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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1904**

State of Minnesota,
Respondent,

vs.

Duane Griffin Gauna,
Appellant.

**Filed November 26, 2018
Affirmed
Jesson, Judge**

Hennepin County District Court
File No. 27-CR-16-24614

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Reilly, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

JESSON, Judge

Duane Griffin Gauna challenges his conviction of first-degree criminal sexual conduct based on his ongoing sexual abuse of M.W., a young girl who viewed him as her stepfather. Gauna argues that the district court abused its discretion by allowing expert testimony despite a discovery violation by the state and by allowing the prosecutor to argue facts not in evidence during its closing argument. Additionally, Gauna contends that the state committed prosecutorial misconduct during closing argument by distorting the burden of proof to the jury. Because the district court's evidentiary rulings were not an abuse of discretion, and because the prosecutor's comments during closing argument were not misconduct, we affirm.

FACTS

M.W. knew appellant Duane Griffin Gauna her entire life and viewed him as her stepfather. Gauna was in a relationship with M.W.'s mother, and when the relationship ended, M.W. went to live with Gauna. Gauna subsequently re-married, and M.W. lived with Gauna, his wife, and seven other children. But in September 2016, M.W. (age 14 at the time) messaged her friend that when Gauna was drunk or when she was the only one home, he would try to touch her, and she was scared to tell people. M.W.'s friend convinced her to talk to a counselor at a youth center, and M.W. told the counselor that Gauna had been touching her inappropriately. The counselor reported the allegations to the police.

When the police arrived, and at their request, M.W. wrote a brief note describing what happened. She stated that Gauna "touches my private parts, forces me to have sexual

intercourse with him, tricks me into letting him get between my legs, eats me out [and] more.” M.W. also showed police several text messages between her and Gauna. In those messages, Gauna called M.W. a “scared ass,” told her that he “like[d] [her] nice stomach,” and asked her “you like the neck thing, right?” M.W.’s responses included statements like “Enough,” and “I’m just tired of keeping this going . . . it’s hurting me.”

The next day, M.W. told a pediatric nurse practitioner that Gauna had touched her inappropriately for years, and she disclosed specific instances of sexual abuse, including: Gauna kissing her, licking her neck and body, licking her “privates” (which she clarified to mean her vagina), touching her butt with his penis, and attempting to put his penis in her mouth and butt. M.W. told the nurse practitioner that she did not let Gauna put his penis inside her mouth, vagina, or butt. Based on these statements and the series of text messages between M.W. and Gauna, the state charged him with first-degree criminal sexual conduct.

Before Gauna’s trial began, the state disclosed as a witness the pediatric nurse practitioner who interviewed M.W. One week before Gauna’s trial was scheduled to begin, the state filed a notice of its intent to offer the expert testimony of the same pediatric nurse practitioner on four topics common in child sexual abuse cases. Gauna filed a motion to preclude the expert testimony because the state did not timely disclose its intent to offer the pediatric nurse practitioner as an expert. Although this motion was discussed with the judge before trial, the district court’s ruling was reserved.

At trial, M.W. testified that Gauna touched her inappropriately approximately once or twice a week¹ beginning when she was ten and continuing until she reported the abuse, a timespan covering around four years. The abuse started with Gauna touching M.W.'s breasts and stomach while he told her that she had a nice body and progressed to him touching her thighs and butt and kissing her on her lips, neck, and chest. The abuse escalated, and M.W. testified that Gauna's mouth went to her vagina, that he put his penis in her mouth, and that she was not sure if Gauna put his penis in her "butt" but she thought he did because her butt hurt afterwards. M.W. also testified about the series of text messages between her and Gauna, indicating that he would ask her if she was "ready" to be touched by him again and call her "scared" if she did not want to be bothered with him. She explained text messages where Gauna told her he liked her neck and "chunky cheeks," and explained that her replies to Gauna's messages indicated she was tired of Gauna's actions, that he "had a wife" to have sex with, and that his actions were hurting her "on the inside."

During trial, the district court offered Gauna a continuance to allow his counsel to personally interview the pediatric nurse practitioner before she gave expert testimony. After defense counsel declined the continuance, the district court ruled that, although the state had violated discovery rules, the prosecution could present expert testimony on three

¹ When asked how often Gauna touched her inappropriately, M.W. testified that "[d]epending on how he felt or I would say once or twice a week probably, or every — every now and then."

designated topics² and that additional credibility-related testimony may be permitted, depending on the defense counsel's cross-examination of the expert. The defense counsel's cross-examination of the expert largely focused on M.W.'s credibility given the discrepancies between M.W.'s testimony and her statements in the interview. The district court then permitted the expert to testify about an additional credibility-related topic, and the expert explained that children who are victims of abuse often do not describe what happened the same way every time.

