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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1069**

Brian Ford Dowell, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 10, 2021
Affirmed
Bratvold, Judge**

Hennepin County District Court
File No. 27-CR-18-2265

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

The jury found appellant guilty of second-degree criminal sexual conduct for molesting his ten-year-old daughter while they played video games. Appellant seeks review of the district court's order denying postconviction relief, arguing that reversible

error occurred during his trial. First, appellant contends that the prosecuting attorney committed prejudicial plain error in two ways: (1) by arguing in closing that “people who prey on children” realize that “children are the perfect victims,” and (2) by emphasizing that appellant asked no questions of a police officer when he learned child protection was involved. Second, appellant argues that the district court improperly admitted evidence of a journal entry where his daughter expressed suicidal thoughts. Because the prosecuting attorney’s closing arguments either did not amount to plain error or did not affect appellant’s substantial rights, and because the district court did not abuse its discretion by admitting the journal entry, we affirm.

FACTS

Respondent State of Minnesota charged appellant Brian Dowell with criminal sexual conduct in the second degree under Minn. Stat. § 609.343, subd. 1(a) (2016), alleging that he touched his daughter with sexual intent when she was under the age of 13. The following summarizes the evidence received during the July 2018 jury trial.

In September 2017, Dowell and his ten-year-old daughter, L.D., were sitting together on a couch playing games on their cell phones. Dowell put his hands between L.D.’s legs and touched her genital area. Later that night, L.D. started chatting through an application on her phone and told the group chat about what had happened to her on the couch. They encouraged her to report her father’s behavior.

The next day at school, L.D. sent messages to a friend and classmate, saying that she and her father were “playing video games” and then describing how her dad molested her. The detective who obtained the messages later read the exchange to the jury. L.D.

wrote, “So he had his hand on my leg because I was cold, . . . [he] moved it down . . . middle of my legs down. . . . He touched it.” L.D. repeated, “it.” L.D.’s friend suggested she should tell the school psychologist, which is what L.D. did. The psychologist informed other school staff and contacted child protection.

When Dowell arrived at school that afternoon to pick up L.D., a police officer told him he was not allowed to be with L.D. and that he would need to find alternative housing. The next week, L.D. was interviewed at CornerHouse, a child-abuse advocacy center. During the interview, L.D. stated that her father touched her vagina. The interview was recorded and later received into evidence and played for the jury.

The jury also heard testimony from witnesses that included L.D., a police officer who spoke with Dowell, the school social worker, and Dowell. The officer testified that, after he told Dowell he could not see his daughter or take her home, Dowell had a “nervous, startled look on his face.” Also, according to the officer’s testimony, Dowell did not ask any questions and instead just left. During cross-examination, the officer agreed that, because the investigation was open, he would not have been able to tell Dowell any details.

In his testimony, Dowell denied molesting L.D., explaining he could not touch her while playing the cell-phone game because it was “improbable to play with one hand.” Dowell testified that when he picked up L.D. from school, he did not ask any questions because he was told he would not get any answers.

The jury convicted Dowell of criminal sexual conduct in the second degree. The district court sentenced Dowell to 36 months in prison, staying execution for five years. Dowell did not pursue a direct appeal of his conviction. In February 2020, Dowell

petitioned for postconviction relief. The district court denied the postconviction petition without a hearing. This appeal follows.

DECISION

We review postconviction rulings for abuse of discretion. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). Because Dowell did not take a direct appeal, he may “raise nearly the same breadth of claims that could have been brought in a direct appeal.” *Deegan v. State*, 711 N.W.2d 89, 94 (Minn. 2006).

I. During closing argument, the prosecuting attorney committed misconduct amounting to plain error, but the error did not affect Dowell’s substantial rights.

Dowell contends that the prosecuting attorney committed misconduct during closing argument by using a “scripted sequence” to argue why men prey on children, and by emphasizing Dowell’s silence to a police officer. Dowell’s attorney did not object to either argument during trial.

