STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0198

State of Minnesota,
Respondent,

vs.

Dustin Blue Davidson,
Appellant.

Filed January 7, 2013
Affirmed
Cleary, Judge

Mille Lacs County District Court
File No. 48-CR-10-2295

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

Janice Jude, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Cleary, Judge.

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

CLEARY, Judge

Following a jury trial, appellant was convicted of five counts of criminal sexual conduct involving a minor. Appellant challenges the convictions, arguing that the district court made evidentiary rulings that constitute reversible error and that the prosecutor committed prejudicial misconduct. We affirm.

FACTS

On August 14, 2010, then 15-year-old S.H. reported to her mother, A.H., and others that appellant Dustin Davidson had sexually abused her at night in her bedroom on several occasions. Appellant was A.H.'s fiancé and lived with A.H., S.H., and S.H.'s two younger siblings. S.H.'s allegations against appellant were reported to the police on August 17, 2010, and on August 18, S.H. was interviewed by a county social worker at the police station. During the interview, S.H. described the incidents of sexual abuse by appellant, which she stated had begun in October 2009. This interview was video recorded.

On August 30, 2010, S.H. contacted the social worker and said that she wanted to talk. The next day, S.H. was interviewed by the social worker and a police investigator at the police station, and S.H. stated that she had "made up" all of the allegations against appellant. This interview was audio recorded.

In early September 2010, S.H. spoke with a school counselor and stated that appellant had sexually abused her. S.H. said that she had told the social worker and the police investigator that she had made up the allegations, but that what she had said in her

first interview was the truth. The school counselor reported her conversation with S.H. to the social worker. On September 16, 2010, S.H. was interviewed by the social worker at S.H.'s school. S.H. again maintained that she had made up all of the allegations against appellant. This interview was audio recorded.

On September 29, 2010, during another conversation with the social worker, S.H. reaffirmed the statements that she had made during the August 18 interview and her allegations against appellant. Appellant was subsequently charged with five counts of criminal sexual conduct.

Appellant moved to prevent the video recording of the August 18 interview from being admitted at trial. The state opposed this motion, arguing that S.H. would be testifying at trial and that the statements that she had made during the August 18 interview were prior consistent statements that would be helpful in evaluating her credibility, and therefore were not hearsay under Minn. R. Evid. 801(d)(1)(B). In the alternative, the state argued that the statements that she had made during the interview should be admitted under the residual exception to the hearsay rule, pursuant to Minn. R. Evid. 807. The district court ruled that the state would be allowed to play the video recording of the August 18 interview during trial.

The state moved to admit the testimony of Mindy Mitnick as expert-witness testimony at trial. The state intended for Ms. Mitnick to testify about various topics relating to child sexual-abuse victims, including reporting and disclosure, recantation, and "Child Sexual Abuse Accommodation Syndrome." Appellant opposed the admission of expert testimony from Ms. Mitnick. The district court ruled that Ms. Mitnick would be

allowed to testify as an expert witness about general information concerning sexual-abuse victims, but that she would not be permitted to provide opinions as to the credibility or truthfulness of S.H. or appellant or to answer hypothetical questions based on the facts of this case.

A jury trial was held on July 25–29 and August 1, 2011. At trial, S.H. testified that appellant had sexually abused her, described the incidents of abuse in detail, and stated that what she had said during the August 18 interview was the truth. She testified that she had previously recanted her allegations against appellant because A.H. was treating her "[h]orrible, like I didn't matter"; A.H. told her that they were going to lose their home, that S.H. would need to get her braces removed, that A.H. would need to drop out of college, and that their family would be torn apart; A.H. had shut off S.H.'s cell phone; and S.H. wanted to be able to go home and be with her family. S.H. also testified that she and her friends frequently drank alcohol and smoked cigarettes and marijuana with appellant. The recordings of the August 18, August 31, and September 16 interviews and transcripts of those interviews were admitted into evidence, and the recordings were played for the jury.

