STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0687

State of Minnesota,
Respondent,

vs.

Thomas Jonathan Deloye,
Appellant.

Filed May 12, 2025
Affirmed
Bratvold, Judge

Ramsey County District Court
File No. 62-CR-21-5067

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

John J. Choi, Ramsey County Attorney, Anna R. Light, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Ross, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant challenges his judgment of conviction for first-degree criminal sexual conduct. Appellant argues that he is entitled to a new trial because the district court (1) abused its discretion by denying his motion for a mistrial based on a witness's testimony

referring to "the last time we had trial" and (2) plainly erred by not striking the same witness's other testimony referring to appellant's drug use and probationary status. Appellant's supplemental brief also argues that he is entitled to reversal based on his "actual innocence" or, in the alternative, a new trial because of other issues, including judicial bias and prosecutorial misconduct. We conclude that the district court did not abuse its discretion by denying appellant's mistrial motion and did not plainly err by failing to strike the challenged testimony. We also conclude that appellant is not entitled to relief based on the issues raised in his supplemental brief. Thus, we affirm.

FACTS

In September 2021, respondent State of Minnesota charged appellant Thomas Jonathan Deloye with first-degree criminal sexual conduct in two counts, both alleging that Deloye sexually assaulted his domestic partner's 12-year-old daughter "on repeated occasions" between April and August 2021. The criminal complaint alleged (1) under Minn. Stat. § 609.342, subd. 1(a) (2020), that Deloye was more than 36 months older than the complainant, who was under 13 years of age (count one), and (2) under Minn. Stat. § 609.342, subd. 1(h)(iii) (2020), that Deloye had a significant relationship to the complainant, who was under 16 years of age, and the sexual abuse involved multiple acts committed over an extended period of time (count two).

In January 2023, the district court conducted Deloye's first jury trial. Deloye experienced a medical emergency, and the district court declared a mistrial. In November 2023, the district court held Deloye's second jury trial. The following summarizes the evidence presented at Deloye's second trial.

Daughter testified that she grew up residing mostly with her father in McGregor. Both mother and father struggled with chemical dependency during daughter's childhood. Father died from a fentanyl overdose in November 2022, which was after Deloye was charged, but before any trial.

In 2020, when daughter was about 12 years old, she moved to White Bear Lake and lived with her mother. During the time daughter lived with mother, mother met Deloye and began dating him. Deloye later moved in with mother and daughter. Daughter called Deloye "T.J." and considered him "a father figure." Daughter loved Deloye and felt that he loved her.

Daughter testified that, in April 2021, she and Deloye were "play-fighting" and "wrestling" on the living-room floor while mother was asleep in another room. Daughter went into her own bedroom and sat on the bed. Deloye lay down by daughter and began touching her "private part" over her clothes. Daughter testified that "private part" meant "vagina." Daughter tried to "move back" to "stop it from happening"; she told Deloye, "You should probably go find your car keys." Deloye stopped touching daughter and left the bedroom.

The next day, daughter told mother what happened. Mother "automatically freaked out." In a conversation between mother, daughter, and Deloye, Deloye said "that he didn't do it." Deloye continued to live in the home with daughter and mother, and daughter felt "[b]etrayed" by mother.

About "three to four days" later, Deloye took daughter to a storage unit in Maplewood. While inside the storage unit, Deloye removed daughter's clothing and put

his penis inside her "private part." Between April and August 2021, Deloye sexually assaulted daughter "more than once" and used different forms of sexual penetration. Daughter testified that Deloye sexually assaulted her "whenever [mother] was away." Deloye also "would just take" daughter to places, such as "hotels and storage lockers," when mother was at home. After disclosing the first assault, daughter did not tell mother about the subsequent sexual assaults because she "was scared."

On August 12, 2021, daughter visited her father in McGregor and stayed for several days. Daughter used a cell phone to text Deloye while staying with father. One morning, father confronted daughter about messages or other content that he saw on her cell phone.[1] Father asked "what was going on" between daughter and Deloye. Daughter did not "tell him the full truth" at first because she "was nervous and scared." At the time, daughter felt that the situation "was [her] fault in a way" and "felt bad for [Deloye]."

Daughter texted Deloye in an attempt "to protect him." In Deloye's first message to daughter, he "pretended like it wasn't him and [daughter] had the wrong number." Deloye

[1] As noted above, father died before trial and did not testify. Three witnesses testified to father's statements after he saw messages or other content on daughter's cell phone. First, daughter testified that father learned "what was going on" between her and Deloye after father found her unlocked cell phone. Father "woke [her] up and asked [her] what it was about." Daughter agreed that father "saw something" on her phone. Second, mother testified that father "got into [daughter's] phone somehow, or he used it, and when he went into it, he said he found all these messages and pictures from [Deloye's] phone to [her] daughter. And when [father] told [mother] some of the stuff, [she] told him he needed to call the police." Third, a law-enforcement investigator agreed during testimony that he was "made aware" that father reported seeing a text message between Deloye and daughter. When Deloye's attorney asked the investigator what concerned him about the text message, the investigator testified: "Given the obvious sexual nature of the messages that [father] had saw or indicated he saw."

then texted daughter and "admitted that it was him." Deloye's text told daughter "to put a lock on [her] phone." Later, daughter told father "the full truth about what was going on." Father contacted law enforcement, and daughter recalled "going somewhere and being interviewed by a nurse."

