STATE OF MINNESOTA

IN SUPREME COURT

A16-1997

State of Minnesota,

Respondent,

vs.

Sandra Grazzini-Rucki,

Petitioner.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Sandra Grazzini-Rucki for further review be, and the same is, denied.

Dated: January 16, 2018

BY THE COURT:

Lorie S. Gildea
Chief Justice

LILLEHAUG and HUDSON, JJ., took no part in the consideration or decision of this case.

STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1997

State of Minnesota,
Respondent,

vs.

Sandra Grazzini-Rucki,
Appellant.

Filed November 6, 2017
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

Dakota County District Court
File No. 19HA-CR-15-2669

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

James C. Backstrom, Dakota County Attorney, Kathryn M. Keena, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Sandra Grazzini-Rucki was convicted of two counts of depriving another of custodial or parental rights. She seeks reversal of her convictions, reversal of her

sentence, and dismissal of the charges against her or a new trial. In support of these requests, Grazzini-Rucki raises a number of issues, including that (1) she was denied her Sixth Amendment right to effective assistance of counsel, (2) the district court erroneously excluded certain evidence, (3) the state engaged in prosecutorial misconduct during closing argument, (4) the district court improperly instructed the jury, (5) media communications with the jury prejudiced the result of her trial, (6) various other procedural violations resulted in prejudice against her, (7) the district court abused its discretion and exceeded its authority in sentencing, and (8) her conviction was barred by double jeopardy. The only reversible error we find is in Grazzini-Rucki's sentencing. We affirm in part, reverse in part, and remand to the district court to execute Grazzini-Rucki's sentence.

FACTS

In 2011, Grazzini-Rucki divorced her ex-husband after 19 years of marriage. They have five children, including S.R. (age 14 in 2013) and G.R. (age 13 in 2013). Following the divorce, custody of the children changed several times until April 19, 2013, when a district court judge filed an order granting a paternal aunt exclusive physical and legal custody of all five children. That evening, the aunt picked up two of the children, S.R. and G.R., and took them home. Shortly after their arrival, S.R. surreptitiously telephoned Grazzini-Rucki, told her that she and G.R. were planning on running away, and asked for her help in doing so. S.R. and G.R. then left the house and met Grazzini-Rucki a short distance away. After picking up S.R. and G.R., Grazzini-Rucki dropped them off at a ranch owned by Gina and Douglas Dahlen. S.R. and G.R. remained at the Dahlens' ranch until November of 2015 when they were recovered by the police.

During the intervening time period, both the police and Grazzini-Rucki's ex-husband were attempting to locate S.R. and G.R. In June of 2013, the district court handling Grazzini-Rucki's divorce ordered Grazzini-Rucki and her ex-husband to divulge any information they had about the whereabouts of S.R. and G.R. Despite this order, Grazzini-Rucki never indicated to her ex-husband or the court that she had any information regarding S.R. and G.R.'s location. In November 2013, while the children were still missing, Grazzini-Rucki's ex-husband was awarded sole physical and legal custody of S.R. and G.R. Finally, in the summer of 2015, police received information implicating Grazzini-Rucki in the disappearance of her children. Based on that information, she was charged with eight counts of depriving another of custodial or parental rights under Minn. Stat. § 609.26 (2012): two for concealing a child from a parent with parental rights, two for concealing a child from a person with custody, two for failing to return a child in violation of a court order, and two for contributing to a child being a runaway.

A jury trial took place from July 18 to 28, 2016. Among the witnesses called by the state was Gina Dahlen, the only witness in the state's case-in-chief with firsthand knowledge of Grazzini-Rucki leaving S.R. and G.R. at the ranch. At the close of the state's case-in-chief, Grazzini-Rucki moved for a judgment of acquittal on a basis unrelated to this appeal. After that motion was denied, Grazzini-Rucki proceeded with her case-in-chief. Among other things, she attempted to offer evidence of information that had led her to believe that her actions were necessary to prevent physical or sexual assault or substantial emotional harm to her children. As relevant to this appeal, three such pieces of evidence were excluded: (1) a news interview with S.R. and G.R. that occurred shortly

