STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1054

State of Minnesota,
Respondent,

vs.

Martell Antonio Bloxson,
Appellant.

Filed July 19, 2021
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-19-19067

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

Michael O. Freeman, Hennepin County Attorney, Jacqueline Bailey, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Hennepin County jury found Martell Antonio Bloxson guilty of first-degree criminal sexual conduct based on evidence that he sexually assaulted a young girl. We conclude that Bloxson is not entitled to a new trial on the ground of prosecutorial

misconduct. We also conclude that the district court did not err by granting the state's motion for an upward durational departure from the presumptive sentencing range. Therefore, we affirm.

FACTS

At various times between 2016 and 2018, Bloxson lived with L.M., her three young children, and some of L.M.'s relatives. Bloxson sometimes watched and cared for L.M.'s children while L.M. was at work.

One day, while Bloxson was watching L.M.'s children, Bloxson called J.M.Y. into his bedroom and talked to her about her getting into trouble at school. Bloxson told J.M.Y. to lie on her back and to undress. He penetrated her vagina with his penis. While he penetrated her, he told her that misbehavior at school has consequences. After he stopped penetrating her, he told her that no one would believe her if she were to tell others about the incident. Later that day, he told her that she was "off punishment" but that she should remember that misbehavior has consequences.

In June 2019, J.M.Y. told her father that she had been raped by Bloxson. J.M.Y.'s father contacted law enforcement. J.M.Y. was interviewed by a child-protection investigator and a police officer, was examined by a pediatrician, and was interviewed by a trained forensic interviewer.

In August 2019, the state charged Bloxson with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2016). The case was tried to a jury over three days in February 2020. The state called seven witnesses, including

J.M.Y. and her mother and her father. Bloxson testified in his own defense and denied engaging in any sexual conduct toward J.M.Y.

The jury found Bloxson guilty. In addition, the jury found one aggravating factor: that Bloxson was in a position of authority over J.M.Y. when he committed the offense. At sentencing, the district court granted the state's motion for an upward durational departure from the presumptive sentencing range. The district court imposed a sentence of 230 months of imprisonment, which is 14 months longer than the longest presumptive sentence. Bloxson appeals.

DECISION

I. Claims of Prosecutorial Misconduct

Bloxson first argues that he is entitled to a new trial on the ground that the prosecutor engaged in misconduct on two occasions. The right to due process of law includes the right to a fair trial. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005). Prosecutorial misconduct may violate a defendant's right to a fair trial. *State v. Nissalke*, 801 N.W.2d 82, 103 (Minn. 2011).

A. Cross-Examination Question

First, Bloxson argues that the prosecutor committed misconduct by attempting to elicit inadmissible character evidence by asking him on cross-examination whether he had been charged with a crime. One way in which a prosecutor may engage in misconduct is "to knowingly offer inadmissible evidence for the purpose of bringing it to the jury's attention." *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014) (quotation omitted).

On direct examination, Bloxson testified that he had had "no complaints" in a prior job working as a water-damage mitigation specialist before losing his certification. On cross-examination, the prosecutor sought to clarify by asking, "I believe you said you've never had any complaints at work?" Bloxson answered, "No, I've never had any to my company. No, I have not." The prosecutor then asked, "Aren't you currently charged with stealing from a former employer?" Bloxson's attorney objected, and the district court sustained the objection. After a bench conference, the prosecutor revised the objectionable question by asking Bloxson whether he had "ever been the subject of complaints . . . as an employee for any company," and Bloxson answered, "Yes, I have."

Bloxson contends that the prosecutor engaged in misconduct by seeking to introduce inadmissible character evidence. In *State v. Harris*, 521 N.W.2d 348 (Minn. 1994), a prosecutor sought to introduce evidence that was inadmissible pursuant to rule 404(b) of the rules of evidence. *Id.* at 354. The supreme court stated:

> We have made it clear that "[t]he state will not be permitted to 'deprive a defendant of a fair trial by means of insinuations and innuendos which plant in the minds of the jury a prejudicial belief in the existence of evidence which is otherwise inadmissible.'" *State v. Tahash*, 280 Minn. 155, 157, 158 N.W.2d 504, 506 (1968) (quoting *State v. Currie*, 267 Minn. 294, 301, 126 N.W.2d 389, 395 (1964)). Use of such insinuation and innuendo is reversible error "whether the allusion to prior misconduct is contained in the question which the prosecutor asks or in the answer which the witness gives."

