STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1459

State of Minnesota,
Respondent,

vs.

Quenton Tyrone Williams,
Appellant.

Filed August 28, 2017
Reversed and remanded
Smith, John, Judge[*]

Anoka County District Court
File No. 02-CR-15-6221

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Smith, John, 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

SMITH, JOHN, Judge

We reverse Quenton Williams's criminal-sexual-conduct conviction and remand for a new trial because the district court committed plain error affecting Williams's substantial rights by admitting unnoticed expert testimony and impermissible vouching testimony.

FACTS

The state charged Williams with third-degree criminal sexual conduct in violation of Minn. Stat. § 609.322, subd. 1(c) (2014) (force or coercion) after the alleged victim, Z.H., reported to a jail nurse that Williams sexually assaulted him in September 2015. The district court conducted a jury trial in February 2016, where the jury heard the following evidence:

Victim Z.H.'s Testimony

Z.H. was arrested for driving while impaired on September 19, 2015, then booked at the Anoka County jail. Z.H. was placed in a cell that Williams already occupied. Z.H. went directly into his bed, feeling afraid because he had never been to jail before. Williams told Z.H. that he got an erection looking at Z.H., then showed Z.H. his erection through his jumpsuit. Williams began to write and pass notes to Z.H., eventually asking Z.H. if he was gay. Z.H. responded that he was gay. Williams asked Z.H. if he "liked to suck dick." During a subsequent lockdown, Williams grabbed Z.H.'s buttocks and "show[ed] himself" to Z.H. while washing himself in the sink. Williams told Z.H. to watch him wash himself, and Z.H. complied because he was "starting to get kind of scared at this point."

The next morning, Williams told Z.H. to open their cell door following an announcement. Z.H. initially refused but eventually opened the door. Z.H. noticed Williams's voice sounded "a little more aggressive," and Williams told Z.H. that it "pissed him off" when people did not do as he said. Z.H. also delivered his breakfast and lunch to Williams after Williams ordered Z.H., "[I]f you're not going to have it give it to me." Williams "kept getting aggressive" and "verbally he just kept asking [Z.H.] to do these things for him." Z.H. also showered at Williams's request "just to make sure that [Williams] would just stop because I didn't want to talk about [it] anymore."

Williams passed notes to Z.H. that "asked or told" Z.H. to perform fellatio on Williams. Z.H. felt nervous and "afraid that [he] would get yelled at." Z.H. felt hopeless and scared. During a lockdown later that night, Williams told Z.H. to "get down and suck his dick." Z.H. did not want to perform fellatio, but he did anyway. Williams ejaculated into Z.H.'s mouth. Z.H. went to the sink, spat the ejaculate out, then cleaned his mouth with water.

Z.H. did not yell for help because he "didn't think that [the] guards could do anything." He also feared the possibility that he might be "jumped" for snitching. Z.H. claimed that he performed the sex act "out of fear."

On cross-examination, Z.H. said he came into jail with a certain amount of fear. Z.H. also admitted that in one of the notes he told Williams, "All I'm going to do tonight is suck your dick." He believed that he was not compelled to engage in any other penetration, and that he "thought that if [he] could offer [Williams] something else that [Williams] would want that instead of anything else."

Karine Zakroczymski's Testimony

Karine Zakroczymski, a registered nurse and the forensic-nurse program manager at Unity Hospital, testified that she received a Bachelor of Science degree in nursing, completed a 40-hour sexual-assault-examination course, with a clinical component, learned to use equipment, learned certain procedures involved with sexual-assault examinations, worked for several years in a sexual-assault resource center, and had performed hundreds of sexual-assault examinations.

Zakroczymski testified generally about the psychological impact of sexual assault, the power dynamics often involved in sexual assaults, and typical reactions. She met with Z.H. on September 21, 2015. Z.H. told Zakroczymski about his interactions with Williams and the alleged sexual assault. Z.H. requested that Zakroczymski perform an evidentiary exam on him. She examined his mouth, throat, head, face, nose, and ears, and she swabbed his mouth, remarking that it is "highly unlikely that you're going to find sperm in the oral cavity 24 hours after the fact."

