STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2127

State of Minnesota,
Respondent,

vs.

James Henry Nikolaisen,
Appellant.

Filed February 2, 2010
Affirmed
Johnson, Judge

Ramsey County District Court
File No. 62-K1-07-001567

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Johnson, Judge.

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

JOHNSON, Judge

A Ramsey County jury found James Henry Nikolaisen guilty of one count of second-degree criminal sexual conduct based on evidence that he engaged in sexual

conduct with a 13-year girl while aided by an accomplice who used force or coercion. On appeal, he argues primarily that he should receive a new trial because evidence of the accomplice's guilty plea was improperly admitted into evidence. He also argues that the evidence is insufficient to sustain the conviction and that the prosecutor committed error in her closing argument. In a *pro se* supplemental brief, he further argues that his trial counsel was ineffective. We affirm.

FACTS

On the evening of May 1, 2007, Nikolaisen was at the residence of Joseph Peterson working with Peterson on a sport-utility vehicle (SUV) that was parked in Peterson's driveway. A 13-year-old girl who lived nearby was inside Peterson's home for part of the evening visiting a girl who lived in the home with her mother, who was Peterson's girlfriend. The 13-year-old girl was away from home past the curfew established by her parents, who became concerned and searched the neighborhood for her, both by car and on foot.

The girl returned home at approximately 11:30 p.m. Her mother confronted her about where she had been. When the girl did not provide an explanation for not being home sooner, her mother administered corporal punishment, and her father telephoned the local police department. When a police officer arrived and was invited into the home, the girl told her mother that she had been sexually assaulted. The girl also reported the sexual assault to the police officer. Based on the girl's description, the police promptly arrested Peterson and Nikolaisen, who were found inside the SUV, which was parked in Peterson's garage.

The state charged Nikolaisen with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(f)(i) (2006) (nonconsensual sexual penetration while aided and abetted by an accomplice using force or coercion); second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(f)(i) (2006) (nonconsensual sexual contact while aided and abetted by an accomplice using force or coercion); and two counts of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b), (c) (2006). The state later filed an amended complaint that omitted the two third-degree criminal-sexual-conduct charges. The state did *not* charge Nikolaisen with an offense for which the girl's consent would be irrelevant due to her young age. *See, e.g.*, Minn. Stat. §§ 609.342, subd. 1(a), (b), .343, subd. 1(a), (b), .344, subd. 1(a), (b) (2006).

At trial, the victim testified that she visited the friend who lived in Peterson's home for about an hour. Then the two girls went to another friend's home. As the girl walked past Peterson's residence later that evening while she was on her way home, Peterson and Nikolaisen grabbed her by both arms and dragged her into the garage. She testified that she yelled "stop" repeatedly but that the two men removed her clothing and pushed her into the backseat of the SUV, which then was parked in the garage. The girl testified that both men sucked on her breasts and that Nikolaisen left a hickey. She testified that both Peterson and Nikolaisen tried to penetrate her vagina with their penises. She also testified that Nikolaisen forced her to put his penis in her mouth for several minutes. The girl was examined later that evening by a nurse, who found a hickey on the girl's left breast.

After a four-day jury trial in August 2008, the jury found Nikolaisen not guilty of first-degree criminal sexual conduct but guilty of second-degree criminal sexual conduct. The district court sentenced Nikolaisen to 110 months of imprisonment, which is the presumptive guidelines sentence. Nikolaisen appeals.

D E C I S I O N

I. Sufficiency of the Evidence

Nikolaisen argues that the evidence is insufficient to convict him of second-degree criminal sexual conduct. Specifically, he contends that the state failed to prove beyond a reasonable doubt that the sexual contact between him and the girl was nonconsensual or that Peterson aided and abetted him by using force or coercion.

When considering a challenge to the sufficiency of the evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," is sufficient to allow the jurors to reach the verdict that they did. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted). The reviewing court must "assume that the jury believed the State's witnesses and disbelieved contrary evidence." *State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008) (quotation omitted), *cert. denied*, 129 S. Ct. 605 (2008). A reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Clark*, 755 N.W.2d 241, 256-57 (Minn. 2008).

