STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1668

State of Minnesota,
Respondent,

vs.

Wayne Scott Martinson,
Appellant.

Filed October 15, 2012
Affirmed
Peterson, Judge

Marshall County District Court
File No. 45-CR-10-48

Lori Swanson, Attorney General, Jennifer R. Coates, Assistant Attorney General, St. Paul, Minnesota; and

Michael D. Williams, Marshall County Attorney, Warren, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota

Considered and decided by Worke, Presiding Judge; Peterson, Judge; and Muehlberg, 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.

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

PETERSON, Judge

In this appeal from multiple convictions of criminal sexual conduct, appellant argues that (1) the district court erred when it allowed an unredacted videotape of the victim's statement to a child-protection social worker to be played at trial before the victim testified; and (2) the prosecutor committed prejudicial misconduct by improperly vouching for the credibility of the complaining witness and by making statements that had no purpose other than to inflame the passions of the jury. We affirm.

FACTS

P.C., a high-school student, reported to a school social worker that P.C.'s friend, seventeen-year-old L.M., had told P.C. that appellant Wayne Scott Martinson, L.M.'s mother's live-in boyfriend, had raped L.M. the previous evening and that L.M. had previously disclosed several incidents of sexual assault by appellant. The social worker forwarded the information to S.P., a child-protection social worker, who arranged to interview L.M. The interview was videotaped.

When S.P. asked L.M. during the interview whether anyone had ever touched her private parts, L.M. stated that appellant had touched her "va-jj" and "boob." L.M. said that the sexual abuse had been going on for awhile and that her mother knew about it and was trying to kick appellant out, but it was not working. L.M. said her mother told her not to tell anyone because her mother did not want L.M. to go and live with her father or be taken away by social services. L.M. thought that her mother might be afraid of getting

beaten by appellant because appellant has lost his temper and has hit L.M. and her brother.

L.M. did not recall when appellant first touched her with his penis but thought that most of the incidents of sexual abuse happened when she was in eighth and ninth grade. L.M. described to S.P. and testified at trial about three incidents of sexual abuse.

The final incident occurred on February 4, 2011, when L.M. was in the basement with her brother. A large canvas icehouse with opaque walls, zippered doors, four windows, and a hard plastic floor was set up in the basement. Appellant came down into the basement and told L.M. to go inside the icehouse to help him take it down. Inside the icehouse, appellant had L.M. pull down her pants and lie on the floor, and then he knelt between her legs and penetrated her vagina with his penis.

Appellant was charged by complaint, as amended, with four counts of third-degree criminal sexual conduct and two counts of first-degree criminal sexual conduct. The case was tried to a jury. The jury found appellant guilty of one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2010), and two counts of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b), (f) (2010), and not guilty of the remaining charges. The district court sentenced appellant to concurrent terms of 187 months for the first-degree offense and 109 months for a third-degree offense. This appeal followed.

D E C I S I O N

I.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

An out-of-court statement is not hearsay and is admissible as substantive evidence if (1) the declarant testifies at trial; (2) the declarant is subject to cross-examination concerning the statement; (3) the statement is consistent with the declarant's testimony; and (4) the statement is helpful to the trier of fact in evaluating the declarant's credibility as a witness. Minn. R. Evid. 801(d)(1)(B). Before permitting testimony about a witness's prior consistent statement, the court must determine that (1) the witness's credibility has been challenged and (2) the prior statement offered to bolster the witness's testimony would be helpful to the trier of fact in evaluating the witness's credibility. *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997); *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000).

Appellant argues that the district court erred in playing L.M.'s videotaped interview before appellant had the opportunity to cross-examine L.M. and that the error was prejudicial because it undermined his ability to challenge L.M.'s credibility. But cross-examination is not the only way to challenge a witness's credibility. A witness's credibility can be challenged through opening statements. *See State v. Grecinger*, 569

N.W.2d 189, 193 (Minn. 1997) (stating that a victim's credibility can be attacked during opening statements); *State v. Harris*, 560 N.W.2d 672, 677 n.2 (Minn.1997) (noting that the defense began attacking the credibility of the defendant's former girlfriend in its opening statement); *State v. Axford*, 417 N.W.2d 88, 90 (Minn. 1987) (finding that defense counsel in his opening statement attacked the victim's credibility).