S.H.'s 15-year-old friend S.W. was called to testify. S.W. testified that she occasionally drank alcohol and smoked cigarettes and marijuana with S.H. When the prosecutor asked S.W. where they would get the alcohol, cigarettes, and marijuana, the defense attorney objected. Outside of the presence of the jury, S.W. stated that her answer to the prosecutor's question would be that appellant had sometimes provided them with alcohol, cigarettes, and marijuana. The defense attorney argued that this

testimony was inadmissible and prejudicial character evidence when appellant had not been charged with providing substances to minors. The district court sustained the objection, and S.W. did not testify as to who had provided her and S.H. with the substances.

A.H. was called to testify, and the following questioning took place during her testimony:

> PROSECUTOR: Are you aware that [appellant] provided your daughter with alcohol?
> A.H.: No, he didn't.
> PROSECUTOR: You're not aware of that?
> A.H.: No.
>
> . . . .
>
> PROSECUTOR: And were you aware that he provided her with marijuana?
> A.H.: No, he did not.
> PROSECUTOR: Not to your knowledge?
> A.H.: That's my knowledge.

The defense attorney did not object to this questioning.

Ms. Mitnick was called to testify. She stated that she has bachelor's and master's degrees in psychology, is a licensed psychologist, is trained and specializes in working with child sexual-abuse victims, has conducted "many hundreds" of training sessions on the subject of child sexual-abuse victims, has written numerous articles on the subject, and has provided expert testimony on the subject in approximately four to six court cases per year for the past 25 years. She stated that she had not met appellant or S.H. and had not reviewed any of the evidence in this case. When the prosecutor moved to have Ms. Mitnick qualified as an expert witness in the field of child sexual abuse, the defense

attorney stated, "We . . . have no objection to the general foundation laid for her and . . . we accept that this woman is an expert in her field of psychology."

Ms. Mitnick was then asked about child-sexual-abuse-accommodation syndrome, which she stated is a theoretical idea concerning children who are molested over an extended period of time. Ms. Mitnick testified that the syndrome is generally accepted in her profession as a theoretical idea and that research had been conducted that supports the idea. She testified that child sexual-abuse victims may delay disclosing the abuse and may disclose and then recant their allegations. Ms. Mitnick also testified that common misconceptions or myths associated with child sexual abuse include that a child will resist the abuse, report the abuse right away, or be afraid of the abuser.

The jury found appellant guilty of five counts of criminal sexual conduct. After the verdicts, appellant moved for a new trial, which the district court denied. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by admitting the video recording of the August 18 interview.

Appellant argues that the district court erred by allowing the video recording of the August 18 interview to be played during trial. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "A court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). "On

appeal, the defendant has the burden of proving both that the [district] court abused its discretion in admitting the evidence and that the defendant was thereby prejudiced." *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997).

A. Hearsay

Appellant argues that the statements that S.H. made during the August 18 interview are not admissible as prior consistent statements and do not fall under any exception to the hearsay rule. "Hearsay" is an out-of-court statement offered into evidence to prove the truth of the matter asserted and is admissible only in certain instances. Minn. R. Evid. 801(c), 802. But a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." Minn. R. Evid. 801(d)(1). The trial testimony and the prior statement need not be identical to be consistent. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). Video-recorded interviews have often been admitted at trial under Minn. R. Evid. 801(d)(1)(B), when the subject of the interview also testifies. *See, e.g.*, *In re Welfare of K.A.S.*, 585 N.W.2d 71, 75–76 (Minn. App. 1998) (affirming the admission of a video-recorded interview of a child sexual-abuse victim who testified at trial); *State v. Christopherson*, 500 N.W.2d 794, 798 (Minn. App. 1993) (same); *State v. Sullivan*, 360 N.W.2d 418, 422 (Minn. App. 1985) (same), *review denied* (Minn. Apr. 12, 1985).

S.H. stated during the August 18 interview that she had been sexually abused by appellant and described the incidents of abuse. These prior statements were consistent

with her testimony at trial, when she maintained that appellant had sexually abused her and again described the incidents of abuse. S.H. was subject to cross-examination at trial regarding all of her statements and testimony. The statements made during the August 18 interview were helpful to the jury when evaluating S.H.'s credibility, as she had changed her story several times, and the central issue for the jury to decide was when she had been telling the truth. Under Minn. R. Evid. 801(d)(1)(B), the statements made during the August 18 interview are not hearsay.

