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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1907**

Ernesto Torres Garcia, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 5, 2019
Affirmed
Cochran, Judge**

Hennepin County District Court
File No. 27-CR-15-10673

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

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

Following the denial of postconviction relief, appellant argues that (1) the state
engaged in prosecutorial misconduct that affected his substantial rights, (2) his Sixth

Amendment right to confront witnesses was violated, and (3) the postconviction court abused its discretion by affirming the district court's denial of a downward dispositional departure. We affirm.

FACTS

On April 17, 2015, Minneapolis police responded to Abbott Children's Hospital after receiving a report that six-year-old A.C.C. had been sexually assaulted by appellant Ernesto Torres Garcia. Torres Garcia was living with A.C.C.'s family at the time. A.C.C. told her parents that Torres Garcia had called her into his bedroom, undressed her, took his own clothes off, and put his "boy private" inside her "girl private." On April 22, Torres Garcia was charged with two counts of first-degree criminal sexual conduct in violation of Minn. Stat § 609.342, subd. 1(a) (2014).

A.C.C. participated in a forensic interview at CornerHouse on April 20, 2015, during which she described the sexual assault. During the interview, A.C.C. provided "sensory details," which the forensic interviewer testified gave her statements credibility.

On April 22, 2015, Sergeant Faulconer, an investigator for Minneapolis police, conducted a post-*Miranda* interview with Torres Garcia and a certified Spanish-language interpreter. Sergeant Faulconer testified at trial regarding Torres Garcia's interview with the police. Sergeant Faulconer stated that Torres Garcia admitted to watching pornography in his bedroom and said that A.C.C. had inadvertently entered his room while the pornography was on his television. After being told that A.C.C. had implicated him, Torres Garcia's "demeanor became very sad and regretful." He made statements that "he was sorry that these things had happened to her." Sergeant Faulconer asked Torres Garcia

whether he had touched A.C.C., and Torres Garcia gave multiple responses, including that he did not remember and that he did not touch her.

During closing argument, the Hennepin County prosecutor urged the jury to listen to children, because “the men who sexually assault them are counting on their silence.” The prosecutor stated that the men who “prey on children” pick them because they are “the perfect victim.” A jury found Torres Garcia guilty on both counts. On June 10, 2016, the district court denied Torres Garcia’s request for a downward departure and sentenced him to 156 months’ imprisonment, the presumptive sentence.

On June 6, 2018, Torres Garcia filed for postconviction relief, arguing that he is entitled to a new trial based on prosecutorial misconduct and the admission of the interpreted statements that he made during the interrogation. He also argued that the district court abused its discretion by denying his motion for a downward dispositional departure. The postconviction court denied relief. Torres Garcia makes the same arguments on appeal.

D E C I S I O N

I. Appellant is not entitled to a new trial based on prosecutorial misconduct.

Torres Garcia argues that he is entitled to a new trial because the prosecutor engaged in misconduct in closing argument by inflaming the jury’s passions and urging the jury to protect society.

Torres Garcia did not object to the prosecutor’s closing argument at trial. This court reviews unobjected-to prosecutorial misconduct under a modified plain-error standard. *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007). Under this standard, Torres Garcia

must demonstrate that the alleged misconduct constituted error and that the error was plain. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). “An error is plain if it was clear or obvious. Usually this is shown if the error contravenes case law, a rule, or a standard of conduct.” *Id.* (quotation and citations omitted). If Torres Garcia shows “error that is plain, the burden would then shift to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights.” *Id.* Thus, the state would have to show “that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.” *Id.* (quotations omitted). If all three prongs of the modified plain-error test are met, this court then determines whether to address the error to ensure fairness and the integrity of the proceedings. *Id.*

We agree with Torres Garcia that the prosecutor’s statements in closing argument constitute error that is plain. But, we conclude that the error did not affect Torres Garcia’s substantial rights.

A. The prosecutor’s comments constitute error that is plain.

The prosecutor began her closing argument by telling the jury:

Children speak softly, and we really need to listen. We have to listen because the men who sexually assault them are counting on their silence. That is why they pick them. Men who prey on children pick children because they can be frightened or persuaded into silence. Children can be confused about the appropriate role of a parent or caregiver or person living in their home.

They prey upon children because they are going to be uncomfortable describing what happened to them; they are not going to want to use the words or they are not going to be able to have words for vagina or penis or anus. They are going to be inconsistent storytellers. They don’t have sequential or

linear presentation. They are going to bounce around. They are going to mix up details. In one sentence they are going to be talking about the day that they were trapped in a room, and the next sentence they are going to be talking about the day they told their mom, and the sentence after that they are going to be talking about how they can't sleep, how they are having nightmares, how they think their dad is dead.

