STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0099

State of Minnesota,
Respondent,

vs.

Christopher George Hubbell,
Appellant.

Filed December 24, 2012
Affirmed
Hudson, Judge

Wright County District Court
File No. 86-CR-08-7046

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Tom Kelly, Wright County Attorney, Buffalo, Minnesota (for respondent)

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

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Chutich, Judge.

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

HUDSON, Judge

On appeal from his conviction of third-degree criminal sexual conduct for engaging in sexual penetration with a person who is at least 13 but less than 16 years of

age, and more than 24 months younger than the defendant, appellant Christopher George Hubbell argues that the state committed prosecutorial misconduct by (1) eliciting inadmissible evidence, and (2) vouching for the credibility of a witness and referring to facts not in evidence in its closing argument. Because we conclude that the state did not commit prosecutorial misconduct, we affirm.

FACTS

Complainant A.M.J., born July 5, 1990, testified that in 2003 he met appellant, born July 25, 1978. The two were introduced at appellant's residence by A.F., a friend of A.M.J.'s of roughly the same age. A.M.J. testified that, during this first visit to appellant's residence, A.F. left A.M.J. alone with appellant, and appellant performed oral sex upon A.M.J. for five to ten minutes.

A.M.J. testified that he began seeing appellant regularly for the next several years, and they engaged in numerous acts of sexual penetration during that time. A.M.J.'s testimony was corroborated by the testimony of A.F., who confirmed that he introduced appellant to A.M.J., and that the two were alone for a period of time during their first meeting. A.F. also testified that A.M.J. later confided to him that he and appellant were having sex.

In 2005, A.M.J. denied having had sex with appellant when asked by a police officer. In November 2007, A.M.J. was sent to a Red Wing juvenile facility. During his first seven months at Red Wing, A.M.J. was receiving money from appellant, and the two were recorded having sexually explicit phone conversations. Despite being confronted with these facts, A.M.J. repeatedly refused to discuss any relationship he had with

appellant while he was under 16. But in June 2008, A.M.J. disclosed that he had engaged in sexual penetration with appellant on multiple occasions dating back to 2003.

In August 2008, a complaint was filed charging appellant with one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2002), and one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b) (2002). The first-degree criminal-sexual-conduct charge was dismissed in September 2009. Following a three-day bench trial, and after considering each party's written closing argument, the district court issued an order convicting appellant of third-degree sexual conduct. This appeal follows.

D E C I S I O N

I

Appellant argues that the state committed prosecutorial misconduct by eliciting inadmissible testimony and failing to prepare its witness when A.M.J. testified that appellant had provided alcohol and cigarettes to himself and A.F., and that appellant had masturbated in front of A.F.

Our standard of review depends upon whether appellant objected to the alleged prosecutorial misconduct. If appellant did not object to the misconduct, we apply the plain-error standard laid out in *State v. Ramey*, 721 N.W.2d 294, 299–300 (Minn. 2006). If appellant objected to the misconduct, we review for harmless error under one of two possible standards, depending upon the severity of the misconduct. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010).

Here, the parties dispute whether appellant objected to the alleged misconduct. While appellant concedes that he did not object to A.M.J.'s testimony at trial, he argues that the testimony had been ruled inadmissible by the district court in two prior rulings. First, in March 2010, appellant brought his sixth of twenty-three motions in limine seeking "an [o]rder that the [s]tate should not be permitted to admit evidence that [appellant] allegedly provided others (not [A.M.J.]) with alcohol, cigarettes, and/or controlled substances." In June 2010, the district court granted this motion "to exclude evidence of [appellant's] prior crimes, wrongs, or acts." Second, in January 2011, the state filed a *Spreigl* notice seeking to introduce evidence that appellant had previously, in the presence of A.F. and one other juvenile, exposed himself, talked about masturbation, and solicited oral sex. Appellant filed a motion to exclude the evidence, arguing that it fell under the district court's June 2010 ruling. At a hearing on February 8, 2011, the state expressed its new understanding that appellant's primary defense would be an alibi defense, in which case it would not offer the *Spreigl* evidence unless the door was opened by appellant, at which time it would make a request to offer the evidence. The district court held that it would "take it one witness at a time, but [the state] is aware of the [c]ourt's prior ruling."

Appellant objects to the following exchange in which he argues the state elicited inadmissible testimony from A.M.J. that appellant had offered alcohol and cigarettes to underage individuals:

PROSECUTOR: Anything else happen on this first encounter?

