STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2064

State of Minnesota,
Respondent,

vs.

Randy Rae Zuppke,
Appellant.

Filed November 30, 2010
Affirmed
Kalitowski, Judge

Wright County District Court
File No. 86-CR-08-9818

Lori Swanson, Attorney General, Kimberly L. Parker, Assistant Attorney General, St. Paul, Minnesota; and

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

Rachael Goldberger, Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

KALITOWSKI, Judge

In this appeal from his conviction of second-degree criminal sexual conduct, appellant Randy Rae Zuppke argues that: (1) the district court abused its discretion when it admitted relationship evidence under Minn. Stat. § 634.20 (2008); (2) the prosecutor committed misconduct when he interjected personal opinion into closing argument and improperly commented on issues of witness credibility; (3) the district court erred in failing to obtain appellant's consent before giving a no-adverse-inference jury instruction; and (4) the evidence is legally insufficient to sustain his conviction. We affirm.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion when, pursuant to Minn. Stat. § 634.20, it admitted relationship evidence of two prior acts of sexual contact between appellant and his seven-year-old stepdaughter, K.R. Appellant claims that any probative value of the evidence was outweighed by the danger of unfair prejudice. We disagree.

We review for an abuse of discretion the admission of similar-conduct evidence under section 634.20. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). "Appellant has the burden to establish that the district court abused its discretion and that appellant was prejudiced." *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008).

Minnesota law 634.20 provides:

> Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. "Similar conduct" includes, but is not limited to, evidence of domestic abuse . . . . "Domestic abuse" and "family or household members" have the meanings given under section 518B.01, subdivision 2.

Minn. Stat. § 634.20. "Domestic abuse" includes second-degree criminal sexual conduct. Minn. Stat. § 518B.01, subd. 2(a)(3) (2008). "Family or household members" is defined as "persons who are presently residing together or who have resided together in the past." *Id.*, subd. 2(b)(4) (2008).

Evidence under section 634.20 need not meet the heightened standard of clear and convincing evidence required for the admission of character or *Spreigl* evidence, but need only be more probative than prejudicial. *McCoy*, 682 N.W.2d at 159. Thus, "the admissibility of evidence under Minn. Stat. § 634.20 depends only on (1) whether the offered evidence is evidence of similar conduct; and (2) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *Id.* at 158. "When balancing the probative value against the potential prejudice, unfair prejudice 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. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted).

At the pretrial hearing, the prosecution provided notice that it planned to offer testimony regarding two prior incidents of sexual contact between appellant and the

victim. The two prior incidents occurred when appellant and K.R. resided in Dakota County; the charged incident occurred in Wright County. Appellant objected to introduction of the relationship evidence as highly prejudicial. The district court ruled that the evidence was admissible under section 634.20, finding that the prior incidents were probative of the nature of the relationship between appellant and the victim, and that this probative value was not outweighed by the potential for unfair prejudice.

Before the victim testified, the district court instructed the jury as follows:

> The State is about to introduce evidence that includes alleged occurrences in Dakota County. This evidence is being offered for the limited purpose of assisting you in determining whether the Defendant committed those acts with which the Defendant is charged in the complaint. The evidence is not to be used to prove the character of the Defendant or that the Defendant acted in conformity . . . with such character.
>
> The Defendant is not being tried for and may not be convicted of any alleged offenses other than the charged offenses. You are not to convict the Defendant on the basis of the alleged occurrences in Dakota County.

The district court gave a similar jury instruction at the conclusion of trial.

At trial, K.R. testified about the charged incident and about two prior instances where appellant touched her "privates." K.R. testified that the Dakota County incidents both involved appellant tickling her leg and then using his fingers to touch her privates in a circular motion. K.R. testified that one of these instances occurred when she was lying in bed between appellant and her mother. She testified that she forgot where she was lying the other time, but "it happened again on there and he did the same stuff." The

Wright County incident occurred when K.R. was sleeping in bed with her mother and appellant, when appellant's fingers again touched her "privates."

Appellant argues that the prior Dakota County incidents were irrelevant, nonprobative, and unfairly prejudicial. But any "[e]vidence that helps to establish the relationship between the victim and the defendant or which places the event in context bolsters its probative value." *State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998). Moreover, the relationship evidence had increased inherent probative value because it involved past acts of abuse committed by the same defendant against the same victim. *See Bell*, 719 N.W.2d at 641. Further, the district court read two cautionary instructions to the jury, one before K.R.'s testimony and the other before jury deliberations. This "lessened the probability of undue weight being given by the jury to the evidence." *Kennedy*, 585 N.W.2d at 392.

On this record, the district court did not abuse its discretion by admitting evidence of the two prior incidents of sexual contact between appellant and the victim under section 634.20.

II.