And they are easily dismissed, ladies and gentlemen. It is so easy to dismiss the word of a child. Oh, she is just attention-seeking or she is troubled or she's coached.

Men who sexually assault children know that children are the perfect victim. And that's why we really have to listen.

Torres Garcia argues that the prosecutor's statements constitute plain error because they "inflamed the passions of the jury and injected broader societal issues by appealing to jurors' instincts to protect children from sexual abuse."

In a closing argument, the state may "present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence" but may not "speculate without a factual basis" or "misstate the evidence." *State v. Peltier*, 874 N.W.2d 792, 804-05 (Minn. 2016) (quotations omitted). The prosecutor also "must refrain from making statements that will inflame the passions or prejudices of the jury." *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). And, "[i]t is improper for the prosecutor to make statements urging the jury to protect society or to send a message with its verdict." *Id.* A prosecutor in a sex-abuse case must adhere to the highest ethical standards. *State v. Jahnke*, 353 N.W.2d 606, 611 (Minn. App. 1984).

In *Duncan*, this court examined similar claims of prosecutorial misconduct in a trial involving child sex-abuse charges. 608 N.W.2d at 555-56. *Duncan* raised several challenges to the prosecutor's closing argument including that the prosecutor improperly referred to Duncan as a "predator" and used various synonyms of the word throughout closing argument. *Id.* at 556. This court determined that the prosecutor intended to inflame the prejudices of the jury by referring to Duncan as a "predator." *Id.* *Duncan* also challenged the prosecutor's statement that "[i]t's time in this country that we start believing kids." This court held that this remark was improper because it could be construed as a request that the jury return a guilty verdict in order "to send a message generally affirming the allegations of children." *Id.*

Similarly, in this case, the prosecutor referred to "men who prey on children" and urged the jury to listen to children. The prosecutor began her closing argument by stating, "Children speak softly, and we really need to listen. We have to listen because the men who sexually assault them are counting on their silence. That is why they pick them. Men who prey on children pick children because they can be frightened or persuaded into silence." These statements refer generally to men who sexually assault children and compare those men to predators. These statements also refer to children as a group. These statements were not based on evidence submitted at trial but were meant to be a generic appeal to the passions and prejudices of the jury and to urge the jury to send a message.

In fact, these statements are very similar to statements made as part of the closing arguments in two other child sex-abuse cases that were recently decided by this court. See *State v. Ciriaco-Martinez*, A18-1415, 2019 WL 2999783 (Minn. App. July 1, 2019); *State*

v. *Danquah*, A18-1581, 2019 WL 3293790 (Minn. App. July 22, 2019).¹ In *Ciriaco-Martinez*, the prosecutor began her closing argument by stating: “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.” *Ciriaco-Martinez*, 2019 WL 2999783 at *2. Similarly, in *Danquah*, the prosecutor started the closing argument by stating:

Children speak quietly, and so we have to listen to them. We have to listen because the men who sexually assault children are counting on their silence, that is why they pick them. Men who sexually assault children pick children because they can be frightened or persuaded into staying quiet. . . .

They prey upon children because they are going to be uncomfortable talking about what happened to them.

A18-1581, 2019 WL 3293790 at *5. In each of these three cases (*Ciriaco-Martinez*, *Danquah*, and this case), the Hennepin County prosecutor began the closing argument using essentially the same language urging the jury to “listen” to the children and referring generally to men who “prey” upon children. The similarity of these three closing arguments reinforces our conclusion that the prosecutor’s statements in this case were not drawn from facts in evidence. Further, it is concerning to us that prosecutors from Hennepin County are using what is essentially a script analogizing the men involved in child sexual-abuse cases to predators and urging the jury to send a message by listening to

¹ The prosecutor who handled the *Ciriaco-Martinez* case is with the Hennepin County Attorney’s office, but is a different prosecutor than the prosecutor who handled this case. The prosecutor who handled the *Danquah* case is the same Hennepin County prosecutor that handled this case.

the children. See *Duncan*, 608 N.W.2d at 556 (stating prosecutors “must refrain from making statements that will inflame the passions or prejudices of the jury” and may not “make statements urging the jury to protect society or to send a message with its verdict”).

In sum, we conclude that the prosecutor’s reference in her closing argument to “[m]en who prey on children” was an improper appeal to the passions and prejudices of the jury. Likewise, we conclude that the prosecutor’s statement that “we really need to listen [to children]” was an improper attempt to inject into the trial the broader societal issue of protecting children from sexual abuse.

The prosecutor tasked the jury with solving a societal problem and appealed to the jury’s passions and prejudices. But the jury’s “role is limited to deciding dispassionately whether the state has met its burden in the case at hand of proving the defendant guilty beyond a reasonable doubt.” *State v. Salitros*, 499 N.W.2d 815, 819 (Minn. 1993). The prosecutor’s statements constitute error that is plain.

