This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0486

State of Minnesota,
Respondent,

vs.

Eriberto Galvan-Tirado,
Appellant.

Filed March 28, 2022
Affirmed
Segal, Chief Judge

Hennepin County District Court
File No. 27-CR-20-8579

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Reilly, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this direct appeal from the judgment of conviction for first-degree criminal sexual conduct following a court trial, appellant argues that the prosecutor committed misconduct

in closing argument by inflaming the passions of the jury, disparaging the defense, and vouching for the complainant's credibility. We affirm.

FACTS

H.P. (the child) was born in El Salvador in 2003. When the child was approximately two years old, her mother moved to the United States. The child remained in El Salvador with her brother and sister. Around 2010, the three children moved to the United States, where they reunited with mother in Florida. While in Florida, the children lived with mother and appellant Eriberto Galvan-Tirado. Mother and Galvan-Tirado were involved in a romantic relationship and were married in 2013. The family lived in Florida for about a year and then moved to Minnesota. After living briefly in St. Paul, the family moved to an apartment in Minneapolis. The family eventually moved to a house near Lake Nokomis, except the child's sister. Sister moved in with her significant other, whom she later married.

In 2017, the child, mother, brother, and Galvan-Tirado moved to Waconia. The child was approximately 13 years old at the time. The child's behavior changed a few months after they moved to Waconia. Mother and Galvan-Tirado expressed concern over the child's behavior, including the individuals who the child was spending time with and that the child was drinking alcohol. They attempted to establish rules for the child, but she did not want to follow them. As a result, mother and sister decided that it would be best for the child to live with sister in Big Lake. The child was initially hesitant, but ultimately moved to Big Lake in February 2019 to live with sister.

The child's behavioral issues continued in Big Lake. Sister expressed concern that the child was hanging out with "the wrong people," smoking marijuana, and drinking alcohol. Sister threatened to send the child back to mother's house on multiple occasions due to the child's behavior. On one occasion, the child snuck out of sister's house. Her family went to look for her, and brother ultimately found her around midnight. He believed that she was high at the time. Mother took the child back to Waconia that night, but the child only remained there for a day before returning to sister's home in Big Lake.

In the summer of 2019, the family decided that the child should return to mother's house in Waconia. Sister's husband called the child to tell her of the decision and during the phone call the child "broke down" and said that she did not want to go back because Galvan-Tirado had sexually abused her. The husband then called sister and told her that she needed to talk to the child before she moved out. The child had previously reported to sister that she had been sexually abused by a neighbor in El Salvador, but this was the first time the child told sister that she had been sexually abused by Galvan-Tirado.

The child spoke with sister and mother that same day and repeated her allegation that Galvan-Tirado sexually abused her. In this initial conversation, the child did not go into specific detail about what happened, but over the following weeks and months she provided additional details to sister. Sister's "main question" was if Galvan-Tirado "penetrate[d] her," and the child told sister that Galvan-Tirado "directly put his penis into her vagina" when they lived in the house near Lake Nokomis.

A few weeks later, sister, her husband, and mother were out to dinner. Sister asked mother what she was going to do about the abuse allegations and mother became upset and

left. Sister and her husband then returned home and spoke with the child. Sister told the child that mother was not going to do anything about the allegations and asked her what she wanted to do. The child responded that she wanted to make a police report. They planned to do so the following day, and sister subsequently informed mother of the decision. Mother called Galvan-Tirado and informed him that the child had accused him of sexual abuse and that the child planned on making a police report.

Galvan-Tirado drove to sister's house that night. Galvan-Tirado was insistent on talking to sister and said that he was sorry if he had done anything to the family. Sister told him to leave but he refused. Sister then called the police. The police responded and the child made a police report that night. The child reported that the sexual abuse started when the family lived in Florida and continued when they moved to Minnesota. She reported that Galvan-Tirado touched her vagina approximately three times when they lived in the apartment in Minneapolis, and that he penetrated her vagina with his penis on one occasion when they lived in the house near Lake Nokomis. The child later underwent a CornerHouse interview and repeated her allegations that Galvan-Tirado digitally penetrated her vagina on multiple occasions[1] and penetrated her vagina with his penis on one occasion.

