STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0057

State of Minnesota,
Respondent,

vs.

Daniel Eugene Myers,
Appellant.

Filed October 15, 2012
Affirmed
Cleary, Judge

Cottonwood County District Court
File No. 17-CR-11-135

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

Nicholas A. Anderson, Cottonwood County Attorney, Lori A. Buchheim, Assistant County Attorney, Windom, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard A. Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Stauber, Judge; and Cleary, Judge.

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

CLEARY, Judge

On appeal from his conviction of malicious punishment of a child, appellant argues that there was insufficient evidence to convict him because he spanked the child

on the bottom with his hand and the child bruised easily because she is anemic; and that the prosecutor committed prosecutorial misconduct when she told the jury in closing that "the State does not have to prove every element beyond a reasonable doubt." Because the evidence is sufficient to permit the jury to reach the verdict that they did, and because there is no reasonable likelihood that the prosecutor's single, inadvertent misstatement had a significant effect on the jury's verdict, we affirm.

FACTS

On March 14, 2011, appellant Daniel Myers was charged with one count of felony malicious punishment of a child, A.H., in violation of Minn. Stat. § 609.377, subds. 1, 4 (2010). Following a one-day jury trial held July 27, 2011, appellant was convicted and sentenced.

A.H., born in April 2008, is the daughter of Kairina and Tyler. Following their divorce in 2009, Kairina and Tyler agreed that A.H. would be with one parent during the week for three months at a time, and during that time, she would stay with the other parent on the weekends. During the next three months, the arrangement would switch.

Tyler had A.H. during the week throughout October, November, and December 2010. At the time, A.H. was two years old. Tyler and his mother, Leann, were working on toilet-training the child. In November 2010, a doctor diagnosed A.H. with a bowel-obstruction condition and recommended she be given a child-strength laxative. Because A.H. was given the laxative on a daily basis, it was difficult for her to control her bowel movements and she had trouble avoiding accidents. Throughout January, February, and March, 2011, A.H. was scheduled to be with Kairina during the week. In January, when

A.H. went to stay with Kairina, Leann sent along a "lengthy note" explaining the laxative situation but was unsure whether Kairina continued the process.

It was Tyler's turn to have A.H. the weekend beginning Friday, February 25, 2011. Tyler picked up A.H. at Kairina's apartment sometime during the late afternoon that Friday and at the time observed nothing different about his daughter. A.H. walked to Tyler's car without falling and did not struggle when Tyler put her in her car seat. As previously arranged, Tyler drove to his parents' house with A.H. and arrived around 5:30 p.m. to drop her off for the weekend. Tyler testified that he did not spank A.H. while he was with her that day and that he had not spanked her at any other time because "[s]he does not need it."

Shortly after Tyler dropped off A.H., Leann took A.H. to the bathroom to prepare her for a bath, and it was at that time that Leann noticed marks and bruises on A.H.'s bottom. Leann testified that the marks were "not a handprint," but that they

> were quite red, raw-looking bruises, and they were vertical on her buttocks on both sides. . . . There was the red bruising. And then right next to it was a line, also vertical, and it was like broken skin, blood vessels, right under the skin. It was not bleeding on the outside, but you could tell it was right next to it, to that point of bleeding.

When Leann asked A.H. what happened to her bottom, A.H. responded "[o]wie" and "I naughty."

After discovering the bruises, Leann called and left a message with Cottonwood County Family Services (family services). She also took pictures of the marks and bruises on A.H.'s bottom that same day and on each of the next two days. At trial, Leann

testified that she had never spanked A.H. and that, between the time Tyler dropped off A.H. and the bath that Friday, A.H. did not fall or slip in any way that could have caused the bruises.

In response to Leann's call, a representative of family services, trained in identifying injuries inflicted on children, visited Leann's house on Monday, February 28. The bruises on A.H.'s bottom were still visible at that time, and the family services representative photographed the bruises after speaking with Leann.

The family services representative and a police officer also interviewed Kairina at her apartment. Kairina told them that she believed A.H.'s bruises were caused by her then-boyfriend, appellant, whom she said had been spanking A.H. once or twice a day with his hand on her bare bottom during the preceding Wednesday, Thursday, and Friday, February 23–25. Appellant had been living with Kairina in her apartment for eight months, until Saturday, February 26, when he had apparently moved out to live with his mother.

At trial, Kairina testified that (1) during the week of February 21, 2011, only she, A.H., and appellant were in her apartment and only she and appellant had cared for A.H.; (2) she had never spanked A.H. because A.H. bruised easily; (3) she had seen appellant spank A.H. multiple times on the bare bottom on the Wednesday, Thursday, and Friday leading up to the time the bruises were first discovered by Leann on Friday; (4) the spanks caused A.H. to "cry for a little bit"; (5) that appellant continued to spank A.H. even though she requested that he stop; (6) she had noticed a red mark on A.H.'s bottom on Friday after appellant had spanked her and before Tyler arrived to pick her up;

(7) although she had told the family services representative and the police officer that she did not think appellant had spanked A.H. hard enough to leave any marks, she now believed A.H.'s bruises were caused by appellant's spankings because A.H. was anemic and bruised easily; and, (8) she had not seen Tyler spank A.H. during the relevant time period.