after Grazzini-Rucki left them at the ranch, (2) testimony that a GPS tracker was found on a car belonging to Grazzini-Rucki's boyfriend, and (3) social services records based on an interview of S.R. conducted after her recovery from the ranch. Toward the end of her case-in-chief, Grazzini-Rucki again moved for judgment of acquittal, this time arguing that, at the time the state rested its case-in-chief, it had failed to corroborate Dahlen's accomplice testimony by any other evidence linking Grazzini-Rucki to the crime. Although Grazzini-Rucki admitted that her case-in-chief had corroborated Dahlen's testimony, she asked the district court to grant the motion based on the evidence that was on the record at the time the motion should (according to Grazzini-Rucki) have been made. The district court denied this motion and submitted the case to the jury, which found Grazzini-Rucki guilty of six counts.

Following the verdict, Grazzini-Rucki was sentenced on two of the six counts. On count one, she was sentenced to a stayed year-and-a-day prison term and three years of probation. As a condition of probation, she was required to serve 250 days in jail. On count three, she was sentenced to a stayed year-and-a-day prison term, running concurrently with her count-one prison term, and three years of probation, running consecutively to her count-one probation. At her sentencing hearing, Grazzini-Rucki moved to terminate probation and execute her prison terms. That motion was denied. At two subsequent probation-violation hearings, the district court twice denied renewed motions to execute the prison terms. Following the second probation-violation hearing, the court relieved the county corrections department of its probation-supervision obligation and placed Grazzini-Rucki on court-supervised probation.

Grazzini-Rucki appeals.

DECISION

I. Grazzini-Rucki's counsel was not ineffective.

To prevail on an ineffective-assistance-of-counsel argument, a defendant "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) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). We review ineffective-assistance-of-counsel arguments de novo. *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016).

In support of her argument that her counsel was deficient, Grazzini-Rucki argues (1) that Minn. Stat. § 634.04 (2014) requires accomplice testimony to be corroborated by other evidence showing the defendant committed the offense in order for it to serve as a basis for conviction and (2) that, at the close of the state's case-in-chief, only Dahlen's uncorroborated testimony implicated Grazzini-Rucki in her daughters' disappearances; therefore, (3) her trial counsel was deficient in failing to argue for a judgment of acquittal on that basis after the state rested its case-in-chief. Although this argument might hold true if premises (1) and (2) were both met, because other evidence in the state's case-in-chief implicated Grazzini-Rucki, we conclude that her trial counsel's representation was not deficient.

Grazzini-Rucki argues that there was no corroboration of Dahlen's testimony. However, "corroborative evidence need not be of itself adequate to establish a prima facie

case of guilt. Instead, it must simply affirm the truth of the accomplice's testimony and point to the guilt of the defendant in some substantial degree." *State v. Chavarria-Cruz*, 839 N.W.2d 515, 519 (Minn. 2013) (quotation omitted). Evidence offered by the state meets this burden.

During its case-in-chief, the state established, through witnesses other than Dahlen, that:

(1) Grazzini-Rucki is the mother of S.R. and G.R.;
(2) there was controversy regarding custody of S.R. and G.R. following the divorce;
(3) after S.R. and G.R. disappeared, their aunt suspected the children had gone to see their mother;
(4) during the first year of the police investigation into her daughters' disappearances, Grazzini-Rucki never inquired into the status of the investigation;
(5) Grazzini-Rucki was unaccounted for when S.R. and G.R. disappeared; and
(6) a photo, taken near the time of the disappearances, of a business owned by Douglas Dahlen was found on the cellphone of a friend of Grazzini-Rucki.

Although this evidence, by itself, does not "establish a prima facie case of guilt," it does "point to the guilt of the defendant in some substantial degree." This evidence establishes motive, suggests Grazzini-Rucki knew where S.R. and G.R. were, and implies a link between Grazzini-Rucki and the Dahlens at the time of the disappearance. As a result, had Grazzini-Rucki's trial counsel made the argument in question, it would have been unlikely to succeed. Therefore, Grazzini-Rucki's trial counsel did not fall below the objective standard of reasonableness in failing to make it. Because Grazzini-Rucki's trial counsel's representation did not fall below this standard, we conclude that Grazzini-Rucki is not entitled to a new trial based on ineffective assistance of counsel.

