STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1803
A16-1804

State of Minnesota,
Respondent,

vs.

Karyl Antone Ingalls,
Appellant.

Filed November 20, 2017
Affirmed in part, reversed in part, and remanded
Reilly, Judge

Olmsted County District Court
File Nos. 55-CR-12-6879, 55-CR-12-6877

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

Mark A. Ostrem, Olmsted County Attorney, A. Michael Debolt, Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Reilly, Judge; and Reyes, Judge.

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

REILLY, Judge

On appeal from separate convictions of first-degree criminal sexual conduct, appellant Karyl Antone Ingalls argues that (1) the district court erred by admitting the victims' out-of-court statements; (2) he is entitled to a new trial because the prosecutor committed prejudicial misconduct during closing arguments; and (3) the district court erred by imposing lifetime conditional release for one of the convictions. We affirm appellant's convictions. However, because the district court erred by imposing lifetime conditional release for one of appellant's convictions when the guilty verdicts were accepted by the district court simultaneously, we reverse and remand for resentencing.

FACTS

Appellant challenges two first-degree criminal-sexual-conduct convictions for sex crimes committed against his step-granddaughters, Child 1 and Child 2, both of whom were under the age of ten at the time of the offenses. The children visited their paternal grandmother and her husband, appellant, on Monday afternoons. In February 2012, the children told their maternal grandmother, H.M., that appellant touched them inappropriately when they were in his care. H.M. reported the allegations to the police, and Rochester Police Officer Anne Johnson investigated the case and conducted a forensic CornerHouse interview with each child. Following its investigation, the state charged appellant by amended complaint with first-degree criminal sexual conduct—sexual penetration against each child, second-degree criminal sexual conduct—victim under the

age of 13 against each child, and second-degree criminal sexual conduct—significant relationship against each child.

The two cases were tried together during a five-day jury trial in May 2016. Both children testified at trial. Child 1 testified that appellant "used to touch us up here in the chest part, and it didn't feel right," and that appellant touched her "[d]own here a little," on her vagina. Child 1 testified that appellant "like[d] to put his hand down there sometimes," that it happened "[e]very day," and that it "felt weird . . . like something cold was going down there." She stated that he sometimes "put his hand through" her underwear and "put his hand in them all the way." The child said she felt "[r]eally scared" when appellant touched her vagina, and he told her "[n]ever tell anybody about this." Child 1 saw appellant touch Child 2 on "[t]he chest and the vagina," and said it "didn't look right," and he was "doing the same stuff [to Child 2] as he did to me." Child 2 testified that appellant touched her on "[t]he butt," underneath her underpants, and that his fingers went in between her butt cheeks and it "felt really cold." She testified that she "really hated that . . . [b]ecause it did not feel good."

Cynthia Jo Tri, a therapist specializing in trauma and working with children, testified that she worked with the children more than 20 times between 2012 and the time of trial, and testified about her therapy sessions with the children.

Appellant testified in his own defense. He denied touching the children sexually, and stated that he had back problems and breathing problems that prevented him from engaging in strenuous activity. Appellant called a number of witnesses to testify on his

behalf, including the children's father and former stepmother, appellant's daughter-in-law, the children's paternal grandmother, a family friend, and a psychologist.

The jury returned a verdict finding appellant guilty of all charges. At sentencing, the district court adjudicated appellant guilty of the first-degree criminal sexual conduct offenses and sentenced him to concurrent sentences of 144 months in prison and ten years of conditional release for the crime against Child 2, and 180 months in prison and lifetime conditional release for the crime against Child 1. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by admitting the children's out-of-court statements.

We apply an abuse-of-discretion standard of review to a district court's evidentiary ruling. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "A [district] court abuses its discretion when it acts arbitrarily, without justification, or in contravention of the law." *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). Appellant bears "the burden of establishing that the [district] court abused its discretion and that [the] appellant was thereby prejudiced." *Amos*, 658 N.W.2d at 203.

The district court admitted certain of the victims' out-of-court statements under Minnesota Statutes section 595.02 (2016), a statutory exception to the hearsay rule that allows into evidence certain out-of-court statements made by children under age ten in sex-abuse cases.[1] The statute provides:

> An out-of-court statement made by a child under the age of ten years . . . alleging, explaining, denying, or describing any act

[1] Child 1 was over the age of ten at the time of trial.

