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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1823**

State of Minnesota,
Respondent,

vs.

Cristian Albert Genchi-Ramirez,
Appellant.

**Filed October 30, 2017
Affirmed
Peterson, Judge**

Anoka County District Court
File No. 02-CR-14-708

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 Halbrooks, Presiding Judge; Peterson, Judge; and Smith,

Tracy M., Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from convictions of first-degree criminal sexual conduct, appellant
argues that (1) the district court abused its discretion by allowing the prosecution to present

a “why would she lie” argument to the jury during closing argument and (2) the prosecutor committed misconduct by telling the jury that (a) appellant was guilty because he ran from police and (b) it had to choose whether to believe the victim or appellant. We affirm.

FACTS

In October 2005, appellant Cristian Genchi-Ramirez began living with his girlfriend, C.S.M., and her daughter, L.D.S. The relationship between appellant and C.S.M. ended in October 2013, and C.S.M. and L.D.S. moved into their own residence. In January 2014, L.D.S. went to a school counselor’s office and reported that appellant had been sexually abusing her. The counselor reported the allegations to law enforcement.

In a statement to Anoka County Sheriff’s Detective Dan Douglas, L.D.S. reported that when she was 11 years old, appellant came into the bedroom where she was taking care of her younger brother, pushed her down, and touched her private parts over her clothing. L.D.S. threatened to start screaming, and appellant ran out of the room. L.D.S. thought that appellant had been drinking because he smelled like alcohol. The second act of sexual abuse occurred a couple of months later, and L.D.S. specifically described to Douglas what appellant did to her. L.D.S. stated that appellant then sexually abused her once a week until October 2013, and she gave examples of the acts that he committed.

L.D.S. was referred to Midwest Children’s Resource Center (MCRC), where a nurse interviewed her. L.D.S. described to the nurse the acts that appellant committed, and the descriptions were consistent with her statement to Douglas, although less detailed.¹ The

¹ L.D.S.’s trial testimony was consistent with her statements to Douglas and the nurse. She also provided additional details that she had not previously disclosed.

doctor who examined L.D.S. diagnosed her with an injury that is consistent with sexual abuse. The doctor testified that when reporting is delayed, an injury that would come from sexual abuse will be found in only three to four percent of cases, although that percentage is slightly higher for children after puberty. The doctor was unable to provide a timeframe for when the injury occurred.

The day after he interviewed L.D.S., Douglas called appellant and left a voicemail requesting that appellant contact him. Douglas did not say why he wanted to talk to appellant. Appellant did not return Douglas's call, so Douglas went to the residence where appellant had lived with C.S.M. and left his business card. Douglas later learned from the property manager that appellant no longer lived there.

In March or April 2014, C.S.M. told Douglas that appellant was working at a restaurant in Columbia Heights. Douglas had only an old driver's license picture of appellant, so he was uncertain what appellant looked like in 2014. Douglas went to the restaurant and asked the first person he saw, "Are you Cristian?" The man said, "No." Within a couple of minutes, Douglas realized that the man was gone. The restaurant manager confirmed that the restaurant had hired appellant but said that the restaurant had no contact information for him.

In late December 2014, C.S.M. told Douglas that appellant had contacted her about visiting their son. C.S.M. arranged a meeting with appellant, and Douglas came to the meeting place and arrested appellant.

Appellant was charged with two counts of first-degree criminal sexual conduct. Before trial, he moved to exclude evidence that he had avoided contact with law

enforcement. He argued that the avoidance was due to his status as an undocumented alien and, therefore, did not go to consciousness of guilt. He also moved to preclude the prosecutor from arguing that L.D.S. had no motive to lie. The district court denied appellant's motions. The case was tried to a jury, which found appellant guilty as charged. This appeal followed sentencing.

D E C I S I O N

I.

Appellant argues that the district court erred by denying his motion to preclude the prosecutor from arguing that L.D.S. had no motive to lie. We review the district court's denial of that motion for an abuse of discretion. *See State v. Thomas*, 305 Minn. 513, 515-16, 232 N.W.2d 766, 768 (1975) (stating that when a prosecutor plans to use a questionable statement in argument, the statement "should first be discussed in chambers with the [district court] so that the [district court] may exercise [its] discretion as to whether such a statement should be included"). "A [district] court abuses its discretion when its decision is based on an erroneous view of the law" *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011).

During closing argument, the prosecutor argued:

[L.D.S.'s] testimony is believable. She had every reason not to tell an adult. She wasn't trying to get [appellant] into trouble. She wasn't trying to find the first adult she could tell. She was telling you, I don't want to upset this household. I don't know what this is going to do to my brother. I don't know what this is going to do to my mom. I'm not ready to tell.

