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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1415**

State of Minnesota,
Respondent,

vs.

Victor Ciriaco-Martinez,
Appellant.

**Filed July 1, 2019
Affirmed in part, reversed in part, and remanded
Reyes, Judge**

Hennepin County District Court
File No. 27-CR-17-21619

Keith Ellison, Minnesota Attorney General, St. Paul, Minnesota; and

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

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

REYES, Judge

Following his conviction of first-degree criminal sexual conduct, appellant argues that (1) the prosecutor committed misconduct that affected his substantial rights and (2) the

district court imposed a consecutive sentence based on an incorrect criminal-history score. We affirm in part, reverse in part, and remand.

FACTS

M.J. has lived with her foster parents for nearly her entire life. M.J.'s biological mother had two children with appellant Victor Ciriaco-Martinez, who are M.J.'s half-brothers. During the relevant time, M.J.'s half-brothers lived with their aunt, appellant's sister, E.C.-M. M.J.'s foster mother had arranged for E.C.-M. to provide respite foster care for M.J. on weekends to allow M.J. to spend more time with her half-brothers. From July 8 to 10, 2017, M.J. stayed with E.C.-M. During this particular weekend, M.J. did not stay at E.C.-M.'s house but instead stayed at the home of the mother of E.C.-M. and appellant. Appellant also stayed at the home that weekend. While M.J. was sleeping, she woke to appellant removing her clothing and forced her to engage in fellatio and sexually penetrated her anus and vagina. M.J. was ten years old at the time.

A few days later, M.J. told her foster mother that appellant had sexually assaulted her. M.J. visited Hennepin County Medical Center (HCMC) and described the sexual assault to the nurse who examined her. M.J. participated in a forensic interview at CornerHouse during which she again described the sexual assault in detail. She also visited the Center for Safe and Healthy Children at the University of Minnesota Masonic Children's Hospital (CSHC) and made disclosures consistent with her HCMC and CornerHouse interviews.

The state charged appellant with one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2016). After a trial, a jury found appellant

guilty. The district court then sentenced appellant to 201 months in prison, consecutive to a 30-month sentence for a prior felony assault conviction, for which appellant was on probation. This appeal follows.

D E C I S I O N

I. Although the prosecutor committed misconduct, appellant is not entitled to a new trial.

Appellant argues that he is entitled to a new trial because the prosecutor engaged in misconduct during closing argument, constituting plain error affecting his substantial rights. We agree that the prosecutor's comments were plain error, but we are not persuaded that they affected appellant's substantial rights.

Appellant did not object to the prosecutor's remarks at trial. This court reviews unobjected-to prosecutorial misconduct under a modified plain-error standard where the appellant must first show an error that is plain. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is "clear" or "obvious" and conflicts with caselaw, a rule, or a standard of conduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the appellant shows plain error, the burden then shifts to the state to show that the misconduct did not affect the appellant's substantial rights. *Id.* When reviewing a prosecutor's statements, we examine the arguments "as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

A. The prosecutor's comments constituted plain error.

During closing argument, the prosecutor stated that appellant chose M.J. as his victim because children make “the perfect victim.” She also stated that M.J. feared coming to court because of appellant and that this meant M.J. told the truth about the sexual assault. We address each statement in turn.

1. “Men-who-prey-upon-children” argument

During closing, the prosecutor argued:

Children speak quietly, so we have to listen. We have to listen because the men who prey upon them are counting upon their silence, that is why they pick them. Men who prey upon children do so because they think they can get away with it. Children can be easily dismissed. They're inconsistent story tellers. They don't have sequential or lineal presentation. They're going to mix up the details. It is so easy to dismiss the word of a child, because they don't think or speak like you or I would, but that is why men pick them. They are *the perfect victim*. And make no mistake about it, that is why Victor Ciriaco-Martinez, the defendant in this case, preyed upon [M.J.] that weekend of July 8th through the 10th, 2017.

[M.J.] was vulnerable in every way. She was alone without her family. She's cognitively delayed. She has social issues, some behavioral issues. The defendant *never thought* she would tell someone, and if she did, who would believe her.

(Emphasis added.) Appellant argues that the prosecutor made this statement without a factual basis and to inflame the jury's passions and prejudices.

