STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2066

State of Minnesota,
Respondent,

vs.

Gerald Phillip Gould,
Appellant.

Filed October 28, 2013
Affirmed
Cleary, Judge

Lyon County District Court
File No. 42-CR-11-1235

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Richard R. Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, St. Paul, Minnesota; and

Julie Nelson, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Connolly, Judge; and Larkin, Judge.

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

CLEARY, Judge

On appeal from his conviction of one count of first-degree criminal sexual conduct and four counts of second-degree criminal sexual conduct, appellant Gerald Gould argues (1) he was deprived of a fair trial when the prosecutor committed misconduct by eliciting improper vouching testimony and inadmissible hearsay evidence; (2) admission of repetitive evidence had a cumulative effect that prejudiced appellant and denied him a fair trial; and (3) the prosecutor's misconduct and admission of the unduly repetitive evidence had a cumulative effect that was not harmless and deprived appellant of a fair trial. We affirm.

FACTS

The charges against appellant Gerald Gould arose after his 13-year-old granddaughter, E.G., reported that her paternal grandfather had sexually abused her more than 100 times. E.G. reported the abuse to her mother S.G. after E.G. attempted to hang herself following a fight between them. Mother testified that when E.G. told her sister, B.G., that their grandfather had sexually abused her, B.G. had a "stone cold face." B.G's lack of reaction surprised mother because B.G. was very protective of their family. Because she was only aware of E.G.'s sexual abuse and because of E.G.'s attempted suicide, mother took E.G. to the emergency room. E.G. was then admitted to a crisis center for observation. B.G. was later interviewed three times and disclosed that she had also been sexually abused by Gould.

E.G., B.G., and their younger brother began visiting their grandparents in 2000. The visits began when mother and the victims' father separated. Father testified that he lived in the same trailer park as his parents after he and mother separated. When father moved in 2006, E.G. and B.G. began spending every other weekend (sometimes every weekend) and holidays with their grandparents.

In an interview and at trial, E.G. testified that she remembered the sexual abuse beginning sometime between first and second grade and ending when she began to menstruate in the summer between fifth and sixth grade. E.G. testified that the sexual abuse by Gould began with intimate touching of her genitals and breasts and quickly progressed to both oral and vaginal intercourse and digital penetration. Most incidents of abuse took place in Gould's bed where E.G. typically slept when she stayed with her grandparents. E.G stated that the sexual abuse would happen every night she slept at her grandparents' home. E.G. remembered crying and bleeding after intercourse and her grandfather threatening her saying, "[Y]ou can't tell anybody. I will go to jail for the rest of my life if you tell anyone." Gould also threatened that if she told anyone, she would never be able to see her father again and he would never believe her. E.G. testified that the last instance of sexual abuse occurred in 2008 when Gould rubbed Vicks VapoRub on her genitals, and Gould said, "[T]his is gonna make it feel better for you."

B.G. testified to three instances of sexual abuse by Gould that involved intimate touching of her breasts and genitals under her clothing. Although she could not remember details of each instance of touching, B.G. testified that it happened more than three times. B.G. also testified to an instance where Gould grabbed her hand, stuck it

down the front of his pants, and onto his penis. B.G. recalled incidents in three locations: at the Gould house, while on the road when Gould was employed as a trucker, and in a camper. Gould's sexual abuse of B.G. began when she was very young, but stopped when B.G. was in fifth grade. B.G testified that the abuse stopped when she "pushed [herself] away from him" and slept and spent more time with her grandma. She testified that Gould always called E.G. his girl and B.G. grandma's girl.

Lisa Decathelineau, E.G.'s therapist, testified regarding her treatment of E.G. Decathelineau diagnosed E.G. with post-traumatic-stress disorder. Her five-page diagnostic report explaining E.G.'s background and the basis for the diagnosis was entered into evidence, and Gould did not object. She testified about general reactions and behaviors of abused children such as attention-seeking behaviors and disconnect from emotions, and she found many of those indicators in E.G.

Kelly Kveene, B.G.'s therapist, testified regarding her diagnosis and treatment of B.G. for post-traumatic-stress disorder. The state asked Kveene, "[I]n order to reach your diagnosis, what traumatic event did [B.G.] experience?" She testified, "Sexual abuse by her grandfather." B.G.'s therapist also testified about general characteristics found in victims of sexual abuse such as avoidance and difficulty remembering the trauma and stated that she saw these indicators in B.G.

The court admitted into evidence one recorded investigatory interview with E.G. and three recorded interviews of B.G. The first interview of B.G. was with Investigator Tony Rollings and took place shortly after E.G. was released from the crisis center on May 30, 2011. During the majority of the interview, B.G. sat silent, avoiding eye

contact. During her second interview with investigator Rollings, B.G. spoke more openly about specific instances of abuse. The third interview was conducted at Child's Voice approximately five months after the first two interviews. Investigator Rollings believed that a more relaxed, forensic interview was necessary in order for B.G. to provide more information about her abuse. In this interview, B.G. gave further details of her grandfather's sexual abuse.

