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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1253**

State of Minnesota,
Respondent,

vs.

Chad William Everett,
Appellant.

**Filed August 9, 2021
Affirmed
Reyes, Judge**

Stearns County District Court
File No. 73-CR-18-4828

Keith Ellison, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant asks this court to reverse his convictions of third-degree criminal sexual conduct, arguing that the prosecutor committed misconduct during closing and rebuttal

arguments by (1) indirectly commenting on his right not to testify and (2) misstating the burden of proof. We affirm.

FACTS

The victim K.M. had been living with her stepfather appellant Chad William Everett since the age of one and refers to him as “dad.” In that home, K.M. also lived with her three younger half-siblings (siblings one, two, and three), the children of appellant and K.M.’s mother. Appellant eventually gained sole custody of the four children. In 2016, appellant and the children lived in a home in Stearns County with sibling one’s (the oldest) bedroom on the first floor, and all others had their own bedrooms on the second floor.

In late 2016, when K.M. was 16 years old, appellant began sexually abusing her. The first incident occurred when K.M. fell asleep on the living room couch and woke up to appellant “rubbing over” her “hips and [] genitals” on top of her clothes. K.M. then grabbed appellant’s shoulder and asked “what are you doing?” Appellant responded that “he was having a dream, and woke up and his hands were all over [K.M.].”

A week later, appellant and K.M. began watching a television series in K.M.’s bedroom without any of the other younger children present because it was a horror show. Although appellant initially stayed in K.M.’s bedroom for an episode or two before returning to his bedroom, he started falling asleep in K.M.’s bed with her after the second or third time. From November 2016 to May or June 2017, K.M. woke up two to three times a week to appellant rubbing her genitals and chest and “inserting his finger” into her vagina. On several occasions, appellant removed K.M.’s clothing. On two or three of those occasions, appellant performed oral sex on K.M. The times that she tried to close

her legs and roll over to her side, appellant grabbed her shoulders to push her on her back again. Out of fear, K.M. pretended to be asleep when she woke up to these incidents.

K.M. did not report these incidents when they happened because she was scared and did not know who to tell. The abuse ended when they completed the first season of the television series. K.M. told appellant that she did not want to watch the second season, told him that she wanted to sleep by herself, and invited her siblings to sleep with her so that he could not.

Approximately one year later, K.M. disclosed the abuse to her best friend and then a day or two later, K.M. told sibling one, her aunt, and her uncle. The day after K.M. disclosed the abuse to her family, K.M. confronted appellant about the abuse in a meeting with their pastor and sibling one. Appellant denied the allegations. A day or two later, K.M. disclosed the abuse to her biological paternal grandmother in her aunt and uncle's presence. In June 2018, K.M. gave a statement to a law-enforcement investigator about the abuse.

Later that month, respondent State of Minnesota charged appellant with two counts of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subds. 1(g)(iii), and 1(f) (2018), for sexually abusing his stepdaughter, K.M., who was between the ages of 16 and 18 at the time of the offenses.

In a pretrial order, the district court granted appellant's motion in limine to prevent the state from "commenting on [appellant's] failure to testify or [appellant's] failure to call certain witnesses."

At trial, the state called several witnesses including K.M., her best friend, her pastor, her aunt, her uncle, her grandmother, sibling one, and the investigator. Appellant did not testify or call any witnesses.

In closing argument, the prosecutor stated, “And so what happens in [K.M.’s] bedroom? Because there’s only two people in that bedroom. Two people. A 16- and 17-year-old [K.M.] and the defendant. That’s it. That’s who spent all those nights alone together. Two people. 16-, 17-year-old [K.M.] and her stepfather.” Before discussing each of the elements of the charged offenses, the prosecutor restated “There’s two people in that room.” After explaining why there were no other witnesses to the charged offenses, the prosecutor said

“So in the end it’s who do you believe. Who’s credible, and who has a reason to lie. The judge read you a long list of things that you can look at. So if you don’t believe [KM], then she had to lie about it. She had to lie to [] her best friend. She had to lie to [sibling 1]. She had to lie to [] her aunt and uncle. She had to lie to her grandma. She had to lie to investigators. And then she had to come here, a year later, and lie to all of you.”

The prosecutor then ended his closing remarks by stating, “The fact is there was two people in that room on all of those nights. Just two. It’s the only people who know what happened. And you heard [K.M.] get on that stand and tell you exactly what happened on all of those nights.”

The defense then argued that K.M. provided inconsistent testimony, called into question K.M.’s motive for disclosing the abuse a year later, and questioned her actions during the abuse.

On rebuttal, the prosecutor stated,

Ladies and gentlemen, you don't have to infer anything, because [K.M.] took that stand and told you exactly what happened. There's two people in that room. She told you what happened on all those nights. No inference needed. If you believe her and he's guilty.

The jury found appellant guilty of both charges. The district court sentenced appellant to 48 months in prison with a ten-year conditional release. This appeal follows.

