**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-2324**

State of Minnesota,
Respondent,

vs.

Abdinur Nurdin Abdullahi,
Appellant.

**Filed October 12, 2010**
**Affirmed**
**Bjorkman, Judge**

Scott County District Court
File No. 70-CR-08-14226

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

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

**BJORKMAN**, Judge

In this appeal from three criminal-sexual-conduct convictions, appellant argues that (1) the district court erred by admitting statements vouching for the complainant's

credibility and (2) the prosecutor committed prejudicial misconduct by improperly arguing that appellant tailored his testimony and by disparaging appellant. We affirm.

## FACTS

In early 2008, 12-year-old B.M. lived with her aunt, A.K. That April, A.K. married appellant Abdinur Abdullahi in an unofficial private ceremony. Abdullahi came to live with A.K. and B.M. in late May or early June.

The events giving rise to Abdullahi's convictions occurred on June 10, 2008. According to evidence adduced at trial, at approximately noon that day, B.M. was reading in her bedroom in the basement. A.K. was upstairs at the time. Abdullahi entered B.M.'s room, climbed on top of her, and removed her skirt and underwear. B.M. tried to scream, but Abdullahi put his hand over her mouth. He tried to force his penis into B.M.'s vagina, but it would not fit. He instead put his finger into her vagina, then threw her on the floor beside the bed and licked her vaginal area. At some point, he ejaculated onto her legs and clothes. When B.M. tried to escape to another room, Abdullahi followed her, picked her up, and slammed her against the wall. He told B.M. that he would kill her if she told anyone what had happened. He then forced her to the floor, placed his hand over her mouth, and again licked her vaginal area. When A.K. called downstairs asking about the noise, Abdullahi stopped and told A.K. that he was fixing the television. Abdullahi told B.M. to "[t]ry to act normal."

Later that day, A.K. asked Abdullahi to go downstairs and help B.M. with a video that B.M. was trying to watch in the basement. Abdullahi went downstairs and assaulted

B.M. again, covering her mouth and licking her vaginal area. Abdullahi subsequently left the house.

While Abdullahi was gone, B.M. told A.K. what Abdullahi had done. B.M. also told A.K. that she had felt something wet on her skirt at one point. A.K. immediately contacted the police. Responding officers interviewed A.K. and B.M. and collected B.M.'s clothing and sheets. The police also took B.M. to the hospital for a sexual-assault examination, which revealed some redness around B.M.'s external vaginal area and perineum. Swabs taken during the examination confirmed the presence of saliva on B.M.'s perineal region. Further investigation also revealed the presence of semen on B.M.'s underwear and skirt. Subsequent testing matched both the saliva and the semen to Abdullahi's DNA profile.

Abdullahi was charged with first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2006), second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(c) (2006), and attempted third-degree criminal sexual conduct, in violation of Minn. Stat. §§ 609.17, .344, subd. 1(c) (2006). Numerous witnesses testified at trial, including B.M., A.K., and Abdullahi. Captain David Muelken of the Savage Police Department, who questioned Abdullahi twice, also testified, and the jury was presented with redacted recordings of the interrogations.

The jury found Abdullahi guilty on all counts. The district court sentenced Abdullahi to 168 months' imprisonment on the first-degree criminal-sexual-conduct conviction. This appeal follows.

## D E C I S I O N

### I. The district court did not plainly err by not redacting statements Captain Muelken made to Abdullahi during an interrogation that credited B.M.

Abdullahi argues that the district court erred by not redacting portions of Captain Muelken's videotaped interrogation of Abdullahi in which Captain Muelken vouched for B.M.'s credibility. Before the video of the interrogation was admitted, the parties agreed to redact certain portions. Abdullahi concedes that he did not seek to have the portions now at issue redacted from the video.

We review unobjected-to evidentiary issues for plain error. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). On plain-error review, the defendant must show that (1) there was error, (2) the error was plain, and (3) the error affected his substantial rights. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). An error is plain if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006), and it affects substantial rights if there is a reasonable likelihood that its absence would have had a significant effect on the jury's verdict, *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). If the three plain-error factors are established, we then consider whether the error seriously affected the fairness and integrity of the judicial proceedings. *See Griller*, 583 N.W.2d at 740, 742 (explaining that a court may exercise its discretion to correct a plain error only if such error seriously affected the fairness, integrity, or public reputation of judicial proceedings).

"[T]he credibility of a witness is for the jury to decide." *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). Accordingly, it is improper for a witness to "vouch for

or against the credibility of another witness." *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). Vouching includes expression of a personal opinion as to a witness's credibility. *State v. Folkers*, 581 N.W.2d 321, 326 (Minn. 1998).

