appellant has failed to show that the probative value of the proffered evidence outweighs its inflammatory or prejudicial nature. Because of the speculative nature of appellant's offer of proof, appellant cannot establish the probative value of this evidence. In weighing the insufficient and speculative offer of proof against the inflammatory nature of evidence of a gang rape which may or may not have occurred at some point in K.B.'s past and may or may not have affected her psychological or emotional health, the district court did not abuse its discretion in disallowing the submission of this evidence. *See State v. Davis*, 546 N.W.2d 30, 35 (Minn. App. 1996) (holding that the district court can exclude even relevant evidence where the potential for prejudice is significant), *review denied* (Minn. May 21, 1996).

There is no merit to appellant's argument that evidence of the alleged gang rape was admissible under the theory of curative admissibility. Appellant argues that since the district court erroneously permitted cumulative evidence that K.B., upon disclosure of the sexual abuse, manifested severe psychological problems, he should have been allowed to

present evidence to rebut or explain her psychological problems. *See State v. Carlson*, 264 N.W.2d 639, 642 (Minn. 1978) (explaining that prosecutor had limited right to refute possibly inadmissible evidence concerning character evidence of an accused); *State v. DeZeler*, 230 Minn. 39, 45, 41 N.W.2d 313, 318 (1950) ("Where one party introduces inadmissible evidence, he cannot complain if the court permits his opponent in rebuttal to introduce similar inadmissible evidence."). However, "[f]or curative evidence to be admitted as a matter of right, the original evidence must have been inadmissible and prejudicial." *State v. Profit*, 591 N.W.2d 451, 462 (Minn. 1999).

Appellant does not meet the requirements for curative admissibility in several respects. First, appellant did not object to the testimony regarding K.B.'s psychological problems. It is well settled that a defendant's "[f]ailure to object to the admission of evidence generally constitutes a waiver of the right to appeal on that basis." *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007). Second, appellant has failed to show that the evidence regarding K.B.'s psychological condition at the time of her disclosure was inadmissible. Since K.B.'s credibility was at issue throughout the trial, her mental health and the treatment she received for her psychological problems at the time of her disclosures of sexual abuse were relevant. Evidence of these psychological issues were also relevant to show her state of mind at the time she made the disclosures, her fear of appellant, and her trauma. *See State v. Williams*, 593 N.W.2d 227, 237 (Minn. 1999) (concluding that cumulative effect of multiple witnesses testifying about alleged abuse of victim did not result in unfair prejudice when defense centered on undermining victim's credibility); *State v. Stillday*, 646 N.W.2d 557, 562 (Minn. App. 2002) (concluding that

district court did not abuse its discretion to permit testimony from two officers corroborating an incident that had already been described by the victim whose credibility was at issue), *review denied* (Minn. Aug. 20, 2002). Third, even if such psychological evidence had not been properly admitted, appellant has failed to show that the probative value of his proffered evidence was sufficient to overcome its prejudicial effect.

Finally, appellant has failed to show that such error affected his substantial rights or affected the fairness and integrity of the trial. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (holding that if the three prongs are found, the court must assess whether the error affected the fairness and integrity of the trial); *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) ("[An appellate court] may review and correct an unobjected-to, alleged error only if: (1) there is error; (2) the error is plain; and (3) the error affects the defendant's substantial rights."). There was substantial and detailed evidence presented by the state supporting the jury's verdict that appellant committed the alleged criminal sexual conduct. Appellant has failed to show how the proffered evidence of an alleged gang rape would have affected the outcome of the trial.

2. Evidence Concerning Appellant's Age, Marital Status, and Child Support Obligations

Appellant next argues that, contrary to the prohibition of character evidence as set forth in Minn. R. Evid. 404, the district court erroneously allowed the state to elicit testimony concerning his non-payment of child support and his alleged untruthfulness about his age and marital status. Appellant asserts that these questions had the prejudicial effect of portraying him as a "deadbeat dad" and a liar. Prejudice means "only 'the unfair

advantage that results from the capacity of the evidence to persuade by illegitimate means.'" *State v. Townsend*, 546 N.W.2d 292, 296 (Minn. 1996) (quoting *State v. Cermak*, 365 N.W.2d 243, 247 n.2 (Minn. 1985)). Because appellant did not object to the inquiries upon cross-examination, we review the admission of such evidence for plain error. Under the plain-error test, a party must show "(1) error, (2) that is plain, and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Appellant did not testify. During the state's cross-examination of appellant's girlfriend, she was asked if appellant lied to her about his age and marital status. Appellant's girlfriend denied that appellant made any untrue statements. In order to counter this denial, the state was permitted to call K.B.'s mother as a witness. She testified that appellant's girlfriend told her during a telephone call that appellant lied about his age and marital status.

