STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1353

State of Minnesota,
Respondent,

vs.

Simon Christopher Mueller,
Appellant.

Filed June 24, 2013
Affirmed
Rodenberg, Judge

Goodhue County District Court
File No. 25-CR-11-3205

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

Stephen Betcher, Goodhue County Attorney, Red Wing, 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 Halbrooks, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

On appeal from his conviction of multiple counts of first- and second-degree criminal sexual conduct, appellant argues that the district court erred in admitting vouching testimony from a county social worker. We affirm.

FACTS

On June 9, 2011, appellant Simon Christopher Mueller was charged in Goodhue County district court with nine counts of criminal sexual conduct involving then three-year-old K.M.[1] and then five-year-old T.W.[2] On December 22, 2011, appellant was charged with five counts of criminal sexual conduct involving then six-year-old R.P. [3] Appellant requested joinder and waived his right to a jury trial, and the case was tried to the district court.

The district court considered 24 pretrial motions filed by appellant, requesting, in part:

> 12. (a) [A]n Order prohibiting the State from eliciting "vouching" testimony from witnesses for the State regarding

[1] Count 1: first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2008); Count 2: first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2008); Count 3: first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a); Count 4: first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2008); Count 5: first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a); Count 6: second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2008); and Count 7: second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2008). The alleged conduct occurred between May 2010 and April 2011.

[2] Count 8: first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2010); and Count 9: second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2010). The alleged conduct occurred between January 2011 and April 2011.

[3] Count 1: first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2010); Count 2: first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2010); Count 3: first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2010); Count 4: second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2010); and Count 5: second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2010). The alleged offenses took place between November 2010 and March 2011.

> the purported truthfulness of statements made by the complainants or other State's witnesses.
>
> (b) [A]n Order directing counsel for the State to admonish all of the State's witnesses to refrain from volunteering such vouching testimony.

The district court granted appellant's motions in limine in part, prohibiting the state from eliciting vouching testimony and requiring the state to prepare its witnesses prior to trial to ensure that each would refrain from volunteering vouching testimony.

At trial, all three child victims testified. Each child described in detail repeated sexual abuse perpetrated by appellant between May 2010 and April 30, 2011.

Katherine Bystrom, a county social worker, testified at trial concerning forensic interviews she had conducted with the three child victims. The following exchange took place between Bystrom and the prosecutor after a recording of K.M.'s interview was played for the district court:

> Q: And after you conduct an interview with a child, are there certain things, when you go back over the interview, that you look for in the forensic interview to check the content of what was told to you and the statements of what the child is saying?
>
> A: Yes. We look for internal consistency and look for indicators of consistency. One of the things in [K.M.]'s interview that you'll notice is she often referenced herself when asked where a contact occurred. And that is consistent with her developmental age of three, in that it's often difficult for a three-year-old to make a representational shift from themselves to a drawing. And so that's consistent with her age and ability.
>
> You also notice, when she was looking at the anatomical drawings when we moved to the back of the drawing, she said—and I pointed to the back, she said a different girl. And that's also consistent with her developmental ability and that representational shift, that she would say that that's a different girl, because they're facing

> different directions. And so that's the pointing to herself as an example of needing to be very concrete because of her developmental age.
>
> When she talked about the contact happening, she didn't disclose that during touch inquiry. She disclosed it later on and it was a more spontaneous disclosure than something done during the touching inquiry. She also verbalized more in that phase of the interview and had more sustained eye contact, which are indicators of internal consistencies.

There was no objection to Bystrom's testimony.

The recording of T.W.'s interview was played for the district court, followed by this exchange between the prosecutor and Bystrom:

> Q: And what, if anything, did you look at in the interview regarding internal consistencies with your interview with [T.W.]?
> A: One of the issues in the interview with [T.W.] that indicates consistencies is that her verbal disclosure matched the demonstration she did on the anatomical dolls. She was able to do a representational shift from her body to the drawings and identify and clarify information using the drawings, whereas [K.M.] was not able to do that. She maintained—only able to do that on herself. So that's consistent with [T.W.]'s five-year-old developmental stage as well.

