STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0783

State of Minnesota,
Respondent,

vs.

Justin John Auck,
Appellant.

Filed April 7, 2014
Affirmed
Klaphake, Judge[*]

Ramsey County District Court
File No. 62CR125976

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Klaphake, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

KLAPHAKE, Judge

Appellant Justin Auck challenges his conviction of two counts of first-degree criminal sexual conduct, arguing that (1) the district court erred by admitting the six-year-old child's statements during an interview with a nurse practitioner under any exception to the hearsay rule; (2) the prosecutor engaged in misconduct when, in closing argument, she discussed with the jury her own opinions relating to the child's credibility; and (3) the district court erred by denying appellant's request for a dispositional departure. We affirm.

D E C I S I O N

Hearsay

Appellant argues that the district court erred when it admitted the child's out-of-court statements describing the abuse during a videotaped interview with a nurse practitioner. Appellant contends that these statements were hearsay and do not fall under any hearsay exception permitting their admission.[1] The district court's evidentiary

[1] Appellant argues that the district court erred when it admitted the child's statements to the nurse under the medical-diagnosis hearsay exception. Minn. R. Evid. 803(4) (providing for the admissibility of "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."). While one purpose of the nurse's interview of the child was for medical treatment, including testing for sexually transmitted diseases, we are troubled by the district court's categorical admission of *all* the child's statements. *State v. Robinson*, 718 N.W.2d 400, 404 (Minn. 2006) ("In contrast to the general notion that statements explaining the cause of an injury are admissible under the medical diagnosis exception, statements attributing fault, including statements identifying the accused perpetrator, are ordinarily not admissible."). But

rulings will generally not be reversed absent a clear abuse of discretion. *State v. Flores*, 595 N.W.2d 860, 865 (Minn. 1999).

Rule 807, the residual hearsay exception, provides that a "statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness" is admissible if:

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

A "totality of the circumstances approach" must be used to determine whether the out-of-court statements have "equivalent circumstantial guarantees of trustworthiness." *Robinson*, 718 N.W.2d at 408 (quotation omitted).

When considering whether statements fall under rule 807, the court must consider "those circumstances actually surrounding the making of the statements." *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990), *cert. denied*, 498 U.S. 1033, 111 S. Ct. 693 (1991). Relevant factors for determining admissibility under this rule are

> whether the statement was given voluntarily, under oath, and subject to cross-examination and penalty of perjury; the declarant's relationship to the parties; the declarant's motivation to make the statement; the declarant's personal knowledge; whether the declarant ever recanted the statement; the existence of corroborating evidence; and the character of the declarant for truthfulness and honesty.

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because the child's statements fit squarely under the residual hearsay exception, we decline to address further whether they qualify under the medical-diagnosis hearsay exception.

State v. Davis, 820 N.W.2d 525, 537 (Minn. 2012) (citing *State v. Keeton*, 589 N.W.2d 85, 90 (Minn. 1998)).

When the victim is a child,

> these circumstances include whether the statement was spontaneous, whether the questioner had a preconceived idea of what the child should say, whether the statement was in response to leading questions, whether the child had any apparent motive to fabricate, whether the statements are of the type one would expect a child of that age to fabricate, whether the statement remained consistent over time, and the mental state of the child at the time of the statements.

State v. Ahmed, 782 N.W.2d 253, 260 (Minn. App. 2010).

In this case, the child's statements satisfy the reliability requirements of Rule 807. The interviewing nurse took great care in questioning the child, purposefully not leading or directing the child toward a particular response. In this clinical setting, the child went on to describe, in graphic detail, instances of sexual abuse involving appellant. Her descriptions involved a level of specificity that one would not expect a six-year-old to articulate, much less fabricate. And the child never recanted her statements even after her mother accused her of lying. As a result, because the child's statements to the nurse are, under the circumstances, undoubtedly reliable, the district court did not abuse its discretion in admitting them under the residual hearsay exception.