Her demeanor in court. She was embarrassed. You saw that. She was sad and she was genuine.

Think about all of the things that [L.D.S.] told you that she went through, all of the things you heard that she went through, and ask yourself, if that wasn't the truth, why would she go through it? Why would she go through that forensic interview . . . ? Why would she at 13 years old [go through a physical sexual-assault examination] and talk about what happened if it wasn't true? What 13-year-old would subject themselves to that if what she was telling you isn't true?

Think about the sensory detail that [L.D.S.] provided. When she testified, she told you how it felt. She told you how it felt during, after[.] . . . That kind of sensory detail is detail from somebody that had experienced something. This isn't made up. This is experience.

The prosecutor also addressed evidence of changes in L.D.S.'s emotional state, specifically (1) her cousin's testimony that L.D.S.'s personality "went from bright, funny, laughing" to "serious, calm and stressed" and (2) L.D.S.'s statements to Douglas and the doctor that she "started cutting on her arm" and was thinking about killing herself. The prosecutor then stated, "No person on the face of the planet would go through this unless they were telling the truth." Finally, in addressing L.D.S.'s credibility, the prosecutor noted (1) the timing of her disclosure, specifically, that she had been living apart from appellant, but then he started coming around again, and (2) the fact that L.D.S. testified that no abuse occurred during a trip out of state, no abuse occurred during the week they moved out of appellant's residence, and appellant committed one type of sex act only once.

Appellant argues that the prosecutor's argument was similar to "were they lying" questions typically asked of defendants on cross-examination. "As a general rule, 'were they lying' questions have no probative value and are improper and argumentative because

they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence.” *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999); *see also State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005) (stating that “were they lying” questions “shifted the jury’s focus by creating the impression that the jury must conclude that these two witnesses were lying in order to acquit [the defendant]”).

In addressing the propriety of “were they lying” questions, the supreme court stated:

The general concern about “were they lying” questions is that asking one witness to express an opinion as to the veracity of another witness calls for improper comment on another witness’ testimony, and that it is the province of the jury to determine the credibility of witnesses. Further, it is perceived as unfairly giving the jury the impressions that in order to acquit, they must determine that witnesses whose testimony is at odds with the testimony of the defendant are lying.

Pilot, 595 N.W.2d at 516 (citations omitted) (footnote omitted).

The prosecutor’s argument was not similar to “were they lying” questions. The prosecutor was not asking for a comment on another witness’s veracity or saying that L.D.S.’s testimony was sufficient to convict appellant. Rather, the questions about why L.D.S. would have put herself through the forensic interview and physical examination if she had not been sexually abused were asked in the context of providing the jury with reasons to find L.D.S.’s testimony credible and were part of a longer argument that listed several additional reasons why the jury should find her testimony credible. Because the argument addressed L.D.S.’s credibility and not another witness’s veracity or the burden of proof, the district court did not abuse its discretion in allowing it.

II.

Appellant argues that the prosecutor's arguments that appellant showed consciousness of guilt by avoiding law enforcement and that the jury had to choose whether to believe L.D.S. or appellant were misconduct that impermissibly shifted the burden of proof. Appellant did not object to the arguments. An appellate court applies "the plain error doctrine when examining unobjected-to prosecutorial misconduct." *State v. Ramey*, 721 N.W.2d 294, 296 (Minn. 2006). "[B]efore an appellate court reviews unobjected-to trial error, there must be (1) error, (2) that is plain, and (3) affects substantial rights." *Id.* at 302. "[T]he burden [is] on the nonobjecting defendant to demonstrate both that error occurred and that the error was plain." *Id.* If "the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden . . . shift[s] to the state to demonstrate . . . that . . . the misconduct did not affect [the defendant's] substantial rights." *Id.* (quotation and citations omitted).

Due process requires the state to prove "each element of the crime charged beyond a reasonable doubt." *State v. Merrill*, 428 N.W.2d 361, 366 (Minn. 1988). "Prosecutors improperly shift the burden of proof when they imply that a defendant has the burden of proving his innocence." *State v. Jackson*, 773 N.W.2d 111, 122 (Minn. 2009). But "the state may argue that particular witnesses were or were not credible." *State v. Lopez-Rios*, 669 N.W.2d 603, 619 (Minn. 2003).

"[T]he prosecutor and the defense have considerable latitude in closing argument, for neither is required to make a colorless argument." *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). A prosecutor may argue all reasonable inferences that may be drawn from

the evidence. *State v. Bobo*, 770 N.W.2d 129, 142 (Minn. 2009). But a prosecutor may not obtain a conviction at any price, for example, by intentionally misstating the evidence or misleading the jury about the inferences to be drawn from the evidence. *State v. Peltier*, 874 N.W.2d 792, 805 (Minn. 2016).