A prosecutor may present all legitimate arguments on the evidence, analyze and explain the evidence, and present all reasonable inferences to be drawn from the facts presented. *State v. Wahlberg*, 296 N.W.2d 408, 419 (Minn. 1980). And a prosecutor need not present a colorless argument. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). But

the prosecutor should refrain from making remarks that inflame the passions and prejudices of the jury. *State v. Mayhorn*, 720 N.W.2d 776, 786-87 (Minn. 2006). A prosecutor cannot disparage the defendant or attack the defendant's character unless the prosecutor's remarks are carefully confined to the evidence. *State v. Bauer*, 776 N.W.2d 462, 476 (Minn. App. 2009). A prosecutor in a sexual-abuse case must exhibit the utmost professionalism and adhere to the highest ethical standards because these cases can invoke an emotional reaction, and any emotional appeal to the jury is therefore likely to be prejudicial. *See State v. Jahnke*, 353 N.W.2d 606, 611 (Minn. App. 1984). Prosecutors in sexual-abuse cases must not inject into trial any matters which they cannot introduce directly. *Id.*

Here, the prosecutor's argument as to why men choose children as victims, and particularly, the statement "make no mistake about it, that is why [appellant], the defendant in this case, preyed upon [M.J.] that weekend," were not confined to the evidence. A prosecutor may argue reasonable inferences drawn from the evidence presented, but the record contains no evidence on *why* appellant chose M.J. as his victim. The prosecutor made an affirmative statement about appellant's motives. This statement went beyond the evidence presented at trial, and the prosecutor used it to inflame the jury's prejudices. This argument constitutes plain error because it violates caselaw precluding such argument.

2. M.J.'s fear of appellant

The prosecutor also argued:

Now, [the district court] provided you a list of factors to consider when evaluating the credibility of the witnesses in this case. They should guide your analysis of the testimony and help you determine whether the state has met its burden beyond a reasonable doubt.

One of the first factors is frankness and sincerity. [M.J.] told you what happened in a very frank and sincere way. Ladies and gentlemen, you saw [M.J.] when she entered this courtroom. That door opened for the first time, she took one step in and started screaming, no, he's in there, and ran back out. She tried a second time. The door opened, she took a step in, she screamed, no, I'm scared, and ran back out. The third time she made it about halfway to the doors before she froze and turned. *That tells you everything you need to know about whether this happened to [M.J.].* She cannot make up that reaction. Had that emotional reaction to seeing the defendant for the first time since this abuse occurred.

(Emphasis added.) Appellant argues that this statement is plain error because it (1) referred to facts outside the evidence; (2) improperly inflamed the jury's passions; and (3) constituted improper vouching for M.J.'s credibility.

A jury may consider the demeanor of a testifying witness. *See State v. Lloyd*, 345 N.W.2d 240, 245 (Minn. 1984) (noting that jury has opportunity to observe demeanor of witnesses and weigh their credibility). But M.J.'s reaction occurred before she was sworn in and had taken the witness stand. She therefore was not a testifying witness, and her reaction was not evidence presented to the jury. When the prosecutor referred to M.J.'s reaction during closing argument and told the jury that M.J. was fearful because appellant sexually assaulted her, she referred to facts outside the evidence presented at trial that improperly inflamed the jury's passions and prejudices because it would make the jury want to punish appellant for causing M.J. to be so afraid.

Moreover, while a prosecutor can point to circumstances surrounding a witness's credibility, a prosecutor cannot vouch for a witness's credibility. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). One of the ways a prosecutor engages in impermissible vouching

is when she implies a guarantee that the witness has testified truthfully. *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003). A prosecutor cannot refer to evidence that she did not introduce to the jury to guarantee the accuracy of a witness's testimony; doing so is vouching. *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998); *accord State v. Gail*, 713 N.W.2d 851, 866 (Minn. 2006) (vouching occurs when state refers to facts outside record when arguing for witness credibility).

Here, the prosecutor referred to M.J.'s reaction when she entered the courtroom, a fact outside the evidence. The prosecutor then used M.J.'s reaction to guarantee M.J.'s truthfulness, by stating that "this tells you everything you need to know about whether this happened to [M.J.]. She cannot make up that reaction." The prosecutor made this statement in the context of discussing how to evaluate credibility and the factors the jury should consider in determining "frankness" and "sincerity." By referring to facts outside the evidence and then using those facts to imply a guarantee of M.J.'s truthfulness, the prosecutor vouched for M.J.'s credibility. We conclude that this statement also rises to the level of plain error because it violates settled caselaw.

B. The prosecutor's errors did not affect appellant's substantial rights.

Appellant argues that he is entitled to a new trial because the prosecutor's statements resulted in substantial prejudice to him. We disagree.

Because appellant has established plain error, the state must show that there is no reasonable likelihood that the misconduct in question affected his substantial rights by having a significant effect on the jury's verdict. *Ramey*, 721 N.W.2d at 302. When evaluating the misconduct's effect on substantial rights, this court considers the

pervasiveness of the improper suggestions, the strength of the evidence against the defendant, and whether the defendant had a chance to rebut any improper remarks. *State v. Peltier*, 874 N.W.2d 792, 805-06 (Minn. 2016). We also consider the district court's jury instructions. *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994).

