STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0322

State of Minnesota,
Respondent,

vs.

Earl Jay Murphy,
Appellant.

Filed March 2, 2020
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-18-3937

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

Michael O. Freeman, Hennepin County Attorney, Mark V. Griffin, Senior Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Johnson, Judge; and Segal, Judge.

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

JOHNSON, Judge

A Hennepin County jury found Earl Jay Murphy guilty of two counts of first-degree criminal sexual conduct based on evidence that he repeatedly raped a pre-teen relative over

a period of several years. Murphy raises five issues on appeal. We conclude that the district court did not err by allowing the state to play a video-recorded forensic interview of the victim, that the interviewer's testimony concerning his observations of the victim during the interview was admissible, that the prosecutor did not engage in misconduct in her opening statement or her closing argument, that the jury instructions did not violate Murphy's right to a unanimous verdict, and that lifetime conditional release is appropriate. Therefore, we affirm.

FACTS

In February 2018, a 13-year-old girl, J.M., disclosed to her pediatrician that she had been sexually abused by Murphy. The pediatrician, a mandatory reporter, passed the information along to the police department in Hopkins, where the girl lived at the time. Law enforcement referred the matter to the CornerHouse organization, where a trained volunteer conducted a forensic interview of J.M. In the interview, J.M. said that Murphy had abused her for several years. She described being raped at her previous home in Columbia Heights, in Murphy's vehicle, and at his workplace. She also said that Murphy had threatened her with a gun and told her that he would hurt her if she disclosed the abuse to anyone.

The state initially charged Murphy with one count of first-degree criminal sexual conduct. The complaint later was amended twice. The second amended complaint charged Murphy with four offenses: (1) first-degree criminal sexual conduct toward a child under 13 years of age, in violation of Minn. Stat. § 609.342, subd. 1(a) (2016), for conduct taking place between May 29, 2017, and July 31, 2017; (2) another count of first-degree criminal

sexual conduct toward a child under 13 years of age, in violation of Minn. Stat. § 609.342, subd. 1(a), for conduct taking place between May 29, 2017, and July 31, 2017; (3) first-degree criminal sexual conduct toward a child under 13 years of age, in violation of Minn. Stat. § 609.342, subd. 1(a), for conduct taking place between June 1, 2014, and December 31, 2017; and (4) first-degree criminal sexual conduct toward a child under 16 years of age who has a significant relationship to the defendant, in violation of Minn. Stat. 609.342, subd. 1(h)(iii), for conduct taking place between October 18, 2010, to December 31, 2016.

The case was tried over seven days in October 2018. The state called 11 witnesses, including J.M., J.M.'s mother, and the CornerHouse interviewer. During the direct examination of the CornerHouse interviewer, the video-recorded interview of J.M. was played for the jury. Murphy called four witnesses and testified on his own behalf.

The district court instructed the jury on counts 2, 3, and 4, which were renumbered counts 1, 2, and 3, respectively. The state later filed a third amended complaint to conform to the jury instructions. During its deliberations, the jury informed the district court that it had reached agreement on counts 2 and 3 (which had been counts 3 and 4) but had not reached an agreement on count 1 (which had been count 2). The district court determined that it would accept a partial verdict. *See* Minn. R. Crim. P. 26.03, subd. 20(7). The jury found Murphy guilty of counts 2 and 3. The district court imposed concurrent prison sentences of 171 months on counts 2 and 3, to be followed by conditional release for the remainder of his life. Murphy appeals.

D E C I S I O N

I. Admissibility of Video-Recorded Interview

Murphy first argues that the district court erred by admitting the recorded CornerHouse interview of J.M. into evidence and by allowing the state to play it for the jury. Specifically, he argues that the evidence is inadmissible under the residual hearsay exception. *See* Minn. R. Evid. 807. In response, the state argues that the district court did *not* admit the interview under the residual hearsay exception but, rather, under the rule governing prior consistent statements, which are non-hearsay. *See* Minn. R. Evid. 801(d)(1)(B).