Evidence related to daughter's cell phone was received at trial. Daughter testified that she did not remember Deloye's entire phone number but recalled that it had "515" in it. Through the testimony of a law-enforcement investigator, the district court received into evidence a summary of some of daughter's cell-phone messages with a phone number that included "515." This summary, along with a log of text content from daughter's cell-phone provider, showed the following: On August 22, 2021, daughter texted, "Tj. I f-cked up and didnt have a lock on my phone. My f-cking dad saw that message. I'm in deep sh-t." The "515" number responded, "no one by the name of tj lives here." Later, the "515" number texted, "Okay erase evetyf-ckin thi g right now n put a f-ckin lock on your phone." The investigator also testified that the "515" number "was listed as TJ in [daughter's] cell phone." The investigator agreed that he became "aware" that father reported a text message between Deloye and daughter but acknowledged that the investigation did not find that particular text message.

Mother also testified at trial, corroborating daughter's testimony about Deloye's first sexual assault. The relevant portions of mother's testimony are summarized and discussed in our analysis. After mother's testimony, Deloye moved for a mistrial, and the district court denied the motion.

A nurse at the Midwest Children's Resource Center (MCRC) testified that, in August 2021, she conducted a forensic interview of daughter about the sexual abuse, which was video recorded and played for the jury. The district court received both the video recording and transcript into evidence. Deloye's primary brief to this court describes the recorded statement as "generally consistent" with daughter's testimony.

Deloye did not testify and called two witnesses, who offered testimony not relevant to the issues on appeal. The jury found Deloye guilty of both counts of first-degree criminal sexual conduct. The district court sentenced Deloye on count one to 360 months in prison.

Deloye appeals.

DECISION

I. The district court did not abuse its discretion by denying Deloye's mistrial motion.

Deloye argues that the district court abused its discretion by denying his mistrial motion based on mother's testimony about "last time we had trial." Appellate courts review the denial of a mistrial motion for abuse of discretion because "[t]he trial judge is in the best position to determine whether an error is sufficiently prejudicial to require a mistrial or whether another remedy is appropriate." *State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016). "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. Jaros*, 932 N.W.2d 466, 472 (Minn. 2019) (quotation omitted).

A. Mother's Testimony and the Mistrial Motion

Before the second trial began, the state moved "to prohibit either side from referring to the previous jury trial." The district court accepted the parties' agreement to refer to Deloye's first trial as a "previous hearing."

During mother's cross-examination by Deloye's attorney, the following exchange occurred:

> Deloye's Attorney: And you—when's the last you've seen Mr. Deloye outside of this courtroom today?
> Mother: The last time we had trial or the last time we had a court hearing.
> Deloye's Attorney: Objection. May we approach?
> The Court: You asked the question. You got the answer. She saw him last time in court. Ask the next question.

Mother completed her testimony. Outside the jury's presence, Deloye's attorney informed the district court and the prosecuting attorney that Deloye would ask for a mistrial. The state continued with its case.

The next morning, before the state had rested and outside the presence of the jury, Deloye moved for a mistrial and made several arguments that emphasized mother's statement about the previous trial. The prosecuting attorney opposed the motion and responded that mother had been "informed not to refer to a previous trial," but "she did let that slip," and mother "quickly corrected herself and referenced a hearing right after she said 'trial.'"

The district court denied Deloye's mistrial motion. The district court explained:

> [Mother's] reference to trial was brief. She did quickly correct herself to call it a hearing. I then, in overruling your objection, called it a hearing as well. Obviously, cases don't just start out

> at jury trial, and the jury would presume that we would have had previous hearings, and it would be fair for them to assume that [mother] had attended them. They know nothing about a past trial, and there's no reason for them to think that anything untoward has happened here. So I'm denying it for that reason.

B. Analysis

On appeal, Deloye "acknowledges that the reference was brief, [mother] corrected herself, and the prosecutor did not mention the first trial or this aspect of [mother's] testimony during closing argument." Deloye maintains, however, that "[w]hile the district court seemed to assume that the jury would not draw any negative implications from knowing there had been a previous trial, there is simply nothing to support that assumption, particularly where no cautionary or curative instruction was given."[2] Deloye contends that "[t]he word 'trial' would have stood out for the jury" and that "[a] reasonable juror could well assume, when hearing in the context of a criminal case that the defendant had a previous trial involving the same parties, that the case involved improper or criminal conduct on the part of the defendant."

The state responds that the district court did not abuse its discretion by denying the mistrial motion because (1) mother's "reference to a previous 'trial' was isolated and brief"; (2) the challenged testimony "was elicited by [Deloye's] counsel"; and (3) "a single reference to a 'trial' is not prejudicial on its face." The state contends that "it was fair to assume the jury understood there were previous court proceedings in this case and the

[2] In denying the motion for mistrial, the district court stated: "I then, in overruling your objection, called it a hearing as well." On appeal, Deloye comments that the district court did not use the word "hearing" when overruling his objection. Deloye is correct; the district court stated: "She saw him last time *in court*." (Emphasis added.)

testimony did not give the jury any reason to think something untoward occurred" and that "[d]eference must be given to the district court."

Mother's reference to "[t]he last time we had trial" violated the district court's pretrial order to refer to the first trial as a hearing. Generally, evidence of a defendant's previous trial is inadmissible as irrelevant and prejudicial to the defendant because it suggests the defendant was charged with committing a criminal act, which is inadmissible character evidence. *See* Minn. R. Evid. 404(b)(1) ("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.").

