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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0069**

State of Minnesota,
Respondent,

vs.

Abdinasir Alasow Mohamed,
Appellant.

**Filed December 31, 2012
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-11-11822

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Abdinasir Mohamed sexually assaulted his eleven-year-old niece while she visited his home. On appeal from his convictions of second-degree criminal sexual conduct and

attempted first-degree criminal sexual conduct, Mohamed argues that the prosecutor improperly elicited testimony about his prior physical assaults, improperly mocked the defense counsel's closing argument, wrongfully shifted the burden of proof by vouching for the victim's credibility, and impermissibly inflamed the jurors by invoking their own experiences with intrafamilial sexual abuse. Because Mohamed's counsel opened the door to testimony about Mohamed's prior assaults, because the prosecutor did not improperly disparage the defense or vouch for the victim's credibility, and because the prosecutor's plain error of inflaming the jury did not prevent Mohamed from receiving a fair trial, we affirm.

FACTS

Eleven-year-old A.A. told a school social worker that her uncle had sexually assaulted her during a sleepover the previous weekend. She had spent the Friday night at the house of her uncle, Abdinasir Mohamed. A.A. shared a room there with her 17-year-old cousin, H.A., Mohamed's step-daughter. At about 7:00 Saturday morning, A.A. awoke and went to the living room where she saw Mohamed, who commented that A.A. had grown up a lot since he had last seen her. A.A. sat on the couch and started to play a video game.

Mohamed, wearing only boxer shorts and a t-shirt, went to the couch and pulled A.A. up to a standing position. He touched her buttocks, rubbed his penis against her, and touched her breasts under her shirt. A.A. asked him to stop. Mohamed stopped and began apologizing, claiming that he had mistaken A.A. for her aunt.

Mohamed later again pulled A.A. off the couch. He exposed his penis and tried to pull A.A.'s pants down, saying, "Let me try to get it in." He again touched A.A.'s breasts. When he heard A.A.'s younger cousin wake up, he stopped. A.A. ran to the bathroom and locked the door. Mohamed followed her, calling her name. He eventually went away. A.A. ran to H.A.'s room and told her what had happened. Mohamed came to H.A.'s room several minutes later and offered both girls money to buy food at a fast-food restaurant, which A.A. took to be an attempt to bribe her. He asked A.A. repeatedly throughout the next day not to tell anyone what had happened, and he promised her money from his future tax refund.

After A.A. reported the incident at school, the social worker notified police. Mohamed learned that the police were looking for him and turned himself in. The state charged him with second-degree criminal sexual conduct and attempted first-degree criminal sexual conduct.

Before trial, Mohamed's counsel asked the district court to permit him to offer testimony that Mohamed previously physically assaulted members of his family, including H.A.'s mother, to support a defense theory that H.A.'s testimony arose from her bias against him. The district court declared that the proposed testimony would "at a minimum" open the door for the prosecution to offer evidence of convictions from those assaults, and the judge "imagine[d] a scenario where the questioning by the defense . . . raises broader issues that would open the door for the State to actually introduce evidence of the facts behind these convictions." Mohamed's counsel acknowledged that his

eliciting of this testimony could open the door to additional testimony about Mohamed's prior bad acts.

During the trial, H.A. testified about what A.A. had told her and that Mohamed had appeared to be intoxicated when he offered them money. During cross-examination by Mohamed's counsel, she admitted that her relationship with Mohamed was "strained." Mohamed's counsel then asked her, "You really don't like him. Is that fair to say?" She replied, "I wouldn't say I don't like him. I just don't like the things he has done." The prosecutor followed up by asking, "What things?" and H.A. replied, "He's been arrested in the past a lot for hitting my mom, for abusing me and my brother." She also asserted that Mohamed had hit her and her brother. Mohamed's counsel did not object to this testimony.

Mohamed testified that he was "a good father" and added, "I love my kids." He asserted that he and H.A. "never had a good close relationship" because of H.A.'s difficulties in school. Mohamed said that he previously pleaded guilty to assaulting his sister-in-law. During cross-examination, over Mohamed's objection, the prosecutor elicited Mohamed's admission that he had also been arrested for assaulting H.A.'s mother while she was nine-months' pregnant.

During closing arguments, the prosecutor said that it took "courage" for A.A. to report the attack and to testify. She reflected on juror answers to questions posed during voir dire and pointed out that "five or six" of the jurors had reported that "there had been some experiences of . . . intrafamilial sexual assault in their families or in the families of people they care about." She urged them to consider how such a "family secret . . . took a

toll on that person and all the people around them” and highlighted how A.A. “would not accept that role” in silence. She also told the jurors, “Take your common sense, your judgment, and your experience . . . and evaluate the testimony and ask yourself who do you believe? Because if you believe [A.A.], this defendant is guilty.” Mohamed’s counsel did not object to any of these statements.

