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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0794**

State of Minnesota,
Respondent,

vs.

Kell Anthony Bean,
Appellant.

**Filed March 26, 2018
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-15-20001

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Mark D. Nyvold, Fridley, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and
Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

Appellant Kell Bean challenges his conviction of fourth-degree criminal sexual
conduct, arguing that the state engaged in both unobjected-to and objected-to prosecutorial
misconduct by eliciting vouching testimony from a number of witnesses and referencing

that testimony during closing arguments. Because the unobjected-to conduct was not plainly erroneous, and because the first instance of objected-to conduct was permissible and the second instance was promptly corrected with a remedial instruction, we affirm.

FACTS

On January 14, 2015, Bean's 20-year-old niece, M.O., went to Bean's home for dinner. Over the course of the evening, Bean served her alcohol, and, between 7:30 p.m. and midnight, M.O. consumed approximately six glasses of wine.

As the evening progressed, Bean began making comments about how "sexy" M.O. was, and he eventually grabbed M.O.'s breast through her shirt. M.O. attempted to extricate herself from the situation, moving from Bean's downstairs dining-room table to the upstairs living-room couch, but Bean followed her upstairs and sat down next to her. M.O. tried to call her boyfriend to come get her, although she knew he was studying in Europe at the time. Bean squeezed M.O.'s breast again, lifted M.O.'s legs into his lap, and began stroking them. At some point, Bean got off the couch and took off his pants to "show [M.O.] how strong his legs were." M.O. texted her boyfriend, telling him Bean had touched her breast and taken off his pants. M.O. also placed a video call to her boyfriend, because she wanted Bean to "see [her] boyfriend." Bean, M.O., and M.O.'s boyfriend talked for a while, and then M.O. hung up and eventually fell asleep on the couch.

M.O. next remembered waking up with Bean on top of her. One of Bean's hands was up M.O.'s shirt on her breast; the other was down her pants. When M.O. woke up, Bean took his hand out from her pants, licked his fingers, and then tried to put his hand

back down her pants. M.O. rolled off the couch and began crawling away. Bean tried to stop her, but M.O. was able to get away and leave his house.

Bean was charged with third-degree criminal sexual conduct and fourth-degree criminal sexual conduct. A jury acquitted Bean of the third-degree charge but found him guilty of fourth-degree criminal sexual conduct. The district court stayed imposition of a sentence and placed Bean on five years' probation.

Bean appeals the judgment of conviction.

D E C I S I O N

I. Presenting unobjected-to vouching testimony from several witnesses was not plain error.

Bean alleges the state engaged in prosecutorial misconduct when it elicited the following testimony and referred to it in closing argument:

- Testimony from M.O. that, “after she had spoken with her mother, father, grandfather, grandmother, and [a family friend], they all supported her decision to report . . . Bean to the police”;
- Testimony from M.O. that her boyfriend had “been supportive of her through this process”;
- Testimony from M.O.’s boyfriend that he never had any reason to doubt M.O.;
- Testimony from M.O.’s mother that she had no reason to doubt M.O. when M.O. told her about the incident; and

- Testimony from M.O.’s uncle (Bean’s brother) that he had never known M.O. to lie about something this extreme.

At trial, Bean did not object to this testimony or the references to it in closing argument. When a defendant does not object at trial, claimed prosecutorial misconduct is reviewed under a modified plain-error standard. *Caldwell v. State*, 886 N.W.2d 491, 501 n.6 (Minn. 2016); *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). “Under this modified test, the defendant has the burden to prove the existence of an error that is plain. 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.” *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). “If the State fails to demonstrate that the alleged error did not affect the defendant’s substantial rights,” appellate courts consider “whether the error should be addressed to ensure fairness and the integrity of judicial proceedings.” *Id.* If “any one of the requirements” for plain error is not satisfied, appellate courts “need not address any of the others.” *State v. Lilienthal*, 889 N.W.2d 780, 785 (Minn. 2017) (quotation omitted).

