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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0436**

State of Minnesota,
Respondent,

vs.

Shawn Thomas Rose,
Appellant.

**Filed February 5, 2018
Affirmed
Schellhas, Judge**

Dakota County District Court
File No. 19HA-CR-16-1590

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

James C. Backstrom, Dakota County Attorney, Mary Russell, Assistant County Attorney,
Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his convictions of first-degree criminal sexual conduct (CSC) and second-degree CSC on the bases of insufficient evidence and prosecutorial misconduct. We affirm.

FACTS

Respondent State of Minnesota charged appellant Shawn Rose by complaint with multiple counts of CSC against his stepdaughter, L.K., as follows: count I—first-degree CSC for multiple acts of sexual penetration of a victim under 16 years of age, occurring between January 1, 2002 and December 31, 2006; count II—second-degree CSC for sexual contact with a victim under the age of 13 occurring in 2002; count III—second-degree CSC in 2003; count IV—second-degree CSC in 2004; and count V—second-degree CSC in 2005. At his jury trial, Rose conceded count IV—that the state had proved that he committed second-degree CSC in 2004. Prior to trial, Rose and his attorney agreed in writing that Rose would concede count IV as a trial strategy.

L.K. was 21 years old at trial and testified that, in 2002, when she was in second grade and age seven, she lived in a townhouse in Apple Valley with her mother, C.R., Rose, who was her mother's then-boyfriend, and her younger sister. L.K. testified that, in 2002, Rose began sexually assaulting her before school while C.R. was at work. Rose usually awoke L.K. before school, carried her to his bedroom, removed her clothes, and sexually penetrated her vagina with his penis. Sometimes Rose carried L.K. to the couch, placed L.K. on his lap, and touched her vagina while watching the news on television. L.K.

testified that Rose assaulted her every school day from 2002 until 2006, from second to fifth grade.

L.K. testified that the assaults caused her physical pain, and that Rose told her to keep their “cuddle time” secret. L.K. testified that she did not tell her family about Rose’s assaults until 2016, because, when she was younger, she did not know right from wrong, she was scared for her younger sister because she thought that her sister would not have a father if she told someone, and she was afraid her mother would not believe her. When Rose assaulted L.K., she pretended to be asleep. When she reached puberty, Rose ceased assaulting her.

On cross-examination, L.K. described the sexual penetration as “full-on” and said that the assaults caused her to bleed. She acknowledged that no medical records regarding the assaults existed but explained that she did not visit the doctor for checkups or exams because C.R. did not have health insurance or enough money to pay for exams.

L.K.’s high-school friend testified that, around tenth grade, L.K. told her that Rose had touched and “raped” her over a number of years. Although the friend acknowledged on cross-examination that she did not use the word “rape” when she spoke to the prosecutor’s office days before trial, she maintained the truth of her May 2016 statement to police that L.K. told her that Rose both touched and raped L.K.

L.K.’s aunt, A.K., testified that on a Sunday in April 2016, the day after L.K. spent the night at A.K.’s home, L.K. told A.K. that Rose raped her as a young girl. A.K. said that L.K. cried while explaining what had happened and said, “It was full on. It wasn’t just touching.” L.K. told A.K. that Rose assaulted her in the morning before school when C.R.

was at work. A.K.'s husband, J.K., also testified that, on that April Sunday, L.K. stated that Rose had "raped" her when she was a girl until she started puberty. J.K. also testified that L.K. told him, while the two were in his car, that Rose did some "icky things" to her when she was young. L.K. told her mother and her grandfather what Rose had done to her, and they called the police the next day.

Detective Shawn McKnight of the Apple Valley Police Department, a specialist in sex-crime investigations, interviewed L.K. twice. During the first interview, L.K. stated that (1) Rose sexually assaulted her almost daily from second grade until puberty, (2) on the mornings she was assaulted, Rose woke her up and moved her to the bed or couch, (3) Rose sexually penetrated her, and (4) Rose called the assaults "cuddle time." Detective McKnight testified that the details of L.K.'s second statement were consistent with her first statement. McKnight also testified about Rose's recorded interview on the morning of his arrest, and the jury heard an audio recording of the interview.

During the recorded interview, McKnight confronted Rose about "sexual stuff" occurring with L.K. at the Apple Valley townhouse. Rose admitted that "it was wrong" but denied that the abuse occurred over a period of three years or that he penetrated L.K. But throughout the interview, Rose's version of the facts changed. Initially, he said that the abuse occurred twice but then admitted that the abuse may have occurred three or four times. And, initially, Rose said that he and L.K. were clothed and that he never ejaculated, but later indicated that he might have exposed himself and ejaculated.