A.M.J.: No.

PROSECUTOR: Then what happened subsequent to that?

A.M.J.: Well, we started hanging out a lot; me and [A.F.] would go over to [appellant's] house a lot; we'd go over there, stay the night, watch movies, sometimes drink, sometimes smoke; we'd go over there and get cigarettes from him because we weren't old enough to go buy them; um, we'd actually go bowling sometimes; um, I guess –

PROSECUTOR: Were there any other sexual encounters?

A.M.J.: Like—oh, yeah, there was numerous ones between when I was 13 until I was 17, yeah.

Appellant also argues the state elicited testimony from A.M.J. of appellant's sexual acts in the presence of A.F.:

PROSECUTOR: Okay. And how about when you were at the apartment complex, was anyone else around during those episodes?

A.M.J.: No, just [A.F.]

PROSECUTOR: Did [A.F.] participate in some of these acts with you?

A.M.J.: No.

PROSECUTOR: Was he in the same room when they occurred?

A.M.J.: I'm trying to think if actually he was in any of them. For some—I think—I believe that [appellant] has masturbated in front of [A.F.] once or twice because I remember him saying something about that to me.

PROSECUTOR: Did he ever, ahh, [A.F.]—did you ever tell [A.F.] what had happened? What was happening?

The parties dispute whether appellant was required to renew his objection to this testimony. "Ordinarily, a party need not renew an objection to the admission of evidence

to preserve a claim of error for appeal following a ruling on a motion in limine." *State v. Litzau*, 650 N.W.2d 177, 183 (Minn. 2002). "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error." Minn. R. Evid. 103(a). However, evidentiary objections should be renewed at trial when an in limine ruling is "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) (citing Minn. R. Evid. 103(a); Fed. R. Evid. 103 2000 advisory comm. note).

We conclude that appellant was required to renew his objection to each piece of testimony. Appellant's sixth motion in limine sought to exclude evidence that appellant provided alcohol and cigarettes to persons other than A.M.J. Yet A.M.J. testified that appellant was providing alcohol and cigarettes to both himself and A.F. A.M.J.'s presence made this a materially different context from the context of the motion in limine, given the potentially probative nature of evidence that appellant provided cigarettes and alcohol to A.M.J. And because the context of A.M.J.'s testimony differed materially from the context of appellant's motion in limine, appellant was required to renew his objection. *See id.*

The district court's second ruling stated that it would consider "one witness at a time" whether evidence of appellant's sexual acts in front of A.F. could be admitted. While the district court subsequently reminded the state of its prior ruling that evidence of appellant's bad acts was inadmissible, a reminder that *Spreigl* evidence has been ruled generally inadmissible does not constitute a definitive ruling excluding a specific piece of

evidence. *See* Minn. R. Evid. 103(a). A renewed objection was particularly important here, when the district court had indicated that it would consider the evidence and testimony "one witness at a time." Appellant was therefore required to renew his objection when A.M.J. testified about appellant's sexual acts in the presence of A.F. *Id.*

Because appellant did not object to the alleged prosecutorial misconduct, we review for plain error. Under the plain-error standard for prosecutorial misconduct, if we conclude that the misconduct reached the level of plain or obvious error, the burden shifts to the state to demonstrate that its misconduct did not prejudice the defendant's substantial rights. *Ramey*, 721 N.W.2d at 298, 299–300. If this standard is met, we then assess whether to address the error to ensure fairness and the integrity of the judicial proceedings. *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011).

Generally, evidence of a defendant's past crimes, wrongs, or bad acts, known as *Spreigl* evidence, may not be admitted into evidence to prove the defendant's character for committing crimes. Minn. R. Evid. 404(b); *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009). However, evidence that bears directly on the history of the relationship between the defendant and the victim is generally admissible and is not subject to the procedural requirements imposed on other such evidence. *State v. Boyce*, 284 Minn. 242, 260, 170 N.W.2d 104, 115 (1969).

A prosecutor may not intentionally elicit inadmissible character evidence at trial. *State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994). Violation of established standards of conduct, including "orders by a district court" and "attempting to elicit or actually eliciting clearly inadmissible evidence may constitute [prosecutorial] misconduct." *State*

v. Fields, 730 N.W.2d 777, 782 (Minn. 2007). "Minnesota law is crystal clear . . . [that] the state has an absolute duty to prepare its witnesses to ensure that they are aware of the limits of permissible testimony." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). A prosecutor must prepare witnesses so that they "will not blurt out anything that might be inadmissible and prejudicial." *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978).