> of sexual contact or penetration performed with or on the child . . . not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:
>
> (a) the court or person authorized to receive evidence finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and
>
> (b) the child . . . either:
>
> (i) testifies at the proceedings; or
>
> (ii) is unavailable as a witness and there is corroborative evidence of the act; and
>
> (c) the proponent of the statement notifies the adverse party. . . .

Id., subd. 3.

We consider the "totality of the circumstances" surrounding the statement when assessing the reliability of a child's out-of-court statements. *State v. Sime*, 669 N.W.2d 922, 927 (Minn. App. 2003). A totality-of-the-circumstances analysis requires us to consider time, content, the circumstances of the statement, and the reliability of the person to whom the statements were made. Minn. Stat. § 595.02, subd. 3. Additional relevant circumstances include "spontaneity, consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate." *In re Welfare of L.E.P.*, 594 N.W.2d 163, 170 (Minn. 1999). The district court also considers the declarant's knowledge, the motives of the declarant and the witnesses to speak truthfully, the proximity in time between the statement and the events described, whether the person speaking with the child had a preconceived idea of what the child would say,

and the lack of leading or suggestive questions. *Id*. A district court has "considerable leeway in their consideration of appropriate factors as long as the factors considered relate to whether the child was particularly likely to be truthful." *Id*. (quotation omitted).

Children's Grandmother, H.M.

The children told H.M. about a "good touch, bad touch" unit at school. H.M. asked if anyone had touched them inappropriately, and Child 1 responded that appellant touched both girls inappropriately. Child 1 told H.M. that when their paternal grandmother was out of the house, appellant "had taken their pants down" and "rubbed them down there." Child 2 stated that "Grandpa Karyl made me suck on his penis." The girls told H.M. that the abuse happened almost every Monday. The children told H.M. that appellant "would rub them down in the groin area in their bottom," that he "would put his finger into their bottom," and that Child 2 "said it was cold, it hurt, and they asked him not to do that." H.M. testified that "the girls talked about how they had asked him to stop and how they had felt uncomfortable."

Before trial, the district court considered the admissibility of the children's out-of-court statements to H.M., recognizing that:

> The Court needs to look at time, content, [and] circumstances, to determine the reliability of the person to whom those statements are made. There was the initial report, details surrounding that, as well as the actions the grandmother took or who she called. She was a trusted caretaker of the children. . . . And the children talked about their allegations with that trusted caretaker and about the timing of the Defendant to be alone with the girls, apparently on Mondays when he took care of them. I find that with the totality of the circumstances, it's more probative than prejudicial, and there is reliability of the statements.

The district court considered each of the statutory factors identified in Minnesota Statutes section 595.02 and determined that the out-of-court statements to H.M. were reliable. The evidentiary record supports these findings. Each of the victims testified at trial that appellant touched her vagina. H.M. reported the allegations to the police, and the victims gave similar accounts to Officer Johnson and to their therapist.

Appellant argues that the children's statements to H.M. were not spontaneous because H.M. prompted the discussion and asked for detailed information. But the record shows that the discussion arose because of a lesson at school, and not because H.M. prompted the discussion. Appellant also argues that H.M. was unreliable because she lacked training or experience in child sex-abuse cases. The district court rejected these arguments and, given the broad discretion granted to district courts in evidentiary matters, we determine that the court's ruling did not constitute an abuse of discretion.

Officer Anne Johnson

The district court considered the admissibility of the children's out-of-court statements to Officer Johnson during the CornerHouse interviews. The district court reviewed the interviews and analyzed the officer's proposed testimony in light of the statutory factors and relevant caselaw. The district court found that the officer "did a good job" during the interviews. The district court determined, based upon its review of the evidence and controlling law, that under "the totality of the circumstances the statements had particular guarantees of trustworthiness for admission."

The officer testified regarding her training, her experience with child sex-abuse victims, and her expertise with forensic interview techniques. The officer testified about

her interviews with the children and stated that both children used hand-drawn diagrams and anatomically correct dolls to demonstrate where appellant touched them. Child 1 "spilled out the whole abuse" and told the officer that "she had been touched by grandpa," "pointed on the diagram to her [chest] area and vagina area," and "tried to take her own hand and rub it on her chest area to show [the officer] what had happened." Child 1 told the officer that appellant put his hands on her "bagina," and "said that it went inside and that it hurt." Child 2 "immediately went into talking about getting touches from grandpa that she didn't like." Child 2 "talked about getting touches down her pants under her clothing with [appellant's] hand's skin on her skin." She said that appellant's hands went "inside" of her, and it "felt cold when she was touched on her butt." The district court found these statements reliable and the evidentiary record supports this determination. The totality of the circumstances surrounding the children's statements support the district court's reliability determination, and we determine that the district court's evidentiary ruling was not an abuse of discretion.

