STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1142

Gene A. Hegerman, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 19, 2012
Affirmed
Crippen, Judge[*]

Ramsey County District Court
File No. 62-CR-08-1526

David W. Merchant, Chief Appellate Public Defender, Jessica Benson Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

John J. Choi, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.

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

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

CRIPPEN, Judge

Appellant challenges the district court's denial of postconviction relief, asserting that the prosecutor committed misconduct in her final argument and the district court erred in permitting the jury to review recorded interviews during deliberations. Because appellant failed to show the prosecutor committed plain error or that the district court abused its broad discretion, we affirm.

FACTS

A.M. and her brother attended a home daycare run by appellant Gene Hegerman and his wife until December 2007, when a parent complained that appellant had spanked one of the other girls. Shortly thereafter, a child-protection social worker went to the home where A.M. lived with her mother and brother to interview them about the complaint. During the audiotaped interview, A.M., who was five years old at the time, reported that appellant had touched her "colita." A.M.'s mother explained that A.M. used the word "colita" to refer to her genital area. The social worker referred A.M. to the Midwest Children's Resource Center (MCRC). In a videotaped follow-up interview with an MCRC nurse, A.M. again said that appellant had taken her into the bathroom on multiple occasions and touched inside her "colita" with his finger.

Appellant was charged with first-degree criminal sexual conduct. A jury found appellant guilty, and the district court sentenced him to 216 months, an upward durational departure.

In December 2010, appellant filed a petition for postconviction relief seeking a new trial based on prosecutorial misconduct and the district court's ruling permitting the jury to review during deliberations A.M.'s recorded interviews with the social worker and the MCRC nurse. Appellant also requested reduction of his aggravated sentence. The district court reduced appellant's sentence to the presumptive 144-month term but denied his request for a new trial.

D E C I S I O N

1. Prosecutorial Misconduct

Appellant argues that the prosecutor committed two types of misconduct during closing argument—vouching for the credibility of A.M., the social worker who initially received A.M.'s report, and the MCRC nurse who interviewed A.M.; and commenting on appellant's failure to mention exonerating evidence before trial. Appellant did not timely object to any of the allegedly improper arguments.[1]

This court reviews claims of prosecutorial misconduct based on unobjected-to conduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299-300 (Minn. 2006). To establish plain error, an appellant must demonstrate that the challenged conduct was erroneous and the error was plain. *Id.* at 302. An error is plain if it is "clear" or "obvious." *Id.* (quotation omitted).

[1] Appellant asserts that he objected to vouching with respect to A.M., but the record reveals that he did not object until after the district court instructed the jury and released it to deliberate. This objection was not timely. *See State v. Bauer*, 598 N.W.2d 352, 359, 363 (Minn. 1999).

If appellant establishes plain error, the burden then shifts to the state to prove that the error did not affect appellant's substantial rights. *Id.* at 300. An error affects substantial rights if it was "prejudicial and affected the outcome of the case." *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). Reversal is warranted only when the alleged prosecutorial misconduct, "viewed in light of the entire record, is of such serious and prejudicial nature that appellant's constitutional right to a fair trial was impaired." *State v. Haynes*, 725 N.W.2d 524, 529 (Minn. 2007) (quotation omitted). When reviewing claims of misconduct based on a prosecutor's closing argument, this court considers the argument as a whole to determine whether the error prejudiced appellant's substantial rights. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Witness Vouching

"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). But this rule is not designed to prevent the prosecutor from arguing that particular witnesses were or were not credible. *State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006).

A.M.

Appellant argues that the prosecutor vouched for A.M.'s testimony by stating, "She's up there being honest." The challenged statement was part of a larger discussion of factors bearing on A.M.'s credibility and directly responsive to defense counsel's claim that A.M. was acting in revenge or retaliation:

> She's not old enough. She's not savvy enough to carry out a grand scheme of retaliation or revenge against [appellant].

> She doesn't know the word furniture until it was described to her by the nurse. Does she know the consequence of what she's saying? She's up there being honest.

This argument does not personally vouch for A.M.'s credibility but properly argues that A.M. likely was being honest because she is too naïve to be manipulative. This is within the proper limits of closing argument.