Captain Muelken's statements to Abdullahi during the videotaped interrogation consistently indicated that he believed B.M. Captain Muelken told Abdullahi that B.M. "cannot make this up," that she had been crying and emotional when she spoke with police, and that "[h]er eyes weren't telling a lie." He also repeatedly declared that he believed Abdullahi did what B.M. claimed and that, in his experience, girls do not lie about sexual assault. By contrast, Captain Muelken told Abdullahi that he believed, based on Abdullahi's body language, that Abdullahi was not telling the truth. Captain Muelken's statements plainly indicated that he endorsed B.M.'s credibility over Abdullahi's.

Abdullahi argues that admission of Captain Muelken's vouching statements constituted plain error. We disagree. The challenged statements were made in the context of Captain Muelken's interrogation of Abdullahi, not during the officer's testimony. Caselaw does not categorically prohibit admission of evidence that includes a police officer's vouching statements made to a defendant during interrogation. *See State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008) (stating that plain error cannot be established in the absence of binding precedent). In *Ferguson*, for example, the district court admitted the transcript of the defendant's interrogation in which a police officer indicated that he believed the defendant was lying and other witnesses were being truthful. 581 N.W.2d at 835. Before the transcript was read, the district court instructed

the jury that only the defendant's statements were evidence and that the officer's statements were merely for context. *Id.* Our supreme court held that vouching did not occur because of this instruction. *Id.* But the supreme court also observed that even if the jury disregarded the instruction, the jury knew that the officer made the statements during questioning at the police station and "could infer that [the investigator] was attempting to get as much information from [the defendant] as possible." *Id.* at 835-36. Again in *State v. Lindsey*, the supreme court held that the district court did not abuse its discretion in admitting an unredacted audiotape of the defendant's interrogation, which included the investigator's accusation that the defendant was lying and assurance that the defendant was "gonna go" on the charged offense. 632 N.W.2d 652, 662-63 (Minn. 2001). The supreme court reasoned, in part, that the investigator's comments provided context for the defendant's statements. *Id.*

Here, as in *Ferguson* and *Lindsey*, the jury was aware that the video depicted an interrogation conducted at a police station shortly after Abdullahi's arrest. The jury, therefore, had the necessary information to understand Captain Muelken's statements as an investigative technique, not necessarily indicative of his personal opinion, and as context for Abdullahi's statements. On this record, the district court's failure to sua sponte redact Captain Muelken's vouching statements from the interrogation video is not plain error.

Finally, Abdullahi has not demonstrated that admission of the vouching portions of the interrogation affected his substantial rights. Captain Muelken's repeated statements to Abdullahi that he believed B.M. were not the jury's only guide in

evaluating B.M.'s claim. The jury also saw and heard Abdullahi maintain his innocence throughout the entire interrogation. And because B.M. and Abdullahi both testified at trial, the jury had a first-hand opportunity to weigh each witness's credibility. *See State v. Wembley*, 712 N.W.2d 783, 792 (Minn. App. 2006) (holding that expert's testimony violated vouching prohibition but was not unfairly prejudicial because the jury watched the videotape of the expert's interview with the child victim and was able to independently judge the child's credibility), *aff'd*, 728 N.W.2d 243 (Minn. 2007).

Moreover, Captain Muelken's vouching statements formed "only a small part" of the trial as a whole. *See State v. Soukup*, 376 N.W.2d 498, 503 (Minn. App. 1985), *review denied* (Minn. Dec. 30, 1985). The interrogation video amounted to slightly more than one hour in a trial that lasted for more than six days. The prosecutor did not mention the vouching statements during closing argument but focused on other indicators of B.M.'s credibility and the overall strength of the evidence against Abdullahi. *Cf. Van Buren v. State*, 556 N.W.2d 548, 551 (Minn. 1996) (holding that vouching testimony deprived defendant of fair trial because prosecutor used it in closing argument to bolster complainant's credibility and the evidence of guilt was "close," hinging entirely on credibility of witnesses). We conclude that any error in admitting Captain Muelken's vouching statements did not affect Abdullahi's substantial rights.

**II. The prosecutor did not commit prejudicial misconduct.**

Abdullahi asserts that the prosecutor committed misconduct by (1) suggesting that Abdullahi tailored his testimony and (2) disparaging Abdullahi's testimony. Abdullahi concedes that he did not object to the prosecutor's conduct at trial, so we apply a

modified plain-error standard of review. *See State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). Abdullahi bears the burden of proving plain error, but the state then must demonstrate that the error did not affect his substantial rights. *See Ramey*, 721 N.W.2d at 302 (imposing burden-shifting framework). Prosecutorial misconduct affects a defendant's substantial rights if there is a reasonable likelihood, after considering the strength of the evidence against the defendant and the pervasiveness of the improper suggestions, that the absence of misconduct would have had a significant effect on the jury's verdict. *State v. Davis*, 735 N.W.2d 674, 681-82 (Minn. 2007).