During opening statement, defense counsel suggested that L.M. had a motive to fabricate because she wanted to get appellant out of the house, that she could not have been sexually assaulted in the icehouse because her brother did not hear or see anything indicating sexual activity, and that the manner in which she was approached by social services and law enforcement and the statements she gave to them cast doubt on the allegations against appellant. Defense counsel also noted that L.M. did not tell her mother about the sexual assaults when they occurred and referred to L.M. accusing someone other than appellant of sexually assaulting her in North Dakota. These statements by defense counsel challenged L.M.'s credibility, which satisfied the first prong of the test for admissibility under Minn. R. Evid. 801(d)(1)(B).

Appellant also argues that he was prejudiced by the admission of the videotaped statement before L.M. testified because, after the videotape was played, he no longer had the opportunity to argue that L.M.'s statement was inadmissible because it was inconsistent with her trial testimony, and because playing the videotape before L.M. testified allowed L.M. to tailor her testimony to match the interview. Although Minn. R. Evid. 801(d)(1)(B) does not expressly require that the trial testimony occur before a prior statement is admitted, appellant is correct that admitting the statement before L.M.

testified may have rendered moot his ability to challenge whether the statement and L.M.'s testimony were consistent. But appellant has failed to show either that the statement and trial testimony were inconsistent or that the victim was present when the statement was played for the jury, which might have allowed her to tailor her testimony to match the statement. Because appellant has failed to show prejudice, any error in admitting the statement before L.M. testified is not a basis for reversal.

II.

The decision whether to redact parts of a statement lies within the district court's discretion. *State v. Lindsey*, 632 N.W.2d 652, 662 (Minn. 2001).

Defense counsel sought to redact the following statements from L.M.'s videotaped statement because they related to appellant's prior criminal-sexual-conduct conviction and the district court had ruled that evidence of the conviction would not be admitted into evidence:

> S.P.: Well, it's part of my job to keep you safe. And if somebody has been touching you we'll have to figure out the best way to keep you safe.
> L.M: I don't want – my mom's boyfriend – my [auntie] that lives with my grandma said that my mom's boyfriend is a child molester. But I don't know if that's true or not.
> . . .
> S.P.: Okay. Ah, do you think – do you know if [appellant] has ever done that kind of thing to anybody else besides you?
> L.M.: I don't know, but the way that auntie was saying that he was a child molester he probably has. But I don't know.

The district court found:

> In relation to the allegations that [appellant] is quote a child molester that may be made by persons in the tape. The Court doesn't believe that – and I've read through the transcripts

> prior to trial, would be sufficiently connected to [the prior conviction] that presumably won't enter into the record here. The Court believes that that's a general enough statement given the allegations of the Complaint and Amended Complaint herein.

At trial, defense counsel expressed concern that the comments about the aunt's statements would undercut the exclusion of evidence about the prior conviction. The district court, however, did not abuse its discretion in finding that the statements were too general to suggest to the jury that appellant had a prior conviction. On appeal, appellant is impermissibly attempting to change the very specific concern raised at trial into a general issue about prior bad acts.

Appellant also objects to L.M.'s statements about a cousin's brother sexually assaulting her in North Dakota. Appellant did not request that those statements be redacted. Rather, defense counsel indicated that he might use evidence about the North Dakota incident during trial, stated that he did not believe the evidence fell within the exclusion for a victim's past sexual conduct, and then referred to the North Dakota incident during opening and closing arguments and while cross-examining S.P. and L.M. Defense counsel used the North Dakota incident to attack L.M.'s credibility by suggesting that L.M. recalled many more details about the North Dakota incident than she recalled about the incidents involving appellant. Having failed to request that the statements be redacted and having used evidence about the North Dakota incident to attack L.M.'s credibility, appellant cannot challenge on appeal the district court's failure to redact the statements.