It is well settled that a prosecutor cannot produce extrinsic evidence to prove collateral matters, even if the testimony of a witness regarding such matters is false. Minn. R. Evid. 608(b); *State v. Ferguson*, 581 N.W.2d 824, 834 (Minn. 1998); *State v. Nelson*, 148 Minn. 285, 296–97, 181 N.W. 850, 855 (1921). Also, in a criminal case, a prosecutor may not cross-examine a defense witness about acts of misconduct reflecting on truthfulness until

> (1) the prosecutor has given the defense notice of intent to cross-examine pursuant to the rule; (2) the prosecutor is able to provide the trial court with sufficient evidentiary support justifying the cross-examination; and (3) the prosecutor establishes that the probative value of the cross-examination

> outweighs its potential for creating unfair prejudice to the accused.

Minn. R. Evid. 608(c). "'[U]se of the adjective collateral is not particularly useful in determining whether to bar contradiction by either cross-examination or by independent or extrinsic evidence.'" *State v. Mattson*, 359 N.W.2d 616, 618 (Minn. 1984) (quoting *State v. Waddell*, 308 N.W.2d 303, 304 (Minn. 1981)). "The better approach is the balancing approach of Minn. R. Evid. 403, which weighs the probative value of impeachment evidence against the potential of the evidence for unfair prejudice." *Id.*

We conclude that the district court erred by allowing the state's cross-examination of the collateral issues concerning whether appellant lied to his girlfriend about his age and marital status. There is nothing in the record showing that the prosecutor gave any notice of her intent to cross-examine appellant's girlfriend on these specific instances of conduct to prove appellant's untruthfulness. Moreover, these allegations of specific acts of untruthfulness, even if true, had very little probative value and were outweighed by the danger of unfair prejudice. Under these circumstances, the cross-examination and the appearance of a witness called by the state to disprove answers from appellant's girlfriend was plain error. *See Ramey*, 721 N.W.2d at 302 (defining plain error as error that is clear or obvious, as shown by the violation of established case law, a rule, or a standard of conduct); *State v. Hansen*, 173 Minn. 158, 159, 217 N.W. 146, 147 (1927) (concluding that prejudice may have resulted from admittance of witness's written statement "charging defendant with falsifying as to a matter irrelevant to any issue in the case").

Despite the erroneous admission of evidence concerning appellant's untruthfulness about his age and marital status, we conclude that this admission did not affect his substantial rights. "An error affects substantial rights if the error is prejudicial—that is, if there is a reasonable likelihood that the error substantially affected the verdict." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). The "heavy burden" of persuasion falls on the defendant. *Griller*, 583 N.W.2d at 741. K.B. provided specific details of how the sexual abuse began, the length of the sexual abuse, the nature of the sexual acts, how she reacted to the abuse, and the reasons for her failure to disclose the sexual abuse. There was substantial support for the descriptions of her emotional trauma and her fear and anxiety surrounding her relationship with her father. There was also physical evidence that was consistent with K.B.'s accusations. The evidence overwhelmingly focused upon these weightier issues, and testimony about appellant's age and marital status was briefly touched upon at the end of trial. Appellant fails to substantiate his argument that the attacks on his credibility and character had particular bearing on the credibility of K.B.'s substantive testimony. As such, there is no reasonable likelihood that this error substantially affected the verdict.

However, the district court did not err in allowing the state's cross-examination of appellant's girlfriend with regard to the payment of child support. K.B. testified that she would call appellant for financial help and there was at least a suggestion by the defense that K.B. wanted to move in with her dad because she did not get along with her mother and her mother was not adequately supporting her financially. After counsel approached the bench when a defense objection to this evidence was sustained, the state was allowed

to solicit testimony that appellant did not have regular child support payments, but would send money when K.B. and her mother needed it. This evidence, which appeared to be in response to claims that she was financially insecure when she was with her mother, did not, as appellant claims, show that he was a "deadbeat dad," but rather that he was responsive to their financial needs. Such evidence did not prejudice his substantial rights.