Nikolaisen was convicted of second-degree criminal sexual conduct in violation of the following statute:

> A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exists:
>
> . . . .
>
> (f) the actor is aided or abetted by one or more accomplices within the meaning of section 609.05, and either of the following circumstances exists:
>
> (i) an accomplice uses force or coercion to cause the complainant to submit[.]

Minn. Stat. § 609.343, subd. 1(f)(i).

Nikolaisen contends that, if the state proved that sexual conduct occurred, the state failed to prove that the sexual conduct was nonconsensual. The girl testified, however, that, while the men dragged her by her arms into the garage, she yelled "stop, stop, I have to go home," and that while the men were engaging in sexual conduct she "was screaming and crying and yelling stop." We must assume that the jury believed this testimony, *see Hughes*, 749 N.W.2d at 312, and it is sufficient to prove that the girl did not consent to the sexual conduct.

Nikolaisen also contends that the state did not prove that Peterson used force or coercion to cause the girl to submit to Nikolaisen's sexual conduct. Specifically, he points out that the girl did not testify that Peterson used force or coercion while Nikolaisen was touching her breasts. But the girl testified that Peterson, along with Nikolaisen, grabbed her as she walked by Peterson's residence and dragged her into the

garage while she yelled for the men to stop. The girl also testified that the two men pushed her into the backseat of the vehicle in the garage. This testimony is sufficient to allow the jury to reasonably conclude that Peterson used force or coercion to aid Nikolaisen's sexual conduct with the girl.

Nikolaisen further contends that the evidence is insufficient because the girl's testimony was not credible, as demonstrated by the fact that the jury found him not guilty of first-degree criminal sexual conduct, which requires proof of penetration, despite the girl's testimony that he forced her to perform oral sex on him and attempted to insert his penis into her vagina. As a general rule, the weight and credibility of a witness's testimony is "exclusively the province of the jury." *Francis v. State*, 729 N.W.2d 584, 589 (Minn. 2007). More relevant to Nikolaisen's argument, a jury "is free to accept part and reject part of a witness' testimony." *State v. Poganski*, 257 N.W.2d 578, 581 (Minn. 1977). Thus, the jury in this case was free to reject some parts of the girl's testimony but to accept those parts that support a verdict of guilty on the charge of second-degree criminal sexual conduct.

Nikolaisen does not challenge the evidence supporting the other elements of the offense. Thus, the evidence is sufficient to support the jury's verdict that Nikolaisen is guilty of second-degree criminal sexual conduct.

II. Evidence of Peterson's Guilty Plea

Nikolaisen also argues that the district court erred by admitting evidence of Peterson's plea of guilty to charges arising out of the same incident. The evidence about which Nikolaisen complains was admitted on two occasions. First, when Peterson

testified as a witness for the state, the prosecutor asked him several questions that referred to the fact that he had pleaded guilty to aiding and abetting second-degree criminal sexual conduct. Second, when the lead investigator, Detective Scott Mueller, testified, the prosecutor questioned him about Peterson's plea. The prosecutor asked, "You know that subsequently Joseph Peterson pled guilty to criminal sexual conduct in the second degree?" The investigator answered in the affirmative. We note that the prosecutor also mentioned Peterson's guilty plea in her opening statement and in her closing argument; Nikolaisen's arguments concerning those statements are discussed below in part III.

The admissibility of evidence generally is subject to an abuse-of-discretion standard of review. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). But at trial, Nikolaisen did not object to the testimony that he now challenges on appeal, so the district court was not asked to make any rulings concerning the admissibility of the evidence. Thus, we review the admission of the evidence for plain error. *See* Minn. R. Crim. P. 31.02. Under the plain-error test, we may not grant appellate relief on an issue to which there was no objection unless (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is "plain" if it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the first three requirements of the plain-error test are satisfied, we then consider the fourth requirement, whether the error "seriously affects the fairness,

integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

As a general rule, "evidence of a plea of guilty, conviction or acquittal of an accomplice of the accused is not admissible to prove the guilt or lack of guilt of the accused." *State v. Cermak*, 365 N.W.2d 243, 247 (Minn. 1985); *see also State v. Helenbolt*, 334 N.W.2d 400, 407 n.4 (Minn. 1983). This court has explained that "[s]uch evidence is not probative of the accused's guilt and may give rise to the prejudicial inference that, because the accomplice is guilty, so is the accused." *State v. Dillon*, 529 N.W.2d 387, 391 (Minn. App. 1995).

