STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1252

State of Minnesota,
Respondent,

vs.

Giovanni German Vasquez Rosales,
Appellant.

Filed August 21, 2023
Affirmed
Reyes, Judge

Mower County District Court
File No. 50-CR-19-2510

Keith Ellison, Attorney General, Lydia Villalva Lijó, Assistant Attorney General, St. Paul, Minnesota; and

Kristen M. Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Reyes, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant challenges his conviction of second-degree criminal sexual conduct due to ineffective assistance of trial counsel and prosecutorial misconduct. We affirm.

FACTS

Appellant Giovanni German Vasquez Rosales and K.B. married in 2012 and raised three children together before they separated in 2019. The victim in this case, G.A.V., is appellant's cousin. G.A.V. was born in the United States on October 22, 2001, and attended several years of elementary school in Austin, Minnesota, before moving to Mexico with her parents. In 2016, G.A.V. moved back to Minnesota at the age of 15 with her father, while her mother and younger sister remained in Mexico. Appellant had a close relationship with G.A.V.'s parents who had introduced K.B. to appellant in 2009. K.B. is also a long-term friend of G.A.V.'s mother. Because G.A.V.'s father worked long hours, he asked appellant and K.B. to supervise G.A.V. after school at appellant's house until he returned home from work during the 2016 to 2017 school year. The next school year, G.A.V.'s mother and sister moved back to Austin, so G.A.V. no longer needed to go to appellant's home after school.

Allegations of Sexual Misconduct and Investigation

In 2019, G.A.V. told her mother that appellant had touched her breast on several occasions at his house between 2016 and 2017 when she was 15 years old. By this time, appellant and K.B. had separated, so G.A.V. no longer believed that the disclosure would break up her cousin's family. G.A.V. also stated that she did not want the same thing to happen to her sister or appellant's daughters. G.A.V.'s mother relayed her claims to K.B., who reported the abuse in August 2019.

A child-protection investigator (the investigator) followed up on K.B.'s report and interviewed G.A.V. in K.B.'s presence. The recording of this interview was published as

evidence at trial. G.A.V. told the investigator that appellant had touched the bare skin of her breast under her clothing several times when she was staying at appellant's house after school. One incident occurred when she came back from an exercise class with K.B. Appellant offered G.A.V. a massage, during which he put his hands down under her sports bra and touched her breast. Another time, appellant touched her breast under her clothes in the kitchen when she was washing the dishes. When asked whether she felt threatened by appellant, G.A.V. responded no, but she stated that she felt uncomfortable and confused because appellant was a close family member trusted by her father. She protected herself by trying to reduce interactions with appellant and avoiding going to appellant's house at times.

Following the interview, the investigator prepared a report identifying three incidents of improper touching. But the investigator acknowledged at trial that his report incorrectly stated that a third incident took place in the bedroom in the presence of two older children. Because the investigator had sent this report to an Austin County police detective (the detective), who relied on it to prepare another report for the county attorney's office for consideration of criminal charges against appellant, the county's charging documents also included the erroneous third incident.

In September 2019, the detective interviewed K.B., G.A.V.'s mother, and appellant. The recordings of these interviews were published at trial. During the detective's direct examination, the state asked, "In conducting this interview [of appellant], was there anything that you found particularly noteworthy?" The detective responded that when he asked appellant whether G.A.V. had been truthful, he "found [appellant] to be evasive in

his answers. [He] asked [appellant] very simple[] yes-no questions, and [appellant] couldn't completely answer them yes or no. [Appellant] always had a discussion or a dialog[ue]. And [appellant] seemed to talk around the answer that we were looking for." The detective further clarified that appellant's pauses in answering the questions were "noteworthy" because appellant appeared to be "searching for an answer" and "biding time to decide on" what he wanted to say. The detective also testified that appellant had indicated that the massage with G.A.V. "ended rather abruptly." Appellant did not object.

