

*This opinion is nonprecedential except as provided by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
A20-0322**

State of Minnesota,
Respondent,

vs.

Rene Gabriel-Ramos,
Appellant.

**Filed February 14, 2022
Affirmed in part, reversed in part, and remanded
Klaphake, Judge^{*}**

Nobles County District Court
File No. 53-CR-19-405

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

Joseph M. Sanow, Nobles County Attorney, Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

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

Considered and decided by Reilly, Presiding Judge; Florey, Judge; and Klaphake, Judge.

^{*} Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

KLAPHAKE, Judge

A jury found appellant guilty of three counts of criminal sexual conduct. While count one permitted a finding of guilt for either sexual penetration or contact, counts two and three were based solely on penetration. Appellant raises several claims in this direct appeal. Among them, he argues that the district court erred in admitting hearsay evidence of penetration. Because the district court committed reversible error by admitting that evidence, we reverse the guilty verdicts on counts two and three. However, we affirm the guilty verdict on count one and remand to the district court to enter a judgment of conviction and sentence on that count.

FACTS

In May 2019, the state charged appellant Rene Gabriel-Ramos with three counts of first-degree criminal sexual conduct, alleging that he abused his ten-year-old niece between November 2018 and May 2019. The first count permitted a finding of guilt based on either sexual penetration *or* sexual contact, while the second and third counts required sexual penetration. *See* Minn. Stat. § 609.342, subds. 1(a), (g), (h)(iii) (2018). The matter proceeded to a jury trial.

Evidence established that Gabriel-Ramos lived with the niece and her family for approximately four years. A cousin also stayed at the residence for some time. The cousin and Gabriel-Ramos both separately sexually abused the niece. The niece told her brother about the abuse, and he made statements to a social worker, who contacted law enforcement.

The niece testified that Gabriel-Ramos touched her “private part” with “[h]is private part.” She clarified that his private part was what he used “[t]o pee.” She testified that she was unclothed on her “bottom” and was not wearing underwear when this abuse occurred.

The niece had previously given a forensic interview concerning the abuse with “Child’s Voice.”¹ The state sought to introduce the interview as substantive evidence. The defense argued that it was inadmissible hearsay. The district court ruled that the forensic interview was admissible as a prior consistent statement under Minn. R. Evid. 801(d)(1)(B).

A medical provider with Child’s Voice testified about her evaluation of the niece. In response to a question from the state, the medical provider testified that the niece “disclosed” Gabriel-Ramos “put his fingers inside --.” The defense objected to the medical provider’s response as inadmissible hearsay because the testimony was not consistent with the niece’s trial testimony. The district court overruled the objection on the grounds of “medical diagnosis.”

An officer who interviewed Gabriel-Ramos about the abuse allegations testified, and a recording of that interview was admitted into evidence. A Spanish interpreter had been present for the interview and translated the officer’s questions and statements into Spanish for Gabriel-Ramos. Prior to trial, the defense had moved to redact some of the officer’s statements made during the recorded interview. The district court granted the

¹ The record indicates that Child’s Voice is a medical clinic for abused children. The clinic employs a trained forensic interviewer to identify the “child’s history of the current concerns.”

motion and ordered certain statements redacted. The recorded interview was played for the jury. However, the Spanish interpretations of some of the redacted statements were played for the jury, and two of the jurors spoke Spanish. One of the Spanish-speaking jurors was an alternate and excused prior to deliberations.

On the third day of trial, after the close of evidence, the state moved to amend the complaint to allege a different range of dates for the charges: June 7, 2015, to May 2, 2019. The defense objected, but the district court permitted the amendment.

The jury returned guilty verdicts on all three counts. The district court entered a conviction on count three and sentenced Gabriel-Ramos to 144 months in prison. Gabriel-Ramos appealed his conviction, and we later stayed the appeal to permit Gabriel-Ramos to seek postconviction relief. Gabriel-Ramos filed a postconviction petition, which the postconviction court denied. We then dissolved the stay and reinstated the appeal.

DECISION

I.

Gabriel-Ramos argues that the district court erred in admitting the forensic interview as a prior consistent statement because it was inconsistent with the niece's trial testimony. We agree.