The prosecutor elicited testimony from Zakroczymski in which she indicated the examination gave her no reason to doubt Z.H.'s allegations. Zakroczymski also observed, "I think that the fear [Z.H.] had about going back into that . . . cell and the possibility of being assaulted again, I think that fear was -- it came across as very real to me."

Williams's counsel cross-examined Zakroczymski as follows:

> Q: In the cases where you've testified, none of those cases involved you making a report that demonstrated that sexual assault was unlikely to have occurred?
> A: You -- I don't determine whether a sexual assault occurred or not. I mean . . . that's not within my realm,

you know. What I do is . . . a medical examination of the patient and I collect evidence . . . . [B]ut I don't diagnose whether a sexual assault occurred or not. . . . [T]hat's a criminal determination, not a medical determination.

Q: Okay. That -- that's fair. I guess my follow-up is that you -- you did testify that you believed a sexual assault occurred in this case?
A: I testified that I believed what the patient was telling me.
. . . .
Q: So you don't undergo any questioning specifically aimed at identifying . . . any false statements?
A: No. That's not my role.

Q: Your job is to believe the person that you're talking to and treat them?
A: Like any other patient, correct.

Q: And so when you say you thought his fear was real that's because he told you that his fear was real?
A: Um, because he told me that his fear was real, because of the way that he told me, his demeanor at the time that he told me, um, year. I mean . . . it came across as real to me. That's all I can tell you.

Other Testimony

Nurse Mary Fletcher testified that Z.H. reported his interactions with Williams during an unrelated medical examination. Sheriff's Deputy Jessica Slavik processed Williams's and Z.H.'s jail cell, photographing and examining the cell with an alternative light source for semen residue, and swabbing areas of the cell. She did not find any incriminating biological evidence. Forensic Scientist Anne Ciecko tested several items from Williams's and Z.H.'s cell for semen, but none of them tested positive. Detective Patrick Nelson recounted how Z.H. initially reported the incident and addressed potential discrepancies between Z.H.'s testimony and his initial reporting. Detective Ryan Franklin

testified about processing the jail cell and Z.H.'s reporting. He also claimed there was no evidence against Williams except for Z.H.'s statements.

Verdict

After a morning of deliberation, the jury indicated it could not reach a decision. Later that afternoon, it again indicated its inability to reach a verdict. But by the end of the afternoon, the jury resolved its deadlock, and found Williams guilty of third-degree criminal sexual conduct. The district court sentenced Williams to 81 months in prison. Williams appeals.

D E C I S I O N

Williams asks us to reverse his conviction and remand for a new trial because the district court permitted: (I) unnoticed and unqualified expert testimony, and (II) impermissible vouching testimony. We briefly address and reject (III) Williams's pro se argument challenging the sufficiency of the evidence. We reverse and remand for a new trial because the admission of unnoticed expert testimony and impermissible vouching testimony constituted plain error affecting Williams's substantial rights. Because we reverse and remand, we decline to address Williams's argument that the district court abused its discretion by denying his jail-call discovery motion, along with his remaining pro se arguments.

I

Williams argues that we should reverse his conviction and remand for a new trial because Zakroczymski testified as an unnoticed and unqualified expert witness. We generally review evidentiary rulings, including those relating to expert testimony, for an

abuse of discretion. *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016); *see also State v. Moore*, 458 N.W.2d 90, 96 (Minn. 1990) (sufficiency of expert qualifications generally rests in district court's sound discretion). Williams did not object to Zakroczymski's qualification as an expert or her unnoticed testimony at trial. We may "correct forfeited errors not timely raised in district court when there is a plain error affecting a substantial right." *State v. Lilienthal*, 885 N.W.2d 780, 785 (Minn. 2017) (quotation omitted). Under the plain-error doctrine, Williams must prove (1) an error; (2) that was plain; and (3) that affected his substantial rights. *Id.*; *see also State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Even if Williams establishes these three prongs, we will correct the plain error "only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Washington-Davis*, 881 N.W.2d 531, 541 (Minn. 2016) (quotations omitted).