Id.

The state contends, however, that Bloxson "opened the door" to the prosecutor's question by testifying that there had been no complaints about him at work. "Opening the

door occurs when one party by introducing certain material . . . creates in the opponent a right to respond with material that would otherwise have been inadmissible." *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006) (quotation omitted). The purpose of the doctrine is to ensure that one party does not gain an unfair advantage by introducing testimony on a particular subject about which the other party may not introduce evidence to refute or respond to the first party's testimony. *Id.*

The state is correct that Bloxson opened the door—to some extent—when he testified that there had been no complaints against him at work. Bloxson's testimony on direct examination permitted the state to inquire by challenging Bloxson's testimony on that issue. But it was unnecessary for the prosecutor to ask Bloxson a question that might be understood to inquire whether the state had charged him with a crime. The district court appropriately sustained the objection before Bloxson answered the prosecutor's question. After a bench conference, the prosecutor asked a narrower question concerning whether Bloxson "had been the subject of complaints . . . as an employee for any company," and Bloxson answered in the affirmative. Nonetheless, the prosecutor's prior question about whether Bloxson was "charged with stealing" went beyond the scope of Bloxson's testimony on direct examination.

If a prosecutor intentionally elicits or attempts to elicit inadmissible evidence, a new trial may be ordered if "the misconduct appears to be inexcusable and so serious and prejudicial that the defendant's right to a fair trial is denied." *State v. Steward*, 645 N.W.2d 115, 121 (Minn. 2002). But a new trial is unnecessary if the misconduct was harmless. *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016). "Prosecutorial misconduct is

harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the misconduct." *Id.* (quotation omitted).

In this case, we do not consider any prejudice arising from Bloxson's answer to the prosecutor's appropriate question about whether there had been any complaints against him at work. Bloxson admitted that there had been such complaints, thereby contradicting his testimony on direct examination. We consider only the prejudice arising from the prosecutor's question about whether he was, at the time of trial, "charged with stealing from a former employer." Bloxson's argument is based on the premise that the prosecutor informed the jury that the state had charged him with the criminal offense of theft. But the question is not so explicit; the jurors may or may not have understood it in that way. Bloxson did not answer the question because his attorney promptly objected and the district court sustained the objection. In her closing argument, the prosecutor did not refer to either a "charge" of "stealing" or to Bloxson's conflicting testimony about complaints against him at work. The prosecutor did refer to evidence of Bloxson's prior conviction of assault, which was admitted into evidence and was the subject of a limiting instruction. Bloxson's prior conviction likely had more of an impact on his credibility than a question that might have been understood to refer to a pending criminal charge. All of these circumstances indicate that the prosecutor's improper question about being "charged with stealing" was a minor and momentary part of the trial. We conclude beyond a reasonable doubt that the jury's verdict was surely unattributable to the prosecutor's impermissible question. *See id.*

B. Rebuttal Argument

Second, Bloxson argues that the prosecutor committed misconduct in her rebuttal closing argument by referring to facts that are not in the record and by vouching for the credibility of J.M.Y.

In Bloxson's attorney's closing argument, she challenged the reliability of J.M.Y.'s testimony by stating:

> You heard from [J.M.Y.] that something happened after my opening, [the prosecutor] met with her. And you heard her agree and say many of those details unfolded . . . when she spoke to [the prosecutor]. . . . It's convenient that after I got up and said I was at a loss of words, that there really wasn't much evidence, that all of a sudden there was a lot more detail than before.

Bloxson's attorney later stated that one particular detail of the alleged incident "came up only after [J.M.Y.] spoke to [the prosecutor] and was not in any of the previous interviews." The attorney further noted that "months passed from June of 2019 until the trial began, and then [J.M.Y.] met with [the prosecutor] after opening, and [the prosecutor] is not trained in the protocol." Bloxson's attorney continued by arguing that certain facts included in J.M.Y.'s trial testimony were not mentioned in her pre-trial statements and were not disclosed until J.M.Y.'s trial testimony. Bloxson's attorney said that "the details were added when she spoke to" the prosecutor. Finally, Bloxson's attorney stated, "I submit to you that the details came out when they did because the evidence was being sandpapered for you."

