STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0004

State of Minnesota,
Respondent,

vs.

Carmen Marie Burth,
Appellant.

Filed January 13, 2025
Affirmed
Bjorkman, Judge

Chisago County District Court
File No. 13-CR-19-1031

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

Janet Reiter, Chisago County Attorney, Brandon J. Pellerin, Assistant County Attorney, Center City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leah C. Graf, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

This reinstated appeal follows the supreme court's vacation of our earlier opinion and remand for reconsideration in light of its decision in *State v. Bigbear*, 10 N.W.3d 48 (Minn. 2024). Accordingly, we consider anew appellant's challenges to her conviction of

animal mistreatment for failing to provide her horses necessary food or shelter. Appellant argues that the district court plainly erred by admitting (1) expert testimony on the ultimate issue and (2) irrelevant and prejudicial evidence of other aspects of the horses' health and wellbeing, unrelated to food or shelter. She asserts additional arguments in a pro se supplemental brief. We affirm.

FACTS

Appellant Carmen Marie Burth kept "rescued" horses on her property in North Branch. In early September 2019, Animal Humane Society investigator Amanda Oquist received a complaint about "skinny" horses on Burth's property. When she went to the property, Oquist saw four or five horses that appeared "very skinny." Because she could only view the horses, she was unable to use the Henneke Body Condition Scoring System, a tool that scores a horse's body condition on a scale of one to nine based on feeling for muscle and fat around the horse's body. A score of one means the horse is emaciated and a score of nine means the horse is obese; an ideal score is between four and six. Oquist visually estimated the horses' body-condition scores as between one and three.

Oquist visited the property three more times between September and November. Over time, she saw the horses look "a little bit better," then lose the weight gains. She also received a follow-up call from the original complainant about a lack of hay on the property, and Oquist consistently saw little or no hay available to the horses. In November, after Burth canceled a veterinary appointment for one of the horses, Oquist sought to coordinate a herd assessment. Burth declined, saying that she would get her own assessment. Oquist then shared the results of her investigation with police, who obtained a search warrant.

On November 15, police searched Burth's property. During the search, Oquist and Dr. Michelle Wiberg, a veterinarian who had previously treated some of Burth's horses, assessed the 20 horses on the property using the Henneke Body Condition Scoring System. They recommended the removal of all horses with a score of 2.5 or lower, indicating a need for "additional nutrition," and those with higher scores but requiring "significant veterinary care." Eleven horses were seized and transferred to veterinary facilities for treatment. Burth was charged with one count of failing to provide an animal "necessary food, water, or shelter" in violation of Minn. Stat. § 343.21, subd. 2 (2018).

At trial, Oquist and Dr. Wiberg testified consistent with the facts stated above. Dr. Wiberg and the two veterinarians who treated the seized horses offered additional expert testimony about the horses' body condition and their assessment of the horses' care based on their condition. They consistently described the horses as "skeletal" and "significantly" underweight, and gave several horses body-condition scores at or below two. The state also presented dozens of photographs showing horses so thin that their ribs and other bones are sticking out. And it presented testimony and photographs regarding the number and capacity of the available constructed shelters, and evidence that numerous horses had a skin condition known as "rain rot," indicative of insufficient shelter.

As part of her defense, Burth presented the testimony of a horse-rescue expert who criticized the veterinarians' methods and opined as to the horses' body condition based on his review of photographs of the horses. Burth's expert testified that the horses "had plenty of feed" but agreed that several of them could have body-condition scores as low as two.

The jury found Burth guilty, and the district court imposed a stayed 90-day jail sentence.

Burth appealed, arguing principally that the district court committed prejudicial plain error by admitting two types of unobjected-to evidence and asserting additional arguments in a pro se supplemental brief. We affirmed in all respects. Burth petitioned for further review of our decision regarding her plain-error evidentiary challenges. The supreme court granted review and stayed proceedings pending its final disposition in *Bigbear*. In July 2024, the supreme court issued its decision in *Bigbear*, reiterating that harmless-error review considers whether a reasonable possibility exists that the error significantly influenced the verdict, not merely whether other evidence was sufficient to support the verdict. 10 N.W.3d at 55. Following that decision, the supreme court vacated our decision and remanded "for reconsideration in light of" *Bigbear*. *State v. Burth*, No. A23-0004, 2024 WL 4613593, at *1 (Minn. Oct. 15, 2024). We thereafter reinstated this appeal and ordered supplemental briefing on the impact of *Bigbear*.