Williams argues that the admission of *unnoticed* expert testimony was plain error affecting his substantial rights. Williams contends that the state violated its discovery obligations by failing to provide the appropriate rule-mandated expert-witness discovery. Whether a discovery violation occurred is a question of law we review de novo. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). The state concedes that it did not comply with Minn. R. Crim. P. 9.01, subd. 1(4)(c), which provides,

> A person who will testify as an expert but who created no results or reports in connection with the case must provide to the prosecutor for disclosure to the defense a written summary of the subject matter of the expert's testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert's qualifications.

Admitting Zakroczymski's unnoticed expert testimony is an error that plainly violates the applicable rule. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Despite the plain error, the state urges us to affirm because Williams "has not made a showing that he was prejudiced." "An error affects substantial rights if there is a reasonable likelihood that it substantially affects the verdict." *State v. Robertson*, 884 N.W.2d 864, 876 (Minn. 2016).

The state argues that "Williams makes no argument as to how the lack of notice hindered his ability to mount a defense." And it stresses that Williams's counsel cross-examined Zakroczymski. But Williams counters that the "decision whether to convict or acquit Williams came down to the credibility of Z.H," given the lack of supporting evidence. And Williams claims that the "potential for Zakroczymski's testimony influencing the jury verdict was enhanced by the manner in which the prosecutor, in her closing argument, emphasized Zakroczymski's experience and training with sexual assaults." He argues that Zakroczymski's testimony had a significant impact by helping the jury break its deadlock and by impeding his ability to prepare an adequate defense.

We agree with Williams that there is a reasonable likelihood that Zakroczymski's testimony substantially affected the verdict. The central issue was whether Z.H. was truthful in his allegation. Zakroczymski testified as an expert on the *general* reactions and power dynamics involved in sexual assaults, but also testified to her *specific* observations of Z.H., remarking on the apparent sincerity of Z.H.'s fear. We are unconvinced by the state's argument that Williams mitigated the impact by cross-examining Zakroczymski about her qualifications and opinions. Having failed to object to the discovery violation,

Williams's counsel was left to proceed through cross-examination on the spot. As Williams emphasizes, the discovery rules are intended to allow parties to prepare properly for trial, and to minimize the possibility of surprise. *See State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998); *State v. Freeman*, 531 N.W.2d 190, 198 (Minn. 1995). The state's eliciting Zakroczymski's testimony after the discovery violation circumvented these purposes. The supreme court has also observed that the ability to prepare a defense is, in itself, a substantial right. *See State v. Gisege*, 561 N.W.2d 152, 159 (Minn. 1997). And where the state's discovery violation *deprived* Williams of this substantial right with regard to expert testimony, it would be illogical to conclude that the violation did not affect a substantial right.

We briefly address Williams's expert-qualification argument. Williams and the state apparently agree that Zakroczymski's testimony about typical behaviors of sexual-assault victims and offenders was expert testimony. *See* Minn. R. Evid. 702. But Williams argues that nothing in Zakroczymski's training or experiences rendered her qualified "to testify as an expert on the types of reactions victims have to trauma in general and to sexual assault in particular, along with archetypal characteristics and motivation of perpetrators of sexual violence." He contends that Zakroczymski's lack of expert qualifications is plainly erroneous. "An error is plain if it was 'clear' or 'obvious.' Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302 (quotation omitted). Courts tend to take "a liberal approach to the question of an expert's qualifications by virtue of experience," *Moore*, 458 N.W.2d at 96, and the state argues that Zakroczymski's "education, training, and extensive experience working with

sexual assault victims" qualified her to testify about reactions and behaviors of victims and perpetrators. Any error arising from a defect in Zakroczymski's expert qualifications was not *plain* error. We therefore need not consider the remaining prongs of our plain-error review on this basis.

