**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-1070**

State of Minnesota,
Respondent,

vs.

Dale Joseph Jackson,
Appellant.

**Filed May 13, 2013**
**Affirmed in part, reversed in part, and remanded**
**Cleary, Judge**

St. Louis County District Court
File No. 69DU-CR-09-2535

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Hooten, Judge; and Willis, 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

**CLEARY**, Judge

Following a jury trial, appellant was convicted of attempted second-degree criminal sexual conduct and fifth-degree criminal sexual conduct. Appellant challenges his convictions, arguing that the district court abused its discretion by excluding evidence that the minor victim had possessed unusual knowledge regarding sex before the offenses occurred; that the prosecutor engaged in misconduct that constituted plain error affecting substantial rights by referring to "justice for children" during trial; and that the district court erred by convicting him of a lesser-included offense and by sentencing him twice for conduct that was part of the same behavioral incident. We affirm the district court's exclusion of evidence, but we reverse appellant's convictions and remand due to prosecutorial misconduct.

## FACTS

In April 2009, seven-year-old K.H. reported to friends and relatives that her grandmother's boyfriend, appellant Dale Jackson, had touched her inappropriately. K.H. was interviewed by an investigator with the St. Louis County Sheriff's Office, and she described two incidents that she said had occurred during the summer of 2008. K.H. told the investigator that, on one occasion, she was sleeping in a bed at her grandmother's house when she was awakened by appellant, who was on top of her and "was going up and down" or "humping" her. K.H. stated that appellant had pulled her pajama bottoms down, but that her underwear was still on, and that appellant was fully clothed during the incident. K.H. described a second incident, also having taken place at her grandmother's

house, when defendant came up to her, showed her his penis, and said "[t]ouch it." K.H. stated that she said "no" and began to call 911, but that appellant took the telephone out of her hand, causing her to fall down and hurt herself. Appellant was subsequently charged with two counts of second-degree criminal sexual conduct, attempted second-degree criminal sexual conduct, fifth-degree criminal sexual conduct, and interference with an emergency call.

Appellant moved to "admit evidence of K.H.'s behavior where she would act out in an inappropriate manner." Appellant wished to introduce evidence at trial through his own testimony that, prior to the summer of 2008, K.H. would "act[] out sexually by rubbing, humping, pulling pants down and otherwise acting out sexually." Appellant intended to introduce this evidence to show "that someone other than [appellant] was the source of [K.H.'s] sexual knowledge" and "[t]o establish that [K.H.'s] prior knowledge and behavior are what led to the allegations against [appellant]." The state opposed appellant's motion, challenging appellant's qualifications to characterize behavior of "rubbing, humping, and pulling pants down" as "sexual conduct" rather than "innocent behavior" during play that "has nothing to do with sexual knowledge or intent." The state further argued that, even if the behavior was sexual in nature, it did not necessarily indicate that K.H. had sexual knowledge. Following a hearing, the district court issued an order denying appellant's motion to admit the evidence. The court concluded that the evidence had "little to no probative value" and that "[a]ny probative value it may have is substantially outweighed by its potential to be prejudicial."

A jury trial was held in January 2012, during which K.H. testified and the jury watched the video recording of the April 2009 interview. With respect to the incident involving the bed, K.H. testified that appellant had pulled down her pajama bottoms while she was sleeping and that, when she woke up, appellant was lying on the side of the bed reading a magazine and said, "Oh, your pants fell down when you were sleeping." She testified that her underwear was still on and that she got up, pulled her pajama bottoms back on, and went outside to play. K.H. stated that she did not remember that appellant had been "doing a humping motion on me" or remember telling the investigator that he had, but said that she did not think she would have had a reason to lie about appellant. With respect to the second incident, K.H. testified that appellant had shown her his "private" and said "[t]ouch," and that she had said "[n]o." The jury subsequently found appellant guilty of attempted second-degree criminal sexual conduct and fifth-degree criminal sexual conduct. The jury was unable to reach a verdict on the remaining charges. This appeal follows. The state has not submitted a response to the appeal.