Here, the state presented overwhelming evidence of appellant's guilt. The jury heard testimony from M.J. herself during which she described the sexual assault. M.J. testified that she was asleep on the floor of the living room when appellant woke her up by pulling off her clothes. She then testified that he licked her vagina and anus, he put his penis into her vagina, and he forced her to put his penis in her mouth. The jury also heard testimony from M.J.'s foster mother that M.J. told her that appellant touched her with his mouth, hands, and penis. The nurse from HCMC testified that M.J. told her that a male forced her to touch his penis with her mouth and that "he touched my front part with his hand and his mouth and his penis." The forensic interviewer at CornerHouse also testified and the jury watched M.J.'s CornerHouse interview during which she recalled the events consistently, described the sexual assault in detail, and demonstrated the sexual assault using anatomical dolls. All of M.J.'s accounts were consistent.

Along with M.J.'s accounts of what happened, a forensic scientist with the Bureau of Criminal Apprehension testified that it collected DNA from M.J.'s underwear and compared the collected DNA with a sample of appellant's DNA. The forensic scientist concluded that the DNA mixture contained male DNA and that 99.99999 percent of the general population could be excluded from being contributors to the mixture. Appellant's

DNA, however, could not be excluded. Though the prosecutor's comments are plain error, the error is slight compared to the overwhelming evidence of appellant's guilt.

Further, the prosecutor made these remarks in the context of a 33-page closing argument. In *Peltier*, the supreme court concluded that the prosecutorial misconduct did not affect the defendant's substantial rights when the "incidents of alleged misconduct were isolated, together comprising approximately one page of a 39-page closing argument. 874 N.W.2d at 806; *see also Washington*, 521 N.W.2d at 40 (no prejudice when improper comments found in only four out of 45 transcript pages). Moreover, the district court instructed the jury that "the arguments or other remarks of an attorney are not evidence." The prosecutor's comments did not result in substantial prejudice to appellant. We affirm appellant's conviction.

II. The district court calculated appellant's sentence based on an incorrect criminal-history score.

Appellant argues that the district court improperly imposed a consecutive sentence based on a criminal-history score of two when it should have sentenced appellant based on a criminal-history score of zero. The state agrees, as do we.

The Minnesota Sentencing Guidelines provide for permissive consecutive sentences. We review a district court's imposition of a permissive consecutive sentence for a clear abuse of discretion. *State v. Fardan*, 773 N.W.2d 303, 322 (Minn. 2009). This court may at any time correct a sentence not authorized by law. Minn. R. Crim. P. 27.03, subd. 9. An unauthorized sentence includes one calculated based on an incorrect criminal-

history score. *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008).

Appellant committed this offense while on probation for third-degree assault, which included a 30-month stayed sentence. At sentencing, the district court revoked probation and executed this sentence. The district court then imposed a top-of-the-box sentence of 201 months for the first-degree criminal-sexual-conduct conviction, consecutive to the 30-month sentence. The district court calculated the 201-month sentence based on a criminal-history score of two.

A district court may impose permissive consecutive sentences if the current and prior felony are eligible for permissive consecutive sentences and the prior felony sentence has not expired or been discharged. Minn. Sent. Guidelines 2.F.2.a (1)(i)(a) (2016). Third-degree assault and first-degree criminal sexual conduct are both eligible for a permissive consecutive sentence. Minn. Sent. Guidelines 6.B. For each felony offense sentenced consecutively to another felony offense, the court must use a criminal-history score of zero, or the mandatory minimum for the offense, whichever is longer.¹ Minn. Sent. Guidelines 2.F.2.b.

The district court acted within its discretion when imposing a consecutive sentence. But the district court should have imposed the sentence based on a criminal-history score of zero, rather than two, as mandated by the sentencing guidelines. On the sex-offender grid, a top-of-the-box sentence for criminal sexual conduct with a criminal-history score

¹ The mandatory minimum sentence for first-degree criminal sexual conduct is 144 months. Minn. Stat. § 609.342, subd. 2(b) (2016).

of two is 201 months. Minn. Sent. Guidelines 4.B. But a top-of-the-box sentence with a criminal-history score of zero is 172 months with a range between 144 and 172 months. *Id.* Because the district court sentenced appellant based on an incorrect criminal-history score and appellant's sentence therefore falls outside the guideline range, we reverse and remand this case for resentencing.

Affirmed in part, reversed in part, and remanded.