The state is correct. The district court stated in its oral ruling that Murphy's attorney had conceded that the interview contains both consistent and inconsistent statements and that, "because some are consistent and some are inconsistent, both are admissible in this case." The district court continued by stating "that [Murphy's] objection's overruled, . . . so the tape can be played on that basis." The district court also stated that Murphy could assert other objections to specific statements made during the interview. Murphy's attorney did not do so.

Murphy's brief does not include any argument that the district court erred by ruling that the video-recorded interview is admissible as non-hearsay prior consistent statements. In the absence of any argument challenging the reasons for the district court's ruling, there is nothing for this court to review. Nonetheless, we note that this court has stated, in *dicta*, that "videotaped statements of children who allegedly have suffered sexual abuse . . . [are] not hearsay if the child testifies at trial and is subject to cross-examination and if the

statement is both consistent with the child's trial testimony and would be helpful in evaluating credibility." *State v. Wembley*, 712 N.W.2d 783, 789 (Minn. App. 2006) (citing Minn. R. Evid. 801(d)(1)(B)), *aff'd*, 728 N.W.2d 243 (Minn. 2007). To be admitted as a prior consistent statement, "[t]he trial testimony and the prior statement need not be identical to be consistent, . . . and admission of a videotaped statement that is 'reasonably consistent' with the trial testimony is not reversible error." *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005) (quoting *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998)). In this case, J.M.'s trial testimony was at least "reasonably consistent" with the statements she made during the interview. We are not aware of any statements in the interview that are significantly inconsistent with J.M.'s trial testimony. In addition, Murphy had an opportunity to cross-examine J.M. before the interview was played for the jury.

Thus, the district court did not err by admitting the video-recorded interview of J.M. into evidence and allowing it to be played for the jury.

II. Testimony of Interviewer

Murphy next argues that the district court erred by admitting testimony of the CornerHouse interviewer that Murphy describes as vouching testimony.

During the direct examination of the interviewer, the prosecutor asked about J.M.'s "ability to communicate with [him] during th[e] interview." The interviewer responded by testifying that "she seemed comfortable [and] she seemed articulate, very bright, and gave a lot of sensory and contextual detail about what she experienced." When the prosecutor followed up by asking why the interviewer took note of J.M.'s sensory and contextual

details, the interviewer testified that "the sensory and contextual information [children] give usually corroborates what they're feeling" and "corroborates what they've experienced, because if they didn't actually experience it themselves, they usually wouldn't be able to provide contextual and sensory information about how something felt or how something looked or the area it occurred in."

Murphy did not object to the prosecutor's question and did not move to strike the interviewer's answer. Accordingly, we review only for plain error. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under the plain-error test, we will reverse only if (1) the district court committed an error, (2) the error is plain, and (3) the plain error affected the defendant's substantial rights. *Id.* "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). An error affects a defendant's substantial rights "if the error was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. If these three requirements are satisfied, an appellant also must satisfy a fourth requirement, that the error "seriously affects the fairness and integrity of the judicial proceedings." *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014). If any requirement of the plain-error test is not satisfied, the appellate court need not consider the other requirements. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

As a general matter, "one witness cannot vouch for or against the credibility of another witness." *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). More specifically, this court has held that, if a person has interviewed a child who reportedly was

sexually abused, the interviewer may not testify about his or her views of the child's credibility. In *Wembley*, the interviewer testified that she "assessed" the complainant's interview, that she considered four factors in the assessment, and that (as this court restated it) "[t]he purpose of the assessment was to determine [the child's] credibility." 712 N.W.2d at 790-91. Even though the interviewer "did not expressly state her opinion that she found [the child] to be credible," she discussed the four criteria that she considered and "testified that [the child's] interview was consistent with all factors making up the credibility assessment." *Id.* at 792. We concluded, "This testimony violated the prohibition against expert opinion as to a witness's credibility." *Id*.