“A prosecutor engages in prosecutorial misconduct when the prosecutor violates clear or established standards of conduct” *State v. Smith*, 876 N.W.2d 310, 334-35 (Minn. 2016) (quotation omitted). Applying this rule, this court has held that “[p]rosecutors may not elicit credibility-vouching testimony from trial witnesses.” *State v. Robideau*, 783 N.W.2d 390, 400 (Minn. App. 2010), *rev’d on other grounds*, 796 N.W.2d 147 (Minn. 2011). Such vouching occurs when one witness testifies “for or against the credibility of another witness.” *See State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001).

However, “a defendant might make certain arguments or introduce material that ‘opens the door’ to allow the state to ‘respond with material that would otherwise have been inadmissible.’” *Robideau*, 783 N.W.2d at 400 (quoting *State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007)). “The opening-the-door doctrine ‘is essentially one of fairness and common sense’ so that one party does not gain an unfair advantage by introducing misleading or distorted information.” *Id.* (quoting *Bailey*, 732 N.W.2d at 622).

The state concedes that at least some of the testimony Bean complains of constituted vouching. However, the state argues that Bean opened the door to vouching testimony through his opening statement and questioning of M.O. (who was the first trial witness) and that, if there was any error, it was not plain. Although we have concerns that vouching testimony pervaded Bean’s trial, we agree with the state that Bean’s opening statement opened the door and, in any event, the error was not plain.

In Bean’s opening statement, Bean told the jury they would hear that the detective who interviewed M.O. “appear[ed] to find her whole story somewhat preposterous.” Additionally, Bean told the jury they would hear that “regardless of what he has to say, it will be apparent by his actions . . . that [M.O.’s boyfriend] simply didn’t believe [M.O.]” Looking at the statements in context, they previewed vouching testimony that Bean expected to elicit for the jury. By previewing vouching testimony against M.O.’s credibility, Bean opened the door for the state to respond with vouching testimony for M.O.’s credibility. *Cf. State v. Glidden*, 459 N.W.2d 136, 141 (Minn. App. 1990) (holding that defendant opened the door to expert-witness testimony by statements made during opening statement).

Bean, however, argues that he was entitled to preview vouching testimony—without opening any door—because the state had already opened the door to vouching testimony during *its* opening statement. The state, during its opening statement and without objection from Bean, referenced anticipated testimony from M.O.’s grandmother (who is also Bean’s mother), saying, “[I]nitially she was supportive of [M.O].” However, again looking at the context in which this statement was made, the anticipated testimony was not described in order to vouch for M.O.’s credibility, but rather to explain the family dynamics between Bean, M.O., and M.O.’s grandmother.¹ We conclude that the state did not open the door to vouching testimony in its opening statement.

Additionally, even if it is debatable which party opened the door to vouching testimony in their respective opening statements, the fact that it is debatable indicates there was no “clear” violation of established standards of conduct. *See State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (declining to find plain error where defendant did not object to hearsay, because statements arguably could have come in under one of the many

¹ The full context of the prosecutor’s statement was:

You [are] going to hear family drama; you may hear some because the family is somewhat split, but what you will hear is just that some family members asked Mr. Bean as soon as this happened: What happened? You will hear from [M.O.’s grandmother], and I said earlier that she was initially supportive. That has somewhat changed. You will be the judges of that, but just be prepared for that, but what you will learn is that initially she was supportive of [M.O.] and advised her to tell the story, but she also wanted to get the story from Mr. Bean.

exceptions to the hearsay rule). Thus, in any event, the error Bean alleges regarding the unobjected-to vouching testimony is not plain and is not a basis for reversal.

II. Eliciting objected-to vouching testimony from M.O.’s uncle and from M.O. was not reversible prosecutorial misconduct.