We review a district court's evidentiary rulings for an abuse of discretion. *State v. Nunn*, 561 N.W.2d 902, 906-07 (Minn. 1997). A district court abuses its discretion if its ruling is "based on an erroneous view of the law or is against logic and the facts in the record." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted). On appeal, the defendant has the burden of proving both that the district court abused its

discretion in admitting the evidence and that he was thereby prejudiced. *Nunn*, 561 N.W.2d at 907. “Reversal is warranted only when the error substantially influences the jury’s decision.” *Id.*

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Minn. R. Evid. 801(c). Generally, hearsay is inadmissible at trial. Minn. R. Evid. 802. But a witness’s prior statement is not hearsay if “[t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility as a witness.” Minn. R. Evid. 801(d)(1)(B). When a witness’s prior statement “contains assertions about events that have not been described by the witness in trial testimony, those assertions are not helpful in supporting the credibility of the witness and are not admissible.” *State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007). Rule 801(d)(1)(B) “should not be the means to prove new points not covered in the testimony of the speaker.” *Id.* (quotation omitted). Otherwise, “a few consistent statements in a multi-statement interview may be used to bootstrap into evidence inconsistent statements that do not qualify under the rule.” *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *rev. denied* (Minn. Feb. 23, 2000).

The forensic interview and the niece’s trial testimony were inconsistent as to the manner of sexual abuse. During her forensic interview, the niece stated that Gabriel-Ramos penetrated her vagina with his fingers. But during her testimony, she did not allege digital penetration by Gabriel-Ramos. Rather, she testified that Gabriel-Ramos engaged in

genital-to-genital contact with her multiple times. Because the forensic interview contained assertions that were not made during the niece's trial testimony, the district court abused its discretion in admitting the forensic interview under rule 801(d)(1)(B).

During cross-examination, the niece testified that her cousin digitally penetrated her, and during her direct and redirect examinations, she stated that her cousin "was doing the same things" and "the same kind of stuff" as Gabriel-Ramos. The state therefore argues that the niece testified that Gabriel-Ramos engaged in digital penetration.

We acknowledge that a prior statement need only be "reasonably consistent" with trial testimony to be admissible under rule 801(d)(1)(B). *Id.* "The trial testimony and the prior statement need not be identical to be consistent" *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005). However, the niece's assertions that Gabriel-Ramos did the same "things" and "stuff" as the cousin do not establish consistency. First, "things" and "stuff" are amorphous terms. The niece could have simply been stating that both Gabriel-Ramos and the cousin sexually abused her. Second, the niece's acknowledgements that Gabriel-Ramos did the same "things" and "stuff" did not occur contemporaneously with her testimony that the cousin engaged in digital penetration. Again, the niece testified during cross-examination that her cousin digitally penetrated her, but her statements that Gabriel-Ramos did the same "things" and "stuff" occurred during her direct and redirect examinations. Third, the niece clearly testified that the cousin engaged in digital penetration, indicating that she was able to provide such testimony concerning Gabriel-Ramos. The forensic interview and trial testimony were not sufficiently consistent.

We next consider prejudice. We conclude that the forensic interview substantially influenced the jury's decision as to counts two and three. *See Nunn*, 561 N.W.2d at 907; *Bakken*, 604 N.W.2d at 110. The forensic interview provided the only clear evidence that Gabriel-Ramos engaged in sexual penetration. In fact, the state conceded at oral argument before this court that if the forensic interview was erroneously admitted, then prejudice resulted. While the medical provider testified that the niece disclosed penetration, as further analyzed below, that disclosure was also inadmissible. We therefore reverse the guilty verdicts for counts two and three.

However, the niece testified that Gabriel-Ramos engaged in genital-to-genital contact with her on multiple occasions. Count one permitted a finding of guilt based on either sexual penetration or contact. At trial, the defense argued that the niece had confused Gabriel-Ramos with the cousin, and Gabriel-Ramos had not engaged in sexual abuse. The jury rejected this defense. We therefore fail to see how the erroneous admission of the forensic interview affected the verdict as to count one. We remand to the district court to enter a judgment of conviction on count one and sentence on that count.

II.

Gabriel-Ramos argues that the district court erred in permitting testimony from the medical provider that the niece disclosed digital penetration. Again, the district court permitted the testimony on the grounds of "medical diagnosis," and the district court also, incorrectly, determined that the medical provider had failed to identify a perpetrator when; in fact, the medical provider identified Gabriel-Ramos.

The medical-diagnosis exception to the hearsay rule applies to “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” Minn. R. Evid. 803(4). Under the medical-diagnosis exception, the statements are admissible “only if the evidence suggests that the child knew she was speaking to medical personnel and that it was important she tell the truth.” *State v. Salazar*, 504 N.W.2d 774, 777 (Minn. 1993).