Respondent State of Minnesota charged Galvan-Tirado with three counts of first-degree criminal sexual conduct. Galvan-Tirado waived his right to a jury trial and the case was tried to the court beginning in October 2020. The child's testimony at trial was

[1] During the interview, the child was asked how many times Galvan-Tirado had digitally penetrated her and answered "about two times maybe."

consistent with her prior allegations that Galvan-Tirado digitally penetrated her multiple times when they lived in the apartment in Minneapolis and penetrated her vagina with his penis on one occasion when they lived in the house near Lake Nokomis.

The child also testified that she previously disclosed the sexual abuse to two of her friends, but at trial neither remembered the child explicitly saying that Galvan-Tirado sexually abused her. Rather, one friend testified that she recalled the child telling her that she did not "really feel comfortable or safe around [Galvan-Tirado]" and the friend "got a hint" that it was related to something sexual in nature. The other friend testified that she recalled the child telling her something negative about Galvan-Tirado but could not recall any specific details and was "not sure" if it was sexual in nature.

Galvan-Tirado testified and denied the allegations, and mother and brother testified that the child was never alone with Galvan-Tirado. Mother also testified that she believed that the child fabricated the allegations because she did not want to move back to Waconia.

The district court found Galvan-Tirado guilty of all three counts of first-degree criminal sexual conduct. The district court imposed a presumptive sentence of 144 months in prison and ordered a ten-year conditional-release period. Galvan-Tirado appeals.

DECISION

Galvan-Tirado argues that the prosecutor committed misconduct during closing argument that entitles him to a new trial. Because Galvan-Tirado did not object at trial, we apply a modified plain-error test to review his claims of misconduct. *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016). In doing so, this court considers whether there is "(1) error, (2) that is plain, and (3) affects substantial rights." *State v. Ramey*, 721 N.W.2d

294, 302 (Minn. 2006). Error is plain when "it was clear or obvious," which is generally established when the error "contravenes case law, a rule, or a standard of conduct." *Id.* (quotation omitted). "Under this approach, the defendant must establish the existence of an error that was plain, and then the burden shifts to the State to establish that the plain error *did not* affect the defendant's substantial rights." *State v. Epps*, 964 N.W.2d 419, 423 (Minn. 2021). Even where misconduct occurs, this court will reverse only when "the defendant was denied a fair trial." *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995).

Galvan-Tirado argues that the prosecutor committed misconduct that amounted to plain error during the state's closing argument by inflaming the passions of the fact-finder, disparaging the defense, and improperly vouching for the child's credibility. He also argues that these errors affected his substantial rights, and that he is therefore entitled to a new trial. We address each argument in turn.

Inflaming the Passions of the Fact-Finder

Galvan-Tirado first argues that the prosecutor committed plain error by inflaming the passions of the fact-finder during the state's closing argument. It is well-established that a prosecutor "may not seek a conviction at any price" and "must avoid inflaming the [fact-finder's] passions and prejudices against the defendant." *Id.* at 362-63. "When credibility is a central issue, [appellate courts] pay[] special attention to statements that may inflame or prejudice the [fact-finder]." *State v. Mayhorn*, 720 N.W.2d 776, 787 (Minn. 2006).

Galvan-Tirado argues that the prosecutor committed misconduct constituting plain error by "appealing to the court's passions and prejudices by making arguments that closely

mirrored a scripted argument previously found to be improper." His argument focuses primarily on the following excerpt from the prosecutor's closing argument:

> There's something inherently imbalanced about cases involving sexual abuse of a child, something happened but how does the child prove it? It happened behind closed doors, months or years earlier, there weren't any witnesses, there isn't any physical evidence.
>
> "Don't tell your mother. No one is going to believe you." Kids know they are kids. They know they're easily discounted and easily dismissed. They don't remember or talk about things in a linear or sequential way all the time. Many times they are often confused and afraid, much like [the child] in this case.
>
> And also they don't have the life experiences to really understand what's happened and they're not equipped to know what to do afterwards. And all of these factors, the secrecy, the confusion, the fear, and the fact that the victim is a child, these factors become instruments of the crime. When a child finally does tell an adult this whole thing plays out in a grownup world.

He also points to the prosecutor's statements that the child was "reserved" and that Galvan-Tirado was "counting on" the fact-finder not believing her.