II. The district court did not abuse its discretion in excluding particular pieces of evidence.

Grazzini-Rucki argues that she must be granted a new trial because the district court abused its discretion when it excluded (A) a newscast in which S.R. and G.R. expressed fear of their father, (B) testimony that Grazzini-Rucki's ex-husband planted a GPS tracker on Grazzini-Rucki's boyfriend's car after S.R. and G.R. disappeared, and (C) social services records indicating S.R.'s continued fear of her father after she was recovered. Grazzini-Rucki sought to introduce this evidence to support her affirmative defense that she reasonably believed that her actions were necessary to protect S.R. and G.R. from physical or sexual assault or substantial emotional harm. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). This standard of review applies even when "the defendant claims that the exclusion of evidence deprived him of his constitutional right to a meaningful opportunity to present a complete defense." *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017).

A. Newscast Exclusion

The district court excluded the newscast on relevance and, alternatively, on lack-of-foundation and rule-of-completeness grounds. Relevant evidence is generally admissible, and includes "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would

be without the evidence." Minn. R. Evid. 402, 401. Evidence that is not relevant is not admissible. Minn. R. Evid. 402. Even relevant evidence may be excluded if it is substantially more prejudicial than probative. Minn. R. Evid. 403.

Here, it is apparent from a review of the newscast that portions of it are relevant to the reasonableness of Grazzini-Rucki's belief that depriving others of custody of S.R. and G.R. was necessary to prevent harm to them. However, other portions are both not relevant and highly prejudicial. Although the district court did not review the newscast before excluding the exhibit, its ruling indicates the court was nevertheless aware of this potential issue and attempted to balance the competing concerns by excluding the newscast but permitting Grazzini-Rucki to testify that she saw the newscast shortly after S.R. and G.R. disappeared and that the children expressed fear of their father therein. Based on the need to balance these concerns, the district court did not abuse its discretion in excluding the newscast.

B. GPS-Testimony Exclusion

The district court excluded the GPS testimony on relevance grounds. Grazzini-Rucki argued that the GPS testimony was relevant to show that she was aware that her ex-husband was stalking her to "get at" her daughters. She did not, nor does she before this court, however, explain how the conclusion that her ex-husband sought to harm S.R. or G.R. flows from the alleged stalking of her. Due to this missing link, the district court concluded that the inference to be drawn from the GPS testimony was that her ex-husband was attempting to locate the children, not that he wanted to harm them, and therefore the testimony was not relevant. Although other inferences *might* be drawn from this testimony,

it was not an abuse of discretion for the district court to exclude the testimony. *Cf. State v. Ture*, 632 N.W.2d 621, 631 (Minn. 2001) (noting a court may take into consideration surrounding circumstances when determining what inferences may be drawn from a piece of evidence and whether that evidence is therefore admissible).

C. Social-Services-Records Exclusion

The district court excluded the social services records on relevance grounds. Grazzini-Rucki argues that the records tended to corroborate her defense that she reasonably believed reuniting the children with their father would subject them to substantial emotional harm because they show the depth of the children's fear of him. However, Grazzini-Rucki does not explain how statements made to social services after S.R. and G.R.'s recovery could have impacted her beliefs during the time the children were missing. Rather, as the district court reasoned, because the statements were made after the recovery of the children, it is impossible for the excluded statements to have played a role in impacting Grazzini-Rucki's decision-making. The exclusion of the records was not an abuse of discretion. *See Zumberge*, 888 N.W.2d at 695 n.1 (excluding evidence for a self-defense defense on the basis of relevance because the defendant did not prove he was aware of the evidence at the time of the shooting).