During its closing argument, the prosecution focused on M.W.'s credibility, including the concept of minimization, to explain M.W.'s inconsistent disclosures. Additionally, the prosecutor emphasized that belief in M.W.'s testimony was sufficient to convict Gauna. Gauna was convicted of first-degree criminal sexual conduct and sentenced to 160 months in prison. Gauna appeals.

DECISION

Gauna challenges his conviction on two grounds. First, Gauna argues that, cumulatively, two of the district court's evidentiary rulings prejudiced him and require a new trial. Gauna argues that the expert testimony should have been excluded as a sanction for the state's discovery violation and that the district court erred by allowing the

² The district court judge permitted testimony on the components and methodology of a forensic interview after defense counsel noted he did not have an issue with testimony on that topic. Additionally, the judge permitted expert testimony on delayed reporting and the fact that there is no universal demeanor for sexual-assault victims because the topics directly addressed credibility-related issues. Testimony on characteristics of abused children and grooming behaviors was excluded. The judge determined the issue of incremental disclosure could be re-visited depending on the cross-examination.

prosecutor to argue facts not in evidence during closing arguments. We review the decision to impose discovery sanctions for abuse of discretion. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). Evidentiary rulings, including rulings about admission of expert testimony, are also reviewed for an abuse of discretion. *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016). Gauna finally argues that the prosecutor committed misconduct during the closing argument by distorting the burden of proof. Because Gauna did not object to the statements during trial, we review his allegations of prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

I. The district court’s expert witness rulings were not an abuse of discretion.

Gauna first alleges that two of the district court’s evidentiary rulings were errors. Specifically, Gauna refers to the district court’s rulings permitting expert testimony despite the state’s discovery violation and allowing the prosecutor to argue facts not in evidence during the closing argument. Gauna argues that, cumulatively, these errors prejudiced him and require a new trial. We address each expert witness issue in turn.

While the issue of whether a discovery violation occurred is an issue of law which this court reviews de novo, we review the decision to impose discovery sanctions for violations of discovery rules for abuse of discretion.³ *Palubicki*, 700 N.W.2d at 489. “A court abuses its discretion when it reaches a ‘clearly erroneous conclusion that is against logic and the facts on record.’” *State v. Vasquez*, 912 N.W.2d 642, 648 (Minn. 2018)

³ Neither party contests that the state’s untimely notice of expert testimony violated discovery rules.

(quoting *State v. Williams*, 842 N.W.2d 308, 313 (Minn. 2014)). The appellant bears the burden of establishing abuse of discretion and resulting prejudice. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

When a party fails to comply with a discovery rule or order, the district court may choose from a wide set of options. It may “order the party to permit the discovery, grant a continuance, or *enter any order it deems just* in the circumstances.” Minn. R. Crim. P. 9.03, subd. 8 (emphasis added). Gauna argues that the expert testimony should have been excluded entirely as a sanction for the state’s failure to timely provide the notice and disclosures required by Minnesota Rules of Criminal Procedure 9.01. To determine whether the decision to permit expert testimony despite the discovery violation was an abuse of discretion, we turn to the analysis set forth in *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979).

In *Lindsey*, the supreme court identified four factors the district court should consider when determining sanctions for violations of discovery rules and orders: (1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors. 284 N.W.2d at 373. The supreme court further noted that preclusion of evidence is a strong sanction which should not be invoked lightly. *Id.* at 374.

Although the district court here never explicitly referenced *Lindsey*, it nonetheless analyzed the factors. On the issue of why the disclosure was not made, the record is not well developed. But regarding the second factor, the district court found that the late disclosure would not prejudice Gauna because he had received some discovery. The court

further explained that limiting the scope of the expert testimony obviated any prejudice to him. Gauna argues that he was prejudiced because he could not adequately prepare for the expert witness before trial. But someone from Gauna's counsel's office interviewed the expert before the trial began, and the defense counsel received some discovery about the expert's credentials and her opinions. Gauna also cross-examined the expert witness during trial. Considering the information and notice Gauna received, the extent of the prejudice to him, as the district court noted, was minimal.