DECISION

I. The prosecutor did not commit prosecutorial misconduct by indirectly commenting on appellant's failure to testify, and any alleged error was harmless beyond a reasonable doubt.

Appellant argues that the prosecutor committed objected-to prosecutorial misconduct by indirectly commenting on his failure to testify. We are not persuaded.

A defendant has a constitutional right to due process, including the right to a fair trial. U.S. Const. amend. XIV; Minn. Const. art. I § 7; *State v. DeRosier*, 695 N.W.2d 97, 106 (Minn. 2005). Indirect references to a defendant's failure to testify constitute misconduct if they "(1) manifest the prosecutor's intention to call attention to the defendant's failure to testify, or (2) are such that the jury would naturally have understood them as a comment on defendant's failure to testify." *State v. Vue*, 797 N.W.2d 5, 16 (Minn. 2011) (quoting *DeRosier*, 695 N.W.2d at 107).

We review objected-to prosecutorial misconduct for harmless error. *State v. Hunt*, 615 N.W.2d 294, 301-02 (Minn. 2000). "[A] party need not renew an objection to the admission of evidence to preserve a claim of error for appeal following a ruling on a motion in limine." *State v. Litzau*, 650 N.W.2d 177, 183 (Minn. 2002) (citing Minn. R. Evid.

103(a) 1989 advisory comm. cmt.).¹ “For serious prosecutorial misconduct, the misconduct is harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error.” *Hunt*, 615 N.W.2d at 302. “For less serious misconduct, the test is whether the misconduct likely played a substantial part in influencing the jury to convict.” *Id.* When evaluating claims of misconduct arising out of closing argument, we view the closing argument “as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence.” *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) (quotation omitted).

In *DeRosier*, the Minnesota Supreme Court concluded that the prosecutor indirectly commented on the defendant’s failure to testify by stating that the defendant “probably knows. In fact, Mr. DeRosier does know Only Mr. DeRosier knows. Obviously we don’t have any information to tell you” *coupled* with “it would be nice to know” what happened. 695 N.W.2d at 107. However, the supreme court concluded that those comments were not per se reversible error, applied the harmless-error standard, and concluded that the error was harmless. *Id.* at 107-08.

In analyzing an ineffective-assistance-of-counsel claim, the Minnesota Supreme Court distinguished the comments in *DeRosier* from a prosecutor’s comment in *Zornes* that “it would be nice to know a motive for these brutal homicides . . . but some things can’t be explained. [Zornes] can’t explain that smoke detector.” *Zornes v. State*, 880 N.W.2d 363,

¹ Because the district court granted appellant’s motion in limine preventing the state from indirectly commenting on his right not to testify, we analyze his first argument as a claim of objected-to misconduct.

372-73 (Minn. 2016). In *Zornes*, the supreme court noted that the comment, in context, explained that motive was not an element of the crime and that any error was harmless. *Id.* at 373. In other words, the statement did not manifest an intention to call attention to Zornes' failure to testify. And the supreme court noted that even the statements in *DeRosier* were "more direct and sustained" than those in *Zornes*, so even if the prosecutor in *Zornes* committed error, any error was harmless. *Id.*

Here, the prosecutor did not comment on appellant's motive as the prosecutor did in *Zornes*. However, as in *Zornes*, a valid purpose exists for the prosecutor's comments: to explain why no one else witnessed the abuse and that the victim's testimony, alone, is sufficient to satisfy all of the elements as direct evidence. Accordingly, the prosecutor did not indirectly comment on appellant's choice not to testify or call witnesses.

Even if we were to assume that the prosecutor's closing argument indirectly commented on appellant's failure to testify, the error was harmless. Under the more stringent standard for serious misconduct, the prosecutor's comments were harmless because the verdict was "surely unattributable to the error." *Hunt*, 615 N.W.2d at 302. The state presented sufficient evidence. K.M.'s testimony, alone, recounting several incidents satisfied the state's burden of proof as direct evidence and required no further inference. The prosecutor's rebuttal argument noted this, stating that "She told you what happened on all those nights. No inferences need."

Finally, a district court's cautionary instructions are also relevant in assessing prejudice because "[w]e presume that the jury followed the [district] court's instruction." *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). Here, the district court's instructions

clearly stated that the jury could make no inference about the defendant's choice not to testify or call witnesses and that he is entitled to the presumption of innocence.

On this record, we are not persuaded that the prosecutor impermissibly commented on appellant's right not to testify and that any error was harmless.

II. The prosecutor did not commit unobjected-to prosecutorial misconduct by misstating the burden of proof.

Appellant argues that the prosecutor misstated the burden of proof by stating to the jury that if they believed K.M., then he was guilty, and they would need to conclude that K.M. lied to acquit. We disagree.

