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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0524**

State of Minnesota,  
Respondent,

vs.

Douglas Neil Raasch,  
Appellant.

**Filed February 19, 2013  
Affirmed  
Crippen, Judge\***

Isanti County District Court  
File No. 30-CR-10-112

Lori Swanson, Attorney General, Jennifer Coates, Assistant Attorney General, St. Paul, Minnesota; and

Jeffrey Edblad, Isanti County Attorney, Cambridge, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and  
Crippen, Judge.

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## **UNPUBLISHED OPINION**

**CRIPPEN**, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that the district court erred when it denied appellant's motions for a new trial and mistrial for the prosecution's alleged discovery violations and prosecutorial misconduct. Appellant also argues that the district court miscalculated its imposition of a 180-month sentence. We affirm.

### **FACTS**

Appellant Douglas Raasch challenges his conviction of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(b) (2010), arising out of allegations that he sexually abused his step-daughter, T.R. In March 2010, 14-year-old T.R. told her friends that her stepfather was forcing her to engage in sexual acts, including intercourse, and that the abuse began when she was ten years old. One of T.R.'s friends told her mother, who informed school authorities. Following an investigation, appellant was charged with one count of first-degree criminal sexual conduct involving penetration with a person between 13 and 15 years of age and another count of the same conduct with a person under 13 years of age. He was convicted of the former count following a jury trial, and was sentenced to 180 months in prison.

### **DECISION**

Appellant argues that he is entitled to a new trial because of discovery violations committed by the prosecution during his trial. Whether a discovery violation occurred is

an issue of law that is reviewed de novo. *State v. Scanlon*, 719 N.W.2d 674, 685 (Minn. 2006) (citation omitted).

At trial, the prosecution called Dr. Claudia Kittock, an expert in child psychology, as a rebuttal witness to testify regarding T.R.'s delayed disclosure of her abuse, her acting out, her recantation, and her flat affect. The witness was called in the prosecution's case-in-chief but only after T.R. had been cross-examined and the defense, out of order for scheduling reasons, offered its own expert witness to impeach T.R.'s credibility. The prosecution did not disclose the identity of this witness until the day she testified, although the record indicates that on several earlier occasions the prosecutor had disclosed that it contemplated a rebuttal witness if needed after T.R. was cross-examined. Appellant argues that Dr. Kittock's testimony did not constitute rebuttal and the prosecution was required to disclose the witness prior to trial.

In a criminal trial, the prosecution must disclose the names and addresses of persons to be called as witnesses at the trial. Minn. R. Crim. P. 9.01, subd. 1(1)(a). But the prosecution does not need to disclose the identities of rebuttal witnesses. *State v. Anderson*, 405 N.W.2d 527, 531 (Minn. App. 1987), *review denied* (Minn. July 22, 1987). "The determination of what constitutes proper rebuttal evidence rests almost entirely in the discretion of the district court." *State v. Yang*, 627 N.W.2d 666, 677 (Minn. App. 2001) (citing *State v. Brown*, 500 N.W.2d 784, 788 (Minn. 1993)), *review denied* (Minn. July 24, 2001). An expert witness may be called as a rebuttal witness in the prosecution's case-in-chief if the victim's credibility was undermined through cross-examination or during defense counsel's opening statement. *State v. Grecinger*, 569

N.W.2d 189, 193 (Minn. 1997); *see also* Minn. R. Evid. 608(a) (permitting the use of opinion evidence to support a witness's credibility when the witness's character for truthfulness was attacked). This is despite recognition that the expert testimony also could be admitted as part of the prosecution's case-in-chief. *See State v. Myers*, 359 N.W.2d 604, 609-10 (Minn. 1984) (concluding that expert testimony is admissible to explain the behavior of a child victim of incest in the prosecution's case-in-chief).

