STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2012

State of Minnesota,
Respondent,

vs.

Jay Dee Kaufman,
Appellant.

Filed April 15, 2008
Affirmed
Hudson, Judge

Ramsey County District Court
File No. K0-02-3761

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101; and

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, Minnesota 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.*

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

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

HUDSON, Judge

On appeal from resentencing, appellant raises several issues associated with the resentencing-jury trial and his sentence. Specifically, appellant argues that the district court erred when it accepted the jury's finding that appellant treated the victim with particular cruelty, an aggravating factor that the district court then used to impose an upward durational departure on the kidnapping offense; imposed a consecutive sentence for his criminal-sexual-conduct offense; and failed to provide the jury with a definition of particular cruelty and instructed the jury that its decision would assist the court in sentencing. Appellant also argues that the prosecutor committed misconduct during closing argument and that the cumulative effect of the errors justifies reversal. In addition, appellant argues in his pro se supplemental brief that he received ineffective assistance of counsel and that his resentencing hearing date was delayed. We affirm.

FACTS

Between October 5 and October 11, 2002, appellant Jay Dee Kaufman kept S.M.—his girlfriend of four years—confined in his St. Paul home, during which time he forced her to perform oral sex on him repeatedly; inserted a beer bottle into her vagina; forced her to kneel on a broomstick while he whipped her with a belt; repeatedly smashed her head into the wall and whipped her; repeatedly bit her on the face and head; burned various parts of her body with a butane torch and a cigarette; punched her in the face; wrapped her in a blanket secured with duct tape while he had visitors or left the house; refused to give her food or drink except for one offer of french fries, which she was

unable to eat because of injuries to her mouth; told her to drink from the toilet if she was thirsty, and twice forced her to drink his urine. At trial, the trauma surgeon who treated S.M. testified that S.M. sustained great bodily harm—including permanent hearing loss and permanent brain injury—as a result of the prolonged assault.

In February 2003, a jury found appellant guilty of: Count I: kidnapping with the intent to cause the victim great bodily harm in violation of Minn. Stat. § 609.25, subds. 1(3), 2(2) (2002); Count II: kidnapping with the effect of causing the victim great bodily harm in violation of Minn. Stat. § 609.25, subds. 1(3), 2(2) (2002);[1] Count III: assault in the first degree in violation of Minn. Stat. § 609.221, subd. 1 (2002); and Count IV: criminal sexual conduct in the first degree in violation of Minn. Stat. § 609.342, subds. 1(e)(i), 2 (2002). The district court sentenced appellant to (1) 237 months in prison on Count II, kidnapping with the effect of causing the victim great bodily harm; an upward durational departure from the 158-month presumptive sentence; and (2) 144 months in prison on Count IV, first-degree criminal sexual conduct, which also carried a presumptive sentence of 158 months. The court also ordered that appellant serve the

[1] The amended complaint cited the wrong subdivision of the kidnapping statute as to Counts I and II. The amended complaint cited Minn. Stat. § 609.25, subds. 1(2), 2(2), which does not concern the infliction of "great bodily harm" or terrorizing the victim, but rather, addresses facilitating commission of any felony or flight thereafter. The inadequacy of the complaint is subject to a harmless-error analysis. *State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006). Here, the verdict forms and the district court record clearly indicate that appellant was convicted on Count I intent to commit and Count II the effect of committing "great bodily harm." Further, the parties agree that appellant was found guilty for kidnapping with the intent of committing great bodily harm and with the effect of committing great bodily harm and do not raise the accuracy of the complaint here on appeal. Thus, any error resulting from references in the complaint to the wrong subdivision appears to be harmless. *Id.* at 31 (stating that an error is harmless if, beyond a reasonable doubt, the verdict was not attributable to the error).

sentences consecutively. No sentence was imposed on the remaining two counts. Appellant appealed his convictions and sentences. On appeal, this court affirmed appellant's convictions but remanded for consideration of the application, if any, of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *See State v. Kaufman*, No. A03-927, 2004 WL 1775581 (Minn. App. Aug. 10, 2004), *review denied* (Minn. Oct. 19, 2004).

On remand, the district court granted respondent State of Minnesota's motion to empanel a resentencing jury. Before the resentencing trial, the district court ruled on several motions, granting respondent's motion to admit out-of-court statements that victim S.M. made to a doctor and a paramedic.