Third, Gauna declined the continuance the district court offered him. Gauna argues that a continuance was not feasible at that point in the trial and that he was denied the opportunity to consult with his own expert. But, as the supreme court has explained, in the context of an undisclosed expert witness, "[i]f defendant was indeed surprised or prejudiced, the proper response would have been to move for a continuance." *State v. Carlson*, 328 N.W.2d 690, 695 (Minn. 1982) (footnote omitted); *see also State v. Pietrazewski*, 283 N.W.2d 887, 891 (Minn. 1979) (noting that the trial court did not abuse its discretion in excluding testimony and identifying defendant's failure to request a continuance a relevant consideration).

Finally, no other factor weighed strongly in favor of precluding the expert testimony. *See Lindsey*, 284 N.W.2d at 373. The district court determined that caselaw supported the conclusion that the admitted expert testimony was extremely helpful to the

trier of fact, and that the nature and extent of caselaw indicates that expert testimony on delayed disclosure should be expected.⁴

Considering the *Lindsey* factors as a whole and the high bar required by the abuse-of-discretion standard, we conclude that the trial court did not abuse its discretion by admitting the expert testimony. *See State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998) (noting that district “courts have broad discretion in imposing sanctions for violations of the discovery rules”). And while Gauna is correct that discovery rules must be complied with to achieve their intended purpose, we note that sanctions are not required by Minnesota Rules of Criminal Procedure 9.03. Rather, the district court may enter any order it determines is just. Minn. R. Crim. P. 9.03, subd. 8.

Gauna also contends that once the district court admitted the expert testimony, it abused its discretion by expanding the topics the expert could testify about after finding that he had “opened the door” through his cross-examination. *See State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007) (explaining that “opening the door” occurs when one party introduces material that allows the other party to respond with otherwise inadmissible material). The crux of Gauna’s argument is that opening the door requires the introduction of new evidence, which he did not do. But even if Gauna did not open the door in the technical sense of the doctrine, the additional expert testimony was only inadmissible based on the district court’s own decision to initially exclude it. And the judge noted in her initial ruling that the issue of incremental disclosure could be re-visited based on

⁴ Further, it appears that Gauna did not genuinely dispute the substance of the expert testimony, but only argued that he did not receive proper notice.

cross-examination. Because of the wide discretion afforded to the district court in making evidentiary decisions, allowing additional expert testimony after cross-examination was not an abuse of discretion. See *Amos*, 658 N.W.2d at 203 (noting that rulings on the admissibility of evidence are within the discretion of the trial court and they will not be reversed absent a “clear abuse of discretion”).

Gauna also argues that the district court abused its discretion by allowing the prosecutor to argue the topic of minimization to the jury when the judge did not permit expert testimony on the subject.⁵ During its closing argument, the state can present legitimate arguments and proper inferences that can be drawn from the evidence. *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016). But a prosecutor cannot argue facts not in evidence. *Id.*

Here, the prosecutor offered minimization as an explanation to the jury for the differing accounts of abuse offered by M.W. at various times before trial. Specifically, the prosecutor noted:

So you’re probably thinking, how can I believe something that she said didn’t happen on one day and then testifies did happen. Well, again, members of the jury, that fits perfectly within the context of this case and fits perfectly with your common sense. It’s called minimization. We do it everyday in every situation that they talk about that’s bad in our lives.

⁵ Gauna argues that the judge expressly permitted the prosecutor to argue minimization during closing arguments which is why he characterizes it as an evidentiary ruling rather than an allegation of prosecutorial misconduct. This is plausible from the record, so we address this issue as an evidentiary ruling.

Moreover, the prosecutor offered the jury reasons why M.W. might have minimized what happened to her during her interview with the pediatric nurse practitioner, including that she was talking about very embarrassing things and was worried about what was going to happen to the man she viewed as her stepfather.

These statements by the prosecutor are reasonable inferences based on M.W.'s testimony. M.W. testified that she still loved her dad, that she didn't want to tell anyone about what happened because she didn't want to break up her family or know where she would go, that she was ready to be done talking about this stuff, and that she had been crying in the hallway and testifying was not easy for her. Minimization was a reasonable inference from M.W.'s testimony, and the jury could understand the premise by using their own knowledge. As a result, expert testimony explaining the topic of minimization was not required. The district court did not abuse its discretion by permitting the prosecutor to argue the topic of minimization to the jury.

Because none of the district court's evidentiary rulings constituted an abuse of discretion, none of the rulings individually were errors. Because there were no errors, Gauna was not prejudiced by their cumulative effect. A new trial is not warranted.