C.R. testified that Rose could not possibly have assaulted L.K. by penetrating her because C.R. was home in the mornings from 2002 until November 2004 and awoke L.K.

every day during that time. C.R. also testified that she never noticed that L.K. bled or was injured, and that she did the laundry and never noticed blood. C.R. believed Rose—that he only had sexually touched L.K.

Rose admitted at trial that, in 2004, over a few-week span when L.K. was age nine, he rubbed his genital area against L.K.’s genital area four or five times while he was clothed. He denied sexually penetrating L.K. and denied any sexual contact with L.K. in 2002, 2003, and 2005. On cross-examination, he testified that he sexually touched L.K. on the couch when the news or cartoons were on the television, and that L.K. pretended to be asleep.

The jury found Rose guilty of first-degree CSC (count I), guilty of second-degree CSC from 2003–2005 (counts III-V), and not guilty of second-degree CSC in 2002 (count II). The district court sentenced Rose to 144 months in prison.

This appeal follows.

D E C I S I O N

I.

Rose first argues that his convictions of first-degree CSC and second-degree CSC in 2003 and 2005 must be reversed because of insufficient evidence. He relies on his denial of sexual penetration and C.R.’s testimony that she was at home during the time in question and did not see any physical evidence to corroborate L.K.’s allegations.

When considering an insufficiency-of-the-evidence claim appellate courts “make a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient

to allow the jury to reach its verdict.” *State v. Brown*, 732 N.W.2d 625, 628 (Minn. 2007). Appellate courts will not disturb a verdict “if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty.” *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004) (quotation omitted).

A. First-Degree CSC

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the state to prove every element of the offense charged beyond a reasonable doubt. *Patterson v. New York*, 432 U.S. 197, 204–05, 97 S. Ct. 2319, 2324 (1977); *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). A person is guilty of first-degree CSC if: (1) that person engages in sexual penetration with another person, (2) the actor has a significant relationship to the complainant, (3) the complainant was under 16 years of age at the time of the sexual penetration, and (4) “the sexual abuse involved multiple acts committed over an extended period of time.” Minn. Stat. § 609.342, subd. 1(h) (2002). “Sexual penetration” means sexual intercourse and “any intrusion however slight into the genital or anal openings.” Minn. Stat. § 609.341, subd. 12(2) (2002).

L.K. testified that Rose sexually penetrated her on multiple occasions with his penis from 2002 until 2006. She told a high-school friend that Rose “touched” and “raped” her when she was a child. In 2016, L.K. repeated the allegations to her aunt, uncle, mother, grandfather, and twice to Detective McKnight, stating that Rose sexually penetrated her.

McKnight testified that the details contained in L.K.'s second statement were consistent with her first statement.

On review, appellate courts assume that “the jury believed the state’s witnesses and disbelieved evidence contradicting those witnesses.” *State v. Pilot*, 595 N.W.2d 511, 519 (Minn. 1999). Furthermore, “the assessment of a witness’s credibility is exclusively the province of the jury.” *State v. McCray*, 753 N.W.2d 746, 754 (Minn. 2008) (quotation omitted). We therefore assume the jury disbelieved C.R. and Rose’s testimony, to the extent it conflicted with L.K.’s testimony. *See State v. Barshaw*, 879 N.W.2d 356, 366 (Minn. 2016) (“In determining whether the evidence is sufficient, we defer to the fact-finder’s credibility determinations and assume that the fact-finder disbelieved any evidence that conflicted with the verdict.” (quotation omitted)).

Additionally, C.R.’s testimony was not entirely inconsistent with the first-degree CSC conviction because she testified that beginning in November 2004 she was away from the home in the mornings and that Rose was then alone with L.K. Witness credibility was a central theme in this case and a reasonable jury could have disbelieved Rose and C.R., and believed L.K. “A conviction can rest on the uncorroborated testimony of a single credible witness.” *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (quotation omitted). L.K.’s testimony alone was sufficient to prove the element of sexual penetration.

Relying on *State v. Kemp*, 272 Minn. 447, 138 N.W.2d 610 (1965) and *State v. Huss*, 506 N.W.2d 290 (Minn. 1993), Rose argues that this is a case requiring corroboration of the single witness’s testimony.

In *Kemp*, the supreme court noted that reversal may be warranted when “the evidence to overcome the presumption of innocence is so completely dependent upon a single witness whose testimony, considered in the light of the record as a whole, is of *dubious veracity*.” 272 Minn. at 450, 138 N.W. 2d at 612 (emphasis added) (footnote omitted). Noting its concern with “[m]aterial inconsistencies between the sworn testimony [of the complainant] at trial and at the preliminary hearing,” the supreme court reversed the conviction of first-degree robbery that was based on the uncorroborated testimony of a single complaining witness, the complainant. *Id.* at 448, 504, 138 N.W. 2d at 610–12.