At the resentencing trial, the jury was charged with determining whether the aggravating factor of "particular cruelty" existed on the bases that appellant confined the victim for "an extreme duration" and that appellant "engaged in gratuitous violence by burning [the victim], biting her, and beating her." The jury returned a special verdict finding that respondent had proved beyond a reasonable doubt that appellant treated the victim with particular cruelty by confining her for an extreme duration and engaging in gratuitous violence.

The district court accepted the jury's verdict and resentenced appellant on Count II (kidnapping) to 237 months. The sentence consisted of an upward durational departure based on the jury's finding that the offense was committed with particular cruelty. The district court also sentenced appellant on Count IV (criminal sexual conduct in the first

degree) to a sentence of 144 months, to be served consecutively to the sentence imposed on Count II. This appeal follows.

D E C I S I O N

I

Appellant argues that the district court erred in imposing an upward durational departure for the kidnapping offense based on the jury's finding that appellant treated the victim with "particular cruelty" because (a) gratuitous violence was an improper ground for departure since "great bodily harm" was already an element of the kidnapping offense; and (b) the jury's finding that the duration of the confinement was extreme was based on inadmissible evidence. We disagree.

The district court may exercise its discretion to depart from the presumptive sentence only if, after the accused chooses to have a jury trial, the jury finds that the facts to support a departure are proved beyond a reasonable doubt. Minn. Sent. Guidelines II.D. "We review a sentencing court's departure from the sentencing guidelines for abuse of discretion." *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003); *see* Minn. Sent. Guidelines II.D (stating that a sentence outside of the presumptive sentence range is an exercise of the district court's discretion). And on appeal, when determining whether a durational departure was justified, this court must base its decision on its "collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts." *Holmes v. State*, 437 N.W.2d 58, 59 (Minn. 1989) (quotation omitted).

A. Gratuitous violence

Appellant argues that gratuitous violence could not serve as a ground to impose an upward durational departure because great bodily harm was an element of the kidnapping offense. Appellant also contends that there was insufficient evidence for the jury to find that appellant engaged in gratuitous violence by biting the victim.

The district court cannot base an upward durational departure on factors already taken into account by the legislature "in determining the degree or seriousness of the offense." *State v. Losh*, 721 N.W.2d 886, 896 (Minn. 2006) (holding that because appellant was convicted of causing great bodily harm, no abuse of discretion on the part of the district court for imposing the upward durational departure on the basis of particular cruelty); *see also State v. Blegen*, 387 N.W.2d 459, 464 (Minn. App. 1986) (stating that the test is "whether the cruelty inflicted by appellant upon [the victim] was greater than the personal injury already included as an element of the crime"), *review denied* (Minn. July 31, 1986).

Here, the upward durational departure was imposed on appellant's conviction of kidnapping with the effect of committing great bodily harm in violation of Minn. Stat. § 609.25, subd. 1(3) (2002). Great bodily harm is defined as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (2002). Cruelty is gratuitous if it was "unjustified within the context of the crime." *State v. Cox*, 343 N.W.2d 641, 645 (Minn. 1984).

To support his argument, appellant notes that respondent relied largely on the same evidence concerning the extent and type of injuries sustained by the victim to prove both the offense element of great bodily harm and gratuitous violence. But respondent's use of the same evidence does not necessarily lead to the conclusion that the district court used factors already taken into account as an element of the offense to justify the upward durational departure and thereby abused its discretion. This is because a proper analysis examines appellant's conduct in inflicting the injuries and not just the injuries themselves. *See Cox*, 343 N.W.2d at 643 (stating that "[t]he general issue that faces a sentencing court in deciding whether to depart durationally is whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question"); *State v. Anderson*, 370 N.W.2d 703, 706–07 (Minn. App. 1985) (holding that while some of the injuries sustained by the victim were included within the definition of great bodily harm, the offender's conduct toward the victim showed particular cruelty in the way that he beat her, by exhibiting "degrading treatment [that] was not necessary to the offense," and assaulting her in the presence of her children), *review denied* (Minn. Sept. 19, 1985).