Bean argues that two instances of objected-to vouching testimony constituted prosecutorial misconduct requiring reversal. When reviewing claims involving objected-to prosecutorial misconduct, appellate courts apply a two-tiered approach determined by the severity of the misconduct. *See State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974). Under this approach, if a claim involves “unusually serious prosecutorial misconduct,” an appellate court reviews the conduct to determine whether it was harmless beyond a reasonable doubt. *See id.* at 127, 218 N.W.2d at 200. If a claim involves less serious misconduct, an appellate court reviews to determine whether the conduct “likely played a substantial part in influencing the jury to convict.” *Id.* at 128, 218 N.W.2d at 200; *see also State v. Wren*, 738 N.W.2d 378, 390 n.9 (Minn. 2007) (elaborating on two-tiered approach). It is unclear whether this two-tiered standard still applies. *See State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (concluding that, because “the one instance of objected-to prosecutorial misconduct here is harmless even under the standard for more serious misconduct, we do not reach the issue of the continued applicability of the *Caron* test to objected-to prosecutorial misconduct”). Here, because we conclude the first instance of objected-to vouching testimony was not misconduct and the second instance was promptly remedied with a curative jury instruction, making any misconduct harmless beyond a reasonable doubt, reversal is not warranted under either standard.

A. Eliciting testimony from M.O.’s uncle was not prosecutorial misconduct.

Bean alleges the state engaged in prosecutorial misconduct when it elicited testimony from M.O.’s uncle (Bean’s brother) that he had “remained supportive of [M.O.]” because he believed her. Bean objected to this testimony, but the district court overruled his objection.

Prior to M.O.’s uncle testifying, Bean had elicited testimony from M.O. that her boyfriend’s behavior “suggested that he didn’t believe [M.O.]” and testimony from the boyfriend himself that, during the investigation, he had told the police, “The reason I sound irritated is because I don’t believe what [M.O.] is saying at this point.” Thus, by the time the uncle was testifying, a vouching contest was well underway. Although it may be unclear whether the door to vouching was open during M.O.’s direct examination, the door was certainly open by the time the state examined M.O.’s uncle. Because Bean elicited vouching testimony from M.O. and her boyfriend, it was not improper for the state to elicit vouching testimony from M.O.’s uncle. *See State v. DeSchoatz*, 280 Minn. 3, 13, 157 N.W.2d 517, 524-25 (1968) (holding that once a defendant had opened the door to hearsay testimony through one witness, the state could elicit related hearsay statements from subsequent witnesses). The state did not commit prosecutorial misconduct by eliciting the testimony in question.

B. The district court’s instruction to the jury properly addressed any misconduct in eliciting M.O.’s order-for-protection testimony.

Bean alleges the state engaged in prosecutorial misconduct when it elicited testimony from M.O. that she obtained an order for protection based on a “statement the

same as you described to the jury today.” Bean objected to this testimony. Initially the district court overruled Bean’s objection; however, after a bench conference, the district court instructed the jury, “The line of questioning for the order for protection . . . is not something that you should consider in the matter that is . . . at hand.” Once the jury left the courtroom, the district court indicated that, if Bean wanted to flesh out the instruction during jury instructions, the court would consider additional language proposed by Bean. Bean never proposed any additional language.

“We presume that jurors follow the court’s instructions.” *Zornes v. State*, 880 N.W.2d 363, 373 (Minn. 2016). In this case, the district court promptly instructed the jury to disregard the testimony in question. Bean argues that the instruction given was insufficient. We disagree. The district court appropriately instructed the jury at the time the testimony was elicited, and, after the testimony was excluded, it was never again referenced by either party. There is no evidence to indicate the jury disobeyed the instruction to disregard the order-for-protection testimony. We thus adhere to the presumption that the jury followed the court’s instruction and conclude that, assuming the order-for-protection testimony was improperly elicited, the misconduct was harmless beyond a reasonable doubt because the testimony was not considered by the jury in reaching its verdict.

Affirmed.