In this case, however, the interviewer's testimony was quite different from the interviewer's testimony in *Wembley*. The interviewer in this case did not testify about the issue of credibility or about criteria that are used to assess credibility. It appears that the prosecutor steered clear of such topics in an attempt to avoid the problem we identified in our *Wembley* opinion. *Cf. State v. Morales-Mulato*, 744 N.W.2d 679, 690 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008). The portion of the interviewer's testimony that is challenged by Murphy is the only portion of his testimony that is even remotely related to the issue of credibility. Because Murphy's trial attorney did not object, the relevant question on appeal is whether the district court plainly erred by admitting the testimony. *Griller*, 583 N.W.2d at 740. In essence, the question is whether the district court erred by not *sua sponte* striking a portion of the interviewer's testimony, which might have made matters worse for Murphy by highlighting it. *See State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001). Because neither the prosecutor nor the interviewer referred to

"credibility" or to related concepts such as truthfulness, Murphy cannot establish that the admission of the testimony is plainly erroneous.

III. Claim of Prosecutorial Misconduct

Murphy next argues that the prosecutor committed misconduct by making four prejudicial comments in her opening statement and her closing argument.

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. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005); *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). There is no dispute in this case that Murphy did not object to the conduct that he challenges on appeal. Accordingly, we apply the "modified plain-error test" to Murphy's unobjected-to claims of prosecutorial misconduct. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail under the modified plain-error test, an appellant initially must establish that there is an error and that the error is plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* If there is a plain error, the burden shifts to the state, which must show that the plain error did not affect the appellant's substantial rights, *i.e.*, "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). "If the state fails to demonstrate that substantial rights were not affected, 'the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.'" *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (quoting *Griller*, 583 N.W.2d at 740).

Murphy argues that the prosecutor engaged in misconduct on four occasions. But Murphy does not cite any caselaw in support of any of his particular assertions of misconduct.

First, Murphy argues that the prosecutor improperly vouched for J.M.'s character by describing her in the opening statement as "brave." This statement is not plainly improper because it could reasonably be construed as a comment on the evidence. *See State v. Wright*, 719 N.W.2d 910, 918-19 (Minn. 2006).

Second, Murphy argues that the prosecutor improperly signaled her personal opinion to the jury by prefacing several statements in her closing argument with the phrase, "I think." "An attorney . . . may not interject his or her personal opinion so as to 'personally attach[] himself or herself to the cause which he or she represents.'" *Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (quoting *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991). But an attorney does not necessarily violate this principle merely by using a first-person pronoun. The supreme court has concluded than an attorney who used the phrase "I submit" in closing argument "was offering an interpretation of the evidence rather than a personal opinion." *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000). We read the transcript of the prosecutor's closing argument in this case in the same way.

Third, Murphy argues that the prosecutor improperly told the jury that it was their job "to do justice" despite imperfections in the state's case. Murphy has not cited any legal authority to demonstrate that this statement is plainly erroneous.

Fourth, Murphy argues that the prosecutor improperly vouched for the credibility of J.M.'s mother in closing argument by stating that she (the prosecutor) "kind of wanted to

applaud" the mother for supporting her daughter. Although this statement is questionable in light of the principle that an attorney may not "personally attach[] himself or herself to the cause which he or she represents," *Everett*, 472 N.W.2d at 870, the statement was brief and was not a plain violation of the applicable caselaw.

Thus, the prosecutor did not engage in any conduct that is plainly improper.

IV. Jury Unanimity

Murphy next argues that the district court erred by instructing the jury in such a way that the jury's verdict might violate his right to a unanimous verdict.

Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, a criminal defendant has a right to a unanimous verdict. *State v. Crowsbreast*, 629 N.W.2d 433, 438-39 (Minn. 2001); *see also* Minn. R. Crim. P. 26.01, subd. 1(5). Jurors must unanimously find "that the government has proved each element of the offense." *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002). But the right to a unanimous verdict does not mean that "'jurors should be required to agree upon a single means of commission'" of a criminal offense. *Crowsbreast*, 629 N.W.2d at 439 (quoting *Schad v. Arizona*, 501 U.S. 624, 631-32, 111 S. Ct. 2491, 2497 (1991) (plurality opinion)). Rather, "'different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line.'" *Id.* (quoting *Schad*, 501 U.S. at 631-32, 111 S. Ct. at 2497 (plurality opinion) (internal quotation omitted)). In other words, "the jury does not have to unanimously agree on the facts underlying an element of a crime." *State v. Pendleton*, 725 N.W.2d 717, 731 (Minn. 2007).

Murphy concedes that he did not object to the jury instructions and that the plain-error rule applies. *See* Minn. R. Crim. P. 26.03, subd. 19(4)(a). As stated above, we will reverse under the plain-error test only if (1) the district court committed an error, (2) the error is plain, and (3) the plain error affected the defendant's substantial rights. *Griller*, 583 N.W.2d at 740. In addition, Murphy has not identified a particular instruction that was either erroneously given or erroneously absent. Rather, he argues generally that, for two reasons, the instructions that were given threatened his right to a unanimous verdict.

The first part of Murphy's argument is premised on the fact that the date range applicable to count 2 overlaps with the date range applicable to count 3. As a consequence, he argues, "it cannot be determined whether the jury convicted appellant for the same act at the same time in returning verdicts" on those two counts. Even if we were to assume that the jury instructions were plainly erroneous, Murphy could not show that such an error affected his substantial rights. In closing argument, the prosecutor stated that, in count 2, the state sought to prove that Murphy committed criminal sexual conduct at his workplace on one occasion and that, in count 3, the state sought to prove that Murphy committed criminal sexual conduct on multiple other occasions when J.M. was younger, in locations other than Murphy's workplace, such as at J.M.'s previous home in Columbia Heights. Given the abundant evidence of criminal sexual conduct in locations other than Murphy's workplace, Murphy cannot show that the jury relied on the same evidence in finding him guilty on both count 2 and count 3. *See State v. Wenthe*, 865 N.W.2d 293, 299-301 (Minn. 2015).

The second part of Murphy's argument is premised on the fact that the date range applicable to count 2, which ends December 31, 2017, extends beyond J.M.'s 13th birthday, which was on October 18, 2017. As a consequence, he argues, the jury may have found him guilty of an offense that requires the victim to be less than 13 years old based on conduct occurring after J.M.'s 13th birthday. Again, even if we were to assume that the jury instructions were plainly erroneous, Murphy could not show that such an error affected his substantial rights. There is no evidence in the record that Murphy committed criminal sexual conduct after October 18, 2017. Murphy himself testified that he did not see J.M. between June 2017 and his arrest in February 2018. One of Murphy's witnesses testified that, based on data retrieved from Murphy's and J.M.'s cell phones, they did not have contact with each other via cell phone after August 2017. Consequently, Murphy cannot show that any of the jurors believed that the offense charged in count 3 occurred on or after October 18, 2017. *See Wenthe*, 865 N.W.2d at 299-301.

Thus, the district court's jury instructions did not plainly violate Murphy's right to a unanimous verdict.

V. Conditional Release

Murphy last argues that the district court erred by ordering that, after he is released from prison, he must be on conditional release for the remainder of his life. If a district court "commits an offender to the custody of the commissioner of corrections for [criminal sexual conduct], 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) (2018). Murphy argues that he should not be subject to lifetime conditional release because he does not have a "previous or prior sex offense conviction" for essentially the same reasons stated in his previous argument. We have concluded that Murphy cannot show that the jury found him guilty of counts 2 and 3 based on the same conduct or that the jury found him guilty of count 3 for conduct occurring after J.M.'s 13th birthday. *See supra* part IV. Thus, the district court did not err by ordering lifetime conditional release.

Affirmed.