Recognizing that mother's testimony about the last "trial" was inadmissible and prejudicial character evidence, a mistrial should be granted if "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Jaros*, 932 N.W.2d at 472 (quotation omitted). To resolve this question, appellate courts "consider whether the State presented other evidence on the issue, as well as whether the district court issued cautionary instructions." *Id.* at 474 (quotations omitted). Appellate courts also consider "whether the State relied on the inadmissible evidence to make its case during its closing argument." *Id.*

As we analyze each of these factors, four points stand out. First, mother's challenged statement was brief; she mentioned seeing Deloye at his prior "trial" once and, in the same sentence, corrected herself by saying "court hearing." The district court determined that, given mother's isolated reference and correction, the jury had "no reason" to suspect "anything untoward has happened here." Caselaw supports this determination. *See State v.*

Bahtuoh, 840 N.W.2d 804, 819 (Minn. 2013) (concluding that the district court did not abuse its discretion by denying the appellant's mistrial motion, in part because the disputed reference "was uttered only once during the course of a 4-day trial").

Second, Deloye does not claim that any prosecutorial misconduct occurred. Deloye's attorney elicited mother's challenged statement on cross-examination, not the prosecuting attorney. Also, the prosecuting attorney informed the district court that mother was instructed on the district court's pretrial ruling and that mother's statement was inadvertent.

Third, the district court gave no cautionary or corrective instruction on mother's testimony that she saw Deloye "the last time we had trial." Even so, the district court somewhat addressed Deloye's general concern that the jury would consider other criminal or wrong acts by Deloye in deciding this case. As this opinion discusses in more detail in the next section, the district court gave a cautionary *Spreigl* instruction[3] three times—after mother's direct examination, after mother's cross-examination, and at the close of the evidence. Finally, the prosecuting attorney did not mention Deloye's prior trial at any point, including during closing arguments.

Based on this record, we conclude that there is no "reasonable possibility" that mother's testimony that she saw Deloye at the prior "trial" significantly affected the

[3] A *Spreigl* instruction is given when evidence of other crimes is received for a permissible purpose under Minn. R. Evid. 404(b); this evidence is often called *Spreigl* evidence. *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (citing *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965)). Here, the district court gave the pattern *Spreigl* instruction to the jury. 10 *Minnesota Practice*, CRIMJIG 3.05 (2023).

verdict. *Jaros*, 932 N.W.2d at 472 (quotation omitted). Therefore, the district court did not abuse its discretion by denying Deloye's motion for a mistrial.

II. The district court did not commit plain error by failing to sua sponte strike mother's testimony about Deloye's drug use and probationary status.

Deloye argues that the district court plainly erred by not sua sponte striking mother's testimony about Deloye's drug use and probationary status because the testimony was "irrelevant, prejudicial, and inadmissible" character evidence. Deloye did not object to this testimony during trial, and his attorney did not ask the district court to strike the testimony. Appellate courts review unobjected-to error "under the plain error test." *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). "In order 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." *Id.* If the first three steps of the plain-error test are satisfied, appellate courts may correct the error only when "failure to do so will cause the public to seriously question the fairness and integrity of our judicial system." *Pulczinski v. State*, 972 N.W.2d 347, 359 (Minn. 2022).

A. Mother's Challenged Testimony

Deloye seeks a new trial based on mother's testimony during her direct examination by the prosecuting attorney. Below, we include the relevant questions and answers and have italicized the remarks that Deloye challenges.

> Q: At some point did you begin a dating relationship with Mr. Deloye?
> A: Yes, I did.
>
> Q: And do you recall approximately when it was that you began this dating relationship in relation to when you met him?

> A: Well, when I met him, it was like—I didn't hang out with him right away. It had been probably a couple weeks before I started hanging out with him. *And I was using meth at the time, and he was also.* And then we started hanging out more, and then he had, like, a toxic relationship with somebody else and, like, I don't know, it was kind of crazy. We hung out more and more because he was trying to get away from that other person, and then he was, like, homeless and I was homeless, so it was like, we started getting hotel rooms together or staying in his van. And then, I guess, it was like he never went away. We kind of were just, like, together, and it just got unhealthier and unhealthier as we went.
>
> . . . .
>
> Q: Okay. At some point, [mother], did [Deloye] move into your house in White Bear Lake?
> A: Yes, he did.
>
> Q: Do you recall when that was?
> A: Well, I wasn't there very long before he started staying with me, so I'd probably say Decemberish, I don't know, January. I don't know. *He was, like, always there, but he didn't technically live there because he had probation stuff, like, so I'm not sure where he was saying he was living*, but he was there, yes, basically, the whole time.

Deloye did not object to this testimony or ask to strike it. Based on our review of the transcript, the parties had three bench conferences during and after mother's testimony; only some details were summarized on the record. The transcript does not include any discussion about a cautionary or limiting instruction. Still, after mother's direct examination, the district court instructed the jury about evidence of "other criminal activity":

> I did want to now give you an instruction that you have heard testimony about other criminal activity that has been discussed both by [daughter] and by the witness on the stand now. *That evidence is being offered for the limited purpose of assisting*

> *you in determining whether the defendant committed those acts with which he is charged in this complaint. The defendant is not being tried for and may not be convicted of any other offense other than the charged offenses.* So you're not to convict the defendant on the basis of the other criminal activity that has been testified to. To do so might result in unjust double punishment.

(Emphasis added.) And after mother finished testifying, the district court again instructed the jury about "other acts" that are not part of the charged offense:

> Members of the jury, while we're waiting for this witness to come in, I want to reiterate the instruction that I gave you applies to the other acts that were testified to as well. You heard testimony about other acts that are not the charged acts here. As I told you earlier, *the defendant is not being tried for and may not be convicted of any other offense other than the charged offense. And so, that was offered for the limited purpose of assisting you in determining whether he's committed the offenses with which he's charged*. He's not being tried for and may not be convicted of any other offense, other than the charged offenses.