Gould's ex-wife testified that she was unaware of the sexual abuse. She also testified that she and Gould slept in different beds; most often Gould with E.G. and she with B.G. Gould testified that his granddaughters frequently stayed overnight at his house, but he never sexually abused them.

A jury found Gould guilty of one count of first-degree criminal sexual conduct involving E.G. and four counts of second-degree criminal sexual conduct, three counts involving E.G. and one count involving B.G. The district court sentenced Gould to 48 months, 90 months, and 195 months for three counts of second-degree criminal sexual conduct and 360 months for the count of first-degree criminal sexual conduct, with all sentences to run concurrently.[1]

D E C I S I O N

I. Plain Error of Prosecutorial Misconduct

If the defense fails to object to an alleged error at trial, we review for plain error. *See* Minn. R. Crim. P. 31.02. In order to review an unobjected-to error, there must be

[1] The district court found that one count of second-degree criminal sexual conduct was part of a single behavioral incident included in the count of first-degree criminal sexual conduct. Therefore, the district court did not impose a sentence on the fourth count.

"(1) [an] error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (citing *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997)), *modified by State v. Ramey*, 721 N.W.2d 294 (Minn. 2006). If these three prongs are met, we correct the error if necessary to "ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740.

In cases of prosecutorial misconduct, the appellant has the burden of proving the error and that it was plain. *Ramey*, 721 N.W.2d at 302. The state has the burden of showing that the error did not affect the appellant's substantial rights. *Id.*

a. Improper vouching testimony

Gould argues that the victims' parents and B.G. provided impermissible vouching testimony regarding the truthfulness of E.G.'s allegations of abuse. It is improper for a witness to vouch for the credibility of another witness. *State v. Burrell*, 697 N.W.2d 579, 601 (Minn. 2005).

i. Mother's testimony

During the trial, the prosecutor questioned mother about her reaction when she first learned of the sexual abuse of E.G. The prosecutor asked, "Did you have a hard time believing what you were hearing at that point?" Mother then responded, "No. I believed her []. [J]ust because of certain things that she had said before, [] she's not a child who would say something like that." The defense did not object. The defense then cross-examined mother on this point and raised the issue of a previous inconsistent statement by mother. The district court told the attorneys at a recess that a witness's statement that she believed reports of abuse was "improper vouching testimony" but allowed cross-

examination for impeachment purposes because the defense did not object on direct. Credibility determinations are the province of the jury. *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). Caselaw provides a clear prohibition on vouching testimony; thus the district court committed plain error by allowing vouching testimony on direct. *See Burrell*, 697 N.W.2d at 601; *see also Ramey*, 721 N.W.2d at 302 (stating that an error is plain if it "contravenes case law, a rule, or a standard of conduct").

Because admission of mother's vouching testimony constituted plain error, we next address whether this error affected Gould's substantial rights. *See Griller*, 583 N.W.2d at 741. "Substantial rights are affected when a plain error was prejudicial and affected the outcome of the case. Plain error is prejudicial when there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010) (citation omitted). When determining if the absence of the misconduct would likely 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).

Mother's testimony about whether she believed E.G.'s claims of sexual abuse were potentially inflammatory; statements by a parent regarding her child's sexual abuse may influence the jury's perception. Here the question related to mother's reaction when she first learned of the abuse. Mother was subject to cross-examination. The question was not repeated and was not highly suggestive. Mother's actions surrounding the event implied that she believed E.G.'s allegations. Therefore a statement regarding her initial

belief was not unduly suggestive. While mother's vouching for E.G.'s credibility was improper, in light of the strength of other evidence supporting E.G.'s credibility, mother's vouching did not affect Gould's substantial rights.

ii. B.G.

Gould argues that the district court plainly erred when it did not sua sponte intervene in B.G.'s improper vouching testimony. The prosecutor questioned B.G. about the moment she first learned of her sister E.G.'s allegations of sexual abuse by their grandfather:

> Q: And what happened?
> A: Um my sister came downstairs bawling and – with my mom and she told me to go into the living room and I had no idea what was going on. She kind of just told me, you know, grandpa raped me.
> Q: Did that surprise you?
> A: I know everybody thought it did because everybody thought I was just gonna say, you're making this up because of how much the family mean [sic] to me but I knew deep down inside it had to have happened.