Therapist Cynthia Tri

Appellant argues that the children's out-of-court statements to their therapist were unreliable, inconsistent, and not spontaneous. The district court found that the statements were "not forensic," and that Tri would not express any opinions. The district court found that the play-therapy sessions were "nondirective dealing with trauma," where "[t]he children direct the play." Thus,

> with that totality of circumstances, the observation of the notes, the spontaneity of the children, the purpose is not to uncover abuse. I find that it's relevant and probative, more probative

> than prejudicial, and renders the declarant worthy of belief. But again, it's up to the jury to decide if it's believable and enough evidence for proof beyond a reasonable doubt.

The evidentiary record supports the district court's reliability determination. Tri testified that she specializes in trauma and working with children, and had provided therapeutic services to the children more than 20 times between 2012 and the trial. Tri engaged in play therapy with Child 2 and more traditional talk therapy with Child 1. During these therapy sessions, Child 2 said that appellant "hurt her," "made [her] suck his pee pee," and that she was afraid of him and had nightmares. Child 2 said she was afraid of appellant because he was a "bad man," and she was worried he "might sit on top of her sister . . . again." During another play-therapy session, Child 2 was playing with a "Grandpa Karyl" doll and a child doll, and the child doll yelled at the Karyl doll "I don't want to marry you and have to kiss you. You're a very bad man." Child 1 told Tri that appellant made her "sit on her hands and knees and he would get on top of her from behind," and rub his penis "on the middle of her back and on her buttocks." The child "knew he took his penis out [because] she heard him unzip his zipper and she could feel it." Based on this record, we hold that the district court did not abuse its discretion in determining that the therapist's testimony regarding the children's out-of-court statements were reliable under the totality of the circumstances.

II. Appellant is not entitled to a new trial on the basis of prosecutorial misconduct because any wrongfully admitted evidence did not significantly affect the verdict.

The right to due process of law includes the right to a fair trial, and the right to a fair trial includes the absence of prosecutorial misconduct. *See Spann v. State*, 704 N.W.2d

486, 493-94 (Minn. 2005). "A prosecutor engages in prosecutorial misconduct when he violates 'clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law.'" *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quoting *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007)). When assessing whether prosecutorial misconduct occurred during closing argument, "we look to the closing argument as a whole, rather than to selected phrases and remarks." *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004). The district court has broad discretion to determine the propriety of a prosecutor's statements during closing argument. *McCray*, 753 N.W.2d 751-52.

The standard of review varies based on whether an objection was raised at the time of the alleged error. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). When reviewing claims involving objected-to prosecutorial misconduct, we apply a two-tiered approach determined by the severity of the misconduct. *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974). Under this approach, if a claim involves unusually serious prosecutorial misconduct, we review the conduct to determine whether it was harmless beyond a reasonable doubt. *Id.* at 127, 218 N.W.2d at 200. We review claims regarding less-serious misconduct to determine whether the conduct "likely played a substantial part in influencing the jury to convict." *Id.* at 128, 218 N.W.2d at 200-01; *see also State v. Wren*, 738 N.W.2d 378, 390 n.9 (Minn. 2007). It is unclear whether this two-tiered standard still applies. *See State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (concluding that because "the one instance of objected-to prosecutorial misconduct here is

harmless even under the standard for more serious misconduct, we do not reach the issue of the continued applicability of the *Caron* test to objected-to prosecutorial misconduct").

a. The prosecutor committed misconduct during closing argument.

i. Arguing facts not in evidence; inflaming passions of jury; vouching

A prosecutor may not make arguments that are unsupported by the evidence or that are designed to inflame the jury's passions or prejudices against the defendant. *State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). Prosecutors may present "legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom," *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996), but it is "unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw." *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009) (citation omitted). Additionally, "[t]he assessment of a witness's credibility is exclusively the province of the jury." *State v. McCray*, 753 N.W.2d at 754 (quotation omitted). It is improper for the state to "express[] a personal opinion as to a witness's credibility." *State v. Jackson*, 773 N.W.2d 111, 123 (Minn. 2009). Vouching occurs "when the government implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted).

