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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A06-1808

State of Minnesota,
Respondent,

vs.

Jose Castano,
Appellant.

**Filed February 12, 2008
Affirmed
Ross, Judge**

Martin County District Court
File No. CR-05-779

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Considered and decided by Dietzen, Presiding Judge; Lansing, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

This appeal arises from appellant Jose Castano's conviction of two counts of second-degree criminal sexual conduct. A jury found Castano guilty. Castano alleges that the prosecutor committed several acts of misconduct that violated his right to a fair trial. He claims that the prosecutor improperly elicited inadmissible testimony and during closing argument improperly vouched for a witness's credibility and denigrated his defense. Because we find that none of the complained-of errors are plain or affected Castano's substantial rights, we affirm.

FACTS

Appellant Jose Castano met J.S. in September 2003. He moved in with her and her three children in Fairmont shortly thereafter. J.S.'s oldest child, A.S., was nine when Castano moved into the home. Castano and J.S. conceived a child together, and Castano tried to parent J.S.'s other children. He testified that he took the children fishing, played basketball and catch with them, taught them how to mow the lawn, and tucked them into bed at night. He said it was J.S.'s idea that he tuck the children in and that he was reluctant to do so because he believed that stepfathers often are accused of "doing things to daughters."

In the fall of 2004, A.S. told her mother that Castano had touched her inappropriately while tucking her into bed. A.S. told J.S. that Castano tried to kiss her with his tongue and touch her chest. She also claimed that he touched her vagina. A.S.

and J.S. reported the allegations to the police in November 2004. The state charged Castano with two counts of second-degree criminal sexual conduct.

Trial occurred in May 2006. In his opening statement, Castano's attorney questioned A.S.'s credibility. During questioning, the prosecutor asked A.S. if Castano had ever done anything to her that made her feel bad or uncomfortable. She replied, "He touched me in wrong places and hit me sometimes. He would rack his knuckle on my head and stuff once in a while." A.S. then explained in greater detail how and when Castano sexually touched her.

A.S. testified that she asked Castano to stop touching her and he responded that he kept forgetting that she was a child. She also testified that Castano told her once that he had a dream in which A.S. was pregnant with his child and that he had "the hots" for her. Castano disputed telling A.S. this; he claimed that he told J.S. about the dream and that A.S. overheard. He denied touching or kissing A.S. inappropriately. He testified that because he was sexually abused when he was a child, he is protective of children and would never molest a child.

A.S. testified that she did not immediately report the abuse to J.S. because she was afraid. J.S. testified that Castano was incarcerated at the time A.S. told her about the alleged abuse. She testified that she was uncertain whether to believe A.S. because A.S. has been untruthful at times, but she acknowledged that she didn't think A.S. would lie about abuse. J.S. also testified that Castano asked her to tell A.S. that "it didn't happen" and to tell the truth.

The officer who investigated A.S.'s allegations, Cory Klanderud, testified that A.S.'s statements were consistent during his interview of her. The prosecutor referenced Klanderud's testimony during his closing argument to persuade the jury that A.S.'s testimony was credible. He also argued that Castano's dream that he had impregnated A.S. demonstrated Castano's sexual intent toward A.S. He characterized Castano's claim that A.S. fabricated the allegations of abuse so that she could live with her father in California as "a red herring, a wild goose chase." He contended that A.S. was so frightened of Castano that she waited until Castano was in jail to tell J.S. about the abuse. He argued that Castano's hitting contributed to A.S.'s fear, and he urged the jury to believe A.S.'s testimony and to find Castano guilty.

As he did during his opening statement, Castano's defense counsel began his closing argument by questioning A.S.'s credibility. He quoted J.S.'s testimony that A.S. had been "a little bit of a liar lately." He reminded the jury that J.S. said A.S. had lied about other things and that when the prosecutor commented that all kids lie, J.S. had said, "Not the way [A.S.] does." But the jury found A.S. credible, finding Castano guilty on both counts. The district court sentenced Castano to 90 months' imprisonment, and this appeal follows.

DECISION

Castano claims that the prosecutor committed multiple acts of misconduct at trial. We review claims of unobjected-to prosecutorial misconduct for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Minnesota has adopted the three-part test for plain error that was set forth in *United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct.

1770, 1776 (1993). *Griller*, 583 N.W.2d at 740–41. That test is whether there is error that is plain and that affected the defendant’s substantial rights by significantly affecting the verdict. *Id.* We apply a reasonable-likelihood analysis to decide whether the plain error prejudiced the outcome.