The general rule stated above, however, is not "an absolute bar to admission." *State v. Dukes*, 544 N.W.2d 13, 18 (Minn. 1996), *abrogated in part on other grounds*, *State v. Dahlin*, 695 N.W.2d 588, 595-96 (Minn. 2005). The supreme court has recognized two exceptions to the general rule. First, evidence concerning a codefendant's guilty plea may, in certain circumstances, be admitted to provide a narrative of relevant facts. *Id.* In *Dukes*, a codefendant's plea transcript was admitted into evidence because the codefendant refused to testify. The supreme court held that the admission of the transcript was not erroneous because it was introduced not to establish guilt "but rather for the value of the first-hand narrative of what happened." *Id.* Similarly, in *Caine*, a codefendant who was called by the state claimed memory loss. 746 N.W.2d at 347. The state moved to admit the codefendant's plea transcript, both for substantive purposes and for impeachment. *Id.* The supreme court held that the admission of the transcript was not plain error because it was offered as a "first-hand

narrative, in lieu of [the codefendant's] testimony" of what had occurred. *Id*. at 351 (quotation omitted).

The second exception, which is more relevant to this case, is that evidence concerning a codefendant's guilty plea may be admitted to rebut an anticipated defense theory. In *Cermak*, a police officer referred to the fact that three other persons had been charged and convicted, two by juries and one upon a guilty plea, as a result of the same investigation. 365 N.W.2d at 247. The supreme court acknowledged that such evidence generally is inadmissible but held that the admission of the evidence in that case was not erroneous because "the evidence was clearly introduced in anticipation of defendant's argument that the charges against her were questionable because they were not filed for over 1 year after the arrest of" another defendant. *Id*. The supreme court also noted that there had been no objection to the evidence and that the prosecutor had cautioned the jury in closing argument not to convict the defendant on the basis of the other defendants' convictions. *Id*. at 247-48.

In this case, the state's primary justification for introducing evidence of Peterson's guilty plea is that it was offered "to rebut the potential defense argument that there was no sexual contact, that nothing happened." This justification is at least similar to the justification offered by the state in *Cermak*, which was recognized as an exception to the general rule of exclusion. *See* 365 N.W.2d at 247. Nikolaisen responds by arguing that his defense actually was different -- that the girl consented to sexual conduct. But under *Cermak*, the state is permitted to anticipate a defense strategy when offering evidence of this type. *Id*. Nikolaisen's failure to timely object to the evidence deprived the state of

an opportunity to justify the evidence contemporaneously, in which event Nikolaisen could have disclaimed any intent to rely on the defense of consent. Thus, in light of *Cermak*, the district court did not commit a clear or obvious error when it admitted the evidence.

Furthermore, even if the district court plainly erred by admitting the evidence, Nikolaisen still must establish the third requirement of the plain-error test by showing that the error affected his substantial rights. *Strommen*, 648 N.W.2d at 688. A plain error affects a person's substantial rights if there is a "reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotation omitted).

Nikolaisen contends that the evidence of Peterson's guilty plea affected his substantial rights because the jury tailored its verdict to the forbidden evidence. In other words, Nikolaisen contends that the jury's knowledge that Peterson had pleaded guilty to aiding and abetting second-degree criminal sexual conduct caused the jury to find him guilty of second-degree criminal sexual conduct but acquit him of first-degree criminal sexual conduct. We note that the specific offense to which Peterson pleaded guilty -- aiding and abetting second-degree criminal sexual conduct -- was mentioned during the evidentiary portion of trial only twice, once by Detective Mueller and once by the prosecutor when examining Peterson. The specific offense also was identified by the prosecutor in her opening statement. The other references to the guilty plea in other parts of Peterson's testimony and in the prosecutor's closing argument did not refer to the specific offense but only to the fact that Peterson had pleaded guilty to an offense related

to the incident. To prevail, Nikolaisen must establish that the jury was able to recall Peterson's specific offense based on only two references. After reviewing the record, we believe that is doubtful.