When an appellant has failed to object during trial, we review allegations of prosecutorial misconduct under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Under this standard, the appellant bears the burden of establishing (1) an error that (2) is plain. *Id.* An error is plain when it is “clear or obvious,” as where the error “contravenes case law, a rule, or a standard of conduct.” *State v. Cao*, 788 N.W.2d 710, 715 (Minn. 2010). If the appellate court finds plain error, then it considers a third element: whether the error affected appellant’s substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error affects substantial rights when “there is a ‘reasonable likelihood’ that the absence of the error would have had a ‘significant effect’

on the jury’s verdict.” *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) “[T]he burden shifts to the [s]tate to demonstrate that the plain error did not affect the [appellant]’s substantial rights.” *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). If these three elements are satisfied, then the appellate court “assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Attorneys have considerable latitude in closing arguments. *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). The state may “present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence” but may not “misstate the evidence.” *State v. Peltier*, 874 N.W.2d 792, 804-05 (Minn. 2016) (quotations omitted). When determining whether a prosecuting attorney has overstepped these lines, an appellate court considers “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). To warrant reversal, the prosecuting attorney’s misconduct, “considered in the context of the trial as a whole, [must be] so serious and prejudicial that the defendant’s constitutional right to a fair trial was impaired.” *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000).

Because different caselaw guides our analysis of Dowell’s two prosecutorial misconduct arguments, we will discuss his arguments in turn.

A. “People who prey on children”

Dowell argues that the prosecuting attorney’s predator argument was plain error because it was “designed to appeal to the jury’s passions and prejudices” and was

“unrelated to the facts in the case.” The state agrees that the predator argument was plain error, but contends the argument did not affect Dowell’s substantial rights.

At the beginning of closing arguments, the prosecuting attorney discussed “people” who sexually abuse children:

People who prey on children are counting on that secrecy. That’s why they pick children. Kids are afraid. They’re confused. They’re ill-equipped to handle a sudden and unexpected violation of their bodies, especially by a person they love and trust. Children are easily dismissed. They’re easily disbelieved by adults. “Oh, they just want attention,” or, “Maybe she’s mad at her dad because he took away her iPhone or something.” And people who do this count on that. And they know, kids know they’re easily dismissed. They know they don’t always have the words or the language to talk about what’s happened, and that fact just adds to the fear and the panic and the confusion that they feel. Children are the perfect victims in that way and that’s why we have to listen to them.

(Emphasis added.) The prosecuting attorney made similar arguments at the end of the initial closing argument but not in rebuttal.¹ The postconviction court found this argument to be plain error, but that the error did not affect Dowell’s substantial rights.

A prosecuting attorney’s duty is not to “seek a conviction at any price but, rather, is to act as a minister of justice.” *State v. Duncan*, 608 N.W.2d 551, 555 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. May 16, 2000). It is misconduct for a prosecuting attorney to call the defendant a “predator” because it inflames the jury’s passions. *Id.* at 556. Similarly, it is improper for a prosecuting attorney to urge the jury to

¹ Dowell’s brief to this court notes that the prosecuting attorney introduced the theme that “people don’t believe kids” during the opening statement, but Dowell does not contend that the opening statement was prosecutorial misconduct.

“protect society or to send a message with its verdict.” *Id.* And caselaw has specifically found prosecutorial misconduct when the attorney has argued that “[i]t’s time in this country that we start believing kids” during closing in a criminal-sexual-conduct case involving children. *Id.* Finally, a prosecuting attorney commits misconduct by misstating the evidence. *State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006).

Here, the prosecuting attorney’s closing argument implied that Dowell preyed on L.D. and “count[ed] on” people not believing L.D., even though the record evidence shows that people listened to L.D. when she reported her father’s sexual misconduct. These passages of the prosecuting attorney’s closing argument, therefore, inflamed the jury’s passions, improperly urged the jury to “send a message” by believing L.D., and misstated the evidence.

In several recent unpublished opinions that were issued after Dowell’s trial, this court held that arguments much like those made by the prosecuting attorney in Dowell’s case were plain error.² This court has described the language as “scripted”—because it appears to follow a pattern—and “we have cautioned the county attorney from using the language.” *Cox*, 2019 WL 6835621, at *2. In each of the five unpublished cases, as with