3. Ineffective Assistance of Counsel

Appellant next argues that he received ineffective assistance of counsel when his trial attorney failed to object to K.B.'s testimony regarding an incident when appellant assaulted her and injured her eye. He also asserts that such evidence was inadmissible because the assault was dissimilar to K.B.'s claims of sexual abuse since she never claimed that appellant threatened or assaulted her as part of the alleged sexual acts.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. *State v. Wright*, 719 N.W.2d 910, 919 (Minn. 2006). To prevail on a claim that counsel is ineffective, a party "must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064–65 (1984)). The objective standard is defined as "'representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.'" *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quoting *White v. State*, 309 Minn. 476, 481, 248 N.W.2d 281, 285 (1976)). A reviewing court need not

address both prongs if a defendant fails to demonstrate one of them. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). "Performance is also not unreasonable when counsel does not object to properly admitted evidence." *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005).

Evidence of a person's character or a trait of character is generally not admissible for the purpose of proving action in conformity therewith on a particular occasion. Minn. R. Evid. 404(a). However, evidence of the physical assault upon K.B. was properly admitted as relationship evidence under Minn. Stat. § 634.20 (2010), which allows the admission of "[e]vidence of similar conduct by the accused against the victim of domestic abuse" unless the probative value of such evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "Similar conduct" is defined in the statute to include domestic abuse, violation of an order for protection or harassment restraining order, stalking conduct, and obscene or harassing telephone calls. *Id.* "Domestic abuse" is defined as "(1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats, . . . [or] criminal sexual conduct." Minn. Stat. § 518B.01, subd. 2(a) (2010).

Such evidence is admissible to demonstrate the history of the relationship between the accused and the victim of domestic abuse. *State v. Barnslater*, 786 N.W.2d 646, 650–51 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010). "[E]vidence showing how a defendant treats his family or household members . . . sheds light on how the defendant

interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010).

The district court's admission of relationship evidence is reviewed for an abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). "Applying the statute to the facts in this case involves two inquiries. First, is the challenged testimony evidence of similar prior conduct? Second, is its probative value substantially outweighed by the danger of unfair prejudice?" *State v. Waino*, 611 N.W.2d 575, 579 (Minn. App. 2000).

We conclude that the district court did not abuse its discretion in allowing evidence of the assault. Contrary to appellant's argument that only relationship evidence regarding the exact same conduct as charged against a defendant is allowed, it has been held that evidence of domestic abuse, as well as other similar delineated conduct, is admissible in order to "illuminate the history of the relationship" and place "the crime charged in the context of the relationship." *McCoy*, 682 N.W.2d at 159. The plain language of the statute provides an expansive array of evidence that qualifies as admissible relationship evidence. *See State v. Matthews*, 779 N.W.2d 543, 553 (Minn. 2010) (holding that, in a domestic-abuse murder trial, twelve separate incidents were admissible as relationship evidence as defined by Minn. Stat. § 634.20, including incidents involving prior assaults of the victim and defendant making harassing telephone calls to the victim).

Evidence of the physical assault upon K.B. because of poor performance in school is obviously prejudicial. However, its probative value outweighs the risk of any unfair

prejudice in light of appellant's defense that K.B. was not credible. The jury heard evidence that K.B. failed to disclose appellant's sexual abuse to others, which supported her claim that she was scared of appellant. Given these considerations, we conclude that the probative value of the state's relationship evidence was not substantially outweighed by the danger of unfair prejudice, and that it was not error for the district court to permit such evidence. Thus, the performance of appellant's trial attorney did not fall below an objective standard of reasonableness.

Appellant is correct, however, that his attorney should have requested, and the district court should have given, a cautionary instruction. *See Waino*, 611 N.W.2d at 579 (noting that a cautionary instruction mitigates prejudice). "Upon admittance of relationship evidence, even in the absence of a request from counsel, the district court should provide a cautionary instruction when the evidence is admitted, and again during its final charge to the jury." *State v. Meldrum*, 724 N.W.2d 15, 21 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). However, the absence of cautionary instructions "does not *automatically* constitute plain error." *Id.* at 22. Rather, we "look at the entire record to determine if there is a significant likelihood that the jury misused the evidence, resulting in the evidence improperly affecting the verdict." *Id.* at 21–22.

Here, the record does not support the conclusion that there is a significant likelihood that the jury misused the relationship evidence. K.B.'s description of the physical assault was limited and provided context to her revelation of the sexual abuse to her friend. The prosecutor only mentioned the physical assault once during closing arguments when briefly discussing the occasion on which K.B. informed her friend about

what had been happening. Under these circumstances, we conclude that the lack of cautionary instructions did not constitute plain error, and that even if it did, it did not affect appellant's substantial rights.