(Emphasis added.)

B. Analysis

To begin our plain-error analysis, we consider whether the challenged testimony was plainly inadmissible. "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted).

Deloye contends that mother's testimony about his drug use and probationary status was inadmissible as irrelevant and prejudicial character evidence. The state does not address Deloye's argument that mother's testimony was inadmissible character evidence. And the state does not contend that mother's testimony about Deloye's probationary status

was relevant. In contrast, the state argues that mother's reference to Deloye's drug use "was arguably relevant to [mother's] testimony regarding her own use and her relationship to [Deloye]." The state acknowledges, however, that Deloye's drug use "was not highly probative to prove the current criminal sexual conduct charges."

"All relevant evidence is admissible." Minn. R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Evidence of a person's other wrong acts is generally not admissible: "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). While there are some exceptions to the inadmissibility of character evidence introduced for "other purposes," *id.*, those exceptions do not apply to mother's testimony about Deloye's drug use and probationary status.[4]

We easily conclude that Deloye's drug use and probationary status were not relevant to prove that he sexually assaulted daughter. We also agree with Deloye that mother's testimony about his drug use and probationary status was prejudicial and inadmissible character evidence under rule 404(b). *See State ex rel. Black v. Tahash*, 158 N.W.2d 504,

[4] Evidence of another crime, wrong, or bad act may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," if the prosecuting attorney gives appropriate notice. Minn. R. Evid. 404(b)(1)-(2). The record supports Deloye's argument that the state "made no pre-trial motion to admit evidence under Rule 404" and that "the required five step inquiry was not conducted" to assess admissibility. *See State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005) (listing five steps the state must complete to request admission of bad-acts evidence).

506 (Minn. 1968) (stating that, generally, "evidence of a defendant's prior criminal activity is inadmissible in a criminal prosecution").

We next consider whether it was plain error for the district court to fail to sua sponte strike mother's testimony about Deloye's drug use and probationary status. The parties disagree and emphasize different caselaw. Deloye argues that plain error occurred, relying on *State v. Strommen*. 648 N.W.2d 681, 687-88 (Minn. 2002). In that case, the state charged Strommen with attempted robbery and a witness testified about Strommen previously "kicking in doors and killing someone." *Id.* at 684, 686. Strommen did not object. *Id.* at 684. Following a bench conference initiated by the district court, the court gave a *Spreigl* instruction to the jury, who later found Strommen guilty. *Id.* at 684-85, 687.

On appeal, Strommen challenged the *Spreigl* evidence and argued that "he was denied the right to a fair trial." *Id.* at 686. The supreme court concluded that the challenged evidence was irrelevant, prejudicial, and inadmissible character evidence. *Id.* at 686-87. The supreme court also determined that, "[b]ecause the testimony was inadmissible, the trial court's instruction should have been curative, rather than cautionary, and the inadmissible testimony should have been stricken." *Id.* at 687. The supreme court concluded that district court plainly erred, reversed Strommen's conviction, and ordered a new trial. *Id.* at 688, 690.

The state urges that no plain error occurred and that "it was appropriate for the district court to provide a general cautionary instruction," relying on *State v. Vick*. 632 N.W.2d 676 (Minn. 2001). In *Vick*, a witness testified about the child victim disclosing that Vick had sexual contact with her that was different from the charged sexual offense.

Id. at 680-81. Vick did not object but on appeal raised the testimony as improper and unnoticed *Spreigl* evidence. *Id.* at 681. The supreme court considered whether a district court's "failure to sua sponte strike the testimony or to provide a cautionary instruction constituted plain error." *Id.* at 685. The supreme court considered that the district court was not asked to rule on admissibility of the evidence and that the failure to give a cautionary *Spreigl* instruction is "not ordinarily reversible error." *Id.* The supreme court concluded that, because the challenged testimony "was an ambiguous description of what may or may not have been a separate *Spreigl* incident and . . . no objection was made to that testimony, any error resulting from the trial court's decision not to intercede was not plain." *Id.* The supreme court then considered the *Spreigl* instruction given to address other evidence and concluded that any plain error did not affect the jury's verdict. *Id.* at 686.

The challenged evidence in Deloye's case is more like the evidence in *Strommen* than the evidence in *Vick*. The *Spreigl* evidence in *Vick* was received without proper notice, but it was potentially admissible. A defendant's prior sexual offense may be relevant and admissible for "other purposes" under rule 404(b), such as to prove a defendant's intent or to show a pattern or plan. Minn. R. Evid. 404(b)(1); *see Washington*, 693 N.W.2d at 198, 203 (concluding that evidence of previous criminal sexual conduct may be admissible to show modus operandi in a subsequent criminal-sexual-conduct trial). In contrast, as already discussed, mother's challenged statements were not admissible for another purpose. Mother's challenged statements are therefore similar to the witness's testimony about Strommen "killing someone" because Deloye's drug use and probationary status were

irrelevant to the charged criminal conduct and impermissible character evidence. *Strommen*, 648 N.W.2d at 687.

