

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1601**

State of Minnesota,
Respondent,

vs.

Dominic Andre Rundles,
Appellant.

**Filed January 4, 2021
Affirmed
Segal, Chief Judge**

Dakota County District Court
File No. 19HA-CR-18-792

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

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Coley J. Grostyan, Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Segal, Chief Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges his two convictions of second-degree criminal sexual conduct arguing that (1) the district court erred by failing to grant a mistrial after a law-enforcement

witness testified that appellant declined, post-*Miranda*, to talk to investigators in violation of appellant's Fifth Amendment rights; (2) the prosecutor committed misconduct in the closing argument; and (3) the cumulative impact of the errors deprived appellant of a fair trial. We affirm.

FACTS

The criminal-sexual-conduct charges involve two victims, Child 1 and Child 2, who were both under the age of 13 at the time of the offenses. The allegations were reported to the police in March 2018, shortly after appellant Dominic Andre Rundles allegedly sexually assaulted Child 1 on the night of a birthday celebration for Rundles's stepbrother, Child 4. Child 1, Child 2 and Child 3 all attended the celebration. Child 2 and Child 3 are stepbrothers of Child 1, and the three of them often spent time at Child 4's house playing. Rundles was 20 years old at the time of Child 4's birthday celebration.

During the evening of the birthday celebration, the children went to a loft area in Child 4's house to play video games, along with Rundles. The plan was for Child 1, Child 2 and Child 3 to sleep at Child 4's house that night. Child 1 testified at trial that Rundles repeatedly touched Child 1's penis when they were playing in the loft. Child 1 testified that, because of Rundles's conduct, he decided not to sleep over at Child 4's house and sent several text messages to his mom around 3:00 a.m. to come and get him.

Once at home, Child 1 told his mom that Rundles had repeatedly touched his penis through his clothes and under his clothes. Child 1's mother called the police department the next day for advice, and then took Child 1 to speak to a detective.

Child 1 reported that, in addition to the incidents on the night of Child 4's birthday celebration, Rundles had in the past touched his private parts while playing video games and that he had seen Rundles touch Child 2's penis. Child 1's mother testified at trial that she recalled that, about a year and a half before the birthday-party night, Child 1 told her that Rundles had touched his private parts. She was not sure whether the touch was intentional or not, so she told Child 1 not to sit on the laps of nonfamily members, and to tell her if someone touched his private parts again.

Shortly after Child 1 spoke to his mother regarding the birthday-night incident, his stepbrothers, Child 2 and Child 3, spoke to their father, about their experiences. Child 3 testified at trial that he saw Rundles touching Child 1's private parts and that Child 1 decided not to sleep at Child 4's house as a result.

Child 2 testified at trial that Rundles had touched his penis on at least five occasions prior to the night of the birthday celebration. He testified that he originally did not tell anyone because he was afraid, but after Child 1 told his mom and dad about the touching, Child 2 told his dad. Child 2 testified that the last time that Rundles had touched him was the night of Child 4's birthday party.

Respondent State of Minnesota charged Rundles with two counts of criminal sexual conduct in the second-degree involving a victim under the age of 13 and an offender who is more than 36 months older. The complaint was later amended by adding two additional counts of second-degree criminal sexual conduct. Specifically, the amended complaint alleged in count 1: intentional touching of Child 1's intimate parts on March 23-24, 2018 (the night of Child 4's birthday celebration); in count 2: intentional touching of Child 2's

intimate parts between January 1, 2017-March 24, 2018; in count 3: intentional touching of Child 1's intimate parts between January 1, 2016-June 30, 2016; and in count 4: intentional touching of Child 2's intimate parts between January 1, 2016-June 30, 2016.

At trial, the three children (1, 2, and 3), their mothers, Child 2's therapist, the detective, and the initial responding officer testified as part of the state's case. The defense called the victim's advocate, Rundles's stepfather, a family friend of Rundles who attended Child 4's birthday celebration, and Rundles's grandmother, whose bedroom abutted the area where the boys played video games.

The jury found Rundles guilty of counts 1 and 2 of criminal sexual conduct in the second degree, and not guilty of counts 3 and 4. Thus, the jury found Rundles guilty of one count each of criminal sexual conduct against Child 1 and Child 2 during the time period that included the date of Child 4's birthday celebration, but not guilty of the counts of criminal sexual conduct that allegedly occurred a couple of years earlier. Rundles now appeals.

DECISION

I. The district court did not err in denying Rundles's motion for a mistrial.

Rundles argues that it was reversible error for the district court to deny his motion for a mistrial. This claim is based on testimony by the detective that Rundles chose not to talk to him after Rundles was provided with notice of his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 1627-28 (1966). Specifically, when the detective was asked why he did not interview Child 4 as part of his investigation, the

detective testified, “I would like to [have interviewed Child 4]. But, I got the impression that I would not be able to speak with him, after [Rundles] chose not to speak with me.”