The family services representative and the police officer also interviewed appellant at his mother's house. At trial, the family services representative and the officer testified that, during the interview with appellant, he stated that (1) he had begun spanking A.H. two or three months earlier as a part of his efforts to toilet-train her; (2) the spankings were not working to help A.H. learn to tell him when she needed to go to the bathroom; (3) spanking was a last resort, and when he did spank A.H., he would do so lightly and always over a diaper or other undergarment; (4) he spanked A.H. on Friday because she had a bowel-movement accident in her bed; (5) only he, Kairina, and A.H. were in the apartment that Friday; and (6) he had never seen Kairina spank A.H..

During trial, the family services representative testified that Kairina explained how she would sometimes get frustrated when A.H. would not stay on the training toilet, and that she would set or place her back on the toilet. Kairina testified, however, that she never used force when placing A.H. on the training toilet. The family services representative testified that, while it was a possibility the bruises were caused by setting A.H. down very firmly on a training-toilet seat, it was her opinion that the bruises were caused by the appellant's spankings "three days in a row," leading up to the discovery of the bruises.

Appellant did not call any witnesses and did not testify. After the state rested, appellant moved for a judgment of acquittal and argued that the state had failed to prove that he had caused the bruising. The motion was denied.

The prosecutor's closing included the following:

> The State must prove every element beyond a reasonable doubt. And I want to take a minute to talk about exactly what reasonable doubt means.
>
> As you will hear the Judge tell you, proof beyond a reasonable doubt is such proof as ordinary men and women would act upon in their most important affairs. . . . *I want to make clear to you that the State does not have to prove every element beyond a reasonable doubt.*
>
> You must go by what the Judge instructs you, but here is a practical example of the difference between all possibility of doubt and reasonable doubt.

(Emphasis added.) Appellant made no objection. The trial lasted for a total of five hours, and after one hour of deliberation, the jury issued their guilty verdict.

This appeal followed.

D E C I S I O N

I.

Sufficiency of the evidence

Appellant argues that trial evidence was insufficient to convict him because the state failed to meet its burden of proof when the evidence at trial established that he spanked A.H. with his hand and that she bruised easily because she is anemic.

When an appellant claims that his conviction is not supported by sufficient evidence, this court conducts a "painstaking analysis" of the record to determine whether the evidence, viewed in the light most favorable to the verdict, is sufficient to permit the

jury to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). 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, could reasonably conclude that the defendant was guilty as charged. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004). This court must assume that the jury disregarded as unreliable testimony and evidence tending to contradict the verdict reached. *See State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). "The weight and credibility of the testimony of individual witnesses is for the jury to determine." *Id*.

For a defendant to be found guilty of malicious punishment of a child, the state must prove that the defendant is a "parent, legal guardian, or caretaker who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances." Minn. Stat. § 609.377, subd. 1 (2010). "If the punishment is to a child under the age of four and causes bodily harm to the head, eyes, neck, or otherwise causes multiple bruises to the body," the charges and subsequent conviction can be enhanced to a felony. *Id*. at subd. 4. "Unreasonable force is such force used in the course of punishment as would appear to a reasonable person to be excessive under the circumstances." 10 *Minnesota Practice*, CRIMJIG 13.85 (2012). Corporal punishment is allowed in Minnesota, and a "parent, guardian, teacher, or other lawful custodian of a child" is not guilty of malicious punishment if he or she used "reasonable force" toward a child in circumstances where the actor reasonably believed he or she was restraining or correcting the child. Minn.

Stat. § 609.06, subd. 1(6) (2010); *see also* Minn. Stat. § 609.379, subd. 1(a) (2010); 10 *Minnesota Practice*, CRIMJIG 13.86 (2012).

Source of the bruising

At trial, appellant argued that the state failed to prove it was his spankings that caused the bruising; he asserted instead that the cause was A.H. being set firmly onto the training toilet. Appellant also claimed to only lightly spank A.H. once on the bottom when spanking her, implying that his spank could not have been the source of the bruises.