## D E C I S I O N

### I.

Appellant argues that the district court abused its discretion by denying his motion to introduce evidence of K.H.'s behavior. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "A court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). "On

appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *Amos*, 658 N.W.2d at 203.

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Although all relevant evidence is generally admissible, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 402 (explaining that relevant evidence is generally admissible); Minn. R. Evid. 403 (delineating when relevant evidence may be excluded). "Unfair prejudice under rule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

In *State v. Benedict*, 397 N.W.2d 337 (Minn. 1986), the supreme court addressed the type of evidence that appellant sought to introduce in this case. In *Benedict*, the state's expert witness testified that the 5-year-old victim of criminal sexual conduct "exhibited an unusual knowledge of sexual activities for someone his age," which was "the result of the boy having been given an education by somebody." *Id.* at 340. The defendant then attempted to introduce evidence that the victim's knowledge had come from his family, rather than from the defendant, but the district court limited the questioning on the subject. *Id.* at 340–41. Addressing the district court's action, the

supreme court held: "Despite the prohibition of a rape-shield law or rule, a [district] court has discretion to admit evidence tending to establish a source of knowledge of or familiarity with sexual matters in circumstances where the jury otherwise would likely infer that the defendant was the source of the knowledge." *Id.* at 341. The court explained that "as in ruling on the admission of other kinds of evidence, the [district] court ought to balance the probative value of the evidence against its potential for causing unfair prejudice." *Id.* The court stated that "[i]f the evidence in question had tended to establish a different source for the victim's knowledge, undoubtedly the [district] court would have admitted the evidence," and concluded that the district court had not abused its discretion by limiting the admission of the evidence. *Id.*

In *Benedict*, an expert witness testified that the victim had an unusual knowledge of sexual activities for someone his age, which was the result of him having been given an education by someone. In this case, appellant apparently assumed that the jurors would themselves conclude that K.H.'s allegations require sexual knowledge that is unusual for a child of her age. It is not clear that a jury would likely reach such a conclusion. The descriptions of the incidents that K.H. gave during the interview and during trial were childlike and do not appear inappropriate for her age. It is unlikely that a jury would infer that K.H.'s allegations signal unusual sexual knowledge and that appellant was the source of this knowledge. Even if K.H.'s allegations did demonstrate unusual sexual knowledge, it is not clear that this knowledge is also demonstrated by K.H.'s behavior of "rubbing, humping, and pulling pants down." No expert witness was disclosed to testify that this behavior is sexual in nature and indicates sexual knowledge

that is unusual for a child of K.H.'s age. Appellant apparently also assumed that the jurors would reach these conclusions themselves.

As the district court determined, the evidence of K.H. "rubbing, humping, and pulling pants down" would have "little to no probative value." Appellant disclosed no witness other than himself to explain that K.H.'s behavior indicates unusual sexual knowledge that somehow correlates to the allegations against him. He has claimed, without corroboration, that K.H.'s behavior was inappropriate and uncharacteristic for a child of her age, which he believes suggests that she had some prior, unreported sexual experience, which he believes confirms that she made up the allegations against him. Introduction of the evidence to attempt to cause the jury to draw these conclusions would be unfairly prejudicial and would also confuse the issues and mislead the jury. The district court did not abuse its discretion by excluding the evidence of K.H.'s behavior.

**II.**

Appellant argues that the prosecutor committed misconduct that deprived him of a fair trial. During voir dire, the prosecutor asked the potential jurors for "a show of hands" as to whether they believed that "there should be justice for children" and asked whether they thought that there "[c]an [] be justice for children" who are victims of crimes to which there are no witnesses. He also stated: "Justice for children can sometimes be . . . a tough deal." During his closing argument, the prosecutor stated: "We should not ever give up hope that there can be justice for [suffering] people." He also stated twice that certain aspects of the case would need to be taken into consideration "[f]or there to be justice for children" and concluded by saying, "These are tough cases,

and they are not easy, but they are important, and justice for children can happen." Finally, in his rebuttal argument, the prosecutor reminded the jurors that "there will never be justice in those cases" where "a child claims an adult sexually touches them," but there is "no direct witness or scientific evidence or video surveillance." Appellant admits that these statements were not objected to during trial.