III. The state did not commit prosecutorial misconduct.

Grazzini-Rucki argues that she must be granted a new trial because the state engaged in prosecutorial misconduct during its closing argument. Grazzini-Rucki did not object at trial. When a defendant fails to object to alleged prosecutorial misconduct, the alleged misconduct is reviewed under a modified plain-error standard. *State v. Peltier*, 874 N.W.2d

792, 803 (Minn. 2016). "Under that test, the defendant has the burden to demonstrate that the misconduct constitutes (1) error, (2) that is plain. If plain error is established, the burden then shifts to the State to demonstrate that the error did not affect the defendant's substantial rights." *Id.* Under this modified plain-error standard, on the third or "prejudice" prong, the state bears the burden of proving that there is no reasonable likelihood that the absence of the misconduct would have a significant effect on the jury's verdict. *Id.* at 803-04. "If all three prongs of the test are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 804 (quotation omitted).

A. Reasonableness of Grazzini-Rucki's Affirmative Defense

The state "must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). "While the state's argument need not be 'colorless,' it must be based on the evidence produced at trial, or reasonable inferences from that evidence." *Id.*

Grazzini-Rucki argues that the state went beyond the evidence, intending to inflame the juror's passions, when the state critiqued the reasonableness of her affirmative defense that she was acting to protect her children. During closing, the state argued that it was unreasonable for Grazzini-Rucki to leave S.R. and G.R. "with complete strangers," one of which, "for all she knows . . . could have been a registered sex offender." Notably, the state did not criticize jury members if they chose to believe Grazzini-Rucki, nor did it imply that jurors would be unable to live with themselves if they did not return a guilty verdict. *See, e.g., id.* (reversing convictions based on such statements). Rather, the state's

argument, when considered in context, was calculated to attack the reasonableness of Grazzini-Rucki's defense by asserting that her behavior did not accord with what a parent truly concerned for her children's safety would do. Such argument is permissible during closing when based on the evidence, as it was here. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). We therefore conclude that the state's argument regarding the reasonableness of Grazzini-Rucki's defense was not prosecutorial misconduct.

B. Impact on the Children

Grazzini-Rucki argues that the state's discussion of the impact of Grazzini-Rucki's actions on her children improperly urged jurors to "put themselves in the shoes of the victim," *State v. Johnson*, 324 N.W.2d 199, 202 (Minn. 1982), or evoked juror sympathy by commenting on issues unrelated to the evidence, *State v. McNeil*, 658 N.W.2d 228, 234-35 (Minn. App. 2003). The restrictions Grazzini-Rucki cites, however, "do not preclude all arguments relating to the impact of the crime on the victim." *Nunn v. State*, 753 N.W.2d 657, 662 (Minn. 2008). It is acceptable "for a prosecutor to talk about what the victim suffers and to talk about accountability, in order to help persuade the jury not to return a verdict based on sympathy for the defendant." *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985).

During closing, the state asked the jury to "think about" the "emotional harm" Grazzini-Rucki committed against S.R. and G.R. when she "robbed [them] of living normal lives with their family and friends during some very critical, critical development years." This argument was permissible. Taking, as we must, the argument in the context of the whole trial, as opposed to in isolation, *State v. Munt*, 831 N.W.2d 569, 587 (Minn. 2013),

it is apparent that the statements were not intended to have the jury "put themselves in the shoes of the victim," but rather to ensure the jury did not "return a verdict based on sympathy for the defendant." This was a legitimate concern for the state, as during trial Grazzini-Rucki had offered evidence that may have placed her in a sympathetic light. Additionally, the argument was also appropriate to counter Grazzini-Rucki's affirmative defense, because pointing out the negative impact of her actions on S.R. and G.R. undermined Grazzini-Rucki's argument that her actions were necessary to protect them from harm. We therefore conclude that the state's argument regarding the impact on S.R. and G.R. was not prosecutorial misconduct.

Because Grazzini-Rucki has not established the first prong of the plain-error standard, it is unnecessary to consider the remaining prongs.