The state points out the lack of clarity whether the statement by the detective referred to a point in time before or after arrest. The prosecutor, however, conceded at trial, and the state does not contest on appeal, that the statement referred to Rundles’s silence post-*Miranda* and that the testimony was in violation of his Fifth Amendment rights. Consequently, for the purposes of this appeal, we will assume without deciding that the statement violated Rundles’s Fifth Amendment rights.

After the detective made the statement, both attorneys approached the bench for an off-the-record discussion and Rundles moved for a mistrial alleging that his Fifth Amendment rights had been violated by the detective’s statement. The district court denied the motion, but added a curative instruction to the jury instructions.

In denying the motion for the mistrial, the district court reasoned that the statement was likely not prejudicial to Rundles because it was brief, particularly when viewed in the context of a four-day trial, and the state did attempt to avoid the issue in its questioning. The court noted that the statement was “unfortunate” and “it may have been somewhat prejudicial, but it is . . . harmless in the whole scheme of what we have done in the trial and how far we have come, and . . . a curative instruction . . . could cure any prejudice that it has to [Rundles].” Furthermore, although the district court confirmed that the court reporter had recorded the statement, the judge noted that the statement was so unobtrusive that she “did not necessarily hear that statement; and neither did my law clerk. I don’t know if all of the jurors heard it or not.”

On appeal, Rundles argues that the district court erred because the statement violated his right to remain silent under the Fifth Amendment and it was not inadvertent. Criminal defendants have a protected right under the Fifth Amendment to remain silent following an arrest and the exercise of this right cannot be used by the state as substantive evidence against the defendant as part of its case-in-chief at trial. *Wainwright v. Greenfield*, 474 U.S. 284, 295, 106 S. Ct. 634, 640-641 (1986); accord *State v. Penkaty*, 708 N.W.2d 185, 199 (Minn. 2006) (“Evidence that a defendant exercised his rights to remain silent . . . is generally inadmissible at trial.”); *State v. McCullum*, 289 N.W.2d 89, 92 (Minn. 1979). When an alleged error implicates a constitutional right, as is alleged here, “[the court] will award a new trial unless the error is harmless beyond a reasonable doubt. An error is harmless beyond a reasonable doubt if the jury’s verdict was ‘surely unattributable’ to the error.” *State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012) (citation omitted).

To determine whether an error was harmless, we look to the record as a whole. *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997). When reviewing the record, we will consider “the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant.” *State v. Sterling*, 834 N.W.2d 162, 171 (Minn. 2013) (quotation omitted). We have previously found that an innocuous, inadvertent, or careless statement is less persuasive. *State v. Dunkel*, 466 N.W.2d 425, 429 (Minn. App. 1991) (citing *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978); *State v. Johnson*, 192 N.W.2d 87, 92 (Minn. 1971)). Finally, “[t]he overwhelming evidence of guilt is [an additional]

factor, often a very important one, in determining whether, beyond a reasonable doubt, the error has no impact on the verdict.” *Sterling*, 834 N.W.2d at 171 (quotation omitted).

Here, the state acknowledges that the detective’s disclosure to the jury that Rundles had exercised his right to remain silent constituted an error. The state, however, argues that the statement was harmless beyond a reasonable doubt and that a new trial is not warranted. The state notes that the statement was “one sentence in a trial with a transcript over 600 pages long” and was not solicited by the prosecutor. The state also argues that Rundles’s silence was never referenced by other witnesses or by the prosecutor.

After reviewing the record, we agree that the error had low persuasive value. The improper statement occurred during redirect by the prosecutor, following up on a question that had been asked by the defense on cross-examination—why the detective had not interviewed Child 4. The detective then responded with the improper information that he assumed that Child 4 would not be made available to answer questions because Rundles “chose not to speak with me.” Aside from this lone statement, neither the prosecutor nor the state’s witnesses referred to Rundles’s silence. And the erroneous statement was, apparently, unobtrusive enough that the court commented to counsel that neither the judge nor her law clerk heard the statement.

It is also significant that the district court provided a curative instruction. One of the factors courts look at in determining whether an error is harmless is whether a cautionary instruction was given—and we presume that jurors follow such instructions. *State v. James*, 520 N.W.2d 399, 405 (Minn. 1994). “Cautionary instructions given by the trial court relating to allegations of misconduct are a significant factor favoring denial of a

motion for a mistrial.” *State v. Robinson*, 604 N.W.2d 355, 361 (Minn. 2000) (quotation omitted).