Again, there was no objection to Bystrom's testimony.

The recording of R.P's interview was also played for the district court, and this colloquy ensued between the prosecutor and Bystrom:

> Q: [W]hen you conduct a forensic interview with a child, are there certain things that you look for in the child's statements and then look at it later and try to figure out if there's any internal consistency in what the child is saying?
> A: Yes, I do.
> Q: And why do you do that?

> A: That's part of the information we collect during the investigation to make our determination of whether or not maltreatment has occurred. So during this interview, she disclosed that [appellant] touched her private or her personals with his tongue. And that's consistent with the statement that she made to the initial reporter who is a therapist. So that's an indication of internal consistency. Also during the interview she not only spoke about that, but she used the dolls to demonstrate to the action of [appellant] licking her personals.

Again, there was no objection to Bystrom's testimony.

The district court found appellant guilty of all counts except counts 4 and 5 related to K.M. He was sentenced to 480 months in prison. This appeal followed.

D E C I S I O N

We first address whether appellant properly preserved his objection to the claimed vouching testimony at trial. The district court ruled such testimony inadmissible in a pretrial order. But there was no specific objection made at trial to the testimony that is now claimed to have violated the pretrial order.

Generally, an appellant's failure to object to the admission of evidence at trial does not preserve the issue for appeal. *State v. Brown*, 792 N.W.2d 815, 820 (Minn. 2011) (citing Minn. R. Evid. 103(a)(1)). This is often so even when a pretrial order has addressed a matter. "[E]videntiary objections should be renewed at trial when an in limine or other evidentiary ruling is not definitive but rather provisional or unclear, or when the context at trial differs materially from that at the time of the former ruling." *State v. Word*, 755 N.W.2d 776, 783 (Minn. App. 2008).

Here, appellant's motions in limine were "boilerplate" in nature, and the district court's pretrial ruling with respect to vouching testimony was not definitive. It did not identify specific anticipated vouching testimony. Vouching testimony is inadmissible. *See State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) (noting that witnesses cannot vouch for or against other witnesses' testimony). As such, the pretrial order on appellant's motion in limine was little more than an instruction that the state follow the law regarding vouching testimony. In setting forth an unquestioned legal principle, it remained for appellant to object to evidence he claimed violated the pretrial order. Appellant neither objected at trial to the claimed vouching testimony nor sought further clarification of the pretrial order. *Cf. Word*, 755 N.W.2d at 783.

"Absent an objection at [trial], an appellate court may only review for 'plain error.'" *State v. Meldrum*, 724 N.W.2d 15, 19 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). We therefore review the claimed error in admitting vouching testimony under the plain error standard. Plain error exists "only if the [district] court's failure seriously affected substantial rights and only if the error was prejudicial error." *State v. Glidden*, 455 N.W.2d 744, 747 (Minn. 1990). The error should be corrected only if it seriously affects the fairness, integrity, or public reputation of a judicial proceeding. *Meldrum*, 724 N.W.2d at 20.

We think it noteworthy that appellant chose to elicit other testimony from Bystrom regarding the inconsistent statements of the victims as an apparent trial strategy. On cross-examination, appellant initiated the following exchange with Bystrom:

> Q: You've had to be here three days, and I appreciate that. And after each time—after each video that we watched, you were asked some questions about internal consistencies, I think.
> A: Correct.
> Q: But it's also true that, if you look at the transcripts of these interviews, there were some inconsistencies in what [K.M.] said to you?
> A: Correct.

And later, when cross-examining Bystrom about T.W. and R.P., appellant's trial counsel again referenced both internal consistencies and inconsistencies in the children's statements during the forensic interviews. It is evident that appellant chose to emphasize inconsistencies in the children's statements as part of his trial strategy. Both parties, without objection, questioned Bystrom about the children's statements and emphasized various portions of each that were either consistent or inconsistent with reference to subjects such as the "developmental ability" and the "developmental stage" of the child being interviewed. The testimony of Bystrom was presented at trial as part of each party's attempt to place the forensic interviews in context of each child-victim's developmental stage.