First, appellant argues that the state committed prosecutorial misconduct by eliciting inadmissible *Spreigl* evidence that appellant provided alcohol and cigarettes to underage individuals. Appellant further argues that the prosecutorial misconduct was knowing given the district court's June 2010 ruling. Respondent argues that the evidence that appellant provided alcohol and cigarettes to A.F. and A.M.J. had not been specifically excluded by the district court and was also admissible as relationship evidence. We agree.

As previously discussed, the context of appellant's March 2010 motion was materially different from the context of A.M.J.'s testimony. The district court's June 2010 ruling did not therefore exclude this testimony. Furthermore, the testimony was admissible as relationship evidence for which no *Spreigl* notice was required, because it explained the history of the relationship between appellant and A.M.J. *See Boyce*, 284 Minn. at 260, 170 N.W.2d at 115. The evidence had probative value because it helped the fact-finder assess appellant's intent and motivation and helped place the alleged criminal conduct in context. *See State v. Henriksen*, 522 N.W.2d 928, 929 (Minn. 1994). Absent a direct ruling excluding the evidence, and given its probative value, the state did

not commit prosecutorial misconduct by eliciting evidence that appellant provided alcohol and cigarettes to A.M.J. and A.F. *See Word*, 755 N.W.2d at 784 (holding that, where there was no direct ruling excluding it, the state did not commit prosecutorial misconduct by eliciting testimony that qualified as relationship evidence).

Second, appellant argues that the state committed prosecutorial misconduct by eliciting testimony from A.M.J. of sexual acts committed by appellant in A.F.'s presence, and by failing to prepare A.M.J. as a witness to ensure he was aware of the limits of admissible testimony. Appellant claims this misconduct was egregious, given the state's prior assurances that it would not introduce evidence of these acts. Respondent argues that it did not elicit this testimony and that there was no direct ruling excluding those acts from the scope of A.M.J.'s testimony.

While we agree that the probative value of the evidence that appellant masturbated in front of A.F. was likely outweighed by its potential for prejudice, we see no evidence of prosecutorial misconduct. First, the testimony was not elicited. The state asked A.M.J. whether A.F. had witnessed any of the sexual acts between A.M.J. and appellant, apparently to provide foundation for A.F.'s later testimony. A.M.J. appears to have misinterpreted the question as asking whether A.F. had witnessed any sexual acts by appellant and testified that A.F. told him he had witnessed appellant masturbating on one or two occasions. Because the state did not intend for A.M.J. to testify on this subject, at worst this constitutes prosecutorial error, not misconduct. *See State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009) (explaining that "there is an important distinction to be made between prosecutorial misconduct and prosecutorial error. The former implies a

deliberate violation . . . . The latter . . . suggests merely a mistake of some sort."), *review denied* (Minn. Mar. 17, 2009).

Second, the testimony does not demonstrate that the state failed to adequately prepare its witness. A.M.J. testified at length about a broad range of events that occurred over the course of several years. Given the scope of A.M.J.'s testimony, absent a direct ruling excluding specific testimony, it was not possible for the state to fully prepare A.M.J. for every possible statement that might not be admissible. A.M.J.'s testimony therefore did not demonstrate the state's failure to adequately prepare its witness. *Cf. State v. Hogetvedt*, 623 N.W.2d 909, 914–15 (Minn. App. 2001) (holding that the prosecutor committed misconduct when the testifying officer gave testimony that the court specifically instructed him not to give), *review denied* (Minn. May 29, 2001). Because the state did not elicit inadmissible testimony or fail to adequately prepare its witness, A.M.J.'s testimony about appellant's sexual act in the presence of A.F. did not constitute prosecutorial misconduct. In conclusion, the state did not commit prosecutorial misconduct by eliciting inadmissible testimony or failing to adequately prepare its witness regarding the limits of admissible testimony.