IV. The district court abused its discretion and erred in sentencing Grazzini-Rucki.

Grazzini-Rucki argues that the district court abused its discretion by imposing probationary sentences more onerous than her stayed prison sentences and exceeded its authority by imposing concurrent stayed prison sentences and consecutive probationary sentences. The state agrees. Both Grazzini-Rucki and the state seek execution of the stayed sentences.

A district court's probationary sentence is reviewed for abuse of discretion. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). Grazzini-Rucki recognizes that she did not have a statutory right to demand execution of her sentences in lieu of a stay of imposition because she would serve less than nine months in prison. *See* Minn. Stat. § 609.135,

subd. 7 (2016). But she argues that the district court abused its discretion by imposing probationary sentences that were more onerous than the stayed prison sentences and that, as a result, the district court should have granted her requests to execute her sentences.

In *State v. Randolph*, the supreme court held that a convicted criminal defendant has the right to refuse probation and to execution of sentence when the conditions attached to a probationary sentence make it more onerous than a prison sentence. 316 N.W.2d 508, 510 (Minn. 1982). The court reasoned that, in such a case, "the trial court, in effect, has not followed the Sentencing Guidelines. Or, to put it another way, the court has followed the Sentencing Guidelines in form but not in spirit or effect." *Id.* In *State v. Rasinski*, the supreme court made clear that the relative onerousness of a probationary sentence and an executed sentence is not measured "only in terms of the relative lengths of incarceration." 472 N.W.2d 645, 651 (Minn. 1991). "To the contrary, *Randolph* and its progeny refer to the 'conditions of probation' of which length of incarceration is only one." *Id.* The "cumulative effect of the probationary conditions" may create "a more onerous sentence than the executed prison sentence prescribed by the sentencing guidelines." *Id.*

Applying these principles, we agree with Grazzini-Rucki and the state that Grazzini-Rucki's probationary sentences were more onerous than her stayed sentences. Grazzini-Rucki was sentenced to concurrent presumptive stayed sentences of a year and a day in prison. Execution of her concurrent sentences at sentencing would have resulted in Grazzini-Rucki serving eight months in prison and four months on supervised release. As conditions of her probation, the court ordered, among other things, that Grazzini-Rucki serve 250 days in jail, an additional 15 days in jail beginning on November 18 of each year

she is on probation, and 12 additional days in jail each year she does not complete 12 days of sentence to service. The cumulative effects of the conditions of probation imposed by the district court rendered her probationary sentences more onerous than her prescribed executed sentences.

At sentencing and at subsequent probation-violation hearings, the district court denied Grazzini-Rucki's motions to execute her prison terms. Following the second probation-violation hearing, the court placed Grazzini-Rucki on court-supervised probation. Because Grazzini-Rucki's probationary sentences were more onerous than her stayed sentences, the district court abused its discretion in not executing her sentences. We therefore remand to the district court to execute the sentences.

Grazzini-Rucki's probationary sentences also suffer from another flaw. We agree with Grazzini-Rucki and the state that the district court exceeded its authority when it imposed concurrent prison terms but consecutive probationary terms.

The interpretation of a statute and the sentencing guidelines is a question of law that is subject to de novo review. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). Minn. Stat. § 609.15, subd. 1(a) (2014), provides that "when separate sentences of imprisonment are imposed on a defendant for two or more crimes . . . the court shall specify whether the sentences shall run concurrently or consecutively." This statute "presumes that a district court has a choice *between* imposing a concurrent or consecutive sentence." *State v. Gilbert*, 634 N.W.2d 439, 442 (Minn. App. 2001) (emphasis added), *review denied* (Minn. Dec. 11, 2001). When sentencing additional crimes beyond the first in a set of multiple crimes, a court exceeds its authority when it imposes both a stayed concurrent prison term

and a consecutive probationary term for the same crime. *State v. Moore*, 340 N.W.2d 671, 673 (Minn. 1983).

