STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1729

State of Minnesota,
Respondent,

vs.

Marquise Davonte Cox,
Appellant.

Filed December 16, 2019
Affirmed
Stauber, Judge[*]

Hennepin County District Court
File No. 27-CR-17-25789

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Patrick R. Lofton, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Stauber, 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

STAUBER, Judge

Appellant Marquise Davonte Cox appeals his judgment of conviction for two counts of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2014). Appellant argues that the district court abused its discretion when it limited the defense's cross-examination of the state's expert witness and that the prosecutor committed misconduct during closing argument. Because the district court's evidentiary ruling and the prosecutor's statements did not prejudice appellant, we affirm.

FACTS

Appellant resided with his girlfriend and her two children. In March 2016, appellant began sexually abusing his girlfriend's six-year-old daughter, A.B. The abuse lasted for roughly 19 months, until A.B. disclosed the abuse to her school's social worker. The social worker reported the abuse to child protection services and the police, who scheduled a CornerHouse interview. At CornerHouse, A.B. was interviewed by a forensic interviewer, A.L. In the interview, A.B. described the sexual contact, both vaginal and anal penetration. While drawing a picture of appellant's "private parts," A.B. drew a black dot in the same area that appellant later testified he has a birthmark. A.B.'s physical exam did not reveal any physical injuries.

The state charged appellant with one count of first-degree criminal sexual conduct (penetration) and later amended the complaint to add a second count of first-degree criminal sexual conduct (contact).

At trial, the state elicited testimony from A.L. about the nature of child-sex-abuse reporting. Specifically, A.L. commented on how it may be difficult for a child to recall the passage of time or retrieve memories, and discussed how a child's communication is often less organized than an adult's. A.L. also described the variety of reasons a child may delay reporting sexual abuse, why a child may disclose small pieces of information at a time, and what a child's demeanor may be like during disclosure.

During cross-examination of A.L., the state objected to defense counsel's question about an article A.L. co-authored. Defense counsel read the statement it wished to ask A.L. about to the court: "Although the importance of a child's statement within the forensic interview is irrefutable, investigators should not rely solely on forensic interviews to prove or disprove allegations of child sexual abuse." Defense counsel argued that questioning about this statement is relevant because it supports the defense's theory that A.B. was not truthful and that the state could not corroborate A.B.'s testimony. The district court barred the testimony. It reasoned that the testimony invaded the jury's duty to determine whether there was sufficient evidence to prove the offense because it would elicit an opinion about what kind of evidence or how much evidence is needed to support a conviction.

The prosecutor's closing argument began with commonly used statements by the Hennepin County Attorney's Office about why children are the "perfect victim[s]," and why appellant "preyed upon [A.B.]." The prosecutor argued, "[S]he's telling the truth about this abuse," and ended with "[t]he defendant has lost his presumption of innocence; find him guilty." The jury convicted appellant of both counts. This appeal followed.

D E C I S I O N

I. Evidentiary ruling

"We will reverse evidentiary rulings only if the district court clearly abused its discretion and the defendant was thereby prejudiced." *State v. Caine*, 746 N.W.2d 339, 349 (Minn. 2008). But when an evidentiary ruling implicates a defendant's right to present evidence, this court determines whether the error was "harmless beyond a reasonable doubt." *State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015). Appellant argues the district court improperly barred him from asking A.L. "whether investigators should rely exclusively on forensic interviews to prove or disprove child sex abuse allegations," and from confronting A.L. about a statement in an article she co-authored discussing forensic interviews. The state argues the evidence was properly excluded because it "would have amounted to an expert opinion on the burden of proof."

A.L. testified that she has worked at CornerHouse for about 25 years and has conducted 3000 to 4000 forensic interviews. The defense's inquiry was relevant to A.L.'s knowledge and experience as a forensic interviewer. We see no reason why the testimony should not have been admitted. The district court's exclusion likely amounts to an abuse of discretion, but given A.L.'s consistent testimony, we are persuaded that the error was harmless beyond a reasonable doubt. *See State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994) (stating the harmless beyond a reasonable doubt standard is applied when an evidentiary ruling concerns a defendant's right to present evidence).

An error is harmless beyond a reasonable doubt if "a reasonable jury would have reached the same verdict if the evidence had been admitted." *State v. Blom*, 682 N.W.2d

578, 622-23 (Minn. 2004) (quotation omitted). The state presented eight witnesses, evidence seized from appellant's home, and A.B.'s videotaped CornerHouse interview. We conclude that if A.L.'s testimony had been admitted, the jury would have reached the same verdict.

II. Prosecutorial misconduct

Because appellant did not object during closing argument, this court reviews the prosecutor's statements for plain error. *State v. Ramey*, 721 N.W.2d 294, 297-98 (Minn. 2006). Under this standard, the appellant must first establish an error that was plain. *Id.* at 302. The burden then shifts to the state to demonstrate that the error did not affect the defendant's substantial rights. *Id.* This court then determines whether the error should be addressed to uphold "fairness and the integrity of the judicial proceedings." *Id.*

This court considers the "closing argument as a whole." *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006). Prosecutors "must refrain from making statements that will inflame the passions or prejudices of the jury." *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). A prosecutor may not "urge the jury to protect society with its verdict." *State v. Hoppe*, 641 N.W.2d 315, 320 (Minn. App. 2002), *review denied* (Minn. May 14, 2002). Sexual abuse cases require the "highest behavior" by prosecutors because the cases "inescapably evoke an emotional reaction." *State v. Jahnke*, 353 N.W.2d 606, 611 (Minn. App. 1984).

Appellant argues the prosecutor used scripted language not supported by the evidence at trial, vouched for A.B.'s credibility, and improperly stated the appellant lost his presumption of innocence.

This court, in unpublished opinions, has repeatedly determined that similar language in closing arguments is plain error and we have cautioned the county attorney from using the language.[1] We conclude that the prosecutor's statements amount to plain error because the statements appeal to the jury's passions by portraying appellant as a predator. However, we conclude that the statements did not affect appellant's substantial rights. The contested language accounted for only a page or two of the prosecutor's 32-page argument, and we conclude that the state presented evidence of guilt that is beyond a reasonable doubt. Thus, we conclude any error did not affect appellant's substantial rights.

Appellant argues that the prosecutor's closing argument misstated the presumption of innocence. We do not agree with appellant's contention because, when taken in context, the prosecutor argued that the state had produced enough evidence of guilt to overcome the presumption. *See State v. Vue*, 797 N.W.2d 5, 14 (Minn. 2011) (concluding the state's remark that "the [d]efendant has lost his presumption of innocence" was not plain error because it was made in the context of arguing there was sufficient evidence of guilt). Additionally, the district court instructed the jury that the closing arguments are not evidence, that appellant is presumed innocent, and that the "presumption remains with [appellant] unless or until [he] has been proven guilty beyond a reasonable doubt." Therefore, we affirm.

Affirmed.

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[1] *See State v. Danquah*, No. A18-1581, 2019 WL 3293790, *4-7 (Minn. App. July 22, 2019), *review denied* (Minn. Oct. 15, 2019); *Garcia v. State*, No. A18-1907, 2019 WL 3545814, *2-4 (Minn. App. Aug. 5, 2019), *review denied* (Minn. Oct. 29, 2019); *State v. Ciriaco-Martinez*, No. A18-1415, 2019 WL 2999783, *2 (Minn. App. July 1, 2019).