Even if the jury was focused on the specifics of Peterson's guilty plea, Nikolaisen also must establish that, without such evidence, he would have been acquitted of both charges. To establish the third requirement of the plain-error test, an appellant must show that, but for the plain error, the result of the trial would have been *better* for him, not *worse*. *See State v. Pearson*, 775 N.W.2d 155, 162-64 (Minn. 2009) (explaining that third prong requires error that is prejudicial to defendant). In this case, the jury essentially had four choices: to convict Nikolaisen of both the first-degree charge and the second-degree charge, to convict him of only the first-degree charge, to convict him of only the second-degree charge, or to acquit him. The jury chose the third of those four options. Nikolaisen cannot prevail on appeal based on the possibility that, absent the challenged evidence, the jury would have found him guilty of both charges or guilty of only the first-degree charge. Rather, Nikolaisen must establish that the challenged evidence caused the jury to convict him when it otherwise would have acquitted him, and Nikolaisen bears the burden of establishing that proposition, *Reed*, 737 N.W.2d at 583-84. We are mindful of the possibility that Nikolaisen's trial counsel intentionally refrained from objecting to evidence that Peterson pleaded guilty to the offense of aiding and abetting second-degree criminal sexual conduct. Before Detective Mueller took the witness stand, the girl had testified that Nikolaisen forced her to perform fellatio on him and sucked on her breasts. All things considered, trial counsel may have perceived

advantages to allowing the jury to believe, in light of Peterson's plea, that Nikolaisen's conduct amounted to only second-degree criminal sexual conduct. As it happened, Nikolaisen received a sentence of 110 months of imprisonment, which is the midpoint of the applicable sentencing range. Minn. Sent. Guidelines IV (sex offender grid) (2006). If he had been convicted of first-degree criminal sexual conduct, the midpoint of the applicable sentencing range would have been 156 months of imprisonment. *Id.*

We believe that the state's evidence was strong enough, and Nikolaisen's defense weak enough, that the challenged evidence did not cause the jury to convict Nikolaisen instead of acquitting him. The girl testified that Nikolaisen and Peterson forced her into the garage, removed her clothes, sucked on her breasts, and forced her to perform fellatio on Nikolaisen. Nikolaisen's primary defensive strategy was not to deny that sexual conduct had occurred but, rather, to claim that the girl had consented to the sexual conduct. When cross-examining the girl, Nikolaisen's counsel attempted to discredit her by portraying her report to the police as a scheme to excuse her violation of curfew and avoid punishment by her parents. But the defense strategy was inconsistent. During Nikolaisen's case, his counsel called Peterson to the witness stand, and Peterson testified that he was not sure whether Nikolaisen engaged in sexual conduct with the girl because he could not see clearly through the windshield of the vehicle while Nikolaisen and the girl were in the back seat of the SUV. The prosecutor then impeached Peterson with his prior statements. The defense rested its case. The impression left by this portion of the transcript is that the defense did not effectively respond to the state's case. During closing arguments, Nikolaisen's counsel sought to convince the jury that the girl

fabricated her report of forcible rape to cover up her desire to engage in sexual conduct with Peterson. Defense counsel argued, "She was with Joe Peterson that night because she wanted to." Our review of these and other parts of the trial record leads us to believe that the jury had a strong evidentiary basis for its verdict and likely was not affected by the evidence of Peterson's guilty plea.

Thus, Nikolaisen has not established that, if the district court plainly erred, there is a "reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *Reed*, 737 N.W.2d at 583 (quotations omitted). In light of our conclusions regarding the second and third requirements of the plain-error doctrine, we need not analyze the fourth requirement, that the error "seriously affects the fairness, integrity or public reputation of judicial proceedings," *Washington*, 693 N.W.2d at 204.

III. Prosecutorial Error

Nikolaisen next argues that the prosecutor committed error in her closing argument by making three statements that deprived Nikolaisen of a fair trial. The state's closing argument "'must be based on the evidence produced at trial, or the reasonable inferences from that evidence.'" *State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006) (quoting *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995)). A prosecutor may not make arguments "calculated to inflame the passions or prejudices of the jury." *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (quotation omitted). But a closing argument is not required to be "colorless." *Young*, 710 N.W.2d at 281 (quotation omitted). A reviewing court should look at the closing argument as a whole. *State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005).