Credibility determinations are decided by the fact-finder. *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). "[A] witness cannot vouch for or against the credibility of another witness." *Ferguson*, 581 N.W.2d at 835. We are not convinced that Bystrom's testimony regarding "internal consistencies" was improper vouching testimony. Bystrom's testimony may have had attributes similar to vouching testimony, but, in context, both parties were examining her in her capacity as a social worker, trained

in forensic interviewing and the effect of a child's developmental stage on that child's recitation of events.

Appellant must prove that the district court plainly erred in allowing the testimony by showing that the error was "clear" or "obvious." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). Appellant relies on *Van Buren v. State*, 556 N.W.2d 548 (Minn. 1996). In *Van Buren*, the supreme court found that appellant was entitled to a new trial because the prosecution elicited improper vouching testimony when three witnesses, including a police officer, testified that certain members of the victim's family believed the sexual abuse story. *Id.* at 550. The supreme court held that "vouching testimony by way of hearsay is more troubling than 'direct' vouching because, where the vouching testimony comes in by way of hearsay, the person whose beliefs are at issue cannot be cross-examined with respect to those beliefs." *Id.* at 552.

The facts here are very different from *Van Buren*. Here, Bystrom did not express an opinion regarding credibility, nor did she use terms like "believable" or "credible." Unlike in *Van Buren*, Bystrom was available all three days of trial, she testified several times, and she was vigorously cross-examined regarding inconsistencies present in the victims' interviews.

Appellant argues that "the finder of fact hearing that Bystrom believed the complainants added extra, unfair credibility to their inconsistent stories." First, and as noted, Bystrom did not testify that she believed the complainants. The fact-finder, who was the district court judge and not a jury, referenced Bystrom's testimony in its findings, but the reference was not to Bystrom's vouching for the children. The district court

found that the children's statements were consistent with their respective ages and their stages of development. While the district court relied on portions of Bystrom's testimony, the manner of the district court's reliance on the unobjected-to testimony by Bystrom was not indicative of the district court having considered the testimony to have been vouching. In context, the testimony of the social worker regarding both consistencies and inconsistencies in the forensic interviews of children was not error.

Next, appellant argues that Bystrom vouched for the child victims' testimony when she testified that "maltreatment was determined . . . [by] a preponderance of the evidence." This portion of Bystrom's testimony may have been objectionable both as vouching and as hearsay. Again, however, there was no objection at trial. As discussed, the district court's pretrial ruling did not definitively prohibit the testimony, so we review under the plain error standard. *See Meldrum*, 724 N.W.2d at 19–20. Even if the admission of this testimony was erroneous as vouching testimony, it was not plainly so. Both parties opted at trial to permit Bystrom's arguably objectionable testimony without objection, with each party choosing in turn to emphasize different aspects of that testimony.

Bystrom's testimony regarding maltreatment having been "determined" also appears to have been hearsay. "The local welfare agency is the agency responsible for investigating allegations of sexual abuse [by family members]." Minn. Stat. § 626.556, subd. 3e (2010). The declarant asserting that "maltreatment was determined" was therefore the agency. Although possibly erroneous as improper hearsay, the admission of the statement of Bystrom's agency-employer was again not plainly erroneous. Any error

did not affect appellant's substantial rights, as the testimony relating to the maltreatment determination amounted to less than four lines of transcript in the context of a lengthy trial. *See Glidden*, 455 N.W.2d at 747 (stating that plain error must affect substantial rights). We also observe that the trier of fact was a judge and not a jury. The judge did not appear to rely in any way on the determination of maltreatment in arriving at his verdict of guilt. The record contains ample other evidence supporting conviction. Any error was not plain nor did it affect appellant's substantial rights.

Affirmed.