The district court elected to sentence Grazzini-Rucki on counts one and three, imposing separate sentences on each count. As noted above, on count one, Grazzini-Rucki was sentenced to a stayed year-and-a-day prison term and a three-year probationary term. On count three, Grazzini-Rucki was sentenced to a stayed year-and-a-day prison term and a three-year probationary term. The district court ordered count three's prison term to run concurrently with count one's prison term, but ordered count three's probationary term to run consecutively with count one's probationary term. As the Minnesota Supreme Court held in *Moore*, such a sentencing structure exceeds the district court's authority, because the court must sentence *either* consecutively or concurrently. Because we are directing that the district court execute Grazzini-Rucki's concurrent prison sentences, this error becomes moot.

V. The district court did not abuse its discretion in instructing the jury.

Grazzini-Rucki argues that she must be granted a new trial because the district court improperly instructed the jury on (A) Grazzini-Rucki's affirmative defense and (B) liability for crimes of another. Because Grazzini-Rucki did not object to these instructions at trial, we review them for plain error. *State v. Washington-Davis*, 881 N.W.2d 531, 541 (Minn. 2016). "Under the plain-error test, we determine whether the jury instructions (1) contained an error, (2) that was plain, and (3) that affected the defendant's substantial rights. If the defendant establishes these three prongs, we may correct the error only if it

seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted).

A. Affirmative Defense Instruction

The district court used the standard jury instruction for the affirmative defense raised by Grazzini-Rucki. That instruction states:

> It is a defense to this charge if: (1) the defendant reasonably believed the action taken was necessary to protect the child from physical or sexual assault or substantial emotional harm. . . . The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in such circumstances and with such intent.

10 *Minnesota Practice*, CRIMJIG 15.07 (2016). Grazzini-Rucki argues this instruction failed to properly instruct the jury about the applicable factors of the affirmative defense.

A comparison of the instruction given and the statute on which it is based reveals no error. Under Minn. Stat. § 609.26, subd. 2 (2012), the state must prove beyond a reasonable doubt that Grazzini-Rucki did not act under the reasonable belief that her actions were necessary to protect her children from physical or sexual assault or emotional harm. The instruction given accurately reflects this requirement. We conclude that there was no error in giving this instruction.

B. Liability-for-Crimes-of-Another Instruction

While reading the jury instructions aloud to the jury, the district court began reading the liability-for-crimes-of-another instruction. Midway through the first sentence, the court stopped and decided to explain why the instruction was being given, and then re-read the instruction from the beginning. The effect of this was that the trial court said, "The

defendant is guilty of a crime—let me explain: The next instruction is captioned Liability for Crimes of Another"; then went on to explain the presence of the liability-for-crimes-of-another instruction; and then said, "The defendant is guilty of a crime committed by another person when the defendant has played an intentional role in aiding the commission of the crime and made no reasonable effort to prevent the crime before it was committed." Grazzini-Rucki argues that the false start on the instruction ("The defendant is guilty of a crime . . .") amounts to the district court instructing the jury that she is guilty. However, a review of the context makes clear that this was neither the intent nor the effect of the district court's statement. Rather, context indicates that the court merely began to read the instruction, backed up to explain the reason why the instruction was being given, and then read the instruction again from the beginning. We conclude that there was no error in the presentation of this instruction.

VI. Media communications with the jury did not prejudice the result of Grazzini-Rucki's trial.

Grazzini-Rucki argues that she must be granted a new trial because of media contact with the jury during her trial. Because Grazzini-Rucki did not object to these contacts or make any motions based upon them at trial, we review them for plain error. *See State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006) ("On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights."). In reviewing whether to grant a new trial based on alleged juror misconduct, we consider the following factors: (1) the nature and source of the prejudicial matter, (2) the number of jurors exposed

to the misconduct, (3) the weight of evidence, and (4) the likelihood that curative measures were effective in reducing the prejudice. *State v. Cox*, 322 N.W.2d 555, 559 (Minn. 1982).

Grazzini-Rucki points to two media contacts with the jury that she claims prejudiced the result of her trial. The first allegedly occurred when two jurors reported that there was a StarTribune article on the jury room table about Grazzini-Rucki. However, Grazzini-Rucki points to nothing in the record, nor does an independent review reveal any discussion or motion related to this alleged event. The only source Grazzini-Rucki cites in support of this occurrence is a news article uncorroborated by anything in the record. "It is well settled that an appellate court may not base its decision on matters outside the record." *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977). Having nothing in the record to consider, we decline to consider the alleged error here.