The county social-services team determined that sexual abuse had occurred based on a preponderance of the evidence, but that child-protective services were not needed because G.A.V. felt safe, she was not in regular contact with appellant, her family had access to support services, and no other child victims were identified. On November 13, 2019, respondent State of Minnesota charged appellant with seven counts of second-degree criminal sexual misconduct. Minn. Stat. § 609.343, subd. 1(b), (g), (h)(iii) (2016). The case proceeded to a jury trial on March 29, 2022.

At trial, G.A.V. testified in greater detail about three specific incidents of appellant's sexual misconduct, two of which are consistent with her interview with the investigator. G.A.V. testified that appellant touched her breast a third time "from behind" and "went up [her] shirt like the one in the kitchen." G.A.V. could not recall the exact location in appellant's home where the third incident occurred but testified that it was not in a bedroom or the kitchen. G.A.V. also disclosed for the first time at trial that appellant had touched her "private areas" "down there" when they were on the couch.

Appellant and K.B.'s Pending Divorce

K.B. and appellant separated in February 2019. K.B. filed for dissolution of their marriage in July 2019, seeking sole legal and sole physical custody of their three children. K.B. thought they would be able to reach a mutually acceptable custody arrangement with limited court intervention, but this changed when she learned about the sexual-assault allegations in August 2019. Because of G.A.V.'s allegations, K.B. wanted to ensure that their children would only have supervised contact with appellant and did not want to proceed with the divorce until this criminal-sexual-misconduct case was resolved.

Pornography Evidence

Appellant sought K.B.'s responses to interrogatories in the dissolution case, which she submitted on March 16, 2022. In response to the question of whether K.B. believed that appellant was "unfit or that there should be any limitations on his contact with the joint children," K.B. answered:

> His sexual behavior was escalating toward the end, and I confronted him about pornography depicting themes of incest and women dressed in school uniforms . . . . His internet search history was becoming disturbing.

The state first learned about the pornography during an interview with K.B. on March 22, 2022, when K.B. described confronting appellant about his browsing history. The state disclosed the information to the defense and provided a *Spreigl* notice[1] the next day.

[1] Under *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965), the prosecutor must give notice in writing, prior to trial, of all other crimes the prosecutor intends to show that an accused had previously committed.

During a hearing on March 28, 2022, appellant sought to introduce K.B.'s answers to interrogatories from the divorce case. The district court expressed a concern about the parties "introducing a slew of *Spreigl* evidence" that are not relevant to the charges in the instant case. The state noted that it would also seek to introduce the interrogatories, explaining that some of the statements go toward appellant's motive, intent, and a lack of mistake. Appellant stated that he had no objection to the state introducing K.B.'s interrogatory answers in their case-in-chief. The district court allowed the admission of K.B.'s interrogatory answers.

Following trial, the jury found appellant guilty on all seven counts. The district court entered a conviction on one count of second-degree criminal sexual conduct--victim under 16 years of age--significant relationship--multiple acts--felony. The district court denied appellant's motion for a downward dispositional departure and sentenced him to 108 months in prison. This appeal follows.

DECISION

I. Appellant did not receive ineffective assistance of trial counsel.

Appellant argues that he received ineffective assistance of trial counsel when his trial counsel agreed to or did not object to the evidence that: (1) appellant watched pornography involving themes of incest and school uniforms; (2) K.B. believed that G.A.V.'s accusations against appellant were credible; (3) the county social-services team determined that appellant had abused G.A.V.; and (4) law enforcement believed that appellant was not forthright during the interview. We are not persuaded.

The United States and Minnesota Constitutions guarantee criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. Appellate courts review "a claim of ineffective assistance of counsel de novo." *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016).