Appellant next argues that he is entitled to relief because the prosecutor committed misconduct in closing argument. Appellant did not object to the prosecutor's argument during trial. We apply plain-error analysis when examining unobjected-to prosecutorial conduct. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Under this analysis, we examine whether (1) there is error; (2) the error is plain; and (3) the error affected appellant's substantial rights. *See id.* at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740

(Minn. 1998)). Appellant bears the burden of demonstrating "both that error occurred and that the error was plain." *See id*. If appellant demonstrates that plain error occurred, the state bears the burden of proving that there is no reasonable likelihood that the absence of the prosecutor's misconduct would have a significant effect on the jury's verdict. *See id*. Even if the three-prong test is satisfied, we will reverse "only if the fairness, integrity, or public reputation of the judicial proceeding is seriously affected." *State v. Jones*, 678 N.W.2d 1, 18 (Minn. 2004).

Interjection of personal opinion

Appellant argues that the prosecutor committed misconduct during closing argument by prefacing several statements with the phrase "I would submit." Appellant argues that use of this phrase impermissibly interjects the prosecutor's personal opinion into case evidence. We disagree. Use of such phrases as "the state submits" or "I submit" does not per se constitute prosecutorial misconduct. *See State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005) (concluding that approximately 18 statements by the prosecutor, such as "I suggest to you," "I ask you," and "I submit to you," were "poorly chosen" but did not constitute plain error); *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000) (concluding that prosecutor's use of the phrase "I submit" was not prosecutorial misconduct when prosecutor was "offering an interpretation of the evidence rather than a personal opinion as to guilt"), *as amended on denial of reh'g* (Minn. Oct. 25, 2000); *State v. Hobbs*, 713 N.W.2d 884, 888 (Minn. App. 2006) (concluding that prosecutor's use of the phrase "I submit" while also acknowledging the jury's role as fact-finder did not constitute prosecutorial misconduct or result in undue prejudice),

vacated in part on other grounds (Minn. Dec. 12, 2006). Here, each of the prosecutor's statements came as part of a discussion of the evidence or the reasonable inferences the jury could make when considering such evidence.

Although we caution prosecutors against use of language that improperly interjects the prosecutor's personal opinion into closing arguments, based on our review of the record, we conclude that the prosecutor's statements were attempts to analyze and explain the evidence to the jury and did not constitute prosecutorial misconduct or result in unfair prejudice to appellant.

Vouching for or attacking witness credibility

Appellant claims that the prosecutor improperly vouched for the credibility of K.R. and impermissibly attacked the credibility of another witness.

During closing argument, the prosecutor concluded a summary of the evidence presented during K.R.'s testimony by stating: "So for all these reasons I would submit that K.R. is credible and that the State has shown—proven its case" and "[K.R.] was so earnest in making sure she told the truth . . . ."

When addressing the testimony of K.R.'s mother, whose testimony at trial did not support K.R.'s version of events, the prosecutor challenged her statements that K.R. was never alone with appellant as "simply impossible," stating that the mother "is not credible" and is "in denial." And, finally, when discussing the uncorroborated allegation by K.R.'s mother that K.R. also once accused her biological father of abuse, the prosecutor stated: "I would submit that the lie here is this accusation that [K.R.'s father]

touched her, this accusation that falls from the sky which has as its only source [K.R. mother]."

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). But although a prosecutor may not personally endorse a witness's credibility, the prosecutor may argue in closing that a witness was or was not credible. *State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006). Further, if supported by reference to the evidence, it is not misconduct to state that a witness "lied." *State v. Anderson*, 720 N.W.2d 854, 865 (Minn. App. 2006), *aff'd*, 733 N.W.2d 128 (Minn. 2007). Here, the prosecutor's statements regarding witness credibility all referenced the testimony and evidence presented to the jury. The record demonstrates that the prosecutor engaged in permissible analysis of the evidence and argued reasonable inferences from that evidence, including whether a witness was credible; therefore, the prosecutor did not commit prejudicial misconduct during closing argument. *See State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977) (stating that a prosecutor is permitted to "analyze the evidence and vigorously argue that the state's witnesses [are] worthy of credibility").

Moreover, even if one or more of the prosecutor's statements constituted error, the plain-error standard would not be met because appellant's substantial rights were not affected. *See Ramey*, 721 N.W.2d at 302 (articulating plain-error standard). When assessing whether the state has met its burden to demonstrate that the error did not affect a defendant's substantial rights, we consider the strength of the evidence against the

defendant, the pervasiveness of the improper conduct, and whether the defendant had an opportunity, or made any efforts, to rebut the improper conduct. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

Here, the state's case relied on K.R.'s consistent recital of the facts, which she communicated to her mother, her father, a nurse practitioner, and the jury at trial. Further, the unobjected-to prosecutorial statements cited by appellant were only a small part of a lengthy closing argument; this court looks at the record as a whole, rather than focusing on particular phrases or remarks. *See State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005).