In testifying about the niece’s disclosure that Gabriel-Ramos “put his fingers inside,” the medical provider gave no indication that the statement was made to medical personnel in the context of a medical diagnosis or treatment. *See* Minn. R. Evid. 803(4). The medical provider was simply giving her “impressions” of the case. The district court abused its discretion in permitting the testimony under the medical-diagnosis exception. The medical provider’s statement further prejudiced Gabriel-Ramos as to counts two and three but had no impact as to count one. *See Nunn*, 561 N.W.2d at 907.

III.

Gabriel-Ramos argues that the prosecutor committed prosecutorial misconduct by arguing that the jury could infer penetration from the niece’s testimony that Gabriel-Ramos engaged in genital-to-genital contact with her.

During his closing argument, in discussing penetration, the prosecutor stated as follows:

[I]t fits the testimony that was provided by [the niece] on Wednesday where she described genital to genital contact as best as she could when she explained that body part that was involved, when she had her pants and her underwear off, was her private part that she used to pee. And that she had sexual or that she had contact with the defendant's private part that he used to pee. If you believe that that was her describing sex, that also fits the element of sexual penetration

The prosecutor made additional, similar statements during his closing, for example:

If you believe that [the niece] was telling the truth when she said that she had her pants and underwear off and that defendant's private part had contact with her private part, then you probably have to conclude that he was trying to put his penis inside of her or that he was having sex with her, raping her.

The defense failed to object to the prosecutor's statements during closing. When an appellant seeks review of prosecutorial misconduct but did not object during closing argument, we apply a modified plain-error standard of review. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An appellant must demonstrate that an error occurred and that the error was plain. *Id.* If those elements are established, then the burden shifts to the state to show the conduct did not affect the appellant's substantial rights. *Id.* An error is plain if the prosecutor's conduct "contravenes case law, a rule, or a standard of conduct" and it is "clear or obvious." *Id.* (quotations omitted). If the three elements of the modified plain-error test are met, this court must decide whether it should address the error "to ensure fairness and the integrity of the judicial proceedings." *Id.*

A prosecutor's closing argument "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). But the prosecutor "may not speculate without a factual basis." *State v.*

Peltier, 874 N.W.2d 792, 804 (Minn. 2016). When this court reviews a closing argument for prosecutorial misconduct, “we look to the closing argument as a whole, rather than to selected phrases and remarks.” *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted).

The niece testified that Gabriel-Ramos engaged in unclothed genital-to-genital contact with her multiple times. Sexual penetration is defined to include “any intrusion however slight into the genital or anal openings.” Minn. Stat. § 609.341, subd. 12(2) (2018). While the ten-year-old girl did not expressly state that Gabriel-Ramos engaged in penetration, the prosecutor did not clearly or obviously violate the standards for closing arguments by asking the jury to infer penetration from her testimony.

IV.

Gabriel-Ramos argues that the Spanish translations of the officer’s redacted statements, made during the recorded interview with Gabriel-Ramos, were erroneously admitted. Gabriel-Ramos assigns fault to the district court, the prosecutor, and defense counsel. While the defense raised the issue of the Spanish interpretations remaining in the recorded interview, there was no specific objection.

Spanish translations of the following statements by the officer, which the district court had ordered redacted, were played for the jury:

- [A]nd she told her brother[,] and her brother has told us the exact same thing.
- Ok. So, you’re telling me that a 10-year-old can come up with an elaborate of plan and a story involving sexual touching and penetration?

- I think you're not being truthful with me. I think that you're scared about what's going to happen and you know what happened, so you're just blaming that she's making it up.
- Her brother was even about to start crying when he told me that he had to stay awake at night to protect her from you and your other cousin in the house.
- That's not normal behavior for kids at that age to come up with a plan like that. Unless something actually happened to them.
- And she talks about—she can't even say what her private parts are. She has to refer to them as her pee area because she is so traumatized by what happened.²

As to the district court's failure to exclude the evidence, Gabriel-Ramos failed to offer a specific objection, and he must therefore show that the admission of the unredacted translation was plain error that affected his substantial rights. *See State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008). Here, even presuming that the district court plainly erred, Gabriel-Ramos fails to make a sufficient showing of prejudice.

