

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0521**

State of Minnesota,  
Respondent,

vs.

Donovan Eric Strong,  
Appellant.

**Filed March 18, 2013  
Affirmed in part, reversed in part, and remanded  
Collins, Judge\***

St. Louis County District Court  
File No. 69VI-CR-11-862

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Ross, 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.

## UNPUBLISHED OPINION

**COLLINS**, Judge

Appellant contends the evidence is insufficient to support his conviction of second-degree criminal sexual conduct and the jury verdict of guilty of solicitation of a child to engage in sexual conduct. Appellant also argues that the prosecutor committed prejudicial misconduct in statements made to the jury. We affirm in part, reverse in part, and remand.

### FACTS

On July 2, 2011, victim M.W.'s family invited friends, appellant Donovan Strong and his wife, to go boating on Lake Vermilion. They cruised on the lake and joined a number of boaters gathered at a popular beach. While others socialized with friends around the beach, 12-year-old M.W., wearing a bikini swimsuit, remained in the back of the boat. Strong also stayed aboard the boat, typing on his cellular telephone.

Strong asked M.W. to bring him a beer. M.W. stepped down into the cabin to get the beer from a cooler. Strong followed M.W. into the narrow entrance to the cabin. While seated on a bench in the cabin, M.W. handed the beer toward Strong. Instead of taking the beer, Strong grasped the decorative string-bow on the front of M.W.'s bikini bottom, pulled the bikini bottom down approximately one-half of an inch, and asked M.W., "can I lick it?" M.W. slapped Strong's hand away, said "no," and fled from the cabin. As M.W. jumped over the side of the boat, Strong followed and said, "[C]an we please just forget about all of this?" M.W. ran through the water, "bawling," until she

found her father and “told him everything.” Leaving Strong behind, M.W., her family, and Strong’s wife returned to the boat, left the scene, and called 911.

Law enforcement officers eventually apprehended Strong along the shore of Lake Vermilion. The state charged Strong with attempted first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a), 2(a) (2010); second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a), 2(a) (2010); and solicitation of a child to engage in sexual conduct in violation of Minn. Stat. § 609.352, subd. 2 (2010). Following a trial, the jury acquitted Strong of attempted first-degree criminal sexual conduct, but found him guilty of both second-degree criminal sexual conduct and solicitation of a child to engage in sexual conduct. After denying Strong’s motions for judgment of acquittal or a new trial, the district court adjudicated the conviction of second-degree criminal sexual conduct. The district court imposed and stayed the sentence of 36 months in prison, followed by 10 years’ conditional release, and placed Strong on 15 years’ probation with one year in local confinement. The district court expressly dismissed the charge of solicitation of a child to engage in sexual conduct as part of the same behavioral incident. This appeal followed.

## **DECISION**

### **I.**

Strong argues that the record contains insufficient evidence of “sexual contact” to support a conviction of second-degree criminal sexual conduct, and insufficient evidence of “solicitation” to support a conviction of solicitation of a child to engage in sexual

conduct.<sup>1</sup> When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis of the record to determine whether the jury reasonably could find the defendant guilty of the offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010). We 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 is guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Strong's challenges raise questions of statutory interpretation, which we review de novo. *Halvorson v. Cnty. of Anoka*, 780 N.W.2d 385, 389 (Minn. App. 2010). When interpreting a statute, we must "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2010). In doing so, we first determine whether the statute's language, on its face, is ambiguous. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). A statute's language is ambiguous only when it is subject to more than one reasonable interpretation. *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384

---

<sup>1</sup> The record does not support the premise of Strong's assertion that he was *convicted* of solicitation of a child to engage in sexual conduct; rather, after adjudicating the conviction of second-degree criminal sexual conduct, the district court expressly dismissed this charge as part of the same behavioral incident. Thus, we analyze Strong's argument as challenging the sufficiency of evidence to support a verdict of guilty of solicitation of a child to engage in sexual conduct.

(Minn. 1999). We construe words and phrases according to their plain and ordinary meaning. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980); *see also* Minn. Stat. § 645.08(1) (2010) (providing that words are construed according to their common usage). When the statute's text is plain and unambiguous, we interpret the language according to its plain meaning without resorting to other principles of statutory construction. *State v. Anderson*, 683 N.W.2d 818, 821 (Minn. 2004).

#### A.

We first address whether the record contains sufficient evidence of “sexual contact” to support the conviction of second-degree criminal sexual conduct. Under Minnesota law, if a person engages in “sexual contact” with a complainant more than 36 months younger and under 13 years of age, the person is guilty of second-degree criminal sexual conduct. Minn. Stat. § 609.343, subd. 1(a). “Sexual contact” includes the actor’s intentional touching, with sexual or aggressive intent, of “the complainant’s intimate parts” or “the clothing covering the immediate area of the intimate parts.” Minn. Stat. § 609.341, subd. 11(a)(i), (iv) (2010).<sup>2</sup> “Intimate parts” include a person’s “primary genital area, groin, inner thigh, buttocks, or breast.” *Id.*, subd. 5 (2010).