B. Torres Garcia’s substantial rights were not affected.

We next examine whether Torres Garcia’s substantial rights were affected. Torres Garcia argues that he is entitled to a new trial because the prosecutor’s statements affected his substantial rights. We are not persuaded.

The state has the burden to show that the misconduct did not affect appellant’s substantial rights once the appellant has established an error that is plain. *Ramey*, 721 N.W.2d at 302. This requires a showing that there is no reasonable likelihood that the absence of the misconduct in question would have significantly affected the jury’s verdict. *Id.* To determine whether there is “a reasonable likelihood that the absence of the

misconduct would have had a significant effect on the jury's verdict, [this court] consider[s] the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to . . . rebut the improper suggestions.” *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007); *see also Peltier*, 874 N.W.2d at 805-06.

Here, there is significant evidence of Torres Garcia's guilt. A.C.C. testified that she went into Torres Garcia's room to drink apple juice and was given candy. Torres Garcia shut his bedroom door and removed A.C.C.'s clothing along with his own. A.C.C. stated that Torres Garcia lifted her onto the bed and touched her body. With the aid of exhibits, A.C.C. indicated that Torres Garcia touched her “girl private” with his “boy private.” She testified that his “boy private” went inside her “girl private” and that it felt “bad.” A.C.C.'s mother confirmed that A.C.C. told her that Torres Garcia touched her. The forensic interviewer at CornerHouse testified that A.C.C. gave “sensory details” which gave her account added credibility.

At the close of trial, the district court told the jury that “the arguments or other remarks of an attorney are not evidence.” These instructions “lessened the impact” of the prosecutor's improper statements. *State v. Hawkins*, 511 N.W.2d 9, 13 (Minn. 1994); *see also State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (“The [district] court's instructions to the jury are also relevant in determining whether the jury was unduly influenced by the improper comments.”). And the prosecutor's improper statements were only a relatively small part of the prosecutor's closing argument. Given the strength of the state's evidence, the limited nature of the prosecutor's improper statements, and the district

court's instruction to the jury, we conclude that Torres Garcia's substantial rights were not affected. *See Montanaro v. State*, 802 N.W.2d 726, 734 (Minn. 2011) (concluding that, after review of the prosecutor's closing argument in light of the entire record, any misconduct viewed in isolation or collectively did not have a significant impact on the jury's verdict and did not affect substantial rights).

Finally, while the prosecutor's statements during her closing argument did not deprive Torres Garcia of a fair trial, we urge prosecutors in Hennepin County and elsewhere to refrain from using this standard language. In a case with less evidence supporting the convictions, we may not be so inclined to conclude that the misconduct was not prejudicial.

II. Appellant's Sixth Amendment right to confront witnesses was not violated.

Torres Garcia argues that the district court deprived him of his Sixth Amendment right to confront witnesses against him when it allowed his statements, translated by an interpreter, into evidence through the testimony of Sergeant Faulconer. He contends that the translated statements were not his own and that the translator was the declarant. Because Torres Garcia did not object at trial to the admission of his interpreted statements, the plain-error test applies. *See State v. Tscheu*, 758 N.W.2d 849, 863-64 (Minn. 2008) (applying plain-error test to Confrontation Clause issue); *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (applying plain-error test to hearsay question).

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions "the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6; *State v. Hull*, 788

N.W.2d 91, 100 (Minn. 2010) (noting that Confrontation Clause claims are analyzed identically under the United States and Minnesota Constitutions). The Confrontation Clause bars the admission of testimonial out-of-court statements unless (1) the declarant is unavailable and (2) the defendant had a prior opportunity to cross-examine the declarant. *Andersen v. State*, 830 N.W.2d 1, 9 (Minn. 2013) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004)). “A successful Confrontation Clause claim has three prerequisites: the statement in question was testimonial, the statement was admitted for the truth of the matter asserted, and the defendant was unable to cross-examine the declarant.” *Id.*

To establish whether Torres Garcia’s Sixth Amendment right was violated, we must first determine the declarant of Torres Garcia’s interpreted statements. The supreme court recently decided this issue in *State v. Lopez-Ramos*, __ N.W.2d __, 2019 WL 2442056, at *1 (Minn. June 12, 2019). “[F]or purposes of applying the plain-error doctrine, [this] court examines the law in existence at the time of appellate review.” *State v. Kelley*, 855 N.W.2d 269, 277 (Minn. 2014). We thus analyze Torres Garcia’s argument under *Lopez-Ramos*.