But Castano points out that the Minnesota Supreme Court has recently deviated from *Olano*, shifting the burden of proof on the third element to the state to show that a plain error did *not* affect the defendant’s substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Castano argues that the *Ramey* burden-shifting approach applies to both the trial tactics and closing argument and that the state carries the burden to prove that the alleged errors did not affect Castano’s substantial rights. We do not read *Ramey* so broadly. The concurring opinions in *Ramey* point out that the burden-shifting approach departs from precedent. *Id.* at 303-04 (Anderson, Paul, J., concurring); *Id.* at 304-07 (Gildea, J., concurring) (citing as precedent, *Griller*, 583 N.W.2d at 741; *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005); *State v. Morton*, 701 N.W.2d 225, 234 (Minn. 2005)). *Ramey* addressed claims of prosecutorial misconduct during closing argument, not during trial questioning. 721 N.W.2d at 296. We do not read the change in approach in assessing claims of prosecutorial misconduct as established in *Ramey* to extend to all aspects of the trial, including areas where the prosecutor is not in complete control, such as questioning witnesses who offer unresponsive answers. Because *Ramey* does not address claims of prosecutorial misconduct that arise from a prosecutor’s examination of witnesses and because Castano does not show that the unobjected-to

alleged errors during the prosecutor's closing arguments were plain, we do not apply *Ramey*'s burden-shifting approach here.

Castano argues that he is entitled to a new trial because the prosecutor committed misconduct by eliciting vouching testimony, introducing bad-character evidence, personally vouching for A.S.'s truthfulness, and denigrating his defense. The state asserts that it is inaccurate to analyze Castano's claims that the prosecutor elicited vouching testimony and improperly introduced bad character evidence as a claim of prosecutorial misconduct, because they are evidentiary claims. Because all of the alleged errors occurred without objection, we analyze both the claims of improperly admitted evidence and prosecutorial misconduct during summation for plain error. *See State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998) (applying the plain-error test to the appellant's claim of inadmissible character evidence under Minn. R. Evid. 404(b)).

Eliciting Vouching Testimony

Castano contends that the prosecutor improperly elicited Officer Klanderud's testimony that A.S.'s statements were consistent, which Castano claims is similar to testimony that Klanderud believed A.S. He maintains that it constituted therefore improper vouching testimony. Vouching for a witness's credibility is improper because it interferes with the jury's duty to assess credibility. *State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005). It occurs when the state "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. Folkers*, 581 N.W.2d 321, 326 (Minn. 1998) (quotation omitted). Klanderud was simply asked to testify to the investigative issue of whether

A.S.'s different statements to police were substantially the same—an assessment of consistency the police officer reasonably would undertake as part of his investigation. We do not construe Klanderud's testimony to be improper vouching of witness credibility.

Bad-Character Evidence

Castano argues that the prosecutor improperly and intentionally elicited testimony that Castano hit A.S. and that Castano has been in jail. Because Castano's primary defense was that A.S. was lying about the abuse, the prosecutor reasonably responded that A.S. delayed reporting the incident out of fear. The prosecutor's statements that A.S. was frightened because Castano hit her and was so afraid of Castano that she waited to report the abuse until he was out of the house and behind bars supports that response.

We acknowledge that the state has a duty to prepare its witnesses to avoid inadmissible or prejudicial statements. *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). It is evident from our review of the record that when the prosecutor asked A.S. whether Castano had ever done anything to her to make her uncomfortable, his question was directed at the allegations of sexual touching. A reviewing court will more likely find prejudicial misconduct when the state has *intentionally* elicited impermissible testimony. *Id.* (emphasis added). But even an intentional elicitation of impermissible testimony warrants reversal only when it is likely that the testimony substantially weighed on the jury's decision to convict. *Id.* The testimony that Castano hit A.S. was not inadmissible. It was relevant to A.S.'s claims that she feared making an earlier report

and this evidence was invited by Castano's repeated contention that A.S.'s allegations lacked credibility.

Additionally, this evidence was not likely to substantially weigh on the jury's decision. Other evidence supported the jury's conclusion of guilt: Castano admitted that he tucked the children in; A.S. consistently described how and where Castano touched her; J.S. acknowledged that she could not see A.S. lying about something like abuse; A.S.'s brother testified that Castano said inappropriate things to A.S.; A.S. testified that Castano told her he dreamt of impregnating her and had "the hots" for her; Castano admitted that he had this dream and that he reported it in A.S.'s presence; and Castano preemptively declared his reluctance to tuck the children in because step-parents often are accused of inappropriate contact with step-children. This evidence substantially supports the jury's determination of guilt and makes it highly unlikely that A.S.'s testimony that Castano hit her on the head had any impact on the verdict.

Castano also argues that the prosecutor committed misconduct when he introduced evidence that Castano contends was bad-character evidence in violation of rules 404(a) and (b) of the Minnesota Rules of Evidence. He asserts that it was improper for the prosecutor to elicit testimony that Castano was in jail when A.S. told J.S. about the abuse. The prosecutor later referenced this testimony during summation, arguing that A.S. waited until Castano was out of the home to disclose the abuse because she was afraid of him. It is generally improper for the state to highlight a defendant's incarceration. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (noting that references to incarceration are potentially prejudicial). But parties may argue for reasonable inferences based on

facts presented to the jury at trial. *State v. Young*, 710 N.W.2d 272, 280 (Minn. 2006). A.S. had stated that she did not tell J.S. about the abuse immediately because she feared Castano. That the prosecutor reiterated this by pointing out that A.S. was so afraid that she waited until Castano was in jail to tell J.S. was not improper.