First, Nikolaisen argues that the prosecutor committed error by referring to Peterson's guilty plea. The prosecutor did so once in her opening statement and twice in her closing argument. In her opening statement, the prosecutor stated:

> The codefendant, Joseph Peterson, has pled guilty. He pled guilty to criminal sexual conduct in the second degree, aiding and abetting another, using force and coercion to cause the victim to submit. He pled guilty last September, he is currently incarcerated. He has been subpoenaed to come and testify today or during the course of this trial. The three people involved in this case are the two defendants and [the girl].

Similarly, in her closing argument, the prosecutor stated, "[T]he codefendant pled guilty. How does that fit into if she made it all up, it is a coincidence?" And at a later point in the closing argument, the prosecutor stated that Peterson "was called by the State to testify to show you that he pled guilty, that he was the codefendant and accomplice in this. He has already admitted to it and he already included his buddy Mr. Nikolaisen in on the plea. That happened, that was a done deal."

At trial, Nikolaisen did not object to any of the prosecutor's statements concerning Peterson's guilty plea. "For unobjected-to prosecutorial misconduct, we apply a modified plain error test." *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007); *see also Ramey*, 721 N.W.2d at 302. Under the modified plain-error test, "the defendant must establish both that misconduct constitutes error and that the error was plain." *Wren*, 738 N.W.2d at 393. "The defendant shows the error was plain 'if the error contravenes case law, a rule, or a standard of conduct.'" *Id*. (quoting *Ramey*, 721 N.W.2d at 302). "The

burden then shifts to the state to demonstrate that the error did not affect the defendant's substantial rights." *Id.*

In part II, we concluded that the district court did not plainly err by admitting evidence of Peterson's guilty plea. In light of that conclusion, and in light of the prosecutor's knowledge that evidence of Peterson's guilty plea was in evidence, the prosecutor did not commit error by referring to such evidence in her closing argument. *See State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996) ("In closing arguments, counsel has the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom."). Furthermore, even if we were to conclude that the prosecutor plainly erred by making the challenged statements, the statements are not reversible error. The prosecutor referred to Peterson's plea only twice in a lengthy closing argument and rebuttal. *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (considering relative length of objectionable passage in determining whether improper comment deprived defendant of fair trial). Thus, the state can demonstrate that the error did not affect Nikolaisen's substantial rights. *See Wren*, 738 N.W.2d at 393.

As stated above, Nikolaisen's argument that the jury was informed of Peterson's guilty plea is closely related to his argument that evidence concerning the guilty plea was erroneously admitted into evidence. Because the two arguments are so closely related, we have considered the possibility that, although each argument independently fails, they cumulatively may have deprived Nikolaisen of a fair trial. *See State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn. 2006); *State v. Erickson*, 610 N.W.2d 335, 340 (Minn. 2000).

We conclude, however, for the reasons already expressed, that there is no cumulative error. *See Erickson*, 610 N.W.2d at 340-41.

Second, Nikolaisen argues that the prosecutor impermissibly endorsed the girl's credibility by stating, in closing argument, that the girl was "not making it up." Nikolaisen did not object to the statement. Thus, we apply a modified plain-error test. *See Wren*, 738 N.W.2d at 389; *Ramey*, 721 N.W.2d at 302.

"It is improper for a prosecutor in closing argument to personally endorse the credibility of witnesses." *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995). The state responds by arguing that the prosecutor did not vouch for the girl's credibility. Rather, the state argues, the prosecutor's statement, "taken as a whole, was that the evidence established that [the girl] was telling the truth." We agree. The prosecutor made the statement in the context of describing the girl's difficult experiences on the evening of the incident and in its aftermath. The prosecutor's comments appear to be an attempt to respond to defense counsel's cross-examination of the girl, which sought to cast doubt on the credibility and plausibility of her testimony. The context is apparent from a broader excerpt of the argument:

> [The girl] tells her mom generally what happens to her that evening, doesn't go into specifics, is scared, embarrassed. Her mom testified they didn't talk about things that specifically. These are ugly things to talk about. Her mom said, we didn't talk about specifics. [The girl] told Officer Paipoovong in general terms in 10 to 15 minutes while sitting in her living room. She told the nurse at St. John's in more detail what happened to her. Making it all up, how about when she is told by the nurse, hop up on this table and put your feet in these stirrups for a vaginal exam, how about that is the time where [the girl] says . . . not happening, this didn't

> happen. I am making it up, that would be the time. She is not making it up.
>
> Reason and common sense. The process of disclosing sexual abuse, what a 13-year-old girl reports about sexual abuse will be more detailed depending on who she is talking to, that makes sense. That is normal. Was any of this fun for [her]? Is this a fun thing for a 13- and a 14-year-old girl to go through, talking to police about intimate parts of your body and other people's body, having a medical interview and a physical exam that you have never had before, coming into court, testifying in court to you and in front of this defendant, being cross-examined. You saw the difficulty she had, it is nerve-racking. You saw the difficulty the nurse had at first, an experienced professional, it is nerve-wracking.