Furthermore, both this court and the Minnesota Supreme Court have held that even though the infliction of great bodily harm was an element of the offense, the injuries sustained by the victim may "be considered as an aggravating factor . . . [due to their] serious and permanent nature." *State v. Felix*, 410 N.W.2d 398, 401 (Minn. App. 1987) (quotation omitted), *review denied* (Minn. Sept. 29, 1987); *see also Cox*, 343 N.W.2d at 644–45 (stating that even though the victim's injuries pertain to an element of the

offense, if the victim was injured in a serious and permanent way, the injuries sustained may be considered at sentencing); *Blegen*, 387 N.W.2d at 464 (evidence that the defendant "inflicted excessive, gratuitous pain upon [the victim, which was] more than was necessary to accomplish his criminal purpose" may also indicate that the victim's pain and injuries were greater than contemplated by the element of the crime). And finally, an upward durational departure on the aggravating factor of particular cruelty may be appropriate based on the "totality of the circumstances." *State v. Van Gorden*, 326 N.W.2d 633, 635 (Minn. 1982).

The record shows that appellant inflicted multiple, serious injuries on the victim, and thus the district court determined that appellant's conduct did not constitute a "typical" kidnapping with the effect of committing great bodily harm. We agree. Appellant not only confined the victim for a period of days, but also beat her, burned her, broke her ribs, and ruptured her eardrum, resulting in permanent hearing loss and permanent brain damage. This evidence amply supports the district court's determination that appellant inflicted more pain and injury on the victim than was necessary to effectuate his kidnapping-with-great-bodily-harm offense. We conclude that the district court did not abuse its discretion when it imposed an upward durational departure based on the sentencing jury's finding that appellant demonstrated particular cruelty by engaging in gratuitous violence.

Appellant also contends that "[w]ithout [S.M.'s] testimony regarding how, or from whom, she received the bite mark, the state found itself unable to prove one of its asserted bases that Kaufman treated [the victim] with gratuitous violence." Appellant's

argument appears to be that there was insufficient evidence from which the jury could find that appellant exhibited gratuitous violence by biting the victim.

When considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Here, at trial, the doctor testified that the victim had bite marks, but that when analyzing one of them, he could not state whether the bite mark was caused by a human or an animal. The doctor also testified that the bite mark showed signs of early infection, which was consistent with the doctor's testimony concerning the apparent age of the victim's other injuries. While the wording of the special verdict is unclear regarding who or what bit the victim, we conclude that there was sufficient evidence in the record from which the jury could find that the bite mark occurred during the kidnapping offense when the victim was under appellant's control.

B. Confinement of extreme duration

Appellant also argues that there was insufficient evidence for the jury to find that appellant confined the victim for an extreme duration because the evidence proffered by respondent was largely based on inadmissible hearsay and out-of-court testimonial statements in violation of appellant's Confrontation Clause rights.

But at oral argument, appellant's counsel acknowledged that this court's recent holding in *State v. Rodriguez*, 738 N.W.2d 422 (Minn. App. 2007), *review granted* (Minn. Nov. 21, 2007), is controlling. In *Rodriguez*, this court held that under Minn. R.

Evid. 1101(b)(3), the rules of evidence do not apply to sentencing proceedings. *Id.* at 432. Further, in *Rodriguez* this court declined to extend Minnesota's Confrontation Clause to sentencing-jury proceedings. *Id.* at 431–32 ("Our state courts and legislature have not extended the right to confront witnesses to sentencing-jury proceedings, even though *Blakely* and *Crawford* are now three years old."). As a result, the paramedic's and the doctor's testimonies were properly before the jury.

Even if we were to consider appellant's claim, there was sufficient other evidence in the record to support the jury's finding. In addition to the testimonies of the paramedic and the doctor as to the victim's statement regarding the duration of her confinement, the doctor also testified that the nature of the victim's wounds indicated that they were inflicted over a period of days. The jury was also informed that appellant had been found guilty of kidnapping the victim for the period between October 5 and October 11, 2002. Accordingly, there was sufficient evidence for the jury to conclude that the victim was confined for an extreme duration.

II

Appellant argues that if this court upholds the departure based solely on the aggravating factor of particular cruelty, the imposition of a consecutive sentence on his criminal-sexual-conduct offense must be reversed because the district court did not find that any additional aggravating factor existed to warrant imposition of the consecutive sentence in accord with Minn. Sent. Guidelines cmt. II.F.04 (2002). This argument was raised for the first time in appellant's reply brief and not in response to an argument raised in respondent's brief. *See McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App.