We recognize that courts should be cautious about the influence of an officer's opinions. *See State v. Hogetvedt*, 623 N.W.2d 909, 915 (Minn. App. 2001) (stating that, “[g]iven [the officer]’s status as a police officer,” his opinion as to guilt “may have unduly influenced the jury”), *rev. denied* (Minn. May 29, 2001). However, the officer's translated statements were made in the context of an interrogation, not during his testimony. *See Dubria v. Smith*, 224 F.3d 995, 1002 (9th Cir. 2000) (concluding that detective's statements made during pretrial interview did not “carry any special aura of reliability”). The jury was specifically instructed that they were “the sole judges of whether a witness is to be

² Additionally, the district court ordered that a statement about Gabriel-Ramos potentially being put in jail be redacted.

believed and of the weight to be given a witness'[s] testimony.” Moreover, the record shows that only two jurors spoke Spanish, and one of those was an alternate and excused prior to deliberations. Given the niece’s testimony that Gabriel-Ramos engaged in genital-to-genital contact multiple times, we cannot say that admission of the unredacted translations affected the verdict.

As for the prosecutor’s actions, again, we review unobjected-to prosecutorial misconduct under a modified plain-error standard of review. *Ramey*, 721 N.W.2d at 302. Gabriel-Ramos must demonstrate plain error, and the burden then shifts to the state to show the conduct did not affect Gabriel-Ramos’s substantial rights. *Id.* Even presuming plain error occurred, the state has made a sufficient showing that Gabriel-Ramos’s substantial rights were not affected. As noted by the state, it is simply not reasonable to conclude that the single Spanish-speaking juror who deliberated was able to convince the other jurors to reach a guilty verdict based upon Spanish translations of the officer’s statements made during an interrogation, translations that the other jurors could not themselves make.

Lastly, we may dispose of a claim of ineffective assistance of counsel if the appellant fails to show “a reasonable probability” that, but for counsel’s errors, the trial verdicts would have been different. *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020). For the reasons previously discussed, Gabriel-Ramos fails to make such a showing.

Gabriel-Ramos also argues that the district court erred by failing to redact several of the officer’s statements after specifically concluding that statements by the officer that Gabriel-Ramos was being untruthful, and opinions of the officer as to the reason for the

niece's conduct, should be redacted. Gabriel-Ramos challenges the admission of the following unredacted statements:

- So, that's what you're going to stick with? I'm not lying and I'm not this?
- I think you're scared about what's going to happen. I think that's why you won't tell me what's going on.
- [M]aybe it hasn't happened in the past 2-3 months, but prior to that is when it was happening.
- And this is your time to tell me what happened if it was—maybe you were under the influence of alcohol, I don't know.
- [I]f you want to sit here and say, "it wasn't me," that little girl has to live with that the rest of her life. Knowing her uncle did something to her and won't own up to the responsibility.
- [I]f that's what you want to stick with, then that's what you stick with, I guess, your story. I'm giving you a chance.
- Ok, if that's what you want to keep going with.
- I'm not sure how you're going to live with yourself about doing that to a 10-year-old and not getting it off your chest.

Again, we review a district court's evidentiary rulings for an abuse of discretion. *Nunn*, 561 N.W.2d at 906-07. Here, Gabriel-Ramos moved to exclude, in addition to some specific statements, "the officer's opinion that the officer does not think" Gabriel-Ramos "is being truthful, and "the officer's opinion" that Gabriel-Ramos "is lying because he is scarred [sic] of what is going to happen to him." In granting Gabriel-Ramos's motion, the district court specifically highlighted the portions of the interrogation that were to be redacted. Gabriel-Ramos failed to request further redactions. We cannot say that the district court abused its discretion by failing to exclude these additional statements. Moreover, Gabriel-Ramos fails to establish prejudice stemming from these limited statements, which occurred in the context of an interrogation. *See id.* at 907.

V.

Gabriel-Ramos argues that the district court abused its discretion by allowing the state to amend the complaint after the close of evidence to expand the timeframe of the alleged abuse. The original complaint alleged that Gabriel-Ramos committed the offenses between November 1, 2018, and May 2, 2019. The amended complaint alleged that he committed the offenses between June 7, 2015, and May 2, 2019.

The evidence of when the sexual abuse occurred was vague. Because of this, the prosecutor sought to expand the date range for the offenses to cover “the entire time from when [Gabriel-Ramos] was an adult all the way through his removal [from] the home.” The defense objected to the amendment. The district court permitted the amendment, reasoning as follows:

Um, it changes the dates. The Court finds that the evidence available to the defendant, which included the interview at Child’s Voice as well as the evidence presented at trial, gave the defendant fair notice of what the victim’s testimony would be in regard to the date range of these offenses. Um, the Court finds that—that the amended complaint matches the evidence presented at trial and, um, that the defendant is not prejudiced by the—or unduly prejudiced by the amendment of the complaint.