Rundles makes two claims in support of his contention that the error had an impact on the verdicts. Rundles argues, first, that the state’s case did not rest on overwhelming evidence because it relied not on any physical evidence, but on the testimony of witnesses; and, second, that the jury returned a split verdict and that the verdict was, thus, a close one. These factors, Rundles argues, must lead the court to determine that the verdict was not “surely unattributable” to the error. We disagree.

While the evidence in the case largely relied on witness testimony, instead of video recordings or other similar evidence, that does not mean there was not overwhelming evidence. At trial, in addition to the testimony of the two alleged victims, the state presented the testimony of Child 3, who was an eyewitness, and the testimony of the victims’ parents and a therapist, whose testimony corroborated the alleged victims’ statements. Thus, the jury heard not only the testimony of the two victims, but Child 3 testified that he saw Rundles touch Child 1’s genitals on the night of Child 4’s birthday party and Child 2’s testimony was corroborated by his disclosures to his parents and to his therapist. The state also presented the physical evidence of the text messages sent by Child 1 the night of Child 4’s birthday party asking his mother to come and get him in the early morning hours after Rundles had touched his genitals.

Further, the cases cited by Rundles as having “overwhelming evidence of guilt” in support of his argument all relied on witness testimony and had either negligible or no physical evidence. *Haglund*, 267 N.W.2d at 506 (evidence of guilt was testimony by

defendant's co-conspirator, brother, and police officers); *Dunkel*, 466 N.W.2d at 429 (detailed testimony by sexual-assault victim and her timely reporting to the police established overwhelming evidence of guilt); *State v. Farr*, 357 N.W.2d 163, 166 (Minn. App. 1984) (evidence of guilt was testimony by sexual-assault victim and witnesses who did not see the assault).

With regard to the significance of the split verdict, we note that the jury found Rundles guilty of the counts for the assaults that occurred on the evening of Child 4's party. The testimony here was more clear and definite and was also supported by detailed corroborating evidence, such as Child 3's eyewitness testimony and Child 1's text messages. The not-guilty verdicts involved the alleged assaults that occurred a couple of years earlier. These counts were not supported by testimony that was as detailed, and Child 1 and Child 2 were not able to provide specifics of when and how many times these earlier offenses occurred. The evidence of the earlier assaults was, thus, less clear and compelling. We, therefore, cannot draw the conclusion that the split verdicts reflect a close case with respect to the more recent assaults. Instead, the split verdict could be read as demonstrating the jury's close attention to the evidence and their careful weighing of that evidence against the burden of proof required for a guilty verdict.

Reviewing the record as a whole, we are convinced that the verdict was surely unattributable to the detective's testimony that Rundles did not want to speak to him. For all of the above reasons, we affirm the district court's denial of Rundles's request for a mistrial.

II. The challenged statements in the state’s closing argument do not constitute plain error.

Rundles next argues that certain statements made by the prosecutor during closing argument constituted prosecutorial misconduct. Because Rundles made no objection at trial to these statements, we apply a modified plain-error standard of review to evaluate his claim of prosecutorial misconduct. Under the modified plain-error standard of review, the burden is on the defendant to demonstrate both that an error occurred and that the error was plain; if the defendant demonstrates that the prosecutor committed plain error, the burden shifts to the state to “demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). “An error is plain if it was clear or obvious.” *Id.* (quotation omitted). To prove a lack of prejudice, the state must show 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.* (quotation omitted).

This court “will reverse a conviction if prosecutorial error, considered in light of the whole trial, impaired the defendant’s right to a fair trial.” *State v. Washington*, 725 N.W.2d 125, 133 (Minn. App. 2006) (citing *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006)), review denied (Minn. Mar. 20, 2007). Prosecutors in sexual-abuse cases are held to an especially high standard of behavior due to the emotional nature of such cases and the likelihood that any “emotive appeal to jurors is likely to be highly prejudicial.” *State v. Jahnke*, 353 N.W.2d 606, 611 (Minn. App. 1984).

Rundles claims that statements made by the prosecutor in closing argument constitute misconduct. He argues she (1) made statements designed to inflame and

prejudice the jury; (2) improperly criticized the cross-examination by Rundles's defense counsel as harsh and that Rundles had further traumatized the victims simply by exercising his constitutional right to a trial, thereby violating Rundles's Sixth Amendment rights; and (3) vouched for the credibility of the state's witnesses.

Specifically, Rundles points to the following statements made by the prosecutor concerning the victims' lack of a motive to lie as seeking to inflame the jury:

Because of these allegations, these kids have given up a huge chunk of their lives and a huge chunk that they loved. . . . All of those things that lead there[sic], common, day-to-day activities, that our common sense and our life experience tell us children crave, was completely taken away from them as a result of this. . . . And they have lost so much more. These children have had to talk about issues that are way too big for [a] child's brain. And not once, not twice, but three times, in a system not designed for children. . . . A mother's worst nightmare.

