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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0520**

State of Minnesota,
Respondent,

vs.

Abner Otwoma Momanyi,
Appellant.

**Filed April 27, 2020
Affirmed in part and remanded
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-17-22606

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

Michael O. Freeman, Hennepin County Attorney, Sean Patrick Cahill, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

On direct appeal of his conviction for second-degree criminal sexual conduct, appellant Abner Otwoma Momanyi challenges his conviction, arguing that (1) the district

court abused its discretion by permitting testimony about a prior interaction between him and the victim and (2) the prosecutor committed misconduct by inflaming the passions of the jury in her closing argument. Momanyi also challenges his sentence, arguing that he is entitled to a shorter sentence based on changes to the sentencing guidelines. We reject appellant's arguments challenging his conviction, but we agree that he may be entitled to resentencing under the revised guidelines. We therefore affirm in part and remand.

FACTS

The facts are drawn from Momanyi's criminal trial. On an afternoon in July 2017, nine-year-old T.M., together with her mother and younger siblings, went to the home of family friends to memorialize the friends' relative who had recently died. About 30 people visited the home throughout the day, including Momanyi, his wife, and their three children. T.M. referred to Momanyi as her uncle, out of respect, but they were not related and had only met twice previously.

At the home, T.M. went to the basement to play with the other children present, while her mother went to the kitchen to help with the dishes. Momanyi was in the basement, too. While in the basement, T.M. played with Momanyi's daughter. Momanyi's son was also in the basement, but, according to T.M., the boy left after Momanyi said something to him. Although Momanyi spoke in a language that T.M. did not understand, she assumed that Momanyi told his son to leave. Momanyi spoke to his daughter and T.M. about T.M. coming to their home for a sleepover.

T.M. then tried to go upstairs, but Momanyi physically stopped her. Momanyi then told T.M., "Come sit on my lap." T.M. testified that, though she did not want to do it, she

agreed to sit on Momanyi's lap to avoid being disrespectful to an elder. Once T.M. was on his lap, Momanyi kissed her left cheek, licked her earlobe, and touched her breast under her shirt. T.M. "felt uncomfortable," so she got off of Momanyi's lap and went upstairs to the bathroom to wipe off his saliva. After wiping off the saliva, she sat in the bathroom breathing in and out to calm herself.

T.M. tried to tell her mother what had happened, but her mother was speaking with the hosts in the kitchen and told T.M. that she would talk with her later.¹ T.M. then went outside to play with the other children. During this time, Momanyi had come upstairs from the basement. Once T.M. had gone outside, Momanyi approached T.M.'s mother and started asking her "weird questions." Momanyi told T.M.'s mother that he needed to tell her something "really troubling" about her husband. As T.M. and her family were leaving the event, Momanyi tried to arrange a meeting with her mother the next day, saying it was about something urgent and that he did not want to talk about it over the phone. T.M.'s mother testified that, looking back at the incident, she believes Momanyi was trying to distract her from T.M.

As T.M.'s mother was driving her family home, T.M. told her mother that she did not like Momanyi and that he was "weird." Her mother agreed that he was weird but then asked T.M. why she thought that. T.M. responded that he has red eyes and keeps following her. Her mother asked her if that was all, and T.M. told her what had happened in the basement. T.M.'s mother turned the car around and returned to the home to confront

¹ T.M. testified that she went to the bathroom first and then sought out her mother. T.M.'s mother stated that T.M. went to the bathroom after speaking with her.

Momanyi. Upon being confronted, Momanyi responded that T.M. was lying and that it was a “setup.” Both T.M. and her mother slapped Momanyi. They then left, with T.M.’s mother threatening to call the police.

At home, T.M.’s mother called the police, and T.M. and her mother went to the police station to report what had happened. An employee of the child-advocacy center CornerHouse also interviewed T.M. a few weeks later. In the interview, T.M. recounted the events in the basement with Momanyi.

The state charged Momanyi with second-degree criminal sexual conduct, and a jury found Momanyi guilty. The district court sentenced Momanyi to 48 months’ imprisonment and 10 years of conditional release but stayed execution of the sentence for five years.

This appeal follows.

D E C I S I O N

I. *Spreigl* Evidence

Momanyi argues that the district court committed reversible error when, over his objection, the district court permitted T.M. to testify about a prior incident in which Momanyi kissed her and her friend on their necks.