Having determined that a plain error affected Williams's substantial rights, we conclude that reversal is necessary to protect the fairness, integrity, or reputation of the judicial proceedings. *See Washington-Davis*, 881 N.W.2d at 541. The fourth prong is satisfied when a "miscarriage of justice would otherwise result," *see State v. Huber*, 877 N.W.2d 519, 528 (Minn. 2016) (citation omitted), and a new trial would protect the fairness of the proceedings as embodied in the rules. We therefore reverse and remand for a new trial on this ground.

II

Williams argues that the prosecutor improperly elicited vouching testimony during the following examination of Zakroczymski:

> Q: Did the exam and the results of the exam give you any reason to doubt what [Z.H.] was telling you had happened?
>
> A: No, because more frequently than not we don't see injury . . . with sexual assaults regardless . . . of the type of assault it was.
>
> . . . .
>
> Q: Were there any other observations that you made from this case of [Z.H.] that caused you to have an opinion as to whether or not the assault happened?
>
> A: I think his fear was real. I mean, that was -- I mean, you know, I don't know that for a fact. Um, but I think that the fear he had about going back into that . . . cell and the possibility of being assaulted again, I think that fear was -- it came across as very real to me.

Williams requests reversal and remand because the district court failed to disallow Zakroczymski from giving this impermissible vouching testimony. Williams did not object to the alleged vouching testimony, so we again review Williams's argument under the plain-error standard. *See Washington-Davis*, 881 N.W.2d at 541.

A. *Plain Error*

The parties dispute whether Zakroczymski's testimony plainly constituted impermissible vouching testimony. An error is "plain" if it contravenes case law, a rule, or a standard of conduct. *Ramey*, 721 N.W.2d at 302. One witness cannot vouch for or against the credibility of another witness. *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). The supreme court has said, "As a general rule . . . we would reject expert opinion testimony regarding the truth or falsity of a witness'[s] allegations about a crime, for the expert's status may lend an unwarranted stamp of scientific legitimacy to the allegations." *State v. Myers*, 359 N.W.2d 604, 611 (Minn. 1984) (quotation omitted). The supreme court has also ruled that testimony describing a sexual-assault victim's allegation as "sincere" was error. *State v. Maurer*, 491 N.W.2d 661, 662 (Minn. 1992).

Williams argues that the challenged testimony vouched for Z.H.'s credibility because Zakroczymski said she had no reason to doubt Z.H. But the state contends Zakroczymski said she did not know "for a fact" whether the assault happened, and that the testimony instead centered on her observations of Z.H.'s behavior and demeanor. The state emphasizes that the vouching testimony was not "plain" because the testimony could

be construed as consistent with findings of a lack of physical injury, observations of Z.H.'s fear, and that fear's consistency with the typical behaviors of a sexual-assault victim.

The challenged testimony was presented in the context of explaining why physical evidence was not obtained, but the state's characterization is too limited. The prosecutor's question clearly asked whether Zakroczymski's examination gave her "any reason to doubt what [Z.H.] was telling" her. And the prosecutor followed up by asking Zakroczymski whether any observations she made had "caused [her] to have an opinion as to whether or not the assault happened." Zakroczymski's response was an assertion that Z.H.'s "fear was real," and that his fear of possibly "being assaulted *again* . . . came across as very real." (Emphasis added.) These statements implicated Z.H.'s believability. And though we acknowledge that Zakroczymski's testimony did not amount to an affirmative endorsement of Z.H.'s credibility (e.g., "I believe he was truthful."), the effect of remarking on the absence of cause for disbelief was substantially similar (e.g., "I have no reason to believe he was untruthful"). The testimony vouched for Z.H.