To prevail on a claim of ineffective assistance of counsel, an appellant must satisfy a two-prong test based on the standard from *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Jones*, 977 N.W.2d 177, 193 (Minn. 2022). The appellant must "show both that (1) his trial counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Jones*, 977 N.W.2d at 193 (quoting *Crow v. State*, 923 N.W.2d 2, 14 (Minn. 2019)). When either prong of the *Strickland* test fails, an appellate court need not address the other prong. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

The record shows that appellant's trial counsel defended him on the theory that G.A.V. fabricated the sexual-abuse allegations to benefit K.B. in their pending divorce case. To defend appellant effectively based on this theory, trial counsel had to demonstrate that appellant was credible in denying the allegations, whereas G.A.V., G.A.V.'s mother, and K.B. lacked credibility.

A. K.B.'s interrogatory answers regarding pornography

Appellant claims that his trial counsel ineffectively represented him by failing to object to the admission of K.B.'s interrogatory answers containing information about his pornography-viewing history. We are not convinced.

Here, the recorded interviews with the investigator and the detective were both published at trial. Even without the admission of K.B.'s interrogatory answers, the jury would have heard the same information from K.B.'s interview recordings, which included appellant's pornography-browsing history. Moreover, before the state introduced K.B.'s interrogatory answers at trial, the district court instructed the jury that the limited purpose of the evidence was to help determine whether appellant committed the charged offense and not to prove his character or propensity. Jurors are presumed to follow limiting instructions regarding the proper use of evidence. *See State v. Ali*, 855 N.W.2d 235, 249-50 (Minn. 2014) (holding that reviewing courts assume that jurors follow a court's instruction). Therefore, even if we assume without deciding that the first prong of the *Strickland* test is met, appellant fails to demonstrate that the outcome of the trial would have been different but for counsel's alleged error. *See Jones*, 977 N.W.2d at 193.

B. K.B.'s unredacted statement

Appellant asserts that trial counsel was ineffective when he failed to redact from K.B.'s interrogatory answers that K.B. believed G.A.V.'s claims. We disagree. Because the defense's theory was that G.A.V. "lied" about appellant's sexual misconduct to benefit K.B. in the custody dispute, K.B.'s endorsement of G.A.V.'s allegations was expected, and redaction of the statements would not have made any reasonable difference to the outcome of the case. *Id.*

C. The investigator's allegedly "vouching" testimony

Appellant contends that he received ineffective assistance of trial counsel because counsel failed to object to the investigator's allegedly vouching testimony. We disagree.

Assessing credibility is "strictly the domain of the jury." *State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005). Generally, "one witness cannot vouch for or against the credibility of another witness." *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998).

During direct examination, the investigator described the interviews that he conducted as part of the social-services team's investigation. The state then asked, "Okay. And what was the result of that investigation?" The investigator responded: "That sexual abuse was determined to have occurred . . . ." Appellant argues that the investigator's testimony impermissibly vouched for G.A.V. and that trial counsel was ineffective for failing to object. Appellant relies on *State v. Morales-Mulato*, in which an expert witness claimed that she had training in "truth-detecting" and impermissibly vouched for a child's credibility in a sexual-abuse case. 744 N.W.2d 679, 688 (Minn. App. 2008), *rev. denied* (Minn. Apr. 29, 2008). Unlike the expert in *Morales-Mulato*, the investigator did not form an opinion about G.A.V.'s truthfulness, but rather answered the state's question about the result of the social-services team's investigation. *Cf. id.* Therefore, the investigator did not impermissibly vouch for G.A.V. in his testimony, and trial counsel acted reasonably by not objecting.

D. The detective's testimony that appellant appeared evasive during his interview

Appellant claims that trial counsel was ineffective when he failed to object to the detective's testimony that appellant appeared to be evasive during his interview. We are not persuaded. Decisions about objections are matters of trial strategy that we will not second-guess on appeal "unless taken as a whole the trial was a mockery of justice." *State*

v. Bailey, 132 N.W.2d 720,724 (Minn. 1965). Trial counsel's lack of objection does not amount to ineffective assistance of counsel.