**Tailoring argument**

Abdullahi argues that the prosecutor committed misconduct by suggesting during cross-examination and in closing argument that Abdullahi tailored his testimony after hearing the state's evidence against him. Generally, a prosecutor may not argue that a defendant observed the full presentation of evidence and then "took the witness stand and concocted a story exonerating himself." *State v. Buggs*, 581 N.W.2d 329, 341 (Minn. 1998). Such an accusation implicates a defendant's constitutional right to be present at trial. *State v. Swanson*, 707 N.W.2d 645, 657 (Minn. 2006). But a prosecutor may impeach a defendant's credibility based on his presence during the trial when there is "specific evidence of tailoring." *Id.* at 657-58. There is sufficient evidence of tailoring to permit impeachment when a defendant's account of events changes significantly after he learns of the state's evidence. *State v. Ferguson*, 729 N.W.2d 604, 616-17 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).

The record reflects that Abdullahi's trial testimony differed significantly from his pretrial statement to Captain Muelken on an issue that was central to the state's case. During the interrogation, Captain Muelken asked Abdullahi, "[W]hen you and [A.K.] have sex do you wear a condom?" Abdullahi replied, "No. I don't. I don't never." But at trial, Abdullahi testified that shortly before June 10, he and A.K. had used condoms because they were fighting and he did not want her to get pregnant. He also suggested that A.K. was framing him by putting the semen from the condoms on B.M.'s underwear and saliva from his tobacco spittoon on B.M.'s vaginal area. Abdullahi's markedly different trial testimony was critical to his effort to explain the DNA evidence. His testimony that he misunderstood Captain Muelken's question to apply to the day of the assault was for the jury to weigh. *See Folkers*, 581 N.W.2d at 327 (stating that it is the exclusive province of the jury to determine the weight and credibility to be afforded the testimony of each witness). On this record, we conclude that the prosecutor did not commit misconduct by pointing out that Abdullahi's presence during trial afforded him the opportunity to tailor his testimony.

**Disparaging questioning and argument**

Abdullahi also contends that the prosecutor committed misconduct during cross-examination and closing argument by disparaging Abdullahi's testimony that the prospect of his penis having touched B.M.'s vagina was "disgusting." Prosecutors may not interject their personal opinions into a case. *State v. Mayhorn*, 720 N.W.2d 776, 786 (Minn. 2006) (cross-examination); *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005) (argument). Nor may they "appeal to the passions of the jury." *Mayhorn*, 720 N.W.2d at

786-87. 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).

During cross-examination, the prosecutor asked Abdullahi whether his penis touched B.M.'s vagina. Abdullahi answered, "No. That is—no. That is something making me nauseating. . . . Disgusting. That is something making me disgusting." The prosecutor then said, "I agree with you, it was disgusting." Abdullahi argues that this statement improperly disparaged him. We agree. By commenting on Abdullahi's testimony, the prosecutor deviated from the appropriate question-answer format and indicated his personal opinion about the case.

Abdullahi challenges a portion of the prosecutor's closing argument on the same grounds. The prosecutor began his argument by repeating the word "disgusting" and stating that "'disgusting' is a good adjective for the type of behavior when someone sexually assaults a child." Unlike the prosecutor's earlier comment, this statement was in the context of a closing argument, in which the prosecutor is not only permitted but expected to comment on the defendant's testimony. *See Francis v. State*, 729 N.W.2d 584, 590-91 (Minn. 2007) (stating that prosecutor's reference during closing argument to defendant's drug trade was proper based on defendant's testimony); *see also State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995) (stating that a prosecutor's closing argument need not be colorless, so long as it is based on the evidence or reasonable inferences from that evidence). Viewing these brief references to Abdullahi's testimony in the context of the prosecutor's closing argument as a whole, we conclude there was no misconduct. *See*

*State v. Johnson*, 616 N.W.2d 720, 729 (Minn. 2000) (requiring consideration of closing argument as a whole).

Although the prosecutor's comment on the word "disgusting" during cross-examination was improper, the record as a whole demonstrates that the prosecutor's conduct did not impair Abdullahi's substantial rights. The prosecutor's comment was brief, and the closing argument that followed properly focused on how the evidence presented at trial demonstrated Abdullahi's guilt beyond a reasonable doubt. And the evidence against Abdullahi was extensive, including not only B.M.'s consistent and emotional description of the assaults but multiple forms of DNA evidence corroborating B.M.'s testimony. On this record, we conclude that the prosecutor's brief comment on cross-examination did not have a significant impact on the jury's verdict. *See Davis*, 735 N.W.2d at 681-82. Abdullahi, therefore, is not entitled to relief on this basis.[1]

**Affirmed.**

[1] Abdullahi also argues that even if none of the asserted errors individually warrants a new trial, the cumulative effect of the errors deprived him of a fair trial. *See State v. Erickson*, 610 N.W.2d 335, 340-41 (Minn. 2000) (evaluating cumulative effect of multiple trial errors). Because we find only one error, there is nothing to aggregate.