At the beginning of her rebuttal argument, the prosecutor replied to Bloxson's attorney's argument as follows:

> So the first thing that I think it's very important to respond to and to emphasize is that the assertion that I sandpapered witnesses, planted evidence in the mind of a child, tried to elicit false details from a kid during a trial preparation meeting, suggesting to her what I wanted to hear, questioned her in an inappropriate manner, or did anything inappropriate or unethical is entirely untrue and unsupported. To make those allegations in a courtroom is actually a very serious thing. And if I had done anything improper . . . .

Bloxson's attorney objected, and the district court overruled the objection. The prosecutor continued with her rebuttal argument by stating, "If I had done anything improper, the judge would have given you an instruction about it, or the evidence would have been excluded." Bloxson's attorney again objected, and the district court again overruled the objection. The prosecutor resumed her rebuttal argument as follows:

> It is not improper for a lawyer trying a criminal case involving sexual abuse of a child to meet with that child before testimony, it is not improper to go through the questions that that lawyer plans to ask the child so that that child isn't coming in to a foreign place, an unfamiliar setting, with no idea about what she's going to be asked. . . .
>
> There's nothing improper about that. Believe you me, if there was, you would have heard. And if I'd done anything improper in this case, that evidence wouldn't have come in. It's completely normal, straightforward trial preparation. . . .
>
> And there was nothing improper about it. And any suggestion to the contrary is an attempt to inflame you, is an attempt to make you think I did something shady.

Bloxson contends that the prosecutor's rebuttal argument was improper because "[t]here was nothing in the record to suggest that the court reviewed the circumstances of the prosecutor's meeting with J.M.Y. or that the court would have given an instruction or excluded evidence if the prosecutor had done something improper." Bloxson also contends

that the prosecutor's rebuttal argument was improper because "the prosecutor implied that J.M.Y.'s statement was credible because if it had not been, the trial court would have excluded the evidence."

"A prosecutor's closing argument should be based on the evidence presented at trial and inferences reasonably drawn from that evidence." *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990). In this case, the evidence introduced at trial does not include specifics about the conversations between J.M.Y. and the prosecutor before trial. Bloxson's attorney asked the jury to infer that the prosecutor had improperly persuaded J.M.Y. to expand on her pre-trial statements by adding details that did not reflect the truth. Having asked the jury to draw such inferences, Bloxson cannot complain that the state asked the jury to draw contrary inferences from the same evidentiary record.

The prosecutor's rebuttal argument also is justified by the fact that Bloxson's attorney rather overtly challenged the propriety of the prosecutor's communications with J.M.Y. In such a situation, a prosecutor is permitted to reply in some way. In determining whether a prosecutor's reply was misconduct, the prosecutor's "remarks must be examined within the context of the trial," which requires consideration of "defense counsel's conduct, as well as the nature of the prosecutor's response." *United States v. Young*, 470 U.S. 1, 12, 105 S. Ct. 1038, 1044 (1985). Appellate courts generally are disinclined "to reverse convictions where prosecutors have responded reasonably in closing argument to defense counsel's attacks, thus rendering it unlikely that the jury was led astray." *Id.* Accordingly, it is appropriate to "not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo" such that "if the prosecutor's remarks

were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction." *Id.* at 12-13, 105 S. Ct. at 1045. In the present situation, the prosecutor's rebuttal argument was an appropriate and proportional reply to Bloxson's closing argument.

Bloxson contends in the alternative that the prosecutor improperly vouched for J.M.Y.'s credibility. Whether a witness is credible or not credible is "strictly the domain of the jury." *State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005). Accordingly, a prosecutor may not "vouch for the veracity of any particular evidence." *State v. McArthur*, 730 N.W.2d 44, 53 (Minn. 2007). 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). A prosecutor may "argue that the state's witnesses were worthy of credibility" but "may not express a personal opinion about the witnesses' credibility." *State v. Yang*, 627 N.W.2d 666, 679 (Minn. App. 2001) (citing *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995)), *review denied* (Minn. July 24, 2001).

The challenged statements by the prosecutor were focused on the prosecutor's own actions, not on J.M.Y.'s veracity. The prosecutor's purpose was to persuade the jury that J.M.Y. was not lacking credibility as a result of her conversation with the prosecutor. The prosecutor did not express her own personal opinion about J.M.Y.'s credibility. The prosecutor simply did not vouch for the credibility of J.M.Y.'s testimony. *See Yang*, 627 N.W.2d at 679.