Also, the *Spreigl* instruction given by the district court during Deloye's trial, like the *Spreigl* instruction given in *Strommen*, probably did not cure any prejudice. The *Spreigl* instruction, which followed the pattern instruction for rule 404(b) evidence, suggested that the jury could consider Deloye's drug use and probationary status to determine whether Deloye committed the charged offense. The district court instructed the jury that the evidence of other acts by Deloye was "offered for the limited purpose of assisting you in determining whether he's committed the offenses with which he's charged." The instruction, therefore, did not rectify and may have exacerbated the prejudicial effect of the irrelevant evidence. *See id.* (concluding that an identical jury instruction "did not mitigate the admission of" *Spreigl* testimony that was erroneously received).

Still, mother's spontaneous and brief testimony about Deloye's drug use and probationary status was far less prejudicial than the inadmissible testimony about Strommen "kicking in doors and killing someone." *Id.* at 686. When mother's challenged statements are considered in context, she testified about her own drug use and gave a full explanation about where Deloye was living in response to the prosecuting attorney's question. And Deloye did not object or move to strike.

A district court may reasonably hesitate to intervene in the absence of an objection, giving defense counsel leeway for trial strategy. In *Washington*, the supreme court explained that addressing *Spreigl* evidence sua sponte may not be proper: "We do not agree that the district court must, or even should, interfere with the trial strategy of the defendant.

To act *sua sponte* would risk highlighting or enforcing rights that the defendant had, for tactical reasons, decided to waive." 693 N.W.2d at 205.

With this caselaw in mind, we consider whether Deloye's substantial rights were affected as the result of any plain error in allowing mother's testimony about Deloye's drug use and probationary status without sua sponte striking the testimony or directing the jury to disregard it.

C. Any plain error in receiving the challenged testimony did not affect Deloye's substantial rights.

An error affects a defendant's substantial rights when "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) (quotation omitted). We consider nonexclusive factors, as discussed in *State v. Bigbear*: "the manner in which the evidence was presented"; "its persuasive value"; "its use in closing argument"; the defense's "counter of the evidence"; and "whether the evidence of guilt was strong." 10 N.W.3d 48, 55-56 (Minn. 2024).[5]

Manner Presented

"In analyzing the prominence of erroneously admitted evidence," appellate courts can consider "the relative number of transcript pages that the evidence occupies." *Id.* at 56. Appellate courts also consider "whether the evidence was used throughout the State's case." *Id.* Deloye argues that "the inadmissible evidence was presented through [mother's]

[5] While neither party cites the factors set out in *Bigbear*, the parties' arguments address the factors, so we slightly reorganize their arguments in our analysis.

live testimony," which "was impactful, both because she was the mother of [daughter] and because her testimony recounted the tragic impact that her addiction and homelessness had on" daughter. The state argues that the challenged references were "brief" and "isolated."

The challenged statements span only three lines of the trial transcript. Mother blurted out her comments about Deloye's drug use and probationary status in response to questions on direct examination. The prosecuting attorney's questions were proper and elicited testimony about mother's relationship with Deloye and their living situation. The prosecuting attorney did not mention Deloye's drug use or probationary status at any point during trial. Under these circumstances, we conclude that challenged testimony was not prominent. Thus, this factor suggests that the challenged testimony did not affect Deloye's substantial rights.

Persuasive Value

This factor addresses whether the challenged testimony was "highly persuasive." *Id.* at 56-57 (quotation omitted). Deloye argues that mother's testimony "revealed to the jury that Deloye engaged in criminal behavior" and that "[t]he potential for jury misuse of this evidence was high." The state argues that the district court's *Spreigl* instructions "mitigated the danger of unfair prejudice."

We have already discussed the prejudicial effect of improper character evidence and noted that the district court's *Spreigl* instructions may have exacerbated the testimony's prejudicial effect. On the other hand, mother's challenged testimony was brief and isolated, which limits its persuasive value. Thus, this factor, at most, slightly favors determining that Deloye's substantial rights were affected.

Use in Closing Argument

Deloye concedes that "the State did not use this evidence in its closing argument." We agree and conclude that this factor indicates that the challenged testimony did not affect Deloye's substantial rights.

Effectively Countered

This factor considers "whether the defendant effectively countered the evidence." *Id.* at 59 (quotation omitted). Deloye argues that "the defense had no effective way to counter the evidence." The state's brief does not address this factor. We agree that Deloye likely had no effective counter to mother's testimony about his drug use and probationary status because any other evidence on these subjects would have highlighted the inadmissible evidence. This factor supports concluding that mother's challenged testimony affected Deloye's substantial rights.

Strong Evidence of Guilt

Finally, we consider the strength of the state's case against Deloye. "[O]verwhelming evidence of guilt is a factor, often a very important one, in determining whether . . . the error has no impact on the verdict." *Id.* (quoting *State v. Juarez*, 572 N.W.2d 286, 291 (Minn. 1997)). "Strong evidence of guilt undermines the persuasive value of wrongly admitted evidence." *Id.* (quotation omitted).

Deloye makes no argument about the strength of the state's case. The state argues that daughter's testimony "established every element of the charged offenses" and that the "jury's determination regarding her credibility and the weight of her testimony was not affected by any plain error alleged in this appeal." The state also contends that the text

messages on daughter's phone "demonstrated [Deloye's] consciousness of guilt" and that daughter's recorded interview corroborated her testimony.

Based on our review of the record, we conclude that the evidence of Deloye's guilt is strong. Daughter testified in detail about Deloye's sexual assaults that continued for over three months. Mother's testimony corroborated daughter's disclosure of the first sexual assault. The text messages on daughter's phone, some of which were from Deloye, and the MCRC interview corroborated daughter's testimony about Deloye's sexual assaults. Thus, this factor weighs in favor of determining that the challenged testimony did not affect Deloye's substantial rights.