Mohamed’s closing argument claimed “inconsistencies in [A.A.’s] story,” suggested that H.A. had reshaped A.A.’s recollections, and observed that “[A.A.] spends a lot of time playing a game where she makes up a life, so she has a very active imagination.” In rebuttal, the prosecutor remarked, “Why would [A.A.] make this up? Because she has an active imagination? Give me a break. Give me a break. Because she comes from a fractured home? . . . Give me a break. Right. That’s the best you can do?” Mohamed objected and the district court overruled the objection.

The jury returned guilty verdicts on both charges. Mohamed appeals from his conviction.

DECISION

Mohamed argues on appeal that the district court erred by allowing evidence of his prior bad acts and that the prosecutor committed misconduct by introducing improper prior-acts testimony, shifting the burden of proof, denigrating the defense, and inflaming the passions of the jury. None of his contentions persuades us to reverse.

Prior Bad Acts Evidence

Mohamed ascribes error to the district court’s allowing the prosecutor to elicit testimony about his assault on H.A.’s nine-months’-pregnant mother. The challenge fails

because Mohamed opened the door to the testimony. We will not reverse a conviction based on the district court's admission of evidence of prior bad acts absent a clear abuse of discretion. *State v. Scruggs*, 421 N.W.2d 707, 715 (Minn. 1988). Reversal requires both error and prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981). There is no error in admitting prior bad acts if the defense opens the door "by introducing certain material [that] 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) (citation omitted). The purpose of the opening-the-door doctrine is to ensure that one party does not gain an unfair advantage by presenting the jury with an un rebutted, "distorted representation of reality." *Id.* at 436.

Mohamed's counsel opened the door to evidence of Mohamed's previous assault on H.A.'s mother. He did so even after he acknowledged during pretrial proceedings that he understood the risk of doing so by inquiring into H.A.'s alleged bias against Mohamed. Defense counsel elicited testimony from H.A. that her relationship with Mohamed was "strained," that she did not like Mohamed, and that she didn't "like the things he has done." Asking about a "strained" relationship because of "things" done and whether H.A. disliked Mohamed naturally raises the question of whether those "things" motivated and skewed her testimony. This opens the door for the prosecution to ask about those things. The district court therefore did not abuse its discretion by allowing the brief clarifying testimony to put Mohamed's challenge to H.A.'s credibility in its full context.

Mohamed's own testimony invited similar evidence. He testified that he was "a good father" and that he had a "[v]ery good" relationship with his children. He also

testified that the reason for his bad relationship with H.A. was her problems in school. Bad-acts evidence is admissible when it is offered to impeach a defendant's testimony. *State v. Clark*, 296 N.W.2d 359, 367 (Minn. 1980). Because Mohamed represented himself as a good husband and father, the district court could allow the prosecutor to impeach this representation during cross-examination with evidence of his prior assault on H.A.'s then-pregnant mother.

Even if the defense had not opened the door, it does not appear that Mohamed was prejudiced by the challenged evidence. Reversal is warranted only if there is a reasonable possibility that the wrongfully admitted evidence affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). But Mohamed's counsel had already elicited testimony about another prior physical assault committed by Mohamed on his sister-in-law. So any belief in the jurors' minds that Mohamed was a physically assaultive person had already been planted by Mohamed.

Mohamed argues that the district court's pretrial ruling allowed only the defense to introduce evidence of Mohamed's physical assault on H.A.'s mother and that only in that event could the prosecutor counter by inquiring about convictions. This does not accurately represent the record. The district court stated that it would "at a minimum" allow the state to inquire into convictions if the defense opened the door to evidence about Mohamed's assault on H.A.'s mother. It also contemplated a "scenario where the questioning by the defense . . . raises broader issues." It does not appear that the district court's pretrial instructions were intended to limit the state's use of the evidence. As to

whether the state had to wait for the defense to first raise the assault, it did; Mohamed's counsel had first elicited testimony from H.A. about her reason for not liking Mohamed.

Mohamed further argues that the state's introduction of bad-act evidence was improper for lack of notice and for lack of a limiting instruction to the jury. But neither notice nor limiting instructions are required when bad-acts evidence is offered for impeachment, and the issue is waived where, as here, the defense did not request a limiting instruction at trial. *See Clark*, 296 N.W.2d at 368 nn.6–7.

Disparaging the Defense

Mohamed argues that the prosecutor impermissibly disparaged the defense when she responded to his counsel's closing argument by saying, "[G]ive me a break" and "That's the best you can do?" We review claims of prosecutorial misconduct based on objected-to statements differently depending on the seriousness of the alleged misconduct. We review "unusually serious" misconduct for "certainty beyond a reasonable doubt that [the] misconduct was harmless," while we review less serious misconduct only "to determine whether the misconduct likely played a substantial part in influencing the jury to convict." *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). Both standards ask whether the statements were misconduct in the first place.