During closing, the defense challenged the credibility of the children, arguing that their "minds are like a crime scene that's been trampled over again and again" and that their "memories are fallible." On rebuttal, the prosecutor made comments related to an

individual's ability to remember the events of September 11, 2001 and to a war veteran's combat experience. The prosecutor argued: "[Y]ou probably remember with vivid detail just precisely where you were on September 11, [2001], when the planes crashed into the Twin Towers in New York and they collapsed." The prosecutor continued: "Thousands of [war veterans] have returned home with shrapnel still in their bodies. . . . The emotional harm and injury from sexual abuse is not unlike this shrapnel that's imbedded in your flesh. You can't see it. You don't feel it. But it's in there." Later during rebuttal, the prosecutor summarized the testimony of the children's CornerHouse interviews and play-therapy sessions and argued that their statements were "spontaneous" and "natural" disclosures, shared without "prompting or prodding." The prosecutor then segued into a Spanish expression, "Solo los borrachos y los ninos siempre dicen la verdad"—"only drunks and little children always tell the truth"—and argued that "children and drunks don't filter what they say. It just comes out."

The defense objected to these statements, which the district court overruled. The district court erred. When the credibility of the witnesses is a central issue, as it was here, a reviewing court will "pay special attention to statements that may inflame or prejudice the jury." *State v. Morton*, 701 N.W.2d 225, 236 (Minn. 2005). "Because sexual-abuse cases generally evoke emotional reactions, an attempt by the prosecutor to exacerbate such reactions by making any emotive appeal to the jury is likely to be highly prejudicial." *State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008) (citation omitted). We determine that the prosecutor's references to the events of September 11, 2001, were not objectionable, considering the closing argument as a whole. However, the prosecutor's statements

regarding the trauma suffered by injured war veterans were prejudicial because they were meant to evoke an emotional reaction in the jury. Additionally, the prosecutor's reference to the expression that "only . . . little children always tell the truth" operated as an endorsement of the credibility of the witnesses, and was therefore improper.

ii. Shifting the burden of proof

A prosecutor improperly shifts the burden of proof by implying that a defendant has the burden of proving his innocence. *State v. Jackson*, 773 N.W.2d 111, 122 (Minn. 2009). "[M]isstatements of the burden of proof are highly improper and constitute prosecutorial misconduct." *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985).

During the state's closing argument, the prosecutor identified the elements of the charged offenses and argued that the state had met its burden of proof with respect to each element. In rebuttal, the prosecutor argued that the children's testimony was credible and concluded: "So I ask you again, do you believe [the children]? If you do, then the Defendant is guilty of criminal sexual conduct, and you may return a verdict of guilty." Appellant argues that these statements distorted the state's burden of proof by suggesting that appellant could not be acquitted unless the jury believed the children were lying.

We disagree. "[A] prosecutor's attempts to shift the burden of proof are often nonprejudicial and harmless where . . . the district court clearly and thoroughly instructed the jury regarding the burden of proof." *State v. McDonough*, 631 N.W.2d 373, 389 n.2 (Minn. 2001). Here, the district court properly instructed the jury on the state's burden of proof, stating:

> [The presumption of innocence] remains with the Defendant unless and until the Defendant has been proven guilty beyond a reasonable doubt. That the Defendant has been brought before the Court by the ordinary processes of the law and is on trial should not be considered by you as in any way suggesting guilt. The burden of proving guilt is on the State. The Defendant does not have to prove innocence.

We presume that the jury followed the district court's instructions. *State v. Ridley*, 776 N.W.2d 419, 428 (Minn. 2009). Analyzing the closing argument as a whole, we determine that the prosecutor did not shift the burden of proof to appellant. *See Ture*, 681 N.W.2d at 19 (directing reviewing court to "look to the closing argument as a whole, rather than to selected phrases and remarks").

b. The errors were harmless.

Because we determine that the prosecutor committed misconduct by inflaming the passions of the jury and vouching for the credibility of witnesses, we next turn to a consideration of whether the error "significantly affected the verdict." *State v. Barajas*, 817 N.W.2d 204, 220 (Minn. App. 2012), *review denied* (Minn. Oct. 16, 2012). This standard is not met if the verdict is "surely unattributable" to the error. *Id.* (quotation omitted). We will not reverse a conviction if the state proves the error was harmless beyond a reasonable doubt. *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005).