Evidence of other crimes or acts is governed by Minn. R. Evid. 404(b). Such evidence is commonly referred to as “*Spreigl* evidence,” based on the supreme court’s decision in *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965). *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). “A district court’s decision to admit *Spreigl* evidence is reviewed for an abuse of discretion.” *State v. Griffin*, 887 N.W.2d 257, 261 (Minn. 2016). “A defendant who claims the [district] court erred in admitting evidence bears the burden of

showing an error occurred and any resulting prejudice.” *Id.* “Evidentiary errors warrant reversal if there is any reasonable doubt the result would have been different had the evidence not been admitted.” *State v. Grayson*, 546 N.W.2d 731, 736 (Minn. 1996) (quotation omitted).

Spreigl evidence may be admitted only in some cases. Minn. R. Evid. 404(b); *State v. Ness*, 707 N.W.2d 676, 682, 685 (Minn. 2006). First, the evidence has to be relevant for a valid purpose “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” and “is not admissible to prove the character of a person in order to show action in conformity therewith.” Minn. R. Evid. 404(b)(1). Second, these conditions also have to be met:

- (1) the state must give notice of its intent to admit the evidence;
- (2) the state must clearly indicate what the evidence will be offered to prove; (3) there must be clear and convincing evidence that the defendant participated in the prior act; (4) the evidence must be relevant and material to the state’s case; and
- (5) the probative value of the evidence must not be outweighed by its potential prejudice to the defendant.

Ness, 707 N.W.2d at 686.

But even if the *Spreigl* evidence is not admissible under rule 404(b), a court may permit inquiry into a prior act when a defendant “opens the door” on the subject. *State v. Guzman*, 892 N.W.2d 801, 814-15 (Minn. 2017). “Opening the door occurs when one party by introducing certain material creates in the opponent a right to respond with material that would otherwise have been inadmissible.” *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006) (quotation omitted). “The opening-the-door doctrine is essentially one of fairness and common sense, based on the proposition that one party should not have an unfair

advantage and that the factfinder should not be presented with a misleading or distorted representation of reality.” *Id.* (quotation omitted).

At trial, the prior-act evidence arose during T.M.’s testimony. During cross-examination, the defense asked T.M. about whether she felt uncomfortable around Momanyi in general, leading to this exchange:

Q: And so at any sort of touch, even if it were incidental or friendly, you might just feel uncomfortable about it?

....

A: No. But most things that he did, I don’t -- I don’t believe it was rough or gentle. Like one time there was this occasion --

Q: I’ll just stop you there. That’s not responsive. But I’m just asking about whether or not you felt uncomfortable with him prior to that day.

T.M. responded that she had felt uncomfortable around Momanyi before the day of the incident. On redirect, the state then asked T.M. if Momanyi had ever touched her in a way that made her feel uncomfortable. Over the defense’s objection, the district court permitted T.M. to explain that she had been uncomfortable on a previous occasion when Momanyi had kissed the back of her neck and left saliva. T.M. also testified that Momanyi had kissed another child’s neck on the same occasion and that the two children had discussed how it made them feel uncomfortable.

Momanyi argues that the state failed to meet the *Spreigl* conditions in order to admit prior-act evidence. He argues that the state failed to provide notice that it intended to introduce *Spreigl* evidence, even though the prosecutor’s questions implied that she was aware of the information. But the state only asked about the prior act after Momanyi’s counsel brought up T.M.’s general discomfort around Momanyi. Momanyi’s counsel’s line

of questioning implied that T.M.'s discomfort was something she always felt around Momanyi and that she would have felt that way even if the contact between them was innocent. The state used T.M.'s explanation of what happened to rebut this implication, as it showed T.M. had a reasonable basis for being uncomfortable around Momanyi. The state did not continue questioning on the subject or raise the prior act again. We conclude that the district court did not abuse its discretion in permitting the testimony on the prior act to fairly respond to the defense's cross-examination of T.M. after the defense opened the door.

II. Prosecutorial Misconduct

Momanyi also argues that the prosecutor committed misconduct by trying to inflame the passions of the jury. A prosecutor has "an affirmative obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt." *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). Attorneys have considerable latitude in closing arguments. *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). But a prosecutor's closing arguments "must be based on the evidence produced at trial, or the reasonable inferences from that evidence." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). A prosecutor must not "appeal to the passions of the jury." *State v. Mayhorn*, 720 N.W.2d 776, 786-87 (Minn. 2006).