Furthermore, the district court instructed the jury that "the arguments and other remarks of attorneys are not evidence," "[i]f the attorneys . . . should make any statement as to what the evidence is which differs from your recollection of the evidence, you should disregard the statement made . . . by the attorney and rely solely on your own memory," and "[y]ou are the sole judges of whether a witness is to be believed and the weight to be given to that witness's testimony." *See State v. Ture*, 353 N.W.2d 502, 517 (Minn. 1984) (recognizing that prosecutor's expression of personal opinion may be harmless if district court cautions jury to consider only the evidence and that argument is not evidence); *State v. Yang*, 627 N.W.2d 666, 681 (Minn. App. 2001) (recognizing that improper comments are harmless if district court instructs jury that closing argument is argument and that jury should rely on its own recollection of facts), *review denied* (Minn. July 24, 2001).

We conclude that on this record any erroneous injection of personal opinion or vouching by the prosecutor during closing argument did not affect appellant's substantial rights such that appellant would be entitled to a new trial.

III.

Appellant argues that the failure of the district court to obtain his consent on the record before giving the jury a no-adverse-inference instruction constitutes plain error entitling appellant to a new trial.

Both the United States and Minnesota constitutions guarantee a criminal defendant's right not to testify. *See* U.S. Const. amend. V (stating that no person shall be compelled to be a witness against himself in any criminal case); Minn. Const. art. I, § 7 (same). A district court should obtain permission from a criminal defendant before instructing the jury with the no-adverse-inference instruction. *State v. Thompson*, 430 N.W.2d 151, 153 (Minn. 1988); *see* 10 *Minnesota Practice*, CRIMJIG 3.17 (2006) (stating that defendant has right, guaranteed by federal and state constitutions, not to testify in his own defense and that jury should not draw any inference from fact that defendant has not testified). Failure to obtain the defendant's consent is error. *State v. Duncan*, 608 N.W.2d 551, 558 (Minn. App. 2000), *review denied* (Minn. May 16, 2000).

But if the defendant fails to object to the instruction, this court reviews the error only if it affected the defendant's substantial rights. *State v. Darris*, 648 N.W.2d 232, 240 (Minn. 2002). The erroneous giving of a no-adverse-inference instruction is prejudicial "when there is a reasonable likelihood that the giving of the instruction would

have had a significant effect on the jury's verdict." *Id.* Appellant bears a heavy burden of proof to show such a significant effect. *See Griller*, 583 N.W.2d at 741.

The state concedes that the district court erred by failing to ask appellant's permission before instructing the jury with the no-adverse-inference instruction. Although appellant's counsel did not object to the jury instruction at trial, appellant maintains on appeal that this error was prejudicial because it amplified his silence and highlighted that he failed to rebut K.R.'s version of events. We disagree.

Appellant's argument does not meet the heavy burden of showing that the error substantially affected the jury's verdict. The district court instructed the jury that "[t]he Defendant has a right not to testify" that is "guaranteed by federal and state constitutions," and that it "should not draw any inference from the fact [that] the Defendant has not testified in this case." On this record, we conclude that appellant has failed to meet the burden of demonstrating that the district court's instruction affected his substantial rights.

IV.

Appellant argues that the evidence at trial was insufficient to support the jury's conclusion that he was guilty of second-degree criminal sexual conduct. In considering a sufficiency-of-the-evidence claim, our review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Because weighing the credibility of witnesses is the exclusive function of the jury, we assume that "the jury believed the

state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

Our review includes an analysis of both the facts presented and the inferences that the jury could reasonably draw from those facts. *State v. Robinson*, 604 N.W.2d 355, 365-66 (Minn. 2000). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could have reasonably concluded that the defendant was guilty of the charged offense. *State v. Olhausen*, 681 N.W.2d 21, 25-26 (Minn. 2004).

Here, K.R.'s testimony was the primary evidence of appellant's guilt. Appellant contends that K.R.'s testimony at trial was contradictory, inconsistent, and insufficient to sustain the jury's verdict. But any inconsistencies in testimony must be resolved in favor of the jury verdict on appeal. *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990); *see also State v. Blair*, 402 N.W.2d 154, 158 (Minn. App. 1987) (upholding criminal-sexual-conduct conviction despite inconsistency between the child's testimony and prior statement).

The jury had the opportunity to evaluate the credibility of K.R. and the other witnesses. K.R.'s statements to her father, her mother, a nurse practitioner, and at trial were consistent regarding the sexual contact. K.R. never deviated in her account that appellant touched her, which, by itself, is sufficient evidence to support appellant's conviction. *See Kennedy*, 585 N.W.2d at 389 (stating that sexual-assault victim's testimony alone is sufficient to establish proof beyond a reasonable doubt). We conclude

that the evidence is sufficient to uphold appellant's conviction of second-degree criminal sexual conduct.

Affirmed.