1990) (stating that issues not raised or argued in appellant's brief cannot be revived in a reply brief), *review denied* (Minn. Sept. 28, 1990); Minn. R. Civ. App. P. 128.02, subd. 3 (providing that reply brief "must be confined to new matter raised in the brief of the respondent"); Minn. R. Crim. P. 28.02, subd. 10 (stating that the Minnesota Rules of Civil Appellate Procedure govern the form and filing of briefs). But in the interests of justice, we will address this issue. Minn. R. Crim. P. 28.02, subd. 11.

Construction of a provision in the sentencing guidelines is a question of law, which this court reviews de novo. *State v. Franks*, 742 N.W.2d 7, 14 (Minn. App. 2007), *review granted* (Minn. Feb. 18, 2008). But "[w]hen the district court has discretion to impose consecutive sentences, we will uphold the sentences unless they are disproportionate to the offense or unfairly exaggerate[ ] the criminality of the defendant's conduct." *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007) (alteration in original) (quotation omitted), *review denied* (Minn. Feb. 19, 2008).

Appellant's argument is based on a provision in the 2002 sentencing guidelines—the guidelines in effect when appellant committed these offenses. In 2002, comment II.F.04 provided that current felony convictions for crimes against persons may be sentenced consecutively to each other without a departure "even when the offenses involve a single victim involving a single course of conduct." Minn. Sent. Guidelines II.F. (2002). But "consecutive sentencing is not permissive under these circumstances when the court has given an upward durational departure on any of the current offenses" because "to give both an upward durational departure and a consecutive sentence when the circumstances involve one victim and a single course of conduct can result in

disproportional sentencing unless additional aggravating factors exist to justify the consecutive sentence." *Id.*

But appellant's argument is misplaced because Minn. Sent. Guidelines II.F. (2002) specifically provided not only that consecutive sentences are permissive for "[a] current felony conviction for . . . Criminal Sexual Conduct in the First through Fourth Degrees with force or violence as defined in Minn. Stat. § 609.342 through 609.345," but also that they "are always permissive" for those offenses.[2] Stated otherwise, comment II.F.04 generally concerns multiple current felony convictions for crimes against persons and does not address the more specific permissive consecutive sentence provision concerning current criminal sexual conduct convictions, which are always considered permissive under II.F. Minn. Sent. Guidelines II.F. cmt. II.F.04 (2002); *see generally* Minn. Stat. § 645.26, subd. 1 (2002) (providing that the more specific statute prevails over a conflicting general statute); *State v. Ronquist*, 600 N.W.2d 444, 447 (Minn. 1999) (stating same).

Here, appellant was convicted of criminal sexual conduct in the first degree in violation of Minn. Stat. § 609.342, subds. 1(e)(i), 2 (2002), and under the 2002 sentencing guidelines, the district court's imposition of the consecutive sentence on his

[2] Our holding is further supported by the fact that in 2000, the legislature amended Minn. Stat. § 609.035 to add subdivision 6. 2000 Minn. Laws ch. 311, art. 4, § 1, at 211. Minn. Stat. § 609.035, subd. 6 (2002), in pertinent part, states that the imposition of consecutive sentences for convictions of criminal sexual conduct in violation of Minn. Stat. §§ 609.342–.345 committed with force or violence "are not a departure from the sentencing guidelines." Following the statutory change, the sentencing guidelines added the provision that consecutive sentences were always permissive if imposed on a current felony conviction for criminal sexual conduct in violation of Minn. Stat. §§ 609.342–.345. Minn. Sent. Guidelines II.F. (2002).

criminal sexual conduct offense was permissive. Accordingly, we hold that the district court did not abuse its discretion by sentencing appellant to a term of 237 months, an upward durational departure, on the kidnapping count, in addition to a consecutive 144-month term on the first-degree criminal-sexual-conduct count.

III

Appellant argues that the district court's jury instruction on particular cruelty was insufficient. Specifically, appellant argues that the district court committed reversible error when it (a) did not provide the jury with a legal definition of "particular cruelty" and (b) instructed the jury that its determination would assist the court in determining appellant's sentence.