But as Williams apparently recognizes, our plain-error inquiry addressing the district court's action should be concerned with whether the district court's *failure to act* was plain error. *See State v. Taylor*, 869 N.W.2d 1, 18 (Minn. 2015) (failure to offer sua sponte instruction in the absence of a request was not plain error). Williams argues that the district court had a duty to intervene. We note that the supreme court has expressed some concern with requiring district courts to affirmatively intrude into the proceedings absent an objection. *See, e.g.*, *State v. Washington*, 693 N.W.2d 195, 205 (Minn. 2005) (disagreeing with the proposition that the district court must or should interfere with

potential trial strategies by acting sua sponte because it would risk highlighting or enforcing rights the defendant chose to waive); *State v. Manthey*, 711 N.W.2d 498, 505 (Minn. 2006) (noting that courts are not advised to make such affirmative intrusions into proceedings and concluding that plain error did not occur).

This scenario implicates two countervailing concerns: the district court's interest in ensuring the jury's role as the sole determiner of credibility, and the recognition that affirmative intrusions are generally disfavored. But the district court intervened to preclude improper testimony at another point in Williams's trial when the prosecutor posed the question, "Was he lying when he said -- if he said on the stand --[?]" Any concern about the district court's affirmative intrusion is mitigated by the fact that the district court chose to intervene and preclude apparent vouching testimony on another occasion. We conclude that, under these circumstances, the admission of Zakroczymski's vouching testimony in the absence of some curative measure was plainly erroneous.

B. *Effect on Substantial Rights*

Williams argues that the district court's failure to intervene was "particularly damaging to Williams because this entire case came down to deciding whether Z.H. was telling the truth." Emphasizing the jury's initial deadlock, Williams argues that Zakroczymski's opinion was "particularly persuasive given that she was presented . . . as an expert who had investigated hundreds of sexual assault cases." The state argues that the challenged testimony was isolated to two questions, subjected to challenge during cross-examination, and not highlighted during closing. But more importantly, the state

claims, Z.H. testified at length and was cross-examined, which allowed the jury to assess Z.H.'s credibility directly.

Though the challenged testimony was comparatively limited, Williams's argument concerning the deadlocked jury is persuasive given that the case turned on Z.H.'s truthfulness. Zakroczymski's testimony that she had no reason to doubt Z.H.'s story and that his fear of "being assaulted again" appeared genuine likely affected the jury's determination of whether Z.H. was truthful. There is a reasonable probability that the vouching testimony significantly affected the verdict.

C. *Necessity of Reversal and Remand*

Williams does not directly address the question of whether reversal and remand is necessary to protect the fairness and integrity of judicial proceedings, but the argument is implicit in his allegation that he was deprived of his right to a fair trial. We are satisfied that reversal and remand is appropriate to protect the fairness and integrity of judicial proceedings where the vouching error compounded the problem of unnoticed expert testimony from the same witness. Because we reverse and remand on the discovery and vouching issues, we need not address Williams's argument that the district court abused its discretion when it denied his jail-call discovery motion, or several of his pro se arguments.

III

Williams makes several arguments generally challenging the sufficiency of the evidence. "When reviewing the sufficiency of the evidence leading to a conviction, we view the evidence in the light most favorable to the verdict and assume that the factfinder disbelieved any testimony conflicting with that verdict." *State v. Hayes*, 831 N.W.2d 546,

552 (Minn. 2013) (quotation omitted). We will not overturn a conviction if the jury, "giving due regard to the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt," could have reasonably found the defendant guilty. *Id.* (quotation omitted). Where the evidence is insufficient to support a conviction, the conviction is simply vacated *without* remanding for a new trial. *See State v. Brown*, 732 N.W.2d 625, 629 (Minn. 2007). We have carefully reviewed the record and Williams's arguments concerning the sufficiency of the evidence, and conclude that they are without merit. Reversal with remand for a new trial is the appropriate remedy.

Reversed and remanded.