Social Worker

Appellant also argues that the prosecutor vouched for the credibility of the social worker who took A.M.'s report by stating that she "did her job in this case without bias." Review of the entire record reveals that the prosecutor did not simply assert that the social worker was unbiased but identified evidence supporting that assertion. Defense counsel suggested during cross-examination that the social worker was biased because she, like the prosecutor, is an employee of Ramsey County. In response, the prosecutor elicited testimony from the social worker that she and the prosecutor had not previously met, do not work in the same building, and do not work for the same supervisor. The prosecutor did not improperly vouch for the social worker's credibility in closing argument by reminding the jury of this testimony and arguing that it indicated lack of bias. *See Jackson*, 714 N.W.2d at 696 (stating that noting a witness's lack of bias is not vouching).

MCRC Nurse

Finally, appellant argues that the prosecutor vouched for the credibility of the MCRC nurse by saying, "She's a professional. And she did her job. And she came in

here and testified for you. She doesn't have a personal bias against [appellant]." These statements are not improper.

First, as discussed above, pointing out a witness's lack of bias is not improper vouching, *id.* at 696, nor is discussion of a witness's experience or qualifications. *See State v. Yang*, 627 N.W.2d 666, 679 (Minn. App. 2001) (stating that prosecutor's statements on the training and observation of police officers generally do not constitute improper vouching), *review denied* (Minn. July 24, 2001). Second, the challenged statements about the nurse, like the prosecutor's argument about the social worker's lack of bias, were directly responsive to questioning by defense counsel that challenged the nurse's credibility by depicting her as a biased "advocate for children" who was "not necessarily an objective person in this case." The challenged portion of the prosecutor's argument, viewed in context, merely responds to this line of questioning: "She doesn't have a personal bias against [appellant]. She was prepared. She was professional. Did she come across like some crazy person yelling from the roof tops for children's rights, or something like that? No." The prosecutor did not improperly vouch for the credibility of the MCRC nurse.

Pretrial Silence

Both the United States Constitution and the Minnesota Constitution guarantee a defendant's right to remain silent. U.S. Const. amend. V; Minn. Const. art. I, § 7. To protect that right, the law limits the state's use of evidence of the defendant's silence. *State v. Dobbins*, 725 N.W.2d 492, 509 (Minn. 2006). The state generally may not refer to or elicit testimony that a defendant remained silent while in custody and after receiving

a *Miranda* warning. *Id.* But it is not improper to impeach a testifying defendant with evidence of his silence in the absence of one of these factors. *See Fletcher v. Weir*, 455 U.S. 603, 607, 102 S. Ct. 1309, 1312 (1982) (permitting impeachment with post-arrest, pre-*Miranda* silence); *Jenkins v. Anderson*, 447 U.S. 231, 238, 240, 100 S. Ct. 2124, 2129, 2130 (1980) (permitting impeachment with pre-arrest silence). And the state may use evidence of a defendant's pre-arrest silence as direct evidence of guilt if the defendant remained silent as to material evidence if there was no government influence compelling him to speak. *See State v. Borg*, 806 N.W.2d 535, 543 (Minn. 2011).

Appellant claims misconduct based on the prosecutor's reference during closing argument to appellant's failure to mention during the investigation of this case that there were surveillance cameras in their home. The camera issue first arose at trial during the direct examination of appellant's wife, who testified that they had installed video cameras in their home that pointed at the door of each bathroom to monitor when children were going in and out. Appellant's wife later testified that she had "observed the surveillance footage of who goes in and out of the bathroom" and did not see any footage of appellant taking A.M. into the bathroom. Appellant also testified that he installed the surveillance system, but that he and his wife sold the cameras "recently" because they "needed the money."

During closing argument, the prosecutor addressed the cameras:

> [T]here were no cameras in that house. There are no cameras in that house. It's convenient to say I installed cameras. Then I uninstalled the cameras.
>
> [Appellant is] an intelligent man. If you're being questioned by a police officer about something, wouldn't you

> say, "Wait, I have video that can exonerate me." Wouldn't he say that? He never told the police about any cameras because there never were any cameras in the house.

Appellant argues that this reference to his failure to tell police about the cameras is improper as a violation of his right to remain silent. The argument is without merit.