Summarizing our analysis of these factors, we conclude that Deloye was not able to effectively counter mother's testimony about his drug use and probationary status. The way the evidence was presented raises no concerns because the challenged statements were brief, isolated, and spontaneous in response to relevant questions. The persuasiveness of the prejudicial testimony was mitigated by its brief nature and the absence of any mention throughout the rest of trial and closing arguments. In particular, the strong evidence of Deloye's guilt suggests that his substantial rights were not affected. Thus, any plain error in allowing the challenged testimony without correction by the district court did not affect Deloye's substantial rights because there was no reasonable likelihood that any plain error substantially affected the verdict.

D. Any plain error in allowing mother's challenged testimony did not undermine the fairness and integrity of the judicial proceedings.

For completeness, we consider the final step of the plain-error test. Appellate courts may grant relief for plain error only if "failing to correct the error would have an impact beyond the current case by causing the public to seriously question whether our court system has integrity and generally offers accused persons a fair trial." *Pulczinski*, 972 N.W.2d at 356.

Deloye argues that mother's challenged testimony "portrayed him as a person of bad character whom the jury may have been motivated to punish" and that this court's correcting this error would "convey[] to the public that the purpose of [the] judicial system is to obtain the right outcome based on competent evidence." The state responds that "a new trial is not warranted" because the trial record "demonstrates that [Deloye] received a fair trial and the evidence supports his guilt."

We have already concluded that the challenged testimony did not affect Deloye's substantial rights. We also conclude that the fairness and integrity of the trial proceedings were not undermined by the challenged testimony. The jury assessed daughter's credibility, and mother's inadmissible statements were brief and not elicited by any prosecutorial misconduct. Thus, the third and fourth steps of the plain-error test do not support any relief on this issue. We conclude that the district court did not commit reversible error by failing to strike the challenged testimony.

III. Deloye is not entitled to relief for the arguments he raises in his supplemental brief.

Deloye raises five issues in a supplemental brief. Deloye argues that he is "actually innocent" because (1) the evidence is insufficient to sustain his conviction and (2) the district court incorrectly excluded relevant evidence. Deloye also argues he should receive a new trial because (3) his constitutional right to confrontation was violated by admitting father's statements into evidence, (4) the district court judge was biased, and (5) the prosecuting attorney engaged in misconduct. We address each issue in turn.

A. The evidence is sufficient to sustain Deloye's convictions.

Deloye challenges the sufficiency of the evidence that he engaged in sexual penetration with daughter under Minn. Stat. § 609.342, subd. 1(a), (h)(iii). Deloye does not appear to contest some elements of the charges—for example, that daughter was under 13 years old or that he had a significant relationship with her at the time of the alleged offenses. Deloye argues that the state "failed to introduce any physical evidence of rape, sexually explicit text messages, [or] DNA to link [Deloye] to this alleged sexual assault and for a first-degree sexual assault, these are needed."[6] The state argues that the jury found daughter's testimony "credible" and that daughter "testified to each element of the

[6] Deloye also argues that the district court erroneously defined "sexual penetration" in the jury instructions by "adding the phrase 'however slight' of the penis into the female's genital opening to the subdivision [which is] beyond the court's authority." This definition, however, is identical to the one provided by statute. Minn. Stat. § 609.341, subd. 12(2) (2020) (defining "sexual penetration" as "any intrusion however slight into the genital or anal openings"). Thus, we conclude that no error occurred.

offense." The state maintains that it produced sufficient evidence to prove Deloye's guilt beyond a reasonable doubt.

"When evaluating the sufficiency of the evidence, appellate courts carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *Griffin*, 887 N.W.2d at 263 (quotation omitted). Appellate courts must view the evidence "in the light most favorable to the verdict" and must assume that the jury "disbelieved any evidence that conflicted with the verdict." *Id.*

"In a prosecution under sections 609.342 to 609.3451; 609.3453 . . . the testimony of a victim need not be corroborated." Minn. Stat. § 609.347, subd. 1 (2022); *see State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (holding that the testimony of a single credible witness can provide sufficient evidence to support a conviction). At trial, daughter agreed that Deloye put his penis inside her "private part"—which she explained was her vagina—more than once when she was 12 years old.

Viewing daughter's testimony in the light most favorable to the guilty verdict, "the facts and the legitimate inferences drawn from" the testimony would allow a jury to reasonably conclude beyond a reasonable doubt that Deloye engaged in sexual penetration with daughter. *Griffin*, 887 N.W.2d at 263. Daughter's testimony is sufficient to sustain Deloye's conviction, and no corroboration with physical evidence is required. *See* Minn. Stat. § 609.347, subd. 1; *Foreman*, 680 N.W.2d at 539. Still, the state also offered corroborating evidence, such as daughter's immediate report to mother after Deloye's first

sexual assault, daughter's text messages with Deloye, and daughter's recorded MCRC interview.