When viewed in context, the prosecutor's comment is not impermissible vouching, which occurs when the state "implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Folkers*, 581 N.W.2d 321, 326 (Minn. 1998) (quotation omitted). Rather, the prosecutor's comment is a permissible explanation of the girl's inconsistent testimony. *See Leake*, 699 N.W.2d at 327 (noting that appellate court must consider entirety of closing argument).

Third, Nikolaisen argues that the prosecutor committed error during her closing argument by stating that Nikolaisen had an obligation to tell the police what had occurred on the evening in question. Specifically, the prosecutor stated, "When he had the opportunity, he took the opportunity to try to get some quick sex from a vulnerable teen. That is what this is about. He knows it. He had the opportunity to tell the police what he saw happening, he didn't." Nikolaisen's attorney objected, and the district court sustained the objection, stating that the prosecutor was "shifting the burden." The district

court also instructed the jury to disregard the statement. We apply a harmless-error test to appellate arguments concerning allegations of prosecutorial error to which an objection was made. *Wren*, 738 N.W.2d at 389.

The state responds by arguing that the prosecutor's comment was not an attempt to shift the burden of proof to Nikolaisen. In fact, the comment does not refer to Nikolaisen's presentation of evidence at trial or lack thereof; it refers to the incompleteness or inaccuracy of the information that he provided to police immediately after the incident. Thus, it is not a comment that shifts the burden of proof at trial. *See State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993). Furthermore, even if we were to conclude that the comment is erroneous, it would not require reversal of the conviction. The comment was a small part of a closing argument that spanned more than 15 pages. *See Powers*, 654 N.W.2d at 679. The objection was sustained, which helps to cure any potential prejudice. *See State v. Davis*, 685 N.W.2d 442, 446 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004). Thus, we would conclude that the jury's verdict "'was surely unattributable'" to the comment and, accordingly, was harmless error. *Wren*, 738 N.W.2d at 394 (quoting *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006)).

IV. Right to Effective Assistance of Counsel

In his *pro se* supplemental brief, Nikolaisen argues that he should receive a new trial because his trial counsel provided him with constitutionally ineffective assistance of counsel. To prevail on this claim, Nikolaisen "must affirmatively prove [first] that his counsel's representation 'fell below an objective standard of reasonableness' and [second] '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) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2068 (1984)).

Nikolaisen contends that his trial counsel should have requested a continuance because several witnesses who were subpoenaed were unavailable at the date of trial. Specifically, Nikolaisen identifies a physician who treated the girl after the incident and four other witnesses who, according to Nikolaisen, would have testified that the girl was not at Peterson's residence on the night in question. We evaluate Nikolaisen's argument with reference to the state's evidence and the various alternatives available to Nikolaisen's trial counsel. Evidence that the girl was not at Peterson's house on the night in question would have clashed not only with the state's evidence but also with Peterson's testimony during Nikolaisen's case. Ultimately, Nikolaisen's primary defense theory was that the girl consented. In light of that strategy, the testimony of the four witnesses identified by Nikolaisen would not have been helpful. "[D]ecisions about which witnesses to call . . . are trial strategy decisions within the proper discretion of trial counsel." *Pippitt v. State*, 737 N.W.2d 221, 230 (Minn. 2007). Likewise, trial counsel's decision not to seek a continuance is a matter of trial strategy. *See Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). Thus, Nikolaisen has failed to establish that his counsel's representation "fell below an objective standard of reasonableness." *Pippitt*, 737 N.W.2d at 229 (quotation omitted). Furthermore, Nikolaisen cannot establish a "reasonable probability" that the result of the trial would have been different if trial counsel had called these witnesses to testify. *Id.* (quotation omitted). Therefore, we

conclude that Nikolaisen's trial counsel did not provide constitutionally ineffective assistance.

Affirmed.