B. Probative Value Versus Prejudice

Appellant contends that the video recording of the August 18 interview should not have been played for the jury because it was "overly prejudicial." "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403. "Unfair prejudice under rule 403 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. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). "Even highly damaging evidence is nonetheless admissible when it is relevant and highly probative of a material issue of fact." *Id.*

Appellant argues that the recording should not have been played because it was unnecessarily lengthy and repetitive. However, this was the only recording of S.H. making allegations against appellant, while two other recordings in which she repudiated her allegations were also played during trial. The central issue for the jury to decide was

in which interview S.H. had been telling the truth. The statements made by S.H. during the August 18 interview thus had high probative value, which was not substantially outweighed by the time it took to play the recording during trial or by any repetition of testimony.

Appellant also argues that the recording should not have been played because the August 18 interview was conducted as a trial tactic and "lack[ed] sufficient spontaneity." But the interview was conducted only days after S.H. initially disclosed the sexual abuse, one day after the abuse was reported to the police, and well before appellant was charged. The interview was the first instance in which S.H. reported the abuse to a professional; it was not a rehearsed conversation regarding information that had been previously provided. The probative value of the video recording from the August 18 interview was not substantially outweighed by any unfair prejudice, and the district court did not abuse its discretion by admitting the recording.

II. The district court did not abuse its discretion by admitting the expert testimony of Ms. Mitnick.

Appellant argues that the district court erred by allowing Ms. Mitnick to provide expert-witness testimony about child sexual-abuse victims. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Minn. R. Evid. 702. Appellate courts review de novo "whether a particular technique is generally accepted in the relevant scientific field, and review under an abuse-of-

discretion standard whether an expert witness is qualified and the testimony helpful to the jury." *State v. Pirsig*, 670 N.W.2d 610, 616 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004).

A. Expert Testimony Regarding Child-Sexual-Abuse-Accommodation Syndrome

Appellant claims that the district court erred by allowing Ms. Mitnick to testify about child-sexual-abuse-accommodation syndrome because the syndrome has been discredited and "no child sexual abuse syndrome exists." Opinion testimony provided by an expert must have "foundational reliability." Minn. R. Evid. 702. "In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community." *Id.*

While Minnesota caselaw has not specifically addressed the admissibility of testimony about child-sexual-abuse-accommodation syndrome, the Minnesota Supreme Court has addressed the admissibility of expert testimony regarding common characteristics seen in child and adolescent sexual-abuse victims. In *State v. Myers*, the supreme court affirmed the admission of expert testimony from a psychologist who had described characteristics and traits typically observed in sexually abused children, including confusion, shame, guilt, fear, and delayed disclosure of the abuse. 359 N.W.2d 604, 608–10 (Minn. 1984). The court stated:

> In the case of a sexually abused child . . . jurors are often faced with determining the veracity of a young child who tells of a course of conduct carried on over an ill-defined time frame and who appears an uncertain or ambivalent accuser

> and who may even recant. Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children . . . .

Id. at 610. The court also stated, "As a general rule, however, we would reject expert opinion testimony regarding the truth or falsity of a witness' allegations about a crime, for the expert's status may lend an unwarranted stamp of scientific legitimacy to the allegations." *Id.* at 611 (quotation omitted).

In *State v. Hall*, the supreme court affirmed the admission of expert testimony from a psychologist who had stated that "experts are able to identify behavioral characteristics commonly exhibited by sexually abused adolescents," including a delay in reporting and continued contact with the assailant. 406 N.W.2d 503, 504–05 (Minn. 1987). The court held that "in cases where a sexual assault victim is an adolescent, expert testimony as to the reporting conduct of such victims and as to continued contact by the adolescent with the assailant is admissible in the proper exercise of discretion by the trial court . . . ." *Id.* at 505.