B. The district court did not abuse its discretion by excluding evidence of daughter's prior sexual abuse.

We understand Deloye's supplemental brief to argue that the district court erred in its pretrial ruling excluding evidence that daughter was sexually assaulted by her father. The state does not address this argument.[7]

Appellate courts review a district court's evidentiary ruling for abuse of discretion. *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). Minnesota's rape-shield law states that "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."[8] Minn. Stat. § 609.347, subd. 3; Minn. R. Evid. 412 (identical rule). Even so, a victim's prior sexual conduct may be admissible as "constitutionally required by the defendant's right to due process, his right to confront his accuser, or his right to offer evidence in his own defense." *State v. Kobow*, 466 N.W.2d 747, 750 (Minn. App. 1991) (citing *State v. Caswell*, 320 N.W.2d 417, 419

[7] The state responds, however, to Deloye's related claim that the district court's exclusion of this evidence was a *Brady* violation. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process . . . ."). The state argues that "the testimony elicited during the motion hearing and the first trial were necessarily disclosed by the State and made known to the defense" in accordance with *Brady*. *See Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005) (holding that the state must disclose relevant or exculpatory evidence to the defense). We agree with the state that the district court's exclusion of evidence was not a *Brady* violation because the evidence was disclosed to the defense.

[8] The rape-shield law has exceptions. Minn. Stat. § 609.347, subd. 3 (2022). Deloye does not contend that any exception applies here.

(Minn. 1982)), *rev. denied* (Minn. Apr. 18, 1991). The defendant, however, "has *no* right to introduce evidence that either is irrelevant, or whose prejudicial effect outweighs its probative value." *State v. Crims*, 540 N.W.2d 860, 865-66 (Minn. App. 1995), *rev. denied* (Minn. Jan. 25, 1996).

Before the first trial, Deloye moved under rule 412 to admit evidence about daughter's "prior statements that her father had raped her." Deloye contended that this evidence showed daughter's motive to falsely accuse him because daughter "was angry" that Deloye "would not let her stay with him and was sending her home to stay with her father" in McGregor. Deloye also argued that the evidence demonstrated that daughter knew "about sexual matters necessary to fabricate a sexual assault charge."

The district court concluded that evidence of daughter's previous sexual abuse was inadmissible and that it is "more prejudicial than it is probative." The district court, however, recognized Deloye's right to present a defense and allowed "evidence of the fact of abuse," including "characterization of the abuse as bad, as severe, . . . as something really negative." The district court concluded that, "given the very high potential for [the evidence] to be used for an improper purpose, I'm going to exclude any mention of the abuse being sexual but give free rein to characterize it according to its severity because that is what is probative."

We conclude that the district court properly balanced Deloye's constitutional rights with the risk of unfair prejudice under Minn. R. Evid. 403. *See State v. Anderson*, 394 N.W.2d 813, 817-18 (Minn. App. 1986) (upholding a district court's application of the rule 403 balancing test where evidence of prior sexual-abuse charges against the

complainant related to a possible motive to fabricate), *rev. denied* (Minn. Dec. 12, 1986). Therefore, the district court did not abuse its discretion when it excluded evidence of daughter's prior sexual abuse while allowing Deloye to introduce evidence that daughter had been abused by father.

C. The admission of evidence of father's report of daughter's text messages did not violate Deloye's right to confrontation.

Deloye argues that his right to confrontation was violated because other witnesses testified that father reported a text message he found on daughter's cell phone and Deloye was "was unable to cross-examine" father. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides a criminal defendant with the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. Appellate courts review de novo whether the admission of evidence violates a defendant's rights under the Confrontation Clause. *State v. Gilleylen*, 993 N.W.2d 266, 278 (Minn. 2023).

Daughter, mother, and a law-enforcement investigator testified that father reported to each of them that he saw a text message or other content on daughter's phone that concerned him. Daughter testified that father found her phone while she was asleep and that she knew father saw "something on [her] phone" because "he woke [her] up and asked [her] what it was about." Mother testified that father said he "got into [daughter's] phone somehow, or he used it, and when he went into it, he said he found all these messages and pictures from [Deloye's] phone to [her] daughter. And when he told [mother] some of the

stuff, [she] told him he needed to call the police." A law-enforcement investigator also testified about father's report of seeing a text message on daughter's phone.

Deloye did not raise the Confrontation Clause issue or otherwise object to this testimony during district court proceedings. Therefore, we analyze the issue using the plain-error test described above. *See State v. Rossberg*, 851 N.W.2d 609, 618 (Minn. 2014) (applying plain-error review to a Confrontation Clause challenge raised for the first time on appeal). "A successful Confrontation Clause claim has three prerequisites: the statement in question was testimonial, the statement was admitted for the truth of the matter asserted, and the defendant was unable to cross-examine the declarant." *Andersen v. State*, 830 N.W.2d 1, 9 (Minn. 2013) (citing *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004)). The third prerequisite is met here because father died before trial.

We consider the other two prerequisites in turn. First, a statement is testimonial if its primary purpose "is to 'establish or prove past events' for purposes of later criminal prosecution." *State v. Dye*, 871 N.W.2d 916, 923 (Minn. App. 2015) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)). Statements made to nongovernment questioners who are "not acting in concert with or as an agent of the government" are nontestimonial. *State v. Scacchetti*, 711 N.W.2d 508, 514-15 (Minn. 2006); *see also State v. Her*, 750 N.W.2d 258, 265 (Minn. 2008) (concluding that declarant's statements to family members before her death were nontestimonial), *rev'd on other grounds*, 555 U.S. 1092 (2009). Based on this caselaw, we conclude that father's statements to daughter and mother about the text message or other content on daughter's phone were not testimonial.

Father's report of a text message to law enforcement, as discussed during the investigator's testimony, warrants closer scrutiny. The state argues that "father's actual out-of-court statement" regarding the content of the text message "was not admitted." While we agree that the district court excluded father's "account of what the text message said" as inadmissible hearsay under Minn. R. Evid. 801, it allowed "testimony regarding the nature of" the text message during the investigator's testimony.