Testimony at trial established the following: (1) only Kairina and appellant were with A.H. in the days and hours leading up to the time Tyler picked her up on Friday; (2) no potentially injurious actions or activities, accidental or otherwise, occurred to A.H. between the time she was picked up at Kairina's and when the bruises were discovered by Leann in the bath; (3) Kairina never spanked A.H. and had not seen Tyler spank A.H. during the relevant time period; (4) Kairina had seen, and appellant had admitted, that he spanked A.H. multiple times on the bare bottom that Friday; and (5) Kairina noticed a red mark on A.H.'s bottom after appellant spanked her and before Tyler picked her up. The representative from family services, who was trained in identifying injuries to children, testified that she believed A.H.'s bruises were caused by a hand spanking. Kairina also believed that appellant's spankings caused the bruising.

The record contains sufficient evidence to support the jury's conclusion that appellant's spankings were the cause of the bruising. We may assume that the jury was not persuaded by appellant's arguments. *See State v. Franks*, 765 N.W.2d 68, 73 (Minn.

2009) (stating that "[o]ur precedent does not permit us to re-weigh the evidence" when reviewing a challenge to sufficiency of the evidence).

Unreasonable force or cruel discipline, excessive under the circumstances

In cases of malicious punishment of a child, all relevant circumstances must be analyzed when determining whether discipline was unreasonable or excessive. *See* Minn. Stat. § 609.377, subd. 1. This court has considered relevant circumstances to include the child's age, height, and weight; the seriousness of the child's "infraction"; the degree of force used by the parent; and the physical impact of the discipline. *See In re Welfare of Children of N.F.*, 735 N.W.2d 735, 738–39 (Minn. App. 2007), *aff'd in part, rev'd in part on other grounds*, 749 N.W.2d 802 (Minn. 2008). In *N.F.*, this court took such factors into consideration and concluded that the appellant, who had spanked his 195-pound, 13-year-old child with "moderate force" using a wooden paddle on the back of the thighs 36 times, had not acted in a manner consistent with malicious punishment of a child when the spanking was done in response to the child leaving the house without permission and then wielding a knife and threatening to commit suicide. *Id.* at 734–39.

Here, the record shows that A.H. was a small two-year-old girl who was spanked on her bare bottom by appellant's hand, thereby causing bruising visible days later, in response to a bowel-movement accident over which A.H. likely had little, if any, control due to the use of laxatives. Unlike in *N.F.*, here there is no evidence that A.H. intentionally engaged in the act that triggered the spankings. During the time of the spankings, A.H. was in the process of being toilet-trained and had a history of suffering from laxative-induced bowel-movement accidents. Appellant continued to spank A.H.

even though it made her cry, and he had been asked by A.H.'s mother to stop doing so. Appellant was the only caretaker who chose to address A.H.'s accidents with spankings.

This court generally upholds findings of unreasonable force and convictions for malicious punishment of a child where evidence at trial showed that a parent or caretaker inflicted spankings which caused resulting bruises or injury. Precedent and relevant statutes do not focus on *how* the injury to the child occurred—be it by instrumentality or by bare hand—but instead on *whether* the physical injury occurred at all. *See Johnson v. Smith*, 374 N.W.2d 371, 320 (Minn. App. 1985) (holding that occasional spankings on the bottom with a wooden spoon are insufficient to constitute danger or unreasonable force for child-custody modification where there was no evidence that the child had been hurt, physically or emotionally, and the child stated that he did not fear the parent), *review denied* (Minn. Nov. 18, 1985); *Murray v. Antell*, 361 N.W.2d 466, 470 (Minn. App. 1985) (holding that spanking a two-year-old with a strap or club on buttocks where bruises resulted constituted abusive use of "excessive force" for purposes of modification of custody). Considering all of the evidence presented, in particular evidence that appellant's spankings caused bruising on A.H.'s bottom, the jury's conclusion that appellant's spanks were excessive and cruel is reasonable and supported by sufficient evidence. "The law does not condone injury of children. . . ." *Johnson*, 374 N.W.2d at 321.

Appellant argues that A.H.'s bruises occurred not because his spankings were unreasonably forceful or excessive under the circumstances, but because A.H. is anemic and bruises easily. Appellant cites no authority in which anemia or a similar illness is a

defense to a malicious-punishment charge. There was very little testimony at trial regarding A.H.'s anemia, and none presented showing any connection between anemia and the propensity to bruise. Appellant presented no evidence showing that the bruises would not have appeared but for the anemia. Indeed, the fact that appellant knew A.H. bruised easily, yet spanked her anyway, arguably shows he did not care if his actions caused bruises, thus lending support to the conclusion that his spankings constituted excessive, unreasonable, and cruel force under the circumstances at the time.

Finally, appellant argues that his spankings are allowed under Minnesota's corporal-punishment law, which permits a caretaker to use *reasonable* force when *correcting* a child and that he therefore cannot be found guilty of malicious punishment. *See* Minn. Stat. §§ 609.06, subd. 1(6); .379, subd. 1(a); CRIMJIG 13.86. At appellant's trial, the jury was given the corporal-punishment instruction. The evidence, however, leads us to conclude that a reasonable jury could have reached the verdict that they did.