II. The prosecutor's statements during closing argument were not misconduct.

Gauna also contends that the prosecutor committed misconduct amounting to prejudicial plain error during closing argument by distorting the burden of proof. Gauna identified three particular instances that he contends constitute improper shifting of the burden of proof:

“[i]f you believe [M.W.] based on her body language and based on what she said, then you’re done. This case is over and he’s guilty,”

“[i]f the state had only called one witness, [M.W.], to testify and you believed her, that’s enough, that’s enough proof beyond a reasonable doubt if you believe her. If you believe her, you’re done, he’s guilty,”

“[i]f you believe [M.W.] when she testified, then you believe this happened. If you believe that there’s no explanation for those texts in light of what [M.W.] said, then you believe that this case happened beyond a reasonable doubt”.

Under the modified plain-error standard of review we use for un-objected to claims of prosecutorial misconduct, the appellant must first establish (1) error and (2) that the error was plain. *Ramey*, 721 N.W.2d at 302. Plain error is one that was clear or obvious, which may be the case if the error “violates case law, a rule, or a standard of conduct.” *Id.*⁶

Gauna is correct that misstating the presumption of innocence or the burden of proof amounts to misconduct. *Id.* at 300. When assessing alleged prosecutorial misconduct during closing remarks, this court examines the argument as a whole, rather than focusing on isolated phrases. *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009). And the context of the closing argument here focused on the credibility of M.W. Both parties agree that her credibility was the primary issue for the jury to determine. The prosecutor’s comments explained correctly to the jury that if they believed M.W. and found her credible, that was

⁶ If the appellant establishes plain error, the burden then shifts to the state to prove that the error did not affect his substantial rights. *Ramey*, 721 N.W.2d at 302. If the state fails to show that the error did not affect substantial rights, then we determine if the error should be addressed to “ensure fairness and the integrity of judicial proceedings.” *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017).

enough to convict Gauna. See Minn. Stat. § 609.347, subd. 1 (2016) (establishing that the testimony of a victim does not need to be corroborated in certain cases, including first-degree criminal sexual conduct). This still left the prosecutor with the burden of convincing the jury that M.W. was credible. When considered in context, the challenged comments were not misconduct. Because the prosecutor did not commit misconduct, there was no error.

While Gauna concedes that a jury may convict someone based solely on the testimony of a sexual-assault complainant, he argues that it is not required to do so. Although Gauna is correct that limited caselaw supports instances where testimony of a complainant, even if believed, will not support a conviction, this case differs factually from those rare instances. Gauna cites *State v. Huss*, 506 N.W.2d 290 (Minn. 1993), a case in which the supreme court found that there was insufficient evidence to support the defendant's conviction for criminal sexual conduct where the only direct evidence presented by the state was the testimony of a three-year-old child.⁷ But in *Huss*, the only direct evidence offered by the state was the alleged victim's testimony. 506 N.W.2d at 292. That is not the case here. While no corroboration of M.W.'s testimony was required, the prosecution presented other evidence to support her testimony, including a series of text messages between M.W. and Gauna, text messages between M.W. and her friend, and testimony from several individuals to whom she disclosed the abuse.

⁷ Gauna also cites *State v. Ani*, but while the supreme court recognized that there may be some instances where uncorroborated testimony of a single witness may be insufficient to convict, the court found that the witness's testimony in that case was sufficient to convict the defendant. 257 N.W.2d 699, 700 (Minn. 1977).

Because the prosecutor's statements during closing argument were related to M.W.'s credibility and because the state presented other evidence to corroborate M.W.'s testimony, we conclude that the prosecutor's statements did not amount to misconduct. Because there was no prosecutorial misconduct, Gauna has not demonstrated plain error.

Finally, Gauna argues that the above-referenced statements are akin to improper "were-they-lying" questions. *See State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005) (noting that "were-they-lying" questions are improper because they can create the impression that the jury must believe a witness was lying in order to acquit the defendant). But here, the prosecutor's statements focused on the credibility of M.W. and made no mention about the jurors needing to believe that she lied in order to acquit Gauna. The prosecutor did not contrast M.W.'s credibility with that of another witness or imply that one was lying or that one must be believed over the other. The prosecutor's statements in this case are not analogous to "were-they-lying" questions.

Accordingly, because the district court did not abuse its discretion in making its evidentiary rulings and because no prosecutorial misconduct occurred, we affirm Gauna's conviction.

Affirmed.