² See *State v. Rosendo Dominguez*, No. A19-0869, 2020 WL 3637928, at *2 (Minn. App. July 6, 2020), *review denied* (Oct. 1, 2020); *State v. Cox*, No. A18-1729, 2019 WL 6835621, at *2 (Minn. App. Dec. 16, 2019), *review denied* (Feb. 26, 2020); *State v. Danquah*, No. A18-1581, 2019 WL 3293790, at *4-7 (Minn. App. July 22, 2019), *review denied* (Minn. Oct. 15, 2019); *Garcia v. State*, No. A18-1907, 2019 WL 3545814, at *2-4 (Minn. App. Aug. 5, 2019), *review denied* (Minn. Oct. 29, 2019); *State v. Ciriaco-Martinez*, No. A18-1415, 2019 WL 2999783, at *2 (Minn. App. July 1, 2019). We recognize that unpublished opinions are not binding precedent, but may be persuasive. See Minn. R. Civ. App. P. 136.01, subd. 1(c).

Dowell's case, the prosecuting attorneys were with the Hennepin County Attorney's Office. Because the prosecuting attorney's closing argument in Dowell's case contravened caselaw, we conclude it was misconduct and plain error.

Once we determine there is plain error, we shift to reviewing the appellant's substantial rights. Under that analysis, the state bears the burden of proving 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." *Ramey*, 721 N.W.2d at 302 (quotations omitted). In deciding whether the misconduct significantly affected the jury's verdict, an appellate court considers factors such as "the strength of evidence," "the pervasiveness of the erroneous conduct," and whether the appellant had "the opportunity to rebut any improper remarks." *Peltier*, 874 N.W.2d at 805-06; *see also Montanaro v. State*, 802 N.W.2d 726, 734 (Minn. 2011) (after considering the prosecuting attorney's closing argument in context, concluding the misconduct, whether viewed in isolation or collectively, did not affect the jury's verdict or appellant's substantial rights).

Turning to Dowell's substantial rights, we consider the pervasiveness of the prosecutor's misconduct. The prosecuting attorney mentioned the word "prey" once, unlike in *Duncan*, where a prosecuting attorney repeatedly called the defendant a "predator" throughout the closing argument. *See Duncan*, 608 N.W.2d at 556. Also, the "believing-children" argument was brief—Dowell identified four transcript pages that used this argument out of 27 pages for the prosecuting attorney's closing argument.

Still, we are troubled that the prosecuting attorney used predator language for the reasons explained nearly 20 years ago in *Duncan, id.*, particularly because the language

was joined with other arguments implying that Dowell chose to abuse his daughter because “[children are] easily disbelieved by adults” and the jury should “listen to them.” We would be even more troubled had Dowel’s jury trial occurred *after* our five unpublished opinions that criticize this scripted language.

But we must also consider the state’s evidence against Dowell, which was strong, in part because L.D. described what happened to many people, beginning with contemporaneous messages and continuing over a span of several weeks. The jury had the opportunity to assess the credibility of L.D. and Dowell, as well as hear L.D.’s recorded interview at CornerHouse. And defense counsel had the opportunity to object and to respond to the prosecuting attorney’s argument, but chose not to. *See State v. Hill*, 801 N.W.2d 646, 656 (Minn. 2011) (concluding that having, but not taking, the opportunity to rebut does not affect an appellant’s substantial rights); *State v. Washington*, 521 N.W.2d 35, 40 (Minn. 1994) (failing to object or seek curative instruction weighs against reversal).

Thus, despite the prosecuting attorney committing misconduct amounting to plain error, Dowell is not entitled to a new trial because the state met its burden to prove that the misconduct did not affect Dowell’s substantial rights.

B. “Walked out without asking any questions”

Dowell claims that the prosecuting attorney committed plain error by arguing during closing that the jury should weigh Dowell’s failure to question police after being told he could not take his daughter home. The state contends that the argument was not error.

The prosecuting attorney argued during closing that the jury should consider Dowell’s conduct:

Consider what the defendant is asking you to believe here. He goes to pick up his only daughter . . . at school. He's met by a police officer, a principal, and a Child Protection investigator whom he does not know and he's told you can't pick up your daughter, you can't talk to your daughter, and you can't go home. *And he's asking you to believe that when met with this information he turned on his heel and walked out without asking any questions.*

. . . So apply those things to the defendant's testimony—on just this point. Does it comport with your good judgment, with your experience that a parent would react this way to learning this when they get to school to pick up their child? The parent who's apparently had an uneventful night before, nothing happened, he has no reason to be nervous and no idea what's going on, that he would just turn around and leave without asking any questions. No matter how tall that cop is, it's not reasonable. It's not consistent with our experience or our common sense that a parent would react that way.