In *Lopez-Ramos*, the supreme court examined whether the admission of statements made by a defendant using a Spanish-language interpreter violated the Confrontation Clause and hearsay rules. The supreme court held that the use of an interpreter to translate a statement from one language to another does not implicate the Confrontation Clause. *Lopez-Ramos*, 2019 WL 2442056, at *6. The supreme court reasoned that the act of translating a defendant’s statement from one language to another “does not transform the

interpreter into a witness against the defendant.” *Id.* The supreme court noted that “[t]he role of the interpreter is not to provide or vary content; the role of the interpreter is to relay what the defendant said in another language. In this way, an interpreter is not a witness against the defendant.” *Id.* Based on the supreme court’s holding in *Lopez-Ramos*, we conclude that Torres Garcia is the declarant of his translated statements, not the interpreter. *See id.* Thus, the Confrontation Clause is not implicated and the postconviction court did not err by determining that Torres Garcia’s Sixth Amendment right was not violated.

Torres Garcia also challenges the admission of his translated statements on hearsay grounds, arguing their admission was plain error on that basis. “Hearsay” is an out-of-court statement of a declarant offered into evidence to prove the truth of the matter asserted. Minn. R. Evid. 801(c). But, a statement offered against a party that is the party’s own statement is not hearsay. Minn. R. Evid. 801(d)(2)(A). Because Torres Garcia is the declarant of his translated statements and the state offered Torres Garcia’s translated statements as evidence against him, his statements are not hearsay under Minn. R. Evid. 801(d)(2)(A). *Lopez-Ramos*, 2019 WL 2442056, at *8. Accordingly, the postconviction court did not err by concluding that these statements were not hearsay under Minn. R. Evid. 801(d)(2)(A).

III. The district court did not abuse its discretion by denying Torres Garcia’s motion for a downward dispositional departure.

Appellate courts “afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). “A district court abuses

its discretion when its reasons for departure are legally impermissible and insufficient evidence in the record justifies the departure.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016).

The Minnesota Sentencing Guidelines prescribe “a sentence or range of sentences that is presumed to be appropriate.” *Soto*, 855 N.W.2d at 308 (quotation omitted). A district court may depart from the presumptive sentencing guidelines only if substantial and compelling circumstances warrant doing so. *Solberg*, 882 N.W.2d at 623. Substantial and compelling circumstances are those that make a case atypical. *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003).

A dispositional departure occurs when the district court orders a disposition other than that recommended in the sentencing guidelines. Minn. Sent. Guidelines 1.B.5.a (2014). A district court may impose a downward dispositional departure from a presumptive prison commitment if the defendant is particularly amenable to treatment in a probationary setting. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Factors relevant in determining whether a defendant is particularly amenable to treatment in a probationary setting include “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *Id.*

Torres Garcia argues that the postconviction court abused its discretion by affirming the district court’s denial of his motion for a downward dispositional departure because he is particularly amenable to probation based on his age (54 at the time of sentencing), poor health, and remorse. Torres Garcia does not provide any support for his argument that his age makes him particularly amenable to probation. And while Minnesota courts have

found that young age might support a finding of particular amenability, *see Soto*, 852 N.W.2d at 310, Torres Garcia does not cite to any cases supporting a finding of particular amenability based on old age. Moreover, there is nothing in the record to demonstrate Torres Garcia's remorse. Rather, the district court expressly noted Torres Garcia's lack of remorse. When it denied his motion for a downward dispositional departure, the district court stated:

I have not through these proceedings seen any remorse demonstrated by you and I—I am confused about whether you are now or whether you will be in the future willing to admit what you did to the victim in this case. You've consistently denied it, but earlier we heard in testimony that you prayed for forgiveness. . . .

So it seems like you want to admit this offense but can't get yourself to do it. And until you are able to admit it, you won't be amenable to treatment. I don't find either that or any other basis to depart downwards.

The record supports the district court's findings. Although Torres Garcia cried and asked for forgiveness during his interview with police, Torres Garcia has never admitted guilt. The presentence investigative report noted that

[i]t was difficult to assess [Torres Garcia] based on his denial of the offense and his limited insight about his conviction. . . . When asked why the victim would fabricate this offense, [Torres Garcia] went on to explain that the victim's mother disliked him and likely told the victim to say things to get him in trouble. He conveyed no remorse for the victim.

The Guidelines provide that a district court may depart when substantial and compelling circumstances are present. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018). But a “departure is not mandatory, and an appellate court will reverse a sentencing

court's refusal to depart only in a rare case.” *Id.* (quotation omitted). Here, the district court acted well within its discretion when it sentenced Torres Garcia to the presumptive disposition of an executed sentence of 156 months' imprisonment. The postconviction court did not err by affirming the denial of Torres Garcia's motion for a downward dispositional departure.

Affirmed.