During closing argument, the prosecutor argued:

Think about [appellant] now. Guilty people run, guilty people hide. You don't have to believe for one second that this man who has been in the United States for 24 years, working all over Minnesota, driving around with a valid driver's license is all of a sudden afraid because he's undocumented. You don't have to believe that for one second. Guilty people run and guilty people hide. And as soon as he caught wind of [L.D.S.] talking to a sheriff's detective, he ran and he hid. He ran from the detective. He lied to the detective, said, I'm not Cristian, and then he ran out the back of that restaurant. It took a setup of having mom tell [appellant] he was going to come and visit his son for the police to locate him.

You can't believe both versions. You have to choose who you're going to believe. Because in this case [appellant] says during this whole time that [L.D.S.] came in here and told you about the sexual abuse, I barely [saw] her. . . . Well, that can't be true if what [L.D.S.] is saying is true. And what [L.D.S.] is saying is true can't be true if what [appellant] is saying is true. And I submit that it is very easy to find out who is telling the truth. And it is not [appellant], because guilty people run and guilty people hide.

You must judge his credibility. You must. You've heard some instructions about he doesn't have to testify, but now that he has, you must judge his credibility. . . . He does not get extra credibility points because he decided to testify. . . .

He came up here this morning and he told you conveniently, oh, the last time I spent any time with [L.D.S.] was right before she turned 12. It was April; April 2012, right

before she turned 12, so this isn't possible. That's ridiculous. . . .

. . . .

You do not have to check your reason and common sense at the door. And I'm asking you to apply it because reason and common sense lead to one conclusion. He's guilty. He's guilty. Guilty people run, guilty people hide. His story doesn't make any sense.

“Flight before apprehension or after arrest . . . is a circumstance to be considered—not as a presumption of guilt, but as something for the jury to consider—as suggestive of a consciousness of guilt” *State v. McDaniel*, 777 N.W.2d 739, 746 (Minn. 2010) (quotation omitted). Appellant argues that the prosecutor’s argument went beyond what is permitted under *McDaniel* because the repeated assertions that “guilty people run and guilty people hide” implied that his “flight, alone, was sufficient evidence to support a conviction.” But, although the prosecutor repeatedly stated that “guilty people run” and “guilty people hide,” the argument also addressed other reasons why appellant’s testimony was not credible and did not imply that running and hiding alone was a sufficient basis to convict appellant.

Appellant also argues that the portion of the argument about choosing whom to believe was misconduct because it “misrepresented the state’s burden of proof by improperly equating the singular factor of [L.D.S.’s] truthfulness with [appellant’s] guilt.” After addressing the elements of the offenses and acts that would prove them, the prosecutor stated: “The testimony of [L.D.S.] does not require corroboration. If you believe her, it is enough. It is proof beyond a reasonable doubt if you believe her.” The

prosecutor then presented numerous reasons why the jury should find L.D.S.'s testimony credible.

The prosecutor's argument did not shift the burden of proof. The prosecutor did not argue that, if appellant did not persuade the jury that his version of events was true, the jury must find appellant guilty. Nor did the prosecutor argue that, if the jury found that appellant was not credible, it must find that L.D.S. was credible. The prosecutor argued that appellant was not credible, that L.D.S. was credible, and, if the jury found L.D.S. credible, it could find appellant guilty even if L.D.S.'s testimony was not corroborated. This argument left the state with the burden of persuading the jury that L.D.S. was credible, and the argument was not misconduct. Because the prosecutor did not commit misconduct, appellant's plain-error claim fails.

Also, the district court instructed the jury on the burden of proof, on the requirement that jurors must determine whether the state proved appellant's guilt beyond a reasonable doubt, and on the jurors' role to determine witness credibility. An appellate court assumes that jurors follow the district court's instructions. *State v. Ferguson*, 581 N.W.2d 824, 833 (Minn. 1998).

III.

In a pro se supplemental brief, appellant argues that he was denied his right to a fair trial, but he does not explain how he was deprived of that right. An assignment of error based on mere assertion and not supported by legal authority or argument is waived unless prejudicial error is obvious on mere inspection. *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008). It is not obvious how appellant was denied his right to a fair trial.

Appellant also argues that his reasons for running were unrelated to guilt and that he was not involved with L.D.S.'s mother after October 2011. These are credibility issues. "Assessing witness credibility and the weight given to witness testimony is exclusively the province of the jury." *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009).

Affirmed.