(Emphasis added.) The postconviction court determined this argument was not plain error.

The Fifth Amendment protects the right of a criminal defendant to remain silent during trial and prevents prosecuting attorneys from commenting on the silence of defendants. U.S. Const. amend. V; *Griffin v. California*, 380 U.S. 609, 613-15, 85 S. Ct. 1229, 1232-33 (1965). The Fifth Amendment does *not* apply, however, unless the government compels speech. *State v. Borg*, 806 N.W.2d 535, 543 n.2 (Minn. 2011) (citing *United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005)).³ Thus, prosecuting attorneys may use pre-arrest silence to impeach a testifying defendant's credibility if the police did nothing to induce the defendant to assert his right to remain silent. *Jenkins*,

³ Dowell argues a defendant's pre-arrest silence is admissible only if it responds to questions by police. We disagree. Dowell cites no caselaw to support his position, and his conflicts with precedent. See *Jenkins v. Anderson*, 447 U.S. 231, 239, 100 S. Ct. 2124, 2129-30 (1980).

447 U.S. at 235-59, 100 S. Ct. at 2127-30; *State v. Johnson*, 811 N.W.2d 136, 146 (Minn. App. 2012), *review denied* (Minn. March 28, 2012); *see also State v. Lilienthal*, 889 N.W.2d 780, 787 (Minn. 2017) (finding no prosecutorial misconduct by using defendant’s pre-*Miranda* silence in closing argument when the purpose was “to question the reasonableness and credibility of his testimony, not to provide independent, substantive evidence of guilt”).

Dowell’s silence was at his daughter’s school—before police arrested him and gave a *Miranda* warning. And the officer did nothing to induce Dowell to assert his right to remain silent. Dowell’s silence did not follow any questioning by police. Based on existing caselaw, we conclude that the prosecuting attorney’s argument was not error.

To convince us otherwise, Dowell cites to *State v. Dobbins*, 725 N.W.2d 492 (Minn. 2006), and *State v. Billups*, 264 N.W.2d 137, 139 (Minn. 1978). Dowell argues that the prosecuting attorney’s argument effectively punished Dowell for his silence even though police did not ask him questions, and therefore the argument amounted to plain error. These cases however are inapposite because they involved the prosecuting attorney’s use of a defendant’s post-*Miranda* silence to impeach his credibility. *Dobbins*, 725 N.W.2d at 509-10; *Billups*, 264 N.W.2d at 139; *see also Borg*, 806 N.W.2d at 545 (“*Billups* applies only in the context of *Miranda*; *Miranda* applies only when a suspect is in custody, and therefore *Billups* does not apply to the facts of this case.”).

Dowell also contends that it is plain error for a prosecuting attorney to argue to a jury that a defendant is less believable for failing to present their defense to police. But this contention mischaracterizes what the prosecuting attorney was arguing. The prosecuting

attorney was not admonishing Dowell for failing to present a defense—he was implying that Dowell was not credible because he said nothing after police told him that child protection was involved and he could not see his daughter. It is “not improper to ask the jury to consider whether [a defendant’s] testimony made sense in light of their experiences and common sense.” *State v. Jones*, 753 N.W.2d 677, 692 (Minn. 2008). We conclude that the prosecuting attorney was arguing about Dowell’s credibility, which is not shifting the burden of proof and is not misconduct.

Because the prosecuting attorney’s closing argument commented on Dowell’s failure to question police about why he could not see his daughter, which occurred before his arrest and before police read his *Miranda* rights, the closing argument was not error.

II. The district court did not abuse its discretion by admitting evidence that the victim was depressed and suicidal.

Dowell argues that the district court erred by admitting L.D.’s journal entry because there was no “temporal connection” to the criminal sexual conduct, making the evidence irrelevant. He also argues that the social worker’s testimony about L.D.’s journal entry improperly vouched for L.D.’s credibility. The state argues that the journal evidence and the social worker’s testimony are relevant evidence “because they demonstrate the psychological effect [Dowell’s] abuse had on L.D.,” making L.D.’s testimony more probable because no evidence “suggested L.D. had these thoughts before [Dowell’s] sexual abuse.”