DECISION

I. The district court did not commit prejudicial plain error in the admission of evidence.

Where, as here, the defendant does not object to the admission of evidence, they forfeit review of the issue. *State v. Fraga*, 898 N.W.2d 263, 276 (Minn. 2017). This principle "encourages defendants to object while before the district court so that any errors can be corrected before their full impact is realized." *Pulczinski v. State*, 972 N.W.2d 347, 355 (Minn. 2022) (quotation omitted). It also is consistent with our refusal to presume

error on appeal, particularly in matters committed to the district court's broad discretion such as evidentiary rulings. *See Dolo v. State*, 942 N.W.2d 357, 362 (Minn. 2020) (requiring deference to the district court's "exercise of discretion in evidentiary matters" (quotation omitted)); *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464 (Minn. 1944) ("[O]n appeal error is never presumed."). Nonetheless, we have "limited power" under the plain-error standard to correct certain unobjected-to errors. *Fraga*, 898 N.W.2d at 277 (quotation omitted). To obtain relief under that standard, a defendant generally must show that (1) there was an error, (2) it was plain "in that it violates or contradicts case law or a rule," and (3) it affected the defendant's substantial rights. *Id.* Even if the first three requirements are met, we "may correct the error *only* when it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Pulczinski*, 972 N.W.2d at 356.

Burth argues that the district court plainly erred by admitting (1) expert testimony on the ultimate issue and (2) evidence that is irrelevant and unfairly prejudicial because it encompasses health concerns unrelated to food and shelter. We address each argument in turn.

Expert Testimony

An expert witness may testify in the form of an opinion. Minn. R. Evid. 702. That opinion testimony may address "an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704. "But an expert may not offer an opinion as to a legal issue or a mixed question of law and fact." *State v. Xiong*, 829 N.W.2d 391, 396 (Minn. 2013). Nor may an expert opine as to matters within the jurors' lay knowledge and experience because it "will not

add precision or depth to the jury's ability to reach conclusions." *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011) (quotation omitted).

Burth contends the district court plainly erred by permitting the three veterinarians to testify as to the ultimate issue—whether she deprived the horses of necessary food and shelter. We disagree. The veterinarians testified about each of the seized horses in turn, describing each one's body condition and other health considerations and, in some instances, opining that they were not receiving "adequate" food and shelter. When offering such an opinion, the veterinarians consistently explained the basis for it, such as the horse's low body-condition score or the presence of rain rot. This testimony did not purport to decide the ultimate issue the jury was asked to decide. Rather, it helped the jurors understand what the photographs and descriptions of the horses mean with respect to food and shelter. Accordingly, we discern no error, let alone plain error, in admitting the testimony.

Moreover, as the supreme court reiterated in *Bigbear*, evidentiary error warrants reversal only if the defendant shows "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." 10 N.W.3d at 54. To determine the impact of admitted evidence on a jury's verdict, we consider a nonexclusive list of factors: "(1) the manner in which the party presented the evidence, (2) whether the evidence was highly persuasive, (3) whether the party who offered the evidence used it in closing argument, and (4) whether the defense effectively countered the evidence." *Id.* (quotation omitted). And, while merely "sufficient evidence does not satisfy the harmless-error standard of review," we may consider the strength of the evidence against the defendant

because "[s]trong evidence of guilt undermines the persuasive value of wrongly admitted evidence." *Id.* at 55, 59 (quotation omitted). Not all of these factors "are relevant or persuasive in every case." *Id.* at 55. But they are the same factors we consider where, as here, an appellant asserts plain error in the admission of evidence. *See State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011) (stating that the "analysis under the third prong of the plain error test is the equivalent of a harmless error analysis").

Burth has not demonstrated a reasonable possibility that the challenged expert opinion testimony significantly affected the jury's verdict. It was not a prominent part of the trial, amounting to only 16 statements about the adequacy of food and shelter in a trial transcript that spans approximately 625 pages. It also had minimal persuasive value because it was largely cumulative of extensive properly admitted evidence on the same issue. Consistent with this minor evidentiary role, there is not a single clear reference to the challenged testimony in the state's closing argument. Moreover, Burth countered the challenged opinion testimony through cross-examining the veterinarians about their decision not to perform blood tests to determine if the horses are breaking down muscle, which may indicate that the horse is burning muscle for energy instead of fat, and through her own expert's testimony about the importance of such tests to assess for "starvation."

Finally, we note that the state presented overwhelming evidence—consistent and detailed testimony about the horses' condition, dozens of photographs, and records from veterinarians who treated the horses—that Burth was guilty of the single charge of depriving an animal of necessary food or shelter. On this record, we are convinced there

is no reasonable possibility that the challenged opinion testimony significantly affected the jury's verdict.

Evidence of Other Health Concerns

Relevant evidence is generally admissible. Minn. R. Evid. 402. Evidence is relevant if it has "any tendency" to make the existence of any material fact more or less probable. Minn. R. Evid. 401. This is a low bar: "A fact is relevant if, when taken alone or in connection of other facts, it warrants a jury in drawing a logical inference assisting, even though remotely, the determination of the issue in question." *State v. Swinger*, 800 N.W.2d 833, 839 (Minn. App. 2011) (quotation omitted), *rev. denied* (Minn. Sept. 28, 2011). Evidence is inadmissible if it is not relevant, Minn. R. Evid. 402, or if it is confusing, misleading, or unfairly prejudicial, Minn. R. Evid. 403.