Because appellant did not object to these statements, we review the claims under the modified plain-error standard. *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016).² Under the modified plain-error standard, the defendant must show that the misconduct constitutes (1) error, (2) that is plain. *Id.* at 803-04. If the defendant establishes plain error, then “the burden then shifts to the [s]tate to demonstrate that the error did not affect the defendant's substantial rights.” *Id.* To satisfy this third prong, “the [s]tate must show that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict.” *Id.* at 803-04 (quotation omitted). If all three prongs are met, then “we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 804 (quotation omitted). If

² The state argues that appellant forfeited this argument by failing to object. But our modified plain-error analysis is a well-defined exception to the general rule that an error must be objected to for appellate review. *See State v. Caine*, 746 N.W.2d 339, 358 (Minn. 2008) (applying plain-error analysis to unobjected-to alleged error).

one prong of the plain-error analysis is dispositive, we need not address the others. *See State v. Mosley*, 853 N.W.2d 789, 798 (Minn. 2014) (concluding that defendant failed to meet first prong of plain-error test).

Under the first prong, appellant argues that the prosecutor’s statement during closing argument that “if you believe [K.M.] and [appellant is] guilty” erroneously stated the burden of proof. But considered in context, the statement shows that the prosecutor argued that K.M.’s testimony, alone, is sufficient direct evidence to satisfy the elements of each offense “beyond a reasonable doubt.” In response to appellant’s closing argument, which offered several theories of K.M.’s motive for lying, the prosecutor rebutted that “[K.M.] told you what happened on all those nights. *No inference needed*. If you believe her and he’s guilty.” (Emphasis added.) The prosecutor explained that this case did not hinge on circumstantial evidence and that the jury did not have to speculate about K.M.’s motives to lie. Appellant concedes that a conviction can be supported by a single credible witness. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990). Because K.M. provided direct testimony as to each element of the offenses, the prosecutor permissibly argued that her testimony alone could satisfy its burden. As such, appellant’s citation to cases in which one witness’s testimony would not satisfy each element is inapposite. *State v. Ani*, 257 N.W.2d 699, 700 (Minn. 1977); *see also State v. Huss*, 506 N.W.2d 290, 292-93 (Minn. 1993).³

³ Appellant cites to a nonprecedential decision of this court for the proposition that a prosecutor may not tell a jury that its burden of proof is necessarily satisfied by one witness’s credibility. *See State v. Cooper*, A13-2318, 2014 WL 7011140, at *5 (Minn. App. Dec. 15, 2014), *review denied* (Minn. Feb. 17, 2015). But *Cooper* is distinguishable

Appellant also argues that, under the first prong, the prosecutor committed error by arguing that the jurors would need to conclude that K.M. lied to acquit appellant.⁴ Appellant relies on “were they lying” caselaw, which discusses the state’s cross-examination of a witness with another witness’s statement, for the proposition that the prosecutor’s closing and rebuttal arguments were analogously impermissible. Appellant argues that a nonprecedential case from this court extends “were they lying” caselaw to closing arguments. See *State v. Eason*, A11-835, 2012 WL 2368844, at *3 (Minn. App. June 25, 2012) (citing *United States v. Reed*, 724 F.2d 677, 681 (8th Cir. 1984) (stating that this form of argument is improper because it distorts the burden of proof)), review denied (Minn. Aug. 21, 2012). But “[t]he [s]tate telling jury members during closing arguments that they must decide who they believe is not analogous to ‘were they lying’ questions of witnesses on the stand.” *Caine*, 746 N.W.2d at 360.

Moreover, even in the context of “were they lying” questions, the state may ask such questions when the defense “holds the issue of the credibility of the state’s witnesses in central focus.” *State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005). This occurs “when

for two reasons. First, the context of the prosecutor’s statement in *Cooper* communicated to the jury that they “necessarily” find defendant guilty if they believe one witness, whereas here, the context shows that the prosecutor communicated that the jury *could* find defendant guilty if they believe K.M. Second, and most importantly, the court in *Cooper* did not analyze whether the defense “unmistakably insinuated” that the witness was not credible. *Id.*; *Johnson*, 616 N.W.2d at 728 (appellate courts consider entire context of statement in closing argument). As such, *Cooper* is neither binding nor persuasive authority.

⁴ Appellant also argues that the prosecutor suggested that, to acquit appellant, the jury would need to conclude that K.M.’s aunt and uncle lied. But that is not supported by the record.

the defense expressly or by *unmistakable insinuation* accuses a witness of a falsehood.” *State v. Leutschaft*, 759 N.W.2d 414, 423 (Minn. App. 2009) (emphasis added), *review denied* (Minn. Mar. 17, 2009). Here, the defense unmistakably insinuated that K.M. fabricated the entire story: “But is it really easy to make a false allegation against someone? The answer is it’s just as easy. If you want to hurt [appellant], great way to do it.” Thus, the prosecutor’s statements were permissible even if they amounted to “were they lying” questions because the defense held K.M.’s credibility in central focus.

In sum, the prosecutor did not commit error by misstating the burden of proof.

Affirmed.