Appellant did not object to the jury instructions at trial. An unobjected-to error will only result in a new trial if: (1) there is an error; (2) that is plain; and (3) the error affected the defendant's substantial rights. *State v. Meldrum*, 724 N.W.2d 15, 20 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). The error should only be corrected, however, if it "seriously affect[ed] the fairness, integrity, or public reputation" of the judicial proceeding. *Id.* (quotation omitted). Generally, when "reviewing a trial court's jury instructions, we examine the record for abuse of discretion and errors of law," but questions of law are reviewed de novo. *State v. Lory*, 559 N.W.2d 425, 427–28 (Minn. App. 1997), *review denied* (Minn. Apr. 15, 1997). This court reviews the jury's instructions in their entirety; they will not be reversed if they correctly state the law using language that can be understood by the jury. *Meldrum*, 724 N.W.2d at 19. A jury instruction is only in error if it "materially misstates the law," and when a defendant

failed to object to the instruction, this court may reverse if the jury instructions were "misleading or confusing on fundamental points of law." *Id.* (quotations omitted).

A. Particular cruelty

Appellant argues that the district court erred when it did not provide the jury with the legal definition of "particular cruelty" or otherwise explain to the jury how appellant's conduct compared to a typical kidnapping offense.

The legal definition of "particular cruelty" is cruelty "of a kind not usually associated with the commission of the offense in question." *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981). Here, the jury was instructed that respondent "alleges two specific acts as constituting particular cruelty"—confinement of extreme duration and gratuitous violence. The special-verdict form then asked the jury to determine whether respondent proved beyond a reasonable doubt that appellant treated the victim "with particular cruelty by: Confining [the victim] for an extreme duration," or "Engaging in gratuitous violence by burning [the victim], biting her, and beating her." The district court did not otherwise provide the elements of the underlying kidnapping-with-the-effect-of-committing-great-bodily-harm offense or provide a legal definition of particular cruelty to the jury.

Before the advent of sentencing juries, a precise definition of the term "particular cruelty" was unnecessary because whether a crime had been committed with particular cruelty was a determination made by a district court judge who could rely on his or her experience and accumulated knowledge of "typical cases." *State v. Weaver*, 733 N.W.2d 793, 802 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). But when a

sentencing jury is charged with determining whether aggravating factors are present, "particular cruelty is a relative term that requires a uniform meaning irrespective of the jurors' lay understanding of the term." *Id.* There is very little caselaw, however, to offer guidance to district courts concerning the requisite jury instruction when a jury is charged with finding evidence on the aggravating factor of "particular cruelty." *See id.* (holding that the instruction provided to the jury was inadequate but declining to provide a definition for particular cruelty).[3]

Despite the still-evolving state of the law on this issue, we conclude that because particular cruelty is a relative term in the sentencing-jury context, the district court's instruction here was insufficient for several reasons. First, absent a definition of the term "particular cruelty," the jury had no basis for determining whether the state proved the existence of the aggravating factor beyond a reasonable doubt. Second, the district court did not provide the elements of the offense itself—kidnapping with the effect of committing great bodily harm—to give the jury some basis of comparison in determining whether appellant's conduct was particularly cruel when compared to the typical kidnapping offense. Third, the district court instructed the jury to find whether the state met its burden using similarly undefined, relative terms such as "gratuitous violence" and

[3] We note that this court has recently addressed this issue in unpublished opinions. *See e.g.*, *State v. Walker*, No. A06-470, 2007 WL 2363790, at *6 (Minn. App. Aug. 21, 2007) (suggesting that the phrase "particular cruelty" should be defined as conduct "significantly more cruel than that usually associated with the offense of which he was convicted"), *review denied* (Minn. Nov. 13, 2007); *State v. Huertas*, No. A05-2359, 2007 WL 329209, at *1–*4 (Minn. App. Feb. 6, 2007) (holding that the district court's instruction defining particular cruelty as "conduct and harm more serious than the typical offense, but does not involve the elements of the offense itself" to be a sufficient instruction), *review denied* (Minn. May 15, 2007).

"extreme duration." In fact, while deliberating, the jury asked the district court what it meant by a confinement of "extreme" duration but returned its verdict before the district court could respond. The district court's instruction failed to provide sufficient guidance to the jury, and therefore, we conclude that the district court committed plain error in the administration of its jury instruction on particular cruelty.