Burth contends the district court plainly erred by admitting evidence of other aspects of the horses' health and well-being, unrelated to food or shelter, because that evidence is irrelevant and unfairly prejudicial. We are not persuaded. Some of the challenged evidence is plainly relevant, such as one horse's apparent Cushing's Disease, which causes excess hair growth that interferes with any visual assessment of the horse's body condition, and the unsafe environment created by "hazard[ous]" uncapped fence posts, which is reasonably related to the concept of shelter.[1] And some of it—evidence of the horses' dental care, hoof condition, parasites, and other physical conditions—provides helpful

[1] The jury instructions did not define the term "shelter."

context for the jury in determining whether the horses' condition resulted from a lack of food or shelter. Accordingly, we discern no plain error in the admission of this evidence.

Further, even if the district court plainly erred by admitting evidence of the horses' other health conditions, Burth again has not demonstrated that there is a reasonable possibility that the evidence significantly affected the verdict. *See Bigbear*, 10 N.W.3d at 54. While the challenged evidence was not merely incidental—19 testimonial references and six exhibits that touch on other health issues—it is still a relatively insignificant part of the 625 pages of transcribed testimony and more than 100 exhibits. Likewise, the state referenced other health issues several times in its closing argument, but Burth countered by emphasizing the narrow scope of the charge before the jury; the state echoed that message in rebuttal, unequivocally identifying food and shelter as the central focus of the case. The persuasive value of the evidence regarding other health concerns is unclear because, as discussed above, it was largely contextual rather than directly relevant to an element of the offense. But any persuasive value was undermined by the abundant evidence of guilt—that numerous horses in Burth's care were so thin as to be skeletal and several had "rain rot," indicative of insufficient shelter. *See id.* ("Strong evidence of guilt undermines the persuasive value of wrongly admitted evidence." (quotation omitted)). Accordingly, there is no reasonable likelihood that the evidence of other health issues significantly affected the verdict.

II. None of Burth's pro se arguments entitle her to relief.

In a pro se supplemental brief, Burth argues that (1) the district court violated her confrontation right by admitting the statements of the complainant, who did not testify; (2) the district court plainly erred by admitting irrelevant evidence as to the zoning of her property; (3) the prosecutor engaged in unobjected-to misconduct throughout the trial; and (4) the district court abused its discretion by denying her motion for a mistrial based on prosecutorial misconduct during closing argument. We address each argument in turn.

Confrontation

Under the Confrontation Clause, a criminal defendant has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Admission of an out-of-court statement violates the Confrontation Clause if the statement is "testimonial," it was admitted for the truth of the matter asserted, and the defendant was not able 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)). We review de novo whether the admission of evidence violates the Confrontation Clause. *State v. Sutter*, 959 N.W.2d 760, 764 (Minn. 2021). A confrontation violation does not require reversal if it was harmless beyond a reasonable doubt, meaning the guilty verdict was "surely unattributable" to the error. *State v. Swaney*, 787 N.W.2d 541, 555 (Minn. 2010) (quotation omitted). In assessing prejudice, we consider the manner in which the evidence was presented, its persuasive value, whether it was used in closing argument, and whether the defense countered it, as well as the evidence of the defendant's guilt. *Id.*

Burth argues that the district court violated her confrontation right by admitting, through Oquist's testimony, the statements of the non-testifying complainant. We disagree. The record shows that the statements were not admitted for the truth of the matter asserted. Rather, Oquist referenced the two calls she received from the complainant to explain why she went to Burth's property to investigate. Testimony about another's statements that provide context for the witness's knowledge and conduct is a proper "non-truth purpose." *Id.* at 552-53.

Additionally, even if the evidence had been admitted in error, it was harmless beyond a reasonable doubt. The jury heard only a handful of brief references to the statements during testimony, and only a single one during the state's closing argument. The statements were not particularly persuasive because their substance was largely cumulative of Oquist's testimony about "skinny" horses and the other extensive evidence that Burth's horses lacked necessary food and shelter. On this record, we are persuaded that the guilty verdict was "surely unattributable" to the admission of the challenged statements. *See id.* at 555.

Zoning Evidence

Burth next challenges the admission of testimony that she violated the applicable zoning code by having too many horses for the size of her property, arguing that it is irrelevant. Burth objected to the testimony at trial as stating a legal conclusion but did not contend that it was irrelevant. "A defendant's objection to the admission of evidence preserves review only for the stated basis for the objection or a basis apparent from the context of the objection." *State v. Vasquez*, 912 N.W.2d 642, 649 (Minn. 2018). Because

Burth did not make a relevance objection, we review only for plain error, under which Burth must show error that was plain and affected her substantial rights. *Fraga*, 898 N.W.2d at 277.