II

Appellant also argues that the state committed prosecutorial misconduct by referring to facts not in evidence and vouching for the credibility of a witness in its closing argument. Appellant concedes that no objection was made to this alleged

misconduct, and therefore we review for plain error under the framework as set out in *Ramey*, 721 N.W.2d at 298–300.[1]

Prosecutorial misconduct occurs "when the [prosecutor] 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 has "a right to analyze the evidence and vigorously argue that the state's witnesses were worthy of credibility whereas defendant and his witnesses were not." *State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977). However, "[a] prosecutor may not personally endorse a witness's credibility or impliedly guarantee a witness's truthfulness." *State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006). A reviewing court considers "the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Carridine*, 812 N.W.2d 130, 148 (Minn. 2012) (quotation omitted).

In its closing brief, the state discussed the "dynamics of sexual abuse" and the "dynamics of disclosure" to explain why A.M.J. did not immediately report the sexual

[1] Respondent argues that the standard set forth in *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) provides us with discretion as to whether to even conduct a plain-error analysis. Yet the cases cited by respondent to support this proposition pre-date *Ramey* and do not pertain to prosecutorial misconduct. While Minn. R. Crim. P. 31.02 provides a court with discretion as to whether to consider a plain error, cases decided since *Ramey* make it clear that only at the final stage of analysis does an appellate court exercise discretion as to whether to address the error. *See, e.g.*, *Hill*, 801 N.W.2d at 654 ("If those three prongs [of *Ramey*] are satisfied, we then assess whether we should address the error to ensure fairness and integrity of the judicial proceedings.") (quotation omitted); *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010) ("Finally, if all three prongs . . . are satisfied, the court determines whether to address the error to ensure fairness and integrity in judicial proceedings.").

abuse and why he was not able to recall specific details of the abuse. The state explained this dynamic:

> Children experience shame and confusion over what has been done to them. In many cases they may also blame themselves. Given this dynamic, the lapse of time makes a nonspecific offense date. It is not fair to expect a victim, particularly a child victim, to know an exact time. Also, given the number of times it allegedly occurred it would not be unusual that the victim is unable to describe in detail each and every instance.

The state also discussed the "elements of a predatory offense"—desire, a vulnerable victim, and opportunity—and then explained how appellant fit the profile of a predatory offender. Appellant argues that there were no facts in evidence regarding the "dynamics of disclosure," the "dynamics of sexual abuse," or the "elements of a predatory offense." Appellant further argues that because there was no testimony regarding the dynamics of disclosure, sexual abuse, or predatory offenses, these arguments amounted to the state improperly vouching for A.M.J.'s credibility as a witness. Appellant argues that this misconduct was prejudicial because it unfairly bolstered the credibility of A.M.J., whose testimony was critical to the state's case.

Respondent argues that there was sufficient evidence to support every argument it made within its closing argument, and therefore its closing argument was proper. We agree. The state's analysis of the dynamics of sexual abuse, disclosure, and predatory offenses was based on testimony regarding the following facts: reporting of sexual abuse of children is often delayed; A.M.J. testified that he delayed reporting because he was ashamed and embarrassed of the abuse he had suffered; A.M.J. was vulnerable and

therefore an attractive victim to appellant; appellant had a sexual interest in A.M.J.; and appellant had many opportunities to commit the offense. There is sufficient evidence in the record to demonstrate every one of these underlying facts. Detective Andrew Fashant testified that sexual abuse is typically reported several years after it occurs. A.M.J. testified regarding the shame and embarrassment he felt about his relationship with appellant, and how that kept him from reporting the abuse. A.M.J. also testified about his lack of a father figure, and how he had come to rely upon appellant to fill that emotional void. A.M.J. further testified that he received material benefits from appellant such as rides, alcohol, tobacco, and money. This testimony demonstrates that A.M.J. was a vulnerable victim, that appellant actively encouraged A.M.J. to spend time with him, and that this afforded appellant many opportunities to commit the offenses of which he was accused. Appellant's sexual desire to commit the alleged offense was evidenced by the recording of his conversations with A.M.J. while A.M.J. was at the Red Wing facility. This testimony provided sufficient factual support for the analysis contained in the state's closing argument. We therefore conclude that the state did not introduce facts not in evidence in its closing argument.

Furthermore, the state did not express a personal opinion regarding the witness's credibility or imply that additional facts existed outside the record that guaranteed the accuracy of A.M.J.'s testimony. *See Patterson*, 577 N.W.2d at 497. Instead, the state's discussion was an analysis of facts within the record to argue that the evidence supported a finding that A.M.J.'s testimony was credible. This is permissible conduct. *See*

Googins, 255 N.W.2d at 806. We therefore conclude that the prosecutor did not commit misconduct in his closing argument.

Affirmed.