The rules of criminal procedure provide that “[t]he court may permit [a] . . . complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if the defendant’s substantial rights are not prejudiced.” Minn. R. Crim. P. 17.05. We review a district court’s decision to permit an amendment to the complaint for an abuse of discretion. *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004).

The district court did not abuse its discretion by permitting the state to amend the complaint. As found by the district court, Gabriel-Ramos had “fair notice” of what the niece’s testimony would be at trial. During her forensic interview, the niece could not recall when she told her brother about the abuse. She could not recall when Gabriel-Ramos first abused her, but she stated that she was nine or ten years old the last time he abused her. She was ten years old at the time of trial. She stated that Gabriel-Ramos did not abuse her when she was in the fourth grade. She was in the fifth grade at the time of trial. She stated it was “a long time ago.”

Though the niece testified at trial that the abuse happened multiple times, she could not recall how long the abuse had been occurring and could not recall what grade she was in when the abuse occurred. “Where the date is not the essential element of the crime the [district] court may properly allow an amendment of the complaint so it comports with evidence presented at trial.” *Ruberg v. State*, 428 N.W.2d 488, 490 (Minn. App. 1988), *rev. denied* (Minn. Oct. 26, 1988).

Gabriel-Ramos argues that the amendment prejudiced his substantial rights because the cousin who abused the niece only lived at the residence for a portion of the time that Gabriel-Ramos lived at the residence, and because the primary defense to the charges was that the niece confused Gabriel-Ramos with the cousin, expanding the charging dates allowed the jury to consider additional time in which the cousin was not around, thereby “eviscerat[ing] his defense.”

The supreme court has stated that “the opportunity to prepare a defense in a criminal case is a substantial right.” *State v. DeVerney*, 592 N.W.2d 837, 846 (Minn. 1999).

However, expansion of the charging dates did not meaningfully impact Gabriel-Ramos's defense. Evidence showed that the cousin resided at the residence intermittently. For example, the niece's father testified that the cousin lived with the family "for a total of four to five weeks," but he also testified that the cousin "had lived there before" approximately nine months prior. Given the lack of exact dates for when the abuse occurred, and the lack of any clear dates for when the cousin resided at the residence, expanding the charging dates did not meaningfully prejudice Gabriel-Ramos's defense. Indeed, despite the expansion of the charging dates, the defense maintained in closing argument that the niece had confused Gabriel-Ramos with the cousin. *See id.* (concluding that the defendant did not suffer "substantial prejudice").

Gabriel-Ramos also argues that the amendment resulted in "a different offense" because the date range in this case was "a material ingredient."³ We disagree. Gabriel-Ramos fails to identify any essential elements of the first-degree criminal sexual conduct charges that were altered by the amendment. The substantive offenses remained the same. *See id.* (determining, as part of a rule 17.05 analysis, that aiding and abetting instruction did not alter the substantive offense); *see also State v. Becker*, 351 N.W.2d 923, 926 (Minn. 1984) ("[T]he rule has evolved that in the prosecution of crimes in which a particular day is not a material ingredient of the offense, the indictment or complaint need not allege the particular date on which the offense was committed, only that it occurred before the

³ We acknowledge that in reviewing an amendment to a complaint under rule 17.05, generally the first step is to determine whether the amendment resulted in an additional or different offense being charged. *DeVerney*, 592 N.W.2d at 846. For purposes of concision, we have reversed the order of the analysis.

issuance of an indictment or complaint.” (quotation omitted)). The district court did not abuse its discretion.

VI.

Lastly, Gabriel-Ramos argues that he is entitled to a new trial because of the cumulative effect of the trial errors. “An appellant may be entitled to a new trial in rare cases where the errors, when taken cumulatively, have the effect of denying the appellant a fair trial.” *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017) (quotation omitted). “When considering a claim of cumulative error, we look to the egregiousness of the errors and the strength of the [s]tate’s case.” *Id.*

We have determined that admission of the hearsay evidence of penetration requires reversal of the guilty verdicts for counts two and three. However, we have also determined that the prosecutor did not engage in plain-error misconduct, the officer’s unredacted statements did not prejudice Gabriel-Ramos, and the district court did not abuse its discretion in permitting the state to amend the complaint. Given the strong evidence that Gabriel-Ramos engaged in sexual contact with his niece, we see no basis to reverse for a new trial based on cumulative errors. *See id.* at 279 (stating that appellate courts are “more inclined to order a new trial for cumulative errors in very close factual cases”).

Affirmed in part, reversed in part, and remanded.