When credibility is a central issue, appellate courts pay special attention to statements that may inflame or prejudice the jury. *Porter*, 526 N.W.2d at 363. In sexual abuse cases in particular, prosecutors "must abide by the highest behavior." *State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008) (quotation

omitted). But a prosecutor may still argue that certain witnesses are believable, so long as they do not vouch for the witness. *Id.* at 552. A prosecutor has a right “to analyze the evidence and vigorously argue that the state’s witnesses were worthy of credibility whereas defendant and his witnesses were not.” *State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977).

When reviewing whether a prosecutor’s argument went too far, appellate courts consider “the argument as a whole, rather than focusing on particular phrases or remarks.” *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008) (quotations omitted).

Momanyi highlights three parts of the prosecutor’s closing argument. First, without objection, the prosecutor said:

[S]he doesn’t know what the defendant’s choice to violate her means about him and means about how little value he placed on her as a person. Children and vulnerable populations are targets for precisely that reason. Because if you don’t know that something bad has just happened, then you don’t know to tell anyone about it. And kids learn what is right and wrong and what is good and what is bad by looking to the adults around them; by trusting that they know what they’re doing and that they’ll keep you safe. The defendant took that trust, he used it, and he used it for his own perversion.

The prosecutor then said, over the defense’s objection, that, when child-abuse victims speak up,

[they enter a] world filled with adult concepts, ideas that they don’t entirely understand. And in order to tell their stories, they are forced upon a new language, right, so they’re putting their vague, sort of, undefined concepts and feelings into words that are given to them. And the whole drama plays out in grown-up context, right, so the grownups always have the upper hand.

And the prosecutor shortly thereafter said: “The deck is stacked against child abuse victims from the very beginning, which is, of course, why they make the most perfect victims; that is what their abusers count on in the first place.”

Momanyi argues that the prosecutor’s closing argument focused on themes present in a “typical child criminal sexual conduct case” but not present here. He argues that there is no evidence that T.M. did not understand the adult concepts present in this case or that the case involved a “predator-prey theme” invoked by the prosecutor’s statements.

Momanyi alleges misconduct to which the defense objected and failed to object. For conduct that was objected-to and was, in fact, prosecutorial misconduct, appellate courts apply a harmless-error test. *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010).

For claims of prosecutorial misconduct to which the defense did not object, appellate courts apply the “modified plain-error test.” *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). To prevail under the modified plain-error test, an appellant must establish that there is an error and that the error is plain. *Ramey*, 721 N.W.2d at 302. An error is plain if it “contravenes case law, a rule, or a standard of conduct.” *Id.* We will reverse under the modified plain-error standard if the state fails to demonstrate that the error did not affect the appellant’s substantial rights and we conclude that the error should be addressed to ensure the fairness and integrity of judicial proceedings. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017).

Before applying either of the above standards, we must first determine whether the prosecutor committed misconduct. Our review of the closing arguments as a whole reveals that the quotes that Momanyi highlights do not provide the full context of the statements.

As the state points out, the additional context shows that the prosecutor was emphasizing T.M.'s credibility and how her youth explained some minor inconsistencies or T.M.'s emphasis on certain details, not the general child-predator themes described by Momanyi. For instance, the prosecutor's objected-to comment stated that children have to testify in an adult world about adult concepts where adults always have the upper hand. As the state points out, the prosecutor explained soon afterwards how these statements applied here and went to T.M.'s credibility: specifically, the prosecutor discussed the CornerHouse employee's testimony that children pick out "idiosyncratic details" and use their own language to describe situations that may appear differently to adults, and how the employee used those details to assess the veracity of T.M.'s story.

Momanyi argues that there was no evidence that T.M. did not understand some of the adult concepts involved in the case. But the record shows otherwise. T.M. talked during the CornerHouse interview about a "muscle" pressing into her back when she sat on Momanyi's lap. She described the licking of her cheek and ear as "nasty" and "disgusting," not wrong. She referred to her breasts as her "unmentionables." So while there are indications that T.M. understood aspects of what was going on and that it made her feel uncomfortable, there is certainly evidence that she was dealing with adult concepts that she did not fully understand.

Momanyi analogizes to several cases as relevant examples of prosecutorial misconduct.² See, e.g., *State v. Myrland*, 681 N.W.2d 415, 421 (Minn. App. 2004) (holding that a prosecutor may not “attempt to divert the jury from the facts of the case by making broad policy arguments”), review denied (Minn. Aug. 25, 2004); *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000) (concluding that argument in child-abuse case that “[i]t’s time in this country that we start believing kids” was misconduct because it urged jurors to “return a guilty verdict . . . to send a message generally affirming the allegations of children”), review denied (Minn. May 16, 2000); *State v. Peterson*, 530 N.W.2d 843, 848 (Minn. App. 1995) (holding that it was improper for the prosecutor to “coerce or urge” jurors to convict the defendant to send a message to victims “that we will protect you”).