"On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006) (citing Minn. R. Crim. P. 31.02 and applying plain-error analysis to an allegation of unobjected-to prosecutorial misconduct). An error is "plain" if it is "clear or obvious" in that it "contravenes case law, a rule, or a standard of conduct." *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008). An error affects substantial rights "if the error was prejudicial and affected the outcome of the case." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). If an appellate court identifies plain error affecting substantial rights, the court "may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (alteration in original) (quotation omitted).

*Plain Error*

A prosecutor is a minister of justice who may not seek a conviction at any price. *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993). A prosecutor should refrain from making arguments that inflame the passions or prejudices of the jury, divert the jury from its duty to decide guilt or innocence based on the evidence, or interject broad societal issues. *Id.* at 817–18.

In this case, the prosecutor's repeated statements regarding "justice for children" diverted the jury's attention from the evidence of the case and interjected a broader issue. The suggestion that a guilty verdict would provide justice for children who are victims of crimes, rather than simply justice for the victim in this case, constituted prosecutorial misconduct that reaches the level of plain error. *See State v. Gaulke*, 281 Minn. 327, 330, 161 N.W.2d 662, 664 (1968) (stating that it was improper for a prosecutor to ask in closing, "If we do not stop this, if we do not convict this defendant, what happens to children?"); *State v. Peterson*, 530 N.W.2d 843, 848 (Minn. App. 1995) (stating that it was improper for a prosecutor to ask jurors not to turn their backs on children of abuse); *State v. Friend*, 385 N.W.2d 313, 322 (Minn. App. 1986) (stating that it was improper for a prosecutor to refer in closing to the jurors as protectors of young girls), *review denied* (Minn. May 22, 1986).

*Affecting Substantial Rights*

When prosecutorial misconduct reaches the level of plain error, the state bears the burden of demonstrating that the misconduct did not affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 299–300. The state must "show 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.* at 302 (quotations omitted). The state has not participated in this appeal, and thus has not attempted to satisfy its burden to demonstrate that the prosecutorial misconduct did not affect appellant's substantial rights.

If we consider whether the misconduct affected appellant's substantial rights without argument from the state, we conclude that there is a reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict.

> In assessing whether there is a reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict, we consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions.

*State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007). Here, there was one victim, and the evidence against appellant consisted only of that victim's allegations. During voir dire and again in his closing argument, the prosecutor repeatedly mentioned "justice for children" who are victims of crimes. The prosecutor's statements suggested that a guilty verdict was necessary to or would provide justice for children, rather than simply justice for the victim in this case. Based on this record, it is reasonably likely that the jury's verdict would have been different absent the prosecutor's improper statements.

*Fairness, Integrity, and Public Reputation of Judicial Proceedings*

We may correct plain error affecting substantial rights "only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Crowsbreast*, 629 N.W.2d at 437 (alteration in original) (quotation omitted). A prosecutor "is a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public," and a prosecutor has "an affirmative obligation to ensure that a defendant receives a fair trial." *Ramey*, 721 N.W.2d at 300 (quotation omitted). When prosecutorial misconduct affects a jury's verdict, as it may

have in this case, the fairness and integrity of judicial proceedings are directly called into question. Thus, it is appropriate to reverse appellant's convictions and remand for further proceedings.

Because we reverse appellant's convictions, we decline to reach appellant's remaining arguments that he was improperly convicted of a lesser-included offense and sentenced twice for conduct that was part of the same behavioral incident.

**Affirmed in part, reversed in part, and remanded.**