In denying Strong’s motion for acquittal, the district court concluded that the evidence supports a finding that M.W.’s “bikini bottom was covering the immediate area of one of the areas that are covered by the statute; and the bow, although maybe not directly over the genital area, is within the immediate area.” The state agrees with this conclusion. But Strong argues that this interpretation of “immediate area” is overbroad.

---

<sup>2</sup> On this appeal, the element of sexual or aggressive intent is not at issue.

He contends that “[i]t is more consistent and logical to read ‘immediate area’ as a way to describe the area directly over a complainant’s intimate parts, but obstructed by clothing.”

To discern the plain and ordinary meaning of a word or phrase, we consider its common dictionary definition. *State v. Brown*, 792 N.W.2d 815, 822 (Minn. 2011). The dictionary definition of “immediate” is “close at hand, near,” *The American Heritage Dictionary*, 902 (3rd ed., 1992), or “directly touching or concerning a person or thing,” *Webster’s New Collegiate Dictionary*, 572 (1977). Considering the plain and ordinary meaning of “immediate,” the statute unambiguously provides that intentionally touching clothing that covers an area directly touching an intimate part constitutes sexual contact. *See* Minn. Stat. § 609.341, subd. 11(a)(iv). Accordingly, we reject Strong’s argument that “to convict [him] of second-degree criminal sexual conduct, [the state] needed to prove that he touched the clothing over one of [M.W.’s] intimate parts.”

But this does not end our analysis; we must consider whether the record supports a legitimate inference that the clothing Strong touched covered “the immediate area” of an intimate part, specifically the primary genital area. The jury was shown a photograph of M.W.’s swimsuit, depicting the bikini bottom with the decorative string-bow on the front of its waistband. M.W. testified that the bikini fit her snugly. She also testified that Strong grasped the bow and used it to pull the bikini bottom down approximately one-half of an inch. We conclude that contact with clothing approximately one-half of an

inch below the normal waistline of a bikini bottom is not sufficiently close to the primary genital area so as to be within the “immediate area” of this intimate part.<sup>3</sup>

For the first time on appeal, the state argues that circumstantial evidence supports a finding that Strong in fact touched either M.W.’s inner thigh (an intimate part) or the portion of the bikini bottom directly covering her primary genital area (also an intimate part). *See* Minn. Stat. § 609.341, subd. 5. We are not persuaded. In particular, M.W.—whom the jury found credible—testified that in pulling her bikini bottom down, Strong touched only the bow. On this record, it is not legitimate to infer that Strong touched either M.W.’s inner thigh or the fabric directly over her primary genital area. Accordingly, we reverse Strong’s conviction of second-degree criminal sexual conduct.

## B.

We next turn to whether the record contains sufficient evidence of “solicitation” to support a verdict of guilty of solicitation of a child to engage in sexual conduct. Under Minnesota law, “[a] person 18 years of age or older who solicits a child . . . to engage in sexual conduct with intent to engage in sexual conduct is guilty of a felony.” Minn. Stat. § 609.352, subd. 2. The statute defines “solicit” as “commanding, entreating, or attempting to persuade a specific person,” including in person. *Id.*, subd. 1(c) (2010). This definition is plain. *State v. Koenig*, 666 N.W.2d 366, 374 (Minn. 2003).

---

<sup>3</sup> In reaching this conclusion, we are guided by the fact that contact with the “immediate area” of a person’s intimate parts constitutes sexual contact only when it is an indirect touch involving clothing and not a direct touching of a victim’s body. *See* Minn. Stat. § 609.341, subd. 11(a) (2010).

Recognizing that the statutory definition governs, the supreme court has elaborated on the general understanding of the word “solicit”:

“Entreat” is defined as “[t]o make an earnest request of. “Earnest” is defined as “[m]arked by or showing deep sincerity or seriousness.” Regarding an attempt to persuade, an “attempt” is defined as “[a]n effort or try.” “Persuade” means “[t]o cause (someone) to do something by means of argument, reasoning, or entreaty.” “Command” means “[t]o direct with authority; give orders to.”

*Id.* at 373 (citations omitted).

Viewed in the light most favorable to the verdict, the record establishes that Strong isolated M.W. in the cabin of the boat, pulled her bikini bottom down approximately one-half of an inch, and asked her “can I lick it?” On this record, the jury could reasonably conclude that Strong entreated or attempted to persuade M.W. to engage in sexual conduct. Thus, we affirm the jury’s verdict of guilty. However, because the district court expressed the dismissal of this charge as part of the same behavioral incident as the now-reversed conviction of second-degree criminal sexual conduct, we remand to the district court for further consideration of whether and how to proceed on this verdict.

## II.

Finally, Strong contends that, in closing argument, the prosecutor committed misconduct by misstating the burden of proof and encouraging the jury to reach a verdict based on sympathy.<sup>4</sup> Strong did not object to the claimed errors at trial. We review a

---

<sup>4</sup> Strong characterizes the prosecutor’s statements as prosecutorial “misconduct.” “[T]here is an important distinction . . . between prosecutorial misconduct and prosecutorial error.” *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). Prosecutorial misconduct “implies a deliberate

claim of unobjected-to trial error under the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). This standard requires an (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If the three plain-error elements are established, we then consider whether to remedy the error to ensure fairness and the integrity of the judicial proceedings. *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002); *see also Griller*, 583 N.W.2d at 740.