On direct examination, the investigator testified that the Aitkin County Sheriff's Office forwarded a report from father that "indicated his daughter was sexually assaulted" by Deloye. According to the investigator, in father's report, he "indicated" he "saw" messages on daughter's cell phone. On cross-examination, the investigator agreed that "when this started, [he was] made aware of a text message that was reported to [him] to be sent by Mr. Deloye to [daughter]." Deloye's attorney later asked the investigator: "What concerned you about the text message that was reported to you?" The investigator responded: "Given the obvious sexual nature of the messages that [father] had saw or indicated he saw." In short, father reported the nature of the text message to a government agent "for purposes of later criminal prosecution." *Dye*, 871 N.W.2d at 923. We therefore conclude that father's report to law enforcement of the "sexual nature" of daughter's text message was a testimonial statement.

Finally, we consider whether father's report to law enforcement was admitted for the truth of the matter asserted. The "admission of testimonial statements does not implicate the Confrontation Clause if the statements are not offered to prove the truth of the matter asserted." *State v. Swaney*, 787 N.W.2d 541, 552 (Minn. 2010). Testimony about

a declarant's statements that provides context for the witness's knowledge or actions is a proper "non-truth purpose." *Id.* at 552-53. The state argues that the testimony was "not offered for the truth of the matter asserted" but "to explain what [the witnesses] knew, learned, and observed during the course of this case."

The investigator referenced father's report of the text messages on daughter's cell phone to explain why law enforcement examined daughter's cell phone, which uncovered relevant evidence. Because the investigator testified about father's report of the text messages to explain the investigation and not to prove what father saw, the investigator's testimony was not offered to prove the truth of the matter asserted. In fact, the investigator candidly agreed that he did not find a text message consistent with father's report.

Even if admission of this evidence was plain error, it did not affect Deloye's substantial rights. In assessing whether plain error affected a defendant's substantial rights, we consider the same factors we discussed earlier. *Bigbear*, 10 N.W.3d at 55-56. The investigator mentioned the "obvious sexual nature" of the text message once during his testimony. The investigator's testimony was not particularly persuasive because daughter and mother also testified that father discovered text messages on daughter's cell phone and then questioned her relationship with Deloye. The prosecuting attorney did not mention father seeing a text message during closing argument. Deloye's attorney countered the investigator's testimony by emphasizing that law enforcement never found the text message father reported. And, as discussed, the jury verdict rests on strong evidence of Deloye's guilt. We conclude that Deloye's substantial rights were not affected by any plain

error in admitting the investigator's testimony about father reporting a sexual text message on daughter's phone.

D. Deloye did not demonstrate that the district court was biased.

Deloye argues that "[t]he district court judge overwhelmingly ruled in favor of the state which shows blatant bias and/or gives the appearance of bias" and denied him a fair trial.[9] Deloye contends that the district court judge "acted as an advocate for the state" in violation of his due-process rights. The state argues that this claim of judicial bias "is conclusory and unsupported by the record and law." Deloye did not challenge the district court's bias during district court proceedings. Thus, we review for plain error. *See State v. Schlienz*, 774 N.W.2d 361, 365 (Minn. 2009) (applying plain-error review to a judicial-bias challenge raised for the first time on appeal).

Appellate courts presume that the district court "judge has discharged her duties properly." *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008). "[A] district court judge's adverse rulings, without more, are not enough for a criminal defendant to demonstrate that the judge was biased against him." *State v. Mouelle*, 922 N.W.2d 706, 716 (Minn. 2019). Because Deloye identifies only adverse rulings to support his judicial-bias argument, Deloye fails to demonstrate that the district court judge was biased in conducting his trial. *See id.*

[9] In his supplemental brief, Deloye also argues that "the district court abused its discretion when it admitted evidence of prior bad acts for which [procedural] requirements were not satisfied." This argument is addressed above.

E. Deloye did not demonstrate prosecutorial misconduct.

Deloye argues that the prosecuting attorney "coached [daughter] on how to answer the questioning in order to not get caught lying" at trial. Deloye maintains that, when daughter was asked if she met with the prosecuting attorney the night before trial, she "first said no" and then "changed her answer to yes as she saw the prosecutor . . . nod her head yes to the question." Deloye cites an affidavit from his trial attorney averring that the prosecuting attorney "nodded toward" daughter when daughter was asked "whether they met with each other the night before trial" and that daughter "previously answered that they had not met with each other."

The state argues that Deloye's prosecutorial-misconduct argument "is not based on the record" and that Deloye "attempts to supplement the record by citing to an affidavit from trial counsel." The state maintains that "[t]here was no record made below regarding the alleged prosecutorial misconduct."

The state is correct that this issue is raised for the first time on appeal. Appellate courts review "unobjected-to prosecutorial misconduct under a modified plain-error standard of review." *State v. Jones*, 772 N.W.2d 496, 506 (Minn. 2009). The appellant must show "(1) error (2) that is plain." *Id.* If the appellant shows plain error, "then the burden shifts to the State to show that [the appellant's] substantial rights were not affected." *Id.* If the appellant's substantial rights were affected, then the appellate court must consider the "whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted).

The affidavit from Deloye's trial attorney is not part of the record on appeal; we therefore do not consider it. Minn. R. Civ. App. P. 110.01 ("The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases."); *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992) ("The court will strike documents included in a party's brief that are not part of the appellate record."), *aff'd*, 504 N.W.2d 758 (Minn. 1993). Because Deloye provides no record evidence to support his claim of prosecutorial misconduct, he has failed to show that any prosecutorial misconduct occurred.

Affirmed.