And in *State v. Sandberg*, the supreme court affirmed the admission of expert testimony from a police officer who had stated that sexually abused children often will not report the abuse. 406 N.W.2d 506, 511 (Minn. 1987). The court held that "in cases where the victim of sexual assault is an adolescent, the admissibility of expert testimony concerning the behavioral characteristics typically displayed by adolescent sexual assault victims is a matter resting in the discretion of the trial court." *Id.*

Ms. Mitnick did not provide an opinion as to the credibility of S.H. or appellant or whether sexual abuse had occurred in this case. Rather, she testified regarding common characteristics seen in child and adolescent sexual-abuse victims, including delayed disclosure and recantation. It was within the district court's discretion to allow testimony on this subject matter.

B. Assistance to the Jury

Appellant contends that the district court erred by allowing Ms. Mitnick to testify regarding child sexual abuse because her testimony was not helpful to the jury and it was not shown "that the jury held any misconceptions about sexual abuse of a teenager." Expert testimony must assist the jury "to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702.

> If the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions about that subject which is within their experience, then the testimony does not meet the helpfulness test.

State v. Helterbridle, 301 N.W.2d 545, 547 (Minn. 1980).

Minnesota caselaw refutes appellant's claim that expert testimony about common characteristics seen in sexual-abuse victims is not helpful to juries. In *Myers*, the supreme court stated, "Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children . . . ." 359 N.W.2d at 610. And in a more recent case, the court held that expert

testimony about common behaviors and mental reactions observed in rape victims is helpful to a jury because that information is "outside the common understanding of most jurors" and may be useful "to dispel commonly-held rape myths that the jury might rely on in evaluating the evidence in the case." *State v. Obeta*, 796 N.W.2d 282, 291 (Minn. 2011). The court stated:

> Typical rape-victim behaviors are common behaviors and mental reactions social scientists repeatedly observe in rape victims, such as delayed reporting, lack of physical injuries, or the failure to fight aggressively against the attacker, that are contrary to society's expectations of how a person who was sexually assaulted would behave.

Id. at 290.

Ms. Mitnick's testimony concerned a subject that generally is not within the knowledge or experience of a lay jury, and thus was helpful to the jury "to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. The district court did not abuse its discretion by concluding that Ms. Mitnick's testimony would be helpful to the jury.

C. Qualification of Ms. Mitnick as an Expert Witness

Appellant claims that Ms. Mitnick lacked the proper qualifications to testify as an expert witness. However, when the prosecutor moved during trial to have Ms. Mitnick qualified as an expert witness in the field of child sexual abuse, the defense attorney stated, "We . . . have no objection to the general foundation laid for her and . . . we accept that this woman is an expert in her field of psychology." Ms. Mitnick testified as to her extensive training and work regarding child sexual-abuse victims. She stated that she

frequently provides expert testimony on the subject of child sexual-abuse victims. Although she had not met appellant or S.H. and had not reviewed any of the evidence in this case, she did not provide opinions concerning this case. The district court did not abuse its discretion by concluding that Ms. Mitnick was qualified to provide expert testimony.

III. The prosecutor did not commit misconduct constituting reversible error by mischaracterizing trial testimony or disparaging the defense.

Appellant argues that the prosecutor committed misconduct by mischaracterizing trial testimony during closing arguments and by disparaging the defense while questioning defense witnesses and during closing arguments. Appellant admits that the defense attorney did not object to this alleged misconduct when it occurred. "On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006) (citing Minn. R. Crim. P. 31.02 and applying plain-error analysis to an allegation of unobjected-to prosecutorial misconduct). An error is "plain" if it is "clear or obvious" in that it "contravenes case law, a rule, or a standard of conduct." *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008).

A. Mischaracterization of Expert Testimony

Appellant claims that the prosecutor improperly vouched for the reliability of Ms. Mitnick's testimony during closing arguments, but does not list any examples of vouching. Instead, appellant's argument appears to be that the prosecutor mischaracterized Ms. Mitnick's testimony during closing arguments. "[I]t is misconduct

for a prosecutor to mischaracterize evidence or make arguments unsupported by the record." *State v. Ferguson*, 729 N.W.2d 604, 616 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). Appellant lists several examples of alleged mischaracterization of Ms. Mitnick's testimony. The state appears to concede that the prosecutor did, at times, mischaracterize the testimony, but argues that the mischaracterizations did not affect appellant's substantial rights.