During opening statements, appellant's counsel suggested that T.R. had a motive to fabricate her allegations and read portions of T.R.'s recantation letter that her mother encouraged her to write. During cross-examination of T.R., appellant's counsel suggested that T.R. could not accurately remember the sexual abuse and that T.R. previously told authorities she had not been abused. And, before rebuttal, appellant called his own expert witness to impeach T.R.'s credibility. These are circumstances that invite evidence to rebut allegations that T.R. was not credible. Finally, further suggesting the district court's proper exercise of discretion in treating Dr. Kittock's testimony as rebuttal, the court limited the scope of Dr. Kittock's testimony to those issues involving T.R.'s credibility. But ultimately, disposition of the case does not require a decision on the merits of the rebuttal issue; we have examined appellant's repeated assertions of prejudice due to lack of notice, and no prejudice was shown. Appellant did not act on the opportunity for a continuance and did not offer further expert testimony to rebut Dr. Kittock. *See State v. Carlson*, 328 N.W.2d 690, 695 (Minn. 1982) (lack of prejudice suggested by failure to seek continuance). And appellant does not dispute testimony that the defense was notified that a rebuttal expert would be called if needed. Moreover, as

observed later in this opinion, there is no showing that trial errors alleged by appellant affected the verdict of conviction.

Appellant also argues that he should have been granted a mistrial because the prosecution failed to disclose statements made by T.R. during a noon recess at trial. We review the denial of a motion for a mistrial for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). “[A] mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different.” *State v. Spann*, 574 N.W.2d 47, 53 (Minn. 1998) (citing *State v. Clobes*, 422 N.W.2d 252, 255 (Minn. 1988)).

During a break in T.R.’s testimony, the prosecutor observed T.R. crying in the hallway. The prosecutor asked her if she was okay, and she responded, “I’m scared. I don’t like the jury staring at me.” When T.R. continued her testimony on direct examination, the prosecutor asked a brief series of questions about this exchange, but did not inform appellant’s counsel about the statement prior to doing so. Appellant’s counsel did not object to the questioning until after the close of T.R.’s direct examination, and then counsel moved for a mistrial. The district court denied the motion and instead instructed the jury to disregard the exchange.

The district court did not abuse its discretion when it denied appellant’s motion for a mistrial because the testimony was not inculpatory and the curative instruction negated any prejudice to appellant. *See Spann*, 574 N.W.2d at 53 (concluding that an undisclosed statement made during a courtroom recess was not grounds for a mistrial because the statement was neither prejudicial nor inculpatory); *see also State v. Manthey*, 711 N.W.2d

498, 506 (Minn. 2006) (concluding that a curative instruction precludes the need to declare a mistrial). The record suggests that T.R.’s crying related to addressing a number of people and does not suggest that it related to appellant. Although appellant asserts that this evidence also was prejudicial, he explains this assertion only by stating that it constituted unfair persuasion; neither the argument nor the record suggest the affect of the evidence on the jury’s verdict.

Appellant also argues that certain of the prosecutor’s statements during closing argument amounted to prosecutorial misconduct, entitling appellant to a new trial. An appellate court “review[s] prosecutorial misconduct to determine whether the conduct, in light of the whole trial, impaired the defendant’s right to a fair trial.” *State v. Milton*, 821 N.W.2d 789, 802 (Minn. 2012) (quotation omitted). Similarly, an appellate court “determin[es] whether prosecutorial misconduct occurred during a closing argument” based on “the closing argument as a whole,” *State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010), “rather than . . . selected phrases and remarks,” *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009) (quotation omitted).

Because appellant’s counsel did not object to the prosecutor’s statements during closing argument, we must apply the modified plain-error standard. *Milton*, 821 N.W.2d at 802.

Under [the] modified plain error test, the defendant has the burden of proving that an error was made and that the error was plain. If the defendant is able to satisfy this burden, the burden shifts to the State to demonstrate that the error did not affect the defendant’s substantial rights.

*Id.* (quotation omitted).