A closing argument must be based on the evidence presented at trial. *Porter*, 526 N.W.2d at 363. And it must not urge the fact-finder to protect society. *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *rev. denied* (Minn. May 16, 2000). Galvan-Tirado argues that "[t]hese arguments went beyond the trial evidence and appealed to the court's instinct to protect children against harm." We disagree that the prosecutor's statements that the child was "reserved" and that Galvan-Tirado was "counting on" the fact-finder not believing her were plain error. Those statements were based on the evidence

presented at trial and, as discussed in greater detail below, were proper arguments related to Galvan-Tirado's defense that the child's allegations were not credible. But we agree that the prosecutor's more general statements about children who are sexually abused constitute plain error.

Galvan-Tirado points to a number of nonprecedential opinions of this court involving similar statements in closing arguments by prosecutors in the Hennepin County Attorney's Office. In particular, *State v. Rosendo Dominguez* addressed a similar statement and determined that it constituted plain error. No. A19-0869, 2020 WL 3637928, at *2-3 (Minn. App. July 6, 2020), *rev. denied* (Minn. Sept. 29, 2020). In that case, the prosecutor argued:

> Children speak quietly, that's why we have to listen. The men who abuse children are counting on their silence. That's why they pick them. Children are easily confused. They're afraid. They may not have the language or the framework to understand what's happening. They don't remember or understand things the way adults do. They don't talk or think in a linear or sequential way all the time. Children are the perfect victims.

Id. at *2. This court determined that the argument constituted plain error because the statements "went beyond the evidence in the case, and they attempted to inject into the trial the broader societal issue of protecting children from sexual abuse." *Id.* at *3. Additionally, this court found that similar arguments constituted plain error in four other nonprecedential opinions.[2]

[2] *See Dowell v. State*, No. A20-1069, 2021 WL 1846830, at *3-4 (Minn. App. May 10, 2021), *rev. denied* (Minn. Aug. 10, 2021); *Garcia v. State*, No. A18-1907, 2019 WL 3545814, at *2-4 (Minn. App. Aug. 5, 2019), *rev. denied* (Minn. Oct. 29, 2019); *State*

Here, the child testified that Galvan-Tirado told her not to report the abuse and that she was scared and confused about what happened. But the prosecutor's arguments go beyond the child's specific testimony and provide a more general analysis of children who are sexually abused. The prosecutor stated that "[t]here's something inherently imbalanced about cases involving sexual abuse of a child" and asserted that "[k]ids know they are kids," are confused, afraid, "easily discounted and easily dismissed," and do not speak in linear or sequential ways. The prosecutor also stated, "[w]hen a child finally does tell an adult this whole thing plays out in a grownup world." Consistent with the determinations reached by this court in the five prior cases cited above, we agree with Galvan-Tirado that this line of argument goes beyond the scope of the evidence in the record and injects the broader societal issue of the need to protect children from sexual abuse into the closing argument. Accordingly, we conclude that the argument constitutes plain-error misconduct because it sought to inflame the passions and prejudices of the fact-finder.

Disparaging the Defense

Galvan-Tirado next argues that the prosecutor committed misconduct amounting to plain error by disparaging Galvan-Tirado and his theory of defense. "[T]he [s]tate has the right to vigorously argue its case. But a prosecutor is not permitted to disparage the defense in closing argument." *Peltier*, 874 N.W.2d at 804 (citation omitted). Prosecutors therefore

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v. Danquah, No. A18-1581, 2019 WL 3293790, at *4-6 (Minn. App. July 22, 2019), *rev. denied* (Minn. Oct. 15, 2019); *State v. Ciriaco-Martinez*, No. A18-1415, 2019 WL 2999783, at *2 (Minn. App. July 1, 2019). We recognize that nonprecedential opinions are not binding precedent, but may be persuasive. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

"may not belittle a line of defense in the abstract or suggest that the defendant raised it because that was the only defense that might work." *State v. Pearson*, 775 N.W.2d 155, 164 (Minn. 2009) (quotation omitted).