III.

"[A]ppellate courts should use the plain error doctrine when examining unobjected-to prosecutorial misconduct." *State v. Ramey*, 721 N .W.2d 294, 299 (Minn. 2006). Under the plain-error doctrine,

> before an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

State v. Griller, 583 N.W.2d 736, 740 (Minn.1998) (citation omitted).

The proper legal standard for determining whether unobjected-to prosecutorial misconduct is prejudicial is whether the plain error affected the defendant's substantial rights. *Ramey*, 721 N.W.2d at 299. "Although the Griller formulation applies, . . . when prosecutorial misconduct reaches the level of plain or obvious error—conduct the prosecutor should know is improper—the prosecution should bear the burden of demonstrating that its misconduct did not prejudice the defendant's substantial rights." *Id.* at 299-300. To meet that standard, the state needs "to show that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* at 302 (quotation and citations omitted).

Appellant argues that the prosecutor committed misconduct when he inserted his opinion into the trial in an attempt to bolster the victim's credibility and inflame the passions of the jury. *See State v. Ferguson*, 581 N.W.2d 824, 836 (Minn. 1998) (vouching); *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (personal belief or

opinion). A prosecutor may "present all legitimate arguments on the evidence and . . . present all proper inferences to be drawn from the evidence." *State v. Bolstad,* 686 N.W.2d 531, 544 (Minn. 2004).

Appellant's argument is based on statements that the prosecutor made during closing argument that (1) the victim took a bath because she felt unclean, (2) there was not that much detail in the evidence about the North Dakota incident, (3) people worry about losing their children if they report abuse and are blamed for the abuse, and (4) L.M. provided sufficient details about appellant's assaults.

During closing argument, in the context of explaining the absence of evidence that there was semen present after the assault, the prosecutor stated: "[L.M.] was upset. That night she takes a bath. Washes off the evidence. You don't—she feels unclean—dirty. She took a bath." Although the prosecutor committed misconduct arguing that L.M.'s testimony about taking a bath showed her state of mind, there is no reasonable likelihood that the absence of that isolated statement would have had a significant effect on the verdict of the jury.

During rebuttal closing argument, the prosecutor stated:

> [Appellant] says well, [L.M.] made all this detail about the North Dakota business. There really wasn't that much detail. They kept asking her well, did he touch you or didn't he touch you? I think the bottom line was at the end the young man wanted to but didn't. And it's not really relevant. What's that got to do with this anyways whether some other young man tried to hit on [L.M.] at some point? The bottom line is what you're faced with is did this occur on four occasions?

The prosecutor also stated:

> Even after that [the mother] had to acknowledge yesterday that she wasn't going to report it because of her fears that she might lose the children. It wasn't really her fault, but she might lose the children. Be blamed that you didn't protect your children. You're going to lose your children, or that no one will believe them. And now he's back in their household again having been physically assaultive upon the family in the past and what can they expect but more of the same. Those are real life issues, real fears that people have.

Finally, in responding to defense counsel's argument that L.M. provided more detail about the North Dakota incident than about the sexual assaults by appellant, the prosecutor stated:

> Now [appellant's] all mad because he said well, there's not enough detail. How much detail does he want? A lady has to come in the courtroom and say a man put his penis in my vagina and had sex with me. How much detail does defense counsel need? That's what happens. That's sexual penetration. Are we suppose[d] to ask [L.M.], did he run it up down three or four times? Is that going to add anything to help you? No, it's going to hurt her. Make her cry even more.

Appellant objects to these latter three arguments, which were based on evidence presented at trial and were made in response to appellant's arguments that L.M. was not credible because she provided many details about the North Dakota incident but few details about the incidents that involved appellant and that the allegations against appellant are not credible because L.M.'s mother (who knew about the assaults) did not report them to the authorities. Appellant's argument on appeal ignores the context in which the arguments were made and attempts to change the case that was presented at trial. The plain-error doctrine is not a mechanism for presenting a different case on

appeal than was presented at trial. Appellant has not shown that admitting the statements was plain error.

Affirmed.