Prosecutorial Misconduct

Appellant argues that the prosecutor engaged in misconduct by substituting her own opinions to vouch[2] for the child's credibility during closing argument. "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). "In applying plain error analysis, we will reverse trial error only if there is (1) error, (2) that is plain, and (3) the error affects the defendant's substantial rights." *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011) "An error is plain if it was clear or obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotations omitted). When assessing alleged prosecutorial misconduct during a closing argument, "we look to the closing argument as a whole, rather than to selected phrases and remarks." *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004). The propriety of a prosecutor's closing argument is "within the sound discretion of the trial court." *State v. Ray*, 659 N.W.2d 736, 746 (Minn. 2003) (quotation omitted).

Here, the prosecutor's statements that appellant identifies as vouching fall well below the threshold necessary to establish plain error. Appellant argues that the prosecutor improperly told the jury that (1) the way the child talked about her situation was the way that children that age generally behave; (2) the child was unfamiliar with the courtroom; (3) the child's life over the past five months had been difficult; and (4) "a lot

[2] Vouching occurs when the government 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." *In re Welfare of D.D.R.*, 713 N.W.2d 891, 900 (Minn. App. 2006) (quotation omitted).

of people" had told the child not to talk about the abuse.[3] But, so long as the prosecutor does not intentionally misstate the evidence or mislead the jury as to the inferences it may draw, she may argue all reasonable inferences from evidence in the record. *State v. McCray*, 753 N.W.2d 746, 753-54 (Minn. 2008). And in this case, the prosecutor's statements qualified as reasonable inferences supported by evidence in the record.

First, the nurse testified that young children can be "very matter-of-fact in explaining what has happened to them in terms of abuse . . . [because they] don't understand . . . the stigma or shame related to abuse." The prosecutor's statement that the child's demeanor was the way children her age behave generally when speaking about the abuse was supported by the record.

Second, the child testified that she had talked to her father about coming to court,[4] but stated that she did not remember to what extent they had spoken. The jury observed the child's willingness to answer questions in the videotaped interview with the nurse whereas the child had difficulty answering basic questions while testifying such as naming her three cats. The child also was reminded about answering questions verbally rather than using gestures. Based on these circumstances, along with common sense, it was reasonable for the prosecutor to explain to the jury that the courtroom was a foreign

[3] Appellant also complains of a slide the prosecutor showed that stated that the child had no reason to lie and argues that the prosecutor's inclusion of this statement amounts to substituting her own opinions to vouch for the child's credibility. This claim is entirely baseless. The district court determined that the prosecutor's statements were proper argument and did not abuse its discretion in doing so.

[4] Moreover, while not in the jury's presence, the child stated at the competency hearing that she had never seen a courtroom before.

environment for a six-year-old child, and the prosecutor's comments do not rise to the level of plain error.

Third, the record establishes that the child had not been living with her mother after the allegations of sexual abuse and that she sees her mother for one hour per week. The child also received regular counseling. It was not unreasonable for the prosecutor to tell the jury that it could consider the child's difficulty testifying at trial in light of the circumstances.

Finally, the prosecutor's statement that "a lot of people" had told the child not to talk about the abuse is supported by the record. The record establishes that the child had been told by at least her father and appellant not to talk about the abuse. While the prosecutor's statement about "a lot of people" discouraging the child from talking about the abuse may have been inartfully phrased, the statement certainly does not rise to the level of plain error affecting substantial rights.

Dispositional Departure

Third, appellant argues that because he had no prior record, had the support of a number of family members and friends, and was respectful and cooperative, the district court erred in denying appellant's request for a departure from the sentencing guidelines. The review of the district court's decision whether to depart is extremely deferential. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "Although the trial court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence." *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). As long as the record shows that the sentencing

court carefully evaluated all the testimony and information before making a determination, we will not interfere with the sentencing court's exercise of discretion. *Id.* at 80-81.

Here, the district court carefully considered appellant's reasons for departure before imposing a sentence permitted by the guidelines. Because the record demonstrates that the district court carefully evaluated the testimony and information before it, and because the district court is not required to provide an explanation for imposing a sentence within the guidelines, it did not abuse its discretion when it imposed a sentence of 144 months in prison.

Affirmed.