That is not the end of our analysis, however. Even if the district court's instruction on particular cruelty was inadequate, we will not reverse the error unless it affected appellant's substantial rights. Here, the jury was presented with detailed, graphic evidence showing that while confining the victim for several days, appellant repeatedly physically assaulted the victim by, among other things, beating and burning her all over her body. Based on the overwhelming evidence demonstrating appellant's appalling conduct toward the victim, we cannot say that the district court's failure to provide a definition or other explanation of particular cruelty affected appellant's substantial rights, and we decline to reverse based on the erroneous instruction.

B. The jury's role

Appellant argues that the district court erred when it informed the jury that its decision would assist the district court in sentencing appellant because it impermissibly injected sentencing matters into the jury's deliberations.

Here, the district court stated several times during the course of the sentencing trial that the sentencing jury's decision would assist the court in sentencing appellant. But CRIMJIG 8.01, adopted in response to *Blakely*, specifically instructs the district court to tell the jury in a bifurcated proceeding, that its ". . . answers will assist the Court in

determining the defendant's sentence." In light of CRIMJIG 8.01, and in the absence of caselaw on point as to what, if anything, the district court may say to sentencing juries regarding its role in the sentencing process, we conclude that the district court did not err in making its comments. And even if the district court did err, any such error was harmless because, based on the evidence presented to the jury, there was no prejudice to appellant's substantial rights.[4]

IV

Appellant argues that the prosecutor committed misconduct during closing argument by (a) mischaracterizing testimony; (b) using the word "torture"; and (c) making a statement not supported by the record. We disagree.

Because appellant did not object to the alleged prosecutorial misconduct at trial, we review this issue for plain error. *State v. Washington*, 725 N.W.2d 125, 133 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007). Plain error exists when there is an error that is plain and that affects the defendant's substantial rights. An error is plain "if it contravenes caselaw, a rule, or a standard of conduct." *Id.* Appellant must first establish that the prosecutor's actions constituted plain error, and if the defendant meets his burden, then the burden shifts to the state to show that the error did not affect the defendant's substantial rights. *Id.* "A prosecutor's misconduct affects substantial rights if there is a reasonable likelihood that it would have had a significant effect on the verdict

[4] Appellant also argues that the district court's instruction to the jury regarding allegations made by respondent that were not later supported by evidence during trial prejudiced the jury against appellant. Appellant, however, cites no legal authority for his position, and our review of the record reveals no discernible prejudice to appellant.

of the jury." *Id.* Further, when misconduct is alleged, the misconduct must be considered in the context of the entire trial. *State v. Powers*, 654 N.W.2d 667, 678–79 (Minn. 2003). And this court may reverse the holding of the district court if the prosecutorial misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial. *Washington*, 725 N.W.2d at 133.

A. Mischaracterizing testimony

Appellant argues that the prosecutor plainly erred by mischaracterizing the paramedic's testimony. During closing arguments, a prosecutor may not mischaracterize the evidence or make arguments unsupported by the record, but prosecutors are allowed to make legitimate inferences from the evidence and comment on such inferences. *Washington*, 725 N.W.2d at 134–35. It is not misconduct when prosecutors poorly paraphrase the substance of a witness's testimony. *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003) (holding that prosecutor's "unartful" paraphrase was not prosecutorial misconduct).

Here, the prosecutor stated in closing argument that the paramedic testified the victim told him "that she believed she had been confined and beaten over a period of three to four days and that during that three-to-four-day period, she was knocked out several times." The paramedic actually stated that when he asked the victim what happened, she told him that "she had been beaten over the past three or four days," and that when asked if she was ever unconscious, the victim replied that "she had been several times." And the doctor testified that the paramedic told him the victim "had been held captive for approximately four days and repeatedly assaulted during that time."

Considering that the jury heard the testimony of both witnesses, and the jury knew that the doctor's statement was based on what the paramedic learned, the prosecutor's statement was, at worst, an "unartful paraphrase" of the testimony presented to the jury. Moreover, the district court instructed the jury that what the lawyers say is not evidence, and "[w]e presume that the jury followed the court's instruction." *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). Accordingly, the prosecutor's misstatement of the paramedic's testimony was not prosecutorial misconduct.