In *Huss*, the supreme court determined that a three-year-old victim’s uncorroborated testimony in a sexual-abuse case was insufficient to prove guilt because the victim was exposed to “highly suggestive” material and her testimony was inconsistent. 506 N.W.2d at 292–93. The child’s testimony was “contradictory as to whether any abuse occurred at all, and was inconsistent with her prior statements and other verifiable facts.” *Id.* at 292.

This case is unlike *Kemp* or *Huss*. Here, L.K. made multiple statements to others about Rose assaulting her from 2002 until 2005. L.K.’s statements were materially consistent. Her trial testimony also was consistent with her out-of-court statements. No corroboration of L.K.’s testimony is required.

But even if corroboration was required, we would conclude that L.K.’s testimony was corroborated. Corroborative evidence includes testimony from others regarding the victim’s demeanor, emotional condition, and changes in behavior after a sexual assault. *State v. Wright*, 679 N.W.2d 186, 190 (Minn. App. 2004), *review denied* (Minn. June 29, 2004). A detailed description of the crime is evidence of credibility supporting a

conviction. *State v. Danielski*, 374 N.W.2d 322, 326 (Minn. App. 1985), *review denied* (Minn. Dec. 13, 1985).

Here, A.K. testified that L.K. was angry as a teenager and always wanted to leave her house. L.K. was crying when she first told A.K. about the abuse. She was crying, upset, and shaking when she spoke to Detective McKnight. Contrary to Rose's contention that L.K.'s testimony was vague and unspecific about time frames, L.K. stated in detail that the assaults began when she was in second grade in 2002 and continued until she reached puberty.

We conclude that the evidence was sufficient to support Rose's conviction of first-degree CSC.

B. Second-Degree CSC in 2003 and 2005

A person is guilty of second-degree CSC if that person (1) engages in sexual contact with another, (2) the complainant is under 13 years of age, and (3) the actor is more than 36 months older than the complainant. Minn. Stat § 609.343, subd. 1(a) (2002). "Sexual contact" includes the intentional touching of the clothing covering the immediate area of the complainant's intimate parts. Minn. Stat. § 609.341, subd. 11(a) (2002).

While Rose admitted to acts constituting the elements of second-degree CSC in the year 2004, he argues that the evidence was insufficient to prove the occurrence of the offenses in 2003 and 2005. This argument is unavailing. The jury, as the sole judge of witness credibility, was entitled to credit L.K.s testimony that sexual contact occurred in 2003 and 2005. This court must assume on review that the jury disbelieved the testimony of Rose and C.R. *See Barshaw*, 879 N.W.2d at 366 ("In determining whether the evidence

is sufficient, we defer to the fact-finder's credibility determinations and assume that the fact-finder disbelieved any evidence that conflicted with the verdict." (quotation omitted)). As with Rose's first-degree CSC conviction, we conclude that L.K.'s testimony and other evidence provided sufficient evidence for the jury to convict Rose of the two counts of second-degree CSC in 2003 and 2005.¹

II.

During closing argument, the prosecutor told the jury that it must decide "whether . . . to take the easy road or whether . . . to take the hard road," and that their oath required them to "take the hard road." The prosecutor said:

You've heard from a defendant who's conceded, completely confessed, to one of the crimes he's charged with. That's evidence in the case. You get to consider that fully.

And I expect that [the defense attorney] will come up here after me and tell you to go back there and convict on Count IV because they—this man—wants to mitigate his damages and they want you to do that for them. And you, as citizens, that would be the easy road. It would be the easy road to say we can feel good about ourselves by hearing about this predatory behavior, entering a conviction on one count, getting home to our families, going back and playing video games, going back to our jobs, not wanting to talk about the facts of this case, entering a conviction, and not thinking about the rest,

¹ Rose cites a number of cases that are inapposite or do not help his case. In *State v. Reinke*, the supreme court noted that the evidence in a CSC case was sufficient when it included "significant corroborating evidence," including evidence of a prompt complaint, and medical evidence. 343 N.W.2d 660, 662 (Minn. 1984). But the court in *Reinke* was not *requiring* such evidence for a conviction. *Id.* In *State v. Johnson*, this court found that the evidence in a CSC case was sufficient even when the victim offered inconsistent testimony and later recanted. 679 N.W.2d 378, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004). In *State v. Packer*, the supreme court stated that corroboration is not a requirement for a jury to find guilt in a CSC case. 295 N.W.2d 266, 267 (Minn. 1980). Finally, in *State v. Ani*, the supreme court makes no suggestion that a credible witness requires corroboration. 257 N.W.2d 699, 700 (Minn. 1977).

and splitting the baby. That will make us feel good about ourselves, and we can go home and think we did the right thing.