Grazzini-Rucki also claims that, three times during trial, members of the media approached jurors, resulting in prejudice. Although Grazzini-Rucki does not point to anything in the record in support of this claim, a review of the record does reveal *one* incident where a reporter contacted an unknown number of jurors during their lunch break. The reporter asked the jurors, "Would you be willing to speak with me after the fact?" When brought to the attention of the court, Grazzini-Rucki's attorney said that he did not "think there's any possible basis to bring any motion for any purpose based upon the fact . . . if that happened." Because no party moved for a mistrial, the district court did not consider whether to order one, instead being satisfied by the prosecutor's proposal to tell the reporter to stop attempting to talk to the jury before the trial concluded.

Applying the plain-error standard to this incident, we see no error in the district court's treatment of it. Looking at the event through the lens of the *Cox* factors, we observe that: (1) the reporter's contact did not provide inadmissible information, threaten, or encourage the jury to vote a certain way, (2) although the number of jurors affected is unknown, the nature of the reporter's conduct minimizes any harm even if the entire jury was contacted, (3) the weight of the evidence is heavily against Grazzini-Rucki, whereas the weight of the reporter's statement was de minimis, and (4) the court took steps to prevent the reporter from doing any further harm by agreeing to have the prosecutor instruct the reporter to refrain from contacting the jury in the future. *Cox* does not require a mistrial to be ordered on these facts, *see* 322 N.W.2d at 559, and we conclude there was no error in the district court's not doing so.

VII. Grazzini-Rucki's sentences for two counts of depriving another of custodial or parental rights did not violate the bar against double jeopardy.

Grazzini-Rucki argues that one of her sentences must be reversed because sentencing her on more than one count of deprivation of custodial or parental rights subjects her to double jeopardy. We review double jeopardy issues de novo. *State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999).

A jury found Grazzini-Rucki guilty of six counts of deprivation of custodial or parental rights, and the district court sentenced her on two of those counts: count one, which covers depriving Grazzini-Rucki's ex-husband of parental rights to S.R. on April 19,

2013; and count three, which covers depriving the children's aunt of custody of S.R. on April 19, 2013.[1]

The United States and Minnesota Constitutions, as well as Minn. Stat. § 609.035 (2014), prohibit double jeopardy. The statutory prohibition is broader than either constitution's prohibition; therefore, we limit our discussion to the statute. *State v. Bakken*, 871 N.W.2d 418, 423 (Minn. App. 2015), *aff'd*, 883 N.W.2d 264 (Minn. 2016). The statute provides that "if a person's conduct constitutes more than one offense under the laws of the state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1. However, under the multiple-victim exception, "courts are not prevented from giving a defendant multiple sentences for multiple crimes arising out of a single behavioral incident if: (1) the crimes affect multiple victims; and (2) multiple sentences do not unfairly exaggerate the criminality of the defendant's conduct." *State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006).

Applying these rules to Grazzini-Rucki's case, assuming, without deciding, that her actions constituted a single course of conduct, they would nevertheless fall within the multiple-victim exception to the statute. Both the children's father and the children's aunt were deprived of rights; therefore, each is a victim. Additionally, Grazzini-Rucki has not shown that sentencing for multiple victims would unfairly exaggerate the criminality of Grazzini-Rucki's conduct. *See State v. Hough*, 585 N.W.2d 393, 398 (Minn. 1998)

[1] During the sentencing hearing, the district court indicated that count three referred to depriving the children's aunt of custody of G.R. (not S.R.). Our review of the amended complaint, however, indicates that count three refers to depriving the aunt of custody of S.R. As these were the sentences entered, they are the ones that we review.

(placing on the defendant the burden of making such a showing). We therefore conclude that sentencing Grazzini-Rucki on counts one and three did not subject her to double jeopardy.