She has not met that standard. The record shows that if horses lack sufficient pasture to graze on—whether due to its size, poor maintenance, inclement weather, or some combination of causes—the horses must have alternative food sources. Because the zoning code bears on the appropriate amount of grazing pasture for the horses, and therefore the amount of food available to them, the evidence is not plainly irrelevant. And as with other challenged evidence, it played a limited role—during testimony and closing argument—in a trial that presented the jury with overwhelming evidence that the horses were deprived of necessary food and water, making any error in admitting the zoning testimony harmless. *See Bigbear*, 10 N.W.3d at 54.

Prosecutorial Misconduct

Burth argues that the prosecutor engaged in misconduct throughout trial, pointing to numerous aspects of the prosecutor's conduct to which she did not object. As with evidentiary issues, we review unobjected-to prosecutorial conduct only for plain error. *State v. Patzold*, 917 N.W.2d 798, 806 (Minn. App. 2018), *rev. denied* (Minn. Nov. 27, 2018). But we apply a "modified" plain-error standard under which the defendant must show that there was a plain error and, if they do so, the state must show that it did not affect the defendant's substantial rights. *Id.*

Burth first contends the prosecutor committed misconduct by eliciting testimony from Dr. Wiberg that Burth had canceled veterinary appointments for lack of funds,

asserting that this is character evidence and hearsay. Both character evidence and hearsay are inadmissible. Minn. R. Evid. 404(b), 802. But evidence that Burth lacked the resources to pay for veterinary care is not evidence of her character; it is evidence of her financial circumstances that bears on whether she was able to meet her obligation to provide the horses necessary food and shelter. *See Fraga*, 898 N.W.2d at 275-76 (concluding that evidence of defendant's financial resources was not character evidence but relevant to charge of child neglect). Nor is it hearsay; it is Burth's own statements offered as evidence against her. Minn. R. Evid. 801(d)(2).

Second, Burth argues that the prosecutor committed misconduct during closing argument by (1) aligning herself with the jury—against Burth—by using the pronoun "we"; (2) inflaming the jury's passions with sympathetic descriptions of the horses' condition, dependence, and prospects; (3) vouching for the credibility of the state's witnesses; (4) misstating testimony about Burth rescuing too many horses, Burth's ability to get hay for the horses, and the defense expert's website promising "results"; (5) implying that Burth had a burden of proof by noting that Burth's husband testified about regular hay purchases and questioning where all of the hay was; and (6) demeaning the defense expert by noting that he is a professional witness who is paid for his testimony.

When analyzing a claim of prosecutorial misconduct during closing argument, we consider the argument "as a whole," not "selected phrases and remarks." *State v. Smith*, 876 N.W.2d 310, 335 (Minn. 2016) (quotation omitted). The argument "need not be colorless, so long as it is based on the evidence or reasonable inferences from that evidence." *State v. Jones*, 753 N.W.2d 677, 691-92 (Minn. 2008). Based on our careful

review of the prosecutor's entire closing argument, we conclude that none of the challenged remarks amount to plain error. Without using inflammatory or exclusionary language, the prosecutor accurately described the evidence, proposed reasonable inferences the jury could draw from it, and suggested reasons to credit or discredit witnesses. Accordingly, Burth's claim of plain error in the prosecutor's closing argument fails.

Mistrial

Finally, Burth argues that the district court abused its discretion by denying her motion for a mistrial based on the prosecutor's reference during closing argument to Burth possessing more horses than the zoning code permits. "We review the denial of a motion for a mistrial for an abuse of discretion because the district court is in the best position to evaluate the prejudicial impact, if any, of an event occurring during the trial." *State v. Bahtuoh*, 840 N.W.2d 804, 819 (Minn. 2013). A district court should not grant a mistrial unless "there is a reasonable probability that the outcome of the trial would be different." *State v. Chavez-Nelson*, 882 N.W.2d 579, 590 (Minn. 2016).

In the challenged portion of her closing argument, the prosecutor referenced testimony about the size of Burth's property, the number of horses on it, and how that comported with zoning limits—all of which was admitted either without objection or over a limited objection that it involved a legal conclusion. The prosecutor did not argue that Burth violated the zoning code. She argued only that, given the size of Burth's property, "[t]he maximum amount of horses that could live and eat that grass would be 9." We see no impropriety in this reference because it pertained directly to the food-deprivation charge. And we are not persuaded—for the reasons discussed above—that there is a

reasonable probability that granting a mistrial and retrying the case would yield a different outcome. On this record, we discern no abuse of discretion in the district court's denial of Burth's motion for a mistrial.

Affirmed.