Appellant argues that the prosecutor committed plain error because she gave her personal belief or opinion regarding the merits of the case when she stated, “we think, as a State and we argue, we should believe [T.R].” It is improper for the prosecutor to interject his or her personal opinion in a case. *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005). And it is improper for a prosecutor to personally endorse the credibility of a witness. *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998). But statements like “I suggest to you,” although poorly chosen, may not be plain error in circumstances where their rhetorical use does not suggest the testimony of the prosecutor. *Blanche*, 696 N.W.2d at 375; *see also State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000) (concluding the statement, “I submit to you . . .” was not prosecutorial misconduct because the prosecutor offered an interpretation of evidence and not a personal opinion). A prosecutor is permitted to argue that a witness is or is not credible. *State v. Anderson*, 720 N.W.2d 854, 865 (Minn. App. 2006), *aff’d*, 733 N.W.2d 128 (Minn. 2007). When viewed in context, the challenged statement functioned as an introduction to the prosecutor’s discussion of the evidence in the record tending to corroborate T.R.’s statements. The prosecutor went on to discuss the evidence supporting T.R.’s credibility: that she was provided with birth control; that she was threatened to prevent her from telling anyone about the abuse; that she endured invasive examinations; that she acted out as a cry for help; and other evidence. Despite the impropriety of the introductory statement, because the prosecutor was discussing relevant evidence in the case, she did not commit plain error. *See Anderson*, 720 N.W.2d at 864-65 (concluding that the

statement, “I suggest to you that [the witness] was a very credible witness in this case,” was not plain error).

Appellant also argues that the prosecutor committed plain error when she suggested that jurors place themselves in T.R.’s shoes by asking the jury if they could imagine what certain events were like for T.R. It is generally improper to ask jurors to place themselves in the shoes of the victim where the statement is calculated to inflame the passions of jury members. *State v. Johnson*, 324 N.W.2d 199, 202 (Minn. 1982). But where the statements were made “to aid the jury in understanding the reasonableness of [a witness’s] conduct, not to decide the case based on the feelings they might attribute to her,” those statements are not misconduct. *Sanderson v. State*, 601 N.W.2d 219, 225-26 (Minn. App. 1999), *review denied* (Minn. Mar. 28, 2000). Viewing the prosecutor’s statements within the context of the overall argument, the statements were intended to aid the jury’s understanding of the reasonableness of T.R.’s actions because the prosecutor’s statements were made while explaining the evidence admitted at trial to the jury. Although a prosecutor may not interject her personal experience or opinions into the argument, a prosecutor “may pose rhetorical questions to the jury, asking it to use common sense to determine whether the defense presented is reasonable.” *State v. Bauer*, 776 N.W.2d 462, 474 (Minn. App. 2009), *aff’d*, 792 N.W.2d 825 (Minn. 2011).

In sum, the district court did not abuse its discretion when it denied appellant’s motions for a new trial and mistrial. Appellant was entitled to a fair trial, not a perfect trial. *State v. Prtine*, 784 N.W.2d 303, 312 (Minn. 2010) (citing *State v. Billington*, 241 Minn. 418, 427, 63 N.W.2d 387, 392-93 (1954)). Moreover, appellant has not

demonstrated that he suffered undue prejudice due to the alleged discovery violations and prosecutorial misconduct. Given the strength of T.R.'s testimony, the evidence corroborating her testimony and credibility, and the district court's appropriate use of limiting instructions, the alleged errors had little effect on the outcome of the trial.

Finally, appellant argues that the district court erred when it calculated appellant's sentence because the district court incorrectly "decayed" the effect of appellant's 1995 conviction by 25% instead of the 75% decay the court had discussed; the court had discussed its choice of a sentence within the guidelines range of 156 to 187 months. Sentencing is reviewed under an abuse of discretion standard. *State v. Ford*, 539 N.W.2d 214, 229 (Minn. 1995). Only in a "rare" case will a reviewing court reverse a district court's imposition of the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Appellant concedes that his sentence is within the presumptive sentence range for his conviction, but argues that his sentence should have been 164 months rather than 180 months, a difference of 16 months. Since appellant's sentence of 180 months is still well within the presumptive range, this is not a rare case that requires modification. *See State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982) (concluding that a sentence within the presumptive sentencing guidelines that resulted in multiple consecutive sentences was not so grossly disproportionate as to permit a modification). The district court did not abuse its discretion in determining the sentence.

**Affirmed.**