In sum, we conclude that appellant did not receive ineffective assistance of trial counsel and is not entitled to a reversal.[2]

II. The state's alleged prosecutorial misconduct does not warrant a new trial.

Appellant argues that the state engaged in plain-error prosecutorial misconduct by eliciting allegedly vouching testimony from the investigator and the detective and by arguing facts not in the record during closing, requiring a new trial. We disagree.

Appellant did not object to the prosecutor eliciting specific testimony from the investigator and the detective or in closing argument. We review claims of unobjected-to prosecutorial misconduct under a modified plain-error standard, considering 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). An error is plain if it "contravenes [caselaw], a rule, or a standard of conduct." *Id.* If a defendant establishes that plain-error misconduct occurred, the state then bears the burden of proving that the misconduct did not affect the defendant's substantial rights. *Id.* An error affects the defendant's substantial rights if it affected the outcome of the case. *State v. Griller*, 583, N.W.2d 736, 741 (Minn. 1998).

[2] In his *pro se* brief, appellant further argues that this court must reverse his conviction due to ineffective assistance of trial counsel. However, appellant does not address the second prejudice prong of the *Strickland* test. *Strickland*, 466 U.S. 668. Therefore, appellant's *pro se* argument also fails.

A. The alleged errors during the investigator's and the detective's testimonies did not affect appellant's substantial rights.

Plain-error prosecutorial misconduct requires that the prosecutor elicited inadmissible evidence "*knowingly* and for the purpose of bringing inadmissible matter to the attention of the judge or jury." *State v. White*, 203 N.W.2d 852, 857 (Minn. 1973) (emphasis added).

During the investigator's direct examination, the state inquired about the result of the social-services team's investigation. The investigator responded that the social-services team determined that sexual abuse had occurred. Subsequently, the state asked the detective. whether there was anything "noteworthy" about appellant's interview, to which the detective answered that appellant was evasive and appeared to be "searching for an answer" and "biding time to decide on" what he wanted to say.

Even if we assume without deciding that the state's questions constituted plain error, we conclude that neither affected appellant's substantial rights because they did not affect the outcome of the case. The state presented strong evidence against appellant, including interviews with and testimony from multiple witnesses that were consistent with each other. A critical issue at trial was the credibility of the parties, which the jury had the opportunity to decide by considering all the evidence and observing them throughout the trial. We conclude that no reasonable probability exists that the jury would have acquitted appellant but for these two isolated questions by the state.

B. No plain error occurred during the state's closing argument.

A prosecutor may argue all reasonable inferences from evidence in the record. *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010). "[A] prosecutor's argument need not be colorless, and it may include conclusions and inferences that are reasonably drawn from the facts in evidence." *Id.* However, a prosecutor may not intentionally misstate the evidence or mislead jurors about the inferences they may draw. *State v. Smith*, 876 N.W.2d 310, 335 (Minn. 2016).

During closing argument, the state described G.A.V. as

> a child whose thoughts had been consumed to the point where she knew she needed to tell. She didn't tell [K.B.] She told her mom as if to say, "Mom, [K.B.]'s making a mistake. The kids shouldn't be with [appellant]. They shouldn't be unfettered with him with no chance of escaping for three or four days in a row. He did this to me. And her mom took it to [K.B.]

During her recorded interview with the investigator., G.A.V. explained that she felt confused when appellant touched her breasts on several occasions when she was 15 years old. At the time, her mother and sister still lived in Mexico; her father worked long hours and trusted appellant. Although G.A.V. told the investigator that she was not afraid of appellant, appellant's conduct made G.A.V. uncomfortable enough that she avoided interacting with him. Most importantly, G.A.V. became close with appellant's children, two of whom are his daughters. G.A.V.'s sister and mother also returned to Minnesota from Mexico. G.A.V. expressly stated that she wanted to protect her sister and appellant's

children from appellant. We therefore conclude that the record supports the state's reasonable inferences in closing argument.

Affirmed.