B. Use of the word "torture"

Appellant also argues that it was plain error for the prosecutor to refer to appellant's actions as "torture." Prosecutors "must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Morton*, 701 N.W.2d 225, 236 (Minn. 2005) (quotation omitted) (stating that special attention should be paid to inflammatory and prejudicial statements when credibility is a central issue).

Here, the prosecutor used the word "torture" to describe and summarize appellant's conduct toward the victim. But the jury heard detailed, and at times gruesome, evidence about the victim's prolonged ordeal at the hands of appellant, and thus the prosecutor's use of the word "torture" was arguably a legitimate characterization based on the evidence in the record. *See The American Heritage Dictionary* 1892 (3d ed. 1996) (defining "torture" as "[i]nfliction of severe physical pain as a means of punishment or coercion," or "[e]xcruciating physical or mental pain"). The prosecutor's use of the word "torture" was graphic, but we cannot conclude that it impermissibly inflamed the passions of the jury against appellant.

C. Unsupported statement

Appellant also argues that the prosecutor plainly erred by making "a highly improper and inflammatory statement" that allowed the jury to infer that appellant allowed or encouraged an animal to bite the victim. "A prosecutor may not speculate about events that occurred either at the time of the alleged crime or thereafter, absent a factual basis in the record." *Washington*, 725 N.W.2d at 134.

During rebuttal, the prosecutor stated "even if you want to think that those bite marks were caused by a dog or a cat or a ferret that he turned loose on her, he's responsible for them." The doctor had earlier testified that the victim was bitten but that he could not determine whether she was bitten by a human or an animal. The doctor also testified that the bite showed signs of infection, but he admitted that he could not determine the age of the bite marks. This testimony was the only evidence before the jury regarding the possibility of an animal bite. But while the prosecutor's statement may have prompted the jury to speculate about the origin of the bite marks, the comments appear to have been made to suggest that regardless of how the bite marks were inflicted, they occurred during the kidnapping offense while the victim was under appellant's control. Further, the jury was also properly instructed that statements by counsel are not evidence and we presume that the jury followed that instruction. *Taylor*, 650 N.W.2d at 207. Accordingly, we cannot conclude that the prosecutor's statement relating to the bite marks constituted prosecutorial misconduct.

V

Appellant argues that the cumulative effect of the numerous errors that occurred during the resentencing jury trial deprived him of a fair trial.

This court may reverse when no single error by itself is sufficient to justify reversal but the cumulative effect of the errors are such that it prejudiced the defendant so as to deprive him of a fair trial. *State v. Erickson*, 597 N.W.2d 897, 904 (Minn. 1999); *State v. Johnson*, 441 N.W.2d 460, 466 (Minn. 1989). Although aspects of the sentencing trial were problematic, we cannot conclude that the cumulative effect of the error was such that it deprived appellant of a fair trial.

VI

In his pro se supplemental brief, appellant argues that he received ineffective assistance of counsel because (1) appellant had difficulty in communicating with his attorney; and (2) appellant's attorney failed to call witnesses on his behalf, including the victim and forensic specialists. Appellant also contends that his attorney and the district court committed misconduct when they delayed the date of his resentencing hearing.

To prove ineffective assistance of counsel, appellant "must affirmatively prove that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotation omitted). There is a strong presumption that an attorney's representation falls within the range of reasonable professional assistance. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Appellant does not explain how he was prejudiced by the difficulty in communicating with his attorney or that, in the absence of such communication difficulties, a different result at trial may have been obtained. Attached to his pro se supplemental brief, appellant provided a number of letters he sent to his attorney and "offender kite" forms evidencing his attempts to contact his attorney from prison. But these documents were not made part of the district court record, and accordingly, we do not consider them. Minn. R. Crim. P. 28.02, subd. 8. Further, this court does not review trial tactics or an attorney's decision regarding which witnesses to call; it is within counsel's discretion to determine which witnesses to call and what information to present to the jury. *Jones*, 392 N.W.2d at 236. Accordingly, appellant's ineffective-assistance-of-counsel claim fails.

Appellant's argument regarding the delay of his resentencing hearing also fails. Appellant does not explain how he was prejudiced by the delay or cite any authority to support his allegations and there is nothing in the record to indicate that the delay was intentionally caused by appellant's attorney or the district court.

Affirmed.