The record established that the interviews with the investigating officer that the prosecutor referenced occurred before appellant was in custody; the interview occurred in appellant's home, where he could have easily pointed out the cameras. The prosecutor's argument merely reiterated legitimate impeachment evidence; without objection, the prosecutor properly impeached appellant on his failure under these circumstances to inform the investigating police officer of the cameras. The prosecutor did not argue improperly by suggesting that appellant's and his wife's claim that there were surveillance cameras in their home lacked credibility in light of their failure to previously assert it.

Even if the prosecutor's argument was improper, it is unlikely that it impaired appellant's substantial rights. The discussion of the cameras was minimal, comprising only a small portion of the testimony and the brief portion of the prosecutor's argument excerpted above. Also, the role the cameras could play as exculpatory evidence was significantly diminished by the testimony of appellant's wife, who plainly testified that the recordings from the surveillance cameras were saved for only two weeks. If her statement is accepted, it is evident that the recordings could not have been produced to assist in weighing the facts of the case. On this record, any error in briefly drawing the

jury's attention to appellant's failure to speak of the cameras during the investigation was harmless.

2. Jury Review of A.M's Recorded Interviews

Appellant argues that the district court abused its discretion by permitting the jury to review during deliberation the recordings of A.M.'s interviews with the social worker and the MCRC nurse. If a deliberating jury requests to review evidence, the district court has broad discretion whether to "permit the jury to reexamine the requested materials admitted into evidence." Minn. R. Crim. P. 26.03, subd. 19(2)(1) (2008);[2] *see State v. Kraushaar*, 470 N.W.2d 509, 514 (Minn. 1991). The district court also has discretion to "have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested." Minn. R. Crim. P. 26.03, subd. 19(2)(2) (2008). In exercising that discretion, the district court should consider "(i) whether the material will aid the jury in proper consideration of the case; (ii) whether any party will be unduly prejudiced by submission of the material; and (iii) whether the material may be subjected to improper use by the jury." *Kraushaar*, 470 N.W.2d at 515. An appellant challenging the district court's decision to permit review of admitted evidence must establish both an abuse of discretion and that he was thereby prejudiced. *State v. Everson*, 749 N.W.2d 340, 346 (Minn. 2008).

[2] We cite the version of the rule in effect at the time of appellant's trial. The rule has since been amended to provide that "[a]ny jury review of depositions, or audio or video material, must occur in open court." Minn. R. Crim. P. 26.03, subd. 20(2)(b) (Supp. 2011). That is what occurred here.

This record does not indicate an abuse of discretion. When the jury requested equipment to review the interviews, the district court discussed the matter with counsel. Defense counsel objected to replaying the interviews for the jury and requested that the district court, "at the very least" instruct the jury to "consider all the evidence not just this evidence." The district court overruled the objection, explaining that the jury had unlimited access to all exhibits, except for the interviews, so an additional opportunity to review the interviews was reasonable. It also declined to provide an additional instruction but sought to mitigate the potential prejudicial impact by limiting the jury to one review, without a transcript. And when it brought the jury back to the courtroom to review the interviews in the presence of appellant and both counsel, it admonished the jury to "focus . . . on the tapes. Listen. And watch carefully. Because I'm not going to give you another opportunity to listen or watch these tapes again." This record indicates that the district court did not give undue prominence to the interviews; the court properly weighed the reasonableness of the jury's request, placed appropriate limitations on the evidentiary review, and presented the interview recordings to the jury in the courtroom. On this record, the district court did not abuse its discretion by granting the jury's request to review the interviews.

Appellant also argues that the recordings contained testimonial evidence that was only admissible because A.M. testified and was subject to cross-examination, so the replaying of the recordings was erroneous as a matter of law because it was not accompanied by a replaying of A.M.'s cross-examination. Appellant waived this argument by failing to present it to the district court. *See Roby v. State*, 547 N.W.2d 354,

357 (Minn. 1996) (stating that arguments not raised to the district court are waived). Moreover, appellant does not cite any authority in support of his argument and ignores the discretion afforded the district court to determine whether to have the jury hear additional evidence. *See* Minn. R. Crim. P. 26.03, subd. 19(2); *Haynes*, 725 N.W.2d at 528-29 (emphasizing that a district court is not required to have the jury consider additional evidence). Although the cross-examination must be permitted to admit the evidence, nothing in the rule or caselaw requires the district court to replay the cross-examination as a prerequisite to replaying the evidence. The district court did not err by permitting the jury to review the recorded interviews without also replaying A.M.'s cross examination.

Affirmed.