A prosecutor may contend that a *particular defense* lacks merit in light of the evidence, but she may not denigrate *types of defenses* in the abstract. *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). The prosecutor also may not question the defendant's motives for raising a particular type of defense. *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005). The prosecutor here was disparaging the particular

arguments made in defense counsel's closing, including the allegation that A.A. "had an active imagination" and "comes from a fractured home." The prosecutor did not denigrate any type of defense by saying, for example, that all defenses based on attacks on the victim's credibility are invalid. Nor did she suggest that Mohamed had bad motives for questioning A.A.'s credibility. She implied only that Mohamed's defense was ridiculous, even laughable, based on the facts. Her comments were blunt, but not misconduct.

Shifting the Burden of Proof

Mohamed contends that the prosecutor's statement "if you believe [A.A.], this defendant is guilty" improperly shifted the burden of proof by telling the jury "that credibility is the sole factor in determining guilt." Prosecutors may not shift the burden of proof to the defendant. *State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009). And they may not personally vouch for the credibility of witnesses. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). But prosecutors are free to argue that a particular witness was credible so long as they do not "guarantee . . . the witness's truthfulness, refer[] to facts outside the record, or express[] a personal opinion as to a witness's credibility." *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003). The prosecutor detailed accurately the state's burden of proof as to each element of the charged offenses and argued the application of specific pieces of evidence to each. She then stated, "As jurors, one of your most important jobs is to evaluate the credibility of the witnesses and their testimony," and she discussed A.A.'s testimony in detail. She did not shift the burden of proof. It so happens in this case that believing A.A.'s testimony logically results in both disbelieving Mohamed's denials and

finding him guilty. The prosecutor may, and did, point that out without engaging in misconduct.

Inflaming the Jury

Mohamed maintains that the prosecutor's reference to the jurors' own familiarity with intrafamilial sexual abuse was improper. The argument has substantial merit. Claims of prosecutorial misconduct for statements that are not objected to during trial are forfeited and reviewed for plain error only. *State v. Ramey*, 721 N.W.2d 294, 301 (Minn. 2006). Establishing plain error requires showing that an error occurred, that the error violated caselaw, a rule, or a standard of conduct, and that it affected the defendant's substantial rights. *Id.* at 302. Prosecutors may not inflame the passions of a jury, particularly where credibility is a central issue. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). The call for the jurors to consider their own family experiences of sexual abuse is plain error. The tactic put the jurors in the victim's shoes and appears to have attempted to evoke an emotional reaction rather than a logical and dispassionate assessment of the evidence.

When we find a plain error that was not challenged by an objection at trial, we “assess[] whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Ramey*, 721 N.W.2d at 302. In *State v. Griller*, our state supreme court adopted the U.S. Supreme Court's discretionary approach to plain-error remedy. 583 N.W.2d 736, 740 (Minn. 1998) (citing *Johnson v. United States*, 520 U.S. 461, 469–70 (1997)). This approach requires that we “determine whether the forfeited error ‘seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings’

before [we] may exercise [our] discretion to correct the error.” *Johnson*, 520 U.S. at 469–70 (quoting *United States v. Olano*, 507 U.S. 725, 736, 113 S. Ct. 1770, 1776 (1993)). And the Supreme Court has counseled that we should exercise our discretion only to remedy forfeited error when a “miscarriage of justice would otherwise result,” including but not limited to a conviction in the face of actual innocence. *Olano*, 507 U.S. at 736. To redress every forfeited error with reversal would undermine “fairness to the court and to the parties and [] the public interest in bringing litigation to an end.” *United States v. Atkinson*, 297 U.S. 157, 159, 297 S. Ct. 391, 392 (1936). We therefore exercise our discretion to reverse a conviction because of prosecutorial misconduct only when it is “so serious as to deprive appellant of a fair trial.” *State v. McNeil*, 658 N.W.2d 228, 236 (Minn. App. 2003).

Although we conclude that the prosecutor’s reference to the jurors’ own experiences with intrafamilial sex abuse was obviously error, we do not find that the error deprived Mohamed of a fair trial. We assess the severity of improper statements by reviewing them in the context of the closing argument as a whole, not in isolation. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). The prosecutor’s erroneous statement here was only a small part of her larger defense against attacks on A.A.’s credibility. The prosecutor followed her improper statement by a lengthy and accurate explanation of the law and the state’s burden to prove each element of the charged offenses beyond a reasonable doubt. She also detailed several legitimate factors for the jury to consider in assessing A.A.’s credibility. The prosecutor invited the jury to assess A.A.’s credibility based on her demeanor on the stand, her directness, and her ability to remain calm and

confident despite her youth. The prosecutor pointed out how A.A. had declined several opportunities to fabricate her accusations. And she highlighted the consistency of A.A.'s testimony with that of H.A. and other witnesses. The prosecutor's misconduct did not render Mohamed's trial unfair or result in a miscarriage of justice. We do not believe that the public reputation of judicial proceedings would be served by requiring another trial under these circumstances. We decline to exercise our discretion to remedy the plain error to which Mohamed's counsel failed to object.

Affirmed.