We determine that the state satisfied its burden of demonstrating that the error was harmless beyond a reasonable doubt. The jury heard extensive testimony regarding appellant's ongoing sexual abuse of the children. The children testified that appellant touched each of them on the chest and the vagina. H.M., Officer Johnson, and Tri corroborated this testimony, and the state also presented videotaped evidence of the

CornerHouse interviews. Officer Johnson testified that during the CornerHouse interview, Child 1 "spilled out the whole abuse" without prompting and shared that appellant had rubbed her chest and her vagina. Child 2 "immediately went into talking about getting touches from grandpa that she didn't like." And Tri testified in detail about her play-therapy sessions with the victims and the disclosures made during those therapy sessions.

The jury's verdict was supported by overwhelming evidence. Because the jury's verdict was surely unattributable to the error in the state's rebuttal, appellant is not entitled to a new trial. *See* Minn. R. Crim. P. 31.01 ("Any error that does not affect substantial rights must be disregarded.").

III. The district court's sentencing decision is erroneous.

When a court commits an offender to prison for a first-degree criminal-sexual-conduct conviction "and the offender has a previous or prior sex offense conviction, the court shall provide that, after the offender has been released from prison, the commissioner shall place the offender on conditional release for the remainder of the offender's life." Minn. Stat. § 609.3455, subd. 7(b) (2010). A conviction is a "prior sex offense" if:

> the offender was convicted of committing a sex offense before the offender has been convicted of the present offense, regardless of whether the offender was convicted for the first offense before the commission of the present offense, and the convictions involved separate behavioral incidents.

Id., subd. 1(g) (2010). A conviction occurs when the district court adjudicates a defendant guilty on the record. *State v. Nodes*, 863 N.W.2d 77, 81 (Minn. 2015). We review the interpretation of a statute de novo. *Id.* at 80.

Appellant argues that the district court erred by imposing lifetime conditional release, and we agree. The recent case of *State v. Nodes* is instructive. In that case, the defendant entered a plea of guilty to two counts of criminal sexual conduct arising from separate behavioral incidents with separate victims. *Nodes*, 863 N.W.2d at 78. The district court formally accepted the guilty pleas at sentencing, adjudicated defendant guilty of the two offenses to which he pleaded guilty, and stayed execution of the sentences. *Id*. at 78-79. The state argued that if defendant's sentences were ever executed, he would be subject to a ten-year conditional-release period on the first count, and lifetime conditional release on the remaining count. *Id*. at 79. The district court disagreed and set the conditional-release period at ten years for each count. *Id*. We affirmed on appeal, reasoning that "when multiple convictions are entered on the record at the same time, those convictions are simultaneous and neither is a prior conviction with respect to the other." *Id*. (quotations omitted). The supreme court disagreed, and reversed and remanded for resentencing. *Id*. The *Nodes* court defined a "prior sex offense conviction" as "a conviction for a separate behavioral incident entered before a second conviction, whether at different hearings or during the same hearing," and concluded that a defendant "who, in a single hearing, is convicted of two sex offenses, one immediately after the other, each arising out of separate behavioral incidents, has a 'prior sex offense conviction' under Minn. Stat. § 609.3455." *Id*. at 77, 82.

Nodes held that a conviction occurs when the district court accepts a guilty plea and adjudicates the defendant guilty on the record. *Id*. at 80-81. The decision reasoned that "[a]s long as one conviction is entered before the second, it is a 'prior conviction' under

the plain language" of Minnesota Statutes section 609.3455. *Id*. at 82. But *Nodes* did not resolve the question of how to treat two convictions when they are entered simultaneously, rather than sequentially, which is the factual posture presented here. Unlike *Nodes*, the district court in this case adjudicated appellant guilty of two first-degree criminal-sexual-conduct offenses at the same time during sentencing. Addressing appellant at sentencing, the district court judge stated: "If you would stand. You're adjudicated guilty of the offenses for which you were convicted by the jury." The district court then sentenced appellant to concurrent sentences of 144 months in prison and ten years of conditional release for the offense committed against Child 1, and 180 months in prison and lifetime conditional release for the offense committed against Child 2. The district court adjudicated appellant guilty of the two offenses at the same time, and, as a result, appellant was not convicted of one count before he was convicted of the other.

Because appellant did not have any previous or prior sex-offense convictions at the time he was adjudicated guilty, and because the convictions were entered simultaneously, we determine that the district court erred by imposing lifetime conditional release on the second offense and we reverse and remand with instructions to impose a ten-year conditional-release period on each offense.

Affirmed in part, reversed in part, and remanded.