B.G.'s statement, "but I knew deep down inside it had to have happened," was potentially improper. However, the prosecutor did not intend to elicit vouching testimony. While the prosecutor asked a question of doubtful relevance, the question related to B.G.'s own allegations of sexual abuse, and B.G.'s answer was not fully within the scope of the question. Further, the district court was not given notice that an improper statement was to be made by B.G. because the prosecutor did not elicit it. *See, e.g., Burrell,* 697 N.W.2d at 601 (stating that the district court should have anticipated vouching testimony simply because there was an improper question). Because B.G.'s

statement was outside the scope of questioning, the district court did not err in failing to intervene.

iii. Father's testimony

Gould argues that the victims' father provided impermissible vouching testimony regarding his daughters' truthfulness. The state questioned:

> Q: Alright. Now with regards to your daughters, you know, when you were with 'em, did they ever tell you tall tales?
> A: Yeah, little white lies, every kid has.
> Q: Alright. Ah, aside from that, did you generally find them to be truthful?
> A: I always have. I mean I've never questioned anything they've told me. They always -

Then the district court interjected to prevent father's improper vouching testimony and instructed the jury:

> Ladies and gentlemen, I'm instructing you to disregard the witness's last remarks in response to the questions about whether or not he found the – anyone to be truthful or not. I'm instructing you to disregard the witness's response to that question.

The state conceded that the question elicited improper vouching testimony, and the district court promptly provided an instruction to the jury. Therefore, this was a plain error, which contravenes the rule against vouching testimony.

Gould argues that his substantial rights were violated by the jury hearing father's comments. A plain error affects a defendant's substantial rights "if there is a reasonable likelihood that the error substantially affected the verdict." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). We consider the manner in which the state presented the testimony, whether highly persuasive, whether used in closing argument, and whether the

defendant countered it. *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011). Father's comment was brief and seemingly inadvertent. Also, in light of other evidence, father's belief in his daughters' reports likely did not surprise the jury. The prosecutor did not use the statement in closing arguments. Thus, the error was harmless. Further, the district court promptly corrected the error. Cautionary instructions may cure prejudicial effect. *State v. Budreau*, 641 N.W.2d 919, 926 (Minn. 2002). The district court provided cautionary instructions, which presumably are followed by the jury. *See id.* Therefore, the plain error, promptly followed by cautionary instructions to the jury, did not violate Gould's substantial rights.

b. Inadmissible hearsay evidence – ultimate issue

Gould argues that the prosecutor solicited statements by mother on the ultimate issue of the case—whether her daughters were molested. Gould also argues that B.G.'s therapist's response to why B.G. was in therapy was improper hearsay evidence. In both instances, the witnesses stated that the reason for therapy was because of sexual abuse. Under Minnesota Rule of Evidence 801(c), hearsay is defined as a statement "offered in evidence to prove the truth of the matter asserted." In both instances, the witnesses offered their statement as an answer to why the victims were receiving therapy, not as an answer to a question on an ultimate issue. Even if the prosecutor solicited such a response, it is not impermissible hearsay, and thus is not a plain error. *See Ramey*, 721 N.W.2d at 302.

II. Plain Error of Admitting Needlessly Cumulative Evidence

Gould argues that the admission of three recorded interviews of B.G. in addition to her in-court testimony was needlessly cumulative. Under Minnesota Rule of Evidence 801(d)(1)(B), the district court may admit a witness's prior consistent statement if it will aid the trier of fact in determining witness credibility. A trial court may exclude relevant evidence "if its probative value is substantially outweighed by . . . needless presentation of cumulative evidence." Minn. R. Evid. 403.

All of these interviews were necessary for the jury to assess B.G.'s credibility. Specifically, Gould argues that the district court should have excluded two of the three interview recordings of B.G. B.G. gradually revealed more information and continued to consistently recount the abuse. The changes in her body language and attitude were also visible through the interviews. This allowed the jury to determine B.G.'s credibility throughout the process. Further, this is a case involving minors and delayed reporting. Multiple statements showing consistency in B.G.'s memory as well as from different points in time provided the jury with evidence to determine the true events. In closing arguments, Gould's counsel implied that Investigator Rollings influenced B.G.'s testimony. The introduction of prior consistent statements allowed the jury to determine credibility and the prosecutor to rebut any inference of undue influence. Under rule 403, the district court has great discretion in determining what is "unduly cumulative." *Hahn v. Tri-Line Farmers Co-op*, 478 N.W.2d 515, 525 (Minn. App. 1991), *review denied* (Jan. 27, 1992). Thus, the court did not commit plain error in admitting prior consistent statements by B.G.

Gould also argues that the district court erred in admitting both therapist Decathelineau's diagnostic report and her oral testimony that provided similar information. The district court did not abuse its discretion in admitting the therapist's report that provided background and context for her oral testimony. Two statements by the therapist are not so prejudicial as to outweigh the value for the jury in determining credibility. The district court did not commit plain error in allowing prior consistent statements.

III. Cumulative Effect of Alleged Errors

Gould argues that even if the alleged errors individually do not warrant reversal, together they resulted in in an unfair trial. Even though errors individually may not warrant a new trial, in certain cases the cumulative effect of the errors may warrant reversal. *State v. Erickson*, 610 N.W.2d 335, 340–41 (Minn. 2000). "The test is whether the effect of the errors considered together denied appellant a fair trial." *State v. Valentine*, 787 N.W.2d 630, 642 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). None of the incidents of plain error alleged by Gould affected his substantial rights. Based on a review of the record, the cumulative effect of any errors did not deprive Gould of the right to a fair trial.

Affirmed.