Thus, Bloxson is not entitled to a new trial on the ground of prosecutorial misconduct.

II. Upward Durational Departure

Bloxson also argues that the district court erred by granting the state's motion for an upward durational departure from the presumptive sentencing range.

The Minnesota Sentencing Guidelines specify presumptive sentences for felony offenses. Minn. Sent. Guidelines 2.C (2016). For any particular felony offense, the presumptive sentence is "presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics." Minn. Sent. Guidelines 1.B.13 (2016). A district court "must pronounce a sentence . . . within the applicable [presumptive] range unless there exist identifiable, substantial, and compelling circumstances to support a departure." Minn. Sent. Guidelines 2.D.1 (2016). "Accordingly, a sentencing court can exercise its discretion to depart from the guidelines *only if* aggravating or mitigating circumstances are present and those circumstances provide a substantial[] and compelling reason not to impose a guidelines sentence." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotations omitted) (citing *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989), and Minn. Sent. Guidelines 2.D.1.). "Substantial and compelling circumstances are those demonstrating that the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotation omitted). In reviewing a departure from the applicable sentencing range, this court generally applies an abuse-of-discretion standard of review. *Soto*, 855 N.W.2d at 307-08.

A district court may base an upward departure on one or more of the aggravating factors identified by statute or by the sentencing guidelines, although the district court is not limited to those factors. *See* Minn. Stat. § 244.10, subd. 5a(a), (c) (2016); Minn. Sent. Guidelines 2.D.3 (2016). In this case, the jury found one aggravating factor: that Bloxson was in a position of authority over J.M.Y. at the time he committed the offense. That fact is recognized as an aggravating factor that may support an upward durational departure. *See State v. Carpenter*, 459 N.W.2d 121, 128 (Minn. 1990); *State v. Cermak*, 344 N.W.2d 833, 839 (Minn. 1984); *State v. Griffith*, 480 N.W.2d 347, 351 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992); *State v. Skinner*, 450 N.W.2d 648, 654 (Minn. App. 1990), *review denied* (Minn. Feb. 28, 1990).

Bloxson contends that an upward departure was improper because his offense "was not more serious than the typical first-degree criminal sexual conduct offense." But the evidence introduced at trial indicates that Bloxson's abuse of his position of authority provided the district court with substantial and compelling reasons to depart. Bloxson was in a position of authority over J.M.Y. because her mother entrusted Bloxson to watch and care for her three children while she was at work. To facilitate the offense, Bloxson called J.M.Y. into his bedroom, ostensibly for the purpose of talking to her, as a person in a position of authority, about her misbehavior at school. Bloxson told J.M.Y. to lie on her back and remove her clothes. While he was penetrating her, he said to her, "If you do bad in school, bad things happen," or "Bad things have consequences," or words to that effect, as if his sexual conduct was a proper punishment for her misbehavior. After the criminal act was complete, Bloxson told J.M.Y. that no one would believe her if she were to tell

others about the incident. Later that day, Bloxson told J.M.Y. that she was "off punishment," thereby using his position of authority to conceal the offense. These facts demonstrate that Bloxson abused his position of authority in committing the crime in a way that makes his offense significantly more serious than the typical offense. Consequently, Bloxson's abuse of his position of authority over J.M.Y. provides substantial and compelling reasons to not impose a sentence in the presumptive range.

Bloxson contends that his offense was less serious than the typical first-degree criminal-sexual-conduct offense because it was "an isolated, one-time incident." But that was true as well in *Carpenter*, in which the defendant was a youth pastor who was convicted of criminal sexual conduct based on one incident with a 14-year-old girl. 459 N.W.2d at 122-24. The district court sentenced the defendant to an upward departure based on one aggravating factor: abuse of a position of trust and authority. *Id.* at 127. The supreme court affirmed the sentence. *Id.* at 128.

Bloxson also contends that his offense was not accompanied by "gratuitous violence, extensive grooming, or multiple acts." But the absence of other aggravating factors does not negate the presence of the aggravating factor found by the jury. Indeed, the presence of a single aggravating factor may be sufficient to support an upward departure. *State v. Ayala-Leyva*, 848 N.W.2d 546, 558 (Minn. App. 2014), *review denied* (Minn. Aug. 11, 2015).

Thus, the district court did not err by granting the state's motion to impose an upward durational departure.

Affirmed.