Galvan-Tirado argues that the prosecutor disparaged the defense and therefore committed misconduct by "implying that all criminal defendants, including [Galvan-Tirado], lie on the stand when they deny the accusations in their entirety." This argument focuses on the following statements made during the prosecutor's closing argument:

> Criminal defendants do not admit to the charges when they take the witness stand. They get on the witness stand to deny everything every time. Just because the defendant denies it doesn't mean that there's reasonable doubt. He's presumed innocent, he's not presumed truthful. A reasonable doubt is doubt based on reason and common sense. If what he said is not credible it is not a reasonable doubt.

Again, this argument is strikingly similar to an argument that was determined to constitute plain error in *Rosendo Dominguez*.[3] 2020 WL 3637928, at *3. In that case, the prosecutor argued that "[c]riminal defendants don't admit to the charges when they take the witness stand; they get on the witness stand and they deny everything, and that's just what he did," and that "the grown-up's always going to have the upper hand in that context, and that is what he is counting on." *Id.*

This court determined that the argument in that case constituted plain error. In doing so, this court explained:

[3] The cases were both prosecuted by attorneys with the Hennepin County Attorney's Office, but not by the same prosecuting attorney.

> Implying that all criminal defendants lie when they take the stand is plain error. The prosecutor lumped Rosendo Dominguez into a category of criminal defendants who all lie when they take the stand—nothing in the prosecutor's statement was connected to Rosendo Dominguez's actual testimony. The prosecutor committed plain error by disparaging the defense.

Id. We again acknowledge that this case is nonprecedential, but find its analysis persuasive. Here, the prosecutor similarly implied that all defendants lie and lumped Galvan-Tirado into that category by stating, "[c]riminal defendants do not admit to the charges when they take the witness stand. They get on the witness stand to deny everything every time." And the prosecutor similarly did not connect the statement to Galvan-Tirado's testimony. By implying that all criminal defendants lie on the witness stand, the prosecutor violated the prohibition on belittling the defense. *See Peltier*, 874 N.W.2d at 804. Such a violation constitutes plain-error misconduct.

Galvan-Tirado next argues that the prosecutor improperly belittled his theory of defense by arguing that Galvan-Tirado was "counting on" the district court "dismissing" the child and "hoping, hoping against hope that [the district court would] discount her." We do not agree that these constitute plain error. These statements were part of the prosecutor's broader argument that Galvan-Tirado was "counting that you'll throw up your hands and say that her word is not enough. But it is enough. In the law the testimony of a credible witness, even if it's only one, is enough." This argument is consistent with caselaw. *See State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998) (stating that "a conviction may rest on the testimony of a single credible witness"). A prosecutor is permitted to argue that a particular defense has no merit, but may not go on to suggest "that the defendant

raised the defense because it was the only one with any hope for success." *Peltier*, 874 N.W.2d at 804. The prosecutor here did not argue that Galvan-Tirado raised the defense that the child fabricated the allegations because it was the only defense that would work; rather, the prosecutor asserted that to the extent Galvan-Tirado was arguing that her testimony could not support a conviction, the argument had no merit. That statement therefore does not constitute plain error.

Improper Vouching

Finally, Galvan-Tirado argues that the prosecutor committed misconduct amounting to plain error by improperly vouching for the child's credibility. Whether a witness is credible or not credible is "strictly the domain of the [fact-finder]." *State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005). As such, a prosecutor may not "vouch for the veracity of any particular evidence." *State v. McArthur*, 730 N.W.2d 44, 53 (Minn. 2007). "[V]ouching 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), *rev. denied* (Minn. July 24, 2001).

Galvan-Tirado argues that the prosecutor vouched for the child by arguing:

> Only the most Machiavellian, amoral human being would make something up like this, come into a courtroom, promise to tell the truth and say it all again because they don't like their stepfather or they got their cell phone taken away, or

> they didn't pick up after the dog. That is not an interest in this case.

The prosecutor in *Rosendo Dominguez* also made a nearly identical statement in closing argument. In that case, the prosecutor stated:

> Only the most amoral, Machiavellian individual would make this up because they are mad at their stepfather for taking their cell phone, and then repeat it again at CornerHouse, and then come into a courtroom full of adults and strangers, promise to tell the truth, and make it up again.

2020 WL 3637928, at *3. This court determined that the statement did not constitute impermissible vouching but rather argued "that the victim's testimony was credible because it was consistent and not self-serving" and thus did not constitute error. *Id.* at *4. This court relied on *State v. Jackson*, in which the supreme court determined that it was proper for the prosecutor to highlight that testimony was not self-serving. 714 N.W.2d 681, 696 (Minn. 2006).