First, as discussed above, the evidence shows that appellant used *un*reasonable force. Second, appellant admitted that he knew that the spankings were not working and therefore essentially concedes that the spankings were not being used to "correct" A.H.'s behavior as the corporal-punishment statutes require, but instead were being used to punish the behavior. A.H.'s response of "I naughty" to Leann's inquiry regarding why her bottom was bruised supports a conclusion that appellant's intent was to punish, not correct. Finally, although appellant told the family services representative and the police officer that he had been trying to use the spankings as a way to toilet train A.H., he presented no evidence that spankings are an effective toilet-training tool.

II.

Prosecutorial misconduct

Appellant argues that the prosecutor's unobjected-to statement during closing that "I want to make clear to you that the State does not have to prove every element beyond a reasonable doubt" was misconduct warranting a new trial.

On appeal, this court can review an unobjected-to error only if the error constitutes "plain error" affecting substantial rights. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006); *see also* Minn. R. Crim. P. 31.02. "An error is plain if it was 'clear' or 'obvious.'" *Ramey*, 721 N.W.2d at 302. Clear or obvious errors are typically those that contravene caselaw, a rule, or a standard of conduct. *Id.* When an appellant demonstrates that the prosecutor's conduct constituted an error that is plain, the burden then shifts to the state to demonstrate that there was no prejudice in that the misconduct did not affect substantial rights. *Id.* The state must 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.* (quotation omitted).

Appellant here shifts the burden to the state by showing that a prosecutor's misstatement of the burden of proof is "off-limits conduct" constituting prosecutorial misconduct and was therefore plain error. *See id.* at 301; *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985) (holding that "misstatements of the burden of proof are highly improper and constitute prosecutorial misconduct"). Because appellant met his burden of showing plain error, the state must show that there is no reasonable likelihood that the plain error affected appellant's substantial rights. *See Ramey*, 721 N.W.2d at 300.

When determining whether substantial rights were affected, reviewing courts consider various factors such as the strength of the evidence, the improper remarks in the context of the entire summation and the entire trial, and whether other errors occurred during trial. *State v. Caldwell*, 322 N.W.2d 574, 590 n.16 (Minn. 1982). When a prosecutor's improper comments are unintentional, the question for a reviewing court becomes "whether the statements likely played a substantial role in influencing the jury's decision." *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988). Misstatements are seen as less prejudicial where the judge has taken proper corrective action and more prejudicial where the erroneous remarks are lengthy or repeated. *Caldwell*, 322 N.W.2d at 590 n.16. While jurors are presumed to follow the court's instructions, caselaw recognizes that they may not do so in all situations. *See State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005) (noting presumption that the jury follows the court's instructions, but also that if the prosecutor's remarks "impart substantial prejudicial evidence into the case," the effect of the error may not be removed by instructions).

The state argues that the prosecutor's statement was a brief, inadvertent misstatement affecting no substantial rights because the trial court fully and correctly: (1) instructed the jury on all relevant matters including the elements of the charge, presumption of innocence, and state's burden to prove appellant guilty; (2) defined the meaning of proof beyond a reasonable doubt; and (3) instructed the jury that it should rely on the court's, not the attorneys', statements of the law. We agree.

The context of the statement within the prosecution's closing argument indicates that it was inadvertently made. The statement was one sentence within the entire closing

statement and was not repeated. The prosecution began its closing by stating that "[t]he State must prove every element beyond a reasonable doubt." It was five sentences later, during an explanation of "reasonable doubt," that the prosecution made the misstatement, which was followed immediately by "[y]ou must go by what the Judge instructs you." As the closing proceeded, the prosecution stated that the elements of the crime were something "*we* have to prove," that the jury should find appellant guilty "[i]f at the end you find that *the state* has proven all of these elements," and stated twice that "*the State* has proven" all of the necessary elements. (Emphasis added.) Appellant's trial counsel's own closing, which followed immediately after the prosecutor's closing, began by twice stating that the state has the burden of proof.

Furthermore, the trial judge informed and reminded the jury the state had the burden of proof twice during voir dire and three times during jury instructions following closing arguments. The judge told the jury that he, not the attorneys, would instruct them on the law once before trial and twice after closing arguments. Here, because the judge's instructions were repeated before and after argument, and because the instructions were likely to be fresh in the juror's minds as it was only six hours between opening statements and the verdict, the presumption that the jury followed the judge's instructions seems to reasonably apply.

Overall, the record supports our conclusion that the prosecutor's one-time misstatement of the burden of proof did not significantly affect the jury's verdict. "A closing argument must be proper, not perfect." *State v. Atkins*, 543 N.W.2d 642, 648

(Minn. 1996). The state met its burden of showing that the plain error did not affect appellant's substantial rights, and a remand for a new trial is not warranted.

Affirmed.