During the social worker’s testimony, the prosecuting attorney offered L.D.’s journal entry, written about one month after the sexual conduct, where L.D. stated:

They don't love me. They love him. Not me. I suck. I suck. I suck. I suck. I shouldn't live. I know it. Nobody will care. It's all him. I deserve it. I'm the absolute f***ing worst. Why should I live. Why is it worth it? It isn't. I can't tell anybody. They all lie. "It'll be o-kay." No. It won't. It's not okay. It never will be. I should die. I'd be doing a favor to the world. They would love me if I deserved to live. But they don't. It's the truth. A stab in my heart, but it's the truth. I'm supposed to live and be happy. But how.

The defense objected based on relevance, among other grounds, and the district court overruled the objections.

The social worker testified that after reading the journal entry, she contacted the Hennepin County Crisis Team. When asked why the journal entry concerned her, the social worker responded:

You know, because I knew what she had reported had happened and I could see, I would say in the weeks like following what she had reported, like an intensity in her need to—to talk and in her intensity to sharing some of the feelings and questions and what she was going through. And it's almost like it just built. And then of course any time a student is talking about is harming themselves like that and it just struck me as so, like, hopeless and that she just didn't care about herself anymore and didn't feel like anybody cared about her. It was just a raw—I would say a raw expression and a raw way of expressing herself.

Dowell's attorney did not object to the social worker's testimony during trial, but argued improper vouching for the first time in the petition for postconviction relief. The district court rejected the postconviction argument. On appeal, Dowell challenges the admission of the journal entry as irrelevant and the social worker's testimony as improper vouching.

Appellate courts generally review a district court's evidentiary ruling for abuse of discretion. *State v. Nunn*, 561 N.W.2d 902, 906-07 (Minn. 1997). A defendant challenging

the admission of evidence must show that the district court abused its discretion and that he was prejudiced as a result. *Id.* at 907. We review unobjected-to evidentiary errors under a plain-error analysis. *State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008). When the alleged error does not implicate a constitutional right, the defendant must prove “there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *State v. Matthews*, 800 N.W.2d 629, 633 (Minn. 2011) (quotations omitted).

Evidence that is not relevant is inadmissible. Minn. R. Evid. 402. Evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. Even relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” Minn. R. Evid. 403.

Here, the district court did not abuse its discretion. The journal entry was relevant because the entry made it more probable that L.D. had been sexually abused. The jury was asked to decide whether L.D. truthfully testified to what her father denied. So her journal entry about her psychological reaction to the sexual abuse is relevant. Dowell’s argument that there was no “temporal connection” between the journal entry and the sexual conduct lacks support in our caselaw and does not track the Minnesota Rules of Evidence. While Dowell may challenge the weight of the evidence by arguing about the lapse of one month, that does not diminish the relevance of the journal entry.

Turning to unfair prejudice under rule 403, which Dowell argues on appeal but did not raise in district court, we agree that the suicidal thoughts of a ten year old are damaging

evidence. But the correct analysis is “unfair prejudice,” which is not “merely damaging evidence, even severely damaging evidence.” *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). Instead, the evidence must persuade “by illegitimate means, giving one party an unfair advantage.” *Id.* The journal entry did not give the state an unfair advantage by urging the jury to “punish” Dowell, as he suggests. Thus, we see no plain error in the admission of the journal entry under rule 403. Even if admission of this evidence were improper, the likelihood that the journal entry on its own would “significantly” affect the verdict is low because the state had a strong case, as we have already discussed. *Matthews*, 800 N.W.2d at 633.

As for the social worker’s testimony, Dowell’s argument finds no support in the record. Vouching is an expression of personal opinion, direct or indirect, about another witness’s credibility. *State v. Folkers*, 581 N.W.2d 321, 326 (Minn. 1998). The social worker did not testify about the truth of the journal entry or vouch for L.D.’s credibility. The social worker testified that L.D.’s journal expressed suicidal thoughts and explained the school’s response.

Because the journal entry was relevant, its probative value was not substantially outweighed by unfair prejudice, and because the social worker did not vouch for L.D.’s credibility, the district court did not abuse its discretion when it admitted the journal entry into evidence and received the social worker’s testimony.

Affirmed.