Galvan-Tirado argues that this court's reliance on *Jackson* in *Rosendo Dominguez* was misplaced. We disagree. As in *Rosendo Dominguez*, the prosecutor here was attempting to highlight the fact that the child's allegations were not self-serving because she did not have any significant reason for fabricating the allegations. Accordingly, the statement does not amount to improper vouching, and does not constitute plain-error misconduct.

Effect on Substantial Rights

Because we have concluded that the prosecutor committed plain-error misconduct by attempting to inflame the passions and prejudices of the fact-finder and by disparaging

the defense, we must next analyze whether the state has met its burden of demonstrating that the error did not affect Galvan-Tirado's substantial rights. *Epps*, 964 N.W.2d at 423. In deciding whether the state has met this burden, we consider "(1) the strength of the evidence against the defendant; (2) the pervasiveness of the improper conduct; and (3) whether the defendant had an opportunity (or made efforts) to rebut the prosecutor's improper suggestions." *State v. Hill*, 801 N.W.2d 646, 654-55 (Minn. 2011).

Galvan-Tirado argues that the misconduct affected his substantial rights because it "permeated the closing argument" and credibility was the central issue in this case. We agree that credibility was the central issue at trial because the state's case against Galvan-Tirado was based primarily on the child's testimony, but we are not convinced that the misconduct impacted the district court's credibility determinations. The improper statements are limited to two statements in a 38-page closing argument. The misconduct was therefore not pervasive. *See State v. Walsh*, 495 N.W.2d 602, 606-07 (Minn. 1993) (determining that improper comments were harmless error because they "comprised only a small part of the prosecutor's summation").

In addition, this case was tried to the court, not a jury, which reduces the risk of prejudice. *See, e.g.*, *State v. Burrell*, 772 N.W.2d 459, 467 (Minn. 2009) (noting that, in the context of considering the impact of *Spreigl* evidence, "[t]he risk of unfair prejudice" was reduced during a court trial because there was less risk that the judge "would use the evidence for an improper purpose or have his sense of reason overcome by emotion").

Moreover, Galvan-Tirado had the opportunity to, and did, rebut the assertions that he was not credible and that the judicial process was unfair to children who allege that they

have been sexually abused. Defense counsel vigorously argued that the child's testimony was inconsistent and uncorroborated by her friends' testimony and that she had motive to fabricate the allegations, and generally argued that "[c]hildren in today's world aren't what they were" and are savvier and "exposed to unbelievable stuff" at younger ages.

Galvan-Tirado also argues that "[t]he court's verdict order reflects the influence of the state's closing arguments. For instance, the court was clearly swayed by the state's assertion that a trial does not require perfection because the court began its verdict order by citing to this argument." But the prosecutor's statement that a trial does not require perfection was not improper—it echoes a well-settled principle that has been recognized by the United States Supreme Court. *See Bruton v. United States*, 391 U.S. 123, 135 (1968) ("A defendant is entitled to a fair trial but not a perfect one." (quotation omitted)); *see also State v. Greenleaf*, 591 N.W.2d 488, 505 (Minn. 1999) (noting that "the constitutional right to a fair criminal trial does not guarantee a perfect trial"). Consequently, the fact that the district court was seemingly persuaded by that argument does not affect Galvan-Tirado's substantial rights.

Finally, we note that none of the previous five cases addressing similar closing arguments resulted in this court concluding that the plain-error misconduct affected the appellant's substantial rights, despite the fact that several of the cases involved more serious misconduct.[4] However, we do express our concern that all five cases, as well as

[4] *See Dowell*, 2021 WL 1846830, at *4-5; *Rosendo Dominguez*, 2020 WL 3637928, at *4; *Garcia v. State*, 2019 WL 3545814, at *4-5; *Danquah*, 2019 WL 3293790, at *6; *State v. Ciriaco-Martinez*, 2019 WL 2999783, at *4.

this case, involve prosecuting attorneys from the Hennepin County Attorney's Office and that our opinions in four of the five cases had already been released before the start of Galvan-Tirado's trial.

Affirmed.