4. Appellant's pro se arguments

Appellant has raised a number of other arguments in his pro se supplemental brief. With regard to most of these issues, appellant's pro se arguments are either meritless or without adequate legal authority. *See State v. Currie*, 400 N.W.2d 361, 367 (Minn. App. 1987), *review denied* (Minn. Apr. 17, 1987).

However, there is merit to appellant's pro se argument that the prosecutor erred in her closing argument to the jury when she claimed as follows:

> There was no semen found in her underwear. Now, there was no DNA able to be extracted from that because there was only the one sperm head. But when you go back into that deliberation room and you think about that, remember [K.B.] is a lesbian. She didn't talk about having sex with any boyfriend who would have left any other semen in her underwear.

When reviewing claims of misconduct based on a prosecutor's closing argument, this court considers the argument as a whole to determine whether the error prejudiced appellant's substantial rights. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). It is improper for counsel to misstate evidence or mislead the jury as to the inferences that may be drawn, *State v. White*, 295 Minn. 217, 223, 203 N.W.2d 852, 857 (1973), or to invite the jury to speculate about evidence that was not presented during the trial, *State v. Zecher*, 267 Minn. 497, 499, 128 N.W.2d 83, 84 (1964).

Here, consistent with Minn. R. Evid. 412(1)(B) and Minn. Stat. § 609.347, neither appellant nor the state were allowed to submit evidence regarding K.B.'s other sexual acts. Thus, to the extent that the state argued that the absence of such evidence supported its theory that K.B. was not having sex with other men, it impermissibly invited the jury to speculate as to whether K.B., because of her sexual orientation, was sexually active with members of the opposite sex.

When not objected to at trial, prosecutorial misconduct is analyzed under a modified plain-error standard. *Ramey*, 721 N.W.2d at 299. If appellant establishes that plain error exists, the burden shifts to the state to establish a lack of prejudice and that the misconduct did not affect the outcome of the case. *Id.* at 302. The state did not respond to appellant's pro se brief. However, while the prosecutor's statements were misleading and constituted plain error, there is no reasonable likelihood that these statements had a significant effect on the jury's verdict. The statements were made in relation to a DNA sample that was too small to match the evidence with a particular individual. It is not reasonably likely that these isolated remarks, when viewed within the context of the entire trial, including K.B.'s credibility and another positive DNA sample, had a significant effect on the jury's verdict.

5. Improper Sentence

Finally, appellant argues that the conviction and sentence on count two must be vacated because it alleged the same behavioral incident as alleged in count one. *See* Minn. Stat. § 609.035, subd. 1; *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995).

The state concedes that both counts involve the same acts during the same period of time, but requests that the matter be remanded to the district court for re-sentencing.

Relative to count one, the jury found that appellant engaged in sexual penetration with K.B. who was "at least 13 years of age but less than 16 years of age," that appellant was "more than 48 months older" than K.B., and that he was "in a position of authority" over K.B. Minn. Stat. § 609.342, subd. 1(b) (2010). Relative to count two, the jury found that appellant engaged in sexual penetration with K.B., who "was under 16 years of age," that appellant had a significant relationship with K.B., and that "the sexual abuse involved multiple acts committed over an extended period of time." Minn. Stat. § 609.342, subd. 1(h)(iii) (2010).

"[S]ection 609.035 contemplates that a defendant will be punished for the 'most serious' of the offenses arising out of a single behavioral incident because 'imposing up to the maximum punishment for the most serious offense will include punishment for all offenses.'" *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quoting *State v. Johnson*, 273 Minn. 394, 399, 141 N.W.2d 517, 522 (1966)). "[A]n appellate court vacating a sentence or sentences pursuant to section 609.035 should look to the length of the sentences actually imposed by the district court to ascertain which offense is the most serious, leaving the longest sentence in place." *Id.* As the district court sentenced appellant to 144 months in prison on count one and 180 months in prison on count two, vacating the sentence imposed on count two would violate section 609.035.

Accordingly, we reverse and vacate the district court's sentence on count one, leaving the 180-month sentence on count two in place. *See* Minn. Stat. § 244.11, subd.

2(b) (2010) (providing that this court may "vacate or set aside the sentence imposed or stayed and direct entry of an appropriate sentence"). Entry of the sentence as ordered herein shall be made accordingly.

Affirmed in part, reversed in part.