But the prosecutor here did not step over the lines described in these cases. She did not make broad policy arguments or suggest that the jury should find Momanyi guilty to send a message. She did not claim that the jury should simply believe T.M. without considering the evidence. Instead, she raised themes of child sexual-assault victims to explain why this particular child’s testimony was credible. We therefore conclude that the prosecutor did not inappropriately inflame the passions of the jury. And, because the prosecutor did not commit misconduct, we need not consider the remaining portions of either the harmless-error test or the plain-error test.

² Momanyi also analogizes to *State v. Danquah*, No. A18-1581, 2019 WL 3293790 (Minn. App. 2019), review denied (Minn. Oct. 5, 2019). *Danquah* is an unpublished opinion and thus not precedential. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993).

III. Sentence

The district court sentenced Momanyi to the presumptive sentence of a stayed 48-month term of imprisonment. This sentence was based on Momanyi's criminal-history score of one, which in turn was based on a custody-status point of one. But Momanyi argues that he is entitled to the benefit of a recent revision to the Minnesota Sentencing Guidelines, which would eliminate that custody-status point, and he requests resentencing. A party can raise an issue with a criminal-history score even if the party did not raise the issue with the district court. *See State v. Strobel*, 932 N.W.2d 303, 305-06 (Minn. 2019).

Under the sentencing guidelines at the time of his offense, a custody-status point was assigned "if the offender is discharged from probation but commits an offense within the initial period of probation pronounced by the court." Minn. Sent. Guidelines 2.B.2.a.(4) (2016). Momanyi states that his custody-status point was assigned under this provision because the present offense occurred during an initial period of probation for a 2015 conviction, even though he had been discharged from probation before the offense date.

In 2019, the Minnesota Sentencing Guidelines Commission amended the sentencing guidelines. The previous language about "initial period[s] of probation" no longer appears. *See Minn. Sent. Guidelines 2.B.2 (Supp. 2019)*. The parties agree that, under the amended guidelines, offenders actively on probation receive a custody-status point but offenders discharged from probation do not. Momanyi claims that he should receive the benefit of this change, which would reduce his presumptive 48-month sentence to a 36-month one.

Momanyi argues that he is entitled to relief under the amelioration doctrine. Under that doctrine, a defendant is entitled to the sentencing benefits of later amendments to the

criminal law—including the sentencing guidelines—that mitigate punishment, so long as final judgment has not been reached. *State v. Kirby*, 899 N.W.2d 485, 489, 491-94 (Minn. 2017). The amelioration doctrine applies to crimes committed before an amendment’s effective date if “(1) there is no statement by the Legislature that clearly establishes its intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered when the amendment takes effect.” *State v. Otto*, 899 N.W.2d 501, 503 (Minn. 2017).

The state concedes that conditions (2) and (3) are met: the change to the sentencing guidelines would mitigate Momanyi’s punishment by reducing his criminal-history score, and Momanyi’s judgment is not final because his appeal is still pending. See *Luna-Pliego v. State*, 904 N.W.2d 916, 919 (Minn. App. 2017). The parties only dispute condition (1): whether the legislature clearly stated its intent to abrogate the amelioration doctrine in connection with the 2019 amendments.

After the briefing in this case, we answered this question in a published decision concerning the identical issue here—the assignment of a custody-status point to an offender who had been discharged from probation. We concluded that there is no statement by the legislature clearly establishing its intent to abrogate the amelioration doctrine and that the amelioration doctrine may apply in this context. *State v. Robinette*, __ N.W.2d __, No. A19-0679, slip op. (Minn. App. Apr. 20, 2020). We follow that decision here.

Thus, if Momanyi would have a lower criminal-history score under the 2019 modification to the sentencing guidelines, the doctrine of amelioration entitles him to be resentenced with that lower score. But, while the state appears to concede that Momanyi

would receive a more lenient sentence under the 2019 guidelines and there is some reference in the record to Momanyi's early discharge from probation, the record is not clear to us that Momanyi had in fact been discharged from probation at the time of his offense here. We therefore remand the matter to the district court to determine whether Momanyi had been discharged from probation at the time of his offense and, if so, to resentence him in accordance with the amended sentencing guidelines.

Affirmed in part and remanded.