VIII. Grazzini-Rucki's other pro se arguments are meritless.

Grazzini-Rucki raises several additional arguments in her pro se supplemental brief.

First, Grazzini-Rucki argues her punishment is cruel and unusual. The Eighth Amendment forbids "extreme sentences that are grossly disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 60, 130 S. Ct. 2011, 2021 (2010) (quotation omitted). However, apart from her complaint about her probationary sentences, which we addressed above, Grazzini-Rucki provides no argument why her sentences are grossly disproportionate. Further, because we remand for execution of the stayed sentences, we do not need to reach the constitutional question of whether the probationary sentences violate the Eighth Amendment.

Second, Grazzini-Rucki argues she was not able to present a complete defense because she was denied the opportunity to review a letter from a psychologist recommending her daughters not be forced to testify. However, she cites to nothing in the record in support of this allegation, and an independent review reveals only that the letter was scanned in to the confidential portion of the district court file, but not that Grazzini-Rucki ever attempted to access the letter or was denied access to it. Moreover, the district court ultimately chose not to heed the letter's advice, refusing to quash subpoenas requiring S.R. and G.R. to testify. As Grazzini-Rucki cannot point to anything in the record showing that she was denied access, or, even if she was, that the denial impaired her defense, the

alleged lack of access to the letter forms no basis for appeal. *Brooks v. State*, 897 N.W.2d 811, 819 (Minn. App. 2017) ("[I]ssues not adequately briefed are waived.").

Third, Grazzini-Rucki argues that her ex-husband and the children's aunt engaged in witness tampering during the month leading up to trial by forcing S.R. to "recant" prior statements she made to social services. Grazzini-Rucki's only support for this assertion, however, comes from a police interview that is not part of the record. *See* Minn. R. Civ. App. P. 110.10 ("The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.") As a result, there is no basis for her appeal on this ground. *Plowman*, 261 N.W.2d at 583 (holding an appellate court may not base its decision on matters outside the record).

Fourth, Grazzini-Rucki argues that the code of judicial conduct required the removal of the district court judge from her case based on the judge's (1) past role as a judge in criminal matters involving Grazzini-Rucki's ex-husband and (2) bias, as evidenced by statements made during sentencing. As to the first, presiding over a prior matter in which witnesses in the present matter were parties does not constitute grounds for disqualification. *Teachout v. Wilson*, 376 N.W.2d 460, 465 (Minn. App. 1985), *review denied* (Minn. Dec. 30, 1985). As to bias, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008). The statements Grazzini-Rucki points to as establishing bias include (1) commending Grazzini-Rucki's ex-husband's victim statement,

(2) admonishing Grazzini-Rucki for her conduct, and (3) noting the importance of family in society. These statements do not "display a deep-seated favoritism or antagonism that would make fair judgment impossible"; therefore, they do not constitute a showing of bias that would be grounds for removal.

Fifth, Grazzini-Rucki argues that the prosecutor used perjured testimony to obtain a conviction. Other than this general allegation, however, Grazzini-Rucki does not specify any testimony that would form a basis for review. Absent such a showing, we conclude that Grazzini-Rucki's claim of perjury is without merit. *See Brooks*, 897 N.W.2d at 819.

Lastly, Grazzini-Rucki argues she was denied effective counsel because her trial counsel failed to convince the district court to admit certain pieces of evidence. However, this issue was not raised until Grazzini-Rucki's pro se reply brief. "The reply brief must be confined to new matter raised in the brief of the respondent." Minn. R. Civ. App. P. 128.02, subd. 3. Issues raised for the first time in an appellant's reply brief, having not been raised in respondent's brief, are "not proper subject matter for [the] appellant's reply brief," and they may be deemed forfeited. *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009). Because Grazzini-Rucki did not raise this issue in her pro se appellant brief and the state did not raise it in its brief, the issue is forfeited, and Grazzini-Rucki is not entitled to relief on this ground.

Affirmed in part, reversed in part, and remanded.

Additional material from this filing is available in the Clerk's Office.