Rundles's complaints about the prosecutor's comments on the cross-examination techniques employed by Rundles's defense counsel, focus on the following statements:

They have had to be interviewed by law enforcement. They have had to be prepared for trial. And you saw each one of them—all three of them—sit up there and not only relay to you what happened to them, but also be cross-examined harshly by the defense attorney. And you saw how hard it was for each of those, the three of them, to come up there and do that.

. . . .

And it makes sense, then, when you are questioned by three different adults, when you are questioned by myself, when you are questioned by [the detective] and when you are questioned—and let's be very clear—and confusingly cross-examined, harshly, by [defense counsel], that there will be inconsistencies.

And, finally, for his claim of improper vouching by the prosecutor, Rundles points to the following statement: “But, no matter what, each and [every one] of [the child-witnesses] are at [an] age where they couldn’t make this up, even if they wanted to,” and to the fact that the prosecutor stated three times in the closing argument that the children “are credible.”

We turn first to Rundles’s argument that statements in the state’s closing argument improperly inflamed and prejudiced the jury. Prosecutors must avoid inflaming the jury’s passions and prejudices against the defendant. *State v. Bailey*, 677 N.W.2d 380, 404 (Minn. 2004). However, the state’s argument need not be colorless, and it may include “conclusions and inferences that are reasonably drawn from the facts in evidence.” *State v. Matthews*, 779 N.W.2d 543, 551 (Minn. 2010).

Rundles points to the state’s comments on the trauma endured by the children as an attempt to inflame the jury’s passions and prejudices. It appears, however, that the prosecutor relies on the description of the difficulty that the children had in providing statements and acting as witnesses not primarily to provoke the jury’s sympathy, but to demonstrate a lack of motivation to lie. Rundles’s primary theory of the case at trial was that the confusing timeline indicates that the children lied about the alleged assaults, the lie got out of control, and the children were all stuck with that lie at trial. The prosecutor used the description of the children’s hardships—having to move neighborhoods, avoid common activities, and having to repeat the traumatic story—as evidence that maintaining a lie in this situation was more difficult than admitting to it. These statements, within their context, do not appear to be an improper attempt to prejudice the jury.

Next, Rundles argues the state's comments on the defense's cross-examination techniques affected Rundles's Sixth Amendment right to counsel and to confrontation. Both the United States and Minnesota Constitutions guarantee a criminal defendant the right to a public trial by an impartial jury and to confront witnesses against him. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *see also State v. McNeil*, 658 N.W.2d 228, 235 (Minn. App. 2003). In *McNeil*, this court found prosecutorial misconduct when the prosecutor attacked the defendant for forcing the alleged victim "to go through a trial: 'To come in here and put her through this, shamed her for never telling anyone, [victimize her] all over again.'" 658 N.W.2d at 235 (alteration in original).

In this case, Rundles argues that the prosecutor's description of the cross-examination of the child witnesses as "harsh" and "confusing" improperly affected Rundles's rights. However, the prosecutor did not attack Rundles for exercising his rights to go to trial or attack his right to establish a defense and these statements appear dissimilar to the statements found improper in *McNeil*. Rather, in context, the statements here appear to have been meant to explain why some of the child victims' testimony may have appeared muddled on cross-examination. Thus, the comments relating to the questioning by defense counsel do not rise to the level of plain error.

Finally, Rundles argues that the state improperly vouched for the credibility of its witnesses. Prosecutors may not imply a guarantee of a witness's truthfulness or express "a personal opinion as to a witness's credibility." *State v. Rucker*, 752 N.W.2d 538, 552 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. Sept. 23, 2008). However, the state is not prohibited from arguing that certain witnesses are believable. *Id.* The

Minnesota Supreme Court has allowed the state to say witnesses were “very believable” but found the state to be impermissibly vouching for a witness when it said “the state believes the witness is very believable.” *Swanson*, 707 N.W.2d at 656.

In this case, Rundles points to the prosecutor’s statements “But, no matter what, each and [every one] of them are at [an] age where they couldn’t make this up, even if they wanted to” and three times saying “they are credible” as improper vouching. Here, the state did not personally vouch for the witnesses’ credibility, or vouch for it on behalf of the state. Although the statement “they couldn’t make this up, even if they wanted to” could be read as implying a guarantee of a witness’s truthfulness, it is not a personal statement and it directly responds to Rundles’s argument that the children were lying in part because they were children. Thus, these statements also do not rise to the level of plain error.

We conclude that Rundles has failed to demonstrate plain error by the state with regard to statements in its closing argument.

III. With no findings of error, there is no basis to reverse for a new trial.

Rundles’s final argument is that there were cumulative errors that entitle him to a new trial. Because we have found no error either in the district court’s denial of Rundles’s motion for a mistrial or in the state’s closing argument, the argument is without merit and the convictions must be affirmed.

Affirmed.