Personally Vouching for the Credibility of A.S.

Castano argues that the prosecutor improperly vouched for A.S.'s credibility during his closing argument. He cites five instances of alleged violations. None support reversal.

He first contends that the prosecutor improperly “endorsed Klanderud’s opinion that A.S.’s statement was consistent in order to advance the inference that she was credible.” Although a prosecutor may not personally endorse the credibility of a witness’s testimony, he may argue that the witness was or was not credible. *State v. Anderson*, 720 N.W.2d 854, 864 (Minn. App. 2006), *aff’d*, 733 N.W.2d 128 (Minn. 2007). The prosecutor’s argument here was proper. Castano next argues specifically, “The prosecutor also improperly vouched for A.S.’s credibility by essentially arguing that she testified as she did, ‘[b]ecause it’s the truth.’” But Castano does not cite to the record or otherwise explain when the prosecutor made this argument. Our review of the record does not reveal the quoted text. Castano seems to have taken this language from the *McNeil* case, in which the prosecutor argued that the complainant testified as she did “[b]ecause it’s the truth.” 658 N.W.2d at 235. Because the statement does not appear to have been made here and because Castano does not demonstrate how or why the

statement would be a violation in its context, his second claim of improper vouching also fails.

Castano claims that the prosecutor referred to facts outside of the record when he argued in his closing remarks that the reason A.S. did not tell her mother about the sexual abuse until Castano was in jail was because she was afraid of Castano. This argument fails because the underlying facts were presented to the jury. A.S. stated she did not tell her mother about the abuse right away because she was afraid, and J.S. testified that Castano was in jail when A.S. finally told her. Parties are permitted during closing argument to emphasize reasonable inferences from the facts presented at trial. *Young*, 710 N.W.2d at 280. It is apparent that this is what the prosecutor did in this case.

Castano also alleges that the prosecutor mischaracterized J.S.'s testimony when he argued that J.S. had testified that A.S. was lying about the abuse. Castano presents an inaccurate description. The prosecutor correctly noted that J.S. had said that A.S. was "a little bit of a liar lately" and that she had testified at length about A.S. being untruthful. We do not see in the record that the prosecutor claimed that J.S. had testified that A.S. lied about the abuse.

Finally, Castano alleges that the prosecutor improperly expressed his personal opinion when he argued that Castano's dream about impregnating A.S. demonstrated his sexual intent regarding her. Castano argues that in the absence of testimony from a dream-interpretation expert, the prosecutor's explanation was misconduct. Leaving aside the question of whether the state needs a dream-interpretation expert for the unremarkable connection noted by the prosecutor, Castano misses the point. The

significance of this evidence is not that Castano dreamt of impregnating his step daughter, it is that he *told* A.S. about the dream. The meaning of the dream as opined by the prosecutor has much less prejudicial impact than the fact that Castano chose to make A.S. aware of it. It was not an improper expression of opinion, or an unreasonable inference, for the prosecutor to argue that the dream discussion implies that Castano had sexual intentions towards A.S.

Denigrating the Defense

Castano maintains that the prosecutor also denigrated his defense. A prosecutor may argue that a defense has no merit, but may not denigrate or belittle the defense itself. *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). A prosecutor may analyze the evidence and vigorously argue that the state's witnesses were credible while the defendant and defense witnesses were not. *State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977). The prosecutor here did not employ tactics held to be denigrating the defense, such as calling the defense "ridiculous" or suggesting that Castano was offering either a standard defense or just any defense that might work. *See State v. Hoppe*, 641 N.W.2d 315, 321 (Minn. App. 2002), *review denied* (Minn. May 14, 2002); *State v. Williams*, 525 N.W.2d 538, 549 (Minn. 1994). The prosecutor did implore the jury not to believe Castano's claims that A.S. fabricated the allegations of abuse so she could live with her father in California. He said, "Ladies and gentlemen of the jury, that's a red herring, a wild goose chase the defendant wants you to chase; don't do it." Although likening a defense to a "wild goose chase" is uncharitable, the phrase was properly used to attack specifically the reasoning of this defense, not to belittle it in the abstract. And in

the context of the entire summation, the comment certainly was not so prejudicial as to support a claim that Castano was denied a fair trial.

When reviewing alleged prosecutorial misconduct, this court looks at the whole argument in context, not just selective phrases or remarks. *McNeil*, 658 N.W.2d at 234. The linchpin of this case for both prosecution and defense was witness credibility. Defense counsel began his opening and closing remarks by casting doubt on A.S.'s credibility. His cross-examination questions attempted to portray A.S. as untruthful and his direct examination presented Castano as a trustworthy father to his girlfriend's children. In this context, the inferences the prosecutor argued and the references made were within the bounds of permissible trial tactics. Castano does not show prosecutorial misconduct, let alone that the conduct impaired his right to a fair trial. We hold that none of the challenged tactics constitute error.

Affirmed.