The burden is on the nonobjecting appellant to show that an error occurred and that it was plain. *Ramey*, 721 N.W.2d at 302. “An error is plain if it was ‘clear’ or ‘obvious.’ Usually this is shown if the error contravenes case law, a rule, or a standard of conduct.” *Id.* at 302 (quotation omitted). In the context of prosecutorial error, if the appellant establishes plain error, the burden shifts to the state to demonstrate that the error did not affect the appellant’s substantial rights. *Id.* Under such circumstances, this standard is met by showing that there is no reasonable likelihood that the error had a significant effect on the jury’s verdict. *Id.* On review, we analyze the challenged statement in the context of the argument as a whole. *State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003); *Leutschaft*, 759 N.W.2d at 418.

---

violation of a rule or practice, or perhaps a grossly negligent transgression,” while prosecutorial error “suggests merely a mistake of some sort, a misstep of a type all trial lawyers make from time to time.” *Id.* We apply the same standard to allegations of prosecutorial misconduct and prosecutorial error. *Id.* Absent assertion of a deliberate violation or gross negligence on the part of the prosecutor here, we adopt the term “prosecutorial error.”

## A.

Strong first argues that the prosecutor misstated the burden of proof by repeatedly telling the jury that if it believed M.W., then Strong is guilty. Due process requires that the state prove every element of the charged offenses beyond a reasonable doubt. *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). Misstatements of this burden of proof constitute prosecutorial error. *See State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000).

Strong contends that the challenged statements are erroneous because “[t]he jury could believe [M.W.’s] testimony and still acquit [him] because the conduct she described did not meet the elements of the charged offenses.” We agree. The jury’s two guilty verdicts demonstrate that it found M.W.’s testimony credible. But the substance of M.W.’s testimony does not of itself support a finding of guilt for each of the charged offenses. *See Part I. A. above.*

Because the prosecutor’s statements are erroneous, we next determine whether they constitute plain error. In addition to telling the jury, “[i]f you believe [M.W.], then the defendant is guilty,” the prosecutor stated, “I’m going to apply [the] law with you to the facts of this case and show to you how the state has proven each and every element of these crimes beyond a reasonable doubt.” The prosecutor then detailed accurately the state’s burden of proof as to each element of each charged offense and argued the application of specific bits of evidence to each. In the context of the argument as a whole, and in light of the fact that believing M.W.’s testimony logically results in finding Strong guilty of one of the charged offenses, the challenged statements do not constitute plain error. *See Part I. B, above.* Moreover, because the jury found Strong not guilty of

the most serious of the charged offenses, attempted first-degree criminal sexual conduct, the state has established that there is no reasonable likelihood that the error had a significant effect on the jury's verdict. Strong is not entitled to relief on this ground.

**B.**

Strong next argues that the prosecutor encouraged the jury to reach a verdict based on sympathy. "Sexual-abuse cases inevitably evoke an emotional reaction, and any attempt by the prosecutor to exacerbate this natural reaction by making any emotive appeal to the jury is likely to be highly prejudicial." *State v. McNeil*, 658 N.W.2d 228, 234 (Minn. App. 2003) (quotations omitted).

Strong contends the prosecutor appealed to the sympathies of the jurors by making the following statements in his closing argument and rebuttal: (1) "[M.W's] got to live with this regardless of what you do. . . . Do you think she wanted that, what happened to her, she had to go through? Did she want that?" and (2) "I'm asking you to not forget. I'm asking you to remember." Strong suggests that these statements "had nothing to do with the facts of the case or the elements of the crimes charged." But a contextual analysis satisfies us that the prosecutor's first comments relate to assessing witness credibility, particularly "the truthfulness of a child." And the prosecutor's second comments draw on record evidence. The prosecutor made the connection to the record clear, stating:

[Strong] tried to get [M.W.] to forget about this after. His words and his actions in that cabin of that boat. "Can we please forget about this," he asked her. She didn't. She didn't forget. She cannot forget. I'm asking you to not forget. I'm asking you to remember.

Because these statements are related to the issues before the jury and the evidence at trial, they do not constitute error.<sup>5</sup> *See McNeil*, 658 N.W.2d at 235 (concluding that the prosecutor’s statements were erroneous when they “were wholly unrelated to the elements of the offenses with which appellant was charged or the evidence at trial”). Strong is not entitled to relief on this ground.

**Affirmed in part, reversed in part, and remanded.**

---

<sup>5</sup> Because Strong fails to establish error, we do not reach the two remaining plain-error factors or determine whether granting the remedy which Strong seeks is necessary to ensure fairness and the integrity of the judicial proceedings. *See Ihle*, 640 N.W.2d at 916; *see also Griller*, 583 N.W.2d at 740 (stating that remedy to ensure fairness and integrity of judicial proceedings considered only after three plain-error factors are established).