When prosecutorial misconduct reaches the level of plain error, the state bears the burden of demonstrating that the misconduct did not affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 299–300.

> In assessing whether there is a reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict, we consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions.

State v. Davis, 735 N.W.2d 674, 682 (Minn. 2007). "With respect to claims of prosecutorial misconduct arising out of closing argument, we consider the closing argument as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (quotation omitted). "Even if an argument is in some respects out-of-bounds, it is normally regarded as harmless error unless the misconduct played a substantial part in influencing the jury to convict the defendant." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Even if it is accepted that the mischaracterizations that appellant has identified were plainly erroneous, the mischaracterizations were brief statements during the prosecutor's lengthy closing argument. Moreover, appellant had the opportunity to rebut the statements during his closing argument. Given all of the testimony and evidence presented during the six-day trial, including S.H.'s detailed description of the sexual abuse, the mischaracterizations did not affect appellant's substantial rights.

B. Disparaging the Defense

Appellant claims that the prosecutor committed misconduct by disparaging the defense. Although the state has a right to vigorously argue its case, it may not denigrate or belittle the defense. *State v. MacLennan*, 702 N.W.2d 219, 236 (Minn. 2005).

Appellant argues that the prosecutor disparaged defense witnesses by asking them whether they had training in the common characteristics of children who have been sexually abused. These were single questions posed to the witnesses that were relevant given the admissible testimony that such common characteristics exist. The questions did not disparage the defense.

Appellant also argues that the prosecutor disparaged the defense during closing arguments by stating, "And what was the testimony that the Defense wanted to bring in time and again to make [S.H.] look bad? That she was being sexually aggressive at this party and hanging on boys," and by stating that A.H. had "even served some of the Defense subpoenas." It appears that, through these statements, the prosecutor was asking the jury to evaluate the credibility of S.H. and A.H. The statements did not disparage the defense.

IV. The prosecutor did not commit misconduct constituting reversible error by alluding to evidence of appellant's character.

Appellant argues that the district court erred by allowing character evidence to be admitted during trial. Appellant claims that "the state elicited from several witnesses that appellant had supplied alcohol and marijuana to underage teen-age girls" and that "[t]he court erred in allowing this prejudicial, inadmissible evidence to be heard by the jury." However, neither S.H. nor S.W. testified that appellant had supplied them with alcohol and marijuana. The defense attorney's objection to such testimony from S.W. was sustained.

It appears that appellant's argument on this issue is actually that the prosecutor committed misconduct by asking A.H. whether she was aware that appellant had provided S.H. with alcohol and marijuana, when questioning on this subject had previously been objected to and that objection had been sustained during the testimony of S.W. "[A]ttempting to elicit or actually eliciting clearly inadmissible evidence may constitute [prosecutorial] misconduct." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Here, it does appear that the prosecutor engaged in misconduct to the extent that the court had already ruled that testimony regarding who supplied S.W. and S.H. with alcohol, cigarettes, and marijuana was inadmissible. Further, the prosecutor improperly framed questions that assumed facts that were not in evidence, based on the previous ruling ("Are you aware that [appellant] provided your daughter with alcohol [and marijuana]?"). Nevertheless, the defense attorney did not object to the cross-examination of A.H. by the prosecutor on this subject, and the prosecutor was stuck with A.H.'s

answer ("No, he didn't" and "No, he did not") and was not allowed to collaterally attack those answers with the admission of contrary evidence. As previously stated, "On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *Ramey*, 721 N.W.2d at 297. Even if the prosecutor's questions were plainly erroneous, they were brief in light of the entire trial and were responded to with answers of "No, he didn't" and "No, he did not." The questions did not affect appellant's substantial rights.

Affirmed.