It's not the right thing. You have to consider all the evidence in this case. And you have to consider each and every one of those counts separately. Don't let this man mitigate his damages through you, because that's exactly what he's doing. He's mitigating his damages through you. And it's a smart move.

I'm going to tell you why the evidence in this case shows you why he's guilty of all of the counts.

Near the end of the closing argument, the prosecutor repeated the “hard road/easy road” theme and told the jury it should go year by year and consider all the counts individually. Rose argues on appeal that the prosecutor committed misconduct by (1) inflaming the passions of the jury and infringing on juror independence, and (2) improperly denigrating Rose's defense strategy of conceding guilt on count IV. Rose did not object to the prosecutor's statements.

Because Rose did not object to the prosecutor's statements at trial, we review Rose's challenge under a modified plain-error test. *See State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017) (reviewing challenge under modified plain-error test when defendant did not object to prosecutor's statements at trial). “Under this modified test, the defendant has the burden to prove the existence of an error that is plain.” *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). “If the defendant establishes error that is plain, the burden shifts to the State to demonstrate that the plain error did not affect the defendant's substantial rights.” *Id.* (footnote omitted). “A plain error affects a defendant's substantial rights if it was prejudicial and affected the outcome of the case.” *Id.* (quotation omitted). “An error is

prejudicial if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *Id.* (quotation omitted).

An error is "plain if it is clear or obvious." *State v. Jones*, 753 N.W.2d 677, 686 (Minn. 2008) (quotation omitted). A "clear and obvious" prosecutorial error occurs when the prosecutor's conduct, "contravenes case law, a rule, or a standard of conduct." *Id.* When assessing a closing argument for prosecutorial misconduct, appellate courts review the argument as a whole, rather than selected phrases and remarks. *McCray*, 753 N.W.2d at 751.

A. Hard road/easy road and do-the-right-thing statements

Rose first contends that it was plain error for the prosecutor to urge jurors to "do the right thing" and to "take the hard road," as well as stating that finding Rose guilty of only one count would be taking the "easy road." But "[i]t is well-settled that the State has the right to vigorously argue its case." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016). "A prosecutor's closing argument need not be colorless, so long as it is based on the evidence or reasonable inferences from that evidence." *Jones*, 753 N.W.2d at 691–92. "In closing argument, a prosecutor must avoid inflaming the jury's passions and prejudices against the defendant." *Fraga*, 898 N.W.2d at 278 (quotation omitted). "But a prosecutor may make all legitimate arguments on the evidence and may draw reasonable inferences from the evidence." *Id.* (quotation omitted).

Rose asserts that the prosecutor linked taking the "hard road" and "do[ing] the right thing" with finding Rose guilty on all counts. This is not accurate. The full context of the statements show that the prosecutor was stating that the "right thing" and the "hard road"

meant considering “all the evidence in this case” and “each and every one of th[e] counts.” Later repeating the “hard road/easy road” theme, the prosecutor told the jury that it should go year by year and consider all the counts individually. We reject Rose’s argument that this case is like *State v. Porter*, in which the supreme court determined that the prosecutor’s appeal to emotions was a “blatant attempt to impinge on juror independence.” 526 N.W.2d 359, 363–64 (Minn. 1995).

This case is similar to *State v. Graham*, in which the supreme court determined that a prosecutor’s statement urging the jury to “do the right thing” was not misconduct when the prosecutor asked the jury to seek justice based on the evidence. 764 N.W.2d 340, 356–57 (Minn. 2009). Like the supreme court in *Graham*, we conclude that the prosecutor’s statements here urged the jury to seek justice based on the evidence and did not amount to misconduct.

B. “Mitigate his damages through you”

Rose argues that the prosecutor committed misconduct by telling the jury that Rose had attempted to use the jury to “mitigate his damages” by conceding guilt on count IV. But a prosecutor does not commit misconduct by commenting on defense tactics when the statements are “couched in arguments about the evidence.” *Id.* at 356. In vigorously arguing its case, the state may argue that “the evidence does not support particular defenses.” *Id.* (quotation omitted).

Rose acknowledged in a written agreement with his attorney that he was conceding count IV as a “trial strategy.” We are not convinced that the prosecutor committed misconduct by arguing that Rose was attempting to mitigate his damages by conceding his

guilt on count IV. Recognizing that the jury might find Rose guilty of the conceded count without examining all of the counts and all of the evidence, the prosecutor's statements were intended to avoid that result by reminding the jury of its duty to consider all of the counts and all of the evidence.

Like *Graham, id.* at 357, the prosecutor's statements here about the defense's tactics were tethered to arguments about the evidence. The prosecutor merely prevailed upon the jury to examine all the evidence. We therefore conclude that Rose has not met his burden to prove the existence of an error, much less a plain error.

Affirmed.